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COMMENDATIONS

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

Roger S. Bamberger (Ohio, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding success in prosecuting two complex drug investigations of individuals involved in extensive marijuana and cocaine conspiracies.

Joseph W. Bottini (District of Alaska), by Morris M. Pallozzi, Director, Office of Enforcement, National Marine Fisheries Services, National Oceanic and Atmospheric Administration, Department of Commerce, Silver Spring, Maryland, for his valuable contribution to the success of the 1992 In-Service training program at the Federal Law Enforcement Training Center.

Terree Bowers (California, Central District), by George Laurie, Chairman, Advisory Committee, and Michael L. Powell, Vice President, Western Region, National Insurance Crime Bureau, Glendora, for his participation at a recent general membership meeting, and for his excellent presentation on the efforts of the United States Attorney's office to combat insurance fraud.

J. Michael Buckley (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his successful prosecution of three drug traffickers, the convictions of which led to a subsequent investigation in California and resulted in a record seizure of the drug PCP.

Mary Elizabeth Carmody (District of Massachusetts), by James H. French, Chief Field Counsel, Office of Field Legal Services, U.S. Postal Service, Windsor, Connecticut, for her excellent representation and services rendered to the Postal Service in a complex environmental case.

Gary Cobe (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for his professionalism and legal skill in successfully prosecuting a complex fraud case in which over 100 investors were defrauded of approximately $1.5 million in a stock option investment scam.

Jerry J. Cooper (District of Colorado), by James B. Webb, Forest Supervisor, Rio Grande National Forest, Department of Agriculture, Monte Vista, for his success in obtaining a conviction in a timber trespass case.

Miriam Duke, Michael Solis, and ***John Lynch*** (Georgia, Middle District), by Charles W. Jones, Supervisory Special Agent, FBI, Atlanta, for their valuable assistance and cooperative efforts in the successful resolution of procedural questions of critical importance in an ongoing investigation of individuals involved in heroin trafficking from southeast Asia to the United States.

Larry Eastepp (Texas, Southern District), was presented a plaque by Theodore B. Royster, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, for his valuable assistance and support in a federal arson investigation in downtown historic Jacksonville, Texas.

Thomas J. Eicher and ***Thomas H. Suddath, Jr.*** (Pennsylvania, Eastern District), were presented recognition awards by the Drug Enforcement Administration at a recent Violent Traffickers Project meeting for their outstanding success in the prosecution of 42 individuals involved in a violent Jamaican drug trafficking group. All defendants were convicted and several life sentences were imposed.

Larry Finder (Texas, Southern District), by Rosanne S. Cannon, Attorney-Advisor, Office of Legislative Affairs, Department of Justice, Washington, D.C., for his excellent presentation at the Money Laundering conference held recently in Houston.

Jay Golden and ***Tom Payne*** (Mississippi, Southern District), by Dick Molpus, Secretary of State, State of Mississippi, and Gordon Kennedy, Securities Investigator, Office of the Secretary of State, Jackson, for their outstanding legal skill and professionalism in the successful prosecution of the last of the principals in a complex securities fraud case.

Odell Guyton (Pennsylvania, Eastern District), received a recognition award from the Drug Enforcement Administration for his outstanding success in the resolution of two cases involving over sixty members of a violent Jamaican drug trafficking group. All of the individuals either pleaded guilty or were found guilty, two were sentenced to life without parole and two were sentenced to terms in excess of 15 years.

Geneva Halliday (Michigan, Eastern District), by Hayes P. Haddox, District Counsel, Army Corps of Engineers, Louisville, for her legal skill and expertise in negotiating a highly favorable settlement in a complex case involving several parties, cross-claims and counterclaims.

Michael A. Hirst (California, Eastern District), by Colonel Alvin E. Schlechter, Staff Judge Advocate, Sacramento Air Logistics Center, McClellan Air Force Base, for his professionalism and legal skill in negotiating two torts suits affecting McClellan Air Force Base and for obtaining highly favorable results in each case.

Sean Hoar (District of Oregon), by Robin L. Montgomery, Special Agent in Charge, FBI, Portland, for his valuable assistance and professional negotiations in a real estate scam case in Bend, Oregon, involving a federal fugitive for probation from a prior drug conviction.

Peter Hsiao (California, Central District), by Nancy J. Marvel, Regional Counsel, Environmental Protection Agency, San Francisco, for his valuable representation and special efforts in obtaining substantial penalties in two environment cases, thereby establishing excellent precedents in future cases.

Michael A. Johns (District of Arizona), by John J. Casey, Trade Practices Division, Office of General Counsel, Department of Agriculture, Washington, D.C., for his special assistance in the enforcement of a subpoena in a civil action.

Darilynn J. Knauss (Illinois, Central District), by Dominic F. Napolski, Special Agent in Charge, U.S. Customs Service, Chicago, for her professionalism and legal skill in the successful prosecution of four individuals who operated a sophisticated importation, manufacturing and distribution scheme in the trafficking of counterfeit merchandise.

Christy Lee (Alabama, Southern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for her demonstration of legal and prosecutive skills in bringing an embezzlement case of a labor union official to a successful conclusion.

Kim Lindquist (District of Idaho), by Sergeant Alan Creech, City County Narcotics Unit, Nampa Police Department, for his outstanding cooperative efforts resulting in the conviction of an individual on narcotics charges.

Richard A. Lloret (Virginia, Western District), by Stran Trout, District Counsel, Dratin Hill, District Director, and Dawn V. DiBenedetto, Attorney, Small Business Administration, Richmond, for his professionalism and legal skill in negotiating the settlement of a financial litigation claim.

Terry L. Lloyd (Georgia, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding efforts and valuable assistance in the investigation of bomb threats and arson directed against a company in Wrens, Georgia.

SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF OKLAHOMA

Ed Kumiega, Assistant United States Attorney for the Western District of Oklahoma, was commended by John E. Cross, Assistant Regional Director, Law Enforcement, Fish and Wildlife Service, Department of the Interior, for his professional guidance, legal skill, and cooperative efforts in the prosecution of wildlife and environmental violations. ***Mr. Kumiega*** has spearheaded litigation against multiple petroleum corporation defendants causing wildlife mortality in open oilfield pits and tanks. To date, over 40 oil corporations have been successfully prosecuted for violation of the Migratory Bird Treaty Act, and these prosecutions have generated the netting or abatement of 90 percent of the open oilfield hazards within the Western District of Oklahoma. It is anticipated that the elimination of these oilfield hazards will most favorably impact on the declining national migratory bird populations.

In addition, ***Mr. Kumiega*** coordinated the successful prosecution of illicit reptile trafficking and smuggling of polar bear trophies into the United States. Both cases were of national, as well as international, significance and will serve as a deterrent to the illegal commercialization of our nation's valuable wildlife resources.

* * * * *

EASTERN DISTRICT OF PENNSYLVANIA

Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, received the following letter dated March 12, 1992, from Stuart M. Gerson, Assistant United States Attorney, Civil Division, Department of Justice:

> A belated note to congratulate you on the fine result we reached in the case of U.S. v. Mullins and Brown. This case is indicative both of our ability to cooperate and of the fine resources you have developed in your office.
>
> As you probably know, we have had significant recent success both in the United States Attorneys' Offices and in the Civil Division itself in making substantial FIRREA recoveries. I know this fine work will continue.

* * * * *

ASSET FORFEITURE SUPPORT STAFF CONFERENCE IN HOUSTON

Suzanne Warner, Assistant Director, Attorney General's Advocacy Institute, Office of Legal Education, Executive Office for United States Attorneys, Washington, D.C., commended a number of Assistant United States Attorneys for their valuable contribution to the success of the Advanced Asset Forfeiture Support Staff Conference held recently in Houston, Texas. Their presentations helped enhance the skills of staff who provide essential support for the Asset Forfeiture Program. The Assistant United States Attorneys who participated in the Conference were: ***Robert Clark,*** District of Colorado; ***David Novak,*** Southern District of Texas; ***Carolyn Reynolds,*** Central District of California; ***Leslie Ohta***, District of Connecticut; ***Emily Sweeney,*** Northern District of Ohio; ***John Harmon,*** Middle District of Alabama; ***Laurie Sartorio,*** District of Massachusetts; and ***James Swain,*** Eastern District of Pennsylvania. ***Minnie Talton,*** (Paralegal), Central District of California, was also commended for her participation in the Conference.

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HONORS AND AWARDS

CRIME VICTIMS FUND AWARDS

At a White House ceremony to commemorate National Crime Victims Rights Week which began Sunday, April 26, 1992, President Bush and Attorney General William P. Barr joined in honoring several individuals for their exemplary service on behalf of crime victims and their families. Following the ceremony, Judge Tim Murphy, Deputy Associate Attorney General, and Brenda Meister, Acting Director, Office for Victims of Crime, conducted a separate ceremony in the Judiciary Hearing Room of the United States Senate where they presented Crime Victims Fund Awards to the following Department of Justice and United States Attorney's office employees, all of whom were guests at the White House:

Nancy L. Rider, Assistant Director of the Financial Litigation Staff, Executive Office for United States Attorneys (EOUSA), was credited with the creation of an extensive national training program, through EOUSA, to improve the collection of criminal fines by the Administrative Office of U.S. Courts. Over 3,000 prosecutors, probation officers, and court clerks throughout the nation received training under this program in 1991. ***Ms. Rider*** also drafted model procedures to guide United States Attorneys and probation departments in their collection of criminal fines, and has written an informative pamphlet for convicted federal defendants entitled, "What You Need to Know About Your Criminal Debts."

Riley J. Atkins, Assistant United States Attorney for the District of Oregon, was responsible for the United States Attorney's Office for the District of Oregon to become the first to aggressively enforce a provision of the Federal Debt Collection Procedures Act. The Act, which became effective in May, 1991, stipulates that a federal defendant's money, which has been deposited in a court as a bail bond, may be held over and applied to an unpaid fine. A total of $300,000 in bail money, posted on behalf of a federal defendant, was seized to pay the individual's outstanding fine. The prompt collection of this fine provided a sizable addition to the Crime Victims Fund, and set a precedent, motivating other United States Attorneys to vigorously enforce the new Act.

Pat Walsh, Senior Debt Collection Agent, and ***Rosemary Zimbelman,*** Paralegal Specialist, United States Attorney's Office for the District of Idaho, were instrumental in the collection of almost $2.3 million in 1991 alone. In the same year, they increased assessment collections by 650 percent, fine collections by 48 percent, and restitution collections by 16 percent, and achieved an overall 21 percent increase in criminal collections. Their persistence and commitment have measurably increased the funding available to victim programs through the Crime Victims Fund.

Paul Horner, Chief, Inmate Financial Responsibility/Victim-Witness Section, Bureau of Prisons, is largely responsible for the success of the Inmate Financial Responsibility Program. Through this program federal inmates work with their caseworkers to create individual plans for meeting their court-ordered payment obligations. Since the program's inception in 1987, the Bureau of Prisons has collected over $51 million for the Crime Victims Fund. Also, in 1991, 86 percent of inmates with court imposed financial obligations were making systematic payments, and over 26,000 inmates currently in custody have fully satisfied their financial responsibilities. ***Mr. Horner*** has provided training to staff from forty-five correctional institutions nationwide and to numerous agencies within the Department of Justice.

John D. Caulfield, Warden, Eglin Federal Prison Camp, Eglin, Florida, has achieved the greatest success in collecting criminal fines in a Bureau of Prisons facility. In 1991, the average amount collected per inmate was $238.00 -- the highest figure for any federal facility. Over 71 percent of its inmates have fully satisfied their court-ordered financial obligations.

Margaret C. Hambrick, Warden, Federal Medical Center, Lexington, Kentucky, has promoted and maintained an active Inmate Financial Responsibility Program, and has made participation an integral part of each inmate's overall programming assessment. This Medical Center, the largest facility in the Bureau of Prisons housing over 1,600 female offenders, is also one of the first federal institutions to create a computer program for tracking inmate payments. This system has enabled the Medical Center to accurately monitor all inmates, including those who have more than one court-ordered financial obligation.

Kim Whatley, a Programs Specialist with the United States Probation Office of the Administrative Office of U.S. Courts, also received an award for her valuable participation as a trainer in training programs provided to prosecutors, probation officers, and court clerks by the Executive Office for United States Attorneys.

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FINANCIAL MANAGEMENT IMPROVEMENTS AWARDS

On April 29, 1992, the Financial Management Service of the Department of the Treasury presented its prestigious Awards for Distinction in Financial Management Improvements. These awards, made annually to individuals or groups in a department or agency within the Executive Branch, State and local governments, are the highest awards granted by the Federal Government for specific achievements in the areas of collections management, payments management, credit management/debt collection, inventory management, and financial/civil litigation. Employees of the Department of the Treasury are not eligible for these awards. This year a new award category was created to honor a United States Attorney for exceptional achievements in the area of civil debt collection. The United States Attorneys and Department of Justice employees who received awards were:

U.S. Attorney Award for Financial/Civil Litigation

Joyce J. George, United States Attorney for the Northern District of Ohio, for providing unexcelled leadership and vision in the area of financial litigation. ***Ms. George,*** the first United States Attorney to receive this award, has raised civil debt collection and litigation to greater prominence in U.S. Attorneys' offices across the country. She was instrumental in incorporating model performance standards nationwide; in training U.S. Attorney personnel in the Federal Debt Collection Procedures Act; and, most importantly, in developing the U.S. Attorney's component of the Department of Justice Debt Collection Plan, a critical component of the Department's program to recover monetary obligations.

Secretary's Certificate Of Appreciation
For Distinction In Financial Management Improvements

Debra M. DeGraff, Phyllis J. Little, and ***Rose Mary Ostrand,*** United States Attorney's Office for the Southern District of Iowa, for improving the implementation of agency credit management practices through procedural and systems changes in the Financial Litigation Unit by compiling, implementing, and enforcing a policies and procedures manual for the Unit. This resulted in a $2.6 million increase in collections over FY 1990.

Secretary's Certificate of Award for Distinction in Financial Management Improvements

Charles W. Larson, United States Attorney, Northern District of Iowa; ***Joseph M. Whittle,*** United States Attorney, Western District of Kentucky; ***Henry D. Knight,*** Assistant United States Attorney, District of South Carolina; ***S. David Schiller,*** Assistant United States Attorney, Eastern District of Virginia; ***James E. Mueller,*** Assistant United States Attorney, District of Arizona; and ***Kathleen A. Haggerty***, Assistant Director, Financial Litigation Staff, Executive Office for United States Attorneys, for securing passage of the landmark Federal Debt Collection Procedures Act of 1990, which, for the first time, established uniform remedies for the collection of delinquent civil debt by U.S. Attorneys and authorized private counsel. By allowing the Department of Justice to create standard policies, procedures, and forms to manage debt collection litigation, savings in excess of $100 million can be expected annually.

Debra Kay Clark, Jean Ann Gregory, Janice J. Grout, Patricia Mahoney, and ***Kristin I. Tolvstad,*** United States Attorney's Office for the Northern District of Iowa, for revitalizing debt collection activities within their office. By instituting inventive approaches to civil debt collection, such as a garnishment procedure in conjunction with the Iowa State Treasurer's Office, this team increased civil collections by 19 percent over FY 1990.

Robert N. Ford, Deputy Assistant Attorney General, Debt Collection Management, Justice Management Division, and staff, ***Imogene H. McCleary, Diane J. Miller,*** and ***Linda A. Parke,*** for developing the Nationwide Central Intake Facility (NCIF), a centralized, automated tracking system of delinquent debts referred to the Department of Justice for litigation. During FY 1991, over 26,000 cases valued at $457 million were processed through the NCIF.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Deputy Attorney General And Associate Attorney General

On April 9, 1992, the United States Senate confirmed by unanimous consent the nomination of ***George J. Terwilliger, III*** to be Deputy Attorney General for the Department of Justice. ***Mr. Terwilliger*** was formerly United States Attorney for the District of Vermont.

The United States Senate also confirmed by unanimous consent the nomination of ***Wayne A. Budd*** to be Associate Attorney General for the Department of Justice. ***Mr. Budd*** was formerly United States Attorney for the District of Massachusetts.

[Note: On April 30, 1992, Associate Attorney General Budd was dispatched to Los Angeles to personally oversee the federal investigation of the Los Angeles police case to determine whether there was a violation of the civil rights laws and to coordinate with the state and local officials on the scene with respect to any assistance that may be required.]

* * * * *

William McAbee (Georgia, Southern District), by Douglas C. Crouch, Assistant Chief Inspector (Internal Security), Internal Revenue Service, Washington, D.C., for his excellent presentation before the Internal Security first-line managers during a recent management training course.

Thomas I. Meehan (Texas, Southern District) by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for his significant contributions to the success of a heroin trafficking investigation conducted by the Bryan/College Station, Texas Resident Agency.

Thomas I. Meehan and ***Andy Andrews*** (Texas, Southern District), by Donald W. Manry, Narcotics Investigator, Brazos Valley Narcotics Task Force, Bryan, Texas, for their high standards of professionalism and skill in the trial of a complex narcotics case in which, out of approximately 20 defendants, only one was found not guilty.

Rosalyn Moore-Silver (District of Arizona), by Robert E. Rogers, Special Agent in Charge, Bureau of Land Management, Department of the Interior, Phoenix, for her outstanding legal and cooperative efforts in the revision and subsequent approval by the District Court of the Consolidated Arizona Collateral Schedule.

James V. Moroney (Ohio, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for successfully prosecuting a number of individuals who prepared and submitted false income documentation to the Department of Housing and Urban Development.

Peter O. Mueller (Washington, Western District), by Richard M. Evans, Assistant Director, Office of Immigration Litigation, Civil Division, Department of Justice, Washington, D.C., for his successful defense of a significant injunctive suit challenging the Immigration and Naturalization Service's detention procedures in cases involving convicted aliens who have been placed in deportation proceedings.

Daniel J. O'Brien (California, Central District), by D. Paul Henry, Chief Park Ranger, Joshua Tree National Monument, National Park Service, Twentynine Palms, for his excellent training session on court procedures and case preparation for a group of National Monument and Bureau of Land Management Rangers.

David Portelli and ***Graham Teall*** (Michigan, Eastern District), by D/F/Lt. L. Michael Knuth, Unit Commander, LAWNET, Ypsilanti, for their excellent presentation on asset forfeiture at a group meeting of local law enforcement officers.

Carolyn Reynolds (California, Central District), by Takeyoshi Hongo, Vice Director, Trial Division, Tokyo District Public Prosecutor's Office, for her successful efforts in obtaining an order rejecting a discovery request in Los Angeles that would have adversely impacted upon a murder trial pending in Tokyo since 1988.

Ed Robbins (California, Central District), by Albert H. Larson, Assistant Regional Counsel, (General Legal Services), Internal Revenue Service (IRS), San Francisco, for his continued excellent service and spirit of cooperation in representing IRS in a number of cases over the years.

Jesse Rodriguez (Texas, Southern District), by Mindi Miller, Ph.D., Rice University, Houston, for his fourth annual presentation before the Rice University students, and for his excellent presentation on the subject of "Chemical Alterations in Behavior."

Gene Seidel (Alabama, Southern District), by Major Dennis W. Heuer, Deputy District Engineer for Civil Works, Army Corps of Engineers, Mobile, for his legal skill and professionalism in negotiating a highly favorable settlement of a pending civil action against the Army Corps of Engineers and a supervisory employee.

Wevley William Shea, United States Attorney (District of Alaska), by Rear Admiral D. E. Ciancaglini, Commander, Seventeenth Coast Guard District, Juneau, for his valuable support and spirit of cooperation in many cases and law enforcement matters, and especially in recent settlement negotiations of a forfeiture action against a Polish fishing vessel for illegal fishing inside U.S. waters.

Richard E. Signorelli (New York, Southern District), by Robert A. Bryden, Special Agent in Charge, Drug Enforcement Administration, New York, for his success in obtaining a conviction of an individual for the distribution of significant quantities of heroin.

James R. Sullivan and ***Robert I. Lester*** (California, Central District), by the Honorable A. Wallace Tashima, Judge, U.S. District Court, Los Angeles, for their excellent representation and prompt action in responding to an urgent development in a civil case filed against him.

Kathleen Tafoya and ***Guy Till*** (District of Colorado), by L. V. Kohler, Investigator, Tarrant County Narcotics Intelligence and Coordination Unit, Fort Worth, for their professional legal skills and excellent representation in a cocaine conspiracy case involving the Crips.

Robert M. Taylor (Washington, Western District), by L. J. Kramer, Commanding Officer, Naval Submarine Base, Bangor, Silverdale, for his excellent representation and valuable assistance in bringing a Title VII suit to a successful conclusion.

Lamar Walter (Georgia, Southern District), by Julian W. De La Rosa, Inspector General, and J.C. Kean, Regional Inspector General for Investigations, Department of Labor, Atlanta, for his excellent and invaluable prosecutive efforts in a Job Training Partnership Act fraud case in which a Georgia representative and his associate were convicted.

Donetta D. Wiethe (Ohio, Southern District), by Colonel Herbert F. Harback, Army Corps of Engineers, Department of the Army, Louisville, Kentucky, for her successful prosecution of a complex case involving violations of the Rivers and Harbors Act of 1899, the Clean Water Act, and the Wild and Scenic Rivers Act.

James Wilson (Pennsylvania, Western District), by James R. Richards, Inspector General, Department of the Interior, Washington, D.C., for his outstanding success in bringing about the conviction of a coal company owner for defrauding the Department of the Interior of reclamation fees owed to the Abandoned Mine Reclamation Fund.

William S. Wong and ***Patrick K. Hanley*** (California, Eastern District), by Frank A. Renzi, Special Agent in Charge, U.S. Secret Service, Sacramento, for their successful prosecution of a major fraud trial in which defendants stole over $300,000 from the Santa Fe Energy Company by submitting fraudulent invoices for work never performed under the name of a fictitious company.

William L. Woodward (Michigan, Eastern District), by Richard A. Cook, a former Assistant United States Attorney, now with a law firm in South Bend, for his excellent representation and valuable assistance in the defense of two lawsuits filed against him by an individual previously convicted in a murder-for-hire scheme in the Northern District of Indiana.

Thomas Zaccaro and ***Elaine Wood*** (New York, Southern District), by Paula A. Loviner, Counsel, Defense Contract Management Command, Defense Logistics Agency, Boston, for their valuable representation and professional services in bringing a civil action to a successful conclusion.

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The Attorney General stated that it is incumbent upon the Department of Justice to support those states that are operating their prisons in good faith compliance with the Constitution and that seek relief from the undue constraints of protracted prison litigation. He said, "The cap has no basis in the Constitution; it is wrong as a matter of law, of policy and of public safety. It is wreaking havoc with public safety and victimizing innocent Philadelphians. It should be removed immediately."

* * * * *

Drug Testing And Casual Handling Of Marijuana And Cocaine

On April 13, 1992, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, forwarded a memorandum to all United States Attorneys and Administrative Officers from Joseph A. Norris, Director, Drug-Free Workplace Program, Justice Management Division, concerning drug testing and casual handling of marijuana and cocaine. Mr. Norris and representatives from the Executive Office for United States Attorneys visited several United States Attorneys' offices to discuss the implementation of the Drug-Free Workplace Program. During the visits a number of employees expressed concerns that the handling of drug exhibits could cause them to test positive if called for random testing.

Experiments were conducted on this issue to "determine the possibility of testing positive . . .as a result of absorbing the drug during handling." In these experiments, no one handling marijuana tested higher than 25ng/ml. Laboratory analysis under the testing program is designed to detect metabolites of marijuana at 100ng/ml or higher. Therefore, participants of this study tested significantly below the screening cut-off levels. Similarly, no one handling cocaine tested at 300ng/ml -- the screening cut-off. The results of these experiments were reported in a letter to the editor of the Journal of Analytical Toxicology, a copy of which is attached at the Appendix of this Bulletin as Exhibit A.

If you have any questions, please contact Mr. Norris at (202) 514-6716 or Legal Counsel, Executive Office for United States Attorneys, at (202) 514-4024.

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Personal And Household Crimes

On April 19, 1992, the Bureau of Justice Statistics (BJS), a Department of Justice component in the Office of Justice Programs, said that the estimated number of personal and household crimes in the United States rose 1.9 percent last year, increasing from 34.4 million in 1990 to 35.1 million in 1991. The preliminary crime rate estimates are from a National Crime Victimization Survey, which is an ongoing data collection program that uses U.S. Bureau of the Census interviewers.

During 1991 approximately 95,000 people in about 48,000 nationally representative U.S. households were asked about crimes they might have experienced during the preceding six months. The data include both crimes reported to police and those that go unreported. Because the BJS survey includes unreported crime, there may be differences in these data from what the Federal Bureau of Investigation publishes in its Uniform Crime Reports, which are based on police reports. BJS crime rate estimates are as follows:

-- About 37 percent of all crimes and 49 percent of all violent crimes were reported to law enforcement agencies last year.

-- An estimated 22 million personal and household crimes were not reported to the police during 1991.

-- The percentage of unreported crime last year was almost identical to the percentage in 1990.

-- Statistically significant increases in the preliminary estimates of rape and simple assault occurred last year, but the rates per capita were only marginally higher than in 1990.

-- The preliminary estimates of the rape rate rose to 1.0 per 1,000 in 1991. This estimate, which was higher than the rate for the preceding year, is similar to rates BJS reported in previous years. For example, in 1978, 1979 and 1981, the per capita rape rates were at or near the 1991 estimate.

-- Last year's ratio of simple assaults per 1,000 U.S. inhabitants 12 years old and older was only marginally higher than the 1990 rate.

-- The estimated 52.6 burglaries per 1,000 U.S. households last year was at or near the lowest rate since the survey began in 1973.

-- Between 1981 and 1991, burglary rates declined 40 percent. During the same period robbery rates declined 24 percent -- from 7.4 robberies per 1,000 people to 5.6 per 1,000 in 1991.

Steven D. Dillingham, Director, Bureau of Justice Statistics, said, "Last year's estimated increase brings the total number of victimizations during 1991 to a level that is still well below the peak number of almost 41.5 million recorded in 1981. In 1981, the survey estimated there were about 6.6 million violent crimes -- that is, about 35.3 violent crimes for every 1,000 people 12 years old or older, compared to an estimated 6.4 million such crimes, or 31.3 per 1,000 people last year."

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Project Triggerlock
Summary Report

Cases Indicted From April 10, 1991 Through March 31, 1992

Description	***Count***	***Description***	***Count***
Indictments/Informations	4,572	Prison Sentences	9,792.5 years; 8 life sentences
Defendants Charged	6,030		
Defendants Convicted	2,643	Sentenced to prison	1,464
Defendants Acquitted	97	Sentenced w/o prison or suspended	137

Numbers are adjusted due to monthly activity, improved reporting and the refinement of the data base. These statistics are based on reports from 94 offices of the United States Attorneys, excluding District of Columbia's Superior Court. [NOTE: All numbers are approximate.]

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Conviction Of Organized Crime Boss John Gotti

On April 2, 1992, Attorney General William P. Barr made the following statement:

> This successful prosecution is a major victory in the Department's continuing assault on organized crime. Although more remains to be done, we are making substantial progress in dismantling these outlaw organizations. I commend the prosecution and investigative team for their steadfast work.

* * * * *

Conviction Of Panamanian Dictator Manuel Noriega

At a press conference on April 9, 1992, Attorney General William P. Barr made the following statement:

> The conviction of former Panamanian Dictator Manuel Noriega on eight counts of racketeering, drug trafficking and conspiracy is an historic accomplishment and a great victory for the rule of law and for the American people. This day was made possible by President Bush's courageous decision to bring to an end the corrupt and lawless regime of the dictator. I want to commend the investigative and prosecutorial team headed by Assistant United States Attorney Pat Sullivan for their superb professionalism and skill in bringing this case to a successful conclusion. Judge Hoeveler observed that it as the best prepared case he had seen. We are very proud of our team. . . .
>
> When General Noriega was indicted nearly four years ago, few observers believed that this day would ever come. Many regarded the indictments as being futile. Manuel Noriega today stands convicted in a United States District Court. This is an important message to the drug lords: There are no safe havens; their wealth and their firepower cannot protect them forever.

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CRIME/DRUG ISSUES

OPERATION "WEED AND SEED"

On April 6, 1992, Attorney General William P. Barr announced an expanded Department of Justice demonstration program to implement Operation "Weed and Seed," a Presidential initiative focusing on violent crime and neighborhood revitalization. The President has launched Operation "Weed and Seed" as an innovative strategy to reclaim and revitalize neighborhoods that are being overrun by violent crime so that American citizens can live, work, and raise their families without fear of violent crime, drug trafficking, and gang activity. It is a two-pronged strategy that first enables the community to take back the streets from gangs, drug dealers and violent criminals -- and then provides stimulus and support for the neighborhood's grassroots economic and social redevelopment. The philosophy that underlies the program is that social programs must be closely coordinated and integrated with law enforcement efforts.

The sites designated under the "Weed and Seed" demonstration program include: Atlanta, Denver, Los Angeles, Philadelphia, San Diego, Washington, D.C., Boston, Chicago, Fort Worth, Pittsburgh, San Antonio, Seattle, Wilmington, Delaware, Charleston, South Carolina, Richmond, Virginia, and Madison, Wisconsin. As FY 1992 demonstration sites, the targeted neighborhoods will receive approximately $1 million from the Department of Justice to begin implementation of the "Weed and Seed" strategy. An award of about half that amount will be made in FY 1992 and the remainder will be available in FY 1993, subject to Congressional appropriations. In addition, "Weed and Seed" neighborhoods will be eligible to receive targeted monies under a variety of existing Federal programs during FY 1992, and if the expanded program proposed by the President is adopted by the Congress, the targeted areas will be eligible for their share of almost $500 million in social services programs, including Job Corps, Head Start, treatment improvement grants, education funding, and WIC (Women, Infants, and Children) resources.

While each site will implement a "Weed and Seed" program specifically designed to address the particular needs of its target neighborhood, each program will include four elements deemed essential to the success of the "Weed and Seed" strategy. Elements include:

-- Coordinated law enforcement efforts to "weed out" violent offenders in targeted neighborhoods.

-- Community policing in which law enforcement works closely with residents to solve neighborhood problems that cause crime and drug use.

-- Increased availability of human services in targeted neighborhoods -- such as drug and crime prevention programs, educational opportunities, drug treatment, family services and recreational activities -- to create an environment where crime cannot thrive.

-- Economic development and expanded economic opportunities for residents to revitalize distressed neighborhoods.

These elements will be implemented by a "Weed and Seed" steering committee comprised of federal, state, and local government officials, community residents, and the private sector. This coordination is critical to the success of the "Weed and Seed" strategy.

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Status Of The Weed And Seed Authorization Bill

The Office of Management and Budget has cleared the Department's draft bill to authorize and implement the Weed and Seed program. As of April 30, 1992, its formal transmittal to Congress was pending.

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ANTITRUST ISSUES

Major Change In Antitrust Enforcement Policy

On April 3, 1992, the Department of Justice announced a change in antitrust enforcement policy that would permit the Department to challenge foreign business conduct that harms American exports when the conduct would have violated U.S. antitrust laws if it occurred in the United States. The new policy, effective immediately, does not alter the jurisdiction of U.S. courts over foreign persons or corporations. Ordinary jurisdictional principles will continue to apply. A summary of the policy change and background information is attached at the Appendix of this Bulletin as Exhibit B.

Under the changed policy, the Department will challenge anticompetitive conduct, such as boycotts and other exclusionary activities that hinder the export of American goods or services to foreign markets. For example, the Department would take action against a foreign cartel aimed at limiting purchases from U.S. exporters or depressing the prices they receive, or a boycott of American goods or services organized by competitors in foreign markets.

James F. Rill, Assistant Attorney General for the Antitrust Division, said, "Our review of this issue confirms that Congress did not intend the antitrust laws to be limited to cases based on direct harm to consumers. As recently as 1982, Congress clarified the jurisdictional reach of the Sherman Act to cover cases of direct, substantial and reasonably foreseeable harm to U.S. export commerce. We have always applied our law to challenge foreign as well as domestic cartels aimed at raising prices to American consumers, and during most of this period we were prepared in appropriate cases to attack cartels aimed at our exporters, as well. Today, when both imports and exports are of growing importance to our economy, we should not limit our concern to competition in only half of our trade."

Mr. Rill said the Department would continue its practice of notifying and consulting with foreign governments in antitrust proceedings that significantly affect their interests. He emphasized that the policy change has general application and is not aimed at particular foreign markets.

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New Horizontal Merger Guidelines

On April 2, 1992, the Department of Justice and the Federal Trade Commission (FTC) issued new 1992 Horizontal Merger Guidelines, updating guidelines issued by the Department in 1984, and the Statement Concerning Horizontal Mergers issued by the FTC in 1982. This is the first time that guidelines were issued jointly by the Department and the FTC, both of which share responsibility for federal antitrust merger enforcement.

The new guidelines are designed to protect free-market competition by first preventing anticompetitive transactions so U.S. consumers will not be disadvantaged by anticompetitive mergers. At the same time, clarification reduces deterrents to efficiency-enhancing business conduct that will promote U.S. competitiveness. The revisions reflect the agencies' eight years of experience working with the 1984 Guidelines. Specifically, the 1992 guidelines offer a comprehensive treatment of the potential adverse competitive effects of mergers, as well as an explication of the relevance of particular market factors to each of those effects. The revisions

articulate a five-step analytical process for determining whether to challenge a merger. The elements include: market definition, measurement and concentration; the potential adverse competitive effects of the merger; entry; efficiencies; and failure and exiting assets. The guidelines, for the first time, also articulate the circumstances under which a merger might lead to the unilateral exercise of market power. The agencies will consider the unilateral effects, in addition to whether a merger might lead to coordinated interaction among the firms remaining in the market.

Attorney General William P. Barr said, "The 1992 guidelines reflect the current state of legal and economic thinking concerning the competitive effects of mergers, as well as our experience in reviewing mergers under the existing standards. The adoption of the new guidelines by the Department and the FTC should result in substantial benefits to U.S. consumers and U.S. businesses."

If you would like a copy of the Horizontal Merger Guidelines, please call the United States Attorneys' Bulletin staff at (202) 501-6098.

* * * * *

ASSET FORFEITURE

Disposition Of Cost Bonds

Attached at the Appendix of this Bulletin as Exhibit C is a memorandum dated April 7, 1992, from Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, to all United States Attorneys, and Department of Justice and other agency officials, concerning the disposition of cost bonds. The memorandum discusses the applicable law, the general policy, administrative forfeiture by agreement after the cost bond is filed, and U.S. Customs Service cases generally.

Please note that Mr. Copeland refers to a previous memorandum dated October 31, 1991, which sets out the Department's policy for settlements in which the claim is withdrawn. For a copy of this memorandum, please refer to Volume 39, No. 11, of the United States Attorneys' Bulletin, dated November 15, 1991, at p. 318.

Questions regarding disposition of cost bonds in forfeiture cases other than Customs cases should be referred to the Asset Forfeiture Office of the Criminal Division, at (202) 514-1263.

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FY 1991 Report On The Asset Forfeiture Program

On April 7, 1992, the Department of Justice announced that $644 million in illegal assets was seized under the Asset Forfeiture Program in FY 1991, an increase of 29 percent over the FY 1990 total of $460 million. In all, more than $2.4 billion in cash and property has been seized from drug traffickers and other criminals and reinvested in law enforcement and other programs at the federal, state and local levels since the program began in 1985.

OPERATION GUNSMOKE

On April 30, 1992, Attorney General William P. Barr announced that the U.S. Marshals Service and state and local law enforcement authorities have arrested more than 3,300 fugitives in over forty cities. The 10-week nationwide campaign called "Operation Gunsmoke" focused on violent criminals and repeat offenders who had evaded arrest, jumped bond or bail or otherwise remained at large. Operation Gunsmoke, initiated by the Attorney General and carried out by the U.S. Marshals Service, complements "Project Triggerlock," a comprehensive Department of Justice initiative that uses federal firearms laws to arrest, prosecute and convict dangerous and violent criminals.

Operation Gunsmoke resulted in the arrests of 3,313 criminals -- including 224 charged with or previously convicted of murder -- and the seizure of $1.9 million in cash and property. Guns, drugs and other contraband valued at approximately $4.1 million also were seized. Those arrested included 751 federal fugitives and 2,562 persons wanted on state charges. Armed with hundreds of arrest warrants, state and local law officers joined Deputy U.S. Marshals in tracking down the targeted offenders in a local, state and federal law enforcement partnership that not only arrested criminals, but also seized cash and property they obtained through their illegal activities. Cities included in the joint task forces operation were Detroit; Kansas City; Baltimore; Miami; Houston; Phoenix; New York City; San Diego; Newark, N.J.; and New Orleans.

Henry E. Hudson, Acting Director of the U.S. Marshals Service, said the key to the success of Operation Gunsmoke was its ability to focus resources specifically on violent criminals and drug fugitives. State and local agencies committed experienced law enforcement officers to the operation and these officers brought with them valuable knowledge of the community and its criminal element. In addition, the U.S. Marshals Service assigned Deputy U.S. Marshals from around the nation to various Gunsmoke locations and also provided communications, vehicles and specialized investigative equipment. Mr. Hudson said, "We have found that the special task force concept utilized by the Marshals Service in Operation Gunsmoke is an efficient and cost-effective method of focusing limited resources on this aspect of the nation's crime problem."

* * * * *

Grants Are Awarded To Improve Services To Crime Victims And Their Families

On April 24, 1992, the Department of Justice awarded eighteen grants totaling more than $20 million to state programs that compensate and assist crime victims and to an innovative center that helps children recover from the violent death of a parent or other loved one. The grants are part of a total of approximately $150 million the Department will award to support crime victims programs this year. The grants, from the Office for Victims of Crime (OVC) within the Justice Department's Office of Justice Programs, include $34,000 for Fernside, a center for grieving children located in Cincinnati, Ohio. The discretionary grant award will support training for educators, victim service providers and other professionals on ways to more effectively respond to inner-city and Native American children grieving the death of a loved one as a result of a crime or other violent means. With previous OVC funding, Fernside produced the first materials specifically developed to help children cope with the loss of a parent or sibling through a violent death. The materials contain poems, pictures and stories written by children themselves that help grieving children better understand and resolve their feelings.

Grants also were made under OVC's Victim Compensation Formula Grant Program to supplement state crime victim compensation programs as follows: Arkansas - $308,000; Indiana - $830,000; Kentucky - $224,000; New Jersey - $2,235,000; North Carolina - $517,000; and Oklahoma - $302,000. These programs reimburse crime victims for out-of-pocket expenses incurred as the result of a crime, such as lost wages, funeral expenses, and medical costs. The amount of the awards is based on the state's prior-year payments for victim compensation. A total of $56.8 million will be awarded to state compensation programs in FY 1992.

Eleven states received awards under OVC's Victim Assistance Formula Grant Program to support state and local programs that provide direct assistance to crime victims, such as crisis intervention, emergency shelter, counseling and other services. The states and amounts are: Alabama - $1,024,000; Alaska - $312,000; Arizona - $947,000; California - $6,270,000; Idaho - $406,000; Illinois - $2,531,000; Kentucky - $952,000; Montana - $363,000; New Mexico - $509,000; Oklahoma - $842,000; and Wisconsin - $1,198,000. The Commonwealth of the Northern Mariana Islands also received an assistance award of $209,000. The amounts are based on state population.

States must give priority in subgranting federal assistance funds to programs that assist victims of sexual assault, domestic violence, and child abuse. Funds also may be used to meet the needs of victims of hate crimes, elder abuse, and other violent crimes as well as survivors of homicide victims. About one-third of all victim service providers in the nation -- about 2,500 organizations -- receive federal funds through the Department. A total of $62.7 million will be awarded to 57 states and territories in FY 1992.

The funding for these grants comes from the Crime Victims Fund in the U.S. Treasury, which receives fines, penalty assessments, and bond forfeitures paid by convicted federal defendants. Since 1985, almost $700 million has been deposited in the Crime Victims Fund and awarded for victim programs through the Justice Department.

Attorney General William P. Barr said, "It is appropriate, as this nation begins its commemoration of National Crime Victims Rights Week, that we demonstrate our support for those in the state, local, and private sector who, with the aid of federal financial assistance, are working to meet the special needs of crime victims and their families."

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Prison Population In Philadelphia

On April 23, 1992, Attorney General William P. Barr announced that the Department of Justice is filing a statement of interest in support of the City of Philadelphia's motion to modify two consent decrees which cap the Philadelphia prison population. The court-ordered cap currently bars the admission of some criminal defendants and requires the release of others, such as muggers, burglars, car thieves, bank robbers and armed drug dealers. The statement presents three separate grounds for modification. They are: 1) that modification is required under governing U.S. Supreme Court precedent because continued enforcement would be manifestly detrimental to the public interest; 2) that significant changes in the law since the entry of the consent decrees warrant modification; and 3) that federal court oversight of the Philadelphia jails is inappropriate in the absence of a finding of unconstitutional conditions.

According to the report, state and local agencies received $279 million in total forfeitures in FY 1991. In addition, property valued at $21 million was transferred to state and local law enforcement agencies; $150 million helped support the National Drug Control Strategy; $98 million aided federal law enforcement agencies participating in the program; and about $68 million was used for business costs, case-related expenses and innocent third party payments. The report also stated that as of September 30, 1991, the United States had an inventory of 100 seized properties valued at or more than $1 million. The United States Marshals Service administers disposition of the properties.

The Southern District of New York was the judicial district with the highest deposits to the program in 1991 with $186 million. The top 10 districts included: Eastern District of New York, $50 million; Central District of California, $46 million; Southern District of Florida, $39 million; Southern District of California, $25 million; Southern District of Texas, $24 million; Puerto Rico, $17 million; Western District of Texas, $17 million; Middle District of Florida, $16 million; and the Eastern District of Virginia, $9 million.

Miami, Florida was the top judicial district in posting sales of forfeited property with $8 million. The top 10 districts included: Southern District of California, $7 million; Central District of California, $5 million; Eastern District of New York, $4 million; Eastern District of Virginia, $4 million; Western District of Texas, $4 million; Southern District of New York, $4 million; Northern District of California, $4 million; Southern District of Texas, $3 million; and Eastern District of Michigan, $2 million.

The report, in noting the program's growth since its inception, stated that $94 million in cash and property was seized in FY 1986; $178 million FY 1987; $206 million in FY 1988; and $581 million in FY 1989. The 1989 figure included $222 million from the Drexel Burnham Lambert case, while 1991 included $176 million from the Michael Milken case.

Highlights of the report included:

-- $500 million in federal forfeiture proceeds was used since FY 1985 to build federal prisons.

-- More than $350 million reinvested in federal law enforcement in the past seven years.

-- The forfeiture of clandestine drug laboratories and forfeiture fund monies were used to clean up lab sites and help protect the environment.

-- In June 1991, the Asset Forfeiture Office shared 50 percent of a $4.9 million seizure with the United Kingdom for aid in a joint investigation by the Drug Enforcement Administration and New Scotland Yard of an international money laundering operation of drug proceeds.

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CIVIL DIVISION ISSUES

Urgent Request For Assistance In A Freedom Of Information Act Case

Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) sets forth extremely demanding requirements for the government's litigation affidavit, usually referred to as a "Vaughn Index." Please note that a petition for a writ of certiorari is pending, No. 91-1641, docketed April 10, 1992.

The team working on Wiener needs your help in documenting the impact of that decision in their presentation to the Supreme Court. Please immediately notify Civil Division attorney Leonard Schaitman of any order or decision issued by any court which relies upon Wiener. The telephone number is: (202) 514-3441; the fax number is: (202) 514-8151.

* * * * *

Recovering Losses To The Government Caused By Erroneously Entered Preliminary Injunctions

The government often sustains substantial economic losses from preliminary injunctions entered against it. Robert E. Kopp, Director of the Appellate Staff of the Civil Division, has advised that even when an injunction is later reversed or held to have been erroneous, the Division frequently does not recover its full losses. The District of Columbia Circuit has recently issued an important decision that should be helpful in recovering these losses in the future.

In National Kidney Patients Ass'n. v. Sullivan, No. 91-5073 (D.C. Cir., Mar. 13, 1992), a Medicare provider obtained a preliminary injunction barring the Department of Health and Human Services (HHS) from reducing its rate of payment. The Civil Division appealed, and the D.C. Circuit initially issued an unreported order holding that the $1,000 bond required by the district court was clearly inadequate. On remand, the district court then ordered a $750,000 bond. The Civil Division's appeal from the preliminary injunction was subsequently dismissed as moot after Congress enacted a statute that specified the Medicare payment rate for the future.

The district court then entered final judgment for the provider, and the Civil Division appealed again, seeking to vacate that order and retain HHS's administrative right to recoup the more than $15,000,000 that had been paid to the provider solely because the preliminary injunction had prevented its rate from being reduced to that of other providers. The D.C. Circuit first held that the district court lacked jurisdiction to issue any injunction because the provider had not presented its claim to HHS. It then held that under Rule 65(c), Fed.R.Civ.P., "a defendant injured by a wrongfully issued preliminary injunction is presumptively entitled to recovery on the injunction bond." Slip op. 14. The court further held that the Division's recovery is not limited to the amount of the bond. It noted the general rule that the bond sets the maximum recovery for damages, absent bad faith or frivolousness. Relying upon Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134 (1919), however, the court held that the right to restitution is not limited by the bond. It held that HHS could pursue its recoupment procedures to recover the full amount of the overpayment.

This decision demonstrates the importance of our insisting upon a preliminary injunction bond in an adequate amount. The bond provides a secure source of payment of our damages if the injunction is later held to have been wrongfully entered. The decision also shows that if an erroneous preliminary injunction not only causes a loss to the government, but also provides an unjust gain to the plaintiff, our right to restitution is not limited to the amount of the bond.

Finally, our insistence on an adequate bond and our apprising plaintiffs that we will seek to recover our losses from any erroneous preliminary injunction should deter plaintiffs from pressing motions for preliminary injunctions in unmeritorious cases.

If you have any questions, please call Tony Steinmeyer of the Civil Division Appellate Staff, at (202) 514-3388.

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POINTS TO REMEMBER

Contacts Between United States Attorneys' Offices And Congress And Inquiries From The General Accounting Office

The Executive Office for United States Attorneys reminds all United States Attorneys' office personnel of the congressional relations procedures for all communications between the Department of Justice and Congress. This reminder has been necessitated by several recent violations of these procedures. The Executive Office stresses the importance of compliance with this policy within the offices of the United States Attorneys.

Section 1-8.020 of the United States Attorneys' Manual states that the Assistant Attorney General for the Office of Legislative Affairs (OLA) is responsible for coordination of all significant communications between Congress and the Department subject to the general supervision of the Attorney General and the direction of the Deputy Attorney General. (See, also, 28 C.F.R. §0.27). For a detailed discussion on Congressional relations procedures, please refer to Volume 39, No. 8, of the United States Attorneys' Bulletin, dated August 15, 1991, at p. 222.

Inquiries from the General Accounting Office (GAO) must be forwarded to the Evaluation and Review Staff. If you require assistance or advice regarding a GAO inquiry, please call Geralyn Dowling, Evaluation and Review Staff, Executive Office for United States Attorneys, at (202) 501-6935.

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

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United States Attorneys' Manual Bluesheet

On April 20, 1992, James A. Bruton, Acting Assistant United States Attorney, Tax Division, issued bluesheet USAM 6-4.120, 6.4-121, and 6.4-243, Direct Referral of False and Fictitious Return Cases for Grand Jury Investigation (18 U.S.C. §§ 286 and 287), to all United States Attorneys. This bluesheet (1) supplements USAM 6-4.120 to implement Tax Division Directive No. 96, delegating to the United States Attorneys the authority to initiate grand jury investigations of the filing of false and fictitious federal tax returns in violation of 18 U.S.C. §§286 and 287, (2) amends USAM 6-4.121 to reflect changes to IRS procedures for requesting initiation of a grand jury investigation, and (3) amends USAM 6-4.243 to clarify that prosecution under 18 U.S.C. §§286 and 287 of cases involving false and fictitious claims for tax refunds submitted through the Internal Revenue Service's Electronic Filing program must be authorized by the Tax Division.

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

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Restrictions On Political Activities:
Political Do's And Don'ts For Federal Employees

Covered Employees

- o May register and vote as they choose
- o May assist in voter registration drives
- o May express opinions about candidates and issues
- o May participate in campaigns where none of the candidates represent a political party
- o May contribute money to political organizations or attend political fund raising functions
- o May wear or display political badges, buttons, or stickers
- o May attend political rallies and meetings
- o May join political clubs or parties
- o May sign nominating petitions
- o May campaign for or against referendum questions, constitutional amendments, municipal ordinances
- o May not be candidates for public office in partisan elections
- o May not campaign for or against a candidate or slate of candidates in partisan elections
- o May not make campaign speeches or engage in other campaign activities to elect partisan candidates
- o May not collect contributions or sell tickets to political fund raising functions
- o May not distribute campaign material in partisan elections
- o May not organize or manage political rallies or meetings
- o May not hold office in political clubs or parties
- o May not circulate nominating petitions
- o May not work to register voters for one party only

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SENTENCING REFORM

Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 4, No. 19, dated April 9, 1992, and Volume 4, No. 20, dated April 21, 1992, is attached as Exhibit E at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit F is a copy of the Federal Sentencing Guide, Volume 3, No. 11, dated March 23, 1992, Volume 3, No. 12, dated April 6, 1992, and Volume 3, No. 13, dated April 20, 1992, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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FINANCIAL INSTITUTION FRAUD ISSUES

Financial Institution Prosecution Updates

On April 21, 1992, the Department of Justice issued the following information describing activity in "major" bank fraud prosecutions, savings and loan prosecutions, and credit union fraud prosecutions from October 1, 1988 through March 31, 1992. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution, or (d) involves other major factors.

Bank Prosecution Update

Description	Count	Description	Count
Informations/Indictments...	1,248	CEOs, Chairmen, and Presidents:	
Estimated Bank Loss.....	$2,841,002,778	Charged by Indictments/ Informations.....	124
Defendants Charged.....	1,734	Convicted.....	112
Defendants Convicted.....	1,400	Acquitted.....	1
Defendants Acquitted.....	30		
Prison Sentences.....	1,765 years		
Sentenced to prison.....	877		
Awaiting sentence.....	257	Directors and Other Officers:	
Sentenced w/o prison or suspended.....	279	Charged by Indictments/ Informations.....	397
Fines Imposed.....	$ 5,110,084	Convicted.....	346
Restitution Ordered.....	$ 466,255,627	Acquitted.....	4

Savings And Loan Prosecution Update

Description	Count	Description	Count
Informations/Indictments....	659	CEOs, Chairmen, and Presidents:	
Estimated S&L Loss.....	$ 10,703,853,549	Charged by Indictments/ Informations.....	129
Defendants Charged.....	1,115	Convicted.....	92
Defendants Convicted.....	819 (93%)	Acquitted.....	9
Defendants Acquitted.....	62 *		
Prison Sentences.....	1,623 years		
Sentenced to prison.....	497 (78%)		
Awaiting sentence.....	192	Directors and Other Officers:	
Sentenced w/o prison or suspended.....	142	Charged by Indictments/ Informations.....	184
Fines Imposed.....	$ 15,026,061	Convicted.....	154
Restitution Ordered.....	$397,776,283	Acquitted.....	6

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* 21 borrowers dismissed in a single case in a District Court.

Credit Union Prosecution Update

Description	Count	Description	Count
Informations/Indictments	74	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$83,551,701	Charged by Indictments/	
Defendants Charged	93	Informations	8
Defendants Convicted	81	Convicted	8
Defendants Acquitted	1	Acquitted	0
Prison Sentences	117 years		
Sentenced to prison	62		
Awaiting sentence	10	Directors and Other Officers:	
Sentenced w/o prison		Charged by Indictments/	
or suspended	9	Informations	48
Fines Imposed	$12,250	Convicted	45
Restitution Ordered	$12,105,476	Acquitted	0

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LEGISLATION

Voting Rights Act

On April 8, 1992, John R. Dunne, Assistant Attorney General, Civil Rights Division, testified before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, concerning the Voting Rights Act. Mr. Dunne urged Congress to extend for fifteen more years legislation that provides for bilingual ballots and language assistance to certain voters who do not speak or read English. In 1975, Congress added Section 203 that requires counties to provide bilingual ballots and other language assistance if more than 5 percent of the voting age population speaks a language other than English. The provision was renewed in 1985 for seven years, and will expire on August 6, 1992.

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JFK Assassination Materials

On April 27, 1992, a Department report was sent to the Subcommittee on Legislation and National Security, House Government Operations Committee, and to the Committee on Governmental Affairs of the U.S. Senate, raising several objections to the Assassination Materials Disclosure Act of 1992, which would establish procedures for the disclosure of materials relating to the assassination of President Kennedy. The report noted that the Department plans to propose an alternative measure shortly.

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Hate Crimes Statistics Act

On April 20, 1992, the House Judiciary Subcommittee on Crime and Criminal Justice held an oversight hearing on hate crimes, including the status of the Department's data collection pursuant to the Hate Crimes Statistics Act. The Subcommittee also considered H.R. 4797, a bill that would provide for increased sentencing guidelines for hate crimes. A representative of the FBI testified for the Department.

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CASE NOTES

WESTERN DISTRICT OF OKLAHOMA

Major Case Dismissed For Lack Of Jurisdiction Based Upon Statute Of Limitations

In 1980, Broad Hollow Associates "purchased" an apartment complex out of foreclosure by paying a portion of the outstanding indebtedness due the Department of Housing and Urban Development (HUD). As part of this deal, HUD agreed to enter into a Modification Agreement altering the terms of the note and mortgage assumed by plaintiff. However, despite years of meetings and correspondence, the parties never executed a formal Modification Agreement.

In 1990, after a second administrative foreclosure but prior to the actual sale, plaintiff sued claiming an equitable lien on the property and seeking restitution of over $1.2 million in damages. Because of the passage of over ten years, HUD could not produce a HUD witness to defend the agency. In lieu of a HUD witness, an expert on HUD workouts testified for the agency.

Following the non-jury trial, the Court entered judgment for the Government based on the statute of limitations, 28 U.S.C. §2401(a). The opinion also established an important point of law favorable for future cases -- both plaintiff's legal and equitable claims were time-barred by the statute. This is called the concurrency doctrine. It precludes a plaintiff from avoiding the legal bar of limitations by casting suit in equitable terms.

Broad Hollow Associates v. Jack Kemp, Secretary of U.S. Department of Housing and Urban Development, Case No. CIV-90-1118-R

Assistant United States Attorneys: Robert Bradford
Warren "Tom" Majors
(405) 231-5281

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CIVIL DIVISION

Supreme Court Holds That Adoption Assistance Act Does Not Create Private Right Of Action To Enforce "Reasonable Efforts" Requirement

The Adoption Assistance Act provides funding to assist states with foster care and adoption services. To be eligible for such funding, a state must submit a plan to the Secretary of the Department of Health and Human Services (HHS), who must approve it. The plan must, among numerous other requirements, provide that before a state removes a child from its home, the state will make "reasonable efforts" to keep the child in its home, and also that a state will make reasonable efforts to return a child to its home after removal. The plaintiffs in this case alleged that the State of Illinois was failing to comply with this "reasonable efforts" requirement. They sued state officials under 42 U.S.C. § 1983. The district court held in their favor and ordered the state to assign a caseworker to every child within three days of the time the child's case is heard in juvenile court. The court of appeals affirmed.

The Supreme Court granted certiorari. We filed a brief as amicus curiae on behalf of the state defendants. The Court reversed. Speaking through the Chief Justice, the Court held that the Adoption Assistance Act does not create a "right" enforceable in a section 1983 action. The Court noted that the only condition the Act places on a state's receipt of federal funds is that the state have an approved plan. The Court also stated that the relevant inquiry is whether Congress has unambiguously conferred upon the beneficiaries of the Act a right to enforce the statutory requirements.

Suter v. Artist M., No. 90-1488 (March 25, 1992). DJ # 145-3443.

Attorneys: Anthony J. Steinmeyer - (202) 514-3388
Jonathan R. Siegel - (202) 514-4821

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Fourth Circuit Holds That The Department of Housing and Urban Development And The Department Of Justice Can Order Drug Evictions From Public Housing Apartments Without Prior Notice And Opportunity For A Hearing Only When "Exigent Circumstances" Exist

The Fourth Circuit affirmed a district court order enjoining the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) from enforcing the civil drug forfeiture statute against public housing apartments in a manner that results in evictions without prior notice and opportunity for hearing, unless there are "exigent circumstances." Under the DOJ policy that was under challenge, seizure of public housing apartments and immediate eviction of the tenants was authorized upon an ex parte finding by a federal district judge or magistrate that there was probable cause to believe that drug offenses had occurred on the premises. The Fourth Circuit held that the plaintiff public housing tenants and their representative organizations had standing to challenge that policy, and that due process prohibits evictions without prior notice and hearing, except in "exigent circumstances."

The Fourth Circuit's opinion, however, suggests a broad reading of "exigent circumstances," stating that they might exist in light of "the level of and type of drug trafficking in a particular location." The opinion also states that if the local federal judge or magistrate thinks there are "exigent circumstances," the local United States Attorneys cannot be held in contempt under the injunction. Thus, the decision leaves it open for United States Attorneys to obtain immediate evictions if they can convince a federal judge or magistrate that the level of drug trafficking on the premises justifies it.

Richmond Tenants v. Kemp, No. 91-1520 (March 4, 1992). DJ # 145-17-4605.

Attorneys: Robert V. Zener - (202) 514-1597

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Ninth Circuit Holds That Customs Service's "Zero Tolerance Policy" Did Not Violate Clearly Established Constitutional Rights, And Therefore Customs Officials Are Entitled To Qualified Immunity With Respect To Plaintiff's Constitutional Damages Claim

Plaintiff, whose commercial fishing vessel was seized and held for a month because a small quantity of marijuana was found in a crewman's jacket pocket, brought this constitutional tort claim against the architect of the "Zero Tolerance Policy," former Customs Commissioner William von Raab, and two Customs Service officials in Alaska. We moved to dismiss on qualified immunity grounds, but the district court denied our motion. On appeal, the Ninth Circuit has now reversed in an unpublished memorandum, stating that "Von Raab made a policy choice about the need for strict deterrence of violations of the narcotics laws," and "[i]t is precisely this type of decision-making that the qualified immunity doctrine insulates from the threat of damages actions." The court further stated that "regardless of whether the Zero Tolerance Policy was a good idea or a bad idea, we cannot say that seizure of a vessel with contraband aboard was unauthorized under applicable law." Finally, the court found no merit to plaintiff's claims that defendants had taken his property in violation of the Fifth Amendment's takings clause, and that they had attempted to discourage him from seeking legal or congressional assistance, in violation of the First Amendment.

Kevin Hogan v. William von Raab, et al., No. 91-35157 (March 31, 1992).
DJ # 145-3-3045.

Attorneys: Barbara L. Herwig - (202) 514-5425
John S. Koppel - (202) 514-2495

* * * * *

Ninth Circuit Upholds Award Of Attorney's Fees In Excess Of The Equal Access To Justice Act's $75/Hour Cap Pursuant To Bad Faith Provision, 28 U.S.C. § 2412(b)

Elisa Cazares was denied admission to the National Honor Society ("NHS") at her high school, which is operated by the Bureau of Indian Affairs ("BIA"). She brought suit alleging that BIA violated her constitutional rights by denying her admission based on her status as an unwed mother. The district court ruled in Cazares' favor, and the Government did not appeal. Cazares sought attorney's fees under the Equal Access To Justice Act ("EAJA"), and the district court, without opinion, awarded fees at the rate of $175/hour. We appealed to the extent the award exceeded $75/hour, arguing that no "special factor" justified exceeding EAJA's statutory cap, 28 U.S.C. § 2412(d). While our appeal was pending, the district court issued a memorandum decision indicating that the EAJA award was based on the "special factor" provision of section 2412(d), but mentioning that BIA had engaged in bad faith in "elect[ing] to terminate the [local chapter] of the NHS rather than induct Cazares," thus suggesting that the award was based on the bad faith provision of section 2412(b).

The court of appeals (Wiggins, Fletcher) has now affirmed. The panel stated that the district court mistakenly cited the "special factor" provision of section 2412(d), but meant to cite the "bad faith" provision of section 2412(b). The panel found that district court's finding of bad faith was not clearly erroneous. Judge Kozinski dissented, stating that the "majority opinion conflicts with the well-settled law in this area [because] the district court made no findings . . . about what conduct of the United States amounted to bad faith." He further indicated that the record did not justify a finding of bad faith. We are considering whether to seek further review.

Cazares v. Barber. No. 90-16423 (Mar. 11, 1992). DJ # 145-7-1050.

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False Claims Cases

Second Circuit Affirms Dismissal of Qui Tam Action Upon Based Public Disclosure

The Second Circuit has held that investigative agents' questioning of innocent employees of the defendant during execution of search warrant constituted "public disclosures in an administrative investigation," thereby barring jurisdiction under 31 U.S.C. § 3730(e)(4)(A). The court also held that a public disclosure is made when "allegations of fraud are revealed to members of the public with no prior knowledge," no matter how few, and that public disclosure "divests district courts of jurisdiction ... regardless of where the relator obtained his information," rejecting relator's literal interpretation of § 3730(e)(4)(A) as requiring that the "action [be] based upon the public disclosure."

United States ex rel. John Doe v. John Doe Corp., No. 91-6239 (2d Cir. April 3, 1992).

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Western District Of Oklahoma Dismisses Breach Of Contract Counterclaim In False Claims Act Suit

In a suit against CHAMPUS providers for falsely billing the Government for services not covered under CHAMPUS, the court dismissed counterclaims alleging that the Government breached its contracts with defendants by failing to reimburse them for other services provided to the same patients. The court found that (1) defendants' claim did not arise out of the same transaction and occurrence as the Government's claim and the Government, therefore, had not waived sovereign immunity as to this claim by filing the False Claims Act action, and that (2) defendants had failed to exhaust their administrative remedies.

United States v. Avery, Civ-91-1065-T (W.D. Okla. March 10, 1992).

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Civil Division Files Amicus Curiae Brief In Support of Relators' Assertion That Government's Knowledge Of Alleged Fraud Is Not A Per Se Bar To An Action Under The False Claims Act

The Civil Division filed an amicus curiae brief in support of a qui tam plaintiff's claim that the district court erred when it held that knowledge by Government officials of the "very facts or characteristics which allegedly made the defendants' claims false" barred an action under the False Claims Act.

The district court had relied upon Boisjoly v. Morton Thiokol, Inc., 706 F.2d 795, 810 (D. Utah, 1988), which was subsequently discredited in United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991). The Division's brief did not address the relator's contention that the district court erred in holding that the claims were time barred under 31 U.S.C. § 3731(b)(2), based on the fact that senior officials in the Army's project manager's office knew of the alleged defect.

United States ex rel. Kreindler & Kreindler v. United Technologies Corp., No. 87-CV-1626 (N.D.N.Y., Nov. 1. 1991).

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District of Maryland Grants Government's Cross-Petition To Enforce Civil Investigative Demand

In granting the Government's cross-petition to enforce a civil investigative demand (CID), the court explicitly rejected arguments that the CID's (1) had insufficiently specified the nature of the conduct under investigation, (2) were issued before less intrusive means of inquiry were exhausted, and (3) were unduly burdensome. The court also refused to consider the merits of the underlying dispute.

Becton Dickinson v. United States, Civ. No. 92-428 (D. Md., March 17, 1992).

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Claims Court Grants Government's Motion To Stay Proceedings

Subsequent to the Government's intervention in a qui tam action filed in the Central District of California, alleging that a contractor had mischarged costs on certain automatic test equipment (ATE), the contractor filed a Claims Court action seeking costs incurred in the production of one type of ATE which was not included in the False Claims Act (FCA) complaint. The Government then filed counterclaims in the Claims Court which were identical to the FCA counts in the district court suit. Thereafter, the contractor moved to stay the district court proceedings, and the Government moved to stay the Claims Court proceedings. In October 1991, the district court stayed its proceedings, ruling that the Government had, through its counterclaims, elected to pursue its claims through an alternative means pursuant to 31 U.S.C. § 3730(c)(5). More recently, the Claims Court has stayed the Claims Court proceedings, criticizing the district court's conclusions that the Claims Court is an "administrative tribunal" and the court's necessary corollary that the district court has review power over the Claims Court's decision.

Northrop Corp, Northrop Electronics Division v. United States, No. 91-1035C (Cl. Ct. March 20, 1992).

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Northern District Of Georgia Holds It Has Jurisdiction Over Government's Alternative Common Law Claims In False Claims Act Suit

The Northern District of Georgia has held that it has jurisdiction in a False Claims Act suit over the Government's alternative common law claims for breach of contract, unjust enrichment and payment by mistake. The Court held that although the Contract Disputes Act covers contract claims, the subject alternative claims were "claims involving fraud" and thus excluded from coverage by the Contract Disputes Act. The Court flatly rejected contrary holdings in United States v. Hughes Aircraft Co., No. CV-89-6842-WJR (C.D. Cal., April 5, 1991); and United States ex rel. Perron v. Hughes Aircraft Co., No. CV-89-3312-RG (C.D. Cal., April 29, 1991).

United States v. Rockwell International Corp., 1:91-CV-2280-RHH (N.D. Ga., Feb. 7, 1992).

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Miscellaneous Qui Tam Decisions

United States ex rel. Kalesh v. Desnick, 91-C-288 (N.D. Ill., Feb. 14, 1992) [adopts reasoning of Second Circuit in United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (1990), in holding that if public disclosure by news media of allegations has occurred, relator must have directly or indirectly been the source to the media making the original public disclosure].

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United States ex rel. Marcus v. NBI, Inc., Civ. No. 89-1605 (RCL) (D. D.C., Feb. 20, 1992) [In qui tam suit in which court has approved a settlement, qui tam relator's application for attorney's fees, costs and expenses is exempt from automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362(a)(1); Court expressly relies in part on In re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990)].

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United States ex rel. Madden v. General Dynamics Corp., CV-88-5352 WMB (C.D. Cal., Feb. 13, 1992) [Relying on Mortgages, Inc. v. United States District Court for the District of Nevada (Las Vegas), 934 F.2d 209 (9th Cir. 1991), and United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc., 92 Daily Journal D.A.R. 172 (N.D. Cal. 1991), court dismisses defendant's counterclaims seeking "independent damages" against relator, (e.g., counterclaims alleging breach of duty of loyalty and breach of fiduciary duty, breach of implied covenant of good faith and fair dealing)].

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Sweigert v. Electronics Systems Associates, Inc., C-3-92-010 (S.D. Ohio, Feb. 24, 1992) (Magistrate dismisses relator's claims with prejudice, based upon relator's public filing of complaint and failure to serve Government; Government given 60 days to determine whether it would proceed with the action).

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United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center, (No. 91-2194) (4th Cir., April 3, 1992) (United States is real party in interest in any False Claims Act suit, even where the United States declines to intervene and permits qui tam relator to pursue action on its own behalf; court affirmed district court's denial of defendant state agency's motion to dismiss based on Eleventh Amendment).

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United States v. Covington Technologies Co., CV-88-5807-JMI (BX) (C.D. Cal. Oct. 22, 1991) (court denies motion by relators in companion qui tam case to have a maximum (25%) share of settlement proceeds in this suit brought by United States; relators argued that their successful prosecution of qui tam case, in which government did not intervene, had a large impact on settlement in government's suit; court held that relators are only entitled to maximum recovery in case in which they "actively and uniquely aid" the government and their assistance continues throughout discovery & trial).

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United States ex rel. Barajas v. Northrop Corp., CV-87-7288 KN (Kx) (Severed Action) (C.D. Cal., Dec. 20, 1991) (court grants motion to dismiss qui tam plaintiff's amended and severed complaint on the grounds that relator was not an original source; court rejects argument that "but for" relator's allegations regarding other violations, government would have not discovered violations at issue).

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Resource Conservation and Recovery Act (RCRA) And The Clean Water Act (CWA) Do Not Waive The Federal Government's Sovereign Immunity To Allow States To Levy Fines And Penalties On It For Violations Of Environmental Laws

The Supreme Court, in a 6-3 opinion by Justice Souter reversing the Sixth Circuit, held that Congress had not waived the United States' sovereign immunity from liability for civil fines imposed by a State for past violations of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). The majority held that neither the CWA's citizen suit provision, 33 U.S.C. 1365(a), its federal facilities section, 33 U.S.C. 1323(a), nor RCRA's citizen suit provision, 42 U.S.C. 6972(a), nor its federal facilities section 42 U.S.C. 6961, clearly and unambiguously waived the Federal Government's sovereign immunity.

The suit arose when Ohio sued the Department of Energy (DOE), charging violations at the agency's nuclear weapons plant in Fernald, Ohio. In a settlement of the lawsuit, DOE admitted the violations and stipulated to a civil penalty of $250,000, but appealed Ohio's right to impose the fine. The district court rejected the government's sovereign immunity argument, and the Sixth Circuit affirmed, holding that Congress, in making both CWA and RCRA applicable to the Federal Government had also intended to make the government subject to the same range of penalties as any other violator.

Justice White, joined by Justices Blackmun and Stevens, concurred and dissented in part. He would have found the requisite waiver under the "arising under" federal law provision of the CWA's citizen suit section. He agrees with the majority that the RCRA federal facilities provision does not unambiguously waive federal immunity from civil penalties, but he would have found a waiver under RCRA's citizen suit provision.

United States Department of Energy v. Ohio, S. Ct. Nos. 90-1341 and 90-1517 (April 21, 1992)

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Intervenor Lacks Standing To Challenge Consent Decree

The National Wildlife Federation intervened in this CERCLA action concerning the clean-up of New Bedford Harbor to challenge a consent decree that compromised claims for cost recovery and natural resource damages. The Federation claimed the decree could not be entered prior to approval of the Record of Decision for the clean-up and that the amount of natural resource damages was inadequate. The district court approved the decree, and the Federation took an appeal. The court of appeals dismissed the appeal for lack of standing, without reaching the merits.

The court held, consistent with Diamond v. Charles, 476 U.S. 54 (1986), that an intervenor had to satisfy the standing requirements of Article III in order to maintain an appeal. The court gave the Federation the benefit of having its pleadings accepted as true for purposes of the motion to dismiss. The court concluded, however, that the allegations of the Federation's complaint and motion to intervene were insufficient to establish standing. The court characterized them as "nebulous * * * [g]auzy generalities," lacking sufficient particularity as to who was threatened with environmental harm and how, and failing to establish any connection between the Federation's members and the resources of the harbor.

The court also rejected the Federation's claim of procedural injury, which was the assertion that the settlement had hindered the Federation's ability to comment on the adequacy of the decree. The court concluded the objection had not been presented below, but that it was insufficient in any event. The panel held that so-called "procedural injury" could not independently satisfy Article III requirements in the absence of any adequate allegation of other substantive injury.

United States v. AVX Corp., 1st Cir. No. 91-1895
(April 21, 1992) (Selya, Bownes, and Cyr, Circuit Judges)

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Columbia River Gorge Scenic Area Act Is Valid Under The Commerce Clause And The Compact Clause And Does Not Violate The Tenth Amendment

By enactment of the Columbia River Gorge Scenic Area Act, 100 Stat. 4274, 16 U.S.C. 544 et seq., Congress established the Columbia River Gorge Scenic Area and gave its consent to Washington and Oregon to enter into an interstate compact which would incorporate the complex regulatory scheme detailed by the Act. Washington and Oregon then entered into a compact pursuant to the Act and thereby created the Columbia River Gorge Commission, a non-federal agency which is responsible for, among other things, overseeing the creation and implementation of local land use ordinances aimed at insuring that private land uses within the Scenic Area are consistent with the purposes of the Act.

An organization representing the interests of private landowners affected by regulation under the Act and the compact filed a suit asserting that the Act exceeded the scope of Congress' constitutional authority by encroaching upon the states, control over local land use and by coercing the states to exercise their sovereign powers to carry out a federal scheme. The district court, however, upheld the constitutionality of the Act.

The Ninth Circuit affirmed. The court of appeals ruled that the Act was a legitimate exercise of Congress' powers under the Commerce Clause and the Compact Clause. The court further ruled that the Act did not offend the Tenth Amendment.

Columbia River Gorge United v. Yeutter, 9th Cir. No. 90-35588 (March 30, 1992)
(Goodwin, Schroeder, Noonan)

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FINANCIAL LITIGATION STAFF
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The Federal Debt Collection Procedures Act (FDCPA) has received mixed reviews in three recent court opinions interpreting different provisions of the Act. In the first case, the court is presented with the issue of whether the FDCPA provisions on fraudulent transfers should apply retroactively and, if so, whether or not one of the government's claims is thereby time-barred. In the second case, the court reviews the government's entitlement to prejudgment discovery based on its interpretation of the phrase "in an action or proceeding under Subchapter B or C." These slip opinions are summarized below and copies are available from the Financial Litigation Staff by calling (202) 501-7017. The third, and published, opinion addresses the applicability of the new 7-year reach-back provision of 11 U.S.C. § 523, as amended.

Fraudulent Transfers

In January 1989, Bernard Gelb was convicted of various counts for RICO, mail fraud, bribery and tax violations. He was sentenced to pay $5,101,000 in fines and restitution. In an attempt to reach assets to satisfy the debt, the government commenced an action on May 5, 1990, to set aside conveyances on two parcels of real estate alleging that the conveyances were fraudulent under applicable state law. Gelb and his co-defendants moved for summary judgment arguing, among other things, that the law of the State of New York was inapplicable to the action, that the newly-enacted FDCPA applied and that under the FDCPA, one of the government's claims for relief was time-barred.

The court first reviewed whether the FDCPA should govern the action before it. The FDCPA took effect on May 29, 1991, or more than a year after the government filed its complaint. Section 3631(b)(1) provides that the FDCPA "shall apply with respect to actions pending on the effective date of this Act in any court on (a) a claim for a debt; or (b) a judgment for a debt." See Note at 28 U.S.C. § 3001 (Supp. 1991). The court determined that "Title I" as used in this section refers to Subtitle A of Chapter XXXVI of the Crime Control Act of 1990. Subtitle A adds chapter 176 to Title 28 of the United States Code and includes Subchapters A through D of the FDCPA. The court found that section 3631(b)(1) constituted a clear statement of intent by the legislature that the FDCPA should be applied retroactively. The court further found that the governments' action, although nominally to clear title, was to enforce the underlying debt.

The court then looked to the legislative history of the Act and found that it supports the conclusion that all of the provisions in Chapter 176 of Title 28, United States Code, are to be applied retroactively. The government contended that the provisions of the Act pertaining to fraudulent transfers were substantive in nature and that generally such legislation would be applied prospectively only. See Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). The court rejected the argument, finding that retroactive application of these provisions was mandated under section 3631 and the legislative history of the FDCPA. See Union Pac. R.R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913).

The court analyzed the application of the statute of limitations under the FDCPA, 28 U.S.C. § 3306, as well as under 28 U.S.C. § 2415. The court concluded that there was no merit to the defendants' contention that one of the government's claims was time-barred under either statute, discussing at some length the failure of Congress to provide a tolling provision similar to that in 28 U.S.C. § 2416(c). The court denied the defendants' motion for summary judgment on these and other grounds and directed the government to amend its complaint to plead its claims under the FDCPA.

United States v. Gelb, No. 90-CV-1543, slip op. (E.D.N.Y. Dec. 23, 1991) 1991 WL 311934

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Prejudgment Discovery

The government commenced this action against Austin Farms and others under the False Claims Act, alleging failure of condition, misrepresentation and common law fraud. The government then served subpoena duces tecum on an accounting firm and two banks to ascertain the defendants' financial condition. The defendants moved the court for a protective order contending that the discovery sought by the government had no bearing on the relevant issues before the court: the merits of the government's claims, the merits of the defenses interposed by the defendants or the amount of any debt alleged to be owed by the defendants. The government asserted that the collectibility of any judgment it obtained and evidence of the transfer of any assets by the defendants were properly discoverable under 28 U.S.C. § 3015. The defendants countered that discovery of these matters was permissible only if the government held a judgment or had obtained a prejudgment remedy under the FDCPA. In its analysis of these arguments, the court reviewed the statutory language and the legislative history of the FDCPA.

The court's analysis of the statutory language focused on the phrase "in an action or proceeding under Subchapter B or C". 28 U.S.C. § 3015(a). The government argued that the terms "action" and "proceeding" are not synonymous and that "action" should be read independent of "proceeding under Subchapter B or C". The court found that the prejudgment remedies of Subchapter B and the postjudgment remedies of Subchapter C may be invoked as independent actions or as proceedings within an action, rendering the contested phrase meaningless if construed in the manner urged by the government.

The court turned to the legislative history of the FDCPA and concluded that it supported this analysis. Looking first at the comments of Congressman Brooks, the court found that the authorization for prejudgment discovery "in conjunction with prejudgment remedies", 136 Congressional Record H13288-02 (Oct. 27, 1990), implied the need for an application for a prejudgment remedy. The court, apparently unaware that no comparable provision was included in the House bill, found it significant that the House report was silent on the use of prejudgment discovery. Holding that prejudgment discovery of the financial condition of a defendant is available only when the government is also seeking one or more prejudgment remedies under the FDCPA, the court quashed the government's subpoenas. The government has filed objections to the Magistrate Judge's decision and its appeal is pending before the district court.

United States v. Austin Farms, No. GC 91-39-B-O, slip. op. (N.D. Ms. January 9, 1992)

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* * * * *

Dischargeability of Student Loans

Recently, a bankruptcy court in the Western District of Missouri issued an opinion containing dicta discussing the effective date of the application of the amended §523(a)(8)(A) on student loans in pending cases. The main issue in Martin v. Great Lakes Higher Education Corp., No. 91-4229-1 (Bkrtcy. W.D. Mo. 2/28/92), was whether consolidation of two student loans into a new government-guaranteed loan alters the date when the loan first becomes due. The opinion implies that if the consolidation date were not controlling as to when the loan came due, then the original loans with their due dates which were more than five years old would have been dischargeable. By implication of the statements in dicta, that "[d]ischarge of a debt is determined by the law in effect at the time debtor files the petition," and in footnote (1) which discusses the amendment to §523(a)(8)(A) by the Crime Control Act of 1990 and its effective date of 180 days after November 29, 1990, it is likely that the original loans would have become due within seven years of the bankruptcy filing. If this is the case, then, in this matter, the debtor would still have had to pay, regardless of the consolidation, because the debts became due within seven years. The real life issue for debtor Martin, therefore, is moot, as she still would have had to pay. It is important, however, to clarify the point of whether or not the amendment changing the look back period on student loans from five to seven years applied to a chapter 7 case which was pending on the effective date if it was filed prior to that date.

In an analysis of the applicability of amended § 523(a)(8)(A) to pending bankruptcy actions, Edmund J. Trepacz II, an attorney with the General Counsel's Office, Postsecondary Education Division, at the Department of Education found that the amendment to §523(a)(8)(A) is applicable to cases pending as of the effective date of 180 days from November 29, 1990. In Bradley v. Richmond School Board, 416 U.S. 696 (1974), the Supreme Court adhered to the principle that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Id., at 711. In the Bradley case, which involved payment of attorneys' fees in school desegregation litigation, there was neither provision for nor prohibition against the application of the intervening law relating to attorneys' fees to a pending case. The Court stated that it must "reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." Id., at 715.

In In re Spell, 650 F.2d 375 (2d Cir. 1981), the Court of Appeals for the Second Circuit went even further in a case in which the law had changed between the time when the debtor had been discharged from "all dischargeable debts" and the subsequent determination by the court of the actual dischargeability of particular debts, by applying the intervening law to the case, although the 10th Circuit, in Franklin v. State of N.M. Ex. Rel. Dept. of H.S., 730 F.2d 86 (10th Cir. 1984), came to a different conclusion. In Matter of Key, 128 B.R. 742 (Bkrtcy. S.D. Ohio 1991), the bankruptcy court, again in dicta, by referring to the terms of the amendment, clearly implied that the amendment was applicable, although the case had been filed in March, 1991.

Judge See in the Martin case relied on Matter of Bruce, 3 B.R. 77 (Bkrtcy. Ill. 1980) for the principle that "[d]ischarge of a debt is determined by the law in effect at the time debtor files the petition." Indeed, the court in Bruce did find that the filing of the petition in bankruptcy is the critical date for purposes of determining dischargeability of a student loan. The Bruce opinion must be seen in context, however, and its reasoning cannot apply here. The court expressed concern that choosing the date of the court's decision as a point at which to determine the applicable law was a date which could be manipulated by the parties, and it arbitrarily chose the date of the filing as being "relatively free from being affected by tampering or whim." Ironically, the debtor in Martin was doing exactly what the Bruce court wanted to prevent: she attempted to escape her obligations to repay her student loans by filing before the May 29, 1991 date.

Finally, the court in Bruce, as well as Judge See in the Martin case, failed to follow the Supreme Court's clear ruling in the Bradley case. Bradley requires application of the law in effect at the time the court renders its decision. In this case, that law was the amended § 523(a)(8)(A).

Martin v. Great Lakes Higher Education Corp., No. 91-4229-1
(Bkrtcy. W.D. Mo. 2/28/92) 4 Bankr. L. Rep. (BNA) 323 (March 19, 1992)

* * * * *

TAX DIVISION

Supreme Court Grants Taxpayer's Petition For Certiorari In Important Case Involving Amortization of Intangibles

On April 6, 1992, the Supreme Court granted the taxpayer's petition for writ of certiorari in Newark Morning Ledger Co., as Successor to the Herald Co. v. United States. The United States acquiesced in that petition. Newark Morning Ledger involves the question whether the purchaser of a newspaper can amortize the amounts attributed to its purchase of the acquired newspapers' subscription lists. The Third Circuit held that an intangible asset is only amortizable, for tax purposes, if it has a value separate and distinct from goodwill and a reasonably determinable finite useful life. It then found that the taxpayer failed to demonstrate that the subscription lists were different from goodwill. The Third Circuit's decision appears to be inconsistent with other recent decisions, including the Eighth Circuit's in Donrey, Inc. v. United States, 809 F.2d 534 (1987).

It is the Government's position that the revenue expected to be generated by the repeat business of existing customers is a core element of goodwill, and therefore not amortizable. The General Accounting Office estimates that $4 billion rides on the resolution of cases and audits involving this question.

* * * * *

Supreme Court Determines That Its Decision In Davis v. Michigan Applies To Military As Well As Civilian Retirees

On April 21, 1992, the Supreme Court held in Barker v. State of Kansas, that Kansas' failure to exempt the retirement benefits of military retirees from state income tax to the same extent that an exemption is provided for benefits paid to retired state employees is inconsistent with 4 U.S.C. § 111 and is contrary to its decision in Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989). In Davis, the Supreme Court held that Michigan's taxation scheme which taxed retirement benefits paid to state retirees more favorably than those paid to federal retirees violated 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental immunity.

Despite the Supreme Court's decision in Davis, the Kansas Supreme Court ruled that Kansas could tax the retirement benefits paid to federal military retirees even though it does not tax the retirement benefits paid to state retirees. The Kansas court reasoned that military retirees were different from civilian retirees in that their "pensions" represented payment for remaining on call for further active duty, relying on two earlier Supreme Court cases. In reversing the decision of the Kansas court, the Supreme Court held that its decision in Davis was controlling, and stated that the Kansas court had misread its prior rulings. The Government filed an amicus brief in this case in support of the federal military retirees.

* * * * *

Supreme Court Grants Certiorari In Depletion Case

On April 27, 1992, the Supreme Court granted the Government's petition for a writ of certiorari in United States v. William F. Hill, et ux. This case involves the determination of the amount of a deduction for depletion that constitutes a tax preference for purposes of the alternative minimum tax. Specifically, Section 57(a)(8) of the Internal Revenue Code provides that depletion deductions that exceed the taxpayer's adjusted basis in "mineral deposits" constituted tax preference items subject to that alternative tax. Taxpayer here argued that the unrecovered cost of depreciable machinery and equipment could properly be included in the adjusted basis of his "mineral deposits" for this purpose, thereby increasing the amount of depletion deductions sheltered from the alternative minimum tax. The Federal Circuit agreed with the taxpayer, and the Government filed a petition for certiorari.

The Internal Revenue Service has determined that the resolution of this issue will have a substantial impact on tax revenues, estimating that $5 billion is at stake with respect to open returns for 1985 through 1989 alone.

* * * * *

Sixth Circuit Rules That Spanish Law Limits The IRS's Ability To Reallocate Income Between Domestic Parent And Spanish Subsidiary

On April 20, 1992, the Sixth Circuit affirmed the adverse decision of the Tax Court in Proctor and Gamble Co. v. Commissioner. Under Section 482 of the Internal Revenue Code, the Internal Revenue Service is permitted to "reallocate" income among commonly-controlled businesses in order clearly to reflect the income earned by the separate businesses. The issue in this case was whether provisions of Spanish law that restricted transfers of currency from a Spanish subsidiary to its non-Spanish parent precluded the Internal Revenue Service from "reallocating" income of Proctor and Gamble's Spanish subsidiary to its domestic parent pursuant to Section 482.

The Tax Court held that the Spanish currency restrictions trumped the Internal Revenue Service's reallocation authority, even though this resulted in an understatement of the domestic parent's income. The Sixth Circuit agreed, holding that the issue turned upon whether foreign law or the domestic parent's controlling interest in the foreign subsidiary caused the distortion of income. The Court concluded that Spanish law caused the distortion here, and thus the Internal Revenue Service was not permitted to reallocate a portion of the Spanish subsidiary's income to its domestic parent.

* * * * *

Eleventh Circuit Rules Against The Government In Case Involving Foreign Tax Credit For Saudi Arabian Taxes

On April 2, 1992, the Eleventh Circuit affirmed, without opinion, the adverse decision of the Tax Court in Vulcan Materials Co. v. Commissioner. This case involved the computation of the foreign tax credit allowed a domestic parent for foreign taxes paid by a foreign subsidiary -- in this case, a subsidiary located in Saudi Arabia. Saudi Arabia imposes a corporate level tax on the percentage of a corporation's earnings attributable to the corporation's non-Saudi Arabian ownership. Here, the taxpayer owned 68 percent of the Saudi Arabian subsidiary; the remainder of the stock was owned by a Saudi national. Therefore, only 68 percent of the subsidiary's earnings were subject to the Saudi Arabian tax.

Taxpayer claimed that it was entitled to a foreign tax credit for the full amount of this tax because the tax was only imposed on the earnings of the subsidiary attributable to its ownership interest. The Government contended that, in calculating the foreign tax credit allowed to the taxpayer, the tax imposed by Saudi Arabia should be allocated pro rata to all of the subsidiary's shareholders. This would have resulted in the taxpayer being entitled to a smaller credit. The Tax Court agreed with the taxpayer, however, and the Eleventh Circuit affirmed.

* * * * *

District Court Renders Favorable Decision In Wrongful Levy Case Involving Warehouse Bank

On March 25, 1992, the District Court for Colorado granted the Government's motion to dismiss in Aspinall, et al. v. United States. The plaintiffs in this case were account holders in a "warehouse bank" operated by the National Commodity and Barter Association (NCBA), a tax protestor organization. They filed this wrongful levy action, claiming that the Internal Revenue Service seized their property when it levied upon $2 million in gold, silver and currency held by NCBA to collect a $20 million tax liability owed by NCBA for its tax shelter activities. The Court found that the plaintiffs had failed to show that the specific property seized by the Internal Revenue Service belonged to them. Absent such a showing, these account holders could not interfere with the tax levy, but could only pursue whatever remedies might be available to them as creditors of NCBA. The Court noted: [T]he suggested unfairness of this result is offset by the fact that an objective of . . . operating the "warehouse bank" was to shield transactions from the IRS. Those who choose to conduct their financial transactions "off the books" have little cause to complain when they are unable to present proof of the existence of their property interests in a court of law. This decision is a major victory for the Government in its battle against tax protestors.

* * * * *

District Court Approves Settlement Reached In Levine

In 1986, Dennis Levine and Robert Wilkis consented to the entry of a judgment against them with respect to their insider trading activities. Pursuant to the consent decree which they had negotiated with the Securities and Exchange Commission, Levine and Wilkis agreed to disgorge $11.5 million and $3.2 million, respectively, to a receiver to be used to satisfy claims against them. In the meantime, the Internal Revenue Service had been investigating Levine and Wilkis' federal income tax liabilities. Based on the substantial unreported income from their insider trading activities, the Internal Revenue Service determined that Levine owed an additional $12.2 million in taxes for the years 1980 through 1985, and that Wilkis owed an additional $2.8 million for the years 1980 through 1986.

The Internal Revenue Service and the SEC, on behalf of securities investors who had traded at the time Levine and Wilkis were profiting from insider information, asserted rights in the disgorged funds. Over the past six years, the two Federal agencies have been attempting to reach a compromise as to their conflicting claims. In an order entered April 3, 1992, the United States District Court for the Southern District of New York approved a settlement agreement between the Internal Revenue Service and the SEC in each of these cases, which provide for the payment by the receiver of approximately $10.9 million to Internal Revenue Service with respect to Levine's outstanding tax liabilities, and approximately $2 million with respect to Wilkis' outstanding tax liabilities. At this time, the Court also entered residual judgments against Levine and Wilkis of approximately $6.6 million and $2.7 million, respectively. Each of these judgments is subject to a separate collection agreement.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

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

* * * * *

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Wyoming	Richard A. Stacy
North Mariana Islands	Frederick A. Black

* * * * *

EXHIBIT A

Letter to the Editor

Urinalysis and Casual Handling of Marijuana and Cocaine

To the Editor:

The possibility of testing positive for either marijuana or cocaine as a result of absorbing the drug during handling has been a concern of law enforcement officers, laboratory personnel, and others who might unknowingly handle materials contaminated with these drugs. We have investigated this issue with experiments designed to force contact with these materials.

For marijuana, one of the laboratory personnel, using bare hands, manicured several marijuana samples by forcing the material through a metal sieve. The number of samples was substantial enough to allow skin absorption to occur, if it were possible. Urine samples were collected over the 24-h period following handling the marijuana. The urine specimens were analyzed with the TDx cannabinoid assay (Abbott Diagnostic Laboratories). None of the samples were found to be positive at a 25-ng/mL cutoff.

Table I. EMIT d.a.u. Analysis* of Urine Specimens from a Subject Who Handled Two Dollar Bills Contaminated with Cocaine

Subject	Lapsed Time (h)	Rate	Concentration (ng/mL)
#2	0	404	0
	4	400	0
	8.5	406	0
	12.5	439	72
	18	427	36
	21	423	24
	22.5	411	0

*The negative, low, and medium assay calibrators gave the following rates respectively: 406, 528, and 710. A calibration curve prepared from 0 to 400 ng/mL benzoylecgonine had a correlation coefficient of 0.9946.

For cocaine, one individual (Subject 1) was asked to take two one-dollar bills with bare hands and immerse them in a large container of powdered coca paste (70% cocaine) and to make sure that the money was thoroughly covered and contaminated with the drug. The loose powder was shaken off the money, and the money was given to another individual (Subject 2), who was asked to purposely handle the money several times during the course of the day. Both individuals were asked not to wash their hands and to perform their normal functions throughout the day, including eating, drinking, etc. Urine samples were collected from both subjects over a period of approximately 24 h. All specimens were analyzed with the EMIT d.a.u. cocaine assay (Syva Company), and the concentration of benzoylecgonine was determined in a semiquantitative way based on the observed rate difference as compared to the assay calibrators. The results are shown in Table 1. From the results of this study, the author concludes that casual handling of articles contaminated with cocaine would not result in a positive test at a cutoff level of 300 ng/mL of benzoylecgonine. It should be noted that Subject 1, who immersed his hands in the coca paste, merely dusted off his hands, leaving a visible residue of the paste. This subject was a chronic nail-biter and had cracks in the skin of his fingertips to which the powder adhered. Even under these conditions, the highest concentration was just less than below the 300-ng/mL cutoff.

Our conclusion is, therefore, that handling of marijuana would not result in a positive urinalysis test for THC at a cutoff as low as 20 ng/mL. Handling of cocaine-contaminated articles, such as money, would not result in a positive test for benzoylecgonine at a 300-ng/mL cutoff, although low levels of the metabolite could be detected. This study does not cover inhalation of cocaine dust.

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EXHIBIT
B

Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Statement of Antitrust Enforcement Policy

The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers, where it is clear that:

(1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;

(2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws -- in most cases, group boycotts, collusive pricing, and other exclusionary activities; and

(3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.

This policy statement in no way affects existing laws or established principles of personal jurisdiction.

This enforcement policy is one of general application and is not aimed at any particular foreign country. The Department of Justice will continue its longstanding policy of considering principles of international comity when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. The Department also will continue its practice of notifying and consulting with foreign governments, where appropriate.

This statement of enforcement policy supersedes a footnote in the Department of Justice's 1988 Antitrust Enforcement Guidelines for International Operations that generally had been interpreted as foreclosing Department of Justice enforcement actions against anticompetitive conduct in foreign markets unless the conduct resulted in direct harm to U.S. consumers. The new policy represents a return to the Department's pre-1988 position on such matters.

If the conduct is also unlawful under the importing country's antitrust laws, the Department of Justice is prepared to work with that country if that country is better situated to remedy the conduct and is prepared to take action against such conduct pursuant to its antitrust laws.

Department of Justice Antitrust Enforcement Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports

Background

The Change Announced Today Would Return the Department to its Longstanding Pre-1988 Enforcement Policy

The Justice Department's longstanding enforcement policy prior to 1988 was most clearly expressed in the Department's 1977 Antitrust Guide for International Operations, which identified two purposes served by the Antitrust laws' application to international trade: to protect U.S. consumers from restraints that raised the price or limited their choice of imported as well as domestic products and, separately,

> to protect American export and investment opportunities against privately imposed restrictions. The concern is that each U.S.-based firm engaged in the export of goods, services or capital should be allowed to compete on the merits and not be shut out by some restriction imposed by a bigger or less principled competitor.

Although the Department had brought few cases based solely on harm to exporters in recent years, it did not hesitate to bring such cases when there was evidence of a violation. For example, in 1982 the Department sued eight Japanese trading companies for fixing the prices they paid Alaskan seafood processors for crab to be exported to Japan. The case was settled by a consent decree. *U.S. v. C. Itoh & Co., et al.*, 1982-83 (CCH) Trade Cases ¶65,010 (W.D. Wash. 1982).

The Department's 1988 Antitrust Enforcement Guidelines for International Operations, however, indicated that harm to exporters would not be a sufficient basis for enforcement action unless there also was direct harm to U.S. consumers. While acknowledging that Congress had provided for actions against export restraints in 1982 when it codified Sherman Act subject matter jurisdiction in foreign commerce cases, the Guidelines stated that as a matter of enforcement policy,

> The Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.

The Department has never limited its antitrust enforcement to cases in which there is direct harm to consumers where the conduct in question is wholly domestic. The antitrust laws have always applied to anticompetitive conduct that harms producers as well as to conduct that harms consumers. For example, a buyers' cartel that suppresses the price paid to suppliers is treated in the same way as a sellers' cartel that raises the price charged to customers -- even though the immediate harm is to producers in the first instance and to consumers in the second. The 1988 policy, however, has been interpreted as precluding action against a cartel of offshore buyers who suppress prices paid to U.S. exporters, even though it has always been clear that the Department would act against offshore sellers' cartels that collusively raise prices to U.S. consumers.

The Policy Implements Existing Law

The enforcement policy announced today is fully consistent with existing law. The Supreme Court has confirmed that anticompetitive conduct that restrains American exports is actionable under the antitrust laws, and there is no debate about the law on this issue. Its clearest expression by the Supreme Court was in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), in which the Court sustained Zenith's antitrust challenge to activities of a Canadian patent pool whose members conspired to give licenses only to firms manufacturing in Canada, and to refuse licenses Zenith needed to export U.S.-made radios and televisions to Canada.

Congress, moreover, endorsed the antitrust laws' application to conduct that restrains exports in the 1982 Foreign Trade Antitrust Improvements Act. 15 U.S.C. §6a. The Act amended the Sherman Act, and added a parallel provision to the Federal Trade Commission Act, codifying their jurisdictional reach over foreign conduct that has a direct, substantial and reasonably foreseeable effect "on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The Act was intended as a clarification of existing law, and was not seen as an extension of antitrust jurisdiction.

The Department Will Seek Cooperation With Foreign Antitrust Authorities

In adopting this enforcement policy, the Justice Department recognizes that a number of unique considerations can affect antitrust enforcement that involves parties or conduct outside the United States. The policy will operate within existing law, and will not alter the jurisdictional principles that determine when foreign firms and individuals are within the reach of U.S. courts.

The Department will also continue its longstanding policy of considering international comity principles when making antitrust enforcement decisions that may significantly affect another government's legitimate interests. Under this approach, the Department will continue its present practice with respect to notification and consultation with foreign governments. In most cases, conduct that harms U.S. exporters also harms foreign consumers who benefit from the availability of imported goods and services. Such conduct may be actionable under the importing country' antitrust laws. The Department of Justice is prepared to work with antitrust authorities in the importing country if they are better situated to remedy the conduct and are prepared to act.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

EXHIBIT C

April 7, 1992

MEMORANDUM

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

FROM: Cary H. Copeland CHC
Director and Chief Counsel

SUBJECT: Disposition of Cost Bonds

I. Applicable Law

Pursuant to statute, the seizing agency receiving a claim and a cost bond transmits them to the U.S. Attorney for the institution of a judicial forfeiture. 19 U.S.C. § 1608, 26 U.S.C. § 7325(3). The cost bond secures the claimant's obligation to pay costs in the event that forfeiture results.[1]

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[1] With only minor differences in statutory language, both 19 U.S.C. § 1608 and 26 U.S.C. § 7325(3) state that the cost bond is "conditioned that, in case of condemnation of the articles so claimed [seized], the obligor[s] shall pay all the costs and expenses of the proceedings to obtain such condemnation" (emphasis added) (section 7325(3) language in brackets); see also, United States v. Real Property and Residence Located at Route 1, Box 111, Firetower Road, Semmes, Mobile County, Alabama, 920 F.2d 788, 789-90 (11th Cir. 1991) (although claimant's bond amount is a "penal" sum, that amount was at risk for unsuccessful claimant only to the extent of the cost of the forfeiture proceedings). Pursuant to 19 U.S.C. § 1608, a surety bond approved by the seizing agency may be filed as the cost bond. Accordingly, applicable DEA and FBI regulations state that "[t]he bond posted to cover costs may be in cash, certified check, or satisfactory sureties." 21 CFR § 1316.76; 28 CFR § 8.8.

The costs which may be charged against the cost bond are set forth in 28 U.S.C. §§ 1920 and 1921.[2] These costs are:

A. the fees of the clerk;

B. the fees of the U.S. Marshal as set forth in 28 U.S.C. § 1921, including:

1. the Marshal's fees for service of the complaint, the warrant of arrest in rem, or any other writ, order, or process in the case;

2. the Marshal's fees for service of witnesses;

3. the Marshals fees for the preparation of public notices; and

4. the Marshal's fees for the keeping of attached property, including actual expenses incurred, such as storage, moving, boat hire, or other special transportation, watchmen's or keepers' fees, insurance, and an hourly rate, including overtime, for each deputy marshal required for special services, such as guarding, inventorying, and moving;

C. the fees of the court reporter for all or any part of the stenographic transcript necessary for use in the case;

D. fees and disbursements for witnesses and any printing related to the case;

E. docket fees under 28 U.S.C. § 1923; and

F. compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

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[2] See also, United States v. One 1969 Plymouth Two-Door Hardtop, etc., 360 F.Supp. 488, 489 (M.D. Ala. 1973) (expense of storing property prior to claimant's intervention should not be taxed to unsuccessful claimant); United States v. One 1949 G.M.C. Truck, 104 F.Supp. 34, 38-39 (E.D. Va. 1950) (costs assessable against an unsuccessful claimant include only those enumerated in 28 U.S.C. §§ 1920 and 1921 and not storage costs incurred by the Government prior to the Marshal's service of process); but see, 26 U.S.C. § 7323(c) (costs of seizure before process issued are taxable under internal revenue law forfeiture procedures).

Pursuant to § 1920, "[a] bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."[3]

II. General Policy

A. Upon receipt of the cost bond from the seizing agency, the U.S. Attorney shall forward the bond to the U.S. Marshal.[4] The U.S. Marshal shall hold the bond in the Seized Asset Deposit Fund pending resolution of the claim for which the cost bond was filed.

B. If any of the property for which the cost bond was filed is judicially forfeited,

1. judgment for allowed costs should be included in the judgment of forfeiture or sought by separate motion and order;

2. the costs allowed should be recovered from the amount of the cost bond; and

3. the amount remaining, if any, after the deduction of allowed costs should be returned.

C. In the settlement of judicial forfeiture cases, the U.S. Attorney shall retain the authority to waive the costs incurred in the case and return the bond.

D. If none of the property for which the cost bond was filed is forfeited, the cost bond, or the entire amount deposited as the cost bond, should be returned to the claimant when the property is returned.

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[3] See also, 28 U.S.C. § 1924 (requiring affidavit verifying bill of costs); Fed.R.Civ.P. 54(d) and 28 U.S.C. §§ 1918(a) and 2412(a) (authority for awarding costs to prevailing party).

[4] U.S. Attorneys usually will receive cost bonds from the seizing agencies after the agency has determined that the claim and the bond are in proper form. See, e.g., 21 CFR § 1316.76(a), 28 CFR § 8.8(b). However, U.S. Attorneys usually will not receive cost bonds from the U.S. Customs Service because it is the general policy of the Customs Service to place the cost bond in a Customs Service suspense account pending resolution of the claim.

III. Administrative Forfeiture by Agreement After Cost Bond Filed

This Office's memorandum styled "Policy Regarding Forfeiture by Settlement," October 31, 1991, sets out (at page 3) the Department's policy for settlements in which the claim is withdrawn. In accord with that policy, the forfeiture should proceed administratively pursuant to a written settlement agreement that includes specific reference to withdrawal of the claim.

When a claim and a cost bond have been filed and the claim is withdrawn pursuant to a settlement agreement, the Department's policy regarding the disposition of the cost bond is as follows:

A. If allowable costs have not been incurred,

1. the settlement agreement should provide for return of the cost bond, or the entire amount deposited as the cost bond; and

2. the cost bond, or the entire amount deposited as the cost bond, should be returned to the claimant pursuant to the settlement agreement.

B. If allowable costs have been incurred,

1. the settlement agreement should provide for return of the amount of the cost bond remaining, if any, after deduction of an agreed upon sum specified as allowable costs;

2. the agreed allowable costs should be recovered from the cost bond; and

3. the bond amount remaining, if any, after deduction of agreed costs should be returned pursuant to the settlement agreement.

IV. U.S. Customs Service Cases Generally

Although the Customs Service has its own asset forfeiture program and procedures, the handling and disposition of cost bonds in Customs cases generally will follow the policies set forth above. Please contact the Customs Regional or District Counsel in your area if there are any questions concerning cost bonds in Customs cases.

Questions regarding disposition of costs bonds in forfeiture cases other than Customs cases should be referred to the Asset Forfeiture Office, Criminal Division, FTS 368-1263 or (202) 514-1263.

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

EXHIBIT D

April 20, 1992

TO: Holders of United States Attorneys' Manual Title 6

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

/s/ James A. Bruton
Acting Assistant Attorney General
Tax Division

RE: **Direct Referral of False and Fictitious Return Cases for Grand Jury Investigation (18 U.S.C. §§ 286 and 287)**

NOTE:
1. This is issued pursuant to USAM 1-1.550.
2. Distribute to Holders of Title 6.
3. Insert in front of affected section.

AFFECTS: USAM 6-4.120, 6.4-121, and 6.4-243

PURPOSE: This bluesheet (1) supplements USAM 6-4.120 to implement Tax Division Directive No. 96, delegating to the United States Attorneys the authority to initiate grand jury investigations of the filing of false and fictitious federal tax returns in violation of 18 U.S.C. §§286 and 287, (2) amends USAM 6-4.121 to reflect changes to IRS procedures for requesting initiation of a grand jury investigation, and (3) amends USAM 6-4.243 to clarify that prosecution under 18 U.S.C. §§286 and 287 of cases involving false and fictitious claims for tax refunds submitted through the Internal Revenue Service's Electronic Filing Program must be authorized by the Tax Division.

The following supplements USAM 6-4.120 Grand Jury Investigations, dated October 1, 1988.

Authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287 (other than violations committed by a professional tax return preparer), has been delegated to all United States Attorneys by the Tax Division (see Tax Division Directive No. 96, dated December 31, 1991). This delegation of authority is subject to the following limitations:

(1) The case has been referred to the United States Attorney by Regional Counsel/District Counsel, Internal Revenue Service, and a copy of the request for grand jury investigation letter has been forwarded to the Tax Division, Department of Justice; and,

(2) Regional Counsel/District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself/herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled.

In all cases, a copy of the request for grand jury investigation letter, together with a copy of the Form 9131 and a copy of all exhibits, must be sent to the Tax Division by overnight courier at the same time the case is referred to the United States Attorney. In cases involving arrests or other exigent circumstances, the copy of the request for grand jury investigation letter (together with the copy of the Form 9131) must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the request for grand jury investigation letter has not been forwarded to the Tax Division by overnight courier or by telefax by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of the delegation of authority. In no such case may the United States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This authority is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18

U.S.C. §287 in line with the United States Attorneys' authority to authorize prosecution of such cases (see USAM, 6-4.243, infra). Because the authority to authorize prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds which are submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation. Due to the unique problems posed by electronically filed false claims for refunds, Tax Division authorization is required if prosecution is deemed appropriate in an electronic filing case.

The following replaces USAM 6-4.121, IRS Requests to Initiate Grand Jury Investigations, dated October 1, 1988.

CID generally relies upon the administrative process to secure evidence during an investigation. However, where CID is unable to complete its administrative investigation or otherwise determines that the use of administrative process is not feasible, it may request a grand jury investigation.

Procedurally, the request must include a completed IRS Form 9131, a Request for Grand Jury Investigation signed by Regional or District Counsel, and whatever exhibits are available to support the request. See IRM 9267.2 et seq. Because this request is a referral of the matter to the Department of Justice, CID may no longer use administrative process. See USAM 6-4.115, supra.

The following replaces subsection B of USAM 6-4.243, Review of Direct Referral Matters, dated October 1, 1988.

B. Multiple filings of false and fictitious returns claiming refunds (18 U.S.C. §§286 and 287)--all offenses wherein taxpayer files two or more returns for a single tax year claiming false refunds, excluding return preparers who falsify returns to claim refunds and cases involving false or fictitious claims for refund which are submitted to the Internal Revenue Service through the Electronic Filing (ELF) program.

Guideline Sentencing Update

FEDERAL [illegible]

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.

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Relevant Conduct

Ninth Circuit holds that relevant conduct must meet test of "similarity, regularity, and temporal proximity." Defendant was convicted by a jury on two drug and two firearms counts, based on possession of a firearm and less than one gram of methamphetamine in March 1989. The presentence report relied on defendant's admission that he sold an ounce of methamphetamine every three days between June and September 1988, to calculate a total of forty ounces. He was sentenced on that basis to 97 months on the drug charges, whereas the guideline range would have been 10–16 months for the amount found at his arrest. Defendant argued on appeal that the 1988 conduct should not have been used in sentencing.

The appellate court remanded and set forth the analysis district courts should use to decide whether conduct is "relevant" for sentencing purposes. Citing *U.S. v. Santiago*, 906 F.2d 867, 872 (2d Cir. 1990), the court determined that the "pertinent factors to be considered are . . . 'the nature of the defendant's acts, his role, and the number and frequency of repetitions of those acts, in determining whether they indicate a behavior pattern.' . . . There must be '"sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct."' Thus, the essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity." (Citations omitted.)

"When one component is absent, however, courts must look for a stronger presence of at least one of the other components. In cases such as the present one, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of the third component. *Compare [U.S. v.] Phillippi*, 911 F.2d [149, 151 (8th Cir. 1990)] (holding that the dates and nature of conduct occurring 'as remotely as two years before [the defendant's] arrest' must be 'clearly established' in order to be considered relevant)[, *cert. denied*, 111 S. Ct. 702 (1991)] *with U.S. v. Cosineau*, 929 F.2d 64, 68 (2d Cir. 1991) ('Because of the continuous nature of the conduct and the circumstances of this case, we are not reluctant to consider relevant the conduct that occurred during the course of a two year period.')." When "the relevance of the extraneous conduct depends primarily on its similarity to the conviction, it is not enough that the extraneous conduct merely amounts to the same offense as the offense for which the defendant was convicted. . . . [A] district court must consider whether specific similarities exist between the offense of conviction and the temporally remote conduct alleged to be relevant under . . . section 1B1.3(a)(2)."

"When regularity is to provide most of the foundation for temporally remote, relevant conduct, specific repeated events outside the offense of conviction must be identified. Regularity is wanting in the case of a solitary, temporally remote event, and therefore such an event cannot constitute relevant conduct without a strong showing of substantial similarity." *Cf. U.S. v. Nunez*, No. 91-2752 (7th Cir. Mar. 25, 1992) (Bauer, C.J.) (affirmed: uncharged cocaine sales that occurred from 1986–88 and in 1990 for defendant arrested in Oct. 1990 "amounted to the same course of conduct"—all sales were made to same buyer and were interrupted only by buyer's imprisonment); *Santiago, supra*, at 871–73 (drug sales 8–14 months before sale of conviction properly considered—all sales were similar and to same individual). The court noted, however, that "[i]n extreme cases, the span of time between the alleged 'relevant conduct' and the offense of conviction may be so great as to foreclose as a matter of law consideration of extraneous events as 'relevant conduct.'" *See, e.g., U.S. v. Kappes*, 936 F.2d 227, 230–31 (6th Cir. 1991) (although the two were similar, "[i]t would take an impermissible stretch of the imagination to conclude that the 1983 offense was part of the same 'course of conduct' as the 1989 offense").

In remanding for reconsideration of the 1988 conduct, the court concluded that the government must show "similarity, regularity, and temporal proximity in sufficient proportions so that a sentence may fairly take into account conduct extraneous to the events immediately underlying the conviction. This test is especially important in cases where the extraneous conduct exists in 'discrete, identifiable units' apart from the conduct for which the defendant is convicted."

U.S. v. Hahn, No. 89-10592 (9th Cir. April 7, 1992) (Tang, J.).

Departures

Substantial Assistance

Ninth Circuit holds that when departure below statutory minimum is made under 18 U.S.C. § 3553(e), further departure for other mitigating circumstances is not authorized. Defendant pled guilty to a drug charge that carried a ten-year mandatory minimum sentence, which was greater than his guideline range (range not specified in opinion). The government made a motion under § 3553(e) and § 5K1.1, p.s. for downward departure based on defendant's substantial assistance and recommended a three-year sentence. The district court departed downward to impose a 39-month sentence. Defendant argued on appeal that the court should have departed further based on his claim of aberrant behavior.

The appellate court affirmed the sentence and held that the district court had no authority to depart for any reason other than defendant's substantial assistance. The court reasoned that generally "district courts do not have discretion to depart downward from mandatory minimum sentences imposed by statute." Section 5K1.1 "is the only section [of the Guidelines] that allows [such] a downward departure . . . . All other sections in part K address departures from the 'guidelines.' U.S.S.G. §§ 5K2.0–5K2.15."

"Here, the district court departed downward from the mandatory minimum sentence in response to a motion by the government based on Valente's substantial assistance. . . . There is no question this downward departure was proper. But the court had no authority to depart downward below the statutory minimum on the basis of Valente's aberrant behavior, nor for that reason to depart below the government's recommended downward departure once the minimum sentence level had been breached."

This is the first appellate court to apparently suggest that a § 3553(e) departure is limited by the government's recommended sentence. The Seventh Circuit has stated that the government's recommendation "should be the starting point" for the extent of departure. *U.S. v. Thomas*, 930 F.2d 526, 530–31 (7th Cir. 1991). *But cf. U.S. v. Pippin*, 903 F.2d 1478, 1485 (11th Cir. 1990) (once government makes § 5K1.1 motion it "has no control over whether and to what extent the district court departs from the Guidelines," except that it may argue on appeal that the sentence was "unreasonable"); *U.S. v. Wilson*, 896 F.2d 856, 859–60 (4th Cir. 1990) (under § 3553(e) "the limit of the district court's discretion is the question of whether or not the sentence imposed was reasonable," and court may depart down to probation).

One other court has specifically held that "only factors relating to a defendant's cooperation" may be considered in determining the extent of a departure under § 3553(e). *Thomas, supra*, at 529–30 (improper to factor in family responsibilities, § 5H1.6, p.s., when choosing extent of departure).

Note that in the instant case the guideline range was *below* the mandatory minimum. The holding here may not apply when the guideline range is *above* the mandatory minimum. That is, a court could depart for mitigating circumstances down to the minimum, then below it for substantial assistance.

U.S. v. Valente, No. 91-10256 (9th Cir. April 1, 1992) (Thompson, J.).

Criminal History

U.S. v. Glas, No. 90-3522 (7th Cir. Mar. 16, 1992) (Kanne, J.) (affirmed upward departure from 24–30 months to 48 months for defendant with 39 criminal history points: it was reasonable to "create" new criminal history categories above VI by adding one for every three points above 13 and increasing the minimum sentence by three months—the pattern for a defendant at offense level 10—thus resulting in new category XIV and 48–54 month range).

Offense Conduct

Possession of Weapon During Drug Offense

U.S. v. Sivils, No. 90-6366 (6th Cir. Mar. 31, 1992) (Jones, J.) (it was not clearly erroneous to give § 2D1.1(b)(1) enhancement to defendant who was a county sheriff and carried a gun as part of his job—carrying the firearm "as part of his status as a sheriff . . . does not mean . . . that the weapon could not be connected with the offense"). *Accord U.S. v. Ruiz*, 905 F.2d 499, 508 (1st Cir. 1990).

U.S. v. Soto, No. 91-1653 (2d Cir. Mar. 24, 1992) (Altimari, J.) (rejecting claim that § 2D1.1(b)(1) enhancement could not be applied unless defendant had personal knowledge of existence of weapons in apartment where he and codefendants were arrested, joining other circuits in holding that this "enhancement may be applied to a defendant's sentence based on possession of a weapon so long as the possession of the firearm was reasonably foreseeable to the defendant"). *Accord U.S. v. McFarlane*, 933 F.2d 898, 899 (10th Cir. 1991); *U.S. v. Blanco*, 922 F.2d 910, 912 (1st Cir. 1991); *U.S. v. Barragan*, 915 F.2d 1174, 1177–79 (8th Cir. 1990); *U.S. v. Garcia*, 909 F.2d 1346, 1349–50 (9th Cir. 1990); *U.S. v. Aguilera-Zapata*, 901 F.2d 1209, 1212–15 (5th Cir. 1990); *U.S. v. White*, 875 F.2d 427, 433 (4th Cir. 1989).

Sentencing Procedure

Plea Bargains

Second Circuit sets forth options on remand when sentence exceeds plea agreement that only specified amount of fines. Defendants and the government entered plea bargains that specified the amounts of the fines to be imposed but contained no other language limiting the sentence. The sentencing judge imposed fines several times higher than the agreement specified, stating that he did so because he imposed probation rather than prison terms. Defendants and the government agreed on appeal that both sentences should be remanded, but disagreed as to whether the district court should simply lower the fine amounts or also could replace the sentences of probation with terms of imprisonment.

The appellate court held that the defendants must be given the opportunity to withdraw their guilty pleas or the sentencing court "must conform the sentence to th[e] bargain by reducing the fine to the bargained amount." However, because the fine was the only component of the sentence that was stipulated, the district judge may, "if he elects to enforce the sentence bargains and reduce the fines, . . . exercise his discretion to impose terms of imprisonment with respect to the same counts for which the fine component of the sentence will be reduced. The extent of such terms, however, must not be so severe as to create an undue risk of deterring others from subsequent challenges to sentence components that might be unlawful." The court noted that defendants' "appellate 'victory' risks consequences that they might well regard as adverse," and therefore gave them the option to withdraw this appeal should they prefer "to accept their current sentences instead of facing the risk of imprisonment."

U.S. v. Bohn, No. 91-1433 (2d Cir. Mar. 19, 1992) (Newman, J.).

Imposition of Supervised Release

U.S. v. Saunders, No. 91-1501 (8th Cir. Mar. 2, 1992) (McMillian, J.) (remanded: court may depart to impose longer term of supervised release, but departure from 2–3-year term to 5-year term was improper here because statutory maximum term was three years; however, defendant was convicted of multiple counts and court may impose consecutive terms of supervised release to reach same result).

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Perez, 956 F.2d 1098 (11th Cir. 1992) (affirmed: even when concurrent sentences are called for under § 5G1.2, "the district court has the authority to impose consecutive rather than concurrent sentences if it follows the procedures for departing from the Guidelines"). *Accord U.S. v. Pedrioli*, 931 F.2d 31, 32 (9th Cir. 1991).

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Departures

SUBSTANTIAL ASSISTANCE

Eighth Circuit holds that § 5K1.1, p.s. motion does not permit departure below statutory minimum under 18 U.S.C. § 3553(e). Defendant was subject to a ten-year mandatory minimum sentence after pleading guilty to possession with intent to distribute 50 or more grams of cocaine base. The government filed a motion under § 5K1.1, p.s. for departure below the guideline range of 235–295 months, and specifically noted that its motion was pursuant to § 5K1.1 only and was not meant to affect the mandatory minimum. The district court departed below both the range and the minimum to impose a sentence of 36 months.

On the government's appeal, the issue was "whether a sentencing judge can depart below the statutory mandatory minimum sentence when the government has moved for a downward departure for substantial assistance pursuant to . . . section 5K1.1, and not pursuant to 18 U.S.C. § 3553(e). The underlying question is whether sections 5K1.1 and 3553(e) provide for two different types of departure . . . or whether they are intended to perform the same function."

The appellate court reversed, concluding that the two sections are distinct. The sentencing statutes "plainly empower the Sentencing Commission to provide for departures below the statutory minimum. However, section 5K1.1 does not state that a 5K1.1 motion applies to mandatory minimum sentences, or is the equivalent of a section 3553(e) motion. Thus, the only authority for the district court to depart below the statutorily mandated minimum sentence exists in the plainly stated limitation in section 3553(e). The government made it clear that it was not filing a motion pursuant to that statute. Because a section 3553(e) motion is the key to unlocking the door to consideration of this issue by the sentencing judge, we can only conclude that the district court erred in departing below the mandatory minimum absent such a motion. . . . [T]he sentencing judge may not depart below the statutory minimum pursuant to a motion under section 5K1.1 alone."

The Second and Ninth Circuits held the opposite—courts may depart below both the guideline range and statutory minimum once a § 5K1.1 motion is made. *U.S. v. Ah-Kai*, 951 F.2d 490, 493–94 (2d Cir. 1991); *U.S. v. Keene*, 933 F.2d 711, 715 (9th Cir. 1991). *See also U.S. v. Wade*, 936 F.2d 169, 171 (4th Cir.) (agreeing with *Keene* in dicta), *cert. granted*, 112 S. Ct. 635 (1991) (arguments heard March 23, 1992).

U.S. v. Rodriquez-Morales, No. 91-2355 (8th Cir. Mar. 11, 1992) (Gibson, J.) (Heaney, Sr. J., dissenting).

CRIMINAL HISTORY

U.S. v. Gammon, No. 91-1832 (7th Cir. Mar. 9, 1992) (Flaum, J.) (Affirming upward departure partly based on inadequate reflection in the criminal history score of "the seriousness of [defendant's] record as evidenced by the sheer number of juvenile offenses." The court held that although the juvenile convictions were too "old" to be counted under § 4A1.2(d)(2) and were not similar to the offense of conviction, § 4A1.2, comment. (n.8), they were a proper ground for departure under § 4A1.3, p.s. because they showed "his serious history of criminality and the likelihood that he would commit crimes in the future."). *Contra U.S. v. Samuels*, 938 F.2d 210, 215–16 (D.C. Cir. 1991) (uncounted juvenile sentences may be used for departure only if evidence of similar misconduct or criminal livelihood) [4, #8]. *Cf. U.S. v. Nichols*, 912 F.2d 598, 604 (2d Cir. 1990) (departure under § 4A1.3, p.s. proper for violent juvenile offense for which defendant received lenient treatment).

Adjustments

ABUSE OF POSITION OF TRUST

Ninth Circuit distinguishes "breach" from "abuse" of trust. Although the § 3B1.3 enhancement for abuse of position of trust may not be applied when elements of the offense include abuse of trust, there is "a qualitative difference between a breach of trust and abuse of trust," and thus § 3B1.3 may be "applied to embezzlers when the breach of trust was particularly egregious." *Accord U.S. v. Georgiadis*, 933 F.2d 1219, 1225 (3d Cir. 1991). "In determining whether particular conduct constitutes a breach or an abuse of trust, courts must look to the role the position of trust played in facilitating the offense. The Commentary states that the enhancement may be applied only when the position of trust contributed in some 'substantial' way to facilitating the crime. 'Substantial' in this context has been interpreted to mean that, in addition to the elements of the crime, the defendant exploited the trust relationship to facilitate the offense." Because defendant's position "not only allowed her access to large amounts of cash, but also made it possible for her to conceal the theft for an extended period of time . . . her position of trust facilitated her embezzlement in a manner not accounted for in the underlying offense"—and the enhancement was properly given.

The court also held that an enhancement for "more than minimal planning," § 2B1.1(b)(5), could be imposed in addition to § 3B1.3 because the extensive planning required for repeated thefts over a two and a half year period involved concerns other than abuse of trust. *Accord U.S. v. Marsh*, 955 F.2d 170 (2d Cir. 1992); *Georgiadis*, *supra*, at 1225–27.

U.S. v. Christiansen, No. 91-30155 (9th Cir. Mar. 3, 1992) (Wright, J.).

USE OF SPECIAL SKILL

U.S. v. Connell, No. 91-1700 (1st Cir. Feb. 26, 1992) (Selya, J.) (affirmed: "the specialized knowledge required of a stockbroker, when combined with the ability to access financial markets directly, can qualify as a special skill" under § 3B1.3 where, as here, it was not an element of the offense).

Victim-Related Adjustments

U.S. v. Caterino, No. 90-50049 (9th Cir. Feb. 21, 1992) (Hall, J.) (remanded: error to apply two "vulnerable victim" enhancements under § 3A1.1, for total increase of four offense levels, for vulnerable victims in two separate fraud counts arising from same fraud scheme—under the multiple counts guidelines in Chapter Three "the offense characteristics for a fraud conviction are applied to the overall scheme rather than by reference to individual counts or victims," and thus the § 3A1.1 adjustment is "counted once for convictions arising out of a single fraudulent scheme"). *See also* U.S.S.G. § 3D1.3, comment. (n. 3) ("When counts are grouped pursuant to § 3D1.2(d), the offense guideline applicable to the aggregate behavior is used.... Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole.").

Obstruction of Justice

U.S. v. Brooks, No. 90-5240 (4th Cir. Feb. 28, 1992) (Luttig, J.) (Remanding imposition of § 3C1.1 enhancement for threatening comment made to third party but not heard by the target of the threat. "At a minimum, section 3C1.1 requires that the defendant either threaten the codefendant, witness, or juror in his or her presence or issue the threat in circumstances in which there is some likelihood that the codefendant, witness, or juror will learn of the threat. Not only is there no evidence in this record that Patterson ever learned of Brooks' threat, there is no basis for concluding from the circumstances in which the threat was made that Patterson might learn of the threat. It is not even clear that Brooks actually intended that Patterson learn of the threat."). *But cf. U.S. v. Capps*, 952 F.2d 1026, 1028–29 (8th Cir. 1991) (affirming enhancement based on threat made to third party: "since the adjustment applies to attempts to obstruct justice, it is not essential that the threat was communicated to [the target] if it reflected an attempt by Capps to threaten or intimidate her conspirators") [4, #18].

Criminal History

Career Offender

Eleventh Circuit reaffirms that unlawful possession of firearm by convicted felon is "crime of violence" and holds that change in commentary cannot overrule circuit precedent. Defendant's sentence as a career offender was affirmed in *U.S. v. Stinson*, 943 F.2d 1268 (11th Cir. 1991), which held that possession of a firearm by a convicted felon categorically constitutes a "crime of violence" for career offender purposes. Later, the Commentary to § 4B1.2 was changed to state that such offense was not a crime of violence. Defendant petitioned for rehearing, arguing that the amendment should be given retroactive effect.

The appellate court denied the petition, reaffirmed its earlier holding, and examined "the appropriate weight to be afforded to the commentary. . . . This new commentary coming after we had construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary—or newly created 'legislative history'—by the Sentencing Commission." Noting that, unlike guidelines, the commentary "is never officially passed upon by Congress," the court determined that "we must be mindful of the limited authority of the commentary. We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts. As far as we can tell, at no point has this change been called to Congress's attention, much less been authorized by Congress. Although commentary should generally be regarded as persuasive, it is not binding. . . . We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as 'a crime of violence.'"

U.S. v. Stinson, No. 90-3711 (11th Cir. Mar. 20, 1992) (per curiam).

General Application Principles

Amendments

U.S. v. Connell, No. 91-1700 (1st Cir. Feb. 26, 1992) (Selya, J.) (Remanded because offense guideline level was lowered after sentencing: "The guidelines provide that '[w]here a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment [listed in § 1B1.10(d)] . . . , a reduction in the defendant's term of imprisonment may be considered.' U.S.S.G. § 1B1.10(a), p.s. (1991).... Hence, while Connell is not necessarily entitled to a reduction in the offense level—section 1B1.10(a) does not mandate the use of the lesser enhancement, but merely affords the sentencing court discretion to utilize it—he is entitled to have his sentence reviewed in light of the amendment."). *Cf. U.S. v. Park*, 951 F.2d 634, 635–36 (5th Cir. 1992) (under facts of this case amendment listed in § 1B1.10(d) "should be applied retroactively").

Juvenile Sentencing

Supreme Court holds juvenile sentences are limited by maximum Guidelines sentence that similarly situated adult could receive. "We hold . . . that application of the language in [18 U.S.C.] § 5037(c)(1)(B) permitting detention for a period not to exceed 'the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult' refers to the maximum length of sentence to which a similarly situated adult would be subject if convicted of the adult counterpart of the offense and sentenced under the statute requiring application of the Guidelines, 18 U.S.C. § 3553(b). Although determining the maximum permissible sentence under § 5037(c)(1)(B) will therefore require sentencing and reviewing courts to determine an appropriate guideline range in juvenile-delinquency proceedings, we emphasize that it does not require plenary application of the Guidelines to juvenile delinquents. Where that statutory provision applies, a sentencing court's concern with the Guidelines goes solely to the upper limit of the proper guideline range as setting the maximum term for which a juvenile may be committed to official detention, absent circumstances that would warrant departure under § 3553(b)."

The Court's holding resolves the conflict between *U.S. v. R.L.C.*, 915 F.2d 320, 325 (8th Cir. 1991) (maximum sentence limited by guideline range), and *U.S. v. Marco L.*, 868 F.2d 1121, 1124 (9th Cir.) (maximum term limited only by "the statute defining the offense"), *cert. denied*, 110 S. Ct. 369 (1989).

U.S. v. R.L.C., No. 90-1577 (U.S. Mar. 24, 1992) (Souter, J.) (concurring ops. by Scalia and Thomas, JJ.; dissenting op. O'Connor, J.).

EXHIBIT F

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 13 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | April 20, 1992

IN THIS ISSUE:

Pre-Guideline Sentencing

1st Circuit upholds pre-guidelines sentence because it was within statutory limits. (100) The 1st Circuit summarily rejected defendant's complaints about his pre-guidelines sentence because it was within statutory limits. "We have no right to review except if the court failed to 'individualize.' . . . It did not fail." *U.S. v. Pryor*, __ F.2d __ (1st Cir. March 16, 1992) No. 90-1295.

10th Circuit upholds consecutive sentences in pre-guidelines case. (100)(650) In a pre-guidelines case, defendant was convicted of 13 different counts of mail and securities fraud. He was sentenced to five consecutive five year terms, for a total of 25 years. The 10th Circuit affirmed, rejecting defendant's contention that the district court attempted to control his sentence beyond appellate review by imposing a sentence that would remain the same even if one of the counts which he appealed was dismissed. Each use of the mails is a separate offense under the mail fraud statute and consecutive sentences may be imposed even if the mailings arose from a single concerted plan to defraud. A similar doctrine is applicable to securities act violations. Thus, the district court could have ordered all 13 counts to be served consecutively. The court also rejected defendant's contention that the sentences violated the 8th Amendment. *U.S. v. Rogers*, __ F.2d __ (10th Cir. April 6, 1992) No. 90-1316.

Guideline Sentencing, Generally

Article critiques guidelines and offers alternative. (110) In "Reestablishing the Federal Judge's Role in Sentencing," a student author argues that the guidelines approach "improperly fosters judicial abdication of the duty of responsible and conscientious sentencing." The author also questions whether

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508 Departures for Criminal History (§4A1.3)
510 Cases Upholding
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550 Determining the Sentence (Chapter 5)
560 Probation (§5B) *(for Revocation, see 800)*
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700 Departures, Generally (§5K)
(for Criminal History Departures, see 508, for Refusal to Depart, see 860)
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900 Forfeitures, Generally
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disparity before the guidelines was as serious a problem as is sometimes portrayed, and suggests that the guidelines fail to cure disparity because they focus only on judicial discretion. The author recommends that the Commission set sentences for certain paradigm cases. Sentencing in actual cases would be performed by rotating three-judge panels, which would explain their sentences in relation to the Commission's paradigm cases. Appellate review would remain available. Note, 101 YALE L. J. 1109-34 (1992).

4th Circuit rejects double counting argument for environmental enhancements. (125)(355) Defendant was convicted of illegally discharging pollutants into wetlands in violation of the Clean Water Act. He received upward adjustments under section 2Q1.3(b)(1)(A) for an "ongoing, continuous, or repetitive" discharge of a pollutant, and under section 2Q1.3(b)(4) for a discharge without a permit. The 4th Circuit rejected defendant's argument that the enhancements constituted impermissible double counting because his base offense level had discharge of a pollutant and discharge without a permit as elements. The guidelines are explicit when double counting is forbidden, and an adjustment that clearly applies must be imposed unless the guidelines expressly excludes its application. Moreover, section 2Q1.3(b)(1)(A) differentiates punishment according to whether the discharge was "ongoing, continuous or repetitive" or occurred only on only occasion. In addition, section 2Q1.3 applies to offenses that do not involve the discharge of a pollutant or the failure to obtain a permit. *U.S. v. Ellen,* __ F.2d __ (4th Cir. April 2, 1992) No. 91-5032.

5th Circuit rules defendant's sentence was not enhanced twice for discharge of a firearm. (125)(330) Defendant was convicted of assaulting a federal officer with a deadly weapon and using a firearm during the commission of a felony. The 5th Circuit rejected defendant's claim that his sentence was enhanced twice for using the firearm. Guideline section 2A2.2(b)(2) provides for a five level enhancement if a firearm was discharged during an assault. However, the guideline applicable to the firearms offense, (section 2K2.4), specifically provides that when a sentence is imposed under this section in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use or discharge of a firearm is not to be applied to the guideline for the underlying offense. The presentence report, which was adopted by the trial court, clearly revealed that the prohibition against double counting was acknowledged and accepted. Defendant did not receive the five level enhancement under section 2A2.2(b)(2) for discharge of a firearm. *U.S. v. Moore,* __ F.2d __ (5th Cir. April 6, 1992) No. 91-2723.

8th Circuit rejects double jeopardy challenge based on delay in probable release date for unrelated conviction. (125) As a result of defendants' failure to appear for service of a pre-guidelines sentence, the Parole Commission added 10 months to their probable release dates. Defendants subsequently pled guilty to failing to surrender for service of sentence, and each received an eight-month sentence for this offense. The 8th Circuit rejected defendants' claim that the eight-month sentence violated the prohibition against double jeopardy since the 10-month delay in their probable release date already punished then for failing to surrender. A decision to delay a defendant's probable release date is an administrative decision and not a criminal prosecution. Thus, the 10-month delay in defendants' probable release date was not criminal punishment for the failure to surrender. *U.S. v. McGowan,* __ F.2d __ (8th Cir. March 2, 1992) No. 91-2955.

11th Circuit affirms adjustments based on amount of loss, role in the offense and more than minimal planning. (125)(300) Defendant defrauded the government out of over $20,000, but because he had to

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share the proceeds, he only received $5,000 from the scheme. The 11th Circuit rejected defendant's contention that the loss calculation under section 2F1.1 should be limited to his $5,000 profit. The court also rejected his claim that since his sentence was increased for his role in the offense and for more than minimal planning, a total loss figure greater than $5,000 would punish him twice for the same conduct. The guideline provides for cumulative, not alternative, punishment. *U.S. v. Rayborn,* __ F.2d __ (11th Cir. April 9, 1992) No. 90-3679.

8th Circuit upholds inclusion of drugs distributed by conspiracy after defendant moved to California. (132)(275)(380) From January to September 1987, defendant and three co-conspirators were involved in drug-related activities in Lincoln, Nebraska. In September 1987, defendant and his fiancee abruptly moved to California. At trial defendant testified that they moved to escape the drug scene in Lincoln and to avoid a debt he had incurred. After the move, he made occasional phone calls to his co-conspirators in Lincoln, but did not actively participate in the distribution of cocaine. The 8th Circuit upheld the application of the guidelines to his offense, and held him accountable for certain amounts of cocaine distributed by the conspiracy after he left for California. Conspiracy is a continuing offense, and a defendant may be sentenced under the guidelines for his participation in any conspiracy that continued past November 1, 1987, even if the defendant performed no overt act in furtherance of the conspiracy after this date. The district court found that although the exact amount of cocaine distributed after defendant's move was not foreseeable, it was reasonably foreseeable that the conspiracy would continue to receive cocaine after defendant's move, and that such amounts would be equal to at least three times the amounts previously transferred by the conspiracy. *U.S. v. Olderbak,* __ F.2d __ (8th Cir. April 10, 1992) No. 91-2165.

Article claims need to clarify 8th Amendment proportionality review. (140) In "Eighth Amendment Proportionality Principle," a student author objects that the Court failed to provide adequate guidance to lower courts in *Harmelin v. Michigan,* 111 S. Ct. 2680 (1991), in which the Court upheld a sentence of life without the possibility of parole for a defendant convicted of possessing more than 650 grams of cocaine. In upholding the sentence against an Eighth Amendment challenge, the author argues, the Court failed to clarify when a reviewing court should conduct "proportionality" review of a noncapital sentence. Notwithstanding the position of some of the justices that such review should never take place, the author advocates retention of some general proportionality review. Case note, 2 SETON HALL CON. L. J. 409-44 (1991).

Application Principles (Chap. 1)

6th Circuit affirms that car burglary involved more than minimal planning. (160)(220) The 6th Circuit affirmed that defendant's theft of a purse from a locked, parked car involved more than minimal planning. Defendant was observed walking through the parking lot for 30 minutes prior to the theft, looking into a number of cars until he found a suitable target. He twice attempted to gain entry into the car, not giving up the attempt even after setting off the car alarm two times. He brought with him a contorted wire hanger to unlock the car and a towel to conceal both the hanger and his loot, he drove to a more remote parking lot in order to dispose of the purse and he drove to yet another area to change clothes. *U.S. v. Gerry,* __ F.2d __ (6th Cir. April 2, 1992) No. 91-5333.

9th Circuit limits consideration of "relevant conduct." (170)(260) Relying on *U.S. v. Santiago,* 906 F.2d 867 (2nd Cir. 1990), the 9th Circuit held that to decide whether conduct is "relevant" within the meaning of guideline section 1B1.3(a)(2), "the sentencing court is to consider such factors as the nature of the defendant's acts, his role, and the number and frequency of repetitions of those acts, in determining whether they indicate a behavior pattern." There must be "sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct" (quoting Wilkins and Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 515-16 (1990). Thus, the court held, "the essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity." When one component is absent the court must look for a stronger presence of at least one of the other components. This methamphetamine case was remanded for resentencing in light of the opinion. *U.S. v. Hahn,* __ F.2d __ (9th Cir. April 7, 1992) No. 89-10592.

11th Circuit holds that loss calculation should include amounts involved in dismissed counts. (175)(300) The 11th Circuit rejected defendant's claim that it was improper to include amounts involved in dismissed counts in the calculation of loss under section 2F1.1. Application notes 6 and 7 to section 2F1.1 clearly indicate that the cumulative loss

produced by a common scheme or plan should be used in determining the offense level for fraud, regardless of the number of counts of conviction. Section 1B1.3, concerning relevant conduct, also supports this conclusion. The records indicated that the methods which defendant used to defraud the government were part of the same course of conduct and displayed a common scheme. *U.S. v. Rayborn*, __ F.2d __ (11th Cir. April 9, 1992) No. 90-3679.

Offense Conduct, Generally (Chapter 2)

5th Circuit reverses enhancement because only city police officer was injured during assault. (210) During a confrontation with DEA agents and Houston police officers, defendant wounded a Houston police officer. He also fired upon a DEA agent, who escaped injury. Defendant was convicted of assaulting a federal officer with a deadly weapon. The 5th Circuit reversed an enhancement under guideline section 2A2.2(b)(3) for causing serious bodily injury to the victim, since the victim in this case, the DEA agent, was uninjured. A plain reading of the term "victim" in section 2A2.2(b)(3) leads to the conclusion that the "victim" must be the object of the aggravated assault. There was no justification for enhancing defendant's sentence based upon the injuries to the city police officer. *U.S. v. Moore*, __ F.2d __ (5th Cir. April 6, 1992) No. 91-2723.

1st Circuit affirms that attempts to illegally transfer bank funds were completed. (220)(380) Defendant arranged for his bank to transfer money from unclaimed accounts to accounts he controlled at other banks. At the time he submitted the forms for one of the transfers, he also submitted two additional forms to transfer $191,985 from another unclaimed account. Before the bank transferred the money, however, he retrieved the forms and stopped the process. The 1st Circuit affirmed the inclusion of the $191,985 in his offense level under section 2B1.1(b)(1). Application note 2 says attempts are to be determined under section 2X1.1. Under 2X1.1(b)(1), the attempt is treated as a completed attempt if the defendant was about to complete the offense but for apprehension or interruption by a similar event beyond defendant's control. Here, testimony indicated that defendant withdrew the transfer request after a bank officer became suspicious and asked questions about the transfers. *U.S. v. Oyegbola*, __ F.2d __ (1st Cir. April 2, 1992) No. 91-1152.

6th Circuit affirms enhancement in car burglary for gun found under back seat of defendant's car. (220) Defendant stole a purse from a locked, parked car. His own car was parked in the same lot. The 6th Circuit affirmed an enhancement under section 2B2.2(b)(4) based on defendant's possession of a gun which was found under the back seat of his car. Unlike the firearm enhancement provision under the drug guidelines, nothing in the burglary guideline indicates that there must be a particular connection between the weapon and the offense. The only issue is whether the weapon was possessed during the offense. The possession requirement ensures that the enhancement will not apply where the firearm is located at a remote distance from the scene. Here, the firearm was under defendant's control and was readily accessible to him. Senior Judge Wellford dissented, believing that the connection between the theft from an unoccupied car and the location of firearm to be too tenuous to warrant the enhancement. *U.S. v. Gerry*, __ F.2d __ (6th Cir. April 2, 1992) No. 91-5333.

9th Circuit punishes attempted bank robbery as if defendant had succeeded. (224)(380) Defendant went into the bank pretending to have control of explosive devices that he would detonate if his demands were not met. He demanded $750,000, but an FBI swat team arrested him before he could take possession of the money. He pled guilty to attempted bank robbery, and the district court increased his sentence by three levels under 2B3.1(b)(6)(T) because the offense involved a potential loss of more then $250,000. On appeal, defendant argued that there was no loss. The 9th Circuit rejected the argument, noting that sections 2B3.1 and 2B1.1 lead to the use of section 2X1.1 to determine "the loss" in an attempted robbery. Even though section 2X1.1 does not list bank robbery as one of the attempts that it covers, the 9th Circuit held that the Guidelines' "general rule" is that "attempts are to be punished as if they had succeeded." *U.S. v. Van Boom*, __ F.2d __ (9th Cir. April 3, 1992) No. 91-10089.

8th Circuit rejects equal protection challenge to harsher sentence for crack than for powder cocaine. (242) The 8th Circuit summarily rejected defendant's claim that his equal protection rights were denied by the imposition of a harsher sentence for crack than for powder cocaine. Such an argument had previously been rejected by the court in *U.S. v. Reed*, 897 F.2d 351 (8th Cir. 1990). *U.S. v. Hechavarria*, __ F.2d __ (8th Cir. March 31, 1992) No. 91-2111.

6th Circuit upholds application of mandatory minimum sentence for defendant who attempted to purchase baking soda. (245)(380) Defendant was

convicted of attempt and conspiracy to possess cocaine in violation of 21 U.S.C. section 846 after arranging to purchase two kilograms of cocaine from an undercover agent. In fact, the agent was carrying two kilograms of pure baking soda. The 6th Circuit rejected defendant's claim that the mandatory minimum sentences in 21 U.S.C. section 841(b) were inapplicable to him because his offense did not involve "a mixture or substance containing a detectable amount" of cocaine. If the transaction had proceeded, defendant could not have been convicted of possession of cocaine because he would have possessed pure baking soda. However, defendant was convicted of attempt and conspiracy to possess cocaine. Section 846 requires the imposition of the same penalties as the completed offense. It did not matter whether the packages the agent carried contained pure cocaine, pure baking soda, or even existed at all. *U.S. v. Kottmyer*, __ F.2d __ (6th Cir. April 9, 1992) No. 91-5826.

9th Circuit applies mandatory minimum sentences for substantive drug offenses to drug conspiracies. (245) The Anti-Drug Abuse Act of 1988 amended 21 U.S.C. section 846 to state that any person who conspires to commit any offense defined in this subchapter "shall be subject to the same penalties" as those prescribed for the offense which was the object of the conspiracy. In light of Congress's "clear intent" in amending section 846, the 9th Circuit followed the 6th Circuit in holding that the mandatory minimum penalties established under 841 apply with equal force to related offenses under section 846. Thus drug conspiracy convictions carry the same mandatory minimum sentence as the underlying substantive offense. *U.S. v. Dabdoub-Kanez*, __ F.2d __ (9th Cir. April 9, 1992) No. 91-10219.

8th Circuit affirms determination of drug quantity based upon trial testimony. (250)(770) Defendant contended that there was insufficient evidence to support the district court's finding that 38 ounces of cocaine were attributable to him. The 8th Circuit affirmed defendant's sentence, since there was trial testimony attributing at least 19 ounces (538.65 grams) of cocaine to him. Because a base offense level of 26 applies to amounts of at least 500 grams but less than two kilograms of cocaine, it was unnecessary to determine whether the government proved the additional amounts. *U.S. v. Galvan*, __ F.2d __ (8th Cir. April 9, 1992) No. 91-2444.

6th Circuit affirms use of drug quantity defendants attempted to purchase rather than smaller quantity actually possessed by federal agents. (265) Defendants were arrested after attempting to purchase three kilograms of cocaine from government agents. The 6th Circuit affirmed basing their sentence upon three kilograms, even though the federal agents posing as narcotics salesmen had access to only one kilogram of cocaine. The negotiated amount was three kilograms and defendant had sufficient funds at the time of their arrest to purchase three kilograms. *U.S. v. Snelling*, __ F.2d __ (6th Cir. Nov. 29, 1991) No. 90-3875.

8th Circuit upholds consideration of drugs involved in acquitted counts. (270)(755) The 8th Circuit rejected defendant's claim that he should not be held accountable for cocaine related to circumstances charged in counts of which he was acquitted. A verdict of acquittal only demonstrates lack of proof beyond a reasonable doubt and does not establish innocence. The facts underlying an acquittal may be considered by the district court for sentencing purposes when those facts appear to be sufficiently reliable, and the government does not need to prove those facts beyond a reasonable doubt. *U.S. v. Olderbak*, __ F.2d __ (8th Cir. April 10, 1992) No. 91-2165.

2nd Circuit upholds firearm enhancement where possession of firearm was reasonably foreseeable. (284) Defendant contended that an enhancement under guideline section 2D1.1(b)(1) based upon possession of a firearm during a drug trafficking crime was improper because he lacked actual knowledge of the weapon's existence. The 2nd Circuit rejected this, holding that a firearm enhancement may be applied to a defendant's sentence based on possession of a weapon so long as the possession of the firearm was reasonably foreseeable to the defendant. Here, defendant could have reasonably foreseen that firearms would be possessed in connection with the crack-packaging activities in the apartment. There was a large quantity of narcotics and narcotics paraphernalia in the apartment where defendant was arrested, and three types of various caliber ammunition were strewn about the apartment in plain view. *U.S. v. Soto*, __ F.2d __ (2nd Cir. March 24, 1992) No. 91-1653.

9th Circuit upholds sentencing for gun used in assault despite lack of conviction for assault. (330) The November 1, 1990 version of section 2K2.1(c)(2) provided: "If the defendant used or possessed the firearm in connection with the commission or attempted commission of another offense, apply section 2X1.1 . . . with respect to that other offense, if the resulting offense level is greater than that determined above." The district court found that defendant had used the firearm in connection with an ag-

gravated assault and accordingly applied the aggravated assault guideline, section 2A2.2(a). On appeal, defendant argued that the term "another offense" meant another offense of which the defendant was convicted. The 9th Circuit rejected the argument, noting that the guideline was intended to allow the continuation of the practice of extending federal jurisdiction over even otherwise unreachable conduct constituting state crimes. *U.S. v. Humphries*, __ F.2d __ (9th Cir. April 15, 1992) No. 91-30207.

4th Circuit affirms that Clean Water Act violation is a serious offense meriting imprisonment. (355) The Sentencing Reform Act of 1984 directs the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." Defendant was sentenced under guideline section 2Q1.3 as a result of his conviction for illegally discharging pollutants into wetlands in violation of the Clean Water Act. He contended that because section 2Q1.3 imposes a sentence of imprisonment for a non-serious offense, the district court should have declined to apply it. The 4th Circuit rejected this argument, holding that the sentencing commission acted within its discretion in classifying the environmental offense a serious one. Through the Clean Water Act and other environmental legislation, Congress "determined that harm to the environment - even absent imminent threats to public health, welfare or safety - is a public policy concern of the greatest magnitude." *U.S. v. Ellen*, __ F.2d __ (4th Cir. April 2, 1992) No. 91-5032.

Adjustments (Chapter 3)

8th Circuit upholds official victim enhancement based upon false 1099 forms filed with IRS. (410) Defendant was convicted of sending to the IRS false 1099 forms claiming he had paid various individuals large sums of money. He also sent these individuals false 1099 forms. The individuals included law enforcement personnel, judges, lenders, attorneys and creditors who had been involved with the foreclosure on defendant's farm. The 8th Circuit upheld an enhancement under guideline section 3A1.2 for an offense involving official victims, even though defendant was convicted only for his actions against the IRS, which under section 3A1.2 cannot be an official victim. Because the IRS investigates any discrepancy between the amounts reported on 1099 forms and an individual's tax returns, defendant's sending of the forms to the IRS had the effect of making these individuals victims. *U.S. v. Hildebrandt*, __ F.2d __ (8th Cir. April 3, 1992) No. 91-2360.

2nd Circuit upholds leadership role of defendant who conducted drug negotiations. (431)(855) The 2nd Circuit upheld a four-level leadership enhancement under guideline section 3B1.1(a). The trial testimony showed that defendant conducted the negotiations regarding price, quantity and location of the drug transaction, he was the individual introduced to a government agent posing as a drug seller, and that on the night of the arrest, he led the agent to two separate cars to display the purchase money. *U.S. v. Pitre*, __ F.2d __ (2nd Cir. March 30, 1992) No. 90-1558.

5th Circuit upholds leadership enhancement for defendant who supplied marijuana and was involved with buyers. (431) Defendant was involved in a conspiracy which transported marijuana from Texas to Atlanta, Georgia. The 5th Circuit upheld a two-level leadership enhancement under guideline section 3B1.1(c). The evidence established that (a) defendant supplied the marijuana for the trips to Atlanta, (b) defendant was involved with the men who picked up the marijuana and paid for the load, (c) defendant chose the hotel where they met, (d) defendant directed one of the couriers to count the money from the buyers and gave the courier permission to keep the small bills, and (e) when another courier was stopped with money in the Atlanta airport, it was defendant and another co-conspirator who met with the courier to discover what happened to the money. *U.S. v. Hinojosa*, __ F.2d __ (5th Cir. April 3, 1992) No. 91-2260.

2nd Circuit does not review propriety of one-level reduction for mitigating role in the offense. (440)(855) The district court reduced defendant's offense level by one based upon his mitigating role in the offense. The 2nd Circuit noted that section 3B1.2 only authorizes a two, three or four-level reduction to account for a defendant's mitigating role. However, on appeal, neither defendant nor the government challenged the one-level reduction. In addition, defendant did not seek a two-level reduction, claiming instead that he should have received a three or four-level reduction. Therefore, the court did not address whether a one-level reduction could be proper. *U.S. v. Pitre*, __ F.2d __ (2nd Cir. March 30, 1992) No. 90-1558.

1st Circuit rejects minor role for defendant who made arrangements for cocaine to be transported. (445) The 1st Circuit rejected defendant's contention that he was a minor participant in a drug transaction.

The government's proffer regarding defendant's role in the offense indicated that he made the initial contacts to have the cocaine brought into Florida; contacted the informant to arrange transportation of the cocaine; actively participated in several meetings; made the contacts and arrangements to bring the cocaine to several meetings; and agreed to pay $1700 per kilogram upon delivery. *U.S. v. Daniel*, __ F.2d __ (1st Cir. April 3, 1992) No. 91-1554.

2nd Circuit rejects minimal participant status for defendant who was aware of full extent of drug transaction. (445) The 2nd Circuit rejected defendant's claim that he should have received a three or four-level reduction in offense level based upon his minimal participation in a drug offense. Defendant, as contrasted with several other co-defendants, was aware of the full extent of the transaction. This finding was supported by trial testimony, which indicated that defendant acted as a look-out during the instant transaction and was present during at least one prior narcotics transactions involving his co-defendants. *U.S. v. Pitre*, __ F.2d __ (2nd Cir. March 30, 1992) No. 90-1558.

2nd Circuit rules drug packager did not prove he was minor participant. (445) The 2nd Circuit rejected defendant's claim that he was a minor participant in a drug organization because he was completely subordinate to everyone else at the time of his arrest. There was ample evidence that defendant was a co-equal member of the drug ring who was entrusted with large quantities of narcotics to be packaged for distribution. Defendant did not sustain his burden of showing he was a minor participant. *U.S. v. Soto*, __ F.2d __ (2nd Cir. March 24, 1992) No. 91-1653.

4th Circuit upholds refusal to apply special skill enhancement to defendant who failed to obtain environmental permits. (450) Defendant specialized in the design and acquisition of permits for construction projects in tidal wetlands and subaqueous areas. As project manager for one proposed development, he was convicted of knowingly filling in wetlands without a permit. The district court refused to apply a special skill enhancement under section 3B1.3 because it concluded that any special skill possessed by defendant did not facilitate the commission of the offense. According to the court, defendant simply failed to obtain a permit, and in this case, such inaction was not facilitated by any expertise he possessed. The 4th Circuit affirmed, rejecting the government's claim that this ruling created a special exemption for defendants who commit regulatory crimes during the course of their profession. The decision was based on the district court's determination that any special skills possessed by defendant did not facilitate the offense. This determination was entitled to great deference. *U.S. v. Ellen*, __ F.2d __ (4th Cir. April 2, 1992) No. 91-5032.

9th Circuit holds that postal carrier who delivers ordinary mail is in a position of trust. (450) Defendant, a mail carrier for the postal service, was convicted of theft of mail and possessing stolen mail. At sentencing, the district court imposed a two level enhancement for abuse of a position of trust, under U.S.S.G. 3B1.3. On appeal, the 9th Circuit affirmed, noting that a postal carrier is free from surveillance when delivering mail and does not account in any way for particular pieces of ordinary mail. Thus, "a postal service employee who delivers ordinary mail is in a quintessential position of trust." *U.S. v. Ajiboye*, __ F.2d __ (9th Cir. April 14, 1992) No. 91-50371.

8th Circuit upholds obstruction enhancement based upon defendant's solicitation of false testimony from her minor children. (461) Defendant was convicted of various charges in connection with her scheme to collect insurance proceeds by burning down her house. The 8th Circuit affirmed an enhancement under guideline section 3C1.1 based upon defendant's solicitation of false testimony from her two minor children. The district court's decision was based upon the credibility of defendant and her children. Their testimony was contradicted on major points by the testimony of a man she solicited to burn the house, and the testimony of his family. The district court had the opportunity to observe the character and demeanor of the witnesses and defendant. *U.S. v. Noland*, __ F.2d __ (8th Cir. April 6, 1992) No. 91-1031.

8th Circuit remands because district court failed to make independent finding of defendant's perjury at trial. (462) The 8th Circuit remanded for resentencing because the court imposed an enhancement for obstruction of justice based upon defendant's perjury but did not make an independent finding that defendant committed perjury. While an enhancement may not be based solely upon a defendant's failure to convince the jury of his innocence, it may be based on the trial judge's express finding that defendant lied to the jury. The judge must make an independent evaluation and determination that defendant's testimony was false. Here, the court merely noted defendant testified that his kidnapping victim went with him willingly, but that the jury's verdict resolved this matter, and thus an obstruction enhancement was proper. This was an insufficient

finding. *U.S. v. Benson,* __ F.2d __ (8th Cir. April 7, 1992) No. 91-2732.

7th Circuit says court need not specify relative importance of each fact it relies upon. (480) The 7th Circuit rejected defendant's claim that the district court did not sufficiently explain its reasons for denying him a reduction for acceptance of responsibility. First, the court is not required to specify the relative importance of each fact it relies on. Second, although the district court did not make specific reference to the factors listed for consideration in application note 1 to section 3E1.1, the court did provide specific reasons for its decision in a manner sufficiently detailed to allow the defendant to identify and challenge those reasons in the appeal. For example, defendant's assault on a corrections officer and his threat against another were relevant to whether he voluntarily terminated his criminal conduct as discussed in Note 1. His refusal to be interviewed by the probation officer was relevant to Note 1(c): voluntary and truthful admission to authorities of involvement in the offense and related conduct. *U.S. v. Beal,* __ F.2d __ (7th Cir. March 31, 1992) No. 91-1935.

7th Circuit affirms reliance upon defendant's justifications for offense to deny acceptance of responsibility reduction. (480)(860) Defendant, a prison inmate, pled guilty to carrying a prohibited item, a sharpened pen, in prison. Defendant argued that his reason for carrying the weapon (he feared for his life in a prison filled with dangerous inmates overseen by guards indifferent to his safety) was a mitigating circumstance which should have persuaded the court to lower his sentence within the guideline range or depart downward. The 7th Circuit found that 18 U.S.C. section 3742(a), which governs appellate review of sentencing decisions, precluded it from reviewing a sentence within the properly calculated guideline range. The district court could properly consider defendant's justifications for the offense as grounds for denying him a reduction for acceptance of responsibility. *U.S. v. Beal,* __ F.2d __ (7th Cir. March 31, 1992) No. 91-1935.

7th Circuit denies acceptance of responsibility reduction where defendant refused to speak with probation officer. (486) Defendant pled guilty to possession of a prohibited object by a federal prison inmate. The 7th Circuit affirmed that it was proper to refuse to grant a reduction for acceptance of responsibility in part because defendant refused to be interviewed by the probation officer. Application note 3 to section 3E1.1 states that failure to cooperate with the court's efforts to gather information is inconsistent with acceptance of responsibility. The opinion in *U.S. v. Enquist,* 745 F.Supp. 541 (N.D. Ind. 1990) is not to the contrary. Although the defendant in *Enquist* was granted a reduction despite his failure to cooperate with his probation officer, this was because other factors convinced the court that the defendant had accepted responsibility. Here, defendant's only explanation for his refusal to cooperate was a generalized mistrust of persons in authority and a fear that other prisoners would retaliate against him if he provided damaging information about them. *U.S. v. Beal,* __ F.2d __ (7th Cir. March 31, 1992) No. 91-1935.

11th Circuit affirms that defendant who submitted statement after trial did not accept responsibility. (488) The 11th Circuit affirmed the district court's determination that a defendant convicted of possessing homemade pipe bombs and grenades in his house did not accept responsibility for the offense. He was not denied the reduction simply because he pled not guilty and chose to go to trial. After his trial and prior to sentencing, defendant submitted a signed statement to the court stating that he took responsibility for committing the charged crimes. Prior to this, he gave no indication of acceptance of responsibility. Even at sentencing, defendant showed no regret for his acts. When asked by the court what he would like to say in mitigation of punishment, defendant merely stated, "The only thing I can say, I take responsibility for the devices." *U.S. v. Dempsey,* __ F.2d __ (11th Cir. April 8, 1992) No. 89-6046.

7th Circuit denies acceptance of responsibility where inmate pled guilty to facilitate move to new prison. (490) The district court denied defendant a reduction for acceptance of responsibility in part because he said he pled guilty only to expedite his transfer to another prison, and because he threatened to harm a security officer who testified against him at a evidentiary hearing. The 7th Circuit held these were valid grounds, despite defendant's denial that he made the statement or threat. The court's decision to rely on the presentence report rather than the defendant was essentially a credibility judgment. The probation officer's statement in the presentence report that defendant told him that he only pled guilty to expedite a transfer was consistent with defendant's statement at sentencing that he wanted to go to a new institution. The threat, reported to the probation officer by staff at defendant's prison, was rendered credible by the disclosure that after defendant pled guilty, he assaulted a different corrections officer. *U.S. v. Beal,* __ F.2d __ (7th Cir. March 31, 1992) No. 91-1935.

Criminal History (§4A)

7th Circuit rules two bank robberies on separate days were not related despite defendant's claimed plan. (504) Defendant robbed a bank in Austin, Indiana on July 31, 1978 and a bank in Jonesboro, Indiana on August 8, 1978. He was convicted and sentenced in separate proceedings by different federal district courts, but received concurrent sentences. In connection with his sentencing for a 1990 bank robbery, defendant argued that the two 1978 robberies were part of a common scheme or plan, based upon his testimony at his sentencing hearing that the 1990 robbery was motivated by his desire to "revert back to '78" and rob a series of three banks on consecutive Tuesdays at noon to gain $50,000. The 7th Circuit affirmed that the two 1978 bank robberies were not related. A relatedness finding requires more than mere similarity of crimes, a common criminal motive or modus operandi, or a common objective. The only evidence offered to support defendant's theory was his testimony that he had a plan. *U.S. v. Brown*, __ F.2d __ (7th Cir. April 8, 1992) No. 91-1821.

7th Circuit rules concurrent sentences do not make convictions related. (504) The 7th Circuit rejected defendant's contention that his concurrent terms of imprisonment for two bank robberies were, in effect, consolidated sentences, and thus the cases were related for criminal history purposes. A desire for a consolidated sentence will not convert concurrent sentences into consolidated status. "Concurrent sentencing does not create related underlying offenses, and we reject any attempt to expand the already broad advisory commentary." *U.S. v. Brown*, __ F.2d __ (7th Cir. April 8, 1992) No. 91-1821.

11th Circuit upholds criminal history assessment for prior conviction even though defendant had not begun serving sentence. (504) While on release after sentencing and prior to his voluntary surrender for service of sentence, defendant committed the instant offense. The 11th Circuit upheld the assessment of criminal history points for the prior conviction even though defendant had not begun serving that sentence at the time he committed the instant offense. The commentary to guideline section 4A1.2 does state that to qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence. However, by the time the district court sentenced defendant for the present offense, he had already spent almost two years in prison. *U.S. v. Rayborn*, __ F.2d __ (11th Cir. April 9, 1992) No. 90-3679.

7th Circuit upholds criminal history departure based on 19 prior convictions. (510) Defendant had 19 prior convictions, which gave him 39 criminal history points and placed him in criminal history category VI, the highest category. Since category VI requires only 13 points, the district judge departed upward. The judge determined that after level II, a defendant falls into a higher criminal history level for every 3 point increase, which would place defendant in level XIV. Using a 3-month increase in sentence for every increase in criminal history, the district court determined that category XIV would have a sentencing range of 48 to 54 months. Defendant received a 48-month sentence. The 7th Circuit affirmed both the grounds and the reasonableness of the departure. The fact that defendant had 19 prior convictions, that he committed the instant offense less than two years after his release from federal prison, and that he was on state probation at the time he committed the offense supported the departure. The district court's use of the guidelines' structure to determine the extent of the departure was reasonable. *U.S. v. Glas*, __ F.2d __ (7th Cir. March 16, 1992) No. 90-3522.

Determining the Sentence (Chapter 5)

10th Circuit upholds prohibition against returning to family in Thailand during period of supervised release. (580) Defendant was convicted of drug trafficking. As a condition of supervised release, the district court prohibited him from leaving the district without permission of the court or his probation officer. The 10th Circuit upheld the denial of a request for a modification of these terms to permit defendant to return to his home, wife and child in Thailand. The court agreed that there was no "direct impediment" to authorizing a person on supervised release to leave the United States, if the necessary supervision could be enforced abroad. However, the district court did not abuse its discretion in imposing conditions that mandated regular, frequent monitoring by a trained probation officer. The structure needed to support defendant's rehabilitative supervision was absent outside the U.S. *U.S. v. Pugliese*, __ F.2d __ (10th Cir. April 3, 1992) No. 91-1357.

Departures (§5K)

1st Circuit refuses to review whether government's refusal to move for downward departure was arbitrary. (710) Defendant contended that the govern-

ment's refusal to file a section 5K1.1 motion was arbitrary, and that therefore, the appellate court should await the Supreme Court's decision in *U.S. v. Wade*, 936 F.2d 169 (4th Cir.) *cert. granted*, 112 S.Ct. 635 (1991), before upholding her sentence. The 1st Circuit rejected her argument, since this was not even a close case. Defendant did not testify against the ringleader of the conspiracy or assist in his prosecution in any way. By the time she identified him as the ringleader, he had already been detained in the immigration area. The prosecutor explained convincingly why defendant's assistance was insubstantial. Thus, even if arbitrariness on the government's part confers some discretion on a district court to depart downward in the absence of a government motion, defendant did not present such a case. *U.S. v. Amparo*, __ F.2d __ (1st Cir. April 8, 1992) No. 91-2010.

6th Circuit holds that section 3553(e) substantial assistance departure allows complete departure from the guidelines. (710) The 6th Circuit held that where the government makes a motion for a downward departure under 18 U.S.C. section 3553(e) based upon a defendant's substantial assistance, a sentencing court has the authority to depart completely from the guidelines. However, such a departure must be based solely upon the substantial assistance rendered by the defendant and the district court cannot impose a sentence which is either specifically prohibited by statute or unreasonable. For example, here defendant pled guilty to an attempt under 21 U.S.C. section 846, the object of which was the commission of a drug offense prohibited by 21 U.S.C. section 841(a)(1). Under 21 U.S.C. section 841(b)(1)(B), the district court would be prohibited from departing downward to impose a sentence of probation or suspending the sentence entirely. *U.S. v. Snelling*, __ F.2d __ (6th Cir. Nov. 29, 1991) No. 90-3875.

1st Circuit rules defendant not entitled to substantial assistance departure in absence of government motion. (712) The 1st Circuit rejected defendant's contention that she was entitled to a downward departure based upon her assistance. A sentencing court may not depart on the basis of substantial assistance except when the government makes a motion. Although defendant claimed the government refused to make such a motion in retaliation for her exercise of her right to a jury trial, there was no evidence to support this theory. A wholly conclusory allegation, unsupported either by proven facts or by reasonable inferences from proven facts, cannot suffice to overcome the force of the government motion requirement. *U.S. v. Amparo*, __ F.2d __ (1st Cir. April 8, 1992) No. 91-2010.

8th Circuit rejects delay in release date on unrelated conviction as basis for departure. (715)(860) As a result of defendants' failure to appear to serve a pre-guidelines sentence, the Parole Commission added 10 months to their probable release dates. Defendants subsequently pled guilty to failing to surrender for service of sentence, and each received an eight-month sentence for this offense. The 8th Circuit rejected defendants' claim that the district court should have departed downward because the total 18 months imprisonment they received as a result of their failure to surrender (eight-month sentence plus a 10-month delay in release on the other charge) exceeded the guideline range of 8 to 14 months. There is no caselaw or sentencing guideline that requires a court to depart downward because conduct that resulted in a criminal conviction also resulted in a delay in a defendant's probable release date from a prison sentence for a prior, unrelated conviction. Moreover, the court lacked authority to review the district court's refusal to depart downward. *U.S. v. McGowan*, __ F.2d __ (8th Cir. March 2, 1992) No. 91-2955.

9th Circuit holds that ineffective assistance in prior state proceeding is not a basis for departure. (715) Defendant rejected a plea offer in an earlier criminal state proceeding on the advice of his counsel. He was then indicted and convicted in federal court for the same conduct, and sentenced far in excess of the sentence he would have received in state court. Arguing that he rejected the state plea offer because of ineffective assistance of counsel, defendant moved for a downward departure. The district court denied the motion, and the 9th Circuit affirmed. The court held that ineffective assistance of counsel in a prior state proceeding was not a mitigating circumstance. "For a factor to be considered, it must be tied to *some* penological purpose or legitimate sentencing concern expressed in the Sentencing Reform Act." *U.S. v. Crippen*, __ F.2d __ (9th Cir. April 14, 1992) No. 91-30074.

8th Circuit rejects due process challenge based on disparity in extent of substantial assistance departures. (716)(860) Defendants argued that the downward departures they received for assistance to the government were insufficient because of the greater departures granted to their co-conspirators. The 8th Circuit held that it lacked jurisdiction to review the extent of a downward departure. However, the court found that it did have jurisdiction under 18 U.S.C. section 3742(a)(1) to review defendant's tangential claim that the disparate sentences violated due process. The court found the argument meritless. De-

fendants were heavily involved in the conspiracy, and although each provided assistance in convicting one of their co-conspirators, no additional evidence of any value was provided. It was possible that one of the defendant's assistance would have been of much greater value if he decided to cooperate at an earlier date. Defendants benefitted from greatly reduced sentences. Mere disparity does not demonstrate an abuse of discretion. *U.S. v. Albers*, __ F.2d __ (8th Cir. April 7, 1992) No. 91-2923.

5th Circuit upholds upward departure based on death of drug user who overdosed. (721) A drug user died of an overdose after ingesting some unusually pure heroin that defendant sold to her. Defendant was subsequently convicted of selling heroin to the undercover agent. The 5th Circuit affirmed an upward departure based upon section 5K2.1, which permits a departure if death results. The district court found that defendant appreciated the dangerousness of the drug he was distributing and reasonably foresaw death as a result. He was distributing unusually pure heroin to junkies and users, rather than to other distributors who would be expected to dilute the drug for resale. Although the user who died was not a "victim" of the offense of conviction, there was a sufficient nexus between the death and the offense of conviction to apply section 5K2.1. Although in most cases the harm involved will be suffered by the victim of the instant offense, the guidelines do not require this. Rather, the harm must merely be "relevant" to the offense of conviction. *U.S. v. Ihegworo*, __ F.2d __ (5th Cir. April 9, 1992) No. 91-1779.

1st Circuit refuses to review district court's refusal to depart based on duress. (730)(860) The 7th Circuit held that it lacked jurisdiction to review the district court's refusal to depart under section 5K2.12 based upon defendant's duress. The court agreed with defendant that the jury's rejection of a duress defense did not preclude a downward departure under section 5K2.12. The type and kind of evidence necessary to support a downward departure premised on duress is somewhat less than that necessary to support a duress defense at trial. However, defendant did not contend that the judge was unaware of his ability to depart or misunderstood the legal standard. Instead, defendant seemed to be arguing that the judge's refusal to depart was wrong. However, an appellate court lacks jurisdiction to review a district court's discretionary decision not to depart. *U.S. v. Amparo*, __ F.2d __ (1st Cir. April 8, 1992) No. 91-2010.

11th Circuit upholds upward departure for risk to public safety from pipe bombs and hand grenades. (734) Defendant was convicted of firearms charges after police found homemade pipe bombs and hand grenades in his home. The 11th Circuit affirmed an upward departure based on the uniquely dangerous nature of the pipe bombs and the grenades. Guideline section 5K2.14 authorizes an upward departure if the offense significantly endangered national security, public health or safety. In *U.S. v. Loveday*, 922 F.2d 1411 (9th Cir. 1991), the 9th Circuit upheld a departure in similar circumstances based upon section 5K2.14 because the defendant's conduct posed a threat to public safety substantially in excess of that ordinarily involved in offenses under section 2K2.2. The extent of the departure, from a range of 21 to 27 months, to a sentence of 60 months, was reasonable. Although the departure was significant, it was reasonable when compared to the maximum 10 year sentence mandated by statute. *U.S. v. Dempsey*, __ F.2d __ (11th Cir. April 8, 1992) No. 89-6046.

Sentencing Hearing (§6A)

1st Circuit does not require notice of court's intent to apply enhancement not recommended in presentence report. (761) Defendant received a leadership enhancement under section 3B1.1 even though his presentence report did not recommend the adjustment. The 1st Circuit rejected defendant's claim that *Burns v. U.S.*, 111 S.Ct. 2182 (1991), a court must give advance notice of its intent to consider an enhancement not recommended in the presentence report. *Burns* dealt with a court's sua sponte decision to depart upward from the guidelines. Such departures are a concern because the guidelines place almost no limit upon the number of potential factors that may warrant a departure. In contrast, the guidelines define specific and finite factors warranting the application of an upward or downward adjustment to defendant's guideline range. The guidelines themselves provide a defendant with sufficient notice under Rule 32 of the issues about which he may be called upon to comment at his sentencing hearing. *U.S. v. Canada*, __ F.2d __ (1st Cir. April 2, 1992) No. 91-1691.

5th Circuit refuses to remand because district court did not rely upon disputed matter. (765) Defendant contended, and the government conceded, that the district court violated Fed. R. Crim. P. 32(c)(3)(D) by failing to rule on defendant's objection to the presentence report's allegation that defendant had previously been convicted of marijuana possession. Although the government conceded that this violation

required a remand, the 5th Circuit found it unnecessary, since the district court clearly did not rely upon the disputed information. Under Rule 32(c)(3)(D), no finding is necessary if the district court states that the disputed fact will not be taken into account in calculating the sentence. Here, the prosecutor advised the court that the prior conviction would have no bearing on the calculation of the guideline range, to which the court responded that it would then leave the issue as a contested matter. It was not necessary for the court to cite the rule or express its determination in the precise language of the rule. *U.S. v. Plazza,* __ F.2d __ (5th Cir. April 9, 1992) No. 91-2484.

1st Circuit upholds reliance upon defendant's testimony at a co-defendant's trial. (770) Relying upon *U.S. v. Berzon,* 941 F.2d 8 (1st Cir. 1991), defendant contended that the district court improperly considered testimony and evidence given at proceedings against his co-defendants to determine that he played a supervisory role in the offense. The 1st Circuit upheld the enhancement, finding *Berzon* was not applicable. Unlike the defendant in *Berzon,* defendant was not ignorant of the information upon which the court relied in sentencing him, hence he was not denied a meaningful opportunity to comment. To the extent that information was derived from a co-defendant's trial, it came from testimony defendant himself had provided before the same judge. Defendant included excerpts from his testimony at the co-defendant's trial in a memorandum he submitted to the judge prior to his sentencing hearing. *U.S. v. Canada,* __ F.2d __ (1st Cir. April 2, 1992) No. 91-1691.

5th Circuit affirms reliance on confidential information at sentencing. (770) At sentencing the trial judge stated that he had received confidential information from a reliable and credible source that defendant had a history of substance abuse. The 5th Circuit upheld the district court's consideration of this information, and rejected defendant's contention that he had not been given the opportunity to comment upon or address the court about this confidential information. Defendant's counsel did not object to the introduction of the information, nor did he request a side bar, challenge the accuracy of the information, or request an in camera conference. Rule 32 does not require that the trial court disclose the name of a confidential source contained in the presentence report, but the court is required to state a summary of the factual information upon which it relies. Once the facts are disclosed to defendant and his counsel, Rule 32 places the burden on the defendant to comment on the factual accuracy contained in the disclosure. *U.S. v. Moore,* __ F.2d __ (5th Cir. April 6, 1992) No. 91-2723.

7th Circuit upholds reliance upon hearsay where defendant was given opportunity to rebut. (770) The district court denied defendant a reduction for acceptance of responsibility based in part on defendant's presentence report which alleged that he made a threat against a security officer. The 7th Circuit affirmed the district court's consideration of such threat because defendant had ample opportunity to rebut the hearsay allegation. Had defendant agreed to speak to the probation officer, he could have presented his side of the story. He did rebut the allegation in his objection to the presentence report, and he and his attorney were both given the opportunity to present their views during the sentencing hearing. The hearsay evidence was worthy of credence because it was supported by the fact that defendant had only recently assaulted another corrections officer. *U.S. v. Beal,* __ F.2d __ (7th Cir. March 31, 1992) No. 91-1935.

9th Circuit holds that not all procedural protections available at trial are necessary at sentencing. (770) Defendant argued that his rights were violated when the district court permitted the government to prove that he had committed an aggravated assault by calling witnesses at the sentencing hearing. The 9th Circuit rejected the argument, noting that "not all of the procedural protections available in the guilt phase of a trial are necessary components of a sentencing hearing." Moreover, defendant did not object when the government offered to prove the assault by calling witnesses. The defense thoroughly cross-examined the witnesses and refused the opportunity to call witnesses for the defense. Defense counsel "was not prevented in any way from acting as an effective advocate." *U.S. v. Humphries,* __ F.2d __ (9th Cir. April 15, 1992) No. 91-30207.

Plea Agreements (§6B)

1st Circuit finds no breach of plea agreement despite incorrect estimate of guideline range. (790) The 1st Circuit rejected defendant's contention that the government breached his plea agreement, despite the inaccurate estimate of his guideline range contained in the agreement. The government promised to recommend a sentence at the bottom of the applicable guideline range and did so; however that range was 21 to 24 months rather than the 15 to 21 months estimated in the plea agreement. The agreement used the non-promissory word "estimate" in describing the length of defendant's possible sentence,

and specifically stated that defendant's actual sentence was within the discretion of the sentencing judge. There was no reason to believe that the government lied in presenting its estimate. *U.S. v. Oyegbola*, __ F.2d __ (1st Cir. April 2, 1992) No. 91-1152.

1st Circuit rules that government breached plea agreement by supporting higher sentence. (790) In the plea agreement, the government agreed to recommend a 36-month sentence and advise the court of the extent of defendant's cooperation. However, as a result of a role enhancement under section 3B1.1, the guideline range was 46 to 57 months. The 1st Circuit ruled that the government breached the plea agreement by failing to recommend the 36-month sentence. Although the prosecutor informed the court of the agreement and the government's promise to recommend a 36-month sentence, the prosecutor never affirmatively recommended the 36-month sentence, and her comments undercut such a recommendation. She paid "lip service" to the agreement and then emphasized defendant's supervisorial role in the offense and urged the judge to impose a lengthy period of incarceration. Her references to the agreement were grudging and apologetic. While a prosecutor normally need not present promised recommendations to the court with any particular degree of enthusiasm, it is improper for the prosecutor to inject material reservations about the agreement to which the government has committed itself. Moreover, the prosecutor failed to mention the details of defendant's cooperation. *U.S. v. Canada*, __ F.2d __ (1st Cir. April 2, 1992) No. 91-1691.

Violations of Probation and Supervised Release (Chapter 7)

3rd Circuit rules that sentence on revocation of probation cannot exceed range available at initial sentencing. (800) The 3rd Circuit adopted the 11th Circuit's decision in *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) and held that under 18 U.S.C. section 3565(a)(2), the sentence imposed on revocation of probation cannot exceed the range available at the initial sentencing. A court may depart from that range only if the facts supporting the departure were presented at the initial hearing. To the extent the probation revocation table in section 7B1.4(a) and section 3565(a)(2) conflict, section 3565(a)(2) prevails. In this case, defendant's original guideline range was zero to six months, while the probation revocation guideline provided a three to nine month sentence. Since section 3565(a)(2) would not allow defendant to be resentenced to more than six months, and the table would not allow him to be resentenced to less than three months, the appropriate resentencing range in this case was three to six months. *U.S. v. Boyd*, __ F.2d __ (3rd Cir. April 13, 1992) No. 91-3597.

3rd Circuit upholds consideration of defendant's drug use at probation revocation hearing. (800) The 3rd Circuit upheld the district court's consideration of defendant's drug use at her probation revocation hearing, even though the probation violation petition did not formally charge her with use or possession of a controlled substance. Defendant did not challenge the positive results of the urinalysis, and admitted at the hearing that she had used drugs while on probation. Section 3565(a) does not require that a defendant be formally charged or convicted of drug possession for the conduct to be considered in probation revocation. Defendant had adequate prehearing notice that her drug possession would be considered. The written probation revocation petition not only detailed the 18 occasions on which she failed to appear for required urinalysis, but also cited the two positive urine specimens that she submitted. *U.S. v. Gordon*, __ F.2d __ (3rd Cir. April 13, 1992) No. 91-3605.

3rd Circuit holds that probationer who possesses a narcotic must be resentenced to at least one-third of original period of incarceration. (800) Under 18 U.S.C. section 3565(a), a probationer who is found in possession of a controlled substance must be resentenced to "not less than one-third of the original sentence." Disagreeing with the 9th Circuit's decision in *U.S. v. Corpuz*, 953 F.2d 526 (9th Cir. 1992), the 3rd Circuit held that the term "original sentence" refers to the original period of incarceration to which the defendant could have been sentenced, rather than the term actually imposed. In *U.S. v. Boyd*, __ F.2d __ (3rd Cir. April 13, 1992) No. 91-3597, issued by the same panel the same day as this decision, the court held that following a probation revocation, section 3565(a)(2) only allows the imposition of prison sentence which could have been imposed at the time of initial sentencing for the underlying crime. Under the 9th Circuit's interpretation, the two provisions conflict, but section 3565(a) controls, since it is prefaced by the phrase "Notwithstanding any other provision of this section." The 3rd Circuit's interpretation reconciled the two provisions. Here, defendant had an original guideline range of zero to four months and was sentenced to three years probation. Under section 3565(a)(2) she could be resentenced to zero to four months, but since she was found in possession of a controlled substance, section 3565(a) established a "floor" of one and one-third months. *U.S. v.*

Gordon, __ F.2d __ (3rd Cir. April 13, 1992) No. 91-3605.

Appeal of Sentence (18 U.S.C. §3742)

4th Circuit upholds waiver of right to appeal upward departure. (850) Defendant's plea agreement waived the right to appeal his sentence. In the agreement, the government reserved the right to seek an upward departure. Defendant appealed the district court's upward departure, claiming that the grounds for the departure were adequately considered by the Sentencing Commission and that he did not receive proper notice of the court's intent to depart. The 4th Circuit refused to consider his arguments, holding that he knowingly and voluntarily waived the right to appeal his sentence. The district court questioned defendant at length about the waiver and the government's reservation of its right to seek an upward departure. The court agreed that a defendant cannot waive his right to appeal a sentence in excess of the statutory maximum or a sentence based upon an unconstitutional factor such as race. However, defendant's complaints alleged at most an improper application of the guidelines and a violation of a procedural rule. *U.S. v. Marin,* __ F.2d __ (4th Cir. April 13, 1992) No. 90-5737.

5th Circuit refuses review where defendant failed to provide record of the sentencing hearing. (850) The 5th Circuit refused to review two alleged sentencing errors because defendant did not provide the court with a record of the sentencing hearing, and no justification was given for not doing so. The rules of appellate procedure require the appellant to provide the record, and case law has consistently followed this rule. To maintain the integrity of the rules and the appellate process, the appellate court will decline to review controversies in which the record is not supplied to it. *U.S. v. Hinojosa,* __ F.2d __ (5th Cir. April 3, 1992) No. 91-2260.

6th Circuit upholds same sentence imposed after remand where it fell within new guideline range. (865) Defendants originally received sentences at the bottom of their guideline ranges. At the initial sentencing, the district court said that there was "absolutely nothing to indicate to this court that the minimum of the applicable guideline range is inappropriate for sentencing purposes." On defendants' first appeal, the 6th Circuit reversed a two level enhancement for obstruction of justice, and remanded for resentencing. At resentencing, the court imposed the same sentences for both defendants, which were now at the top of their newly-calculated guideline ranges. The 6th Circuit affirmed, ruling that two 2nd Circuit cases relied upon by defendants did not require a sentence at the bottom of the new guideline range. The judge was obviously satisfied that the earlier sentences were appropriate regardless of where they fell within the recomputed range. The defendants' sentences are not otherwise appealable under 18 U.S.C. section 3742(a). *U.S. v. Sanchez,* __ F.2d __ (6th Cir. April 6, 1992) No. 91-1744.

4th Circuit reviews de novo whether defendant waived right to appeal his sentence. (870) The 4th Circuit held that the question of whether a defendant has effectively waived his right to appeal is a matter of law that is to be reviewed *de novo. U.S. v. Marin,* __ F.2d __ (4th Cir. April 13, 1992) No. 90-5737.

Habeas Corpus/28 U.S.C. 2255 Motions

1st Circuit rules that defendant need not show he has meritorious issues to obtain right to appeal through habeas corpus. (880) Defendant attempted to appeal his sentence, but because of the dereliction of his counsel, the appeal was dismissed for want of prosecution. In a habeas corpus motion brought under 28 U.S.C. section 2255, the 1st Circuit held that defendant did not have to show that he had a meritorious issue for appeal in order to obtain the the right to appeal his conviction and sentence. Defendant was deprived of his constitutional right to appeal because of the dereliction of counsel. This was not a case of "sloppy briefing" or inadequate oral argument. Defendant had the opportunity to appeal. He was entitled to do so and should be treated like any other defendant appealing for the first time. Thus, he did not have to show that there were meritorious issues to be appealed. *Bonneau v. United States,* __ F.2d __ (1st Cir. April 6, 1992) No. 91-1584.

Forfeiture Case

California District Court finds no probable cause to seize cash at airport. (950) Security personnel at the San Diego airport detected what appeared to be a large amount of currency in the claimant's carryon luggage. When claimant arrived in Oakland, he was questioned, and told the agents he was a gem dealer traveling on business and had $15,000 in cash. The agents seized his bags and two hours later a "dog sniff" was positive for narcotics. A search later that evening revealed no drugs, but $191,910 in cash. District Judge Thelton E. Henderson suppressed the evidence for lack of probable cause, and granted the

claimant's motion for summary judgment in the forfeiture action. The facts failed to demonstrate any nexus between the seized currency and drugs. The government's "after acquired" evidence linking claimant to a marijuana distribution chain was not sufficient, and in any event "probable cause must be shown to have existed at the time the forfeiture proceeding was instituted." *U.S. v. $191,910 in U.S. Currency,* __ F.Supp. __ (N.D. Cal. February 7, 1992) No. C90-1276 TEH.

Amended Opinion

(716)(760) *U.S. v. Mejia,* 953 F.2d 461 (9th Cir. 1991), *amended* March 25, 1992.

Opinion Withdrawn and Superceded

U.S. v. Panet-Collazo, __ F.2d __ (1st Cir. Jan. 21, 1992) No. 91-1404, *withdrawn and superceded, U.S. v. Panet-Collazo,* __ F.2d __ (1st Cir. March 30, 1992) No. 91-1463.

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10th Circuit upholds consecutive sentence for pre-guidelines and post-guidelines offenses. (100) (650) The 10th Circuit held that a sentencing court may impose consecutive sentences if a defendant is convicted of both a pre-sentencing guidelines offense and a post-sentencing guidelines offense, even if the guidelines, had they applied to both offenses, would have required concurrent sentences. The district court has "unfettered discretion" to impose sentences on pre-guidelines counts consecutively or concurrently, and nothing in the guidelines precludes a court from ordering that a sentence imposed on a pre-guidelines count be served consecutively to a sentence imposed on a guidelines count. *U.S. v. Litchfield*, __ F.2d __ (10th Cir. March 24, 1992) No. 90-8102.

Supreme Court relies on legislative history in construing ambiguous criminal statute. (110) In attempting to determine what sentence was "authorized" for juveniles under 18 U.S.C. section 5037, the Supreme Court found the statute ambiguous. However, rather than construing the ambiguity in favor of the juvenile under the "rule of lenity," Justice Souter, in an opinion joined by Chief Justice Rehnquist, and Justices White and Stevens, examined the legislative history of the statute and its predecessors, and concluded that the statute was not ambiguous after all. Justice Scalia, in an opinion joined by Justices Kennedy and Thomas concurred in the judgment, but argued that it was "not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." Justices O'Connor and Blackmun dissented on other grounds. *U.S. v. R.L.C.*, __ U.S. __, 112 S.Ct. __ (March 24, 1992).

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Article reviews proposed 1992 amendments. (110) In *"Proposed 1992 Guidelines Amendments,"* Ronald Welch summarizes a number of proposed amendments currently under consideration by the Commission. He notes that several of the amendments continue the Commission's trend of moving toward a real offense system by cross-referencing charges on which the defendant is convicted to other guidelines that more accurately reflect the evidence against the defendant. He also notes that other amendments that would increase sentences for particular offenses are subject to criticism on the grounds that they are unaccompanied by empirical data suggesting the need for such enhancements and analyses of the impact of the proposed changes on prison populations. 4 FED. SENT. RPTR. 239-40 (1992).

6th Circuit says government manipulation of drug quantity may violate fundamental fairness but rejects defendant's claim. (110)(250) Defendant and his co-defendant had $15,000 to purchase cocaine, but defendant was unsure of the quantity that could be purchased with this sum. The co-defendant advised defendant that he expected to get a pound and a tenth, or 498.96 grams, for the money. Nonetheless, the state police and FBI decided to "sell" one kilogram of cocaine to the co-defendant for $15,000. Defendant's sentence was based upon one kilogram of cocaine, which resulted in a two-level increase in his base offense level. The 6th Circuit upheld the sentence, although it noted that there was something "very disturbing" about the government having the power to manipulate a sentence by essentially changing the market value of the cocaine. If defendant could "demonstrate that the government manipulated the dollar amount of cocaine to increase his sentence, such manipulation would certainly provide a fundamental fairness defense against the higher sentence." Defendant did not have such a fundamental fairness claim because he ratified the amount of cocaine actually sold to the co-defendant. When the co-defendant reported the quantity he had been able to purchase with the money, defendant's response reflected no surprise, he simply said "[u]m-hm." Defendant failed to demonstrate that the amount of cocaine they received in exchange for $15,000 was so unreasonable as to make his sentence fundamentally unfair. *U.S. v. Sivils,* __ F.2d __ (6th Cir. March 31, 1992) No. 90-6420.

1st Circuit finds no double jeopardy in obstruction of justice enhancement and consecutive sentence for firearm charge. (125)(320)(650) Defendant was convicted of threatening a victim in retaliation for information the victim had given to law enforcement officials and of carrying a firearm during a crime of violence. He received an eight-level enhancement under section 2J1.2(b)(1) because the offense involved a threat to physically injure a person in order to obstruct the administration of justice. The 1st Circuit found no double jeopardy problem. Defendant would have been subject to the enhancement for the threats to cause physical injury, whether by means of a firearm or in any other manner. The enhancement would have applied even if defendant had used a "wet noodle" to threaten the witness. The firearm count, however, specifically required the use of a firearm. *U.S. v. Weston,* __ F.2d __ (1st Cir. March 25, 1992) No. 91-1546.

9th Circuit rules guidelines do not preclude judge from considering reliability of evidence. (135) The district judge held the guidelines unconstitutional on the ground that they preclude adjusting the weights of the various sentencing factors to reflect differences in the reliability of evidence. *U.S. v. Davis,* 715 F.Supp. 1473, 1483 (C.D. Cal. 1989). After the defendants were sentenced, the 9th Circuit rejected the identical argument in *U.S. v. O'Neal,* 937 F.2d 1369, 1376 (9th Cir. 1990) and other cases. Accordingly, the district judge's ruling in this case was reversed. *U.S. v. Davis,* __ F.2d __ (9th Cir. March 31, 1992) No. 89-50335.

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11th Circuit upholds government's decision to seek mandatory life sentences for drug offenses. (135)(245) The 11th Circuit rejected defendant's claim that the district court denied him due process by permitting the government to invoke the procedures of 21 U.S.C. section 851 and seek mandatory life sentences. The mandatory life sentence provisions applicable to defendant appear to be valid, and there was no constitutional problem with the scope of the government's discretion. There is no material difference between the grant of discretion to seek a downward departure and the grant of discretion here. The government's decision to proceed against an accused under a particular statute is not reviewable unless the decision is made for an unlawful reason such as the accused's race. *U.S. v. Willis,* __ F.2d __ (11th Cir. March 23, 1992) No. 90-5476.

9th Circuit holds that life without parole for felon in possession of a firearm is not cruel and unusual. (140)(330) Defendant was sentenced to life imprisonment without possibility of parole pursuant to 18 U.S.C. section 924(e), the "Armed Career Criminal" statute, after he was convicted of being a felon in possession of a firearm. The 9th Circuit held that in judging the appropriateness of his sentence under a recidivist statute "we may take into account the government's interest not only in punishing the offense of conviction, but also its interest 'in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.'" Given the defendant's criminal history, the court found "no need to compare his sentence with others across the nation" and held that the sentence was not cruel or unusual. *U.S. v. Bland,* __ F.2d __ (9th Cir. March 20, 1992) No. 91-50148.

11th Circuit upholds mandatory life sentences against statutory and constitutional challenges. (140)(245)(650) Defendant received concurrent life sentences for conspiracy to possess and possessing with intent to distribute at least five kilograms of cocaine. Because he had two prior drug convictions, the life sentences were mandatory under 21 U.S.C. section 841(b)(1)(A). The 11th Circuit rejected defendant's contention that the mandatory life sentence provisions conflicted with 28 U.S.C. section 994(h), which requires that the should be at or near the statutory maximum. The guidelines accommodate this in section 5G1.1(b) by providing that where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence. The life sentence did not violate the 8th Amendment. The Supreme Court recently rejected a similar argument in *Harmelin v. Michigan,* 111 S.Ct. 2680 (1991). *U.S. v. Willis,* __ F.2d __ (11th Cir. March 23, 1992) No. 90-5476.

9th Circuit finds that defendant possessed a dangerous weapon when he showed the outline of a gun under his shirt. (160)(224) Defendant handed the teller a note stating that he had a gun in the waistband of his pants. He then pulled his T-shirt tightly so the teller saw the clear outline of a gun handle. On this evidence, the 9th Circuit held that the district court's conclusion that defendant possessed, brandished, or displayed what appeared to be a dangerous weapon was not clearly erroneous. The court said that whether defendant actually possessed a functioning firearm was "beside the point." "He intentionally created the inference that he possessed a dangerous weapon, he told his victim he had a gun, and the victim reasonably believed that [defendant] was armed." *U.S. v. Taylor,* __ F.2d __ (9th Cir. March 30, 1992), No. 91-50095.

Articles address Ninth Circuit relevant conduct cases. (175)(780) In a series of cases, the Ninth Circuit has departed from the position of other circuits by limiting the extent to which conduct underlying dismissed counts, uncharged conduct, and acquitted counts can be considered by a court in setting a guidelines range or in departing. In *"The Ninth Circuit's Undeclared War on 'Real Offense' Factors and Relevant Conduct,"* Roger W. Haines, Jr., argues that these decisions are contrary to the guidelines and that, by moving from a "real offense" toward a "charge offense" system, they transfer power from the courts to the prosecutors in contravention of the guidelines' intent. In *"Relevant Conduct and Plea Bargaining,"* Steven E. Zipperstein argues that the Ninth Circuit cases have erred by treating charge bargains as if they were sentence bargains. He suggests that reduction of disparity requires treating the conduct underlying dismissed counts as relevant so long as those counts are groupable under section 3D1.2. In *"The Real Issue: Fair Plea Bargains, Not Relevant Conduct,"* Judy Clarke defends the Ninth Circuit cases, claiming they are necessary to ensure that plea bargaining remains a fair practice. 4 FED. SENT. RPTR. 191-94, 223-25, 233 (1992).

7th Circuit affirms firearm enhancement despite dismissal of gun counts. (175)(284) The 7th Circuit rejected defendant's claim that because the government voluntarily dismissed two gun counts against him, a firearm enhancement under section 2D1.1(b)(1) was improper. Defendant misunder-

stood the difference between a charged offense and a sentence enhancement under the guidelines. The government dismissed the firearm counts based upon its evaluation of the charges and did not promise not to seek enhancement. Under the guidelines, an enhancement is proper if the weapon was present during a drug trafficking offense, unless is it clearly improbable that the weapon was connected to the offense. Here, police found a .38 caliber revolver and a .9 millimeter pistol when they seized one-half a kilogram of cocaine from defendant's home. The .38 was loaded when seized and the .9 millimeter was found with two partially loaded clips lying nearby. Defendant was unable to offer any evidence that the connection between the guns and his cocaine sales was clearly improbable. The type and location of the seized guns suggested that they were used in connection with defendant's drug business. *U.S. v. Nunez,* __ F.2d __ (7th Cir. March 25, 1992) No. 91-2752.

11th Circuit rejects Sentencing Commission's amendment and holds that a felon's possession of a firearm is a crime of violence. (180)(520) In defendant's original appeal, *U.S. v. Stinson,* 943 F.2d 1268 (11th Cir. 1991), the 11th Circuit held that possession of a firearm by a convicted felon was categorically a crime of violence for career offender purposes. After defendant was sentenced, the Sentencing Commission amended the commentary to section 4B1.2 (effective November 1991) to state that the term crime of violence does not include the offense of unlawful possession of a firearm by a felon. On defendant's petition for rehearing, the 11th Circuit reaffirmed its earlier holding, ruling that it would not be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to specifically exclude the possession of a firearm by a felon as a crime of violence. Although the Sentencing Commission submits guideline amendments to Congress, the commentary was never officially passed upon by Congress. "We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts." Although commentary should generally be regarded as persuasive, it is not binding. *U.S. v. Stinson,* __ F.2d __ (11th Cir. March 20, 1992) No. 90-3711.

Supreme Court holds that juvenile cannot be sentenced to more than adult could receive under the guidelines. (190) The Juvenile Delinquency Act requires the length of official detention in certain circumstances to be limited to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." 18 U.S.C. Section 5037(c)(1)(B). Although the sentencing guidelines do not apply to juveniles, the Supreme Court held, in a 7-2 opinion written by Justice Souter, that "this limitation refers to the maximum sentence that could be imposed if the juvenile were being sentenced after application of the United States Sentencing Guidelines." Justices Scalia, Kennedy, and Thomas concurred separately, and Justices O'Connor and Blackmun dissented. *U.S. v. R.L.C.,* __ U.S. __, 112 S.Ct. __ (March 24, 1992).

Offense Conduct, Generally (Chapter 2)

11th Circuit upholds equating one marijuana plant with 1,000 grams of marijuana. (242)(253) In *U.S. v. Osburn,* 756 F.Supp. 571 (N.D. Ga. 1991), the Northern District of Georgia held that the Drug Quantity Table in section 2D1.1 was unconstitutional to the extent it treated one marijuana plant as equivalent to 1000 grams of marijuana for plants in groups of 50 or more. The 11th Circuit reversed, upholding the constitutionality of this portion of guideline section 2D1.1 and the statute on which it was based, 21 U.S.C. section 841. Federal legislation mandating length of sentence does not violate the separation of powers doctrine. Section 2D1.1 of the guidelines is consistent with the congressional mandate contained in section 841(b)(1)(D) for offenses involving 50 or more marijuana plants. The classification equating one marijuana plant to 1000 grams of marijuana for offenses involving more than 50 plants, and using actual weight of marijuana for offenses involving fewer than 50 plants, was not arbitrary. There is a rational basis for penalizing those convicted of offenses involving 50 or plants more harshly than those convicted of offenses involving fewer than 50 plants. *U.S. v. Osburn,* __ F.2d __ (11th Cir. March 23, 1992) No. 91-8091, reversing *U.S. v. Osburn,* 756 F.Supp. 571 (N.D. Ga. 1991).

Article responds to Commission's criticism of mandatory minimums. (245) In *"Mandatory Minimum Sentencing,"* Robert S. Mueller, III, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, questions the conclusions drawn in the Sentencing Commission's 1991 report on mandatory minimum penalties. The Commission had concluded that prosecutors were failing to enforce the minimums in cases where they seemed appropriate, generating disparity among defendants. Mueller concludes that the Commission's study inaccurately classifies cases as circumventions of the mandatory minimums. For example, it assumes that the mandatory minimum should be charged when the charge would be "reasonable," rather than applying the Department's more stringent

requirement that the count be "readily provable." Moreover, the Commission lacked access to substantial assistance motions filed under seal for the protection of the defendant. 4 FED. SENT. RPTR. 230-33 (1992).

7th Circuit rules court erroneously failed to consider section 841(b) in sentencing. (245) The district court determined that defendant's base offense level was 32 because he possessed six kilograms of cocaine. Given his criminal history category of IV, this yielded a sentencing range of 168 to 210 months. Defendant received a 168-month sentence. The 7th Circuit found that the district court erred because it failed to consider the penalties for violations of 21 U.S.C. section 841(a) which are set forth in subsection (b). Under section 841(b)(1)(A)(ii)(II), any violation of section 841(a) involving five or more kilograms of a substance containing a detectable amount of cocaine carries a sentence of 10 years to life. Although defendant's sentence was at the low end of this range, and none of the statute's enhancement provisions applied, the court could not determine whether the district court's error resulted in an increased sentence. *U.S. v. Trujillo,* __ F.2d __ (7th Cir. March 24, 1992) No. 91-1740.

7th Circuit rules due process does not require a jury to determine drug quantity under section 841(a). (250)(755) Defendant argued that 21 U.S.C. section 841(a) violates due process because the quantity of the controlled substance is not included as an element of the offense. Because drug quantity is a crucial element of sentencing, he reasoned that due process requires that a jury determine quantity beyond a reasonable doubt. Relying upon prior caselaw holding that drug quantity is not a substantive element of a drug offense, the 7th Circuit rejected this argument. Drug quantity is a sentencing enhancement, not a separate substantive offense. The sentencing-hearing tail must wag the substantive-offense dog in order for the preponderance of the evidence standard to violate due process. Such was not the case here. Because of the drug quantity involved, defendant's offense level was raised by six for a 53-month increase in sentence. While such an increase was not insignificant, it was not so extreme as to require a beyond a reasonable doubt standard. *U.S. v. Trujillo,* __ F.2d __ (7th Cir. March 24, 1992) No. 91-1740.

7th Circuit upholds consideration of 28 kilograms of flour which defendants attempted to purchase. (250) Defendants contended that it was error to find that they attempted to purchase 30 kilograms of cocaine from a government informant, since 28 of the kilograms actually were flour. Following its decision in *U.S. v. White,* 888 F.2d 490 (7th Cir. 1989), the 7th Circuit rejected this argument. The district judge properly applied guideline section 2D1.4(a) in counting the entire 30 kilograms towards defendants' base offense level. *U.S. v. Leiva,* __ F.2d __ (7th Cir. March 26, 1992) No. 90-1883.

New York District Court finds smaller drug quantity because of possible errors in counting balloons swallowed by defendant. (250) Customs officers reported that while defendant was in detention at an airport medical facility, he "passed" 63 balloons containing 555.8 grams of cocaine. Defendant contended that he had only swallowed 48 balloons containing 480 grams of cocaine. The District Court for the Eastern District of New York found defendant credible, and because this reduced the amount of cocaine imported by defendant to under 500 grams, reduced defendant's offense level by two. In doing so, the judge noted that there were "many cases in this district in which the defendant carries just a few gram above a guidelines cutoff point, exposing the accused to significant additional time in prison. This suggests that the fine and arbitrary distinctions between drug weights in section 2D1.1(c) of the guidelines are of questionable value in deterring drug importation. The large increments of punishment that come with small changes in drug weight do not seem to further deter leaders of drug rings, to whom their couriers' lives are without significance. The couriers themselves are usually ignorant of the specifics of our drug laws and are almost undeterrable because of economics and other pressures." *U.S. v. Londono,* __ F.Supp. __ (E.D.N.Y. Feb. 4, 1992) No. 91 CR 724.

7th Circuit upholds inclusion of additional 30 kilograms of cocaine. (270) Defendants were arrested after attempting to purchase 30 kilograms of cocaine from a government informant. The 7th Circuit found no error in the district court's inclusion of an additional 30 kilograms of cocaine which defendants had possessed and distributed prior to the offense of conviction. At trial, witnesses testified that defendants promised to pay for the cocaine purchased from the government informant from the proceeds of 30 kilograms which they had already distributed. Moreover, after their arrest, one of the defendants placed a telephone call from the detention center to the owner of the apartment where defendants stayed prior to their arrest. In that conversation, the owner told defendant that defendant's wife "told me she had some," and said that there were 30 left. *U.S. v. Leiva,* __ F.2d __ (7th Cir. March 26, 1992) No. 90-1883.

7th Circuit says relevant conduct includes sales made to confidential informant in years prior to defendant's arrest. (270) The 7th Circuit rejected defendant's claim that the district court erred in determining his offense level by including cocaine he allegedly sold to a confidential informant before the transactions described in the indictment. At the sentencing hearing, defendant admitted supplying a single customer, who later became a confidential informant for the government, with cocaine since 1986. A government agent testified that defendant had informed him on a prior occasion that the total volume of cocaine sold to this customer was between six to eight kilograms. The district court found this testimony more credible than defendant's claim of only three kilograms. The district court could properly conclude that all of defendant's sales to the informant amounted to the same course of conduct. *U.S. v. Nunez,* __ F.2d __ (7th Cir. March 25, 1992) No. 91-2752.

11th Circuit holds that acquittal of knowingly maintaining a "stash" house does not preclude responsibility for possession of drugs at same site. (270) Defendant contended that it was improper to include in his base offense level drugs found at a "stash" house since he had been acquitted of knowingly maintaining the house for the purposes of manufacturing, distributing or using a controlled substance. The contours of knowingly maintaining are broader than those of possessing. Thus, an acquittal of knowingly maintaining does not preclude responsibility for the narrower offense of possession of drugs at the same site. *U.S. v. Clavis,* __ F.2d __ (11th Cir. March 31, 1992) No. 89-9011.

Article identifies difficulties in basing drug sentences on quantity. (275) In *"Sentencing Narcotics Cases Where Drug Amount Is a Poor Indicator of Relative Culpability,"* Catharine M. Goodwin argues that the guidelines currently fail to distinguish among defendants with differing culpability and are often difficult to apply. The author notes special difficulties in determining what actions by conspirators should be regarded as sufficiently "foreseeable" to be included in the relevant conduct determination and in calculating drug quantities where the evidence is sparse or the transaction was never consummated. She proposes amendments that might improve the process. 4 FED. SENT. RPTR. 226-29, 238 (1992).

11th Circuit holds conspirators accountable for cocaine seized from courier six days after their arrest. (275) Defendants contested the attribution of 369 grams of cocaine base seized from a courier on January 19 because they, and most of the other conspirators, had been arrested six days earlier. The 11th Circuit rejected this since there was evidence that the cocaine had been ordered by the conspiracy's leader in December. It was reasonably foreseeable that the conspiracy would continue unabated after their arrest to the extent of continued movement of cocaine previously ordered. *U.S. v. Clavis,* __ F.2d __ (11th Cir. March 31, 1992) No. 89-9011.

11th Circuit holds conspirator accountable for drugs found in house run by conspiracy. (275) Defendant was involved in a large cocaine conspiracy. He claimed the district court could not attribute to him 161.5 grams of cocaine seized from one of the houses rented by the conspiracy since, unlike other conspirators, he was not charged with either possessing this cocaine or with knowingly maintaining the house. The 11th Circuit rejected this argument, since the activities at the house were activities attributable to the conspiracy. Defendant, as a member of the conspiracy, could foresee that cocaine distributed at another house rented by the conspiracy was being brought from elsewhere and being processed and packaged elsewhere. *U.S. v. Clavis,* __ F.2d __ (11th Cir. March 31, 1992) No. 89-9011.

1st Circuit affirms obstruction enhancement for threatening associate who cooperated with authorities. (320) Defendant was convicted of threatening bodily injury with intent to retaliate for information given to law enforcement officials. He received an eight-level enhancement under guideline section 2J1.2(b)(1) because the offense involved a threat to physically injure a person in order to obstruct the administration of justice. Defendant contended the enhancement was improper because his conviction on the retaliation count implied only that he sought to punish his victim for post cooperation, and that the language of the guideline demands an intent to affect the victim's willingness to cooperate in the future. The 1st Circuit upheld the enhancement, finding no incompatibility between a conviction for retaliation and an enhancement under section 2J1.2(b)(1). *U.S. v. Weston,* __ F.2d __ (1st Cir. March 25, 1992) No. 91-1546.

11th Circuit bases sentence for failure to appear for trial on maximum sentence for underlying offense. (320) Former guideline section 2J1.6, applicable for failure to appear offenses, provides for various sentence enhancements based upon the maximum term of imprisonment for the underlying offense. Defendant was convicted of failure to appear for trial. The 11th Circuit upheld the application of the enhancement in section 2J1.6 to defendant even though the sentence he received for the underlying

offense was well below the statutory maximum. The court distinguished *U.S. v. Lee*, 887 F.2d 888 (8th Cir. 1989), which held that former section 2J1.6(b) exceeded the statutory grant of authority when applied to a failure to report to serve a sentence. This case involved a failure to appear for trial. The Sentencing Commission did not violate its statutory mandate by calculating the sentence for failure to appear for trial with reference to the maximum, rather than the actual, sentence for the underlying offense. *U.S. v. Gardiner*, __ F.2d __ (11th Cir. March 23, 1992) No. 90-8418.

5th Circuit applies 2M5.2, rather than 2K2.1, to export of ammunition. (330)(345) Defendant was arrested attempting to smuggle 10,181 cartridges of various caliber ammunition from the United States into Mexico. The 5th Circuit upheld the application of section 2M5.2 (exportation of arms without an export license), rather than section 2K2.1 (unlawful transportation of firearms or ammunition). The court rejected defendant's argument that section 2M5.2 was intended to apply only to offenses involving "serious military or space hardware," not firearms ammunition. Section 2M5.2 is not limited to the items listed in application note 1. Moreover, the Statutory Index lists section 2M5.2 as the only guideline applicable to convictions under 22 U.S.C. section 2778. The application note to section 2M5.2 does state that in an unusual case in which the offense does not pose a risk to security or foreign policy interest of the United States, a downward departure may be appropriate. Here, the district court departed downward from a range of 33 to 41 months and imposed a 24-month prison term. *U.S. v. Galvan-Revuelta*, __ F.2d __ (5th Cir. March 27, 1992) No. 91-8467.

9th Circuit holds person under deportation order who voluntarily leaves U.S. has been deported. (340) Defendant pled guilty to use of a false passport. At sentencing, the court added two points to his base offense level under U.S.S.G. section 2L2.4(b)(1) because he had previously been deported. In fact, the defendant had voluntarily left the country after appealing the deportation order. The 9th Circuit felt that by voluntarily leaving the country while his appeal was pending, defendant was deemed to have withdrawn his appeal and his voluntary departure resulted in his deportation. Accordingly, the district court properly increased his offense level by two levels. *U.S. v. Blaize*, __ F.2d __ (9th Cir. March 26, 1992), No. 91-50754.

9th Circuit holds that immigration guideline defines "felony" by reference to maximum penalty. (340)(500) Section 2L1.2 of the Sentencing Guidelines requires that aliens convicted of illegally re-entering the United States receive a heavier sentence if they have been originally deported after being convicted of a felony. In this case, the 9th Circuit held that section 2L1.2 "defines a felony by reference to the maximum penalty authorized for the offense by the state statute of conviction." The court held "that a felony conviction, for purposes of Guidelines section 2L1.2 is defined as a conviction under a statute, state or federal, with a statutory maximum penalty in excess of one year." *U.S. v. Olvera-Cervantes*, __ F.2d __ (9th Cir. March 24, 1992) No. 91-30093.

9th Circuit holds that escapee from prison camp is not entitled to decrease for escape from "non-secure" custody. (350) Defendant walked away from the federal prison camp at Lompoc, California and remained a fugitive for almost a year. He was sentenced for escape, and argued that the district court should have decreased his offense level by four levels under U.S.S.G. 2P1.1 for escaping from the "non-secure custody of a community corrections center, community treatment center 'half-way house,' or similar facility." The 9th Circuit rejected the argument, agreeing with the district court that "federal prison camps are generically different from the facilities listed in section 2P1.1(b)(3)." *U.S. v. McGann*, __ F.2d __ (9th Cir. March 31, 1992).

Adjustments (Chapter 3)

11th Circuit affirms supervisor enhancement for defendant who ran "stash" house. (431) The 11th Circuit affirmed that defendant's receipt of cocaine at a stash house, his distribution of it to distributors, and his supervisorial role over the house adequately supported the finding that he was a supervisor. *U.S. v. Clavis*, __ F.2d __ (11th Cir. March 31, 1992) No. 89-9011.

11th Circuit upholds supervisor enhancement for bookkeeper of drug conspiracy. (431) The 11th Circuit upheld a supervisorial enhancement for a defendant who was the bookkeeper for a large cocaine conspiracy. Defendant approached the building manager of a house which the conspiracy rented and hired the manager to become a member of the organization and to receive cocaine shipments in the parking lot and deliver them to the rented house. Defendant delivered shipments to the manager at the parking lot, and the manager in turn delivered them to others. *U.S. v. Clavis*, __ F.2d __ (11th Cir. March 31, 1992) No. 89-9011.

10th Circuit reverses leadership enhancement for defendant's essential role in the offense. (432) Defendant was convicted of conspiracy and fraud as a result of his involvement in an investment scheme in an alleged mining operation that defrauded investors. The district court imposed a four level leadership enhancement under section 3B1.1(a) because defendant was deeply involved in and essential to the success of the fraud. The 10th Circuit reversed, ruling that a defendant's "essential role" in an offense was an insufficient basis for the leadership enhancement in the absence of elements of control or organization of other people. Most of the other conspirators also held important roles, but the guidelines did not intend to define an organizer or leader so broadly that nearly every member of a conspiracy qualifies. Defendant did not organize or initiate the original scheme. Although he may have recruited unwitting investors, he did not recruit accomplices. Defendant did not control the distribution of profits or take a larger share, and did not exercise decision-making authority over his co-conspirators. Although he might be termed an organizer or leader of the mining operation, that operation was not itself criminal activity. *U.S. v. Litchfield,* __ F.2d __ (10th Cir. March 24, 1992) No. 90-8102.

1st Circuit rejects minor role for defendant who received money and handed drugs to government agent. (445) The 1st Circuit rejected defendant's contention that he was a minor participant in a drug transaction which took place in the store in which he worked. Defendant's receipt of the money, his contacts with the drug courier, and his having handed the drugs to the agent, taken together, justified the district court's denial of the reduction. *U.S. v. Torres,* __ F.2d __ (1st Cir. March 30, 1992) No. 91-1161.

1st Circuit upholds obstruction enhancement based upon perjury at trial. (461) The 1st Circuit affirmed an enhancement under section 3C1.1 based upon defendant's perjury during the trial. Two drug enforcement agents and a tape recording indicated that defendant sold cocaine to a government agent for $3300. This evidence sufficiently supported the determination that defendant was lying when he said he did not know about the drug transaction, that he had no connection with the courier who brought the drugs to his shop, and that he did not hand the drugs to the government agent. Even construed in the light most favorable to him, defendant's testimony was "elaborate, fanciful and false." *U.S. v. Torres,* __ F.2d __ (1st Cir. March 30, 1992) No. 91-1161.

8th Circuit upholds obstruction enhancement and denies acceptance of responsibility for flight and use of an alias. (461)(492) Defendant contended that an enhancement for obstruction of justice was improperly imposed upon him for merely avoiding or fleeing arrest, as discussed in application note 4(d) to guideline section 3C1.1. The 8th Circuit upheld the enhancement, ruling that defendant did more than simply avoid or flee arrest. Defendant left the jurisdiction and remained a fugitive for about a year. During that time he used a driver's license he had stolen from his brother and obtained work under his brother's name. He also violated the conditions of his probation imposed by the State of Missouri. At his sentencing hearing, he agreed that his goal had been to remain as far away as possible so that he would not be involved in the proceedings in any way or forced to cooperate or testify against his co-defendants. The 8th Circuit also affirmed that defendant's year-long fugitive status supported the denial of a reduction for acceptance of responsibility. *U.S. v. Lyon,* __ F.2d __ (8th Cir. March 18, 1992) No. 91-2171.

10th Circuit affirms obstruction enhancement based upon false testimony at trial. (461) The 10th Circuit affirmed an enhancement under section 3C1.1 based upon the district court's finding that defendant obstructed justice by giving false testimony at trial. "Our deference to the district court is especially appropriate when the issue concerns questions of a witness' credibility." *U.S. v. Litchfield,* __ F.2d __ (10th Cir. March 24, 1992) No. 90-8102.

11th Circuit rules false assertions to probation officer were not material because they conflicted with jury's verdict. (462) Defendant was convicted of drug charges based upon evidence that he was travelling with a companion who had a claim check for a suitcase containing cocaine. The 11th Circuit reversed an enhancement for obstruction of justice based upon defendant's assertions to his probation officer that he knew nothing about cocaine found in the suitcase and that he was with his companion only because the companion offered to buy him a plane ticket if he would drive a car back to Miami. After defendant was sentenced, application note 4 to section 3C1.1 was amended to provide that an obstruction enhancement is not warranted for providing misleading information, not amounting to a material falsehood, in respect to a presentence report. The court held that this amendment to the commentary was merely a clarification of section 3C1.1, and thus could be considered on appeal. Defendant's assertions did not as a matter of law justify the enhancement because a pre-sentence assertion cannot be ma-

terial to sentencing if the assertion's truth requires the jury's verdict to be erroneous. The probation officer would have to disregard the jury's determination in order to believe defendant's assertions. *U.S. v. Gardiner,* __ F.2d __ (11th Cir. March 23, 1992) No. 90-8418.

5th Circuit reverses one-level reduction in offense level for partial acceptance of responsibility. (480) The district court, being "about halfway convinced" on the matter, reduced defendant's offense level by one for a "partial" acceptance of responsibility. The 5th Circuit reversed, ruling that a district court may not grant a one-level reduction under guideline section 3E1.1 for partial acceptance of responsibility. Section 3E1.1 directs a court to reduce an offense level by two if the defendant clearly demonstrated a recognition and affirmative acceptance of responsibility. To permit a one-level reduction would allow courts to circumvent much of the rationale behind section 3E1.1 by allowing a court to "straddle the fence" in close cases without explicitly finding whether or not the defendant accepted responsibility. In such a case, the better course is to deny the reduction on the theory that the defendant had not clearly demonstrated acceptance of responsibility. *U.S. v. Valencia,* __ F.2d __ (5th Cir. March 18, 1992) No. 91-2868.

9th Circuit upholds constitutionality of acceptance of responsibility guideline. (484) Defendants challenged the constitutionality of the "acceptance of responsibility" guideline section 3E1.1 arguing that it forces a defendant to relinquish his right to assert his innocence on appeal. Relying on *U.S. v. Gonzalez,* 897 F.2d 1018, 1021 (9th Cir. 1990), the 9th Circuit rejected the argument. The court observed that the purpose of section 3E1.1 is to encourage defendants to accept responsibility for their actions during the early stages of prosecution. The purpose is not to punish those who choose to exercise their constitutional rights. *U.S. v. Davis,* __ F.2d __ (9th Cir. March 31, 1992) No. 89-50335.

6th Circuit affirms denial of acceptance of responsibility reduction to defendant who contradicted his earlier confession. (488) The 6th Circuit affirmed the denial of an acceptance of responsibility reduction to a defendant who attempted to rob a bar. Upon his arrest, defendant confessed to police that he had entered the bar intending to rob it. However, in a two-page statement furnished to the probation office, defendant contradicted his earlier confession and maintained that he had actually entered the tavern intending to shoot someone who had sold him diluted cocaine, and that his earlier statement to police was unreliable because he was high on cocaine at the time. *U.S. v. Brown,* __ F.2d __ (6th Cir. March 19, 1992) No. 91-5447.

7th Circuit agrees that defendant's post-trial admission of guilt was untimely and insincere. (488) The 7th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility despite the fact that in his interview with his probation officer, defendant admitted participation in the offense and claimed that he deeply regretted his involvement. Defendant admitted his participation in the offense only after a full trial in which he claimed that he was entrapped by government agents. At trial, he relied upon testimony by a co-defendant which the district court found was perjurous. There was no error in the district court's determination that defendant's admission of guilt was "motivated more by [his] concern to improve his potential disposition than by true remorse." *U.S. v. Leiva,* __ F.2d __ (7th Cir. March 26, 1992) No. 90-1883.

Criminal History (§4A)

6th Circuit rules that two robberies committed with same weapon in half-hour period constituted one conviction for Armed Career Criminal Act purposes. (500) The 6th Circuit ruled that two robberies committed by defendant with the same weapon in a half-hour period constituted a single conviction for purposes of sentencing enhancement under the Armed Career Criminal Act. Although the circuit has adopted the "separate and distinct criminal episode" test utilized by the majority of circuits, the court noted that factual situations which have been described as separate episodes can be found on both ends of the spectrum. It found that where multiple convictions arise of out a continuous course of criminal activity, or a "crime spree," only one separate and distinct criminal episode has occurred for purposes of the Act. Judge Milburn dissented, not believing that the Act can never apply to crimes that occur during a single evening, and that the majority's holding was contrary to the law in sister circuits. *U.S. v. Brady,* __ F.2d __ (6th Cir. March 30, 1992) No. 91-1350.

8th Circuit holds one night in jail constituted period of imprisonment. (504) Defendant received three criminal history points under section 4A1.1(a) for his prior "sentence of imprisonment" on a second-degree criminal mischief conviction. He contended that this was improper under application note 2 to section 4A1.2. He was arrested on June 5 at 11:05 p.m. for second-degree arson. He was released at

7:50 p.m. the next day after posting bond. He remained free on bond until July 25, when he was arrested for violating the terms of his parole. He was kept in jail on the parole violation until October 8, when he was sentenced to five years on the reduced charge of second-degree criminal mischief. This sentence was to run consecutive to his parole revocation sentence. The court gave defendant credit for time served while awaiting disposition of the criminal mischief charge, but not for time served in regard to the parole revocation. The 8th Circuit affirmed the district court's determination that defendant did serve a period of imprisonment. *U.S. v. Griebe,* __ F.2d __ (8th Cir. March 23, 1992) No. 91-2786.

10th Circuit rules sentences imposed on same day are unrelated for career offender purposes. (504) Defendant contended that he should not be classified as a career offender because his two prior convictions for crimes of violence were consolidated for sentencing and thus should be considered "related" rather than discrete crimes. The 10th Circuit held that the two sentences were unrelated, even though defendant was sentenced to probation, probation revocation and imprisonment for one offense on the same date that he was sentenced for another non-related violent offense. To require the state court to have sentenced defendant to probation for his first offense on one day, and then to reconvene the parties the next day to revoke the probation, sentence defendant to prison for the first offense, and sentence him to prison for the second offense, solely for the purpose of satisfying "an inartfully drafted definition in the federal sentencing guidelines," would be a waste of judicial resources. *U.S. v. Villarreal,* __ F.2d __ (10th Cir. March 23, 1992) No. 91- 2102.

11th Circuit rejects downward departure for owning a business, supporting minor children and mother, and trouble-free past. (514)(660)(736) The district court departed downward because defendant (a) had a business which could "go under" if she was not there to run it, (b) supported her two minor children and her mother, and (c) had never been in trouble in the past. The 11th Circuit found that none of these factors, either individually or in combination, were sufficiently extraordinary to overcome the strong presumption against downward departures on the basis of offender characteristics established in section 5H of the guidelines. Moreover, defendant's trouble-free past was an inappropriate ground for departure because her placement in criminal history category I already reflected the absence of prior brushes with the law. A departure below the lower limit of the guideline range for a category I offender on the basis of adequacy of criminal history cannot be appropriate. *U.S. v. Mogel,* __ F.2d __ (11th Cir. March 19, 1992) No. 90-8549.

1st Circuit holds felon's possession of a firearm is not a violent felony under 924(e). (520) Under 18 U.S.C. section 924(e), a felon possessing a firearm who has three previous convictions for "violent felonies" faces a mandatory minimum prison term of 15 years. The 1st Circuit, following the 4th Circuit, and disagreeing with the 9th and 11th Circuits, held that a conviction for being a felon in possession of a firearm is not itself a "violent felony" conviction under 18 U.S.C. section 924(e). First, simple possession of a firearm does not fit easily within the literal language of the statute: it does not normally involve a significant risk of physical harm. Second, to read the statute broadly in order to cover firearm possession would also bring within the statute crimes such as drunken driving that do not seem to belong in the same category. The term "violent felony" calls to mind a tradition of crimes that involve the possibility of more closely related, active violence. Third, similar state statutes generally do not include felon-in-possession offenses from their definition of crimes of violence. Finally, the Sentencing Commission has recently amended the commentary to the sentencing guidelines to indicate that a felon's possession of a firearm is not a crime of violence under the career offender guideline. *U.S. v. Doe,* __ F.2d __ (1st Cir. March 30, 1992) No. 91-1008.

9th Circuit finds grand theft not an appropriate predicate for career offender. (520) In determining whether a particular prior conviction is a crime of violence for purposes of section 4B1.1, the 9th Circuit applies the so-called "categorical approach," evaluating the crime based on its statutory definition. Grand theft does not have as an element, the use, attempted use, or threatened use of force. Moreover, even if the appellant here had been convicted of the battery that occurred during the theft, that crime carried only a maximum penalty of 6 months. The career offender provision counts only crimes punishable by a term exceeding one year of imprisonment. *U.S. v. Alvarez,* __ F.2d __ (9th Cir. March 31, 1992) 90-50298.

9th Circuit counts prior sentence from date of last incarceration, not date of conviction. (520) Defendant was convicted of robbery in 1965 and given an 8-year suspended sentence. He violated his probation in 1967 and was paroled in 1968 but was apparently returned to prison on a number of occasions until he was ultimately released and discharged from parole in 1976. The case was remanded to clarify the record, but the 9th Circuit stated that if defendant's

incarceration for the 1965 offense did not terminate until 1976, that offense would satisfy the 15-year requirement of U.S.S.G. section 4B1.1. *U.S. v. Alvarez*, __ F.2d __ (9th Cir. March 31, 1992) 90-50298.

Determining the Sentence (Chapter 5)

Supreme Court holds that Attorney General, not the sentencing court, computes custody credits. (600) In rewriting the Custody Credits statute, 18 U.S.C. section 3568, and changing it to its present form in section 3585(b), Congress left out the formal reference to the Attorney General. Nevertheless, in a 7-2 decision written by Justice Thomas, the Supreme Court held that "the Attorney General must continue to compute the credit under section 3585(b) as he did under the former section 3568." The court noted that at the time of sentencing, the district court often will not know how much credit the defendant will be entitled to. Thus, in light of the sentencing court's inability to compute the credit, the Attorney General must continue to make the calculation even though section 3585(b) no longer mentions him. Justices Stevens and White dissented. *U.S. v. Wilson*, __ U.S. __, 112 S.Ct. __ (March 24, 1992).

8th Circuit upholds order for federal sentence to run consecutively to unexpired state sentence. (650) The 8th Circuit upheld the district court's decision to order defendant's federal sentence to run consecutively to his unexpired state sentence. The sentencing transcript indicated that the district court provided an adequate explanation for its sentence, and considered the factors set forth in 18 U.S.C. section 3553(a). *U.S. v. Griebe*, __ F.2d __ (8th Cir. March 23, 1992) No. 91-2786.

9th Circuit says consecutive sentence for escape was not abuse of discretion. (650) The 9th Circuit declined to address whether or not the decision to run defendant's escape sentence consecutively with his underlying sentence constituted an exercise of discretion or a failure to depart downward under the guidelines that could not be reviewed on appeal. The court said that the "district court's decision was not an abuse of discretion and hence could not be reversed, even if it could be reviewed." *U.S. v. McGann*, __ F.2d __ (9th Cir. March 31, 1992).

11th Circuit affirms consecutive sentences on related counts as upward departure. (650)(700) Defendants were convicted of one count of burglary and one count of theft from the same structure which they had burglarized. Under guideline section 5G1.2, the sentences for these counts would normally be served concurrently. However, the 11th Circuit affirmed the imposition of consecutive sentences, holding that a district court has the authority to impose consecutive rather than concurrent sentences if it follows the procedures for departing from the guidelines. In this case, the district court chose to depart from the guidelines range because of defendants' threat of recidivism and because criminal history category VI did not adequately reflect their criminal history. *U.S. v. Perez*, __ F.2d __ (11th Cir. March 31, 1992) No. 90-5250.

11th Circuit holds that in extraordinary cases a court may depart downward based upon specific offender characteristics. (660)(736) The 11th Circuit held that in extraordinary circumstances, a district court may depart downward on the basis of specific offender characteristics listed in guideline sections 5H1.1-6. This is also true for offender-related characteristics not considered by the guidelines. Nevertheless, a judge's discretion to depart on the basis of offender-related characteristics must remain within the "penological framework" established by the guidelines. For example, the placement of an offender within criminal history I reflects the sentencing commission's assessment that the offender possesses the lowest possible likelihood of recidivism. The low end of the range applicable to a category I offender specifies the sentence appropriate for an offender who is so unlikely to engage in future criminal conduct as to not warrant imprisonment for incapacitative purposes. A judge therefore may not depart downward from a category I sentence on incapacitative grounds. Rehabilitative considerations have been declared irrelevant for purposes of deciding whether or nor to impose a prison sentence. Therefore, a judge may depart from a category I sentence on the basis of offender-related characteristics only if considerations of general deterrence or retribution counsel such a departure. *U.S. v. Mogel*, __ F.2d __ (11th Cir. March 19, 1992) No. 90-8549.

New York District Court departs downward for pregnant woman to avoid permanent loss of parental rights. (680)(736) At the time of sentencing, defendant, a Ghanaian resident alien, was seven months pregnant with her second child by a father who she planned to marry. The pregnancy had been difficult, and defendant had been bedridden for much of the period prior to her sentencing. The parties agreed that imprisonment for more than a year after the birth of the child would likely cause defendant to lose custody. Defendant had no family member in this country to care for the child, and therefore would

be required to name the state as legal guardian of the child within a few days of giving birth. Under state law, defendant would almost certainly lose permanent custody of the child. The District Court for the Eastern District of New York therefore departed downward "to protect the health of the mother and child and to permit the mother to be united with her child." Defendant was sentenced to time served and five years of supervised release. In addition, the probation officer was directed to arrange for defendant's transportation to Ghana. If possible, such transportation should occur prior to the child's birth, since if born in the United States the child would be an American citizen with the right to look to the community for support, and because the cost of caring for the mother and child for the next several months would be significant. *U.S. v. Pokuaa,* __ F.Supp. __ (E.D.N.Y. Jan. 31, 1992) No. 91 CR 967.

Departures Generally (§5K)

9th Circuit rejects additional departure beyond amount for substantial assistance. (710)(719) The district court departed downward from the mandatory minimum sentence in response to a motion by the government for defendant's substantial assistance. On appeal, the defendant argued that the district court should have departed further to take into account his "aberrant" behavior. The 9th Circuit rejected the argument, holding that "the court had no authority to depart downward below the statutory minimum on the basis of [defendant's] aberrant behavior, nor for that reason to depart below the government's recommended downward departure once the minimum sentence level had been breached." *U.S. v. Valente,* __ F.2d __ (9th Cir. April 1, 1992) No. 91-10256.

11th Circuit finds no plain error in district court's failure to make substantial assistance departure. (712)(855) Defendant contended that the government, acting in bad faith, refused to file a motion for a downward departure under section 5K1.1 and 18 U.S.C. section 3553(e), and that therefore the district court should have granted him a departure as a matter of due process. The 11th Circuit refused to consider this claim because defendant failed to raise it below. There was no plain error. *U.S. v. Willis,* __ F.2d __ (11th Cir. March 23, 1992) No. 90-5476.

1st Circuit upholds longer sentence for employee of shop in which cocaine was sold. (716) Defendant was convicted of drug offenses as a result of his participation in drug sales which took place in the shop where he was employed. The 1st Circuit rejected the argument that his 55-month sentence was excessive even though the owner of the shop only received a 33-month sentence. The owner of the shop, unlike defendant, accepted responsibility, did not obstruct justice, and did not have a lengthy past criminal record. These factors accounted for the difference in sentence. Defendant's sentence was lawful under the guidelines. The fact that a co-defendant received a different sentence does not provide a basis in law for setting aside defendant's sentence. *U.S. v. Torres,* __ F.2d __ (1st Cir. March 30, 1992) No. 91-1161.

Sentencing Hearing (§6A)

8th Circuit refuses to review sentence at top of properly calculated guideline range. (775)(860) The 8th Circuit found that it lacked jurisdiction to consider defendant's claim that the district court abused its discretion in sentencing him at the top of his guideline range. A sentence is not reviewable merely because it is at the top of a properly calculated guideline range. The sentencing range did not span more than 24 months, which would trigger the requirement that the district court state its reasons for imposing a sentence at a particular point within that range. *U.S. v. Woodrum,* __ F.2d __ (8th Cir. March 17, 1992) No. 91-3207.

Plea Agreements (§6B)

2nd Circuit directs district court to permit withdrawal of guilty pleas or conform sentence to plea bargain. (790) Defendants' plea agreements specified the amounts of their fine but were silent on all other aspects of their sentences. The agreements did not contain any language limiting the sentence to a fine. The district court judge sentenced both defendants to probation and a fine in excess of the amount specified in their respective plea agreements. The 2nd Circuit remanded for resentencing, but found that the district judge had the option of accepting the sentencing bargain, in which case he must conform the sentence by reducing the fine to the bargained amount. If he preferred to retain the authority to impose a greater fine in either case, then he must afford the defendant the opportunity to withdraw the guilty plea. The government waived any objection to the withdrawal of the guilty plea by failing to alert the district judge that the initial sentences exceeded the sentence bargains. On remand, if the sentencing judge accepts the sentencing bargain and lowers the fine, he may also impose a sentence of imprisonment in lieu of the sentence of probation. The government may argue in favor of imprisonment even though it

did not take a cross-appeal. Because defendants could not necessarily have anticipated that success on appeal might result in a term of imprisonment, the appellate court decided to give each defendant the opportunity to withdraw his or her appeals instead of facing the risk of imprisonment. *U.S. v. Bohn,* __ F.2d __ (2nd Cir. March 19, 1992) No. 91-1443.

Appeal of Sentence (18 U.S.C. §3742)

Supreme Court holds that case was not moot where remainder of sentence could still be imposed. (850) Defendant was sentenced to three years in custody, but his sentence was reversed and on remand the District Court imposed an 18-month sentence. In the meantime, the Supreme Court granted certiorari and the juvenile served his time before the Supreme Court decided the case. Nevertheless, the Supreme Court held the case was saved from mootness by the juvenile's "failure to complete the 3-year detention originally imposed and the possibility that the remainder of it could be imposed." *U.S. v. R.L.C.,* __ U.S. __, 112 S.Ct. __ (March 24, 1992).

8th Circuit holds it has no jurisdiction to review extent of downward departure. (860) Defendant complained that the district court abused its discretion by departing downward from the guideline range by only one month (from 121 months to 120) pursuant to the government's motion under section 5K1.1. The 8th Circuit found that defendant misread the record and that it lacked jurisdiction to review the extent of the departure. The district court reduced defendant's sentencing range from 188 to 235 months to 97 to 121 months. The court then sentenced defendant to one month less than the maximum in that range. A defendant's challenge to a district court's decision to depart downward or to the degree of its departure is not reviewable on appeal. *U.S. v. Lyon,* __ F.2d __ (8th Cir. March 18, 1992) No. 91-2171.

Forfeiture Cases

8th Circuit rules claimants waived contention that civil forfeiture statute is a Bill of Attainer. (910) Claimants contended for the first time on appeal that 21 U.S.C. section 881(a)(7), a civil forfeiture statute, was an unconstitutional Bill of Attainder. The 8th Circuit refused to consider this argument, ruling that claimants' failure to raise this issue below constituted a waiver. *U.S. v. One Parcel of Property Located at RR 2, Independence, Buchanan County, Iowa,* __ F.2d __ (8th Cir. March 17, 1992) No. 91-2071.

8th Circuit affirms striking unverified pleadings. (920) The 8th Circuit upheld the district court's decision to grant the government's motion to strike claimant's pleadings and enter a default judgment and a final order of forfeiture. The district court struck the pleadings for two reasons. First, the claims did not comply with Supplemental Rule C(6) because they were not verified. It is not an abuse of discretion for the district court to require strict compliance with Supplemental Rule C(6). Second, the government's motions to strike claimants' claims and answers were unresisted. An unresisted motion may be granted. The appellate court also granted the government's motion to strike claimants' Addendum to their Reply Brief. The addendum consisted of 43 pages of newspaper articles that were reprinted from the Pittsburgh Press. This did not comply with 8th Circuit Rule 30A(d)(1). *U.S. v. One Parcel of Property Located at RR 2, Independence, Buchanan County, Iowa,* __ F.2d __ (8th Cir. March 17, 1992) No. 91-2071.

8th Circuit holds that child had no standing to contest forfeiture of parent's property. (920) The 8th Circuit ruled that a child had no standing to contest to forfeiture of property owned by his mother. There was no showing that the child had any present ownership interest in the property. The future expectation of ownership by a child is insufficient to give a claimant standing. *U.S. v. One Parcel of Property Located at RR 2, Independence, Buchanan County, Iowa,* __ F.2d __ (8th Cir. March 17, 1992) No. 91-2071.

Opinion Reversed

(242)(253) *U.S. v. Osburn,* 756 F.Supp. 571 (N.D. Ga. 1991), reversed, *U.S. v.Osburn,* __ F.2d __ (11th Cir. March 23, 1992) No. 91-8091.

Certiorari Granted

(930)(950)(960) *U.S. v. A Parcel of Land, Buildings, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Rumson, New Jersey,* 937 F.2d 98 (3rd Cir. 1991), cert. granted. __ U.S. __, 112 S.Ct. 1260 (March 2, 1992).

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4th Circuit rules that sentencing judge in pre-guidelines case may take a defendant's perjury into account. (100)(761) In a pre-guidelines case, the 4th Circuit rejected defendant's contention that a sentencing court may not take into account a defendant's perjury unless the defendant is provided with both advance notice of the judge's intention to consider such conduct and an opportunity to rebut the judge's determination that perjury was committed. Moreover, it is permissible for a sentencing judge to infer from the testimony and demeanor of the witnesses at trial that the defendant coerced or allowed a defense witness to commit perjury. *U.S. v. Pavlico*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-6629.

8th Circuit upholds consideration of guidelines in fashioning pre-guidelines sentence. (100) In a pre-guidelines case, defendant argued that the district court abused its discretion by using a "guidelines analysis," resulting in a sentence similar to one which would have been imposed under the guidelines. The 8th Circuit found no abuse of discretion in the district court's consideration of the guidelines, since the sentence imposed was well within the statutory limits. It is not improper for a district court to be guided in part by the guidelines in exercising its discretion in imposing a pre-guidelines sentence. *U.S. v. Dunlop*, __ F.2d __ (8th Cir. March 16, 1992) No. 91-2140.

Guideline Sentencing, Generally

4th Circuit treats motion improperly brought under Rule 35 as motion to vacate sentence under 28 U.S.C. section 2255. (115)(880) Defendant appealed from an order denying his motion under Fed. R. Crim. P. 35(a) challenging the legality of his sentence. The 4th Circuit found that the motion could

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not have properly been brought under Rule 35(a) because defendant's sentence was not illegal and the motion was not brought within the 120-day time limit. However, because defendant's claims could have been raised in the district court by a motion to vacate sentence under 28 U.S.C. section 2255, the appellate court decided to treat the action as one brought under 2255 for purposes of the appeal. *U.S. v. Pavlico*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-6629.

9th Circuit finds no error in refusing to order an updated presentence report for Rule 35 motion. (115)(760) In this preguidelines case, the defendant filed a 2255 motion and a Rule 35 motion arguing that the six years he spent in state prison showed that his character had improved enough to render him deserving of probation rather than federal jail time. He argued that the district court abused its discretion in refusing to order an updated presentence report. The 9th Circuit found no error, ruling that the original presentence report contained sufficient relevant information to satisfy Rule 32. The record indicated that the district court sufficiently considered defendant's "individualized characteristics" including the years spent in state prison. *U.S. v. Hardesty*, __ F.2d __ (9th Cir. March 10, 1992) No. 90-30260.

9th Circuit finds no double counting in enhancements for abuse of trust and more than minimal planning. (125)(160)(450) The 9th Circuit held that the defendant's embezzlement scheme involved repeated thefts over two and a half years. "Carrying out such an extended scheme required more than minimal planning." The abuse of trust, on the other hand, "grew out of her position as branch representative and her ability to conceal her crime because of her position." Since the two enhancements stemmed from separate concerns, the 9th Circuit held that both could be applied to the embezzlement in this case. *U.S. v. Christiansen*, __ F.2d __ (9th Cir. March 3, 1992) No. 91-30155.

D.C. Circuit rejects double jeopardy challenge to use of prior convictions to enhance sentence. (125)(245)(520) Defendant received an enhanced sentence under 21 U.S.C. section 841(b)(1) and as a career offender under the guidelines because of his two prior felony drug convictions. The D.C. Circuit rejected defendant's claim that these enhancements violated the double jeopardy clause. The Supreme Court has held that the sentence as a habitual criminal is not to be viewed as either a new jeopardy or an additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one. *U.S. v. Garrett*, __ F.2d __ (D.C. Cir. March 17, 1992) No. 90-3210.

10th Circuit upholds mandatory minimum sentence under section 841 despite indictment's failure to allege drug quantity. (130)(245) The 10th Circuit rejected defendant's argument that because his indictment did not allege a specific quantity of controlled substance, he could not be subject to a mandatory minimum sentence under 21 U.S.C. section 841. *U.S. v. McCann*, 940 F.2d 1352 (10th Cir. 1991) plainly states that the imposition of a mandatory minimum sentence is not precluded by an indictment's failure to allege drug quantity involved in a post-guidelines case. Although *McCann* was decided after defendant was sentenced, its application did not violate the ex post facto clause. *McCann* did not overrule prior law, but merely distinguished it and held it inapplicable to post-guidelines cases. The sentencing guidelines were promulgated well before defendant participated in the conspiracy. *U.S. v. Morehead*, __ F.2d __ (10th Cir. March 4, 1992) No. 91-7003.

8th Circuit rejects due process claim based upon disparity of sentences among co-conspirators.

(135)(716) The 8th Circuit rejected defendant's claim that the disparity between his sentence and the sentences received by his co-conspirators who were more culpable than he was violated his due process and equal protection rights. At defendant's sentencing hearing, the prosecutor explained that conspirators who were prosecuted earlier in the investigation had received shorter sentences because the government was then unaware of the conspiracy's magnitude. *U.S. v. Askew*, __ F.2d __ (8th Cir. March 5, 1992) No. 90-2714.

4th Circuit upholds aggregate 44-year sentence against 8th Amendment challenge. (140) The 4th Circuit rejected defendant's claim that his 40-year sentence for fraud, which was to run concurrent to his four-year sentence on related charges, constituted cruel and unusual punishment. Since this was a pre-guidelines case, defendant would be eligible for parole after serving 10 years. Although a co-defendant received a lighter sentence, in setting the sentence, the court took into account that the co-defendant was 64 years old and suffered a life-threatening heart condition. *U.S. v. Pavlico*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-6629.

D.C. Circuit rejects 8th Amendment challenge to 30-year career offender sentence for drug offense. (140)(520) Because he was classified as a career offender, defendant received a 360-month sentence for his drug offense involving 26.41 grams of cocaine and 19.56 grams of cocaine base. The D.C. Circuit rejected the claim that the sentence constituted cruel and unusual punishment, since the Supreme Court has approved a 40-year sentence for a drug offense involving only nine ounces of marijuana. *U.S. v. Garrett*, __ F.2d __ (D.C. Cir. March 17, 1992) No. 90-3210.

9th Circuit reiterates that guidelines apply to offenses committed before Mistretta. (130) The 9th Circuit has repeatedly held that the guidelines apply retroactively to the period between its decision holding the guidelines unconstitutional in *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), and the Supreme Court's decision upholding the guidelines in *Mistretta v. U.S.*, 488 U.S. 361 (1989). The appellant here argued that the 9th Circuit's prior cases were decided under the due process clause, rather than under the ex post facto clause. Relying on *Marks v. U.S.*, 430 U.S. 188, 191 (1977), the 9th Circuit said that the ex post facto clause is a limitation on the powers of the legislature, and does not of its own force apply to the judicial branch of the government. Analyzing appellant's arguments under the due process clause the court found no substantial inequity in sentencing him under the guidelines. *U.S. v. Robinson*, __ F.2d __ (9th Cir. March 2, 1992) No. 89-10439.

9th Circuit rejects retroactive application of amendment allowing 'career offenders credit for accepting responsibility. (131)(150)(520) Under 18 U.S.C. section 3553(a)(4) and (5), the guidelines to be applied by the sentencing court are those that "are in effect on the date the defendant is sentenced." After defendant was sentenced, section 4B1.1 was amended to permit career offenders to be given a two point reduction for acceptance of responsibility. The defendant here argued that this amendment should be held to constitute a clarification of the Sentencing Commission's previous intent. Relying on *U.S. v. Mooneyham*, 938 F.2d 139, 140 (9th Cir.) *cert. denied*, 112 S.Ct. 443 (1991), the 9th Circuit rejected the argument, noting that it had been "squarely rejected" in *Mooneyham*. *U.S. v. Robinson*, __ F.2d __ (9th Cir. March 2, 1992) No. 89-10439.

Application Principles, Generally (Chapter 1)

8th Circuit upholds consideration of uncharged conduct in pre-guidelines case. (175)(270)(770) In a pre-guidelines case, defendant contended that his sentence was excessive because the district court considered inappropriate and irrelevant information connecting him to other uncharged conduct. Specifically, defendant objected to the portion of the presentence report which indicated that he had provided cash to an unindicted co-conspirator for the purchase of cocaine in California. The 8th Circuit rejected this claim, since at sentencing a judge is given broad discretion as to the type of information he may consider. Defendant was given the opportunity to rebut and explain the information contained in the presentence report. An evidentiary hearing was held to address defendant's numerous objections to the presentence report. Defendant's 15-year sentence was not excessive because it fell within the statutory limits of 21 U.S.C. sections 841(b)(1)(B) and 846. *U.S. v. Dunlop*, __ F.2d __ (8th Cir. March 16, 1992) No. 91-2140.

10th Circuit affirms firearm enhancement despite acquittal on section 924(c) charges. (175)(284) The 10th Circuit affirmed an enhancement under guideline section 2D1.1(b)(1) despite defendant's acquittal on charges of violating 18 U.S.C. section 924(c). The standard to convict on section 924(c) is much higher than that necessary for an enhancement under the guidelines. It was not clearly improbable

that the weapons were connected to the drug trafficking offense. Marijuana cultivation was occurring near defendant's house. Near the door of the house leading to the carport, officers found a loaded rifle. In defendant's truck, which had been used for marijuana cultivation, officers discovered a loaded rifle of which defendant's son admitted ownership. Finally, near the shed where the tractor which had been used for the cultivation was parked, officers discovered another son's loaded rifle. *U.S. v. Morehead*, __ F.2d __ (10th Cir. March 4, 1992) No. 91-7003.

Supreme Court discusses significance of guidelines' "policy statements." (180) In a footnote, the majority noted that the dissent stated that an error in interpreting a policy statement governing departures "is not, in itself, subject to appellate review." Nevertheless, the majority noted that the dissent quoted 18 U.S.C. section 3553(b) which requires the court to consider "the sentencing guidelines, policy statements, and official commentary of the sentencing commission." Thus, the majority noted that "the dissent would appear to agree that an appellate court *can* review the validity of a district court's reasons for departure for consistancy with the commission's policy statements; it simply considers that inquiry to go to the 'reasonableness' of the decision to depart rather than to the correct application of the guidelines." *Williams v. U.S.*, __ U.S. __, 112 S.Ct. __ (March 9, 1992) No. 90-6297.

Offense Conduct, Generally (Chapter 2)

8th Circuit rules selling assets, moving to another state, and burying drug lab equipment did not constitute withdrawal from conspiracy. (240)(380) The 8th Circuit rejected defendant's claim that he withdrew from a drug conspiracy prior to the effective date of the guidelines. A defendant must do more than show no conspiracy activity on his part after the cut-off date. He has the burden of showing that he affirmatively disavowed the conspiracy, either by making a clean breast to the authorities or by communicating his withdrawal to his co-conspirators. Here, defendant sold his farm equipment and livestock and moved to another state in September 1987 because the local authorities were on his trail and he was concerned the federal government would seize his assets. He buried the drug lab equipment on the property, and later dug up the equipment and burned it. These were not acts of affirmative withdrawal, but were designed to thwart the authorities and probably made it more likely the conspiracy would continue. Moreover, after moving, defendant drove his brother to a meeting with another conspirator in which the conspirator threatened to kill the brother if he cooperated with the police. *U.S. v. Askew*, __ F.2d __ (8th Cir. March 5, 1992) No. 90-2714.

10th Circuit refuses to apply 2D1.1 to conspiracy to carry firearm during a drug trafficking offense. (240)(330)(380)(390) The 10th Circuit rejected the application of guideline section 2D1.1 to a defendant convicted solely of a conspiracy under 18 U.S.C. 371 to use or carry firearms during the commission of a drug trafficking offense in violation of 18 U.S.C. section 924(c). While a defendant must have intended to commit a drug trafficking crime in order to be convicted of this conspiracy charge, a conspiracy to use or carry a firearm during a drug trafficking crime is distinct from a conspiracy to commit the drug trafficking offense. The appropriate guideline for section 371 conspiracies is section 2X1.1. Under this guideline, the base offense level is determined by the guideline for the substantive offense. However, section 2K2.4(a), the guideline for the underlying section 924(c) offense, does not provide a base offense level but references only the term of imprisonment required by statute. In this situation, section 2X5.1 directs a court to apply "the most analogous guideline," which in this case is section 2K2.1(a)(7). *U.S. v. Morehead*, __ F.2d __ (10th Cir. March 4, 1992) No. 91-7003.

8th Circuit holds that section 5K1.1 does not authorize a departure below a mandatory minimum sentence. (245)(710) The government filed a 5K1.1 motion for a downward departure based on defendant's substantial assistance, but stressed that the motion was not being made under 18 U.S.C. section 3553(e), and did not affect the mandatory minimum sentence. Nonetheless, the district court departed below the 120-month mandatory minimum sentence and sentenced defendant to 36 months. The 8th Circuit reversed, holding that section 5K1.1 does not permit a sentencing judge to depart below a statutory mandatory minimum sentence. Although the Commission was empowered to provide for departures below mandatory minimum sentences, section 5K1.1 only discusses departures from the guideline range. A 5K1.1 motion is not equivalent to a motion under section 3553(e), and only section 3553(e) authorizes a sentence below a mandatory minimum sentence. The court disagreed with 9th and 2nd Circuit cases equating 5K1.1 motions with section 3553(e) motions. Senior Judge Heaney dissented. *U.S. v. Rodriguez-Morales*, __ F.2d __ (8th Cir. March 11, 1992) No. 91-2355.

8th Circuit affirms sentencing drug conspirator to same mandatory minimum sentence as underlying offense. (245) Citing *Bifulco v. United States*, 447 U.S. 381 (1980), defendant argued that his drug conspiracy conviction should not be subject to the mandatory minimum sentence applicable to the underlying substantive offense. The 8th Circuit rejected this contention because the drug conspiracy statute, 21 U.S.C. section 846, has been amended since *Bifulco* expressly to provide that convicted drug conspirators are subject to the same penalties as those convicted of the underlying offense. *U.S. v. Askew*, __ F.2d __ (8th Cir. March 5, 1992) No. 90-2714.

9th Circuit holds that prior convictions become final when time for direct review passes. (245)(504) The 9th Circuit held that once a conviction becomes final on appeal, "it may serve as the basis for enhancement even though the conviction is being challenged by way of a petition for post conviction relief." Under these circumstances, "a defendant who wishes to attack collaterally the underlying conviction, must do so in the sentencing court under 18 U.S.C. section 851(c)(2)." Since section 851 affords this opportunity, a defendant is not deprived of due process even if he claims that his failure to appeal was due to ineffective counsel. Judge Tang concurred, emphasizing that a defendant may still file a collateral attack and have his enhanced sentence reversed later "as long as that collateral proceeding was commenced prior to the date the federal sentence was imposed." *U.S. v. Guzman-Colores*, __ F.2d. __ (9th Cir. March 13, 1992) No. 90-30212.

D.C. Circuit upholds use of prior convictions to enhance under both 21 U.S.C. 841(b)(1)(B) and the guidelines. (245)(520) The base offense level for a career offender is determined with reference to the maximum term of imprisonment authorized for the offense of conviction. The term of imprisonment authorized by 21 U.S.C. 841(b)(1)(B) is increased from a range of five to 40 years to a range of 10 years to life if a defendant has one or more prior drug convictions. Defendant was classified as a career offender. In determining the maximum term of imprisonment, the district court considered defendant's two prior felony drug convictions and concluded that life imprisonment was the maximum term. Accordingly, defendant received an offense level of 37. The D.C. Circuit rejected defendant's claim that it was error to use his prior drug convictions to calculate both his sentence under 21 U.S.C. 841(b)(1)(B) and his base offense level and criminal history category. The court rejected defendant's contention that the relevant maximum statutory sentence should be the maximum for a defendant with no prior drug convictions. *U.S. v. Garrett*, __ F.2d __ (D.C. Cir. March 17, 1992) No. 90-3210.

4th Circuit applies requirement of capacity to produce negotiated quantity to drug purchases. (265) Application Note 1 to section 2D1.4 states that if the defendant did not intend to produce and was not reasonably capable of producing a quantity of drugs under negotiation, the court shall exclude that quantity from the calculation of the defendant's offense level. The 4th Circuit found that the note also applies to a defendant's ability to make a negotiated drug purchase. Thus, a court must exclude any quantity of drugs which a defendant has negotiated to purchase if the defendant lacked both the intent and the ability to complete the transaction. The requirement is framed in the conjunctive and not the disjunctive. Here, defendant had both the intent and the ability to purchase 20 kilograms of cocaine. He repeatedly told undercover agents during the course of negotiations of his intent to purchase the 20 kilograms. Although he did not have in cash the $300,000 necessary to complete the deal, he apparently owned various properties collectively worth in excess of $300,000, which he offered to pledge as collateral to support his purchase of drugs on credit. *U.S. v. Brooks*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-5240.

10th Circuit affirms consideration of cocaine deliveries made to defendant in the 10 months prior to his arrest. (270) Defendant was arrested after attempting to purchase eight ounces of cocaine from his long-time drug supplier. The 10th Circuit affirmed the district court's consideration of 8.9 kilograms of cocaine which defendant received from his supplier during the 10 month period prior to his arrest. The test is whether the 8.9 kilograms were part of the same course of conduct or part of a common scheme or plan. Defendant made numerous cocaine purchases from the supplier's son from 1981 until the son's death in 1989. Shortly before the son's death, defendant began buying cocaine from the father, and continued to do so until his arrest in May 1990. The total amount involved in this 10 month period was established through records maintained by the father's wife. There was a long-term relationship between defendant and the supplier's family. *U.S. v. Laster*, __ F.2d __ (10th Cir. March 5, 1992) No. 90-6389.

2nd Circuit affirms that defendant could have foreseen quantity of drugs sold by conspiracy. (275) Defendant admitted selling 183.5 grams of cocaine. The 2nd Circuit affirmed the district court's

determination that defendant could have reasonably foreseen that the conspiracy would distribute over twice that amount, which increased defendant's offense level by two. The sentencing judge found that during 1987 and in July 1988 defendant had been part of a conspiracy that distributed substantial amounts of drugs, and that he was either involved in the distribution of those drugs or knew that his co-conspirators were distributing them. *U.S. v. Blair*, __ F.2d __ (2nd Cir. Feb. 28, 1992) No. 91-1245.

4th Circuit affirms that defendant was member of conspiracy at time six kilogram transaction took place. (275) The 4th Circuit rejected defendant's contention that he was not yet a member of a drug conspiracy at the time a co-conspirator travelled to Florida to obtain six kilograms of cocaine in September of 1988. A witness testified that he began working in the organization in 1986, that he was promoted to "lieutenant" a year to a year and a half later, and that at the time of his promotion, defendant had been working for him for about three or four months. Another witness testified that she began working in the organization in September of 1988, and that defendant was already there when she got there. Since there was sufficient evidence to support the conclusion that defendant was a member of the conspiracy in September 1988, it was proper to hold him responsible for the six kilograms. *U.S. v. Brooks*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-5240.

4th Circuit affirms that there was sufficient evidence linking negotiations to defendant's conspiracy. (275) The 4th Circuit affirmed attributing to defendant at sentencing 20 kilograms of cocaine which another drug dealer was negotiating to purchase. Although the dealer represented himself to the undercover agents as a wholesaler for several different individuals, there was evidence in the record that the dealer, if not a de facto member of defendant's drug ring, had at least close ties to the organization. For example, during the course of the dealer's negotiations, he made repeated references to defendant's husband, who was the leader of the drug operation, and even identified the husband as a business associate. At one point the dealer took two undercover agents to meet the husband at a club that the dealer and the husband co-owned. There was no clear error in determining that there was a sufficient nexus between the conspiracy and the 20 kilograms of cocaine for sentencing purposes. *U.S. v. Brooks*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-5240.

4th Circuit upholds enhancement based upon co-conspirator's possession of firearm. (284) The 4th Circuit affirmed an enhancement under guideline section 2D1.1(b)(1) based upon a co-defendant's possession of a weapon during a conspiracy because such possession was in furtherance of the conspiracy and was reasonably foreseeable to defendant. Two murders were committed during the time defendant was a member of the conspiracy. The district court found that guns were "of the foremost importance" in this conspiracy, and "were available in abundance." Defendant himself testified that at about the time of one of the murders, he was threatened at gunpoint by two of his co-conspirators. *U.S. v. Brooks*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-5240.

1st Circuit affirms that abuse of trust is not a specific offense characteristic of RICO violation. (290)(450) Defendant, a police detective, was found guilty of RICO offenses for accepting bribes from a bookmaker. Defendant contended that because the predicate acts of the RICO convictions, bribery, involved an abuse of trust, an additional enhancement for abuse of trust under section 3B1.3 was improper. Following its recent decision in *U.S. v. Butt*, __ F.2d __ (1st Cir. Jan. 27, 1992) No. 91-1227, the 1st Circuit affirmed the abuse of trust enhancement. Section 2E1.1 is a universal base offense level for RICO violations, implying no specific offense characteristics. Thus, abuse of trust is not a specific offense characteristic of the RICO guideline, and applying the enhancement was not double counting. *U.S. v. McDonough*, __ F.2d __ (1st Cir. March 13, 1992) No. 91-1221.

1st Circuit finds no error in denial of motion to continue sentencing hearing. (300)(750)(865) Defendants asserted that the trial court erred in denying their motion for a continuance at sentencing so that they could offer proof of the amount of the victim loss caused by their fraud. Defendants had ample opportunity to present evidence to the court regarding valuation of victim loss. The sentencing judge made a determination that defendants were not entitled to an evidentiary hearing to present further proof of loss. Further, defendants would have had to show that the district court's valuation erred by $450,000 in order to reach the next lower level. The only evidence cited in their briefs alleged an error of $79,000, well below the threshold necessary to change their offense level. Moreover, even if defendants had prevailed and received the offense level reduction, their sentences still would fall within the present guideline range. Thus any error in the calculation of loss was harmless. *U.S. v. Concemi*, __ F.2d __ (1st Cir. March 4, 1992) No. 91-1241.

8th Circuit holds that "loss" includes checks which defendant's girlfriend covered. (300) Defendant

wrote $6537.16 in bad checks, of which $6,045.24 were not returned NSF because defendant's girlfriend, a bank employee, covered the checks with her own money. The 8th Circuit rejected defendant's contention that the $6,045.24 should not be included in the calculation of the loss caused by his fraud because the bank did not lose that money. The dollar value associated with his conduct does not turn upon actual loss, and the fact that his girlfriend covered some of his checks did not effect the calculation of the loss. Under note 7 to section 2F1.1, the focus for sentencing purposes should be on the amount of the possible loss which the defendant attempted to inflict. *U.S. v. Saunders*, __ F.2d __ (8th Cir. March 2, 1992) No. 91-1501.

5th Circuit upholds application of section 2X3.1(a) to perjury offense related to murder. (320)(380) Defendant was convicted of perjury and misprision of a felony for lying to a grand jury about his meeting with an individual who later murdered a federal witness. Defendant contended that the district court erred in sentencing him under guideline section 2X3.1 because even though his perjury related to a murder, he was not implicated in the murder as a principal or accessory after the fact. The 5th Circuit affirmed the application of section 2X3.1 to the offenses. Guideline section 2J1.3(c)(1) states that if the offense involved perjury or subornation of perjury in respect to a criminal offense, apply section 2X3.1 (Accessory After the Fact) in respect to that criminal offense. Section 2J1.3(c)(1) does not require that the defendant actually be convicted of the underlying offense or as an accessory to the underlying offense. *U.S. v. Salinas*, __ F.2d __ (5th Cir. March 4, 1992) No. 90-2427.

6th Circuit bases bail jumping sentence on maximum term for underlying offense. (320) Guideline section 2J1.6, which applies to bond jumping, increases a defendant's base offense level nine levels if the underlying offense was punishable by 15 or more years of imprisonment. The 6th Circuit reversed the district court's ruling that this provision was arbitrary and capricious. This sentencing structure reflects the recognition that those defendants facing a longer potential prison term need a greater deterrent from bond jumping. Defendant also argued that at the time he failed to appear for sentencing, he was no longer facing the maximum sentence because he could estimate his guideline sentence. The 6th Circuit rejected this argument, noting that the sentencing judge had not yet adopted the presentence report and could have departed from that sentence for many reasons. In view of the uncertainty of the guidelines, it was neither arbitrary or capricious for the bond-jumping sentence to reflect the severity of the crime for which the defendant was being held. *U.S. v. Kincaid*, __ F.2d __ (6th Cir. Feb. 10, 1992) No. 91-1547.

8th Circuit refuses to group perjury with underlying offense absent obstruction enhancement. (320)(460)(470) Defendant was convicted of mail fraud. He was later convicted of four counts of suborning perjury during the mail fraud trial. The 8th Circuit rejected his contention that the district court should have grouped his perjury conviction with his prior mail fraud conviction. If an obstruction offense has been used to adjust the sentence for a related offense, the court is required to group that offense with the related offense even when the two offense were separately charged, tried and sentenced. However, in this case, defendant did not receive an obstruction enhancement for his mail fraud conviction. Thus, his obstruction of justice was not doubly counted. *U.S. v. Lincoln*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-1506.

8th Circuit upholds consecutive sentence for offense committed while on release. (320)(650) Defendant was originally convicted of mail fraud. He was then convicted of suborning perjury during the mail fraud trial. Because he committed the subornation offense while on release pending trial, his sentence was subject to enhancement under 18 U.S.C. 3147. That section requires a separate consecutive sentence of imprisonment in addition to the underlying offense. The guidelines handle this in section 2J1.7 by providing for a three level enhancement. Application Note 2 to section 2J1.7 states that to comply with the consecutive sentence requirement, the court should divide the sentence on the judgment form between the sentence for the underlying offense and the sentence for the enhancement. Defendant argued that only the portion of his subornation sentence attributable to the three-level enhancement required by section 2J1.7 could be consecutive to his previously-imposed mail fraud sentence. The 8th Circuit rejected the argument, ruling that the term "total punishment" in 2J1.7 includes the sentence attributable to the offense committed while on release plus the enhancement. *U.S. v. Lincoln*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-1506.

Adjustments, Generally (Chapter 3)

3rd Circuit applies leadership enhancement to source of drug distribution ring. (431) The 3rd Circuit affirmed a four level enhancement under guideline section 3B1.1 for defendant's leadership role in a

drug distribution ring. Defendant was the source of cocaine for the group, which included five or more people. He chose the times when he would travel to Philadelphia and he recruited people to travel with him. Once he obtained the cocaine, defendant was responsible for storing it at two different locations until it was needed for distribution. When defendant's supply was gone, he directed buyers to another co-conspirator. The court found that defendant was equally culpable with the other co-conspirator as an organizer of the distribution scheme. Judge Rosenn dissented, since there was no evidence that defendant exercised any control over the co-conspirator or any member of the co-conspirator's drug ring. *U.S. v. Phillips*, __ F.2d __ (3rd Cir. March 3, 1992) No. 91-3252.

8th Circuit upholds four-level leadership enhancement for drug distributor. (431) The 8th Circuit rejected all of defendant's challenges to a four-level enhancement under section 3B1.1(a) for his leadership role in a drug conspiracy. Because there were five or more participants, the government was not required to prove that the conspiracy was "otherwise extensive." Defendant was an organizer of the conspiracy, rather than merely a manager or a supervisor. Defendant exercised some decision-making authority by determining the amount of marijuana to be obtained from the supplier and by determining when and to whom he would resell the drug; he participated at the high end of the chain of distribution; he recruited his cousin to sell drugs for his co-conspirator; he received a profit on every pound of marijuana he sold; and he participated in planning the ordering, storage and redistribution of the cocaine and marijuana. *U.S. v. Harry*, __ F.2d __ (8th Cir. March 13, 1992) No. 91-2021.

8th Circuit upholds leadership enhancement for defendant who introduced cocaine into existing marijuana conspiracy. (431) The 8th Circuit affirmed a four-level enhancement for defendant's leadership role in a drug conspiracy. Defendant organized the sale on credit of marijuana and introduced cocaine into the existing marijuana distribution scheme. He controlled or exercised authority over others. The scope of the distribution downstream indicated that defendant had substantial responsibility in the scheme. *U.S. v. Flores*, __ F.2d __ (8th Cir. March 12, 1992) No. 91-2217.

8th Circuit upholds managerial enhancement based upon purity of cocaine, large number of customers and recruitment of others. (431) The 8th Circuit upheld a three level managerial enhancement under guideline section 3B1.1(b), rejecting defendant's contention that this enhancement was based solely upon the purity of the drugs involved. Purity of drugs is an appropriate factor to consider because possession of unusually pure narcotics may indicate a prominent role in the enterprise and proximity to the source. Not only did defendant possess and sell 90 percent pure cocaine, but he was selling it to about 75 customers in quantities of up to one-half ounce. At one time defendant had four ounces of cocaine. Additionally, defendant recruited others to help finance his cocaine purchases. Defendant did not dispute that the conspiracy involved five or more persons. *U.S. v. Wichmann*, __ F.2d __ (8th Cir. March 4, 1992) No. 91-1661.

8th Circuit affirms leadership enhancement for defendant who suborned perjury. (431) Defendant pled guilty to four counts of suborning perjury in connection with his trial for mail fraud. The 8th Circuit upheld a two-level enhancement under guideline section 3B1.1(c) based upon defendant's leadership role in the offense. A witness testified at defendant's sentencing hearing that during the month in which defendant's mail fraud trial was to begin, defendant asked her to lie for him and composed the story she later told the jury. Defendant arranged a subsequent meeting between the witness and a detective, and even transported the witness to the meeting. Defendant called the witness every day after this meeting and the two rehearsed her story "over and over." The witness testified that she never called defendant or suggested that they rehearse her story. Thus, defendant was the initiator of the scheme, the composer of the perjury, and the author of every decision regarding its presentation to law enforcement officials. *U.S. v. Lincoln*, __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-1506.

4th Circuit rejects minor role for defendant promoted from "lookout" to seller in drug conspiracy. (445) The 4th Circuit rejected defendant's claim that he played a minor role in a drug conspiracy. Soon after joining the organization, defendant was promoted from lookout to seller, a central position in a drug distribution ring. *U.S. v. Brooks*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-5240.

9th Circuit upholds abuse of trust enhancement for embezzlement by manager of credit union. (450) The abuse of trust enhancement may not be applied if abuse of trust is included in the elements of the specific offense. Thus, Application Note 1 to U.S.S.G. 3B1.3 provides that it "would not apply to an embezzlement by an ordinary bank teller." Nevertheless, following the 3rd Circuit's reasoning in *U.S. v. Georgiadis*, 933 F.2d 1219 (3rd Cir. 1991), the 9th

Circuit upheld the enhancement in this case, because the defendant was the credit union's manager, not a teller, and her "position of trust facilitated her embezzlement in a manner not accounted for in the underlying offense." *U.S. v. Christiansen*, __ F.2d __ (9th Cir. March 3, 1992) No. 91-30155.

1st Circuit upholds obstruction enhancement based upon perjury at trial. (461) Defendant, a police detective, was found guilty of RICO offenses for accepting bribes from a bookmaker. He received an enhancement for obstruction of justice under section 3C1.1 based upon his testimony, contrary to the overwhelming evidence against him, that the money he received constituted loans and not bribes. The 1st Circuit upheld the enhancement, rejecting defendant's claim that his testimony was a mere denial of guilt protected by paragraph 3 of the commentary to section 3C1.1. No criminal defendant enjoys a constitutional right to testify falsely. For sentencing purposes, due process is not violated where perjury is established by a preponderance of the evidence. *U.S. v. McDonough*, __ F.2d __ (1st Cir. March 13, 1992) No. 91-1221.

8th Circuit upholds obstruction enhancement for lying at sentencing hearing. (461) The 8th Circuit upheld an enhancement under section 3C1.1 for obstruction of justice based upon the district court's finding that defendant lied at sentencing for the purpose of obtaining a lighter sentence. The record supported the district court's finding. Defendant minimized his involvement in the criminal activity, and his testimony varied from the testimony of the government's witnesses in several material respects. *U.S. v. Flores*, __ F.2d __ (8th Cir. March 12, 1992) No. 91-2217.

8th Circuit upholds obstruction enhancement based upon perjury of defendant and his father-in-law. (461) The 8th Circuit upheld an enhancement for obstruction of justice based upon the district court's finding that defendant perjured himself and suborned the perjury of his father-in-law. The district court did not make its finding based only on jury's disbelief of the testimony as evidenced by the guilty verdict. Rather, the "experienced" trial judge based his decision upon his personal observation of defendant and his father-in-law at the trial. The findings of perjury were clearly based upon the witnesses' demeanor and all the evidence presented at trial. Under application note 3(b) to section 3C1.1, obstruction of justice includes committing, suborning or attempting to suborn perjury. *U.S. v. Seabolt*, __ F.2d __ (8th Cir. March 3, 1992) No. 91-2837.

4th Circuit reverses obstruction enhancement based defendant's testimony denying guilt. (462) Based upon its recent decision in *U.S. v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), which was decided after defendant was sentenced, the 4th Circuit vacated a two level enhancement based upon defendant's testimonial denial of guilt. The district court was instructed to reduce defendant's offense level by two, and the government was prohibited from seeking an alternative enhancement. *U.S. v. Torcasio*, __ F.2d __ (4th Cir. March 11, 1992) No. 91-5316.

4th Circuit rejects obstruction enhancement for threat against witness made to a third party. (462) Defendant received an enhancement for obstruction of justice based upon a deputy marshal's testimony that he overheard defendant make a threat to a third party against a witness. There was no suggestion in the record that the witness either heard or was ever informed of this threat. The 4th Circuit reversed the enhancement, since section 3C1.1 requires that the defendant either threaten the witness his presence or issue the threat in circumstances in which there is some likelihood that the witness or juror will learn of the threat. Here, there was no evidence in the record that the witness ever learned of this threat. On remand, the district court was free to consider whether an enhancement was proper based upon the presentence report's description of an incident in which defendant directly threatened the witness. *U.S. v. Brooks*, __ F.2d __ (4th Cir. Feb. 28, 1992) No. 90-5240.

2nd Circuit denies reduction to defendant who attempted to accept responsibility one week before sentencing. (488) The 2nd Circuit affirmed the district court's denial of a reduction to a defendant who attempted to demonstrate his acceptance of responsibility one week before sentencing. Prior to that time, defendant took no steps to accept responsibility or show remorse. *U.S. v. Blair*, __ F.2d __ (2nd Cir. Feb. 28, 1992) No. 91-1245.

8th Circuit affirms denial of acceptance of responsibility reduction for minimizing role at sentencing. (488) The district court found that defendant lied at sentencing by minimizing his role and because his testimony varied from the testimony of government witnesses in several material respects. The court then imposed an enhancement for obstruction of justice and denied defendant a reduction for acceptance of responsibility. The 8th Circuit affirmed. In denying the reduction, the district court stated it was not relying upon the fact that defendant testified untruthfully, but that it was convinced, based on the

sentencing hearing, that defendant did not accept responsibility for his criminal conduct. *U.S. v. Flores,* __ F.2d __ (8th Cir. March 12, 1992) No. 91-2217.

8th Circuit denies acceptance of responsibility reduction to defendant who minimized his guilt. (488) Defendant pled guilty to four counts of suborning perjury. The 8th Circuit upheld the denial of a reduction for acceptance of responsibility since when he initially pled guilty, he minimized his guilt to such an extent that the district court initially refused to accept his plea. Defendant denied having provided the name of a lying witness to his lawyer, stated that he was unsure how the lawyer came to know of the witness, and denied that he told the witness to perjure herself. When the district court refused to accept defendant's guilty plea, defendant conferred with his attorney, and then admitted that he and the witness combined their efforts to present false testimony. The combination of defendant's initial evasiveness and the absence of any expression of remorse or admission of responsibility supported the denial of the reduction. *U.S. v. Lincoln,* __ F.2d __ (8th Cir. Feb. 24, 1992) No. 91-1506.

8th Circuit upholds denial of acceptance of responsibility to defendant who entered late guilty plea. (490) The 8th Circuit rejected defendant's argument that he was entitled to a reduction for acceptance of responsibility because of his guilty plea, even though he originally failed to appear for trial and only pled guilty after he surrendered to authorities. A guilty plea does not automatically entitle a defendant to a reduction for acceptance of responsibility. *U.S. v. Wichmann,* __ F.2d __ (8th Cir. March 4, 1992) No. 91-1661.

8th Circuit denies reduction to defendant who did not accept responsibility until after he was convicted in absentia. (494) Defendant disappeared before the 7th day of trial and was convicted in absentia. He was then rearrested and cooperated in the government's efforts to apprehend others. In denying defendant a reduction for acceptance of responsibility, the district court commented "I never understood what's the value of giving acceptance of responsibility for a person who waits to see if they are convicted and then decides whether they accept responsibility." The 8th Circuit upheld the denial of the reduction, finding that the district court did not punish defendant for exercising his right to a trial. The district court had noted that defendant's acceptance was untimely because it did not occur until after he was convicted in absentia after fleeing his trial, and this was not an extraordinary case in which a defendant both obstructs justice and accepts responsibility. *U.S. v. Askew,* __ F.2d __ (8th Cir. March 5, 1992) No. 90-2714.

Criminal History (§4A)

7th Circuit holds that section 851 notice does not apply to enhancements under guidelines. (500) The 7th Circuit rejected defendant's argument that his prior convictions could not be used to increase his sentence under the sentencing guidelines because the government did not file an information alleging those prior convictions under 21 U.S.C. section 851. Section 851 applies to additional penalties provided by a repeater statute over and above the maximum penalty prescribed by statute for a particular offense. It has no application to the effect of prior convictions in deciding the appropriate sentence under the guidelines. *U.S. v. Koller,* __ F.2d __ (7th Cir. March 3, 1992) No. 90-3787.

8th Circuit says insufficient objections to criminal history calculation waived objection on appeal. (500)(855) Defendant claimed that the district court erroneously added two points to his criminal history score under section 4A1.1(d) for committing the instant offense while under a criminal justice sentence. The 8th Circuit ruled that defendant waived this objection because his written objections to the presentence report did not sufficiently alert the district court to this argument. Defendant's written objections related to the inclusion of two prior convictions. Neither the presentence report nor the district court's sentencing decision included the two prior convictions in the calculation of defendant's criminal history. The inclusion of the criminal history points did not result in a miscarriage of justice since defendant's sentence was within the range established by criminal history category I. *U.S. v. Flores,* __ F.2d __ (8th Cir. March 12, 1992) No. 91-2217.

8th Circuit rules similar offenses which occurred within a one-year period are not related. (504) The 8th Circuit rejected defendant's contention that his two prior drug convictions were related under guideline section 4A1.2 simply because they both involved the distribution of a controlled substance and occurred within a one-year period. Defendant's argument would mean that a defendant who is repeatedly convicted of the same offense on different occasions could never be considered a career offender. The prior offenses were not related because they were combined for sentencing. Defendant was sentenced on two different dates for different controlled substance offenses. The sentencing proceedings were entirely separate and unrelated. Although defendant

violated the terms of his probation, resulting in his earlier sentence being reimposed at his later sentencing, this did not mean that the two cases were related. *U.S. v. Mau*, __ F.2d __ (8th Cir. March 3, 1992) No. 91-2050.

Supreme Court declines to review departure based on nonsimilar outdated convictions. (508) The Supreme Court noted that the guidelines explicitly authorize a district court to base a departure on outdated convictions that are "evidence of similar misconduct," *see* U.S.S.G. 4A1.2, comment., n.8. But the circuits are divided as to whether by implication they prohibit a departure based on *nonsimilar* outdated convictions. Compare *U.S. v. Aymelek*, 926 F.2d 64, 72-73 (1st Cir. 1991) and *U.S. v. Russell*, 905 F.2d 1439, 1444 (10th Cir. 1990), which permit nonsimilar, outdated convictions to be used for departure, with *U.S. v. Leake*, 908 F.2d 550, 554 (9th Cir. 1990), holding that an upward departure can never be based on nonsimilar, outdated convictions. Since the issue was not clearly presented here, the Supreme Court declined to resolve the conflict. *Williams v. U.S.*, __ U.S. __, 112 S.Ct. __ (March 9, 1992) No. 90-6297.

7th Circuit affirms upward criminal history departure for uncounted adult and juvenile convictions. (510) The district court departed upward by one criminal history category based on a theft conviction, a large number of juvenile offenses, and numerous arrests which were not counted in defendant's criminal history. The 7th Circuit affirmed, finding that the uncounted theft conviction and the uncounted juvenile convictions adequately supported the departure. The theft conviction was consolidated for sentencing with an unrelated reckless homicide conviction, and thus was considered "related" for purposes of calculating defendant's criminal history. The eight juvenile convictions, which were excluded from defendant's criminal history because of their age, were also a proper ground for departure. Defendant was confined during the five years preceding the instant offense, and to limit his criminal history to those five years would underrepresent the seriousness of his criminal history. The court did not decide whether the use of defendant's juvenile arrest record was proper, since the first two grounds adequately supported the departure. *U.S. v. Gammon*, __ F.2d __ (7th Cir. March 9, 1992) No. 91-1832.

8th Circuit approves upward departure for repeated frauds, past lenient treatment, and harm caused. (510)(715) Defendant was convicted of six counts of social security number misuse after using various names and social security numbers to obtain jobs and credit in different cities. The 8th Circuit affirmed an upward departure based upon defendant's repeated use of the same fraudulent scheme, two prior offenses which were not counted because of their age, two additional pending fraud charges, an outstanding warrant for a probation violation, the lenient treatment defendant received in the past, and the fact that the dollar loss did not fully take into account the harm caused by defendant's fraud. Based upon all these factors, the decision to depart upward from a range of 18 to 24 months to a sentence of 36 months was reasonable. *U.S. v. Saunders*, __ F.2d __ (8th Cir. March 2, 1992) No. 91-1501.

5th Circuit says Texas conviction for illegal investment was a drug offense for career offender purposes. (520) The 5th Circuit held that defendant's Texas conviction for illegal investment was a controlled substance offense under guideline section 4B1.2(2). Under Texas law, a person commits the offense of illegal expenditure or investment if he knowingly (1) expends funds that he knows are derived from the commission of certain drug offenses, or (2) finances or invests funds to further the commission of such drug offenses. Previous caselaw held that a conviction under subsection (2) (investing funds in a drug deal) constitutes a controlled substance offense. Although the presentence report did not specify whether the conviction came under subsection (1) or (2), the description of the crime indicated it was under subsection (2). The presentence report stated the conviction was for "illegal investment," and described the crimes as involving defendant's attempt with others to buy 300 pounds of marijuana for $105,000. *U.S. v. Rinard*, __ F.2d __ (5th Cir. March 5, 1992) No. 91-8208.

8th Circuit rules district court was aware of its ability to depart downward from career offender guidelines. (520)(860) The 8th Circuit rejected defendant's claim that the district court was unaware of its ability to depart downward from the career offender guidelines. Instead the court chose to reject defendant's contention that the career offender guidelines exaggerated his criminal history. A district court's decision not to depart downward, when it was aware of its authority to do so, is not reviewable by an appellate court. *U.S. v. Mau*, __ F.2d __ (8th Cir. March 3, 1992) No. 91-2050.

Determining the Sentence (Chapter 5)

9th Circuit holds that consecutive sentence on revocation of probation violated original plea agree-

ment. (560)((650)(790)(800) The plea agreement under Fed. R. Crim. P. 11(e) provided that the sentences on the two charges would run concurrently. Before the guidelines became effective, defendant was sentenced to six years for one conviction and consecutive probation for the other. After serving his sentence and being placed on probation, he violated probation and was sentenced to three years in prison. On appeal, the 9th Circuit held that the sentence of imprisonment for violation of probation was not permissible because it was consecutive to the other sentence, and therefore violated the original plea agreement. The court acknowledged that this meant that the order of probation had "almost no teeth." "Nonetheless this was the bargain the government made and the court accepted and that now must be kept." *U.S. v. Norgaard*, __ F.2d __ (9th Cir. March 13, 1992) No. 91-30007.

1st Circuit upholds continuous employment as a condition of supervised release. (580) The 8th Circuit upheld as a condition of supervised release the requirement that defendant remain continuously employed for compensation throughout his term of supervised release. Guideline section 5B1.4(a)(5) expressly lists this as a standard condition recommended for supervised release. *U.S. v. Austin*, __ F.2d __ (1st Cir. March 9, 1992) No. 91-2262.

8th Circuit affirms that 18 U.S.C. section 3553(b) authorizes supervised release departures. (580)(700) The 8th Circuit rejected defendant's argument that 18 U.S.C. section 3553(b) which allows departures from the sentencing guidelines, does not apply to terms of supervised release. The language in the statute is broad enough to cover departures from terms of supervised release. However, the supervised release terms provided for in the guidelines are identical to the statutory maximums in 18 U.S.C. section 3583(b). The district court could not impose a five year term of supervised release because it exceeded the statutory maximum of three years. The district court could, however, impose consecutive terms of supervised release. *U.S. v. Saunders*, __ F.2d __ (8th Cir. March 2, 1992) No. 91-1501.

2nd Circuit rejects credit for time on bail pending sentence, even though restricted to residence under electronic monitoring. (600) The 2nd Circuit found no error in the district court's refusal to grant defendant credit for the time he spent on bail pending sentencing, even though defendant was confined to his uncle's apartment and under electric monitoring. This pre-sentence confinement was not tantamount to official detention. The court did not believe that in passing the Comprehensive Crime Control Act of 1984, Congress intended to alter the federal court holdings that defendant is not entitled to sentencing credit for time spent while released on bail pending trial or appeal. The denial of credit did not violate equal protection, even though under guideline section 5C1.1, a defendant sentenced to home detention is given credit for each day in home detention. *U.S. v. Edwards*, __ F.2d __ (2nd Cir. Feb. 28, 1992) No. 91-1215.

2nd Circuit holds that sentencing court has authority under 18 U.S.C. section 3585(b) to grant custody credit. (600) The 2nd Circuit held that a district court has the authority under 18 U.S.C. section 3585(b) to grant to a defendant at sentencing credit for time previously served in custody. The court rejected the government's contention that a motion at sentencing is premature and that a defendant is first required to exhaust administrative remedies provided by the Bureau of Prisons. Such may have been the rule under now-repealed 18 U.S.C. section 3568 (1982), but section 3585(b), which became effective as part of the Sentencing Reform Act, appears to have deleted this requirement by removing explicit statutory language delegating authority to determine custody credits to the Attorney General. The court declined to decide whether, under section 3585(b), the power to grant sentencing credit is exclusively within the sentencing court's province or is shared concurrently with the Attorney General. *U.S. v. Edwards*, __ F.2d __ (2nd Cir. Feb. 28, 1992) No. 91-1215. [*Ed. Note: But see U.S. v. Koller, below.*]

7th Circuit rules that defendant must seek sentencing credit under 18 U.S.C. 3585 from Attorney General. (600) Defendant contended that the district judge erred in not giving him credit for time served prior to sentencing pursuant to 18 U.S.C. section 3585(b). The 7th Circuit ruled that defendant must first seek the section 3585 credit from the Attorney General, and the district court has jurisdiction only to review the Attorney General's decision pursuant to 28 U.S.C. section 2241. A previous provision, repealed when section 3585(b) was enacted, gave the responsibility for making these decisions to the Attorney General. In enacting section 3585, Congress did not intend to relieve the Attorney General of this responsibility. *U.S. v. Koller*, __ F.2d __ (7th Cir. March 3, 1992) No. 90-3787. [*Ed. Note: But see U.S. v. Edwards, above.*]

9th Circuit upholds order for federal sentence to run consecutively to state sentence. (650) In this preguidelines case, the 9th Circuit resolved a conflict in prior caselaw, and upheld an order requiring defendant's federal sentence to be served consecutively

to his state prison sentence. The court noted that this rule was adopted by Congress in 18 U.S.C. section 3584(a) for crimes committed after November 1, 1987. That section provides that where a prisoner is already in state custody, the federal term "may run concurrently or consecutively." In addition, "multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." Judge Alarcon dissented, arguing that the issue could only be resolved by the *en banc* court. *U.S. v. Hardesty*, __ F.2d __ (9th Cir. March 10, 1992) No. 90-30260.

Departures Generally (§5K)

Supeme Court applies harmless error analysis to departure based on both "good" and "bad" reasons. (700)(870) In a 7-2 decision written by Justice O'Connor, the Supreme Court held that when a departure is based on both permissible and impermissible grounds, reviewing courts should use a "harmless error" analysis to decide whether the defendant would have received the same sentence even if the sentencing judge had not given the impermissible reasons. Although the defendant bears the initial burden of showing that the district court relied on an invalid factor at sentencing, he does not have the additional burden of proving that the invalid factor was determinative. "Rather, once the Court of Appeals has decided that the district court misapplied the guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." Justices White and Kennedy dissented. *Williams v. U.S.*, __ U.S. __, 112 S.Ct. __ (March 9, 1992) No. 90-6297.

6th Circuit refuses to consider statement of reasons for downward departure filed after sentencing hearing and notice of appeal. (700) Over two months after the government filed its notice of appeal challenging the district court's downward departure, the district judge filed a memorandum explaining the reasons for his downward departure. The 6th Circuit refused to consider the memorandum, holding that a district court's statements filed after the sentencing hearing and notice of appeal cannot be considered when evaluating the reasons for a district court's downward departure. *U.S. v. Kincaid*, __ F.2d __ (6th Cir. Feb. 10, 1992) No. 91-1547.

6th Circuit rules district court failed to state adequate reasons for downward departure. (715) Defendant was convicted of bond-jumping. The district court departed downward after noting that defendant's psychological stress at the time of sentencing on the underlying charges might serve as a basis for departure. The 6th Circuit remanded for resentencing, finding this statement was not sufficient to permit meaningful review of the reasons for the departure. *U.S. v. Kincaid*, __ F.2d __ (6th Cir. Feb. 10, 1992) No. 91-1547.

8th Circuit rejects downward departure based upon disparity of sentence where co-defendant was not similarly situated. (716) Defendant contended that his 30-year sentence was not proportionate to the smaller sentence received by the "ring leader" of the conspiracy. The 8th Circuit refused to order resentencing because the two defendants were not similarly situated. The "ring leader" entered into a plea agreement with the government at a time when the government was able to attribute a smaller quantity of drugs to the conspiracy than when defendant was sentenced. In addition, the "ring leader" received a downward departure for cooperating the authorities. *U.S. v. Jackson*, __ F.2d __ (8th Cir. March 12, 1992) No. 91-3106.

Sentencing Hearing, Generally (§6A)

8th Circuit affirms that district court granted defendant right of allocution. (750) The 8th Circuit affirmed that the district court extended to defendant the right of allocution under Fed. R. Crim. P. 32(a)(1)(C). Before imposing sentence, the district court requested the defendant to rise and asked "Do you know of any reason why the Court should not pronounce sentence? That is, are you ready to receive the Court's sentence?" Defendant replied "Yes, sir." *U.S. v. Flores*, __ F.2d __ (8th Cir. March 12, 1992) No. 91-2217.

7th Circuit rules defendant waived right to object to sentencing judge's ex parte communication with probation officer. (760)(855) Defendant claimed for the first time on appeal that he should be resentenced because the sentencing judge's ex parte communication with the probation officer who wrote his presentence report deprived him of the opportunity to respond to the information provided by the probation officer. The 7th Circuit ruled that defendant waived this objection on appeal by failing to raise it below. The defendant's failure to raise this objection prevented the sentencing judge from explaining whether he relied upon any information not available in the presentence report. *U.S. v. Pryor*, __ F.2d __ (7th Cir. March 12, 1992) No. 90-2405.

Plea Agreements (§6B)

5th Circuit upholds denial of motion to vacate plea. (790) The 5th Circuit upheld the district court's denial of defendant's motion to withdraw his plea, given the 69-day delay between defendant's plea and his verbal motion to withdraw the plea, his failure to assert his innocence in support of the motion, the knowing and voluntary nature of his initial plea, and the prejudice a withdrawal would cause the government. *U.S. v. Rinard*, __ F.2d __ (5th Cir. March 5, 1992) No. 91-8208.

7th Circuit rules that challenge to alleged breach of plea agreement was waived by failure to object below. (790)(855) In the plea agreement, defendant promised to cooperate with the government and the government agreed to make the sentencing court aware of the nature and extent of defendant's cooperation. At sentencing, defendant testified about the extent of his cooperation. On appeal, he contended that the government's failure at sentencing to confirm the nature and extent of his cooperation was a breach of the plea agreement. The 7th Circuit ruled that defendant waived any breach by failing to raise it at sentencing. Any violation of the plea agreement could have been cured if defendant or his counsel had raised this issue below. Moreover, this trivial violation of the plea agreement would not require setting aside defendant's guilty plea. The court received the same evidence as if the government had offered the testimony, because it was obvious that the government would have objected to the testimony if it did not agree. *U.S. v. Pryor*, __ F.2d __ (7th Cir. March 12, 1992) No. 90-2405.

9th Circuit holds failure to impose bargained-for sentence under Rule 11(e)(1)(C) required reversal. (790) The plea agreement expressly stated that it was pursuant to Rule 11(e)(1)(C), Fed. R. Crim. P. That rule requires the court to impose the agreed-upon sentence or to reject the guilty plea. At sentencing, the government took the position that the defendant had failed to live up to his obligation to cooperate under the plea agreement and that this failure rendered paragraph 5, but not the entire plea agreement null and void. The district judge agreed, and imposed a sentence greater than the agreed sentence. On appeal, the 9th Circuit reversed, noting that under Rule 11(e)(1)(C) and U.S.S.G. 6B1.3 the district judge was required either to accept the plea agreement and sentence accordingly or to reject the plea agreement and allow the defendant to withdraw his guilty plea. The conviction was reversed. *U.S. v. Hernandez*, __ F.2d __ (9th Cir. March 18, 1992) No. 91-10023.

Violations of Probation and Supervised Release (Chapter 7)

7th Circuit upholds defendant's stipulation to probation violation. (800) Defendant appeared before the district court for a probation revocation hearing as well as for the court's consideration of his guilty pleas to new charges. The 7th Circuit rejected defendant's argument that his guilty plea to the probation violation was void because it was not a voluntary relinquishment of known rights. Defendant did not "plead guilty" to the probation violation, he simply stipulated to the fact that he had violated the terms of his probation. He could not have done otherwise: the government submitted to the court a copy of the judgment of defendant's state criminal conviction as a basis for the probation revocation. Defense counsel admitted that defendant pled guilty to the state charge while he was on federal probation. In the absence of any basis for challenging the authenticity of the judgment or defendant's identity as the person sentenced in it, any potential error in accepting the stipulation was harmless. *U.S. v. Pryor*, __ F.2d __ (7th Cir. March 12, 1992) No. 90-2405.

Habeas Corpus/ 28 U.S.C. 2255 Motions (§880)

5th Circuit refuses habeas corpus review of guidelines issues which could have been raised on direct appeal. (880) In an action brought under 28 U.S.C. section 2255, defendant argued that the district court incorrectly increased his sentence under the guidelines for discharging a firearm and for obstruction of justice. The 8th Circuit found that defendant's claims were not cognizable under the limited scope of relief available under 28 U.S.C. section 2255. They were not of constitutional dimension, could have been raised on direct appeal, and there was no showing as to why they were not. *U.S. v. Vaughn*, __ F.2d __ (5th Cir. March 11, 1992) No. 91-1589.

Appeal of Sentence (18 U.S.C. §3742)

9th Circuit finds that court exercised its discretion in refusing to depart downward. (860) The 9th Circuit found "no indication in the record that the sentencing court's refusal to depart downward was anything but discretionary." The court entertained briefs

and oral arguments on the appropriateness of a downward departure, and concluded that under the circumstances a downward departure was "not warranted." Accordingly the 9th Circuit held that since the district court was exercising its discretion, "we have no jurisdiction over this issue." *U.S. v. Robinson*, __ F.2d __ (9th Cir. March 2, 1992) No. 89-10439.

Forfeiture Cases

1st Circuit upholds denial of attorneys' fees to claimants who presented successful innocent owner defense. (900)(960) In a forfeiture action against property jointly owned by three siblings, the government eventually stipulated that two of the siblings were innocent owners. Nevertheless, the 1st Circuit upheld the denial of attorneys' fees under the Equal Access to Justice Act (EAJA). The government's decision to seize the property was warranted because there was probable cause to believe that it was used for illegal activity. Once probable cause is established, it is the claimant's burden to prove the innocent owner defense. It would be unreasonable to require the government to foresee an owner's possible affirmative defenses. The government also had substantial justification for the manner in which it seized the property under 21 U.S.C. 881. Even if the statutory procedures were ultimately found to be insufficient, the government was reasonable in using those procedures. Although the 2nd Circuit recently found constitutional problems with section 881, the government was not required to follow the 2nd Circuit. *U.S. v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements, Known as Plat 20*, __ F.2d __ (1st Cir. March 12, 1992) No. 91-1681.

1st Circuit upholds forfeiture of property used to grow marijuana for personal use. (900) Section 881(a)(7) authorizes forfeiture of real property used to commit "a violation of this subchapter punishable by more than one year's imprisonment." Section 841(a)(1) of the subchapter makes it unlawful to manufacture a controlled substance. The term manufacture includes production, and the term production includes planting, cultivation, growing or harvesting a controlled substance. Marijuana grown for personal use is within the reach of section 841(a). Violations of section 841(a) are punishable by more than one year in prison. Thus the growing of marijuana, whether or not for personal use, is an activity sufficient to subject the property on which cultivation occurs to civil forfeiture under section 881(a)(7). *U.S. v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements, Known as Plat 20*, __ F.2d __ (1st Cir. March 12, 1992) No. 91-1681.

D.C. Circuit finds challenges to forfeiture provisions of child pornography law nonjusticiable. (900) Plaintiffs sought an injunction against the enforcement of the Child Protection and Obscenity Act of 1988, contending that the civil and criminal forfeiture provisions violated the First Amendment. The D.C. Circuit ruled that plaintiffs' challenges were nonjusticiable. Plaintiffs' case did not fall within either category in which a pre-enforcement facial challenge may be made: they did not demonstrate that the law could never be applied in a valid manner or that it was so broad as to inhibit constitutionally protected speech. Plaintiffs' challenge to the provisions authorizing pretrial seizure of allegedly obscene materials was also not justiciable. These sections could pose a threat only if plaintiffs' speech activities at least arguably violated the child pornography or obscenity statutes, which they denied, and there was some probability that the government would invoke the provisions against them, which the government denied. *American Library Association v. Barr*, __ F.2d __ (D.C. Cir. Feb. 19, 1992) No. 89-5216.

1st Circuit holds that civil forfeitures are not subject to proportionality analysis under 8th Amendment. (910) Claimant's one-third interest in property appraised at $1.8 million was forfeited as a result of cultivation of marijuana on the property. The 1st Circuit rejected his claim that the forfeiture was so disproportionate as to violate the 8th Amendment. Circuit precedent established that proportionality analysis is inappropriate in civil forfeiture cases brought under 21 U.S.C. 881(a)(7). Moreover, even if proportionality analysis were applied, the claimant would still lose. Although the claimant's interest was valuable, its forfeiture was not disproportionate when compared to the nature of his crime and the extent of his unlawful activities. *U.S. v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements, Known as Plat 20*, __ F.2d __ (1st Cir. March 12, 1992) No. 91-1681.

9th Circuit holds double jeopardy does not bar criminal indictment after forfeiture of property. (910) The government obtained a forfeiture judgment of against property that had been used to grow marijuana. Defendant claimed he had an equity of $30,000 in the property. Thereafter, defendant was indicted on charges of maintaining the same property for the purpose of manufacturing marijuana. Prior to trial he moved to dismiss on the grounds of double jeopardy, relying on *U.S. v. Halper*, 490 U.S. 435 (1989). That case held that a defendant who has al-

ready been punished in a criminal prosecution may not be subjected to an additional civil sanction unless the civil sanction is "remedial" rather than a "deterrent or retribution." The 9th Circuit held that "*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government." In such forfeitures "there is no necessary relation between the value of the property forfeited and the loss to the government, nor is there any necessary proportion between the value of the property forfeited and the criminal use of the property." Defendant's motion to dismiss the indictment was properly denied. *U.S. v. McCaslin,* __ F.2d __ (9th Cir. March 13, 1992) No. 91-30302.

9th Circuit holds pretrial seizure of obscene materials based on probable cause is unconstitutional. **(920)(970)** The 9th Circuit held that RICO's provisions permitting the pretrial preservation of assets for forfeiture are not facially unconstitutional in obscenity cases. Only that part of section 1963(d) that authorizes pretrial seizures of obscene materials on the basis of probable cause is unconstitutional. With regard to post-trial forfeitures, the court held that they "do not on their face, amount to prior restraints." However, the court did find it necessary to tailor the scope of RICO forfeitures in obscenity cases, holding that "[o]nly those assets traceable to or substantially intertwined with the obscenity racketeering enterprise may be forfeited." *Adult Video Association v. Barr,* __ F.2d __ (9th Cir. March 12, 1992) No. 90-55252.

1st Circuit rules title dispute did not prohibit forfeiture of real property on which marijuana was grown. **(970)** The district court ordered summary judgment in favor of the government against property on which marijuana was grown. The 1st Circuit rejected claimant's argument that summary judgment was improper because an unrelated party claimed title to a portion of the property. Claimant contended that this claim barred forfeiture since the marijuana crop may have been grown on land belonging to the third party. The 1st Circuit upheld the summary judgment, because defendant failed to present sufficient evidence to negate the property's connection with the illegal activities. The government may treat as unitary, for purposes of an initial seizure warrant, any tract over which an owner or group of owners exercises dominion and treats as its own. Defendant failed to present sufficient evidence to negate the property's connection with the illegal activities or to show that he was an innocent owner. *U.S. v. One Parcel of Real Property with Buildings, Appurtenances, and Improvements, Known as Plat 20,* __ F.2d __ (1st Cir. March 12, 1992) No. 91-1681.

Opinion Vacated by Supreme Court

(510)(700) *U.S. v. Williams,* 910 F.2d 1574 (7th Cir. 1990), *vacated and remanded sub nom. Williams v. U.S.,* __ U.S. __, 112 S.Ct. __ (March 9, 1992).

Supplemental Opinion Filed

(750) *Boardman v. Estelle,* __ F.2d __ (9th Cir. Jan. 9, 1992), *supplemental opinion,* __ F.2d __ (9th Cir. March 11, 1992) No. 90-55238.

Amended Opinion

(930) *U.S. v. $12,248 U.S. Currency,* __ F.2d. __ (9th Cir. Dec. 17, 1991) No. 90-15912, *amended* Feb. 27, 1992.

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