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COMMENDATIONS

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

Ivan Abrams (District of Arizona), by Gene Weinschenk, Assistant Director (Research and Development), Financial Crimes Enforcement Network (FinCEN), Department of the Treasury, Arlington, Virginia, for his attendance and participation in FinCEN's first seminar.

Charysse Alexander (Alabama, Middle District), by Joseph A. Mahoney, II, Supervisory Special Agent, FBI, Mobile, for her professionalism and legal skill in preparing documents, conducting interviews, and obtaining the cooperation of key subjects in a major criminal investigation.

Leslie Banks (Texas, Southern District), by Andrew J. Kemmerer, Regional Director, National Oceanic and Atmospheric Administration, St. Petersburg, Florida, for her outstanding contribution to the success of the criminal prosecutions under the Endangered Species Act, particularly the Turtle Excluder Device regulations.

Vicki Zemp Behenna and ***H. Lee Borden, Jr.*** (Oklahoma, Western District), by Robert B. Bird, Assistant Regional Attorney, Department of Agriculture, for their legal skill in implementing the money laundering and criminal forfeiture statutes relative to the conversion of security mortgaged to the Farmers Home Administration, and ensuing successful results in trial.

Marilyn A. Bobula (Ohio, Northern District), received a Certificate of Appreciation from William J. Wood, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms (ATF), Department of the Treasury, in recognition of her dedication, professionalism, and outstanding efforts in support of ATF's enforcement objectives directed toward violent criminal offenders.

Cristine Bland (Texas, Southern District), by Ronald G. Parra, District Director, Immigration and Naturalization Service, Houston, for her successful prosecution of a Nigerian citizen who re-entered the United States after having been deported subsequent to committing a felony.

John Braddock (Texas, Southern District), by E. Neal Findley, Assistant Director/Investigations, Resolution Trust Corporation, Houston, for his outstanding representation and success in the trial of a savings and loan case.

Barbara Z. Brook (Indiana, Northern District), by Captain Thomas S. Frailey, Indiana State Police, Indianapolis, for her assistance in the asset forfeiture of money, personal property and real estate resulting from the investigation of "Operation Three Amigo's."

J. Michael Buckley (Michigan, Eastern District), by William R. Coonce, Special Agent-in-Charge, Drug Enforcement Administration, Detroit, for his excellent case presentation and subsequent conviction of an individual for distribution of Dilaudid.

Daniel J. Cassidy (District of Colorado), by Drena L. Klase, Training Coordinator, Colorado District Attorneys Council, Englewood, for his participation and excellent presentation on "Racketeering Case Preparation" at a recent training seminar.

Janet Craig and ***Sarah Tunnell*** (Texas, Southern District), by James N. De Stefano, Regional Counsel, U.S. Customs Service, Houston, for their excellent representation and favorable results in a sex discrimination case. ***Janet Craig*** was also commended by James C. Piatt, Regional Commissioner, U.S. Customs Service, Houston, for her outstanding efforts in this case.

Robert J. DeSousa, James A. Gibbons, and ***Robert R. Long, Jr.*** (Pennsylvania, Middle District), by James M. Ridenour, Director, National Park Service, Department of the Interior, Washington, D.C., for their valuable assistance, interest, and cooperation in the acquisition of land during the last several years for the 2,100-mile Appalachian National Scenic Trail in Cumberland Valley.

Robert Dopf (Iowa, Southern District), by R.J. Bowdren, Inspector in Charge, U.S. Postal Service, Des Moines, for his outstanding efforts and professional skill in obtaining temporary injunctions resulting in the freezing of $2.7 million in two mail fraud cases.

David E. Fritchey (Pennsylvania, Eastern District) by Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, for preparing an excellent Monograph on the Interstate Agreement on Detainers Act and the Writ of Habeas Corpus Ad Prosequendum. (See, p. 7 of this Bulletin.)

David M. Gaouette (District of Colorado), by Richard F. Miklic, Chief Probation Officer, U.S. District Court, Denver, for his valuable assistance and support in a revocation hearing involving violations of electronically monitored home detention.

Maynard Grant (District of Wyoming), by Colonel Michael R. Emerson, Chief, General Litigation Division, Office of The Judge Advocate General, U.S. Air Force, Washington, D.C., for his outstanding representation of the Air Force in the defense of a complex civil case.

Joseph E. Kane (Ohio, Southern District), by R. G. Sellers, Director, Department of Veterans Affairs, Columbus, for his valuable assistance and professional skill in the successful prosecution of a complex civil case.

Rachel V. Lee (Alabama, Middle District), by Major General Lester P. Brown, Jr., Headquarters Ninth Air Force, Shaw Air Force Base, South CarolinaColonel Scott L. Silliman, Staff Judge Advocate, Headquarters Tactical Air Command, Langley Air Force Base, Virginia, and for her outstanding service as Chief of Military Justice at eight Ninth Air Force Bases throughout the eastern United States in support of "Operation Desert Shield."

Fredrick E. Martin (Pennsylvania, Middle District), and his assistant ***Rose Troisi,*** by John R. Pulley, Country Attache, Drug Enforcement Administration, Washington, D.C., for their valuable assistance in expediting a Writ of Habeas Corpus to transfer a witness to testify in criminal proceedings in the Commonwealth of the Bahamas.

Dan Morris (District of Nebraska), by Colonel Michael R. Emerson, Chief, General Litigation Division, Office of the Judge Advocate General, U.S. Air Force, Washington, D.C., for his excellent representation and assistance in obtaining a favorable decision by the court for the U.S. Air Force.

Gerald J. Rafferty and ***Thomas M. O'Rourke*** (District of Colorado), by John G. Freeman, Inspector in Charge, U.S. Postal Service, Denver, for their successful prosecution of a complex white collar crime case involving millions of dollars in losses to the American public and a loss to the public treasury equal to the taxes on $400 to $500 million.

Steven M. Reynolds (Alabama, Middle District), by Tim Byrd, Chief of Police, Enterprise, Alabama, for his valuable assistance and special efforts in the successful prosecution of a complex criminal case.

Joanne Rodriguez, Warren Derbidge, and ***Anthony Hall*** (District of Idaho), by Eugene F. Glenn, Special Agent in Charge, FBI, Salt Lake City, for their participation in a recent moot court training program.

Laurie J. Sartorio (District of Massachusetts), by Frank W. Donaldson, United States Attorney, Northern District of Alabama, Birmingham, for her valuable assistance and legal skill in the defense of a habeas corpus petition filed against the United States Parole Commission.

Eugene A. Seidel (Alabama, Southern District), by John B. Sasser, District Director, Farmers Home Administration, Department of Agriculture, Mobile, for his outstanding representation in a complex civil suit.

Michael T. Shelby (Texas, Southern District), by Glenda M. Pappillion, Chief, Criminal Investigation Division, IRS, Houston, for his valuable assistance and excellent presentation of two money laundering cases resulting in the successful prosecution of five defendants and the seizure of $844,533 and 151 kilograms of cocaine.

Eduardo E. Toro-Font (District of Puerto Rico), by Stanley E. McKinley, Regional Commissioner, Immigration and Naturalization Service (INS), Burlington, Vermont, for his success of a First Circuit Court of Appeals case which precluded INS officers from questioning passengers at the San Juan airport as to their status and destination, thereby allowing the entry of illegal aliens into the United States.

Steve West and ***Norman Acker*** (North Carolina, Eastern District), by Donald M. Murray, Director, North Carolina Department of Crime Control and Public Safety, Raleigh, for their excellent presentation on federal forfeiture proceedings at a recent program for a group of supervisors.

Linwood C. Wright (Pennsylvania, Eastern District), by Thomas J. Sardino, Chief of Police, Amtrak Police Department, National Railroad Passenger Corporation, Washington, D.C., for his professional skill and expertise in obtaining guilty verdicts in two separate trials for possession and intent to deliver 8.7 kilograms of high grade Asian heroin.

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PERSONNEL

On January 3, 1990, ***Harry A. Rosenberg*** was appointed Interim United States Attorney for the Eastern District of Louisiana.

On January 7, 1991, ***Richard Palmer*** was appointed Interim United States Attorney for the District of Connecticut.

On January 7, 1991, ***Grant C. Johnson*** was appointed Interim United States Attorney for the Western District of Wisconsin.

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CRIMINAL DIVISION VACANCIES

As part of an ongoing reorganization and to fill several existing openings, the Criminal Division is in the process of advertising vacancies for the following positions:

- Chief, General Litigation and Legal Advice Section
- Chief, Organized Crime and Racketeering Section
- Director, Asset Forfeiture Office

The following additional positions are expected to be advertised in the near future:

- Chief, Terrorism and Violent Crime Section
- Chief, Money Laundering Section
- Chief, Narcotics and Dangerous Drugs Section
- Senior Counsel for International Law Enforcement Matters (Mexico City)

The Terrorism and Violent Crime Section will be an entirely new section.

The Money Laundering Section will be created by elevating the former Money Laundering Office to the status of a section.

The General Litigation and Legal Advice Section will be reorganized; certain of its former functions will be transferred to the new Terrorism and Violent Crime Section, while computer crime will be transferred from the Fraud Section to the General Litigation and Legal Advice Section.

The position of Senior Counsel for International Law Enforcement Matters (Mexico City) is new.

Each of these positions is a Senior Executive Service position, with a substantial salary and other benefits. Senior attorneys with management experience who wish to apply for any of these positions should consult the applicable advertisements as they are published for details. The closing date for three of the above vacancies (Organized Crime, General Litigation and Legal Advice, and Asset Forfeiture) is February 15, 1991.

If you have any questions, please call or write Paul W. Mathwin, Executive Secretary, Senior Executive Resources Board, Justice Management Division, Room 1103, Department of Justice, 10th and Constitution Avenue N.W., Washington, D.C. 20530. Telephone: (FTS) 368-4006 or (202) 514-4006.

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NOTE: For other important career opportunities, please refer to the Administrative Issues section of this Bulletin, at p. 17.

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ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

In the United States Attorneys' Bulletin, Vol. 38, No. 12, dated December 15, 1990, at p. 303, ***Otto Obermaier, United States Attorney for the Southern District of New York,*** was inadvertently omitted from the list of members of the Attorney General's Advisory Committee. The complete list of members follows:

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 Otto Obermaier, Southern District of New York George L. Phillips, Southern District of Mississippi George J. Terwilliger, III, District of Vermont Jay B. Stephens, District of Columbia, ex officio

* * * * *

ASSET FORFEITURE

New Standards Of Conduct Section: 28 C.F.R. §45.735-18 (Dated July 18, 1990)

Purchase Of Forfeited Property

On July 18, 1990, Attorney General Dick Thornburgh signed Order No. 1436-90 (codified at 28 C.F.R. §45.735-18), which generally prohibits Department of Justice employees from purchasing property, or using property purchased by a spouse or dependent child, forfeited to the Government and offered for sale by the Department or its agents. The prohibition is intended to ensure no actual or apparent use of non-public information by Department employees in the purchase of forfeited property. The purpose of the rule is to protect the integrity of the operation of the Asset Forfeiture Program. The rule's effective date was August 27, 1990.

In order to avoid any perception of a conflict of interest, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, will be the appropriate official for the purposes of granting a waiver from the prohibition of the regulations. If you have any questions, please contact Legal Counsel at (FTS) 368-4024 or (202) 514-4024.

The new Order reads as follows:

PART 45--STANDARDS OF CONDUCT

1. The authority citation for Part 45 is revised to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 901 et seq.; EO 11222, 3 CFR 1964-1965 Comp.; 5 CFR Part 735; EO 12674.

2. Section 45.735-18 is added to read as follows:

§ 45.735-18 Purchase of forfeited property.

(a) No employee shall purchase, either directly or indirectly through an agent or intermediary, any property that has been forfeited to the Government and offered for sale by the Department of Justice or its agents.

(b) No employee shall use such forfeited property if it was purchased independently by a spouse or dependent child.

(c) These prohibitions may, upon request, be waived in writing by the Head of the employee's division, who must make a determination that:

(1) Such purchase is not based upon non-public information that came to the employees attention by reason of his status as a Department of Justice employee; and

(2) The employee's reason for purchasing or using the property is so compelling as to outweigh any appearance of impropriety.

(d) Copies of all waivers granted pursuant to paragraph (c) of this section shall be forwarded to the Deputy Attorney General.

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Credit For Multi-District Forfeiture Cases

On December 12, 1990, the Executive Office for United States Attorneys issued a bluesheet to all United States Attorneys entitled "Credit for Multi-District Forfeiture Cases," which affects Section 3-7.110 of the United States Attorneys' Manual.

As the Department of Justice has placed greater emphasis on asset forfeiture, the need for an accurate accounting system of the assets being forfeited by the United States Attorneys' offices has arisen. This bluesheet sets forth procedures for crediting work done in multi-district asset-forfeiture cases.

If you would like additional copies of the bluesheet, please call the United States Attorneys' Manual staff at (202) 501-6098 or (FTS) 241-6098.

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SENTENCING REFORM

Sentencing Guidelines For Organizational Offenders

On December 13, 1990, Richard B. Stewart, Assistant Attorney General for the Environment and Natural Resources Division, appeared before the United States Sentencing Commission to discuss the Sentencing Guidelines for Organizational Offenders. Mr. Stewart's statement is attached at the Appendix of this Bulletin as Exhibit A.

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Application Of Major Count Policy In Sentencing Guideline Cases

On December 17, 1990, the Tax Division issued a bluesheet entitled "Application of Major Count Policy in Sentencing Guideline Cases," which affects Section 6-4.310 of the United States Attorneys' Manual. This bluesheet sets forth minor modifications to the Tax Division's "Major Count Policy" to conform to the implementation of the Sentencing Guidelines and Department policies adopted pursuant thereto.

If you would like to have additional copies of this bluesheet, please call the United States Attorneys' Manual staff at (202) 501-6098 or (FTS) 241-6098.

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Federal Sentencing and Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit B is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 12, dated December 3, 1990, and Volume 2, No. 13, dated December 17, 1990, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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SAVINGS AND LOAN ISSUES

Bankruptcy Court Ruling In Savings And Loan Case In The Southern District Of California

On December 3 and 4, 1990, the Tax Division participated in the Bankruptcy Court's estimation hearing in the case of In re Imperial Corporation of America in the Southern District of California. The debtor is the holding company parent of Imperial Savings and Loan Association, a thrift institution placed into receivership by the Office of Thrift Supervision. At the hearing, the Government contended that $709 million in federal financial assistance provided by the Resolution Trust Corporation (RTC) to Imperial Savings was includable intaxable income.

On December 17, 1990, the Bankruptcy Court ruled that federal financial assistance payments made by the RTC to Imperial Savings were to be treated as income under Section 597 of the Internal Revenue Code. This issue was hotly contested not only by the taxpayer but also by the RTC.

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POINTS TO REMEMBER

Interstate Agreement On Detainers Act

United States Attorney Michael M. Baylson of the Eastern District of Pennsylvania has forwarded a Monograph prepared by David E. Fritchey, Assistant United States Attorney, Organized Crime Strike Force, on the Interstate Agreement on Detainers Act and the Writ of Habeas Corpus Ad Prosequendum.

This Monograph, which is attached at the Appendix of this Bulletin as Exhibit C, provides some historical perspective, explains how the Agreement operates in practice, identifies the major Interstate Agreement on Detainers Act issues, covers the case authority as it exists to date, and provides a few suggestions that may prove helpful in avoiding the potential pitfalls of the Act.

If you have any questions or comments, please call Mr. Fritchey at (215) 597-2790.

* * * * *

Public Integrity Section, Criminal Division

On December 11, 1990, Attorney General Dick Thornburgh issued the following statement regarding the annual report of the Criminal Division's Public Integrity Section:

> As part of our on-going effort to crack down on white collar crime – crime in the suites – the Justice Department last year secured the conviction of a record 1,149 corrupt public officials and their associates. This record number of convictions, which includes more than 600 federal officials, is continuing evidence of our desire to insure that the business of representative government is kept free from those who would abuse the public trust.
>
> In 1989, the Justice Department secured more than three times as many convictions as it did 14 years ago when the Public Integrity Section was established during my tenure as Assistant Attorney General in charge of the Criminal Division. Only 380 public officials and their cohorts were convicted in 1976, the section's first year of operation.
>
> The Justice Department's record now shows a grand total of 10,944 public officials and their associates who have been found guilty of public corruption in the past 14 years. Citizens can rest assured that our investigative and prosecutorial efforts will continue unabated in pursuit of those who betray their oaths of office and their duty to the constituents they serve.

If you would like a copy of the report, please call the Public Integrity Section of the Criminal Division at (FTS) 368-1412 or (202) 514-1412.

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Civil Fraud Settlements And Judgments In FY 1990

On November 26, 1990, Attorney General Dick Thornburgh announced that the Department of Justice obtained more than $257 million in judgments and settlements in cases involving fraud against the government during FY 1990. The amount was $32 million more than the $225 million collected in FY 1989. That result was even more impressive inasmuch as the 1989 total included one settlement of more than $100 million. The 1990 results included 13 cases involving recoveries of $5 million or more. The total has steadily increased during the last several years. It was $176 million in FY 1988, $83 million in FY 1987, $54 million in FY 1986 and $27 million in FY 1985.

The Attorney General said the 1986 Amendments to the False Claims Act (FCA) authorizing the government to recover triple damages and clarifying other proof requirements contributed substantially to the increase. He also said the improved figures demonstrated, in a concrete fashion, the Administration's dedication to the fight against fraud, waste and abuse. The 1986 amendments liberalizing provisions of the FCA that allow private citizens to bring fraud suits on behalf of the government resulted in the filing of almost 280 qui tam suits since October 1986. Some 80 were filed in FY 1990. Since the 1986 amendments, the government intervened in 42 qui tam suits, settling 28. Out of the $70 million it recovered, about $9 million was awarded to the individuals who filed the original actions and were deemed to be proper relators.

Fraud cases in Department of Defense programs represented a major part of the government's civil fraud effort. The following are a few examples:

(1) Some $34 million recovered by the Civil Division, working with the Antitrust Division, from members of a Japanese bid rigging cartel in Japan for collusive bid rigging in the procurement of U.S. military contracts that raised costs to the United States at least 25 percent. After many months of negotiations, the Department reached settlement with 137 of the 140 companies involved.

(2) General Electric (GE) agreed to pay $30 million in fines and civil settlements for overcharging the Army for a battlefield computer and other claims. Specifically, GE paid a $10 million criminal fine, $8.3 million to settle a related civil suit, and another $11.7 million to settle other civil charges brought by the government. Significantly, the $8.3 million civil settlement repaid the government for what was lost, plus the costs of the investigation.

(3) The Civil Division, in conjunction with the U.S. Attorney's Office in Alexandria, Virginia, settled five cases involving Boeing, RCA, Hughes Aircraft, Grumman, and Raytheon that resulted in $13.5 million in civil settlements and $1.15 million in costs and contract savings. The cases stemmed from an investigation of a Boeing marketing analyst who illegally obtained and trafficked in over 700 classified Department of Defense and National Security Agency documents. The documents were secret planning, programming, and budgeting papers, which may have given the companies an advantage in their long term planning.

The Civil Division was equally active in non-defense fraud against the government, with combating fraud against the Department of Housing and Urban Development continuing to be a priority over the past year.

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Fiscal Year 1990 Environmental Civil Enforcement Statistics

On October 16, 1990, the Department of Justice issued the following FY 1990 environmental civil enforcement statistics:

- Fiscal Year 1990 (FY 90) had the largest civil penalty recovery figure for any fiscal year in history -- $32,134,021 (1989 - $15,972,294).

- FY 90 had the largest single civil penalty ever assessed: $15 million in the Texas Eastern pipeline case (previous high was $5 million assessed against Chevron in 1985);

- The value of the Department's civil enforcement efforts for FY 90 was $1,230,804,726 - 23 percent above the 1989 level and including: $61,770,070 in past costs expended by Superfund and $1,093,900,635 in court ordered cleanup activities; $23,000,000 in natural resource damage recoveries; and $32,134,021 in civil penalties;

- FY 90 marks the second straight billion dollar year under Attorney General Thornburgh;

- The Superfund cases filed during the year - 151, is a 50 percent increase over the previous year (62) and was the highest number in the history of the Act;

- During the fiscal year, the Department obtained the first ever major recoveries for damages to natural resources harmed by pollution activities -- $23 million under Section 311 of the Clean Water Act and Section 107 of the Comprehensive Environmental Response Compensation and Liability Act;

- Shell Oil agreed to pay $11 million for natural resource damages caused by the oil spill in San Francisco Bay on April 22-23, 1988;

- Texas Eastern ordered to spend $400,000,000 for clean up of PCP's in 14 states under the Toxic Substances Control Act;

- Montrose Chemical ordered to pay $12 million to restore damage to natural resources caused by hazardous substance releases in the San Pedro Channel in Los Angeles;

- First ever cases filed for illegal importation of chlorofluorocarbons under the Clean Air Act rule that implements the Montreal Protocol;

- An agreement in principle that one defendant will contribute $66 million toward clean up of PCB contamination and restoration of natural resources at New Bedford Harbor, Massachusetts Superfund site;

- Court order against Syntex Corporation and others for clean up of dioxin contamination at Times Beach, Missouri, valued at up to $100 million dollars;

- Record $1.3 million dollar civil fine against the Sumitomo Corporation for illegal filling of wetlands in Guam;

- Court Order requiring San Diego to spend $2.5 billion dollars for sewage treatment.

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CASE NOTES

SOUTHERN DISTRICT OF ILLINOIS

Seventh Circuit Holds That No Liberty Interest Is Implicated In Disciplinary Transfer

Frank O. Castaneda, an inmate at the United States Penitentiary in Marion, Illinois, filed this habeas corpus lawsuit alleging that his central file, as well as the summary of his central file (known as a "profile"), contained false information about him. Castaneda maintained that the false information led to a disciplinary transfer from a less secure prison to Marion. He contended that he was thus entitled to due process under Wolff v. McDonnell, 418 U.S. 539 (1974), because of the disciplinary nature of the transfer. He also contended that the Privacy Act, 5 U.S.C. §552a(e), entitled him to correction of the central file.

The Seventh Circuit, finding the government's motion for summary judgment meritorious, rejected those contentions. The court found that prison regulations do not place substantive limits on the discretion to transfer inmates when the transfer is disciplinary. The court noted that often multiple reasons exist for transfers, and absent criteria which delineate the circumstances amounting to a disciplinary--as opposed to a security or administrative--transfer, the right to a hearing would depend on which motivation for the transfer was dominant, "a fruitless and impossible inquiry." With regard to the Privacy Act claim, the court found that because Castaneda received all the process he was due, the court would not decide whether Section 552a(e)(5) creates a protected liberty interest. The court found that Castaneda was given an opportunity to be heard when he filed inmate administrative grievances and will be able to challenge the allegedly false information before the Parole Commission.

Frank O. Castaneda, petitioner-appellant v. G.L. Henman, respondent-appellee, 914 F.2d 981 (7th Cir. 1990).

Attorneys: Laura J. Jones; Thomas E. Leggans
Assistant United States Attorneys
Southern District of Illinois (Benton)
(618) 439-3808

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CIVIL DIVISION

Supreme Court Grants Certiorari In Bivens Case

Plaintiff was a psychologist at St. Elizabeth's Hospital, a federal government facility in Washington, D.C. He applied for a job as a psychologist at a U.S. Army hospital in Bremerhaven, West Germany. Defendant, one of plaintiff's superiors at St. Elizabeth's, sent a letter to Bremerhaven stating that plaintiff was inept, unethical, and untrustworthy. Plaintiff did not get the job, and allegedly has been unable to obtain suitable employment in his field. He brought this Bivens action, seeking damages on the ground that defendant sent the letter in bad faith, thereby violating Due Process. Defendant filed a motion to dismiss on grounds of qualified immunity.

The district court denied the motion and ordered that discovery proceed. The court of appeals reversed, holding that defendant was entitled to qualified immunity because plaintiff's allegations of subjective bad faith were conclusory and therefore insufficient to warrant discovery. The Supreme Court has now granted certiorari. This case provides the Court with an opportunity to address the so-called "heightened pleading standard" that the lower courts have applied in qualified immunity cases, and may cause the Court to address the D.C. Circuit's stringent requirement that plaintiffs in Bivens cases involving allegations of subjective bad faith provide specific, direct evidence of bad faith in order to proceed to discovery.

Frederick A. Siegert v. H. Melvyn Gilley, No. 90-96 (Oct. 15, 1990).
DJ # 157-16-9936.

Attorneys: Barbara L. Herwig - (202) 514-5425/FTS 368-5425
Thomas M. Bondy - (202) 514-2397/FTS 368-2397

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Second Circuit Declines To Reconsider Its Order Dismissing Putative Appellants Who Were Not Identified "With Certitude" In The Notice Of Appeal Pursuant To Fed. R. App. P. 3(c).

Three individuals and a union brought this suit challenging, on constitutional and statutory grounds, a security newsletter issued by the Department of Energy (DOE). The district court dismissed the suit, and plaintiffs filed a timely notice of appeal. The caption of the notice of appeal listed two individuals (Bordell and Allen) and the union as plaintiffs in the district court proceedings. The text of the notice stated that "Bordell, et al., hereby appeal" the district court's judgment, and it referred to the district court's purportedly wrongful dismissal of "plaintiffs' claims."

We filed a motion to dismiss all putative appellants except Bordell on the ground that the notice of appeal failed to comply with Fed. R. App. P. 3(c), which requires "specify[ing] the party or parties taking the appeal." The Supreme Court in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), held that the failure to identify "with certitude" the party or parties taking the appeal pursuant to Rule 3(c) presents a jurisdictional bar to appeal. It further held that the use of the term 'et al.' "utterly fails" to meet the specificity requirement of Rule 3(c). Applying the Torres rationale to the instant case, we argued that although the notice of appeal evinced an intent for some unspecified plaintiffs to join Bordell in the appeal, it failed to enable the court to determine, with reasonable certainty, the specific identity of the plaintiffs (other than Bordell) who actually wished to appeal. The Second Circuit (Altimari, C.J., Miner, J., Kelleher, D.J.) agreed, and, without opinion, granted our motion. The appellants who were dismissed filed a petition for rehearing with suggestion for rehearing en banc, which the Second Circuit has now denied. The Second Circuit's action is a vivid reminder of the need strictly to comply with the specificity requirements of Rule 3(c), and the harsh results that can follow from the failure to specify "with certitude" the identity of each appellant.

Bordell v. Department of Energy, No. 90-6176 (Aug. 14, 1990), reh. denied (Oct. 2, 1990). DJ # 145-19-650.

Attorneys: Douglas N. Letter - (202) 514-3602/FTS 368-3602
E. Roy Hawkens - (202) 514-4331/FTS 368-4331

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Fifth Circuit Holds That Unnamed Class Members In A Civil Rights Case May Not Collaterally Attack Provisions Of The Consent Decree To Which They Are Bound

Several unnamed members of a class brought suit in district court seeking to bar the demolition of unhabitable public housing units. This demolition was called for by a consent decree settling the claim of the plaintiff class that the Dallas Housing Authority and the Department of Housing and Urban Development and others engaged in racial discrimination in the provision and funding of low-income housing in Dallas, Texas. In their separate suit, the unnamed class members alleged that the demolition was barred by congressional passage of the so-called "Frost Amendment," which precluded HUD from financing the demolition called for under the decree.

The court of appeals held that these unnamed class members were bound by the consent decree under the principles of res judicata and could not, therefore, collaterally attack the consent decree in a separate suit. Such dissatisfied class members, the court ruled, must either intervene as named parties or bring a separate suit in which they must allege and prove that they were inadequately represented by class counsel.

Baylor v. HUD, No. 89-1880 (Oct. 1, 1990). DJ # 145-17-4435.

Attorneys: Michael Jay Singer - (202) 514-5432/FTS 368-5432
Mark W. Pennak - (202) 514-5714/FTS 368-5714

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Ninth Circuit Amends Its Prior Opinion In Its Entirety, Removing Prior Holding That EAJA Fees May Be Awarded In Bivens Cases And Expressly Recognizing That EAJA Does Not Apply To Individual Capacity Suits

In its initial opinion the Ninth Circuit held that plaintiffs possibly qualified for attorneys fees under the Equal Access to Justice Act (EAJA) not only because they prevailed on their official capacity Administrative Procedure Act action against the United States, but also because they prevailed in their Bivens action against the federal officers sued in their individual capacities. The panel explained that Bivens actions, although nominally against the federal official, were in fact seeking to remedy government wrongs. The panel reasoned, "EAJA's purpose of awarding fees to those who help to ensure government officials will act in accordance with their legal responsibilities also cuts in favor of finding Bivens actions to fall within EAJA's definition of suits against the United States." We petitioned for rehearing and rehearing in banc, arguing that EAJA only applies to actions against the United States, federal agencies, and officers sued in their official capacities. We explained that the United States is not even a party to a Bivens action, and is not liable for a Bivens award. In response to our petition, the panel has now completely rewritten its opinion, deleted all of the offending discussion, has expressly recognized that EAJA fees cannot be awarded for prevailing against a federal officer sued in his individual capacity. With the opinion so amended, rehearing was denied.

Ramon v. Soto, No. 88-2690 (Nov. 15, 1989, Amended Oct. 2, 1990). DJ # 145-0-2792.

Attorneys: Michael Jay Singer - (202) 514-5423/FTS 368-5423
Robert M. Loeb - (202) 514-4028/FTS 368-4028

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Ninth Circuit Reissues Decision That Breach Of "Implied Covenant Of Good Faith And Fair Dealing" Is Actionable Under The Federal Tort Claims Act

The plaintiffs in this case are farmers whose farming equipment was repossessed by the Farmers Home Administration after the plaintiffs defaulted on federal loans. The plaintiffs sued the government under the Federal Tort Claims Act (FTCA), alleging that the repossession constituted: (1) conversion, and (2) a breach of the implied covenant of good faith and fair dealing arising out of the security agreement. The district court dismissed the suit, holding that the conversion and good-faith claims were essentially contractual and therefore could be heard only in the Claims Court.

In April 1989, a divided Ninth Circuit panel (Fletcher, Nelson; Carroll dissenting) reversed, holding that both claims sounded in tort and therefore were actionable before the district court under the FTCA. 871 F.2d 1488. Almost simultaneously, another Ninth Circuit panel reached precisely the opposite conclusion with respect to an identical good-faith claim in another repossession case. LaPlant v. United States, 872 F.2d 881. The two panels stayed their mandates and ordered supplemental briefing, which was completed in June 1989. The panel in this case has now reissued its original decision, making no reference to the conflicting panel decision in LaPlant or to the arguments advanced in the supplemental briefs. The LaPlant panel has not yet issued its decision; if LaPlant remains in conflict with this case, which seems unlikely, en banc review may be required.

Love v. United States, No. 87-3832 (Oct. 5, 1990). DJ # 136-44-341.

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Tenth Circuit Holds Anti-War Demonstrators Can Be Barred From Military Open House

Plaintiffs were barred from Peterson Air Force Base, Colorado, after distributing anti-war leaflets during a military open house. The district court held that the bar orders violated the First Amendment because the restriction on plaintiffs' speech had been content-based and the normally closed base had become a public forum during the open house.

On our appeal, the Tenth Circuit has now reversed. It first held that the base was not a public forum, relying upon the affidavits of the Air Force Chief of Staff and the base commander stating that, by inviting the public to the base on Armed Forces Day, the Air Force did not intend to create a forum for political debate. The court also held that the distribution of nonpolitical literature by civic and religious groups did not render the base a public forum. It then held that the Air Force's restrictions were reasonable and viewpoint-neutral. Noting that the Air Force barred all explicit political and ideological materials, the court held that any implicit pro-military message in the displays by the military and by defense contractors was insufficient to justify a finding of viewpoint discrimination. Judge Moore dissented, stating his view that the base had become an open forum because the civilian materials distributed during the open house were foreign to any military objective.

The Tenth Circuit's decision is consistent with an en banc decision of the Eighth Circuit. Together they support the military's authority to conduct open houses with broad participation by civilian groups but to exclude explicitly political and ideological messages.

Joan Brown v. Colonel James O. Palmer. No. 88-2450 (Oct. 3, 1990).
DJ # 145-14-2351.

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* * * * *

Eleventh Circuit Holds Attorney General Scope-of-Employment Certifications Judicially Reviewable; Remands Slander Action Against United States Attorney For Evidentiary Hearing

Plaintiff brought this individual slander action against a United States Attorney, based on statements he allegedly made at a press conference announcing the institution of drug-related forfeiture proceedings against several parcels of real estate. The Department of Justice certified that the challenged actions were within the scope of the U.S. Attorney's scope of employment and sought substitution of the United States as defendant, along with dismissal of the action because of the slander exception to the Federal Tort Claims Act. The district court granted this relief, ruling that the administrative scope certification was conclusive. On appeal, however, we abandoned the argument that such certifications are nonreviewable, and supported the district court's judgment on the alternate ground that the actions were plainly within scope. Defendant, through private counsel, urged affirmance on the district court's theory.

The Eleventh Circuit (Kravitch, Cox, and Dyer) has now reversed and remanded. On the issue of the reviewability of scope certifications, the court agreed with our current analysis that the certification was reviewable. While rejecting some of our further arguments regarding deference to such certifications, the court agreed that once the Attorney General certifies scope, the burden is on the plaintiff to prove otherwise. The court declined to reach the merits of the scope issue, remanding to the district court for further proceedings.

S.J. & W. Ranch, Inc. v. Lehtinen, No. 89-5990 (Oct. 10, 1990).
DJ # 157-18-2484

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TAX DIVISION

Third Circuit Holds That Settlement Of Multimillion Dollar Gambling Debt Did Not Result In Discharge Of Indebtedness Income

On October 10, 1990, the Third Circuit, in a 2-1 decision, reversed the Tax Court's reviewed 11-8 decision and held for the taxpayer in David Zarin, et al. v. Commissioner. Taxpayer, a heavy gambler in Atlantic City, established a line of credit at Resorts Casino. Resorts advanced him $3,435,000 before cutting off his credit line. Resorts sued to collect this debt. Taxpayer, arguing that the debt was unenforceable under New Jersey law, denied liability. In 1981, taxpayer paid Resorts $500,000 in settlement of the dispute.

The Commissioner asserted that taxpayer realized income from discharge of indebtedness in the amount of $2,935,000 (the difference between the amount of the debt and the amount paid in settlement of the debt). In reaching its decision in favor of the taxpayer, the Third Circuit held that the discharge of the unenforceable debt does not give rise to income from discharge of indebtedness. It also relied on the principle that the settlement of a disputed debt does not give rise to income, rejecting our argument that this principle applies only where there is a dispute regarding the amount of the debt.

* * * * *

Fourth Circuit Upholds "Blanket" Claim Of Privilege In Summons Case

In a published opinion decided December 6, 1990, the Fourth Circuit reversed the order of the District Court directing the taxpayer to comply with an IRS summons in United States, et al v. Sharp. The District Court had ordered enforcement of an IRS summons seeking financial records and documents for years in which the taxpayer had failed to file federal income tax returns. Taxpayer failed to comply with the court order, and the Government sought to have taxpayer held in contempt. Taxpayer then appeared before the IRS agent and raised a Fifth Amendment privilege claim in response to each IRS question. The District Court ordered taxpayer to respond to the questions, finding that his fear of self-incrimination was unfounded in light of the Government's representation that it had no present intention of pursuing criminal prosecution.

In reversing, the Fourth Circuit rejected the Government's argument that the taxpayer was precluded by res judicata from raising the Fifth Amendment claim for the first time during the contempt proceedings and found that the information requested by the Government was potentially incriminating, since taxpayer had failed to file returns for the years in issue and the statute of limitations for prosecution for the 1982 year was still open at the time the summons was enforced. The decision might be viewed as being in conflict with United States v. Schmidt, 816 F.2d 1477 (10th Cir. 1987) and United States v. Reis, 765 F.2d 1094 (11th Cir. 1985).

* * * * *

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.

* * * * *

Office of Consumer Litigation, Civil Division

The Office of Consumer Litigation, Civil Division, is seeking an Assistant United States Attorney to serve a detail in its office in Washington, D.C. for a period of six months or more. The Office represents the government in criminal proceedings and civil suits instituted against corporations and individuals engaged in violations of the Federal Food, Drug, and Cosmetic Act. Cases address such matters as generic drugs, bulk animal drugs and steroids trafficking. The Office's practice is in large part criminal with cases handled from the grand jury stage through final disposition. In addition, the Office is assigned a number of appeals, both matters handled by the Office at the district court level and certain direct review cases under the Federal Food, Drug and Cosmetic Act. Other affirmative litigation by the Office covers such areas as hazardous and unsafe products, unfair and deceptive advertising practices, odometer tampering, unfair consumer credit and debt collection practices, fraudulent practices in areas such as franchising, used car sales, and door-to-door and mail order sales. The Office also defends the government in suits challenging federal policies and initiatives relating to foods, drugs, medical devices and other consumer products.

If you have any questions, please call John R. Fleder, Director, or Margaret A. Cotter, Assistant Director, Office of Consumer Litigation, at (FTS) 367-0134 or (202) 307-0134.

* * * * *

Significant Payroll Changes

Attached at the Appendix of this Bulletin as Exhibit D is a list of significant payroll changes which will be effective in pay periods 01 through 03 (December 16, 1990 - January 26, 1991).

For further information on these changes, please contact your Administrative Office.

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Diners Club Government Card Program

In the United States Attorneys' Bulletin, Vol. 38, No. 8, dated August 15, 1990, at page 201, and the July and August, 1990 issue of For Your Information, Vol. 11, No. 7, at page 5, the subject article states, inter alia, ". . .travelers are expected to pay Diners Club. . .upon reimbursement of their travel funds." The underlined portion of this statement is misleading in that it appears that employees are permitted to delay paying Diners Club until such time as they receive reimbursement of their travel funds.

The traveler will receive a monthly statement directly from Diners Club. The traveler is expected to pay the amount, in full, within 25 days of receipt of the statement, even if reimbursement of travel funds is not received prior to receipt of the statement. The Employee Card Account Agreement, a copy of which was provided to cardholders along with their credit card, states that, "The Account will be past due unless Diners Club receives the amount shown on the billing statement. . . within 25 days of the date of the billing statement."

For further information, please contact your Administrative Officer for a copy of U.S. Department of Justice ATM Cash Advance Program Policies, Procedures, and Enrollment Guide, prepared by the Financial Operations Service, dated June 1, 1990.

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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%	04-05-90	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%		
12-14-89	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.

* * * * *

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* * * * *

U. S. Department of Justice

Washington, DC 20530

EXHIBIT A

STATEMENT

OF

RICHARD B. STEWART
ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

SENTENCING GUIDELINES FOR ORGANIZATIONAL OFFENDERS

DECEMBER 13, 1990

Mr. Chairman and Members of the Commission:

I would like to thank the Commission for the opportunity to appear before you today to discuss the views of the Department of Justice Environment and Natural Resources Division on the sentencing of organizational offenders. The Environment Division (formerly Land and Natural Resources) has developed a close working relationship with the Commission since 1985, and my comments today are offered in the spirit of that relationship. At the outset let me say that we support a carefully crafted set of guidelines which would govern organizational sentencing. We believe that just as the individual guidelines have brought certainty and consistency to sentencing for environmental crimes, so can appropriately structured organizational guidelines, which retain the fundamental philosophy of providing more predictable and consistent sentencing.

If adopted by the Commission, the Justice Department's proposed guidelines for organizational sentencing would significantly strengthen our nation's efforts to protect our environment. Clear guidelines imposing stiff, certain penalties for environmental crime would deter violations by providing a more definite counterbalance to the cost of compliance. The sentencing process should be expedited by guidelines that provide predictable punishment for the great majority of crimes, while leaving exceptional cases for consideration as departures under the "loss/gain doubling" provisions of the Criminal Fine Improvements Act. 18 U.S.C. § 3571.

At the risk of reiterating my colleagues' eloquent discussion of the need for an "offense-level" approach to sentencing, which the Department's proposal incorporates, I would like to focus on aspects of the Commission's proposal that could seriously undermine the sentencing process for organizational defendants in environmental offenses. My two primary concerns focus on the "gain-loss" calculation as a basis for "typical" sentencing and the role given to mitigating factors.

If a "gain-loss" alternative is chosen as a basic part of the standard approach for sanctioning organizations under guidelines, judges, probation officers, and prosecutors will be required to engage in a lengthy examination in order to quantify the social cost of pollution in each case. Such an inquiry would be quite time consuming and burdensome for the court and the parties and would likely produce disparate results in similar cases. By attempting to recalculate in each case the factors already included in the offense levels for environmental crimes, the proposed guidelines would defeat the whole purpose of the offense-level system developed by the Commission. Moreover, the Commission's proposed guidelines create the potential that mitigating factors will dramatically reduce fines based largely on post-violation conduct that many environmental laws already require. This problem is compounded by the lack of aggravating factors to offset mitigators. The net result could be that many pollution fines would be so reduced as to become an acceptable "cost" of doing business.

As Assistant Attorney General Mueller testified earlier, the Department's approach is both straightforward and similar to existing sentencing guidelines for individuals. It is our view that, by overly complicating the guidelines with gain/loss calculations and vague or overly generous mitigation factors, the Commission's approach could defeat one of the main purposes of having sentencing guidelines in the first place: to place explicit boundaries on the exercise of judicial discretion in the sentencing process so that similar offenders in different courts will find themselves treated similarly. By promulgating a system with twists and turns that will inevitably lead to calculation, recalculation and recalculation of the recalculation, the Commission's proposed guidelines run the risk of becoming self-defeating. Adherence in the organizational context to the "offense-level" approach, employed by the sentencing guidelines for individuals, is essential in order to serve the purposes of the Sentencing Reform Act of 1984 -- just punishment, deterrence, protection of the public from further crimes of the defendant, and rehabilitation.

Offense-Level v. Gain-Loss Approach to Setting Fines

The Commission's proposed guidelines could seriously undermine our ability to obtain expeditious and fair sentencing after convictions. As we understand it, each sentencing will require the government to establish the value of the defendant's gain and society's loss. One proposal would require the court to

recalculate the offense level at the sentencing stage by using the greater of three factors: (1) the gross pecuniary gain, (2) the gross pecuniary loss, or (3) an alternative amount set forth in a table of offense levels, § 8C2.1(c). Another proposal would allow the court to choose whichever of these three factors it thinks is "appropriate." § 8C2,1(d)(2) n.2. While a calculation based on the nature of the conduct (offense level) will inevitably require introduction of some evidence which is beyond the essential elements of the offense, it will at least start with evidence which was common to the government's case in chief. A gain-loss approach requires an entirely different kind of evidence, which in environmental cases can be particularly challenging to develop, quantify and easily introduce in the short period of time between indictment and sentencing.

In the context of environmental violations, this approach is inappropriate and extremely burdensome because the resources protected by our environmental laws often defy easy calculation and necessarily include many non-pecuniary values that are difficult to quantify. For example, the Department of the Interior spent seven years attempting to devise a system for the calculation of natural resource damage, only to have their regulations invalidated by the D.C. Circuit for failing to evaluate many intangibles. Ohio v. Dept. of Interior, 880 F.2d 432 (D.C. Cir. 1989). Calculation of the defendant's gain from violation of an environmental law can also involve difficult assessments of the cost of compliance, especially where

compliance would have involved alteration of production processes or development of new technologies. Moreover, this tinkering with offense levels is particularly dangerous in the context of environmental law because a judge may not understand the full extent of the social costs posed by an environmental offense[1] or may be sympathetic to defense arguments that the loss, calculated in terms of the lost commercial value of land and animals, is not serious, and could even conclude that the offense-level fine is unduly harsh in comparison.

By requiring the court to focus on gain and loss in situations where the penalty should include non-monetary harm, that harm would be unduly minimized or even ignored, when in fact it could be by far the more serious aspect of the crime. For example, the commercial value of a fur seal pelt is $15, according to estimates by the Department of the Interior, but no one would argue that a polluter who illegally dumps toxic waste and kills a thousand fur seals should be fined $15,000. The problem is compounded when one attempts to calculate the loss, pecuniary and otherwise, of a complex ecosystem like a marsh or estuary. In situations where the threat or damage to the environment is so serious as to greatly exceed the values contemplated by the tables for fines and the applicable offense

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[1] In United States v. Hayes, 786 F.2d 1499, for example, a corporation was fined only $2500 for eight felony convictions. The company illegally disposed of toxic, flammable and explosive wastes in residential neighborhoods and open fields in Alabama.

guidelines, we would consider seeking relief under the Criminal Fine Improvements Act. 18 U.S.C. § 3571(d).

The Division seeks fines under this Act's "double loss or gain" provision in extraordinary situations, not our "heartland" cases. The Commission's proposed guidelines would require us to engage in calculations appropriate only in departures from the offense-level system.

The Department's offense-level approach assures that the seriousness of an offense, as measured by the offense level the Commission has assigned to offenses in Chapter Two of the Guidelines Manual, is reflected in the penalty imposed on an organization. Intangible factors such as the risk of harm created by defendant's conduct or defendant's impact on values that defy monetary assessment are included in the offense level and, where that offense level is used as a guide to the appropriate fine, are translated into an appropriate penalty by the guidelines. The Department's approach recognizes that the defendant's gain or society's loss should increase the available fine, but treats this calculation as an additional factor that is only applied in appropriate cases, not an integral part of the fine calculation in all cases. By establishing fines based on the offense level, the Department's proposal assures that an environmental offense is penalized according to harm caused or threatened, and reflects important non-monetary factors that are recognized by the current individual guidelines but may be

undervalued by the Commission's proposed reliance on a loss-gain approach in every case.

The Commission has proposed to further mitigate the potential impact of fines based on gross pecuniary loss by eliminating that loss from consideration where the organization has a program to prevent and detect violations. §8C2.1(d)(2). If adopted, this guideline could interfere with regulatory schemes painstakingly developed by Congress and the Environmental Protection Agency by reducing penalties for the violation of substantive requirements based on the defendant's compliance with procedural requirements. The Clean Water Act's discharge permit system is an example of a mixture of procedural and substantive requirements that would be affected, because these permits typically require discharge monitoring. Where the defendant had obtained the required permit and conducted discharge monitoring, but violated a permit requirement-- For example, illegally discharging a toxic chemical into the water supply-- we would be precluded from claiming a higher fine based on pecuniary loss, such as a city's costs in tapping a new water supply. Even where they are not required by law, these programs are easily produced on paper and shown to a court but, by definition, have failed to prevent a violation.

The Commission has also proposed to exclude gross pecuniary loss where "the offense conduct that triggered the organization's criminal liability involved neither intentional, knowing, nor reckless criminal conduct." § 8C2.1(d)(2). This provision would

also add a limitation not considered appropriate by Congress in the basic federal criminal fine statute, 18 U.S.C. § 3571.

The vast majority of environmental crime is prosecuted under general intent standards. However, there are exceptions in provisions for criminal liability on the basis of negligence or strict liability, which are generally treated as misdemeanors. Congress has specified maximum fines for such offenses. Those limits may be exceeded only in exceptional cases that qualify as "departures" under the loss doubling provisions of the Criminal Fine Improvements Act. The Exxon Valdez case is one such exception, where catastrophic loss may appropriately drive fines above those specified for misdemeanors.

Finally, the Commission has proposed exclusion of pecuniary loss where that loss was "substantially greater than would have been anticipated by a reasonable person acting under the circumstances" in which the organization or its agents acted. § 8C2.1(d)(2). Addition of this factor would lengthen and complicate the sentencing proceedings by raising complex "proximate cause" issues.

Absence of Aggravating Factors

One of our most serious concerns with the Commission's draft is its use of numerous mitigating factors that could result in a drastic reduction in the fine levels, compounded by the lack of countervailing provisions requiring an increase in the fine for aggravating factors. The asymmetry of this proposal is

inconsistent with the individual guidelines currently in effect. Especially in environmental crime, responsibility for a crime may as easily lie with institutional forces, such as the demands of increased production, as with individual motivations like personal wealth. The deterrent effect of stiff fines is made all the more necessary where an organization may consider a lower fine part of the cost of doing business.

The Commission's proposal should be amended to include an increased offense level for elements of conduct that reflect increased seriousness of an offense or a greater need for deterrence. The use of aggravating factors is consistent with the individual guidelines, which provide a number of generally applicable aggravating factors. The Department has proposed aggravating factors for organizations that include the following, among others: (1) high-level organizational involvement, (2) prior criminal history or prior similar misconduct adjudicated civilly or administratively, (3) violation of a judicial order or injunction, (4) bribery or obstruction of justice, and (5) targeting vulnerable victims, which is of particular concern with crimes like the dumping of toxic waste. The absence of an aggravating factor for repeat offenders is a particularly serious omission from the Commission's proposal. The fact that two organizations can receive the same fine for similar offenses, despite the fact that one had a prior criminal record or a civil record of similar misconduct, is a significant weakness in the Commission's draft.

Effect of Mitigating Factors

The Commission's draft proposes a system where fine ranges may appear to be sufficiently high, yet may be reduced dramatically if certain mitigating factors are present. See §8C2.1(e). While the Commission's goal of guiding post-violation behavior is clearly laudable, and to a limited extent incorporated into the Department's proposal, these mitigating factors are given such power under the Commission's scheme that they would interfere with many environmental statutory schemes that rely on fines to enforce substantive standards like the amount of a certain toxin that may safely be released into our air. As I noted before with regard to the proposed elimination of pecuniary loss from fine calculation based on a defendant's prevention and detection program, these mitigators should prove quite easy for most organizational offenders to meet because many of these mitigators are required by environmental laws. As a result, significantly mitigated sentences will be routinely granted, substantially damaging our ability to enforce substantive standards by over-rewarding compliance with routine procedural requirements which are generally required by law.

The Commission's mitigators are not only easily earned, they have a profound impact on the multipliers for offense amounts. Up to eight points may be awarded for conduct already required by law, reducing the minimum and maximum multipliers from two and three to .35 and .55 respectively. A guilty plea would reduce

these "multipliers" down to .15 and .25. This drastic reduction, apparently premised on the supposed inequity of vicarious liability, is inconsistent with federal criminal law and the offense level system. While some offenders deserve reduced punishment because of a variety of factors, including a low level of organizational involvement in the offense, the degree of mitigation must be carefully measured so as not to thwart the deterrent purpose of federal criminal law, which applies to both individuals and organizations.

Under the first mitigator, § 8C2.1(e)(2)(A), organizations are granted a four-point reduction (out of a possible nine) for voluntary and prompt disclosure of the offense, reducing the fine multipliers to 1.15 and 1.80. This is a large reduction for complying with a requirement which, if not observed, carries criminal or civil sanctions in many environmental laws.[2] The Department's proposal allows a reduction of one offense level for prompt notification.

As an alternative to this mitigator, under the Commission's proposal a corporation may receive a three-point reduction if it shows that both prior to the offense it had, and after the offense continues to maintain, an "effective program to prevent and detect violations of law." § 8C2.1(e)(2)(A)(ii). Given the breadth of this mitigating factor, compliance programs which are

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[2] Section 103(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund") includes a penalty of fines and 3 to 5 years in prison for any person who fails to notify the government as soon as he has knowledge of a release of toxic chemicals. 42 U.S.C. § 9603(b).

well-documented will be rewarded regardless of whether or not they represent serious efforts at compliance. Furthermore, this mitigator may apply despite repeat violations, if the previous violations were sufficiently dissimilar.[3] Thus, it appears that many organizations would receive substantial credit simply for having a compliance program that under many environmental regulatory schemes is required by law, even when that compliance program failed. See, e.g. 33 U.S.C. § 1314(i), 1316(e) (Clean Water Act discharge monitoring and reporting requirements).

Second, if despite due diligence, the organization also shows a lack of knowledge of the offense by any person in a policy-influencing or legal compliance position or by anyone who exercised substantial managerial authority, it would qualify for a further two-point reduction. As Application Note 7 readily admits, this mitigator virtually duplicates the previous mitigator, combining to reduce the "multipliers" to roughly half.

Finally, if the organization "complies fully" with government investigators it would be entitled to one mitigation point and a second if it also accepted responsibility for the offense by pleading guilty prior to commencement of trial and took "prompt and reasonable steps to remedy the harm caused by the offense." Thus, in a crime that constitutes a level 26

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[3] Application Note 7 addresses this problem only by stating that the factor "will not ordinarily apply if the organization has been guilty of prior similar misconduct" since such an organization was on notice that the misconduct could occur. A failed compliance program characterized by the past occurrence of dissimilar offenses would presumably remain eligible for this mitigating factor.

offense, which under the Department's proposal could at best be reduced to a level 22 offense of $6,500,00 to $18,000,000, the nine mitigation points awarded for procedural compliance with the law and admission of guilt would, under the Commission's proposal, almost automatically reduce the organization's fine to a maximum of $675,000 and a minimum of $405,000 (under Alternative B). The large scope of mitigating factors, many of which involve considerable discretion in application, could perpetuate undesirable disparities in sentencing.

Moreover, if an organization meets the conditions for all mitigating factors set forth in §8C2.1(e), the draft states that a downward departure may be warranted. §8C5.18. Since the proposed guideline itself provides a reduction in the minimum multiplier to 0.15, this invitation to depart downward would likely result in the imposition of zero fines, except where a statute establishes a minimum mandatory fine.

The Alternative § 8C2.1(e) amounts to a reformulation of the first proposal, except that post-offense conduct would allow a corporate offender to add seven points out of a possible nine to its "mitigation" score under the first alternative, while all eight points available under the second are based on post-offense conduct. The Department's proposal places much less importance on eleventh-hour conversions.

It will be extremely difficult for a government attorney to rebut evidence of post-crime mitigation once it is introduced by corporate defense counsel at the sentencing hearing. The

government will typically not have access to such information. Presumably, discovery will be unavailable, and the grand jury cannot be used to obtain evidence of events (such as remedial steps) which occur after indictment.

The guidelines recommended by the Department of Justice do establish a number of mitigating factors that reflect reduced culpability or a decreased need for punishment or deterrence. These include: (1) reporting of the offense to government authorities promptly upon discovering it, (2) a reasonable lack of knowledge of the offense by high-level management, (3) an offense that represented an isolated incident of criminal activity committed despite organizational policies and programs aimed at preventing it, and (4) substantial cooperation of the organization in the investigation or substantial steps by it to prevent a recurrence of similar offenses. A meaningful reduction in the fine would result if all the mitigating factors were present in a given case. However, the mitigating factors we propose would not unduly reward corporate activity that has failed to prevent crime. Moreover, these mitigators would not apply where they are specifically incorporated in the offense level or if the factor is inherent in the offense.

Probation

With regard to probation, we appreciate the Commission's efforts to respond to our earlier concerns by encouraging a court to "consider the views of any government regulatory body that

oversees the conduct of the defendant relating to the offense of conviction." § 8D1.3(e), Application Note 1. However, in order to provide an effective probation scheme, the guidelines must assure the government access to all relevant information regarding a proposed compliance plan and any reports or inspections relating to the implementation of an adopted plan. This is essential to give the government the opportunity, and the court the ability, to evaluate the adequacy of very technical requirements used in environmental compliance plans, and to evaluate the organization's implementation of that plan. The probation guidelines must also state specifically that no compliance plan shall be approved which is inconsistent with relevant statutory and regulatory requirements. Courts should ensure that probation provisions incorporate and thereby reinforce relevant requirements of federal law.

The Commission's probation guidelines would allow examination of books, records, and people, but it is silent on actual facility inspection, which is critical to any compliance evaluation. Compliance failures which would be apparent to the trained eye of an inspector may not emerge from documents or from people who may have an interest in being less than candid. Moreover, the court should be encouraged to consult with appropriate regulatory experts such as federal and state agencies with regulatory authority, in devising probation provisions and overseeing compliance plans.

Section 8B1.3 limits community service, as a condition of probation, to situations where it "is reasonably designed to repair the harm caused by the offense." This section should make clear that community service is not a substitute for a fine, remedial order or restitution, and that it is ordered as a sanction directly related to the offense. Community service often does not carry the stigma of other penalties. Unless community service is directly linked to the offense, it may be portrayed to the public as a form of altruism or atonement on the part of the convicted organization.

Moreover, fines should be the primary and most powerful penalty for, and deterrent to, criminal activity. Probation should be reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing and involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. The Department's proposed guidelines require organizational probation in certain circumstances -- e.g., to ensure payment of a monetary penalty, as a mechanism to impose restitution, if the organization or its upper management was recently convicted of similar misconduct, or where the court finds that probation is necessary to ensure that changes are made to reduce the likelihood of future criminal conduct. The proposal also provides conditions of probation that authorize, when appropriate, periodic submission of reports by the defendant

to the court or probation officer and development of a compliance plan aimed at preventing a recurrence of criminal behavior.

Conclusion

I thank the Commission for this opportunity to explain the position of the Environment and Natural Resources Division. We look forward to working with the Commission on the creation of final guidelines that will strengthen our enforcement efforts by providing strong, certain penalties for organizational crime.

EXHIBIT B

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 13 | Federal Sentencing Guidelines and Forfeiture Cases from All Circuits. | December 17, 1990

IN THIS ISSUE:

Cruel and Unusual Punishment

6th Circuit rejects claim that bribery sentence was harsh and excessive. (105)(220) Defendant was an elected city councilman convicted of violating the Hobbs Act by soliciting a bribe. Defendant was sentenced to 30 months in prison, a $3,000 fine and two years of supervised probation. The 6th Circuit rejected defendant's argument that his sentence was harsh and excessive. Defendant's sentence was within the applicable guideline range. The sentence was also not cruel and unusual because it was not grossly disproportionate to the severity of his offense or to the sentence imposed on similarly situated criminals. *U.S. v. Peete*, __ F.2d __ (6th Cir. Nov. 28, 1990) No. 89-6269.

Guideline Sentences, Generally

9th Circuit upholds guideline for failure to appear despite acquittal on underlying charge. (120)(320) Defendant failed to appear on drug charges. He was later apprehended and tried jointly on the drug charges and for failing to appear. The judge granted his motion for judgment of acquittal on the drug charges and he then pled guilty to failure to appear. On appeal, defendant argued that guideline section 2J1.6(b)(1) violated the statutory mandate by failing to distinguish between a defendant's conviction of the underlying charge and his acquittal of that same charge. Making a "narrow inquiry" into whether the Sentencing Commission's construction is "sufficiently reasonable," the 9th Circuit found it reasonable for the Commission to consider the maximum term of imprisonment for the underlying offense without regard to whether the defendant is actually acquitted. The court distinguished the 8th Circuit's opinion in *U.S. v. Lee*, 887 F.2d 888 (8th Cir. 1989) which held that the Commission violated its statutory mandate by failing to consider the actual sentence imposed on a defendant who failed to appear *after* she had been sentenced. *U.S. v. Nelson*, __ F.2d __ (9th Cir. Nov. 27, 1990) No. 89-50578.

SECTION

11th Circuit finds defendant did not withdraw from conspiracy prior to effective date of guidelines. (125)(380) Defendant argued that he should not have been sentenced under the guidelines for his conspiracy conviction because he engaged in no criminal activity after the effective date of the guidelines. The 11th Circuit rejected this contention. The ex post facto clause does not bar application of the guidelines to conspiracies that began before and continued after the effective date of the guidelines. In order to avoid sentencing under the guidelines, a conspirator must prove that he withdrew from the conspiracy prior to the effective date. Defendant alleged that he refused to make any further drug courier trips prior to the effective date. However, mere cessation of criminal activity does not constitute withdrawal. Moreover, defendant continued to demand payment for his earlier trips. Defendant's assertion that he refused to act as a courier was irrelevant if he continued to demand that he be paid for his prior illegal activity. *U.S. v. Nixon*, __ F.2d __ (11th Cir. Dec. 7, 1990) No. 88-4001.

General Application Principles (Chapter 1)

1st Circuit upholds calculation of offense level based upon defendant's receipt of 11 previous express mail packages. (170)(250)(260) Defendant was arrested in possession of an express mail package containing three ounces of cocaine. The envelope was the 12th similar express mail package defendant had received during the past eight months. The sender's receipt for all 12 packages were in the same handwriting, bore a series of fictitious trade names as the originator, and contained four different return addresses (three of which were nonexistent). The district court concluded that the mailings were part of a common scheme, and estimated that defendant had handled 300 grams of cocaine. The 1st Circuit upheld the determination. The repetitive nature of the mailings, their common origin and destination, their frequency over a brief time span, defendant's admission that he supported himself by selling drugs, defendant's lack of any known employment, and defendant's acknowledgement that he owed the sender money for an earlier debt forged the "requisite linkage" between the shipments. This evidence also adequately supported the district court's determination that the shipments contained cocaine. The district court's estimation of the amount of cocaine involved was conservative and performed with adequate regard for defendant's rights. Over 25 percent of the weight of the seized package contained cocaine. In estimating the contraband contained in the missing packages, the judge found, on average, that 20 percent of the weight was cocaine. *U.S. v. Sklar*, __ F.2d __ (1st Cir. Dec. 3, 1990) No. 90-1450.

5th Circuit refuses to review whether guideline section 1B1.3 was legally adopted. (170)(800) Defendant argued that the Sentencing Commission exceeded its authority in promulgating the "relevant conduct" guideline section 1B1.3. The 5th Circuit refused to consider this argument since defendant raised it for the first time on appeal. The court found that no "manifest injustice" would result from its failure to review the legality of defendant's sentence, since defendant's guideline sentence was to run concurrently to his sentence on pre-guidelines convictions. *U.S. v. Cockerham*, __ F.2d __ (5th Cir. Dec. 4, 1990) No. 89-8056.

5th Circuit determines that dismissed counts were relevant conduct to offense of conviction. (170)(220) Defendant was a bank president convicted of various counts of bank fraud. His offense level was increased by nine under guideline section 2B1.1, based on the district court's consideration losses caused by transactions underlying dismissed counts as relevant conduct. Defendant argued that the dismissed counts should not be considered relevant conduct because they were of a different type and were perpetrated in a different time frame than the bank fraud. The 5th Circuit rejected this argument. The dismissed counts involved misapplication of bank funds through a loan and a letter of credit. Defendant held the same position at the bank as he did during the offenses for which he was convicted. Defendant continually made use of his position at the bank to improperly engage in loan transactions for the benefit of himself and others. De-

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fendant also contended that no "loss" to the bank occurred because the loans at issue were repaid. However, the commentary to guideline section 2B1.1 defines loss to include the value of all property taken, even if recovered or returned. *U.S. v. Cockerham*, __ F.2d __ (5th Cir. Dec. 4, 1990) No. 89-8056.

9th Circuit looks beyond the crime of conviction in imposing firearm enhancement. (170)(280) The 9th Circuit stated that it was bound by the language of guideline section 1B1.3(a)(2) which says that specific offense characteristics "shall be determined on the basis of ... all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." Thus the court held that "for purposes of the firearm enhancement" the district court properly looked to all of the offense conduct, not just the crime of conviction. Distinguishing other cases, the court said that it has never *required* that guns and drugs be found in proximity to each other, in order to support a firearm enhancement. It must only be shown that the defendant "possessed the guns during the commission of the offense, and that it is not clearly improbable that the guns were connected with the offense." *U.S. v. Willard*, __ F.2d __ (9th Cir. Nov. 27, 1990) No. 89-30206.

6th Circuit reverses district court's interpretation of environmental guideline. (180)(355) Defendant pled guilty to charges of not reporting the release of hazardous wastes into the environment. Defendant was sentenced under guideline section 2Q1.2, which provides for a four level increase in offense level if the offense involves release of a hazardous substance. The commentary notes that this subsection assumes a discharge into the environment resulting in actual environmental contamination. The district court refused to increase defendant's offense level under this subsection, finding that the government had failed to prove actual environmental contamination. The 6th Circuit reversed, finding that the district court misinterpreted the guidelines. Although the commentary "illuminates the intent of the section's drafter," the express command of a guideline section may not be countermanded by the commentary. The language of guideline section 2Q1.2 does not differentiate between a release that causes environmental contamination and one that does not. *U.S. v. Bogas*, __ F.2d __ (6th Cir. Dec. 3, 1990) No. 90-3228.

Offense Conduct, Generally (Chapter 2)

6th Circuit upholds application of guideline section 2E1.4 to defendant who attempted to hire hit man to kill wife. (210)(290) Defendant pled guilty to using an interstate commerce facility in an attempt to have his wife killed. The 6th Circuit rejected defendant's argument that he should have been sentenced under guideline section 2A2.1 (Conspiracy or Solicitation to Commit Murder), rather than guideline section 2E1.4 (Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire). The Statutory Index indicated that either guideline was applicable to defendant's conduct. However, guideline section 2E1.4(a) directs a court to apply the greater of a base offense level of 23, or the offense level applicable to the underlying conduct. Under the facts of this case, section 2A1.2 contains the offense level applicable to the underlying conduct and results in a base offense level of 20. Since 23 is greater than 20, the base level in guideline section 2E1.4 is applicable. *U.S. v. Wilson*, __ F.2d __ (6th Cir. Dec. 10, 1990) No. 90-5359.

11th Circuit reverses enhancement of offense level for defendant's role in continuing criminal enterprise. (240) Four defendants were convicted of engaging in a continuing criminal enterprise and sentenced under guideline section 2D1.5. The 11th Circuit agreed with defendants that the district court had improperly enhanced their offense levels for their roles in the offense. Guideline section 2D1.5 expressly prohibits such an enhancement because this guideline already reflects an adjustment for role in the offense. *U.S. v. Nixon*, __ F.2d __ (11th Cir. Dec. 7, 1990) No. 88-4001.

9th Circuit upholds constitutionality of sentencing scheme based on quantity rather than purity. (245) Defendants argued that the mandatory minimum sentence imposed on them by 21 U.S.C. section 841 denied due process and equal protection by focusing solely on quantity and disregarding purity. Relying on their prior opinion in *U.S. v. Savinovich*, 845 F.2d 834 (9th Cir. 1988), the 9th Circuit reiterated that the mandatory penalty imposed by section 841(b) does not deny equal protection. This is true even though a street dealer possessing a drug which has been "cut" several times may serve a minimum mandatory sentence greater than a manufacturer possessing a smaller but purer quantity of drugs. The court found that the fact that the heroin was diluted below street quality did not provide a basis for distinguishing *Savinovich*. *U.S. v. Yu-Chong*, __ F.2d __ (9th Cir. Dec. 6, 1990) No. 89-30355.

9th Circuit holds that heroin and unidentified white powder constituted a "mixture or substance" under section 2D1.1. (250) The DEA chemist testified that the material was "composed of a mixture of hard lumps similar to very carmelized brown sugar and a fine substance similar to flour or white sugar." She also testified that to facilitate analysis of the purity of the material, she separated the lumps of heroin from the unidentified substance with a metal sieve. Defendant argued that as a matter of law, the heroin and unidentified powder did not constitute a mixture or substance for purposes of 21 U.S.C. section 841(b) and guideline section 2D1.1, "because of its heterogeneous nature and its easy mechanical separability into the two substances." The 9th Circuit rejected this argument, holding that the definition of "mixture" does not "imply or require homogeneity." The

court found no evidence in the record to suggest that the unidentified substance was not consumable by the ultimate user. *U.S. v. Yu-Chong*, __ F.2d __ (9th Cir. Dec. 6, 1990) No. 89-30355.

7th Circuit upholds consideration of dismissed counts in determining of offense level. (270) A search of a house rented by defendant revealed four kilograms of cocaine, eight ounces of heroin, $34,000, a money counting machine, packaging materials for drugs, and a triple beam scale. Defendant admitted possessing the four kilograms of cocaine, but objected to the inclusion of the heroin in the calculation of his base offense level. The charges of heroin distribution had been dropped as part of a plea agreement. The 7th Circuit upheld the consideration of the heroin in defendant's offense level. The heroin was in a quantity large enough to imply an intent to distribute, and was connected by location with the cocaine. The district court's determination that possession of the heroin was part of the same course of conduct as possession of the cocaine was not clearly erroneous. *U.S. v. Rodriguez-Nuez*, __ F.2d __ (7th Cir. Dec. 3, 1990) No. 89-2203.

7th Circuit reverses enhancement where weapons were not related to offense of conviction. (286) Defendant was arrested in connection with drug distribution activities which took place in a duplex owned by defendant and in a house rented by defendant. Pursuant to a plea agreement defendant pled guilty to possessing the cocaine which was found at the house, while all other charges were dropped. The 7th Circuit reversed an enhancement based upon defendant's possession of a weapon during the commission of a drug crime. The only weapons involved were found at the duplex, not the house. There was no proximity of the weapon to the contraband. There was nothing to show that defendant carried the weapons when he visited the house, or otherwise possessed the weapon at the same time as he possessed the cocaine. Thus, there was no evidence to show that defendant possessed the weapons during the offense of conviction. Judge Manion, dissenting in part, would have upheld the enhancement, since evidence supported the conclusion that the house was used to store drugs which were distributed at the duplex. *U.S. v. Rodriguez-Nuez*, __ F.2d __ (7th Cir. Dec. 3, 1990) No. 89-2203.

5th Circuit affirms that most analogous offense for defendant who ran prostitution ring was Mann Act. (290)(310) Defendant ran a prostitution ring that processed checks and credit card charges in interstate commerce. He was convicted of violating the Travel Act, which proscribes using a facility of interstate commerce with the intent to carry on an "unlawful activity." Defendant was sentenced under guideline section 2E1.2, which provides for an offense level of six or the offense level of the underlying unlawful activity, whichever is higher. The commentary provides that where the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used. The 5th Circuit affirmed the district court's determination that the Mann Act was the most analogous federal offense. The fact that defendant did not transport prostitutes over state borders, as required for a Mann Act violation, did not mean it was not the most analogous offense. The term "analogous" implies a difference, and "that the state offense lacks the federalizing element of a given federal offense should not of itself necessarily prevent the two from being considered 'analogous' for purposes of such a guideline directive." *U.S. v. Langley*, __ F.2d __ (5th Cir. Dec. 7, 1990) No. 90-5523.

9th Circuit finds that defendant did not possess firearm for sporting or collection purposes. (330) Defendant was convicted of being a felon in possession of a firearm. Guideline section 2K2.1(b)(2) provides for a four level decrease in offense level "if the defendant obtained of possessed the firearm wholly for sport or recreation." During the sentencing hearing, defendant argued that he had only constructive possession of the shotgun, because he did not own it and was neither using not intending to use it. He also argued that any future use of the shotgun would be solely for sporting or collecting purposes. The district judge found his statements internally inconsistent and denied the reduction in offense level. On appeal, the 9th Circuit found no clear error, noting that the shotgun was kept fully loaded while it was on the display rack, "a condition perhaps more consistent with use for personal protection than use as a hunting weapon." *U.S. v. Uzelac*, __ F.2d __ (9th Cir. Dec. 10, 1990) No. 89-10558.

10th Circuit vacates consecutive sentences for multiple firearms carried in connection with one drug offense. (330)(680) Defendant was convicted of a drug offense, using various firearms during such drug offense, and using a machine gun during such drug offense. Defendant was sentenced to 33 months on the drug offense, five years on the first firearms offense, consecutive to his 33 month sentence, and ten years on the machine gun offense, consecutive to his first two sentences. The 10th Circuit reversed. Following a recent 10th Circuit opinion, it found that "where a defendant has been convicted of a single drug trafficking offense and more than one firearm was involved, a single violation of [the firearms statute] occurs and multiple consecutive sentences may not be stacked to account for each firearm seized." *U.S. v. Moore*, __ F.2d __ (10th Cir. Nov. 29, 1990) No. 89-3199.

11th Circuit rejects argument that felon possessed firearm solely for sport or recreation. (330) Defendant was convicted of unlawful possession of a firearm by a felon. He alleged that he should have received a four level reduction for possession of a firearm solely for sport or recreation under guideline section 2K2.1(b)(2). The 11th Circuit found that the district court's determination that defendant did not possess the weapon for sport or recreation was not clearly erro-

neous. Defendant was carrying a loaded high powered rifle in August, a time of year when hunting is not in season. Defendant admitted that he had the weapon in his possession because he had gotten into a fight with the individual he was with on an earlier occasion. "Self-defense or self-protection is not sport or recreation." In addition, defendant refused to turn the rifle over to police when they arrived at the scene. *U.S. v. Wyckoff*, __ F.2d __ (11th Cir. Dec. 7, 1990) No. 89-7937.

11th Circuit allows criminal history points for prior that was predicate for crime of conviction. (330)(500)(680) Defendant was convicted of unlawful possession of a firearm by a felon. He argued that adding points to his criminal history score for his prior felony was impermissible double counting. Since the prior felony was an element of the offense, defendant contended that it had already been taken into consideration in his offense level. The 11th Circuit rejected the argument. The "offense level and criminal history scores embody distinctly separate notions related to sentencing." It was not impermissible double counting for a court to consider that defendant had previously been sentenced to a term of imprisonment in excess of one year and that the current offense was committed within two years after release from imprisonment on the prior sentence. *U.S. v. Wyckoff*, __ F.2d __ (11th Cir. Dec. 7, 1990) No. 89-7937.

8th Circuit upholds three month sentence for defendant who entered into sham marriage to evade immigration laws. (340)(810) Defendant entered into a sham marriage in order to obtain permanent residency in the United States. She contended that her three-month prison sentence under the sentencing guidelines was "mechanistically determined and excessive." The 8th Circuit upheld the sentence. Defendant did not argue that the guidelines were incorrectly applied or that her sentence was outside the guideline range. The applicable guideline range was two to eight months. The district court did not abuse its discretion by imposing a three month sentence or by deciding not to depart from the appropriate guideline range. *U.S. v. Vickerage*, __ F.2d __ (8th Cir. Dec. 4, 1990) No. 90-1400.

6th Circuit rejects calculation of clean-up costs of environmental contamination. (355) Defendant pled guilty to charges of not reporting the release of hazardous wastes into the environment. Defendant was sentenced under guideline section 2Q1.2, which provides for a four level increase in offense level if cleanup required a "substantial expenditure." Although the government argued that the required clean-up was $350,000, the district court accepted defendant's figure of $10,300, and did not increase his offense level. The 6th Circuit found that the district court's calculation of the clean-up costs was clearly erroneous. Clean-up costs recoverable under CERCLA provide a useful measure of the clean-up expenditure to be taken into account under the guidelines. Defendant's estimate was by a non-certified contractor of what it would cost for him physically to excavate the pit where the hazardous material had been buried. The estimate did not include the cost of disposing properly of the estimated material, the cost of protective measures for the workers, and the cost of testing to find out what substances were buried in the pit. *U.S. v. Bogas*, __ F.2d __ (6th Cir. Dec. 3, 1990) No. 90-3228.

5th Circuit upholds money laundering sentence for defendant who attempted to smuggle cash into Mexico. (360) Defendant attempted to smuggle $20,000 out of the United States by dividing the money among three companions and himself, and driving into Mexico in a single truck. During a customs search, the money was found hidden in each of the men's underwear. Defendant contended on several grounds that it was improper to sentence him under guideline section 2S1.3(a)(a)(A) for structuring transactions to evade reporting requirements. The 5th Circuit rejected each of defendant's arguments and concluded that a single border crossing involving two or more individuals in one vehicle, each possessing cash below the reporting threshold, in a scheme to evade the reporting requirements, can constitute a structured transaction. It was not necessary for defendant's acts to involve a financial institution for his conduct to constitute a structuring offense. *U.S. v. Morales-Vasquez*, __ F.2d __ (5th Cir. Nov. 29, 1990) No. 90-2405.

Adjustments (Chapter 3)

7th Circuit reverses supervisory role enhancement where subordinate was not involved in offense of conviction. (430) Defendant was arrested in connection with drug distribution activities which took place in a duplex owned by defendant and in a house rented by defendant. Pursuant to a plea agreement, defendant pled guilty to possessing the cocaine which was found at the house, while all other charges were dropped. The 7th Circuit reversed a finding that defendant was a supervisor. The only person that defendant supervised was defendant's tenant at the duplex. There was no evidence that the tenant participated in defendant's activities at the house. Defendant's supervision of the tenant in connection with distributions at the duplex could not be a predicate for an enhancement of defendant's sentence for a different offense. A court must focus on "defendant's role in the offense" of conviction, rather than other criminal conduct. Judge Manion, dissenting in part, would have upheld the enhancement, since there was evidence that defendant intended to distribute the cocaine through the tenant. *U.S. v. Rodriguez-Nuez*, __ F.2d __ (7th Cir. Dec. 3, 1990) No. 89-2203.

10th Circuit upholds defendant's leadership role based upon associate's subordinate role. (430) The 10th Circuit upheld the district court's characterization of defendant as a leader or an organizer under guideline section 3B1.1. The evidence demonstrated that an associate provided "doorman"

services to defendant at the apartment from which defendant distributed cocaine. The associate would also sell the cocaine himself when defendant was not present at the apartment, but never when the defendant was at the apartment. This evidence alone was sufficient to support the district court's conclusion that defendant was a leader or organizer. However, the fact that defendant was a source for other customers who resold the cocaine was not sufficient evidence to include defendant's customers in the list of those controlled by defendant, in the absence of evidence that defendant exercised any authority, direction or control over his customer's resale of the cocaine. *U.S. v. Moore*, __ F.2d __ (10th Cir. Nov. 29, 1990) No. 89-3199.

10th Circuit remands where judge incorrectly stated difference between minor and minimal participants. (440) After denying defendant's request for a four level reduction of offense level based on his role as a minimal participant, the sentencing judge stated "the Court is not persuaded that [defendant] was a minimal participant. I think under the definition set forth in the sentencing guidelines, he was a minor participant, which is entirely different from minimal." The judge then denied defendant a two level reduction. The 10th Circuit remanded the case. It was not clear whether the trial court actually made a finding that defendant was a "minor participant." In addition, the judge's statement that a minor participant is "entirely different" from a minimal participant was incorrect. The terms are "not too distant points along a continuum of moderate criminal participation." *U.S. v. Maldonado-Campos*, __ F.2d __ (10th Cir. Nov. 1990) No. 89-2227.

2nd Circuit upholds obstruction adjustment for defendant who lied to agents and burned drug records. (460) When defendant was arrested in his home, he denied that he possessed any weapons. When government agents received permission to search his house, defendant then admitted that he possessed a gun. A search revealed a pile of ashes in the driveway. Underneath the ashes, in readable condition, were drug records that matched other records found in the house. Defendant told agents that he had burned those materials the night before when he was outside and wanted to keep warm. Defendant also lied to the agents about why he possessed the drug records. The 2nd Circuit found that this conduct justified an enhancement for obstruction of justice. Defendant's overall conduct was calculated to mislead and deceive authorities. *U.S. v. Charria*, __ F.2d __ (2nd Cir. Dec. 3, 1990) No. 90-1120.

7th Circuit holds that defendant who failed to appear for arraignment obstructed justice. (460) The 7th Circuit found that defendant's failure to appear for his arraignment was a willful interference with the disposition of criminal charges, thus justifying an enhancement for obstruction of justice. Defendant's conduct was willful because it was done with the purpose of disobeying the law. The court rejected defendant's argument that there is a distinction between an act done with the purpose of obstructing justice and an act done with the purpose of disobeying the law. The court also declined to adopt a narrow definition of "obstruction of justice" that includes only acts that corrupt a court's truth-finding process. "Obstruction of justice" also includes conduct that may hinder the progress of a case without the use of deceit. *U.S. v. Teta*, __ F.2d __ (7th Cir. Nov. 28, 1990) No. 89-3797.

5th Circuit reviews de novo decision not to group counts. (470)(820) The district court grouped defendant's two counts of auto theft separately for the purpose of determining defendant's offense level. The 5th Circuit found that in a case such as this, where the underlying counts were specifically enumerated in guideline section 3D1.2(d) as offenses susceptible to grouping, it should apply a *de novo* standard of review to the district court's decision not to group defendant's counts. The two counts of auto theft to which defendant pled guilty involved two different cars, different owners and different events. Since the counts did not satisfy the primary requirement of section 3D1.2 that they involve "substantially the same harm," the district court correctly refused to group the counts. *U.S. v. Ballard*, __ F.2d __ (5th Cir. Nov. 29, 1990) No. 90-1340.

6th Circuit reverses failure to group six counts of using interstate facilities in an attempt to kill. (470) Defendant pled guilty to six counts of use of interstate facilities with the intent that his wife be killed. Five of the counts involved recorded discussions over the telephone between defendant and a government informant. The sixth count involved a letter mailed by defendant to the informant containing money for the hit man. The 6th Circuit reversed the district court's refusal to group the six counts together. Under guideline section 3D1.2(b) the telephone calls and letter involve "two or more acts or transactions connected by a common criminal objective," involving the same harm and the same victim. The exclusion in section 3D1.2(d) to offenses sentenced under guideline section 2E1.4 has no effect on counts grouped under 3D1.2(b). *U.S. v. Wilson*, __ F.2d __ (6th Cir. Dec. 10, 1990) No. 90-5359.

2nd Circuit finds no acceptance of responsibility by defendant who did not voluntarily admit his guilt. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he did not contest certain parts of the government's case in chief at trial. He also argued that by consenting to a search of his home and by admitting to one of the arresting agents that certain recovered documents would get him in trouble, he voluntarily assisted the authorities. The 2nd Circuit found that the district court's determination that defendant did not accept responsibility was not clearly erroneous. At no time did defendant voluntarily admit his guilt. Instead, during a presentence interview, he referred to himself as a pawn, despite extensive drug records under his control, and referred to his involve-

ment in the conspiracy as a set of "isolated acts." The district court was "free to discount the last-minute expression of remorse ... and to conclude that [defendant's] cooperation with the arresting agents was motivated by self interest rather than genuine contrition." *U.S. v. Charria*, __ F.2d __ (2nd Cir. Dec. 3, 1990) No. 90-1120.

Criminal History (§ 4A)

5th Circuit upholds consideration of misdemeanors that occurred after guilty plea. (500) After defendant pled guilty but before he was sentenced, defendant was arrested again. Without the benefit of counsel defendant pled guilty to several state misdemeanor charges, and received a fine. Defendant complained that the district court's consideration of the misdemeanor charges in the calculation of his criminal history violated the ex post facto clause. The 5th Circuit rejected this argument. The commentary to guideline section 4A1.2 expressly authorizes the use of the misdemeanor sentences. Since this guideline was in effect when defendant committed his offenses and at the time he pled guilty, there was no violation of the ex post facto clause. The fact that his misdemeanor plea was entered without the benefit of counsel did not alter the analysis. The possible enhancing effect on subsequent sentences was a collateral consequence of which a defendant need not be advised. *U.S. v. Ballard*, __ F.2d __ (5th Cir. Nov. 29, 1990) No. 90-1340.

10th Circuit refused to review propriety of criminal history calculation where it would not change criminal history category. (500)(800) Defendant contended that the district court improperly assessed him one criminal history point for a conviction which took place over ten years ago. The 10th Circuit refused to consider the issue. Even if defendant were correct, this would only reduce his total criminal history points from five to four. Since criminal history category III includes those with four to six criminal history points, any error made was harmless. *U.S. v. Williams*, __ F.2d __ (10th Cir. Nov. 26, 1990) No. 89-1174.

10th Circuit upholds assessment of criminal history points for domestic violence crime. (500) Defendant contended that the district court improperly added three points to his criminal history score based upon his 1988 conviction for a domestic violence crime. The 10th Circuit upheld the district court's calculation. Defendant had properly been assessed one criminal history point for the crime. Guideline section 4A1.1(c) excludes some local ordinance violations but not those for which a probation term of at least one year was imposed. The district court correctly assessed two additional points because the defendant was on probation when he committed the offense. *U.S. v. Williams*, __ F.2d __ (10th Cir. Nov. 26, 1990) No. 89-1174.

10th Circuit reverses district court's calculation of defendant's criminal history. (500) Defendant pled guilty to failing to appear for trial on various drug charges. He was sentenced to 12 months imprisonment to be served consecutive to the 180 month sentence he received for the underlying drug charges. Defendant argued that a sentence imposed in 1971 on firearms charges should not have been included in calculating his criminal history since he had been released from incarceration over 15 years before "the commencement of the instant offense," his failure to appear offense. The district court had found that the term "instant offense" referred to the underlying drug charge, not the failure to appear offense. The 10th Circuit reversed, finding that the term "instant offense" clearly referred to the offense for which defendant was being sentenced, in this case the failure to appear offense. Since the failure to appear occurred more than 15 years after defendant was released from incarceration on the firearms offense, the firearms offense should not have been included in defendant's criminal history. *U.S. v. Kirby*, __ F.2d __ (10th Cir. Nov. 28, 1990) No. 90-3058.

8th Circuit determines sentencing defendant as career offender does not violate plea agreement. (520)(790) Defendant's plea agreement required the government to withdraw its notice pursuant to 21 U.S.C. section 851 of its intent to prosecute defendant as a repeat offender. Defendant contended that the district court's consideration of his prior drug convictions to sentence him as a career offender violated section 851 and his plea agreement. The 8th Circuit rejected these arguments. Section 851's notice procedures do not conflict with the career offender provisions because section 851 is limited to situations in which a defendant's statutory minimum or maximum penalty is enhanced. The career offender guidelines merely increase defendant's sentence within a statutory range. There also was no violation of the plea agreement, since it clearly stated that the determination of the applicability of the career offender guidelines was left to the discretion of the court. *U.S. v. Auman*, __ F.2d __ (8th Cir. Nov. 30, 1990) No. 90-5019.

10th Circuit affirms that sentence to provide drug treatment constitutes a sentence of incarceration for career offender purposes. (520) Defendant argued that his 1973 conviction for possession of heroin should not count as a predicate offense for career offender liability because his sentence did not constitute a "sentence of imprisonment" within the meaning of guideline section 4A1.2(e). Defendant had been sentenced under the Narcotic Addict Rehabilitation Act (NARA), which committed him to the custody of the Attorney General for treatment. Following completion of a drug rehabilitation program, an offender could be paroled at the discretion of the Parole Commission. The 10th Circuit found that defendant's sentence under the NARA was a sentence of imprisonment. Physical confinement is a key distinction between a sentence of imprisonment and other sentences. Defendant remained in a federal institution and

was deprived of his liberty until such time as the Parole Commission determined he was a suitable candidate for parole. *U.S. v. Vanderlaan*, __ F.2d __ (10th Cir. Dec. 4, 1990) No. 90-2008.

Determining the Sentence (Chapter 5)

6th Circuit upholds prohibition against serving in or seeking public office as a condition of probation. (560) Defendant was an elected city councilman convicted of violating the Hobbs Act by soliciting a bribe. Part of defendant's sentence included two years of supervised probation. One of the conditions of probation prohibited defendant from serving in or seeking public life. The 6th Circuit rejected defendant's argument that this condition deprived him of his First Amendment rights without due process. 18 U.S.C. section 3563(b)(6) specifically allows a court to impose as a condition of probation that the individual refrain from engaging in a specified occupation. Probation restrictions that affect fundamental rights such as freedom of speech or freedom of association are permitted if the conditions are primarily designed to meet the ends of rehabilitation and protection of the public. The court found that the condition imposed upon defendant served this dual purpose by insulating him from the same environment that enabled him to violate the Hobbs Act and protected the public from defendant's recidivism. *U.S. v. Peete*, __ F.2d __ (6th Cir. Nov. 28, 1990) No. 89-6269.

9th Circuit holds that one year supervised release term for misdemeanor did not violate right to be indicted. (580) Under Fed. R. Crim. P. 7(a), an offense which may be punished by imprisonment for more than a year must be prosecuted by indictment. Moreover the 5th Amendment requires indictments for "infamous crimes" which are punishable by more than one year. Nevertheless, the 9th Circuit held that defendant's sentence of six months in custody and a one year supervised release term, did not subject him to a term of imprisonment of more than one year. Thus he was not prosecuted for an "infamous crime" and the prosecution was properly initiated by information rather than indictment. *U.S. v. Linares*, __ F.2d __ (9th Cir. Dec. 10, 1990) No. 89-50098.

9th Circuit finds it "not ripe" to decide whether revocation of misdemeanant's supervised release can result in more than one year in custody. (580)(800) Defendant was convicted of misdemeanor possession of controlled substances in violation of 21 U.S.C. section 844(a). He argued that because his sentence included a one year term of supervised release in addition to his sentence of six months imprisonment, he was subject to imprisonment for more than one year if the district court revoked his supervised release. He argued that this would violate the one year maximum sentence permissible under 21 U.S.C. section 844(a), and would violate his right to be indicted for an offense punishable for more than one year. The 9th Circuit held that this issue was not ripe for review, because the defendant "lacks standing to challenge hypothetically a revocation that may never occur." *U.S. v. Linares*, __ F.2d __ (9th Cir. Dec. 10, 1990) No. 89-50098.

9th Circuit says death of defendant does not end restitution obligation. (620) Defendant argued that the portion of his sentence stating that on his death any unpaid balance of his restitution payments were due and payable violated 18 U.S.C. section 3565(h), which has since been repealed. Before its repeal, section 3565(h) provided that an "obligation to pay a fine or penalty ceases upon the death of the defendant." Judges Choy, Farris and Thompson rejected the argument that "fines and penalties" was intended to include restitution. Section 3565 was concerned with the collection of fines or penalties *by the government*. "Nowhere does it purport to limit restitution payments." *U.S. v. Cloud*, __ F.2d __ (9th Cir. Dec. 12, 1990) No. 89-10644.

9th Circuit rules that enhancement based on acquitted charges did not amount to "double counting." (680) Defendant argued that the enhancement of his base offense level for failing to appear, by an additional nine levels because he faced a potential maximum sentence of at least 15 years on the underlying drug charges, resulted in "double counting of the drug charges on which he had been acquitted. The 9th Circuit rejected the argument, ruling that there was no "double counting" because defendant was not being sentenced for the drug charges but "for his subsequent crime of escape." The court added that enhancing an offense level based upon the seriousness of the *charges* "seems permissible." *U.S. v. Nelson*, __ F.2d __ (9th Cir. Nov. 27, 1990) No. 89-50578.

Departures Generally (§ 5K)

1st Circuit suggests downward departure based on defendant's rehabilitation may be proper in rare circumstances. (710)(722) The district court departed downward because of defendant's rehabilitation efforts since arrest and indictment and defendant's good faith efforts to offer cooperation. The 1st Circuit reversed. In the absence of a government motion, a court may not depart downward based on a defendant's cooperation. However, the court found that a defendant's rehabilitation might, on rare occasions, serve as a basis for a downward departure, but only if the rehabilitation is "so extraordinary as to suggest its presence to a degree not adequately taken into consideration by the acceptance of responsibility reduction." Defendant did not present such a case. His rehabilitative endeavors, "though carried out in a conscientious fashion, were largely prompted by the specific mandates of his pretrial release agreement." *U.S. v. Sklar*, __ F.2d __ (1st Cir. Dec. 3, 1990) No. 90-1450.

6th Circuit refuses to review failure to depart downward. (720)(810) Defendant argued that the district court should have departed downward under guideline section 5K2.13, based on reduced mental capacity: and guideline section 5K1.1, based on substantial assistance to the government. The 6th Circuit rejected these claims, finding that where the guideline range is properly computed, the district court is aware of its discretion to depart downward, and the sentence is not imposed in violation of law or as a result of an incorrect application of the guidelines, the failure to depart downward is not cognizable on appeal. Moreover, a government motion is necessary to make a departure under section 5K1.1. *U.S. v. Davis*, __ F.2d __ (6th Cir. Nov. 30, 1990) No. 89-6519.

2nd Circuit rejects claim that district court mistakenly believed it lacked authority to depart downward. (720)(810) Defendant argued that the district court's refusal to depart downward was based on a mistaken view that it lacked discretion to do so, and thus the appellate court had authority to review the question. The 2nd Circuit rejected this claim. As shown in the record, the district court refused to depart because it believed that defendant had not satisfied either of the two elements required for a downward departure based on reduced mental capacity, reduced capacity and a causal link between that reduced capacity and the commission of the charged offense. *U.S. v. Prescott*, __ F.2d __ (2nd Cir. Nov. 28, 1990) No. 90-1156.

2nd Circuit refuses to review district court's failure to depart downward. (720)(800) Defendant argued that the district court should have departed downward because his guideline sentence was unreasonably harsh, given his minor role in the offense. The 2nd Circuit disposed of the argument by noting that a district court's failure to depart downward is unreviewable, absent a showing that a violation of law occurred or that the guidelines were misapplied. *U.S. v. Charria*, __ F.2d __ (2nd Cir. Dec. 3, 1990) No. 90-1120.

8th Circuit finds district court properly understood its authority to depart downward. (720) Defendant's applicable guideline was 70 to 87 months, however, the statutory maximum for his offense was 60 months. The district court accordingly sentenced defendant to 60 months. The 8th Circuit rejected defendant's argument that the district court mistakenly believed it did not have the authority to depart below the 60 month sentence. The district court expressly noted that it was "not disposed to grant" a downward departure and that it found no reason to depart downward. *U.S. v. Sayers*, __ F.2d __ (8th Cir. Nov. 27, 1990) No. 90-5056.

4th Circuit reverses downward departure based on drug dealer's charitable contributions and community relations. (722) A non-profit organization argued for a downward departure because of defendant's work history, his family ties and responsibilities, and his extensive contributions to a local town. The district court departed downward "for matters that [defendant] has done in a positive stance in his community and in his past life." The 4th Circuit reversed, finding that personal factors are "ordinarily irrelevant" in sentencing, and "to depart downward because a successful drug dealer has made charitable contributions to his community is to distort the purpose of the guidelines." A defendant's socioeconomic status, a factor correlated to the amount of charitable contributions, is not relevant to sentencing. Community ties are not ordinarily relevant, but may be considered when probation is an option. The judicial system cannot reward defendant because he was a successful and prosperous drug dealer rather than an unsuccessful one. *U.S. v. McHan*, __ F.2d __ (4th Cir. Dec. 6, 1990) No. 89-5057.

6th Circuit finds district court made required findings on disputed factual issues. (722)(775) The 6th Circuit rejected defendant's claim that the district court failed to make required findings of fact on disputed issues involved in sentencing. The district court had expressly adopted the presentence report as its finding of fact and law, and sufficient findings were made on the record to support the sentence. The report adequately explained why a downward departure for diminished capacity was not appropriate. For diminished capacity to justify a decrease, the offense must be nonviolent in nature. Defendant pled guilty to using an interstate facility to solicit a murder, which was not a non-violent offense. *U.S. v. Wilson*, __ F.2d __ (6th Cir. Dec. 10, 1990) No. 90-5359.

6th Circuit reverses downward departure for first-time offender. (722)(734) The district court departed downward based on the fact that this was the first time defendant had been in any trouble, and that the circumstances were "somewhat unusual." The 6th Circuit reversed. The absence of a criminal record is taken into account by the sentencing guidelines, and there can be no downward departure from criminal history category I on the basis of a defendant's limited criminal history. The district court's reference to "unusual circumstances" failed to state a specific reason for the departure which the appellate court could review. *U.S. v. Todd*, __ F.2d __ (6th Cir. Dec. 4, 1990) No. 89-2262.

4th Circuit finds district court failed to adequately explain reasons for downward criminal history departure. (730) The presentence report indicated that defendant had a criminal history category of III, based on his attempted assault of his girlfriend, for which he received a sentence of probation, and driving a rental car without permission, for which he received a 60-day sentence. Defense counsel argued for a downward departure based on the "snowball effect" his earlier conviction for use of the rental car had caused. The judge stated that he made a "factual finding" that defendant's criminal history category was II rather than III. Since under "simple counting," defendant fell within category III, the 4th Circuit found that it was appropriate to re-

view the district court's action as a downward criminal history departure. Under this standard, the district court had failed to identify an aggravating or mitigating circumstance not adequately considered by the sentencing commission, so the case was remanded for the district court to establish reasons for its findings. *U.S. v. Chester*, __ F.2d __ (4th Cir. Nov. 30, 1990) No. 90-5605.

10th Circuit finds record insufficient as to whether court believed it lacked authority to depart downward. (730) In denying defendant's motion for a downward departure, the judge stated that he was concerned that defendant's prior minor offense was treated as a more serious crime, "but I fought these Sentencing Commission guidelines long enough and I think its up to the Courts of Appeals to give us some direction on it. But I will state for the record, that I find that particular part of the sentencing guidelines that requires a Category III is too harsh and inflexible, but I feel that I'm committed under the sentencing guidelines to impose that kind of sentence." Defendant argued that the district court mistakenly believed it lacked authority to depart downward based on his criminal history. The 10th Circuit found that it lacked a sufficient record to determine whether the district court would have departed downward had it thought it had the power. The case was already being remanded for other reasons, and the 10th Circuit would not "speculate as to whether the district court will exercise its discretion to depart on remand, and if so, what its reasoning will be." *U.S. v. Maldonado-Campos*, __ F.2d __ (10th Cir. Nov. 1990) No. 89-2227.

Sentencing Hearing (§ 6A)

2nd Circuit upholds denial of defendant's motions to continue sentencing hearing. (750) The 2nd Circuit found that the district court's denials of defendant's motions for continuances of the sentencing hearing were not arbitrary or prejudicial. The denials came after defendant had successfully moved twice for a continuance. Defendant's new attorney had nine days to review the government's sentencing memorandum, which was more than sufficient time. The attorney's failure to schedule defendant's psychiatric examination until five days before the hearing was not a sufficient reason for a continuance. Any problems were caused by defense counsel's selection of a doctor who would not be available until such a late date, without informing the sentencing court of the problem. *U.S. v. Prescott*, __ F.2d __ (2nd Cir. Nov. 28, 1990) No. 90-1156.

2nd Circuit determines that guidelines did not change procedure by which district court resolves disputed facts. (755)(770) Defendant contested the presentence report's reliance on hearsay evidence, and argued that a sentencing court should hold a "full-blown" evidentiary hearing when a presentence report relies on hearsay to set a defendant's base offense level. The 2nd Circuit found that the sentencing guidelines did not change the law regarding the procedure by which the district court resolves disputed sentencing factors. Thus, the burden of proof at a sentencing hearing to determine a base offense level is by a preponderance of the evidence, and the sentencing court is under no duty to conduct a full evidentiary hearing simply because contested hearsay testimony is contained in a presentence report. *U.S. v. Prescott*, __ F.2d __ (2nd Cir. Nov. 28, 1990) No. 90-1156.

9th Circuit holds that defendant bears the burden of proving entitlement to downward adjustment. (755) The 9th Circuit held that a defendant who seeks a downward adjustment in his base offense level bears the burden of proving, by a preponderance of the evidence, that he is entitled to the reduction. Here the district court found that the defendant had not met his burden and the 9th Circuit held that the ruling was not clearly erroneous. *U.S. v. Urelac*, __ F.2d __ (9th Cir. Dec. 10, 1990) No. 89-10558.

2nd Circuit upholds reliance on testimony of co-defendant. (770) Defendant contended that the district court's resolution of disputed matters was not supported by a preponderance of the evidence, principally because the court relied on testimony of a cooperating co-defendant. Defendant characterized the testimony as "largely uncorroborated and blatantly incredible and contradictory." The 2nd Circuit rejected this contention. The district court's findings were supported by the testimony, portions of which were corroborated, and a transcript of a meeting between defendant and an undercover agent. *U.S. v. Vargas*, __ F.2d __ (2nd Cir. Dec. 3, 1990) No. 90-1125.

2nd Circuit upholds district court's reliance on hearsay testimony. (770) The 2nd Circuit upheld the district court's reliance on hearsay testimony to determine that defendant sold 150 kilograms of cocaine. Several different individuals made statements about defendant's drug activity. Each of these individuals made their statements independently of one another; in three cases the statements were made before a grand jury, and in others the statements were made at the time of the person's arrest. The statements were corroborated by defendant's telephone records and hotel records. Defendant himself admitted that he was engaged in drug activities for three years. Since the accounts of defendant's drug distribution were "numerous and independent," and displayed a "high degree of intercorrelation," the hearsay testimony had a sufficient degree of reliability for the district court to conclude it was accurate. *U.S. v. Prescott*, __ F.2d __ (2nd Cir. Nov. 28, 1990) No. 90-1156.

6th Circuit upholds calculation of drugs based on defendant's statements to probation officer. (770) At defendant's plea hearing, defendant testified that his long-standing mental disorder was "well-regulated" by certain medication. The judge accepted defendant's plea after determining that de-

fendant was not under the apparent influence of narcotics and was competent to plead. Immediately after this, defendant met with the probation officer for a presentence interview, and admitted to distributing five or six ounces of cocaine per week. Defendant contended that his statements to the probation officer were unreliable because of his mental problems, and thus should not have been considered by the district court in determining his base offense level. The 6th Circuit rejected this argument. Defendant had testified earlier in the day that his problems were "well-regulated" by medication, and the judge had determined that defendant was competent. Judge Jones, dissenting, argued that the district court incorrectly computed the base offense level by relying on unreliable information. *U.S. v. Davis*, __ F.2d __ (6th Cir. Nov. 30, 1990) No. 89-6519.

9th Circuit holds that judge may consider out-of-court observations of the defendant in sentencing. (770) At sentencing, the judge noted that the defendant had testified in a "mild, meek voice like Mr. Milktoast." The judge then said he had seen the defendant out in the hall with some "repeater defendants" who were waiting outside another courtroom, and defendant "had the voice of a platoon sergeant in directing them." The judge said "I think its something I can consider, just like I consider all the information from the presentence report." The 9th Circuit upheld the judge's reliance on the out-of-court observations, stating that while judges "as a general matter should not be overly influenced by out-of-court observations in making sentencing decisions, we hold the present circumstances do not give rise to a Sixth Amendment violation." *Taylor v. Kincheloe*, __ F.2d __ 90 D.A.R. 13991 (9th Cir. Dec. 11, 1990) No. 89-35687.

6th Circuit finds district court made adequate factual findings concerning amount of cocaine involved in conspiracy. (775) Defendant contended that the district court did not make an adequate factual finding regarding the amount of cocaine involved in his conspiracy. He argued that a sentencing court must do more than state conclusions, it must state the rationale for such conclusions. The 6th Circuit found that the district court made adequate factual findings. At trial, the jury had been presented with conflicting stories as to defendant's involvement in the conspiracy. In sentencing defendant, the judge stated "I think the jury chose to believe the former [story], and I think that is a reasonable determination." This statement constituted an adequate factual finding. *U.S. v. Todd*, __ F.2d __ (6th Cir. Dec. 4, 1990) No. 89-2262.

Plea Agreements, Generally (§ 6B)

4th Circuit holds that defense counsel's failure to advise of possible future prosecution did not render plea involuntary. (790) Three months after defendant pled guilty to a drug charge, he attempted to withdraw his plea. He claimed that he learned only after he had pled guilty that the government planned to bring a continuing criminal enterprise (CCE) charge against him, and that his guilty plea could be used as a predicate offense of a CCE charge. The 4th Circuit rejected defendant's argument that defense counsel's failure to advise him of a "speculative CCE prosecution" rendered the plea involuntary. A CCE prosecution requires the government to prove many additional elements and does not automatically result from a guilty plea to a narcotics offense. Moreover, in light of the overwhelming evidence against defendant, the court could not conclude that there was any reasonable possibility that had defendant been advised of the potential CCE prosecution, he would have refused to plead guilty and gone to trial. *U.S. v. McHan*, __ F.2d __ (4th Cir. Dec. 6, 1990) No. 89-5057.

10th Circuit finds that attorney's incorrect estimate of guideline range did not render plea involuntary. (790) Defendant's counsel and the prosecutor calculated defendant's applicable guideline range as 57 to 71 months, based on their determination that defendant fell within criminal history category II. The prosecutor agreed to recommend a 60 month sentence. The district court then accepted an unconditional plea after determining that defendant was aware that it was not bound by the plea agreement or the government's 60 month sentence recommendation. The probation department found that defendant fell within criminal history category III, and thus had an applicable guideline range of 63 to 78 months. Defendant was sentenced to 78 months. The 10th Circuit rejected defendant's claim that his plea was involuntary because he believed his sentencing range would be between 57 and 71 months. The plea was voluntary because it was made with the knowledge that the sentencing recommendation was nonbinding. *U.S. v. Williams*, __ F.2d __ (10th Cir. Nov. 26, 1990) No. 89-1174.

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

10th Circuit refuses to review district court's reasons for sentencing defendant at top of guideline range. (810) Defendant argued that the district court relied on improper factors in sentencing him at the top of his applicable guideline range. The 10th Circuit held that in the absence of an incorrect application of the guidelines or a violation of the law, defendant could not appeal a sentence within the applicable guideline range. The district court's consideration of defendant's 13-year old conviction was not an incorrect application of the criminal history guidelines, since the criminal history guidelines only address what prior convictions may be counted for purposes of computing a defendant's criminal history category. The district court's consideration of the fact that defendant transported three illegal aliens was also not a misapplication of the guidelines. Although an upward departure is only warranted where a large number of aliens

are involved, in this case no upward departure took place. *U.S. v. Garcia*, __ F.2d __ (10th Cir. Nov. 30, 1990) No. 89-2193.

4th Circuit adopts three-step standard of review for departures. (820) The 4th Circuit found that the appropriate standard of review for a departure is the three prong test first used by the 4th Circuit in *U.S. v. Hummer*, 916 F.2d 186 (4th Cir. 1990). A court must first examine *de novo* the specific reasons cited by the district court in support of its sentence outside the guidelines range to ascertain whether those reasons encompass factors not adequately taken into consideration by the Sentencing Commission. If the sentencing court identified one or more factors potentially warranting departure, the appellate court is to apply a clearly erroneous standard and review the factual support in the record for those identified circumstances. Upon ascertaining that there is an adequate factual basis for the factors, the appellate court must apply an abuse of discretion standard to determine if the cited departure factors are of sufficient importance to impose a sentence outside the guidelines range. The court then applies an abuse of discretion standard to determine if the extent of departure was reasonable. *U.S. v. Chester*, __ F.2d __ (4th Cir. Nov. 30, 1990) No. 90-5605.

5th Circuit holds that relevant conduct is a factual finding subject to review for clear error. (820) Defendant argued that the determination of what is relevant conduct under guideline section 1B1.3 is a determination of whether a particular guideline applied, and thus subject to *de novo* review. The 5th Circuit found that such an analysis was primarily factual, and raised no substantial issues of law. Thus, it held that a district court's determination of relevant conduct is reviewed under a clearly erroneous standard. *U.S. v. Cockerham*, __ F.2d __ (5th Cir. Dec. 4, 1990) No. 89-8056.

9th Circuit reviews application of guidelines de novo. (820) The 9th Circuit held that application of the sentencing guidelines is reviewed *de novo*. However factual findings under the guidelines are reviewed for clear error. Thus, in this case, the district court's determination that the defendant did not possess the firearm solely for sporting purposes was a factual finding reviewed under the clearly erroneous standard. *U.S. v. Uzelac*, __ F.2d __ (9th Cir. Dec. 10, 1990) No. 89-10558.

9th Circuit reviews de novo the legality of a sentence and the interpretation of a federal statute. (820) The 9th Circuit "reviews *de novo* the legality of a sentence and the interpretation of a federal statute." Whether an information is sufficient to charge a defendant in a particular situation is a question of law that the 9th Circuit also reviews *de novo*. *U.S. v. Linares*, __ F.2d __ (9th Cir. Dec. 10, 1990) No. 89-50098.

Forfeiture Cases

2nd Circuit holds that illegal seizure does not bar later forfeiture action. (900)(950) The government seized from defendant a suitcase carrying approximately $38,000 in small bills, after defendant provided conflicting explanations of how he obtained the money and why he was carrying it. After further investigation uncovered incriminating evidence, the DEA initiated a forfeiture action against the money. Defendant moved for summary judgement on the grounds that the government lacked probable cause at the time of the seizure. The district court granted the motion, ordering the government to return the money and prohibiting it from initiating any other forfeiture action against the same property. The 2nd Circuit reversed, finding that the district court confused probable cause to seize the money and probable cause for the forfeiture. Even assuming there was no probable cause for the seizure, there was no support in law for the drastic remedy of enjoining the government from further attempts to forfeit the money. The court held that "an illegal seizure of property itself does not immunize that property from forfeiture . . . and that evidence obtained independent of the illegal seizure may be used in the forfeiture action." Even if there was no probable cause to seize the money, the government had established, by the time of the forfeiture action, probable cause to believe that the money was forfeitable. Therefore, the burden of proof had shifted to defendant to establish that the money was not drug-related. *U.S. v. $37,780 in United States Currency*, __ F.2d __ (2nd Cir. Dec. 3, 1990) No. 90-6003.

9th Circuit holds that administrative forfeiture remedy bars reliance on Rule 41 equitable relief. (940) Appellant argued that the district court was required to return the seized property pursuant to his motion under Rule 41(e) Fed. R. Crim. P., upon the dismissal of the criminal action for lack of probable cause to arrest him. The 9th Circuit rejected the argument, holding that appellant had a remedy at law pursuant to the administrative forfeiture scheme set forth in 19 U.S.C. section 1608. It was not clear from the present record whether the appellant lost the opportunity to invoke the appropriate statutory remedy provided by 21 U.S.C. section 881-1(c) by failing to follow the procedures set forth in that statute and 19 U.S.C. section 1608. But "[f]ailure to comply with a remedy at law does not make it inadequate so as to require the district court to exercise its equitable jurisdiction." *U.S. v. Elias*, __ F.2d __ (9th Cir. Dec. 11, 1990) No. 89-16707.

AMENDED OPINION

(450) *U.S. v. Hill*, 915 F.2d 502 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. Dec. 5, 1990) No. 89-50045.

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-Guideline Sentences, Generally

5th Circuit upholds two and one-half year sentence against 8th Amendment challenge. (105)(145) In this pre-guidelines case, defendant complained that his two and one half year sentence constituted cruel and unusual punishment, primarily because his co-defendant received a sentence of probation from a different judge. The 5th Circuit rejected this argument. Disparity of sentences among co-defendants, by itself, is not grounds for reversal. The record showed that the sentencing judge considered a variety of factors in imposing the sentence, including the sentencing range recommended by the sentencing guidelines. Given the quantity of drugs involved, defendant could have received a much more severe sentence. There was no abuse of discretion. *U.S. v. Harrison*, __ F.2d __ (5th Cir. Nov. 19, 1990) No. 90-4204.

8th Circuit upholds life without parole sentence for drug dealer against 8th Amendment challenge. (105)(242) Defendant was convicted of various drug-related charges and sentenced to life imprisonment without parole. The 8th Circuit rejected defendant's claim that his sentence was disproportionate to his offenses and therefore violated the 8th Amendment. First, although defendant's sentence was harsh, his crime was very serious. A life sentence for repeatedly dealing drugs cannot be considered disproportionately cruel and unusual. Second, defendant's sentence was not disproportionate when compared to other defendants similarly situated in the 8th Circuit and in other circuits. *U.S. v. Meirovitz*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 90-5017.

9th Circuit rejects argument that career offender guideline punishes "status" or is cruel or unusual punishment. (105)(520) Defendant argued that his sentence violated the 8th Amendment's prohibition against cruel and unusual

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punishment because it punished him for his "status" of being a career offender and because the punishment was disproportionate to the crime. His status argument relied on *Robinson v. California*, 370 U.S. 660 (1962) which invalidated a statute that criminalized the "status" of being a drug addict. The 9th Circuit rejected the argument, stating that defendant was not being punished for his status of being a career criminal, "he is being punished for selling cocaine base." Section 4B1.1 "is an ordinary enhancement provision, which does not increase the statutory maximum for the crime," but merely "requires the judge to sentence him nearer to this maximum penalty." The court also found that defendant's 262-month sentence for selling cocaine near a school yard and being a career offender, was not cruel and unusual. *U.S. v. McDougherty*, __ F.2d __ (9th Cir. Nov. 28, 1990) No. 89-50245.

Guideline Sentences, Generally

8th Circuit finds no due process violation in application of guidelines. (110)(755) Defendant had originally been prosecuted in state court, but the charges were dropped, and he was eventually convicted in federal court for the same conduct. He asserted that an Assistant U.S. Attorney assigned to the Drug Task Force served a dual role in the state prosecutor's office, and that the case against him in state court was dismissed solely to gain a tactical advantage. The 8th Circuit rejected this argument. The fact that the federal government prosecutes a case in federal court that could have been prosecuted in state court does not violate due process. Nor does the fact that defendant was subject to a harsher sentence in federal court. Moreover, the fact that the prosecutor was spared from having to prove beyond a reasonable doubt crimes that were considered in setting his sentence did not violate due process. *U.S. v. Turpin*, __ F.2d __ (8th Cir. Nov. 26, 1990).

8th Circuit refuses to apply amended guideline where it would increase offense level. (130) Defendants' offenses were committed prior to November 1, 1989. However, they were not sentenced until after this date, and the district court applied the guideline amendments that became effective November 1, 1989. The 8th Circuit reversed, finding that since the result of the amendments would be to increase defendants' offense level, sentencing under the amended guidelines would violate the ex post facto clause. The case was remanded for resentencing under the prior version of the guidelines. *U.S. v. Swanger*, __ F.2d __ (8th Cir. Nov. 19, 1990) No. 90-1583.

6th Circuit permits downward departure to bring sentence "in line" with co-defendants' sentences, but reverses as to extent. (140)(722) The 6th Circuit found that district courts are not precluded as a matter of law from departing from the guidelines in order to conform one conspirator's sentence to the sentence imposed on his co-conspirators. In this case, the great disparity between defendant's guidelines sentence and the his co-defendants' sentences justified a departure. Defendant's guideline range was 151 to 188 months, whereas the codefendants received sentences of 60, 48 and 30 months, respectively, based on their substantial assistance to the government. However, departing downward to 42 months was unreasonable. The co-defendants received their substantial departures based upon their extensive cooperation with authorities. Defendant not only failed to cooperate, he obstructed justice by lying to DEA agents and at trial. The case was remanded for resentencing. *U.S. v. Nelson*, __ F.2d __ (6th Cir. Nov. 20, 1990) No. 89-5270.

9th Circuit upholds downward departure to correct disparity caused by holding guidelines unconstitutional. (140)(721) The district court departed downward from about 27 years to 12 years on the ground that the guideline sentence was disproportionately long compared to the 5- to 6-year sentences imposed on codefendants who had been sentenced after the 9th Circuit held the guidelines unconstitutional in the *Gubiensio* case but before the guidelines were upheld by the Supreme Court in *U.S. v. Mistretta*, 488 U.S. 361 (1989). In a 2-1 opinion the 9th Circuit upheld the downward departure, holding that it was "unlikely that the Commission

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ever contemplated the 9th Circuit's brief flirtation with rebellion in the *Gubiensio* case." Noting that "disparity was said to be one of the most important evils the guidelines were intended to cure," the court held that "on these unusual facts" the district court properly departed downward. Judge Kozinski dissented, arguing that the ruling was contrary to the holding of *U.S. v. Enriquez-Munoz*, 906 F.2d 1356 (9th Cir. 1990). *U.S. v. Ray*, __ F.2d __ (9th Cir. Nov. 23, 1990) No. 89-10218.

Offense Conduct, Generally (Chapter 2)

8th Circuit finds no violation of guideline section 1B1.8 in prosecution's disclosure of defendant's admissions. (185) (795) Defendant entered into a plea agreement which provided that no information which defendant provided would be used against him. Defendant then breached the plea agreement by using drugs while the agreement was in effect. The plea agreement was revoked and defendant entered into a new plea agreement which added a stipulation that a factual basis existed for using 3,000 pounds of marijuana in determining defendant's base offense level. Defendant contended that the prosecution's disclosure of his admissions regarding 3,000 pounds of marijuana for use in calculating his offense level violated guideline section 1B1.8. The 8th Circuit rejected this argument, noting that defendant voluntarily stipulated that his sentence should be based on 3,000 pounds of marijuana. The district court had reviewed with defendant the modified plea agreement, and defendant stated on the record that he understood and agreed to those terms. *U.S. v. Stevens*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-2736.

8th Circuit reaffirms that blotter paper should be included in weight calculation for LSD offense. (250) Defendant contended that the weight of blotter paper should not have been included in the weight calculations for his LSD offense. The 8th Circuit rejected this claim, noting that an 8th Circuit panel had recently decided this question adversely to defendant. *U.S. v. Ruklick*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-3080.

9th Circuit requires most analogous guideline to be applied without a multiplying factor for potency. (250)(390) Defendant was convicted of conspiracy to manufacture OPP/PPP, a novel synthetic heroin which was not listed in the guidelines' drug tables. Testimony at trial showed that OPP/PPP is a chemical analog of MPPP, a Schedule I narcotic listed in the Drug Equivalency Table. The table indicated that 1 gram of MPPP was the equivalent of 0.7 grams of heroin. Nevertheless, the district court multiplied the base offense amount by 100, based on two letters from the DEA to the Sentencing Commission which represented that OPP/PPP is 100 times as potent as MPPP. The 9th Circuit reversed, holding that once the court found that the proper analog was MPPP, it was not authorized to use a multiplying factor. The court added that it was offering no opinion "as to whether the potency considerations that concerned the district court could serve as the basis for an upward departure." *U.S. v. Ono*, __ F.2d __ (9th Cir. Nov. 23, 1990) No. 89-50138.

11th Circuit upholds departure based on large quantity of pure cocaine involved in underlying offense. (255)(745) Defendants were arrested in connection with the importation and distribution of over 278 kilograms of 91 percent pure cocaine. Pursuant to a plea agreement, each defendant pled guilty to a single count of unlawful use of a communications facility. The applicable guideline range was 6 to 12 months. The district court departed upward to four years, the statutory maximum, on the basis of the large amount of extremely pure cocaine. The 11th Circuit upheld the departure, finding it met the three-part test established in *U.S. v. Shuman*, 902 F.2d 873 (11th Cir. 1990). First, the large amount of pure cocaine involved was an aggravating circumstance not taken into consideration by the Sentencing Commission. Second, consideration of this factor was consistent with the goals of the guidelines. Finally, since the district court could have sentenced defendants to 15 to 19 years had it been able to sentence defendants on the basis of their actual conduct, the extent of the departure was reasonable. *U.S. v. Asseff*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89- 5823.

3rd Circuit finds no double jeopardy violation in prior sentencing court's consideration of current offense. (270)(680) The district court dismissed counts related to defendant's earlier arrest on the ground that the defendant had already been punished for these offenses by a judge who considered them at a prior sentencing, and therefore double jeopardy barred the prosecution. The 3rd Circuit reversed, finding that the sentencing judge's consideration of the prior arrest did not constitute "punishment." Information about the earlier arrest could not have been used to calculate defendant's base offense level, since the judge had no gram count for defendant's earlier transaction. Nor had the earlier arrest been used as the basis for an upward departure. On the other hand, the arrest did play a role in denying a reduction for acceptance of responsibility and assessing a penalty for obstruction of justice. In addition, it may have played a role in the judge's decision to sentence defendant at the top of the applicable guideline range. However, none of these uses constituted "punishment," and thus did not implicate the double jeopardy clause. *U.S. v. Garcia*, __ F.2d __ (3rd Cir. Nov. 28, 1990) No. 90-1190.

5th Circuit upholds consideration of cocaine to be distributed under common scheme or plan. (275) Defendants argued that because they had agreed to purchase and distribute only seven kilograms of cocaine, it was improper for the district court to sentence them on the basis of the 20 kilograms to be distributed by their co-conspirators as a

group. The 5th Circuit rejected this argument, finding the guidelines clearly authorize including drugs not specified in the count of conviction if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. In this case, there was ample evidence from which to conclude that defendants were part of a common scheme or plan to distribute 20 kilograms of cocaine. *U.S. v. Giraldo-Lara*, __ F.2d __ (5th Cir. Nov. 27, 1990) No. 89-7115.

1st Circuit upholds enhancement based upon gun found in car in airport parking lot. (284) Defendant was arrested at the airport attempting to open a locker which he had been told contained cocaine. A loaded semiautomatic pistol was seized from defendant's automobile, which was parked in the airport parking lot. The 1st Circuit upheld an enhancement based on defendant's possession of the gun during a drug offense, noting that "we would be blinking reality were we to hold that the weapon's presence was purely coincidental or that any connection between it and the crime of conviction was improbable." *U.S. v. McDowell*, __ F.2d __ (1st Cir. Nov. 14, 1990) No. 89-1061.

8th Circuit upholds enhancement based upon possession of gun in automobile. (284) A witness testified that he saw a pistol in an automobile from which defendant and a co-defendant were distributing cocaine. The 8th Circuit held that this evidence was sufficient to support the upward adjustment in defendant's offense level based upon her possession of a firearm during the commission of a drug offense. *U.S. v. Turpin*, __ F.2d __ (8th Cir. Nov. 26, 1990) No. 90-1628WM.

9th Circuit holds that repetition of the same false testimony over did not justify upward departure in perjury case. (320)(746) Defendant was convicted of making false declarations in violation of 18 U.S.C. section 1623 during the trial of his wife. The district court departed upward from 16-24 months based on its conclusion that the 70 pages of defendant's testimony contained "more than 100 of these one-statement lies." The 9th Circuit reversed, holding that the essential conduct "is ordinarily the same regardless of the number of questions and answers it takes to illicit the tale." Thus is was improper for the court to "consider that fact that a number of false statements have been charged in a single count" as a ground for an upward departure. The district court's finding that these false declarations were "somehow extraordinary" was clearly erroneous. *U.S. v. Goodrich*, __ F.2d __ (9th Cir. Nov. 20, 1990) No.89-50674.

11th Circuit reverses sentencing of principal as accessory after the fact. (320)(380) Defendant engaged in money-laundering schemes with two different coin and precious metal dealers. When the dealers were subpoenaed to testify before a grand jury, defendant asked them to identify someone else as the person who set up the money laundering schemes. Defendant was convicted of obstructing justice. The guideline for obstruction, section 2J1.2(c)(1), contains a cross-reference to the guideline for accessory after the fact, section 2X3.1, which is to be applied if the offense involves obstructing the investigation or prosecution of a criminal offense. Finding defendant's conduct was an attempt to protect others from prosecution, the district court sentenced defendant as an accessory after the fact. The 11th Circuit reversed, holding that defendant's conduct was an attempt to protect himself from punishment for the underlying money laundering scheme. Since defendant was a principal of the underlying money laundering offense, he could not be sentenced as an accessory after the fact. He should have been sentenced under guideline section 2J1.2(a). *U.S. v. Huppert*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5917.

Adjustments (Chapter 3)

1st Circuit remands case where record did not reflect five or more participants. (430) Defendant received a four-level enhancement in offense level based on his role as an organizer or leader of an offense involving five or more participants. The 1st Circuit remanded for resentencing, finding no evidence in the record that five or more participants were involved. Although the presentence report recommended the upward adjustment, the report neither suggested who the five participants might have been nor discussed why five or more participants were involved. Only four individuals who might qualify as participants, including defendant, were named in the report. The judge made no findings in this regard and the government's brief did not address the issue. *U.S. v. McDowell*, __ F.2d __ (1st Cir. Nov. 14, 1990) No. 89-1061.

3rd Circuit determines that defendant who handled negotiations with undercover agent was leader or supervisor. (430) The 3rd Circuit rejected defendant's argument that he should not have received a two level increase in offense level based on the finding that he was a leader or supervisor of a drug conspiracy. There was "ample" evidence in the record to support the district court's determination. Defendant handled the original negotiations with an undercover agent and determined both the location and the price of the drugs. Defendant eventually reached an agreement with the undercover agent, used another defendant as an intermediary and had another defendant bring the cocaine to him so that he could complete the sale. *U.S. v. Gonzalez*, __ F.2d __ (3rd Cir. Nov. 16, 1990) No. 90-5188.

8th Circuit upholds determination that defendant who brought other participants into drug deal was organizer. (430) The 8th Circuit upheld the district court's four level increase in defendant's base offense level for being an organizer. Defendant brought the other participants together and set up the location of the drug deal. Defendant flew to the location, arranged for hotel rooms for the buyers and

sellers, cut part of the cocaine, communicated between groups of dealers, and participated in the drug sale to FBI agents. *U.S. v. Wiegers*, __ F.2d __ (8th Cir. Nov. 14, 1990) No. 90-1462.

8th Circuit finds that defendant who handled proceeds from drug sales was manager or supervisor. (430) Evidence indicated that defendant encouraged another person to become involved in a drug conspiracy by allowing the conspirators to use the person's apartment as a base of operations. Defendant also had responsibility for handling the proceeds from the drug sales. The 8th Circuit found that this evidence supported the district court's finding that defendant was a manager or a supervisor, justifying a three-level increase in offense level. *U.S. v. Turpin*, __ F.2d __ (8th Cir. Nov. 26, 1990) No. 90-1628WM.

8th Circuit upholds determination that defendant was an organizer of drug distribution ring. (430) Evidence at trial supported a finding that there were at least five other participants in defendant's criminal activity. There was testimony that defendant fronted crack cocaine to one person, sold crack to three others who then resold it, and provided the drug to a fifth person in exchange for that person registering defendant's vehicles in that person's name rather than defendant's. These persons would contact defendant by paging his beeper. The district court concluded that defendant "got cars in other people's names, apartments in other people's names, and he controlled them and he controlled the crack which was the whole basis of their operation . . ." The 8th Circuit found that the district court's finding that defendant was an organizer or leader was not clearly erroneous. *U.S. v. Yerks*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-2621.

11th Circuit affirms that defendant who attempted to evade Coast Guard was manager. (430) Defendant and others were arrested by the Coast Guard on a boat containing 495 bales of marijuana. When the Coast Guard initially approached the boat, the boat ignored the Coast Guard's attempts to communicate and attempted to move away. At some point in the encounter, defendant, the first mate of the boat, emerged from the pilothouse and motioned for the Coast Guard vessel to move out of the boat's way. The district court concluded that defendant's act of motioning the Coast Guard vessel to move away during its pursuit made defendant more culpable than the rest of the crew, who remained in the background during the pursuit. The 11th Circuit agreed, finding that defendant's actions might evidence a greater degree of control over the criminal enterprise and some degree of decision-making authority. *U.S. v. Castillo-Valencia*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5712.

5th Circuit finds defendant with minor role in drug transaction did not have minor role in conspiracy. (440) In the factual resume that defendant signed as part of her guilty plea, she admitted that she had been involved on a daily basis in acquiring, transporting, and distributing cocaine and money over a period of about two years. The 5th Circuit found that defendant was not entitled to a reduction for her minor role. Although she may have had a minor role in the particular transaction that led to her arrest, she was not a minor participant in the cocaine distribution ring. *U.S. v. Giraldo-Lara*, __ F.2d __ (5th Cir. Nov. 27, 1990) No. 89-7115.

11th Circuit rejects argument that defendants had minor role in offense as mere transporters of cocaine. (440) Defendants contended that they had a minor role in their offense as mere transporters of cocaine with no knowledge of the quantity involved. The 11th Circuit rejected this argument based on defendants' apparent knowledge of the large amount of cocaine involved. One defendant offered the other defendant $1,000 to move a car parked at a local mall and told the other defendant that he suspected that the car contained drugs and that he was being followed. The removal of the back seat of the car to increase storage space for the cocaine and the distinct cocaine odor from the back passenger compartment and the trunk should have indicated to defendants that a large amount of cocaine was stored in the car. Moreover, defendants looked into the trunk and verified the sizeable cocaine load being transported by the vehicle. *U.S. v. Asseff*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5823.

11th Circuit refuses to consider argument not raised in district court. (440)(800) Defendant failed to object to the denial of a downward adjustment in his base offense level for being a minor participant. Instead, he sought to have his minor role considered in determining his sentence within the applicable guideline range. The 11th Circuit therefore refused to review defendant's argument that he had been improperly denied a reduction in offense level for being a minor participant. *U.S. v. Asseff*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5823.

8th Circuit upholds obstruction enhancement for use of alias despite no loss to government. (460) Defendant received an upward adjustment for obstruction of justice based upon his use of an alias. Defendant did not dispute that he gave arresting officers an alias and later signed another alias on a financial status affidavit at his first appearance before the federal magistrate. Defendant did contend that the enhancement was improper because there was no showing that his use of aliases caused the government to lose any time, manpower or money. The 8th Circuit found that whether the government suffered such a loss was irrelevant, since guideline section 3C1.1 encompasses attempted obstruction, which does not require success in actual obstruction. *U.S. v. Yerks*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-2621.

8th Circuit holds that misleading investigators about identity of accomplice constituted obstruction. (460) When de-

fendant and her accomplice were arrested, the accomplice gave the police a false name. The police were unable to connect the crime with the accomplice because of the false name, and charges against the accomplice were eventually dismissed. At defendant's trial, which ended in a mistrial, defendant referred to the accomplice by the false name. When the accomplice's true identity was finally discovered, defendant and the accomplice were charged in a superseding indictment and convicted. The 8th Circuit found that defendant's attempts to mislead authorities as to the true identity of her accomplice justified the enhancement for obstruction of justice. Defendant knew the accomplice's true identity, as evidenced by her address book which was recovered from her motel room. Moreover, there was no evidence that the false name was a legitimate alias for the accomplice, rather than an assumed name designed to mislead investigators. *U.S. v. Turpin*, __ F.2d __ (8th Cir. Nov. 26, 1990) No. 90-1628WM.

9th Circuit holds that defendant waived right to challenge adjustment for obstruction by failing to object. (460)(800) At sentencing, the district court summarized the recommendations of the probation officer in the presentence report, including the addition of "two levels because the defendant lied at trial." When asked if there was any objection to the probation officer's computation, defense counsel replied, "no, we concur." Later, the court asked if there were any other objections to the presentence report, and defense counsel replied "no, your honor." Rule 32(c)(3)(D), Fed. R. Crim. P. provides that "where factual inaccuracy is alleged, the defendant has the burden of introducing, or at least proffering, evidence to show the inaccuracy." Relying on this language and cases in other circuits, the 9th Circuit held that the defendant waived his right to challenge the two-level increase for obstructing justice under 3C1.1, "because he agreed to the adjustment and failed to present the issue in the district court." *U.S. v. Visman*, __ F.2d __ (9th Cir. Nov. 28, 1990) No. 89-10630.

11th Circuit affirms obstruction of enhancement for defendant who assisted effort to evade capture. (460) Defendant was the first mate on a boat carrying 495 bales of marijuana from Colombia. Evidence revealed that, unlike others of the crew, he and the captain were fully aware of presence of the marijuana and were more centrally involved in the conspiracy to distribute the marijuana. When the boat was approached by a Coast Guard vessel, the boat attempted to evade capture by refusing to communicate with the Coast Guard and trying to move away from the vessel. The 11th Circuit found that the district court's determination that defendant aided the captain's attempt to evade the Coast Guard vessel was not clearly erroneous and justified the three point increase in offense level for obstruction of justice. *U.S. v. Castillo-Valencia*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5712.

8th Circuit finds failure to object to mistake in determining offense level constituted ineffective assistance of counsel. (480)(520)(760) Defendant was a career offender. A month prior to defendant's sentencing, the guidelines were amended to permit a court to reduce a career offender's base offense level by two points for acceptance of responsibility. When the presentence report was prepared, the reduction was not possible, so that even though the report noted that such a two point reduction was applicable, no such reduction was given. The district court accepted the probation officer's findings, and defendant's trial counsel did not object. The 8th Circuit found that defense counsel's performance at the sentencing hearing constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1983). First, counsel's failure to object to the base offense level was equivalent to defendant's having no counsel at all. Second, counsel's error was so serious that it deprived defendant of a fair sentence. The case was remanded for the district court to determine the acceptance of responsibility issue. *U.S. v. Ford*, __ F.2d __ (8th Cir. Nov. 15, 1990) No. 90- 5028.

9th Circuit upholds denial of credit for acceptance of responsibility for offense of conviction. (480) Guideline section 3E1.1 requires that a defendant accept responsibility "only for the offense of conviction." The defendant argued that he was denied credit for acceptance of responsibility because he did not elaborate on his involvement in the "whole criminal enterprise." The 9th Circuit held that the record did not support this assertion. The sentencing court stated that the defendant did not accept responsibility "for his acts, primarily his acts of perjury." Only after the court announced its decision did the defendant make statements apologizing for his perjury. *U.S. v. Goodrich*, __ F.2d __ (9th Cir. Nov. 20, 1990) No. 89-50674.

5th Circuit upholds denial of acceptance of responsibility reduction where defendant denied involvement in drugs. (485)(820) A district court's findings as to a defendant's acceptance of responsibility will only be overturned if clearly erroneous. Moreover, the standard of review may be even more deferential than usual: "Because the trial court's assessment of a defendant's contrition will depend heavily on credibility assessments, the 'clearly erroneous' standard will nearly always sustain the judgment of the district court in this area." In this case, the 5th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility. Although defendant pled guilty, during an interview with the probation officer, defendant maintained that he was not involved in anything illegal and that he was not involved with drugs. *U.S. v. Giraldo-Lara*, __ F.2d __ (5th Cir. Nov. 27, 1990) No. 89-7115.

11th Circuit upholds consideration of defendant's decision to go to trial in denying credit for acceptance of responsibility. (485) Defendant and others were arrested in a boat containing 495 bales of marijuana. Defendant contended

that he was entitled to a two point reduction in base offense level because he voluntarily cooperated with the government by telling them what he knew concerning where and when the boat was supposed to rendezvous with the marijuana. The 11th Circuit rejected his argument. The district court had found that defendant's decision to proceed to trial was evidence of his failure to accept personal responsibility for his offense. Although a district court may not refuse to find acceptance of responsibility simply because a defendant elects to go to trial, it is a factor that "may properly be considered along with other factors in determining whether there has been an acceptance of responsibility." *U.S. v. Castillo-Valencia*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5712.

Criminal History (§ 4A)

5th Circuit counts "deferred adjudication probation" as prior sentence where defendant entered guilty plea. (500) Defendant was on "deferred adjudication probation," under Texas law, and argued that this should not count as a "prior sentence" in his criminal history score. The 5th Circuit rejected this argument. In Texas, when a deferred adjudication probation is imposed, the criminal action is temporarily stilled and the accused is given an opportunity to demonstrate good behavior. If he succeeds, the criminal action is dismissed. If he fails, the criminal action proceeds. Guideline section 4A1.2(f) provides that "diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted [as a prior sentence]. A diversionary disposition resulting from a finding or admission of guilt . . . is counted as a [prior] sentence." Since the record indicated that defendant entered a guilty plea in the state prosecution, his "deferred adjudication probation" could properly be counted as a prior sentence. *U.S. v. Giraldo-Lara*, __ F.2d __ (5th Cir. Nov. 27, 1990) No. 89-7115.

8th Circuit finds unsupervised probation constitutes a criminal justice sentence. (500) Guideline section 4A1.1(d) provides that a defendant's criminal history score shall be increased by two "if defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status." Defendant committed a drug offense while on unsupervised probation in connection with his conviction for fourth degree burglary, which arose out of a domestic misunderstanding with a former wife. Defendant contended that his unsupervised probation was not "the sort of probation contemplated by the guidelines" as warranting an increase in criminal history score. The 8th Circuit disagreed, finding that guideline section 4A1.1(d) broadly defines "any criminal sentence" to include probation, whether supervised or unsupervised. Moreover, the fact that defendant's crime arose out a "domestic misunderstanding" did not entitle defendant to be treated with leniency. *U.S. v. Knighten*, __ F.2d __ (8th Cir. Nov. 15, 1990) No. 89-5605.

8th Circuit refuses to consider whether career offender provision violates constitution. (520)(800) Defendant argued that the career offender provision under which he was sentenced discriminated against his socioeconomic class, was fundamentally unfair, violated the equal protection clause, and constituted cruel and unusual punishment. He failed to raise any of these arguments in the district court. Therefore the 8th Circuit stated it would not consider the arguments unless a "clear miscarriage of justice otherwise would result." In this case, defendant entered a plea agreement to obtain the government's recommendation of a sentence between 120 and 150 months. Since defendant received a 150-month sentence, the court found no "likelihood" of a miscarriage, and therefore refused to consider defendant's claims. *U.S. v. Ybabez*, __ F.2d __ (8th Cir. Nov. 23, 1990) No. 90-5024.

9th Circuit holds that robbery under California law is by definition a crime of violence for career offender purposes. (520) Robbery as defined by California Penal Code section 211 is a crime committed directly against and in the presence of the victim through "force or fear." Thus, the 9th Circuit found that it is "certainly the kind of crime that presents a serious risk that physical force may be used." The term "a crime of violence" is defined in the career offender section of the guidelines, section 4B1.2, by reference to 18 U.S.C. section 16. That section describes a crime of violence as an offense that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The commentary to that guideline specifically includes robbery as a crime of violence. Accordingly the 9th Circuit held that robbery under California law is by definition a crime of violence for career offender purposes. *U.S. v. McDougherty*, __ F.2d __ (9th Cir. Nov. 28, 1990) No. 89-50245.

9th Circuit holds that career offender sentence may be imposed without regard to the procedural requirements of 21 U.S.C. section 851. (520) 21 U.S.C. section 851 provides certain procedural requirements when the government seeks to obtain the increased statutory penalties for prior convictions provided in 21 U.S.C. sections 841-858. The 9th Circuit held that these procedural requirements do not apply to the career offender provision of the guidelines, because that provision "does not entail increasing the statutory penalties for the defendant's crime." Rather the career offender guideline simply implements the statutory mandate for the Sentencing Commission to assure that certain career offenders receive sentences "at or near the maximum term authorized" for their crime. The 9th Circuit held that "the requirements of section 851 simply do not apply in these circumstances." *U.S. v. McDougherty*, __ F.2d __ (9th Cir. Nov. 28, 1990) No. 89-50245.

9th Circuit holds that career offender's prior convictions need only be proven by a preponderance. (520) The defendant argued that due process requires the government to charge and prove the prior convictions used for the career offender guidelines beyond a reasonable doubt. The 9th Circuit rejected the argument, relying on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), upholding Pennsylvania's mandatory minimum sentencing act. That Act provided for a mandatory minimum sentence if the judge found by a preponderance of the evidence at sentencing that the defendant visibly possessed a firearm. The court also relied on *U.S. v. Brewer*, 853 F.2d 1319 (6th Cir. 1988) holding that the Armed Career Criminal Act "is-a sentence enhancement and not a separate statutory offense." Thus the government "is not required to prove a defendant's prior convictions beyond a reasonable doubt." Here the government established by the presentence report and copies of the conviction records that the defendant did commit the two predicate prior convictions. This was sufficient to comply with due process. *U.S. v. McDougherty*, __ F.2d __ (9th Cir. Nov. 28, 1990) No. 89-50245.

9th Circuit holds that California first degree burglary is a "crime of violence" for career offender purposes. (520) Applying the "categorical" approach of *Taylor v. U.S.*, 110 S.Ct. 2143, 2159 (1990), the 9th Circuit held that first degree burglary of a residence under California Penal Code section 460 is a "crime of violence" within the meaning of 18 U.S.C. section 16(b). The court stated that "the confluence of common sense and precedent lead to the conclusion that the unauthorized daytime entry of the dwelling of another with the intent to commit a larceny or any felony carries with it a substantial risk that force will be used against the person or property of another." Therefore first degree burglary under California law is a "crime of violence" for purposes of sentence enhancement under guideline section 4B1.1, the career offender guideline. *U.S. v. Becker*, __ F.2d __ (9th Cir. Nov. 20, 1990) No. 89-50240.

Determining the Sentence (Chapter 5)

9th Circuit upholds public apology as condition of probation. (560) Two police officers were convicted of perjury in connection with their EEOC complaint against the police department. As a condition of probation the judge ordered them to publish an apology in the local newspaper or in the police department's newsletter. On appeal they argued that the probation condition violated their First Amendment right to refrain from speaking. The 9th Circuit rejected the argument, noting that the test for validity of probation conditions, even where preferred rights are affected, is "whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public." Here the court held that a public apology may serve a rehabilitative purpose. *U.S. v. Clark*, __ F.2d __ (9th Cir. Nov. 14, 1990) No. 89-10252.

5th Circuit remands one case and reverses another where court gave incorrect advice on supervised release. (580) At the time of their pleas, the district court told both defendants that the maximum penalty was 20 years and a million dollars in fines. As to one defendant, the court said the maximum supervised release term was three years. As to the other defendant, the court said a two year term was mandatory. In fact, the guidelines required three to five years on supervised release. At sentencing, the district court imposed five years of supervised release on the first defendant and three years on the second. The 5th Circuit remanded the first defendant's case, noting that given the overwhelming evidence of guilt, he could not plausibly assert that he would have changed his plea had he known that he could face two further years of supervised release. However, he may have understood that his term of supervised release could not exceed three years. The second defendant's case was reversed and he was allowed to plead anew because the failure to inform him of the minimum and maximum terms of supervised release constituted an "entire failure" to address the core concern of Rule 11. *U.S. v. Andres*, __ F.2d __ (5th Cir. Nov. 27, 1990) No. 89-1844.

9th Circuit holds that state criminal restitution obligation is dischargeable in bankruptcy under Chapter 13. (610) In a brief one sentence order, the 9th Circuit held that "on the authority of *Pennsylvania Dept. of Public Welfare v. Davenport*, 110 S.Ct. 2126 (1990), we affirm the decision of the district court that a state criminal restitution obligation is dischargeable under Chapter 13 of the bankruptcy code." *In re Price*, __ F.2d __ (9th Cir. Nov. 23, 1990) No. 89-35482.

6th Circuit upholds community service imposed on defendant unable to pay fine. (630) The 6th Circuit rejected the government's contention that the district court's decision not to fine defendant was improper. The reason the district court did not impose a fine was because it expressly found that defendant was not able to pay a fine. Under guideline section 5E1.2(f), if a defendant establishes that he cannot pay a fine, a district court may waive the fine and impose an additional sanction such as community service. In this case, defendant was required to provide 100 hours of community service. *U.S. v. Nelson*, __ F.2d __ (6th Cir. Nov. 20, 1990) No. 89-5270.

Departures Generally (§ 5K)

5th Circuit rejects argument that court punished defendant for cooperating in undercover activities without court's consent. (720) Defendant contended that the district court improperly punished him for cooperating, after his plea hearing and before sentencing, in undercover activity without the

court's permission. He argued that the district court punished him by rejecting his request for a downward departure. The 5th Circuit rejected this argument. An appellate court will uphold a district court's refusal to depart unless it violates the law, is imposed as a result of incorrect application of the guidelines, or is a departure from the applicable guidelines. Here, the court did not depart and there was no incorrect application of the guidelines. Defendant actually received a two-point reduction for acceptance of responsibility based on defendant's cooperation. In addition, defendant's argument would improperly shift the burden from a defendant to the district court to show that the court did not violate the law. *U.S. v. Andres*, __ F.2d __ (5th Cir. Nov. 27, 1990) No. 89-1844.

8th Circuit finds district court exercised discretion not to make downward departure. (720) Defendant contended that the district court improperly believed that it lacked the power to make a downward departure. The judge stated "Well, I don't see how I could justify a downward departure under the facts of this case at all except to just say that I think the guidelines are set too severe which I sometimes do, but that's not my determination. I've got to go by the guidelines." The 8th Circuit found this statement reflected a discretionary decision not depart based upon the facts of the case. *U.S. v. Yerks*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-2621.

8th Circuit reaffirms that it may not, on defendant's motion, review extent of downward departure. (720)(800) Defendant contended that the district court should have made more of a downward departure in light of his substantial assistance to the government, his failure to profit substantially from his drug dealings, and the prospect that he would be more than 60 years old at the time of his release under the current sentence. The 8th Circuit found that the district court considered these factors in determining the sentence. Moreover, an appellate court cannot not review the extent of a downward departure on a defendant's motion. *U.S. v. Ybabez*, __ F.2d __ (8th Cir. Nov. 23, 1990) No. 90-5024.

8th Circuit reverses where district court misunderstood authority to depart downward for diminished capacity. (720) The district court denied a downward departure because it found that defendant's diminished capacity was not the sole cause of his offense. The 8th Circuit remanded for resentencing, finding that the district court misunderstood its authority to grant a downward departure. The guidelines policy statement for diminished capacity does not require defendant's mental state to have caused the offense. Rather, a departure is justified if "defendant's diminished capacity comprised a contributing factor in the commission of the offense." *U.S. v. Ruklick*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-3080.

11th Circuit reverses downward departure based on dependent personality disorder. (722) Defendant was persuaded by his co-defendant to rob a bank at gunpoint. A psychologist diagnosed defendant as having a "dependent personality disorder," which could cause him to do unpleasant things to win approval. The 11th Circuit rejected this as a grounds for a downward departure. A defendant's emotional or mental condition is not ordinarily relevant in determining whether a departure is authorized. Defendant was not entitled to a downward departure based on his diminished capacity, since this is only available to one who commits a non-violent crime. Armed robbery is a crime of violence regardless of whether defendant's gun was loaded or fired. Defendant was also not entitled to a departure based on coercion or duress, since there was no threat of injury or damage to property. Defendant introduced no evidence that his co-defendant "engaged in anything more substantial than run-of-the-mill persuasion." *U.S. v. Russell*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-8920.

11th Circuit rejects downward departure based on likelihood of recidivism. (730)(734) Defendant fell into criminal history category I. The district court found a downward departure was justified because "the court is confident that defendant will not get involved again in any type of criminal activity." The 11th Circuit reversed, finding that likelihood of recidivism was a factor considered by the Sentencing Commission in the formulation of the criminal history categories. Although the Sentencing Commission recognized that it could not guarantee that likelihood of recidivism would have been adequately considered in all cases, guideline section 4A1.3 provides that category I is designed for a first offender with the lowest risk of recidivism. Therefore, a district court is not authorized to consider risk of recidivism as a mitigating factor for a defendant in category I. *U.S. v. Russell*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-8920.

Plea Agreements, Generally (§ 6B)

3rd Circuit upholds government's withdrawal of proposed plea agreement. (790) The government offered a plea agreement to three defendants, but demanded that all three accept the agreement. When only two of the defendants agreed to the plea package, the government withdrew the proposal. The proposal was never presented to the district court. The three defendants were tried and convicted by a jury. The 3rd Circuit rejected the argument that the government's withdrawal of the plea agreement was improper. Since the government had made unanimous acceptance of the agreement a condition precedent to the agreement, the district court did not err in refusing to order specific performance of the agreement. The court also rejected the argument that the prosecutor's requirement of unanimous acceptance violated due process. Neither defendant who agreed to the plea package detrimentally relied on the terms

of the agreement and therefore, trial by jury was an adequate remedy for any impropriety that may have arisen from the government's action. *U.S. v. Gonzalez*, __ F.2d __ (3rd Cir. Nov. 16, 1990) No. 90-5188.

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

8th Circuit determines it need not decide issue where result would not change applicable guideline range. (800) Defendant contended that it was improper for the district court to set his base level at 36 rather than 34 based upon an additional 460 grams of cocaine for which he was not charged. The 8th Circuit refused to consider the issue. Defendant's offense level, after adjustments for obstruction of justice and his leadership role, would result in an offense level of either 42 or 40. Combined with his criminal history score, both offense levels would result in a guideline range 360 months to life. Defendant had received a 360 month sentence. Therefore, it was unnecessary to consider defendant's claim. *U.S. v. Yerks*, __ F.2d __ (8th Cir. Nov. 21, 1990) No. 89-2621.

11th Circuit finds applicability of a particular guideline a mixed question of law and fact. (820) The 11th Circuit found that a determination of whether a particular guideline applies is a mixed question of law and fact. The underlying questions of fact are reviewed under the clearly erroneous standard. However, whether the facts require the application of a particular guideline is a legal conclusion subject to de novo review. In this case the district court erred in concluding that defendant was an accessory after the fact. *U.S. v. Huppert*, __ F.2d __ (11th Cir. Nov. 20, 1990) No. 89-5917.

Death Penalty

Supreme Court vacates state's ruling that prisoner may be medicated to make him competent to be executed. (860) In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Supreme Court held that incompetent prisoners cannot be executed. In this case, the Louisiana courts found that the prisoner was competent when medicated, and held that he could be medicated against his will in order to carry out the death penalty. The Supreme Court granted certiorari, and after argument, vacated and remanded the case for reconsideration in light of *Washington v. Harper*, 494 U.S. __, 110 S.Ct. 1028 (1990). That case held that a prisoner may be medicated without consent if he is dangerous to himself or others and the medication is in his medical interest. *Perry v. Louisiana*, __ U.S. __, 111 S.Ct. ___ (Nov. 13, 1990) No. 89-5120.

Supreme Court reverses "reasonable doubt" instruction that suggested too high a degree of doubt at penalty phase. (868) In this death penalty case, the court gave a reasonable doubt instruction, stating that to be reasonable, a doubt must be such as "would give rise to a grave uncertainty." It is not "a mere possible doubt." It is "an actual substantial doubt." The court added that mathematical certainty was not required, but a "moral certainty." In a unanimous per curiam opinion, the Supreme Court held that "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." The judgment was reversed. *Cage v. Louisiana*, __ U.S. __, 111 S.Ct. __ (Nov. 13, 1990) No. 89-7302.

Forfeiture Cases

7th Circuit upholds forfeiture of real property under gambling forfeiture statute. (900) Claimant argued that 18 U.S.C. section 1955(d), which provides for the forfeiture of "any property" used in violation of the federal anti-gambling statute, does not provide for the forfeiture of real property. The 7th Circuit rejected this argument, finding the term "all property" encompassed both real and personal property. Although in 1984 Congress amended several other forfeiture statutes to clarify that they included real property, and did not so amend the gambling forfeiture statute, claimant's argument that this evidenced Congressional intent to exclude real property from the gambling forfeiture statute amounted to "speculation." *U.S. v. On Leong Chinese Merchants Association Building*, __ F.2d __ (7th Cir. Nov. 14, 1990) No. 90-1191.

7th Circuit upholds forfeiture of entire building against proportionality arguments. (900)(910) Claimant contended that forfeiture of an entire three-story building was inappropriate. The 7th Circuit noted that claimant failed to present these arguments to the district court, and therefore, they could not serve as a basis for a reversal. Nonetheless, the court found the arguments were without merit. The district court had no discretion to order a proportional, rather than a total, forfeiture. Nor did forfeiture of the entire building violate the 8th Amendment's prohibition against disproportionate punishment, since the 8th Amendment does not apply to civil in rem actions. Moreover, there was no unfairness in seizing the entire building, because the gambling was not confined to any one small area of the building. Gambling had been discovered on two different floors, and on at least one occasion, close to 100 hundred people were present. The building itself had been modified to harbor the gambling activity, with a camera and electronically-activated gates to monitor outsiders. *U.S. v. On Leong Chinese Merchants Association Building*, __ F.2d __ (7th Cir. Nov. 14, 1990) No. 90-1191.

7th Circuit upholds denial of motion for continuance in forfeiture case. (920) The district court denied claimant's motion for a continuance of the summary judgment proceedings in a forfeiture action. Claimants contended that the stay of discovery which the government had been granted during the

pendency of a related criminal investigation made it impossible for claimants to obtain evidence with which to oppose the government's motion. In particular, claimants were unable to depose two government agents who had provided information concerning illicit gambling activities which took place in the building in question. The 7th Circuit found that the denial of the motion for a continuance was not an abuse of discretion. Claimant did not identify the information that it hoped to gain by deposing the adverse witnesses. This was merely a case of a party "seek[ing] to avoid the entry of an adverse judgment by raising the unlikely possibility that, upon further discovery, an adverse witness may contradict an earlier statement or volunteer an admission." *U.S. v. On Leong Chinese Merchants Association Building*, __ F.2d __ (7th Cir. Nov. 14, 1990) No. 90-1191.

7th Circuit finds probable cause that building was being used to conduct illegal gambling business. (950)(960) State police raided claimant's building three times in two years and discovered illegal gambling activities. The FBI raided the building a fourth time and interrupted the same gambling activities. Claimant argued that forfeiture of the building was improper because the government failed to prove an underlying state law violation, since at the time of the FBI raid, no arrests were made. Moreover, although owners of the building were present at the three state raids, only gamblers were arrested. The 7th Circuit rejected these contentions. First, the fact that none of the owners were arrested was immaterial, since there is no innocent owner defense. Second, the fact that no arrests were made at the FBI raid did not mean state laws were not being violated. At the time of the FBI raid, the same gaming activities were being conducted as were conducted at the time of the state raids. Since gamblers were arrested for violations of state law on these earlier occasions, it was reasonable to assume that state law was being violated during the FBI raid. *U.S. v. On Leong Chinese Merchants Association Building*, __ F.2d __ (7th Cir. Nov. 14, 1990) No. 90-1191.

EXHIBIT
C

THE INTERSTATE AGREEMENT ON DETAINERS ACT

AND

THE WRIT OF HABEAS CORPUS AD PROSEQUENDUM

A Practical Guide for the Federal Prosecutor In the Eastern District of Pennsylvania

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INTRODUCTION

The Interstate Agreement on Detainers Act has been a source of confusion and even dread for federal prosecutors. It has caused confusion, because it is not always obvious whether or not it applies to a given prisoner defendant. It has caused dread because of its draconian penalties for the federal prosecutor who, making a mistake, runs afoul of its anti-shuttling and speedy trial provisions and finds the case dismissed for seemingly trivial technicalities having nothing to do with guilt or innocence.

There are additional reasons for confusion about the Agreement. The Interstate Agreement on Detainers was drafted with interstate transfers of prisoners in mind. While it works reasonably well between the states, its application to the federal government is less satisfactory. The United States does not fit well as a "State" either conceptually or operationally, and the federal prosecutor can find himself within the ambit of the Agreement without realizing it. Also, when Congress enacted the Interstate Agreement on Detainers Act, it failed to consider the interplay of the Act with the writ of habeas corpus ad prosequendum, the mechanism historically used by federal authorities to obtain custody of state prisoners for federal trial. It took a Supreme Court decision to resolve this difficult question, and the resolution still leaves a trap for the unwary prosecutor.

Finally, the Interstate Agreement on Detainers Act is a relatively obscure act that is not typically addressed in law school or on the bar examination. The average prosecutor first learns of it through the admonitions of his peers or through the sometimes painful process of trial and error.

This monograph attempts to provide some historical perspective, explain how the Agreement operates in practice, identify the major Interstate Agreement on Detainers Act issues, cover the case authority as it exists to date, and provide a few suggestions that may prove helpful in avoiding the potential pitfalls of the Act.

HISTORICAL BACKGROUND

Detainers

A detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent. Detainers generally are based on outstanding criminal charges, outstanding parole or probation violation charges, or additional sentences already imposed against the prisoner. Carchman v. Nash, 473 U.S. 716, 719, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985).

Before the Agreement on Detainers, which is discussed below, there were several means by which states could obtain custody of prisoners from other jurisdictions, none of which was entirely satisfactory. The traditional method of interstate rendition was formal extradition pursuant to Article IV, §2, cl. 2 of the United States Constitution, 18 U.S.C. §3182, and the Uniform Criminal Extradition Act, a uniform act adopted by virtually all states that sets forth procedures. (While extradition does not apply to federal/state prisoner transfers, the limitations of the extradition process are noteworthy here, because they led to the development of detainer practice.) Extradition was a cumbersome and time consuming process, requiring the approval of the governors of both states and allowing for habeas corpus challenge to interstate rendition. Some states entered into special compacts with each other concerning the transfer of prisoners; however, such efforts lacked uniformity and were sporadic, because unless there was large fugitive traffic between the states involved, these compacts tended to present an administrative burden that outweighed the benefit of simplicity of prisoner transfer.

Dissatisfaction with the formal extradition process and occasional interstate compacts between small groups of states resulted in the development of an informal practice of filing detainers against prisoners. Rather than seeking immediate transfer, a law enforcement authority in one state would merely notify the state having custody of the prisoner that he was wanted in the second state at the completion of his sentence. At that time the prisoner would be paroled to the detainer and typically would waive extradition. This practice led to abuses noted below. See generally United States v. Mauro. 436 U.S. 340, 355, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978). Detainers were less important in federal/state prisoner transfers which, historically, were accomplished through the writ of habeas corpus ad prosequendum. Lodging a detainer was not a prerequisite to obtaining a writ; however, the use of detainers became popular and spread from interstate practice into federal/state practice as well. Anyone in law enforcement could prepare and submit a detainer, and if it was accepted and lodged by the prison records office at the facility where the prisoner was held, the prisoner had little means to challenge it before the advent of the Agreement on Detainers. No judicial supervision is involved in the lodging of detainers, and detainers may be filed without prosecutorial approval or even knowledge. See for example United States v. Schrum, 504 F.Supp. 23 (D.Kan. 1980), aff'd. 638 F.2d 214 (CAlO 1981).

It should be noted that captioning a document "Detainer" does not necessarily make it one. See for example United States v. Currier, 836 F.2d 11 (CAl 1987) where the document labeled "detainer" stated that the prosecution had ended with a finding of guilt on all counts but did not expressly give notice that the defendant was wanted for future prosecution in the jurisdiction that submitted it. Thus, the document was held not to be a detainer within the meaning of the Interstate Agreement on Detainers Act, and the prisoner was denied the Act's protections.

The Interstate Agreement on Detainers Act

During the late 1940's and 1950's, when rehabilitation of criminals was the prime objective of penological thinking, it was realized that detainers posed a substantial obstacle to prisoner rehabilitation. Detainers might be lodged routinely and then be forgotten for years. A prisoner serving a sentence in one state might have a detainer from another state lodged against him and have no way of resolving the second state's charges. He would simply remain in prison until paroled by the first state to the second state's detainer. The existence of one or more detainers in and of itself might delay parole. Prison administrators were thwarted in their efforts toward rehabilitation, because the inmate who had a detainer lodged against him faced a bleak and uncertain future and had little incentive to respond to training programs.

Additionally, such prisoners were often deprived of the ability to take advantage of many of the prison's programs aimed at rehabilitation (e.g. work release, educational release, furlough, or release to a half-way house), because having a detainer lodged against oneself normally resulted in a security classification that precluded program participation. Ironically, upon parole to the detainer, the second state often found itself with a stale case or one that had never been indicted. Dismissal of such charges frequently followed once the state that received the paroled prisoner pursuant to its detainer was faced with evaluating the prosecutive worthiness of its case. Worse yet, there were instances where the informal and casual passage of information between law enforcement authorities resulted in erroneous detainers based on inaccurate information; thus, prisoners were held for crimes with which they were never charged, even by complaint and warrant. See generally United States v. Mauro, 436 U.S. at 357360. It should be noted that at this time the right to a speedy trial remained relatively undeveloped. The Sixth Amendment right to a speedy trial was not applied to the states through the Fourteenth Amendment until Kloofer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d (1967). The federal Speedy Trial Act, 18 U.S.C. §3161 et seq., was not passed until 1974.

The Interstate Agreement on Detainers was a reaction against the abuses of the detainer system. The Agreement, consisting of nine articles, was drafted by the Council of State Governments in 1956 and included in the Council's suggested State Legislation Program for 1957. Its stated purpose was "to encourage the expeditious and orderly disposition of [outstanding] charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints." Article I.

The operation of the Agreement will be discussed in greater detail below. For introductory purposes, suffice it to say that the Agreement provides a procedure by which a prisoner incarcerated in one party State (the "sending state") may demand the speedy disposition of "any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner" by another party state (the "receiving state"). Article III. It also provides a parallel procedure whereby the prosecutor in the "receiving state" may initiate return of the defendant from the "sending state" and resolve charges that are the subject of his pending detainer. Article IV.

Various states enacted the Agreement. In 1970 Congress enacted the Agreement as the Interstate Agreement on Detainers Act, 18 U.S.C. Appendix §1 et seq. Its substance is found in 18 U.S.C. App. §2, which is the enactment into law of the nine articles of the Interstate Agreement on Detainers. The Agreement was drafted primarily for application between the states. Adoption of the Interstate Agreement on Detainers Act by the United States has presented some serious problems of interpretation and has provided fertile ground for litigation. Unfortunately, the Interstate Agreement on Detainers Act was passed hurriedly by Congress with a scant legislative history that has proved notably unhelpful by failing to explore the ramifications of the Agreement's application to the federal government. United States v. Umbower, 602 F.2d 754 (CA5 1979); see also Judge Garth's dissenting opinion in United States v. Thompson. 562 F.2d 232, 238-246 (CA3 1977).

These ambiguities were compounded by a later development. Up to the time of Congressional enactment, the Agreement was in the nature of a uniform law, with the case law authority of one member jurisdiction holding equal persuasive authority as that of another. However, by a six (6) to three (3) vote, the Supreme Court held in 1981 that Congress' action of entering into an agreement between the states (making the United States a "State" within the meaning of the Agreement's definitional section) transformed the states' agreement into a Congressionally sanctioned interstate compact under the Compact Clause of the United States Constitution, Article I, §10, cl. 3. Cuyler v. Adams, 449 U.S. 442, 101 S.Ct. 708, 66 L.Ed.2d 650 (1981). The significance of this holding is that it transformed interpretation and construction of the Agreement into a matter of federal law. Thus, although the Agreement was designed for interstate practice and fits that practice better, and although the state courts had a thirteen year head start in interpreting the Agreement, federal case law now overshadows and eclipses state decisions construing the Agreement.

The rights a defendant receives under the Agreement on Detainers are nothing more than a statutory set of procedural rules; they do not rise to the level of constitutionally guaranteed rights. Cooney v. Fulcomer, 886 F.2d 41 (CA3 1989). Entry of a guilty plea to the charges that the detainer reflected constitutes a waiver of the provisions of the Interstate Agreement on Detainers Act. Thus, a defendant cannot plead guilty and then challenge his conviction in a habeas corpus proceeding claiming that the charges should have been dismissed for a Detainers Act violation. United States v. Fulford. 825 F.2d 3 (CA3 1987) citing United States v. Palmer, 574 F.2d 164 (CA3), cert. denied. 437 U.S. 907 (1978); Beachem v. Attorney General of Missouri, 808 F.2d 1303 (CA8 1987).

At this writing the Agreement has been enacted by forty-eight (48) states (the two hold-outs are Mississippi and Louisiana), the District of Columbia, Puerto Rico, and the Virgin Islands, in addition to the United States. As will be discussed in greater detail below, the Agreement on Detainers is typically used to obtain custody for trial in one member "state" of sentenced prisoners incarcerated in another member "state". Thus, it is used by federal prosecutors to obtain jurisdiction of the person of prisoners under sentence in the prisons of one of the member states (other than the United States itself) for trial.

Writ of Habeas Corpus ad Prosequendum

In Ex parte Bollman, 4 Cranch 75, 2 L.Ed. 554 (1807), Chief Justice Marshall interpreted §14 of the first Judiciary Act to use the words "habeas corpus" in generic form, including the writ "necessary to remove a prisoner in order to prosecute him in the proper jurisdiction wherein the offense was committed." Since Bollman the statutory authority of federal courts to issue writs of habeas corpus ad prosequendum to secure the presence, for purposes of trial, of defendants in federal criminal cases, including defendants then in state custody, has never been in doubt. Mauro, 436 U.S. at 357, citing Carbo v. United States, 364 U.S. 611, 81 S.Ct. 338, 5 L.Ed.2d 329 (1961). In 1948 this authority was made explicit with the enactment of 28 U.S.C. §2241.

Writs of habeas corpus ad prosequendum have traditionally served as the mechanism by which federal courts obtain the presence for trial of accused criminals who are being held in state custody. See for example United States v. Cooke, 795 F.2d 527 (CA6 1986) and United States v. Graham, 622 F.2d 57 (CA3 1980). Likewise, writs of habeas corpus ad prosequendum are used to obtain the presence of federal prisoners incarcerated in one federal district for trial in another federal district. See for example United States v. Stoner, 799 F.2d 1253 (CA9 1986) and United States v. Krohn, 558 F.2d 390 (CA8), cert. denied, 434 U.S. 868 (1977). These writs are issued by a federal judge upon the explicit motion of a federal prosecutor, and typically, they are executed virtually immediately. The cumbersome extradition procedures that apply between states have no applicability to the securing of prisoners between the state and federal government levels. Thomas v. Levi, 422 F.Supp. 1027 (E.D. Pa. 1976).

The relationship and interaction between the writ of habeas corpus ad prosequendum and the Interstate Agreement on Detainers Act will be described below.

APPLICATION OF THE AGREEMENT ON DETAINERS

The Agreement on Detainers applies to anyone who has "entered upon a term of imprisonment in a penal or correctional institution in a party State", who, "during the continuance of the term of imprisonment", has lodged against him a detainer concerning a pending "untried indictment, information, or complaint" from any other party State. Articles III(a) and IV(a). On its face this language seems clear enough. However, in practice, a number of issues have arisen that have been the subject of litigation. Many of these issues have now been resolved, however, some remain uncertain.

Pre-trial Detainees, Unsentenced Prisoners, and Sentenced Prisoners Who Have Not Yet Arrived at Their Destination

It is well established that the provisions of the Interstate Agreement on Detainers Act do not apply to pre-trial detainees. United States v. Fulford, 825 F.2d 3 (CA3 1987); United States v. Currier, 836 F.2d 11 (CA1 1987); United States v. Reed, 620 F.2d 709 (CA9), cert. denied, 449 U.S. 880 (1980); United States v. Harris, 566 F.2d 610 (CA8 1977); United States v. Roberts, 548 F.2d 665 (CA6), cert. denied, 431 U.S.931 (1977). The Agreement also does not apply to prisoners who have been convicted but have not yet been sentenced on the conviction. Currier; Crooker v. United States, 814 F.2d 75 (CA1 1987); United States v. Wilson, 719 F.2d 1419 (CA10 1983); United States v. Fromal, 725 F.Supp. 856 (E.D.Pa. 1989). The reason the Agreement does not apply to these groups is fairly obvious. Because they have not yet been given a "term of imprisonment", they do not fit within the plain language of the statute. It has also been held that the Agreement does not apply to a prisoner who, though sentenced, has not yet been taken to the correctional facility to commence his sentence. Fulford; Crooker; Wilson; Lublin v. Johnson, 628 F.Supp. 1496 (E.D.N.Y. 1986). The rationale for this holding is that the rehabilitative process the Agreement is designed to protect does not begin until the prisoner is transferred from the detention facility to the prison designated by his sentence; thus, until the transportation occurs he has not yet "entered" upon his term of imprisonment.

Probation and Parole Violators

Reversing Nash v. Jeffes, 739 F.2d 878 (CA3 1984), the United States Supreme Court held in Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985) that Article III of the Agreement on Detainers (authorizing prisoner initiated resolution of detainers) does not apply to detainers based on probation violation charges, because a probation violation charge is not a detainer based on "any untried indictment, information, or complaint" within the meaning of the Agreement. Accord, United States v. Jankowski, 771 F.2d 70 (CA3 1985). Just as Article III of the Agreement on Detainers does not apply to probation violators, neither does Article IV (prosecutor initiated resolution of detainers). Fulford. Similarly, the Agreement on Detainers does not apply to detainers based on parole violation charges. Hopper v. United States Parole Com'n, 702 F.2d 842 (CA9 1983); Queenel v. Meese, 656 F.Supp. 1496 (N.D.Cal. 1986).

Detainers Lodged to Return Prisoners for Sentencing

It remains unclear whether the protections of the Agreement on Detainers apply to a prisoner in one party state who has lodged against him a detainer from another party state pertaining to a case in which he has been convicted but has not yet been sentenced. United States v. Coffman, 714 F.Supp. 478 (D.Kan. 1989), aff'd. 905 F.2d 330 (CA10 1990), citing numerous state appellate cases, holds that the term "trial", as used in the Agreement, ends with the adjudication of guilt and does not include sentencing. Thus, the Tenth Circuit held that there was no violation of the anti-shuttling provisions of the Interstate Agreement on Detainers Act when a defendant was returned to the state reformatory after his plea of guilty in federal court but before sentencing on the federal charges. Several federal courts have reached a contrary result, however. Generally, they analogize to the concept of trial for Sixth Amendment speedy trial purposes and conclude that sentencing is part of trial for purposes of the Agreement. Tinghitella v. State of Cal., 718 F.2d 308 (CA9 1983); Hall v. State of Fla., 678 F.Supp. 858 (M.D.Fla. 1987); Walker v. King, 448 F.Supp. 580 (S.D.N.Y. 1978). In both Hall (speedy trial violation) and Walker (anti-shuttling violation) convictions were vacated and indictments dismissed. The Third and Eighth Circuits have expressly declined to reach the issue. Kearns v. Turner, 837 F.2d 336 (CA8 1988); Johnson v. Williams, 666 F.2d 842 (CA3 1981). Until

this matter is decided by the United States Supreme Court, the prudent course of action for the federal prosecutor is to assume that trial includes sentencing within the meaning of the Agreement, and to be guided by that principle in dealing with the Agreement's speedy trial and anti-shuttling provisions which are discussed in greater detail below. Section 9 of the Interstate Agreement on Detainers Act, a 1988 amendment discussed below, presents a means to avoid this troublesome issue.

Detainers Lodged to Assure Service of Imposed Sentence

It is not uncommon that a prisoner in the institution of one jurisdiction will have lodged against him a detainer from another jurisdiction noting that he is wanted there for service of an already imposed sentence. It may be a consecutive sentence or a concurrent sentence that, depending on the time of parole of the prisoner in the state in which he is being held currently, may expire without a transfer or may necessitate transfer for completion. Typically, such detainers will result where a prisoner resolves a detainer through the provisions of the Interstate Agreement on Detainers Act and is convicted and sentenced. After sentencing he will be returned to the "sending state" [Article V(e)] and a detainer reflecting his sentence will accompany him. The Interstate Agreement on Detainers Act does not apply to detainers of this type, because they do not pertain to untried indictments, informations or complaints. Breeze v. Trickey, 824 F.2d 653 (CA8 1987); Johnson v. Williams, 508 F.Supp. 52 (D.N.J. 1980), aff'd, 666 F.2d 842 (CA3 1981). See also United States v. Roy, 830 F.2d 628 (CA7 1987).

HOW THE AGREEMENT ON DETAINERS WORKS

The operation of the Interstate Agreement on Detainers Act can be explained best in terms of its nine official forms which are uniformly employed in all party states. As previously noted, the United States is defined in Article II(a) of the Interstate Agreement on Detainers Act as a "State". These forms, together with the Act itself, are attached for the reader's ready reference.

Activation of the Agreement on Detainers

The Agreement on Detainers' processes become activated when a detainer reflecting an untried indictment, information or complaint from a party state is lodged against a prisoner serving a prison sentence in another party state. The records office of the prison receives the detainer and lodges it as a hold against its subject's release. Article III(c) requires that the prisoner promptly be notified of the detainer and the implications of the Agreement. Thus, when the detainer is received and lodged, the prison's Records Office prepares Form 1, gives it to the prisoner, and requires the prisoner's signature as acknowledgment. Form 1 gives the prisoner notice of the lodging of the detainer, its source and content (i.e. the charges), and advises him that he may request final disposition of the charges underlying the detainer.

Form 1 also notifies the prisoner that the prosecutor of the jurisdiction that has lodged the detainer may seek to obtain temporary custody of him to resolve the charges, and advises him further that in such event he may write to the Governor of the state in which he is currently imprisoned to request disapproval of any request for delivery of temporary custody of himself to the demanding jurisdiction. Such letters are seldom written and, when written, seldom successful. However, they are of little more than academic interest to the federal prosecutor. Where the United States is the demanding or "receiving state", no gubernatorial disapproval power exists because of the Supremacy Clause of the United States Constitution. United States v. Graham, 622 F.2d 57 (CA3), cert. denied, 494 U.S. 904 (1980). See also, United States v. Mauro, 436 U.S. 340, 363, 98 S.Ct. 1834, 1848, 56 L.Ed.2d 329, 348-349 (1978).

Once the detainer is lodged and the Form 1 process has been completed, the prisoner may be returned to the jurisdiction lodging the detainer (the "receiving state") either through his own initiation or through the initiation of the prosecutor.

Prosecutor Initiated Return: Article IV

Once the detainer is lodged, the demanding or "receiving" prosecutor, acting under the authority of Article IV(a) of the Agreement, may make a written request to the appropriate authority of the state where the prisoner subject to the detainer is located for temporary custody of him. Normally, this will be the warden of the institution where he is incarcerated. The written request is effectuated by the prosecutor's filing of Form 5. Form 5, entitled "Request for Temporary Custody", identifies the person sought, the state of prosecution and the charges pending. Five copies of Form 5 should be prepared and distributed as specified in the block at the top of the form.

Upon receipt of Form 5, Article IV(b) requires that the custodial authority in the "sending state" send Form 3, entitled "Certificate of Inmate Status" to the "receiving" prosecutor. Form 3 provides information about the time served and the anticipated extent of future custody of the prisoner in the "sending state".

Generally, there would be a thirty (30) day waiting period from the time of the "sending state's" receipt of the Form 5 until the request is honored. During this time the prisoner could petition the governor of the "sending state" to disapprove the "receiving state's" request for temporary custody. Article IV(a). As noted, where the United States is the "receiving state", the Supremacy Clause of the Constitution precludes gubernatorial disapproval of a federal request for temporary custody. Graham.

After the "receiving" prosecutor is notified that the Request for Temporary Custody has been approved, (pursuant to Article V(a) he will receive Form 4: "Offer to Deliver Temporary Custody"), he should then comply with Article V(b) by filing Form 6, entitled "Evidence of Agent's Authority to Act for Receiving State." Form 6 designates an agent to return the prisoner for trial, advises the "sending state" of the agent's identity, and specifies the date on which temporary custody will be taken.

Once the prisoner is returned to the "receiving state" as a result of a prosecutorial request authorized by the filing of Form 5, he must be tried in the "receiving state" under the conditions imposed by Article IV(c) and (e).

Article IV(c) contains a speedy trial provision. It requires that trial commence within one hundred twenty (120) days of the prisoner's return to the "receiving state". Article IV(c)'s time limit operates independent of and supplementary to any speedy trial statute or rule that may prevail in the "receiving state" (e.g. 18 U.S.C. §3161). Failure to commence trial within the time limit will result in voiding the detainer and dismissing the underlying indictment, information or complaintwith prejudice. Article V(c). Necessary and reasonable continuances beyond the one hundred twenty (120) day period may be granted "for good cause shown in open court, the prisoner or his counsel being present." Additionally, under certain circumstances, the one hundred twenty day period may be deemed "tolled". Article VI(a); United States v. Taylor, 861 F.2d 316 (CAl 1988); United States v. Nesbitt, 852 F.2d 1502 (CA7 1988); United States v. Roy, 771 F2d. 54 (CA2 1985), cert. denied. 485 U.S. 1110 (1986); United States v. Scheer, 729 F.2d 164 (CA2 1984); Bush v. Muncy, 659 F.2d 402 (CA4 1981), cert. denied. 455 U.S. 910 (1982). But see Stroble v. Anderson, 587 F.2d 830 (CA6 1978), cert. denied. 440 U.S. 940 (1979). Certain actions of a defendant may also be deemed to constitute a waiver of the right to be tried within one hundred twenty days. United States v. Hines. 717 F.2d 1481.(CA4 1983), cert. denied, 467 U.S. 1214 (1984); United States v. Odom, 674 F.2d 228 (CA4), cert. denied, 457 U.S. 1125 (1983).

Article IV(e) contains the anti-shuttling provision, which has proved to be a dangerous trap for the unwary prosecutor. It provides that if the prisoner is returned by the "receiving state" to the "sending state's" custody before trial on any indictment, information or complaint, the charges will be dismissed with prejudice. Thus, once custody is gained the prisoner should be arraigned, any pre-trial motions should be litigated, and he should be tried without any intervening returns to the custody of the "sending" jurisdiction. While there is a split of authority on this point, it would appear wise to hold the prisoner following trial in the event of a conviction until he is sentenced. See the "Application of the Agreement on Detainers" section of this monograph above. Taking a prisoner via the Agreement and returning him to the "sending" jurisdiction's custody following arraignment, in the hope of taking custody a second time for trial, violates Article IV(e) and will result in dismissal, especially in the Third Circuit. Mauro; United States v. Williams, 615 F.2d 585 (CA3 1980); United States v. Sorrell, 413 F.Supp. 138 (E.D.Pa. 1976), affirmed, 562 F.2d 227 (CA3 1977), cert. denied, 436 U.S. 949 (1978); United States v. Thompson, 562 F.2d 232 (CA3 1977), cert. denied, 436 U.S. 949 (1978). See also United States v. Schrum, 638 F.2d 214 (CAlO 1981). Some courts have found ways around what appears to be clear statutory language mandating dismissal. See for example United States v. Taylor. 861 F.2d 316 (CAl 1988); United States v. Roy, 771 F.2d 54 (CA2 1985); and Sassoon v. Stynchcombe, 654 F.2d 371 (CA 5 1981). The November 18, 1988 amendment to the Interstate Agreement on Detainers Act (18 U.S.C. App. §9) may provide an escape from the Third Circuit's rule of strict application of the language of Article IV(e). Section 9 will be discussed later.

Like Article IV(c)'s speedy trial provision, Article IV(e)'s anti-shuttling provision may be waived. A request by a prisoner to return to the "sending state" before he has been tried in the "receiving state" will operate as a waiver. Thus, if the defendant requests to go back to his former place of imprisonment, whether to be closer to his family, or to facilitate communication with his lawyer, or to be present for a parole hearing, or for medical treatment, or any other reason, he will be deemed to have waived his anti-shuttling rights. Moreover, current authority holds that the waiver need not be "knowing and intelligent" in the constitutional sense. This is so because rights under the Interstate Agreement on Detainers Act are statutory and not constitutional in nature. Thus, a prisoner request to return to the "sending state" prison waives his Article IV(e) rights, even though the prisoner does not know about the anti-shuttling provision. Yellin v. Cooper, 828 F.2d 1471 (CAlO 1987); Webb v. Keohane. 804 F.2d 413 (CA7 1986); United States v. Lawson, 736 F.2d 835 (CA2 1984); United States v. Black, 609 F.2d 1330 (CA9 1979), cert. denied, 449 U.S. 847 (1980); Gray v. Benson, 608 F.2d 825 (CAlO 1979); United States v. Eaddy, 595 F.2d 341 (CA6 1979); Camp v. United States, 587 F.2d 397 (CA8 1978); United States v. Ford, 550 F.2d 732 (CA2 1977), aff'd sub nom. United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978); United States v. Scallion, 548 F.2d 1168 (CA5 1977), cert. denied, 436 U.S. 943 (1978). However, the prisoner must be explicit in stating a desire to return to the "sending state". Thus, in Eaddy, the defendant's expression of indifference as to where he was to be held pending trial in the "receiving state" was held not to constitute a waiver of Article IV(e).

While the vast weight of authority holds that a waiver of the anti-shuttling provision need not be "knowing and intelligent", it is a simple matter to obtain such a waiver. An on the record statement or written acknowledgment from the defendant to the effect that he is aware of his rights under the Agreement's antishuttling provision and that he nonetheless wishes to return to the "sending" jurisdiction before trial should suffice. United States v. Rossetti, 768 F.2d 12 (CAl 1985). It would be still better to get on the record the additional fact that the defendant discussed the matter with his attorney and has reached a considered decision. Additionally, it is useful to get the defendant's reasons on the record for wanting to return to the original place of incarceration.

Given the disastrous results that can occur in the event of a violation of the speedy trial and anti-shuttling provisions of the Agreement, it is particularly important for the prosecutor to ascertain whether of not the prisoner he is dealing with is covered by the protections of the Agreement. As noted above in the section of this monograph concerning "Applicability of the Agreement on Detainers", it is not always obvious who is and is not covered by the Agreement.

After resolution of the subject charges, the "receiving" prosecutor must file Form 9: "Prosecutor's Report of Disposition of Charges".

Prisoner Initiated Return: Article III

Article III(a) of the Agreement on Detainers provides that the prisoner, himself, may request speedy disposition of untried indictments, informations or complaints by offering custody of himself, for trial, to the "receiving state".

The prisoner offers himself for trial following his receipt of Form 1 by securing, through the prison warden, the transmission of Forms 2, 3, and 4 to the "receiving" prosecutor. Form 2: "Inmate's Notice of Place of Imprisonment and Requests for Disposition of Indictments, Informations or Complaints" is the formal request document. Forms 3 and 4 must be transmitted with Form 2. Article III(a). The "receiving" prosecutor must bring the prisoner to his jurisdiction and commence trial within one hundred eighty (180) days after he and the court of his jurisdiction receive Form 2. Failure to so commence trial will result in the voiding of the detainer and dismissal of the underlying indictment, information or complaint, with prejudice. Article V(c); United States v. Ford, 550 F.2d 732 (CA2 1977), aff'd sub nom. United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978); United States v. Eaddy, 595 F.2d 341 (CA6 1979); United States v. Smith, 696 F.Supp. 1381 (D.Ore. 1988).

As with requests for temporary custody initiated by the prosecutor, continuances beyond the trial commencement deadline may be granted for good cause shown in open court, the prisoner or his counsel being present. See Article III(a) and Stroble v. Anderson, 587 F.2d 830 (CA6), cert. denied, 440 U.S. 940 (1978). Again, the "receiving state's" speedy trial laws or rules may mandate commencement of trial on pain of dismissal within the one hundred eighty (180) day period permitted by Articles III(a) and V(c). Under certain circumstances "excludable time" from the one hundred eighty day period may be deemed to exist. United States v. Scheer, 729 F.2d 164 (CA2 1984); Young v. Mabry, 596 F.2d 339 (CA8), cert. denied, 455 U.S. 853 (1979). Likewise, the running of the one hundred eighty day period may be deemed to be "tolled" as the result of actions taken by the defendant. Article VI(a); United States v. Mason, 372 F.Supp. 652 (N.D.Ohio 1973).

Following receipt of Forms 2, 3, and 4, the prosecutor must decide whether or not he wishes to take custody and prosecute. If the prosecutor refuses or fails to accept temporary custody of the prisoner, the detainer is voided and the underlying indictment, information or complaint is dismissed with prejudice. Article V(c). If the decision is made to prosecute, the receiving prosecutor must file Forms 6 and 7. Form 7 is the "Prosecutor's Acceptance of Temporary Custody in Connection with a Prisoner's Request for Disposition of a Detainer." Copies of Form 6 and 7 must be sent to the Agreement Administrator. A copy of Form 7 must be sent to the Agreement Administrator of the "sending state", also.

If the "receiving" prosecutor accepts the prisoner's offer of temporary custody under Article III, trial (and probably sentencing in the event of conviction -- see the "Application of the Agreement on Detainers" section of this monograph) must be completed prior to return of the prisoner to the original place of imprisonment. Just as in Article IV(e), return before completion of trial will result

in dismissal with prejudice. Article III(d); United States v. Rossetti, 768 F.2d 12 (CA1 1985); Burrus v. Turnbo, 743 F.2d 693 (CA9 1984). A defendant may waive Article III(d)'s anti-shuttling provision by expressly requesting that he be held in the "sending state's" penitentiary pending trial in the "receiving state". United States v. Rossetti, 768 F.2d 12 (CA1 1985).

Letters from prisoners to prosecutors requesting disposition of charges against themselves and offering temporary custody should not be dismissed casually. They may be deemed the functional equivalent of Forms 2 and 4, and, given other facts and circumstances of the case, may be held to trigger the one hundred eighty (180) day time limit of Article III(a). See for example Nash v. Jeffes, 739 F.2d 878 (CA3 1984), rev'd on other grounds sub nom. Carchman v. Nash, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985); Franks v. Johnson, 401 F.Supp. 669 (E.D.Mich. 1975); Schofs v. Warden, FCI, Lexington, 509 F.Supp. 78 (E.D.Ky. 1981). However, the burden of proof is on the prisoner to show substantial compliance with the offer of temporary custody provisions of the Agreement before charges will be dismissed for an Article III(a) violation; in practice the courts generally hold the prisoner to a rather strict standard. Casper v. Ryan, 822 F.2d 1283 (CA3 1987), citing Williams v. Maryland, 445 F.Supp. 1216 (D.Md. 1978), Gray v. Benson, 443 F.Supp. 1284 (D.Kan. 1978), and Beebe v. Vaughn, 430 F.Supp. 1220 (D.Del. 1977). See also United States v. Moline, 833 F.2d 190 (CA9 1987), cert. denied, 485 U.S. 938 (1988). Probably the most common deficiency of these prisoner letter requests is that they do not provide the functional equivalent of Form 3, the "Certificate of Inmate Status".

Once again it bears repeating that the prosecutor must be as clear as possible as to whether or not the Agreement on Detainers applies to the prisoner with whom he is dealing. See the section of this monograph entitled "Application of the Agreement on Detainers" for some of the issues involved in making this determination.

After resolution of charges, the "receiving" prosecutor must file Form 9.

"Return to the Original Place of Imprisonment": Problems Arising from Multi-Jurisdictional Criminal Conduct, and Problems Relating to Where the Federal Government as the "Receiving State" Houses the Prisoner

The anti-shuttling provisions of the Agreement provide that: "If trial is not had on any indictment. . .contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment. . .shall not be of further force or effect, and the Court shall enter an order dismissing the same with prejudice." Article III(d). See also Article IV(e).

On the state level, these provisions have been held to require trial in all counties of the "receiving state" before return to the "sending state". Thus, the "receiving" county prosecutor, who tries his case and returns the fugitive to the "sending state" before his fellow prosecutor in the next county tries his case, may effectuate a discharge of his fellow prosecutor's case. State v. Keener, 577 P.2d 1182 (Kan.), cert. denied, 439 U.S. 953 (1978); State v. Wiggins, 425 So.2d 621 (Fla.App. 1983). See also Fasano v. Hall, 476 F.Supp. 291 (D.Mass. 1979), aff'd, 615 F.2d 555 (CA1), cert. denied, 449 U.S. 867 (1980) and Boyd v. State, 441 A.2d 1133 (Md.App.), aff'd, 447 A.2d 871 (Md. 1982). But see Commonwealth v. Petrozziello, 491 N.E.2d 627 (Mass. App.), cert. denied, 449 U.S. 867 (1986).

Form 8 is used to control and coordinate such situations. If for example, detainers pertaining to separate and unrelated criminal informations pending in Philadelphia County, Montgomery County, and Delaware County, Pennsylvania, are lodged against the same sentenced inmate in the Michigan State Prison, the District Attorney of Delaware County may file Form 5. The warden of the Michigan

State Prison will then send copies of Forms 3 and 4 to the District Attorney of Philadelphia and Montgomery Counties, as well as the District Attorney of Delaware County. The Philadelphia and Montgomery County District Attorneys will each have to decide whether to accept custody. To accept custody, they must file Form 8. If more than one county in the "receiving state" decides to prosecute, the counties must coordinate the schedules of trials between themselves and complete their trials before the prisoner is returned to the sending state.

Application of these principles to the United States presents an obvious administrative and logistical nightmare. By the plain language of the Agreement, the United States is a "State". United States v. Krohn, 558 F.2d 390 (CA8 1977), cert. denied. 434 U.S.868 (1977); United States v. Cappucci. 342 F.Supp. 790 (E.D.Pa. 1972). See also United States v. Stoner, 799 F.2d 1253 (CA9 1986). The cases holding that the United States is one "State" within the meaning of the Agreement are cases in which the defendant sought to invoke the Agreement's protections where he was being transferred from one federal district to another federal district. The gist of these holdings, which uniformly reject the prisoner's argument, is summarized in United States v. Woods, 621 F.2d 844 (CA6), cert. denied, 449 U.S. 877 (1980): "in entering into the Agreement the United States had not agreed with itself". Thus, it seems clear that the United States is a "unitary jurisdiction" where it stands as the "sending state".

It would seem logical and consistent that when the federal government is the "receiving state", the different federal districts would stand in the same relationship as the counties of a state; thus, return of a defendant to the "sending state" by the United States Attorney of one district without prosecution of that defendant on untried indictments supported by lodged detainers from another federal district should result in the discharge of the other United States Attorney's case. However, the few circuit courts that have considered the question have declined to reach that result. In United States v. Bryant, 612 F.2d 806 (CA4), cert. denied, 446 U.S. 920 (1979), the Fourth Circuit refused to dismiss one federal district's charges as a result of the return of the prisoner to state custody after trial of another federal district's charges only, holding that for the purposes of being a "receiving state" under the Agreement on Detainers, the jurisdictional unit "state" would be deemed to be the federal district, not the entire federal judicial system. Much of the Bryant rationale hinged on the Justice Department's view that, notwithstanding the plain language of the Interstate Agreement on Detainers Act, Congress really intended that the United States only be a "sending state" and not a "receiving state". An argument based on this early Justice Department view was rejected by the Supreme Court in Mauro, and reliance on Bryant seems risky. However, Stoner, an opinion written by now Supreme Court Justice Kennedy, cites Bryant with approval and attempts to harmonize it with the other cases. See also Woods, and United States v. Umbower, 602 F.2d 784 (CA5 1979) which, in very fact specific cases, provide alternate rationales for rejecting unitary federal jurisdiction where the United States is the "receiving state".

While reliance on Bryant may prove problematic, the 1988 amendment adding §9 to the Interstate Agreement on Detainers Act appears to create a more principled way out of the dilemma. Section 9 will be discussed below.

Application of the literal language of the anti-shuttling provisions creates still another major problem when applied to the federal government. The Agreement was drafted primarily with state criminal justice systems in mind. All states have state penitentiaries. All counties have county jails. But there is not a federal prison in each federal judicial district. Where, as in the Eastern District of Pennsylvania, no federal detention facility exists, federal prisoners awaiting trial are housed in state or local facilities where they may be serving state or local sentences. Where these state and county prison facilities are part of the correctional system of the "sending state", and the federal government is the

"receiving state", confusion is likely to result on the question of whether the defendant is a state prisoner, a federal prisoner, or both at any given time. Ambiguity as to status, or simple mistakes by state prison records officers, can lead to dismissal under the Article III(d) or IV(e) anti-shuttling sanctions, even though the prisoner may be federally detained in the very same prison where he is serving his state sentence, and even though his rehabilitation may not be impaired in any meaningful way.

United States v. Thompson, 562 F.2d 232 (CA3 1977), cert. denied, 436 U.S. 949 (1978) presents a particularly egregious example of this phenomenon. In Thompson a federal heroin distribution indictment in the Eastern District of Pennsylvania was dismissed with prejudice for violating the anti-shuttling provisions where the defendant, a prisoner at Holmesburg Prison (part of the Philadelphia County prison system) serving a three to twenty-three month state sentence, was brought for a few hours to the Federal Court House at 601 Market Street in Philadelphia for arraignment on his federal indictment and was returned to Holmesburg that same day. See also United States v. Sorrell, 413 F.Supp. 138 (E.D. Pa. 1976), aff'd, 562 F.2d 227 (CA3 1977), cert. denied, 436 U.S. 2858 (1978), a virtually identical case with the same unfortunate result, distinguished only by the fact that the prisoner was held at the State Correctional Institution at Graterford.

While it is doubtful that the same result would be reached today with §9 amending the Interstate Agreement on Detainers Act, other courts have rejected the slavishly literal interpretation given the Agreement by the Third Circuit in Thompson and Sorrell. Focusing on the underlying purpose of the Interstate Agreement on Detainers Act, these courts gneerally have held that there is no interruption of rehabilitative programs justifying dismissal where the prisoner is taken into federal custody for a day or two for arraignment and then returned to the place of state custody. United States v. Taylor, 861 F.2d 316 (CA1 1988); United States v. Roy, 830 F.2d 628 (CA7 1987); United States v. Roy, 771 F.2d 54 (CA2 1985); Sassoon v. Stynchcombe, 654 F.2d 371 (CA5 1981); United States v. Chico, 558 F.2d 1047 (CA2 1977), cert. denied, 436 U.S. 947 (1978).

Still other courts have found ways to avoid the result in Thompson and Sorrell without rejecting the literal language of the anti-shuttling provisions. United States v. Persinger, 562 F.Supp. 557 (W.D.Pa. 1982) holds that this problem may be avoided if the United States Magistrate orally orders that the prisoner be maintained in federal custody and directs the marshal to maintain the prisoner in that status. Such an order is self-executing and will not be impaired by communication failures between marshals, other federal authorities and state or county prison officials. Persinger involved a federal prisoner being held in the Allegheny County Jail, the same place where he was serving a state sentence.

A similar result obtained in Shigemura v. United States, 726 F.2d 380 (CA8 1984), which held that housing a federal prisoner at a local jail where the original state sentence was being served did not transgress the Interstate Agreement on Detainers' antishuttling provisions. Shigemura involved the Saint Louis, Missouri, County Jail. Like the Eastern District of Pennsylvania, the Eastern District of Missouri had no federal penal institution within its boundaries, and the Justice Department had approved the County Jail to hold federal prisoners awaiting trial. The defendant Shigemura was confined there both as a state and federal prisoner during the pendency of the United States' temporary custody as the "receiving state".

Likewise, in United States v. Hunnewell, 891 F.2d 955 (CAl 1989), the United States took custody of a prisoner serving a sentence in the Maine State Penitentiary at Thomaston, arraigned him in federal court, and remanded him to the custody of the federal marshals who returned him to the State Penitentiary inasmuch as the District of Maine had no federal penal facility. The First Circuit

noted that literal application of the Interstate Agreement on Detainers Act language would produce a result at variance with the Agreement's objectives; the prisoner was being maintained in a stable environment and could avail himself of whatever rehabilitative programs he had undertaken or could undertake. Thus, there was no violation of the Agreement where the prisoner was returned before trial as a federal prisoner to the state prison in which he had been held by the "sending state".

Section 9

Section 9 was added to the Interstate Agreement on Detainers Act in a November 18, 1988 amendment. By making this amendment, Congress finally strove to remedy many of the problems created by the imperfect fit of the United States as a "State" within the meaning of the Agreement.

Section 9(1) provides that notwithstanding any provision of the Agreement to the contrary, where the United States is the "receiving state", any court order dismissing any indictment, information or complaint may be with or without prejudice. In determining whether to dismiss with or without prejudice, Section 9 enjoins the court to consider, inter alia, the following factors: (a) the facts and circumstances of the case which led to the dismissal; and (b) the impact of a reprosecution on the administration of the Agreement and the administration of justice. To date there is only one reported case that employs Section 9. In United States v. Iwuamadi, 716 F.Supp 420 (D.Neb. 1989) the defendant sought disposition of the charges underlying a detainer lodged against him. He was not tried within the requisite 180 days, and, therefore, a violation of Article III(a) occurred. However, the court concluded that the charges were serious and the reason for delay was an effort by the federal authorities to accommodate local authorities who were resolving one of their cases against the defendant. Therefore, the indictment was dismissed without prejudice. 18 U.S.C. App. §9(1).

Additionally, §9(2) provides that notwithstanding anything in the Agreement to the contrary, where the United States is the "receiving state", it shall not be a violation of the Agreement if prior to trial the prisoner is returned to the custody of the "sending state" pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing. Although this language has yet to be construed in any reported case, it appears to provide a sensible and principled way to resolve the problems presented by such cases as Thompson, and Sorrell.

Section 9 also provides a means to escape the unresolved question of whether or not "trial" includes sentencing. Compare Coffman and Hall. Additionally, Section 9 provides a viable means to reach a sensible result in an intellectually satisfying fashion concerning the issue presented by Bryant of whether the United States as a "receiving state" is a unitary jurisdiction.

While Section 9 appears to provide avenues of escape from some of the most vexing problems presented to federal prosecutors by the Interstate Agreement on Detainers Act, one must bear in mind that mistakes can still be made, and Section 9 will not cure all of them. It is critically important that the prosecutor be aware of Section 9 as well as all the provisions of the Agreement. Section 9(2) contemplates notice and the opportunity for a hearing before any return to the "sending state". Thus, if the prosecutor and the court act in ignorance of §9(2) and return the prisoner to the "sending state" without notice and a hearing, the results in Thompson and Sorrell can occur again. Similarly, while Section 9(1) provides that the court may dismiss an indictment with or without prejudice, the prosecutor who is knowledgeable about the Agreement's provisions and has acted on that knowledge will stand in a far better equitable position at the time of a §9(1) hearing. Also, it should be noted that having an indictment dismissed without prejudice at a §9(1) hearing may prove to be a phyrric victory, particularly if the statute of limitations runs on some or all of the indictment counts before the case can be reindicted. A knowledgeable prosecutor who has followed the requirements of the Agreement should not be in the position of trying to save his case in a §9(1) hearing.

THE RELATIONSHIP BETWEEN THE INTERSTATE AGREEMENT ON DETAINERS ACT AND THE WRIT OF HABEAS CORPUS AD PROSEQUENDUM

Historically, federal prosecutors used the writ of habeas corpus ad prosequendum to obtain custody for trial of defendants who were imprisoned in other states. Detainers are legally nonessential to the writ process which for years worked smoothly without them. However, detainer practice spread from interstate prisoner transfers to federal/state prisoner transfers. Frequently, but not invariably, prisoners taken into federal custody pursuant to a writ had a federal detainer lodged against them at the time. Congress' 1970 passage of the Interstate Agreement on Detainers Act raised the question of whether the Agreement had become the sole means .of obtaining custody of prisoners to whom it applied, or whether writs of habeas corpus ad prosequendum could continue to be used and the provisions of the Agreement (especially the anti-shuttling and speedy trial provisions) be ignored. A split in circuit court authority soon developed. The Second and Third Circuits held that a writ of habeas corpus ad prosequendum is, itself, a detainer within the meaning of the Agreement, and, therefore, any prisoner returned by a writ for federal trial was entitled to the Agreement's protections if he was within its coverage. The First, Fifth and Sixth Circuits held that an ad prosequendum writ did not, by itself, trigger the application of the Agreement.

The conflict between the circuits was resolved by the Supreme Court in United States v. Mauro, 436 U.S. 340, 98 S.Ct. 1834, 56 L.Ed.2d 329 (1978). Mauro held that:

1. a writ of habeas corpus ad prosequendum [28 U.S.C. §2241] is not in and of itself a detainer within the meaning of the Agreement on Detainers and thus does not trigger the application of the Agreement; and

2. the "receiving state" is bound by the Agreement on Detainers when it activates its provisions by filing a detainer against a sentenced prisoner in the "sending state" and then obtains his custody through use of a writ of habeas corpus ad prosequendum, which, under such circumstances, is deemed a "written request for temporary custody" within the meaning of Article IV of the Agreement (the functional equivalent of the Agreement on Detainers Form 5).

Language found in United States ex rel. Esola v. Groomes, 520 F.2d 830 (CA3 1975) and United States v. Sorrell, 413 F.Supp. 138 (E.D.Pa. 1976), aff'd, 562 F.2d 227 (CA3 1977), cert. denied, 436 U.S. 949 (1978), to the effect that the Agreement on Detainers, when applicable, provides the exclusive means of transfer, would appear to be an incorrect statement of the law in light of footnote 30 in Mauro, 436 U.S. at 364. See also Diggs v. Owens, 833 F.2d 439 (CA3 1987).

Thus, as a federal prosecutor, if you wish to secure the presence of a sentenced state prisoner for trial, and no federal detainer has been lodged against him, he may be taken into federal custody via a writ of habeas corpus ad prosequendum without regard to the provisions of the Interstate Agreement on Detainers Act, and he may be transferred back and forth between federal and state custody before trial so long as no federal detainer is lodged. However, you must always keep abreast of whether or not a federal detainer has been lodged during the course of the federal trial process, because detainers can be lodged without your knowledge or consent, and you will be held accountable for those detainers.

If a federal detainer is lodged, you may return the sentenced state prisoner by means of the Interstate Agreement on Detainers Act processes. You may also return him by means of a writ of habeas corpus ad prosequendum; however, the case will be treated as though return was effectuated under the Agreement. Most significantly, Article IV(e)'s anti-shuttling sanction will apply.

A FEW SUGGESTIONS

The following are suggestions to help the federal prosecutor in dealing with cases that may or do implicate the Interstate Agreement on Detainers Act.

1. Take a half hour to read this monograph and familiarize yourself with the Interstate Agreement on Detainers Act and the issues relating to it. If you are comfortable with the law and practice in this area, it will make your analysis of cases that may involve the Agreement much easier. Likewise, it will lessen the chance of an inadvertent discharge with prejudice of your case.

2. Whenever you learn that one of your defendants is a prisoner, you, personally, should check his status with the records office of the prison where he is being held. This should be done at your earliest convenience. Your initial object in doing this is to determine whether or not the Agreement applies. Your secondary objective is to find out whether other prosecutors are likely to attempt to try him at about the same time as you will be, thereby requiring you to undertake efforts to coordinate trial schedules. Find out if your defendant is a sentenced prisoner, a pre-trial detainee, or one who has been convicted but is not yet sentenced. If he is the later, the Agreement will not apply to him that day, but it may a week later if he is sentenced by then; therefore, you will want to determine the sentencing date for persons in such status. Next you must determine whether or not there are any pending detainers against the prisoner. Has a detainer been lodged pertaining to your case? Is there a detainer for any other untried federal case either from your district or some other federal district? Is there a detainer for any untried state prosecution?

3. Inquire into the trial schedule of any other pending state or federal case revealed by your inquiry with the records office. This will require you to call your fellow prosecutor(s) at the state and/or federal level(s) to attempt to coordinate the scheduling of your prosecutions. Nothing is more corrosive to cordial relationships between federal and state prosecutors than a federal prosecutor snatching a state prisoner via a writ of habeas corpus ad prosequendum on the eve of his state trial, or worse yet during the trial. Securing a prisoner by a writ without coordinating the action in advance with other concerned prosecutors may also effect a preemption of an on-going interstate rendition. In either case, it is extremely impolitic to manifest indifference to orderly state prosecution processes.

4. Use the writ of habeas corpus ad prosequendum to secure custody of prisoners to whom the Interstate Agreement on Detainers Act does not apply.

5. Use the Interstate Agreement on Detainers Act to secure custody of prisoners to whom it does apply. First, the Agreement provides an orderly mechanism, complete with documentation, for reasonably fast acquisition of the prisoner, and the prison authorities and marshals understand it. Second, it provides for an orderly transfer of custody that both avoids aborting state and on-going interstate renditions; also, it involves Form 8 procedures and notification to fellow federal prosecutors whose prosecutions could be jeopardized by your acting outside the Agreement. Third, you will avoid accidental sabotage of your case by a well meaning agent or marshal who lodges a detainer in your case without telling you about it. Fourth, you will avoid interruption of your trial schedule if some other federal prosecutor indicts the same defendant and writs him or transfers him under the Agreement to his district from the "sending state" prison while you are shuttling the prisoner back and forth without a detainer from calendar call to calendar call.

6. Where the Interstate Agreement on Detainers Act applies and its provisions are inconvenient, do not hesitate to seek a waiver from the defendant or agree to a waiver he proposes. The chances are that any inconvenience will be mutual. While the case law is fairly clear that the waiver does not have to be "knowing and intelligent", the better practice is to obtain such a waiver explicitly and on the record with participation of defense counsel.

7. Assume "trial", as used in the Interstate Agreement on Detainers Act, includes sentencing until there is conclusive authority to the contrary and act accordingly.

8. Assume Bryant is wrongly decided until there is conclusive authority on the unitary federal jurisdiction as a "receiving state" issue and act conservatively and with coordination to protect your own cases and those of your fellow prosecutors in other districts.

9. Whenever a prisoner to whom the Agreement arguably applies offers custody of himself to resolve a pending detainer, even if by a letter that may not fully comply with the Agreement's requirements, accept custody and resolve the case as though the Agreement's provisions apply.

10. Be aware of Section 9 and utilize it in timely fashion where appropriate.

18 APPENDIX III
INTERSTATE AGREEMENT ON DETAINERS

Pub.L. 91-538, §§ 1 to 9, Dec. 9, 1970, 84 Stat. 1397-1403

Sec.

[§ 1. Short title]

That this Act may be cited as the "Interstate Agreement on Detainers Act".

Complementary Laws:

Ala.—Code 1975, § 15-9-81.
Alaska—AS 33.35.010 to 33.35.040.
Ariz.—A.R.S. §§ 31-481, 31-482.
Ark.—(A.C.A., §§ 16-95-101 to 16-95-107).
Cal.—West's Ann.Cal.Penal Code, §§ 1389-1389.8.
Colo.—C.R.S. 24-60-501 to 24-60-507.
Conn.—C.G.S.A. 54-186 to 54-192.
Del.—11 Del.C. §§ 2540 to 2550.
D.C.—D.C. Code 1981, §§ 24-701 to 24-705.
Fla.—West's F.S.A. §§ 941.45 to 941.50.
Ga.—O.C.G.A. §§ 42-6-20 to 42-6-25.
Hawaii—HRS 834-1 to 834-6.
Idaho—I.C. §§ 19-5001 to 19-5008.
Ill.—S.H.A. ch. 38, ¶ 1003-8-9.
Ind.—West's A.I.C. 35-33-10-4.
Iowa—I.C.A. §§ 821.1 to 821.8.
Kansas—K.S.A. 22-4401 to 22-4408.
Ky.—KRS 440.450 to 440.510.
Me.—34-A M.R.S.A. §§ 9601 to 9609.
Md.—Code 1957, art. 27, §§ 616A-616S.
Mass.—M.G.L.A. c. 276 App., §§ 1-1 to 1-8.
Mich.—M.C.L.A. §§ 780.601 to 780.608.
Minn.—M.S.A. § 629.294.
Mo.—V.A.M.S. §§ 217.490 to 217.520.
Mont.—MCA 46-31-101 to 46-31-204.
Neb.—R.R.S.1943, §§ 29-759 to 29-765.
Nev.—N.R.S. 178.620 to 178.640.
N.H.—R.S.A. 606-A:1 to 606-A:6.
N.J.—N.J.S.A. 2A:159A-1 to 2A:159A-15.
N.M.—NMSA 1978, § 31-5-12.
N.Y.—McKinney's CPL § 580.20.
N.C.—G.S. §§ 15A-761 to 15A-767.
N.D.—NDCC 29-34-01 to 29-34-08.
Ohio—R.C. §§ 2963.30 to 2963.35.
Okl.—22 Okl.St.Ann. §§ 1345 to 1349.
Ore.—ORS 135.775 to 135.793.
Pa.—42 Pa.C.S.A. §§ 9101 to 9108.
R.I.—Gen.Laws 1956, §§ 13-13-1 to 13-13-8.
S.C.—Code 1976, §§ 17-11-10 to 17-11-80.
S.D.—SDCL 23-24A-1 to 23-24A-34.
Tenn.—T.C.A. §§ 40-31-101 to 40-31-108.
Tex.—Vernon's Ann.Texas C.C.P. art. 51.14.
U.S.—18 U.S.C.A.App.
Utah—U.C.A.1953, 77-29-5 to 77-29-11.
Vt.—28 V.S.A. §§ 1501 to 1509, 1531 to 1537.
Va.—Code 1950, §§ 53.1-210 to 53.1-215.
Wash.—West's RCWA 9.100.010 to 9.100.080.
W.Va.—Code, 62-14-1 to 62-14-7.
Wis.—W.S.A. 976.05, 976.06.
Wyo.—W.S.1977, §§ 7-15-101 to 7-15-107.

§ 2. Enactment into law of Interstate Agreement on Detainers

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"Article I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"Article II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"Article III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"Article IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) here-

of upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"Article V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"Article VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"Article VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"Article VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"Article IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia.

EDITORIAL NOTES

Transfer of Functions. "Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub.L. 93-198. The Office of Commissioner of the District of Columbia was abolished as of noon Jan. 2, 1975 and replaced by the Office of Mayor of the District of Columbia.

§ 4. Definition of term "appropriate court"

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions

For the United States, the Attorney General, and for the District of Columbia, the Mayor of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

EDITORIAL NOTES

Transfer of Functions. "Mayor of the District of Columbia" was substituted for "Commissioner of the District of Columbia" pursuant to section 421 of Pub.L. 93-198. The Office of Commissioner of the District of Columbia was abolished as of noon Jan. 2, 1975 and replaced by the Office of Mayor of the District of Columbia.

§ 7. Reservation of right to alter, amend, or repeal

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective date

This Act shall take effect on the ninetieth day after the date of its enactment.

EDITORIAL NOTES

References in Text. The date of its enactment, referred to in text, means Dec. 9, 1970.

§ 9. Special provisions when United States is a receiving state

Notwithstanding any provision of the agreement on detainers to the contrary, in a case in which the United States is a receiving State—

(1) any order of a court dismissing any indictment, information, or complaint may be with or without prejudice. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: The seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of the agreement on detainers and on the administration of justice; and

(2) it shall not be a violation of the agreement on detainers if prior to trial the prisoner is returned to the custody of the sending State pursuant to an order of the appropriate court issued after reasonable notice to the prisoner and the United States and an opportunity for a hearing.

(Added Pub.L. 100-690, Title VII, § 7059, Nov. 18, 1988, 102 Stat. 4408.)

Agreement on Detainers: Form I

In duplicate. One copy of this form, signed by the prisoner and the warden should be retained by the warden. One copy, signed by the warden should be retained by the prisoner.

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT

AND OF RIGHT TO REQUEST DISPOSITION

Inmate _____ No. _____ Inst. _____

Pursuant to the Agreement on Detainers, you are hereby informed that the following are the untried indictments, informations, or complaints against you concerning which the undersigned has knowledge, and the source and contexts of each.

You are hereby further advised that by the provisions of said Agreement you have the right to request the appropriate prosecuting officer of the jurisdiction in which any such indictment, information or complaint is pending and the appropriate court that a final disposition be made thereof. You shall then be brought to trial within 180 days, unless extended pursuant to provisions of the Agreement, after you have caused to be delivered to said prosecuting officer and said court written notice of the place of your imprisonment and your said request, together with a certificate of the custodial authority as more fully set forth in said Agreement. However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Your request for final disposition will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against you from the state to whose prosecuting official your request for final disposition is specifically directed. Your request will also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein and a waiver of extradition to the state of trial to serve any sentence there imposed upon you, after completion of your term of imprisonment in this state. Your request will also constitute a consent by you to the production of your body in any court where your presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which you are now confined.

Should you desire such a request for final disposition of any untried indictment, information or complaint, you are to notify _____ _____ of the institution in which you are confined.

Agreement on Detainers: Form I (continued)

You are also advised that under provisions of said Agreement the prosecuting officer of a jurisdiction in which any such indictment, information or complaint is pending may institute proceedings to obtain a final disposition thereof. In such event, you may oppose the request that you be delivered to such prosecuting officer or court. You may request the Governor of this state to disapprove any such request for your temporary custody but you cannot oppose delivery on the grounds that the Governor has not affirmatively consented to or ordered such delivery.

DATED: _____

_____
(insert name and title of custodial authority)

BY: _____
Warden - Superintendent - Director

RECEIVED

DATE _____

INMATE _____ NO. _____

five copies, if only one jurisdiction within the state involved has an indictment, information of complaint pending. Additional copies will be necessary for prosecuting officials and clerks of court if detainers have been lodged by other jurisdictions within the state involved. One copy should be retained by the prisoner. One signed copy should be retained by the warden. Signed copies must be sent to the Agreement Administrator of the state which has the prisoner incarcerated, the prosecuting official of the jurisdiction which placed the detainer, and the clerk of the court which has jurisdiction over the matter. The copies for the prosecuting officials and the court must be transmitted by certified or registered mail, return receipt requested.

Agreement on Detainers: Form 2

INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS

To: _____, Prosecuting Officer _____
(jurisdiction)

_____, Court _____
(jurisdiction)

And to all other prosecuting officers and courts of jurisdiction listed below from which indictments, informations or complaints are pending.

You are hereby notified that the undersigned is now imprisoned in

_____ at _____
(town and state)

and I hereby request that a final disposition be made of the following indictments, informations or complaints now pending against me:

Failure to take action in accordance with the Agreement on Detainers, to which your state is committed by law, will result in the invalidation of the indictments, informations or complaints.

I hereby agree that this request will operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I also agree that this request shall be deemed to be my waiver of extradition with respect to any charge or proceeding contemplated hereby or included herein, and a waiver of extradition to your state to serve any sentence there imposed upon me, after completion of my term of imprisonment in this state. I also agree that this request shall constitute a consent by me to the production of my body in any court where my presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which I now am confined.

If jurisdiction over this matter is properly in another agency, court or officer, please designate the proper agency, court or officer and return this form to the sender.

The required Certificate of Inmate Status and Offer of Temporary Custody are attached.

DATED: _____

_____
(inmate's name and number)

The inmate must indicate below whether he has counsel or wishes the court to appoint counsel for purposes of any proceedings preliminary to trial which may take place before his delivery to the jurisdiction in which the indictment, information or complaint is pending. Failure to list the name and address of counsel will be construed to indicate the inmate's consent to the appointment of counsel by the appropriate court in the receiving state.

A. My counsel is _____,
(name of counsel)

Whose address is _____.
(street, city and state)

B. I request the court to appoint counsel.

_____
(inmate's signature)

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In the case of a request initiated by a prosecuter under Article IV, copy of this Form should be sent to the prosecutor upon receipt by the warden of Form 5. Copies also should be sent to all other prosecutors in the same state who have lodged detainers against the inmate. A copy may be given to the inmate.

Agreement on Detainers: Form 3

CERTIFICATE OF INMATE STATUS

RE: _____
(inmate) (number) (institution) (location)

The (custodial authority) hereby certifies:

1. The term of commitment under which the prisoner above named is being held:

2. The time already served:

3. Time remaining to be served on the sentence:

4. The amount of good time earned:

5. The date of parole eligibility of the prisoner:

6. The decisions of the Board of Parole relating to the prisoner: (if additional space is needed use reverse side)

7. Maximum expiration date under present sentence.

8. Detainers currently on file against this inmate from your state are as follows:

DATED: _____

_____
Custodial Authority

BY: _____
Warden - Superintendent - Director

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form 2. In the case of a request initiated by a prosecutor this Form should be completed after the Governor has indicated his approval of the request for temporary custody or after the expiration of the 30 day period. Copies of this Form should then be sent to all officials who previously received copies of Form 3. One copy also should be given to the prisoner and one copy should be retained by the warden. Copies mailed to the prosecutor should be sent by certified or registered mail, return receipt requested.

Agreement on Detainers: Form 4

OFFER TO DELIVER TEMPORARY CUSTODY

Date_____

TO:_____ Prosecuting Officer
(Insert name and Title if known)

_____
(jurisdiction)

And to all other prosecuting officers and courts of jurisdiction listed below from which indictments, information or complaints are pending.

RE:_____ Number_____

Dear Sir:

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which is (described in the attached inmate's request) (described in your request of_____).
date

(The required Certificate of Inmate Status is enclosed). (The required Certificate of Inmate Status was sent to you with our letter of_____).

If the proceedings under Article IV(d) of the Agreement are indicated, an explanation is attached.

Indictments, informations and complaints charging the following offenses also are pending against the inmate in your state and you are hereby authorized to transfer the inmate to custody of appropriate authorities in these jurisdictions for purposes of disposing of these indictments, informations or complaints.

Offense	County or Other Jurisdiction

If you do not intend to bring the inmate to trial, will you please inform us as soon as possible?

Kindly acknowledge.

_____
(Name and Title of Custodial Author

BY: _____
(Warden - Superintendent - Director)

_____
(Institution and Address)

Agreement on Detainers: Form V

ive copies. Signed copies must be sent to the prisoner and to the official who as the prisoner in custody. A copy should be sent to the Agreement Administrator the state which has the prisoner incarcerated. Copies should be retained by a person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

_____ _____
(Warden - Superintendent - Director) (Institution)

_____
(address)

Please be advised that _____, who is presently an mate at your institution, is under [indictment] [information] [complaint] in the

_____ of which I am the _____
(jurisdiction) (title of prosecuting officer)
id inmate is therein charged with the [offense] [offenses] enumerated below:

Offense

_____

_____

_____

I propose to bring this person to trial on this [indictment] [information] omplaint] within the time specified in Article IV (c) of the Agreement.

In order that proceedings in this matter may be properly had, I hereby, request mporary custody of such person pursuant to Article IV (a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction I 'll return the prisoner directly to you or allow any jurisdiction you have designated take temporary custody. I agree also to complete Form IX the Notice of Disposition of a Detainer, immediately after trial.

Signed _____

Title _____

I hereby certify that the person whose signature appears above is an appropriate fficer within the meaning of Article IV (a) and that the facts recited in this request r temporary custody are correct and that having duly recorded said request, I hereby mit it for action in accordance with its terms and the provisions of the Agreement ainers.

ATED: _____ Signed _____
(Judge)

quadruplicate. All copies, signed by the prosecutor and the agent should be sent to the Administrator in the receiving state. After signing all copies, the Administrator should retain one for his files, send one to the warden of the institution in which the prisoner is located and return two copies to the prosecutor who will give one to the agent for use in establishing his authority and place one in his files.

Agreement on Detainers: Form 6

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR RECEIVING STATE

_____
Administrator of the Agreement on Detainers

_____ is confined in _____
(institution)

_____, and will be taken into custody at the
(address)

institution on _____ for return to this jurisdiction

for trial on or about _____. In accordance with Article

V(b), I have designated _____ whose signature

appears below as agent to return the prisoner.

_____
(prosecuting official)

_____
(agent's signature)

Warden

In accordance with the above representation and the provisions of the Agreement on Detainers, _____ is hereby designated as
(agent)

agent for this state to return _____ for trial.
(inmate)

_____
Administrator

Agreement on Detainers: Form VII

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of a prisoner's request for disposition of a detainer. If the offer has been received because another prosecutor in your state has initiated the request, use Form VIII. Copies of Form VII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the acceptance and the judge who signs it.

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH A PRISONER'S REQUEST FOR DISPOSITION OF A DETAINER

_____ _____
(Warden, Superintendent, Director) (Institution)

_____
(address)

In response to your letter of _____ and offer of temporary
(Date)
custody regarding _____ who is presently
(Name of Prisoner)
under indictment, information, complaint in the _____ of which
(jurisdiction)
I am _____, please be advised that I accept temporary
(Title of Prosecuting Officer)
custody and that I propose to bring this person to trial on the indictment, information or complaint named in the offer within the time specified in Article III(a) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer, immediately after trial.

COMMENTS: [If your jurisdiction is the only one named in the offer to temporary custody the space below to indicate when you would like to send your agents to conduct the prisoner to your jurisdiction. If the offer of temporary custody has been sent to other jurisdictions in your state, use the space below to make inquiry as to the order in which you will receive custody, or to indicate any arrangements you have already made with other jurisdictions in your state in this regard.]

Signed: _____

Title: _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit for action in accordance with its terms and the provisions of the Agreement on Detainers.

DATED: _____ Signed: _____
(Judge)

_____
(Court)

Agreement on Detainers: Form VIII

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of another prosecutor's request for disposition of a detainer. If the offer has been received because a prisoner has initiated the request, use Form VII to accept such an offer. Copies of Form VIII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copy should be retained by the person filing the acceptance and the judge who signs it.

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH ANOTHER PROSECUTOR'S REQUEST FOR DISPOSITION OF A DETAINER

TO: _____ _____
(Warden, Superintendent, Director) (Institution)

_____
(Address)

According to your letter of _____ _____
(Date) (Name of Prisoner)
_____ is being returned to this state at the

request of _____ of _____
(Title of Prosecuting Officer) (Jurisdiction)
I hereby accept your offer of temporary custody of _____
(Name of Prisoner)
who also is under indictment, information or complaint in the _____
(Jurisdiction)
_____ of which I am the _____
(Title of Prosecuting Officer)

I plan to bring this person to trial on said indictment, information or complaint within the time specified in Article IV (c) of the Agreement on Detainers.

I hereby agree that immediately after trial is completed in this jurisdiction, I will return the prisoners directly to you or allow any jurisdiction you have designated to take temporary custody. I agree also to complete Form IX, the Notice of Disposition of a Detainer immediately after trial.

COMMENTS: [Use the space below to make inquiry as to order in which your jurisdiction, will receive custody or to inform the warden of arrangements you have already made with other jurisdictions in your state in this regard.]

Signed: _____

Title: _____

I hereby certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request, I hereby transmit it for action in accordance with its terms and the provisions of the Agreement on Detainers.

ATED: _____ Signed: _____
(Judge)

quadruplicate - One copy to be retained by the prosecutor; one copy to be sent to the warden of the state of original imprisonment, one copy to be sent to the compact administrator of the state of original imprisonment, one copy to be sent to the warden or agency who will have jurisdiction over the prisoner when he returns to the state which placed the detainer to serve his new sentence.

PROSECUTOR'S REPORT ON DISPOSITION OF CHARGES

TO: _____ _____
(Superintendent) (Date)

_____
(Name of Institution in which the Prisoner was originally imprisoned)

_____
(Street Address)

_____ _____ _____
(City) (State) (Zip Code)

_____, _____
(Name of Inmate) (Number)

transferred to the State of _____ pursuant to the Interstate
(Name of State)

Agreement on Detainers for trial based on the pending charge or charges contained in the Agreement on Detainers, Form II (if transfer was at the request of inmate) or in Forms IV and V (if transfer was as request of the prosecutor).

The disposition of the pending charge or charges in <u>this</u> jurisdiction was as follows:

Disposition: _____

_____

_____

_____
Prosecuting Officer

_____
Jurisdiction

EXHIBIT D

PAY PERIOD 01 PAYROLL CHANGES

Beginning December 16 - Ending December 29, 1990
Reflected in Salary Payments Received January 9, 1991

Federal Tax Change - A slight decrease will occur in the computation for Federal income taxes withheld.

State Tax Changes - There is a decrease in the computation for taxes withheld for theDistrict of Columbia, California, Oklahoma, and Montana.

There is an increase in the computation for taxes withheld for Arizona and Minnesota.

Social Security Changes - The wage base for the Old Age Survivors and Disability Insurance (OASDI) portion of FICA (Social Security) has increased from $51,300 to $53,400. The wage base for the Medicare portion of FICA has increased from $51,300 to $125,000.

PAY PERIOD 02 PAYROLL CHANGES

Beginning December 30, 1990 and ending January 12, 1991
Reflected in Salary Payments Received January 23, 1991

Thrift Savings Plan Open Season - An Earnings Statement message will be produced regarding Thrift Savings Plan Open Season and Funds Allocation options.

PAY PERIOD 03 PAYROLL CHANGES

Beginning January 13, 1991 and ending January 26, 1991
Reflected in Salary Payments Received February 6, 1991

1991 Pay Comparability Increase - Executive Order 12736, dated December 12, 1990, authorizes a 4.1 percent pay adjustment to the General Schedule (Payplans GS, GW, and GM). The new pay rates will be effective January 13, 1991, which corresponds with the February 6, 1991 payday. Attached is the new pay schedule for the GS, GW, and GM payplans.

Under the same authorization, the rates of pay for the Senior Executive Service (ES) and the Executive Schedule (EX) personnel will be increased. Attached are copies of the new pay schedules for SES and EX payplans.

NOTE: Basic and Additional Optional Federal Employees' Group Life Insurance (FEGLI) automatically changes for employees who have FEGLI, when their salary changes to a different thousand-dollar bracket.

Interim Geographic Adjustments For Three Specific Areas - An "Interim Geographic Adjustment" rate of 8 percent in addition to the 4.1 percent pay comparability, effective January 13, 1991, has also been included in Executive Order 12736 for General Schedule (GS) employees in the areas specified below:

- o New York-Northern New Jersey-Long Island, NY-NJ-CT;
- o San Francisco-Oakland-San Jose, CA; and
- o Los Angeles-Anaheim-Riverside, CA.

Employees currently receiving regular rates of pay under the General Schedule, who work in the specified areas, will receive the full 8% adjustment.

The Office of Personnel Management will be prescribing regulations governing the interim adjustment rates payable to employees already receiving soecial salary rates.

Maximum Earnings Limitation - Employees whose pay has been reduced to the biweekly maximum earnings limitation will see increases in their payable salaries. Based on Executive Order 12736, for most employees, this cap will be $3,072.00, or the biweekly base rate for GS-15/10. Law enforcement employees (Retirement Codes 6, E, T, and M), will now be capped at an amount equal to 150 percent of the biweekly base rate for a GS-15/01, $3,544.80, rather than at the rate for EX-5. Both the regular and law enforcement "caps" will be further increased by any applicable geographic adjustment cited above.

Thrift Savings Plan For FERS Employees - Employees covered under the Federal Employees' Retirement System (FERS) who are currently "ineligible" for the Thrift Savings Plan (TSP) will become "eligible" on 01-13-91, if their appointment date is before 07-01-90. One percent basic agency contribution to TSP will be reflected in the "Remarks" section of the Earnings Statement beginning Pay Period 03. These actions will be systemically generated by the Finance Staff, JMD.

Open Season - Health Benefits - Health Benefits rate changes become effective. Refer to appropriate brochure for specific rate changes.

Combined Federal Campaign - Combined Federal Campaign deductions for 1991 commence.

NOTE: For employees who had 1990 CFC payroll deductions, but are not authorizing CFC payroll deductions for 1991, the "Year-to-Date Charity" on the Earnings Statement will reflect deductions for the 1990 campaign. Pay Period 02/91 is the last pay period for the 1990 CFC payroll deduction. "This Pay Period Charity" column should be blank.

Federal Group Life Insurance Change - Optional Federal Employees' Group Life Insurance (FEGLI) increases in January 1991 for employees who elected Optional FEGLI and who reached the following ages in 1990: 35, 40, 45, 50, 55, and 60.

Use or Lose Annual Leave - Any annual leave forfeitures will take place at the beginning of Pay Period 03. Therefore, all leave must be scheduled and taken by January 12, 1991.

Leave Without Pay and Absence Without Official Leave Balances - Leave Without Pay (LWOP) and Absence Without Leave (AWOL) balances as of January 12, 1991, will be dropped at the beginning of Pay Period 03. Additionally, any compensatory time forfeitures will also be reflected in Pay Period 03.

* * * * *