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Laurence S. McWhorter, Director

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

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COMMENDATIONS

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

Daniel P. Bach (Wisconsin, Western District), by L. W. Graves, Associate Warden, Federal Correctional Institution, Bureau of Prisons, Department of Justice, Oxford, for conducting an outstanding Criminal Litigation Seminar for the Federal Correctional Institution staff.

Peter Barrett and ***Richard Starrett*** (Mississippi, Southern District), by Lieutenant Randy Dearman, Laurel Police Department, Laurel, Mississippi, for their successful efforts in obtaining a conviction in an important criminal case in the local community.

A. George Best (Michigan, Eastern District), by Benjamin R. McMakin, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, Detroit, for his informative and comprehensive lecture on asset forfeiture and other provisions of Title 31 at a training program attended by more than 100 special agents.

William H. Browder, Jr. (District of Maine), was awarded a Certificate of Appreciation by Kevin D. Gallagher, Special Agent in Charge, Drug Enforcement Administration, Department of Justice, Washington, D.C. for his outstanding contributions in the field of drug law enforcement.

Lance A. Caldwell (District of Oregon), by Nancy C. Hill, Assistant Director, Attorney General's Advocacy Institute, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for two excellent lectures (overview of statutes and case law and conducting the investigation) at the Financial Institution Fraud Conference in Washington, D.C.

Robert Cares, Gary Felder and ***Ronald Waterstreet*** (Michigan, Eastern District), by Richard J. Hoglund, Special Agent in Charge, U.S. Customs Service, Detroit, for their successful prosecution of three significant criminal cases resulting in substantial seizures of narcotic proceeds, indictments, arrests, and convictions.

Virginia M. Covington (Florida, Middle District), by Laurence E. Fann, Acting Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for her excellent presentation on civil forfeiture at the OCDETF/Strike Force Training Conference recently held in Albuquerque.

Charles Cox (Georgia, Middle District), by Donald F. Bell, Chief, ATF National Academy, Bureau of Alcohol, Tobacco and Firearms, Glynco, for his outstanding presentation on asset forfeiture at an ATF Advanced Agent training class at the Federal Law Enforcement Training Center.

Salvador A. Dominguez (Ohio, Southern District), by C. Daniel DeLawder, President, Fairfield National, Lancaster, for his successful prosecution of a criminal case and his personal interest in the employees who testified at the trial.

Jeffrey S. Downing (Florida, Middle District), by James H. DeAtley, Assistant Director, Attorney General's Advocacy Institute, Executive Office for United States Attorneys, Department of Justice, Washington, D.C. for his outstanding presentation at a recent Federal Practice Seminar in Tampa.

Suzanne E. Durrell (District of Massachusetts), by Victor J. Ferlise, Chief Counsel, U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, for her exceptional efforts in litigating a False Claims Act case.

Frederick C. Emery, Jr. (District of Maine), by David H. Gamble, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense, Roslyn Air National Guard Station, Roslyn, New York, for his successful efforts in obtaining guilty pleas to conspiracy to rig bids on contracts awarded by the Department of Defense from 1981 through 1989, and conspiracy to file false statements regarding country of origin of fish supplied under Department of Defense contracts from 1986 through 1989.

Holly Fitzsimmons and ***Joseph Martini*** (District of Connecticut), by George D. Heavey, Assistant Commissioner, Office of Internal Affairs, U.S. Customs Service, Washington, D.C., for their excellent prosecutorial efforts, dedication and professionalism during a lengthy litigation involving the death of a Customs Inspector. ***Holly Fitzsimmons*** was also commended by Francine Platko, Vice President and Security Officer, Sikorsky Federal Credit Union, Stratford, for her participation in a seminar on money laundering.

Annette Forde (District of Massachusetts), by Thomas K. Ranft, Postmaster/Division Manager, U.S. Postal Service, Boston, for her valuable assistance and special efforts on behalf of the postal officials and the Suffolk County Assistant District Attorney in an assault and battery case involving a postal supervisor.

Nicholas M. Gess (District of Maine), was presented a Certificate of Appreciation by Kevin D. Gallagher, Special Agent in Charge, Drug Enforcement Administration, Department of Justice, Washington, D.C. for his outstanding contributions in the field of drug law enforcement.

James Gibbons (Pennsylvania, Middle District), by John T. Farrell, Jr., Chief Field Counsel, Office of Field Legal Services, U.S. Postal Service, Philadelphia, for his excellent representation and valuable assistance in negotiating an agreement with the City of Kingston to expand present facilities.

Stephen R. Graben (Mississippi, Southern District), by Brigadier General Charlie D. Brackeen, Special Advisor for Military Affairs, State of Mississippi Adjutant General's Office, Jackson, and Colonel M. Scott Magers, Chief, Litigation Division, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for his outstanding trial skills leading to a favorable decision by the court in a complex civil action.

Tony M. Graham, United States Attorney for the Northern District of Oklahoma, his secretary, ***Sherry Stinson,*** and ***David O'Meilia, Assistant United States Attorney,*** by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding success in the prosecution and conviction of the highest ranking narcotics trafficker ever extradited to the United States.

Andrew Grosso (Florida, Middle District), by James M. Cottos, Regional Inspector General for Investigations, Department of Health & Human Services, Atlanta, for successfully prosecuting two physicians for defrauding the government in a Medicare/Medicaid fraud scheme. Also, by Susan Fentress, Education Coordinator, National Association of Medical Equipment Suppliers (NAMES), Alexandria, Virginia, for his excellent presentation on fraud and abuse at a recent Post-Legislative Conference.

Johnathon Haub (District of Oregon), by Raymond J. McKinnon, Special Agent in Charge, Drug Enforcement Administration, Seattle, for his legal skill and expertise in successfully prosecuting two significant and complex marijuana conspiracy cases in Eugene and Portland, Oregon.

D. Marc Haws (District of Idaho), by J.S. Tixier, Regional Forester, U.S. Forest Service, Inter-mountain Region, Department of Agriculture, for his excellent representation of the Forest Service and for obtaining a favorable opinion on behalf of the Service in a recent litigation.

Ronald W. Hayward (Florida, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding success in prosecuting a complex nationwide fraud scheme promoting the sale of worthless drafts drawn on nonexistent offshore or foreign entities.

Ronald D. Howen and ***Robert C. Grisham*** (District of Idaho), by Nels C. Nelson, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Seattle, for their outstanding prosecution of a white supremacists conspiracy case involving a firebombing of a Seattle nightclub.

Michael Hluchaniuk (Michigan, Eastern District), received a Meritorious Service Award from the Saginaw Exchange Club for his many years of exemplary service to local law enforcement organizations.

Mark V. Jackowski (Florida, Middle District), by Herbert A. Biern, Assistant Director, Federal Reserve System, Washington, D.C., for his successful prosecution of the former officers of a banking, credit and commerce organization in a money laundering case.

David R. Jennings (Florida, Middle District), by James L. Brown, Chief, Explosives Division, Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Washington, D.C., for participating in a recent Arson-for-Profit seminar for United States Attorneys at the Federal Law Enforcement Training Center in Glynco, Georgia.

Paul J. Johns (District of Colorado), by Horacio M. Ayala, Assistant Special Agent in Charge, Drug Enforcement Administration, Denver, for his successful prosecution of a complex narcotics case.

Grant C. Johnson (Wisconsin, Western District), by Thomas J. Tantillo, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for obtaining a conviction of an individual for the theft of over $12,000 in program funds from the Social Security Administration.

Michael Anne Johnson (Ohio, Northern District), by Judith Kaleta, Acting Chief Counsel, Research and Special Programs Administration, Department of Transportation, Washington, D.C., for her successful defense of a safety enforcement case involving a violation of regulations issued under the Hazardous Materials Transportation Act.

Robyn R. Jones (Ohio, Southern District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for her special prosecutive efforts resulting in a guilty plea to conversion of government collateral.

Catherine Killam (Ohio, Northern District), by Donald W. Bottles, Special Agent, FBI, Cleveland, for her professionalism and legal expertise in obtaining guilty verdicts in two major criminal cases. Also, by Robert L. Brown, District Director, Immigration and Naturalization Service, Cleveland, for her successful conclusion of a conspiracy case to fraudulently secure legal temporary resident status for a number of illegal aliens as Special Agricultural Workers in the United States.

Wallace Kleindienst, Gary Husk and ***Fred R. Petti*** (District of Arizona), by Andrew L. Vita, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Los Angeles, and Melinda Howell, the victim in this case, for their successful conclusion of a "fatal attraction" package bomb murder case resulting in guilty verdicts being returned on all counts.

William A. Kolibash, United States Attorney for the Northern District of West Virginia, John H. Reed, and ***Martin P. Sheehan, Assistant United States Attorneys,*** by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding success in the prosecution of an organized crime figure and others for multistate racketeering activities, including drug trafficking, gambling, fraud, interstate theft, and murder.

James Kuhn (Illinois, Central District), by John W. Beaty, Area Administrator, Office of Labor-Management Standards, Department of Labor, Chicago, for his outstanding success in the investigation and trial of three former officers of Local Union 206 for financial malpractice.

Stephen K. Lester (District of Kansas), by Frank V. Smith III, Chief Counsel, Department of Health & Human Services, Kansas City, for his valuable assistance and legal skill in managing a witness in a recent private state court litigation.

Sheldon Light (Michigan, Eastern District), by John Gibson, Regional Inspector, Internal Revenue Service, Cincinnati, for his successful prosecution of a bribery case involving an undercover IRS agent posing as a corrupt employee.

Peter B. Loewenberg (Florida, Middle District), by M.D. Purcell, Postal Inspector in Charge, U.S. Postal Service, Tampa, for his valuable assistance and outstanding support of the programs of the Tampa Division of the Postal Inspection Service over the years.

William R. Lucero (District of Colorado), by David R. Struthers, Statewide Chairperson, People's Law School, Colorado Trial Lawyers Assn., Denver, for his excellent presentation at the People's Law School, a successful program sponsored by the Association.

George Martin (Alabama, Southern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for obtaining a plea agreement of a labor union official in a complex fraud case.

Kim Martin and ***Lanny Welch*** (District of Kansas), by Richard J. Whitburn, Chief, Criminal Investigation Division, Internal Revenue Service, Wichita, for their outstanding success in the trial and conviction of a difficult tax case. ***Kim Martin*** was also commended by Jerry E. Mayhall, Director, Medical and Regional Office Center, Department of Veterans Affairs, Wichita, for successfully prosecuting a narcotics theft case.

Kathleen Midian (Ohio, Northern District), by Robert E. Tilton, Chief of Police, Stow Police Department, for her exceptional efforts on behalf of the Police Department in resolving a longstanding forfeiture case and for her assistance to law enforcement officers in combatting crime in the local community.

Celeste K. Miller (District of Idaho), by Norman S. Jensen, Assistant District Counsel, Department of Veterans Affairs, Boise, for her excellent representation of a bankruptcy case before the U.S. Bankruptcy Court, the U.S. District Court, the Bankruptcy Appellate Panel, and the U.S. Court of Appeals for the Ninth Circuit.

Thomas O. Mucklow (West Virginia, Northern District) received a Certificate of Appreciation from the Drug Enforcement Administration for his successful prosecution of numerous drug cases in the Eastern Panhandle area of West Virginia. ***Mr. Mucklow*** also received the U.S. Department of Justice Award of Honor from the International Narcotic Enforcement Officers Association for outstanding service and dedication to his duties in the area of law enforcement.

Janet Parker (Michigan, Eastern District), by Bernard H. LaForest, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Detroit, for bringing a complex explosives/narcotics criminal case to a successful conclusion.

William G. Pharo and ***Kathleen L. Torres*** (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigation Division, Internal Revenue Service, Denver, for their valuable assistance and support in resolving a civil state court action in which an IRS agent was to testify as a third party.

George L. Phillips, United States Attorney for the Southern District of Mississippi, and ***Staff***, by Wayne R. Taylor, Special Agent in Charge, Federal Bureau of Investigation, Jackson, for their outstanding efforts in support of the many significant investigations throughout the past year which impacted greatly upon longstanding crime problems within the State of Mississippi.

Gerald J. Rafferty (District of Colorado), by Thomas J Harrington, Special Agent, FBI, Denver, for successfully prosecuting a complicated check-kiting operation case and obtaining a jury conviction.

Alex Rokakis (Ohio, Northern District), by Rear Admiral G. A. Penington, U.S. Coast Guard, Cleveland, for his legal skill and professionalism in negotiating the settlement of a longstanding dispute between the Coast Guard and shipping companies over the interpretation of the Great Lakes pilotage laws.

Kathleen A. Sutula and ***Arthur I. Harris*** (Ohio, Northern District), by M.D. Hannas, Acting Deputy Assistant Judge Advocate General, Department of the Navy, Alexandria, Virginia, for their special efforts and excellent representation of the Navy's interest in the litigation of a complex case.

Thomas Wales (Washington, Western District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for obtaining a conviction in a loan collateral case involving complex financial transactions and manipulations of multiple business entities.

Guy L. Womack (Texas, Southern District), by A. T. Brown, Inspector in Charge, U.S. Postal Service, Houston, for his legal skill and expertise in the trial and conviction of a criminal case.

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Robert E. Larsen, Western District Of Missouri, Receives 1990 GEICO Public Service Award

Robert E. Larsen, Senior Litigation Counsel, Western District of Missouri, has been selected to receive the 1990 GEICO Public Service Award for his outstanding achievements in the area of substance abuse prevention and treatment.

In 1987, the Mayor of Kansas City and the United States Attorney's office formed the Kansas City Metropolitan Task Force on Drug and Alcohol Abuse, and Robert Larsen served as its Coordinator. To fund this new project, Mr. Larsen obtained $100,000 from a Foundation in Princeton,

New Jersey. The Task Force is a model for other cities today. In 1988, Mr. Larsen spearheaded the development of YouthNet, a program that works with "at risk" 11 to 16-year-old children in twelve community centers. This program focuses on athletics, art programs, and special events, and serves as a preventive measure for potential school drop-outs, involvement in drugs, and other problems. Mr. Larsen has also established a program for pregnant women and their babies who are addicted to cocaine. Recognizing this initiative, the State of Missouri appropriated $1 million to fund a comprehensive drug treatment program in Kansas City for these mothers.

The GEICO Public Service Awards were established in 1980 to emphasize GEICO's belief that the contributions of many dedicated and talented government employees are deserving of special acclaim. Only four government employees are selected each year for their achievements in one of the following areas: Substance Abuse Prevention and Treatment; Fire Prevention and Safety; Physical Rehabilitation; and Traffic Safety and Accident Prevention.

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Assistant United States Attorneys Commended
For Their Assistance In Nine Forfeiture Training Seminars

On November 5, 1990, Attorney General Dick Thornburgh commended twelve Assistant United States Attorneys (AUSAs) for their assistance in nine forfeiture training seminars conducted by the Department of Justice from January to September of this year. One of these seminars was sponsored by the Executive Office for United States Attorneys (EOUSA), six were cosponsored by EOUSA and the Criminal Division, and two were cosponsored by the Executive Office for Asset Forfeiture and the Criminal Division.

A total of 747 AUSAs, support personnel in the United States Attorneys' offices and federal law enforcement personnel were trained in these seminars. Two of these seminars were directed solely to criminal prosecutors; two were directed to AUSAs and Department component personnel; two were directed to support personnel in the United States Attorneys' offices; one was directed to new forfeiture AUSAs; one was directed to fraud attorneys handling Financial Institutions, Reform, Recovery, and Enforcement Act (FIRREA) forfeiture actions; and one was directed to advanced forfeiture attorneys. There were a total of 93 instructors (25 from department headquarters, 64 from the field offices, and four from the private sector) who taught at these seminars. Of the 64 individuals from the field, 37 instructors were AUSAs who handled this responsibility along with their regular prosecutorial assignments. Nine AUSAs instructed at three or more of these seminars. Three assisted in preparing FIRREA computerized forfeiture forms as a special project during these seminars, and one assisted in preparing a pamphlet on sales of property seized for forfeiture.

Louis J. Gicale, Jr. (New York, Western District) and ***Richard W. Sponseller*** (Pennsylvania, Middle District) prepared the agendas for eight of these seminars. ***Mr. Sponseller*** also assisted in preparing the computerized FIRREA forfeiture forms. ***Gregg Marchessault*** (Texas, Eastern District) was a primary author of the Department's new policy on contaminated property. He also assisted in preparing the computerized FIRREA forfeiture forms and was the Department's first instructor on FIRREA forfeiture prosecutions. Other Assistant United States Attorneys who were commended by the Attorney General were: ***Terry Derden,*** Eastern District of Arkansas; ***Glenda G. Gordon,*** District of Maryland; ***Arthur W. Leach,*** Southern District of Georgia; ***Robert E. Mydans,*** Western District of Oklahoma; ***Wilmer Parker, III (Buddy),*** Northern District of Georgia; ***Virginia M. Covington,*** Middle District of Florida; ***Joseph A. Florio,*** Western District of Texas; ***Leslie Ohta,*** District of Connecticut; *and* ***William J. Landers,*** District of Columbia.

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PERSONNEL

On November 30, 1990, ***Margaret Colgate Love*** was appointed Pardon Attorney. Ms. Love previously served in the Office of Legal Counsel from 1979 to 1988, then was appointed Deputy Associate Attorney General in 1988, and Associate Deputy Attorney General in 1989 where her responsibilities included criminal law matters and professional ethics. She will replace David Stephenson who retired after 38 years of service with the Department of Justice.

On November 15, 1990, ***John Logan*** was appointed Director of the United States Trustee program after having served as General Counsel since 1988. Mr. Logan was a Deputy General Counsel for the Justice Management Division of the Department of Justice from 1985 to 1988, and Attorney-Advisor in the Office of Legislative Affairs from 1980 to 1985.

On December 12, 1990, ***John Volz, United States Attorney for the Eastern District of Louisiana,*** was appointed Special Counsel for the Executive Office for United States Attorneys. Mr. Volz, who will remain in New Orleans, will work closely with the Evaluation and Review Staff, especially in the Priority Programs Area.

On December 17, 1990, ***Judge Tim Murphy*** was appointed Associate Deputy Attorney General, and will be responsible for planning, coordinating, and monitoring the Department of Justice's enhanced debt collection efforts. Judge Murphy, a Senior Judge of the District of Columbia Superior Court, served as Associate Director of the Financial Litigation Staff in the Executive Office for United States Attorneys from 1985 to 1988.

On November 6, 1990, ***Richard Jenkins*** became the Interim United States Attorney for the Eastern District of California.

On November 19, 1990, ***Leland E. Lutfy*** was appointed United States Attorney for the District of Nevada.

On November 19, 1990, ***Ronald G. Woods*** was appointed United States Attorney for the Southern District of Texas.

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ATTORNEY GENERAL HIGHLIGHTS JUSTICE DEPARTMENT'S 1990 ACHIEVEMENTS

On December 12, 1990, Attorney General Dick Thornburgh submitted a year-end report to the Attorney General's Advisory Committee of United States Attorneys. A copy of the press release is attached at the Appendix of this Bulletin as Exhibit A.

Citing a nearly 20 percent increase in resources and new legislative authority for far-reaching laws and stiffer penalties, the Attorney General said that the Department of Justice has more tools in place than ever before to move decisively against white collar criminals, drug traffickers, corrupt public officials, and others. Bolstered by a record $9.3 billion budget and tougher laws to punish white collar criminals, the Justice Department is better prepared to carry out our primary law enforcement missions of dismantling international drug cartels and bringing to justice financial executives who left the American taxpayer with the tab for their excesses during the 1980s. Mr. Thornburgh also highlighted the passage of the Debt Collection Procedures Act, which goes into effect in May 1991. This Act will be of great benefit to the United States Attorneys and will provide important new tools to help collect the millions of dollars owed to the government by providing uniform federal procedures and remedies.

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ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

On December 17, 1990, Attorney General Dick Thornburgh announced the appointment of six new members of the Attorney General's Advisory Committee of United States Attorneys. The new members are: Linda Akers, District of Arizona; Lourdes Baird, Central District of California; Tom Corbett, Western District of Pennsylvania; Jeffrey R. Howard, District of New Hampshire; Timothy D. Leonard, Western District of Oklahoma; and Mike McKay, Western District of Washington.

The Attorney General also announced that Joseph M. Whittle, United States Attorney for the Western District of Kentucky, will assume the position as Chairman. The Committee elected J. William Roberts, Central District of Illinois, Chairman-elect for the new year. Deborah Daniels, United States Attorney for the Southern District of Indiana, and Wayne A. Budd, United States Attorney for the District of Massachusetts, will serve as Vice Chairpersons.

General Thornburgh commended James G. Richmond, United States Attorney for the Northern District of Indiana, for his outstanding service as Chairman of the Committee from April 1989 to May 1990, before assuming the role of Special Counsel for Financial Institutions for the Department of Justice.

The following is a complete list of members:

Chairman:
Joseph M. Whittle, Western District of Kentucky

Chairman Elect:
J. William Roberts, Central District of Illinois

Vice Chairpersons:
Deborah J. Daniels, Southern District of Indiana
Wayne A. Budd, District of Massachusetts

Members:
Linda Akers, District of Arizona
Lourdes Baird, Central District of California
Marvin Collins, Northern District of Texas
Tom Corbett, Western District of Pennsylvania
E. Bart Daniel, District of South Carolina
Jeffrey R. Howard, District of New Hampshire
Timothy D. Leonard, Western District of Oklahoma
Mike McKay, Western District of Washington
George L. Phillips, Southern District of Mississippi
George J. Terwilliger, III, District of Vermont
Jay B. Stephens, District of Columbia, ex officio

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INTERNATIONAL LAW ENFORCEMENT

United States And Spain Sign Mutual Legal Assistance Treaty

On November 20, 1990, Attorney General Dick Thornburgh and Spanish Minister of Justice Enrique Mugica Herzog signed a Mutual Legal Assistance Treaty designed to "cut through bureaucratic red tape" and enable both countries to assist each other more effectively in mutual law enforcement. Under this treaty, each country will be able to request from the other help in freezing and forfeiting assets, obtaining important evidence such as bank records and other financial documents, taking testimony of witnesses, executing requests for searches and seizures, serving documents, and locating and identifying people of interest. The treaty also provides that assistance is available even when the conduct under investigation or prosecution would constitute a crime in only the requesting country.

The Attorney General said, "We understand, as do the Spanish authorities, the particular needs of each nation's law enforcement community. Therefore, the absence of a 'dual criminality' requirement ensures that investigations and prosecutions of virtually all violations of American law that rely on Spanish assistance will be able to proceed. Spanish law enforcement agencies, of course, will enjoy the same benefits."

The treaty, which now must be ratified by the legislatures of both nations, includes specific provisions relating to the evolving areas of asset forfeiture and international sharing of seized funds. To date, the United States has seven similar treaties with the Bahamas, Canada, Cayman Islands, Italy, the Netherlands, Switzerland and Turkey. While this treaty does not address extraditions specifically, the United States and Spain have had an extradition treaty since 1971, and a supplement that was effective in 1978. The close relationship between the United States and Spanish law enforcement agencies is evidenced by the long standing presence of the Drug Enforcement Administration in Spain. The FBI has also recently been authorized to set up its own office at the U.S. Embassy in Madrid.

Budapest

On December 3, 1990, Attorney General Dick Thornburgh initiated negotiations with Hungarian officials over a Mutual Legal Assistance Treaty. Following a meeting with Hungarian Justice Minister Istvan Balsai, Prime Minister Jozsef Antall and members of Parliament, the Attorney General stated that such a treaty, the first with an Eastern European nation, would further our cooperative law enforcement efforts. Discussions on the proposed treaty will continue.

Sofia, Bulgaria

On December 4, 1990, Attorney General Dick Thornburgh met with President Zhelyu Zhelev of Bulgaria and other Bulgarian leaders to discuss "rule of law guarantees" in a proposed new Constitution for Bulgaria. Also discussed was the need for constitutional human rights protection, an independent judiciary with adequate compensation and status for judges, and the relationship between the central governments and local governments. The Attorney General later departed for Rome to meet with European law enforcement officials.

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DRUG ISSUES

Attorney General Praises United Nations Drug Convention

On November 2, 1990, in an address before the 45th United Nations General Assembly's Third Committee, Attorney General Dick Thornburgh described the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances as "the world's most significant drug law enforcement treaty" and praised the United States for its foresight in developing the treaty. General Thornburgh signed the Convention on behalf of the United States in December, 1988 in Vienna. The treaty, which enters into force November 11, has been ratified or acceded to by 27 nations from around the world. The United States deposited its instruments of ratification with the United Nations on February 20, 1990, and was the sixth nation to do so. Under this treaty, signatory nations are obligated to criminalize each link in the chain of illicit drug-related activities, from the initial production of drugs to the final laundering of profits. While respecting the sovereignty of each nation, this agreement mandates unprecedented cooperation in investigations, prosecutions and, where appropriate, extraditions in drug-related cases.

The Attorney General praised several other United Nations organizations, including the World Health Organization, for its new program on substance abuse and the International Labor Organization for their efforts to control drugs in the workplace. He said, "The U.N. Fund for Drug Abuse Control has been a mainstay of international support for drug control. Last year we worked to develop a judicial assistance project in the Andean region. We want to ensure that there is a mechanism that will protect judicial officials whose lives are placed in jeopardy while they are simply trying to do their jobs. While this treaty is a historic first step, there is more work to be done. In reality, this is not the culmination of our efforts, but rather the beginning. The Convention is, after all, the starting point for the vital work that must follow."

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Drug War In Michigan

Attorney General Dick Thornburgh and John A. Smietanka, United States Attorney for the Western District of Michigan, distributed more than $300,000 from the Department of Justice's Asset Forfeiture Program to ten law enforcement agencies in western Michigan for use in the war on drugs.

The funds result from currency and property seized in four separate drug cases. The first case involved a suit brought against Matthew Myers under the Racketeer Influenced Corrupt Organizations Act (RICO) in connection with marijuana smuggling. Myers pled guilty to conspiracy to defraud the government and income tax evasion. In the process, he forfeited more than $1 million in property including a home in Aspen, Colorado that is currently being sold through the Asset Forfeiture Program. In the second case, the defendant was convicted on two counts of cocaine distribution. According to informants, the defendant was a large-scale distributor of cocaine brought into Grand Rapids from Detroit. Substantial assets, including cars, were forfeited. The third case involved a home that was being used to sell heroin. After an investigation determined that drugs were stored, weighed and distributed from the house, the defendant agreed to forfeit his interest in the property. The final case was a joint federal and local investigation involving the FBI, the Wyoming, Michigan Police Department and the Kent County Sheriff's Department. A physician was indicted for prescribing narcotics in violation of the Controlled Substances Act. His office was forfeited after negotiations with the physician and the bank that held the mortgage.

The Attorney General said, "It is poetic justice indeed when we can turn drug profits into funds for fighting the drug war. Our message to drug profiteers, 'you make it...we'll take it.'"

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SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On November 6, 1990, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions during FY 1989-1991 (October 1, 1988 through October 31, 1990):

Information/Indictments	328
S&Ls Victimized	403
Estimated S&L Loss	$3.518 billion
Defendants Charged	519
Defendants Convicted	355
Defendants Acquitted	14 *
Prison Sentences:	706 years
Sentenced to prison	206 (77%)
Awaiting sentence	102
Sentenced w/o prison or suspended	62
Fines Imposed	$4.524 million
Restitution Ordered	$211.475 million

Note: All numbers are approximate.

"Major" is defined as (a) the amount of fraud or loss was $100,000 or more, (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution. These numbers are based on reports from the 94 offices of the United States Attorneys and from the Dallas Bank Fraud Task Force. The totals of "major" savings and loan prosecutions since October 1, 1988, are higher than last month's totals because of (a) activity between October 1-31, 1990 and (b) previously unreported activity submitted by those offices during the past month.

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* One of the 14 defendants was convicted in another case.

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Department Of Justice Breaks The Record In Savings And Loan Prosecutions

On November 6, 1990, Attorney General Dick Thornburgh addressed some 175 prosecutors and investigators hired under the Financial Institution Reform Recovery Enforcement Act of 1989 (FIRREA) which augmented the staffs of the United States Attorney's Offices, the Criminal Division's Fraud Section, and the FBI.

The Attorney General announced that as of the end of October, 1990, the Department of Justice has broken the 500 mark in the number of defendants charged and has secured the conviction of more than 350 individuals in major savings and loan fraud cases. To date, of those defendants sentenced, 77 percent of them have gone to prison. The courts have imposed fines totaling $4.5 million and ordered restitution totaling $212 million. Mr. Thornburgh said, "With the additional $160 million in funding provided by the Congress, the Department will be able to add even more investigators and prosecutors to our ranks. Our task is to ensure that those who have cheated our financial institutions and left the American taxpayer holding the bag not escape their just punishment. This year, the FBI alone will get more than $71 million to conduct investigations into allegations of financial fraud throughout the nation. Additional funds are also allotted to the Criminal, Civil and Tax Division as well as the offices of the United States Attorneys."

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CRIME ISSUES

Felony Arrests

A study that tracked offenders in selected states throughout the United States found that of every ten people arrested on felony charges, eight were prosecuted, six were convicted of the original charge or a lesser offense and four were sentenced to a jail or prison term. This study was conducted by the Bureau of Justice Statistics, a component of the Office of Justice Programs, which utilized data obtained from a number of states that tracked felony arrests processed during 1987.

The case tracking data came from seven states that processed more than 536,000 felony arrests during 1987 and from an additional five states that tracked more than 100,000 defendants folowing decisions to prosecute. Altogether, these 12 states provided information on sentencing outcomes for almost 377,000 convicted offenders for the Bureau's Offender-Based Transaction Statistics Program. The statistics help determine the likelihood of conviction and the types of sentences imposed as well as whether or not case processing is changing over time. The 12 states included in the analysis were Alabama, Alaska, California, Delaware, Georgia, Minnesota, Missouri, Nebraska, New York, Pennsylvania, Vermont and Virginia. They account for more than one-third of U.S. residents.

Among those convicted of homicide in those states during 1987, 92 percent were sentenced to jail or prison, as were 94 percent of the offenders convicted of rape, 88 percent convicted of robbery and 85 percent of those convicted of burglary. Among offenders sentenced to prison in the 12 states, 27 percent were convicted of a violent crime, as were 14 percent of those sentenced to a jail term and 14 percent of those sentenced to serve time on probation in the community. About one out of four persons sentenced to prison or to jail had been convicted of a drug crime, as were one out of eight persons sentenced to probation. About 86 percent of all those convicted of felonies in the 12 states were male, 61 percent were white and 64 percent were less than 30 years old.

Copies of "Tracking Offenders, 1987" (NCJ-125315) may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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Eight States Executed Sixteen People Last Year

The Bureau of Justice Statistics announced that eight states executed sixteen criminal offenders last year. Since 1976, the year in which the United States Supreme Court reinstated the death penalty, 13 states had executed 120 people as of last December 31. The eight black males and eight white males executed during 1989 had spent an average of 7 years and 11 months awaiting execution, according to the Bureau. During 1989, 250 state offenders were added to death row, 96 people were removed and 6 died while awaiting execution. Alabama and Texas each executed four offenders, Florida and Nevada each executed two offenders and Georgia, Mississipi, Missouri and Virginia each executed one offender.

Other than a man held for the capital rape of a child in Mississippi, all of the 2,250 state death row inmates being held as of December 31 had been convicted of a murder. Of these, 58.2 percent were white, 40.1 percent were black, 1 percent was American Indian and 0.6 percent were Asian. One hundred fifty six (6.9 percent) of those on death row were of Hispanic origin. Twenty-five (1.1 percent) were women. Among those death row inmates for whom such information was available, about 7 out of 10 had a prior felony conviction, and 1 in 11 had a prior homicide conviction. About 2 in 5 were on some type of criminal justice status at the time of their capital offense. Half of these were on parole, the rest were in prison, had escaped from prison, were on probation or had criminal charges pending against them. About 58 percent of the death row inmates were being held in Southern states, 21 percent in the West, 15 percent in the Midwest and just under 6 percent were in the Northeastern states of Connecticut, New Jersey and Pennsylvania.

As of the end of last year, the death penalty was legal in 36 states and in the federal system, and 34 of these states held prisoners under a death sentence. Since 1930, the states have executed 3,946 offenders, and the federal government has executed 33. Of the 120 offenders executed from 1977 through 1989, 72 were electrocuted, 42 were given lethal injections, 5 were executed with lethal gas and one was killed by a firing squad.

Copies of "Capital Punishment 1989" (NCJ-124545) may be obtained form the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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Record Number Of Federal Environmental Criminal Prosecutions In FY 1990

On November 15, 1990, Attorney General Dick Thornburgh and Environmental Protection Agency Administrator William Reilly announced that during FY 1990, the Department of Justice recorded a 33 percent increase in felony indictments for environmental crimes. A record 134 indictments were returned and the Department achieved a 95 percent conviction rate for environmental prosecutions. Over the last eight years, the Department has obtained 517 pleas and convictions and secured over $56 million in criminal fines for environmental crimes.

The Attorney General pointed out that the Department's Environmental Crimes Section is only eight years old, yet a third of its indictments and convictions were secured in just the last two years. He said that the Section more than pays for itself -- it returns over two dollars in fines and restitution for every criminal enforcement dollar spent.

The following is an Environmental Crimes Breakdown:

Indictments		Pleas/Convictions		Fines Imposed		Jail Terms Imposed
FY 83	40	FY 83	40	FY 83	341,100	FY 83 11 yrs.
FY 84	43	FY 84	32	FY 84	384,290	FY 84 5 yrs. 3 mos.
FY 85	40	FY 85	37	FY 85	565,850	FY 85 5 yrs. 5 mos.
FY 86	94	FY 86	67	FY 86	1,917,602	FY 86 124 yrs. 2 mos. 2 days
FY 87	127	FY 87	86	FY 87	3,046,060	FY 87 32 yrs.4 mos. 7 days
FY 88	124	FY 88	63	FY 88	7,091,876	FY 88 39 yrs. 3 mos. 1 day
FY 89	101	FY 89	107	FY 89	12,747,330	FY 89 53 yrs. 1 mo.
FY 90	134	FY 90	85	FY 90	29,977,908**	FY 90 21 yrs. 11 mos. 1 day
Total	703*	Total	517*	Total	$56,071,616	Total 299 years.1 mo.11 days

* Of the 703 defendants indicted, 222 were corporations and 481 were individuals. Of the 517 convictions, 163 were corporations and 354 were individuals.

** This figure includes criminal fines, restitution imposed in connection with sentencing and forfeitures.

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ASSET FORFEITURE

Forfeiture Of Leaseholds Or Other Occupied Real Property

Attached at the Appendix of this Bulletin as Exhibit B is a Memorandum in Support of Federal Defendants' Motion for Summary Judgment in the Department of Housing and Urban Development's Leasehold Forfeiture Program. This memorandum was prepared by the Federal Programs Branch, Civil Division, and provides an excellent analysis of civil forfeiture and seizure of real property. [Note: Although there was a decision on this case on December 19, 1990, the nationwide injunction is currently still in effect.]

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Attorney General's Guidelines On Seized And Forfeited Property

On September 24, 1990, Attorney General Dick Thornburgh and President Richard P. Ieyoub, National District Attorneys Association (NDAA), forwarded a joint letter to NDAA members, together with a copy of The Attorney General's Guidelines on Seized and Forfeited Property (1990). (See United States Attorneys' Bulletin, Vol. 38, No. 11, dated November 15, 1990, at p. 270.

In a memorandum dated December 7, 1990, George Phillips, Chairman, LECC/Victim Witness Subcommittee of the Attorney General's Advisory Committee, advised all United States Attorneys that the revised Guidelines define law enforcement as "the investigation or prosecution of criminal activity and the execution of court orders arising from such activity." (See Guidelines, Section II(1).) Under this definition, state and local prosecutors can now clearly receive an equitable share from forfeitures in which they assisted. The joint letter by the Attorney General and President Ieyoub sets forth the primary ways in which our state and local counterparts can qualify for an equitable share of federally forfeited property.

Mr. Phillips urged all United States Attorneys to meet with their state and local prosecutors to discuss equitable sharing under the new Guidelines. (See Guidelines, Section V.) It is important to remember that we are statutorily required to base the equitable share upon the direct law enforcement participation which led to the forfeiture. The state and local investigative agencies will be concerned about the effect that sharing with prosecutors will have on them. We should take care that expectations of all parties are realistic and that care is taken to ensure that shares are equitable--to the investigative agencies, the prosecutors and to the United States. One of the goals of the Department's forfeiture program is to seek greater uniformity and fairness in equitable sharing.

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

* * * * *

Quick Reference To Federal Forfeiture Procedures

The Asset Forfeiture Office (AFO) of the Criminal Division has published the first supplement to Quick Reference to Federal Forfeiture Procedures. This handbook, first published in August, 1990, is a single-source summary of federal forfeiture statutes, regulations, policy, and advisory materials. The supplement was issued October 28, 1990, and contains recent amendments to 19 U.S.C. §1607, INS regulations for the seizure and forfeiture of conveyances, and policies regarding equitable sharing levels and seizure of occupied real property and financial instruments.

Copies of the supplement have been sent by AFO to forfeiture personnel in each United States Attorney's office. Additional copies are available by calling AFO Paralegal Specialist Pat Dinkens at (FTS) 368-1271 or (202) 514-1271.

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Prosecutor's Guide To Criminal Fines And Restitution

The 1990 edition of the Prosecutor's Guide to Criminal Fines and Restitution has been sent to all United States Attorneys for distribution to criminal prosecutors and civil collection attorneys. This Guide, published by the Executive Office for United States Attorneys (EOUSA), alerts criminal prosecutors to what they can do to ensure that the fines and restitution imposed in their cases are both collectible and collected. To date, approximately 3,500 copies of the new Guide have been distributed, and the Probation Division of the Administrative Office for U.S. Courts is also sending copies of the Guide to each U.S. Probation Office. Besides serving as an important reference source, this Guide is also being used as a text in a nationwide joint Assistant United States Attorney/Probation Officer training initiative.

This monograph was first published in the fall of 1989, and 3,000 copies were then distributed to federal criminal prosecutors, civil collection attorneys, probation officers, and other components of the criminal justice system involved in fine and restitution enforcement. Changes in the law concerning enforcement of criminal monetary impositions prompted EOUSA to revise and republish the Guide. The Guide will be supplemented in the near future to reflect the passage of the Federal Debt Collection Procedures Act.

If you would like additional copies, please contact Nancy Rider, Assistant Director, Financial Litigation Staff, Executive Office for United States Attorneys, (FTS) 241-7017 or (202) 501-7017.

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Asset Forfeiture And Collection Activity In The Eastern District Of Virginia

The United States Attorney's Office for the Eastern District of Virginia collected $38,810,008.00 during the 1990 fiscal year ending September 30, 1990. This total includes over $6,682,857.00 obtained through the forfeiture of criminals' assets, the largest such amount ever collected in one year in this District.

In announcing these totals, United States Attorney Henry E. Hudson noted that collections by his office significantly exceeded expenditures. For fiscal year 1990, the operating budget of this district, including all personnel, litigation, and administrative expenses, totalled approximately $8.3 million. This office thus operated at a profit of over $30 million. This significant return reflects the dedication of the staff as well as the increased emphasis by the Department of Justice on asset forfeitures and collections activity. The monies included criminal fines, payments on defaulted loans, asset distributions from bankruptcy cases, and the proceeds of properties seized in connection with criminal prosecutions. Civil debts were collected on behalf of seven federal agencies, including the Department of Health and Human Services, Department of Education, Internal Revenue Service, Small Business Administration, Department of Agriculture, and the Department of Veterans Affairs.

In fiscal year 1990, the Office of the United States Attorney for the Eastern District of Virginia opened nearly 1,700 new cases and processed a total of 5,515 payments. This office also issued garnishment summonses in 202 cases.

* * * * *

Status Of The Asset Forfeiture Fund

The Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of 1986 granted the Attorney General and the Department of Justice greater latitude in the seizure of currency and property used in connection with criminal operations. This led to the establishment of the Asset Forfeiture Fund.

The program has seen dramatic increases. In fiscal year 1985, the Fund collected $27.2 million. One year later, revenues had jumped to $93.7 million. By fiscal 1987, the Fund had grown to $177.6 million. Fiscal 1988 saw the Fund increase to $207 million. In fiscal 1989, $358 million was collected, plus $222 million in a one-time only forfeiture from Drexel Burnham Lambert. In fiscal 1990, a record $460 million was collected. Of that, more than $180 million was awarded to state and local governments for cooperative law enforcement efforts; $115 million was transferred to the Bureau of Prisons for the construction of new cells; and $95 million was given to federal law enforcement agencies. The remainder was spent on administrative costs. Since fiscal year 1986, this program has aided in the transfer of more than $525 million to state and local law enforcement agencies throughout the nation.

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GOVERNMENT ETHICS

Honorarium Prohibition And Limitations On Outside Earned Income And Employment

On November 28, 1990, a memorandum was issued by the Director of the Office of Government Ethics, which provides guidance on the honorarium prohibition affecting all employees, and the ban and limitations on outside earned income for certain employees. A copy of this memorandum is attached at the Appendix of this Bulletin as Exhibit C.

The provisions added by Title VI of the Ethics Reform Act of 1989 become effective on January 1, 1991. On that date, all officers and employees in the Executive Branch will become subject to the prohibition against receipt of honoraria, and certain high-level noncareer employees will become subject to limitations on the amount of outside earned income and the types of outside employment they may have. Pending issuance of regulations, employees may rely on the guidance contained in this memorandum.

If you have any questions, please contact Legal Counsel, Executive Office for United States Attorneys, at (FTS) 368-4024 or (202) 514-4024.

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LEGAL EDUCATION

Investigating Judges, Lawyers And Others: Ethical Pitfalls

Ira H. Raphaelson, formerly Interim United States Attorney for the Northern District of Illinois, and presently First Assistant in that office, recently presented an outstanding lecture at the Attorney General's Advocacy Institute entitled "Investigating Judges, Lawyers, and Others: Ethical Pitfalls." Mr. Raphaelson and Deputy Chief Michael J. Shepard, of the Special Prosecution's Division of the same office, prepared a detailed outline of five main topics: 1) When to Start an Undercover Investigation: New Developments in Outrageous Conduct and Entrapment Defenses; 2) Ethical Issues Involving Lawyers; 3) Cooperating Witnesses as Lawyers; 4) Selected Publicity Issues: Common Problems in Public Corruption Cases; and 5) The Rise and Fall of Elected Officials. Several issues are addressed within the text, including DR7-104(a)(1) and (2); subpoenas of lawyers; undercover courthouse investigation issues; using real vs. contrived cases; and whether resignation is an appropriate plea to negotiate with an official.

Copies of this outline were distributed to all United States Attorneys offices. Additional copies are available by contacting Margaret A. Smith, Assistant Director, Office of Legal Education, 601 D Street, N.W., Room 1000, Washington, D.C. 20530 - (FTS) 241-7467 or (202) 501-7467. The Fax number is: (FTS) 241-7334 or (202) 501-7334.

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SENTENCING REFORM

New Developments Regarding Sentencing Guidelines

There have been three recent developments regarding the Sentencing Guidelines:

1. The Supreme Court currently is considering in Burns v. United States, No. 89-7260, whether a district court is required to notify the defendant in advance of its intent to depart upward from the range of sentences prescribed by the Sentencing Guidelines, and of the grounds for departure. The government's brief in the Supreme Court argues that such notice is not required by the legislation authorizing the Guidelines, Federal Rule of Criminal Procedure 32, or the Guidelines themselves.

In two cases in the courts of appeals, United States v. Goff, 907 F.2d 1441 (4th Cir. 1990), and United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990), the courts have accepted the government's argument that the district court must give the prosecutor notice before it departs downward from the Guidelines sentence. In light of the government's argument in the Supreme Court, Assistant United States Attorneys should not argue that the government has any right to notice before a downward departure until Burns is decided. If, however, the Supreme Court in Burns finds a right to notice in the statute, the federal rules, or the Guidelines themselves, then we should reassert the argument that we have an equal right to notice.

2. Three courts of appeals have held that the government must object to the particular error in a district court's sentencing decision in order to preserve that error as a ground for appeal. See United States v. Pritchett, 898 F.2d 130 (11th Cir. 1990); United States v. Garcia-Pillado, 898 F.2d 36 (5th Cir. 1990); United States v. Houston, 892 F.2d 696 (8th Cir. 1990). We therefore advise Assistant United States Attorneys to make objections to the court's decision known on the record at the sentencing hearing in any case in which the government may appeal the sentence.

3. Recently, Congress amended 18 U.S.C. §3742(b). In its prior version, that section provided that the government could file a notice of appeal to an adverse sentencing decision only "with the personal approval of the Attorney General or Solicitor General." The amended version states that the government may file a notice of appeal to an adverse sentencing decision, but that "[t]he Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General."

This amendment allows the government to file a protective notice of appeal without obtaining the Solicitor General's approval. Solicitor General approval is necessary, however, before the government files its brief. The amendment therefore brings the practice for sentencing appeals into conformity with internal Department requirements for all other appeals. United States Attorneys are encouraged to transmit all appeal recommendations to the Department as expeditiously as possible.

If you have any questions, please call Sidney M. Glazer, Chief, Appellate Section, Criminal Division, (FTS) 368-2638 or (202) 514-2638 or Doug Wilson, Appellate Section, Criminal Division, at (FTS) 368-3740 or (202) 514-3740.

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1990 Sentencing Guideline Manual

Joe B. Brown, Chairman of the Sentencing Guideline Subcommittee of the Attorney General's Advisory Committee, advised that the 1990 Sentencing Guideline Manuals were distributed to all United States Attorneys on November 9, 1990. The old Manual should be retained for reference purposes since a defendant will normally get the benefit of whichever Guideline favors him/her if his/her offenses were committed before November 1, 1990. A summary of the major changes in the Guidelines that were effective in 1990 was also distributed. This summary should be made available to all Assistant United States Attorneys handling criminal cases. The Sentencing Commission has completed a new computer "ASSYST" program which incorporates the Guideline changes for both 1989 and 1990. This program has been duplicated by the Executive Office for United States Attorneys, and sent out to all United States Attorneys.

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Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 3, No. 15, dated November 8, 1990 and Volume 3, Number 16, dated December 14, 1990, is attached as Exhibit D at the Appendix of this Bulletin.

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Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit E is a copy of the Federal Sentencing Guide, Volume 2, No. 9, dated October 22, 1990, Volume 2, No. 10, dated November 5, 1990, and Volume 2, No. 11, dated November 19, 1990, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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SUPREME COURT ACTION

October 1990 Supreme Court Criminal Docket

Attached at the Appendix of this Bulletin as Exhibit F is a list of questions presented in criminal and related cases being reviewed this term by the Supreme Court, and in one instance pending on a petition for a writ of certiorari. The brief of the Solicitor General is summarized in the cases in which the United States is participating.

This list was prepared by F. Dennis Saylor IV, Special Counsel to the Assistant Attorney General for the Criminal Division, (FTS) 368-4674 or (202) 514-4674.

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Supreme Court Grants Certiorari In Case Involving Conviction Under Provision Of Hobbs Act (18 U.S.C. § 1951)

The United States Supreme Court has recently granted certiorari in the case of United States v. Robert L. McCormick, S.D.W.Va. (896 F.2d 61 (4th Cir.); Cert. granted, 111 S.Ct. 37 (1990). This case involves a conviction under that provision of the Hobbs Act (18 U.S.C. §1951), which prohibits interference with commerce through extortion, "under color of official right." While the questions presented to the Court surround the adequacy of the evidence showing that payments to a West Virginia legislator were bribes rather than legitimate campaign contributions, this grant of certiorari may have more, and troubling, significance.

Since 1972, when the Circuit Court of Appeals for the Third Circuit decided United States v. Kenny, 462 F.2d 1205, each Circuit has followed in recognizing the validity of the theory that the "color of official right" language in the Hobbs Act is not mere surplusage, but rather the codification of the Common Law crime of extortion. Despite some recent limitations in the Second and Ninth Circuits, the Appellate Courts have generally defined this crime as the obtaining of property by a public official through the misuse of his office.

The Supreme Court, however, has never ruled on the validity of this theory, which has been used to prosecute and convict legions of corrupt public officials since 1972. The Court's willingness to review this case may signal an end to, or a severe limitation of, the Government's most popular statutory tool in combatting official corruption at the state and local level.

The reasons for this concern spring from the Court's apparent hostility to federal prosecution of state and local corruption without a specific legislative mandate, as is evidenced by the holding in United States v. McNally, 483 U.S. 350 (1987); and the fact that the Court chose this case, which represents a potentially fertile factual setting in which to examine the limits of the Hobbs Act.

The McCormick prosecution involved the acceptance of cash by the state legislator, but proof of a specific quid pro quo was minimal. The Fourth Circuit held that, absent such a quid pro quo, payments characterized as campaign contributions could still constitute extortion if the parties, in fact, never really intended them to be legitimate campaign contributions. The Court then went on to set out a number of circumstances which could be proven to show that the parties did not intend the payments to be proper campaign contributions.

Because the case deals with the concepts of extortion "under color of official right," the need to prove a quid pro quo, and campaign contributions to elected officials, it is possible that a Supreme Court decision in the McCormick case could have an impact upon many outstanding indictments and investigations. For this reason, it may be advisable to charge, where possible, violations of other statutes as well as the Hobbs Act. The possibility of using other statutory tools, such as 18 U.S.C. §666, 18 U.S.C. §1341, 1346 or 18 U.S.C. §1952 should be examined in state and local bribery cases. Inclusion of one of these alternate theories in a Hobbs Act indictment might serve to preserve a conviction if the McCormick decision results in the retroactive loss or limitation of current Hobbs Act law.

If you have any questions, please call Lee Radek, Public Integrity Section, Criminal Division, at (FTS) 368-1452 or (202) 514-1452.

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POINTS TO REMEMBER

American Bar Association Proposed Guidelines For Enforcement Of Section 6050I

The United States Attorneys' Bulletin, Vol. 38, No. 10, dated October 15, 1990, at p. 242, reported on the Justice Department's response to proposed guidelines submitted by the American Bar Association for enforcement of the cash fee reporting requirements of Internal Revenue Code Section 6050I. To clarify any misunderstanding resulting from the report, the Department has declined to adopt the requested guidelines and has no plans at this time to implement litigation guidelines with respect to Section 6050I summons enforcement actions.

If you have any questions, please call Miriam L. Fisher, Special Assistant to the Assistant Attorney General for the Tax Division at (FTS) 368-2574 or (202) 514-2574.

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Department Of Justice Symposia And "Justice"

The second of a series of Department of Justice symposia was held on November 16, 1990, at the Bonaparte Auditorium of the Federal Bureau of Investigation. The subject of discussion was the Voting Rights Act of 1965, and was led by Attorney General Thornburgh and Assistant Attorney General for the Civil Rights Division, John R. Dunne. Panel members were John Doar, Assistant Attorney General in charge of the Civil Rights Division at the time the bill was passed; Julian Bond, a journalist, civil rights leader and former Georgia State Senator; and Abigail M. Thernstrom, author of Whose Votes Count? Affirmative Action and Minority Voting Rights. The proceedings, along with other selected writings, will be published in the inaugural issue of the Department of Justice's biannual journal, Justice.

Please refer to Volume 38, No. 10, of the United States Attorneys' Bulletin, dated October 15, 1990, at p. 241, for a discussion of the first symposium on September 17, 1990, on the subject of the role of the Attorney General. Also included in that article is detailed information and guidelines for submitting articles to Justice for publication.

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Immigration And Naturalization Service

On November 6, 1990, Attorney General Dick Thornburgh announced the appointment of a group of senior executives to assist Commissioner Gene McNary in identifying and implementing reforms in the operation of the Immigration and Naturalization Service (INS). With the passage of the landmark Immigration Act of 1990, the Attorney General said it is important that INS be in a strong position to fulfill its new mandate under the statute.

Heading the review committee is Norman Carlson, who is an acknowledged expert in the criminal justice field after having served as Director of the Bureau of Prisons for 17 years. Also joining the group are Tony Moscato, Deputy Assistant Attorney General for Administration, Department of Justice, and Don Wortman, Director of Federal Programs, National Academy of Public Administration and a former executive with the Social Security Administration and the Central Intelligence Agency. They will be joined by other management experts within the Department of Justice and other governmental and private organizations.

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General Services Administration Services For The United States Attorneys' Offices

On November 20, 1990, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, forwarded a copy of comments from William Coleman, Commissioner, Public Building Services, General Services Administration (GSA), to all United States Attorneys, concerning the improvement of services provided by GSA to the United States Attorneys. Mr. Coleman's comments are as follows:

> U.S. Attorneys, nationwide, are important customers to us. I understand your increasing responsibilities and the importance of our actions in helping you meet these new challenges.
>
> One of my most important responsibilities at the Public Buildings Service is strengthening our organizational commitment to meeting agency "customer" needs. Our challenge is to provide an environment that complements your ability to perform your organizational responsibilities, which we are committed to doing.
>
> Success for us is measured by "making the best deal for the customer." We have to provide space which is attractive, convenient, conducive to your technology, and includes the amenities which allow you to recruit and retain the talented employees you must have. Our actions are demonstrating this resolve.
>
> The quality of space being constructed or leased for agencies is among the best ever in the Federal inventory. We are helping you design interiors that are contemporary, attractive, and that help you to be productive. Our buildings are located on mass transit routes to provide convenience and energy savings to your employees and your functions. We are including amenities in our buildings such as quality food service, child care centers, and fitness centers.
>
> We are starting new activities to continue improving our services. In nationwide focus groups, we are listening to our customers--in their cities. We are implementing a Quality Management Program, and our senior managers are the first ones being intensively trained. Our policies and procedures, our principles of doing business, and our performance and reward systems reflect our commitment to meeting your needs. Our recently implemented Strategic and Tactical Planning process helps guide us in achieving these goals. Yes, we have responsibilities to ensure that the taxpayers' money for buildings is well spent. This gives us regulatory responsibilities in addition to our service responsibilities. We will not use these regulatory responsibilities as an excuse for poor service.
>
> For U.S. Attorneys, we have put in place procedures for being responsive to your needs. Our regional offices have initiated special coordinating efforts to monitor this work. We look forward to improving our relationship with you.

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Fiscal Year 1990 Awards Statistics

Pursuant to the requirements of 5 CFR §531.507(d) and DOJ Order 1430.3A, Chapter 6, paragraph 43 (dated April 14, 1987), the following statistics for incentive awards were processed during FY 1990:

Total Quality Step Increases		
(Support Personnel Only)		278
GS 1 - 6	36	
GS 7 - 12	242	
GS 13 - 15	0	
GS 16 - up	0	
Total Special Achievements		
(Support and Attorney Personnel)		993
Sustained Superior Performance		666
GS 1 - 6	78	
GS 7 - 12	306	
GS 13 - 15	151	
GS 15 - up	131	
Special Act or Service		332
(Support and Attorney Personnel)		
GS 1 - 6	74	
GS 7 - 12	141	
GS 13 - 15	58	
GS 15 - up	54	
GM 13 - 15	5	

The Executive Office for United States Attorneys extends its congratulations to all award recipients and looks forward to your continued superior performance.

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United States Attorneys' Manual Bluesheets

Attached at the Appendix of this Bulletin as Exhibit G is a list of bluesheets that were issued during 1989 and 1990 by the Executive Office for United States Attorneys for inclusion in the United States Attorneys' Manual.

Each of these bluesheets has been approved by the Attorney General's Advisory Committee of United States Attorneys and will be incorporated into the first update to the 1988 Manual to be published in January, 1991.

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Office On Americans With Disabilities Act

On October 30, 1990, Attorney General Dick Thornburgh announced the creation of the Office on Americans With Disabilities Act within the Coordination and Review Section of the Civil Rights Division. The principal responsibility for this office will be the development and implementation of regulations regarding public accommodations and state and local government services provisions of the Americans with Disabilities Act (ADA).

The Attorney General said that the passage of this Act marks a milestone in our social and legal understanding of those who live among us with disabilities and is a responsibility the Department of Justice wholeheartedly accepts. In addition to implementing regulations for the Americans with Disabilities Act, the office will:

- o Develop a system with the Equal Employment Opportunity Commission and the Department of Labor to handle employment complaints under the Act;
- o Review the regulations of other federal agencies with ADA responsibilities;
- o Participate in various task forces working toward implementation of the ADA;
- o Issue a government-wide technical assistance plan to other federal agencies;
- o Provide technical assistance to places of public accommodation and state and local government agencies;
- o Design and implement a system to investigate complaints that are the responsibility of the Department of Justice; and
- o Determine if state and local accessibility codes meet ADA standards.

The mailing address is: Coordination and Review Section; Civil Rights Division, Department of Justice, P.O. Box 66118, Washington, D.C. 20035-6118. Telephone numbers: (202) 514-0301; TDD: (202) 514-0381 or (202) 514-0383.

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LEGISLATION

Analysis Of Money Laundering And Forfeiture Provisions In The Crime Control Act Of 1990

On October 27, 1990, Congress passed S. 3266, the Crime Control Act of 1990 and sent it to the President. While numerous provisions favored by the Criminal Division and the United States Attorneys were stripped from the bill in the House-Senate conference--e.g., the entire public corruption title, the bill does contain the debt collection bill long sought by the United States Attorneys, an expansion of prosecution authority for savings and loan fraud, numerous provisions protecting child victims of crime, firearms provisions, and other useful substantive amendments.

Provisions relating to money laundering fared relatively well in the House-Senate conference. The bill contains 32 provisions relating to money laundering and forfeiture ranging from purely technical amendments to useful substantive and procedural changes. Almost all of these are helpful to law enforcement, although one provision could cause serious problems for money laundering prosecutions in white collar crime cases. Unfortunately, there were also 24 other provisions -- particularly in the forfeiture area -- that were passed by either the House or the Senate but were not ultimately enacted.

Attached at the Appendix of this Bulletin as Exhibit H is an analysis of the provisions that were enacted, together with a brief summary of our wins and losses in this legislative session. If you have any questions, please call Stefan D. Cassella, Trial Attorney, Money Laundering Office, Criminal Division, at (FTS) 368-1758 or (202) 514-1758.

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Clean Air Act Amendments

Congress has passed and the President has signed the Clean Air Act Amendments, which substantially changes the current law. Of particular interest will be the new enforcement provisions. Among other helpful changes, knowing violations of the stationary source provisions, which used to be misdemeanors, will now be felonies (see the amended §113(c)), and evidentiary requirements for proving continuing or repeated violations have been streamlined (see §113(e)). More problematic are changes to the definitions of the terms "operator" and "person" for purposes of criminal enforcement. The new definitions exempt from criminal liability some employees who are not senior management (see §113(h)). More information on these provisions will follow.

During the legislative debate, the issue of environmental audits and their use in criminal prosecutions was discussed. The statute is silent regarding audits. However, the following passage is included in the Joint Explanatory Statement of Committee of Conference:

> Criminal fines and penalties are included for a range of violations of the Act, including negligent or knowing violations that result in the endangerment of others, knowing violations of State Implementation Plans (SIPs) that occur after the violator is on notice of the violation, knowing violations of certain sections in the permit title, and knowing violations of the acid rain title or the stratospheric ozone protection title. In addition, the agreement provides criminal fines and penalties for the knowing filing of false statements and other similar recordkeeping, monitoring, and reporting violations. Consistent with other recent environmental statutes, criminal violations of the Clean Air Act are upgraded from misdemeanors to felonies.
>
> The amendments add new criminal sanctions for recordkeeping, filing and other omissions. These provisions are not meant to penalize inadvertent errors. For criminal sanctions to apply, a source owner or operator must be on notice of the recordkeeping, information or monitoring requirements in question.
>
> Nothing in subsection 113(c) is intended to discourage owners or operators of sources subject to this Act from conducting self-evaluations or self-audits and acting to correct any problems identified. On the contrary, the environmental benefits from such review and prompt corrective action are substantial and section 113 should be read to encourage self-evaluation and self-audits.

> Owners and operators of sources are in the best position to identify deficiencies and correct them, and should be encouraged to adopt procedures where internal compliance audits are performed and management is informed. Such internal audits will improve the owners' and operators' ability to identify and correct problems before, rather than after, government inspections and other enforcement actions are needed.
>
> The criminal penalties available under subsection 113(c) should not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting an audit or while attempting to correct any deficiencies identified in the audit or the audit report itself should not ordinarily form the basis of the intent which results in criminal penalties.

136 Cong. Rec. H13201 (daily ed. Oct. 26, 1990)

The Environment and Natural Resources Division is currently preparing a draft policy to provide guidance to prosecutors regarding the use of audits in the context of criminal prosecutions under environmental laws. The Attorney General's Advisory Committee of United States Attorneys and the Environmental Protection Agency will be involved in this process as well.

If you have any questions, please call Jerry Block, Chief, Environmental Crimes Section, Environment and Natural Resources Division, at (FTS) 272-9877 or (202) 272-9877, or Criselda Ortiz, Acting Assistant Chief, Environmental Crimes Section, Environment and Natural Resources Division, at (FTS) 272-9897 or (202) 272-9897.

* * * * *

Antitrust Improvements Act Of 1990

President Bush has signed into law the Antitrust Improvements Act of 1990 that will increase to $10 million the maximum fine for a corporation found guilty of violating the antitrust laws. The new maximum signed by the President represents a ten-fold increase over the old maximum set in 1974. Under the old law, corporations could be fined only up to a $1 million maximum for violations of the Sherman Antitrust Act. An alternative maximum fine of twice the gain or loss caused by any federal criminal violation has existed since 1984, but proving gain or loss could be difficult where price fixing or bid rigging had increased prices to an unknown extent. And in many cases, the $1 million maximum would not have permitted courts to impose the fines the United States Sentencing Commission determined were appropriate for antitrust offenders.

Assistant Attorney General James F. Rill underscored the significance of the new $10 million fine. He said, "Rooting out price fixing and bid rigging is of crucial importance. The Antitrust Division currently has 140 active investigations into such conduct -- many in government procurement -- where antitrust conspiracies directly affect the federal budget and harm taxpayers. This new law makes unequivocally clear the strong support of Congress for the Department's antitrust efforts and the Sentencing Commission's tough approach to all white collar crime. We hope the message is heard."

* * * * *

Immigration Act Of 1990

The Immigration Act of 1990 is the most comprehensive reform of our immigration laws in 66 years. The Act accomplishes what the Administration sought from the outset of the immigration reform process: increasing immigration of skilled individuals to meet our economic needs while retaining our commitment to family reunification. It enhances America's singular advantage as an international magnet for eager and talented people.

The main features of the Act are:

- Total immigration levels will increase from 540,000 per year in 1989 to 700,000 per year in 1992-1994. Thereafter, immigration levels will be at least 675,000.

- Employment-based immigration will more than double, from 54,000 per year to 140,000 per year. New criteria will ensure most of these workers are highly skilled. This increase in skill-based immigration will help relieve labor shortages in key technical areas and improve the competitiveness of our workforce. A special investor provision will help create jobs in rural areas and bring investment capital into our country.

- Family-based immigration is increased in all major categories. Family-sponsored levels will be 520,000 per year through 1994. This figure includes a special allocation of 55,000 visas per year from 1992 through 1994 for spouses and minor children of persons granted amnesty in 1986. Starting in 1995, family-based immigration will be at least 480,000 per year.

- Forty thousand new visas per year are allocated to broaden the diversity or our immigrant pool. This number will rise to 55,000 per year starting in 1995. Education and work experience requirements will help ensure these immigrants can become productive members of our society quickly.

- Several outdated and restrictive immigration exclusion grounds are lifted. These changes are the first major update of the exclusion provisions in several decades.

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

Legal Counsel, Executive Office For United States Attorneys

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Executive Office for United States Attorneys' Legal Counsel's office, in Washington, D.C. Incumbent will function as the Deputy to the Legal Counsel and must have legal expertise in the areas of Personnel and Administrative Law, Equal Employment Opportunity, Ethics Statutes, and Standards of Conduct. In addition, applicants should be familiar with the workings of the Department of Justice. Previous supervisory experience is preferred along with work experience in a Chief Counsel/General Counsel's Office.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least five years post-J.D. experience. Applicants should submit a resume or SF-171 (Application for Federal Employment), writing sample, and current performance appraisal to: Executive Office for United States Attorneys, Department of Justice, Room 6207, Patrick Henry Building, 601 D. Street, N.W., Washington, D.C. 20530, Attn: John C. Summers, Personnel Management Specialist. The position is a GM-14 with a salary range of $50,342 to $65,444. This advertisement will remain open until the position is filled.

* * * * *

United States Marshals Service

The Office of Attorney Personnel Management, Department of Justice, is recruiting an experienced attorney for the Office of Equal Employment Opportunity, United States Marshals Service, to serve as Chief, Complaint Processing Branch. Incumbent will be responsible for the counselling, investigation and disposition of all EEO complaints filed against the Marshals Service.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Applicants must have at least three years of demonstrated experience in analyzing and adjudicating complaints of discrimination in the federal, public or private sector. Applicants should submit a resume or SF-171 (Application for Federal Employment), to: Richard J. Gillen, Personnel Management Division, United States Marshals Service, Suite 850, 600 Army Navy Drive, Arlington, Virginia 22202. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GM-13 ($42,601 - $55,381) to GM-14 ($50,342 - $65,444). This advertisement is in anticipation of future vacancies. No telephone calls, please.

* * * * *

Office Of Special Counsel For Immigration Related Unfair Employment Practices

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Office of Special Counsel for Immigration Related Unfair Employment Practices. The attorney will be primarily responsible for the investigation and litigation of charges filed with this Office under the antidiscrimination provision of the Immigration Reform and Control Act.

Applicants should have a minimum of one year of post-J.D. litigation, must possess a J.D. Degree and be an active member of the bar in good standing (any jurisdiction). In addition, applicants should be fluent in English and Spanish. Applicants should submit a resume or SF-171 (Application for Federal Employment), a recent writing sample, and at least three references familiar with the applicant's accomplishments and abilities to: Office of Special Counsel, P.O. Box 65490, Washington, D.C. 20035-5490, Attn: Gaylord Draper, Executive Officer. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($35,825 - $46,571) to GS-13 ($42,601 - $55,381). This advertisement is in anticipation of future vacancies.

* * * * *

Drug Enforcement Administration

The Office of Attorney Personnel Management, Department of Justice, is seeking experienced attorneys for positions in the following sections of the Office of Chief Counsel, Drug Enforcement Administration (DEA): Criminal Law Section; Civil/Administrative Law Section; Diversion/Regulatory Law Section; and Asset Forfeiture Section. All positions are at DEA Headquarters, Arlington, Virginia.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. experience. Specialized experience in the following areas of law is preferred: Criminal, International, Intelligence, Contracts, Administrative Litigation, Environmental, Pharmaceutical, Forfeiture, Banking and Commercial. Applicants should indicate area(s) of expertise and interest and submit a resume, an SF-171 (Application for Federal Employment), and a writing sample to the attention of each Section for which they wish to be considered to: Office of Chief Counsel, Drug Enforcement Administration, Washington, D.C. 20537. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($29,891 - $38,855) to GS-14 ($50,342 - $65,444).

* * * * *

Office Of U.S. Trustee

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Executive Office for United States Trustees in Atlanta; Milwaukee; Peoria; Los Angeles; Cleveland; and Newark. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the bankruptcy court and the U.S. District Court.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Current salary and years of experience will determine the appropriate grade and salary level. The possible range is GS-11 ($29,891 - $38,855) to GS-14 ($50,342 - $65,444). No telephone calls, please.

Applicants must submit a resume and a law school transcript to one of the following addresses listed below:

Office of the U.S. Trustee
1418 Richard Russell Bldg.
75 Spring Street, S.W.
Atlanta, Georgia 30303
Attn: Donald F. Walton

Office of the U.S. Trustee
175 W. Jackson Blvd., Room A-1335
Chicago, Illinois 60604
Attn: M. Scott Michael
(applies to position in Milwaukee)

Office of the U.S. Trustee
46 East Ohio Street, Room 258
Indianapolis, Indiana 46204
Attn: Kenneth C. Meeker
(applies to position in Peoria)

Office of U.S. Trustee
300 N. Los Angeles Street, Rm. 3101
Los Angeles, California 90012
Attn: Randall W. Moon

Office of U.S. Trustee
113 St. Claire Ave., N.W., Suite 200
Cleveland, Ohio 44114
Attn: Conrad J. Morgenstern

Office of U.S. Trustee
60 Park Place, Suit 210
Newark, New Jersey 07102
Attn: Novalyn Winfield

The Office of Attorney Personnel Management, Department of Justice, is also recruiting an individual to assist with the management of the legal activities of the Executive Office for United States Trustees in Boston; Los Angeles; Cleveland; Orlando; and Portland, Maine. Responsibilities include assisting with the administration and trying of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the United States Attorney's Office for possible prosecution, as well as supervising the administrative aspects of the office.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Applicants must have extensive management experience and at least five years of bankruptcy law experience. Current salary and years of experience will determine the appropriate grade and salary level. The salary level for the Assistant U.S. Trustee position could go up to $77,900. No telephone calls, please.

Applicants must submit a resume, salary history, and an SF-171 (Application for Federal Employment) to one of the following addresses listed below:

Office of the U.S. Trustee
10 Causeway St., Room 472
Boston, Massachusetts 02222-1043
Attn: Virginia Greiman
(also applies to position in Portland Maine)

Office of the U.S. Trustee
300 N. Los Angeles St., Room 3101
Los Angeles, California 90012
Attn: Edward I. Gold

Office of the U.S. Trustee
75 Spring St., S.W., Suite 1418
Atlanta, Georgia 30303
Attn: Donald F. Walton
(applies to position in Orlando)

* * * * *

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
10-21-88	8.15%	01-12-90	7.74%
11-18-88	8.55%	02-14-90	7.97%
12-16-88	9.20%	03-09-90	8.36%
01-13-89	9.16%	04-06-90	8.32%
02-15-89	9.32%	05-04-90	8.70%
03-10-89	9.43%	06-01-90	8.24%
04-07-89	9.51%	06-29-90	8.09%
05-05-89	9.15%	07-27-90	7.88%
06-02-89	8.85%	08-24-90	7.95%
06-30-89	8.16%	09-21-90	7.78%
07-28-89	7.75%	10-27-90	7.51%
08-25-89	8.27%	11-16-90	7.28%
09-22-89	8.19%	12-14-90	7.02%
10-20-89	7.90%		
11-16-89	7.69%		
12-04-89	7.66%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
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California, E	Richard Jenkins
California, C	Lourdes G. Baird
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Stanley A. Twardy, Jr.
Delaware	William C. Carpenter, Jr.
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Florida, M	Robert W. Genzman
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Illinois, C	J. William Roberts
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Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

DISTRICT	U.S. ATTORNEY
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Nebraska	Ronald D. Lahners
Nevada	Leland E. Lutfy
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South Dakota	Philip N. Hogen
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Tennessee, M	Joe B. Brown
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Virginia, E	Henry E. Hudson
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Washington, E	John E. Lamp
Washington, W	Michael D. McKay
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West Virginia, S	Michael W. Carey
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Wisconsin, W	Patrick J. Fiedler
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North Mariana Islands	D. Paul Vernier

* * * * *

Department of Justice

EXHIBIT A

FOR IMMEDIATE RELEASE
WEDNESDAY, DECEMBER 12, 1990

AG
202-514-3392
(TDD) 202-514-1888

ATTORNEY GENERAL THORNBURGH HIGHLIGHTS JUSTICE DEPARTMENT'S 1990 ACHIEVEMENTS; PRAISES NEW LAW ENFORCEMENT TOOLS

WASHINGTON, D.C. -- Attorney General Dick Thornburgh, citing a nearly 20 percent increase in resources and new legislative authority for far-reaching laws and stiffer penalties, said today that the Department of Justice has more tools in place than ever before to move decisively against white collar criminals, drug traffickers, corrupt public officials and others.

"Bolstered by a record $9.3 billion budget and tougher laws to punish white collar criminals, the Justice Department is better prepared to carry out our primary law enforcement missions of dismantling international drug cartels and bringing to justice financial executives who left the American taxpayer with the tab for their excesses during the 1980s," the Attorney General said.

"Thanks to the tireless efforts of President Bush and the Congress, the Department received a hefty budget increase which will enable us to put more agents in the field and more prosecutors into the courtroom," Thornburgh said in a year-end report to the Attorney General's Advisory Committee of U.S. Attorney's, a group of 16 U.S. Attorneys who consult with the

(MORE)

Attorney General on policy matters on behalf of all 93 of the nation's chief prosecutors.

"And they will be backed by a rigorous set of new laws in areas ranging from financial institution fraud, to civil rights to environmental protection," Thornburgh added.

"Coupled with our record authorization last year, the Department's operating budget has increased by $2.6 billion or 39 percent in the last two years," he said. This unprecedented infusion of resources has given us substantially more means to aggressively carry out our principal law enforcement efforts."

The 19.9 percent budget increase for FY 91 excludes prison construction and modernization costs but the Department received the President's full request of $1.7 billion for the prison system as well.

"The last 12 months have also seen the fulfillment of many of the Administration's most important policy initiatives, including the enactment of the most sweeping civil rights legislation in the last 25 years, the Americans With Disabilities Act (ADA); the entering into force of the United Nations Drug Convention, the first step toward establishing a worldwide drug law enforcement infrastructure; and the passage of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Act of 1990, which included new laws that will significantly aid our investigation and prosecution of those thrift executives who

investigation and prosecution of those thrift executives who bankrupted their institutions and left the American taxpayer holding the bag."

Thornburgh voiced his disappointment with Congress' failure, despite support in both the Senate and the House, to authorize a federal death penalty, and enact habeas corpus and exclusionary rule reform. "These fundamental reforms are long overdue," he said," and will be pursued again in the new Congress."

"I am especially pleased that the budgets for two of our priority areas of law enforcement -- drugs and financial institution fraud -- have been enhanced significantly. This year alone the Department will receive $114 million in new funding targeted specifically to investigating and prosecuting S&L crimes, bringing our total expenditures for this area to $160 million. Overall, 611 more prosecutors from various Justice Department components and United States Attorneys offices will be available through this increase.

"In addition, the enactment of new legislation has given us the necessary tools to enhance enforcement and assure that financial institutions are protected from any further fraud. From increasing penalties for certain offenses, to codifying new laws to cover the array of financial manipulations used in fraud schemes, to authorizing wiretap authority in S&L investigations,

(MORE)

"In another vital area, the Department's war on drugs was almost completely funded with a grand total of $3.8 billion allotted to our battle. The Drug Enforcement Administration's budget alone increased by $145 million to $694 million.

"Coupled with a sizeable increase in funds to hire additional Assistant United State Attorneys and other prosecutors, the virtual across-the-board increase in allocations to the Department's drug-fighting agencies (FBI, INS, Marshals Service, Organized Crime Drug Enforcement, Office of Justice Programs, Federal Prison System and others) is continuing evidence that investigation and prosecution of drug traffickers remain at the forefront of our priorities.

"Internationally, the Department has been active in establishing direct 'cop-to-cop' relations with many nations. Add to this the entering into force of the United Nations Drug Convention and international criminals, especially drug traffickers, are increasingly finding that there is no place to hide worldwide.

"Last summer I was especially proud when President Bush signed the ADA which extends to the nation's 43 million citizens with disabilities the same protection offered against discrimination based on race, sex, national origin and religion under the Civil Rights Act of 1964. This legislation will bring

under the Civil Rights Act of 1964. This legislation will bring millions of Americans with a wealth of skills into the mainstream of American life and business.

"I was also pleased to attend last month's signing at the White House of the most comprehensive reform of the nation's immigrations laws in 66 years. The Immigration Act of 1990 dramatically increases skill-based immigration (more than doubling employment-related immigration) and enhances our commitment to family reunification by increasing family-based immigration at all levels. It also provides for swift and effective deportation of aliens who commit violent crimes. The Immigration and Naturalization Service is given additional powers to keep our borders secure and continue in its mission as a frontline agency in the war on drugs.

"Last year also saw the creation of 85 much-needed new judgeships on the federal district and appeals court level. These additional judges will be able to reduce the backlog of cases in the federal courts that have resulted from increasing number of drug, financial fraud and other highly complex cases.

"Protecting our environment was another of the Department's priorities in 1990 and our efforts led to passage of two important pieces of legislation: the Clean Air Act and the Oil Pollution Act of 1990. Now, a knowing violation of this law is a felony punishable by a stiff jail term. Likewise, new criminal

authority has been added which allows the government to criminally prosecute persons who knowingly or negligently endanger the lives of other by releasing toxic chemicals. Civil judicial penalties and more effective citizen suit enforcement were also added.

"The Congress last year also approved a major overhaul of the fines for corporations under the Sherman Antitrust Act. Violating Section 1 of the Act now is punishable by fines up to $10 million, up from a limit of $1 million previously.

"And, of great benefit to our United States Attorneys, the Debt Collection Procedures Act was passed. This Act, which goes into effect in May 1991, gives us important new tools to help collect the millions of dollars owed to the government by providing uniform federal procedures and remedies.

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

RICHMOND TENANTS ORGANIZATION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:90CV00346
JACK KEMP, as Secretary of Housing and Urban Development, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STUART M. GERSON
Assistant Attorney General

HENRY E. HUDSON
United States Attorney

ARTHUR R. GOLDBERG
MARK W. BATTEN
Attorneys
Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-1285

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

RICHMOND TENANTS ORGANIZATION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:90CV00346
JACK KEMP, as Secretary of Housing and Urban Development, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Despite the plaintiffs' colorful portrayals, this case involves neither questionable conduct by the federal government nor even a particularly new legal issue. The federal defendants' efforts to remove drug dealers from public housing are solidly grounded in centuries-old forfeiture law, and their policy of requiring a warrant before seizure satisfies the constitutional holding of virtually every decided case on the issue.

As a threshold matter, none of these plaintiffs has established a case or controversy between themselves and the federal defendants: none of their leases has been seized, and there is no indication that the government's policy will cause them any injury in the future. On the merits, the plaintiffs' due process claim rests entirely on dicta in two recent decisions, suggesting that the many existing cases are all wrongly decided, and that the well-settled rule should give way to a new procedure that requires a full adversary hearing before real property may be seized. That conclusion is not widely

shared, nor has any circuit ever so held. This Court should not be among the first to elevate the plaintiffs' novel theory from dicta to holding because the majority view better balances the competing interests, acknowledging that the public interest carries significant weight in the balance while protecting the due process rights of the affected individuals.

The plaintiffs' statutory claim relies on a statute that never even mentions the federal government, but merely requires certain terms in contracts between tenants and local housing authorities. The plaintiffs' efforts to derive some federal obligation from this irrelevant statute ignore its plain language and intent. Even if the Housing Act did impose some duty on the federal defendants, it does not provide a private right of action to enforce its terms in federal court. Because neither the Constitution nor the Housing Act can support the plaintiffs' novel theories, the federal defendants are entitled to judgment as a matter of law.

STATUTORY AND REGULATORY BACKGROUND

Civil Forfeiture Law

Forfeiture of property connected to criminal offenses dates back at least to English common law, and perhaps much further. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974) (tracing history to Biblical precedents). A forfeiture action is usually a civil in rem proceeding, wholly separate from any possible criminal case, in which the government

may seize and forfeit[1] property merely by showing probable cause to believe that the property is connected to certain illegal activities. See, e.g., 19 U.S.C. § 1615 (forfeiture under the customs laws). In in rem proceedings, the property, not the owner or occupant, is the "defendant"; traditionally, therefore, the property must be seized before the court can exercise jurisdiction over the forfeiture action. See, e.g., Dobbins' Distillery v. U.S., 96 U.S. 395, 396 (1877).

The forfeiture statute at issue in this case, 21 U.S.C. § 881, provides for the civil forfeiture of various property connected to illegal drugs, ranging from the drugs themselves to proceeds and property used to facilitate the commission of drug offenses. See 21 U.S.C. § 881(a)(1)-(9). Congress added 21 U.S.C. § 881(a)(7) in 1984, permitting the forfeiture of real property, and in 1988 specifically amended the statute to include leasehold interests as property subject to forfeiture. See Pub. L. 100-690, § 5105, 102 Stat. 4301 (1988).

The statute permits the Attorney General to seize property subject to forfeiture pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. 21 U.S.C. § 881(b). Those rules provide that where the United States seeks forfeiture for federal statutory violations, the government need only file a verified complaint, and the clerk "shall forthwith issue a

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[1] Property is "seized" when the government initially takes control of it, before actually acquiring title. If the government ultimately prevails in the civil action, then the property is "forfeited," which means that title is transferred to the government.

summons and warrant for the arrest of the vessel or other property." Rule C(3). The rules (and therefore the federal statute) do not require any showing of probable cause or a warrant before seizure.

After the property is seized, individuals with an interest in the property may file a claim, and the case proceeds much like a civil action. However, as in forfeitures under the customs laws, the government bears the burden only of demonstrating probable cause that the property is subject to forfeiture, after which the burden shifts to the claimant to demonstrate that the government lacked probable cause or, in some cases, that the claimant was an "innocent owner," that is, that the claimant owned the property but did not know of or permit the illegal activity. See 19 U.S.C. § 1615 (incorporated into 21 U.S.C. § 881 by § 881(d)); 21 U.S.C. § 881(a)(7).

The Public Housing Leasehold Forfeiture Project

Although the language of the 1988 amendment to § 881(a)(7) covers all leasehold interests, the provision was targeted at drug dealers in public housing, to make clear that the broad definition of real property subject to forfeiture included public housing leaseholds. See 134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988). The Public Housing Leasehold Forfeiture Project is a joint effort by the Department of Housing and Urban Development and the Department of Justice to implement that amendment.

Despite the statute's permissive provision allowing seizure of real property under the Supplemental Rules, the federal

defendants' policy requires Assistant U.S. Attorneys to obtain a warrant, supported by probable cause, before seizing any real property, including public housing leaseholds.[2] Federal prosecutors work with local police and housing authorities to locate public housing units where the tenant appears to be distributing drugs and to gather evidence of illegal sales. The prosecutor then presents this evidence to a Magistrate to obtain a seizure warrant. If the Magistrate finds probable cause and issues the warrant, federal marshals then seize the property.

After seizure, the general policy is to permit tenants to remain in the apartment while the forfeiture action is pending if the tenants sign an occupancy agreement in which they agree to maintain the property in good repair. See Policy Statement at 2. However, if the Assistant U.S. Attorney determines that tenants in a particular case (1) pose a danger to law enforcement personnel or other tenants, (2) may continue to use the property for illegal activities, or (3) may damage the unit, the federal defendants' policy permits immediate eviction of the tenants while the forfeiture action is pending. See Policy Statement at 4-5.

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[2] See Memorandum from Cary H. Copeland to All United States Attorneys, "Departmental Policy Regarding Seizure of Occupied Real Property" (Policy Statement) at 1. A copy of the Policy Statement is attached as Exhibit A. As the Statement explains, Assistant U.S. Attorneys may also choose to proceed by merely "arresting" the property, that is, posting a Warrant of Arrest on the premises, which does not require prior judicial approval because it does not interfere with tenants' possession of the property. Id.

ARGUMENT

I. THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE THE PLAINTIFFS LACK STANDING

The various plaintiffs in this case have attempted to mount a sweeping, abstract assault on the Project, totally divorced from any particular facts of any specific case. Apparently unsure that any one of their number would have standing to pursue this academic challenge, the plaintiffs have collected several individuals and three organizations, alleging standing under numerous theories.

Despite the variety of these efforts, however, the Amended Complaint and the individual plaintiffs' affidavits fail to demonstrate that any of the plaintiffs in this case has satisfied the basic constitutional prerequisite of injury in fact. The Amended Complaint, drafted entirely in terms of threatened injury, does not even allege that either the individual plaintiffs or any member of the organizational plaintiffs has yet suffered any injury from the Project. Further, the vague allegations of future injury include no specific allegations to show that any of them has any reason to fear seizure in the future.

Even if the plaintiffs could make such allegations, however, the controlling precedent would bar these claims as hypothetical and speculative. Before any of the plaintiffs' leases could be subject to forfeiture, the plaintiffs must first give the federal defendants probable cause to believe that the plaintiffs have violated federal narcotics laws. The plaintiffs have not alleged

that they intend to violate the law, and the Court may not assume that they will. See O'Shea v. Littleton, 414 U.S. 488, 493-99 (1974). The Court should therefore dismiss the Amended Complaint for lack of standing.

A. The Individual Plaintiffs Lack Standing

The constitutional "bedrock" of standing doctrine requires plaintiffs, at an "irreducible minimum," to "'show that [they] personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[s].'"[3] Particularly where, as here, the plaintiff relies on a threat of future injury, "[a]bstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury.'"[4] These plaintiffs have utterly failed to show either that the federal defendants have taken any action against them under the Project or any well-founded fear that their leases will be subject to forfeiture in the future.

Plaintiffs Hopson, Robison, Washington, and Wright do not claim that the federal defendants have already inflicted any actual injury; none of their leases has been seized, nor has the government taken any other action against them under the Project. Their claim is much more nebulous: they merely allege that they

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[3] Valley Forge Christian College v. Americans United For Separation Of Church And State, 454 U.S. 464, 471-72 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

[4] O'Shea, 414 U.S. at 494 (quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923)).

will "live in fear" that someday the federal defendants might decide to seek forfeiture of their leases, Amended Complaint ¶ 22, even though neither the Amended Complaint nor the individuals' affidavits gives any reason to believe that these plaintiffs will ever be subject to the Project.

This vague assertion of possible future injury is hardly the "real and immediate" threat required by Article III; it is purely "conjectural" and "hypothetical." O'Shea, 414 U.S. at 494. The federal defendants' clear policy forbids participating U.S. Attorneys to seize public housing leaseholds until they obtain a warrant, supported by probable cause to believe that the property has been used to facilitate drug felonies. See Policy Statement at 1. To show any concrete threat that the federal defendants will take action against them, then, the plaintiffs would have to allege that the government has probable cause to seize their lease. Plaintiffs Hopson, Robison and Washington are residents of public housing in Richmond, which is one of the 23 jurisdictions participating in the Project.[5] However, their affidavits all recite that neither they nor anyone in their household has been convicted of any drug crime, nor do the affidavits provide any reason to believe that their leaseholds

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[5] Affidavit of Mamie Robison ¶¶ 1-2; Affidavit of Shirley Washington ¶ 1; Affidavit of Teresa Hopson ¶ 1. Plaintiff Wright is allegedly a resident of public housing in Baltimore, Maryland. See Amended Complaint ¶ 8. However, Ms. Wright has not provided the Court with an affidavit that attempts to establish her standing to sue, nor is there any allegation in the Amended Complaint that suggests Ms. Wright's lease may be subject to forfeiture under the Project.

are subject to forfeiture.[6] Nor do these plaintiffs allege that they intend to engage in any conduct in the future that would subject their leases to forfeiture.

The Supreme Court has long held that "absent an allegation of a specific threat of being subject to the challenged practices, plaintiffs [have] no standing to ask for an injunction." Allen v. Wright, 468 U.S. 737, 760 (1984) (collecting cases).[7] For example, in O'Shea, plaintiffs alleged that the defendants, a state magistrate and circuit judge, routinely discriminated against individuals on the basis of race in setting bond and sentencing. The Supreme Court held that even the plaintiffs who alleged they had been discriminated against by the defendants in the past lacked standing, because the threat of future injury depended on a long chain of speculative assumptions: that the plaintiffs would violate the law in the future, be arrested, charged, and brought before the defendants. 414 U.S. at 496. The Court held that "attempting to anticipate whether and when these respondents will be charged with crime and

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[6] See Robison Affidavit ¶ 7; Washington Affidavit ¶ 6; Hopson Affidavit ¶ 6. Moreover, as the U.S. Attorney's Office represented to the Court at the preliminary injunction hearing, that Office's policy (notwithstanding the Project) is never to seek immediate removal of tenants. Plaintiffs Robison, Washington, and Hopson therefore have even less reason to claim that they may be subject to summary removal.

[7] See also Babbit v. Farm Workers, 442 U.S. 289, 298-99 (1979) ("[w]hen plaintiffs 'do not claim that they have ever been threatened with prosecution, or that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court.") (quoting Younger v. Harris, 401 U.S. 37, 42 (1971)).

will be made to appear before either petitioner takes us into the realm of speculation and conjecture," and was "unable to conclude that the case or controversy requirement is satisfied by general assertions or inferences that in the course of their activities respondents will be prosecuted for violating valid criminal laws." Id. at 497; see also Rizzo v. Goode, 423 U.S. 362 (1976); Golden v. Zwickler, 394 U.S. 103, 109-10 (1969).

The individual plaintiffs' allegations here are even sparser than those rejected in O'Shea. These plaintiffs do not even assert that they or someone in their household may violate drug laws in the future and be subject to the forfeiture statute. Even if they had, just as in O'Shea, their allegations that they might be evicted would rely on a chain of unsupported inferences and assumptions: that local police would become aware of their illegal activities, report them to the U.S. Attorney, and that the U.S. Attorney would then decide not only to seize their leasehold but to evict them as well. Based on the facts provided in their affidavits, the individual plaintiffs have no reason to "live in fear" that the federal defendants may seize their leases. If these individuals have standing to challenge the forfeiture of real property, then every other homeowner or tenant in the United States must also. Permitting these individuals to rely on such baseless assertions would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." U.S. v. SCRAP, 412 U.S. 669, 687 (1973). The Court therefore should dismiss

plaintiffs Hopson, Robison, Washington and Wright for lack of standing.

B. The Organizational Plaintiffs Lack Standing

Not content to rest standing solely on the individual plaintiffs, three organizations also challenge the government's policy on behalf of themselves, their members, and even other nonmember tenants. Without a single affidavit or even a concrete allegation of injury on which to rely, however, these plaintiffs have also failed to establish injury in fact, and the Court should dismiss them for lack of standing.

1. The Organizational Plaintiffs Have Alleged No Injury To Their Own Interests

The Richmond Tenants Organization (RTO) and the Resident Advisory Board of the Housing Authority of Baltimore City (RAB) each claims to sue not only on behalf of its members but "in its own right."[8] When organizations allege injury to themselves, they must satisfy the same standing tests as any other litigant, and show, among other things, that the defendants have caused some direct injury to them that is distinct from any injury suffered by their members. See, e.g., Valley Forge, 454 U.S. at 476 n.14.

These organizations have not even alleged such an injury. They cannot show, for example, that the federal defendants' implementation of the Project interferes with their ability to

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[8] Amended Complaint, ¶¶ 5, 7. Plaintiff National Tenants Organization (NTO) does not reveal whose interests it represents, see Amended Complaint ¶ 4, but presumably also sues on its own behalf and on behalf of its members.

recruit members, solicit contributions, or gain access to information, or that it harms them in any other way as organizations. See, e.g., UAW v. Brock, 783 F.2d 237, 246-47 (D.C. Cir. 1986); Taxation With Representation v. Regan, 676 F.2d 715, 722-23 (D.C. Cir. 1982), rev'd on other grounds, 461 U.S. 540 (1983). The only government action they challenge -- seizure of individual public housing leaseholds -- affects only their members' interests. The only possible injury that these organizations can assert themselves is to their generalized ideological interest in promoting the legal rights of tenants. But "harm to an interest in 'seeing the law obeyed or a social goal furthered' does not constitute injury in fact." Dellums v. U.S. NRC, 863 F.2d 968, 972 (D.C. Cir. 1988) (quoting American Legal Found. v. FCC, 808 F.2d 84, 92 (D.C. Cir. 1987)). As organizations, these plaintiffs can claim no more than this, and any standing they may have must be derived from their representation of their members.

2. The Organizations Have Failed To Establish Any Injury In Fact To Their Members

In Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), the Supreme Court summarized the three requirements for an organization to assert standing based on injury to its members:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 343; see also Warth v. Seldin, 422 U.S. 490, 511 (1975). The plaintiffs here have failed to satisfy at least the first and third requirements of the Hunt test.

First, the organizations have failed to demonstrate that any of their members would have standing to sue. Although RTO and RAB allege generally that they sue on behalf of those members who will be "deprived of their homes and their federally guaranteed rights to live without fear of being unconstitutionally deprived of their homes," Amended Complaint ¶¶ 5, 7, their allegations are as unsupported as the individual plaintiffs: neither organization presents any affidavit nor even any specific factual allegations to demonstrate that any of their members' leaseholds either has been or is likely to be subject to forfeiture under the Project. The National Tenants Organization does not even allege that any of its members would be affected. See Amended Complaint ¶ 4. To meet their burden of establishing standing, these organizations must provide not only affidavits from their members, but specific factual details in those affidavits demonstrating that those members are likely to lose their leases under the Project.[9]

This particularized showing is especially important here, because it appears that not all public housing tenants in Richmond and Baltimore are members of RTO and RAB, respectively.

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[9] See, e.g., Lujan v. Nat'l Wildlife Federation, 110 S. Ct. 3177, 3185-89 (1990) (rejecting organizational standing where the two affidavits submitted did not provide specific facts demonstrating injury in fact).

See Amended Complaint ¶¶ 5, 7 (RTO and RAB sue on behalf of their "members and public housing tenants who will be deprived . . .") (emphasis added). Similarly, the National Tenants Organization is merely an association of several other (unnamed) tenants' organizations, and the Amended Complaint does not claim that NTO's member associations are comprised of all public housing tenants in their respective cities. Therefore, even if the Court were willing to presume that some public housing tenant in Richmond, Baltimore, or some other city would have standing to sue,[10] it is far from clear that any member of these three organizations would have standing.

However, the organizations' inability to establish standing runs much deeper than merely failing to provide affidavits. Even if they could provide a member's affidavit that showed a likelihood of forfeiture, the claim would still be "conjectural" and "hypothetical" under O'Shea. As explained supra pp. 9-10, in that case the Supreme Court refused to find standing because none of the plaintiffs would suffer any injury unless they were arrested. Similarly, no member of the plaintiff organizations will be subject to the Project unless he or she first gives the government probable cause to believe that he or she has violated federal drug laws. See 414 U.S. at 496-97. Thus, the organizational plaintiffs have failed the first prong of the Hunt

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[10] The Supreme Court specifically held in Lujan, however, that on a motion for summary judgment the Court may not presume any facts that would support standing; they must be specifically averred. Lujan, 110 S. Ct. at 3189.

test, because they have not provided any affidavits showing a specific threat of injury, and even if they could their claim would necessarily be too speculative tc satisfy the demands of Article III.

The organizations' standing also stumbles on the third Hunt requirement, because the potential conflict of interest between these organizations' position in this case and the views of their members requires individual participation. Where there is disagreement between an organization and its membership, or among its members, over the position taken in litigation, the organization fails the third prong of Hunt because it cannot presume to speak for its entire membership. See, e.g., Associated Gen'l Contractors v. Otter Tail Power Co., 611 F.2d 684, 691 (8th Cir. 1979); cf. Harris v. McRae, 448 U.S. 297, 321 (1980).

Such a conflict is likely here. These organizations are composed of individual public housing tenants, the vast majority of whom presumably have never participated in any drug activity and whose safety is constantly threatened by drug dealers in neighboring units. These members may well believe that their interests are better served by removing drug dealers from public housing as quickly and as efficiently as possible. Even if some members agree with the organizations' efforts in this case to impose more burdensome procedural requirements, the possibility of disagreement among members is pronounced, and these

organizations have not even alleged that a majority of their members agrees with their position.

In every other case to address the constitutional question at issue here, the claim was raised by an individual whose home or lease had been seized, and who therefore had clearly suffered an injury that the court could redress. In contrast, the seven plaintiffs in this case have suffered no injury, and nothing in the record even suggests that any of these plaintiffs will suffer any injury in the future from the Project. Their premature attack seeks a purely advisory opinion on the constitutionality of government conduct, without reference to any concrete facts. None of the plaintiffs has standing, and the Court should dismiss the Amended Complaint on this ground alone.

II. THE CONSTITUTION DOES NOT REQUIRE A FULL ADVERSARY HEARING BEFORE SEIZURE OF REAL PROPERTY

In many cases, the government may not seize property, at least on behalf of private parties, without prior notice and a hearing. Fuentes v. Shevin, 407 U.S. 67 (1972) (prejudgment replevin).[11] However, the Fuentes rule is not absolute,

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[11] See also North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975) (prejudgment attachment of bank account); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages). But see Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (prejudgment seizure of consumer goods, rejecting Fuentes); id. at 628 (Powell, J., concurring) (describing Fuentes as "a significant departure from past teachings as to the meaning of due process"); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931) ("[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate").

particularly where the government itself initiates seizure to protect a general public interest. Fuentes itself explained at length that the Court has always allowed no-notice seizures where three requirements are met: (1) the seizure is necessary to protect a general public interest, as opposed to private claims; (2) there is a "special need for very prompt action"; and (3) the government initiates the seizure only after a government official determines that seizure is "necessary and justified in the particular instance." Id. at 91. None of these requirements was satisfied in Fuentes, but the Court has repeatedly found these elements in a wide variety of situations where the government itself seizes property to protect the public interest, ranging from tax collection to mislabeled vitamins. See id. at 92 (collecting cases).

Because those three requirements are also met when the government seizes real property for forfeiture under the drug laws, the Constitution does not require preseizure process, and the dicta on which the plaintiffs rely simply misinterprets the Supreme Court's holdings on this issue. Moreover, even if the Court should conclude that due process does require some pre-seizure procedure where real property is involved, virtually every court to consider the issue has held that a warrant requirement satisfies the Constitution, and there is neither a practical need nor a constitutional requirement that the courts conduct the full adversary hearing that the plaintiffs demand.

A. The Constitution Permits Seizure Of Real Property Under 21 U.S.C. § 881 Without A Warrant

In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 676-80 (1974), the Supreme Court held that the Fuentes factors are satisfied whenever the government seizes property for forfeiture under the drug laws, and that the government may therefore seize such property without a hearing, notice to the owner, or even a warrant.[12] Recently, however, two circuits have declared in dicta that Calero-Toledo does not apply to forfeitures of real property, even though neither that case nor the federal statute draws any distinction between real and personal property.[13] The Eleventh Circuit has rejected this novel distinction,[14] and the other circuits (including the Fourth) have not considered the issue. However, Calero-Toledo makes clear that preseizure process is never required in forfeiture actions regardless of the nature of the property to be

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[12] See also U.S. v. Von Neumann, 474 U.S. 242, 249 n.7 (1986); U.S. v. $8,850 in Currency, 461 U.S. 555, 562 n.12 (1983).

[13] U.S. v. Premises and Real Property Located at 4492 S. Livonia Road, 889 F.2d 1258 (2d Cir. 1989) (dicta); Application of Kingsley, 802 F.2d 571 (1st Cir. 1986) (dicta) (opining that full adversary hearing is required prior to seizure of real property).

[14] The Eleventh Circuit has twice held that Calero-Toledo does not distinguish between real and personal property, and permits the government to seize real property without even a warrant. U.S. v. Certain Real Property Located at 4880 S. Dixie Highway, 838 F.2d 1558, 1561 (11th Cir. 1988); U.S. v. A Single Family Residence, 803 F.2d 625, 632 (11th Cir. 1986). The Western District of North Carolina reached the same conclusion in U.S. v. 1.678 Acres of Land, 671 F. Supp. 413, 415 (W.D.N.C. 1987).

seized, and the contrary dicta in Kingsley and Livonia Road simply misinterprets the plain language of these decisions.

In Calero-Toledo, the Pearson Yacht Leasing Company leased a yacht to two individuals. Puerto Rican authorities found marijuana aboard the vessel, and seized it without notice to either the lessees or the company. The company brought suit, claiming that the no-notice seizure violated due process.

The Supreme Court rejected this claim, holding that all three Fuentes factors existed. First, the Court held that seizure of property for forfeiture "serves significant government purposes": it provides the court with jurisdiction over the in rem forfeiture action,[15] and serves the public interest in preventing further illegal activity. 416 U.S. at 479.

Second, the Court held that Fuentes' requirement of a "special need for very prompt action" was also satisfied. The Court noted that the property seized "will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." Id. Third, the Court noted that seizures for forfeiture occur only after a government official determines that seizure is necessary in the particular circumstances. Id.

The Supreme Court did not distinguish between real and personal property in determining the demands of due process, but

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[15] The Fuentes Court had suggested that seizure to acquire jurisdiction is a "clearly a most basic and important public interest" that alone justified a no-notice seizure. 407 U.S. at 91 n.23 (citing Ownbey v. Morgan, 256 U.S. 94 (1921)).

broadly held that "seizure for purposes of forfeiture is one of those '"extraordinary situations" that justify postponing notice and an opportunity for a hearing.'" 416 U.S. at 677 (quoting Fuentes, 407 U.S. at 90). The Second Circuit simply ignored this holding when it stated the exact opposite in Livonia Road: "Calero-Toledo did not hold that seizure for purposes of forfeiture without more was an extraordinary situation justifying the postponement of notice and an opportunity for a hearing until after the seizure." 889 F.2d at 1263-64.

In Livonia Road, the government had seized a remote farm and 120 acres of land from an individual who was later convicted of several cocaine charges. The government obtained a warrant before seizing the property and permitted the individual to live there while the forfeiture suit was pending. Despite these steps and Calero-Toledo's plain language, the Second Circuit declared that the Supreme Court's decision did not mean what it said, but applied only to movable personal property, that seizure of real property can never satisfy the Fuentes criteria, and that the Constitution requires a full adversary hearing prior to seizure whenever the government seeks forfeiture of real property. 889 F.2d at 1263-1265.

The court justified this departure from the plain language of Calero-Toledo by focusing on one sentence in the Supreme Court's opinion: the Court had mentioned that the yacht in Calero-Toledo could be moved out of the jurisdiction, while real

property cannot. Id.[16] The Second Circuit then leaped from this slender reed to the sweeping conclusion that Fuentes' "need for prompt action" can never be satisfied when the government seizes real property.

To reach this conclusion, the Livonia Road decision had to ignore not only the Supreme Court's express statement that seizure for purposes of forfeiture never requires notice and a hearing, but the Court's analysis of the other two Fuentes factors, that is, that seizure for forfeiture under the drug laws serves the public interest and is initiated only after the government determines that it is necessary in each particular case.

Even leaving aside these issues, the Second Circuit plainly misinterpreted the Supreme Court's analysis of the "prompt action" requirement. It is obviously true that real property, unlike a yacht, currency, or other personal property, cannot be removed from the jurisdiction. But Calero-Toledo did not hold that mobility of the property is the only way to establish a need to move quickly; the Court simply noted that "the property seized -- as here, a yacht -- will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679 (emphasis added). If a need for prompt action exists, the

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[16] The Supreme Court did not mention the mobility of the yacht at all except in this one sentence of its 27-page opinion. Nevertheless, Livonia Road characterized the Court's opinion on this issue as "[c]entral to its holding." 889 F.2d at 1263.

Fuentes criterion is satisfied, and it does not matter whether the property is fixed or mobile. Thus the Second Circuit's observation that "a home cannot be readily moved or dissipated," 889 F.2d at 1265, should have begun its analysis, not completed it.

The government necessarily has a profound need to move quickly when it has probable cause to believe that public housing tenants are using their unit to commit drug felonies, both to stop the use of the property for illegal purposes and to protect other tenants, despite the fact that the tenants cannot remove their leasehold from the jurisdiction. In U.S. v. A Building Known As 16 Clinton Street, 730 F. Supp. 1265 (S.D.N.Y. 1990), the district court rejected its own circuit's analysis of the government's interests in Livonia Road. The court noted that the 120-acre farm in Livonia Road was isolated and not the scene of ongoing drug activity, and held that where the government has probable cause to believe that the premises are continuously used for drug activities, the government has a need for prompt action despite the fact that the property is immobile, and that seizure without a hearing satisfies the exception described in Fuentes and Calero-Toledo. Id. at 1272.

Indeed, the Second Circuit itself has recently agreed that the possibility of continued drug activity satisfies the "prompt action" requirement. In U.S. v. 141st Street Corp., 911 F.2d 870 (2d Cir. August 17, 1990), the Second Circuit upheld the no-notice seizure of an entire apartment building, despite the

immobility of the six-story building. The court held that the "prompt action" requirement was satisfied because police had reason to believe that drug trafficking would continue and that the owner of the building may have known of the activity, and that therefore "prior notice of the seizure might have hampered efforts to enforce the narcotics laws and increased the risk to police and the community from the seizure." That fact is no less true when the government seizes public housing leaseholds. Calero-Toledo did not distinguish between real and personal property, and its holding controls this case.

B. Even If The Constitution Required Some Preseizure Procedure, A Warrant Would Satisfy That Requirement

In its rush to create a new constitutional rule for real property seizures, Livonia Road overlooks yet another step in the analysis. If the Court should conclude, notwithstanding Calero-Toledo, that due process requires some procedure before seizure of real property, the Court must also determine how elaborate the Constitution requires those procedures to be. This question of "how much process is due" requires the Court to balance the three factors set out in Mathews v. Eldridge, 424 U.S. 319, 335 (1975): (1) the claimant's interest, (2) the government's interest, and (3) the risk of erroneous deprivations under the current procedure and the probable value of additional procedures. With few exceptions, even those courts adopting Livonia Road's unfounded distinction between real and personal property have held that the government must only obtain a warrant before

seizure, not conduct a full adversary hearing.[17] Livonia Road was able to strike a different balance only with its thumb on the scale, ignoring the government's interest and overestimating both the practical need and the constitutional requirement for procedures beyond a warrant.

First, Livonia Road's determination that the Constitution requires an adversary hearing before seizure of real property was largely driven by its evaluation of the individual's interest. The court held that the individual's expectation of privacy in the home merits such "special constitutional protection" that a warrant is constitutionally insufficient. 889 F.2d at 1264. In requiring a full hearing, however, the court relied almost entirely on Fourth Amendment cases, all of which merely require the government to obtain a warrant before searching private residences.[18] Thus, the Second Circuit's analogy to Fourth

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[17] See, e.g., U.S. v. 26.075 Acres, 687 F. Supp. 1005 (E.D.N.C. 1988); U.S. v. Real Property Located At 25231 Mammoth Circle, 659 F. Supp. 925 (C.D. Cal. 1987); U.S. v. 124 E. North Avenue, 651 F. Supp. 1350 (N. D. Ill. 1987); U.S. v. Certain Real Estate Property, 612 F. Supp. 1492 (S.D. Fla. 1985); U.S. v. $128,035 in Currency and Real Estate Known As 1325-1337 W. Fifth Avenue, 628 F. Supp. 668, 674-75 (S.D. Ohio 1986), appeal dismissed, 806 F.2d 262 (6th Cir. 1986). Reviewing a later award of attorney's fees, the Eleventh Circuit went even further than the district court's decision in Certain Real Estate Property, holding that no preseizure process is required for either real or personal property "insofar as this circuit is concerned." 4880 S. Dixie Highway, 838 F.2d at 1562 n.8. But see U.S. v. A Leasehold Interest In Property Located at 850 S. Maple, No. 90-CV-71173 (E.D. Mich. July 30, 1990) (following Livonia Road); U.S. v. Parcel I, Beginning At A Stake, 731 F. Supp. 1348 (S.D. Ill. 1990) (same).

[18] See, e.g., U.S. v. Karo, 468 U.S. 705, 714 (1984) ("private residences are places in which the individual normally

(continued...)

Amendment cases, while apt, does not support its conclusion. Quite to the contrary, the analogy establishes that the federal defendants' warrant requirement properly accommodates the individual's expectation of privacy.[19] Therefore, even if an individual's interest in her home weighs more heavily in the Mathews balance than the yacht in Calero-Toledo, it does not require a preseizure adversary hearing.

Second, Livonia Road misjudged the government's interest, dismissing it as "the narrow one of obtaining pre-notice seizure of a fixed item." 889 F.2d at 1265. As the Supreme Court recognized in Calero-Toledo, however, immediate seizure promotes the public's undeniable interest in "preventing continued illicit use of the property and in enforcing criminal sanctions." 416 U.S. at 679. Furthermore, requiring the government to tip its

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[18](...continued)
expects privacy free of governmental intrusion not authorized by a warrant") (emphasis added), quoted in Livonia Road, 889 F.2d at 1264; G.M. Leasing Corp. v. U.S., 429 U.S. 338, 354, 358-59 (1977) (invalidating warrantless seizure of private property), cited in Livonia Road, 889 F.2d at 1264.

[19] The Supreme Court has also noted that the claimant's interest is diminished when neither party has an undivided interest in the property, and in fact has permitted postponement of the hearing in those cases. See North Georgia Finishing v. Di-Chem, Inc., 419 U.S. 601, 607 (1975) (prejudgment garnishment); Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974) ("[B]oth seller and buyer had current, real interests in the property, and . . . [r]esolution of the due process question must take account not only of the interests of the buyer but those of the seller as well"). Similarly, when the government has probable cause to believe that property is subject to forfeiture, the government has at least as strong a property interest as the claimant. See 21 U.S.C. § 881(h) (vesting "[a]ll right, title and interest" to the property in the United States "upon commission of the act giving rise to forfeiture").

hand prematurely, advising individuals that the government has probable cause to believe crimes have been committed, would totally frustrate both federal plans to forfeit the property and local law enforcement efforts to arrest the individuals. By tying the government's hands and broadcasting the fact of an investigation, prior notice would ensure an opportunity for the tenants to move their drug operations to another housing unit or complex before the government can either arrest them or seize the unit. The Supreme Court has repeatedly upheld no-notice deprivations of liberty or property in numerous situations where the government's interest was far less weighty than the public interest here, including seizures of defective goods,[20] tax collection,[21] preventing bank failures,[22] maintaining decorum in school,[23] and even to protect the public's interest in fair horse

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[20] See, e.g., Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 600 (1950) (no-notice seizure of misbranded but harmless vitamins); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of diseased poultry in cold storage).

[21] E.g., Bob Jones Univ. v. Simon, 416 U.S. 725, 747 (1974) (no-notice revocation of tax exempt status); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931) (summary collection of taxes).

[22] E.g., Fahey v. Mallonee, 332 U.S. 245 (1947) (upholding statutory authority of Federal Home Loan Bank Administration to assume management of any savings and loan conducting business unsafely).

[23] See, e.g., Ingraham v. Wright, 430 U.S. 651 (1977) (no prior hearing necessary before administering corporal punishment to schoolchildren); Goss v. Lopez, 419 U.S. 565, 582-83 (1975) (permitting exception from the general rule that notice and a hearing must precede removal of a student from school where the student's presence might "disrupt[] the academic process").

races.[24] The federal government's undeniable interest in preventing further use of public housing units for drug sales, especially where police have probable cause concerning a particular unit, far outweighs any minimal additional value of providing a full trial rather than an ex parte warrant.

Finally, and perhaps most importantly, the Mathews v. Eldridge balancing test tips decidedly in the government's favor on the second prong: the likelihood of erroneous deprivation through existing procedures and the value of additional safeguards. Here, requiring a warrant before seizure virtually eliminates the possibility of incorrect seizure, and the adversary hearing proposed by the plaintiffs and Livonia Road would add very little to the accuracy of the determination. As the Supreme Court has explained, the Constitution requires only that the procedures used be "reasonably reliable":

> the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." [citation omitted] And, when prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Mackey v. Montrym, 443 U.S. 1, 13 (1979).

The warrant requirement at issue in this case more than satisfies this flexible test. Under current policy, no apartment

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[24] See Barry v. Barchi, 443 U.S. 55 (1979) (upholding suspension of trainer's license without prior hearing where urinalysis reveals drugs in horse's system).

can be seized until a neutral judicial officer determines that probable cause exists to believe that the property has been used to facilitate drug crimes. This is the same standard courts have always applied in deciding whether an individual may be temporarily "seized," and a determination that probable cause exists to seize property surely constitutes a "reasonably reliable basis" to conclude that government officials have a factual foundation for their accusations.

Moreover, unlike most civil cases, where the plaintiff must prove its case by a preponderance of the evidence, in the forfeiture proceeding that follows seizure the government need only prove that it has probable cause to believe that the property is subject to forfeiture. The burden then shifts to the claimant, to show (for example) that the government seized the wrong apartment or, in this case, to show that the illegal activity occurred without the claimant's "knowledge or consent." 21 U.S.C. § 881(a)(7); see 19 U.S.C. § 1615. Thus, in demonstrating probable cause to obtain a warrant, the government must bear a burden that no civil plaintiff faces in any other context: it requires the government to meet its entire burden of proof and establish a prima facie case before filing a complaint. This requirement leaves little "risk of an erroneous deprivation of [the claimant's] interest." Mathews, 424 U.S. at 335.

There is therefore no reason to require "additional or

substitute procedural safeguards." Id.[25] In obtaining a warrant, the government must already prove its case before seizure; a hearing requirement would merely permit the claimant to assert affirmative defenses before seizure as well. Essentially, then, the plaintiffs demand that the entire forfeiture case be heard before the leasehold is seized, without any indication that such an extraordinary procedure would even marginally improve the accuracy of the magistrate's seizure determination.

III. PLAINTIFFS HAVE NO CAUSE OF ACTION AGAINST THE FEDERAL DEFENDANTS UNDER THE HOUSING ACT

Plaintiffs also search for a statutory basis for their due process claims in the United States Housing Act of 1937, specifically 42 U.S.C. §§ 1437d(k) and (l). The federal defendants are entitled to judgment as a matter of law on this claim because the plaintiffs cannot demonstrate either a right or a remedy under the Housing Act. By its plain terms, the Housing Act applies only to local public housing authorities (PHAs), not to the federal government, and even if the plaintiffs could establish some statutory duty on the federal defendants, Congress

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[25] Livonia Road dismissed this prong of the Mathews test in a single sentence, summarily concluding that "although an ex parte probable cause determination . . . reduces the possibility of an erroneous deprivation, preseizure notice and an opportunity to be heard would certainly further minimize the risk." 889 F.2d at 1265. This truism simply begs the question. More elaborate procedures will often incrementally reduce the risk of erroneous deprivations; the relevant issue, which Livonia Road failed to address, is whether that minor improvement justifies the burdens it imposes on the competing interests.

did not intend to confer any implied right of action to enforce it in federal court.

A. The Housing Act Sections On Which The Plaintiffs Rely Impose No Obligation On The Federal Defendants

Congress declared in the Housing Act that its purpose was "to assist the several States" in providing lower-income housing, and "to vest in local public housing agencies the maximum responsibility in the administration of their housing programs." 42 U.S.C. § 1437. Consonant with this policy, the statute does not provide for direct federal development and management of local housing projects, but merely provides federal funds to assist local efforts. In exchange for those funds, the statute requires PHAs to comply with numerous restrictions, but no provision of the Housing Act even suggests that the Department of Housing and Urban Development must also comply with these terms, much less the Attorney General or the Department of Justice. The plaintiffs cannot prevail on their statutory claim because the statute imposes no duty on the federal defendants.

The sections on which the plaintiffs rely, 42 U.S.C. §§ 1437d(k), (l), are like countless other federal statutes: they condition grants of federal funds to public housing authorities (PHAs) on acceptance of certain restrictions, such as implementation of a grievance procedure and inclusion of certain language in the contracts PHAs enter into with tenants. See, e.g., South Dakota v. Dole, 483 U.S. 203 (1987) (conditioning federal highway funds on states' adoption of drinking age of 21).

But Congress' imposition of these duties on PHAs imposes no similar limitation on the federal government. First, the scope of the grievance procedure in § 1437d(k) is limited to local disputes, guaranteeing tenants a right to certain process only when the local housing agency proposes some adverse action against a tenant. See, e.g., §§ 1437d(k)(1), (6). The only federal responsibility this statute imposes is to issue regulations repeating this requirement, which the Secretary has done. See 24 C.F.R. Part 966.

Similarly, § 1437d(l) does not mention the federal government at all: it merely requires that PHAs agree to various terms in their leases with tenants. It "obligate[s] the public housing agency to maintain the project," and "require[s] that the public housing agency may not terminate the tenancy except for serious or repeated violation" of the lease (emphasis added). Whatever responsibility the PHA may have in terminating public housing leases, these sections do not limit the federal government's authority to evict tenants.

The plaintiffs' interpretation conflicts not only with the clear language of the Housing Act, but with other federal statutes. If the plaintiffs' interpretation were correct, the provisions of the Housing Act requiring notice and a hearing would directly conflict with the provisions of 21 U.S.C. § 881(a)(7) and § 881(b), which together permit the Attorney General to seize public housing leaseholds without either notice or a hearing. Of course, where possible, courts in interpreting

apparently conflicting statutes should "steer a 'middle course that vitiates neither provision but implements to the fullest extent possible the directive of each.'" United Hospital Center v. Richardson, 757 F.2d 1445, 1451 (4th Cir. 1985) (quoting Citizens To Save Spencer County v. EPA, 600 F.2d 844, 871 (D.C. Cir. 1979)). Here, the Court can avoid the conflict by reading the Housing Act as it was written: as a limitation on PHAs, not on the federal government.

B. The Housing Act Does Not Confer A Private Right Of Action

Mere allegations of federal question jurisdiction under 28 U.S.C. § 1331 do not, without more, create a right to federal court review. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. Univ. of Chicago, 441 U.S. 677, 688 (1979). Rather, plaintiffs can maintain a cause of action under the Housing Act only if they can show that "Congress affirmatively intended to imply the existence of a . . . private remedy." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assn., 453 U.S. 1, 17 (1981). Where Congress intends to authorize private suits, it generally includes an explicit statutory provision for them, and the Supreme Court has rarely created a new cause of action where Congress has not expressly provided for one.[26] The Housing Act

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[26] See, e.g., Sea Clammers, 453 U.S. at 13; Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639-40 (1981); California v. Sierra Club, 451 U.S. 287, 297 (1981); (continued...)

contains no such provision, and every indication of legislative intent here weighs against implication of a private right of action. Thus, even assuming that the plaintiffs could uncover some federal duty in the Act, they still would have no statutory cause of action against any defendant in this case.

The Fourth Circuit has already rejected efforts to create a private right of action under 42 U.S.C. § 1437d, the section on which the plaintiffs rely in this case. See Perry v. Housing Authority of the City of Charleston, 664 F.2d 1210 (4th Cir. 1981). In fact, the court in Perry held that Congress had not even intended to provide an implied right of action against PHAs, and its analysis applies with even more force to the allegations against the federal defendants in this case.

The Perry court noted that neither the Housing Act nor its legislative history indicated any intent to confer private rights of action but, to the contrary, clearly intended to "place control of and responsibility for these housing projects in the local Housing Authorities." 664 F.2d at 1213; see id. at 1213-15. That intent is also clear in the two subsections on which the plaintiffs rely in this case, which focus only on adverse actions taken by local agencies, and it would be inconsistent indeed to hold that plaintiffs may not sue the local agencies,

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[26](...continued)
Northwest Airlines v. Transport Workers, 451 U.S. 77, 91 (1981); Cannon, 441 U.S. 677; Cort v. Ash, 422 U.S. 66 (1975); see also Tribe, American Constitutional Law § 3-23 at 160-61 (2d ed. 1988) ("For the most part, [the Supreme Court has] den[ied] implication of a cause of action except where the text or legislative history suggests that Congress specifically intended to create one.").

actions taken by local agencies, and it would be inconsistent indeed to hold that plaintiffs may not sue the local agencies, who are the plain subjects of § 1437d, but may sue the federal government, whose responsibilities under that section are ill-defined if they exist at all.[28]

Similarly, in Edwards v. District of Columbia, 821 F.2d 651 (D.C. Cir. 1987), the D.C. Circuit refused to imply a right of action under § 1437d(1) even against the local housing authority:

> the only rights created by § 1437d(1) itself are rights to a lease that in turn requires proper maintenance and termination. Plaintiffs do not claim that their leases fail to require these things . . . § 1437d(1) does not create federal rights to proper maintenance and termination, and . . . these claims belong in local court.

Id. at 653-54 n.2. Thus, even if the plaintiffs were able to divine some duty owed by the federal defendants under 42 U.S.C. § 1437d, the statute simply does not provide nor did Congress intend a private right of action in federal court to pursue these claims.

In sum, the plaintiffs cannot point to any statutory language that either imposes a substantive obligation on the federal defendants or provides a federal right of action to

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[28] Perry also pointed out that tenants' claims under their leases have traditionally been handled by state courts, and that the creation of a federal remedy would upset this legislative scheme. See 664 F.2d at 1216 ("It would be hard to find an area of the law in which the states have a greater interest or have had greater involvement"); see also Shivers v. Landrieu, 674 F.2d 906, 912 (D.C. Cir. 1981) (interpreting the National Housing Act as providing no federal remedy because "[c]omplaints of . . . unlawful evictions are cognizable in the state courts, but have no basis for remedy under federal law").

enforce such a duty. In fact, Congress seems to have intended to leave disputes concerning tenants' grievances and lease provisions to local authorities and state courts. The Housing Act therefore cannot serve as an independent source of due process guarantees, and the federal defendants are entitled to summary judgment on Count II of the Amended Complaint.

CONCLUSION

For the foregoing reasons, the federal defendants' motion for summary judgment should be granted.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

HENRY E. HUDSON
United States Attorney

ARTHUR R. GOLDBERG

MARK W. BATTEN
Attorneys
Department of Justice
Civil Division
Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
(202) 514-1285

Exhibit A

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

Washington, D.C. 20530

October 9, 1990

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

FROM: Cary H. Copeland
Director

SUBJECT: Departmental Policy Regarding Seizure of Occupied Real Property

I. General Policy

As previously stated in this Office's memorandum styled "Seizure of Forfeitable Property", January 11, 1990, it is the Department's policy that ex parte judicial approval is required prior to the seizure of all real property.

However, it is not required that the U.S. Marshal actually seize property and take dominion and control of it in order to establish the Court's jurisdiction over the res. An alternative method of initiating the forfeiture of property is to "arrest" the property under the Admiralty Rules.

In certain circumstances it may be advisable to use this less intrusive means of bringing the property into the jurisdiction of the Court for purposes of commencing a civil in rem forfeiture action. Moreover, as "arresting" property through the service of process does not interfere significantly with an owner's possessory interests, advance ex parte judicial review is not required as a matter of law or policy.

The determination of whether to initiate real property forfeitures through a "seizure" or "arrest" of the property requires an exercise of discretion by the Attorney for the Government taking into account the circumstances of the case at hand.

A. Arresting Real Property without Taking Actual Possession

The Clerk of Court may issue a Warrant of Arrest pursuant to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims which is then posted upon the real property by the U.S. Marshal. This process establishes the jurisdiction of the Court. The simultaneous filing of a complaint and a lis pendens should also occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

B. Effecting the Seizure Where the U.S. Marshal Takes Dominion and Control

1. Permitting Continued Occupancy

As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture provided that:

a. The occupants agree to maintain the property, which shall include but is not limited to keeping the premises in a state of good repair or in the same condition as existed at the time of seizure, and continuing to make any monthly payments due to lienholders or to make timely rent payments to the U.S. Marshal or his designee if the occupants are tenants;

b. The occupants agree not to engage in continued illegal activity;

c. The continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;

d. The continued occupancy does not adversely affect the ability of the U.S. Marshal or his designee to manage the property; and,

e. The occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants.

2. Removal of Occupants Upon Seizure

Immediate removal of all occupants at the time of seizure should be sought if there is reason to

believe that failure to remove the occupants will result in one or more of the following:

a. Danger to law enforcement officials or the public health and safety;

b. The continuation of illegal activity on the premises; or

c. Interference with the Government's ability to manage and conserve the property.

If appropriate under 19 U.S.C. 1612(a), consideration should be given to effecting an interlocutory sale of the defendant property if it is in the best interest of the United States. See A Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale, Criminal Division, 1990.

II. Notice and Opportunity for Hearing Prior to Seizure

It is the Department's position that no advance notice or opportunity for an adversary hearing is statutorily or constitutionally required prior to the seizure of property, including real property.

This is the Department's national policy and practice, with the exception of districts within the Second Circuit that are currently subject to United States v. The Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989), reh'g denied, 897 F.2d 659 (1990). The Court in Livonia Road did note that under exigent circumstances there is no need for a pre-seizure hearing (supra at 1265). The Second Circuit recently stated in United States v. 141st Street Corporation, 911 F.2d 870 (2nd Cir. 1990) that an exigent or extraordinary circumstance exists if: "1) seizure was necessary to secure an important governmental or public interest, 2) very prompt action was necessary, and 3) a governmental official initiated the seizure by applying the standards of a narrowly drawn statute."

III. Circumstances Supportive of Immediate Removal of Occupants

A. Reason to believe that leaving occupants in possession will result in danger to the health and safety of the public or to law enforcement may be based upon the following:

1. The nature of the illegal activity;

2. Presence of weapons, "booby traps," or barriers on the property;

3. Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;

4. Presence of serious safety code violations; or

5. Contamination by or presence of dangerous chemicals.

B. Reason to believe that leaving occupants in possession will result in continued use of the property for illegal activities may be based upon:

1. The nature of the illegal activity (e.g., repetitive drug sales);

2. The history of the property's and/or occupant's involvement in illegal activities;

3. Evidence that all occupants have been involved in the illegal activity;

4. The inability of non-participating occupants to prevent continued illegal activity; or

5. The failure of other sanctions to stop illegal activity.

C. Reason to believe that leaving occupants in possession might undermine the U.S. Marshal's or his designee's ability to manage the property may be based upon all the factors set out above or information that the occupants intend to waste or destroy the property.

D. The above list of circumstances is not intended to be exclusive. Attorneys for the Government may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

IV. Nature of Adversary Pre-Seizure Hearing

Notwithstanding our legal position regarding pre-seizure adversary hearings, some courts have required such hearings prior to the seizure of occupied real property. It is the Department's position that any such adversary hearing should be carefully restricted.

In terms of its scope, such a hearing should be limited to a proffer by the Government of evidence supporting probable cause. Such evidence may be circumstantial or hearsay. Claimants may then be heard, and upon the Court's satisfaction that probable cause exists and that there is no mistake in the identification of the property to be seized, the warrants for arrest should issue.

In terms of timing, given the limited nature of such a hearing it may be scheduled within 24 hours of notice of intent to seize. The Supreme Court has repeatedly indicated that the simple opportunity for an individual to speak and be heard in court has inherent value for purposes of due process. (See e.g., Marshall v. Jericho, 446 U.S. 238, 242 (1980)). Following initiation of the forfeiture action, a full trial on the merits will follow, prior to a judgment of forfeiture.

This policy does not create or confer any rights, privileges or benefits on prospective or actual claimants, defendants or petitioners. Likewise, this policy is not intended to have the force of law. See, United States v. Caceres, 440 U.S. 471 (1979).

cc: George J. Terwilliger III
Associate Deputy Attorney General

Philip M. Renzulli
U.S. Postal Inspection Service

Glenn McAdams
Internal Revenue Service

James Wooten
Bureau of Alcohol, Tobacco and Firearms

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Federal Defendants' Motion For Summary Judgment, with accompanying memorandum and exhibit, was mailed this 10th day of October, 1990, by Airborne Express, postage prepaid, to:

Anne B. Holton, Esq.
Central Virginia Legal Aid Society, Inc.
114 Cary Street
Richmond, VA 23241

Florence Wagman Roisman, Esq.
National Housing Law Project
122 C Street, NW, Suite 220
Washington, DC 20001-2109

David B. Bryson, Esq.
National Housing Law Project
1950 Addison Street
Berkeley, CA 94704

Stuart Cohen, Esq.
Legal Aid Bureau, Inc.
Candler Bldg., 7th floor
714 E. Pratt Street
Baltimore, MD 21202-3105

William G. Broaddus, Esq.
McGuire, Woods, Battle and Boothe
One James Center
Richmond, VA 23219

MARK W. BATTEN

United States
Office of Government Ethics
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3917

EXHIBIT C

November 28, 1990

MEMORANDUM

TO: Designated Agency Ethics Officials, General Counsels and Inspectors General

FROM: Stephen D. Potts
Director

SUBJECT: The Honorarium Prohibition and Limitations on Outside Earned Income and Employment

The provisions added by Title VI of the Ethics Reform Act of 1989 become effective on January 1, 1991. On that date, all officers and employees in the Executive branch will become subject to the prohibition against receipt of honoraria, and certain high-level noncareer employees will become subject to limitations on the amount of outside earned income and the types of outside employment they may have. All three provisions become and remain effective only if the pay increase provisions contained in Section 703 of the Reform Act are not repealed. The maximum penalty for violation is $10,000 or the amount of compensation received for the prohibited conduct, whichever is greater.

This memorandum provides initial guidance regarding the application of Title VI. The content of this memorandum has been coordinated with the Department of Justice and the Office of Personnel Management and we expect that the implementing regulations to be issued by the Office of Government Ethics will be consistent in all significant respects with the interpretation set forth below. Therefore, pending the issuance of regulations, employees may rely on the guidance contained in this memorandum. We have attached a copy of the text of Sections 501 through 505 as enacted by Public Law 101-194, Nov. 30, 1989, 103 Stat. 1716, with technical amendments enacted by Public Law 101-280, May 4, 1990, 104 Stat. 149.

THE HONORARIUM PROHIBITION

Section 501(b) states that "An individual may not receive any honorarium while that individual is a Member, officer or employee." For these purposes, Section 505 defines the phrase "officer or employee" to mean any officer or employee of the Government except a special Government employee or an individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate. The term "honorarium" is defined in that section to mean:

"... a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed."

Section 501(c) contains standards under which an honorarium paid to charity may be deemed not to have been received by the individual for whose appearance, speech or article it was given. On January 1, 1991, the $2,000 honorarium limitation imposed by 2 U.S.C. § 441i will no longer apply to Executive branch personnel.

The honorarium prohibition applies even without a nexus between the appearance, speech or article and the individual's Federal employment. Executive branch employees have long been prohibited from receiving any compensation, including honoraria, for speaking and writing on subject matter that focuses specifically on the employing agency's responsibilities, policies and programs; when the employee may be perceived as conveying agency policies; or when the activity interferes with his or her official duties. Those limitations, discussed more fully in OGE informal advisory memoranda 84 x 5 and 85 x 18, will continue to apply after January 1. However, on or after that date, receipt of compensation will be prohibited for any appearance, speech or article, regardless of the subject matter or circumstances.

Whether compensation constitutes an honorarium requires a threshold determination whether it is offered for an "appearance, speech, or article." We expect that the regulatory definitions of those terms will be similar to definitions used in the Federal Election Commission's regulation implementing 2 U.S.C. § 441i at 11 CFR § 110.12(b). Those definitions provide:

"(2) Appearance. 'Appearance' means attendance at a public or private conference, convention, meeting, social event, or like gathering, and the incidental conversation or remarks made at that time.

"(3) Speech. 'Speech' means an address, oration, or other form of oral presentation, regardless of whether presented in person, recorded, or broadcast over the media.

"(4) Article. 'Article' means a writing other than a book, which has been or is intended to be published."

art

Except when the opportunity was extended to the employee wholly or in part because of his or her official position, we expect to exclude the following from the respective definitions of the terms "appearance" and "speech:"

- Engagements to perform or to provide entertainment using an artistic or other such skill or talent or primarily for the purpose of demonstration or display; and

- The recitation of scripted material as for a live or recorded theatrical production.

We expect that the definition of the term "article" will exclude works of fiction, poetry, lyrics and scripts.

Although the statutory definition of the term "honorarium" excludes travel expenses for the employee and one relative, we expect that the regulations will reflect standards of conduct concerns by continuing to forbid acceptance of travel expenses from a source whose interests may be substantially affected by performance of the employee's official duties or where the subject matter of the speech or article focuses specifically on the employing agency's responsibilities, policies or programs. Travel expenses accepted under a specific statutory authority, such as 5 U.S.C. § 4111 or 31 U.S.C. § 1353, will continue to be permissible.

In addition to providing an exclusion for travel expenses, we expect that the implementing regulations will include at least the following exceptions to the statutory definition of "honorarium:"

- Meals and other incidents of attendance, such as waiver of attendance fees or provision of course materials furnished as part of the event at which an appearance or speech is made;

- Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

- Copies of publications containing articles, reprints of articles, tapes of appearances or speeches, and similar items that provide a record of the appearance, speech or article;

- Compensation for goods and services other than appearing, speaking or writing, even though making a speech or appearance or writing an article may be an incidental task associated

with provision of the goods or services;

- Salary, wages and other compensation pursuant to an employee compensation plan when paid by an employer for services on a continuing basis that involve appearing, speaking or writing;

- Compensation for teaching a course involving multiple presentations by the employee offered as part of a program of education or training sponsored and funded by a state or local government;

- Compensation for teaching a course involving multiple presentations by the employee offered as part of the regularly established curriculum of an accredited institution of higher education;

- An award for artistic, literary or cratorical achievement made on a competitive basis under established criteria;

- Witness fees credited under 5 U.S.C. § 5515 against compensation payable by the United States; and

- Compensation received for any appearance or speech made or article accepted for publication prior to January 1, 1991, or for any appearance or speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991.

The legislative history of the Ethics Reform Act indicates that the honorarium ban cannot be circumvented by contracting for a continuing series of talks, lectures, speeches or appearances and characterizing the income as a stipend or as salary. Thus, employees will not be able to avoid the prohibition simply by contracting or otherwise agreeing to provide multiple appearances, speeches or articles in exchange for a fee, nor may they accept compensation from an agent, speakers bureau or similar entity that facilitates appearance, speaking or writing opportunities.

An honorarium is "received" when the employee has the right to exercise dominion and control over the honorarium and direct its subsequent use. Thus, with the exception of an honorarium paid to a charity pursuant to Section 501(c), an honorarium will be deemed to have been received if it is paid to another person on the basis of designation, recommendation or other specification by the employee or if, with the employee's knowledge and acquiescence, it

is paid to his or her parent, sibling, spouse, child or dependent relative.

There are several statutory limitations on the authority created by Section 501(c) to direct an honorarium to a charitable organization to avoid receipt in violation of the prohibition. The organization to which the honorarium is paid must be a charitable organization described in 26 U.S.C. § 170(c) and the employee, the employee's parent, sibling, spouse, child or dependent relative may not derive any direct financial benefit from the charitable organization separate from and beyond any general benefit conferred by the organization's activities. The amount of any honorarium directed to such an organization may not exceed $2,000 per appearance, speech or article, and the employee must not take a tax deduction on account of the honorarium payment.

Only those honoraria that could be accepted by the employee but for the existence of the honorarium prohibition may be paid to a qualifying charity. Thus, for example, an honorarium that must be declined under 18 U.S.C. § 209 because it is offered for the performance of an employee's official duties may not be directed to a charity. Similarly, an honorarium offered for a speech regarding subject matter that focuses on agency responsibilities, policies and programs must be declined under the standards of conduct and thus may not be directed to a charity. Individuals who direct honoraria to charitable organizations will be required to file, on a confidential basis, a report identifying the charitable recipients.

THE 15 PERCENT OUTSIDE EARNED INCOME LIMITATION

With a special proration provision for individuals who are subject to the limitation for less than a year, Section 501(a) provides that an officer or employee, other than a special Government employee:

> "... who is a noncareer officer or employee and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule under section 5332 of title 5, United States Code, may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5 United States Code, as of January 1 of such calendar year."

Many who will be subject to the 15 percent outside earned income limitation are full-time Presidential appointees who are already prohibited from receiving "any" outside earned income by Section 102 of Executive Order 12674, as modified by Executive Order 12731 dated October 17, 1990. Unlike the Executive order

prohibition, however, the statutory 15 percent limitation carries civil penalties.

The 15 percent outside earned income limitation only applies to a noncareer employee whose rate of basic pay is equal to or greater than the annual rate for GS-16, Step 1 of the General Schedule. In the case of an employee who holds a General Schedule or other position that provides several rates of pay or steps per grade, we expect that the regulations will construe the above-quoted provision as applying only if the rate of pay for the lowest step of the grade at which he or she is employed exceeds the annual rate for GS-16, Step 1. Thus, a GS-15 noncareer employee paid at Step 9 would not be subject to the limitation even though his or her total annual compensation exceeds the per annum pay for GS-16, Step 1.

Under the Federal Employees Pay Comparability Act of 1990, Public Law 101-509, General Schedule positions at GS-16, 17 and 18 will be replaced by a new range of rates for positions classified "above GS-15." The pay for these positions may be no less than 120 percent of the rate for GS-15, Step 1. When this provision of the Comparability Act takes effect, this minimum rate for positions classified "above GS-15" will replace GS-16, step 1 as the rate that triggers application of the 15 percent outside earned income limitation. For purposes of determining whether an individual's rate of basic pay equals or exceeds the triggering rate, adjustments, such as those for locality pay authorized by the Comparability Act, will be disregarded.

Noncareer employees covered by the prohibition include those paid at or above the triggering rate and appointed by the President to positions under the Executive Schedule, 5 U.S.C. § 5312 through 5317, or to positions that, by statute or as a matter of practice, are filled by Presidential appointment, other than positions in the uniformed services and within the foreign service below the level of Assistant Secretary or Chief of Mission. All noncareer members of the Senior Executive Service or of other SES-type systems (e.g., the Senior Foreign Service) will be subject to the prohibition, as will employees serving in Schedule C or noncareer executive assignment positions who are paid at or above the triggering rate. The prohibition will also apply to individuals paid at or above the triggering rate who are appointed to positions under agency-specific statutes that establish appointment criteria essentially the same as those set forth in 5 CFR § 213.3301 for Schedule C positions or 5 CFR § 305.601 for noncareer executive assignment positions.

The term "outside earned income" includes wages, salaries, commissions, professional fees and any other form of compensation or remuneration for services. We expect that the regulatory definition will exclude the following:

- Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

- Income attributable to service with the military reserves or national guard;

- Income from pensions and other continuing benefits attributable to previous employment or services;

- Income from investment activities where the individual's services are not a material factor in the production of income;

- Payments, whether advanced, provided in kind or reimbursed, intended to compensate for out-of-pocket expenses actually incurred;

- Copyright royalties, fees, and their functional equivalent from the use or sale of copyright, patent and similar forms of intellectual property rights, when received from established users or purchasers of those rights;

- Honoraria paid to charitable organizations pursuant to Section 501(c), as discussed above;

- Compensation for services rendered prior to January 1, 1991, or in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991; and

- Compensation for services which the employee first undertook to provide prior to January 1, 1991, where the standards of the applicable profession require the employee to complete the case or other undertaking.

The statutory limitation applies to income attributable to the calendar year and, thus, cannot be avoided by deferring payment. It cannot be avoided by accepting compensation in some form other than cash or by artificial efforts to characterize earned income as investment income. For example, a covered noncareer employee who has been employed on his own time as an educational consultant cannot incorporate his consulting business, limit the amount of salary he draws from the corporation and, under the guise of a dividend, recover additional compensation attributable to his consulting services.

The only authority to exclude compensation diverted to another is the authority at Section 501(c) by which an honorarium paid to a charitable organization is deemed not to have been received. Other compensation will be included in determining the amount of outside earned income attributable to the calendar year, even if it is donated by the employee or on behalf of the employee to a charitable organization.

Assuming, for purposes of illustration, that the rate of basic pay for Executive Level II is $120,000 on January 1, 1991, the maximum amount of outside earned income a covered noncareer employee may have in 1991 will be 15 percent of $120,000, or $18,000. Subsection 501(a)(2) provides a proration formula for determining the amount of the outside earned income limitation applicable to an employee who becomes a covered noncareer employee during a calendar year. In the case, for example, of an employee appointed to a noncareer Senior Executive Service position on November 1, the outside earned income limitation applicable to him during the 61 days of the year he is in a covered position is determined in the following manner:

Step 1 — The rate of basic pay for Executive Level II as in effect on January 1 of that year ($120,000) is divided by 365. That quotient is $329;

Step 2 — The dollar amount determined by Step 1 ($329) is then multiplied by the 61 days the employee held the covered noncareer position. That product is $20,069;

Step 3 — The dollar amount determined by Step 2 ($20,069) is multiplied by .15, or 15 percent. The product ($3,010) is the maximum outside earned income the employee may have in 1991 attributable to the period of his service in a covered noncareer position.

LIMITATIONS ON OUTSIDE EMPLOYMENT

...tion 502 states that one who is a noncareer officer or em... ...e whose rate of basic pay is equal to or greater than the ann... ...ate of basic pay in effect for grade GS-16 of the General Sch... ...s shall not:

"(1) receive compensation for affiliating with or ...ng employed by a firm, partnership, association, ...poration, or other entity which provides professional

services involving a fiduciary relationship;

"(2) permit that ... officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

"(3) receive compensation for practicing a profession which involves a fiduciary relationship;

"(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

"(5) receive compensation for teaching, without the prior notification and approval of the appropriate entity referred to in section 503."

The above limitations apply to those noncareer officers and employees who are subject to the 15 percent limitation on outside earned income discussed in the preceding section of this memorandum. We expect that the term "compensation" will be given the same meaning as the term "outside earned income," which is also defined in the preceding section.

Application of the first three prohibitions listed above must begin with a definition of the phrase "profession involving a fiduciary relationship." The following excerpt is from the report of the bipartisan task force that initiated the legislation:

> "The task force notes that a 'fiduciary' is generally described as one 'having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking' (Black's Law Dictionary, 5th Ed. 563). However, the task force intends that the term fiduciary not be applied in a narrow, technical sense and wants to ensure that honoraria not reemerge in various kinds of professional fees from outside interests. The task force intends the ban to reach, for example, services such as legal, real estate, consulting and advising, insurance, medicine, architecture, or financial. The appropriate ethics office will make the determination as to which professional activities involve a 'fiduciary' relationship."

Consistent with this purpose, we expect that a "profession which involves a fiduciary relationship" will be defined in the regulations as a profession in which the nature of the services provided causes the recipient of those services to place a substantial degree of trust and confidence in the integrity, fidelity and specialized knowledge of the practitioner.

We expect that the term "profession" will be given its normally understood meaning. According to Webster's Third New International Dictionary, a profession is:

> "... a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service."

The term "profession" is not used in Section 502 in the more colloquial sense to refer generally to any vocation or employment.

Section 504(b) gives the Office of Government Ethics and designated agency ethics officials authority to render advisory opinions. Accordingly, designated agency ethics officials will be responsible in the first instance for determining whether a given activity involves "practicing a profession which involves a fiduciary relationship" or employment or affiliation with a firm or entity that "provides professional services involving a fiduciary relationship."

Nothing in the law prohibits a covered noncareer employee from providing uncompensated, or "pro bono," services. Nor does it prohibit a covered noncareer employee from assuming fiduciary responsibilities or from accepting compensation for performing such responsibilities, provided that he or she is not thereby "practicing a profession which involves a fiduciary relationship." Thus, a covered noncareer employee may receive the customary fee for serving as executor of the estate of a friend or for serving as the trustee of a family trust, as long as his or her outside earned income does not violate either the 15 percent outside earned limitation discussed above or the outside earned income prohibition applicable to certain Presidential appointees. A covered noncareer employee could not, however, hold himself or herself forth as a professional trustee and charge a fee for such services or serve for compensation as an attorney for an estate.

The prohibition on receipt of compensation for serving as an officer or member of the board of any association, corporation, or other entity is straightforward. Covered noncareer employees are prohibited from receiving compensation for serving as officers or on boards of directors of any entity. This prohibition is not limited to commercial or for-profit entities; it also prohibits compensation for serving as an officer or board member of entities such as professional associations and charitable organizations. Uncompensated service, however, is not prohibited by Section 502. The definition of the term "compensation" that we expect to include

in the regulations would allow a covered noncareer employee to receive travel and similar reimbursements that would permit participation in the activities and business affairs of an entity he or she serves without compensation.

The provision relating to teaching by covered noncareer employees is one that will require the designated agency ethics official to give advance written approval for any compensated teaching activity. The statute imposes no requirement for advance approval of uncompensated teaching. For purposes of this provision, we expect that "teaching" will be defined in the regulations as any activity that involves oral presentation or personal interaction, the primary function of which is to instruct or otherwise impart knowledge or skill. We do not expect that it will be limited to the structured type of teaching that occurs in a formal setting, as through teaching a class or course to a number of individuals, but will extend to instruction on an individual basis or in an informal setting. As a practical matter, the approval mechanism will not come into play where compensation for the particular teaching activity is prohibited because it is an honorarium for a speech.

The approval criteria that we expect to include in the regulations will require a determination that the teaching will not interfere with performance of the covered noncareer employee's official duties nor give rise to an appearance that the teaching opportunity was extended to the employee principally because of his or her official position. The designated agency ethics official will, of course, be required to determine that the employee's receipt of compensation will not violate any of the statutory limitations discussed above, and that the activity will not violate any other conflict of interest statute or any prohibition or limitation imposed by applicable standards of conduct. Thus, for example, a Presidential appointee prohibited by Section 102 of Executive Order 12674 from receiving any outside earned income could not be authorized to engage in compensated teaching activities. Similarly, an employee could not be authorized to receive compensation for teaching a course that focuses substantially on a particular agency program in violation of the standards of conduct.

§ 501. OUTSIDE EARNED INCOME LIMITATION

(a) OUTSIDE EARNED INCOME LIMITATION . --

(1) Except as provided by paragraph (2) a Member or an officer or employee who is a noncareer officer or employee and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule under section 5332 of title 5, United States Code, may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annaul rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such calendar year.

(2) In the case of any individual who becomes a Member or an officer or employee who is a noncareer officer or employee and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 or the General Schedule during a calendar year, such individual may not have outside earned income attributable to the portion of that calendar year which occurs after such individual becomes a Member or such an officer or employee which exceeds 5 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such calendar year multiplied by a fraction the numerator of which is the number of days such individual is a Member or such officer or employee during such calendar year and the denominator of which is 365.

(b) HONORARIA PROHIBITION. -- An individual may not receive any honorarium while that individual is a Member, officer or employee.

(c) TREATMENT OF CHARITABLE CONTRIBUTIONS. -- Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed $2,000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

§ 502. LIMITATIONS ON OUTSIDE EMPLOYMENT.

A Member or an officer or employee who is a noncareer officer or employee and whose rate of basic pay is equal to or greater than the annual rate of basic pay in effect for grade GS-16 of the General Schedule shall not--

(1) receive compensation for affiliating with or being employed by a firm, partnership, corporation, or other entity wh#ch provides professional services involving a fiduciary relationship;

(2) permit that Member's, officers, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

(5) receive compensation for teaching without the prior notification and approval of the appropriate entity referred to in section 503.

§ SEC. 503. ADMINISTRATION

This title shall be subject to the rules and regulations of - (1) and administered by --

(A) the Committee on Standards of Official Conduct of the House of Representatives, with respect to Members, officers, and employees of the House of Representatives; and

(B) in the case of legislative branch officers and employees other than Senators, officers, and employees of the Senate and other than those officers and employees specified in subparagraph (A), the committee to which reports filed by such

officers and employees under title I are transmitted under such title, except that the authority of this section may be delegated by such committee with respect to such officers and employees;

(2) the Office cf Government Ethics and administered by designated agency ethics officials with respect to officers and employees of the executive branch; and

(3) and administered by the Judicial Conference of the United States (or such other agency as it may designate) with respect to officers and employees of the judicial branch.

§ 504. CIVIL PENALTIES

(a) CIVIL ACTION. -- The Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of section 501 or 502. The court in which such action is brought may access against such individual a civil penalty of not more than $10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater.

(b) ADVISORY OPINIONS. -- Any entity described in section 503 may render advisory opinions interpreting this title, in writing, to individuals covered by this title. Any individual to whom such an advisory opinion is rendered and any other individual covered by this title who is involved in a fact situation which is indistinguishable in all material aspects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction under subsection (a).

§ 505. DEFINITIONS

For purposes of this title:

(1) The term "Member" means a Representatives in, or a Delegate or Resident Commissioner to, the Congress.

(2) The term "officer or employee" means any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any

special Government employee (as defined in section 202 of title 18, United States Code).

(3) the term "honorarium" means a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.

(4) The term "travel expenses" means, with respect to a Membber, officer or employee, or a relative of any such individual, the cost of transportation, and the cost: of lodging and meals while away from his or her residence or principal place of employment.

(5) The term "charitable organization" means an organization described in section 170(c) of the Internal Revenue Code of 1986.

Guideline Sentencing Update

FEDERAL J

EXHIBIT D

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.

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VOLUME 3 • NUMBER 15 • NOVEMBER 8, 1990

Departures

AGGRAVATING CIRCUMSTANCES

Third Circuit holds extreme departures require clear and convincing standard for facts underlying departure and higher standard of admissibility for hearsay; endorses use of analogy to relevant guidelines in setting extent of departure for aggravating circumstances. Defendant was convicted of several explosives and passport offenses. The guideline range was 27–33 months, but the district court departed to impose a 30-year term after concluding defendant was a terrorist connected with the Japanese Red Army and had planned to use the explosives in a "terrorist mission . . . to kill and seriously injure scores of people." *See U.S. v. Kikumura*, 706 F. Supp. 331 (D.N.J. 1989) (2 *GSU* #2). The court held that the Guidelines did not account for terrorist activity, that defendant's conduct implicated several grounds for departure listed in U.S.S.G. § 5K2, and that defendant's criminal history category significantly underrepresented the seriousness of his criminal past and the likelihood of further criminal activity.

The appellate court, noting that this was "apparently the largest departure . . . since the sentencing guidelines became effective," affirmed the district court's findings of fact and conclusion that departure was warranted, but held that the extent of departure was not properly determined and remanded for resentencing. In affirming the district court's findings, the court made several rulings on significant procedural issues regarding departures.

First, for a departure of this magnitude the court held that "the factfinding underlying that departure must be established at least by clear and convincing evidence." (Note: The district court had held that a preponderance of evidence was sufficient, but held alternatively—and the appellate court agreed—that its findings met the clear and convincing standard.) The court recognized that "there is overwhelming authority in our sister circuits for the proposition that guideline sentencing factors need only be proven by a preponderance of evidence, . . . but we note that in none of those cases did the operative facts involve anything remotely resembling a twelve-fold, 330-month departure from the median of an applicable guideline range." The court did not further specify how large a departure required this heightened standard.

Similarly, the court concluded that a higher standard of admissibility was required for hearsay statements relied on to make a departure of this size. "Normally, hearsay statements may be considered at sentencing . . . 'if they have some minimal indicium of reliability beyond mere allegation.' . . . However, we believe that [this] standard, like the preponderance standard, is simply inadequate in situations as extreme and unusual as this one." The court held that "at a sentencing hearing where the court departs upwards dramatically from the applicable guideline range . . . the court should examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy." This "intermediate standard" is less strict than that used for hearsay statements at trial, but stronger than that used in the "garden variety sentencing hearing." *Cf. U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990) ("hearsay statements admitted against a defendant . . . violate the Confrontation Clause unless a court finds that the declarant is unavailable and that there are indicia of reliability supporting the truthfulness of the hearsay statements") (3 *GSU* #12). As with the factfinding, the court held that the hearsay evidence admitted by the district court met this heightened standard.

The court also upheld the district court's findings that the guidelines applicable to the offenses of conviction did not adequately account for defendant's conduct, but held that the extent of departure was unreasonable and should have been calculated by comparing the aggravating circumstances to analogous guidelines. The court "endorse[d] th[e] general approach" taken by other circuits that "have recently begun to look to the guidelines themselves for guidance in determining the reasonableness of a departure," and concluded that "analogy to the guidelines is a useful and appropriate tool for determining what offense level a defendant's conduct most closely resembles." *See U.S. v. Landry*, 903 F.2d 334 (5th Cir. 1990); *U.S. v. Pearson*, 911 F.2d 186 (9th Cir. 1990); *U.S. v. Ferra*, 900 F.2d 1057 (7th Cir. 1990); *U.S. v. Kim*, 896 F.2d 678 (2d Cir. 1990). The court recognized that this method cannot always be "mechanically applied" and that analogies to the guidelines "are necessarily more open-textured than applications of the guidelines."

Rather than simply remand, because it was "convinced beyond any doubt that the district court would impose as high a sentence as possible up to 30 years," the appellate court proceeded to consider whether "reasonable analogy existed to support the sentence imposed." The court concluded that the maximum sentence imposable was 262 months, based on an offense level 32 and criminal history category VI, and remanded for resentencing "consistent with this opinion."

U.S. v. Kikumura, No. 89-5129 (3d Cir. Nov. 2, 1990) (Becker, J.).

MITIGATING CIRCUMSTANCES

U.S. v. Pharr, No. 90-1284 (3d Cir. Oct. 19, 1990) (Cowen, J.) (reversing downward departure for theft defendant who after arrest had made "conscientious efforts" to overcome his heroin addiction and whose rehabilitation might be hindered by incarceration: "We read policy statement 5H1.4 to mean

that dependence upon drugs, or separation from such a dependency, is not a proper basis for a downward departure from the guidelines"). *Contra U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989); *U.S. v. Harrington*, 741 F. Supp. 968 (D.D.C. 1990); *U.S. v. Floyd*, 738 F. Supp. 1256 (D. Minn. 1990); *U.S. v. Rodriguez*, 724 F. Supp. 1118 (S.D.N.Y. 1989).

Criminal History

U.S. v. Fortenbury, No. 89-2291 (10th Cir. Oct. 26, 1990) (Logan, J.) (court erred in departing upward in offense level, instead of criminal history category, for defendant who illegally possessed firearms three times after conviction for possession of firearm by felon—commissions of the same crime "are elements of a criminal history category, not an offense level," and "courts cannot depart by offense level when the criminal history category proves inadequate").

U.S. v. Lawrence, No. 89-30284 (9th Cir. Oct. 10, 1990) (Norris, J.) (holding that neither Sentencing Reform Act nor Guidelines prohibit downward departure for career offender). *Accord U.S. v. Brown*, 903 F.2d 540 (8th Cir. 1990).

Probation and Supervised Release

Revocation of Probation

U.S. v. Tellez, No. 89-6177 (11th Cir. Oct. 30, 1990) (per curiam) (Defendant had been sentenced under pre-Guidelines law to three years' probation after district court held the Guidelines unconstitutional, and the sentence became final when neither party appealed. However, defendant's sentence after probation revocation is still limited by the sentence authorized by the Guidelines for his original offense, 18 U.S.C. § 3565(a)(2). *See U.S. v. Smith*, 911 F.2d 133 (11th Cir. 1990).).

Adjustments

Role in the Offense

U.S. v. McMillen, No. 90-3079 (3d Cir. Oct. 29, 1990) (Stapleton, J.) (vacated and remanded—district court should have found that misapplication of funds defendant, who was a bank manager with authority to approve loan applications, was in "position of private trust," U.S.S.G. § 3B1.3; also, because defendant personally approved his own fraudulent loan applications, his position as manager "significantly facilitated the commission or concealment of the offense").

U.S. v. Hill, 915 F.2d 502 (9th Cir. 1990) (truck driver for moving company, convicted of conspiracy to commit theft of an interstate shipment, was in "position of trust" per § 3B1.3 vis-a-vis the owners of the goods stolen—defendant had unwatched and exclusive control of goods for extended period of time without oversight by owners and used that position to facilitate the offense).

Criminal History

Juvenile Convictions

U.S. v. Unger, 915 F.2d 759 (1st Cir. 1990) (federal rather than state law is used to determine whether a juvenile offense should be counted in criminal history score under U.S.S.G. § 4A1.2(c), and court may "look to the substance of the underlying state offense in order to determine whether it falls within" the guideline).

Offense Conduct

Drug Quantity

U.S. v. Callihan, No. 89-7085 (10th Cir. Oct. 12, 1990) (Anderson, J.) (total weight of amphetamine precursor mixture, not just weight of controlled substance in mixture, is used to calculate base offense level under U.S.S.G. § 2D1.1).

Determining the Sentence

Fines and Restitution

U.S. v. Hickey, No. 89-1459 (6th Cir. Oct. 24, 1990) (Milburn, J.) (remanded—clearly erroneous for court to find that defendant with uncontested net worth of at least $50,000 was unable to pay any fine under U.S.S.G. § 5E1.2).

U.S. v. Labat, 915 F.2d 603 (10th Cir. 1990) (vacating imposition of fine to offset costs of incarceration when punitive fine was not imposed: "an 'additional fine' under § 5E1.2(i) cannot be imposed unless the court first imposes a punitive fine under § 5E1.2(a)").

Sentencing Procedure

Procedural Requirements

U.S. v. Lopez-Cavasos, 915 F.2d 474 (9th Cir. 1990) (upholding District of Idaho local rule that requires parties to lodge objections to presentence report prior to sentencing hearing, leaving later objections to discretion of court—rule is not inconsistent with Fed. R. Crim. P. 32(a) or (c) requirements for opportunity to comment on presentence reports).

Decision to Apply Guidelines

U.S. v. Marmolejo, No. 89-8079 (5th Cir. Oct. 26, 1990) (Clark, C.J.) (Appellate court agreed with *U.S. v. Garcia*, 893 F.2d 250 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 1792 (1990), that Guidelines apply to Assimilative Crimes Act (ACA), 18 U.S.C. § 13, but the sentence is limited by state law maximum and minimum sentences. *Accord U.S. v. Young*, No. 89-5016 (4th Cir. Oct. 12, 1990) (Chapman, J.); *U.S. v. Leake*, 908 F.2d 550 (9th Cir. 1990). For defendant sentenced under the ACA whose probation was revoked, the district court properly sentenced him to six-month prison term plus one-year term of supervised release, even though state law provided for parole but not supervised release: "For ACA purposes, we hold that when the applicable state law provides for parole, a sentence of imprisonment plus supervised release is 'like punishment' when the period of imprisonment plus the period of supervised release does not exceed the maximum sentence allowable under state law," which here was ten years.).

U.S. v. Bear, 915 F.2d 1259 (9th Cir. 1990) (for crimes covered by Indian Major Crimes Act, 18 U.S.C. § 1153, Guidelines should be applied only to offenses that are defined and punished under federal law; burglary of a private residence is not defined under federal law, so defendant should be sentenced in accordance with state law). *Cf. U.S. v. Norquay*, 905 F.2d 1157 (8th Cir. 1990) (holding that Guidelines apply to Indian Major Crimes Act, although sentence must be within maximum and minimum sentences imposable under state law).

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Sentencing Procedure

U.S. v. Herrera-Figueroa, No. 89-50660 (9th Cir. Nov. 14, 1990) (Reinhardt, J.) ("Concluding that the exclusion of counsel from presentence interviews serves no rational purpose, we exercise our supervisory power over the orderly administration of justice to hold that when a federal defendant requests that his attorney be permitted to accompany him at a presentence interview, the probation officer must honor that request.").

Offense Conduct

WEAPONS POSSESSION—DURING DRUG OFFENSE

Seventh Circuit holds courts may not, Fifth and Ninth Circuits hold courts may, consider relevant conduct in addition to offense of conviction for U.S.S.G. § 2D1.1(b)(1) enhancement. In the Seventh Circuit case, defendant was involved in drug sales and weapons possession at one residence, but was convicted only of possessing with intent to distribute drugs that were at another residence several miles away where no weapons were found. The district court increased the offense level under § 2D1.1(b)(1), finding that the weapons were used to facilitate "the drug business" at both residences.

The appellate court reversed, holding that the guns found at the first residence could not be used for the enhancement. "Defendant's possession of the weapons was contemporaneous with his commission of the offense, but it is clear from the Guidelines and court decisions that contemporaneity is not enough. There must be some proximity of the weapon to the contraband (if not also to the defendant or some person under his control)." *See U.S. v. Vasquez*, 874 F.2d 250 (5th Cir. 1989) (§ 2D1.1(b)(1) improperly applied—gun that defendant admitted owning during period of drug-dealing was several miles away from drugs in offense of conviction). The Seventh Circuit noted that "[t]here need not be an exact proximity of the contraband and weapons, so long as other evidence connects the weapons to the crime," *see, e.g., U.S. v. Paulino*, 887 F.2d 358 (1st Cir. 1989) (§ 2D1.1(b)(1) properly applied where drug supply in one apartment and guns in different apartment in same building where drugs were sold). The court concluded, however, that "§ 2D1.1(b)(1) says that the weapons must be possessed 'during the commission of the offense,' and this must mean the offense of conviction."

U.S. v. Rodriguez-Nuez, No. 89-2203 (7th Cir. Dec. 3, 1990) (Fairchild, Sr. J.).

The Ninth Circuit defendant pled guilty to a distribution offense involving only drugs found in his car at the time of arrest. Numerous weapons were found "only later at his place of business, some miles distant." Given the number of weapons and the extent of defendant's involvement in drugs, the district court found "it was clearly probable that the weapons were related to this offense" and applied § 2D1.1(b)(1).

Affirming, the appellate court reached the opposite conclusion from that of the Seventh Circuit regarding "whether the statutory language 'during the commission of the offense' refers to the offense of conviction, or to the entire course of criminal conduct." Finding that "the language of the guidelines . . . make[s] clear that 'specific offense characteristics . . . shall be determined on the basis of . . . all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction,'" U.S.S.G. § 1B1.3(a)(2), the court determined that "offense" in § 2D1.1(b)(1) "includes all conduct that was part of the same scheme." Therefore, the district court "properly looked to all of the offense conduct, not just the crime of conviction."

U.S. v. Willard, No. 89-30206 (9th Cir. Nov. 27, 1990) (Norris, J.).

In the Fifth Circuit, defendant did not possess a weapon during the commission of the drug offense to which he pled guilty, but was given the § 2D1.1(b)(1) enhancement because he "clearly possessed a firearm" during the related drug conspiracy and co-conspirators possessed guns when arrested. The appellate court affirmed, holding, like the Ninth Circuit, that § 1B1.3(a)(2) applies to § 2D1.1(b)(1) and the sentencing court could "consider related relevant conduct."

U.S. v. Paulk, 917 F.2d 879 (5th Cir. 1990).

SPECIFIC OFFENSES

U.S. v. Nelson, No. 89-50578 (9th Cir. Nov. 27, 1990) (Poole, J.) (upholding application of offense level increase in § 2J1.6(b)(1), based on statutory maximum of underlying offense, for defendant who failed to appear for trial but was eventually acquitted of the underlying charges; distinguished *U.S. v. Lee*, 887 F.2d 888 (8th Cir. 1989), which invalidated § 2J1.6(b)(1) insofar as it applied to defendant who failed to report to prison *after* trial and sentencing to only a fraction of the statutory minimum).

U.S. v. Rothman, 914 F.2d 708 (5th Cir. 1990) (in conspiracy guideline section calling for three-level reduction "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the offense," § 2X1.1(b)(2), term "the offense" refers to underlying offense, not the conspiracy—thus defendant convicted of money laundering conspiracy qualified for reduction because conspirators were arrested after receiving money but before they could begin to launder it).

Challenges to Guidelines

U.S. v. Swanger, No. 90-1583 (8th Cir. Nov. 19, 1990) (per curiam) (remanded for resentencing—when use of amended Guidelines in effect at time of sentencing instead of those in effect at time of offense increased defendant's offense level, "sentencing under the amended Guidelines violated the ex post facto clause of the Constitution"). *Accord U.S. v. Suarez*, 911 F.2d 1016, 1021 (5th Cir. 1990).

Departures

Mitigating Circumstances

U.S. v. Shortt, No. 89-2571WM (8th Cir. Nov. 27, 1990) (Arnold, J.) (reversing downward departure for defendant convicted of building and possessing pipe bomb found in truck of man who was having affair with defendant's wife, holding that as a matter of law U.S.S.G. § 5K2.10, p.s. (Victim's Conduct), could not support a departure in this case: "A concern for the proportionality of the defendant's response is manifested by the terms of § 5K2.10 . . . . Though certainly wrongful and provocative, adultery does not justify blowing up the adulterers").

U.S. v. Ruklick, No. 89-3080 (8th Cir. Nov. 21, 1990) (Bright, Sr. J.) (district court erroneously believed it could not depart downward under U.S.S.G. § 5K2.13, p.s., because defendant's significantly reduced mental capacity "was not the sole cause of his drug-related offense"—appellate court "interpret[s] section 5K2.13 to authorize a downward departure where, as here, a defendant's diminished capacity comprised a contributing factor in the commission of the offense").

U.S. v. Nelson, No. 89-5270 (6th Cir. Nov. 20, 1990) (Ryan, J.) (affirmed downward departure imposed to avoid "unreasoned disparity" between defendant's sentence and much lower sentences of codefendants who received departures for cooperation with authorities—"district courts . . . are not precluded as a matter of law from departing from the guidelines in order to generally conform one conspirator's sentence to the sentences imposed on his co-conspirators"; remanding for resentencing, however, because extent of departure was "unreasonable" in light of "substantial factual differences between [defendant's] case and his confederates'," especially his lack of cooperation).

Criminal History

U.S. v. Collins, 915 F.2d 618 (11th Cir. 1990) (court may consider successful completion of intervening state criminal sentence, which occurred between commission of and sentencing on instant offense, as evidence that defendant "has demonstrated his determination to avoid future crimes" and will be less likely to recidivate; such a departure must be guided by the procedure in U.S.S.G. § 4A1.3).

Computation—Departure Above Category VI

U.S. v. Glas, No. 90 CR 434 (N.D. Ill. Nov. 1, 1990) (Williams, J.) (departing upward for criminal history category VI defendant with 39 criminal history points, court extrapolated from sentencing table to create new criminal history categories for every three criminal history points above 15, with three-month increase in minimum sentence for every new level; defendant's 39 points resulted in criminal history category XIV and, with offense level of 10, a minimum sentence of 48 months). *See also U.S. v. Dycus*, 912 F.2d 466 (6th Cir. 1990) (per curiam) (table, unpublished) (affirming use of hypothetical category VIII for 19 criminal history points).

Adjustments

Acceptance of Responsibility

U.S. v. Piper, No. 89-30325 (9th Cir. Nov. 9, 1990) (per curiam) (agreeing with *U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989), that "a defendant must show contrition for the crime of which he was convicted, but he need not accept blame for all crimes of which he may be accused" to qualify for acceptance of responsibility reduction, § 3E1.1). *Accord U.S. v. Oliveras*, 905 F.2d 623 (2d Cir. 1990); *U.S. v. Rogers*, 899 F.2d 917 (10th Cir.) (dicta), *cert. denied*, 111 S. Ct. 113 (1990); *U.S. v. Guarin*, 898 F.2d 1120 (6th Cir. 1990) (dicta). *Contra U.S. v. Mourning*, 914 F.2d 699 (5th Cir. 1990); *U.S. v. Munio*, 909 F.2d 436 (11th Cir. 1990); *U.S. v. Gordon*, 895 F.2d 932 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990).

Victim-Related Adjustments

U.S. v. Rocha, 916 F.2d 219 (5th Cir. 1990) (affirmed finding that 17-year-old male kidnap victim "was unusually vulnerable due to age," U.S.S.G. § 3A1.1—"it is reasonable to believe that [he] was chosen as the kidnapping victim because of his young age").

Relevant Conduct

U.S. v. Lawrence, 915 F.2d 402 (8th Cir. 1990) (quantities of cocaine that defendant purchased and distributed during the course of the marijuana conspiracy he was convicted of, but that were not part of the same "common scheme or plan" as the marijuana offense, may still be included as relevant conduct under U.S.S.G. § 1B1.3(a)(2) because the cocaine was "part of the same course of conduct" to possess and distribute drugs).

Criminal History

Career Offender Provision

U.S. v. Becker, No. 89-50240 (9th Cir. Nov. 20, 1990) (Reinhardt, J.) (in determining whether prior felony was "crime of violence" under U.S.S.G. § 4B1.1, "we do not look to the specific conduct which occasioned [defendant's] burglary convictions, but only to the statutory definition of the crime. We hereby adopt the so-called 'categorical approach' that the Supreme Court has held is appropriate for determining whether someone is a career criminal under the Armed Career Criminal Act, 18 U.S.C. § 924. *See Taylor v. United States*, 110 S. Ct. 2143, 2159 (1990)"; affirmed finding that daytime burglary is violent crime).

U.S. v. Houser, 916 F.2d 1432 (9th Cir. 1990) (vacated because it was error to classify defendant as career offender under § 4B1.1—two prior drug offenses were "part of a single common scheme or plan," § 4A1.2(a), comment. (n.3), and were only charged and tried separately because they occurred in different counties). *See also U.S. v. Rivers*, 733 F. Supp. 1003 (D. Md. 1990) (two prior violent felony convictions should not be counted separately because "accident of geography" led to separate sentences for related offenses).

EXHIBIT E

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Pre-Guidelines Sentences, Generally

8th Circuit rejects claim that court improperly applied guidelines to pre-guidelines case. (100) In sentencing defendant, the judge noted that although the guidelines did not apply to defendant's case, many of the same factors were relevant. The judge also observed that there should be a "parity" between sentences imposed under "the two systems" of sentencing. The 8th Circuit rejected defendant's argument that the district court abused its discretion by seeking parity with the guidelines and imposing what was in effect a guidelines sentence. The district court had noted that under the pre-guidelines sentence imposed, defendant would be eligible for parole after serving only one-third of his sentence. The district court also expressly considered a non-guidelines factor (defendant's rehabilitation efforts during the two years between arrest and conviction) in imposing sentence. Although the district court may have been influenced by the guidelines, it was not improper for the court to be guided, in part, by the guidelines in exercising its discretion in imposing a pre-guidelines sentence. *U.S. v. Brenneman*, __ F.2d __ (8th Cir. Nov. 8, 1990) No. 90-1567.

California District Court warns that motion to vacate an "old law" sentence is "risky business." (100)(125) Petitioner committed his offenses after the district court held the guidelines unconstitutional. He pled guilty after the 9th Circuit held the guidelines unconstitutional and was sentenced before the Supreme Court upheld the constitutionality of the guidelines. He filed a pro per petition to vacate his sentence under 28 U.S.C. section 2255 complaining about the amount of cocaine used as the basis for his sentence. Counsel was appointed, and decided that the issue should be left dormant because the guideline range was higher than the 9 years which defendant received under the old law. The district court noted the wisdom of this course of action, pointing out that vacating sentences imposed under "old law" must be regarded as "risky business." The court noted that if the issue had not been withdrawn, it would have presented the "intriguing question" of whether petitioner's sentence could be enhanced by application of the guidelines solely due to his

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asking the court under section 2255 to vacate his sentence on the ground that it was a sentence "not in accordance with law." *Maya v. U.S.*, __ F.Supp. __ (C.D. Cal.) No. SA CV 89-758 AHS.

6th Circuit finds 22-year sentence not cruel and unusual punishment. (105) In a pre-guidelines case, defendant contended that his 22-year sentence was excessive. He was sentenced for violations of the Travel Act, possession of marijuana, and importation of marijuana. The 6th Circuit noted that while the length of the sentence might seem severe, in light of defendant's extensive criminal history, the sentence was not "so grossly disproportionate to the crime as to constitute cruel and unusual punishment." *U.S. v. Sammons*, __ F.2d __ (6th Cir. Oct. 30, 1990) No. 88-6311.

Guideline Sentences, Generally

10th Circuit holds defendant need not be advised of guidelines, even under prior version of Fed. R. Crim. P. 11(c)(1). (110)(790) The 10th Circuit rejected defendant's argument that the district court violated Fed. R. Crim. P. 11(c)(1) by failing to advise him that the sentencing guidelines would determine the range of his sentence, and that the range would be related to the quantity of marijuana involved in his offense. At the time defendant was sentenced, Rule 11(c)(1) required the sentencing court to inform a defendant of any mandatory minimum penalty and the maximum possible penalty provided by law. It did not require the court to discuss the guidelines. The court's failure to inform defendant that the guidelines would apply was not the "functional equivalent" of a failure to inform him of a statutory minimum sentence. *U.S. v. Gomez-Cuevas*, __ F.2d __ (10th Cir. Nov. 7, 1990) No. 89-2189.

5th Circuit upholds requirement of government motion for substantial assistance departure against due process challenge. (115)(710) Defendant contended that guideline section 5K1.1's requirement of a government motion before a judge may depart downward for substantial assistance limits the judge's discretion in a way that violates due process. The 5th Circuit rejected the argument noting that it has been rejected by every circuit that has considered it. Because defendants have no constitutional right to a "substantial assistance" departure provision in the guidelines, a government motion requirement does not unconstitutionally limit the discretion of the sentencing judge. *U.S. v. Harrison*, __ F.2d __ (5th Cir. Nov. 9, 1990) No. 89-7114.

7th Circuit upholds guidelines against due process challenge. (115)(170) Defendant contended that guideline section 1B1.3, which permits the judge to increase a sentence based on related, but uncharged, drug activity, violates due process by requiring the judge to impose a fixed penalty for such activity. He argued that since uncharged relevant conduct need only be proved by a preponderance of the evidence, due process requires that judges have discretion to discount penalties imposed for such conduct. The 7th Circuit rejected this argument. Since standardizing the process of sentencing by using the same offense and offender characteristics is permissible, and sentencing defendants on the basis of crimes for which they have not been convicted is permissible, then Congress may impose a uniform penalty when the evidence indicates that defendant committed these other crimes. Moreover, Congress could have constitutionally prescribed a higher mandatory sentence for possession of any amount of drugs, making quantity irrelevant to the sentencing process. Congress adopted the less draconian method of making quantity a factor relevant to sentencing and mandating the weight to be accorded to additional quantities not proved beyond a reasonable doubt. *U.S. v. Ebbole*, __ F.2d __ (7th Cir. Nov. 8, 1990) No. 89-3672.

10th Circuit upholds constitutionality of substantial assistance provisions. (115)(710) Defendant argued that 18 U.S.C. section 3553(e) and guideline section 5K1.1 violated his 5th Amendment due process rights by preventing a court from departing downward for substantial assistance in the absence of a government motion. Following recent Circuit

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

Publication Manager:
- Beverly Boothroyd

cases, the 10th Circuit rejected this argument. *U.S. v. Deases*, __ F.2d __ (10th Cir. Nov. 2, 1990) No. 90-3010.

3rd Circuit finds defendant's eligibility for probation should be based on classifications in effect when offense was committed. (130)(560) Defendant committed an offense which, at the time it was committed, was a Class B felony. By the time he was sentenced, the law had been amended and defendant's offense was reclassified as a Class C felony. One who commits a Class C felony is eligible for probation, while one who commits a Class B felony is not. The district court determined that defendant had committed a Class C felony, and sentenced her to probation. The 3rd Circuit remanded for resentencing. The "savings statute," 1 U.S.C. section 109, provides that the repeal of any statute does not extinguish any "penalty" incurred under such statute, and such statute will be treated as remaining in force for the purpose of enforcing such penalty. The court found that ineligibility for probation was a type of penalty, and therefore the savings statute prohibited the application of the amendment to defendant. *U.S. v. Jacobs*, __ F.2d __ (3rd Cir. Nov. 13, 1990) No. 90-5339.

11th Circuit remands where court failed to apply amended guidelines in effect at time of sentencing. (130)(480) Defendant was denied a sentence reduction for acceptance of responsibility on the ground that no such reduction was available to a defendant who had obstructed justice. The guidelines had been amended prior to defendant's sentencing to permit both a downward adjustment for acceptance of responsibility and an upward adjustment for obstruction of justice in "extraordinary cases." The 11th Circuit remanded the case, finding that the district court had failed to properly apply the guidelines in effect on the date defendant was sentenced. The district court was instructed to determine whether defendant's case qualified as "extraordinary" under the amended guidelines, thereby entitling him to a reduction for acceptance of responsibility. *U.S. v. Marin*, __ F.2d __ (11th Cir. Nov. 9, 1990) No. 89-6257.

8th Circuit upholds $40,000 fine despite disparity with codefendant. (140)(630) Defendant contended that his $40,000 fine was unjust because his co-conspirator received only a $4,000 fine. The 8th Circuit upheld the fine, noting that the district court properly based its decision on defendant's ability to pay the fine. *U.S. v. Dall*, __ F.2d __ (8th Cir. Sept. 5, 1990) No. 90-1049.

General Application Principles (Chapter 1)

7th Circuit finds false claim of gun ownership involved more than minimal planning. (160)(300) Defendant was the business partner of a man charged with possession of a firearm by a felon. After the partner's arrest, defendant approached the man who sold the gun to the partner, advised the seller that the partner had actually purchased the gun on defendant's behalf, and obtained a receipt. Defendant then employed an attorney who wrote to the police and requested that the weapon be returned to defendant since it belonged to defendant, not the partner. Defendant was later approached by government agents and advised them that he was the owner of the gun. Defendant was convicted of making a false statement to a federal agent, and received a sentence enhancement under guideline section 2F1.1(b)(2)(A) for more than minimal planning. The 7th Circuit upheld the enhancement, finding that defendant's establishment of a paper trail removed his conduct from the ambit of "simple" perjury. *U.S. v. Lennick*, __ F.2d __ (7th Cir. Oct. 26, 1990) No. 90-1063.

5th Circuit upholds consideration of relevant conduct in enhancing sentence for possession of firearm. (170)(284) Defendant was arrested in possession of one quarter pound of amphetamine and notes indicating drug transactions. He was alone and no gun was found. However, he had been arrested by state officials eight days earlier, in possession of amphetamines and two handguns. He was charged in federal court, and pled guilty to one count of possession of amphetamines in return for dismissal of other counts, including conspiracy. His offense level was enhanced by two levels for possession of a firearm during the conspiracy and because co-conspirators possessed guns when arrested. Defendant argued that the enhancement in 2D1.1(b)(1) applies only if the firearm is possessed during the offense of conviction. The 5th Circuit rejected this argument, finding that guideline section 1B1.3 permits a court to consider relevant conduct in determining the application of specific offense characteristics, such as possession of a gun. *U.S. v. Paulk*, __ F.2d __ (5th Cir. Nov. 7, 1990) No. 89-1921.

9th Circuit reaffirms that uncharged conduct may be considered in calculating the offense level. (170)(270) Relying on *U.S. v. Restrepo*, 883 F.2d 781 (9th Cir. 1989) (*Restrepo I*), the district court refused to consider conduct not charged in determining the defendant's sentence. While the appeal was pending, *Restrepo I* was withdrawn and reissued as *U.S. v. Restrepo*, 903 F.2d 648 (9th Cir. 1990), *reh. granted en banc*, 912 F.2d 1568 (*Restrepo II*). The new incarnation of *Restrepo* made it clear that conduct other than that of which the defendant was convicted may be considered in calculating the offense level of a distribution charge if it is part of the same course of conduct as the crime of conviction. Uncharged conduct must be proved by evidence of a sufficient weight "to convince a reasonable person of the probable existence of the enhancing factor." Based on *Restrepo II*, the 9th Circuit rejected the defendant's argument that a more stringent clear and convincing standard of proof should apply to uncharged conduct. *U.S. v. Piper*, __ F.2d __ (9th Cir. Nov. 9, 1990) No. 89-30325.

8th Circuit remands to determine whether government already possessed information defendant revealed to probation officer. (185)(790) Defendant contended that the government violated his plea agreement by using incriminating information which he gave to the probation officer in his presentencing interview. The 8th Circuit rejected the government's argument that guideline section 1B1.8(a)'s prohibition against the use of certain self-incriminating information does not apply to self-incriminating information admitted to a probation officer. However, the government also argued that defendant's admissions merely corroborated more general information it had already obtained from independent sources. Since the record was silent regarding what information the government already knew before the sentencing hearing, the 8th Circuit remanded the case to the district court to hear evidence on the issue. *U.S. v. Frondle*, __ F.2d __ (8th Cir. Nov. 1, 1990) No. 90-1032.

8th Circuit holds juvenile's term cannot exceed the sentence an adult could receive under the guidelines. (190) The minor was found to be a juvenile delinquent, and was sentenced under 18 U.S.C. section 5037(c). This section provides that a juvenile delinquent's term of detention may not extend beyond the lesser of the date when the juvenile becomes 21 years old, or the "maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The minor argued that this means the maximum sentence an adult could receive under the sentencing guidelines. The 8th Circuit agreed, finding that the sentencing court should focus on the sentence a juvenile would receive "but for his age, considering those individualized, subjective factors that should be relevant to sentencing the same individual as an adult." Although the guidelines do not apply to individuals sentenced as juveniles, using the guidelines to fix the maximum sentence a juvenile delinquent could receive serves as a guide to eliminate unwarranted disparity between juvenile and adult sentences. *U.S. v. R.L.C.*, 915 F.2d 320 (8th Cir. 1990).

Offense Conduct, Generally (Chapter 2)

7th Circuit upholds use of assault guideline for firearms offense. (210)(330)(380) Defendant was convicted of being a felon in possession of a firearm. The 7th Circuit found that the district court properly sentenced defendant using the offense level for aggravated assault. The guideline for the felon-in-possession charge, section 2K2.1, states that if the felon used a weapon in connection with the commission or attempted commission of another offense, guideline section 2X1.1 should be applied if the offense level would be higher. Section 2X1.1(a) provides that the base offense level shall be the base offense level for the "object offense." The term "object offense" refers to the underlying conduct, in this case aggravated assault, rather than the charged offense. The district court had sufficient evidence to determine that the crucial element of aggravated assault -- intent to do bodily harm to the victim -- was present. Defendant had raised a cocked gun at a police officer and demanded that the officer leave defendant's apartment. The officer left, and returned with other officers, who found defendant hiding in the bathroom behind the shower curtain. Defendant shouted that if the officers tried to capture him, he would "blow their heads off." *U.S. v. Madewell*, __ F.2d __ (7th Cir. Oct. 30, 1990) No. 89-3700.

8th Circuit finds postal employee who stole from mail abused position of trust. (220)(450) Defendant pled guilty to theft of government mail by a postal employee. The district court refused to enhance defendant's sentence based on abuse of a position of trust, because it believed that in all postal theft cases, trust is built into the guidelines. The 8th Circuit disagreed, finding that while the underlying criminal statute does assume an abuse of public trust, the guidelines do not. Defendant was sentenced under guideline section 2B1.1, which applies to any theft, not just theft by a postal employee. The court rejected defendant's argument that any postal employee could have committed his crime. Defendant had direct access to express and certified mail as a substitute handler one day a week. Other employees did not have access to such mail, which by its nature was especially sensitive and more likely to contain things of value than mail in general. Judge Heaney dissented, finding defendant's job provided the same opportunity for crime that was afforded to every other handler of express and certified mail. *U.S. v. Lange*, __ F.2d __ (8th Cir. Nov. 2, 1990) No. 89-2588S1.

10th Circuit finds exception to sentence enhancement for counterfeiting does not apply to all who use photocopy machines. (220) Guideline section 2B5.1(b)(2) provides for a sentence enhancement for certain counterfeiting offenses. However, the enhancement does not apply "to persons who merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." Defendant contended that the enhancement did not apply to any person who produced a counterfeit note by photocopying. The 10th Circuit rejected this interpretation, noting that it "would protect even the most successful counterfeiters from the enhanced penalties . . . based solely on the method of production, photocopying." Instead, the court read the language to exclude from sentence enhancement "those defendants who produce notes, by photocopying or other means, that 'are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.'" *U.S. v. Bruning*, 914 F.2d 212 (10th Cir. 1990).

1st Circuit upholds district court's calculation of cocaine. (250) Defendant argued that the district court incorrectly calculated that 1500 grams of cocaine were involved in his

offense. The 1st Circuit rejected this challenge. Although the two experts who submitted evidence on the amount of cocaine differed in their findings, both experts found that the amount exceeded 1500 grams. Moreover, defendant's expert actually estimated the amount of cocaine as higher than the expert for the government. *U.S. v. Filippi*, __ F.2d __ (1st Cir. Nov. 2, 1990) No. 90-1277.

8th Circuit upholds approximation of drug quantity. (250) A co-conspirator testified that he "fronted," to defendant's intermediary, between two and four kilograms of cocaine. The district court "split the difference," and determined that defendant was responsible for three kilograms. The 8th Circuit rejected defendant's argument that this approximation violated due process. Guideline section 2D1.4 permits a district court to approximate the amount of cocaine involved. The court refused to determine whether simply "splitting the difference" was so arbitrary and standardless a method as to violate due process, since defendant's sentence would have been the same even if the district court determined only two kilograms were involved. *U.S. v. Frondle*, __ F.2d __ (8th Cir. Nov. 1, 1990) No. 90-1032.

9th Circuit upholds finding that methamphetamine lab was capable of producing 18 pounds. (250) The government's expert estimated that defendant's lab had already produced 12 pounds of methamphetamine and was capable of producing an additional 6 pounds. He based this conclusion of his analysis of the chemicals and materials present at the lab at the time of the arrest. Defendant did not challenge any of the facts underlying the government's analysis. Instead his expert drew different inferences from the facts. Under the circumstances, the 9th Circuit ruled that the trial court's finding was not clearly erroneous. *U.S. v. Upshaw*, __ F.2d __ (9th Cir. Nov. 6, 1990) No. 89-10582.

5th Circuit upholds inclusion of drugs distributed by co-conspirators. (275)(760) Defendant objected to including cocaine, which was part of transactions involving defendant's co-conspirators, in the calculation of his base offense level. Defendant contended that this was inconsistent with the judgment in one of his co-conspirator's cases. The 5th Circuit rejected this contention, noting that the other case had been remanded because the district court failed to resolve defendant's contention that he was not part of the conspiracy to distribute cocaine. In this case, although defendant objected to the presentence report's conclusion that he was a part of the conspiracy, the district court expressly resolved this disputed matter against him. Therefore, it was proper for the district court to rely upon this fact at sentencing. *U.S. v. Ponce*, __ F.2d __ (5th Cir. Nov. 6, 1990) No. 89-5628.

8th Circuit upholds inclusion of drugs from all transactions in defendant's offense level. (275) The district court found that defendant was involved with 5 to 14.9 kilograms of cocaine, based on 25 different drug transactions. Defendant challenged the inclusion of drugs from 10 of the transactions. The 8th Circuit upheld the district court's calculation. In the first transaction, defendant accompanied a co-conspirator on a trip to Chicago where the co-conspirator purchased two kilograms of cocaine. The co-conspirator testified that during part of the trip, defendant carried a leather pouch which defendant knew carried cocaine. Defendant was accountable for drug transactions handled by his co-conspirator which he knew about or could reasonably foresee. In the second transaction, defendant was held accountable for cocaine sold by his co-conspirator to another individual. The fact that defendant profited from this transaction and knew about others was sufficient to show a conspiratorial involvement. Since these two transactions alone would account for defendant's base offense level, it was not necessary for the court to consider the other eight transactions. *U.S. v. Lawrence*, __ F.2d __ (8th Cir. Nov. 5, 1990) No. 89-2602NI.

8th Circuit upholds inclusion of drugs co-conspirator "fronted" to defendant's intermediary. (275)(770) Defendant contended that the district court improperly included, in the calculation of his offense level, three kilograms of cocaine that a co-conspirator testified he "fronted" to defendant's intermediary. The 8th Circuit upheld the district court's calculation. Although defendant argued that the co-conspirator was unreliable, matters of credibility are for the district court to determine. The co-conspirator's testimony was uncorroborated, but a district court may consider uncorroborated evidence, provided the defendant is given an opportunity to rebut it. Since defendant admitted that the co-conspirator supplied defendant with cocaine through the intermediary, it was not clearly erroneous for the district court to conclude that the three kilogram transfer was reasonably foreseeable by defendant. *U.S. v. Frondle*, __ F.2d __ (8th Cir. Nov. 1, 1990) No. 90-1032.

5th Circuit remands for district court to determine defendant's intent in possessing inoperable gun. (280) An unloaded, inoperative firearm was found in the glove compartment of a car which defendant drove to the scene of a drug transaction. At the time of defendant's arrest, he was some distance from the car, observing a co-conspirator's sale of drugs to an undercover agent. Defendant claimed that he had intended to take the gun to a gunsmith for repair, and had forgotten that he put it in his car. The 5th Circuit rejected defendant's argument that he did not possess a firearm during the commission of the drug transaction. The fact that the gun was inoperative did not alter the analysis. The mere presence of a gun can "escalate the danger inherent" in a drug deal. However, the version of guideline section 2D1.1(b)(1) under which defendant was sentenced had a scienter requirement. Since defendant claimed he was unaware that the gun was in the glove compartment, the case was remanded for the district court to determine defendant's intent in possessing the weapon. *U.S. v. Paulk*, __ F.2d __ (5th Cir. Nov. 7, 1990) No. 89-1921.

6th Circuit upholds upward departure based on defendant's possession of a machine gun. (280)(720)(745)(810) Defendant's offense level was increased by two levels based upon his possession of a machine gun. The 6th Circuit upheld the upward departure. Guideline section 5K2.6 authorizes an upward departure when a weapon or dangerous instrumentality is used or possessed in the commission of an offense. The 6th Circuit concluded that the district court considered departure appropriate and found that increasing the offense level by two points was reasonable. Judge Nelson, concurred in the result, arguing that the majority applied the wrong analysis. Defendant did not receive an upward departure, but rather his base offense level had been increased by two under guideline section 2D1.1(b). Defendant argued that he was entitled to a downward departure. Rather than reviewing defendant's sentence as an upward departure, the majority should have dismissed defendant's claim on the ground that a refusal to depart downward is not reviewable. *U.S. v. Smith*, __ F.2d __ (6th Cir. Nov. 9, 1990) No. 89-3917.

6th Circuit affirms firearms enhancement even though defendant was acquitted of carrying a firearm. (284)(755) A jury found defendant guilty of distributing and possessing cocaine, but not guilty of using and carrying a firearm during a drug trafficking crime. Defendant challenged the district court's enhancement of his offense level under guideline section 2D1.1 for possessing a firearm during the commission of a drug offense. The 6th Circuit upheld the enhancement. The district court found that defendant possessed the weapon on the front seat next to him during a drug transaction that took place in his car. A later drug transaction took place in the home at which defendant's car was parked, but it was still proper for the court to determine that the gun was easily accessible to defendant, and was therefore present, during the offense. Although defendant had been acquitted of the firearms carrying charge, there was still ample room for the district court to find by a preponderance of the evidence that the weapon was possessed during the drug offense. *U.S. v. Duncan*, __ F.2d __ (6th Cir. Nov. 8, 1990) No. 90-5111.

3rd Circuit finds defendant's intent to kill was a proper basis for departure in firearms and explosives case. (330)(745) Defendant was sentenced under guidelines section 2K2.1 (possession of firearms by prohibited persons), 2K2.2 (possession of firearms in violation of regulatory provisions), and 2K1.6 (transporting explosives with knowledge that others will use the explosives to harm people or property). Defendant argued that these guidelines considered his specific intent to kill, and therefore this was not a proper ground for an upward departure. The 3rd Circuit rejected this argument, finding no clear textual evidence that this factor was considered. Although the firearms guidelines obviously incorporated "some presumption of intended unlawful use," the intent to shoot and kill someone was "sufficiently different" from other less egregious unlawful uses. Likewise, there is a distinction between one who transports explosives with the knowledge that others will use the explosives to harm people and property, and one who transports explosives intending to harm people and property himself. Defendant's intent to kill was a proper ground for departure. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Nov. 2, 1990) No. 89-5129.

8th Circuit upholds defendant's right to appeal district court's failure to grant downward adjustment. (330)(800) Defendant pled guilty to being an unlawful user of marijuana in possession of firearms. He argued that the district court erred in refusing to reduce his offense level under guideline section 2K2.1(b)(1) because he possessed the firearms for the lawful purpose of hunting or collection. The 8th Circuit rejected the government's contention that the court had no jurisdiction to review the district court's refusal to grant a downward departure. The case did not involve a refusal to grant a downward departure, it involved the refusal to grant a downward adjustment in the offense level. *U.S. v. Dinges*, __ F.2d __ (8th Cir. Oct. 30, 1990) No. 90-1559.

8th Circuit affirms that defendant did not possess firearms for hunting or collection purposes. (330)(755) Defendant pled guilty to being an unlawful user of marijuana in possession of firearms. He argued that the district court erred in refusing to reduce his offense level under guideline section 2K2.1(b)(1) because he possessed the firearms for the lawful purpose of hunting or collection. The 8th Circuit rejected defendant's argument that it was error to place the burden of proving that he possessed the firearms for sport or collection on him. A defendant has the burden of proving the applicability of any guideline section which would reduce the offense level. It affirmed the district court's decision, finding that the number and type of firearms, the quantity of ammunition, and the presence of explosives strongly supported the district court's inference that at the time of defendant's arrest, he and his friends were not on an ordinary hunting trip and refuted defendant's claim that he possessed the firearms as collector's items. *U.S. v. Dinges*, __ F.2d __ (8th Cir. Oct. 30, 1990) No. 90-1559.

8th Circuit upholds upward departure based upon importing harmful drugs into the United States. (370)(745) The commentary to guideline section 2T3.1 (Evading Import Duties or Restrictions) provides that an upward departure may be appropriate in cases where a defendant smuggles a harmful good into the United States, and the duties evaded on such good may not reflect the harm to society resulting from its importation. Defendant imported over $1 million worth of adulterated drugs, including 50 kilograms of an animal drug into the United States. The 8th Circuit found that defendant's offense fell into the situation described in the commentary. Therefore the district court's upward departure was justified, and the 24-month sentence was rea-

sonable. *U.S. v. Dall*, __ F.2d __ (8th Cir. Sept. 5, 1990) No. 90-1049.

8th Circuit upholds inclusion of FDA-approved drugs which had been adulterated in calculating offense level. (370) Defendant argued that there was no substantial evidence that over $1 million worth of drugs he imported into the United States were part of his conspiracy to violate customs laws and the Federal Food, Drug and Cosmetic Act because the drugs had been FDA-approved. The 8th Circuit rejected this argument, noting that although defendant paid duties on these drugs, they were adulterated, and therefore imported contrary to law. Thus, the drugs were properly included in the calculation of defendant's base offense level. *U.S. v. Dall*, __ F.2d __ (8th Cir. Sept. 5, 1990) No. 90-1049.

Adjustments (Chapter 3)

8th Circuit affirms that supplier for animal drug smuggling ring was organizer and manager. (430) The 8th Circuit found that there was sufficient evidence to support defendant's enhancement for being an organizer and manager of an animal drug smuggling ring. Defendant was one of the largest suppliers of unapproved animal drugs in the United States, met with his customers to discuss smuggling the drugs into the United States, made the arrangements with European suppliers to send the drugs to Canada, and met with bank officials regarding a letter of credit for one of his customers. *U.S. v. Dall*, __ F.2d __ (8th Cir. Sept. 5, 1990) No. 90-1049.

8th Circuit holds that defendant need only manage the criminal activity, not the co-conspirators. (430) The 8th Circuit found that there was sufficient evidence for the district court to conclude that defendant acted as manager of many drug transactions. Defendant procured, stored and sold drugs to several other people and paid his suppliers. "To be a manager, a defendant in a drug conspiracy need not control or manage the activities of the co-conspirators -- it is sufficient that the facts show that the defendant managed the criminal activity." *U.S. v. Lawrence*, __ F.2d __ (8th Cir. Nov. 5, 1990) No. 89-2602 NI.

4th Circuit affirms that seller of drugs was not a minor or minimal participant. (440) Defendant was convicted of selling crack cocaine to a government informant. Defendant contended that he was merely a minor or minimal participant since each time he sold crack to the informant, he had to locate and purchase the drug from someone else, and that he resold the drug to the informant at no profit to himself, but merely as a favor. The 4th Circuit rejected this argument, finding that defendant was a major participant in a minor operation. As the actual seller of drugs, even if merely a go-between, defendant did not engage in the kind of conduct contemplated by section 3B1.2. *U.S. v. Glasco*, __ F.2d __ (4th Cir. Oct. 25, 1990) No. 89-5197.

6th Circuit denies reduction for being minor or minimal participant to defendant whose home was used to sell drugs. (440) Defendant contended that he was a minor or minimal participant in a drug conspiracy, because he would have received much more money as compensation had his involvement been more than minimal. The 6th Circuit rejected this argument, noting that defendant had a role in the genesis of the conspiracy, and defendant's home was used as the base of operations for the conspiracy. *U.S. v. Smith*, __ F.2d __ (6th Cir. Nov. 9, 1990) No. 89-3917.

5th Circuit upholds obstruction of justice enhancement for defendant who used an alias. (460) After being stopped by police, defendant gave an alias in order to prevent the police from learning of several outstanding warrants. Defendant was subsequently arrested after the police discovered a gun in the car defendant was driving, and eventually pled guilty to being a felon in possession of a firearm. Defendant's sentence was enhanced for obstruction of justice based on his use of the alias. He argued that there was an insufficient nexus between the obstruction and the weapons offenses. The alias was used only to obstruct arrest on previous outstanding warrants; it was not used to obstruct his arrest for the weapons offenses. The 5th Circuit rejected defendant's argument. Had defendant's alias not been discovered, his status as a felon would not have been known, and defendant could have escaped conviction for his present offense. *U.S. v. Rogers*, __ F.2d __ (5th Cir. Oct. 31, 1990) No. 90-8023.

8th Circuit affirms adjustment for obstruction and denial of reduction for acceptance of responsibility. (460)(485)(790) Defendant appealed the district court's decision to deny him a two-level reduction for acceptance of responsibility and to assess him a two-level penalty for obstruction of justice. The 8th Circuit affirmed, finding that defendant lied on several occasions concerning the extent of his past drug dealings. This was not only a breach of his plea agreement, thus disqualifying him for an acceptance of responsibility reduction, but was also grounds for an obstruction of justice enhancement. Defendant was not punished for failing to confess the full extent of his drug involvement. That would violate the 5th Amendment. Rather, he was punished for lying, after he had voluntarily agreed in his plea agreement to reveal all of his past drug dealings. *U.S. v. Lawrence*, __ F.2d __ (8th Cir. Nov. 5, 1990) No. 89- 2602NI.

8th Circuit imposes obstruction of justice enhancement on defendant who lied about extent of thefts. (460) Defendant pled guilty to theft of government mail by a postal employee. The government claimed that defendant opened numerous letters and stole a total of $645, while defendant maintained in his stipulation of facts and at his plea hearing that he stole only $90 from three pieces of mail. At sentencing, defendant

admitted he had lied about the extent of his thefts in order to minimize his sentence under the guidelines. The 8th Circuit found that the district court erred in not increasing defendant's offense level for obstruction of justice. Defendant lied during the investigation of his offense, and this lie was material, since under the guidelines, the offense level increases as the value of the stolen property increases. Defendant was not being punished for the exercise of a constitutional right, since there is no constitutional right to lie. Judge Heaney dissented, noting that the government never suggested that defendant's apparent lies constituted an obstruction of justice until he recanted them at sentencing. *U.S. v. Lange*, __ F.2d __ (8th Cir. Nov. 2, 1990) No. 89-2588S1.

9th Circuit holds that probation officers must permit counsel to be present at presentence interview. (480)(760) In *Baumann v. U.S.*, 692 F.2d 565 (9th Cir. 1982), the 9th Circuit held that the presentence interview did not constitute a "critical stage" at which counsel was required by the 6th Amendment. Nevertheless, in this case the 9th Circuit exercised its "supervisory power" to hold that probation officers must permit defendants to have their attorneys present at the presentence interview. The court noted that the presentence interview plays a crucial role in determining the probation officer's recommended sentence. In this case the district court declined to give the defendant credit for acceptance of responsibility because he refused to talk with the probation officer in the absence of counsel. The court said that its rule would serve the guidelines policy of evenhandedness in sentencing. Judge Leavy concurred that the sentence should be vacated because the district court simply deferred to the presentence report. He dissented from the holding requiring counsel's presence at presentence interviews, however, expressing fear that this may turn the interview into an adversary proceeding. *U.S. v. Herrera-Figueroa*, __ F.2d __ (9th Cir. Nov. 14, 1990) No. 89-50660.

9th Circuit rules that defendant need only accept responsibility for the offense of conviction. (480) In *U.S. v. Perez-Franco*, 873 F.2d 455, 459 (1st Cir. 1989), the 1st Circuit held that a reduction for acceptance of responsibility may not be conditioned on defendant's acknowledgement of responsibility for dismissed counts. The 1st Circuit's reasoning has been endorsed by the 2nd, 6th and 10th Circuits, but rejected by the 4th, 5th and 11th Circuits. Here the 9th Circuit agreed with *Perez-Franco* "that a defendant may controvert evidence of other criminal conduct at sentencing without thereby losing the reduction for acceptance of responsibility." "To merit such a reduction a defendant must show contrition for the crime for which he was convicted, but need not accept blame for all crimes of which he may be accused." However, the court added that evidence of continued criminal activity may be used to cast doubt his sincere acceptance of responsibility *for the offense of conviction*. *U.S. v. Piper*, __ F.2d __ (9th Cir. Nov. 9, 1990) No. 89-30325.

6th Circuit finds no acceptance of responsibility by defendant who refused to admit leadership role in offense. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he did not fight removal from Detroit to Cleveland, he pled guilty, and he explained his role to the probation officer. The 6th Circuit rejected this argument, noting that defendant conceded in his brief that he refused to accept responsibility for any managerial or leadership role in the overall conspiracy. *U.S. v. Smith*, __ F.2d __ (6th Cir. Nov. 9, 1990) No. 89-3917.

Criminal History (§ 4A)

5th Circuit treats two convictions with concurrent sentences as separate offenses for criminal history purposes. (500) Defendant claimed that the district court erred in computing his criminal history score because it treated as separate offenses two convictions on which concurrent sentences were imposed on the same day. The 5th Circuit rejected this argument. The convictions were the result of two separate criminal acts: possession of a controlled substance in 1984 and possession of a controlled substance in 1985. Defendant did not allege that the two convictions were factually related. The fact that the sentences ran concurrently and were imposed on the same day did not require the sentences to be consolidated for guideline purposes absent a showing of a close factual relationship between the convictions. *U.S. v. Paulk*, __ F.2d __ (5th Cir. Nov. 7, 1990) No. 89-1921.

9th Circuit upholds use of AWOL military conviction in calculating criminal history. (500) Guideline section 4A1.2(g) provides that in computing criminal history, "[s]entences resulting from military offenses are counted if imposed by a general or special court martial." Sentences imposed by summary court martial are not counted. Here the appellant argued that it violated due process and equal protection to consider his conviction by a special court martial for being absent without leave from the Navy. He also argued that the phrase "military offenses" as used in section 4A1.2(g) did not include "purely military offenses" of a "minor" nature such as an AWOL conviction. The Ninth Circuit rejected his arguments and affirmed his sentence. *U.S. v. Locke*, __ F.2d __ (9th Cir. Nov. 13, 1990) No. 89-50667.

5th Circuit upholds career offender status even though prior crimes were committed in a short time span. (520)(734) Defendant argued that the trial court sentenced her under the erroneous impression that it was without authority to depart downward from the guidelines. The 5th Circuit found nothing in the record to support this assertion. Defendant also argued that the district court should have departed downward on the basis that her criminal history was overstated. Although defendant met the technical requirements for career offender status, she argued she should

not be considered an ordinary career offender because all of her crimes were committed in a short period of time. Defendant had five controlled substance violations in 1986 and 1987. The 5th Circuit rejected this argument, finding no support for defendant's position that crimes committed within a short time frame should be an exception to the career offender guidelines. *U.S. v. Harrison*, __ F.2d __ (5th Cir. Nov. 9, 1990) No. 89-7114.

8th Circuit finds state misdemeanor is felony for career offender purposes. (520) Defendant contended that he was improperly sentenced as a career offender because one of the convictions relied on by the district court was a misdemeanor. The 8th Circuit rejected this argument. Defendant received a sentence of 45 days in county jail for selling a counterfeit controlled substance. However, defendant could have received a sentence in excess of one year, and therefore the offense constituted a felony under the sentencing guidelines. Judge Bright dissented, arguing that since defendant was attempting to sell a counterfeit controlled substance, he had not committed a controlled substance offense as defined in the guidelines. *U.S. v. Hester*, __ F.2d __ (8th Cir. Oct. 26, 1990) No. 89-2471.

Determining the Sentence (Chapter 5)

3rd Circuit remands pre-guidelines case where district court failed to adequately state basis for restitution. (620) Defendant was originally convicted of embezzlement and making false statements in bank records in connection with his activities as vice president in the trust division of a bank. Defendant's embezzlement convictions were overturned on appeal because the government failed to prove certain essential elements of the crime. After defendant was resentenced, he argued that since his embezzlement convictions had been reversed, it was improper for the district court to order restitution without connecting it to the false statement offenses for which he remained convicted. The 3rd Circuit agreed that the district court could not impose restitution based on the overturned embezzlement convictions, and that the district court had failed to properly state the basis for the restitution award. The district court failed to identify who the defendant victimized or to explain how the restitution was related to any loss caused by the conduct for which defendant remained convicted. *U.S. v. Furst*, __ F.2d __ (3rd Cir. Nov. 5, 1990) No. 90-5222.

6th Circuit reverses district court's failure to impose fine. (630)(820) The district court refused to impose a fine on defendant, concluding that he was "unable to pay a large fine." Reviewing this factual finding under the clearly erroneous standard, the 6th Circuit reversed. The guidelines place on a defendant the burden of proving an inability to pay a fine. Defendant presented no proof to the district court that he was unable to pay a fine. Uncontested evidence showed that defendant's net worth was $250,500, of which $200,000 was the proceeds of a spendthrift trust. The minimum fine for a person with defendant's offense was $15,000. Therefore, the district court's finding was clearly erroneous. *U.S. v. Hickey*, __ F.2d __ (6th Cir. Oct. 24, 1990) No. 89-1459.

6th Circuit upholds district court's use of seized funds to pay costs of prosecution and special assessment. (630)(940) Upon defendant's arrest on various drug charges, police seized some personal property and cash. After defendant was convicted, the district court ordered all items not introduced as evidence to be released, except $397.25 cash. $380 was applied toward the costs of investigation and prosecution and the balance was applied toward the special assessment. The 6th Circuit found that the district court had properly balanced the competing equities in deciding whether to return the property. A defendant's right to the return of lawfully seized property is subject to the government's continuing interest in the property. In this case, the government had an interest in insuring that the monetary penalties imposed as part of defendant's sentence were paid. Moreover, the record indicated that some of the money seized was the proceeds of an illegal drug sale. In addition, by applying the cash to the sentence imposed, the district court essentially allocated the defendant's property for his benefit, rather than depriving him of the property altogether. *U.S. v. Duncan*, __ F.2d __ (6th Cir. Nov. 8, 1990) No. 90-5111.

10th Circuit reverses fine that exceeded guideline range. (630)(820) On appeal, defendant objected to the alternative fine of $225,000. Since he had not objected to the amount of the fine in the district court, the 10th Circuit reviewed the sentence only for plain error. The court found that the district court had committed obvious error in selecting the appropriate fine range under the guidelines. The maximum fine was governed by the fine table in section 5E1.2(c), which provided for a maximum fine of $50,000, unless defendant was convicted under a statute authorizing a maximum fine "greater than $250,000." Defendant was convicted of violating a statute with a maximum fine of $5,000. The alternative fine statute provided that a fine of "not more than $250,000" may be imposed if the defendant was convicted of a felony. The 10th Circuit found that even if the reference to "the statute under which 'the defendant is convicted' could be construed to include the alternative fine statute," a "maximum fine greater than $250,000" is not the same as a fine "not more than $250,000." Therefore, $50,000 was the maximum fine permissible. *U.S. v. Smith*, __ F.2d __ (10th Cir. Nov. 6, 1990) No. 90-6112.

6th Circuit rejects defendant's double jeopardy claim in pre-guidelines case. (680) In a pre-guidelines case, defendant contended that his sentence violated double jeopardy. He was charged with violations of the Travel Act by aiding

and abetting and conspiracy to import and distribute marijuana. The 6th Circuit rejected his double jeopardy claim, finding that Congress did not intend conspiracy to merge with aiding and abetting a Travel Act offense. Therefore, defendant's double jeopardy claim was without merit. *U.S. v. Sammons*, __ F.2d __ (6th Cir. Oct. 30, 1990) No. 88-6311.

Departures Generally (§ 5K)

3rd Circuit holds that extent of departures must be guided by the structure of the guidelines. (700) The 3rd Circuit held that, wherever possible, an offense-based departure should be based on determining the offense level that most closely approximates a defendant's conduct. Thus, if a departure is based upon aggravating conduct that itself would constitute a separate offense under a different guideline, the reasonableness of a departure may be evaluated by "treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it." A court must apply the guidelines' grouping rules. If the aggravating conduct is not a separate crime, but is a special offense characteristic, "the gravity attached to the characteristic in the other guidelines provides appropriate guidance as to what degree of departure would be reasonable." Thus, if the aggravating factor were more than minimal planning, "a departure equivalent to increasing defendant's offense level by more than two levels would be presumptively unreasonable." The court recognized that there would be cases where the guidelines provide no useful analogies, and in such cases, there may be other "vehicles for making offense-related departures under section 5K of the guidelines." *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Nov. 2, 1990) No. 89-5129.

3rd Circuit subjects hearsay to more strenuous test in case involving extreme departure. (700)(770) Defendant had an applicable guideline range of 27 to 33 months. The district court departed upward on various grounds and imposed a sentence of 30 years. The departure was based in part on the hearsay statement of a confidential informant which linked defendant to terrorist activities. The 3rd Circuit held that in cases involving such extreme departures, the standard for admissibility of evidence used in the sentencing hearing must be increased. The court must examine "the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy." In this case, this heightened standard had been met. The informant's testimony regarding defendant's presence and activities in a terrorist training camp was verified by other information in the record, including defendant's possession of materials to make explosive devices in the manner described by the informant. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Nov. 2, 1990) No. 89-5129.

3rd Circuit holds that facts underlying extreme departures must be supported by clear and convincing evidence. (700)(755) The district court departed upward from 33 months to 30 years. The 3rd Circuit found that in cases involving such extreme departures, the standard of proof at the sentencing hearing must be greater than a preponderance of the evidence. Where the magnitude of the contemplated departure is sufficiently great, "a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations." The court held that in extreme departure situations, the factfinding underlying the departure must be established by at least clear and convincing evidence. Since defendant did not request a higher standard, the court assumed without deciding that the clear and convincing standard was adequate. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Nov. 2, 1990) No. 89-5129.

6th Circuit upholds sentence within guideline range. (720)(810) Defendant argued that the district court should have departed downward from the guidelines because it should have been clear that he could not have organized a drug conspiracy. However, defendant did not point to any facts in the record that supported this assertion, and defendant's counsel admitted that defendant's sentence fell within the applicable guideline range. Because the sentence imposed was within the applicable range, "the sentence was not clearly erroneous under 18 U.S.C. section 3742(e)." Judge Nelson, concurred in the result, noting simply that defendant's claim was not cognizable on appeal. *U.S. v. Smith*, __ F.2d __ (6th Cir. Nov. 9, 1990) No. 89-3917.

10th Circuit reaffirms that it has no jurisdiction to review refusal to depart downward. (720)(810) Defendant claimed the district court abused its discretion by not taking into account his possible deportation and departing downward from the guidelines. The 10th Circuit dismissed for lack of jurisdiction, reaffirming that it could not review a district court's refusal to depart downward. The district court clearly believed it had the authority to depart downward but chose not to because the facts did not warrant a departure. The fact that defendant's drug conviction might result in his deportation did not give the appellate court jurisdiction. Moreover, Congress has specifically stated that the courts should not recommend to the Attorney General that an alien convicted of a controlled substance offense not be deported. A downward departure for the purpose of avoiding possible deportation would be an attempt to circumvent a Congressional prohibition. *U.S. v. Soto*, __ F.2d __ (10th Cir. Nov. 8, 1990) No. 89-2254.

11th Circuit refuses to review failure to depart downward. (720)(810) Defendant argued that the district court failed to depart downward because it felt it did not have the authority to do so. The 11th Circuit noted that generally a defendant cannot appeal a court's failure to depart downward. However, a defendant can appeal if it is clear that the district court did not believe that it had the authority to depart

downward for the reasons requested by the defendant. In this case, after reviewing the transcript of the sentencing hearing, the 11th Circuit concluded without discussion that the district court believed it had the authority to depart downward but declined to exercise its discretion. *U.S. v. Keller*, __ F.2d __ (11th Cir. Nov. 2, 1990) No. 89-8623.

3rd Circuit affirms upward departure to criminal history category VI for terrorist. (733) Defendant was arrested transporting a homemade bomb which he intended to detonate in New York City. Defendant had no prior criminal convictions and fell into criminal history category I. However, defendant had received terrorist training in Lebanon. He also provided training in the use of explosives to members of a group publicly committed to perpetrating acts of terrorism against Americans. Although defendant had been arrested in 1986 in the Netherlands in connection with terrorist activities, he was subsequently released due to an illegal search. The 3rd Circuit found that these facts justified an upward departure from criminal history category I to category VI. "Defendant is a professional terrorist who is extremely likely to commit other equally serious crimes in the future." Therefore, it was reasonable to analogize defendant to a category VI offender. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Nov. 2, 1990) No. 89-5129.

5th Circuit affirms upward criminal history departure based on excessive criminal history point total. (733) Defendant had a total of 21 criminal history points, which placed him in criminal history category VI. Category VI is the highest criminal history category, and covers defendants with 13 or more points. The district court departed upward because of defendant's excessive criminal history point total. Defendant contended that the sentencing commission took into account high criminal history point totals because category VI covers "13 or more points." The 5th Circuit rejected this argument, noting that the policy statement contained in guideline section 4A1.3 expressly contemplates an upward departure when category VI is not adequate to reflect the seriousness of a defendant's criminal record. The court also found the extent of the departure (from a guideline range of 27-33 months to a sentence of 48 months) to be reasonable. *U.S. v. Rogers*, __ F.2d __ (5th Cir. Oct. 31, 1990) No. 90-8023.

3rd Circuit finds departure for terrorist exceeded bounds of reasonableness. (745)(746) Defendant, a member of a violent terrorist organization, was arrested transporting homemade bombs which he intended to detonate in a federal building in New York City. The district court departed upward from 33 months to 30 years. Since defendant intended to use his bombs to kill people, an analogy to the attempted murder guideline, carrying a base offense level of 20, could be made. The district court could assume that defendant intended to detonate his bomb when at least six people were present, justifying a five-level upward adjustment. The district court also could reasonably have imposed a two-level increase for more than minimal planning. However, the court found that intent to disrupt a government function was an inappropriate ground for departure. Defendant's actions were intended to influence the government's terrorist policies with respect to Libya, which was "indistinguishable from the motivation underlying ordinary civil disobedience designed to change government policy." A departure of five levels could also be properly based on defendant's extreme conduct and threat to public safety. Adding all of these factors together, defendant's conduct could be analogized to a defendant with an offense level of 32. Based on a criminal history category of VI, the resulting range would be 210 to 262 months. Therefore, the district court's sentence of 360 months was unreasonable. *U.S. v. Kikumura*, __ F.2d __ (3rd Cir. Nov. 2, 1990) No. 89-5129.

Sentencing Hearing (§ 6A)

9th Circuit finds no abuse of discretion in refusing oral argument and testimony on the issue of quantity of drugs. (750) Defendant argued that the district court erroneously refused oral argument and testimony on the issue of quantity of drugs. However, the court delayed sentencing to allow a written submission on the quantity issue. Defendant filed a written argument and a supporting declaration and the government filed an opposition and a supporting declaration. The district court denied defendant's request to testify but stated that his affidavit could be filed. The 9th Circuit held that these procedure did not violate guidelines section 6A1.3(b). There was no abuse of discretion since defense counsel was given the opportunity to make a written submission. *U.S. v. Upshaw*, __ F.2d __ (9th Cir. Nov. 6, 1990) No. 89-10582.

3rd Circuit remands pre-guidelines case where district court failed to comply with Fed. R. Crim. P. 32(c)(3)(D). (760) Defendant contended that the district court did not comply with Fed. R. Crim. P. 32(c)(3)(D) because it failed to resolve or expressly disclaim reliance upon disputed matters in the presentence report. Defendant had objected to the fact that the victim impact statement improperly referred to him as a thief when his embezzlement convictions had been overturned. Defendant had also objected to the Probation Office's estimate of when he would be eligible for parole and what his sentence would be if the sentencing guidelines were applicable. The 3rd Circuit agreed that the district court had failed to comply with Rule 32(c)(3)(D). Even though the district court characterized defendant's objections to the report as "arguments" it was required to either resolve the factual dispute at the core of the argument or expressly disclaim reliance upon those disputed facts. *U.S. v. Furst*, __ F.2d __ (3rd Cir. Nov. 5, 1990) No. 90-5222.

9th Circuit finds that defendant was given reasonable notice of the position taken by the sentencing judge. (760) The Commentary to Sentencing Guidelines Policy Statement section 6A1.3 states that if sentencing factors are the subject of reasonable dispute, "the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed." Although the court made no tentative findings here, the 9th Circuit found that the defendant had adequate opportunity to marshall his cases. The change in the presentence report made it clear that the quantity of drugs was an issue. The defendant had received a continuance to enable him to file a written report by his expert, and he filed the report together with a written argument. Therefore he had reasonable notice and an opportunity to provide information and argument. *U.S. v. Upshaw*, __ F.2d __ (9th Cir. Nov. 6, 1990) No. 89-10582.

9th Circuit reverses where court failed to give adequate reasons for choosing a sentence within the range. (775) 18 U.S.C. section 3553(c) requires a statement in open court of the reasons for choosing a sentence within the sentencing range if that range exceeds 24 months. Here the range was 188-235 months. The court simply indicated that it was imposing a sentence in the midrange in accordance with it "customary procedure." The 9th Circuit found this inadequate, ruling that the statement must include a discussion of the factors used to choose a particular sentence including background, character and conduct, as well as the systemic goals of deterrence, rehabilitation and consistency in sentencing. The sentence was vacated and remanded. *U.S. v. Upshaw*, __ F.2d __ (9th Cir. Nov. 6, 1990) No. 89-10582.

Plea Agreements, Generally (§ 6B)

10th Circuit rejects claim that government promised defendant his sentence would not exceed four years. (780) Defendant contended that his 96-month sentence was improper because the government promised, as part of his plea agreement, that his sentence would not exceed four years. The 10th Circuit disagreed, finding the language of the written plea agreement to "completely negate[]" defendant's claim. The plea agreement clearly stated that the actual sentence was in the sole discretion of the trial judge, and that the government could not predetermine the final sentence. At the sentencing hearing, defendant stated that the written plea agreement contained his entire agreement with the government. He was also advised by the district court that the court did not have to follow any recommendation of the government, and defendant acknowledged that he understood this. *U.S. v. Gamble*, __ F.2d __ (10th Cir. Oct. 29, 1990) No. 90-5076.

1st Circuit orders resentencing where prosecution's sentence recommendation breached plea agreement. (790) As part of the plea agreement, the government agreed to recommend 12 months. The presentence report, however, suggested a higher offense level, and at sentencing, the prosecution recommended a sentence in accordance with the presentence report. Defendant objected and the hearing was continued. The prosecution withdrew its original recommendation and recommended 12 months. Defendant argued that this was ineffective to cure the breach because the judge was aware of the prosecution's "real" position. He demanded recusal and specific performance, declining the opportunity to withdraw his plea. The judge found no breach of the plea agreement, and sentenced him to three years in prison. The 1st Circuit reversed, and since defendant had already served more time than the government agreed to recommend and was scheduled to be released soon, the court ordered the district court to resentence defendant to time served. *U.S. v. Kurkculer*, __ F.2d __ (1st Cir. Nov. 7, 1990) No. 89-1266.

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

8th Circuit hears sentencing appeal even though defendant misdesignated it as 28 U.S.C. 2255 motion. (800) Defendant's main brief claimed that he was appealing his sentence under 28 U.S.C. section 2255. The 8th Circuit rejected the government's argument that it was without jurisdiction to hear the appeal. The right of appeal is not affected by failure to designate the grounds for jurisdiction in the notice of appeal. Therefore defendant's right of appeal was not affected by his inadvertent misdesignation of the grounds for jurisdiction in his main brief. The court had jurisdiction under over this sentencing appeal under 18 U.S.C. section 3742. *U.S. v. Frondle*, __ F.2d __ (8th Cir. Nov. 1, 1990) No. 90-1032.

6th Circuit upholds sentence at upper end of guideline range. (810) Defendant argued that the district court miscalculated his guideline range because there was no evidence that he knew about firearms found in his house, and the district court failed to make findings of fact. The 6th Circuit rejected these arguments. First, the district court did not take the firearms into account when sentencing defendant. Although defendant implied that because other defendants were charged with firearms charges, the district court was somehow influenced to sentence defendant at the upper end of the guideline range, the 6th Circuit found this argument had no foundation. Since the court did not depart from the guideline range, defendant's argument that the district court should have made findings of fact to support its upward departure was also without merit. *U.S. v. Smith*, __ F.2d __ (6th Cir. Nov. 9, 1990) No. 89-3917.

Forfeiture Cases

9th Circuit holds that automobile lessor's failure to post a claim and bond did not deprive court of equitable jurisdiction. (920) The government suggested that the district court did not have jurisdiction to hear the automobile lessor's challenges to the validity of the forfeiture because the lessor failed to avail itself of the opportunity to post a claim and bond to obtain judicial forfeiture, as permitted by 19 U.S.C. section 1608. The 9th Circuit rejected the argument, noting that failure to resort to the statutory scheme "cannot be taken to deprive this court of jurisdiction to hear appellant's claims that appellant did not receive constitutionally adequate notice of the availability of judicial forfeiture and that the statutory scheme and the Constitution required the government itself to initiate judicial forfeiture." *Marshall Leasing, Inc. v. U.S.*, 893 F.2d 1096 (9th Cir. 1990).

1st Circuit upholds forfeiture where claimants failed to file timely claim. (930) Approximately five weeks after the government filed a forfeiture action and served the claimants, the claimants filed claims requesting protection of their alleged interests in the properties. Over two weeks later, they filed an answer to the government's complaint. The government filed a motion to dismiss the claims since they were not timely filed. Claimants did not oppose this motion. The government filed several additional motions in the case which were also not opposed by claimants. The district court eventually entered a order dismissing the claims. Claimants contended that forfeiture was too harsh a remedy for their filing of a late claim. The 1st Circuit disagreed. Rule 6(c) of the Supplemental Rules provides that a claim must be filed within 10 days after process has been executed, or within such additional time as permitted by the court. Defendants failed to comply with this rule, or present any mitigating factor which might warrant relief. The record indicated that claimants completely disregarded the time requirements for filing, and failed to respond to other motions filed by the government. Therefore, the district court's action was not an abuse of discretion. *U.S. v. One Dairy Farm*, __ F.2d __ (1st Cir. Nov. 9, 1990) No. 90-1323.

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

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Guideline Sentences, Generally

11th Circuit holds that district court has jurisdiction under 28 U.S.C. section 2255 to consider a claim that a sentence is illegal. (110)(800) Seven months after sentencing, defendant brought a pro se motion in district court under Fed. R. Crim. P. 35(a) to correct an illegal sentence. The 11th Circuit found that Rule 35(a) is not applicable to individuals sentenced under the Sentencing Reform Act of 1984. However, because the motion was brought pro se, it was proper for the district court to look beyond the motion's label and determine whether the motion was cognizable under a different statute. In this case, the district court had jurisdiction under 28 U.S.C. section 2255 to consider defendant's claim that his sentence was illegal. Although the Sentencing Reform Act altered the method by which a defendant could obtain review of his sentence, there was no evidence that the Sentencing Reform Act limited a defendant's ability to obtain relief under section 2255. *U.S. v. Jordan*, __ F.2d __ (11th Cir. Oct. 19, 1990) No. 89-8056.

1st Circuit upholds guidelines against due process challenge. (115)(755) Defendants argued that the sentencing guidelines violate due process by permitting the sentencing court to consider evidence not established beyond a reasonable doubt. The 1st Circuit rejected this claim, finding that due process only requires defendants be given a reasonable opportunity to rebut disputed facts. Defendants also argued that the district court applied the guidelines too mechanically and did not take adequate account of their individual circumstances. The 1st Circuit rejected this argument as well, finding that the guidelines impose no unconstitutional constraint on individualized sentencing, given the broad range of variables cognizable by the sentencing court and the court's discretion to depart in appropriate circumstances. *U.S. v. Sanchez*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 89-1600.

4th Circuit upholds constitutionality of acceptance of responsibility provisions. (115)(480) Defendant was convicted of selling firearms without a license. Defendant admitted he sold the guns, but claimed he was innocent because he was

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unaware that his conduct was illegal. The district court found that the acceptance of responsibility reduction was not available to defendant because he continued to profess his innocence after conviction. The 4th Circuit rejected defendant's argument that the acceptance of responsibility provisions of the guidelines violated his 5th Amendment right against self-incrimination by coercing him to admit his guilt. Following previous Circuit precedent, the court reasoned that "a defendant is not penalized for failing to accept responsibility. Rather, acceptance of responsibility is a mitigating factor available under appropriate circumstances." *U.S. v. O'Connor*, __ F.2d __ (4th Cir. Oct. 16, 1990) No. 90-5758.

4th Circuit determines that amount of drugs need only be proven by a preponderance of the evidence. (115)(755) Defendant contended that the sentencing guidelines were unconstitutional because they did not provide for trial by jury to determine the quantity of drugs involved in his offense, and because the quantity of drugs involved need not be proven beyond a reasonable doubt. The 4th Circuit rejected these arguments. Since the quantity of drugs goes to the question of the sentence rather than guilt, a trial by jury is not required, and the government need only prove the quantity by a preponderance of the evidence. *U.S. v. Engleman*, __ F.2d __ (4th Cir. Oct. 17, 1990) No. 89-5145.

10th Circuit upholds constitutionality of acceptance of responsibility provisions. (115)(480) Defendant contended that the acceptance of responsibility provisions of the sentencing guidelines violated his 5th Amendment privilege against self-incrimination. Following its decision in *U.S. v. Rogers*, 899 F.2d 917 (10th Cir. 1990), the 10th Circuit rejected this argument without discussion. The court also rejected defendant's contention that the guidelines violate equal protection because they impose different sentences on defendants convicted of the same crime. Giving defendants who accept responsibility for their conduct lighter sentences than unrepentant defendants is rationally related to the government's legitimate interest in rehabilitating convicted criminals. *U.S. v. Mayes*, __ F.2d __ (10th Cir. Oct. 24, 1990) No. 90-3016.

4th Circuit holds that sentencing guidelines apply to a "straddle" conspiracy. (125)(380) Defendant contended that because his conspiracy began prior to November 1, 1987, it violated the ex post facto clause to apply the sentencing guidelines to his offense. The 4th Circuit, following its opinion in *U.S. v. Sheffer*, 896 F.2d 842 (4th Cir. 1990), found this claim had no merit. *U.S. v. Engleman*, __ F.2d __ (4th Cir. Oct. 17, 1990) No. 89-5145.

4th Circuit rejects district court's interpolation between two offense levels. (130)(250) Defendant argued that the amount of cocaine involved in his offense was 13.7 kilograms, which would result in a base offense level of 32. The probation office found that the offense involved 17.3 kilograms, which would result in a base offense level of 34. The district court did not determine the amount of cocaine involved, but assigned a base offense level of 33, splitting the difference between levels 32 and 34. The 4th Circuit rejected this calculation, and remanded the case for resentencing. Although a previous version of the guidelines authorized interpolation when it was uncertain whether the quantity of drugs fell into one category or another adjacent category, this reference had been deleted from the guidelines at the time defendant was sentenced. The law in effect when the district court sentenced defendant required the court to determine the quantity of drugs involved, and then apply the appropriate guideline sentence. *U.S. v. Engleman*, __ F.2d __ (4th Cir. Oct. 17, 1990) No. 89-5145.

11th Circuit refuses to apply amended guideline where effect would be to increase defendant's sentence. (130)(330) The sentencing guidelines were amended November 1, 1989 adding a new guideline, section 2K1.7, which governs the use of fire to commit a federal felony. Defendants committed their offenses prior to this date, and were sentenced November 8, 1989, one week after the amendments took effect. The 11th Circuit noted that ordinarily sentences are to be determined based on the guidelines in effect at the time a

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

Publication Manager:
- Beverly Boothroyd

defendant is sentenced. However, since the effect of applying the new guideline would be to increase defendant's sentence in violation of the ex post facto clause, the court applied old section 2K1.4 to the offense. *U.S. v. Worthy*, __ F.2d __ (11th Cir. Oct. 30, 1990) No. 89-9009.

General Application Principles (Chapter 1)

7th Circuit determines that obtaining and using multiple forms of false identification involved more than minimal planning. (160) Defendant obtained numerous false identification cards, which she then used to open a bank account. She also provided the bank with a false social security number, birth date and address. Defendant contended that her offense did not involve more than minimal planning because she did not select any particular bank or any particular employee to mislead, did not request temporary checks or open multiple accounts, and provided only random numbers and dates as her purported social security number and birth date. The 7th Circuit rejected this argument, noting that defendant had obtained the false state-issued identification after a different bank had earlier rejected her application to open an account, due to her lack of proper identification. Moreover, forethought and planning were required to obtain the false identification. *U.S. v. Oja*, __ F.2d __ (7th Cir. Oct. 18, 1990) No. 89-2865.

9th Circuit upholds use of arson guidelines in mail fraud case. (165)(300)(330)(795) Defendant pled guilty to mail fraud. Pursuant to guideline section 1B1.2, he stipulated that he conspired to blow up his store to collect the insurance proceeds. The district court sentenced him using the arson guidelines instead of the mail fraud guidelines, resulting in a sentence of five years -- the statutory maximum. The 9th Circuit affirmed, noting that guideline section 1B1.2 expressly provides that a stipulation may establish a more serious offense than the offense of conviction, and that Application Note 13 to section 2F1.1 specifically suggests that a state arson offense might be prosecuted as a mail fraud where a fraudulent insurance claim is mailed. The court also found that the plea in this case was not inconsistent with guideline section 6B1.2, which requires courts to accept only pleas that reflect the seriousness of the conduct. *U.S. v. Bos*, __ F.2d __ (9th Cir. Oct. 26, 1990) No. 90-30014.

3rd Circuit upholds calculating sentence based upon drugs reasonably foreseeable by defendant. (170)(275) Defendant pled guilty to conspiracy to possess and distribute less than five kilograms of cocaine. However, defendant's plea agreement stated that the total amount of cocaine that it was "reasonably foreseeable" for the conspiracy to handle was between 5 and 14.9 kilograms. The 3rd Circuit held that it was proper for the district court to sentence defendant on the basis of the amount set forth in the plea agreement, noting that every court of appeals to consider the issue has held that a sentencing court may consider drug quantities outside the offense of conviction. *U.S. v. Williams*, __ F.2d __ (3rd Cir. Oct. 24, 1990) No. 90- 5004.

Offense Conduct, Generally (Chapter 2)

5th Circuit upholds enhancement for both ransom demand and extortion. (210)(680) Defendant's base offense level was increased by six levels under section 2A4.1(b)(1) for committing the offense of kidnapping when a ransom demand was made, and by four levels under section 2A4.1(b)(5) for committing the offense of kidnapping to facilitate the commission of another offense (extortion). Defendant argued that enhancing his offense level once for the ransom demand and again for extortion amounted to a double penalty for the same conduct. The 5th Circuit upheld the double enhancement. The guidelines are explicit when double counting is forbidden, and nothing in the guidelines prohibited a double enhancement in this situation. *U.S. v. Rocha*, __ F.2d __ (5th Cir. Oct. 22, 1990) No. 89-1712.

4th Circuit affirms upward departure in product tampering case. (220)(745) Defendant sent threatening letters to Coca-Cola in which he described a method by which he intended to penetrate and poison Coca-Cola's products. The company spent over $341,000 testing this method to determine if it was feasible, and otherwise responding to the threat. Although defendant's offense level was 25 with an applicable guideline range of 70 to 87 months, the district court determined that defendant's conduct was equivalent in seriousness to level 30, and departed upward to impose a sentence of 151 months. The 4th Circuit affirmed the district court's finding that the $341,000 expended by Coca-Cola in responding to defendant's extortion threats constituted grounds for an upward departure. The 4th Circuit also found that defendant's expansive threat to public health and safety justified the upward departure. The extortion guideline only contemplated harm to one or a few persons, property, or a business enterprise, and defendant's conduct went far beyond this. *U.S. v. Hummer*, __ F.2d __ (4th Cir. Oct. 17, 1990) No. 89-5454.

8th Circuit reverses valuation of stolen property based upon hearsay opinion of owner. (220)(770) Defendant's offense level was increased by one under guideline section 2B2.1(b)(2)(B), based on the district court's determination that the value of property stolen by defendant exceeded $2,500. The only evidence of the value of the property was the owner's estimate. The 8th Circuit remanded, finding that the government failed to prove the value of the stolen goods by a preponderance of the evidence. The owner was unavailable to testify, and therefore her opinion was presented by a police officer who spoke with her on the phone. The testimony indicated that many of the stolen items were gifts,

and that the owner's estimate was based on conjecture or sentimental value. The fact that the victim was well educated and the president of a local college was insufficient to support a conclusion that the victim's estimates were accurate. *U.S. v. Rivers*, __ F.2d __ (8th Cir. Oct. 18, 1990) No. 90-5029.

1st Circuit upholds use of drug guideline for felon who unlawfully possessed firearm. (240)(280)(330) Defendant was convicted of being a felon in unlawful possession of a firearm. The district court determined that defendant used the firearm in "committing or attempting" a drug offense, and therefore under the 1987 version of the firearms guideline, section 2K2.1, sentenced defendant under the drug offense guideline, section 2D1.1. The 1st Circuit found that the record supported the district court's determination. Officers searching defendant's house found three plastic freezer bags with cocaine residue, a scale commonly used for drug transactions, a magazine folded a special way used for drug sales, some marijuana, inositol powder, $25,000 cash in a couch, $9,000 cash elsewhere in the house, a loaded shotgun and a loaded rifle. Defendant was firing the rifle when officers entered his house. The 1st Circuit also found that in applying the drug guideline, it was proper for the district court to add two points to defendant's offense level for possession of the guns. The language in the 1987 firearms guideline made it clear that the court is to apply the cross-referenced drug guideline, including any upward adjustment for possessing guns. *U.S. v. Wheelwright*, __ F.2d __ (1st Cir. Oct. 18, 1990) No. 90-1304.

11th Circuit finds mandatory minimum sentence does not violate due process. (245)(280) 18 U.S.C. section 924(c)(1) requires that an individual convicted of using a firearm during a drug trafficking offense or crime of violence receive a five year sentence. Defendant contended that this violated due process by depriving him of the right to receive an individualized sentence. The 11th Circuit rejected this argument, noting that a defendant who commits a non-capital offense generally has no right to receive an individualized sentence. The court also found that a mandatory sentence was neither arbitrary nor capricious, since the use of weapons during a drug trafficking offense or crime of violence increases the likelihood of harm to innocent persons. *U.S. v. Grinnell*, __ F.2d __ (11th Cir. Oct. 24, 1990) No. 89-8823.

9th Circuit includes entire amount of heroin as relevant conduct for misprision regardless of defendant's knowledge of amount. (260) Defendant denied that he knew how much heroin was in the bag and therefore argued that he should not have been sentenced on the basis of the entire amount for misprision of the felony of possession with intent to distribute heroin. The Ninth Circuit rejected the argument, noting that knowledge of the amount of drugs is not an element of the offense of distribution. Therefore, "the defendant's knowledge of the amount of heroin similarly is irrelevant in determining the offense level for misprision of the felony of distribution of heroin." *U.S. v. Rosales*, __ F.2d __ (9th Cir. Oct. 30, 1990) No. 90-10068.

1st Circuit upholds calculation of offense level based upon kilogram that defendant agreed to sell. (265) Defendant contended that it was error to include in the calculation of his offense level one kilogram of cocaine that he promised to sell to government agents, since he never intended to sell the kilogram and was incapable of selling such a large quantity. Defendant testified that the kilogram was a figment of his imagination and the promise to deliver it mere bragging. The 10th Circuit rejected the argument, noting that two weeks after defendant was introduced to the agents, defendant told them he would sell any amount of cocaine at any time. When the agents broached the subject of a kilogram, defendant immediately quoted a price and an availability date. Defendant thereafter negotiated in earnest, and eventually upped the price of the cocaine. Moreover, the agents overheard defendant at a party tell two friends that the cocaine being provided for the gathering had cost him $28,000 per kilogram, the price defendant subsequently quoted to the agents. *U.S. v. Bradley*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 90-1578.

1st Circuit upholds grouping third firearms offense separately from two earlier firearms offenses. (330)(470) A jury found defendant guilty of unlawfully possessing firearms on three separate occasions. Since defendant was also found in possession of drugs on the first two occasions, the first two counts were grouped together. The 1st Circuit found that it was proper to group the third count separately from the first two. The first two counts involved possession of drugs and guns in the same house in the same town. The third count involved different officers, finding a different weapon, without drugs, in a different home, in a different town. The difference in place, time, nature of the guns, lack of drugs and intervening arrests, supported the conclusion that the third offense did not share a "common criminal objective" with the first two offenses, nor was it part of a common scheme or plan. *U.S. v. Wheelwright*, __ F.2d __ (1st Cir. Oct. 18, 1990) No. 90-1304.

4th Circuit upholds enhancement for selling firearm to felon. (330) Defendant's offense level was increased under former guideline section 2K2.3 for selling a firearm to an undercover agent who represented himself to be a convicted felon. The 4th Circuit rejected defendant's argument that he did not understand the agent to be representing that he was a felon. The agent stated on tape that "I appreciate you selling it to me. You know, I got in a little bit of a bind a few years ago and I can't buy one, you know, from a dealer or anything. . . . I couldn't have a gun as long as I was a felon." *U.S. v. O'Connor*, __ F.2d __ (4th Cir. Oct. 16, 1990) No. 90-5758.

9th Circuit upholds enhancement where arson created a substantial risk of death or serious bodily injury. (330) Defendant's base offense level for arson was increased by 18 levels because he "knowingly created a substantial risk of death or serious bodily injury," under section 2K1.4(b)(1). Defendant argued that this was improper because the enhancement conflicted with the arson statute which required "actual" injury, and because there was no factual basis for the court's finding of risk. The 9th Circuit rejected both arguments finding no inconsistency with the arson statute, 18 U.S.C. section 844(i). The district court found that the act of placing an explosive device in a commercial building near the public streets "poses a substantial risk of death or serious bodily injury." This finding was not clearly erroneous. *U.S. v. Bos*, __ F.2d __ (9th Cir. Oct. 26, 1990) No. 90-30014.

11th Circuit applies guideline for use of fire in committing a federal felony to cross-burning offense. (330) Defendants pled guilty to conspiracy to interfere with civil rights for participating in a cross-burning at the residence of a black family. The 11th Circuit found that the district court erred in refusing to apply the base offense level for the use of fire in commission of a federal felony as the offense underlying defendant's conspiracy. The district court believed the section was intended to apply only to arson offenses. The 11th Circuit found nothing in the guideline or its commentary to suggest that it was intended to apply only to arson offenses. *U.S. v. Worthy*, __ F.2d __ (11th Cir. Oct. 30, 1990) No. 89-9009.

5th Circuit reverses upward criminal history departure in alien case. (340)(734) Defendant was convicted of various offenses related to smuggling aliens into the United States. Defendant had several previous convictions for similar offenses, and the district departed upward, finding that the guidelines did not adequately take into consideration defendant's "criminal involvement, particularly in matters involving the same type of offense [and] the number of aliens involved in this case." The 5th Circuit reversed, finding no reason to believe that the guidelines did not adequately consider defendant's criminal history. All of defendant's prior convictions of any significance were considered in calculating his criminal history score. The fact that defendant had previously been convicted of similar offenses was also considered. Although the district court's comments also suggested that the departure was based on the large number of aliens involved, the 5th Circuit found that this was a "makeweight, or minor collateral reinforcement" for its departure, and the primary reason for the departure was defendant's substantial criminal history. *U.S. v. Martinez-Perez*, __ F.2d __ (5th Cir. Oct. 30, 1990) No. 89-2400.

11th Circuit upholds supervised release term imposed upon defendant convicted of conspiracy. (380)(580) Defendant was convicted of conspiracy under 21 U.S.C. section 846, which at the time of his offense provided for punishment by "imprisonment or fine or both." Relying upon *Bifulco v. U.S.*, 447 U.S. 381 (1980), defendant argued that a sentence of supervised release was not within the permissible statutory penalties for a violation of section 846. Bifulco had held that since section 846 did not explicitly authorize the imposition of special parole as punishment for those convicted of conspiracy, no special parole terms could be imposed. The 11th Circuit rejected defendant's argument, finding that the district court had authority to impose a term of supervised release under 18 U.S.C. 3583(a). Enacted as part of the Sentencing Reform Act, section 3583(a) gives a federal district court the authority to impose supervised release as part of any criminal sentence. *U.S. v. Jordan*, __ F.2d __ (11th Cir. Oct. 19, 1990) No. 89-8056.

Adjustments (Chapter 3)

5th Circuit holds that 18-year-old kidnapping victim was a vulnerable victim. (410) Defendants kidnapped the 18-year-old nephew of a former drug associate. Defendants argued that it was improper to enhance their sentence based on the vulnerability of the victim, since the victim was nearly 18 years old, his mother had moved to California leaving him to live with his grandfather, and the government considered him mature enough to decide whether to consult an attorney during the pretrial conference. The 5th Circuit upheld the enhancement, finding it reasonable to believe that the victim was chosen because of his young age. Defendants were able to keep the victim from escaping by frightening him into believing that "the Colombians" would capture and kill him if he escaped. Younger people might be more likely to believe such a story. Moreover, during the trial, the victim was terrified of defendants, supporting the theory that he was quite susceptible to intimidation with threats. *U.S. v. Rocha*, __ F.2d __ (5th Cir. Oct. 22, 1990) No. 89-1712.

4th Circuit upholds determination that supplier who organized drug ring was manager or supervisor. (430) Defendant argued that the district court erred in increasing his offense level by three for being a manager or a supervisor because the district court had stated that he did not fit the literal definition of a manager or a supervisor. The 4th Circuit rejected this argument, finding that the district court had made this statement in the context of deciding whether to increase defendant's offense level by three (as a manager or supervisor) or by four (as an organizer or leader). Defendant was a supplier who travelled from Florida to Maryland to organize various aspects of the distribution of cocaine. Therefore, defendant's conduct fell within the definition of a manager or supervisor. *U.S. v. Engleman*, __ F.2d __ (4th Cir. Oct. 17, 1990) No. 89-5145.

1st Circuit affirms that crewman on ship carrying cocaine was not a minor or minimal participant. (440) Defendant

was one of five crewman on a 70-foot boat found to be carrying 386 kilograms of cocaine hidden in a secret compartment. Defendant contended that he was entitled to a reduction for being either a minor or a minimal participant, pointing to the fact that he had been a fisherman or assistant machinist all his life, and that his name appeared last on the list of crew members. The 1st Circuit found that the district court's refusal to grant the reduction was not clearly erroneous. *U.S. v. Passos-Paternina*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 89-1396.

3rd Circuit finds bank manager abused position of trust. (450) Defendant was a bank manager who fraudulently obtained loans in a fictitious name. The loans were collateralized by a savings certificate that was fraudulently issued by the defendant. Defendant approved of the fraudulent loans in his capacity as branch manager. The 3rd Circuit held that the district court erroneously determined that defendant should not receive an adjustment under guideline section 3B1.3 for abusing a position of trust. Defendant clearly occupied a position of trust: as branch manager, defendant was in a supervisory position and had the authority to approve loan applications, issue savings certificates, and sign bank documents without the approval of any other bank employee. Defendant also used his position to facilitate the crime: as branch manager, he approved the fraudulent loans to himself, created a false savings certificate, and opened a false checking account in the fictitious name. District Judge Pollak, sitting by designation, found the factual record inadequate, and on remand would have instructed the district court to reexamine the question of abuse of trust on an adequate factual record. *U.S. v. McMillen*, __ F.2d __ (3rd Cir. Oct. 29, 1990) No. 90-3079.

4th Circuit holds that defendant's ability to tamper with consumer products was a special skill. (450) Defendant, an inventor of tamper-resistant consumer products, sent threatening letters to Coca-Cola in which he described a method by which he would penetrate and poison Coca-Cola's products. The 4th Circuit found that defendant's ability to tamper with consumer products was a special skill, and upheld a sentence enhancement under guideline section 3B1.3. Defendant was an inventor who had obtained patents for his inventions and had "through life's experience obtained the special ability to tamper with consumer products." His special skill was used to facilitate the offense by describing in detail the method by which he intended to poison Coca-Cola's products. The fact that this method was feasible gave his extortion threats a high degree of credibility and increased the chances that Coca-Cola would comply with his demands. *U.S. v. Hummer*, __ F.2d __ (4th Cir. Oct. 17, 1990) No. 89-5454.

9th Circuit holds that truck driver abused his "position of trust" when he took the victims' furniture from his van. (450) In his capacity as an employee-driver for a container company the defendant picked up furniture and several crates containing the household goods and personal possessions of five military families who were being relocated to Germany. He was supposed to transport their belongings to Texas where they would eventually be shipped abroad. Instead, he and his brother-in-law opened the crates and sold or traded several of the household items. Defendant pled guilty to conspiracy to commit theft of an interstate shipment. His base offense level was adjusted upward under section 3B1.3 for abuse of a position of trust. On appeal, the 9th Circuit affirmed the adjustment. The defendant had a "trust relationship" with the families because he "had unwatched and exclusive control over the families' belongings for an extended period of time." Moreover "the families did not have the ability to monitor [defendant's] integrity because of their relocation to Europe." *U.S. v. Hill*, __ F.2d __ (9th Cir. Sept. 27, 1990) No. 89-50045.

1st Circuit affirms obstruction of justice enhancement for defendant who intimidated witness. (460) The district court determined that defendant obstructed justice by intimidating a witness. The witness provided the state police with information that led to the search of defendant's home and his subsequent arrest. Soon after this, several men beat the witness badly. Subsequently, the witness received threats, usually just before he was scheduled to appear as a witness, and he was beaten on two other occasions just before he was supposed to testify. Although defendant claimed this evidence did not show he was behind the beatings, the 1st Circuit found that the "timing and pattern of the threats and the beatings" supported the district court's conclusion that defendant was involved in the intimidation. *U.S. v. Wheelwright*, __ F.2d __ (1st Cir. Oct. 18, 1990) No. 90-1304.

6th Circuit finds no 6th Amendment violation where defendant's counsel failed to attend presentence interview. (460)(770) Defendant received a two point enhancement for obstruction of justice based upon misrepresentations defendant made in his presentence interview about his involvement in other offenses. Defendant contended that the enhancement was improper, since the presentence interview was conducted without the assistance of counsel in violation of the 6th Amendment. Defendant's counsel asserted that had he been present during the interview, he would have objected to the questions. Without determining whether defendant had a 6th Amendment right to counsel in the presentence interview, the 6th Circuit found no constitutional violation. Nothing in the record revealed that defendant's counsel was not informed of, or was excluded from the presentence interview. "When a defendant's counsel makes a choice not to attend the presentence interview, the defendant cannot argue on appeal that the government deprived him of his [6th Amendment] right to counsel." Therefore, the upward adjustment was proper. *U.S. v. Saenz*, __ F.2d __ (6th Cir. Oct. 3, 1990) No. 89-4034.

7th Circuit holds that defendant who lied about identity to pre-trial services officer obstructed justice. (460) Defendant used false identification to open a bank account. Upon her arrest, defendant provided the pre-trial services officer with false information concerning her name, date of birth, length of residence in the United States, current address, family history, financial status and arrest record. This information was given to the U.S. Magistrate, who relied upon the information in setting a low appearance bond. Defendant contended that enhancing her sentence for obstruction of justice punished her twice for the offense for which she was convicted. The 7th Circuit rejected this argument, noting that although defendant's conduct was similar in nature, she performed two distinct and separate acts of providing false information. *U.S. v. Ojo*, __ F.2d __ (7th Cir. Oct. 18, 1990) No. 89-2865.

7th Circuit finds district court failed to properly explain reasons for denial of acceptance of responsibility. (480) Defendant pled guilty to transmitting a threat in interstate commerce. The district court declined to reduce defendant's sentence for acceptance of responsibility, finding that defendant had failed to alleviate the stress he caused the victim through his threats. Defendant contended that the district court denied him the opportunity to do so by issuing a temporary restraining order prohibiting him from direct or indirect contact with the victim except through counsel. The 7th Circuit remanded for resentencing, finding that the district court had failed to properly articulate its reasons for finding defendant had failed to accept responsibility. It was unclear from the sparse record what action the district court believed defendant should have taken to alleviate the victim's stress, given the restraining order. Therefore, the 7th Circuit was "at a loss" to understand why the district court focused on this factor. *U.S. v. Sullivan*, __ F.2d __ (7th Cir. Oct. 23, 1990) No. 89-2459.

8th Circuit upholds district court's failure to make explicit finding as to defendant's acceptance of responsibility. (480)(760) Defendant's presentence report recommended no downward adjustment for acceptance of responsibility for defendant's drug offense nor for his failure to appear offense. Defendant objected to the recommendation for the drug offense, but did not specifically object to the recommendation concerning the failure to appear offense. The district court only made an explicit finding as to the drug offense. The 8th Circuit rejected defendant's argument that it was improper for the district court to fail to make an explicit finding for the failure to appear offense. Since defendant did not specifically object to the recommendation in the presentence report that he receive no downward adjustment for acceptance of responsibility on the failure to appear offense, the district court was not required to make a specific finding of fact on that issue. *U.S. v. Toirac*, __ F.2d __ (8th Cir. Oct. 19, 1990) No. 90-1258.

1st Circuit finds no acceptance of responsibility by defendant who obstructed justice. (485) The 1st Circuit found that defendant was not entitled to a reduction for acceptance of responsibility since he had obstructed justice. Moreover, "it is primarily up to the district court to decide whether or not [defendant] accepted responsibility for his conduct with 'candor and authentic remorse.'" *U.S. v. Wheelwright*, __ F.2d __ (1st Cir. Oct. 18, 1990) No. 90-1304.

1st Circuit finds no acceptance of responsibility by defendant who lied about his capacity to deliver cocaine. (485) The 1st Circuit rejected defendant's argument that the trial court lacked a sufficient foundation to withhold a reduction for acceptance of responsibility. Defendant attempted to minimize his role by claiming that he never intended to sell, and lacked the ability to deliver, one kilogram of cocaine that he promised to sell to government agents. *U.S. v. Bradley*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 90-1578.

5th Circuit refuses acceptance of responsibility reduction to defendant who did not surrender immediately. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because as soon as he learned that his activities were under investigation he released his kidnap victim and voluntarily surrendered to authorities. The 5th Circuit rejected this argument, noting that defendant did not take his victim to any law enforcement authority, but transferred the victim involuntarily to the control of another unidentified male. Moreover, defendant did not surrender immediately. He fled and later surrendered only after contacting his attorney. *U.S. v. Rocha*, __ F.2d __ (5th Cir. Oct. 22, 1990) No. 89-1712.

5th Circuit finds no acceptance of responsibility by defendant who went to trial. (485) Defendant contended that he was improperly denied a reduction for acceptance of responsibility because he refused to plead guilty and went to trial. The 5th Circuit found that this was at least partially true, but there was no error by the district court. Defendant continued to maintain his innocence through the trial and up to the moment of sentencing. "Refusal to admit factual guilt . . . is inconsistent with acceptance of responsibility when such refusal is not based in a legal or technical defense." The district court's determination that defendant's eleventh hour change of heart did not demonstrate acceptance of responsibility was not "without foundation." *U.S. v. Garcia*, __ F.2d __ (5th Cir. Oct. 30, 1990) No. 90-2050.

6th Circuit finds no acceptance of responsibility by defendant who merely pled guilty. (485) Defendant argued that the district court erred in failing to reduce his base offense level for acceptance of responsibility. The 6th Circuit rejected this argument, noting that "where a defendant merely pleads guilty, he is not entitled to a reduction for acceptance of responsibility as a matter of right." *U.S. v. Saenz*, __ F.2d __ (6th Cir. Oct. 3, 1990) No. 89-4034.

7th Circuit finds defendant who obstructed justice did not accept responsibility. (485) The 7th Circuit rejected defendant's claim that her guilty plea and alleged expressions of sincere remorse entitled her to a sentence reduction for acceptance of responsibility. Although defendant had sent a letter to the court apologizing for her actions, this was insufficient to support her claim of acceptance of responsibility. Defendant had received a sentence enhancement for obstruction of justice, and the application notes to guideline section 3E1.1 in effect at the time defendant was sentenced precluded a reduction for acceptance of responsibility when that sentence had already been enhanced because of obstruction of justice. *U.S. v. Ojo*, __ F.2d __ (7th Cir. Oct. 18, 1990) No. 89-2865.

9th Circuit holds immediate plea to superseding information does not justify reduction for acceptance of responsibility. (485) The Ninth Circuit held that pleading to a reduced charge does not necessarily demonstrate an acceptance of responsibility. "It is at least equally possible that the defendant made a clever bargain." Here the defendant never expressed remorse for his conduct. Accordingly, the district court properly denied defendant an offense level reduction for acceptance of responsibility. *U.S. v. Rosales*, __ F.2d __ (9th Cir. Oct. 30, 1990) No. 90-10068.

Criminal History (§ 4A)

1st Circuit upholds use of juvenile conviction in calculating criminal history score. (500) Defendant contended that it was improper for the district court to add two points to his criminal history score for a juvenile conviction for receiving stolen goods. The 1st Circuit rejected this argument. Once the government meets its burden of proving the conviction, defendant bears the burden of showing that the conviction is constitutionally infirm. Defendant failed to meet this burden. Although he was entitled to counsel at the sentencing for the juvenile offense, the record reflected that defendant had waived the right to counsel at his arraignment. Therefore, it was proper for the district court to conclude that defendant had also waived counsel at the sentencing. The district court's finding was supported by the fact that at defendant's probation violation hearing, defendant's counsel did not contend that his client had been impermissibly deprived of counsel at sentencing. *U.S. v. Unger*, __ F.2d __ (1st Cir. Sept. 28, 1990) No. 90-1472.

1st Circuit finds juvenile adjudications in which defendant was found "wayward" were not status offenses. (500) Guideline section 4A1.2(c)(2) prohibits previous sentences for juvenile "status offenses" to be used in calculating a defendant's criminal history score. Defendant contended that the district court incorrectly assessed six points to his criminal history score for three juvenile adjudications in which he was found "wayward." He further asserted that by virtue of state law, waywardness should be deemed a status offense under section 4A1.2(c)(2). The 1st Circuit rejected defendant's argument that state law determines whether an offense is a status offense. Rather, a court must look to the substance of the underlying offense. In this case, defendant's conduct consisted of breaking and entering, receiving stolen goods, and assault and battery. Therefore, they were not status offenses. *U.S. v. Unger*, __ F.2d __ (1st Cir. Sept. 28, 1990) No. 90-1472.

1st Circuit upholds criminal history enhancement for offense committed within two years of release. (500) Defendant received two points on his criminal history score because he committed the instant offense within two years after his release from the Rhode Island Training School, on a juvenile offense. The 1st Circuit rejected defendant's argument that the enhancement was improper because he was serving time for a juvenile conviction. The enhancement applies if the prior sentence was included in calculating defendant's criminal history score. In this case defendant's juvenile conviction was properly counted in his criminal history score; therefore the enhancement was proper. *U.S. v. Unger*, __ F.2d __ (1st Cir. Sept. 28, 1990) No. 90-1472.

1st Circuit rules that actual time served under prior sentences is irrelevant for career offender purposes. (520) Defendants argued that it was improper to treat their prior state drug offense as a felony because although they each were sentenced to six years for the offense, they actually served less than "one year and one month." The 1st Circuit rejected this argument, finding that for career offender purposes, the type and term of the sentence previously imposed or served is immaterial. Instead, only the maximum term of imprisonment under the controlling criminal statute may be considered in determining whether there was a prior felony conviction. *U.S. v. Sanchez*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 89-1600.

1st Circuit finds no violation of 21 U.S.C. section 851(a)(1) in sentencing defendants as career offenders. (520) Before a defendant can receive an enhanced sentence under 21 U.S.C. section 851(a)(1), a prosecutor must file an information giving notice of the prior convictions on which the enhancement will be based. Here, the defendants argued that section 851(a)(1) required such notice before they were sentenced to 360 months as career offenders under the guidelines. The 1st Circuit rejected the argument, ruling that section 851's notice requirement only applies where a defendant's statutory minimum or maximum penalty is enhanced, not where a defendant is assigned a guideline offense level and receives an increased sentence which is within the prescribed minimum-maximum range. Since defendants' 360 month sentences were well below the life imprisonment term prescribed as the statutory maximum for their offense, section

851)(a)(1) did not require an enhancement notice. *U.S. v. Sanchez*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 89-1600.

Determining the Sentence (Chapter 5)

11th Circuit vacates sentence imposed upon revocation of probation where district court failed to consider guidelines. (560) In 1988, defendant pled guilty to conspiracy, and the district court, believing that the sentencing guidelines were unconstitutional, sentenced defendant under pre-guidelines law to three years probation. Neither party appealed, and defendant's sentence became final. In 1989, defendant's probation was revoked, and the district court sentenced defendant to three years imprisonment. The 11th Circuit vacated the sentence and remanded for resentencing. Upon probation revocation, a district court may impose any sentence that was available under the Sentencing Reform Act at the time defendant was initially sentenced. In this case, the district court erred because it did not, when resentencing defendant, consider the sentences available under the sentencing guidelines in 1988, when it first put the defendant on probation. *U.S. v. Tellez*, __ F.2d __ (11th Cir. Oct. 30, 1990) No. 89-6177.

5th Circuit upholds supervised release under Assimilative Crimes Act even though state law provides for parole. (580)(590) The Assimilative Crimes Act makes a state offense committed on a federal installation a federal crime, and provides that a person convicted under the Act receive punishment that is "like" the punishment that the state would impose. Defendant contended that it was improper to impose a term of supervised release on him, since state law only provided for parole. The 5th Circuit found that parole and supervised release were sufficiently similar to satisfy the "like punishment" requirement. However, one important difference is that parole occurs before the completion of the period of incarceration, and does not extend a sentence beyond the statutory maximum, whereas a person convicted under federal law can be required to undergo supervised release after serving the maximum prison term. Therefore, under the Assimilative Crimes Act, when the applicable state law provides for parole, a sentence of imprisonment plus supervised release is "like punishment" so long as the period of imprisonment plus the period of supervised release does not exceed the maximum sentence allowable under state law. *U.S. v. Marmolejo*, __ F.2d __ (5th Cir. Oct. 26, 1990) No. 89-8079.

5th Circuit upholds its jurisdiction to hear a government appeal from a district court order dismissing a supervised release revocation proceeding. (580)(800) The 5th Circuit rejected defendant's argument that it lacked jurisdiction to hear the government's appeal from a district court order dismissing a supervised release revocation proceeding. The court agreed that absent express congressional authorization, the United States cannot appeal in a criminal case. However, it found that a supervised release revocation proceeding was not a criminal case. Therefore, the court had appellate jurisdiction to hear the case under 28 U.S.C. section 1291, which confers appellate jurisdiction to federal courts of appeal from "all final decision of the district courts of the United States. First, the proceeding arises after the end of the criminal prosecution. Second, in a supervised release revocation hearing, the defendant does not possess "the full panoply of rights due a defendant" in a criminal trial, and revocation does not deprive the defendant of absolute freedom, "but only of conditional liberty properly dependent on observance of special . . . restrictions." For purposes of appellate jurisdiction, proceedings for the revocation of parole, probation or supervised release are indistinguishable. *U.S. v. Marmolejo*, __ F.2d __ (5th Cir. Oct. 26, 1990) No. 89-8079.

9th Circuit finds failure to notify parolee of possible forfeiture of "street time" credit not prejudicial. (590) The Parole Commission failed to notify petitioner before his 1981 and 1985 parole revocation hearings that the "street time" from his earlier parole was subject to forfeiture. This violated his right to adequate notice of the possible consequences of his parole revocation hearing. Nevertheless, the 9th Circuit held that the 1985 notice was cured by the Commission's mailing a "probable cause" letter to petitioner before the hearing, notifying him of the possible forfeiture of "street time." As for the 1981 hearing, the court remanded the case for a new hearing on whether the street time was properly forfeited. The court rejected petitioner's argument that a new hearing was inadequate due to delay, finding that much of the delay was attributable to the petitioner's own failure to appeal the earlier proceedings. *Camacho v. White*, __ F.2d __ (9th Cir. Oct. 26, 1990) No. 89-15521.

1st Circuit upholds $50,000 fine. (630) The district court imposed a fine of $50,000, the maximum fine permitted by the guidelines for defendant's offense level of 17. On appeal, defendant argued that the fine would unduly burden his dependents. The 1st Circuit found that this argument was more properly addressed to the district court. Defendant did not point to any law that forbid the district court from assessing the maximum fine, and therefore there was no error in the fine. *U.S. v. Wheelwright*, __ F.2d __ (1st Cir. Oct. 18, 1990) No. 90-1304.

8th Circuit finds district court failed to make adequate findings supporting $25,000 fine. (630) Defendant contended that the district court failed to state adequate reasons for the imposition of a $25,000 fine. The 8th Circuit agreed that the district court failed to make adequate findings on the record demonstrating that it considered various factors, including the defendant's ability to pay the fine and the burden the fine placed on the defendant. The presentence report stated that defendant had a negative net worth, had not

generated income through his sales job, and was living on $15-20,000 a year that he borrowed from his family. At sentencing the government stated that defendant lived off of "hundreds of thousands of dollars" but introduced no evidence in support of this position. *U.S. v. Cammisano*, __ F.2d __ (8th Cir. Oct. 24, 1990) No. 89-3041.

6th Circuit holds that court may impose a concurrent sentence on a defendant who commits a crime while serving an unexpired sentence. (660)(720) Guideline section 5G1.3 provides that if at sentencing, a defendant is already serving an unexpired sentence for an unrelated offense, the sentence for the instant offense shall run consecutively to the unexpired sentence. However, 18 U.S.C. section 3584(a) provides that if a term of imprisonment is imposed upon a defendant serving an unexpired sentence, then the terms may run either consecutively or concurrently. The 6th Circuit reconciled these two provisions by holding that although guideline section 5G1.3 requires consecutive sentences, a district court retains discretion to depart and impose a concurrent sentence. In this case, since the district court did not believe it had discretion to impose a concurrent sentence, the 6th Circuit remanded for the district court to determine whether a concurrent sentence was appropriate. *U.S. v. Stewart*, __ F.2d __ (6th Cir. Oct. 29, 1990) No. 89-2401.

Departures Generally (§ 5K)

10th Circuit finds defendant had adequate notice of upward departure. (700)(750) The 10th Circuit rejected defendant's argument that he did not have sufficient time to prepare for the sentencing hearing and lacked sufficient notice of the possibility of an upward departure. The presentence report was made available to defendant's counsel 20 days before the sentencing hearing, and was obtained 17 days prior to the hearing. Defense counsel filed a written statement of sentencing factors prior to the hearing which indicated that he had read the presentence report. The presentence report recommended an upward departure based on the grounds which were eventually relied upon by the court. Defendant's counsel could and did respond to the factual allegations that served as a basis for the departure. *U.S. v. Fortenbury*, __ F.2d __ (10th Cir. Oct. 26, 1990) No. 89-2291.

1st Circuit reaffirms it has no jurisdiction to review district court's failure to depart downward. (720)(810) Defendants contended that the 10-year gap since their last criminal convictions suggested that their current crime represented an "aberration," and therefore the district court should have departed downward. Noting that it was without appellate jurisdiction to consider this claim, the 1st Circuit dismissed the claim without discussion. *U.S. v. Sanchez*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 89-1600.

1st Circuit upholds failure of government witness to attend sentencing hearing. (720)(770) Defendants contended that the district court erroneously refused to compel the government informant and chief witness to attend their sentencing hearings. Through the use of cross-examination, defendants argued they could demonstrate entrapment, and thereby establish a basis for a downward departure under guideline section 5K2.10, which permits a downward departure where the victim's wrongful conduct contributed to provoking the offense behavior. The 1st Circuit rejected this argument, finding that defendants had the opportunity for lengthy cross examination of the informant at trial. Moreover, section 5K2.10 is ordinarily not relevant to non-violent offenses such as these drug offenses. *U.S. v. Sanchez*, __ F.2d __ (1st Cir. Oct. 24, 1990) No. 89-1600.

3rd Circuit rejects downward departure based on post-arrest drug rehabilitation efforts. (722) Defendant, who was convicted of selling stolen treasury checks, admitted that he was a heroin addict and that this addiction motivated him to sell the stolen treasury checks. The district court departed downward because it found that defendant had made a conscientious effort to overcome his heroin addiction, and that sentencing him to jail would disrupt his drug rehabilitation efforts. The 3rd Circuit reversed, finding that this was not an acceptable ground for a downward departure. The policy statement to section 5H1.4 provides that "[d]rug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." Therefore, separation from such addiction is also not a ground for a downward departure. Since only those addicted to drugs would be eligible for such a departure, a downward departure would reward defendants for being addicted. Although incarceration could interrupt a defendant's drug rehabilitation efforts, this is also not a proper basis for departure, since the guidelines represent a shift away from a rehabilitative system of penology. *U.S. v. Pharr*, __ F.2d __ (3rd Cir. Oct. 19, 1990) No. 90-1284.

10th Circuit reverses upward departure in offense level based on crimes committed after instant offense. (730)(746) The district court departed from offense level 7 to offense level 11 on the basis of defendant's illegal possession of firearms on three occasions after the instant firearms offense. The 10th Circuit found that this was a proper ground for making an upward departure in criminal history category, since it reflected defendant's recidivist tendencies. However, since it was not a proper ground for an upward departure in offense level, the case was remanded for resentencing. Although the district court had already made one criminal history departure in this case, it was possible that defendant's continuing offenses presented grounds for an even greater criminal history departure. *U.S. v. Fortenbury*, __ F.2d __ (10th Cir. Oct. 26, 1990) No. 89-2291.

9th Circuit finds district court's reasons for criminal history departure "barely adequate." (733) The district court

departed upward from criminal history category VI, noting that defendant had a pattern of consistent criminal conduct that had started with criminal mischief and escalated into serious felonies. The court also adopted most of the presentence report. The 9th Circuit found that while the court's determination was "adequate," it was "just barely so." The court noted that if it were not for the density of the defendant's string of offenses, and their escalating nature, it would have vacated the sentence to the extent that it was based upon the inadequacy of the criminal history category. Since the case had to be remanded for resentencing on other grounds, the court strongly suggested that the district court clarify the exact basis of its determination. *U.S. v. Singleton*, __ F.2d __ (9th Cir. Oct. 23, 1990) No. 89-30190.

10th Circuit affirms criminal history departure based on prior lenient treatment. (733) Defendant pled guilty to possession of a firearm by a felon and was placed in criminal history category I. The district court departed upward to criminal history category III, finding that defendant had been treated leniently in receiving probation sentences for drug trafficking and that such treatment had failed to deter subsequent criminal conduct. Defendant had four felony convictions outside the 10-year period utilized in calculating his criminal history score, and received probation or suspension of sentence for each. The 10th Circuit upheld the departure, even though it found the district court could have been more explicit in explaining its reasons for the degree of departure. *U.S. v. Fortenbury*, __ F.2d __ (10th Cir. Oct. 26, 1990) No. 89-2291.

11th Circuit approves downward departure based on unlikelihood of future crimes by defendant. (733) Defendant pled guilty to a drug offense which resulted in an applicable guideline range of 168 to 210 months. The district court departed downward and imposed a 66-month sentence, because it found that the defendant was unlikely to commit crimes in the future. Because the quantity of drugs involved required a 10-year mandatory minimum sentence, the 11th Circuit remanded for the court to impose at least a 10-year sentence. Moreover, the 11th Circuit further found that a downward departure made on the ground that the defendant is unlikely to commit future crimes must be made as a criminal history departure under guideline section 4A1.3. On remand, the district court was instructed to select an appropriate criminal history category for defendant, and sentence defendant accordingly. *U.S. v. Collins*, __ F.2d __ (11th Cir. Oct. 19, 1990) No. 89-3743.

6th Circuit affirms upward departure for defendant who coerced high school students to participate in kidnapping and robberies. (745) Defendant organized a group of seven individuals to commit a series of robberies using firearms provided by defendant. Defendant recruited four high school students by threatening to kill members of their families. Defendant and others conspired to rob a local bank by forcing entry into the residence of an officer of the bank, threatening harm to him and his wife, and inducing the officer to take them to the bank so that the conspirators could rob the bank. The district court departed upward from a guideline range of 51 to 63 months and imposed a sentence of 96 months. Cited as reasons for the departure were defendant's role as organizer and leader of the criminal activity, the fact that defendant had, by coercion, induced the involvement of four high school students, and that the conspiracy included a plan to abduct one or more persons. The 6th Circuit upheld the departure, noting only that the district court had committed "no factual or legal errors in the direction and degree of the departure." *U.S. v. Wilson*, __ F.2d __ (6th Cir. Oct. 23, 1990) No. 89-6583.

8th Circuit reverses upward departure based on hearsay about "organized crime." (746)(770) Three FBI agents testified at defendant's sentencing hearing that defendant was a leader of a local organized crime group, and that he was involved with, and may have committed, two murders. The agents' testimony was based upon information supplied by two different confidential informants and FBI files. The district court departed upward based upon defendant's involvement in organized crime and its finding that defendant's criminal history category underrepresented his involvement in crime. The 8th Circuit reversed, finding that the testimony of the FBI agents was unreliable hearsay because it lacked insufficient corroboration. The fact that each confidential informant corroborated the other did not make the hearsay reliable because this was merely "hearsay upon hearsay upon hearsay." The court declined to decide whether, in appropriate circumstances, ties to organized crime might provide a basis for an upward departure. *U.S. v. Cammisano*, __ F.2d __ (8th Cir. Oct. 24, 1990) No. 89-3041.

9th Circuit reverses "physical injury" departure under 5K2.2 for lack of specific findings. (746) The evidence showed that the defendant had hit the officer in the head several times and that he also kicked him. The officer wrote in a police report that he had suffered a bruise near his eye, a scratch on his cheek, and a sprained finger. He did not mention whether the kick had, in fact, landed with sufficient force to cause pain. He also did not indicate that he required medical attention or that his injuries prevented him from carrying out his job for any period of time. In fact he indicated that he was able to minimize the impact of most of the defendant's blows. Based on this record, and the lack of any specific findings, the 9th Circuit reversed the district court's upward departure based on "significant physical injury" under section 5K2.2. The court indicated that on remand, the district court was free to supplement the evidentiary record for resentencing. *U.S. v. Singleton*, __ F.2d __ (9th Cir. Oct. 23, 1990) No. 89-30190.

9th Circuit rejects upward departure for disruption of government function under section 5K2.7. (746) Defendant es-

caped from prison. Several months later the police set up a road block to capture him but he jumped out of the truck and fled on foot. A month later, a state trooper recognized defendant and attempted to keep him in his truck but the defendant forced his way out of the truck, hit the trooper around the head and kicked him, before running into a nearby field where he was apprehended. The district judge departed upward from the guidelines on the ground that the defendant had significantly disrupted a government function under section 5K2.7. Judges Fernandez, Goodwin and Fletcher reversed, holding that defendant's flight did not disrupt government functions, because "one of the primary functions of a police department is to apprehend criminals." A defendant "cannot be charged with significantly obstructing a government function when, in fact, the government was performing exactly as it was supposed to." *U.S. v. Singleton*, __ F.2d __ (9th Cir. Oct. 23, 1990) No. 89-30190.

Sentencing Hearing (§ 6A)

9th Circuit grants rehearing to order remand so that court's findings can be appended to the presentence report. (760) In response to the defendant's challenge to the presentence report, the district judge declared that defendant had "obtained in excess of $250,000 illegally from various insurance companies." However, it failed to append these findings to the presentence report, as required by Rule 32. Accordingly, Judges Tang and Skopil granted rehearing in this case and amended their prior opinion to order a limited remand to the district court with instructions that the court append a transcript of its proceedings to the presentence investigation report. Third Circuit Judge Aldisert, sitting by designation, dissented, stating that requiring a copy of the transcript to be appended to the presentence report "is a pendanticism required neither by procedural rule nor case law." *U.S. v. Roberson*, 896 F.2d 388 (9th Cir. 1990), *on rehearing*, __ F.2d __ (9th Cir. Oct. 23, 1990) No. 89-10049.

9th Circuit holds that court may satisfy requirement of "findings" by adopting the conclusions of the presentence report. (775) In resolving objections to the presentence report, the court may satisfy the requirement to make its findings clear by adopting the conclusions of the presentence report. Here, the presentence report recommended against giving defendant a reduction for acceptance of responsibility. The judge gave the defendant an opportunity to argue at sentencing why he should receive the reduction, and then adopted the presentence report's recommendation. The Ninth Circuit held that '[n]o more was required under Rule 32(c)(3)(D)." *U.S. v. Rosales*, __ F.2d __ (9th Cir. Oct. 30, 1990) No. 90-10068.

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

3rd Circuit finds no double jeopardy violation in government's appeal of incorrect sentence. (800) Defendant was a bank manager convicted of fraudulently misapplying bank funds. The government appealed his sentence, arguing that the district court should have enhanced his sentence for abusing a position of trust. Defendant argued that since he had begun serving his sentence, the government's appeal violated the double jeopardy clause. The 3rd Circuit rejected this argument. Since Congress provided the government with the means of appealing an incorrect application of the sentencing guidelines, defendant had no expectation of finality in his sentence until the appeal was concluded or the time to appeal expired. *U.S. v. McMillen*, __ F.2d __ (3rd Cir. Oct. 29, 1990) No. 90-3079.

8th Circuit refuses to consider firearm enhancement where finding would not directly affect defendant's sentence. (800) Defendant argued that the district court improperly concluded that he used a firearm in the course of a conspiracy to grow and distribute marijuana. Defendant conceded that because of the manner in which the district court grouped his money laundering conviction and his conspiracy conviction for sentencing purposes, the district court's conclusion as to the firearm did not directly affect his sentence. Therefore, the 8th Circuit refused to address the issue. *U.S. v. Englebrecht*, __ F.2d __ (8th Cir. Oct. 24, 1990) No. 90-1066.

3rd Circuit applies de novo standard in reviewing whether defendant held position of trust. (820) Defendant was a bank manager who misapplied bank funds. In determining whether defendant should receive an adjustment under guideline section 3B1.3 for abusing a position of trust, the 3rd Circuit found that the determination of what authority defendant had as branch manager and what he did in the course of committing his crime are factual findings reviewable only for clear error. However, whether the authority defendant possessed as bank manager was such that he served in a "position of trust" is "better characterized as an inquiry into the 'interpretation of the guideline term.'" The inquiry therefore approaches a "purely legal determination," and a standard "approaching de novo review" is appropriate. Whether defendant abused his position in a way that substantially facilitated the commission or concealment of the crime is a finding of fact reviewed under the clearly erroneous standard. *U.S. v. McMillen*, __ F.2d __ (3rd Cir. Oct. 29, 1990) No. 90-3079.

9th Circuit holds that de novo standard of review applies where facts are not in dispute. (820) It is "axiomatic" that legal issues are reviewed *de novo* and factual issues are reviewed for clear error." Thus a district court's application of the guidelines is reviewed *de novo*, but where the case turns on the facts, the issue will be reviewed only for clear error. Here the facts were not in dispute, so the court applied the *de novo* standard of review in considering whether the dis-

trict court properly applied the guidelines. *U.S. v. Hill*, __ F.2d __ (9th Cir. Sept. 27, 1990) No. 89-50045.

Forfeiture Cases

9th Circuit distinguishes between criminal and civil aspects of civil forfeiture actions. (900) Civil forfeiture actions constitute a hybrid procedure of mixed civil and criminal law elements. Because civil forfeiture statutes aid in the enforcement of criminal laws, courts have developed limited constitutional criminal law protections for owner-claimants. Thus both the 4th and 5th Amendments apply but not the double jeopardy clause nor the Federal Rules of Criminal Procedure. Once the government shows probable cause to believe that the property was used in violation of federal drug laws, the burden of proof shifts to the claimant to show that no probable cause existed. Due process does not required an immediate post-deprivation hearing, as long as forfeiture proceedings are commenced without unreasonable delay. Thus in evaluating whether a claimant's rights have been respected, the 9th Circuit found it necessary to "clearly distinguish between the criminal and civil aspects of civil forfeiture actions." *U.S. v. One 1985 Mercedes*, __ F.2d __ (9th Cir. Oct. 25, 1990) No. 88-2490.

D.C. Circuit upholds forfeiture of proceeds from 23 properties related to RICO violations. (900) Defendants were convicted of RICO violations in connection with their purchase and sale of 23 properties. On the verdict form, the jury listed racketeering acts relating to only 11 of the 23 properties. The D.C. Circuit upheld the forfeiture of proceeds from all 23 of the properties. It found that the jury must have concluded that defendant committed racketeering acts relating to all 23 properties since the jury reached a guilty verdict on at least one substantive count relating to each property. Therefore, it was proper to order forfeiture of the proceeds from all 23 properties. *U.S. v. Madeoy*, 912 F.2d 1486 (D.C. Cir. 1990).

D.C. Circuit upholds forfeiture of portion of proceeds from sale of property partially purchased with RICO proceeds. (900) Defendant contended it was improper to require him to forfeit part of the proceeds from his sale of a property, when the property's only connection to defendant's RICO violations was that defendant made a down payment on the property with two $5,000 checks drawn on an escrow account in which, from time to time, he deposited illegal proceeds from his racketeering activities. Defendant claimed that the $10,000 could not have been the proceeds of his racketeering activity because at the time the checks were drawn, the escrow account had a negative balance. The D.C. Circuit rejected this argument, noting that defendant deposited into the account illicit RICO funds six days after the first check was written, and before the check cleared the bank. The court also upheld the forfeiture of only a portion of the proceeds derived from the sale of the property. Since defendant used RICO proceeds to pay for only part of the property, it was not irrational for the jury to conclude that only part of the funds derived from the sale of that property could be traced to the RICO money. *U.S. v. Madeoy*, 912 F.2d 1486 (D.C. Cir. 1990).

New York District Court finds forfeiture of condo where two small cocaine sales were made, was not "excessive punishment." (910) Relying on *U.S. v. Halper*, 109 S.Ct. 1892 (1989), district judge Nickerson rejected the government's argument that labeling the forfeiture as "civil" made it unnecessary to review it under the Eighth Amendment. Under *Halper*, a civil penalty that is sufficiently great and sufficiently unrelated to any compensatory or remedial purpose may be deemed a punishment for double jeopardy purposes. The presence of both punitive and remedial goals does not in itself convert a civil forfeiture into a criminal one. The question is "whether the forfeiture serves some alternate purpose" and whether the "penalty inflicted is excessive in relation to that alternative purpose." Here a $70,000 condominium was forfeited based on two cocaine sales, involving a total of 2-1/2 grams. The district court ruled that "forfeiture of [claimant's] $70,000 interest in the condo does not seem a grossly excessive amount for his share of the costs of remedying ills occasioned by drugs." Thus the forfeiture in this case is a "civil penalty that offends neither due process principles nor the Eighth Amendment." *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, __ F.Supp. __ (E.D.N.Y. Sept. 18, 1990), No. 88-C-3550.

2nd Circuit reverses default judgment imposed as sanction in forfeiture case. (920) The 2nd Circuit reversed a default judgment imposed by the district court as a sanction for a claimant's failure to timely respond to a set of government interrogatories. Although the deadline for responding to the interrogatories had already been extended once by the district court, the 2nd Circuit found that the district court had "acted precipitously in using the ultimate sanction of a default judgment." There was no pattern of repeated discovery violations. One claimant was incarcerated, and the other intended to assert an innocent owner defense. The subject of the forfeiture was the claimants' home. Moreover, the government's need for discovery was not "overwhelming" in light of the evidence it already had from its successful prosecution of one of the claimants, and the "minimal burden it bears in forfeiture actions." *U.S. v. Aldeco*, __ F.2d __ (2nd Cir. Oct. 16, 1990) No. 90-6081.

6th Circuit remands case to determine whether amendment would cure claimant's standing problem. (920) Shortly after the government filed its forfeiture action against the claimants' home, a claim contesting the forfeiture was filed by one claimant and an individual who purported to be the legal guardian of the other claimant. The claim was not

properly verified and the individual was not the other claimant's legal guardian. Approximately three months after the claim was filed, the claimant granted a durable power of attorney to the individual. The government moved to strike the claim and answer of claimants and for entry of a default or summary judgment. The claimants failed to file a response, and instead made an oral motion to amend the claim. Since claimants failed to respond to the government's motion, the district court granted the government's motion to strike and for default. The 6th Circuit remanded, finding that prior to denying the motion to amend, the district court should have made a determination as to whether the government would have been prejudiced by the amendment. The court noted that even if an amendment were permissible, summary judgment in favor of the government might still be appropriate in light of the weakness of claimant's innocent owner defense. Judge Nelson dissented. *U.S. v. $267,961.07*, __ F.2d __ (6th Cir. Oct. 22, 1990) No. 89-2027.

9th Circuit refuses discovery of government forfeiture policies. (920) Claimant was arrested on a warrant as he exited his $45,000 Mercedes. In his wallet, the agents found a small quantity of cocaine, worth about $75. They seized the Mercedes for forfeiture under 21 U.S.C. section 881 and 49 U.S.C. 782. Thereafter, the claimant was convicted on the charges that led to the warrant for his arrest, but his conviction was overturned on appeal and the indictment was dismissed with prejudice. He argued that the government's pursuit of the forfeiture action, despite the dismissal of the criminal charges, violated government policy and was vindictive. He sought discovery of the government's policies pursuant to the Administrative Procedure Act, 5 U.S.C. section 706(2)(A). The district court denied his request and granted summary judgment in favor of the government. On appeal, the 9th Circuit affirmed the denial of his discovery request, because no agency policy that was not already public "would have the force and effect of law." Thus discovery could not have established that the government acted arbitrarily or capriciously. Moreover, the claimant "failed to produce evidence of improper government motivation sufficient to justify discovery in his vindictive prosecution claim." *U.S. v. One 1985 Mercedes*, __ F.2d __ (9th Cir. Oct. 25, 1990) No. 88-2490.

11th Circuit requires prompt hearing on third party's interest in seized RICO assets. (920) The government seized, in its entirety, a club which the government claimed was the proceeds of one of the club owner's RICO activities. The other owners of the club filed petitions objecting to the forfeiture. The 11th Circuit found the district court erred in not holding an evidentiary hearing within 30 days after the owners filed their petition, to adjudicate the validity of their interest in the club. In such a hearing, a third party can prevail on his claim to the disputed property if he can show, by a preponderance of the evidence, that his title to the property vested before the commission of the acts leading to the forfeiture or that he was a bona fide purchaser of the property. The district court was ordered to hold such hearing within 30 days of the 11th Circuit's order, or the order forfeiting the property and imposing restraints on the club would be vacated. *U.S. v. Kramer*, 912 F.2d 1257 (11th Cir. 1990).

2nd Circuit finds probable cause where claimant purchased property with large sums of cash in excess of legitimate income. (950) Claimant argued that his guilty plea to drug charges was insufficient to establish probable cause that certain properties were the proceeds of a narcotics exchange, because the activities for which he was convicted occurred after he had purchased most of the property. The 2nd Circuit rejected this argument, noting that the government need only have probable cause to connect the property to drug activity. It need not link the property to a particular transaction. In this case, probable cause was established by several factors. First, claimant was arrested with heroin that was 90 percent pure, from which the district court could reasonably infer that claimant occupied a fairly high position on the drug distribution chart and that he had been involved in illegal activities for a substantial period of time prior to his actual arrest. Second, almost all of the properties were purchased with large sums of cash, in an amount that greatly exceeded claimant's legitimate after-tax income. Third, many of claimant's cash payments for the property were made with five, ten and twenty dollar bills. Finally, claimant made various false statements about his purchases, including listing a false social security number. *U.S. v. 228 Acres of Land and Dwelling Located on Whites Hill Road in Chester, Vt.*, __ F.2d __ (2nd Cir. Oct. 17, 1990) No. 90-6072.

REHEARING GRANTED

(110)(755)(790) *U.S. v. Roberson*, 896 F.2d 388 (9th Cir. 1990), *on rehearing*, __ F.2d __ (9th Cir. Oct. 23, 1990) No. 89-10049.

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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Guideline Sentencing, Generally

2nd Circuit holds that district court can correct erroneous sentence during period that either party can appeal. (110)(660) A half-hour after sentencing, the district court advised the parties that the 78-month sentence exceeded the statutory maximum of five years for each of the two counts. Proceedings were adjourned until 11 days later, when the court sentenced defendant to 60 months on one count and 18 months consecutive on the other count, for a total of 78 months. The 2nd Circuit held that the district court had the authority to correct its erroneous sentence during the period in which either party can file a notice of appeal. The district court's authority was not limited to excising that portion of the sentence in excess of the statutory maximum. The district court properly corrected the sentence to comply with guideline section 5G1.2(d), which requires that when the guideline range exceeds the statutory maximum for two counts, the district court must impose consecutive sentences to the extent necessary to reach the selected sentence within the guideline range. *U.S. v. Uccio*, __ F.2d __ (2nd Cir. Oct. 15, 1990) No. 90-1095.

D.C. Circuit rules that guidelines do not apply to escapes committed before November 1, 1987. (125) Defendant was convicted of bank robbery in 1987 and escaped from prison three times before November 1, 1987, the effective date of the sentencing guidelines. His additional sentence for the escapes was more than he would have received under the guidelines, so he filed a complaint against the Parole Commission alleging that he had been denied due process. The district court dismissed the complaint for failure to state a claim upon which relief could be granted, and the D.C. Circuit affirmed, ruling that it was "patently obvious" that defendant could not prevail. The sentencing guidelines only apply to offenses committed after November 1, 1987. *Baker v. Director, U.S. Parole Commission*, __ F.2d __ (D.C. Cir. Oct. 9, 1990) No. 89-5096.

4th Circuit holds that prior version of guidelines permitted consideration of defendant's relevant conduct. (130)(170)

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Defendant argued that relevant conduct could not be considered in calculating his base offense level because his offense occurred prior to amendments to guideline section 1B1.2 and 1B1.3, which became effective January 18, 1988. The prior version of these sections, defendant argued, did not permit consideration of relevant conduct. The 4th Circuit, following the 2nd, 6th and 10th Circuits, found that the amendments were not substantive changes, but simply clarified existing law that relevant conduct should be used to determine a defendant's base offense level. *U.S. v. Deigert*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5184.

4th Circuit reaffirms that applying guidelines to "straddle crime" does not violate Ex Post Facto Clause. (130)(380) Defendant was found guilty of a drug conspiracy that continued from 1981 until March 1988. He was sentenced under the guidelines. Without discussion, the 4th Circuit rejected defendant's argument that applying the guidelines to his crime violated the Ex Post Facto Clause even though it included punishment for conduct prior to November 1, 1987, the effective date of the guidelines. *U.S. v. Deigert*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5184.

General Application Principles (Chapter 1)

8th Circuit rules that distributing cocaine was relevant conduct for marijuana conviction. (170)(270) Defendant pled guilty to conspiracy to distribute marijuana. He later admitted purchasing and selling cocaine various times over an eight-year period. The 8th Circuit upheld the district court's determination that defendant's cocaine involvement constituted "relevant conduct" for the purpose of determining his offense level. Defendant's cocaine sales were part of the same course of conduct as his marijuana distribution: he possessed the cocaine during the same period as his marijuana conspiracy, he had at least one common customer for his marijuana and cocaine dealings, and his source of marijuana was also a large-scale cocaine dealer. Since there was sufficient evidence of the same course of conduct, it was not necessary to determine whether the cocaine offense was part of the same common scheme or plan as the marijuana conspiracy. *U.S. v. Lawrence*, __ F.2d __ (8th Cir. Oct. 9, 1990) No. 90-1103.

4th Circuit applies guidelines to Assimilative Crimes Act offense. (190) Defendant argued that the sentencing guidelines did not apply to crimes made federal offenses under the Assimilative Crimes Act because of the requirement that persons convicted under the Assimilative Crimes Act receive "like punishment" to what they would receive under state law. The 4th Circuit rejected the argument, ruling that the "like punishment" requirement simply mandates that federal sentences for assimilated crimes fall within the minimum and maximum terms established by state law. Within this range of discretion, federal judges should apply the sentencing guidelines to the extent possible. *U.S. v. Young*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5016.

4th Circuit applies guidelines to violations of District of Columbia Code. (190) Defendant assaulted a corrections officer while an inmate at Lorton Reformatory in Virginia. He was charged with several counts, including a violation of the District of Columbia Code. The 4th Circuit held that the sentencing guidelines applied to defendant's crimes, including the violation of the D.C. Code. The District Court for the Eastern District of Virginia has original jurisdiction over crimes committed at Lorton Reformatory, which is located within that district, and this includes criminal charges for violations of the D.C. Code. *U.S. v. Young*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5016.

Offense Conduct, Generally (Chapter 2)

4th Circuit groups all counts arising out of same assault. (210)(470) Defendant was convicted of three different offenses arising out of his assault on a corrections officer. The district court found that defendant's counsel had withdrawn

his claim that Counts I and II should be grouped, and accordingly did not group any of the offenses. The government acknowledged that it was error not to group Counts I and II, and did not argue that the issue was not properly reserved for appeal. The 4th Circuit found that all counts against defendant should have been grouped for sentencing under guideline section 3D1.2(a). They all involved the same act or transaction, represented essentially the same injury, were part of the same criminal episode, and involved the same victim. *U.S. v. Young*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5016.

10th Circuit calculates amount of drugs based on total weight of mixture containing the drugs. (250) Defendant was arrested with 94 kilograms of a mixture containing various chemicals. When heated under proper conditions, the mixture produces P2P, a precursor of amphetamine. The actual amount of P2P present in the mixture was 2.95 kilograms. The 10th Circuit found that defendant was properly sentenced based upon 94 kilograms of P2P, rather than the 2.95 kilograms of actual P2P contained in the mixture. A footnote to guideline section 2D1.1 provides that for guideline purposes, the weight of a mixture containing a controlled substance is the entire amount of the mixture. *U.S. v. Callihan*, __ F.2d __ (10th Cir. Oct. 12, 1990) No. 89-7085.

8th Circuit reverses district court's estimate of amount of cocaine distributed. (250) Defendant admitted purchasing approximately one pound of cocaine over an eight-year period. Because the marijuana conspiracy charge to which he pled guilty covered half of that period, the district court credited defendant with half of that quantity. The 8th Circuit reversed, ruling that the district court's method of approximating the unseized, uncharged amounts of cocaine was arbitrary and not supported by a preponderance of the evidence. There was no direct or circumstantial evidence that defendant distributed the cocaine during the period of his marijuana conspiracy. *U.S. v. Lawrence*, __ F.2d __ (8th Cir. Oct. 9, 1990) No. 90-1103.

5th Circuit affirms upward departure on telephone count for facilitating commission of another offense. (255)(745) Defendant pled guilty to using a telephone to facilitate a drug felony. The district court departed upward from 16 months to 36 months based on guideline section 5K2.9, which permits an upward departure if the offense was committed to facilitate another offense. The 5th Circuit noted that the offense of using a telephone to facilitate a crime necessarily includes facilitation of another offense, and therefore this factor was already considered by the guidelines. However, guideline section 5K2.0 also permits a court to depart from the guideline range if the aggravating factor was present to a degree substantially in excess of that which is ordinarily involved in the offense of conviction. In this case, defendant facilitated a conspiracy to manufacture 100 pounds of methamphetamine. The district court's determination that the amount of drugs involved was substantially in excess of that ordinarily involved in the offense was not clearly erroneous. The extent of the departure was also reasonable, since the 36-month sentence was well below the statutory maximum of 48 months. *U.S. v. Perez*, __ F.2d __ (5th Cir. Oct. 12, 1990) No. 89-8054.

8th Circuit reaffirms that relevant conduct determination is a factual finding subject to the clearly erroneous standard. (260)(820) The 8th Circuit reaffirmed that a district court's determination of "whether uncharged drugs are part of a common scheme or plan is a factual finding which will be disturbed only if clearly erroneous." Moreover, a district court's determination of the quantity of drugs for sentencing purposes is also a factual finding subject to the clearly erroneous standard. *U.S. v. Lawrence*, __ F.2d __ (8th Cir. Oct. 9, 1990) No. 90-1103.

2nd Circuit holds defendant need not know how much cocaine is involved in conspiracy. (275) Defendant was involved in a conspiracy to smuggle 60 kilograms of cocaine into the United States in the gas tank of a van. He contended that he should not have been held responsible for the entire 60 kilograms because he did not know how much cocaine was involved. The 2nd Circuit rejected his argument, finding that knowledge of the amount is not required as long as the court determines by a preponderance of the evidence that defendant knew or could reasonably have foreseen the quantity involved. *U.S. v. Cardenas*, __ F.2d __ (2nd Cir. Oct. 1, 1990) No. 89-1497.

8th Circuit holds defendant accountable for all cocaine and crack in conspiracy with family members. (275) A conspirator may properly be held accountable for all drugs involved in a conspiracy which were known or reasonably foreseeable to the conspirator. *U.S. v. Francis*, __ F.2d __ (8th Cir. Oct. 12, 1990) No. 89-2747WM.

9th Circuit upholds constitutionality of mandatory minimum sentence for using a firearm in drug trafficking. (280) Defendant argued that the mandatory minimum 5 year sentence for using or carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. section 924(c)(1), was unconstitutionally overbroad and violated the doctrine of separation of powers. The 9th Circuit rejected these arguments, ruling that defendant's conduct in attempting to sell a pound of heroin while carrying a loaded, cocked firearm was "not even arguably Constitutionally protected." Moreover, Congress's establishment of mandatory minimum penalties for drug trafficking offenses does not violate the doctrine of separation of powers. The court also held that conspiracy to possess a controlled substance with intent to distribute constituted "drug trafficking" within the meaning of 18 U.S.C. section 924(c)(2). *U.S. v. Chaidez*, __ F.2d __ (9th Cir. Oct. 12, 1990) No. 89-50226.

8th Circuit upholds enhancement based on co-defendant's possession of a gun: (284)(290) Defendant acted as a middleman between a bookie and his clients, warning one gambler to pay his debt to the bookie. Defendant also surreptitiously took pictures of another gambler which the bookie used to intimidate the gambler. Defendant was convicted of aiding and abetting the bookie's use of extortionate means to collect gambling debts. His sentence was enhanced under section 2E2.1(b)(1)(C), based on the bookie's possession of a gun. Defendant argued that this was improper because the charge of carrying a firearm had been dismissed against the bookie and defendant had not been charged with conspiracy. The 8th Circuit disagreed, noting that defendant was involved in criminal activity undertaken in concert with the bookie. The bookie's possession and display of the gun was in furtherance of such activity, and such conduct was reasonably foreseeable by defendant. *U.S. v. Barragan*, __ F.2d __ (8th Cir. Oct. 2, 1990) No. 90-1055.

1st Circuit affirms upward departure for defendant who fraudulently obtained identification to escape prosecution. (300)(745) While on parole for sexual battery, defendant fled his hometown to escape prosecution for sexually molesting two young girls. Defendant unlawfully adopted a dead man's identity and fraudulently obtained the dead man's social security card, driver's license and birth certificate. Defendant lied on his passport application and continued to lie after being arrested and identified by the FBI. The applicable guideline range was 15 to 21 months. The district court properly departed upward and sentenced defendant to 36 months, based on the deception used and the fact that the monetary loss caused by defendant's fraud did not capture the harmfulness of defendant's conduct. The 1st Circuit upheld the departure, finding both the grounds and the extent of the departure reasonable. *U.S. v. Scott*, __ F.2d __ (1st Cir. Oct. 2, 1990) No. 90-1224.

1st Circuit agrees that defendant who assisted in smuggling aliens was not a minor nor a minimal participant. (340) (440) Defendant was a passenger on a boat smuggling illegal aliens into Puerto Rico. The owner of the vessel then hired defendant to assist in operating the boat under the owner's supervision. When the boat landed in Puerto Rico, defendant remained aboard to make one more smuggling trip, after which he would have remained in Puerto Rico. The probation officer recommended that defendant's sentence be decreased by three levels for being more than a minimal but less than minor participant. The the district court refused to follow the recommendation, and the 1st Circuit found no plain error. The court noted that the defendant took an active role in the smuggling operation by operating the vessel. *U.S. v. Trinidad De La Rosa*, __ F.2d __ (1st Cir. Oct. 5, 1990) No. 90-1765.

1st Circuit reverses upward departure where defendant was not responsible for method of transporting aliens. (340) (746) Defendant pled guilty to bringing illegal aliens into the U.S. The district court departed upward from seven months to 15 months based on the "dangerous" and "inhumane" manner in which the aliens were transported-- 54 persons jammed into a 34-foot yawl. The court noted that the boat was "unseaworthy" and that "more [often] than not these trips don't make it in full. Half of the people get drowned." The 1st Circuit reversed, noting that despite the danger, there was no evidence that the conditions were inhumane, that the vessel was unseaworthy, or that on these trips, "half the people get drowned." Moreover, it was unreasonable "to punish defendant for a condition over which he had no control and to which he did not contribute." Defendant had started out as a passenger but was hired to help operate the boat when the owner learned he had experience. *U.S. v. Trinidad De La Rosa*, __ F.2d __ (1st Cir. Oct. 5, 1990) No. 90-1765.

2nd Circuit rules that 10-year term of supervised release exceeded statutory maximum. (380)(580)(746) Defendant was convicted of conspiracy to distribute cocaine. In sentencing defendant, the district court departed upward and imposed a 10 year term of supervised release. The 2nd Circuit reversed, finding that at the time defendant was sentenced, the only punishment for conspiracy was a fine or imprisonment or both, and the only statutory authority for a term of supervised release was 18 U.S.C. 3583(b), which provided a maximum term of three years for a Class C felony. In addition, the district court improperly failed to give advance warning of its intention to depart upward. *U.S. v. Cardenas*, __ F.2d __ (2nd Cir. Oct. 1, 1990) No. 89-1497.

Adjustments (Chapter 3)

7th Circuit finds that defendant was a leader based upon division of proceeds. (430) Defendant properly received a four level enhancement under guideline section 3B1.1(a) for being a leader. The offense involved five persons who stole money from a savings bank. Defendant's paramour, an employee of the bank, provided the keys to enter the bank and open the automatic teller machines. Defendant went with her, taking steps to cover their traces. The 7th Circuit found that the division of proceeds alone (defendant admitted to taking about one-third of the money; the prosecution calculated two-thirds), and the fact that the bank employee apparently had no criminal ambitions until defendant appeared on the scene, supported the district court's determination that defendant had a lead role. *U.S. v. Busche*, __ F.2d __ (7th Cir. Oct. 15, 1990) No. 89-3539.

5th Circuit finds no plain error in district court's misapplication of the guidelines. (450)(745)(800) The district court departed upward from the six-month guideline range to 18 months, on the ground that the guidelines did not consider defendant's misuse of his position as Assistant District At-

torney. On appeal, defendant pointed out that guideline section 3B1.3 provides for a two-level enhancement for abuse of a position of public trust. Such a two level increase would have resulted in a maximum guideline range of eight months. The 5th Circuit agreed, but found that since defendant failed to raise this argument below, he could not raise it on appeal absent plain error. The court found no plain error, noting that the 18-month sentence was well below the 20-year statutory maximum, and if the case were remanded, the district court could impose the same sentence by including a reasonable explanation for the departure. Judge Rubin dissented, finding that the district court's misapplication of the guidelines was plain error. *U.S. v. Brunson*, __ F.2d __ (5th Cir. Oct. 11, 1990) No. 89- 4894.

9th Circuit will decide en banc whether bank janitor abused position of trust, and whether appeal was moot. (450)(800) The defendant, an after-hours janitor for a bank, took travelers checks from the bank's vault. The panel opinion upheld the district court's enhancement of the defendant's sentence for abuse of a position of trust. The panel also held that even though the defendant had completed his sentence, his appeal was not moot because his sentence may still have had collateral consequences. The 9th Circuit ordered the case to be reheard en banc pursuant to Circuit Rule 35-3, and the mandate was recalled. *U.S. v. Drabeck*, 905 F.2d 1304 (9th Cir. 1990), *rehearing en banc granted*, __ F.2d __ (9th Cir. Oct. 11, 1990).

1st Circuit finds no acceptance of responsibility by defendant who misled authorities about his identity. (460)(485) Defendant obtained false identification which he used to apply for a passport. When approached by government agents, defendant gave a false name. When placed under arrest, defendant continued to refuse to give his true identity. Even after his fingerprints revealed his true identity, defendant refused to truthfully identify himself. When defendant finally admitted his true identity to the district court, he made several false statements about his financial status. Defendant received a two point enhancement for obstruction of justice. Under these circumstances, defendant was not entitled to a reduction for acceptance of responsibility. *U.S. v. Scott*, __ F.2d __ (1st Cir. Oct. 2, 1990) No. 90-1224.

7th Circuit remands because unclear whether judge confused acceptance of responsibility with government assistance. (480)(710) After defendant refused to tell the district court anything about his sources or accomplices, the judge declined to grant defendant a reduction for acceptance of responsibility. The 7th Circuit remanded because the record was unclear whether the judge confused the standards for acceptance of responsibility with those of substantial assistance to the government. Although the judge suggested that the court needed information concerning defendant's sources because defendant was not being candid about his own acts, the judge's statements could also be interpreted as incorrectly stating that a defendant must cooperate with the government in order to receive a reduction for acceptance of responsibility. *U.S. v. Escobar-Mejia*, __ F.2d __ (7th Cir. Oct. 15, 1990) No. 90-1029.

5th Circuit finds defendant did not meet burden of proving acceptance of responsibility. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he pled guilty and said he was sorry for what he did and that he was guilty. The 5th Circuit upheld the district court's determination that defendant failed to prove that he had accepted responsibility. The presentence report noted that defendant's explanation of his offense left out significant facts and included no remorse for the conduct. *U.S. v. Perez*, __ F.2d __ (5th Cir. Oct. 12, 1990) No. 89-8054.

8th Circuit finds that defendant who ran from police did not accept responsibility. (485) Police officers went to defendant's home to question him about a bank robbery. As his girlfriend opened the door, defendant ran out. He was caught later that night after a foot chase around town. Although defendant voluntarily confessed to the crime immediately after his arrest, the 8th Circuit upheld the district court's finding that defendant did not accept responsibility. The court found it relevant that "defendant did not voluntarily terminate his illegal conduct or surrender before arrest." *U.S. v. Casal*, __ F.2d __ (8th Cir. Oct. 8, 1990) No. 89-5615.

Criminal History (§ 4A)

2nd Circuit reverses upward departure based on defendant's "narrowly missing" higher criminal history category. (500)(734) The district court departed upward in part because defendant's 1976 conviction narrowly missed being counted in his criminal history. The 2nd Circuit held that this was not a proper grounds for departure: "The fact that a defendant falls just below a line leading to a harsher sentence is by itself no more grounds for departing upward than the fact that a defendant falls just above the line is by itself grounds for departing downward." *U.S. v. Uccio*, __ F.2d __ (2nd Cir. Oct. 15, 1990) No. 90-1095.

4th Circuit upholds use of alcohol-related traffic offenses in calculating defendant's criminal history. (500) The district court properly considered defendant's two prior alcohol-related traffic convictions in calculating defendant's criminal history. Note 5 to guideline section 4A1.2 provides that such convictions are not minor traffic infractions which can be excluded from the calculation. *U.S. v. Deigert*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5184.

10th Circuit finds robberies committed in two different states were not related for criminal history purposes. (500) Defendant argued that his prior convictions for bank robbery in Nevada and California were related for purposes of cal-

culating his criminal history score because the robberies were part of a single common scheme to obtain money to support his drug habit. The 10th Circuit rejected his argument, noting that the robberies were in different locations over a three-month period. The last two occurred nearly two months apart and in different states. The only evidence of a common scheme was defendant's testimony. Defendant pointed out that if he had sought to transfer the California cases to Nevada the cases would have been consolidated and thus related. But the cases were never consolidated, and the fact that defendant received concurrent sentences in the separate jurisdictions did not constitute consolidation for purposes of the guidelines. *U.S. v. Kinney*, __ F.2d __ (10th Cir. Oct. 17, 1990) No. 90-3037.

9th Circuit permits downward departure from career offender guideline. (520)(721) The district court departed downward from the career offender guideline from 12 years to 30 months for this 52-year old defendant on the ground that the likelihood of recidivism was low, and the defendant was not violent or antisocial. Judges Norris, Wright and Schroeder affirmed the departure, rejecting the government's argument that departures were not permitted for career offenders. The court found no reason to distinguish the career offender guideline, 4B1.1, from any other guideline for departure purposes. *U.S. v. Lawrence*, __ F.2d __ (9th Cir. Oct. 10, 1990) No. 89-30284.

9th Circuit reverses career offender sentence because two prior drug convictions were "related." (520) Defendant was convicted of two drug offenses in state court in 1984. The first was in Rosebud County, Montana and the second was in Yellowstone County. Guideline section 4A1.2(a)(2) states that prior sentences imposed in "related" cases are to be treated as one sentence for purposes of criminal history. Here the two 1984 drug convictions were the result of a single investigation involving two drug sales between the defendant and a single government agent. The defendant was charged with two separate offenses only because the two drug sales took place in different counties. Thus he was convicted of two offenses "merely because of geography." His two prior convictions should have been treated as one, and therefore he was improperly sentenced as a career offender under guideline section 4B1.1. His sentence was reversed. *U.S. v. Houser*, __ F.2d __ (9th Cir. Oct. 18, 1990) No. 90-30043.

10th Circuit holds that career offender guideline does not require a sentence at top of guideline range. (520)(775) The district court found defendant to be a career offender and sentenced him to 210 months -- the top of the guideline range. The court suggested it believed a sentence at the maximum of the guideline range was required by 28 U.S.C. section 994(h). The 10th Circuit remanded for resentencing, ruling that section 994(h) is merely a mandate for the Sentencing Commission to promulgate guidelines at or near the maximum statutory term. It does not mandate or even suggest what sentence within the applicable guideline range should be imposed. *U.S. v. Elliott*, __ F.2d __ (10th Cir. Oct. 10, 1990) No. 89-2217.

8th Circuit determines that residential burglary is a crime of violence for career offender purposes. (520) Defendant contended that his burglaries were not crimes of violence because he entered the dwellings when no one was present. The 8th Circuit rejected this claim, noting that under the commentary to guideline section 4B1.2, burglary is a crime of violence. Moreover, after defendant was sentenced the Sentencing Commission amended the guidelines to specify that burglary is a crime of violence, and another Circuit court agreed. *U.S. v. Brunson*, __ F.2d __ (8th Cir. Oct. 1, 1990) No. 89-1848WM.

Determining the Sentence (Chapter 5)

2nd Circuit finds that addition of restitution upon resentencing did not violate double jeopardy. (610) To correct an illegal sentence, the district court resentenced defendant 11 days after the original sentence. Upon resentencing, the district court added a restitution order. The 2nd Circuit rejected defendant's argument that this violated double jeopardy. There was no evidence that the court's failure to impose restitution at the original sentencing was a conscious decision. "Moreover, when it is necessary to correct a sentence to make it lawful, the corrected sentence may be greater than the sentence originally imposed without violating the Double Jeopardy Clause." *U.S. v. Uccio*, __ F.2d __ (2nd Cir. Oct. 15, 1990) No. 90-1095.

9th Circuit holds that restitution is limited to offense of conviction. (610) In *Hughey v. United States*, 110 S.Ct. 1979 (1990), the Supreme Court held that the Victim and Witness Protection Act, 18 U.S.C. section 3663(d), limits an order of restitution to "the loss caused by the specific conduct that is the basis of the offense of conviction." Since guideline section 5E1.1(a) provides that restitution shall be ordered in accordance with the act, restitution under the guidelines is similarly limited to the offense of conviction. Here the district court had ordered restitution of funds taken from a robbery of another bank which was dismissed as part of a plea bargain. Pursuant to the stipulation of the parties, the 9th Circuit reversed the order of restitution. *U.S. v. Garcia*, __ F.2d __ (9th Cir. Oct. 16, 1990) No. 89-50297.

Departures Generally (§ 5K)

4th Circuit remands where unclear whether judge believed he lacked authority to depart downward. (720)(810) Defendant argued that the sentencing judge did not consider de-

fendant's tragic personal background and family history as grounds for downward departure because the judge mistakenly believed the guidelines prohibited downward departures on these grounds. The 4th Circuit found the record unclear and remanded the case. The sentencing judge had stated that defendant's background was "clearly relevant in criminal sentencing prior to the sentencing reform act, but such policy on departures under the Act destroys the whole purpose of the Act." *U.S. v. Deigert*, __ F.2d __ (4th Cir. Oct. 12, 1990) No. 89-5184.

4th Circuit affirms upward departure based on arrest record, breach of restitution agreement, and failure to pay taxes. (733)(770) Defendant had one prior conviction and numerous arrests. In addition, the State's Attorney's Office had required defendant to refund money to his customers as a result of defendant's business practices. Rather than repay the money, defendant moved his office, changed his telephone number, and began operating under a different name. Moreover, defendant did not pay federal income taxes over a three-year period. The 4th Circuit found that this record justified the district court's departure from criminal history category II to III. The court also rejected defendant's argument that the upward departure was based upon unreliable information. The district court relied almost entirely upon information contained in the presentence report. Defendant failed to meet his burden of proving that the presentence report was inaccurate. *U.S. v. Terry*, __ F.2d __ (4th Cir. Oct. 16, 1990) No. 90-5003.

8th Circuit affirms upward departure for defendant who committed drug offense while awaiting trial on state drug charges. (733) Defendant committed a federal drug offense while awaiting trial in state court on a four-count drug charge. The district court found that defendant's criminal history significantly underrepresented the seriousness of his criminal conduct, and departed upward. The 8th Circuit found no an abuse of discretion. *U.S. v. Matha*, __ F.2d __ (8th Cir. Oct. 5, 1990) No. 90-1657.

Sentencing Hearing (§ 6A)

7th Circuit upholds sentencing nine days after presentence report became available for examination. (760) Defendant contended that the district judge violated 18 U.S.C. section 3552(d) by scheduling sentencing nine days after the probation office told defendant that he could examine the presentence report. Section 3552(d) requires 10 days, "unless this minimum period is waived by the defendant." Defendant examined the report one day prior to being sentenced, and did not object to the timing at the sentencing hearing. Defendant thus waived the 10-day period by participating in sentencing without objection. *U.S. v. Busche*, __ F.2d __ (7th Cir. Oct. 15, 1990) No. 89-3539.

9th Circuit finds no resentencing required where failure to delete information from presentence report was an "oversight." (760) Page six of the original presentence report included a statement that the appellant's common law wife had previously found a cocaine bindle among the appellant's belongings. The court deleted the disputed fact from page six of the presentence report, and it was therefore obvious that the court did not take that information into account in sentencing. The court's failure to delete the same information on page eight of the report "was an oversight." Therefore the court complied with the substantive requirement of Rule 32 and resentencing was not required. However the case was remanded to the district court to correct the "technical error" of failing to append the required determinations to the presentence report, and to delete the page 8 reference to the contested matter. *U.S. v. Macias-Perez*, __ F.2d __ (9th Cir. Oct. 5, 1990) No. 89-10146.

7th Circuit upholds use of hearsay in sentencing hearing. (770) Defendant contended that the evidence did not support the district court's determination that he sold more than five kilograms of cocaine. The 7th Circuit upheld the determination, which was based on hearsay testimony. The court noted that hearsay was a staple in sentencing, and "[n]othing shows that the evidence was false or perjured; [defendant's] disagreement with the substance of the evidence is not a constitutional objection to its use." *U.S. v. Escobar-Mejia*, __ F.2d __ (7th Cir. Oct. 15, 1990) No. 90-1029.

8th Circuit finds adequate reasons for imposing sentence where range exceeded 24 months. (775) When the sentencing range exceeds 24 months, the district court must state its reasons for imposing a particular sentence within the range. Here the guideline range was 168 to 210 months, and the district court imposed a 197-month sentence. The 8th Circuit found that the district court adequately stated its reasons for the sentence. It considered defendant's three prior convictions and the fact that he committed the instant offense while on probation. Defendant requested leniency based on his military service, and the district court stated that the only reason it did not sentence defendant at the top of the guideline range was defendant's military service. *U.S. v. Tate*, __ F.2d __ (8th Cir. Oct. 3, 1990) No. 90-1013.

Forfeiture Cases

4th Circuit holds that court may enjoin disposition of substitute assets belonging to fugitive RICO defendant. (900) Defendant was indicted on various RICO violations which caused the failure of a savings and loan association. The indictment charged defendant and others with transferring $22,000,000 to Swiss bank accounts. Defendant fled the country, but later wired $500,000 to an accomplice in the United States. The district court found that the stolen RICO funds were not the source of wired money, and

therefore it had no jurisdiction to enjoin the disposition of the funds pending trial. The 4th Circuit disagreed, ruling that the district court *did* have jurisdiction to enjoin the disposition of the wired funds. Under the RICO forfeiture statute, a money judgment can be satisfied out of any of the defendant's assets. The possession of the wired funds by defendant's accomplice did not defeat the government's right to those funds, since the accomplice was not a bona fide purchaser for value. The 4th Circuit also rejected the accomplice's argument that the continued restraint of the funds violated her 6th Amendment right to counsel and due process. *In Re Assets of Billman*, __ F.2d __ (4th Cir. Oct. 3, 1990) No. 90-7029.

EXHIBIT F

OCTOBER 1990 SUPREME COURT CRIMINAL DOCKET

(November 1, 1990 version)

The questions presented in criminal and related cases being reviewed this term by the Supreme Court, and in one instance pending on a petition for a writ of certiorari, are set forth below. The brief of the Solicitor General is summarized in the cases in which the United States is participating.

I. STOPS, ARRESTS, SEARCHES, AND SEIZURES:

Pursuit as a Seizure

California v. **Hodari D.**, No. 89-1632 (cert. granted 10/1/90)(case below: 216 Cal. App. 3d 745).

1. Whether seizure of a person under the Fourth Amendment requires physical restraint.

2. Whether a person pursued on a public street by a police officer may immunize himself from prosecution by discarding evidence (crack cocaine) and asserting that he did so out of fear of an unlawful search.

Boarding Bus for Search Request

Florida v. **Bostick**, No. 89-1717 (cert. granted 10/9/90)(case below: Fla. S.Ct. 554 So.2d 1153).

Whether police violated the Fourth Amendment when, acting without individualized suspicion, they asked and obtained the consent of a passenger on an interstate bus to search his luggage.

Container Searches

California v. **Acevedo**, No. 89-1690 (cert. granted 10/1/90).

1. Whether under United States v. Ross, 456 U.S. 798 (1982), an officer with probable cause to believe that a specific container within a vehicle contains contraband may search the container without a warrant.

2. Whether Ross overruled or limited United States v. Chadwick, 433 U.S. 1 (1977).

Adequacy of Probable Cause Hearing

County of Riverside v. **McLaughlin**, No. 89-1817, (cert. granted 10/1/90)(case below: 888 F.2d 1276).

1. Whether, in a state that provides for an extensive probable cause hearing at arraignment, the additional time necessary to provide for this more extensive protection may be

weighed in determining the promptness of the probable cause hearing required under Gerstein v. Pugh, 420 U.S. 103 (1975).

2. Whether a person arrested without a warrant who does not receive a prompt probable cause hearing has standing under City of Los Angeles v. Lyons, 461 U.S. 95 (1983), to obtain an injunction requiring such hearings after the time for a prompt hearing has passed in the absence of allegations that he will again be subject to misconduct in the future.

II. CONFESSIONS:

Miranda and Interrogation after Attorney Consultation

Minnick v. **Mississippi**, No. 89-6332 (argued 10/3/90)(case below: S.Ct.Miss.).

Whether law enforcement officers may reinitiate custodial interrogation after a suspect has invoked his right to counsel and consulted with a lawyer.

The Solicitor General contends that the rule in Edwards v. Arizona, 451 U.S. 477 (1981), should not be extended to interrogations conducted after a suspect has consulted with a lawyer. He also argues that the interrogation did not violate Sixth Amendment rights because these rights had not attached since petitioner had not been formally charged at the time he confessed. Even if Mississippi rather than federal law applied, these rights did not attach when an arrest warrant was issued.

Unrelated Offense Interrogation without Charged Offense Attorney

McNeil v.**Wisconsin**, No. 90-5319 (cert. granted 10/29/90)(case below: Wis.S.Ct. 454 N.W. 2d 724).

Whether an accused's appearance with counsel on a charged offense constitutes an invocation of his fifth amendment right to counsel that precluded police initiated interrogation on an unrelated and uncharged offense.

Promises as Coercion; Harmless Error

Arizona v. **Fulminante**, 89-839 (cert. granted 3/26/90) (case below: Az.S.Ct.)

1. Whether a confession to an inmate informant was involuntary on the ground that it was coerced by the informant's implied promise to protect the petitioner from other inmates who had previously subjected him to rough treatment.

2. Whether the erroneous admission of an involuntary confession can be harmless error.

In an amicus brief, the Solicitor General contends that the Constitution bars the admission of the petitioner's statements only if coercive governmental misconduct overbore his free will, and that an informant's offer to protect petitioner in exchange for incriminating information did not coerce his confession. The Solicitor also contends that the erroneous admission of an

involuntary confession is not error that automatically requires a conviction to be reversed. Finally, he asserts that stare decisis considerations do not preclude reconsideration of the rule adopted in Bram v. United States, 168 U.S. 532, 542-543 (1897) that a statement is involuntary if obtained by "any direct or implied promises, however, slight."

III. GRAND JURY INVESTIGATIONS:

Relevance of Subpoenaed Records

United States v. **R. Enterprises, Inc.**, 89-1436 (argued 10/29/90) (case below: 884 F.2d 772 (4th Cir.).

Whether, before it may enforce compliance with a grand jury subpoena for corporate business records, the government must establish that the subpoenaed materials would be relevant and admissible at a trial on the merits.

The Solicitor General contends that the rules regarding compliance with grand jury subpoenas must be guided by the broad investigative responsibilities of the grand jury; that a grand jury subpoena may not be quashed on relevance grounds unless the recipient demonstrates that the materials bear no conceivable relevance to any legitimate subject of grand jury inquiry; and that the subpoenas should have been enforced because respondents did not carry their burden of proof.

IV. TRIALS:

Trial Attorney Press Conferences

Gentile v. **State Bar of Nev.**, No. 89-1836 (petition for a writ of certiorari pending).

1. Whether the First Amendment permits a state to punish a lawyer who holds a press conference decrying criminal charges against his client as based upon the misconduct of government offficials in the absence of evidence that the conference could or did interfere with the impartial administration of justice.

2. Whether the lawyer's statements about public officials may be restricted because the lawyer is counsel in pending litigation concerning the conduct of the officials.

3. Whether a court rule forbidding lawyer extrajudicial statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding," and decreeing that publicly expressing any opinion as to the guilt or innocence of a defendant or the credibility of a witness is ordinarily likely to have such an effect, is impermissibly vague and overbroad under the First Amendment and the due process clause.

Jury Selection under Magistrate without Objection

United States v. **France**, 89-1084 (argued 10/2/90)(case below: 886 F.2d 223 (9th Cir.)).

Whether Gomez v. United States, 109 S.Ct. 2237 (1989), requires reversal of a conviction even though the defendant did not object to a magistrate's conducting the voir dire of prospective jurors and even though the defendant's attorney expressed no objection to the manner in which the jury was selected.

The Solicitor General contends that the court of appeals should not have reversed the conviction because the defendant forfeited her right to have a district court judge, rather than a magistrate, conduct the selection of the jury when she failed to object contemporaneously to the magistrate's role in jury selection. He points out that the contemporaneous objection rule greatly promotes judicial economy by requiring a party to declare at trial what action the court should take. He argues that the plain error, jurisdictional error, and futile action exceptions are not applicable to this case.

Batson and Standing

Powers v. **Ohio**, 89-5011 (argued 10/9/90) (case below: Ohio Ct. App.).

Whether a white defendant has standing to challenge the prosecutor's peremptory challenges of black prospective jurors under Batson v. Kentucky, 476 U.S. 79 (1986).

Retroactive Application of Batson

Ford v. **Georgia**, 87-6796 (cert. granted 4/23/90)(case below: Ga.S.Ct. 362 S.E. 2d 764).

1. Whether, in a case remanded in light of Griffith v. Kentucky, 107 S.Ct. 708, a pre-Batson challenge to a prosecutor's use of peremptories is different from a constitutional claim under Swain v. Alabama, 380 U.S. 202 (1965).

2. Whether the retroactive application of the Batson constitutional rule established in Griffith may be voided by invoking a previously unannounced state objection as a procedural bar.

Batson Explanation

Hernandez v. **New York**, No. 89-7645 (cert. granted 10/9/90).

1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translation of Spanish language testimony constitutes an acceptable "racial neutral" explanation under Batson v. Kentucky, 476 U.S. 79 (1986).

2. Where a trial court has accepted the prosecutor's proffered explanation as being race neutral, what standard of review is to be applied by reviewing courts.

Scope of Jury Selection Inquiry

Mu'Min v. **Virginia**, No. 90-5193 (cert. granted 10/9/90)(case below: 389 S.E. 886 (Va.S.Ct.)).

Whether, in a capital case, the trial court violated petitioner's rights under the Sixth, Eighth, and Fourteenth amendments by refusing to allow voir dire questions of potential jurors about precisely what they had read or heard about the case.

Instruction on Willfulness

Cheek v. **United States**, 89-658 (argued 10/3/90)(case below: 7th Cir., 882 F.2d 1263).

1. Whether, in a prosecution for willful violation of the tax laws, the district court erred in instructing the jury that willfulness may be negated by petitioner's asserted good faith misunderstanding of the law only if that misunderstanding was objectively reasonable.

2. Whether the jury instructions violated petitioner's right to have the jury determine his guilt or innocence or offended fundamental notions of fairness.

The Solicitor General contends that a taxpayer acts "willfully" if he is aware of the requirements of the tax code but refuses to accept them based on a theory that is objectively unreasonable or a belief that the requirements are unconstitutional. He argues that the objectively reasonable requirement does not violate petitioner's constitutional rights.

Jury Unanimity; Lesser Offense Instruction

Schad v. **Arizona**. No. 90-5551 (cert. granted 10/9/90)(case below: Az.S.Ct.).

1. Whether a capital conviction obtained without providing for a unanimous, or even majority, vote by the jury violates the Sixth and Fourteenth Amendments.

2. Whether a state may avoid a defendant's exercise of his Eighth and Fourteenth Amendment rights under Beck v. Alabama, 447 U.S. 625 (1980), by denying that a necessarily included offense is a "lesser included offense" under state law.

Harmless Error

Yates v. **Aiken**, No. 89-7691 (cert. granted 10/1/90).

1. Whether the state court's harmless-error analysis of Sandstrom v. Montana, 442 U.S. 510 (1979), errors which considered neither petitioner's defense nor the jury's likely interpretation of the unconstitutional instructions conflicts with the requirements of Rose v. Clark, 478 U.S. 570 (1986), and Carella v. California, 109 S.Ct. 2419 (1989).

2. Whether the state court correctly followed two prior remand orders that instructed it "to grant the relief which federal law requires."

3. Whether correct harmless-error analysis was applied to a burden-shifting mandatory presumption.

V. SENTENCING:

Sentencing Guidelines

Burns v. United States, 89-7260 (cert. granted 6/28/90)(case below: 893 F.2d 1343 (D.C.Cir.)).

Whether the district court was required to give the defendant notice of its intention to depart from the sentence mandated by the Sentencing Guidelines.

The Solicitor General contends that a district court is not required to give advance notice that it may depart from the range of sentences prescribed by the Sentencing Guidelines either under the due process clause or the Sentencing Reform Act.

Supervised Release

Gozlon-Peretz v. **United States**, 89-7370 (argued 10/30/90).

Whether the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 became effective for offenses committed on or after the date of enactment, October 27, 1986.

The Solicitor General contends that the mandatory minimum terms of supervised release required by the Anti-Drug Abuse Act of 1986 apply to offenses committed on or after the date of enactment, October 27, 1986. He argues that Congress did not postpone all the penalty provisions in Section 1002 of the 1986 Act; that the post-confinement monitoring provisions of the 1986 Act became effective on October 27, 1986; and that petitioner was subject to a mandatory term of supervised release rather than special parole.

Mandatory Life Sentence

Harmelin v. **Michigan**, 89-7272 (cert. granted 5/29/90)(case below: Mich. S.Ct.).

Whether the mandatory sentence of life imprisonment without possibility of parole constitutes cruel and unusual punishment.

The Solicitor General points out that following Solem v. Helm, 463 U.S. 277 (1983), appellate courts without exception have held that life imprisonment may be imposed for serious or violent crimes committed by adults. He contends that the Michigan legislature could reasonably conclude that distribution of drugs is equivalent to a violent assault on the users of drugs and others who suffer the consequences of their use. He argues that the fact that Michigan provides a heavier penalty than any other state for a crime such as petitioner's does not render the statute unconstitutional. Finally, he contends that Eighth Amendment history only indicates particular concern with the unbridled discretion exercised when a judge or jury chooses an extremely severe punishment from a range of authorized options while this case reflects a considered judgment of the legislature to apply a

mandatory life sentence to all offenders in petitioner's position.

VI. COLLATERAL ATTACK:

Successive Applications

McCleskey v. Zant, 89-7024 (argued 10/31/90)(case below: 890 F.2d 342 (11th Cir.)).

Whether a state must demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of the claim in a subsequent petition constitutes abuse of the writ.

Scope of Habeas Relief

McCarthy v. Blair, No. 89-1862 (cert. granted 10/1/90)(case below: 881 F.2d 602 (9th Cir.)).

1. Whether the court of appeals improperly expanded the scope of federal habeas corpus relief by granting federal collateral relief in the absence of any federal violation based solely on an alleged violation of a state procedural rule plus a finding that it is "reasonably probable" a different result would have occurred in the absence of the error of state law.

2. Whether a federal court can avoid the clear limitation on retroactive application of new federal rules by choosing to recast the issue in terms of a "violation of state law plus prejudice," which can be claimed in almost any federal habeas corpus petition.

VII. STATUTORY CONSTRUCTION:

Extortion or Campaign Contributions

McCormick v. United States, No. 89-1918 (cert. granted 10/1/90)(case below: 4th Cir. 896 F.2d 61).

1. Whether the evidence was sufficient to show that petitioner, an elected official, committed extortion under color of official right under the Hobbs Act.

2. Whether the court of appeals used an impermissibly vague standard in distinguishing between bona fide campaign contributions and unlawful payoffs to public officials.

3. Whether the evidence was sufficient to support petitioner's conviction for filing a false personal income tax return.

Transportation of Falsely Made Instruments

Moskal v. United States, 89-964 (cert. granted 3/19/90)(case below: 3rd Cir. 888 F.2d 283)

Whether 18 U.S.C. 2314, which prohibits the transportation in interstate commerce of instruments that are "falsely made," covers petitioner's conduct in obtaining automobile certificates of title that contain false mileage information.

The Solicitor General contends that an automobile title is

falsely made within the meaning of section 2314 if false information is inserted into a genuine document at the time it is made. He argues that the language and purposes of section 2314 indicate that it applies to all false documents, regardless of the method used to falsify the documents.

Witness Fees for Prisoners

Demarest v. **Manspeaker**, 89-5916 (cert. granted 4/23/90)(case below: 884 F.2d 1343).

Whether a state prisoner who serves as a witness in federal court proceedings is entitled to a witness fee under 28 U.S.C. 1821.

The Solicitor General contends that petitioner is not entitled to witness fees because he did not appear pursuant to a subpoena but under a writ of habeas corpus ad testificandum and thus did not satisfy the requirements of 28 U.S.C. 1825, which implements the entitlements of Section 1821. He also argues that convicted prisoners are not within the class of intended beneficiaries of the statute.

VIII. MISCELLANEOUS:

Civil Damage Immunity of Prosecutor

Burns v. **Reed**, 89-1715 (cert. granted 6/28/90) (case below: 894 F.2d 949 (7th Cir.)).

Whether a state prosecutor is absolutely immune from an action for damages under 42 U.S.C. 1983 for giving legal advice to two police officers about their proposed investigative conduct, and for eliciting misleading testimony from one of the officers at a subsequent probable cause hearing.

IX. CAPITAL PUNISHMENT:

Victim Impact Evidence

Ohio v. **Huertas**, No. 89-1944 (cert. granted 10/1/90) (case below: Ohio S.Ct.).

Whether Booth v. Maryland, 107 S.Ct. 2529 (1987), and South Carolina v. Gathers, 109 S.Ct. 2207 (1989), require that evidence about the effect of the crime on the victim's family be excluded from the penalty phase of a capital murder trial even when the defendant intimately knew the victim and the victim's family, and was aware of the trauma that commission of the crime would cause.

Death Row Mentally Ill Prisoners

Perry v. **Louisiana**, 89-5120 (argued 10/2/90) (case below: La. S. Ct.).

Whether the Eighth Amendment prohibits a state from forcibly injecting an insane death row inmate with mind-altering drugs to

make him competent so that he can be executed.

Overriding Jury's Sentencing Recommendation

Parker v. **Dugger**, 89-5961 (cert. granted 6/28/90) (case below: 876 F.2d 1470 (11th Cir.)).

1. Whether Florida's jury override standard is subject to Eighth Amendment review, and if so, what standard of review is applicable.

2. Whether a constitutional claim raised in the trial court and on direct appeal is procedurally barred in a federal habeas proceeding if it is not raised in state collateral proceedings.

3. Whether petitioner was entitled to a theory of defense instruction on duress that was applicable to one theory of criminal liability, felony murder, but was inapplicable to a second theory, intentional murder.

4. Whether the prosecutor may always cross examine a defendant as to the extent of any coaching by his lawyer during a recess.

5. Whether, in a federal habeas proceeding presenting multiple claims for relief, an appellate court has jurisdiction to review an order of the district court that does not dispose of all of the asserted claims.

Untimely Appeal as Procedural Default for Federal Habeas

Coleman v. **Thompson**, No. 89-7662 (cert. granted 10/29/90)(case below: 895 F.2d 139 (4th Cir.)).

1. Whether, under Harris v. Reed, 109 S.Ct. 1042 (1989), it is permissible for a federal court to analyze state law and the state court record to determine if claims in a federal habeas petition are barred by state procedural default.

2. Whether the ineffectiveness of counsel in not filing a timely appeal constitutes cause for avoiding the procedural default when the default would bar a hearing on a convicted capital defendant's constitutional claims.

3. Whether the deliberate bypass standard of Fay v. Noia, 372 U.S. 391 (1963), applies to procedural default resulting from a failure to file a timely appeal from a state habeas proceeding.

X. IMPRISONMENT:

Conditions of Confinement

Wilson v. **Seiter**, No. 89-7376, (cert. granted 10/1/90).

1. Whether the intent requirements of Whitley v. Albers, 475 U.S. 312 (1986), apply to Eighth Amendment challenges to continuing conditions of confinement that do not involve the use of force.

2. Whether the court of appeals erred in affirming the trial court's grant of summary judgment in view of the factual conflicts in the record.

EXHIBIT G

UNITED STATES ATTORNEYS MANUAL BLUESHEETS
1990

Bluesheet No.	Subject	Date Issued
1-11.000	U.S. Attorneys Compliance with Attorney General Guidelines Management of the Provision of Victim-Witness Assistance	10-30-89
5-9.120	Statutes Administered	6-13-89
5-12.620	Consent Decrees in Environmental Cases	6-04-90
6-4.211	Charging the Filing or Causing the Filing of False Income Tax Returns as Mail Fraud and/or as Mail Fraud Predicates to a RICO Charge	7-03-89
8-3.130	Authorization for Grand Jury Proceedings, Arrests, and Indictments	1-23-89
8-2.300	Office of Redress Administration	4-19-89
9-23.400	Prosecution after Compulsion	6-07-89
9-110.414	Temporary Restraining Orders Under 18 U.S.C. §1963(d)	6-30-89
9-5.101	Criminal Division Brief/Memo Bank	7-20-89
9-105.000	Review and Prosecution of 18 USC §1956 a)(1)(A)(ii) - Money Laundering Cases	8-16-89
9-6.200	Pretrial Disclosure of Witness Identity	3-29-90
9-11.155	Notification to Targets when Target Status Ends	8-10-90
9-16-500	Multi-District (Global) Agreement Requests	8-22-90

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EXHIBIT H

Legislative Scorecard

The Crime Control Act contains 32 amendments to current law in the area of money laundering or forfeiture, including nine provisions relating specifically to the principal money laundering statute, 18 U.S.C. §1956, and 10 relating to money laundering forfeiture under 18 U.S.C. §§ 981-82. The one major disappointment was the omission of the Senate amendment that would have made penalties for money laundering conspiracies commensurate with the penalties for substantive offenses. Also omitted was the proposed CMIR structuring amendment to title 31, the safe-harbor provision under the RFPA, and the provision that would have resolved the split in the circuits on the "disjunctive/conjunctive" issue in the innocent owner statutes.

The following is a summary of the measures passed and not passed:

	PASSED	NOT PASSED
RFPA	1	1
§§ 981-82	10	4
§1956	9	3
§§ 853,881	4	6
Title 26	2	1
Title 31	0	2
Fft Fund	4	1
Title 19	0	2
Other Title 18	0	3
Miscellaneous	2	1

The RFPA amendment inserts a reference to the money laundering statutes into the "insider exemption." The §981-82 amendments include new forfeiture authority relating to the proceeds of bank crimes as well as provisions authorizing criminal forfeiture in CMIR cases, removing the treaty requirement for equitable sharing with foreign governments, and clarifying the substitute assets provision as it relates to "intermediaries." Congress did not enact the Senate provision relating to the forfeiture of the instrumentalities of foreign drug offenses.

The §1956 amendments include a "sting" provision for subsection (a)(2) cases similar to the one enacted in 1988 in subsection (a)(3); a correction to the knowledge requirement relating to foreign drug offenses; clarifications of the definitions of "financial transaction" and "monetary instrument;" and the addition of new predicate offenses including banking and environmental crimes.

The title 21 forfeiture amendments include authority to forfeit drug paraphernalia and firearms used to facilitate drug offenses. Congress did not enact the requested authority to forfeit personal property used to facilitate a drug offense and proceeds traceable to conveyances. Congress also failed to enact

a number of desirable procedural changes such as those giving precedence to forfeiture in bankruptcy cases, and providing for the nonabatement of forfeiture when a defendant dies.

The title 26 amendments include the correction of the penalty applicable to §6050I offenses (making the penalty a felony), and a two-year extension on the provisions permitting dissemination of CTR reports.

The statute governing the Asset Forfeiture Fund, 28 U.S.C. §524(c), has been amended to permit the Attorney General to quiet title. There are also two inconsistent amendments enlarging the authority to pay awards out of the fund: one amendment extends the authority to all Justice Department cases, while the other sets forth a list of specific offenses to which the award authority would apply. It is not clear which amendment will take effect. Section 524(c) was also amended to permit quarterly transfers to the Special Forfeiture Fund and to require reports to Congress with respect to forfeited property. Congress did not enact a provision that would have authorized the use of the Fund to buy weapons and ammunition for law enforcement personnel.

Among the miscellaneous provisions enacted were the lifting of the ceiling on administrative forfeitures entirely in cases involving cash, and to $500,000 in all other cases, and requirements that Treasury report on the uses made of currency transaction reports and on the feasibility of scanning U.S. currency electronically. Miscellaneous provisions not enacted include the criminal forfeiture provision for illegal gambling businesses under 18 U.S.C. §1955, and the attempt to make unlawful use of food stamps a money laundering predicate.

Money Laundering in White Collar Cases

The problem section is the one that adds a variety of banking crimes to the list of money laundering predicates in §1956(c)(7)(D). Currently, under §1956(c)(7)(A), all RICO predicates are included in the definition of "specified unlawful activity". Because mail and wire fraud are RICO predicates, the laundering of the proceeds of any mail or wire fraud offense is currently prosecutable under §§ 1956 and 1957.

The new amendment, however, adds mail and wire fraud offenses "affecting a financial institution" to the definition of specified unlawful activity. This undoubtedly reflects the intent of some zealous Congressional aide to expand the money laundering statute to cover banking crimes without realizing that the statute already covered all such offenses. The result, unfortunately, will be that defense counsel will argue that Congress could not have intended to pass a meaningless statute and that it therefore must have intended to restrict the money laundering statute only to those fraud offenses affecting financial institutions. The Department will seek to have this problem fixed early next year.

MONEY LAUNDERING AMENDMENTS IN THE CRIME CONTROL ACT OF 1990

On October 27, 1990, Congress passed the Crime Control Act of 1990. The provisions in the bill will become law when the President signs it within a few weeks.

The Crime Control Act contains numerous changes to the principal money laundering statute, 18 U.S.C. §1956, and the money laundering forfeiture statutes, 18 U.S.C. §§981-82. The following is a discussion of the most significant provisions in the Act; versions of all three statutes, as amended, are attached.

AMENDMENTS TO 18 U.S.C. §1956

The Crime Control Act contains nine separate amendments to Section 1956. One of these is purely technical, while another adds a new subsection (c)(8) defining the term "State" to include the District of Columbia, Puerto Rico, and all territories and possessions of the United States. The other provisions are as follows:

Section 108 -- "Sting" Provision for International Money Laundering

This section eases the government's burden of proof with respect to the knowledge requirements in 18 U.S.C. §1956(a)(2). Section (a)(2) deals with the transportation or transmission of funds into or out of the United States. Under paragraph (B) of that section, the government must prove that the defendant knew the property in question to be the proceeds of some form of unlawful activity, and that the purpose of the transaction was to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity.

The amendment makes it possible to satisfy both of these requirements by having an undercover agent or confidential informant make representations to the defendant concerning the source of the money and the purpose of the transaction. Thus, in a case under section (a)(2), the government could satisfy the knowledge requirements by having a confidential informant, working under the direction of a federal agent, tell the defendant that the property being sent into or out of the country was the proceeds of specified unlawful activity and that the purpose of the transaction was to disguise the ownership of the property.

Legislative History: Section 510 of S.1970; Sec. 1410 of S. 1972. See Congressional Record, daily ed., November 21, 1989, at S.16760.

Section 106 -- **Knowledge Requirement When the Property is the Proceeds of a Foreign Drug Offense**

This section resolves a minor inconsistency in the definition of the knowledge requirement in §1956(c)(1). That subsection provides that while the government must prove that the property involved in the financial transaction was in fact the proceeds of some form of specified unlawful activity, it is not required that the launderer know what form of unlawful activity was involved as long as he knows that it was some offense that would be a felony under "state or federal law."

The inconsistency is that while the "specified unlawful activity" could be an offense under foreign law, see 18 U.S.C. 1956(c)(7)(B), the knowledge requirement relates only to "state or federal law." Thus a person who launders the proceeds of a foreign offense could argue that he or she might not be prosecutable under the statute as originally drafted because the underlying offense would not be covered by the knowledge requirement. A court would presumably reject this argument as obviously contrary to the Congressional intent. Nevertheless, the amendment resolves this possible problem by expanding the knowledge requirement to include foreign offenses. As amended, subsection (c)(1) provides that the defendant must know that the property represents the proceeds of some offense that would be a felony under "state, federal or foreign law".

Legislative History: Section 506 of S.1970; Section 1406 of S.1972; Sec. 1502 of S.1711. See Congressional Record, daily ed., November 21, 1989, at S16759 and October 5, 1989, at S12748.

Sections 105 and 1402 -- **Clarification of Definitions of "Financial Transaction" and "Monetary Instrument"**

These amendments are intended to be purely technical in nature and are not intended to have any substantive effect. The first amendment is intended merely to add grammatical clarity to the definition of "financial transaction" in subsection (c)(4). The clarification is consistent with the legislative history which explains that for the purposes of this statute, a financial transaction need not involve a financial institution. See S. Rep. 99-433, 99th Cong., 2nd Sess. (1986), at p. 13.

Legislative History: Secs. 3202 and 3706 of S.1970; Sec. 7203 of S.2652. See Congressional Record, daily ed., May 18, 1990, at S6606.

The second amendment adds similar clarity to the definition of "monetary instrument" in subsection (c)(5). As originally drafted, the phrase "in bearer form or otherwise in such form that title thereto passes upon delivery" appeared twice in the

definition modifying both "investment securities" and "negotiable instruments." Prosecutors have encountered repeated questions, however, as to whether the "in bearer form" limitation is applicable also to travelers' checks, personal checks, bank checks, and money orders. By subdividing the definition into two branches, the amendment makes clear that the phrase "in bearer form ..." modifies only the categories of "investment securities" and "negotiable instruments."

Legislative History: Section 505 of S.1970; Sec. 1405 of S.1972; Sec. 1206 of S.1711. See Congressional Record, daily ed., November 21, 1989, at S16759.

Section 107 -- Precursor Chemical Offense as Specified Unlawful Activity

This is the first of three amendments to the list of offenses in subsection (c)(7) defining "specified unlawful activity." This section makes a technical correction to the reference to the Chemical Diversion and Trafficking Act.

Section 6466 of the Anti-Drug Abuse Act of 1988 amended the definition of "specified unlawful activity" for the purposes of 18 U.S.C. 1956 to include a reference to section 310 of the Controlled Substances Act, 21 U.S.C. 830, relating to precursor and essential chemicals. That reference, however, is to a provision that contains no criminal penalty but rather only a direction to keep records and file reports regarding such chemicals. Felony penalties are set forth elsewhere in the Chemical Diversion and Trafficking Act of 1988 for importing, exporting, possessing or distributing a listed chemical with intent to manufacture a controlled substance and for other miscellaneous trafficking-type offenses involving listed chemicals. Misdemeanor penalties are set forth for recordkeeping violations. It is thus evident that the reference to 21 U.S.C. 830 in section 1956(c)(7)(D) was incorrect. The amendment provides an appropriate reference to any felony violation, i.e., trafficking-type offenses, of the Chemical Diversion and Trafficking Act of 1988 involving precursor and essential chemicals.

Legislative History: Secs. 509 and 3708 of S.1970;[1] Sec. 1409 of S.1972; Sec. 1202 of S.1711. See Congressional Record, daily ed., November 21, 1989, at S16759-60.

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1 Section 3708 was a floor amendment offered to S.1970 by Sens. Biden and Thurmond with the intent of replacing §509. The Senate adopted the amendment, but it was the original §509 that was ultimately enacted.

Section 2706 -- Addition of Banking Crimes as Specified Unlawful Activity

This section adds several bank fraud offenses to the definition of specified unlawful activity in §1956(c)(7)(D). The additions include 18 U.S.C. §§1005-07 and 1014. Unfortunately, this amendment contains another provision that may cause major problems in money laundering cases involving the proceeds of mail and wire fraud offenses.

Currently, under §1956(c)(7)(A), all RICO predicates are included in the definition of "specified unlawful activity". Because mail and wire fraud are RICO predicates, the laundering of the proceeds of any mail or wire fraud offense is currently prosecutable under §§ 1956 and 1957.

The new amendment, however, adds mail and wire fraud offenses "affecting a financial institution" to the definition of specified unlawful activity. This undoubtedly reflects the intent of some zealous Congressional aide to expand the money laundering statute to cover banking crimes without realizing that the statute already covered all such offenses. The result, unfortunately, will be that defense counsel will argue that Congress could not have intended to pass a meaningless statute and that it therefore must have intended to restrict the money laundering statute only to those fraud offenses affecting financial institutions.

The Justice Department will probably seek to have this problem fixed early next year. In the meantime, however, prosecutors should be aware of the problem, and should, whenever possible, base money laundering/mail fraud prosecutions on conduct that occurred before the effective date of Crime Control Act. When this is not possible, prosecutors should argue that Congress' clear intent in enacting the savings and loan provisions in the Act was to enhance prosecutorial authority, not restrict it, and that therefore the amendment should be viewed as a drafting error that does not affect the inclusion of all mail and wire fraud offenses as money laundering predicates under §1956(c)(7)(A).

Legislative History: Sec. 507 of S.1970 (not including mail and wire fraud offenses); Sec. 1407 of S.1972 (same); Sec. 8105 of S.2652 (same); Sec. 2106 of H.R.5269 (containing mail and wire fraud); Sec. 106 of H.R.5401 (same); Sec. 4153 of S.1970 (same). See Congressional Record, daily ed., July 31, 1990, at H6005 (H.R.5401); November 21, 1989, at S16759 (S.1972); May 18, 1990, at S6607 (S.2652).

Section 1404 -- Environmental Crimes as Specified Unlawful Activity

This section adds the most serious environmental crimes to the definition of "specified unlawful activity" in the money laundering statute. The provisions are listed in a new paragraph (E) of subsection (c)(7). The intended effect is to enable the government to bring money laundering charges against any person who conducts a financial transaction involving the proceeds of some other specified unlawful activity (such as fraud or bribery) with the intent to further an environmental crime, or who launders the proceeds of an environmental crime.

Legislative History: Section 3204 of S.1970 was offered as a floor amendment by Senator Kennedy without explanation. See Congressional Record, daily ed., July 11, 1990, at S9592.

AMENDMENTS TO 18 U.S.C. §§ 981-82

There are ten separate amendments to the money laundering forfeiture statutes, 18 U.S.C. §§ 981-82. Most of these relate to the savings and loan scandal, and indicate Congress' intent to use §§981-82 to authorize forfeiture in areas beyond money laundering and drug trafficking. There are also several provisions that amend the original provisions of the bill concerning money laundering forfeitures, as well as purely technical amendments.

Section 103 -- Equitable Sharing with Foreign Governments: §981(i)

This section amends 18 U.S.C. §981(i) to authorize the equitable transfer to a participating foreign nation of forfeited property when the forfeiture is pursuant to 18 U.S.C. §§ 981 or 982. Section 981(i) currently authorizes transfers of forfeited property to a foreign country; however, such transfers may only be made "to the extent provided by treaty" -- a restriction which has rendered the provision virtually useless. The amendment removes the treaty requirement and conforms Section 981(i) to 21 U.S.C. §881(e) and 19 U.S.C. §1616a.

Those statutes currently provide for the equitable sharing with a foreign nation of forfeited property or the proceeds therefrom where the foreign nation participated in the seizure or forfeiture of the property as long as three conditions are satisfied: (1) the Secretary of State concurs, (2) the transfer is authorized in an international agreement between the United States and the foreign country, and (3) the country has been certified under section 481(h) of the Foreign Assistance Act of 1961.

Legislative History: Sec. 2434 of S.1970; Sec. 1403 of S. 1972; Sec. 710 of S.1711. See Congressional Record, daily ed., October 4, 1989 at S12623 and November 21, 1989 at S16759.

Section 1401 -- Criminal Forfeiture for CMIR Violations: §981(a)(1)(A)

This section corrects an oversight in the Anti-Drug Abuse Act of 1988. That Act amended 18 U.S.C. §982 to require the forfeiture in a criminal case of any property involved in certain anti-money laundering statutes including the statute requiring currency transaction reports (CTRs) and the anti-structuring statute. See Pub. L. 100-690, Section 6463(c). Inadvertently, the 1988 amendment failed to include criminal violations of the statute requiring the filing of monetary instrument reports (CMIRs) with the Customs Service whenever more than $10,000 is imported to or exported from the United States. 31 U.S.C. 5316. Such violations are already subject to civil forfeiture, 31 U.S.C. 5317. The amendment makes them subject to the same criminal forfeiture sanctions as apply to the CTR and anti-structuring violations.

Legislative History: Secs. 3201 and 3705 of S.1970; Sec. 7202 of S.2652. See Congressional Record, daily ed., May 18, 1990, at S6606.

Section 1403 -- Forfeiture of Substitute Assets in Money Laundering Cases: §982(b)(2)

In 1988, the statute permitting forfeiture of property in criminal money laundering cases, 18 U.S.C. 982(b), was amended to authorize the forfeiture of substitute assets. Under the amendment, whenever property involved in money laundering violations can not be located, has been placed outside the jurisdiction of the court, has been diminished in value, or otherwise is not available for forfeiture because of some action of the defendant, the government is entitled to the forfeiture of substitute property of equal value. See Section 6464 of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690.

This provision is identical to the substitute assets provision in 21 U.S.C. 853(p) which applies to forfeitures in criminal narcotics cases with one important difference. As amended in 1988, Section 982(b)(2) provided that the substitute assets provision may not be used where the convicted money launderer was merely an "intermediary" who handled the money "only temporarily" in the course of the money laundering offense. This exception was seen as necessary to prevent an "unduly harsh" result where a person was a mere conduit for a financial transaction between other principals. See Congressional Record, daily ed., November 10, 1988, at S17365.

The intent of this caveat in the 1988 amendment was to protect the low-level or occasional participant in a money laundering offense, such as a "smurf" who carries his employer's money to a bank but retains none of it for himself, from forfeiture of money over which he never exercised exclusive control. It was not intended to preclude forfeiture of substitute assets from a professional money launderer who moves hundreds of thousands of dollars through various businesses and accounts on behalf of other criminals engaged in drug trafficking or other specified unlawful activity.

The 1990 amendment qualifies the 1988 exception by providing that substitute assets will be forfeited even by an intermediary who does not retain the laundered property if that person is a professional money launderer, who is defined as a person who participates in three or more transactions involving $100,000 or more in a twelve-month period.

Legislative History: Sec. 3203 of S.1970 (Kennedy floor amendment); Sec. 7204 of S.2652. See Congressional Record, daily ed., May 18, 1990, at S6606.

Section 2724(1) -- Expanding Civil Forfeiture in Bank Fraud Cases: §981(a)(1)(C)

In the FIRREA Act, Pub. L. 101-73, §963(a) and (b), Congress amended 18 U.S.C. 981 to permit forfeiture of the proceeds of certain crimes involving bank fraud by enacting a new subsection 981(a)(1)(C). The latest amendment expands this list by amending subsection (a)(1)(C) to include mail and wire fraud offenses affecting insured depository institutions, and the new offense in 18 U.S.C. §1032 relating to the concealment of assets from the RTC.

Legislative History: Sec. 4151 of S.1970; Sec. 2126(1) of H.R.5269; Sec. 206 of H.R.5401. See Congressional Record, daily ed., July 31, 1990, at H6077.

Section 2724(2) -- Authority of the Attorney General to Conduct Forfeiture in Bank Fraud Cases: §981(b)

In amending §981 in the FIRREA Act to authorize forfeitures in bank fraud cases, Congress failed to make a conforming amendment to §981(b) authorizing the Attorney General to make seizures of property covered by the new provision. Absent this amendment, the FBI had no authority to make the seizures necessary to carry out the intent of Congress. The amendment corrects this oversight by making clear which agencies have authority to make seizures under each of the subparagraphs of §981(a)(1).

Legislative History: Sec. 4151 of S.1970; Sec. 2126(2) of H.R.5269; Sec. 206 of H.R.5401. See Congressional Record, daily ed., July 31, 1990, at H6007.

Section 2725 -- Civil Forfeiture for Fraud in the Sale of Assets by the Resolution Trust Corporation: §981(a)(1) & §982(a)

This section adds paragraphs (D) and (E) to 18 U.S.C. §981(a)(1), and paragraphs (3) and (4) to §982(a) to permit the civil and criminal forfeiture of property obtained as a result of certain criminal violations relating to the sale of assets by the Resolution Trust Corporation or the Federal Deposit Insurance Corporation.

Legislative History: Section 4252 of S.1970; Sec. 2127 of H.R.5269; Sec. 207 of H.R.5401. See Congressional Record, daily ed., July 31, 1990, at H6007.

Sections 2708 and 2725(a)(2) -- Uses of Forfeited Funds: §981(e)

The first amendment adds a new paragraph (6) to §981(e) to permit forfeited funds to be used to pay restitution to the victims of any of the fraud offenses described in §981(a)(1)(C). The second amendment adds a new paragraph (7) to permit the transfer of forfeited property to the RTC or FDIC in cases relating to fraud in sale of assets by the RTC or FDIC as described in the new §981(a)(1)(D).

Legislative History: Section 4152 of S.1970; Secs. 2108 and 2127(a)(2) of H.R.5269; Secs. 108 and 207 of H.R.5401. See Congressional Record, daily ed., July 31, 1990, at H6005, H6007.

AMENDMENTS TO THE INTERNAL REVENUE CODE

Section 3302 of the Crime Control Act amends 26 U.S.C. §7601(b) to grant a two-year extension to the IRS's authority to disseminate cash transaction reports filed pursuant to Section 6050I (Form 8300) to government agencies for purposes unrelated to the collection of taxes.

Section 3303 clarifies the penalty provision that applies to the willful failure of a trade or business to file IRS Form 8300 relating to the receipt of $10,000 or more in U.S. currency. The current language, enacted in 1988, provides for a misdemeanor penalty of five years. The amendment retains the five year maximum, but makes clear that the offense is a felony. See 26 U.S.C. §§ 6050I and 7203.

Finally, a provision inserted into the budget reconciliation act by the House Ways and Means Committee, Sec. 11318, increases the civil penalty for intentional violations of §6050I and amends §6050I itself to redefine the kind of "cash" transaction that triggers the reporting requirement. The new definition defines "cash" to include any monetary instrument, up to $10,000 in face value, that the Secretary of the Treasury chooses to define as cash. Until the Secretary promulgates such regulations, however, the definition of "cash" remains effectively unchanged.

Legislative History: Sec. 3711 of S.1970; Sec. 8101 of S.2652; Secs. 2002-03 of H.R. 5269. See Congressional Record, daily ed., May 18, 1990, at S6607.

AMENDMENT TO THE RIGHT TO FINANCIAL PRIVACY ACT

Section 104 amends the Right to Financial Privacy Act, 12 U.S.C. §3413(l)(2), to conform to provisions of the 1988 drug bill. Section 6186 of the Anti-Drug Abuse Act of 1988 created an exemption from the Right to Financial Privacy Act of 1978 for the financial records of "insiders". It provided that the Act does not apply to the transfer of financial records of financial institution officers, directors, controlling shareholders or certain major borrowers to federal or State law enforcement agencies where such records may be relevant to possible crimes against financial institutions or supervisory agencies by such persons, or to possible money laundering violations covered by the Bank Secrecy Act. The amendment expands the latter exemption to include money laundering offenses under 18 U.S.C. §§ 1956 and 1957.

Legislative History: Sec. 504 of S.1970; Sec. 1404 of S.1972; Sec. 1205 of S.1711. See Congressional Record, daily ed., November 21, 1989, at S16759.

AMENDMENTS TO THE DRUG FORFEITURE STATUTE: 21 U.S.C. §881

The Crime Control Act contains four relatively minor amendments to the civil forfeiture statute for drug cases. There are no amendments to the corresponding criminal forfeiture statute.

Sections 2007-08 -- Forfeiture of Drug Paraphernalia and Firearms

The first section adds a new subsection (a)(10) to §881 permitting forfeiture of any drug paraphernalia as defined in 21 U.S.C. §857. The second section adds a new subsection (a)(11) permitting forfeiture of any firearm "used or intended to be used to facilitate the transportation, sale, receipt, possession, or

concealment" of any property forfeitable under subsections (a)(1) or (a)(2).

Legislative History: Secs. 410-11 of H.R.5269; Sec. 3801 of S.1970; Sec. 3001 of S.2652. See Congressional Record, daily ed., May 18, 1990 at S6597 (relating to Senate version of paraphernalia amendment only).

Section 2003 -- Attorney General's Forfeiture Sale Authority

Current law does not specify what means the Attorney General may use to sell forfeited property. This section amends 21 U.S.C. 881(e)(1)(B) and 18 U.S.C. 2254(f)(2) to permit sale by "public sale or other commercially feasible means" which would include the use of commercial auctioneers and brokers.

Legislative History: Sec. 1908 of S.1970; Sec. 406 of H.R.5269; Sec. 508 of S.1972; Sec. 711 of S.1711. See Congressional Record, daily ed. October 4, 1989, at S12623.

Section 2004 -- Destruction of Dangerous Materials

Title 21, United States Code, Section 881(f) currently authorizes the summary forfeiture and destruction of schedule I and II controlled substances that are seized for a violation of the Controlled Substances Act. This section permits such forfeiture and destruction of "all dangerous, toxic, or hazardous raw materials" subject to forfeiture under 21 U.S.C. 881(a)(2), and any equipment that cannot be separated safely from it.

Legislative History: Sec. 1910 of S.1970; Sec. 407 of H.R.5269; Sec. 510 of S.1972; Sec. 713 of S.1711. See Congressional Record, daily ed. October 4, 1989, at S12623.

AMENDMENTS TO THE ASSET FORFEITURE FUND

The Control Act contains four amendments to 28 U.S.C. §524(c), the statute governing the administration of the Justice Asset Forfeiture Fund.

Section 2002 -- Warranting Clear Title

This section authorizes the Attorney General to warrant clear title to forfeited property.

Legislative History: Sec. 1901(b) of S.1970; Sec. 403 of H.R.5269; Sec. 501(b) of S.1972; Section 701(b) of S.1711; Sec. 4 of H.R.3550. See Congressional Record, daily ed. November 13,

1989, at H8439 (relating to H.R.3550); October 4, 1989, at S12622 (relating to S.1711).

Secs. 1601 and 2005 -- Enlargement of Forfeiture Award Authority

Both the Senate and the House passed measures enlarging the authority to use the Asset Forfeiture Fund to pay rewards to informants in forfeiture cases. Previously, such authority existed only with respect to forfeitures under title 21 and the RICO statute. See 28 U.S.C. §524(c)(1)(C). The House bill, and one section of the Senate bill, enlarged this authority to cover money laundering forfeitures. Another provision of the Senate bill, introduced as a floor amendment by Sens. Biden and Thurmond without explanation, struck the limitation on forfeiture award authority entirely, permitting the making of such awards in all cases involving a forfeiture statute "enforced or administered by the Department of Justice."

In the Crime Control Act, Congress enacted both of these provisions, leaving it unclear whether the forfeiture award authority has been increased to cover all forfeiture actions enforced by the Justice Department, or whether the increase in authority is limited to money laundering forfeitures.

Legislative History: Secs. 1901(a)(5) and 3703 of S.1970; Sec. 408 of H.R.5269; Sec. 501 of S.1972; Sec. 701 of S.1711. See Congressional Record, daily ed., October 4, 1989, at S12622.

Section 2006 -- Report to Congress

This section merely adds a subsection (c)(6)(C) that provides that the Attorney General must file an annual report to Congress including profit and loss information with respect to each category of forfeited property.

Legislative History: Sec. 409 of H.R.5269.

Section 2001 -- Quarterly Transfers from the Asset Forfeiture Fund

This section amends §524(c)(9) to provide that transfers made from the Asset Forfeiture Fund to the Special Forfeiture Fund shall not exceed $150 million and shall be made on a quarterly basis.

Legislative History: Sec. 411 of H.R.5269; Sec. 6 of S.1735; Sec. 2 of H.R. 3550. See Congressional Record, daily ed., November 13, 1989, at H8438-39.

RAISING THE CEILING ON ADMINISTRATIVE FORFEITURES

Finally, Congress has adopted the recommendation of the General Accounting Office to raise the ceiling on administrative forfeitures from $100,000 to $500,000, and to remove entirely the ceiling on administrative forfeitures of cash. This is accomplished through amendments to section 607 of the Tariff Act of 1930 (19 U.S.C. §1607) that were originally included in the Senate crime bill, but that were ultimately enacted as part of a set of amendments to the Customs Forfeiture Fund in Pub. L. 101-382, effective August 20, 1990.

Legislative History: Sec. 122 of H.R.1594 (Pub. L. 101-382, 104 Stat. 642); Sec. 1902 of S.1970; Sec. 502 of S.1972; Sec. 704 of S.1711. See Congressional Record, daily ed., October 4, 1989, at S12622.