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

# United States Attorneys' Bulletin

*Published by:*
*Executive Office for United States Attorneys, Washington, D.C.*
*Laurence S. McWhorter, Director*

| | | |
|---|---|---|
| *Legal Counsel:* | *Manuel A. Rodriguez* | *FTS/368-4024* |
| *Editor:* | *Judith A. Beeman* | *FTS/241-6098* |
| *Assistant Editor:* | *Audrey J. Williams* | *FTS/241-6098* |

**VOLUME 39, NO. 5** **THIRTY-EIGHTH YEAR** **MAY 15, 1991**

**TABLE OF CONTENTS** **Page**

*TABLE OF CONTENTS* *Page*



---

***Please send name or address changes to:***
***The Editor, United States Attorneys' Bulletin***
***Room 6419, Patrick Henry Building***
***601 D Street, N.W., Washington, D.C. 20530***
***FTS 241-6098 Commercial: 202-501-6098***

---

## COMMENDATIONS

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

***G. Norman Acker*** (North Carolina, Eastern District), by Charles K. McCotter, Jr., United States Magistrate Judge, United States District Court, New Bern, for his efficiency and organizational skill in the trial of a number of land condemnation cases requiring a title determination.

***James R. Allison*** (District of Colorado), by Richard F. Miklic, Chief Probation Officer, Probation Department, Denver, for his special cooperative efforts in the preparation of the Probation Department's Annual Report.

***David L. Allred*** (Alabama, Middle District), by C. Michael Hoffman, Director, Laboratory Services, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., for his participation as an instructor in an advanced courtroom procedures course for forensic experts at the National Laboratory Center in Rockville, Maryland.

***Randy I. Bellows*** (Virginia, Eastern District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his demonstration of dedication and professionalism in obtaining plea agreements in a complex fraud and abuse case.

***Steven M. Biskupic*** (Wisconsin, Eastern District), by Keith E. Gatz, Special Agent in Charge, Office of Labor Racketeering, Department of Labor, for his special prosecutive efforts leading to the conviction of a labor union official for illegal use of union funds.

***Lance A. Caldwell*** (District of Oregon), by Anthony E. Daniels, Assistant Director, FBI, Quantico, Virginia, for his outstanding presentation on bank fraud prosecutions at a Bank Failure Seminar in Houston attended by FBI agents and bank examiners.

***K. Tate Chambers*** (Illinois, Central District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of over 100 defendants in a drug task force case entitled "Operation Iron Eagle."

***William M. Cohen, Melissa Harrison, Janice H. Bossing*** and ***Wendy H. Goggin*** (Tennessee, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding teamwork and professional skill in the prosecution of members of the Davidson County Sheriff's Department involved in widespread public corruption.

***David M. Conner*** and ***Andrew A. Vogt*** (District of Colorado), by Carl F. Gamble, Counsel, Federal Deposit Insurance Corporation, Washington, D.C., for their excellent professional efforts in the successful prosecution of a complex bank fraud case.

***Don DeGabrielle*** (Texas, Southern District), by Nancy C. Hill, Acting Director, Attorney General's Advocacy Institute, Executive Office for United States Attorneys, Washington, D.C., for his services as an instructor and his contribution to the success of a first-time-offered Criminal Advocacy West program held recently in Los Angeles.

***Robert J. DeSousa*** (Pennsylvania, Middle District), by Anthony R. Conte, Regional Solicitor, Department of the Interior, Newton Corner, Massachusetts, for his prompt action to a request for assistance in a matter involving a timber trespass on land owned by the United States and dedicated to the Appalachian National Scenic Trail.

***Suzanne E. Durrell*** (District of Massachusetts), by Captain Michael Cain, District Legal Officer, U.S. Coast Guard, Portsmouth, Virginia, for her successful efforts in obtaining an outstanding settlement of a civil penalty case.

***Charles A. Guadagnino*** (Wisconsin, Eastern District), by Toby M. Harding, Special Agent in Charge, FBI, for his valuable assistance and special efforts in charging an individual with a federal extortion violation.

***John Harmon*** (Alabama, Middle District), by Laurence E. Fann, Acting Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for his outstanding participation as a discussion coordinator at the Southeast Component Conference held in Atlanta.

***James W. Jennings Jr.*** and ***Winstanley F. Luke*** (Texas, Western District), by Brigadier General William L. Moore, Jr., Brooke Army Medical Center, Fort Sam Houston, for their valuable assistance and support in the investigation of medical-legal issues involved in Brooke Army Medical Center cases.

***Janet F. King*** (Georgia, Northern District), by Garfield Hammonds, Jr., Special Agent in Charge, DEA, Atlanta, for her outstanding efforts in prosecuting a major multi-defendant drug ring involved in the manufacturing and distribution of "ecstacy" (3, 4-methylene dioxymethamphetamine).

***Denise Langford-Morris*** (Michigan, Eastern District), by Lloyd E. Wesley, Jr., Postmaster, U.S. Postal Service, Wayne/Westland/Canton, Michigan, for her successful defense of the U.S. Postal Service against an equal employment opportunity complaint filed by a discharged employee.

***James Leavey*** (District of Rhode Island) and his secretary, ***Sharleen Souza***, by Thomas A. Hughes, Special Agent in Charge, FBI, Boston, for their professional and organizational skills during the apprehension of four individuals for armed robbery of an armored car carrier.

***William H. McAbee, II*** (Georgia, Southern District), by William L. Hinshaw, II, Special Agent in Charge, FBI, Atlanta, for his excellent representation and successful prosecutive efforts on behalf of the FBI agents in the Atlanta office. Also, by the Honorable B. Avant Edenfield, Chief Judge, U.S. District Court, Savannah, for his outstanding contribution and active participation in a recent Criminal Justice Seminar.

***Joseph Mackey*** (District of Colorado), by John G. Freeman, Inspector in Charge, U.S. Postal Service, Washington, D.C., was presented a Postal Inspection Service Crime Prevention pin for his valuable assistance in resolving a postal crime case.

***Richard H. Moore*** (North Carolina, Eastern District), was presented a plaque by the U.S. Fish and Wildlife Service, for his "time and effort in the N.C. Museum of Natural Science investigation" involving the importation, transportation, and possession of endangered wildlife, namely a jaguar hide and skull (panthera onca).

***Bradley Murphy*** (Illinois, Central District), by Larry D. Closson, Chief, Division of Law Enforcement, Illinois Department of Conservation, Springfield, for his excellent presentation on "Federal Prosecution and Sentencing" at the 1990 Waterfowl Enforcement Training School held in Peoria.

***Paul M. Newby*** (North Carolina, Eastern District), by Edward C. Leach, District Office Attorney, Small Business Administration (SBA), Charlotte, for his valuable assistance in successfully resolving a delinquent SBA loan of $27,990.00.

***Peter M. Ossorio*** (Missouri, Western District), by Colonel William F. Daugherty, Assistant Deputy Commandant, U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, for his excellent presentation on "drugs and national security" and for providing an insight into the complexity of the drug crisis in America.

***Thomas Payne*** (Mississippi, Southern District), by Harrison County Sheriff Joe Price, Biloxi and Gulfport, for serving as a legal training instructor on the laws of evidence, arrest, search and seizure at the Sheriff's Department Training Academy.

***Susan M. Poswistilo*** (District of Massachusetts), by Daniel D. Haley, Administrator, Agricultural Marketing Service, Department of Agriculture, Washington, D.C., for her excellent representation in a case involving the cranberry industry and the enforcement of the Agricultural Marketing Agreement Act.

***Julie Robinson*** (District of Kansas), by Colonel William L. Hart, U.S. Disciplinary Barracks, Fort Leavenworth, for her prompt action and valuable assistance in the apprehension of an inmate from the Disciplinary Barracks.

***Stephen Robinson*** (Michigan, Eastern District), by Glenn S. Arendsen, Associate Counsel, Ford Motor Company, Dearborn, for his dedication, professional judgment and skill in securing guilty pleas from four individuals attempting to defraud the auto manufacturer.

***J.B. Sessions, III, United States Attorney for the Southern District of Alabama,*** and ***Staff***, by E. H. Bixler, IV, Attorney Advisor, Small Business Administration (SBA), Birmingham, for the outstanding cooperation and support provided by the Birmingham District Office to the Atlanta Regional Office Inpection Team of SBA during their annual review.

***Richard S. Sponseller*** (Pennsylvania, Middle District), by Attorney General Mario J. Palumbo, Charleston, West Virginia, for his outstanding efforts in the investigation and prosecution of WMG/Circles of Light Church fraud and money laundering scheme.

***Milan Tesanovich*** (District of Arizona), by Bryan J. Swift, Chief Ranger, National Park Service, Department of the Interior, Tucson, for his valuable assistance and support in court proceedings for a number of violations, including possession of a weapon, reckless driving and unsafe operation/resource damage.

***Michael A. Thill*** and ***Orest Szewciw*** (Indiana, Northern District), by Francis D. DeGeorge, Inspector General, Department of Commerce, Washington, D.C., for their special efforts in obtaining convictions and settlements in criminal and civil actions against a pollution control organization for submitting false claims.

***Joseph Wilson*** and ***Thomas Secor*** (Ohio, Northern District), by Marti D. Felker, Chief of Police, City of Toledo, for their valuable assistance and support of the task force comprised of various law enforcement officials which was organized by the Toledo Police Division to investigate major criminal organizations involved in illegal drug activity.

***Tom Withers*** and ***Lamar Walter*** (Georgia, Southern District), by Ronald A. Mikell, Investigator, METRO Drug Squad, Brunswick, for their legal skill and professionalism in the successful prosecution of a notorious drug trafficker.

* * * * *

## PERSONNEL

On April 19, 1991, ***Richard D. Bennett*** became the Interim United States Attorney for the District of Maryland.

* * * * *

## UNITED STATES ATTORNEYS RECEIVE HONORS

On March 26, 1991, at the United States Attorneys' Conference in Savannah, Georgia, Attorney General Dick Thornburgh and Deputy Attorney General William P. Barr presented a plaque and a United States Attorney flag to the following United States Attorneys for their significant contributions to the ongoing work of the Department of Justice:

***Michael Baylson, Eastern District of Pennsylvania,*** in recognition of his work in combatting violent crime.

***Wayne Budd, District of Massachusetts,*** in recognition of his sustained support for United States Attorneys' programs.

***Michael W. Carey, Southern District of West Virginia,*** in recognition of his outstanding achievements in prosecuting public corruption.

***Marvin Collins, Northern District of Texas,*** in recognition of his work in Financial Institution Fraud.

***Thomas W. Corbett, Jr., Western District of Pennsylvania,*** in recognition of his management initiatives.

***E. Bart Daniel, District of South Carolina,*** in recognition of his outstanding achievements in prosecuting public corruption.

***Deborah Daniels, Southern District of Indiana,*** in recognition of her support and encouragement for the Law Enforcement Coordinating Committee (LECC) program.

***Louis DeFalaise, Eastern District of Kentucky,*** in recognition of his support for the Department's legislative initiatives.

***Charles W. Larson, Northern District of Iowa,*** in recognition of his tireless efforts in financial litigation.

***George Terwilliger, District of Vermont,*** in recognition of his distinguished service to the Department.

***Dennis C. Vacco, Western District of New York,*** in recognition of his leadership and work in environmental enforcement.

* * * * *

## DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, PRESENTS AWARDS

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, presented the Director's Awards at a ceremony at the Great Hall of the Department of Justice, Washington, D.C. on April 19, 1991. Participating in the ceremony were Deputy Attorney General William P. Barr, and Joseph M. Whittle, Chairman of the Attorney General's Advisory Committee and United States Attorney for the Western District of Kentucky. Mr. McWhorter honored the men and women of the United States Attorneys' offices for their work which covered a wide spectrum of drug-related cases, violent crime, financial institution fraud, civil enforcement, financial litigation, and law enforcement cooperation.

The ***Director's Award for Superior Performance*** was presented to the following Assistant United States Attorneys:

| | | |
|---|---|---|
| District of Arizona | - | Roslyn O. Moore-Silver |
| California, Central District | - | Steven Zipperstein<br>Leon W. Weidman |
| California, Eastern District | - | Joseph E. Maloney; John Panneton;<br>John Vincent |
| California, Northern District | - | John Kennedy |
| California, Southern District | - | Larry Alan Burns |
| Florida, Middle District | - | Mark V. Jackowski; Michael L. Rubinstein;<br>Gary J. Takacs |
| Florida, Northern District | - | Stephen P. Preisser |
| Florida, Southern District | - | Frank H. Tamen |
| District of Hawaii | - | Leslie E. Osborne, Jr. |
| Illinois, Northern District | - | Dan Gillogly; James P. Fleissner;<br>Mark D. Pollack; William Hogan |
| Michigan, Eastern District | - | Lynn A. Helland |
| District of Nevada | - | Leslie Anthony White |
| New York, Eastern District | - | David Shapiro; Beryl Howell<br>Catherine E. Palmer |
| New York, Northern District | - | David R. Homer |
| New York, Southern District | - | J. Gilmore Childers; Adam S. Hoffinger;<br>Carl H. Loewenson, Jr.; Andrew C. McCarthy;<br>Frances M. Fragos; Deiredre M. Daly;<br>Elliot R. Peters; Jeffrey B. Sklaroff;<br>Kevin J. Ford; James R. DeVita; Cathy Seibel |
| North Carolina, Western District | - | Jerry Miller |
| Pennsylvania, Eastern District | - | Seth Weber; John C. Dodds |
| Pennsylvania, Middle District | - | Gordon Zubrod |
| Pennsylvania, Western District | - | Craig McKay |
| Tennessee, Eastern District | - | James R. Dedrick |
| Texas, Eastern District | - | Lon Stuart Platt |
| Texas, Northern District | - | Howard A. Borg |
| Texas, Western District | - | LeRoy M. Jahn |
| Virginia, Eastern District | - | Jack I. Hanly |
| Washington, Western District | - | John C. Carver |

*The **Director's Special Commendation Award*** was presented to the following Assistant United States Attorneys:

| | | |
|---|---|---|
| District of Arizona | - | Wendy E. Harnagel |
| California, Central District | - | Stephen David Clymer;<br>Michael W. Emmick; Jean A. Kawahara |
| Georgia, Middle District | - | Samuel A. Wilson; Miriam Duke |
| Georgia, Northern District | - | Wilmer Parker III |
| Illinois, Northern District | - | Mark L. Rotert; Mark J. Vogel;<br>Steven A. Miller; Laurie J. Barsella |
| Kentucky, Western District | - | Cleve Gambill |
| District of Maryland | - | Susan M. Ringler |
| District of Massachusetts | - | Carolyn Stafford Stein; Fred Wyshak |

| | | |
|---|---|---|
| District of New Jersey | - | J. Fortier Imbert; Fred Wyshak |
| New York, Eastern District | - | Dave S. Hattem; Alan Vinegrad; Cheryl Pollak; Virginia B. Evans |
| New York, Northern District | - | John J. Brunetti |
| New York, Southern District | - | Paul K. Milmed; Henry J. DePippo; Patrick J. Fitzgerald; Michael L. Tabak; Howard M. Shapiro |
| New York, Western District | - | Bradley E. Tyler |
| District of Oregon | - | G. Frank Noonan |
| Pennsylvania, Eastern District | - | Paul A. Sarmousakis |
| District of South Carolina | - | John W. McIntosh; John M. Barton; Dale DuTremble |
| Tennessee, Eastern District | - | Curtis L. Collier; Michael E. Winck |
| Texas, Northern District | - | Mark McBride |
| District of Utah | - | Glen R. Dawson |
| Virginia, Eastern District | - | Randy I. Bellows; Liam O'Grady; J. Phillip Krajewski |

The ***Special Commendation Award*** was also presented to the following attorneys and support staff of the Executive Office for United States Attorneys:

| | | |
|---|---|---|
| Legal Counsel | - | Manuel Rodriguez |
| Policy and Evaluation Branch | - | Lawrence A. Davidson |
| Evaluation and Review Staff | - | Michele A. Tomsho; Betty Kathleen Mann |
| Financial Management Staff | - | Jeff Kramer |

The ***Director's Award for Outstanding Performance as a Special Assistant United States Attorney*** was presented to the following Assistant United States Attorneys:

| | | |
|---|---|---|
| Central District of California | - | Guy Ormes |
| Eastern District of Pennsylvania | - | Andrew Levine |

The ***Director's Award for Outstanding Achievement in Financial Litigation or Asset Forfeiture*** was presented to Kathleen Haggerty and Nancy Rider of the Financial Litigation Staff, Executive Office for United States Attorneys. This award was also presented to the following Assistant United States Attorneys and other United States Attorney staff:

| | | |
|---|---|---|
| Alabama, Middle District | - | Calvin C. Pryor |
| California, Northern District | - | Stephen A. Shefler; Robert D. Ward |
| Florida, Middle District | - | Ellen L. Statz; Warren A. Zimmerman |
| Georgia, Middle District | - | Becky S. Sanders |
| District of Hawaii | - | Sharon B. Takeuchi |
| Illinois, Northern District | - | Craig A. Oswald; Marsha A. McClellan |
| Iowa, Northern District | - | Debra K. Clark |
| Kentucky, Western District | - | Jane Bondurant |

* * * * *

## UNITED STATES ATTORNEYS' CONFERENCE UPDATE

### Operation Triggerlock

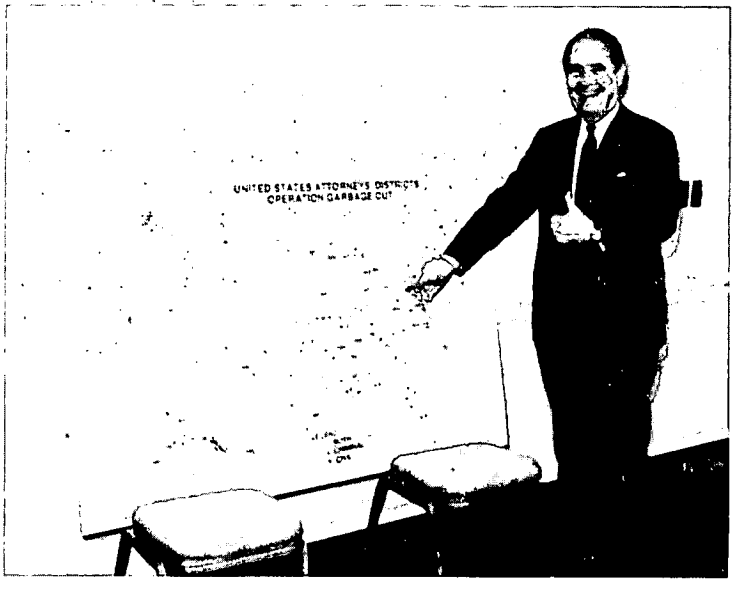
At the United States Attorneys' Conference held on March 25-28, 1991 in Savannah, Georgia, Attorney General Dick Thornburgh announced "Operation Triggerlock." This new federal program to combat violent crime is outlined in United States Attorney's Bulletin, Vol. 39, No. 4, dated April 15, 1991, at p. 88.)

On April 11, 1991, the Attorney General commended all United States Attorneys for a superior job in developing the Project Triggerlock Task Forces under a rigorous deadline -- only two weeks after the meeting in Savannah. He said, "The Task Forces are a reality and we are moving ahead on one of the Bush Administration's most important crime control efforts. Local and state law enforcement participation is essential, and you performed superbly in bringing them into Triggerlock at its very beginning. I have no doubt that, based in large part on your hard work, Triggerlock and other anti-crime programs will have great success."

### Operation Garbage Out

The Attorney General emphasized at the Conference that one of his top management priorities for FY 1991 is to ensure the accurate reporting of statistical information. Since he is often asked to respond to questions from the President, the Office of Management and Budget, and the Congress on the Department's litigation efforts, it is critical that this information reflect the comprehensive efforts of the Department. Most United States Attorneys' offices have already completed the first phase of that effort by reviewing cases and matters that are more than five years old and certifying the accuracy of the data in those cases. The help and commitment of all United States Attorney employees to this effort will ensure that the statistical information the Attorney General receives -- and in turn provides to those who request it -- accurately reflects the volume and the importance of the good work that you do.

For additional information concerning Operation Garbage Out, please refer to United States Attorneys' Bulletin, Vol. 39, No. 3, dated March 15, 1990, at p. 64. If you have any questions, please call the Information Management Staff, at (FTS) 241-7320 or (202) 501-7320.




*The Attorney General was pleased to see that the Western District of Pennsylvania had submitted its statement certifying that all cases and matters over five years old were current. To date 89 districts have submitted certification statements.*

## CRIME ISSUES

### Comprehensive Violent Crime Control Act Of 1991

On April 18, 1991, Attorney General Dick Thornburgh testified before the Senate Judiciary Committee concerning S. 635, the President's Comprehensive Violent Crime Control Act of 1991. This bill approaches the problem of violent crime in a comprehensive manner by addressing a number of specific objectives. These objectives are: to restore an enforceable federal death penalty; curb the abuse of the writ of habeas corpus; reform the exclusionary rule; combat criminal violence involving firearms; protect witnesses and other participants in the criminal justice system from violence and intimidation; address the problems of gangs and serious juvenile offenders; combat terrorism; combat sexual violence and child abuse; provide for drug testing of offenders in the criminal justice process; secure the right of victims and defendants to equal justice without regard to race or color; and enhance the rights of crime victims. Several of the titles in the bill address the same subjects as the violent crime proposal transmitted to Congress by the President in the 101st Congress, including the federal death penalty, general habeas corpus reform, firearms violence, and drug testing of offenders.

A copy of the Attorney General's testimony is attached at the Appendix of this Bulletin as Exhibit A.

* * * * *

### National Crime Victims' Rights Week

On April 22, 1991, at a White House ceremony, President Bush and Attorney General Dick Thornburgh honored seven persons who have made outstanding contributions in assisting victims of crime. The President presented awards to the honorees who were selected from nominations submitted by federal, state and local criminal justice and victim assistance officials; national victim assistance organizations; and individual citizens. The Attorney General said, "I commend these outstanding men and women who have worked tirelessly for many years to ensure that our criminal justice system treats crime victims and their families with equity and sensitivity. Through the concerted efforts of these individuals -- and others like them throughout the country -- significant progress has been made in ensuring that innocent victims of crime are treated with the dignity and respect they deserve, while criminals are held accountable for the terrible harm they have inflicted upon law-abiding citizens."

One of the honorees was Nancy Stoner Lampy, Law Enforcement Coordinating Committee/Victim-Witness Coordinator in the United States Attorney's Office for the District of South Dakota, Sioux Falls. Ms. Lampy has developed an excellent rapport with Native American communities in a state that encompasses nine Indian reservations. She has arranged mental health counseling for scores of victims of child sexual abuse on several Indian reservations in the state. Since joining the United States Attorney's Office as the first victim-witness advocate, she has provided support, information, and assistance to hundreds of Native American victims of violent crime. In addition, Ms. Lampy has been a leader in developing model programs for providing victim-witness services in remote areas where transportation is often difficult and telephones are often lacking.

This annual awards program is administered by the Office for Victims of Crime (OVC), a component of the Justice Department's Office of Justice Programs.

* * * * *

### *Hate Crimes*

On April 4, 1991, the Department of Justice announced that, three months after the nationwide program began, efforts to collect hate crime statistics are on track and such statistics will be vital in the Department's efforts to continue its crackdown on these acts. Within the last three years, the Department has indicted 139 defendants in 26 states for hate crimes. Of these, 126 defendants have been convicted -- a 91 percent conviction rate.

The Uniform Crime Reports Section of the FBI developed data collection standards and training guides to aid the agencies in the accumulation of these important data in cooperation with law enforcement agencies across the nation, the Civil Rights Division and Community Relations Service of the Department of Justice, and many community and civil rights organizations. The data collection program resulted from legislation passed last year directing the Attorney General to collect data on crimes involving prejudice based on race, religion, ethnicity, or sexual orientation. In order to insure standard reporting methods throughout the country, law enforcement officials in all fifty states and the District of Columbia have been instructed in the data collection methods and now have the capability to further the standardized training in their own jurisdictions. The data collection standards provide uniform definitions of hate-related crimes and objective criteria upon which to determine if a hate crime has taken place. The standards also explain procedures for the various contributing agencies to report data to the FBI. The training guides address the nature of prejudice and its effects on the victims of hate crime as well as the community in general. The guides also provide definitions of terms law enforcement officers should use when dealing with hate crimes, and a model hate crime reporting system adaptable for use in large, medium or small law enforcement agencies.

Statistics reported to the FBI through the national program will be published periodically by the Uniform Crime Reports Section. These statistics will assist law enforcement agencies in working closely with various community groups in developing programs of community awareness in responding to actual and potential hate-related incidents.

* * * * *

## *DRUG ISSUES*

### *Drug Testing*

On March 29, 1991, Attorney General Dick Thornburgh issued the following statement on the D.C. Circuit Court's decision upholding a Department of Justice policy requiring that all job applicants submit to a test to detect possible use of illegal drugs:

> Drug testing in the workplace is an important tool in the difficult job of ferreting out "hidden" drug use. Drug use on the job can have serious consequences both in terms of loss of human life and damage to property. It is especially important to be able to determine whether or not persons entrusted with law enforcement and national security responsibilities are violating drug laws.

* * * * *

## *Drug Offenses Account For Large Percentage Of Jail Inmates*

On April 24, 1991, the Bureau of Justice Statistics, Office of Justice Programs, Department of Justice, reported that drug offenses accounted for 23 percent of the charges against the almost 400,000 men and women being held in local jails during 1989 -- up from 9 percent in 1983. The number of inmates in the nation's 3,312 local jails grew 77 percent from 1983 to 1989. More than 40 percent of that growth resulted from the increased number of persons held for or convicted of drug offenses. The dramatic increase in the number of persons in jails on drug charges occurred both among those awaiting trial and those already convicted of crimes. More than one-half of all convicted jail inmates said they had committed the offense for which they were incarcerated under the influence of drugs or alcohol or both.

The findings were drawn from a nationally representative survey of 5,675 inmates held in 424 local jails. Similar Bureau surveys of jail inmates were conducted in 1972, 1978 and 1983. About half of all jail inmates in 1989 had been convicted and were serving time, 7 percent had been convicted but not yet sentenced, 26 percent were awaiting or on trial and 16 percent were awaiting arraignment. An estimated 46 percent of the jail inmates in 1989 were on probation, on parole, on bail or were in some other criminal justice status at the time of their arrest. More than three-quarters of all inmates being held in 1989 for any offense had had a prior sentence of probation or incarceration. At least a third of the inmates were in jail for a violent offense or had been previously sentenced for a violent offense. Other survey results are as follows:

-- More than four of every 10 convicted inmates said they had been using an illegal drug during the month before they committed the offense for which they were incarcerated. About one in four convicted inmates said they had used a major drug, such as heroin, cocaine, crack, LSD or PCP, in that month.

-- Women and Hispanic prisoners were the most likely among all jail inmates to be held on drug charges--about one-third in each group.

-- Among convicted inmates, 29 percent reported they committed their offenses under the influence of only alcohol, 15 percent under the influence of only drugs and 12 percent under the influence of both.

-- Almost one-third of all jail inmates said they had participated in a substance abuse treatment program at some time in their lives--about 18 percent of the inmates had received treatment for drugs, 9 percent for alcohol and 6 percent for both.

-- More than four of every 10 female inmates reported they had been abused at some time before their current incarceration--33 percent physically and 36 percent sexually.

-- About 39 percent of all jail inmates had grown up in a single parent household and an additional 11 percent had lived in a household without either parent.

-- The racial and ethnic composition of local jails changed between 1983 and 1989--blacks increased from 38 percent to 42 percent of the inmate population, Hispanics increased form 14 percent to 17 percent and the percentage of white non-Hispanics decreased from 46 percent to 39 percent.

-- The female jail population increased from 7.1 percent in 1983 to 9.5 percent in 1989. One of every four female inmates was in jail for larceny or fraud.

-- About 11 percent of the inmates were being held for other authorities--most awaiting transportation to a state prison.

-- Among the inmates who had been sentenced to serve their time in local jails, half had received a sentence of six months or less. It is estimated that about half of the inmates sentenced to local jails would serve less than five months.

Single copies of the special report, "Profile of Jail Inmates, 1989" (NCJ-129097), as well as other Bureau of Justice Statistics publications and statistical information may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 10850.

* * * * *

## SAVINGS AND LOAN ISSUES

### Savings And Loan Prosecution Update

On April 11, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through March 31, 1991:

| | |
|---|---|
| Informations/Indictments | 397 |
| Estimated S&L Losses | $ 7.548 billion |
| Defendants Charged | 683 |
| Defendants Convicted | 495 |
| Defendants Acquitted | 18 |
| Prison Sentences | 1,021 years |
| Sentenced to prison | 298 (79%) |
| Awaiting sentence | 129 |
| Sentenced w/o prison or suspended | 77 |
| Fines Imposed | $ 7.998 million |
| Restitution Ordered | $259.244 million |
| | |
| CEOs, Board Chairmen and Presidents: | |
| Charged by indictment/information | 82 |
| Convicted | 62 |
| Acquitted | 6 |
| | |
| Directors and other officers: | |
| Charged by indictment/information | 122 |
| Convicted | 99 |
| Acquitted | 3 |

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. [NOTE: "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.]

* * * * *

### *Conviction Rate In Major Savings And Loan Cases*

On April 11, 1991, Attorney General Dick Thornburgh announced that during the first three months of 1991, the Department of Justice has maintained a 96 percent conviction rate in major savings and loan fraud cases. The 96 percent conviction rate for the first three months of the year matches the overall conviction rate for 1990. To date, 79 percent of the defendants who have been sentenced for savings and loan fraud have been imprisoned, with sentences ranging as high as 40 years.

The Attorney General said, "Nearly 500 people have been convicted in major savings and loan fraud cases since October 1, 1988, proving to the American public that white collar crime - 'crime in the suites' - continues to be a priority enforcement effort for the Justice Department. The consistency in the rate of convictions combined with increases in the number of indictments and length of sentences offers mounting evidence that those responsible for looting our nation's thrifts are being held accountable."

* * * * *

## *POINTS TO REMEMBER*

### *Child Protection Restoration And Penalties Enhancement Act Of 1990*

Paul L. Maloney, Deputy Assistant Attorney General, Criminal Division, has issued a memorandum to all United States Attorneys concerning the recordkeeping requirements of the Child Protection Restoration and Penalties Enhancement Act of 1990. On February 22, 1991, the American Library Association, together with various publishers and photographers, sued the Justice Department to prevent enforcement of the new recordkeeping requirement of 18 U.S.C. §2257 which requires producers of certain visual depictions of sexually explicit conduct to keep records on the names and ages of the performers depicted. Although the Act was to go into effect on February 27, 1991, the Justice Department has not yet issued the regulations that the Act requires. The Department, therefore, stipulated with the plaintiffs not to enforce the Act until the regulations are issued and become final, and also not to prosecute plaintiffs, or anyone "in their chain of supply or distribution" for recordkeeping violations based on visual depictions that are made prior to the regulations' effective date. A copy of the stipulation is attached at the Appendix of this Bulletin as Exhibit B.

The regulations are expected to issue within the next few weeks. There will be a 30-day Notice and Comment period, and an additional 30-day period until Final Regulations are issued. The Final Regulations will become effective 30 days after issuance. It is expected that the district court will reach a decision within the 90-day period.

If you have any questions, please call Patrick A. Trueman, Chief, National Obscenity Enforcement Unit, Criminal Division, at (202) 514-5780 or (FTS) 368-5780.

* * * * *

### *Witness Payments To Convicted Prisoners*

On March 15, 1991, the Special Authorizations Unit of the Justice Management Division advised all United States Attorneys that the temporary rules for payment of fact witness fees to convicted prisoners are being delayed while the progress of several congressional bills is tracked. (See, United States Attorneys' Bulletin, Vol. 39, No. 4, dated April 15, 1991, at p. 101.)

On April 10, 1991, the President signed Public Law 102-27, the Dire Emergency Supplemental Appropriations Act, which prohibits the use of Department of Justice appropriations for the payment of witness fees to any incarcerated person. The Special Authorizations Unit advises that no witness payments should be made to convicted prisoners who appear as witnesses. Additionally, effective immediately, no witness payments should be made to illegal aliens, material witnesses and unconvicted persons in custody, even if testifying in a case other than their own. Please maintain records of the appearances of these witnesses. Several bills have been introduced on this matter and depending on which bill is enacted, it may be necessary to make retroactive payments to illegal aliens, material witnesses and unconvicted persons in custody testifying in a case other than their own.

### *New Witness Authorization Form*

Expert and unusual fact witness expenses should be requested on the new August 1990 version of Form OBD-47, Request, Authorization and Agreement For Fees And Expenses of Witnesses and forwarded to the Special Authorizations Unit, Justice Management Division, Department of Justice, Room 6434, Patrick Henry Building, 601 D Street, N.W., Washington, D.C., 20530. The telephone number is: (202) 501-8429 or (FTS) 241-8429.

* * * * *

### *Foreign Witnesses*

The Special Authorizations Unit, Justice Management Division, has provided the following information and instructions concerning requests for the attendance of foreign witnesses:

In civil cases, requests for attendance of foreign witnesses should be coordinated with the Office of Foreign Litigation in the Civil Division - (202) 514-7455 or (FTS) 368-7455. In criminal cases, requests should be coordinated with the Office of International Affairs, Criminal Division - (202) 514-0000 or (FTS) 368-0000. If you have any questions concerning foreign laws governing the appearance of foreign nations in United States Courts, you should contact the Office of Citizens Consular Services at the Department of State at (202) 647-3666. Your call will be referred to a person familiar with the country involved.

Advances (cash and airline tickets) for foreign witnesses should be requested through the Special Authorizations Unit (SAU) at least two weeks prior to the appearance of the witness. SAU will then transmit the request for advance to the appropriate U.S. Embassy or Consular Office. This procedure will also assist in obtaining any required visas or travel documents. [Note: Fact witness GTS accounts should not be used for foreign witnesses because the Department of Justice is required to go through the Department of State.]

The attendance of employees of foreign governments MUST be requested through the Office of Citizens Consular Services at the Department of State. Please be advised that the Department of State is quite adamant on this requirement and failure to comply may jeopardize assistance in all cases involving foreign witnesses and foreign government assistance.

If you have any questions, please call the Special Authorizations Unit, at (202) 501-8429 or (FTS) 241-8429.

* * * * *

## *"Mandatory Detention" Provisions Of The Crime Control Act Of 1990*

James S. Reynolds, Acting Chief, General Litigation and Legal Advice Section of the Criminal Division, has prepared a memorandum in response to questions from various United States Attorneys about recent amendments to 18 U.S.C. §§3143 and 3145 enacted by the Crime Control Act of 1990. These amendments severely limit the discretion of the trial court to grant bail to defendants convicted of violent crimes and serious drug trafficking offenses.

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

* * * * *

## *Lock Box Procedures For Direct Deposit Of Cash Collections*

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, wishes to remind you of the requirements of OBD 2110.19, Lock Box Procedures for Direct Deposit of Cash Collections. The Lock Box System receives restitution payments, disburses the money to the victims (both federal agencies and third parties), provides an audit trail, and meets internal control and Treasury requirements.

You should be aware that each United States Attorney's office has a Financial Litigation Unit (FLU) that is responsible for receiving and disbursing restitution payments. This office, generally located in the civil section, handles both civil and criminal debts, including restitution payments, and can assist you in ensuring that fines, restitution, interest, bail bond forfeitures, and special assessments imposed in your cases are enforced. The FLUs deposit all restitution checks in the Department's Lock Box System on a daily basis. The checks go to the C&S Bank of Atlanta, a designated depository for the United States Treasury. The C&S Bank daily transfers the funds to the Treasury electronically, crediting the Department's clearing account and notifying the Debt Management Section of the Justice Management Division of the deposit. The Debt Management Section then transfers the restitution payments to the affected agencies or third party victims using standard Treasury procedures. All government agencies are required to follow the cash management procedures outlined in 31 CFR §206 (1990) and the Treasury Financial Manual, Department of the Treasury, Volume I, Chapter 6-8000.

When a defendant makes a payment of $50,000 or more, the FLU can arrange for a wire transfer of the payment from the defendant's bank account to the Department's Lock Box so the payment is credited to the Government immediately. The goal is to get the money deposited and accounted for so that it is drawing interest for the Government and not for the convicted defendant.

Please note that the Criminal Division of the Department of Justice does not maintain an office to receive payments. Restitution payments received in criminal cases by Criminal Division litigators should be directed to the FLU in the United States Attorney's office where the case was tried.

A portion of OBD 2110.19, Lock Box Procedures for Direct Deposit of Cash Collections, is attached at the Appendix of this Bulletin as Exhibit D. If you have further questions, please call Kathleen Haggerty or Nancy Rider, Financial Litigation Staff, Executive Office for United States Attorneys, at (202) 501-7017 or (FTS) 241-7017.

* * * * *

## *Operation Desert Shield/Desert Storm*

On April 8, 1991, Attorney General Dick Thornburgh authorized supervisors to grant up to five days of excused absence without charge to leave or loss of pay to employees returning from service in Operation Desert Shield/Desert Storm. Supervisors may also grant up to five days of excused absence to those employees whose husbands or wives are returning from such service even though the returning spouse is not a Federal employee. The Attorney General said, "While we can never repay them for what they have done for us, I hope that this small expression of our gratitude will help make their transition back to family life a little easier."

* * * * *

## *Gambling Ship Act*

On April 25, 1991, the Criminal Division issued a bluesheet (USAM 9-110.900) to all United States Attorneys concerning the Gambling Ship Act (18 U.S.C. §§1081, et seq., which sets forth guidance in exercising prosecutorial discretion with respect to certain provisions of this Act. A copy of the bluesheet is attached at the Appendix of this Bulletin as Exhibit E.

Department of Justice officials met with House Judiciary Committee staff, at the staff's request, to discuss the Department's interpretation and application of this Act, particularly a determination as to what constitutes a "gambling ship."

* * * * *

## *Computerized Victim-Witness Tracking System*

On April 23, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised that the Law Enforcement Coordinating Committee (LECC)/Victim Witness staff is working with the Information Management Staff to create a nationwide computerized victim-witness tracking system.

If your office has a computerized program for tracking statistics for victims and witnesses, please call the LECC/Victim-Witness Staff at (202) 514-3982 or (FTS) 368-3982.

* * * * *

### *Department Of Justice Symposia And "Justice"*

The inaugural edition of Justice has been distributed to all Department of Justice employees. Justice is a semi-annual, magazine-format journal which is dedicated to the exposition of issues related to the Department of Justice. This issue features "The Role of The Attorney General," and the "200th Anniversary of the Office of the Attorney General." It includes excerpts from remarks made at the Department's celebration of th 100th anniversary of the passage of the Sherman Antitrust Act, an article by former Attorney General Griffin B. Bell, and other contributions from legal experts and Department alumni.

The next edition of Justice will feature highlights from the second of a series of Department of Justice symposia held on November 16, 1990. The subject of discussion was the Voting Rights Act of 1965, and was led by Attorney General Thornburgh and Assistant Attorney General for the Civil Rights Division, John R. Dunne. Panel members were John Doar, Assistant Attorney General in charge of the Civil Rights Division at the time the bill was passed; Julian Bond, a journalist, civil rights leader and former Georgia State Senator; and Abigail M. Thernstrom, author of Whose Votes Count? Affirmative Action and Minority Voting Rights.

Articles should be mailed to: Office of Policy Development, Room 4511, Department of Justice, Washington, D.C. 20530, Attn: Dixie Dodd. If you have any questions, please call (FTS) 368-4582 or (202) 514-4582.

* * * * *

## *SENTENCING REFORM*

### *Guidelines Sentencing Update*

A copy of the Guideline Sentencing Update, Volume 3, No. 20 dated March 25, 1991, and Volume 4, No. 1, dated April 25, 1991, is attached as Exhibit F at the Appendix of this Bulletin.

* * * * *

### *Federal Sentencing And Forfeiture Guide*

Attached at the Appendix of this Bulletin as Exhibit G is a copy of the Federal Sentencing Guide, Volume 2, No. 20, dated March 25, 1991, and Volume 2, No. 21, dated April 8, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

* * * * *

# LEGISLATION

## Expansion Of Tribal Court Jurisdiction

On April 11, 1991, Philip Hogen, United States Attorney for the District of South Dakota, testified before the House Interior Committee on H.R. 972, a bill to expand the criminal jurisdiction of tribal courts to include non-member Indians. Mr. Hogen explained the Department's position in support of the expansion of jurisdiction, but indicated that the impact of the bill would further heighten the need for passage of the Indian Civil Rights Act Amendments (ICRA). These amendments would provide more complete protection of the rights of criminal defendants in such courts.

The Administration sought passage of the ICRA amendments in the 101st Congress, and the Department is preparing to secure its introduction and passage in this Congress. Meetings have been scheduled with members and staff in both Houses to secure both sponsors and broad support for the amendments.

* * * * *

## Telemarketing Fraud

On April 29, 1991, Department of Justice representatives met with attorneys for VISA and Mastercard International to discuss telemarketing fraud issues. In particular, VISA and Mastercard are seeking enactment of legislation to combat what they call "credit card laundering" -- a practice by which fraudulent operators persuade merchants with access to the credit card systems to submit, in the name of the merchant, the fraudulent operators' sales drafts into the credit card system. The Office of Legislative Affairs is currently coordinating the preparation of a report on telemarketing fraud requested by the Department's FY 1991 appropriations bill.

* * * * *

## RICO Amendments Act Of 1991

On April 15, 1991, John Keeney, Deputy Assistant Attorney General for the Criminal Division, testified before the House Judiciary Committee Subcommittee on Intellectual Property and Judicial Administration on H.R. 1717, the RICO Amendments Act of 1991. As in the past, the Department has no objection to the general approach of the bill, provided that its key provisions (e.g., a "gatekeeper" approach to limiting treble damages actions) do not apply to the Government. Mr. Keeney urged that the bill be amended to: 1) clarify that the United States is a "person" eligible to pursue treble damages actions; and 2) require that all civil RICO actions filed by the Government be approved in advance by, and be subject to the direction and control of, the Attorney General.

* * * * *

# CASE NOTES

## CIVIL DIVISION

### Supreme Court Holds That Federal Employees' Statutory Immunity From Common Law Tort Actions Applies Even Where Federal Tort Claims Act (FTCA) Exception Bars Recovery Against United States

This medical malpractice action, initially brought against a military physician in his individual capacity, arises out of services performed at a U.S. Army hospital in Italy. The district court ruled that, under the Gonzalez Act, 10 U.S.C. §1089, the United States must be substituted as defendant and that the case could only proceed under the Federal Tort Claims Act (FTCA). Because the FTCA excludes liability for torts arising outside of the United States, this ruling required dismissal of plaintiffs' claims. On appeal, we abandoned the Gonzalez Act argument in light of intervening case law, but urged that the Federal Employees Liability Reform and Tort Compensation Act of 1988 (popularly known as the "Westfall Act") required the same result. The Ninth Circuit, however, ruled that the Westfall Act does not apply wherever one of the FTCA exceptions would deprive the plaintiff of a damage remedy against the United States.

The Supreme Court (per Marshall, J.) has now reversed, by a vote of 8-1. The court fully adopted our arguments that the Westfall Act immunity applies regardless of whether one of the FTCA exceptions ultimately bars recovery against the United States. The court also agreed that the general provisions of the Westfall Act apply even to specific groups of federal employees (e.g., military physicians) covered by the Gonzalez Act, recognizing that there is no conflict between the two statutes and that the Westfall Act simply adds to the immunity provided by the Gonzalez Act. This decision resolves an important conflict regarding the application of the Westfall Act, and will ensure the immunity of individual federal employees from suit in a wide range of cases.

United States v. Smith, No. 89-1646 (Mar. 20, 1991). DJ # 157-12C-3592

Attorneys: Barbara L. Herwig - (202) 514-5425 or FTS/368-5425
John F. Daly - (202) 514-2496 FTS/368-2496

* * * * *

### Supreme Court Rules That Discretionary Function Exception Precludes Government Liability For Actions of Federal Thrift Regulators, Including "Operational" Matters Regarding Management of Financial Institutions

Plaintiff, former president of a failed Texas thrift institution, brought this action under the Federal Tort Claims Act (FTCA) claiming that regulatory actions by the Federal Home Loan Bank Board caused the failure. The actions complained of consisted of informal, advisory intervention, prior to receivership or any other formal action. Although the district court accepted our arguments that all of the actions in question were "discretionary functions" exempt from FTCA liability, the Fifth Circuit reversed in part, holding that "operational" activities could not fall within the FTCA discretionary function exception. Such actions included various efforts of federal regulators to assist the thrift's board of directors in improving the institution's circumstances, such as providing advice concerning the hiring of a financial consultant and urging the board to convert to a federally-chartered institution.

The Supreme Court has now unanimously reversed. In an opinion by Justice White and joined by eight Justices, the court adopted a broad approach to the application of the discretionary function exception to such regulatory matters. The court firmly rejected the court of appeals' reliance on the "operational" nature of challenged actions, holding that such activities still fall within the exception as long as the decisions at issue were "susceptible to policy analysis." The court then noted that all of the specific actions alleged in the complaint were within the broad statutory discretion of federal regulators and that there were no regulations prescribing any particular regulatory course. Accordingly, despite the fact that technical expertise may have been needed for some of the actions at issue, the court held that all of them involved policy judgment and were thus within the exception. (Justice Scalia concurred in the result, relying on a somewhat different theory that focused on the fact that all of the actions at issue constituted conditions for federal regulators' forbearance from exercising discretionary authority to take more stringent regulatory actions.)

This is an extremely important reaffirmation of the vitality of the discretionary function exception with respect to day-to-day activities that nevertheless involve discretion. Although it will likely have ramifications for nearly all discretionary function cases, it should be especially helpful where, as here, plaintiffs charge negligence by federal officials in carrying out regulatory activities.

United States v. Gaubert, No. 89-1793 (March 26, 1991). DJ # 157-73-955.

Attorneys: Anthony J. Steinmeyer - (202) 514-3388 or FTS/368-3388
John F. Daly - (202) 514-2496 or FTS/368-2496

* * * * *

***D.C. Circuit Affirms Dismissal Of All Tort Claims Against The Government Arising Out Of The Soviet Shootdown Of Korean Airlines Flight 007***

This tort case arose out of the Soviet shootdown of Korean Air Lines (KAL) Flight 007 on September 1, 1983. The United States, along with KAL and others, was a principal defendant in the multidistrict tort litigation which followed this disaster. In May 1986, the district court dismissed all claims against the United States, concluding (1) that there was no evidence of negligence by FAA air traffic controllers, (2) that Air Force personnel had no duty to track the KAL flight and warn it of any course deviation, and (3) that, in any event, the Soviet action was unforeseeable and constituted a superseding cause of the disaster.

The D.C. Circuit has now affirmed that decision, holding that an internal Air Force regulation concerning monitoring and control of military flights in the vicinity of Alaska by Air Force radar trackers created no duty running to passengers and crew of civilian aircraft flying in that region and that, in any event, the record contained no evidence that Air Force trackers were aware that KAL 007 was off course. The court also held that there was no evidence that FAA air traffic controllers in Anchorage had such information. Having found no breach of any actionable tort duty by the government, the court found it unnecessary to reach the superseding cause issue.

Wyler v. Korean Air Lines Co., Ltd., No. 89-5400 et al. (March 29, 1991).
DJ # 157-16-7928.

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
Irene M. Solet - (202) 514-3355 or (FTS) 368-3355
Lori M. Beranek - (202) 514-3688 or (FTS) 368-3688

* * * * *

***Ninth Circuit Holds That The Civil Service Reform Act (CSRA) Precludes Bivens Remedies Even When The Actions Involved Are Unrelated To Pay And Even When The CSRA Offers No Alternative Remedy, And That The CSRA Preempts All Common Law Tort Claims***

A disgruntled federal employee alleged that his supervisors defamed him, and violated his First Amendment rights by opening personal mail. He sought damages for the commission of common law torts and for violations of his constitutional rights. We argued that all claims were preempted by the CSRA.

The Ninth Circuit has ruled in our favor and given the CSRA the extremely broad reading we requested. The court held (a) that under the CSRA the terms "personnel action" and "prohibited personnel practices" are to be read broadly, and encompass actions not related to pay or promotions -- such as opening an employee's mail; (b) that the CSRA precludes Bivens actions, whether or not the CSRA offers an alternative remedy and whether or not the action challenged is related to pay; and (c) that the CSRA precludes all common law tort claims, for Congress in the CSRA "left no room for supplementary state regulation." Because the court of appeals was satisfied that the CSRA preempts all common law torts, it found it unnecessary to consider whether the district court's substitution of the United States for the individual defendants charged with the commission of common law torts, pursuant to the Westfall Act, was proper.

Saul v. United States. No. 89-35698 (March 11, 1991). D.J. # 157-82-1344

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Richard A. Olderman - (202) 514-3542 or (FTS) 368-3542

* * * * *

***Ninth Circuit Reverses $1 Million Lower Court Decision In Hoover Dam Accident Case, Finding U.S. Not Liable Under Nondelegable Duty Theory***

In 1986, a construction worker, Lloyd Littlefield, was seriously injured while repairing Hoover Dam in Nevada. His employer, a large construction company, was operating under a contract with the Department of the Interior. Under the state's workers' compensation program, Littlefield received substantial payments but was prevented from suing his employer directly for his job-related injuries. As is increasingly common in such cases, Littlefield sued the government, claiming that, as the landowner and overseer of construction work, it had a nondelegable duty to provide safety for workers at the jobsite. The United States impleaded the construction company as a third party defendant.

The district court found the government liable and allocated damages equally between the United States and the construction company, thereby circumventing the cap on employer liability provided by the workers' compensation statute. We appealed and were opposed by both Littlefield and the construction company. We argued that there was no reason in law or policy why liability should be shifted from the employer to the landowner who hired him. In a unanimous decision, the Ninth Circuit agreed. It reversed the district court's finding of government liability, thus also relieving the construction company of any third party liability for the $1 million judgment. Littlefield's request for sanctions against the government for having filed an appeal with "obvious lack of merit" was not addressed by the court.

Littlefield v. United States, Nos. 89-16087 and 89-16230 (Mar. 12, 1991).
D.J. # 157-46-496

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
William G. Cole - (202) 514-5090 or (FTS) 368-5090

* * * * *

***Tenth Circuit Dismisses Tort Claims Against NASA Official***

This action arose out of plaintiff's termination from her employment with a NASA contractor. In her complaint, plaintiff raised various claims against the contractor and also alleged that the NASA station director had defamed her and tortiously interfered with her employment contract. In a decision issued prior to the passage of the Westfall Act, the district court granted summary judgment for the NASA official, concluding that he was entitled to absolute immunity. Several years later, after enactment of the Westfall Act, final judgment was entered against plaintiff on her remaining claims against the contractor. The Tenth Circuit has now affirmed, holding that under the Westfall Act, the United States must be substituted for the NASA official. Since the United States has not consented to suit for defamation or tortious interference with contractual relations, the court concluded that the claims must be dismissed.

Bayliss v. Contel Federal Systems, No. 89-2310 (March 21, 1991).
DJ # 35-49-92

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Jennifer Zacks - (202) 514-4826 or (FTS) 368-4826

* * * * *

***Tenth Circuit Holds That Release Of Previously Acquired Information Does Not Violate The Privacy Act***

Kline, an HHS dietician, was terminated for failure to meet job requirements. After appeal to the Merit Systems Protection Board (MSPB), she was reinstated. Kline then applied to the State of Oklahoma for a dietician's license, enclosing with her application the MSPB decision and a signed form consenting to the release of information regarding her contained in federal personnel files. Oklahoma conducted an investigation of Kline's competency. Kline sued HHS, alleging that the federal government's release of information relating to her skills as a dietician violated the Privacy Act. The district court issued an order granting summary judgment for the government. No appeal was taken from this order. Ten months later the district court again granted summary judgment for the government. Kline appealed from this second order.

The Court of Appeals affirmed. Despite Kline's failure to appeal the first grant of summary judgment, the court determined that it had jurisdiction. Acknowledging that the orders at issue "present a close question," the court found that Kline's timely appeal from the second order was sufficient to confer jurisdiction. On the merits, the Tenth Circuit held that because the disputed information had been initially released either by Kline or pursuant to her authorization, any subsequent release did not violate the Privacy Act. The court also found the Privacy Act was not implicated by information provided by Kline's coworkers which was not derived from a system of records. With this decision the Tenth Circuit joins several other courts in holding that the reach of the Privacy Act is limited to previously unreleased information.

Kline v. HHS. No. 89-6205 (March 6, 1991). DJ # 137-60-283

Attorneys: Leonard Schaitman - (202) 514-3441 or (FTS) 368-3441
Jennifer Zacks - (202) 514-4826 or (FTS) 368-4826

* * * * *

## ENVIRONMENT AND NATURAL RESOURCES DIVISION

### Restrictions On Surface Mining Aluvial Valley Floors In Surface Mining Reclamation And Control Act (SMRCA) Effect A Taking Of Coal Deposits

**UNFAVORABLE DECISION:**

In this taking case under the Fifth Amendment, plaintiffs claimed that the restrictions on surface mining alluvial valley floors contained in the Surface Mining Reclamation and Control Act, 30 U.S.C. 1201 et seq. took their interests in certain coal deposits in the Powder River Basin of Wyoming. Plaintiffs alleged that the taking occurred upon the mere enactment of the statute in 1977. The Claims Court granted judgment to the plaintiffs for $60,296,000, plus prejudgment interest from August 3, 1977, the date of enactment.

A panel of the court of appeals has unanimously affirmed. The panel first rejected our contention, based on such cases as Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), that no taking could have ripened until plaintiffs received a denial of an application to mine, holding that any such application would have been futile. The panel also held that despite the failure of the statute to declare a taking of any specific property, the remarks of a single representative on the House floor identifying Whitney's property as within the statutory restrictions was sufficient to establish that Congress expected to and intended to take Whitney's property by enactment of the legislation.

The panel also concluded that the question of whether there was a taking upon enactment need not include consideration of the significant surface uses that were left undisturbed by the statute. In addition, the fact that the statute allowed owners of coal deposits affected by the statute to exchange their property for other coal owned by the United States was held to be of no significance to the issue because the government had allegedly unreasonably delayed an exchange for Whitney coal. Finally, the panel dismissed any consideration of the purpose behind the restrictions because the effect, the court found, was to destroy all economic value in Whitney's property.

The panel also rejected the appeal of the Claims Court's determination of the value of the coal, holding that none of the findings were clearly erroneous.

Whitney Benefits, Inc. v. United States, Fed. Cir. No. 90-5058
(Markey, Newman, and Clevenger, Circuit Judges) (Feb. 26, 1991)

Attorneys: John A. Bryson - (202) 514-2740 or (FTS) 368-2740
Michael P. Healy - (202) 514-2757 or (FTS) 368-2757
Jacques B. Gelin - (202) 514-2762 or (FTS) 368-2762

* * * * *

***Comprehensive Environmental Response, Compensation And Liability Act, (CERCLA) Section 133(h), Bars Constitutional Challenges To Environmental Protection Agency Removal Action***

Barmet Aluminum Corporation, a potentially responsible party for the hazardous wastes on the Brantley Landfill and Fort Hartford sites, sought injunctive relief to prevent the Environmental Protection Agency (EPA) from listing the sites on the National Priorities List and from engaging in removal actions pursuant to CERCLA. The district court dismissed Barmet's action for lack of subject matter jurisdiction, holding that it was without authority to hear Barmet's constitutional challenges, under Sections 113(a) and 113(h) of CERCLA, 42 U.S.C. 9613(a), (h).

The court of appeals affirmed. First, the court rejected Barmet's contention that because its challenge to CERCLA is constitutional, the proscription against pre-enforcement review under Section 113(h) is inapplicable. Relying on the language of the statute, its legislative history, and the underlying objectives of CERCLA, the court held that Congress, in enacting Section 113(h), intended to bar pre-enforcement review of constitutional challenges. Second, the court rejected Barmet's argument that, even if Section 113(h) precludes review of its challenge at this time, Congress may not restrict the jurisdiction of the district court in a manner that would violate Barmet's due process rights. Unwilling to extend the result in Reardon v. United States, 922 F.2d 28 (Ist Cir. 1990), the court found that Barmet's due process rights are not implicated as a result of Section 113(h)'s limitations on judicial review. Finally, the court concluded that EPA, by simply inviting Barmet to conduct an Remedial Investigation/Feasibility Study on the sites, has not "forced" Barmet to do anything. Thus, the court held that Barmet's argument that CERCLA is unconstitutional because a potentially responsible party is "forced" to pay for a Remedial Investigation/Feasibility Study before it can contest liability is without merit.

Barmet Aluminum Corporation v. William K. Reilly, Administrator, United States Environmental Protection Agency, et al., 6th Cir.
No. 90-5435 (Milburn, Guy, Brown) (March 7, 1991)

Attorneys: Robert L. Klarquist - (202) 514-2748 or (FTS) 368-2748
Evelyn Ying - (202) 514-2754 or (FTS) 368-2754

* * * * *

## TAX DIVISION

### Supreme Court Rules In Favor Of The Government On The Tax Treatment Of Early Withdrawal Penalties Received By Financial Institutions

On April 17, 1991, the Supreme Court reversed the adverse decision of the Fifth Circuit in United States v. Centennial Savings Bank with respect to the tax treatment of early withdrawal penalties received by a financial institution when its depositors make premature withdrawals from fixed-term savings accounts. In this case, taxpayer collected early withdrawal penalties by reducing the amount payable to a depositor by the amount of the penalty. Taxpayer conceded that the penalties were income, but argued that the income was "income from the discharge of indebtedness," which is excludable from gross income under certain circumstances.

The Supreme Court held that a debtor realizes income from the discharge of indebtedness only when the income results from the forgiveness of, or release from, an obligation to repay assumed by the debtor at the outset of the debtor-creditor relationship. The court concluded that a depositor does not "discharge" a financial institution from an obligation when it accepts an amount equal to its principal and accrued interest less an early withdrawal penalty as this is exactly the amount the institution is obligated to pay under the terms of the account. Accordingly, the Supreme Court ruled that the amounts in question were includable in taxable income and that the discharge of indebtedness rules were irrelevant. Approximately $128 million in revenue was at stake on this issue industry-wide.

* * * * *

### Summary Judgment Obtained In Privacy Act Case Involving Billions In Statutory Damages

On April 1, 1991, the District Court of New Jersey granted our motion for summary judgment in Ingerman v. United States, a case in which a plaintiff class of purportedly 107,000,000 individuals sought injunctive, declaratory, and monetary relief against the Internal Revenue Service. The plaintiffs in this case alleged that the Service's practice of placing social security numbers on the mailing labels of forms mailed to taxpayers at the end of the year violated the anti-disclosure provisions of the Privacy Act. They further contended that the instruction to include a taxpayer's social security number on a tax return inappropriately solicited information. In a bench opinion, the court ruled that the use of the social security numbers on mailing labels does not violate the Privacy Act because the Act only prohibits the disclosure of "records." The court concluded that a social security number is an "identifier,' not a record. The court further held that the tax return instructions do not solicit disclosures of social security numbers as the Service already has the information.

It is not known whether the plaintiff class will appeal. The potential exposure here is in excess of $321 billion -- each of the more than one hundred million individual plaintiffs would be entitled to $3,000 in statutory damages.

* * * * *

### *Favorable Decision In Summons Enforcement Action*

On January 31, 1991, a summons enforcement action was filed against an attorney, Robert A. Leventhal, personally and in his representative capacity as a partner/officer of Leventhal and Slaughter, P.A., of Orlando, Florida. (See, United States Attorneys' Bulletin, Vol. 39, No. 3, dated March 15, 1991, at p. 74.)

On March 12, 1991, the United States District Court for the Middle District of Florida entered an order directing Mr. Leventhal to supply to the United States the names of the person or persons who had made cash payments to his law firm in excess of $10,000. Mr. Leventhal did not include these names on the Forms 8300 which he had filed with the Internal Revenue Service as required by Section 6050I of the Internal Revenue Code. Mr. Leventhal refused to provide this information in response to the summons arguing that the attorney-client privilege barred its release. The court stated that Mr. Leventhal correctly declined to answer the summons on account of the attorney-client privilege without the direction of the court. The court then ruled that fee arrangements fall outside of the privilege because such information ordinarily reveals no confidential professional communication between an attorney and his client.

On April 9, 1991, the United States District Court for the Middle District of Florida denied our motion to alter and amend its order of enforcement, thus letting stand its prior order that had required the summonsed attorney only to furnish the names of clients who had made cash payments of $10,000 or more, but did not require him to provide all the testimony and documents sought by the summons.

* * * * *

### *Seizure Of Antique Automobiles In Uncovering Scheme To Avoid Withholding Tax Liabilities*

The taxpayers are in the construction business in Brooklyn, New York. They have a history of creating shell corporations which incur substantial withholding tax liabilities. When liabilities are assessed against a shell corporation, the taxpayers cease operations under that corporate name and start up a new corporation. Responsible person penalties have been assessed against the taxpayers, but the taxpayers have managed to hide most of their assets in corporations which do not incur liabilities.

On March 15, 1991, the Tax Division obtained a Writ of Entry, allowing the Internal Revenue Service to enter property owned by three of the nominee corporations, in order to seize property belonging to other nominee corporations. The writ was executed on the morning of March 21, 1991. Some of the more interesting items which were seized were a 1957 orange Chevrolet; a pink Cadillac (early 1960s); a 1932 and 1939 Ford; 1977 Porsche convertible; 1988 Ferrari Testarosa; a Mercedes 190D and Mercedes 300; Model T Ford pickup truck, and an antique Mack truck. The Tax Division has two suits pending in the Eastern District of New York to reduce to judgment some of the taxpayers' liabilities and to foreclose its liens upon their interests in real estate holding corporations. They have obtained injunctions prohibiting the taxpayers from transferring or encumbering the assets of those corporations. At the time the suits were commenced, the Tax Division did not know the extent of the taxpayers' assets or the manner in which they operate. New liabilities were incurred after the commencement of their actions through the creation of a new shell corporation.

* * * * *

### *Multimillion Dollar Damage Award In Federal Tort Claims Act Case*

On April 4, 1991, the United States District Court for the Southern District of Texas awarded $10.9 million in damages under the Federal Tort Claims Act (FTCA) in Johnson v. Sawyer. In this case, Elvis Johnson sought damages from various Internal Revenue Service employees, officials in the office of the United States Attorney, and the United States, for injuries he claimed resulted from disclosures contained in an Internal Revenue Service press release. The press release reported that Johnson had pled guilty to an Information charging him with evasion of tax for two years (only one year was actually covered by the Information) and set forth personal information regarding Johnson that was not contained in the Information. The court found that the United States had agreed in the plea bargain that it would issue no press release and that the press release contained information that was not in the public record. It went on to hold that the discretionary function exception to the FTCA did not shield the United States from liability and determined that, by virtue of the lost business opportunities and emotional distress he had suffered as a result of these disclosures, Johnson was entitled to $10.9 million in damages.

* * * * *

### *Claims Court Dismisses Numerous Hockey Player Cases*

On February 22, 1991, the Claims Court sustained the Government's motion for partial dismissal in Favell, Jr. et al. v. United States (and consolidated and related cases), referred to as the "hockey player cases." At issue in these cases is the allocation, for purposes of the federal income tax, of hockey players' salaries between Canada and the United States and the substantiation of alleged "training" expenses. Based on jurisdictional defects, the court dismissed 308 of the approximately 680 tax years at issue in these cases and 19 of 231 cases. There are still motions pending which seek the dismissal of an additional 17 tax years and two suits.

All of the hockey players in these actions are represented by Charles Abraham. At least one of the taxpayers has asked the court to withdraw Abraham as counsel due to Abraham's failure to communicate with his client and "a complete and irreconcilable breakdown in the attorney/client relationship." The court has ordered each plaintiff to verify that Abraham will continue as counsel or face dismissal. Because many of the plaintiffs may not be able to be located or may not want to continue prosecuting their cases, the court's order could result in the dismissal of over 100 additional hockey player cases.

* * * * *

# ADMINISTRATIVE ISSUES

## Office Relocations In The Executive Office For United States Attorneys

Effective April 8, 1991, the Legal Education Institute (LEI) staff, under the direction of Susan Moss, Associate Director, relocated to the 10th floor of the Patrick Henry Building. The new address and the telephone and telefax numbers are as follows:

| | | |
|---|---|---|
| Legal Education Institute | Telephone: | (202) 501-7467 |
| Room 10418, Patrick Henry Building | | (FTS) 241-7467 |
| 601 D Street, N.W., | | |
| Washington, D.C. 20530 | Telefax: | (202) 501-7334 |
| | | (FTS) 241-7334 |

The Administrative Support Staff of the Office of Legal Education (OLE), under the direction of Nancy C. Hill, Acting Director, has also relocated to the 10th Floor of the Patrick Henry Building. The new address and the telephone and telefax numbers are as follows:

| | | |
|---|---|---|
| Office of Legal Education | Telephone: | (202) 208-7574 |
| Administrative Support Staff | | (FTS) 268-7574 |
| Room 10332, Patrick Henry Building | | |
| 601 D Street, N.W. | Telefax: | (202) 208-7235 |
| Washington, D.C. 20530 | | (FTS) 268-7235 |

The Attorney General's Advocacy Institute staff of the Office of Legal Education (OLE) will remain at the Department of Justice, Room 1344, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530. The telephone number is: (FTS) 368-4104 or (202) 514-4104. The telefax number is: (FTS) 368-8340 or (202) 514-8340.

The Priority Program Team of the Executive Office for United States Attorneys, under the direction of Kathi Kahoe, has moved to its new location in Room 1630, Main Justice. Tracey Carey, Carroll Newton, and Peggy Melville are also available to assist you. Their telephone number is: (202) 616-2128 or (FTS) 369-2128. Their telefax number is: (202) 514-8340 or (FTS) 368-8340.

* * * * *

## Special Thanks To District Freedom Of Information Act Contacts

The Freedom of Information Act/Privacy Act Unit (FOIA/PA) of the Executive Office for United States Attorneys, under the direction of Bonnie L. Gay, wishes to thank the 120 District Contacts for their special efforts during the past few months in responding to requests for records and documents. Your dedication and persuasive powers with the Assistant United States Attorneys and other staff members in the United States Attorneys' office have enabled FOIA to reduce their backlog by more than 200 requests -- it is now down to 500. While the names of the individuals who devoted so much time and effort are too numerous to mention, special thanks are in order for the following:

***Kevin Gaffney*** (Northern District of Illinois), who attacked a huge backlog and now has only four outstanding requests.

***Beverly Sumner*** (Northern District of Georgia), who now has only five outstanding requests.

***Tomi Guzman-Michaels*** and ***Chris Griffiths*** (Middle District of Florida, Tampa) and ***Pat Nadiak*** (Middle District of Florida, Orlando). Although Ms. Nadiak is designated as the principal contact, both offices always demonstrate a cooperative spirit and respond quickly to the numerous FOIA requests.

***Joy Williams*** (Eastern District of Missouri) and ***Laura Day*** (Western District of Washington), both "veterans" in this field, who respond quickly and are always cooperative and helpful.

All four of the Texas districts carry heavy caseloads. Two individuals who deserve special recognition for their prompt action are: ***Millie Tausworthe*** (Southern District of Texas), and ***Denise Swain*** (Western District of Texas).

New FOIA contacts who deserve special mention for their cooperative and diligent efforts are: ***Sandra Densham*** (Western District of Michigan) and ***Gloria Estolano*** (Northern District of California).

Other choices for gold stars go to ***Donna Murphy*** (Western District of North Carolina); ***Gerry Zinser*** (District of Maryland); and ***Leanna Mayberry*** (Eastern District of Michigan).

The FOIA/PA staff is always available to assist you in finding the least burdensome way of handling requests and in answering your FOIA/PA questions. Their telephone number is: (FTS) 241-7826 or (202) 501-7826.

* * * * *

## ***Federal Employees Health Benefits Program (FEHB)***

An enrollee who cancelled his/her FEHB enrollment previously had to pay his/her share of the premium for a pay period longer than he/she wanted coverage because the cancellation of enrollment was effective on the last day of the pay period after the pay period in which the cancellation was received by the employing office.

The Office of Personnel Management has published interim regulations (FPM Letter 890-42) changing the effective date to the last day of the pay period in which the cancellation is received by the employing office. Because the primary purpose of that interim regulation was to implement the temporary continuation of coverage provision, some employing offices may have overlooked the change in the effective date for cancelling enrollment. All employees who may cancel his/her FEHB coverage should be aware of this recent change.

* * * * *

### *Increase In The Maximum Amount Of Basic And Additional Optional Federal Employees' Life Insurance*

As of November 30, 1989, the annual rate of pay for level II of the Executive Schedule was increased from $96,600 to $125,100 to be effective the first day of the first applicable pay period that began on or after January 1, 1991. This increase affects the maximum insurance amounts for basic and additional optional insurance and the withholding for these coverages. The maximum basic insurance amount increases from $99,000 to $128,000. Since the annual rate of pay for level II is increased to $125,100, the amount of an Additional Option is increased from $97,000 to $126,000. Beware that if an insured employee's amount of insurance changes during the pay period, the amount of premium withheld is based on the amount of insurance in force on the last day of the pay period.

Attached at the Appendix of this Bulletin as Exhibit H is a Schedule of Basic Insurance Withholdings.

*[The above articles were submitted by Saundra M. Callier-Tyndle, Labor & Employees Relations Branch, Executive Office for United States Attorneys]*

* * * * *

## *CAREER OPPORTUNITIES*

### *United States Sentencing Commission*

The United States Sentencing Commission, Washington, D.C., is seeking a staff attorney to assist the General Counsel in analyzing the operation of sentencing guidelines and drafting of guideline amendments; training of probation officers, attorneys, and judges in guideline application; preparation of legal memoranda, briefs, and reports on sentencing issues; and other projects related to the Commission's work. The applicant must have demonstrated skill in legal research, writing, brief preparation, and advocacy. Experience in federal criminal prosecution and/or defense and experience in guideline application is strongly preferred. The salary will be commensurate with qualifications and experience.

Please forward your resume to the Personnel Office, United States Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, D.C. 20004. If you have any questions, please call John R. Steer, General Counsel, at (202) 626-8500.

* * * * *

### *Organized Crime And Racketeering Section, Criminal Division*

The Office of Attorney Personnel Management, Department of Justice, is seeking an attorney for the Criminal Division's Organized Crime and Racketeering Section who speaks fluent Cantonese Chinese. The ability to read and write Cantonese Chinese is highly desirable, but not absolutely essential. The attorney will be used to prosecute organized crime cases. Extensive travel is involved, but the attorney will be headquartered and spend most of his or her time in Washington, D.C.

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Experience as an Assistant United States Attorney, or in a state or local prosecutor's office, is desirable. Applicants must submit a resume or SF-171 (Application for Federal Employment) to: James Knapp, Organized Crime and Racketeering Section, Criminal Division, Department of Justice, Universal South Building, 1825 Connecticut Avenue, 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) to GS-15 ($61,643 - $80,138). The position is open until filled.

* * * * *

***Child Exploitation And Obscenity Section, Criminal Division***

The Office of Attorney Personnel Management, Department of Justice, is seeking experienced attorneys for the Child Exploitation and Obscenity Section of the Criminal Division, Washington, D.C. Trial attorneys with experience in child pornography law or child sexual exploitation law or obscenity and organized crime prosecution, as well as excellent investigative, litigative, analytical, and writing skills are preferred.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least two and one-half years post-J.D. experience. Applicants must submit a resume to: Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, Room 2216, 10th and Constitution Avenue, 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-13 ($44,348 - $57,650) to GS-15 ($61,643 - $80,138). Positions are available immediately. This advertisement is open until filled.

* * * * *

## *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% | | |
| 12-16-88 | 9.20% | 03-09-90 | 8.36% | | |
| 01-13-89 | 9.16% | 04-06-90 | 8.32% | | |
| 02-15-89 | 9.32% | 05-04-90 | 8.70% | | |
| 03-10-89 | 9.43% | 06-01-90 | 8.24% | | |
| 04-07-89 | 9.51% | 06-29-90 | 8.09% | | |
| 05-05-89 | 9.15% | 07-27-90 | 7.88% | | |
| 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 Akers |
| Arkansas, E | Charles A. Banks |
| Arkansas, W | J. Michael Fitzhugh |
| California, N | William T. McGivern |
| California, E | Richard Jenkins |
| California, C | Lourdes G. Baird |
| California, S | William Braniff |
| Colorado | Michael J. Norton |
| Connecticut | Richard Palmer |
| 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 | D. Paul Vernier |
| 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 |
| Kentucky, E | Louis G. DeFalaise |
| Kentucky, W | Joseph M. Whittle |
| Louisiana, E | Harry A. Rosenberg |
| Louisiana, M | P. Raymond Lamonica |
| Louisiana, W | Joseph S. Cage, Jr. |
| Maine | Richard S. Cohen |
| Maryland | Richard D. Bennett |
| Massachusetts | Wayne A. Budd |
| Michigan, E | Stephen J. Markman |
| Michigan, W | John A. Smietanka |
| Minnesota | Jerome G. Arnold |
| Mississippi, N | Robert Q. Whitwell |
| Mississippi, S | George L. Phillips |
| Missouri, E | Stephen B. Higgins |
| Missouri, W | Jean Paul Bradshaw |

| DISTRICT | U.S. ATTORNEY |
|---|---|
| Montana | Doris Swords Poppler |
| Nebraska | Ronald D. Lahners |
| Nevada | Leland E. Lutfy |
| New Hampshire | Jeffrey R. Howard |
| New Jersey | Michael Chertoff |
| New Mexico | William L. Lutz |
| 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 |
| North Carolina, E | Margaret P. Currin |
| North Carolina, M | Robert H. Edmunds, Jr. |
| North Carolina, W | Thomas J. Ashcraft |
| North Dakota | Stephen D. Easton |
| Ohio, N | Joyce J. George |
| Ohio, S | D. Michael Crites |
| Oklahoma, N | Tony Michael Graham |
| Oklahoma, E | John W. Raley, Jr. |
| Oklahoma, W | Timothy D. Leonard |
| Oregon | Charles H. Turner |
| Pennsylvania, E | Michael Baylson |
| Pennsylvania, M | James J. West |
| Pennsylvania, W | Thomas W. Corbett, Jr. |
| Puerto Rico | Daniel F. Lopez-Romo |
| Rhode Island | Lincoln C. Almond |
| South Carolina | E. Bart Daniel |
| South Dakota | Philip N. Hogen |
| Tennessee, E | John W. Gill, Jr. |
| Tennessee, M | Joe B. Brown |
| Tennessee, W | W. Hickman Ewing, Jr. |
| Texas, N | Marvin Collins |
| Texas, S | Ronald G. Woods |
| Texas, E | Robert J. Wortham |
| Texas, W | Ronald F. Ederer |
| Utah | Dee V. Benson |
| Vermont | George J. Terwilliger III |
| Virgin Islands | Terry M. Halpern |
| Virginia, E | Henry E. Hudson |
| Virginia, W | E. Montgomery Tucker |
| Washington, E | John E. Lamp |
| Washington, W | Michael D. McKay |
| West Virginia, N | William A. Kolibash |
| West Virginia, S | Michael W. Carey |
| Wisconsin, E | John E. Fryatt |
| Wisconsin, W | Grant C. Johnson |
| Wyoming | Richard A. Stacy |
| North Mariana Islands | D. Paul Vernier |

* * * * *

Department of Justice

EXHIBIT
A

STATEMENT

OF

DICK THORNBURGH
THE ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 635
THE COMPREHENSIVE VIOLENT
CRIME CONTROL ACT OF 1991

ON

APRIL 18, 1991

Mr. Chairman and members of the Committee, I greatly appreciate the opportunity to appear before you today in support of S. 635, the President's Comprehensive Violent Crime Control Act of 1991. The fact that you have scheduled this hearing, Mr. Chairman, is a further reflection of your commitment to law enforcement and to the search for meaningful solutions to the problem of violent crime. I commend you for your continuing interest in this area of deep national concern.

As all of the members of this distinguished Committee know, the issues of violent crime and drug abuse are high priorities for the President and this Administration. The President's dedication to the cause of law enforcement has been repeatedly expressed over the past two years. From his inaugural address to his recent speech before a joint session of Congress, the President has challenged the Congress to enact legislation necessary to support the fight against those who violate what I have always called the first civil right of every American -- the right to be free from fear in our homes, on our streets, and in our communities.

In my role as the chief law enforcement official in this Administration, I share the President's devotion to a comprehensive approach to the effort to contain violent crime which involves close cooperation with state and local law enforcement agencies, effective use of federal laws and resources, and the quest for legislative improvements vital to protecting the safety of every citizen.

A noteworthy example of our desire to maximize state and

local cooperation is the Crime Summit that was recently held in this city. This unprecedented gathering of over 650 federal, state and local law enforcement officials was organized to encourage the exchange of ideas in the battle against violent crime. I am pleased to report that by all accounts this goal was clearly achieved, and the result will be increased cooperation in the nationwide apprehension, prosecution and punishment of violent criminals.

With respect to the effective use of federal resources, the recently announced "Project Triggerlock" stands out as an example. In an effort aimed at America's most deadly armed felons, I have ordered every United States Attorney to establish a Violent Offenders Task Force to identify armed career criminals, armed drug violators, and other armed violent offenders who should be prosecuted to the maximum for firearms offenses under federal law, with no probation, no parole, and no plea bargaining.

While the expansion of law enforcement cooperation and the increased use of federal resources are significant weapons in the war against violent crime, we are dependent upon the Congress to fully equip us for our mission. Without critical procedural reforms of the criminal justice system, and without new federal sanctions against violence, this Nation's law enforcement community will continue to be deprived of the full support they need. More important, the public will continue to be unnecessarily exposed to the life-threatening risks of violent

crime. Mr. Chairman and members of this Committee, we need your help if we are going to succeed.

Before I summarize the contents of this legislation and contrast it to the bill you have introduced, Mr. Chairman, I must point out a fundamental principle that underlies the President's proposal. That principle is this: the most effective way for the law enforcement community to reduce violent crime is to get violent criminals off the streets and into prison. Incapacitation is the key.

This simple truth is woven throughout the President's proposal. Protecting the public requires holding violent criminals accountable for their actions. Certain and swift apprehension, prosecution and incarceration are our goals.

## Analysis of S. 635

The President's bill approaches the problem of violent crime in a comprehensive manner by addressing a number of specific objectives. These objectives, identified in the preamble to the bill, are:

-- To restore an enforceable federal death penalty.

-- To curb the abuse of the writ of habeas corpus.

-- To reform the exclusionary rule.

-- To combat criminal violence involving firearms.

-- To protect witnesses and other participants in the criminal

justice system from violence and intimidation.

-- To address the problems of gangs and serious juvenile offenders.

-- To combat terrorism.

-- To combat sexual violence and child abuse.

-- To provide for drug testing of offenders in the criminal justice process.

-- To secure the right of victims and defendants to equal justice without regard to race or color.

-- To enhance the rights of crime victims.

Several of the titles in the bill address the same subjects as the violent crime proposal transmitted to Congress by the President in the 101st Congress, including the federal death penalty, general habeas corpus reform, firearms violence, and drug testing of offenders.

The bill also incorporates, however, important modifications and additions, including provisions and concepts drawn from the crime bills passed by the Senate (S. 1970) and the House of Representatives (H.R. 5269) in the last Congress, and some entirely new proposals. The areas of most extensive modification or addition include: special habeas corpus procedures for death penalty litigation, alternatives to the exclusionary rule, additional firearms provisions, gangs and juvenile offenders, terrorism, sexual violence and child abuse, equal justice, and victims' rights. Overall, the provisions of the President's bill provide an effective and wide-ranging approach to enhancing the

efficacy of the criminal justice system in protecting the public from crime.

In addition to the following detailed analysis of the provisions in the President's bill, I have included comparisons to your crime bill, Mr. Chairman, S. 618, the Violent Crime Control Act of 1991.

Before turning to a discussion of particular topics, I would offer the general observation that S. 618 involves significant problems of formulation, which have adverse consequences that are presumably unintended. For example, proposed 18 U.S.C. 3595(c)(2) in title II of S. 618 is drafted so as to require courts of appeals to reverse death sentences in every case. An amendment proposed in section 301 of S. 618 would divest the federal government of authority to prosecute second-degree murders of federal judges and law enforcement officers. Section 601 of S. 618 would authorize the death penalty or life imprisonment in certain cases in which members of a drug gang kill members of a rival drug gang in a drive-by shooting, but would generally preclude the death penalty and life imprisonment in such a case if the persons killed are innocent bystanders, such as children in a nearby building or innocent persons caught in the line of fire. Many other provisions in S. 618 involve comparable problems.

## I. Death Penalty

Title I of the President's violent crime bill provides effective procedures to restore an enforceable death penalty for

the most heinous federal crimes. While some remain opposed to the death penalty in principle, that debate is over. The Supreme Court has upheld the constitutionality of the death penalty and the Congress has provided for capital punishment in federal statutes. Most of these existing laws, however, are currently inoperative because of the absence of adequate procedural provisions. Similarly, there are a number of new death penalty authorizations provided for in the President's bill to address highly aggravated federal crimes, and these new authorizations also could not be used without the concurrent enactment of the necessary procedural provisions.

The procedures for imposing and carrying out death sentences proposed in title I of the President's violent crime bill are virtually identical to those passed by the Senate last year in title XIV of S. 1970 (relating to the "drug kingpin" death penalty) and by the House of Representatives in title II of H.R. 5269 (general death penalty). The procedural provisions in the President's bill are also generally the same in substance as the corresponding provisions in the death penalty proposal for terrorist murders that the Senate recently passed in section 605 of S. 320.

In addition, title I of the President's bill authorizes the admission in capital sentencing hearings of information concerning the effect of the offense on the victim and the victim's family. This was also endorsed in the general death penalty proposal passed by the Senate last year as title I of

S. 1970.

The President's bill would allow the death penalty to be used under a number of existing statutes that already contain death penalty authorizations. These include statutes defining such crimes as treason and espionage, murders of federal judges and law enforcement officers, assassinations of high level federal officials, mail bombings where death results, destruction of aircraft or hijacking where death results, other fatal attacks on common carriers or transportation facilities, murders committed with explosives, and murders in the course of bank robberies.

Title I of the President's bill creates new death penalty authorizations for such crimes as fatal kidnapings, murder for hire or in aid of racketeering, murders during hostage takings and terrorist murders abroad of American nationals, and murders by federal prisoners serving a life term. Other titles of the President's bill also contain new death penalty authorizations for a number of crimes, including retaliatory murders of witnesses and jurors under title V, murders in the course of various terrorism offenses under title VII, and murders in violation of the principal criminal provisions of the federal civil rights laws under title X. A complete description of the offenses for which the death penalty would be available under the President's bill appears in the analysis accompanying the bill. See Cong. Rec. S3216 (March 13, 1991).

In contrast, S. 618 does not authorize the death penalty for

a number of offenses that would be capital crimes under the President's bill, such as retaliatory murders of witnesses and jurors. The procedures for imposing and carrying out the death penalty under S. 618 are also deficient in comparison with the President's bill, and in comparison with the death penalty proposals that have previously been passed by the Senate.

For example, there is no authorization in title II of S. 618 for admitting victim-impact and victim-family-impact information in capital sentencing hearings. More broadly, the capital sentencing hearing under S. 618 would be less effective than the sentencing hearing contemplated by the President's bill and earlier Senate-passed death penalty proposals (such as title I of S. 1970), since title II of S. 618 would take the unprecedented step of limiting the evidence admissible at the sentencing stage to evidence that would be admissible in a trial of guilt or innocence under the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. (Proposed 18 U.S.C. 3593(c) in title II of S. 618.)

This novel requirement would unjustifiably restrict the use of reliable evidence supporting the imposition of a warranted death sentence if it failed to meet the technical requirements applicable to trial evidence. As indicated above, the provision governing appellate review of sentences in title II of S. 618, proposed 18 U.S.C. 3595(c), is also problematic, and differs from the corresponding provisions of the President's bill and title I of S. 1970.

Title II of S. 618 is deficient in comparison with title I of the President's violent crime bill in its specification of the statutory aggravating and mitigating factors to be considered in capital sentencing hearings. For example, the President's bill includes use of a firearm in committing a capital offense as a statutory aggravating factor. (Proposed 18 U.S.C. 3592(c)(2) in title I of S. 635.) This means that the capital sentencing option would consistently be available where the offender killed the victim with a gun. In contrast, the possibility of considering the death penalty for firearms killings under S. 618 would be limited to cases in which one of the other aggravating factors listed in the bill happened to be present.

Finally, I would note that title II of S. 618 contains no provisions guarding against the obstruction of capital punishment through repetitive collateral litigation. The abuse of habeas corpus and other collateral remedies has bogged down state death penalty litigation to the point where state-imposed death sentences can rarely be carried out. The enactment of federal death penalty legislation could be an empty gesture if the pattern of litigation abuse that has thwarted state death penalty laws were replicated in federal cases. Title I of the President's violent crime bill, title XIV of S. 1970 as passed by the Senate last year, and title II of H.R. 5269 as passed by the House of Representatives last year, all contained provisions governing collateral litigation in federal capital cases which were modeled on the recommendations of the "Powell Committee" and

would provide effective protection against this abuse. (Proposed 18 U.S.C. 3598-99 in these bills.) S. 618 contains no such provisions.

## II. Drug Offender Death Penalty

Proposed 18 U.S.C. 3591 in title I of the President's violent crime bill (S. 635) includes death penalty authorizations for three categories of drug offenders: (1) the leaders of the largest drug enterprises, who are currently subject to a mandatory term of life imprisonment under 21 U.S.C.848(b), (2) other leaders of drug enterprises, subject to punishment under 21 U.S.C. 848, who attempt to obstruct the investigation or prosecution of their activities by attempting to murder participants in the criminal justice process, and (3) other persons who commit murders in the course of drug felonies. The Senate passed substantially the same proposal last year as title XIV of S. 1970.

Title IV of S. 618 is also concerned with the death penalty for "drug criminals," but its provisions are highly inadequate in comparison. At best, the death penalty authorizations it provides are comparable only to a portion of the third category of death-eligible drug offenders proposed in the President's bill and title XIV of S. 1970. Unlike the President's bill and S. 1970, title IV of S. 618 does not authorize the death penalty for even the most significant drug kingpins, or for all murders committed in the course of felony violations of the federal drug laws, but only for certain types of murders committed in the

course of violations of specified federal drug provisions.

Title VI of S. 618, which is meant to provide appropriate penalties for drive-by shootings in the drug context, including the death penalty in fatal cases, is also deficient. The general maximum penalty under title VI of S. 618 is twenty-five years. The higher murder penalties of 18 U.S.C. 1111 would also be available in some circumstances, but only for an offender who "fires a weapon into a group of two or more persons and who kills one of those persons." In other words, terms of imprisonment exceeding twenty-five years, life imprisonment, and the death penalty would be potentially available as sentencing options if members of a drug gang fired into a group of members of a rival drug gang and killed one or more persons in the target group. These penalties would not be available, however, if the persons killed in the shooting were innocent bystanders, such as children in a nearby building, or innocent persons caught in the line of fire.

## III. Obstruction of Justice

Unlike the President's violent crime bill, S. 618 does not have a separate title dealing with obstruction of justice offenses as such. Title III of S. 618, entitled "death penalty for murder of law enforcement officer act," is intended to deal with some aspects of this area. However, the provisions in title III of S. 618 would not achieve their apparent objectives.

Section 301 of S. 618 amends the penalty provision of 18 U.S.C. 1114 -- a statute that generally prohibits killings and

attempted killings of federal judges and law enforcement officers -- for the purpose of authorizing the death penalty for murders of federal law enforcement officers. However, 18 U.S.C. 1114, as currently formulated, simply cross-references the murder and manslaughter penalties of 18 U.S.C. 1111 and 1112. Once the death penalty provision of 18 U.S.C. 1111 is fixed -- which is done by section 203 of S. 618 -- the death penalty would automatically become available under 18 U.S.C. 1114 on the basis of the existing cross-reference. This is the approach taken in the President's bill, which fixes the death penalty provision in 18 U.S.C. 1111, and does not make an unnecessary additional amendment in the penalty provision of 18 U.S.C. 1114. Moreover, as indicated earlier, the amendment proposed in section 301 of S. 618 is technically deficient as well as unnecessary, since it would not preserve any penalty authorization under 18 U.S.C. 1114 for murders other than first degree murders.

Section 302 of S. 618 is similarly intended to provide a federal death penalty for murders of state and local law enforcement officers who are assisting federal officers. This provision is unsound because it only authorizes the death penalty and does not authorize any alternative, non-capital sentence. In other words, if a person were prosecuted for killing a police officer under proposed 18 U.S.C. 1119 in section 302, and the jury concluded that the proper penalty was a non-capital sentence, such as life imprisonment, there would be no authority to impose such a sentence.

In lieu of this unsound provision, Congress should enact section 503 of the President's violent crime bill, which explicitly adds state and local law enforcement officers assisting federal officers to the list of persons protected under 18 U.S.C. 1114. This would ensure that the death penalty and the other penalties provided under 18 U.S.C. 1114 for killings and attempted killings of federal officers will apply equally to killings and attempted killings of state and local officers who assist them. It would also ensure that such state and local officers have the protection of statutes punishing non-homicidal violent crimes against federal officers -- see 18 U.S.C. 111, 1201(a)(5) -- that cross-reference the list of protected persons in 18 U.S.C. 1114.

## IV. Habeas Corpus

Title II of S. 635 proposes comprehensive reforms to curb the abuse of habeas corpus. Subtitle A of title II proposes general habeas reforms, applicable in both capital and non-capital cases, that are largely the same as provisions passed by the Senate in S. 1763 of the 98th Congress. These include a time limitation rule for federal habeas filings, a rule of deference in federal habeas corpus proceedings to full and fair state court adjudications of a petitioner's claims, and various technical improvements in habeas corpus procedure.

Subtitle B of title II of the President's bill proposes reforms addressed to the particularly acute problems of delay and abuse in capital cases. It incorporates the recommendations of

the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases (the "Powell Committee" proposal) in the form passed by the House of Representatives last year as title XIII of H.R. 5269. Under this proposal, states appointing counsel meeting articulated standards of competence to represent indigent capital defendants in state collateral proceedings -- in addition to the constitutionally required appointment of competent counsel to represent such defendants at trial and on appeal -- would be accorded stronger rules of finality on federal habeas review in capital cases. This includes a rule barring second and successive habeas petitions except in extraordinary cases involving a claim that casts doubt on the defendant's guilt of the offense for which the death penalty was imposed.

In addition, subtitle B of title II of the President's bill incorporates the most important features of the habeas reform proposals passed by the Senate in the 101st Congress (title II of S. 1970) and the 98th Congress (S. 1763). These include definite time limits for concluding the litigation of habeas petitions in capital cases, and a rule of deference to full and fair state adjudications.

In contrast, title X of S. 618 consists of (1) optional procedures for capital cases, which no state would actually elect to use, because they are far less favorable than current law, and (2) a mandatory overruling in all state and federal cases of the "retroactivity" standards adopted by the Supreme Court in Teague v. Lane, 109 S. Ct. 1060 (1989), and subsequent decisions.

1. The optional procedures. The Powell Committee proposal and the President's bill limit second and successive federal habeas petitions to cases in which a claim is raised whose underlying facts, if proven, would undermine confidence in the verdict and cause is shown for the failure to raise such a claim at an earlier point. In contrast, proposed 28 U.S.C. 2257(c) in section 1002 of S. 618 would permit repetitive petitions if either cause is shown for the failure to raise a claim earlier, or the facts underlying a claim, if proven, would undermine confidence in the verdict, or "a stay and consideration of the requested relief are necessary to prevent a miscarriage of justice."

This feature of S. 618 is more permissive than current law in allowing prisoners under sentence of death to bring second and successive habeas corpus petitions. See McCleskey v. Zant, No. 89-7024 (Sup. Ct. April 16, 1991). The McCleskey standard does allow second or successive petitions to prevent a "fundamental miscarriage of justice," but this is defined in the McCleskey decision as referring to cases in which "a constitutional violation probably has caused the conviction of one innocent of the crime." In contrast, S. 618 has an open-ended authorization for entertaining second and successive petitions under an undefined "miscarriage of justice" standard, even if there is no question abut the defendant's commission of the murder and no justification at all for failing to raise the claim earlier.

Moreover, even an accurate codification of the McCleskey

rule would not be an adequate standard. The proposed standard for second and successive petitions in S. 618 is part of a set of optional procedures that are supposed to give states stronger rules of finality in return for compliance with new requirements concerning counsel qualifications and payment for defense services. A standard that merely followed current law would not give the states anything in return for undertaking these new obligations, and hence there would be no incentive for states to "opt in" to the new system. The strengthening of finality rules proposed in the President's bill is necessary to create a system that would be used by the states and actually result in an improvement over the current situation.

Proposed 28 U.S.C. 2258 in section 1002 of S. 618 would provide a normal one year time limit for federal habeas filing. This is more than twice the ample 180 day limitation period proposed in the Powell Committee's recommendations and the President's bill. Under current law, the pressure of upcoming execution dates and the need to obtain stays of execution gives prisoners an incentive to file their claims. However, the automatic stay-of-execution provisions in proposed 28 U.S.C. 2257 in section 1002 of S. 618 would remove this pressure. In conjunction with the unduly long limitation period under proposed 28 U.S.C. 2258, this would result in more delay -- not less -- than occurs under the current rules.

Proposed 28 U.S.C. 2259(b) in section 1002 of S. 618 would overturn the existing rules that limit the belated raising of

claims in federal habeas corpus proceedings that were not raised before the state courts. It provides at most that courts "may" refuse to entertain such claims in certain circumstances, apparently giving district judges a standardless discretion to entertain any claim on federal habeas, even if there was no justification at all for failing to raise such a claim in a timely manner in state proceedings.

Proposed 28 U.S.C. 2259(b)(2) would overturn the holding of the Supreme Court's decision in Murray v. Carrier, 477 U.S. 478, 488 (1986), by providing that claims which defendant's counsel failed to raise in state court must be considered in federal habeas proceedings under a standard of "ignorance or neglect" of counsel, even if counsel's performance satisfied constitutional requirements. The same provision goes beyond overruling Murray by providing that a claim must be considered on federal habeas if it was not raised in state court due to the ignorance or neglect of the defendant. In other words, a prisoner under sentence of death could re-open his case in federal habeas proceedings, and potentially secure the overturning of his conviction and sentence, merely by alleging that he did not happen to think of a particular claim, or did not bother to raise it, in state proceedings. Proposed 28 U.S.C. 2259(b)(2) would also require that a claim be considered if the failure to do so would result in a "miscarriage of justice." The provision does not say what "miscarriage of justice" means; potentially, it could mean almost anything.

Overall, the optional procedures proposed in section 1002 of S. 618 would do a good job of destroying the already modest safeguards of finality in federal habeas corpus litigation in capital cases. It is obvious that no state would elect to have its capital cases reviewed under such rules.

2. Mandatory overruling of Teague v. Lane. Under the current "retroactivity" rules, the law applied in reviewing a case in federal habeas corpus proceedings is normally the law in effect at the time the judgment in the case became final (i.e., the end of state direct review). This reflects the common sense notion that courts must comply with existing controlling precedent, but cannot be expected to exercise prophetic powers and anticipate new rules that may be generated in decisions coming years later. However, even under the current standards, sufficiently important later decisions are applied retroactively, including decisions that categorically limit the power of the state to prohibit conduct or impose a penalty, and decisions establishing procedures without which the reliability of the fact-finding process at trial is seriously diminished.

Section 1003 in S. 618 would abrogate the fair and balanced standards that have been established in this area by Teague v. Lane, 109 S. Ct. 1060 (1989), and related cases. Proposed 28 U.S.C. 2255A(a) in section 1003 overturns the Teague rule that the law at the time of finality normally applies in federal habeas review. Proposed 28 U.S.C. 2255A(b) replaces the specific Teague retroactivity criteria with a number of vague factors to

be considered by the court in making retroactivity decisions. Proposed 28 U.S.C. 2255A(c) goes further and narrowly defines "new rules" so as to include only decisions that depart from precedent and definitely change the law. Since very few Supreme Court decisions meet this criterion, most decisions would not count as establishing "new rules," and hence would be automatically retroactive.

The practical effect of section 1003 of S. 618 may be illustrated by considering the facts in Butler v. McKellar, 110 S. Ct. 1212 (1990). The defendant in that case (Butler) raped and murdered a woman in 1980. Following his arrest for an unrelated assault, Butler declined to answer questions about the assault and asked for a lawyer. When later questioned about the rape-murder incident, however, Butler was willing to talk, and confessed to killing the woman. He was convicted of the crime and sentenced to death.

Several years later, the Supreme Court held in Arizona v. Roberson, 486 U.S. 675 (1988), that a suspect's invocation of the right to counsel in relation to an offense for which he was arrested generally bars later efforts by the police to question him about other offenses. However, when Butler subsequently sought to overturn his conviction on the basis of the Roberson rule, the Supreme Court found it inapplicable: Roberson established a "new rule," as the Court defines that notion, because it was not dictated by prior precedent. Moreover, the Roberson rule does not fall within the recognized exceptions to

the general principle of non-retroactivity, since it did not categorically limit the power of the state to prohibit conduct or impose a penalty, and was not of basic importance in ensuring the accuracy of the conviction.

Under section 1003 of S. 618, the opposite result would have followed: Since the rule of Roberson was not a break from precedent or a definite change from prior law, it would not be deemed a "new rule" under S. 618, and hence would automatically be retroactive. Butler's confession accordingly would have been made retroactively inadmissible, potentially resulting in the overturning of his conviction, and setting him free unless the state could successfully re-try him -- ten years later -- without the use of his confession. This result would follow despite the fact that there was no basis for doubting Butler's factual guilt of the crime, and no way for the police to anticipate that the type of conduct they engaged in in questioning Butler would be disapproved by the Supreme Court eight years later in Roberson.

The facts in Butler v. McKellar illustrate the wisdom of not disturbing the retroactivity rules adopted by the Supreme Court, which generally accord finality to state judgments that reflect reasonable interpretations of existing precedent. They also illustrate the harm to the public's security from dangerous criminals that would result from the enactment of S. 618.

## V. Exclusionary Rule

Title III of the President's violent crime bill proposes reforms relating to the exclusionary rule. One reform in title

III is the establishment of a general "good faith" exception to the exclusionary rule, which would ensure the admissibility of evidence where the officers conducting a search or seizure acted in an objectively reasonable belief that their conduct was consistent with the Fourth Amendment. The underlying premise of this proposal is that the exclusionary rule should not be applied in cases where there has been no misconduct by the officers and no legitimate deterrent function would be served by excluding evidence.

In relation to this proposal, we should keep in mind Justice Cardozo's question whether it is right that the criminal should go free because the constable has blundered. Still less should the criminal go free where a court determines that the conduct of the "constable" was objectively reasonable. There may also be an element of parochialism in objections to this moderate limitation of the exclusionary rule, since the legal systems of comparable foreign nations, including England, are far less receptive to the idea of excluding reliable evidence as a regular sanction for official mistakes or misconduct, and generally have nothing corresponding to our search and seizure exclusionary rule.

There is, of course, no question that Congress has the authority to modify the exclusionary rule in the United States, since it is not a constitutional requirement. As the Supreme Court observed in United States v. Leon, 468 U.S. 897, 906 (1984), the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through

its deterrent effect, rather than a personal constitutional right of the party aggrieved."

As the Court also observed in United States v. Leon, 468 U.S. at 920, excluding evidence where an officer's conduct is objectively reasonable "will not further the ends of the exclusionary rule in any appreciable way, for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." The proposal in title III would extend the underlying principle of the Leon decision -- which is limited in its specific holding to searches involving warrants -- so that it would apply as well to searches for which warrants are not required.

I would note that the House of Representatives passed the same "good faith" exception proposal last year as section 2204 of H.R. 5269, and that the Senate passed a very similar proposal in S. 1764 of the 98th Congress. I would also note that the federal courts in the Fifth and Eleventh Circuits have applied a fully general "good faith" exception, applicable in both warrant and non-warrant cases, since the decision of United States v. Williams, 622 F.2d 830, in 1980, with no adverse effect on the rights of suspects and defendants. There is no reason why the benefits of this approach should not be available on a nationwide basis.

Title III of the President's bill also includes important

new elements. It would enact a consistent rule barring suppression of firearms seized by federal law enforcement officers, where the firearm is to be used as evidence in the prosecution of a dangerous offender. The killer should never go free because the firearm used in the murder was thrown out in court.

The application of this new firearms exception to the exclusionary rule, which I would refer to as an "inclusionary rule," would, however, be contingent on an agency's adoption of alternative safeguards to ensure compliance by its officers with the Fourth Amendment. The required safeguards would include regulations specifying standards for training of officers in the law of search and seizure, standards and procedures for carrying out searches and seizures, procedures for reporting and investigating search and seizure violations, and the sanctions to be imposed for violations. The requirements would also include the establishment of a review board to review all allegations of search and seizure violations by the agency's officers and to recommend or impose appropriate disciplinary sanctions where violations are determined to have occurred, and improved administrative mechanisms for ensuring that victims of unlawful searches and seizures receive the compensation to which they are entitled.

The alternative safeguards systems would also involve an important element of external oversight: mandatory periodic reports to Congress concerning all allegations of search and

seizure violations and claims for damages based on unlawful searches and seizures. The required reports to Congress would also have to describe the actions taken on such allegations and claims, and the basis for the action taken in each case.

In light of these provisions for prevention and redress of search and seizure violations through comprehensive systems of administrative and legislative oversight, title III of the President's bill offers fundamental improvements over current law in protecting the rights of suspects and defendants, as well as fundamental improvements in ensuring the admissibility of evidence in the prosecution of crime.

In contrast, S. 618 does not propose any reforms at all in the exclusionary rule -- or at least no "reform" in any positive sense. All that appears in title XXII of S. 618 is a provision that is supposed to be a codification of the rule of United States v. Leon, 468 U.S. 897 (1984), which held that evidence is admissible if obtained in objectively reasonable reliance on a warrant. However, Leon is already the law, and the Supreme Court should be free to consider broader applications of Leon's objective reasonableness ("good faith") standard, unhampered by legislation that attempts to freeze the status quo.

Moreover, as we noted in our comments on the same proposal in the 101st Congress, the provision in title XXII of S. 618 is not an accurate codification of the Leon rule, and would actually narrow the admissibility of evidence in comparison with current law. It would accordingly be unacceptable on its own terms, even

if there were some legitimate purpose to be served by codifying Leon.

## VI. Firearms

Title IV of the President's violent crime bill addresses the problem of criminal violence involving firearms. Subtitle A of title IV contains 24 sections which include a wide range of provisions to strengthen federal firearms laws. Some of these are taken from the violent crime proposal of the 101st Congress; a number of them are new.

Section 418 of the President's bill is a particularly important new provision. Under current law -- the Armed Career Criminal provision, 18 U.S.C. 924(e) -- firearms possession by a person with at least three violent felony or serious drug offense convictions is punishable by a mandatory term of imprisonment of fifteen years. However, there is no mandatory term requirement for firearms possession by dangerous offenders who do not meet the three-conviction standard of section 924(e). Section 418 of S. 635 would fill this gap by providing a mandatory five-year prison term for firearms possession by offenders who have at least one previous conviction for a violent felony or serious drug offense. This may be compared to the mandatory five-year term now provided under 18 U.S.C. 924(c) for using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime.

The new penalty requirement of section 418 will be a potent tool in the hands of federal prosecutors as part of the

nationwide crackdown I have ordered against violent firearms offenders, "Project Triggerlock." I would also note that the United States Sentencing Commission is considering proposals, strongly supported by the Department of Justice, to significantly raise the guidelines ranges applicable to firearms and explosives offenses.

Few of the provisions in subtitle A of title IV of the President's bill appear in any comparable form in S. 618. Most of the firearms provisions that do appear in title XI of S. 618 are inadequate, or even regressive in comparison with current law.

Section 1103 of S. 618 -- which proposes amendments relating to the penalties for using or having firearms in connection with federal crimes of violence and drug trafficking crimes -- provides a good illustration of these points. To begin with, section 1103 would repeal the mandatory 10 year term for use of a short-barreled rifle or short-barreled shotgun that Congress enacted last year in section 1101 of the Crime Control Act of 1990.

Moreover, section 1103 would limit the application of the general five year mandatory prison term under 18 U.S.C. 924(c) to cases in which the offender has the "intent to injure another person"; there is no such limitation under current law. Under the provision proposed in section 1103, for example, a bank robber who pointed a gun at a teller and demanded cash could argue that he is not subject to the mandatory five year term on

the ground that he only intended to intimidate the victim into compliance and did not intend to injure anyone.

These provisions illustrate my fundamental concerns about the shortcomings of S. 618 and its implications for the public's security against crime. Whatever Congress may choose to do about the problem of criminal violence involving firearms, it should not be considering any proposals to weaken existing firearms laws.

Another provision in section 1103 of S. 618 does attempt to go beyond current law by providing a mandatory 10 year term for offenses involving specific types of "assault weapons," as defined in title VII of the bill. This provision is inadequate, however, because it only provides an increased mandatory penalty for criminal use of these particular weapons, and makes no comparable provision in relation to other weapons that are equally dangerous or more dangerous if used in the commission of crimes. Congress should enact instead the mandatory 10 year term for use of any semiautomatic firearm in committing a crime of violence or drug trafficking crime that is proposed in section 401 of the President's violent crime bill.

Subtitle B of title IV of the President's violent crime bill proposes a general ban on magazines, clips, and other ammunition feeding devices that enable any type of firearm to fire more than fifteen rounds without reloading. Title VII of S. 618 is apparently addressed to similar concerns, but takes a very different approach. It proposes a general ban on nine specific

categories of firearms, defined by make and model, which it characterizes as "assault weapons." We regard the approach of S. 618 as inadequate.

Weapons commonly referred to as "assault weapons" -- aside from machineguns, which are already banned under federal law -- are actually semiautomatic weapons that can, with the proper extra equipment, fire a large number of rounds without reloading. Legislative proposals to ban particular types of weapons have tended to focus on weapons that are often configured to look menacing and "Rambo-like" to persons unfamiliar with firearms. However, many more powerful firearms used for hunting have not been targeted by these bills, apparently because they have polished wood stocks and appear less threatening.

In reality, semiautomatic firearms -- whether or not configured to have a military-like appearance -- can present an unacceptable danger to society if they are equipped with ammunition feeding devices that enable them to fire a large number of rounds without reloading. Hunters do not need to shoot off dozens of rounds in a matter of seconds and neither is such "spraying" of bullets a necessary feature of firearms ownership for purposes of home protection. It is, however, a too-familiar feature of urban gang warfare.

The proposal in subtitle B of title IV of the President's bill relating to ammunition feeding devices would take away from criminals the firepower associated with semiautomatic "assault weapons" without unnecessarily impinging on legitimate firearms

ownership for self-defense and sporting purposes. It zeros in on the source of the problem rather than arbitrarily banning some weapons that are inherently no more dangerous than others. To deprive criminals of the use of such weapons requires that we proceed rationally and concentrate our enforcement efforts against the key piece of equipment that converts a weapon into the type that is particularly desired by criminals.

## VI. Gangs and Juvenile Offenders

Title VI of S. 635, relating to gangs and juvenile offenders, includes provisions to broaden the availability of the records of serious juvenile offenders for law enforcement and judicial use. It would also broaden adult prosecution of serious juvenile drug and firearm offenders and gang leaders, add serious drug crimes by juveniles as Armed Career Criminal Act predicate offenses, and increase penalties for certain offenses that may be committed in the course of gang activities.

None of these provisions appears in a comparable form in S. 618, and we would generally regard the provisions concerning juvenile offenders that do appear in title XIV of S. 618 as inadequate or unwarranted. Section 1421 of S. 618, relating to adult prosecution of serious juvenile offenders, is weaker than the corresponding proposal in section 602 of the President's violent crime bill, and section 1422 of S. 618 makes a much narrower range of serious drug crimes by juveniles Armed Career Criminal predicate offenses than section 603 of the President's bill. In relation to these provisions, as well as many others,

we believe that Congress should enact the full proposal advanced by the President, in lieu of the weakened or fragmentary versions that appear in S. 618.

## VIII. Terrorism

Title VII of S. 635 proposes a wide-ranging program of reforms to combat terrorism. Subtitle A of title VII in the President's bill proposes implementing legislation for an international agreement for the suppression of terrorist acts at airports. Subtitle B of title VII includes implementing legislation for international agreements for the suppression of maritime terrorism, and other provisions directed against terrorist acts on ships. Subtitle C of title VII proposes new, effective procedures for removing alien terrorists from the United States.

Subtitle D of title VII in the President's bill proposes new anti-terrorism offenses and increased penalties for terrorist crimes. These include implementing legislation for the convention against torture, a new offense of using weapons of mass destruction against American nationals or United States property anywhere in the world, a new offense covering killings and attempted killings in firearms attacks on federal facilities, a new offense of providing material support to terrorists, addition of terrorist offenses to the RICO statute, forfeiture of instrumentalities and proceeds of terrorist and other violent acts, enhanced penalties for offenses involving travel or identification documents that are likely to be committed by

terrorists, and increased penalties under the sentencing guidelines for crimes involving terrorism.

Subtitle E of title VII in the President's bill includes measures strengthening anti-terrorism enforcement efforts. These include authority for the Attorney General to admit to the United States up to 200 aliens annually who assist in terrorism or other investigations, enhancement of the President's authority under the Alien Enemy Act to protect the United States from predatory incursions, authorization of access to telephone and credit records in counterintelligence investigations, strengthening the laws relating to interception of communications to facilitate their effective use in terrorism investigations, and extension of the statute of limitations for certain terrorism offenses.

In lieu of the comprehensive anti-terrorism measures proposed in the President's bill, title V of S. 618 contains a relatively limited number of provisions on the subject of terrorism, most of which are inadequate or unwarranted.

For example, section 521 of S. 618 would create a new offense of domestic terrorism, limited in scope to cases in which the offender is both acting as an agent of a foreign power and acts with a specified "terrorist" motivation. Both of these elements would be difficult to prove and would necessitate, in most instances, the disclosure of classified information. Additional problems are that requiring these elements of proof could turn trials for acts that are mala in se (such as murder) into political forums for the defendant, and that the proposed

definition of terrorist motivation does not include retaliation against a government or civilian population, though experience shows that retaliation is a major reason for terrorist conduct.

Rather than defining a special domestic terrorism offense, acts of terrorism within the United States should be prosecuted under generally applicable provisions that do not require proof of a principal-agent relationship with a foreign power or "terrorist" motivation. If gaps exist in current law, they should be closed through carefully tailored provisions that cover the kind of conduct that is likely to be engaged in by terrorists, but without the burdensome new elements of proof required by section 521 of S. 618. This is the approach taken in the President's violent crime bill, which would create, for example, new offenses covering use of weapons of mass destruction, killings and attempted killings in firearms attacks on federal facilities, and provision of material support to terrorism.

## IX. Sexual Violence and Victims' Rights

Title XI of the President's violent crime bill contains a number of provisions to strengthen the rights of crime victims. These include provisions that would extend the scope of restitution to include child care, transportation, and other expenses to the victim resulting from participation in the investigation or prosecution of the offense or attendance at proceedings; authorize courts to enforce restitution orders by suspending an offender's eligibility for federal benefits; and

give victims of violent crimes and sex crimes a right to address the court concerning the sentence.

Title VIII of the President's bill, relating to sexual violence and child abuse, incorporates both reforms that would enhance the effectiveness of prosecution and reforms that would directly benefit victims in such cases. It would enact a general rule of admissibility for evidence of the defendant's commission of similar crimes on other occasions in prosecutions for crimes of sexual assault and child molestation. It would also increase penalties for many sex crimes against victims below the age of sixteen and for recidivist sex offenders; authorize restitution for victims of sex crimes, whether or not physical injury results; provide for HIV testing of the offender in sex offense cases, with disclosure of the test results to the victim; require penalty enhancement for HIV infected sex offenders who risk infection of their victims; and require government payment of the cost of HIV testing for the victim.

There is nothing comparable to most of these provisions in S. 618. Of the provisions relating to victims' rights that do appear in title XIX of S. 618, some have already been enacted in title V of the Crime Control Act of 1990.

## X. Drug Testing

Title IX of S. 635 proposes a nationwide program of drug testing for federal offenders on post-conviction release, including probation, parole, and post-imprisonment supervised released. A testing program of this sort is plainly warranted

for offenders who are to be released into the community in light of the likelihood that such persons will revert to criminality if they become involved with drugs.

The greater importance of drug testing, of course, is at the state and local level, where the vast majority of serious crimes are prosecuted. Title IX of the President's bill accordingly would require states to adopt drug testing programs in their criminal justice systems as a condition of eligibility for federal justice assistance funding. To ensure that no unmanageable financial burden will result to any state, title IX provides that a state could not be required to expend an amount for drug testing in excess of 10% of the minimum amount of federal justice assistance funding for which the state is eligible.

In contrast, S. 618 has nothing regarding drug testing in state criminal justice systems. Title XXIII of S. 618 does propose a nationwide drug-testing program for federal offenders on post-conviction release, but the formulation of this proposal contains a number of features that are questionable or unworkable. For example, the requirements of S. 618 would go into effect upon enactment, although the system does not currently have the capacity for a nationwide drug testing program of this sort. This point is recognized in the President's proposal, which requires that the testing program for federal offenders be phased in as soon as practicable and feasible, but does not make the impossible demand that the necessary technical

personnel and facilities be acquired instantaneously.

## XI. Equal Justice

Title X of the President's bill, the "Equal Justice Act," includes provisions that are designed to guard against racial discrimination in the administration of the death penalty and other penalties. It includes explicit provisions that the death penalty and all other penalties must be administered evenhandedly without regard to the race of the defendant or the victim; a prohibition of racial quotas and statistical tests in the administration of the death penalty and other penalties; protection for both crime victims and defendants against racial bias in the tribunal through enquiry on voir dire concerning such bias, change of venue, and prohibition of appeals to racial bias by defense lawyers and prosecutors; and specific jury instruction and certification requirements guarding against racial bias in federal capital cases. Title X would also add new death penalty authorizations for killings in violation of the principal criminal provisions of the federal civil rights laws, and would make the capital sentencing option consistently available for racially motivated murders within federal jurisdiction.

Aside from the addition of death penalty authorizations to federal civil rights statutes (section 206 in S. 618), there are no comparable provisions in S. 618. Rather, S. 618 merely recycles the "Racial Justice Act" proposal that the Senate wisely rejected in both the 100th and 101st Congresses.

In the 101st Congress, the Department of Justice provided a

number of detailed legal analyses and critiques of this proposal. In the present context, I would simply emphasize the following points:

As we have explained in our earlier statements, the likely practical effect of the "Racial Justice Act" would be to invalidate all death sentences that are currently in effect in the United States, and to preclude all future use of the death penalty. This would not occur because racial bias permeates the criminal justice system, but because the proposed Act imposes unrealistic burdens of proof on the government in response to "statistical disparities."

The practical abolition of the death penalty that would flow from the "Racial Justice Act" would gravely harm the security of the American people, including minority groups who are particularly victimized by violent crime. For example, about one-half of all <u>victims</u> of murders and willful homicides are black. The "Racial Justice Act" would ensure that the death penalty is not available to punish and deter such crimes. Thus, it would make no contribution to the cause of civil rights, but would deal a heavy blow to the most fundamental of all civil rights -- the right to governmental protection against lethal criminal violence.

The factual premises underlying the "Racial Justice Act" proposal are also flawed. Its proponents have primarily argued that, for invidious reasons, the death penalty is less likely to be imposed in cases involving black victims than in cases

involving white victims. In reality, however, the weight of reliable empirical study indicates that racially neutral factors overwhelmingly account for apparent disparities relating to the race of the victim or the defendant. Likewise, courts that have analyzed statistical studies purporting to show racial discrimination in capital punishment have invariably concluded that these studies did not actually support an inference of discrimination because they failed to take account of pertinent non-racial factors or involved other fundamental flaws. A number of studies and analyses have also indicated that white defendants are more likely to be sentenced to death than black defendants. See McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (the so-called "Baldus study" in Georgia indicating that white murder defendants were almost twice as likely to be sentenced to death than black murder defendants); U.S. Dep't of Justice, Bureau of Justice Statistics, Capital Punishment 1984, at 9 (nationwide figures indicating that white persons arrested for serious homicidal offenses had a probability of being sentenced to death that was more than 35% higher than the probability for black arrestees).

Moreover, even if it were believed that the death penalty is imposed with insufficient frequency in cases involving black victims, the proper corrective measure would be to seek the death penalty more consistently in appropriate cases on an evenhanded basis. In comparison, the "remedy" proposed by the "Racial Justice Act" -- the invalidation of capital sentences -- is perverse. It would amount to redressing alleged statistical

"discrimination" against a class of murder victims through increased leniency towards their killers, as well as towards all other capital murderers!

Finally, S. 618's provision for an effectively irrebuttable presumption of "discrimination" based on a failure to achieve pre-set numerical proportions could serve for the first time to introduce racial considerations into criminal penalty decisions on a systematic and legally compelled basis. For example, given the evidence that white defendants are more frequently sentenced to death, it would arguably be necessary to charge and sentence more black defendants to death, or to consciously reduce the number of white defendants for whom a death penalty is sought, in order to achieve the racial proportions deemed proper by the proposed Act. In practical terms, compliance with the Act would require a death-by-the-numbers system of quota justice that introduces race into capital charging and sentencing decisions in a constitutionally impermissible manner. If this effect were achieved in relation to capital punishment, it is predictable that comparable proposals would follow to effectively require racial proportionality in the imposition of other (non-capital) penalties.

In contrast, the Supreme Court's constitutional decisions already prohibit all actual racial discrimination in criminal justice decisions, and the "Equal Justice Act" proposal in title X of the President's violent crime bill would provide additional, strengthened safeguards against the operation of racial bias in

the criminal justice process. These provisions provide effective protection against racial discrimination without quota justice or the imposition of unjustified standards that cannot realistically be met.

## XII. Other Issues

We will soon provide the Committee with a letter that sets out our section-by-section analysis of S. 618. I would refer the members of the Committee to that report for a more complete account of the fundamental defects we perceive in S. 618. I will address briefly, however, certain other provisions of S. 618 which, for good reasons, are not included in the President's bill.

Titles XII and XIII of S. 618 propose, in effect, the creation of a new federal prison system to house State prisoners. Title XII would require the federal government to establish ten "regional prisons," housing a large prisoner population, 80% of whom would be State prisoners. Title XIII would require the federal government to establish ten "boot camp" prisons, collectively housing between 2,000 and 3,000 prisoners, at least 80% of whom would have to be State prisoners.

We know of no reason why the federal government, as opposed to the States, should be regarded as the appropriate entity to run such facilities. Rather, we believe that the States should continue to maintain and operate their own correctional systems for State prisoners, as they have throughout the history of the nation. Proposing a new federal prison system to house State

prisoners makes as little sense as proposing a new federal police force to enforce State laws.

Title XXI of S. 618 proposes, in effect, that the functions within the Department of Justice that are concerned with organized crime and drug enforcement be segregated from normal Department operations, and run as a separate establishment. At the national level, an Organized Crime and Dangerous Drugs Division would be established within the Department. The proposed Division would have at least 20 local field offices characterized as "organized crime and dangerous drug strike forces," an unspecified number of field offices concerned with asset forfeiture and civil enforcement, and at least 10 international drug enforcement teams.

I would have to characterize this proposal as a bad idea that never seems to die. As I have emphasized in a number of earlier statements to Congress concerning proposals of this type, the proposed reorganization would severely impair the Department's drug and organized crime enforcement efforts. The varied strike forces, field offices, and teams contemplated by the proposal would regenerate in a highly aggravated form the separate organized crime strike forces that were recently and successfully integrated into the U.S. Attorneys offices. Resurrecting this fragmentation of the Department's field level enforcement operations would introduce separation and division in areas where coordination and cooperation are paramount virtues.

There is also no merit in the proposal for a separate

Organized Crime and Dangerous Drugs Division at the national level. As the members of the Committee are aware, the Office of National Drug Control Policy (ONDCP), which was directed by Congress to study this question, recommended against the creation of such a Division. The creation of the proposed Division would require extensive duplication of operational and support functions, and would encourage undesirable inconsistencies in prosecutorial standards and philosophy. ONDCP was entirely correct in concluding that a new Division "would add yet another element of bureaucracy to the drug enforcement effort within the Justice Department . . . and would not, by itself, enhance the civil and criminal law enforcement effort."

In a number of places, S. 618 proposes funding authorizations for grant programs and federal law enforcement agencies, most of which are earmarked for specific purposes or areas. Provisions of this sort appear in titles I, V, VIII, IX, XIV, XV, and XVI of the bill. We generally oppose these provisions because they are not consistent with the budgetary requests of the President, and we have more specific criticisms of many of the individual proposals. I would refer the members of the Committee to our detailed letter on S. 618 for further discussion of these issues.

In this context, I would simply note that most of the grant funding provisions in S. 618 address areas in which support is already being provided under grant and assistance programs administered by the Bureau of Justice Assistance or other

agencies. We believe that the existing assistance programs provide effective means of allocating resources on the basis of actual law enforcement needs and state law enforcement priorities, and that the proliferation of new programs addressing narrow areas that S. 618 proposes would be counterproductive.

Our view is essentially the same with respect to the proposed authorizations in S. 618 for federal law enforcement agencies. The federal law enforcement mission is furthered most effectively through comprehensive planning and coordination, and the allocation of available resources in furtherance of such a coordinated program. It is not assisted through the proliferation of ad hoc legislative proposals to provide sums for particular favored purposes.

In closing, I wish to thank the Chairman and the Committee again for the opportunity to appear here today. As we all know, the President has challenged Congress to act expeditiously on his violent crime proposal. He transmitted his bill to Congress 38 days ago, and as each day passes, the scales of justice continue to be tilted against the law abiding citizens of this country. I share the Chairman's confidence that legislation can be enacted within the time proposed by the President, if the will exists to do so.

However, meeting the President's challenge means enacting measures that actually do what is necessary to deal with the violent crime problem. These are the measures proposed in S. 635. No alternative proposals have been advanced that would

accomplish what the President has proposed in his bill, or any significant part of what the President has proposed.

I would be pleased to answer any questions that the Committee may have.

Respectfully submitted,

THOMAS H. PEEBLES
United States Department
of Justice, Civil Division
9th & Pennsylvania Avenue, N.W.,
Room 3732
Washington, D.C. 20530
(202) 514-4778

Counsel for Defendants Thornburgh
and United States Department of
Justice

DAVID W. OGDEN
ANN M. KAPPLER
Jenner & Block
21 DuPont Circle
Washington, D.C. 20036
(202) 223-4400

Counsel for Plaintiffs American
Library Association, Freedom to Read
Foundation, American Booksellers
Association, American Booksellers
Foundation for Free Expression, ASMP
-- The American Society of Magazine
Photographers, Inc., Council for
Periodical Distributors
Associations, Inc., International
Periodical Distributors Association,
Inc., National Association of
Artists' Organizations, National
Campaign for Freedom of Expression,
Penthouse International, Ltd., Hank
Londoner Photography, Inc., and
Haaren Enterprises, Inc., d/b/a/
Suze Randall Photography.

February 26, 1991

So ordered

EXHIBIT C

SUBJECT: New Post Conviction Bail Limitations of the Crime Control Act of 1990

Title IX of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4826 (1990), has amended 18 U.S.C. §§ 3143 and 3145 to severely limit the discretion of the trial court to grant bail to defendants convicted of violent crimes and serious drug trafficking offenses. The categories of crime affected are: (1) crimes of violence, (2) offenses for which the maximum sentence is life imprisonment or death, and (3) Title 21 drug offenses carrying a maximum term of imprisonment of ten years or more. 18 U.S.C. § 3142(f)(1)(A)-(C).

A convicted defendant who is awaiting imposition or execution of a sentence must be detained unless (1) he is found unlikely to flee or pose a danger and (2) the court determines "there is a substantial likelihood that a motion for acquittal or new trial will be granted," or the government has recommended against imposition of a term of imprisonment. 18 U.S.C. § 3143(a)(2). In addition, Congress enacted a statutory presumption that a defendant who has been sentenced but is still awaiting final disposition of his appeal or petition for certiorari is not bailable. 18 U.S.C. § 3143(b)(2).

A narrow statutory exception to the detention requirement for defendants awaiting sentence and pending appeal was supported by the Department of Justice and was designed to cover exceptional circumstances warranting bail. Under this exception, persons otherwise subject to detention under either § 3143(a)(2) or (b)(2) may be released only when the defendant meets certain specified preconditions of release[1] and there are "exceptional reasons" why such person's detention would not be appropriate. 18 U.S.C. § 3145(c).

---

[1] These conditions are spelled out in Sections 3143(a)(1) and (b)(1). Section 3143(a)(1) pertains to a person subject to detention pending sentence and requires detention unless the judicial officer finds by clear and convincing evidence that such person is not likely to flee or pose a danger to the safety of any other person or the community. Section 3143(b)(1) pertains to a person subject to detention pending appeal and requires detention unless the judicial officer finds by clear and convincing evidence that such person is not likely to flee or pose a danger to the safety of any other person or the community and that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in (a) reversal, (b) an order for a new trial, (c) a sentence that does not include a term of imprisonment, or (d) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

Although Congress did not provide any statutory guidance about what constitutes an "exceptional" case, the Department's comment upon an earlier version of the bill acknowledged that there may be "rare instances" when release under appropriate conditions would be proper. To assist their mandatorily detained clients, defense counsel can be expected to claim "exceptional circumstances" whenever possible. Therefore, these claims should be examined with care on a case by case basis.

The "exceptional case" provision was intended to accommodate extreme situations that would otherwise be subject to the statute's mandatory detention provisions. Its application should be limited to situations where, in addition to the preconditions for post conviction bail required by § 3143(a)(1) or § 3143(b)(1), two other factors are present. First, the defendant must establish beyond a reasonable doubt that he will not abscond or cause further harm. Second, the factual context of the defendant's bail motion must be unusually sympathetic. One example might be an elderly first offender defendant convicted of the mercy killing of the defendant's terminally ill spouse who had been in great pain, causing the defendant great mental pain and anguish. Another example might be a seriously ill nonviolent drug offender who is in great physical pain and immobilized due to ongoing treatment in an intensive care medical facility.

Despite the fact that the provision authorizing release where "exceptional reasons" exist is contained in a section of Title 18 otherwise dealing with <u>appeals</u> from release and detention orders (i.e., 18 U.S.C. § 3145(c)), the provision pertains by its terms to any "judicial officer", which is broadly defined in 18 U.S.C. § 3156(a). Accordingly, a judge or magistrate of the district court may make an "exceptional reasons" finding in appropriate circumstances. It is anticipated that the making of such a finding will proceed in the following manner:

A defendant who has been denied release pursuant to 18 U.S.C. § 3143(a)(2) or (b)(2) files a proffer as to the existence of "exceptional" circumstances warranting his release pending sentence or appeal. The government is given an opportunity to respond. If the court finds the proffer is sufficient on its face, it may hold a hearing to determine whether the defendant meets the conditions of 18 U.S.C. § 3143(a)(1) or (b)(1) (whichever is appropriate) <u>and</u> whether exceptional reasons for releasing the defendant have been "clearly shown." If the required findings are made, the court may order the defendant released on appropriate conditions. The United States should urge that any such exception to § 3143(a)(2) or (b)(2) obviously requires more than that which is ordinarily necessary to satisfy the relevant conditions of 18 U.S.C. § 3143(a)(1) or (b)(1). If not satisfied by the court's order, the prosecutor can seek Solicitor General approval to appeal the bail determination.

EXHIBIT D

**DEPARTMENT OF JUSTICE**

# Order

OBD 2110.19

June 23, 1986

**Subject:** LOCK BOX PROCEDURES FOR DIRECT DEPOSIT OF CASH COLLECTIONS

1. PURPOSE. This order prescribes the lock box procedures for the direct deposit of civil collections (judgments and prejudgments). Establishment of these procedures will accelerate the deposit of funds into the account of the United States Treasury thereby complying with cash management policies set forth by the Department of the Treasury (Treasury) and the Office of Management and Budget (OMB). In addition, these procedures enhance the internal control of cash from receipt to deposit.

2. SCOPE. This order applies to the collection offices in the legal divisions and the United States Attorneys' offices. For purposes of this order legal divisions are the Tax Division, Civil Division, Land and Natural Resources Division, Civil Rights Division, Criminal Division, and Antitrust Division.

3. POLICY.

   a. Collection Office Procedures. All payments of civil debts received by the U.S. Department of Justice (DOJ) collection offices (see paragraph 4b for a definition of collection office) will be mailed by the collection office DAILY to The Citizens and Southern National Bank (C&S) of Atlanta, Georgia, a designate depository. Checks for civil judgments and civil prejudgments will no longer be forwarded to referring Government agencies or the Financial Operations Service, Finance Staff, Justice Management Division, for deposit. All checks received from debtors will be accepted SUBJECT TO COLLECTION. Unless expressly requested by a debtor, his agent, or attorney, receipts will not be issued for payments received by check or money order. Copies of payment receipts will not be forwarded to the referring agency. All other current office procedures will remain in effect.

**Distribution:** OBD/ATR/CRM/CIV/CRT/LDN/ TAX/USA/H-2
OBD/USA/F-2
SPL-23

**Initiated By:** Finance Staff
Justice Management Division

b. Payments Received by Collection Offices. All payments received by DOJ collection offices must be mailed for deposit daily to C&S. The bank will, on the day of receipt of the deposit, transfer the funds to the Treasury in Washington, DC by electronic funds transfer (EFT), thereby crediting a DOJ clearing account. At the same time C&S will, by electronic data link, notify the Debt Management Section (DMS) of the Financial Operations Service of the deposit. Notification by C&S will contain individual debtor information, exceptions or discrepancies in deposit information, and returned check data.

c. Funds Credited to Clearing Account. Funds credited to a DOJ clearing account will be transferred by DMS to the referring agency using standard Treasury procedures. With the transfer of funds, each referring agency will receive a report which will identify each debtor's name, the date mailed to C&S (interest computation date), agency file number, amount collected, cause of action or agency program code, and the name and telephone number of the DOJ collection office. Each agency can use this information to apply the cash collections as best suits their internal procedures.

d. Costs Included in a Payment with Principal.

(1) Each collection office shall advise the referring agency of the amount of costs in the judgment transmittal. The judgment transmittal should show the detail amounts for principal, interest, court costs, and U.S. Marshal costs, as well as specifying the applicable interest rate. Additional notifications SHALL NOT be sent to the referring agencies after the initial advice unless circumstances of the original judgment change. The referring agency should be specifically directed to credit payments according to 28 USC 1961 and the U.S. Rule, and to deposit costs to a Miscellaneous Receipt account.

(2) Form OBD-230, Deposit Slip, will be prepared for the amount collected, with no breakdown for court or U.S. Marshal costs. Payments will be split only when they are distributed to two or more different

locations within one agency (i.e., a consolidated VA debt with a portion going to the Centralized Accounts Receivable System in St. Paul and a portion to a VA regional office), or to two or more separate referring agencies, as shown in appendix 1, item number 2.

e. Money Judgment for Costs Only. Where a money judgment is for costs only, the imposition and receipt of funds is to be processed using the referring agency code, with a cause of action code of CSTS. The DMS computer system will automatically convert the referring agency code on all CSTS cause of action codes so that the costs will be directed to the DOJ where the costs will be reported in the appropriate miscellaneous receipt account.

f. Notification of Payments. Notification to the referring agencies of individual payments received will be made by the DMS. Referring agencies SHOULD NOT be sent a separate advice of individual payments received.

g. Bequests to the United States. Funds received as a result of a bequest to the United States in a will are processed as are state court tax liens, 28 U.S.C. 2410. However, report all bequests with an agency code of JUST and a cause of action code of OPB.

. DEFINITIONS.

a. Payments. Checks or money orders. Currency, coin or negotiable instruments such as bonds must be converted to a check or money order prior to deposit.

b. Collection Office. A U.S. Attorney's office or legal division in the Department which collects civil payments.

. CONVERSION TO A MONEY ORDER.

a. All debtors should be requested to make payments by check or money order. If a debtor pays in currency or coin, payment MUST be accepted and immediately converted to a money order, preferably a U.S. Postal Service money order, made payable to the Department of Justice.

b. To convert currency or coin to a money order, the collection office shall purchase a money order and charge the costs to administrative expense. The money order will then be deposited in accordance with these procedures.

6. CHECK OR MONEY ORDER INSPECTION.

   a. Each debtor is to be advised to make all checks or money orders payable to the U.S. Department of Justice. Nevertheless, checks received payable to the Treasury or another Government agency WILL be accepted and deposited according to the procedures in this order.

   b. Each debtor is to be advised to place the U.S. Attorney or legal division claim number on the face of the check or money order in the lower left corner. If the claim number is not on the check or money order when received, the individual preparing the deposit slip will be responsible for placing the claim number on the check or money order.

7. DEPOSIT SLIP PREPARATION. Each collection office will use Form OBD-230, Deposit Slip, as shown in appendix 1. Deposit slips and self-addressed envelopes will be mailed to each office by DMS on an annual basis.

   a. Sequential Number. The deposit number for each deposit slip requires a sequential number issued by the collection office. See the deposit slip instructions in appendix 1. This number will only be used once in a fiscal year by each collection office. One consolidated deposit will be made daily to C&S for all collections received. No currency, coin or negotiable instruments, other than checks or money orders, may be deposited. Such other items must be converted to a money order. Checks or money orders received before 3 p.m. local time MUST be deposited on the day of receipt. Checks or money orders received after 3 p.m. local time shall be deposited the next business day. Sufficient information shall be retained from the deposited checks or money orders so that the debtor record may be updated as soon as possible in accordance with applicable procedures for the system in use at the collection office.

   b. Collection Offices That Have Automated Capabilities. A collection activity that has automated capabilities (i.e., PROMIS, other division computer systems, or word processing equipment) may produce the deposit slip shown in appendix 1, from their automated system. All elements shown on the deposit slip MUST be incorporated into the automated version and MUST be in the same sequence.

locations within one agency (i.e., a consolidated VA debt with a portion going to the Centralized Accounts Receivable System in St. Paul and a portion to a VA regional office), or to two or more separate referring agencies, as shown in appendix 1, item number 2.

e. Money Judgment for Costs Only. Where a money judgment is for costs only, the imposition and receipt of funds is to be processed using the referring agency code, with a cause of action code of CSTS. The DMS computer system will automatically convert the referring agency code on all CSTS cause of action codes so that the costs will be directed to the DOJ where the costs will be reported in the appropriate miscellaneous receipt account.

f. Notification of Payments. Notification to the referring agencies of individual payments received will be made by the DMS. Referring agencies SHOULD NOT be sent a separate advice of individual payments received.

g. Bequests to the United States. Funds received as a result of a bequest to the United States in a will are processed as are state court tax liens, 28 U.S.C. 2410. However, report all bequests with an agency code of JUST and a cause of action code of OPB.

. DEFINITIONS.

a. Payments. Checks or money orders. Currency, coin or negotiable instruments such as bonds must be converted to a check or money order prior to deposit.

b. Collection Office. A U.S. Attorney's office or legal division in the Department which collects civil payments.

. CONVERSION TO A MONEY ORDER.

a. All debtors should be requested to make payments by check or money order. If a debtor pays in currency or coin, payment MUST be accepted and immediately converted to a money order, preferably a U.S. Postal Service money order, made payable to the Department of Justice.

b. To convert currency or coin to a money order, the collection office shall purchase a money order and charge the costs to administrative expense. The money order will then be deposited in accordance with these procedures.

6. CHECK OR MONEY ORDER INSPECTION.

   a. Each debtor is to be advised to make all checks or money orders payable to the U.S. Department of Justice. Nevertheless, checks received payable to the Treasury or another Government agency WILL be accepted and deposited according to the procedures in this order.

   b. Each debtor is to be advised to place the U.S. Attorney or legal division claim number on the face of the check or money order in the lower left corner. If the claim number is not on the check or money order when received, the individual preparing the deposit slip will be responsible for placing the claim number on the check or money order.

7. DEPOSIT SLIP PREPARATION. Each collection office will use Form OBD-230, Deposit Slip, as shown in appendix 1. Deposit slips and self-addressed envelopes will be mailed to each office by DMS on an annual basis.

   a. Sequential Number. The deposit number for each deposit slip requires a sequential number issued by the collection office. See the deposit slip instructions in appendix 1. This number will only be used once in a fiscal year by each collection office. One consolidated deposit will be made daily to C&S for all collections received. No currency, coin or negotiable instruments, other than checks or money orders, may be deposited. Such other items must be converted to a money order. Checks or money orders received before 3 p.m. local time MUST be deposited on the day of receipt. Checks or money orders received after 3 p.m. local time shall be deposited the next business day. Sufficient information shall be retained from the deposited checks or money orders so that the debtor record may be updated as soon as possible in accordance with applicable procedures for the system in use at the collection office.

   b. Collection Offices That Have Automated Capabilities. A collection activity that has automated capabilities (i.e., PROMIS, other division computer systems, or word processing equipment) may produce the deposit slip shown in appendix 1, from their automated system. All elements shown on the deposit slip MUST be incorporated into the automated version and MUST be in the same sequence.

c. Preparer Must Sign and Date the Deposit Slip. Prior to making a deposit, the preparer of the deposit slip must sign and date the slip as shown in appendix 1. This acknowledges that:

(1) The deposit number is the next in sequence.

(2) The DATE MAILED is correct.

(3) All deposit information is correct.

(4) Checks or money orders are properly filled in and signed by the payor.

(5) The claim number is on the face of each check or money order in the lower left corner.

(6) The checks or money orders are properly endorsed.

d. The Deposit Slip Must be Countersigned and Verified. Prior to making a deposit the verifier must sign and date the slip as shown in appendix 1. This acknowledges that:

(1) An independently prepared adding machine tape has been made which contains each check or money order amount.

(2) The total of the tape agrees with the total of the deposit.

(3) The number of checks or money orders agrees with the item count on the deposit slip.

8. ENDORSEMENT. Each check/money order must be endorsed on the back. The sample endorsement shown below shows the format and items required in each endorsement.

For Deposit Only To
U.S. Department of Justice
009-24-449/15030001
U.S. Attorney
California - Southern
5-N-19 U.S. Courthouse
940 Front St.
San Diego, CA 92189

Deposit # CAS_____

The preceding sample endorsement is for the Southern District of California. The underlined portion of the deposit number will be filled in by the collection office with the last digit of the fiscal year and the three digit sequential number. The deposit number on each check or money order must be the same as the deposit slip. See appendix 2 for your collection office code which must always precede the underlined deposit number.

NOTE: The only items within the endorsement that cannot be included in a regular hand stamp are the items within the underlined portion of the Deposit #. If your office is equipped with a rubber stamp with automatic numbering capabilities, make certain that the sequential portion of the deposit number remains the same for all checks or money orders in the deposit. If your automatic stamp has the capability of inserting sequential item numbers, make certain that the item number for each check or money order is in the same sequence as the item number on the deposit slip.

9. EXCEPTIONS OR DISCREPANCIES IN DEPOSIT SLIPS. C&S will notify DMS daily by electronic data link of any exceptions or discrepancies noted during the bank reconciliation. The bank may, after reconciling the checks to the deposit slip, correct the deposit amount in accordance with the actual amount of the checks. The corrected amount will be used in the daily transmission. DMS will then notify the collection office telephonically of the exception/discrepancy. The collection office will be required to correct individual debtor records to reflect the corrected amount when discrepancies occur. However, photostats of all checks in question can be obtained from the bank upon request by DMS and the corrected amount will be subject to confirmation by the originating collection office as soon as possible after the bank correction has been made. DMS will notify C&S of any errors in C&S's reconciliations. Bank errors will be corrected by C&S and reported in the next transmission to DMS.

10. MONTHLY STATEMENT. C&S will submit a monthly listing by collection office of all deposits received, all discrepancies and exceptions, and all returned checks. This listing will be sent to DMS, by electronic data link, and mailed by DMS to EACH collection office. The monthly statement MUST be reconciled to the daily deposits for the month by each collection office. Deposits not listed or in error should be brought to the attention of DMS immediately. DMS will notify C&S of any errors in C&S's reconciliation. See appendix 5 for an example of the monthly statement.

11. RETURNED CHECKS. If a check is returned, C&S will charge the DOJ account in Treasury and notify DMS by the electronic data link. Sufficient identification data will be provided to permit DMS to correct agency accounts and notify the collection office of the returned check. In addition, C&S will forward the returned check to DMS. Upon receipt DMS will forward the returned check to the collection office, where the debtor record must be updated. Checks returned to the collection office WILL NOT be resubmitted for deposit. A new check or a money order must be obtained and deposited.

12. DEPOSITS OF GREATER THAN OR EQUAL TO $50,000.00. A collection office expecting an exceptionally large payment, encountering an unusual situation or having any questions regarding this order should contact:

Department of Justice
JMD/Debt Management Section
P.O. Box 177
Ben Franklin Station
Washington, DC 20044
FTS 272-6323

13. AUTHORITY. This order is issued under the authority of 28 CFR Section 0.76(a).

W. LAWRENCE WALLACE
Assistant Attorney General
for Administration

U.S. Department of Justice

Executive Office for United States Attorneys

EXHIBIT E

Washington, D.C. 20530

April 25, 1991

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

RSM by JK
Robert S. Mueller, III
Assistant Attorney General
Criminal Division

RE: 18 United States Code, Section 1081, et seq.

NOTE: 1. This is issued pursuant to USAM 1.1.550.
2. Distribute to Holders of Title 9.
3. Insert at the end of USAM Title 9.

AFFECTS: USAM 9-110.000

PURPOSE: This bluesheet sets forth guidance for United States Attorneys in exercising prosecutorial discretion with respect to certain provisions of the Gambling Ship Act (18 U.S.C. §§ 1081, et seq.)

---

The following is a new section:

9-110.900 The Gambling Ship Act (18 U.S.C. §§ 1081, et seq.)

Section 1081 defines "gambling ship" to mean a vessel used principally for the operation of one or more gambling establishments.

In making a prosecutorial determination whether a particular ship is a gambling ship within the meaning of this definition, it will be presumed that a ship which operates one or more gambling establishments on board is a "gambling ship", unless it cruises for a minimum of 24 hours with meals and lodging provided for all passengers, or unless it docks at a foreign port. The fact that the presumption applies or does not apply in a given situation, however, is not ultimately determinative of compliance with Section 1081, et seq., but merely provides guidance to United States Attorneys in exercising their prosecutorial discretion under the pertinent statutes.

An explanation of this Act and related statutes applicable to cruise ship gambling is available from the Organized Crime and Racketeering Section in the Criminal Division.

# Guideline Sentencing Update

FEDERA

EXHIBIT F

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

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 1 • APRIL 25, 1991

## Sentencing Procedure

**D.C. and Third Circuits hold that unlawfully seized evidence that would be excluded at trial may be considered in sentencing under Guidelines.** In the Third Circuit case, DEA agents acting on a tip conducted a warrantless search of an apartment and seized 198 grams of cocaine. Defendant arrived at the scene and was arrested; his car was searched and a kilogram of cocaine was seized. The district court ruled the kilogram from the car would be suppressed, but not the 198 grams from the apartment. Defendant and the government then entered into a plea agreement, part of which stipulated that the amount of cocaine for sentencing purposes was 100–200 grams. The agreement also stated the court was not bound by the stipulation. The court included the kilogram of cocaine in the sentencing calculations, despite objections by both defendant and prosecutor, and refused defendant's request to withdraw his guilty plea.

The appellate court affirmed: "Consideration of the suppressed evidence is consistent with the caselaw on the exclusionary rule and follows the well-established practice of receiving evidence relevant to sentencing from a broad spectrum of sources. We hold, therefore, that evidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges." The court noted it "need not address the situation . . . where . . . evidence was illegally seized for the purpose of enhancing the sentence."

As to the withdrawal of the guilty plea, the court held that "in the unusual circumstances present here, defendant is entitled to relief." At the plea colloquy the district court had indicated that only the 198 grams would be used in sentencing; it was after preparation of the PSI that the issue of including the kilogram arose. Thus, "a legal issue unforeseen by the prosecution, defense and apparently the court itself, frustrated an agreement clearly contemplated by all concerned. The sentence evolved not from a routine computation per se or newly discovered information, but reflected an unexpected change in a critical factor that for all intents and purposes had been settled during the plea colloquy." It was left to the district court to determine on remand "whether to grant specific performance or allow withdrawal of the plea."

*U.S. v. Torres*, 926 F.2d 321 (3d Cir. 1991).

In the D.C. Circuit case, undercover police made a controlled buy of $50 worth of crack cocaine at an apartment. Within minutes an awaiting arrest team forcibly entered the apartment without a warrant, arrested defendant, searched the apartment and seized evidence. Defendant moved to suppress evidence obtained from the search. The parties agreed that the contested evidence would not be used at trial, but the government reserved the right to introduce it at sentencing.

The sentencing court allowed the contested evidence—weapons and more drugs—to be used in computing the guideline sentence, with the result that defendant's sentencing range increased from 27–33 months to 235–293 months. Defendant argued that use of evidence seized in the warrantless search violated his Fourth Amendment rights and that the exclusionary rule should be applied at sentencing as well as at trial.

The appellate court, citing *Torres*, held that "evidence inadmissible at trial may be admissible at sentencing," and "under the circumstances of this case the deterrent effect [of the exclusionary rule] would not outweigh the detrimental effect of excluding the evidence. . . . Where there is no showing of a violation of the Fourth Amendment purposefully designed to obtain evidence to increase a defendant's base offense level at sentencing, this police misconduct is not sufficient to justify interfering with individualized sentencing." The court left open "the question whether suppression would be necessary and proper at the sentencing phase where it is shown that the police acted egregiously, e.g., by undertaking a warrantless search for the very purpose of obtaining evidence to increase a defendant's sentence."

*U.S. v. McCrory*, No. 89-3211 (D.C. Cir. April 12, 1991) (Sentelle, J.).

## Departures

**Ninth Circuit holds upward departure may not be based on conduct underlying criminal charge on which defendant was acquitted; also reverses imposition of consecutive sentences and rejects departure grounds.** Defendant was tried on charges of first degree murder and assault with intent to commit murder, but convicted on the lesser included offenses of voluntary manslaughter and assault with a dangerous weapon. The presentence report included a reduction for acceptance of responsibility and noted that two prior tribal court convictions not included in the criminal history score might warrant departure under U.S.S.G. §§ 4A1.2(i) and 4A1.3(a), p.s. With a departure, the report calculated a maximum sentencing range of 63–78 months.

The district court sentenced defendant to 180 months. The court denied the reduction for acceptance of responsibility, enhanced the sentence for the discharge of a firearm, and departed for inadequate criminal history score. The court also determined that departure was warranted under § 5K2.1, p.s. because it found the facts showed that defendant intended to kill or seriously injure his victims. The court imposed consecutive sentences for the two offenses, thus effectively aggregating the statutory maximum sentences of ten years for voluntary manslaughter and five years for the assault.

The appellate court reversed and remanded, with the majority holding that the grounds for departure and imposi-

tion of consecutive sentences were improper. The court held unanimously that the defendant "should have been notified before sentencing that the court intended (1) to deny him the acceptance of responsibility reduction, (2) to depart from the Guidelines based on [his] state of mind, (3) to enhance the sentence based on the firearm discharge, and (4) to run the sentences consecutively rather than concurrently." The court also stated that sentencing courts should "explain the role each factor played in the departure decision . . . [and] . . . indicate the extent each factor played in increasing the sentence."

On the acceptance of responsibility issue, the court found that "[b]ecause the . . . reduction was included in the presentence report, Brady was led to believe that this issue would not be raised at the sentencing hearing. . . . The sentencing court should have articulated its reasons and justifications for denying the § 3E1.1 reduction, should have notified the defendant before the sentencing hearing of these tentative findings, and should have held a hearing on the . . . issue" in order to give defendant "an adequate opportunity to present information to the court on his acceptance of responsibility."

The majority of the court also concluded that the departure itself was improper. It held that the sentencing court could not base the sentence on facts underlying an acquittal, reasoning that "[w]e would pervert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted. The Guidelines recognize that voluntary manslaughter is to be punished less severely than murder by setting a lower base offense level for voluntary manslaughter than for murder. A sentencing court should not be allowed to circumvent this statutory directive by making a finding of fact—under any standard of proof—that the jury has necessarily rejected by its judgment of acquittal. . . . We remand this portion of the sentence noting that the jury's determination of Brady's state of mind is dispositive in the sentencing hearing, and that the sentencing court may not circumvent the jury's verdict by departing from the Guidelines on this basis." Nine other circuits have considered this issue and concluded that courts may consider a defendant's conduct despite an acquittal on charges arising out of that conduct. *See U.S. v. Averi*, 922 F.2d 765 (11th Cir. 1991) (per curiam); *U.S. v. Fonner*, 920 F.2d 1330 (7th Cir. 1990); *U.S. v. Duncan*, 918 F.2d 647 (6th Cir. 1990); *U.S. v. Rodriguez-Gonzalez*, 899 F.2d 177 (2d Cir. 1990); *U.S. v. Mocciola*, 891 F.2d 13 (1st Cir. 1989); *U.S. v. Dawn*, 897 F.2d 1444 (8th Cir. 1990); *U.S. v. Isom*, 886 F.2d 736 (4th Cir. 1989); *U.S. v. Juarez-Ortega*, 866 F.2d 747 (5th Cir. 1989) (per curiam); *U.S. v. Ryan*, 866 F.2d 604 (3d Cir. 1989).

The majority also held that "[t]he decision to impose consecutive sentences violates the Guidelines requirements" in § 5G1.2, which "determines whether the sentence should run concurrently or consecutively. . . . The concurrent-consecutive determination boils down to this: consecutive sentences are imposed only if 'no count carries an adequate statutory maximum' to contain the sentence prescribed by the adjusted combined offense level." Because the prescribed guideline range fell within the statutory maximum for voluntary manslaughter, imposing consecutive sentences "is a drastic departure from the Guidelines and an unreasonable sentence."

It was also improper to use the prior tribal convictions to depart. Defendant had been convicted of two misdemeanor assault and battery offenses in 1979 and 1983, and received sentences of $50 or 25 days for the first conviction, $150 or 15 days for the second. Noting that "criminal history departures are warranted only when the criminal history category 'significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes,'" the court held that the tribal convictions "are simply not serious enough to warrant an upgrade in Brady's criminal history category." In addition, the convictions were uncounseled, and the court held that an uncounseled conviction where defendant did not waive counsel could not be used collaterally to impose an increased term of imprisonment on a subsequent conviction. The court did not rule on whether the conduct underlying the prior convictions could provide a basis for departure. *Cf. U.S. v. Eckford*, 910 F.2d 216, 220 (5th Cir. 1990) (may count prior uncounseled misdemeanor convictions in criminal history score).

*U.S. v. Brady*, No. 89-300074 (9th Cir. Mar. 18, 1991) (Pregerson, J.).

## Substantial Assistance

**Seventh Circuit holds probation under 18 U.S.C. § 3553(e) is not permitted when specifically prohibited by statute of conviction; delineates method to determine extent of substantial assistance departures.** Defendant was arrested for possessing almost four kilograms of heroin. She cooperated with the government, which later moved under § 3553(e) for departure from the ten-year mandatory minimum and recommended a six-year term. The court sentenced defendant to probation and the government appealed.

The appellate court vacated and remanded. Defendant was sentenced under 18 U.S.C. § 841(b), which provides that "[n]otwithstanding any other provision of law, the court shall not place on probation . . . any person sentenced under this subparagraph." This provision, the court held, serves to "trump § 3553(e)," and distinguishes this case from *U.S. v. Diagi*, 892 F.2d 31 (4th Cir. 1990) (general prohibition against probation for Class A and B felonies in 18 U.S.C. § 3561 does not preclude departure to probation under § 3553(e)).

To determine the extent of a departure for substantial assistance, "only factors relating to a defendant's cooperation" may be considered. Here, the district court improperly considered defendant's "extremely burdensome family responsibilities." The court held that § 5H1.6, p.s., allows consideration of family responsibilities only in determining whether to impose restitution and fines or, if it is an option, probation; they may not provide a basis for departure.

The court further instructed that, as with all departures, the sentence "must be linked to the structure of the guidelines," and courts "must employ the rationale and methodology of the guidelines when considering cases not adequately addressed by existing guidelines. The sentencing judge is thus required to articulate the specific factors justifying the extent of his departure." The "government's recommendation should be the starting point for the district court's analysis," and the court should "examine the government's recommendation in light of factors like, but not limited to, those listed in § 5K1.1(a)." The court suggested reference to analogous guidelines provisions, such as § 3E1.1, in determing the weight to be accorded the § 5K1.1(a) factors.

*U.S. v. Thomas*, No. 90-2183 (7th Cir. Apr. 11, 1991) (Flaum, J.).

# Guideline Sentencing Update

FEDERAL JUDICIAL CENTER



*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 Federal Judicial Center, which speaks officially through its Board.

VOLUME 3 • NUMBER 20 • MARCH 25, 1991

## Departures

### MITIGATING CIRCUMSTANCES

**Second Circuit holds that downward departure for defendant whose cooperation "broke the log jam in a multi-defendant case," and thereby helped district court's "seriously overclogged docket," was neither adequately considered nor precluded by Guidelines §§ 5K1.1 and 3E1.1; district courts retain "sensible flexibility" to depart in such cases.** Defendant pled guilty to conspiracy to possess with intent to distribute cocaine. Even before his arrest he entered into an agreement with the government to provide information regarding his drug-related activities, and some of this information led to his indictment. His cooperation led to a guilty plea by a codefendant. Thereafter, defendant disclosed additional information and another codefendant pled guilty.

At sentencing, defendant received a two-level reduction for acceptance of responsibility and was subject to a sentence of 51–63 months. The government did not move for a substantial assistance departure under U.S.S.G. § 5K1.1, p.s., but the district court departed to impose a 36-month term, explaining that: "I don't think the guidelines speak to that kind of cooperation which relates to the defendant who breaks the log jam in a multi-defendant case that's pending in the seriously overclogged dockets of the District Courts of the United States." The court stated that defendant's cooperation was "constituted by a relatively early plea of guilty and a willingness to testify, or at least the public perception of the willingness to testify and what that does with other defendants or can do and, in this case, did in my judgment do." The government appealed on two grounds: that defendant's conduct was covered in § 5K1.1 and the court could not depart absent a government motion; and that the conduct was covered by the acceptance of responsibility reduction.

The appellate court affirmed the departure, holding that "§ 5K1.1 does not preclude a downward departure in this case. As written, § 5K1.1 focuses on assistance that a defendant provides to the government, rather than to the judicial system. . . . Garcia not only helped the government develop the case, his cooperation after the indictment resulted in the disposition of the charges against the remaining two defendants. Garcia's 'activities facilitating the proper administration of justice in the District Courts,' are not encompassed by § 5K1.1."

The court then rejected the argument that § 3E1.1 precludes this departure: "We believe that the acceptance of responsibility differs from 'activities facilitating the proper administration of justice in the District Courts' and that the district court properly determined that cooperation such as Garcia's is not covered by § 3E1.1. Garcia's willingness to testify against his co-defendants is more than mere acceptance of responsibility." Having thus found that defendant's mitigating circumstances have not been adequately considered by the Sentencing Guidelines, the court concluded that they were a permissible basis for departure and the district court was justified in departing downward.

The court added: "In cases such as this, the district court has 'sensible flexibility' to depart in circumstances where departure from the Sentencing Guidelines has a reasonable basis." *U.S. v. Garcia*, No. 90-1274 (2d Cir. Feb. 8, 1991) (Lumbard, J.).

*U.S. v. Poff*, No. 89-3017 (7th Cir. Feb. 14, 1991) (Flaum, J.) (en banc) (holding that U.S.S.G. § 5K2.13, p.s., allowing departure for defendant with "diminished capacity" convicted of "non-violent offense," does not authorize departure for career offender convicted of "crime of violence" as that term is defined in § 4B1.2, even though the crime was making a threat that defendant had no ability to carry out; alternatively, even if offense could be considered non-violent under § 5K2.13, defendant's career offender status "indicates a need for incarceration to protect the public," which also precludes departure under the terms of § 5K2.13).

### AGGRAVATING CIRCUMSTANCES

*U.S. v. Benskin*, No. 90-5707 (6th Cir. Feb. 26, 1991) (Contie, Sr. J.) (affirming upward departure for mail and securities fraud defendant because Guidelines did not adequately account for long duration of the ongoing scheme, large amount of money solicited from over 600 investors, and emotional harm inflicted on investors, some of whom lost life savings or college funds for children; extent of departure, from range of 27–33 months to 60-month term, was reasonable under the circumstances).

*U.S. v. Astorri*, 923 F.2d 1052 (3d Cir. 1991) (affirming finding that departure under U.S.S.G. § 5K2.3, p.s., "Extreme Psychological Injury," was warranted for fraud defendant whose victims "suffered much more psychological injury than that normally resulting from the commission of a wire fraud offense"; court also noted, "If there is any place in sentencing guidelines analysis where a fact-finder is to be given considerable deference, it is here where the district court is called upon to assess the psychological impact upon victims").

### CRIMINAL HISTORY

*U.S. v. Simmons*, 924 F.2d 187 (11th Cir. 1991) (affirming departure from 15-year statutory minimum to 50-year term for defendant convicted of possession of firearm by three-time felon, 18 U.S.C. § 924(e)—departure was properly based on risk of recidivism, past criminal conduct, and obstruction of justice, factors that were not accounted for because the statutory minimum effectively nullified all guidelines computations for this particular offense: "Neither the statute nor the

guidelines provide any means to factor the enhancement for obstruction of justice into the offense level, or to adjust the defendant's criminal history category based on conduct not used in calculating the statutory sentence"; extent of the departure was "carefully and meticulously set out" and reasonable under the circumstances).

Note: A new provision in the Guidelines, § 4B1.4 (effective Nov. 1, 1990), sets offense levels and criminal history categories for defendants convicted under 18 U.S.C. § 924(e).

*U.S. v. Aymelek*, No. 90-1510 (1st Cir. Feb. 15, 1991) (Selya, J.) (prior convictions that are too remote in time to be counted in criminal history score, and are not similar to current offense, *see* U.S.S.G. § 4A1.2(e), comment. (n.8), may still be considered as grounds for departure under § 4A1.3, p.s., "when and if those convictions evince some significantly unusual penchant for serious criminality, sufficient to remove the offender from the mine-run of other offenders"; in this case, defendant's "seven earlier convictions, though outdated, were distinguished by their numerosity and dangerousness," and departure was appropriate). *See also U.S. v. Williams*, 910 F.2d 1574 (7th Cir. 1990); *U.S. v. Russell*, 905 F.2d 1439 (10th Cir. 1990); *U.S. v. Carey*, 898 F.2d 642 (8th Cir. 1990). *But see U.S. v. Leake*, 908 F.2d 554 (9th Cir. 1990) ("we conclude that the Guidelines reject the possibility that an upward departure could be based on remote convictions having no similarity to the [instant] offense," citing § 4A1.2(e), comment. (n.8)).

*U.S. v. Polanco-Reynoso*, 924 F.2d 23 (1st Cir. 1991) (affirming departure, under U.S.S.G. § 4A1.3, p.s., from criminal history category I to category II for drug defendant who committed instant offenses while on bail awaiting sentencing for unrelated state drug charge that was not counted in criminal history score).

*U.S. v. Richardson*, 923 F.2d 13 (2d Cir. 1991) (downward departure may not be considered for career offender based on small amount of cocaine in instant offense—one-half gram—or length of time elapsed since prior felony convictions—10 and 12 years; those factors were adequately considered by Sentencing Commission). *See also U.S. v. Hays*, 899 F.2d 515 (6th Cir.) (small amount of drugs and lack of violence not proper grounds for departure for career offender), *cert. denied*, 111 S. Ct. 385 (1990).

## Adjustments

### Role in Offense

*U.S. v. Andrus*, 925 F.2d 335 (9th Cir. 1991) (role in offense adjustments, U.S.S.G. § 3B1, should be determined under two-part test: 1) "the relative culpability of the defendants vis-a-vis each other" and 2) "in relation to the elements of the offense," which means "in comparison with an average participant in such a crime"; here, defendant could not qualify for minor participant status under either standard). *Accord U.S. v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989).

### Vulnerable Victims

*U.S. v. Astorri*, 923 F.2d 1052 (3d Cir. 1991) (affirming § 3A1.1 enhancement for defendant who defrauded his girlfriend's parents because parents were "particularly susceptible to the criminal conduct"—defendant totally supported girlfriend and used promise of marriage to persuade parents to invest more money in fraudulent scheme).

### Obstruction of Justice

*U.S. v. Williams*, 922 F.2d 737 (11th Cir. 1991) (per curiam) (defendant who received six-month jail term for contempt for refusal to testify at co-conspirator's trial may not also receive obstruction of justice enhancement for that same conduct, *see* U.S.S.G. § 3C1.1, comment. (n.6)).

### Acceptance of Responsibility

*U.S. v. Tucker*, No. 90-5101 (6th Cir. Feb. 19, 1991) (Ryan, J.) (holding that "entry of an *Alford* plea does not, per se, preclude a section 3E1.1 reduction for acceptance of responsibility"; reduction denied, however, because defendant failed to meet burden of proving she accepted responsibility).

## Offense Conduct

### Specific Offenses

*U.S. v. Boyd*, 924 F.2d 945 (9th Cir. 1991) (road flare brandished during bank robbery and claimed to be stick of dynamite was "dangerous weapon" under § 2B3.1(b)(2)(C); "consideration of the actual nature of the device used," however, is appropriate in determining where within guideline range to set sentence). *Cf. U.S. v. Smith*, 905 F.2d 1296 (9th Cir. 1990) (inoperable revolver or pellet gun is "dangerous weapon").

*U.S. v. Astorri*, 923 F.2d 1052 (3d Cir. 1991) (error to increase offense level by four under U.S.S.G. § 2F1.1(b)(2) by giving two-level increases for both "more than minimal planning" and "scheme to defraud more than one victim": "The commentary does not indicate a four level enhancement where both signs of harm are present. A two rather than a four level increase is proper under section 2F1.1 because where, as here, a defendant defrauds more than one victim, the scheme will often involve more than minimal planning, and vice-versa.").

## Sentencing Procedure

*U.S. v. Cortes*, 922 F.2d 123 (2d Cir. 1990) ("a probation officer need not give *Miranda* warnings before conducting a routine presentence interview").

## Probation and Supervised Release

### Revocation of Probation

*U.S. v. White*, 925 F.2d 284 (9th Cir. 1991) (reversed three-year sentence imposed after revocation of probation under 18 U.S.C. § 3565(b) for possession of firearm, agreeing with *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) and *U.S. v. Von Washington*, 915 F.2d 390 (9th Cir. 1990), that sentence imposed after revocation is limited by guideline sentence for original offense, which here was 0–6 months; conduct that constituted the violation of probation may not be used to set revocation guideline range, but may be considered in determining appropriate sentence within the range and, if there were factors that warranted departure at the time of initial sentencing, whether to reconsider the initial decision not to depart).

## Applying the Guidelines

### Amendments

*U.S. v. Morrow*, 925 F.2d 779 (4th Cir. 1991) (ex post facto clause of Constitution prohibits application of Guidelines section amended after offense but before sentencing when amendment would increase offense level). *Accord U.S. v. Lam*, 924 F.2d 298 (D.C. Cir. 1991); *U.S. v. Swanger*, 919 F.2d 94 (8th Cir. 1990); *U.S. v. Suarez*, 911 F.2d 1016 (5th Cir. 1990).

EXHIBIT G

# Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 21 | Federal Sentencing Guidelines and Forfeiture Cases from All Circuits. | April 8, 1991

**IN THIS ISSUE:**



## Cruel and Unusual Punishment

**9th Circuit finds no Eighth Amendment violation despite lesser sentence under state law.** (105) The 9th Circuit rejected defendant's argument that his sentence violated the Eighth Amendment because it was not proportional to the crime or to the sentence he would have received under Oregon law. "The Eighth Amendment does not require harmonization among sentences imposed by different courts." *U.S. v. Lillard*, __ F.2d __ (9th Cir. March 29, 1991) No. 90-30202.

**10th Circuit upholds pre-guidelines 20-year sentence for cocaine charges against Eighth Amendment and proportionality challenges.** (105)(145) In this pre-guidelines case, defendant pled guilty to conspiracy to distribute cocaine and conspiracy to commit tax fraud. He was sentenced to 20 years, consecutive to his current federal sentence. The 10th Circuit rejected defendant's claims that his sentence violated the Eighth Amendment and was disproportionate to the 5-year sentence his co-defendant received. The sentence was within prescribed statutory limits. The sentence was not disproportionate given the serious nature of the charged offense, defendant's four prior felonies, and defendant's disclosure of confidential grand jury information. Defendant failed to demonstrate that the disparity in sentence vis-a-vis his co-defendant was an abuse of discretion. *U.S. v. Jimenez*, __ F.2d __ (10th Cir. March 19, 1991) No. 90-1114.

## Guideline Sentencing, Generally

**10th Circuit upholds district court's ability to correct oral sentence.** (110)(750) The district judge orally sentenced defendant to 30 months. While sentencing a co-defendant, the district court realized it had misread defendant's presentence report and not included 189 pounds of marijuana in the calculation of defendant's offense level. Since defendant and his attorney had already left the courthouse, a second sentencing hearing was held one week later to discuss this issue. At a third sentencing hearing held a month later, the district court found defendant responsible for the additional 189

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)
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

pounds of marijuana, and resentenced him to 56 months. The 10th Circuit upheld the district court's ability to resentence defendant in this manner. Since defendant had not yet begun to serve the sentence imposed upon him at the first sentencing hearing, he was still under the jurisdiction of the courts, and the district court had the power to resentence him to correct its incorrect application of the guidelines. Moreover, defendant had no expectation in the finality of the original sentence since the government's time to appeal had not yet expired. Judge McKay dissented, finding the district court lacked authority to resentence under Fed. R. Crim. P. 35, and that defendant's double jeopardy rights were violated. *U.S. v. Smith*, __ F.2d __ (10th Cir. March 18, 1991) No. 90-2029.

## General Application Principles (Chapter 1)

**2nd Circuit affirms that conduct occurring prior to date of charged conspiracy is relevant.** (170)(270) Defendant contended that any conduct that occurred prior to the beginning of his charged conspiracy could not be considered relevant conduct because it would not have been in furtherance of the conspiracy. Although some of uncharged conduct pre-dated the conspiracy by as much as two years, the 2nd Circuit rejected defendant's argument. Defendant engaged in the same course of conduct--cocaine distribution--for a period of years without significant interruption. His method of distribution remained virtually unchanged over time. Because of the "high degree of similarity" between the charged and uncharged conduct, and because "relevancy 'is not determined by temporal proximity alone,'" the uncharged quantities were properly attributable to defendant. *U.S. v. Cousineau*, __ F.2d __ (2nd Cir. March 26, 1991) No. 90-1400.

**5th Circuit upholds consideration of drugs confiscated during defendant's prior arrest.** (170)(265)(270) In January, defendant was arrested on state charges after a search of his house uncovered approximately 860 grams of amphetamine and various laboratory equipment. Over five months later, defendant sold a small quantity of amphetamine to undercover agents, and agreed to sell to the agents an additional 28.35 grams of amphetamine. The 5th Circuit upheld calculating defendant's offense level based on all of these amounts. A court may properly consider the amounts of drugs under negotiation in calculating relevant conduct. The amphetamine found earlier was also relevant. Although the search took place over five months earlier, the evidence demonstrated that defendant was engaged in a continuous amphetamine and distribution enterprise. *U.S. v. Moore*, __ F.2d __ (5th Cir. March 20, 1991) No. 90-8337.

**6th Circuit upholds consideration of conduct outside dates set forth in indictment.** (170)(260) Defendant asserted that the district court erred in considering as relevant defendant's conduct outside the specific dates of the conspiracy as set forth in his plea agreement, which dates were the same as those set forth in an amended superceding indictment. The 6th Circuit summarily rejected this argument, noting that it had previously held that conduct beyond that alleged in the indictment may be considered as long as there is a minimum indication of its reliability. *U.S. v. Herrera*, __ F.2d __ (6th Cir. March 25, 1991) No. 90-3196.

**9th Circuit says role in offense is not limited to offense of conviction, disapproving earlier dictum.** (170)(420) In *U.S. v. Zweber*, 913 F.2d 705 (9th Cir. 1990) the 9th Circuit approved in dictum of the 7th and D.C. Circuit's view that the word "offense" as used in section 3B1.1 means "offense of conviction." After *Zweber* was decided, the introductory commentary to chapter 3E was amended to state, "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of section 1B1.3 . . . and not solely on the basis of the elements and acts cited in the count of conviction." Because of this change, the 9th Circuit held the adjustment for role in the offense under section 3B1.1 "is not limited to the offense of conviction." Accordingly the court upheld a two level upward adjustment for defendant's leadership role even though he was the only participant in the offense of conviction. *U.S. v. Lillard*, __ F.2d __ (9th Cir. March 29, 1991) No. 90-30202.

**9th Circuit holds that two drug laboratories were part of a**

*The* **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, bimonthly cumulative supplements and biweekly newsletters. The main volume, now in its second edition, covers ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month the newsletters are merged into a cumulative supplement with full citations and subsequent history.*

Annual Subscription price: **$250** (includes main volume, 6 cumulative supplements and 26 newsletters a year.)

Main volume and current supplement only: **$75.**

Editors:
- Roger W. Haines, Jr.
- Kevin Cole, Associate Professor of Law, University of San Diego
- Jennifer C. Woll

Publication Manager:
- Beverly Boothroyd

**common scheme.** (170)(260) The district court added the drug and chemical quantities from the November lab to the July lab amounts in calculating defendant's base offense level because the November lab was "part of the same course of conduct or common scheme or plan as the offense of conviction" U.S.S.G. section 1B1.3(a)(2). The 9th Circuit affirmed, finding that "both labs were sophisticated and on-going, as evidenced by the equipment and chemicals recovered." *U.S. v. Lillard*, __ F.2d __ (9th Cir. March 29, 1991) No. 90-30202.

**10th Circuit upholds sentencing defendant on the basis of sold and unsold marijuana.** (170)(270) Defendant pled guilty to possession with intent to distribute more than 50 kilograms of marijuana. The 10th Circuit upheld the district court's determination that an additional 189 pounds of marijuana stored in a shed should also be considered. Originally, defendant stored 314 pounds of marijuana in the shed. He loaded 125 pounds of it into a car and attempted to sell it to undercover agents. Shortly after his arrest, the remaining 189 pounds was seized. The possession of the 189 pounds of marijuana was part of the same course of conduct as the charge to which defendant pled guilty. *U.S. v. Smith*, __ F.2d __ (10th Cir. March 18, 1991) No. 90-2029.

## Offense Conduct, Generally (Chapter 2)

**10th Circuit upholds guidelines' distinction between cocaine base and cocaine in other forms.** (242)(250) The guidelines punish offenses involving cocaine base more harshly than offenses involving other forms of cocaine, treating one gram of cocaine base the same as 100 grams of cocaine hydrochloride. Defendant claimed that this sentencing scheme violated due process, and that the term "cocaine base" was impermissibly vague and invited arbitrary sentencing. The 10th Circuit rejected these arguments, noting that other circuits have held that this does not violate due process. Moreover, defendant did not establish that the term "cocaine base" encourages arbitrary and discriminatory enforcement or that it was vague as applied to his conviction and sentence. In fact, defendant's expert chemist testified that a chemist can easily differentiate between cocaine base and cocaine hydrochloride based upon their melting points. *U.S. v. Turner*, __ F.2d __ (10th Cir. March 20, 1991) No. 89-2178.

**Georgia District Court invalidates treating one marijuana plant as equal to 1,000 grams of marijuana.** (250) The District Court for the Northern District of Georgia found that Drug Quantity Table in section 2D1.1 is unconstitutional to the extent it treats one marijuana plant as equivalent to 1000 grams of marijuana. An expert testified that he had never seen or been able to grow even one marijuana plant that produced one kilogram of marijuana, and that to expect an average of one kilogram per plant would be very unreasonable. The district court found that there was no rational basis to support the Sentencing Commission's 1000 grams per plant ratio for plants in groups of 50 or more. Based on the expert's testimony, the court found that 300 grams per plant was a rational equivalency to the amount of marijuana produced by the average marijuana plant and sentenced defendant accordingly. *U.S. v. Osburn*, __ F.Supp. __ (N.D. Ga. Feb. 13, 1991) No. 90-CR-13-WCO.

**2nd Circuit rejects possible "double counting" of drugs where defendant's offense level would not change.** (250)(680) Defendant contended that the estimated 2000 grams of cocaine he purchased on trips to Connecticut was the same cocaine witnesses testified he later sold to them, and that the district court erroneously double counted these amounts by including them both in his offense level. The 2nd Circuit found that any improper double counting that occurred did not change defendant's offense level. The sales that defendant argued involved the same cocaine he purchased amounted to 465.1 grams. If this were subtracted from the 2617.6 grams for which defendant was held responsible, the result would be 2153 grams, or 2.153 kilograms. Under guideline section 2D1.1(c)(8), a base offense level of 28 is assigned to a defendant who is responsible for distributing between two and three and one-half kilograms of cocaine. *U.S. v. Cousineau*, __ F.2d __ (2nd Cir. March 26, 1991) No. 90-1400.

**8th Circuit upholds district court's determination of drug quantity based upon testimony of co-conspirators.** (250) The 8th Circuit upheld the district court's determination that defendant was responsible for 6 to 8 kilograms of cocaine. The finding was based largely on the trial testimony of two individuals to whom defendant had sold cocaine in the past, and defendant's prison cell mate, who testified that defendant stated that he had arranged a 4 kilogram purchase of cocaine just prior to his arrest. Defendant's claim that he did not have the chance to rebut the evidence was rejected; defendant had ample opportunity to present witnesses at sentencing, and had the opportunity, and did in fact, cross-examine all three government witnesses at trial. *U.S. v. Nash*, __ F.2d __ (8th Cir. March 25, 1991) No. 90-1006.

**9th Circuit says calculation of lab capacity is not limited by least abundant precursor chemical.** (250) Defendant argued that the court's calculation of lab capacity is limited by the quantity of the least abundant precursor chemical. The 9th Circuit rejected the argument, holding that the court "properly calculated the capacity of each lab by looking at all chemicals found there." *U.S. v. Lillard*, __ F.2d __ (9th Cir. March 29, 1991) No. 90-30202.

**2nd Circuit affirms consideration of uncharged quantities of drugs.** (270) Defendant contended that there was insufficient evidence to support the district court's use in calculating his offense level of approximately 2500 grams of cocaine that were not specified in his indictment. The 2nd Circuit

found that the government had satisfied its burden of showing defendant's involvement in transactions involving the uncharged quantities of cocaine. Four government witnesses testified that they regularly bought cocaine from defendant over a period of time preceding and including the dates of the conspiracy. Defendant presented no evidence at the hearing, only arguing that the government did not establish the additional amounts by a preponderance of the evidence. *U.S. v. Cousineau*, __ F.2d __ (2nd Cir. March 26, 1991) No. 90-1400.

**8th Circuit finds uncharged conduct was not proven by a preponderance of the evidence.** (270)(770) The district court included in defendant's offense level cocaine found in a neighbor's apartment. The 8th Circuit reversed. A confidential informant asserted that both apartments were used to store drugs for defendant's half-brother, a reputed drug kingpin. But the investigation failed to corroborate critical aspects of the informant's story. Most significantly, a search of defendant's apartment failed to produce the alleged drug proceeds, which formed the only direct link between defendant and the purported drug dealings between the neighbor and defendant's half-brother. The government did not call the confidential informant to explain the link, and produced no chemical evidence to establish that the cocaine found in the two apartments came from the same source. *U.S. v. Townley*, __ F.2d __ (8th Cir. March 27, 1991) No. 90-1364.

**8th Circuit reverses district court's consideration of uncharged conduct.** (270) The district court included in defendant's base offense level four kilograms of cocaine seized from four bus passengers three months prior to defendant's arrest. A purse from one of the passengers contained a group photograph of defendant and his half-brother, a reputed drug kingpin. Defendant approached the officers during the passengers' arrest and indicated that he had come to pick up the passengers. He was carrying a pager and wearing a medallion similar to that worn by two of the passengers. When questioned by police, defendant initially denied any relationship to his half-brother. One of passengers stated that the cocaine was intended for defendant's half-brother. The 8th Circuit found this evidence insufficient to justify including the four kilograms in defendant's offense level. "Although [defendant] could have been a culpable participant, he also could have embarked on an innocent favor." The government presented no proof that defendant maintained regular contact with his half-brother or knew the workings of the half-brother's drug ring. *U.S. v. Townley*, __ F.2d __ (8th Cir. March 27, 1991) No. 90- 1364.

**9th Circuit upholds calculating offense level based on all drugs handled by conspiracy.** (275) The trial court found that both defendants were members of the conspiracy at the time of the 75 kilogram cocaine transaction. Therefore the 9th Circuit held that this transaction was properly included in calculating their base offense level under section 2D1.4, commentary, note 1 (1988). *U.S. v. Torres-Rodriguez*, __ F.2d __ (9th Cir. April 4, 1991) No. 89-30298.

**4th Circuit affirms holding defendant responsible for all drugs involved in conspiracy.** (275) Defendant contended it was improper to sentence him for drugs possessed or distributed by his brother because there was no evidence to show that the distribution of all the drugs was within the scope of their agreement. The 4th Circuit upheld the calculation, since defendant did not offer any evidence to suggest that the district court's findings were clearly erroneous. The evidence showed that defendant made trips to New York to pay for drugs previously acquired by his brother and to purchase and transport drugs for the brother. It also showed that the brothers worked together in the same business location and that when another co-conspirator delivered money or drugs to that location he would leave the packages with defendant when the brother was absent. The district court found that it was reasonably foreseeable by defendant that his brother would be dealing in the amount of drugs established here. *U.S. v. Clark*, __ F.2d __ (4th Cir. March 20, 1991) No. 90-5771.

**10th Circuit upholds sentence based upon conspiracy's distribution of over 8600 grams of heroin.** (275) The 10th Circuit rejected defendant's contention that it was improper to sentence her on the basis of 8624 grams of heroin. Defendant contended that there was no evidence that she had actual knowledge or that she reasonably should have known that this amount was being distributed by the conspiracy in which she was involved. The district court found that the purpose of the conspiracy was to turn over as much heroin as possible, and that the total amount distributed would be the maximum amount the supplier was capable of supplying. *U.S. v. Sanders*, __ F.2d __ (10th Cir. March 19, 1991) No. 90-6026.

**2nd Circuit rejects downward departure for disparity caused by government's plea bargaining practices.** (280)(722)(780) The guidelines direct that a defendant who uses a firearm in connection with narcotics trafficking shall receive a two-level offense level enhancement, except that if he is convicted under 18 U.S.C. section 924(c), the enhancement should be disregarded, and he should be sentenced to the mandatory five-year term. The District Court found that the U.S. Attorney often charged defendants who refused to plead guilty with section 924(c), but allowed similarly situated defendants who pled guilty to avoid section 924(c) charges. The district court found that this plea bargaining practice created a disparity between those defendants who pled guilty and those who went to trial. To eliminate the disparity the court departed downward. The 2nd Circuit reversed, finding no impropriety. It is "constitutionally legitimate" for the prosecutor to threaten more severe charges to persuade a defendant to plead guilty. *U.S. v. Stanley*, __ F.2d __ (2nd Cir. March 21, 1991) No. 90-1505.

**6th Circuit affirms enhancement for firearm laying on couch in room where defendant was seated.** (284) The 10th Circuit upheld a two-level increase in offense level based upon defendant's possession of firearm during a drug offense. Four weapons were found in the small crack house in which defendant was arrested. Although not in physical possession of any of the guns, defendant was in constructive possession of at least one sawed-off shotgun which, according to defendant's testimony, was laying on the couch in the room where he was seated. *U.S. v. Head*, __ F.2d __ (6th Cir. March 18, 1991) No. 90-3288.

**8th Circuit affirms firearm enhancement based upon firearm found in defendant's girlfriend's luggage.** (284) Defendant was arrested on drug charges upon his return from a trip to California with his girlfriend. Defendant's girlfriend was carrying defendant's loaded semi-automatic weapon in her luggage. The 8th Circuit upheld an enhancement under guideline section 2D1.1(b)(1) based upon defendant's possession of a firearm during a drug crime. Defendant admitted to his cell mate that the purpose of the trip to California was to arrange the purchase of 4 kilograms of cocaine. Defendant had told others that his supply of cocaine came from California. At the time of defendant's arrest, he was carrying $7,000 in cash, which tested positive for cocaine residue. There was no dispute that the weapon found in his girlfriend's suitcase belonged to defendant. *U.S. v. Nash*, __ F.2d __ (8th Cir. March 25, 1991) No. 90-1006.

**10th Circuit upholds enhancement based upon co-conspirator's possession of a firearm.** (284) Defendant and a co-defendant drove the co-defendant's truck to Arizona to purchase cocaine. After purchasing the cocaine defendant drove the truck back home while the co-defendant drove the cocaine to Las Vegas. A search of defendant's truck uncovered a handgun in the co-defendant's luggage. Defendant's offense level was enhanced under guideline section 2D1.1(b)(1) based upon his co-defendant's possession of the weapon during a drug trafficking offense. The 10th Circuit affirmed. Defendant admitted he knew that his co-defendant possessed the gun during their trip to Arizona. The fact that defendant may have been unaware that the gun was in the co-defendant's luggage at the time of defendant's arrest did not change the analysis. The 10th Circuit also rejected defendant's contention that the selective application of section 2D1.1 to him and not to certain other co-defendants violated due process. These co-conspirators were not as actively involved in the drug transaction, and did not have actual knowledge that the gun was present. *U.S. v. Goddard*, __ F.2d __ (10th Cir. March 27, 1991) No. 90-8038.

**2nd Circuit holds acceptance of responsibility is not precluded even though offense committed while on bail.** (320)(480) The 2nd Circuit held that a two-level reduction for acceptance of responsibility is not precluded as a matter of law even though defendant already received a three-level increase under guideline section 2J1.7 for committing the offense while on bail. The district court found such a reduction unavailable because defendant's commission of the new offense contradicted any claim that he had disavowed future criminal conduct. The 2nd Circuit rejected this reasoning. The fact that defendant committed a second offense while awaiting sentencing for a first offense was relevant in denying the acceptance of responsibility reduction to the first offense. But the judge was not precluded as a matter of law from granting such a reduction. The case was remanded for the district court to exercise its discretion as to whether to grant the reduction. *U.S. v. Rodriguez*, __ F.2d __ (2nd Cir. March 20, 1991) No. 90-1442.

**9th Circuit says it was not double counting to increase offense level and criminal history for bail jumping.** (320)(680) Defendant was convicted of failing to appear, and his sentence was increased by nine levels under section 2J1.6 because the underlying offense, drug manufacturing, carried a statutory maximum sentence of 20 years. His conviction on that underlying offense was also used to calculate his criminal history score, raising it by three points. On appeal defendant argued that this was improper under section 4A1.2(a) because "the offense of establishing a manufacturing operation was part of the offense of failing to appear." The 9th Circuit rejected the argument, noting that in *U.S. v. Nelson*, 919 F.2d 1381 (9th Cir. 1990), the court upheld an enhancement under 2J1.6 for an underlying methamphetamine charge even though the defendant had been acquitted of it. This demonstrated that the underlying charge was not part of the offense of failing to appear. "The offenses are separate and there was no double counting." *U.S. v. Schomburg*, __ F.2d __ (9th Cir. April 1, 1991) No. 90-10104.

**5th Circuit holds that reduction where firearm is possessed for sport or recreation applies to felons.** (330) Defendant was convicted of being a felon in possession of a firearm and sought a four-level decrease in offense level, claiming he possessed the firearm for sport or recreation within the meaning of former section 2K2.1(b)(1). The probation report stated that defendant was not eligible because felons cannot lawfully possess firearms, and the district court denied the reduction. The 5th Circuit held that the sport/recreation exception applied to felons, because the guideline section applies only to persons prohibited from owning weapons. The court distinguished *U.S. v. Pope*, 871 F.2d 506 (5th Cir. 1989), which held that a similar "collection" exception under section 2K2.2(b)(3) did *not* apply to felons, on the ground that felons may not lawfully collect firearms. The case was remanded for the district court to clarify whether it denied defendant the reduction because it was misled into believing that felons were not eligible for the reduction, or because it found that defendant did not possess the weapon for sport or recreation. *U.S. v. Buss*, __ F.2d __ (5th Cir. March 27, 1991) No. 90-8441.

**9th Circuit holds that enhancement for weapon possession was not an element of the offense.** (330)(755) Defendant was convicted in Montana state court of kidnapping and assault. The sentencing court imposed a ten year consecutive sentence for using a firearm while engaged in the commission of an offense. He sought habeas relief, alleging that the firearm allegation was an element of the crime rather than a mere sentence enhancement. Judges Wright, Browning and Farris rejected the argument, relying on *LaMere v. Risley*, 827 F.2d 622 (9th Cir. 1987) which held that the Montana statute did not create a separate substantive offense but merely provided for enhancement of a penalty. The court found nothing in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) that limited the state's power to increase a sentence beyond the maximum permitted by the underlying offense. *Nichols v. McCormick*, __ F.2d __ (9th Cir. April 1, 1991) No. 90-35416.

**9th Circuit finds departure in alien high speed chase proper, but reverses degree of departure.** (340)(746) While transporting illegal aliens, defendant led the officers on a high speed chase. The 9th circuit held that it was proper to depart upward on the ground that the car was a dangerous instrumentality (*see* section 5K2.6), public safety was endangered by the reckless driving (*see* section 5K2.14), and that the alien passengers were subjected to dangerous treatment (*see* section 2L1.1, commentary, note 8). However the court reversed the 30 month sentence because the district court did not adequately explain its reasons for the degree of departure. In a footnote, the court noted that after the sentencing in this case, the guidelines were amended effective November 1, 1990 to create section 3C1.2 which provides for a two level increase for reckless endangerment during flight from a law enforcement officer. The court said that "[t]his fits high-speed chases to a tee." *U.S. v. Perez-Magana*, __ F.2d __, 91 D.A.R. 1721 (9th Cir. Apr. 1, 1991) No. 90-50107.

## Adjustments (Chapter 3)

**11th Circuit upholds determination that kidnap victim's father was unusually vulnerable to extortion threats from kidnapper.** (410) Defendant kidnapped a girl and then attempted to extort money from the girl's father. The 11th Circuit upheld a determination that the girl's father was unusually susceptible to extortion because of the father's concern for the health and safety of his daughter. The father suffered mentally and emotionally when his daughter disappeared for five months and was desperate to discover her whereabouts. *U.S. v. Villali*, __ F.2d __ (11th Cir. Jan. 10, 1991) No. 90-5151.

**8th Circuit upholds organizer role of drug dealer.** (430) The 8th Circuit found that the record supported the district court's finding that defendant was organizer of a conspiracy to distribute cocaine. The record showed that defendant hired a co-conspirator to drive the truck containing the cocaine, recruited another co-conspirator to follow the first co-conspirator in another vehicle, paid the first co-conspirator $2,000 for two days of work, and had been under investigation for some time in other states for extensive, high-volume cocaine trafficking. *U.S. v. Maejia*, __ F.2d __ (8th Cir. March 22, 1991) No. 90-1919.

**1st Circuit reviews role in the offense adjustment under the clearly erroneous standard.** (440)(820) The 1st Circuit held that the determination of whether defendant was a minimal or minor participant was subject to the clearly erroneous standard of review. The district court's determination that defendant was not a minor or minimal participant was not clearly erroneous. There was evidence that defendant (a) was one of only three charged co-defendants in a conspiracy to distribute cocaine, (b) initially introduced one co-defendant to the other, (c) accompanied one co-defendant to the site where the delivery of the cocaine was to take place, (d) vouched for the quality of the cocaine to the government informant, and (e) was to receive $300 from the transaction. The district court did sentence at the bottom of the guideline range, which demonstrated that the district court did consider defendant's role in the offense. *U.S. v. Osorio*, __ F.2d __ (1st Cir. March 26, 1991) No. 90-1205.

**9th Circuit holds that defendants have burden of showing they were minor participants.** (440) The defendants have the burden of showing that they are not minor participants under section 3B1.2, and they "clearly did not satisfy this burden" here. *U.S. v. Torres-Rodriguez*, __ F.2d __ (9th Cir. April 4, 1991) No. 89-30298.

**D.C. District Court finds defendant who sold drugs to support her addiction was minimal participant.** (440) Defendant was a homeless drug addict arrested for selling crack. Her dealer gave her some crack with instructions to sell as much of it as necessary to realize $1000 for the dealer, and to keep the remainder for her personal use. The D.C. District Court found that defendant was entitled to a four-point reduction for being a minimal participant in the drug ring. Defendant's minimal role was evidenced by the fact that "she never had any hope or intention of receiving payment in currency for her effort. Her sole remuneration was to be the left-over drugs." This was the first time defendant had engaged in a drug selling transaction with her dealer. She lacked knowledge and understanding of the scope of the drug enterprise. The court noted that cases denying such a reduction to couriers and street-level dealers do not prohibit such a reduction under appropriate circumstances. *U.S. v. Jackson*, __ F.Supp. __ (D.D.C. Feb. 12, 1991) No. 90-333-01 SS.

**6th Circuit upholds obstruction enhancement based upon defendant's perjury.** (460) The 10th Circuit affirmed an enhancement for obstruction of justice based upon the district

court's determination that defendant committed perjury at trial. Defendant had stated that he had not seen drugs in the small apartment in which a drug buy took place. He also claimed to be playing a dice game in the apartment, which given the size of the apartment, the district court found "implausible." Defendant also changed his testimony concerning one of his codefendants. *U.S. v. Head*, __ F.2d __ (6th Cir. March 18, 1991) No. 90-3288.

**8th Circuit upholds obstruction enhancement where defendant threatened cooperating co-defendants.** (460) The 8th Circuit upheld a two-point enhancement for obstruction of justice based upon evidence that defendant threatened his co-defendants who were cooperating with authorities. One co-defendant testified at defendant's trial that defendant stated that the co-defendant would be a "dead man," if he "narked [defendant] out." In addition, several proceedings involving the cooperating co-defendants were held in camera. The probation officer testified at defendant's sentencing that he believed that this was done for safety reasons. Defendant had the opportunity to present witnesses or testimony to rebut the district court's findings, and did not. *U.S. v. Nash*, __ F.2d __ (8th Cir. March 25, 1991) No. 90-1006.

**9th Circuit upholds obstruction adjustment for testifying untruthfully.** (460) The 9th Circuit noted that "[u]nder the guidelines, testifying untruthfully is conduct that constitutes obstruction of justice," citing section 3C1.1, commentary. note 1 (1989). The court rejected defendant's argument that the adjustment was unconstitutional because it "chills the defendant's right to testify" and "punishes him for perjury on an evidentiary showing of less than evidence beyond a reasonable doubt." *U.S. v. Torres-Rodriguez*, __ F.2d __ (9th Cir. April 4, 1991) No. 89-30298.

**2nd Circuit upholds separate grouping of false passport and heroin importation charges.** (470) Defendant entered the United States presenting a passport that he had fraudulently obtained and carrying four balloons of heroin he had swallowed. On appeal, he contended it was improper for the district court to separately group his false passport count and his heroin importation count. The Circuit affirmed, finding that the interests protected by the laws regulating passports and the laws prohibiting narcotics smuggling are sufficiently different to preclude grouping. *U.S. v. Odofin*, __ F.2d __ (2nd Cir. March 22, 1991) No. 90-1154.

**5th Circuit upholds separate grouping of drug offenses and money laundering.** (470) Defendant contended that the district court improperly refused to group his drug offenses with his money laundering offense as closely related offenses. The 5th Circuit upheld the separate grouping, finding that distinct societal interests were invaded by defendant's crimes. The record did not establish that defendant's money laundering was a continuous and ongoing part of defendant's drug-related offenses, as suggested by defendant. *U.S. v. Gallo*, __ F.2d __ (5th Cir. March 19, 1991) No. 89-2843.

**2nd Circuit affirms denial of acceptance of responsibility reduction despite district court's reliance on improper reason.** (485) Defendant contended that the district court improperly denied him a reduction for acceptance of responsibility based upon his failure to accept conduct for which he was not convicted. The 2nd Circuit agreed that this reason would be improper, but affirmed the district court's action. "[A] denial of a reduction for acceptance of responsibility may be affirmed where a district court articulates permissible as well as impermissible reasons for the denial." Here, the district court also denied defendant the reduction because he failed to show remorse or acknowledge the wrongfulness of the conduct for which he was convicted. *U.S. v. Cousineau*, __ F.2d __ (2nd Cir. March 26, 1991) No. 90-1400.

**5th Circuit denies acceptance of responsibility reduction to felon who claimed he was unaware that he could not possess firearm.** (485) Defendant falsely stated on a gun purchase application that he had never been convicted of a felony punishable by more than one years' imprisonment. Defendant plead guilty to being a felon in possession of a firearm. The 5th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility. Defendant claimed (a) he was not aware that he could not possess a weapon, (b) the firearms were for hunting, and (c) the firearms were purchased by his wife as a birthday present. The district court's findings that these were lies was not clearly erroneous. *U.S. v. Buss*, __ F.2d __ (5th Cir. March 27, 1991) No. 90-8441.

**6th Circuit finds no acceptance of responsibility by defendant who only accepted responsibility for drugs listed in indictment.** (485) The 6th Circuit found that defendant was not entitled to a reduction for acceptance of responsibility because he only accepted responsibility for the drugs listed in the indictment. However, the district court had found that defendant was responsible for a much larger quantity of drugs than those listed in the indictment. *U.S. v. Herrera*, __ F.2d __ (6th Cir. March 25, 1991) No. 90-3196.

**6th Circuit denies acceptance of responsibility where defendant said he was in crack house only to purchase drugs.** (485) Defendant was arrested in the basement of a crack house. After being convicted of possession with intent to distribute crack, defendant continued to maintain that he was not involved in the operation of the crack house. Defendant contended that he had only gone to the apartment to purchase crack. Although the probation officer recommended a reduction for acceptance of responsibility based upon defendant's admission that he had gone to the house to purchase crack, the 10th Circuit agreed with the district court that defendant's admission did not amount to acceptance of responsibility of the charges for which defendant was convicted.

Defendant did no more than admit an offense with which he was not charged and admit conduct which he could not deny. *U.S. v. Head*, __ F.2d __ (6th Cir. March 18, 1991) No. 90-3288.

**4th Circuit defers to district court's determination of acceptance of responsibility.** (490) Defendant was convicted of possession of a firearm by a felon. The government appealed the district court's two-level reduction for defendant's acceptance of responsibility. The 4th Circuit upheld the district court's action. The district court had found that although defendant had been initially confuses about the distinction between possession and ownership of the firearm, at sentencing he did take responsibility for his possession of the gun. *U.S. v. Greenwood*, __ F.2d __ (4th Cir. March 20, 1991) No. 90-5018.

## Criminal History (§ 4A)

**9th Circuit counts state sentence in criminal history even though not yet served.** (500) Defendant committed his federal offense after his Oregon conviction had been affirmed on appeal, but before he had begun to serve that sentence of six months in jail. The 9th Circuit held that the unserved sentence was properly considered in calculating his criminal history under section 4A1.1(d), which provides for two points "if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status." *U.S. v. Lillard*, __ F.2d __ (9th Cir. March 29, 1991) No. 90-30202.

**9th Circuit holds that although defendant only did weekend work, sentence was "for imprisonment."** (500) The presentence report added two points under section 4A1.1(b) for a prior sentence of sixty days in county jail. Defendant objected, because the sentence was served on a weekend work project that required him to work seven hours each Saturday and Sunday under the supervision of the sheriff's office, but he was not locked up or in custody. The 9th Circuit rejected the argument, noting that the sentence was for sixty days, and the court's recommendation of the work project did not bind the sheriff, who could have imprisoned defendant at his discretion. *U.S. v. Schomburg*, __ F.2d __ (9th Cir. April 1, 1991) No. 90-10104.

**10th Circuit holds state stolen car offense was not part of felon in possession offense.** (500) Defendant was arrested while driving a stolen car. In the trunk of the car was a suitcase containing a sawed-off shotgun and narcotics paraphernalia. Defendant pled guilty in state court to possession of the stolen car and was sentenced to one year. Several days later, he was indicted on federal charges, and eventually pled guilty to being a felon in possession of a firearm. The 10th Circuit ruled that the state conviction was a "prior sentence" under guideline section 4A1.1. Defendant carried the suitcase containing the shotgun from a hotel room to the car. Thus, the felon in possession crime was complete before defendant approached the car. The court admitted that this would have been a more difficult case if defendant had not been observed with the gun before entering the stolen car. *U.S. v. Banashefski*, __ F.2d __ (10th Cir. March 19, 1991) No. 89-2282.

## Determining the Sentence (Chapter 5)

**9th Circuit reverses order for corporate defendants to make payments to drug clinics.** (570)(620) Four soft drink companies were convicted of price fixing. As a condition of probation they were ordered to pay $660,000 into a fund to be distributed to four substance-abuse organizations run by local governments with local, state and federal tax dollars. The district court justified the payments as "restitution to the community." The government appealed, and the 9th Circuit reversed and remanded for resentencing. The court held that the Probation Act, 18 U.S.C. section 3651 (repealed in 1984), did not authorize a monetary payment to third parties. The payments could not be justified as restitution because the price fixing crime and the drug and substance abuse programs "are in no way related." The court cautioned that "the judiciary should not take upon itself the role of selecting beneficiaries of defendants' crimes." *U.S. v. Blue Mountain Bottling Company*, __ F.2d __ (9th Cir. April 4, 1991) No. 90-30075.

**9th Circuit holds that defendant did not meet his burden to show he could not pay $500 fine.** (630) Defendant, an indigent prisoner at the time of his offense, was ordered to pay a $500 fine. The 9th Circuit affirmed the fine, ruling that he failed to meet his burden to show that he had no ability to pay the fine under section 5E1.2(d). The presentence report showed he had no debts and was employed in prison. No impediment to his future earning capacity was shown. *U.S. v. Quan-Guerra*, __ F.2d __ (9th Cir. April 4, 1991) No. 90-10074.

**10th Circuit finds no double jeopardy violation in resentencing defendant to term greater than initial sentence.** (680) Defendant was originally sentenced to four years on count I and to concurrent three-year terms on counts II, III and IV. The three-year terms ran concurrent to the four year term, for a total imprisonment of seven years. On appeal, the judgment was modified to constitute only one conviction. On remand, the district court sentenced defendant to five years on the one count. Defendant argued that the district court violated double jeopardy by imposing a sentence in excess of four years, the maximum imposed on a single count at defendant's initial sentencing. The 10th Circuit found no double jeopardy violation, since defendant had no legitimate expectation of finality in his original unlawful

sentence. Judge McKay concurred in the result, but also suggested that defendant might have attacked his resentencing as a violation of due process under the principles set forth in *North Carolina v. Pearce*, 395 U.S. 711 (1979). *U.S. v. Welch*, __ F.2d __ (10th Cir. March 19, 1991) No. 89-5090.

## Departures Generally (§ 5K)

**6th Circuit finds prosecutor's refusal to move for downward departure did not entitle defendant to withdraw plea.** (710)(790) The plea agreement provided that if the defendant's information and testimony merited it, the government would move for a downward departure. But after defendant testified, the government advised him that it would not seek a downward departure because he failed to identify two co-defendants at trial and his testimony failed to include most of the facts he had earlier disclosed. The 6th Circuit found that the government's decision did not entitle defendant to withdraw his plea. Defendant did not attempt to withdraw his plea until after his testimony led the government to announce its intention. He did not maintain his innocence. Defendant was familiar with the criminal justice system and admitted his guilt. He did not fulfill his obligations under the plea agreement and could not now profit from that breach. *U.S. v. Head*, __ F.2d __ (6th Cir. March 18, 1991) No. 90-3288.

**4th Circuit upholds downward departure based upon defendant's severe physical handicap.** (721) Defendant was convicted of being a felon in possession of a firearm. The government appealed the district court's decision to depart downward based on defendant's severe physical handicap and impose probation rather than a term of imprisonment. The 4th Circuit upheld the downward departure. In the Korean War defendant had lost both of his legs below the knee. The trial judge had found that this medical impairment required treatment at the VA Hospital, and that incarceration would jeopardize this treatment. "Consideration of such an extraordinary medical problem in deciding to impose a sentence other than imprisonment is specifically authorized" by guideline section 5H1.4. *U.S. v. Greenwood*, __ F.2d __ (4th Cir. March 20, 1991) No. 90-5018.

**D.C. District Court departs downward based on defendant's family responsibilities and lack of threat to society.** (721) The district court found that a downward departure from 51 to 36 months was justified because the guidelines do not adequately take into consideration the ability of the trial judge to evaluate the culpability of the defendant, her similarity or dissimilarity to other people convicted of the same crime, her family responsibilities, and the threat she poses to the community. The defendant here had two children, ages 1 and 6, and received no financial support from the children's fathers. She was a homeless addict, without any means of support, selling drugs to support her addiction. Although these circumstances did not make defendant less culpable, they did indicate that defendant did not pose a severe danger to the community. A 51-month sentence would be "unduly harsh for a homeless mother, addicted to drugs, with two small children, and who was as much a victim of people higher up in the drug distribution chain as she was a perpetrator." *U.S. v. Jackson*, __ F.Supp. __ (D.D.C. Feb. 12, 1991) No. 90-333-01 SS.

**6th Circuit rejects criminal history departure for failure to explain why intervening categories were inadequate.** (734) The district court departed upward from criminal history category II to category V for various violent factors in defendant's background. The 6th Circuit vacated the sentence and remanded for resentencing. In the absence of reasons why the trial court rejected the next two higher criminal history levels, the case was not sufficiently unusual to warrant a departure beyond the next category or the next two categories. Many of the factors identified by the district court were adequately considered by the Sentencing Commission in computing criminal history points. Defendant's prior misdemeanor conviction for disorderly conduct was specifically excluded from consideration by the Sentencing Commission. *U.S. v. Head*, __ F.2d __ (6th Cir. March 18, 1991) No. 90-3288.

**9th Circuit reverses criminal history departure beyond category VI because statement of reasons was inadequate.** (734) After reviewing conflicting cases on criminal history departures beyond category VI, the 9th Circuit agreed with the 1st Circuit that "[w]here valid grounds for departure are present, we will uphold sentencing judges' resolution of the matter so long as the circumstances warranting the departure and the departure's direction and extent are in reasonable balance." "To facilitate this inquiry we suggest in the strongest terms that the sentencing judge explain succinctly the reasons for the degree of departure which he or she utilizes." The court found that the degree of departure was not accounted for here. Accordingly the sentence was vacated and the case was remanded "so that the district court may give reasons for its degree of departure." *U.S. v. Perez-Magana*, __ F.2d __, 91 D.A.R. 1721 (9th Cir. Apr. 1, 1991) No. 90-50107.

**11th Circuit affirms upward criminal history departure based upon outstanding warrants and consolidation of offenses.** (734) The 11th Circuit upheld a departure from criminal history category IV to category VI. Defendant had seven prior convictions, one of which was consolidated for sentencing, and had 13 other prior arrests which were dismissed along with guilty pleas on other charges. At the time of his arrest in this case, defendant faced three outstanding warrants in other states. In light of this, the district court's departure was not clear error. *U.S. v. Villali*, __ F.2d __ (11th Cir. Jan. 10, 1991) No. 90-5151.

## Sentencing Hearing (§ 6A)

**4th Circuit finds district court did not improperly deny defendant the opportunity to call a witness.** (750) The 4th Circuit rejected defendant's contention that during sentencing the district court improperly refused to permit his counsel to call and examine a co-conspirator. Defendant did not issue a subpoena or request the government to have the co-conspirator at the hearing. He did not suggest the co-conspirator would change his trial testimony, nor relate what efforts he had made to ascertain the co-conspirator's testimony. At the time of defendant's request, the co-conspirator had already been transported to his designated prison and would be unavailable for a significant period of time. Defendant's request was not timely and lacked the particularity required to compel the granting of a continuance. *U.S. v. Clark*, __ F.2d __ (4th Cir. March 20, 1991) No. 90-5771.

**6th Circuit remands where district court participated in presentence conference.** (750) The district judge, defendant's counsel, the government's counsel and the probation officer held a presentence conference for the purpose of discussing defendant's objections to the presentence report. The conference was not transcribed by a court reporter, and at the sentencing hearing 11 days later, the parties' memories of the conference were not consistent. The 6th Circuit found it was inappropriate for the sentencing judge to participate in a presentence discussion with counsel, and that the conference was misleading to defendant. The parties and the court did not recall, in the same fashion, exactly what took place, which is one of the "serious dangers" of such an off-the-record discussion. The case was remanded for the district court to hold a new sentencing hearing at which defendant would be given a full opportunity to address those parts of the sentencing which established a higher offense level and criminal history category than recommended by the probation officer. *U.S. v. Head*, __ F.2d __ (6th Cir. March 18, 1991) No. 90-3288.

**9th Circuit holds that findings of fact underlying a sentencing decision need not be made by jury.** (750) In *Walton v. Arizona*, 110 S.Ct. 3047 (1990) the Supreme Court held that the Constitution does not require every finding of fact underlying a sentencing decision to be made by a jury rather than by a judge. Relying on *Walton* in footnote 3 of this opinion, the 9th Circuit rejected petitioner's argument that his sentence was improperly enhanced for possession of a weapon during the offense. *Nichols v. McCormick*, __ F.2d __ (9th Cir. April 1, 1991) No. 90-35416.

**8th Circuit considers whether uncharged conduct must be proven by clear and convincing evidence to justify large adjustment.** (755) The district court's consideration of uncharged conduct resulted in an 18-level increase in defendant's base offense level, and a seven-fold increase in his sentencing range. The 8th Circuit considered whether in such an extreme situation, due process might require the uncharged conduct be proven by a more stringent standard than a mere preponderance of the evidence, as the 3rd Circuit recently held in *U.S. v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990). The court found that it need not decide this issue, since the government failed to meet the preponderance of the evidence standard. However, it did not "foreclose the possibility that in an exceptional case, such as this one, the clear and convincing standard adopted by our sister circuit might apply." *U.S. v. Townley*, __ F.2d __ (8th Cir. March 27, 1991) No. 90-1364.

**6th Circuit finds district court made adequate findings of fact under Fed. R. Crim. P. 32(c)(3)(D).** (760) The 6th Circuit rejected defendant's argument that the district court failed to make factual findings concerning disputed issues as required by Fed. R. Crim P. 32(c)(3)(D). First, although defendant contended the district court failed to make the required finding concerning the reliability of an informant, the district court expressly ruled "I find there is such indicia of reliability." Second, although defendant claimed the court failed to make a proper finding concerning his role in the offense, the court stated it felt defendant "was a supplier of substantial quantities of cocaine," and that it found defendant was a leader or organizer. Finally, although defendant asserted that the court failed to make the required finding concerning acceptance of responsibility, the court expressly denied defense counsel's objections concerning its acceptance of responsibility determination. *U.S. v. Herrera*, __ F.2d __ (6th Cir. March 25, 1991) No. 90-3196.

**10th Circuit refuses to strike defendant's admission in presentence report even though interview was conducted without counsel.** (760) Defense counsel claimed at defendant's sentencing hearing that an incriminating statement made by defendant to the probation officer during his presentence interview should be stricken because counsel was not present at the interview. Counsel stated it was her "established practice" to request the probation department not to interview her clients unless she was present and that she had made such a request in this case. However, the record did not indicate to whom she made her request, and the probation officer who interviewed defendant was unaware of the request. Based on this record, the 10th Circuit upheld the district court's refusal to strike defendant's admission from the presentence report. *U.S. v. Smith*, __ F.2d __ (10th Cir. March 18, 1991) No. 90-2029.

**6th Circuit upholds reliance upon information provided by informant.** (770) The 6th Circuit rejected defendant's assertion that the district court erred in relying upon information incorporated in the presentence report which was provided by an unreliable witness. The probation officer asserted that the informant had provided detailed information on the automobile which was used to transport the drugs, and the in-

formant warned the government that kilogram quantity deliveries of the drugs could be delivered by her source, an allegation which was corroborated by the occurrence of such a delivery soon after her warning. The information thus had the "minimum indicia of reliability beyond mere allegation." *U.S. v. Herrera*, __ F.2d __ (6th Cir. March 25, 1991) No. 90-3196.

**9th Circuit holds that destruction of chemicals did not prejudice defendant's sentence.** (770) Chemicals seized from defendant's labs were destroyed before he or the government had a chance to weigh them. Defendant argued that this denied him due process at sentencing because he had no way of disproving the amount the government claimed it found. Because "sentencing courts are not limited to evidence that would be admissible at trial" the 9th Circuit said it was "uncertain" whether the suppresion rule of *U.S. v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979) (*en banc*) applies in the sentencing context. Assuming that it was applicable, however, the court found no evidence of government misconduct and that defendant failed to show any prejudice. "He had an opportunity at the sentencing hearing to present his own experts, to refute the estimated capacity of the lab based on the physical characteristics and equipment and to cross examine the government witnesses." *U.S. v. Lillard*, __ F.2d __ (9th Cir. March 29, 1991) No. 90-30202.

**6th Circuit finds district judge adequately stated reasons for imposing sentence within guideline range.** (775) The 6th Circuit rejected defendant's argument that the district judge failed to adequately state reasons for its sentencing decision. Defendant's guideline range was less than 24 months, and therefore the judge was not required by the guidelines to specify a reason for imposition of a sentence within the guideline range. *U.S. v. Smith*, __ F.2d __ (6th Cir. March 22, 1991) No. 90-3426.

## Plea Agreements, Generally (§ 6B)

**10th Circuit holds state's failure to inform defendant of possible forfeiture proceeding did not render plea involuntary.** (780)(900) Several months prior to pleading guilty in Oklahoma state court on drug charges, the state entered a judgment in civil forfeiture proceedings against money seized from defendant at the time of his arrest. On appeal from a district court's denial of his petition for habeas corpus, defendant argued that the forfeiture proceeding constituted an additional punishment which was not included in his plea agreement, and that the state's failure to inform him of the proceeding or to include it in plea agreement rendered his guilty plea unknowing and involuntary. The 10th Circuit rejected this contention, finding that the possibility of a civil forfeiture proceeding was a collateral consequence of defendant's guilty plea. Thus, the court was under no affirmative obligation to advise him that a guilty plea could possibly lead to a civil forfeiture. There was nothing preventing defendant from requesting that his plea agreement set forth the disposition of the seized assets. *Harris v. Allen*, __ F.2d __ (10th Cir. April 1, 1991) No. 89-6404.

**6th Circuit rejects claim that there was a separate agreement outside the written plea agreement.** (790) The indictment charged defendant with a conspiracy that lasted two years, but he eventually pled to a one-count superceding indictment which limited the conspiracy to 11 days. Defendant argued that the purpose of this was to limit the quantity of drugs which the court could consider. The 6th Circuit rejected the claim that there was a separate agreement outside the written plea agreement. "[A]bsent extraordinary circumstances, ... a defendant's plea agreement consists of the terms revealed in open court." The district court followed the procedures outlined in Rule 11. When questioned by the court about the plea agreement, neither defendant nor his attorney advised the court of the additional terms in the plea agreement. *U.S. v. Herrera*, __ F.2d __ (6th Cir. March 25, 1991) No. 90-3196.

**10th Circuit finds no breach of plea agreement in government's disclosures and "unenthusiastic" sentence recommendation.** (790) After entering into a plea agreement, defendant was involved in disseminating confidential grand jury material and intimidating a witness. Defendant contended that although the government literally complied with the plea agreement in recommending a seven-year sentence, the government effectively breached the plea agreement by furnishing a written report of defendant's activities and by commenting during sentencing about the defendant's disclosure of the material. The 10th Circuit rejected this argument, finding that the plea agreement could not be interpreted as prohibiting the government from informing the court of relevant conduct of this nature. The prosecutor had an ethical obligation to disclose such information. Moreover, "although the government attorney undeniably demonstrated a clear lack of enthusiasm for the recommended sentence, an unenthusiastic recommendation is still a recommendation." *U.S. v. Jimenez*, __ F.2d __ (10th Cir. March 19, 1991) No. 90-1114.

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

**8th Circuit refuses to review for error where defendant's sentence would not change.** (810) Defendant contended that the district court incorrectly determined that he belonged in criminal history category II rather than I. The 8th Circuit refused to review the merits of defendant's argument since it would not change his sentence. His offense level would remain unchanged at 40, resulting in an applicable guideline range of 292 to 365 months. Defendant had received a sentence of 240 months, the statutory maximum. *U.S. v. Nash*, __ F.2d __ (8th Cir. March 25, 1991) No. 90-1006.

## Death Penalty

**9th Circuit holds there is no right to jury trial on aggravating circumstances in death case.** (860) Relying on *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986), and *Hildwin v. Florida*, 109 S.Ct. 2055, 2057 (1989) the 9th Circuit held that a defendant has no Constitutional right to a jury trial on the existence of aggravating circumstances in a death penalty case. *Creech v. Arave*, __ F.2d __, 91 D.A.R. 3551 (9th Cir. March 27, 1991) No. 86-3983.

**Eastern District of California, en banc, upholds "Neuschafer" hearings to avoid piecemeal death penalty habeas review.** (860) In *Neuschafer v. Whitley*, 860 F.2d 1470, (9th Cir. 1988) the 9th Circuit permitted a death row inmate to assert his federal habeas claims piecemeal in successive petitions where he explained that he had delayed raising some issues because he had not exhausted his state remedies. Responding to a suggestion in Judge Alarcon's concurring opinion in *Neuschafer*, the magistrate judges in the Eastern District of California ordered two death row habeas petitioners to attend hearings at which they and their counsel would be questioned "to see to it that all . . . claims, except those which may be truly discovered late, are contained in the first petition for habeas corpus." The petitioners sought reconsideration in the district court. The District Judges met *en banc* and affirmed the magistrate judges' orders. *Ainsworth v. Vasquez*, __ F.Supp. __, 91 D.A.R. 3436 (E.D. Cal. March 15, 1991) (*en banc*) No. CIV-S-90-329-LKK-JFM.

**9th Circuit upholds requirement that courts "shall apply the death penalty unless mitigating circumstances outweigh the aggravating circumstances."** (865) Relying on *Blystone v. Pennsylvania*, 110 S.Ct. 1078 (1990), the 9th Circuit upheld Idaho's statutory requirement that courts "*shall* apply the death penalty *unless* mitigating circumstances outweigh the aggravating circumstances and make the imposition of death unjust." The court ruled that such a statute is not "impermissibly mandatory" and that "the requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant, mitigating evidence." *Creech v. Arave*, __ F.2d __, 91 D.A.R. 3551 (9th Cir. March 27, 1991) No. 86-3983.

**9th Circuit holds that in capital resentencing hearings defendant must be allowed to present mitigating evidence.** (865) Petitioner argued that after the Supreme Court of Idaho voided his sentence and ordered resentencing, he was constitutionally entitled to present "any and all mitigating evidence" that existed at the time of the resentencing. This includes evidence of good conduct in prison since the original sentencing. *Creech v. Arave*, __ F.2d __ (9th Cir. March 27, 1991) No. 86-3983.

**9th Circuit orders death sentence vacated where judge failed to find specific intent for aggravating circumstances.** (865) To properly constitute aggravating circumstances under Idaho law, the statutory elements must be combined "with the specific intent to cause . . . death of a human being." In this case the sentencing judge failed to indicate that he found specific intent beyond a reasonable doubt in finding that there were aggravating circumstances. Accordingly the district court was ordered to grant the petition for a writ of habeas corpus and to permit the state to resentence the defendant. *Creech v. Arave*, __ F.2d __, 91 D.A.R. 3551 (9th Cir. March 27, 1991) No. 86-3983.

**9th Circuit strikes down phrase "utter disregard for human life" as vague.** (865) The 9th Circuit held that Idaho Code's aggravating circumstance that "the defendant exhibited utter disregard for human life," was unconstitutionally vague. Although the Idaho Supreme Court had attempted to limit the phrase by stating that it constituted "the highest, the utmost, callous disregard for human life," the 9th Circuit held that this limiting construction gave no more guidance than the statute, and was still unclear. Accordingly the 9th Circuit ordered the writ of habeas corpus to be granted and for the petitioner to be given a new sentencing hearing at which the mitigating and aggravating circumstances could be balanced anew. *Creech v. Arave*, __ F.2d __, 91 D.A.R. 3551 (9th Cir. March 27, 1991) No. 86-3983.

## Forfeiture Cases

**1st Circuit holds innocent lienholder must follow Customs procedures to foreclose and sell seized property.** (900) Claimant, an innocent lienholder who held a mortgage on property seized by the government, filed a motion for "leave" to foreclose its mortgage. The district court denied the motion and the 1st Circuit affirmed, holding that Customs laws set forth bonding procedures an innocent lienholder must follow to obtain the release of seized property. The court rejected claimant's argument that 28 U.S.C. section 2465 mandated the property's release, because the statute only applies when there is no forfeitable interest. The court said it was not holding that the Customs statute, or current Customs procedure, "literally and exactly" sets the standard for posting a bond in a forfeiture case. Rather, the courts have the legal power to make appropriate adjustments. But since claimant made no offer to file a bond, the district court properly denied claimant's motion for release of the property. *In re Newport Savings and Loan Association*, __ F.2d __ (1st Cir. March 21, 1991) No. 90-1793.

**1st Circuit rules denial of innocent lienholder's motion for leave to foreclose is appealable order.** (920) The 1st Circuit held that the district court's denial of an innocent leinholder's motion for "leave" to foreclose its mortgage and sell property seized by the government was an appealable order. Al-

though no statute states that a lienholder needs court approval to bring a foreclosure action, as a practical matter, it may be impossible to find a buyer for property that is in the custody of the Attorney General. The district court's action, while not appealable as a final decision, was appealable as a collateral order. The order conclusively determined a right that claimant could not vindicate on a later appeal, i.e., the right to foreclose now, before a final forfeiture determination. A significant postponement of that right might mean added loss for the claimant, who contended that the real estate market was falling. *In re Newport Savings and Loan Association*, __ F.2d __ (1st Cir. March 21, 1991) No. 90-1793.

**5th Circuit denies DEA's petition for rehearing.** (920) In *Scarabin v. Drug Enforcement Administration*, 919 F.2d 337 (5th Cir. 1990), the 5th Circuit found that it had jurisdiction under 21 U.S.C. section 877 to review a DEA administrative forfeiture for the limited purpose of determining whether the DEA followed proper procedural safeguards. The DEA had rejected petitioner's claim on a technicality, without reviewing the merits of the claim, and the 5th Circuit had remanded with directions for the DEA to consider the merits of petitioner's claim. On petition for rehearing, the DEA argued that the legislative history and statutory language of section 877 showed that judicial review of administrative forfeitures is limited to forfeiture decisions by the Attorney General affecting the pharmaceutical and research industries. The 5th Circuit rejected this interpretation and the DEA's petition for rehearing, reiterating that section 877 clearly gave it jurisdiction to provide a limited review of an administrative forfeiture order by the DEA. *Scarabin v. Drug Enforcement Administration*, 925 F.2d 100 (5th Cir. 1991).

# Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 20 | Federal Sentencing Guidelines and Forfeiture Cases from All Circuits. | March 25, 1991


IN THIS ISSUE:



## Guideline Sentences, Generally

**5th Circuit rejects due process challenge to guidelines.** (115) Defendant argued that the guidelines violated due process by depriving her of the right to have all available information considered by the district court. The 5th Circuit summarily rejected this argument, noting that the due process clause does not mandate that the sentencing court have complete discretion to consider mitigating factors. *U.S. v. Vela*, __ F.2d __ (5th Cir. March 8, 1991) No. 90-1065.

**3rd Circuit upholds application of guidelines to RICO violation which began prior to and continued beyond guideline effective date.** (130)(290) Defendant argued that it was improper to apply the guidelines to his RICO offense which began prior to and continued after the effective date of the guidelines. The 3rd Circuit agreed with the district court that RICO is a continuing offense "directly analogous to the crime of conspiracy," and that therefore the guidelines were applicable to defendant's RICO conviction. The application of the guidelines to defendant's offense did not violate the ex post facto clause. Defendant elected to continue his illegal pattern of conduct after the effective date of the guidelines, and the guidelines do not prescribe a higher sentence for his RICO offense than that provided by pre-guidelines law. *U.S. v. Moscony*, __ F.2d __ (3rd Cir. March 8, 1991) No. 90-1535.

**3rd Circuit finds no due process violation in application of guidelines to "straddle" crime.** (125) Although the majority of defendant's racketeering activities occurred prior to the November 1, 1987, the guidelines were applied to his RICO violation based on his obstruction of justice acts which took place after that date. Defendant contended that he was denied substantive due process because the guidelines permitted the prosecution to convert what was in actuality a pre-guidelines case into a guidelines case by charging him with the two obstruction of justice racketeering acts. The 3rd Circuit rejected this argument, finding that as long as there was no prosecutorial misconduct or vindictiveness, it was irrelevant that the prosecution could have kept the RICO charge from falling under the guidelines by failing to include defen-

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)
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

dant's obstruction of justice acts. The decision whether or not to prosecute on certain charges generally rests entirely on a prosecutor's discretion. Defendant had constructive notice of the guidelines, and continued to violate RICO after the guidelines became effective. *U.S. v. Moscony*, __ F.2d __ (3rd Cir. March 8, 1991) No. 90-1535.

## General Application Principles (Chapter 1)

**2nd Circuit finds "same course of conduct" need not involve acts connected by same participants or overall scheme. (170)(260)** In July, defendant was arrested after picking up a package of cocaine shipped from Miami to Vermont. In March, defendant had been involved in a conspiracy to transport cocaine from Miami to Montreal. He objected to the district court's inclusion of the March drugs in calculating his offense level, arguing that the March conspiracy was not part of the same course of conduct. The 2nd Circuit rejected this argument, finding the two offenses were part of the same course of conduct. "The 'same course of conduct' concept . . . looks to whether the defendant repeats the same type of criminal activity over time. It does not require that acts be 'connected together' by common participants or by an overall scheme. It focuses instead on whether defendant has engaged in an identifiable 'behavior pattern'. . . of specified criminal activity." Thus it was not unreasonable for the district court to conclude that defendant's Vermont offense was a continuation of his Montreal activities. *U.S. v. Perdomo*, __ F.2d __ (2nd Cir. March 6, 1991) No. 90-1177.

**2nd Circuit holds that defendant's role in offense can be based upon uncharged relevant conduct. (170)(430)** Defendant contended it was improper to increase his offense level based upon his leadership role in uncharged conduct, contending that a court may only make this determination based upon a defendant's role in the offense of conviction. The 2nd Circuit rejected this, finding that a court may properly determine a defendant's role in an offense based upon all relevant uncharged conduct. The commentary to the guidelines was amended November 1, 1990 to specifically provide this. The Sentencing Commission viewed the new language as simply clarifying the guidelines. Although the commission's instructions are not dispositive, they are entitled to considerable deference. *U.S. v. Perdomo*, __ F.2d __ (2nd Cir. March 6, 1991) No. 90-1177.

**2nd Circuit vacates obstruction enhancement which was based upon conduct outside charged offense. (170)(460)** Defendant contended that he was improperly given a two-point increase in offense level for obstruction of justice based upon conduct beyond the charged offense. The 2nd Circuit agreed, and vacated the obstruction enhancement. Guideline section 3C1.1 refers only to obstructing the prosecution of the offense of conviction. Defendant's instruction to a co-defendant to place cocaine under a car could have meant that this was the drop-off spot. Defendant's statement that a co-defendant was on a plane was not shown by a preponderance of the evidence to be false. The presentence report stated only that there was no evidence that the co-defendant was on the plane. Finally, defendant's statement that he intended to drive from Vermont to New York was not necessarily belied by the fact that he was only carrying $50 in cash. If the cocaine deal went through, he would have much more to finance his trip. *U.S. v. Perdomo*, __ F.2d __ (2nd Cir. March 6, 1991) No. 90-1177.

**10th Circuit rejects consideration of entrapment defense in determining relevant conduct. (170)** Defendant pled guilty to one charge of distributing cocaine, and one charge of distributing crack. Defendant conceded that he was involved in the distribution of cocaine prior to his contact with undercover agents, but argued that he was entrapped by them into distributing the crack. Therefore, defendant contended it was improper for the district court to include the crack in determining his offense level. The 10th Circuit rejected defendant's contention, since entrapment is an affirmative defense relevant only to whether defendant is guilty of the crime charged, not to sentencing. Since defendant pled guilty to distributing the crack, entrapment was not an issue. The "otherwise accountable" language in the relevant conduct guideline permits a court to consider acts in addition to the offense of conviction; it does not permit the defendant to

*The* **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, bimonthly cumulative supplements and biweekly newsletters. The main volume, now in its second edition, covers ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month the newsletters are merged into a cumulative supplement with full citations and subsequent history.*

Annual Subscription price: $250 (includes main volume, 6 cumulative supplements and 26 newsletters a year.)

Main volume and current supplement only: $75.

Editors:
- Roger W. Haines, Jr.
- Kevin Cole, Associate Professor of Law, University of San Diego
- Jennifer C. Woll

Publication Manager:
- Beverly Boothroyd

raise at sentencing the issue of whether defendant is "otherwise accountable" for the offense of conviction. *U.S. v. Riles*, __ F.2d __ (10th Cir. March 14, 1991) No. 90-4046.

## Offense Conduct, Generally (Chapter 2)

**9th Circuit reverses departure where firearm discharge was already taken into account by assault guideline. (210)(746)** The district court justified a portion of the upward departure on the ground that a firearm had been discharged during the commission of the assault with a deadly weapon. The 9th Circuit reversed, holding that the court overlooked the fact that the computed adjusted offense level on this count had taken the firearm discharge into account, increasing the offense level by five. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

**7th Circuit upholds loss calculation for stolen documents based upon government's cost of obtaining duplicates. (220)** Defendant was convicted of stealing government documents relating to a tax fraud case against him. The 7th Circuit upheld the district court's increase in offense level under guideline section 2B1.1(b)(1) based on a loss of between $100,001 and $200,000. This was based on the government's estimated replacement cost of the documents. The government's estimate was based on the effort it would take to duplicate the missing documents, including time spent to reorganize the documents, reinterview witnesses, obtain new copies of documents that witnesses previously had supplied, and recopy stolen undercover tape recordings. "Time is money, and the value of the labor involved in replacing the stolen documents is part of the cost of replacing them." The court rejected defendant's argument that the district court should have considered the government's failure to mitigate damages. No mitigation is necessary, for the amount of mitigation is irrelevant to defendant's crime. *U.S. v. Berkowitz*, __ F.2d __ (7th Cir. March 15, 1991) No. 89-2125.

**2nd Circuit affirms mandatory minimum sentence greater than applicable guideline range. (245)** Defendant pled guilty to conspiracy to distribute heroin, which resulted in a guideline range of 78 to 97 months. However, the statute provided for a mandatory minimum 10-year sentence for distribution of heroin. Defendant contended that his 10-year sentence exceeded the period provided by the sentencing guidelines. The 2nd Circuit disagreed, since the guidelines provide that where a mandatory minimum sentence is greater than the maximum guideline range, the mandatory minimum sentence becomes the guidelines sentence. *U.S. v. Larotonda*, __ F.2d __ (2nd Cir. March 11, 1991) No. 90-1486.

**2nd Circuit upholds determination that stocked laboratory was capable of producing 800 grams of pure PCP. (250)** The 2nd Circuit upheld the district court's determination that defendant's laboratory as stocked was capable of producing 800 grams of pure PCP. Although there was contradicting testimony from two experts, the district court resolved the issue in favor of the government chemist. The government chemist stated that it is common for clandestine PCP laboratories not to use a purification process, but under the guidelines, "pure PCP" appears to mean PCP which has not been "cut" or adulterated, rather than PCP which has been subjected to the maximum possible purification. *U.S. v. Macklin*, __ F.2d __ (2nd Cir. March 14, 1991) No. 89-1245.

**2nd Circuit upholds estimate of PCP that could be produced from seized chemicals despite government's failure to test chemicals. (250)** Based on the chemicals seized and the formula defendants intended to use, a government expert testified that defendants could have produced 550 grams of PCP. The expert stated that she had seen all of the chemical containers seized, but did not test the substances in every container. Instead, she noted the physical characteristics of the substances, and believed them to be consistent with the labels on the containers, many of which were factory sealed. She considered the chemicals dangerous and had them destroyed. The 2nd Circuit found no error in the district court's reliance on this estimation. *U.S. v. Macklin*, __ F.2d __ (2nd Cir. March 14, 1991) No. 89-1245.

**7th Circuit affirms that drug conspiracy involved 100 kilograms of marijuana. (250)** The 7th Circuit affirmed the district court's determination that defendants conspired to distribute over 100 kilograms of marijuana. The government submitted evidence that one of the defendants had travelled to Tucson at least 10 times within a nine-month period. Most of those trips lasted less than five days. On each occasion, this defendant carried two large suitcases. A narcotics detection dog reacted positively to both suitcases after one of these trips. Financial records revealed that this defendant spent almost $40,000 more than he could account for during the relevant period. Bank and Western Union records revealed that two defendants transferred funds totalling $64,036 to another defendant during this same period of time. That evidence, coupled with the inference that at least 30 pounds of marijuana were involved in each trip, supported the finding that the conspiracy involved an intent to distribute in excess of 100 kilograms. *U.S. v. Atterson*, __ F.2d __ (7th Cir. Jan. 25, 1991) No. 89-2157.

**8th Circuit upholds calculation of drug weight based upon police officer's visual estimate. (250)** While being pursued by police, defendant threw two bags containing cocaine out of the car window. One of the bags burst and cocaine scattered over the street. Approximately 449 grams of cocaine was eventually seized. A police officer testified that the cocaine that was too small or powdered to be retrieved covered an area 4 to 5 feet by 40 yards, and that in the officer's opinion at least 100 grams remained on the street. The 8th Circuit upheld the district court's decision to sentence defendant on

the basis of over 500 grams of cocaine. The officer's estimate was "exactly the type required when a defendant's own conduct makes precise measurement difficult, if not impossible, to accomplish." Moreover, defendant presented no evidence to contradict the officer's testimony. *U.S. v. Angulo*, __ F.2d __ (5th Cir. March 8, 1991) No. 90-8425.

**2nd Circuit finds no Rule 11 violation in calculating offense level based upon drugs involved in uncharged conduct.** (270)(780) Rule 11, Fed. R. Crim. P. requires that the defendant be informed of the nature of the charges against him and the consequences of pleading guilty. Defendant argued that the inclusion of two kilograms he negotiated to sell in an uncharged offense violated Rule 11. The 2nd Circuit found that Rule 11 was satisfied when the judge informed defendant of the maximum sentence he could receive under the statute, and that the guidelines, if constitutional, would apply to his case. Rule 11 does not require the judge and prosecutor to calculate how the guidelines would actually apply to defendant. Defendant also argued that it violated due process to require him to divulge information about other crimes during the presentence interview, thus exposing himself to future prosecution. The 2nd Circuit found that resolution of this issue must wait until any prosecution of defendant for such crimes. *U.S. v. Perdomo*, __ F.2d __ (2nd Cir. March 6, 1991) No. 90-1177.

**5th Circuit upholds sentencing based on total amount of drugs involved in conspiracy.** (275) Defendant contended that his offense level should have been calculated based upon the 100 grams of heroin mentioned in the charge rather than the 17 kilograms distributed by the conspiracy in which he was involved. The 5th Circuit upheld the calculation, finding that defendant failed to demonstrate that the information relied upon by the district court was materially untrue. Defendant signed a factual resume admitting his involvement in the conspiracy. The presentence report indicated that defendant knew about the overall conspiracy and was fully involved in it. This conclusion was based on the statements of the investigative agents assigned to the case. *U.S. v. Vela*, __ F.2d __ (5th Cir. March 8, 1991) No. 90-1065.

**8th Circuit holds defendant need not be advised that drugs sold by co-conspirators can be considered at sentencing.** (275)(780) The 8th Circuit rejected defendant's argument that the district court violated Fed. R. Crim. P. 11 by failing to advise him that the cocaine distributed by co-conspirators could be considered at sentencing. The amount of cocaine used to calculate defendant's base offense level had nothing to do with Rule 11's requirement that defendant understand the nature of the offense because the amount of cocaine involved is a matter for sentencing. *U.S. v. Young*, __ F.2d __ (8th Cir. March 12, 1991) No. 90-1294.

**7th Circuit reverses failure to apply enhancement for possession of firearm during drug offense.** (284) A search of defendant's apartment uncovered marijuana, cocaine, drug records, a triple beam balance scale, two loaded handguns and $1000 in cash. The guns were found in a drawer in the headboard to defendant's bed, while the cash was found in another headboard drawer. The 7th Circuit reversed the district court's failure to increase defendant's offense level based upon his possession of a firearm during the commission of a drug crime. Guideline section 2D1.1(b)(1) does not require the government to show a connection between the weapon and the offense, only that the weapon was possessed during the offenses. *U.S. v. Atterson*, __ F.2d __ (7th Cir. Jan. 25, 1991) No. 89-2157.

**7th Circuit upholds calculation of loss where defendant failed to challenge calculation at sentencing hearing.** (300)(820) Defendant made false claims of travel and moving expenses to the Army. On appeal, he challenged the district court's calculation of loss under guideline section 2F1.1, contending that the amount of loss was $9,635.38, rather than $10,780.35. The 7th Circuit upheld the district court's calculation, finding that the calculation of loss was a factual determination subject to clearly erroneous review. Defendant had the opportunity at the sentencing hearing to offer an alternative method of calculating the loss, but appeared to agree with the judge's calculation. He cannot, on appeal, offer new facts to show that the district court's calculation was incorrect. *U.S. v. Haddon*, __ F.2d __ (7th Cir. March 8, 1991) No. 89-3671.

**7th Circuit upholds 8-level offense level increase for destruction of government documents.** (320) Defendant was convicted of obstruction of justice and theft of government property for stealing and destroying government documents to be used in a tax fraud case against him. He received an 8-level increase in offense level under guideline section 2J1.2(b)(1) because he destroyed the documents. The guideline refers to obstructing justice by causing or threatening to cause physical injury to a person or property. Defendant argued that this referred to property damage used to intimidate a witness or inflict emotional distress. The 7th Circuit rejected this argument, finding nothing in the guideline or the commentary to support it. *U.S. v. Berkowitz*, __ F.2d __ (7th Cir. March 15, 1991) No. 89-2125.

**9th Circuit applies base offense level for attempted murder under firearms guideline section 2K2.1.** (330) The base offense level for simple possession of a firearm by an ex-felon is six. However, if the firearm is used in the commission of another offense, guideline section 2K2.1(c)(2) instructs the court to apply the base offense level for the underlying offense. Relying on this provision, the district court applied the base offense level for attempted murder. On appeal, the defendant argued that his state court conviction for charges arising out of the same conduct barred the application of the attempted murder offense level. The 9th Circuit disagreed, finding no indication that such an exception was intended by

the Sentencing Commission. *U.S. v. Mun*, __ F.2d __ (9th Cir. March 18, 1991) No. 90-30214.

**5th Circuit upholds adjustment based upon discharge of a hazardous substance.** (355) Defendant dumped 16 drums of hazardous paint waste on a rural creek embankment and was convicted of 16 counts of disposing of hazardous waste without a permit. His offense level was increased under guideline section 2Q1.2(b)(1)(B) for an offense involving a discharge, release or emission of a hazardous or toxic substance. The notes to the guidelines state that this section assumes a discharge resulting in actual environmental contamination. The 5th Circuit rejected defendant's contention that his enhancement was improper because the waste was discovered one day after being dumped, so there was little chance that the waste actually contaminated the environment. The district court specifically found that one of the drums was leaking and that the offense involved a discharge of a hazardous substance into the environment. Because of the toxicity of the substance involved, it was proper for the district court to infer that there had been environmental contamination from the one-day leak. *U.S. v. Sellers*, __ F.2d __ (5th Cir. March 1, 1991) No. 90-1216.

**7th Circuit upholds determination that defendant knew money was criminally derived.** (360) Defendant was convicted of failing to report a currency transaction in excess of $10,000. The 7th Circuit affirmed a 5-point increase in offense level because the defendant knew the money was criminally derived. When defendant was stopped at the airport on her way to Nigeria, she was carrying $13,000, $4,000 of which was hidden in her underwear. She lied to customs agents as to the amount of cash she carried. A narcotics dog reacted positively to the money taken from her. Her bank account showed a series of large deposits and withdrawals during the prior year. During the period in which defendant deposited over $12,000 in cash into the account, she earned about $4,000 from her job at a nursing home. The district court could determine, by a preponderance of the evidence, that defendant knew the money in her possession was criminally derived. *U.S. v. Hassan*, __ F.2d __ (7th Cir. March 6, 1991) No. 89-2559.

**7th Circuit reverses double counting based on drug involvement in money laundering scheme.** (360)(680) As a result of his involvement in a drug conspiracy, defendant was convicted of money laundering, and was sentenced under guideline section 2S1.1(a)(1). Although evidence indicated that he received approximately $64,000, the court found the total funds exceeded $100,000. The court increased defendant's offense level under section 2S1.1(b)(2)(B) by multiplying the total quantity of marijuana by its street value. The 7th Circuit reversed, ruling that this was double counting. The district court had already increased defendant's offense level by three under guideline section 2S1.1(a)(1) because defendant knew that the laundered money was the proceeds of marijuana distribution. "To then include the value of those drugs in computing the total value of the funds involved in the money laundering scheme would result in [defendant's] sentence being doubly enhanced due to the fact that drugs were involved in the money laundering scheme." *U.S. v. Atterson*, __ F.2d __ (7th Cir. Jan. 25, 1991) No. 89-2157.

**2nd Circuit rejects higher burden of proof at sentencing for conspiracy despite recent guideline amendments.** (380)(755) Defendant argued that the district court should have applied a higher standard than preponderance of the evidence in determining the object of an uncompleted conspiracy. The 2nd Circuit rejected this contention. A recent amendment to the guidelines applying the higher reasonable doubt standard is applicable only to a special class of conspiracy cases. Under guideline section 1B1.2(d), a conviction of conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense. An application note states that this guideline section should apply, with respect to an object offense, only if the court, as trier of fact, would convict defendant of conspiring to commit that offense. A higher standard of proof applies because this guideline creates, in effect, a new count of conviction for sentencing purposes. No such situation was presented here. *U.S. v. Macklin*, __ F.2d __ (2nd Cir. March 14, 1991) No. 89-1245.

## Adjustments (Chapter 3)

**1st Circuit upholds leadership role of defendant who piloted boat containing illegal aliens.** (430) The 1st Circuit rejected defendant's argument that there was insufficient evidence to prove that he was a leading participant in an illegal alien smuggling ring. A number of passengers stated that defendant and a co-defendant co-piloted the boat containing illegal aliens during a two-day trip. The court did, however, express concern over the government's practice of labeling as "captains" (and thus leaders) individuals whose sole participation in an illegal alien smuggling venture was to occasionally steer the vessel. Not everyone who lays a hand on a ship is its captain; there can be only one captain. The appellate court instructed sentencing courts that, "whenever the government attempts to ascribe principal status to a defendant in an illegal alien smuggling case, special care must be taken to ensure that the defendant's role was in fact as the government has alleged." *U.S. v. Reyes*, __ F.2d __ (1st Cir. March 7, 1991) No. 90-2089.

**6th Circuit upholds leadership enhancement where trial testimony established involvement of five other participants.** (430) The 6th Circuit upheld a four-point enhancement based upon defendant's role as a leader or an organizer in a drug conspiracy involving five or more participants. The district court found that defendant was the "clear leader" of a

conspiracy which involved the use of defendant's stepson and wife to distribute drugs. Trial testimony established that two other individuals were involved in transporting cocaine from Miami to eastern Michigan. Trial testimony further established that another individual was also involved in the drug operation. *U.S. v. Alvarez*, __ F.2d __ (6th Cir. March 8, 1991) No. 89-1384.

**7th Circuit upholds leadership enhancement for defendant who laundered proceeds of drug conspiracy.** (430) Defendant was convicted of laundering the proceeds of a marijuana distribution conspiracy. The 7th Circuit upheld an enhancement based upon defendant's leadership role in the conspiracy. The district court found that defendant "ranked at the top of the hierarchy. He was the procurer, he was the recipient of the money for the marijuana, which he may or may not have passed on to others." Without defendant, his co-conspirators had nothing as far as drugs were concerned. *U.S. v. Atterson*, __ F.2d __ (7th Cir. Jan. 25, 1991) No. 89-2157.

**8th Circuit finds no improper consideration of information outside offense of conviction to determine leadership role.** (430) Defendant pled guilty to interstate transportation of securities obtained by fraud as a result of her involvement in a scheme to obtain fraudulent claim checks from her insurance company employer. The 8th Circuit found no evidence that the district court improperly considered information outside the offense of conviction in determining that defendant was the manager of criminal activity in interstate commerce. Defendant was the first person to join the scheme with her co-conspirator; she thoroughly understood the details of the scheme and recruited other persons; and she was entitled to one-half of the proceeds from checks she cashed and one-third of the proceeds issued to third parties. The court also rejected defendant's contention that because the charge did not indicate more than one other person was involved in the crime, it was error to find the criminal activity involved at least 5 other participants. *U.S. v. Andersen*, __ F.2d __ (8th Cir. March 15, 1991) No. 90-2446.

**8th Circuit affirms leadership role of drug dealer.** (430) The 8th Circuit found that the evidence supported the trial court's determination that defendant was an organizer and leader of a drug ring. Defendant supplied cocaine to numerous people for resale. He used several bank accounts of one friend for his cocaine proceeds, instructing his drug customers to use the friend's name when paying for cocaine by check. Defendant made major purchases in the friend's name. Defendant persuaded a different friend to convert large amounts of cash into larger bills for him and to purchase cashier's checks for him. On at least two occasions, defendant requested a third friend to accompany him to a bank, where he used this friend's identification to purchase additional cashier's checks. Defendant had one of the friends drive him to his drug deals. *U.S. v. Contreras*, __ F.2d __ (8th Cir. March 12, 1991) No. 90- 5369.

**3rd Circuit rejects minimal status to defendant who procured van used to transport co-defendants to drug deal.** (440) Defendant contended that he should have received a four-point reduction for being a minimal participant in a drug transaction rather than the two-point reduction he received for being a minor participant. The 3rd Circuit rejected this contention, finding that defendant's characterization as a minor participant may have been generous. Defendant participated in a meeting with an undercover agent where the sale of drugs was discussed. He drove the van to another meeting, and at the time of arrest had in his possession documents which indicated that the van was owned by a female residing at his residence, from which it could be inferred that he obtained the vehicle for the trip. *U.S. v. Gonzales*, __ F.2d __ (3rd Cir. March 8, 1991) No. 90-5577.

**10th Circuit finds minor or minimal status to be determined by defendant's combined role in both offenses.** (440) Defendant pled guilty to one count of distributing cocaine, and one count of distributing crack. The district court refused to give him a reduction for mitigating role, basing its decision on his role in distributing all of the drugs. Defendant argued that the court should have calculated a separate base offense level for each offense and then made a separate role adjustment for each offense. The 10th Circuit rejected this approach, ruling that the court must examine all relevant conduct in determining whether to make such an adjustment. Defendant was clearly not entitled to minimal or minor status in these offenses. The evidence demonstrated that he was a principal or an aider and abettor in all eight deliveries of cocaine to undercover agents, and he alone was involved in the delivery of the crack.. *U.S. v. Riles*, __ F.2d __ (10th Cir. March 14, 1991) No. 90-4046.

**6th Circuit affirms obstruction enhancement for defendant who testified untruthfully.** (460) The 6th Circuit affirmed an obstruction enhancement where the district court found that defendant had lied "openly, continuously, almost ridiculously before the jury." Although the district court expressed some misgiving about applying the enhancement, the 6th Circuit noted that once the district court had found that defendant had testified untruthfully as to a material fact, it had no discretion under the guidelines not to apply the enhancement. *U.S. v. Alvarez*, __ F.2d __ (6th Cir. March 8, 1991) No. 89-1384.

**7th Circuit upholds obstruction enhancement based upon defendant's lies.** (460) The district court reviewed defendant's testimony at her detention hearing and was convinced that she lied repeatedly. The magistrate conducting the hearing made the same determination. The district court judge also found that defendant testified untruthfully at her sentencing hearing. The judge noted that he had a difficult

time getting a straight answer from defendant, and found inconsistencies that indicated she lied throughout the hearing. Based on this record, the 7th Circuit affirmed an enhancement for obstruction of justice. *U.S. v. Hassan*, __ F.2d __ (7th Cir. March 6, 1991) No. 89-2559.

**9th Circuit holds that sentence may not be based on factors of which defendant was not given advance notice.** (480)(660)(750) In *U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989), the 9th Circuit held a defendant must be given advance notice of the district court's intention to depart. The notice requirement is not satisfied by the fact that the relevant information is present in the presentence report. Extending the *Nuno-Para* rule in this case, the 9th Circuit held that the defendant should have been notified that the court intended (1) to deny him the acceptance of responsibility reduction, (2) to depart from the guidelines based on his state of mind, (3) to enhance the sentence based on the firearm discharge and (4) to run the sentences consecutively rather than concurrently. Chief Judge Wallace concurred and dissented separately. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

**9th Circuit requires notice and hearing on disputed facts regarding acceptance of responsibility.** (480) The 9th Circuit held that because the presentence report recommended a reduction for acceptance of responsibility, defendant was led to believe that this was not an issue. Thus the trial court's denial of the two level reduction without notice "deprived [defendant] of an adequate opportunity to present information to the court on his acceptance of responsibility." The 9th Circuit held that the sentencing court "should have articulted its reasons and justifications for denying the section 3E1.1 reduction, should have notified the defendant before the sentencing hearing of these tentative findings, and should have held a hearing on the acceptance of responsibility issue." The case was remanded for a hearing on the facts in dispute on this issue. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

**D.C. Circuit denies acceptance of responsibility reduction where defendant admitted guilt on only 1 of 3 charges.** (485) Defendant was convicted of two drug-related offenses and a firearm offense. The D.C. Circuit found that defendant was properly denied a reduction in offense level for acceptance of responsibility, since defendant only admitted at trial to possessing the firearm, but refused to admit guilt on the drug-related charges. Defendant complained about the judge's reference to *U.S. v. Gordon*, 895 F.2d 932 (4th Cir.) (1990), which broadly stated that a defendant must accept responsibility for all of his criminal conduct. Although that statement might be extreme, this was not a case in which a defendant accepted responsibility for all but a trivial element of the offense charged. *U.S. v. Hazel*, __ F.2d __ (D.C. Cir. March 15, 1991) No. 90-3067.

**1st Circuit denies acceptance of responsibility reduction to defendant who continued to deny his role in offense.** (485) Defendant contended he was denied a reduction for acceptance of responsibility because he denied being the captain of the vessel smuggling the aliens, a fact he allegedly stipulated to at the time he signed his plea agreement. Defendant contended there was no inconsistency between his original stipulation to co-piloting the vessel and his denial of being the ship's captain. Although the 1st Circuit agreed that there was no contradiction between the two statements, it still found the reduction unwarranted. The record did not reflect any genuine feeling of remorse by defendant. In his allocution, defendant only denied his role as captain and did not admit his role as co-pilot. *U.S. v. Reyes*, __ F.2d __ (1st Cir. March 7, 1991) No. 90-2089.

**2nd Circuit denies acceptance of responsibility reduction despite reversal of several convictions.** (485) Defendant's convictions for mail and wire fraud and conspiracy were reversed by the 2nd Circuit, but it affirmed his perjury conviction. Defendant contended that the case should have been remanded for resentencing so that he might receive a reduction for acceptance of responsibility. The 2nd Circuit refused to remand the case, finding that although defendant made legal challenges to the validity of the mail and wire fraud and conspiracy charges, he made no such challenge to the perjury charges. Nothing prevented him from demonstrating his acceptance of responsibility for his false grand jury testimony. Moreover, there was no reason to believe that defendant would have received a different sentence for the perjury charge absent the other convictions. *U.S. v. Sacco*, __ F.2d __ (2nd Cir. March 11, 1991) No. 90-1002.

**2nd Circuit refuses acceptance of responsibility reduction due to defendant's post-plea behavior.** (485) The district court relied upon three factors in refusing to reduce defendant's offense level for acceptance of responsibility. Defendant (a) tested for cocaine three times during the pre-sentence period after he pled guilty, (b) failed to report to the probation office weekly, and (c) was involved in a crime while on bail. Although continued drug use alone probably does not constitute a sufficient reason to deny such a reduction, the 2nd Circuit found that the totality of defendant's post-plea behavior provided an adequate basis for the district court's refusal to grant the reduction. Prior case law does not require a district court to ignore a defendant' other crimes in considering a defendant's acceptance of responsibility. "[C]ontinued involvement in criminal activity casts substantial doubt on the sincerity of a defendant's protestations of contrition." *U.S. v. Woods*, __ F.2d __ (2nd Cir. March 12, 1991) No. 89-1605.

**7th Circuit denies acceptance of responsibility reduction despite defendant's cooperation with government.** (485) The district court denied defendant a reduction for acceptance of responsibility, even though he provided extensive informa-

tion concerning his marijuana distribution network, because he was reluctant to provide testimony in connection with the information he provided. The 7th Circuit affirmed the district court's decision, although it found it to be a "close question." At the sentencing hearing, the district judge stated that it had "grave doubts" about the veracity of anything defendant told the court, and that defendant was motivated to say anything to advance his cause, including making illusory promises in return for favorable sentencing recommendations. Since the district judge was in the best position to determine this issue, the appellate court refused to find an abuse of discretion. *U.S. v. Atterson*, __ F.2d __ (7th Cir. Jan. 25, 1991) No. 89-2157.

**8th Circuit rejects acceptance of responsibility reduction because defendant refused to admit extent of his involvement in drug scheme.** (485) Although defendant pled guilty, the 8th Circuit found that he was not entitled to a reduction for acceptance of responsibility. Despite evidence to the contrary, defendant "steadfastly" refused to admit the extent of his involvement in a drug distribution scheme or the volume of drugs involved. *U.S. v. Contreras*, __ F.2d __ (8th Cir. March 12, 1991) No. 90-5369.

## Criminal History (§ 4A)

**9th Circuit holds that defendant has the burden to show that prior conviction is constitutionally infirm.** (500) Application Note 6 to guideline section 4A1.2 states that "convictions which the defendant shows to have been constitutionally invalid may not be counted in the criminal history score." The 9th Circuit held that under this section, the defendant bears the burden of establishing that a conviction is constitutionally infirm. The court noted that "such challenges test a conviction's validity solely for the purpose of using it as a basis for enhanced punishment, and do not have preclusive effect in state or federal habeas corpus proceedings challenging the same conviction." Here, the court rejected defendant's arguments that his prior conviction violated the plea agreement, or that it was the result of ineffective assistance of counsel. *U.S. v. Mims*, __ F.2d __ (9th Cir. March 14, 1991) No. 90-30104.

**9th Circuit holds that prior sentence where defendant did not waive counsel may not be used as basis for departure.** (500)(730) Under guidline section 4A1.2(i) a sentence for a tribal court conviction is not counted in the calculation of a defendant's criminal history category. Nevertheless, the district court considered two uncounseled misdemeanor tribal court convictions in departing upward from the guidelines. The 9th Circuit reversed, holding that "any term of imprisonment imposed on the basis of an uncounseled conviction where the defendant did not waive counsel violates the 6th Amendment." The court also held that the convictions were "simply not serious enough" to warrant an upward increase in defendant's criminal history category. Chief Judge Wallace concurred and dissented separately. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

**9th Circuit holds that "burglary in the first degree using a firearm" is a violent crime for career offender purposes.** (520) Using the "categorical" approach of *U.S. v. Becker*, 919 F.2d 568 (9th Cir. 1990), the 9th Circuit held that the Idaho crime of "burglary in the first degree using a firearm" constituted a crime of violence within the meaning of 18 U.S.C. section 16 and guideline section 4B1.2(1). The court noted that breaking into any building in the dead of night with a criminal intent and wielding a firearm "creates very serious risks to both occupants of the building and law enforcement officials who become aware of the crime and seek to apprehend its perpetrator." *U.S. v. Sherman*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-50552.

## Determining the Sentence (Chapter 5)

**6th Circuit holds defendant who violates supervised release may be resentenced up to full period of supervised release.** (580) The 6th Circuit rejected defendant's argument that the maximum sentence he could receive upon revocation of his supervised release was the maximum sentence in his guideline range, minus the time he had already served. Defendant's reliance upon *U.S. v. Von Washington*, 915 F.2d 390 (8th Cir. 1990) and *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990), was misplaced, since these cases involved revocation of probation, not supervised release. Cases involving revocation of supervised release are not governed by 18 U.S.C. section 3565(a)(2), but by 18 U.S.C. section 3583(e), which plainly grants the district court discretion to resentence for any period up to the whole period of supervised release, with certain limiting exceptions. This difference is necessitated by differences in probation and supervised release. *U.S. v. Stephenson*, __ F.2d __ (6th Cir. March 15, 1991) No. 90-6037.

**6th Circuit finds revocation of supervised release to be an abuse of discretion.** (580) Defendant's supervised release was revoked after the district court found that defendant had committed an assault and had not refrained from the excessive use of alcohol. The 6th Circuit held that this was an abuse of discretion because there was no reliable evidence. The only evidence regarding the assault was the probation officer's statement that defendant was arrested for assaulting his step-uncle and defendant's admission that in arguing with his step-uncle, "[t]here was some pushing in there." Defendant's case never went to trial. Neither the step-uncle nor the arresting officer submitted letters, affidavits or testified at the revocation hearing. The only evidence that defendant had used alcohol to excess was defendant's admission that he routinely drank a 12-pack of beer in his home over the

course of a weekend. The district court also failed to make a written statement explaining the evidence relied upon or the reasons for revoking the release. *U.S. v. Stephenson*, __ F.2d __ (6th Cir. March 15, 1991) No. 90-6037.

**9th Circuit holds that District of Columbia statute did not impliedly repeal good time forfeiture statute.** (600) Petitioner argued that the Good Time Credits Act of 1986, now codified at D.C. Code Ann. sections 24-428 through 434 impliedly repealed an older D.C. statute, D.C. Code section 24-206(a) which required forfeiture of street time credit on revocation of parole. The 9th Circuit disagreed, holding that repeals by implication are not favored, and the older section could be read as a still valid exception to the general rule in the new statute requiring crediting time on parole against prisoner's sentences. *Tyler v. U.S.*, __ F.2d __ (9th Cir. March 13, 1991) No. 90-35389.

**8th Circuit upholds restitution order where defendant did not object at sentencing hearing.** (610) The 8th Circuit upheld a restitution order despite defendant's argument that she did not have the financial resources. The district court's order was based upon the plea agreement, and defendant did not object to it at the sentencing hearing. *U.S. v. Andersen*, __ F.2d __ (8th Cir. March 15, 1991) No. 90-2446.

**9th Circuit reverses consecutive sentences.** (660) Under guideline section 5G1.2 consecutive sentences may be imposed only if "no count carries an adequate statutory maximum" to contain the sentence provided by the guidelines' adjusted combined offense level. Here the statutory maximum for manslaughter, 120 months, was sufficient to cover the guideline sentence of 63 months. Accordingly, the district court erred in imposing consecutive sentences totaling 180 months. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

## Departures Generally (§ 5K)

**9th Circuit holds that court may not base departure on factual findings rejected by jury's not-guilty verdict.** (700)(770) Disagreeing with five other circuits, the 9th Circuit held that a district court may not make findings of fact during sentencing that have been implicitly rejected by a jury's not-guilty verdict. "We would prevert our system of justice if we allowed a defendant to suffer punishment for a criminal charge for which he or she was acquitted." The court acknowledged that guidelines section 1B1.3(a) permits a sentencing court to consider evidence of sentencing factors which are not elements of the offense of conviction. But the court held that this did not mean that a judge can "reconsider" critical elements of the offense to "avoid the restrictions of the guidelines and push the sentence to the maximum." The court noted that "the maximum sentences prescribed by the statutes were formulated in a time when a defendant was eligible for parole after serving 1/3 of his or her sentence less good time." Chief Judge Wallace dissented. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

**9th Circuit reverses upward departure for failure to state adequate reasons.** (700) When departing from the guidelines the court must state its reasons with sufficient particularity "to permit meaningful appellate review." This also requires the court to "explain the role each factor played in the departure decision." Here the court explained in general terms that the defendant had not accepted responsibilty, had discharged a firearm, had acted with premeditation, and had a tribal court conviction record showing a propensity to harm others. "But the court failed to indicate the extent each factor played in increasing the sentence almost 200 percent." The court also failed to give advance notice to defendant of its intention to depart. The sentence was reversed. Chief Judge Wallace concurred and dissented separately. *U.S. v. Brady*, __ F.2d __ (9th Cir. March 18, 1991) No. 89-30074.

**D.C. Circuit rules it has no authority to review methodology employed in downward departure.** (700)(720) Defendant was classified as a career offender based on two prior felony convictions. The district court found that defendant's criminal history was over-represented because one of his prior convictions arose under the Federal Youth Corrections Act. Accordingly, it departed downward from criminal history category VI to category IV. Defendant contended that in departing downward, the district court failed to follow the methodology in guideline section 4A1.3. The D.C. Circuit ruled that it had no authority to review the methodology employed by the district court in fashioning the downward departure. Defendant's argument would place an appellate court in the inconsistent position of being able to review the methodology and justifications for the degree of a downward departure, while leaving it unable to review a decision not to depart. The court also rejected defendant's argument that the district court misunderstood the scope of its authority to depart from the guidelines. *U.S. v. Hazel*, __ F.2d __ (D.C. Cir. March 15, 1991) No. 90-3067.

**3rd Circuit refuses to review whether government's refusal to move for downward departure was in good faith.** (710) Defendant contended that the government did not act in good faith in refusing to request a downward departure under guidelines section 5K1.1 for his cooperation. Moreover, he contended that the district court erred in not granting a downward departure, even in the absence of such a motion. The 3rd Circuit rejected both contentions. First, prior case law does not require the government to act in good faith in refusing to request a downward departure. Second, in the absence of such a motion, the district court is without authority to depart downward. The district court did consider defendant's cooperation, but did not think much of it. Thus,

it sentenced him at the top of the guideline range. *U.S. v. Gonzales*, __ F.2d __ (3rd Cir. March 8, 1991) No. 90-5577.

**9th Circuit holds that assistance in forfeiture did not warrant downward departure for substantial assistance.** (710) In the civil forfeiture agreement, the government acknowledged that defendant had rendered "substantial assistance" during the forfeiture proceedings. In the criminal action, the plea agreement stated that defendant was free to argue that he had provided substantial assistance to the government. The district court, however, determined that surrendering property in a civil forfeiture did not constitute substantial assistance under guidelines section 5K1.1, and the 9th Circuit agreed. The court held that section 5K1.1 is restricted to cases in which a defendant has provided substantial assistance in the investigation or prosecution of another person. The settlement agreement in this case did not mention any assistance in a criminal investigation or prosecution of another. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. March 8, 1991) No. 89-50505.

**5th Circuit finds insufficient facts to justify downward departure based upon coercion and duress.** (722) The 5th Circuit upheld the district court's determination that defendant did not satisfy the requirements for a downward departure under guideline section 5K2.12 based upon coercion, blackmail or duress. The district court found that section 5K2.12 did not apply because no threat of violence or injury was made. Although defendant's mother may have improperly influenced defendant, it did not amount to coercion serious enough to justify a downward departure. *U.S. v. Vela*, __ F.2d __ (5th Cir. March 8, 1991) No. 90-1065.

**5th Circuit rejects downward departure based upon defendant's family history.** (722) Defendant argued that the district court erred in refusing to depart downward due to the corrupting influence of her family history. At the sentencing hearing, defendant offered evidence that her stepfather had sexually abused her as a child and that this experience and her mother's denial of it predisposed her to commit the instant offense. The 5th Circuit found that the district court properly determined that this was not an adequate ground for a downward departure. Although the district judge found that defendant's home life was shocking and repulsive, he also found that her family background did not cause her to commit the current offense. There was no violation of the principles of 18 U.S.C. section 3661, which provides that no limit shall be placed on information concerning a defendant's background in sentencing. "Although a court may consider any information not legally prohibited, it is not free to ignore the mandate of the guidelines in formulating the sentence which such information produces." *U.S. v. Vela*, __ F.2d __ (5th Cir. March 8, 1991) No. 90-1065.

**Supreme grants certiorari to review whether departure based on both good and bad reasons can be upheld.** (733) In this case, the 7th Circuit ruled that a district court may not rely on an arrest record as a basis for an upward departure unless the court determines that the underlying facts are sufficiently trustworthy to be considered "reliable information." The defendant disputed the facts surrounding his prior arrest, and the district court failed to resolve the dispute. The 7th Circuit held that it was therefore improper for the district court to rely upon defendant's arrest record. However, because the district court relied on other proper factors in departing, the 7th Circuit found the error was harmless. On March 18, 1991, the Supreme Court granted certiorari to review this ruling. *U.S. v. Williams*, 910 F.2d 1574 (7th Cir. 1990) *cert. granted*, __ U.S. __, 111 S.Ct. __ (March 18, 1991) No. 90-6297.

**7th Circuit affirms upward departure where offense was committed while on bond.** (733) Defendant was convicted of stealing government documents relating to a pending tax fraud case against him. The 7th Circuit upheld an upward departure from criminal history category I to category III based on the fact that he conducted the instant offense while the tax fraud charges were pending against him. The court rejected defendant's contention that the departure was unwarranted because the tax fraud case and this case were so closely related that the fact he stole the documents while out on bond indicated nothing about his likelihood of committing future crimes. Most criminal defendants do not try to impede their prosecutions by stealing and destroying government evidence. *U.S. v. Berkowitz*, __ F.2d __ (7th Cir. March 15, 1991) No. 89-2125.

**1st Circuit affirms upward departure in alien smuggling case based upon endangerment of human lives.** (745) Defendant attempted to smuggle 70 illegal aliens from the Dominican Republic to Puerto Rico in a 30-foot open boat. The district court found that defendant had endangered their lives, and departed upward from 14 months to 36 months. The 1st Circuit affirmed, finding the dangerous circumstances sufficient to justify the departure. Unlike other boats routinely intercepted by marine authorities, defendant's boat had to be dismantled because immigration authorities concluded that it was unsafe. The new version of the guidelines no longer requires the concurrence of both "a large number of aliens" and "inhumane treatment" for the court to consider an upward departure. Since defendant's criminal conduct could have resulted in the death of 70 people, the extent of the departure was reasonable. *U.S. v. Reyes*, __ F.2d __ (1st Cir. March 7, 1991) No. 90-2089.

## Sentencing Hearing (§ 6A)

**9th Circuit upholds sentence based on preponderance of the evidence.** (755) Quoting earlier precedent, the 9th Circuit stated that in the sentencing context, a preponderance of the evidence is "a sufficient weight of evidence to convince a rea-

sonable person of the probable existance of the enhancing factor." Under this standard the court found that the district court could properly conclude that defendant intended to kill his victim. *U.S. v. Mun*, __ F.2d __ (9th Cir. March 18, 1991) No. 90-30214.

**1st Circuit requires disclosure of letters from victims relied on by the judge in sentencing.** (770) At sentencing the district judge quoted from a letter he had received from a victim, in imposing a longer sentence than the government had recommended. In addition, the court had received numerous letters from other victims that were not part of the presentence report. The 1st Circuit ordered resentencing, exercising its supervisory power to hold that whenever a sentencing court considers documents which are not required to be disclosed by Rule 32, Fed. R. Crim. P., it should "either make clear that the document is not being used for its factual content, or should disclose to the defendant as much as was relied on, in a timely manner, so as to afford the defendant a fair opportunity to examine and challenge it." *U.S. v. Curran*, __ F.2d __ (1st Cir. Feb. 14, 1991) No. 90-1181.

**8th Circuit holds district court improperly relied upon probation officer's hearsay testimony.** (770) At defendant's sentencing hearing, the probation officer testified that several other individuals had told him that they had received counterfeit money from defendant to distribute for him. The probation officer also recalled that another individual had his parole revoked as a result of his involvement in defendant's scheme. Based on this testimony, the district court found that defendant was a leader and that at least five participants were involved. The 8th Circuit found that it was error to base findings of fact on the probation officer's hearsay testimony without undertaking the Confrontation Clause analysis required by *U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990). The district court should have inquired whether the out-of-court declarants were unavailable as witnesses, and if so, whether the hearsay was admissible. Judge Gibson dissented, arguing that the other circuits' rule that the Confrontation Clause does not apply to sentencing hearings was a better rule. *U.S. v. Wise*, 923 F.2d 86 (8th Cir. 1991).

## Plea Agreements, Generally (§ 6B)

**8th Circuit finds failure to advise defendant of minimum and maximum penalty to be harmless error.** (780) Defendant contended that the district court violated Fed. R. Crim. P. 11 by failing to advise him that one count carried a maximum of life and a minimum of 10 years, and that another count carried a mandatory five-year consecutive sentence. Nevertheless, the record showed that at the plea hearing, defendant had the indictment, which contained this information, in front of him. He declined the court's offer to read the indictment and acknowledged that he had read and understood the plea agreement, which also contained this information. The prosecutor, preempting the district court, specifically advised the defendant of this information. Accordingly, the 8th Circuit found the error harmless. Judge McMillian dissented. *U.S. v. Young*, __ F.2d __ (8th Cir. March 12, 1991) No. 90-1294.

**9th Circuit gives substantial weight to contemporaneous statements in assessing voluntariess of pleas.** (790) Defendant argued that his prior conviction was constitutionally invalid because the government failed to adhere to the terms of the plea agreement. To support his contention, he offered an affidavit stating his understanding that the state would not seek to sentence him as a habitual offender. The 9th Circuit rejected his argument, stating that it attached "substantial weight to contemporaneous on-the-record statements in assessing the voluntariness of pleas." Here the defendant did not object at the time of sentencing even after it became apparent that the state court would sentence him as a habitual offender. Moreover nothing in the written plea agreement nor any statements on the record revealed an agreement concerning habitual offender status. Finally, a Florida appeals court had already rejected this claim when defendant raised it in a habeas corpus action. *U.S. v. Mims*, __ F.2d __ (9th Cir. March 14, 1991) No. 90-30104.

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

**9th Circuit refuses to consider issue not raised in the briefs.** (800) At oral argument, defendant asserted for the first time that the district court made insufficient findings with respect to his intent to kill. Because this issue was not raised in the briefs, the 9th Circuit declined to address it. *U.S. v. Mun*, __ F.2d __ (9th Cir. March 18, 1991) No. 90-30214.

**8th Circuit refuses to review government's appeal because defendant's overall sentence would not change.** (810) Defendant was convicted of several drug and firearms charges. Defendant received a 70-month sentence on the drug charges, to run concurrently to the mandatory 15-year sentence he received on the firearms charge. The government appealed the district court's calculation of defendant's offense level for the drug charges and criminal history calculation. The 8th Circuit refused to review the issues. Even if the government were successful, this would only increase defendant's maximum guideline sentence for the drug charges to 115 months. The 180-month sentence defendant actually received was more than this. *U.S. v. Gibson*, __ F.2d __ (8th Cir. March 12, 1991) No. 89-2994.

**9th Circuit refuses to review refusal to depart downward.** (810) Defendant asserted that the district court should have departed downward pursuant to section 5K2.10 of the guidelines because of the victim's wrongful conduct in provoking him. The 9th Circuit held that it had no jurisdiction to re-

view this claim. *U.S. v. Mun*, __ F.2d __ (9th Cir. March 18, 1991) No. 90-30214.

## Forfeiture Cases

**1st Circuit affirms denial of relief from forfeiture judgment under Fed. R. Civ. P. 60(b). (920)(960)** The government's motion for summary judgment in a forfeiture case was granted after claimant failed to oppose the motion. After final judgment was entered, claimant filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). The 1st Circuit affirmed the denial of the motion, since claimant did not have a potentially meritorious defense. Claimant did not deny the facts set forth in a DEA agent's affidavit, which established that claimant's officers and employees used the property to distribute cocaine. The court also rejected claimant's argument for application of Rule 60(b)(6) based on the gross neglect of its former counsel. Senior Circuit Judge Aldrich dissented, arguing that claimant came "very close" to having a potentially meritorious defense, since all non-operating club members of claimant were apparently unaware of the officers' misconduct. *U.S. v. Parcel of Land with Building, Appurtenances and Improvements, Known as Woburn City Athletic Club, Inc., at 5 Sylvan Road, Woburn, Massachusetts*, __ F.2d __ (1st Cir. March 12, 1991) No. 90-1752.

**3rd Circuit upholds use of government informant paid a reward for forfeited assets. (900)** Defendant objected to the government's use of an informant who, in return for his cooperation, was to receive a reward of up to 25 percent of the value of any forfeited property. Although this objection might have more properly been brought by motion prior to trial, the 3rd Circuit considered the issue on the merits, since current information concerning the government's reward policy was not made available to defendant until the eve of trial. The 3rd Circuit rejected defendant's contention that the use of such a "contingent fee operative" violated due process. Although conceding that the informant's chances of collecting the reward were probably enhanced by defendant's conviction, the use of the informant was not outrageous. The informant's payment was properly a matter for the jury to consider in assessing the informant's credibility. *U.S. v. Gonzales*, __ F.2d __ (3rd Cir. March 8, 1991) No. 90-5577.

**1st Circuit declines to determine jurisdictional question since government would prevail on the merits. (920)** After final judgment in a forfeiture action was entered in favor of the government, eviction proceedings were commenced and an auction of the property was scheduled. Claimant's motion for relief from judgment under Fed. R. Civ. P. 60(b)(6) was denied, and claimant appealed. The government argued that the appellate court lacked jurisdiction because the district court's jurisdiction was dependent upon its control of the property. Claimant contended that the district court retained jurisdiction over the property while it remained in the custody of the United States Marshall. The 1st Circuit found that it need not "hack its way through this jurisdictional bramble bush," since the case could be resolved on the merits in favor of the government. *U.S. v. Parcel of Land with Building, Appurtenances and Improvements, Known as Woburn City Athletic Club, Inc., at 5 Sylvan Road, Woburn, Massachusetts*, __ F.2d __ (1st Cir. March 12, 1991) No. 90-1752.

### CERTIORARI GRANTED

(733) *U.S. v. Williams*, 910 F.2d 1574 (7th Cir. 1990) *cert. granted*, __ U.S. __, 111 S.Ct. __ (March 18, 1991) No. 90-6297.

**EXHIBIT H**

FEDERAL EMPLOYEES' GROUP LIFE INSURANCE
SCHEDULE OF BASIC INSURANCE WITHHOLDINGS

| Annual Pay | | Basic | Amount of withholdings per pay period | | |
|---|---|---|---|---|---|
| Greater than | But no greater than | Insurance | Biweekly | Semimonthly | Monthly |
| $90,000 | $91,000 | $93,000 | $17.21 | $18.64 | $37.27 |
| 91,000 | 92,000 | 94,000 | 17.39 | 18.84 | 37.68 |
| 92,000 | 93,000 | 95,000 | 17.58 | 19.04 | 38.08 |
| 93,000 | 94,000 | 96,000 | 17.76 | 19.24 | 38.48 |
| 94,000 | 95,000 | 97,000 | 17.95 | 19.44 | 38.88 |
| 95,000 | 96,000 | 98,000 | 18.13 | 19.64 | 39.28 |
| 96,000 | 97,000 | 99,000 | 18.32 | 19.84 | 39.68 |
| 97,000 | 98,000 | 100,000 | 18.50 | 20.04 | 40.08 |
| 98,000 | 99,000 | 101,000 | 18.69 | 20.24 | 40.48 |
| 99,000 | 100,000 | 102,000 | 18.87 | 20.44 | 40.88 |
| 100,000 | 101,000 | 103,000 | 19.06 | 20.64 | 41.28 |
| 101,000 | 102,000 | 104,000 | 19.24 | 20.84 | 41.68 |
| 102,000 | 103,000 | 105,000 | 19.43 | 21.04 | 42.08 |
| 103,000 | 104,000 | 106,000 | 19.61 | 21.24 | 42.48 |
| 104,000 | 105,000 | 107,000 | 19.80 | 21.44 | 42.89 |
| 105,000 | 106,000 | 108,000 | 19.98 | 21.64 | 43.29 |
| 106,000 | 107,000 | 109,000 | 20.17 | 21.84 | 43.69 |
| 107,000 | 108,000 | 110,000 | 20.35 | 22.04 | 44.09 |
| 108,000 | 109,000 | 111,000 | 20.54 | 22.24 | 44.49 |
| 109,000 | 110,000 | 112,000 | 20.72 | 22.44 | 44.89 |
| 110,000 | 111,000 | 113,000 | 20.91 | 22.65 | 45.29 |
| 111,000 | 112,000 | 114,000 | 21.09 | 22.85 | 45.69 |
| 112,000 | 113,000 | 115,000 | 21.28 | 23.05 | 46.09 |
| 113,000 | 114,000 | 116,000 | 21.46 | 23.25 | 46.49 |
| 114,000 | 115,000 | 117,000 | 21.65 | 23.45 | 46.89 |
| 115,000 | 116,000 | 118,000 | 21.83 | 23.65 | 47.29 |
| 116,000 | 117,000 | 119,000 | 22.02 | 23.85 | 47.70 |
| 117,000 | 118,000 | 120,000 | 22.20 | 24.05 | 48.10 |
| 118,000 | 119,000 | 121,000 | 22.39 | 24.25 | 48.50 |
| 119,000 | 120,000 | 122,000 | 22.57 | 24.45 | 48.90 |
| 120,000 | 121,000 | 123,000 | 22.76 | 24.65 | 49.30 |
| 121,000 | 122,000 | 124,000 | 22.94 | 24.85 | 49.70 |
| 122,000 | 123,000 | 125,000 | 23.13 | 25.05 | 50.10 |
| 123,000 | 124,000 | 126,000 | 23.31 | 25.25 | 50.50 |
| 124,000 | 125,000 | 127,000 | 23.50 | 25.45 | 50.90 |
| 125,000 | ..... | 128,000 | 23.68 | 25.65 | 51.30 |

*U.S.G.P.O:1991-282-341:40066