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

United States Attorneys' Bulletin

Published by:
Executive Office for United States Attorneys, Washington, D.C.
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VOLUME 39, NO. 3 **THIRTY-EIGHTH YEAR** **MARCH 15, 1991**

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The Editor, United States Attorneys' Bulletin
Room 6419, Patrick Henry Building
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FTS 241-6098 Commercial: 202-501-6098

COMMENDATIONS

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

James Allison and ***Stephen Peters*** (District of Colorado), by Robert J. Zavaglia, Chief, Criminal Investigation Division, Internal Revenue Service, Denver, for their special efforts and outstanding success in two complex bankruptcy fraud trials.

Leslie D. Banks (Texas, Southern District), by Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, D.C., for her successful prosecutions during the past year of more than two dozen shrimp trawlers who were violating the Endangered Species Act.

Donna E. Barrow (Alabama, Southern District), by Kenneth L. Murphy, Resident Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Mobile, for obtaining a guilty verdict on all counts of an individual for possession of cocaine with intent to distribute, carrying a firearm during drug trafficking, and possession of a firearm by a felon.

Robert A. Berg (Texas, Southern District), by William B. Whitworth, Senior Vice President, Commercial National Bank, Beeville, for the prosecution and ultimate conviction of an individual for presenting false information to a federally insured institution to obtain credit.

A. George Best (Michigan, Eastern District), by John Domm, Director, Advanced Training, Oakland Police Academy, Auburn Hills, for his excellent presentation on confiscation law at a class held recently at the Academy.

Mary Elizabeth Carmody (District of Massachusetts), by Mary W. Forsyth, Medical Center Director, Department of Veterans Affairs, Northampton, for her excellent representation and ultimate success in a medical malpractice case.

Robert D. Clark (District of Colorado), by Charles W. Larson, United States Attorney for the Northern District of Iowa, for his excellent article entitled "Third Party Rights," a copy of which is being reprinted in three installments in Asset Forfeiture News.

Terry Clark (Texas, Southern District), by George D. Heavey, Assistant Commissioner, Office of Internal Affairs, U.S. Customs Service, Washington, D.C., for his successful conclusion of a public corruption case involving a high-ranking Customs law enforcement officer.

Ernest J. DiSantis, Jr. (Pennsylvania, Western District), by Thomas P. Gleason, Supervisory Special Agent, FBI, Pittsburgh, for his legal and professional skill in prosecuting a physician for illegal diversion of pharmaceutical drugs.

Miriam W. Duke, Assistant United States Attorney and ***Special Assistant United States Attorneys Sharon T. Ratley*** and ***Kimberly S. Shumate*** (Georgia, Middle District), were presented Honorary Award Plaques by William R. Britt, Chief, Criminal Investigation Division, Internal Revenue Service, Atlanta, in recognition of their successful prosecution of a highly publicized narcotics trial in Macon.

Thomas L. Fink (District of Arizona), by William Sessions, Director, FBI, Washington, D.C., for his exceptional efforts in the investigation and prosecution of a Colombian drug trafficking case, resulting in the largest seizure of cocaine in the history of the State of Arizona.

Henry J. Fredericks (Missouri, Eastern District), by L. S. Crawford, Jr., Postal Inspector in Charge, U.S. Postal Service, St. Louis, for his excellent representation and the ultimate success of settlement negotiations of a personal injury lawsuit filed against the United States.

Ginny S. Granade (Alabama, Southern District), by Dick Thornburgh, Attorney General, Department of Justice, and William Sessions, Director, FBI, Washington, D.C., for her legal skill and expertise in the successful prosecution of several local government officials and a construction company in the Mobile area.

Patrick J. Hanley (Ohio, Southern District) was presented the Inspector General's Integrity Award by Richard Kusserow, Inspector General, Department of Health and Human Services, for his outstanding efforts during 1989-1990 in successfully prosecuting 17 individuals and recovering $250,000 in Social Security Administrative Program Losses during Project "Snowball II."

Katherine Hayden (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for her professionalism and legal skill in the successful prosecution of an important savings and loan case.

Joan Jurjevich (Texas, Southern District), by Mayor Kathryn J. Whitmire, City of Houston, for her valuable assistance and support in the 1991 Texans' War on Drugs/Houston Crackdown Red Ribbon Campaign.

James T. Lacey (District of Arizona), by Donald K. Shruhan, Jr., Special Agent in Charge, U.S. Customs Service, Tucson, for successfully prosecuting several defendants involved in a complex multi-state air smuggling operation.

John David Lenoir (Texas, Southern District), by William Sessions, Director, FBI, Washington, D.C., for his outstanding efforts during the investigation and prosecution of a sensitive civil rights case.

Kim R. Lindquist (District of Idaho), by Wayne M. Longo, Department of Law Enforcement, Idaho Bureau of Narcotics, Coeur d'Alene, for her valuable assistance in pursuing several investigations concerning indoor cultivation of marijuana in the North Idaho area.

Elizabeth Mattingly (Ohio, Southern District), by William M. Henderson, Director, Office of Administration and Resources Management; Calvin O. Lawrence, Senior Official for Research and Development; and Thomas A. Darner, Legal Counsel, Environmental Research Center, Environmental Protection Agency, Cincinnati, for her valuable representation and legal skill in negotiating a favorable settlement of a longstanding civil suit.

Maureen Murphy and ***William J. Kopp*** (Ohio, Northern District), by Philip P. O'Connor, Jr., Attorney, Office of District Counsel, Department of Veterans Affairs, Pittsburgh, for their excellent representation and successful results of a medical negligence case.

Don Overall (District of Arizona), by Major Gill P. Beck, Litigation Attorney, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for his valuable assistance and legal skill in the settlement of a complex medical malpractice case.

John F. Paniszczyn (Texas, Western District), by Laurence S. McWhorter, Director, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for his outstanding efforts in representing the Air Force in a complicated employment discrimination case.

Steve Russell (District of Nebraska), by Lieutenant J. J. Parish, Nebraska State Patrol, Omaha, for his valuable assistance in the prosecution of a drug trafficking case involving the forfeiture of a 1974 Piper aircraft.

Michael Reap (Missouri, Eastern District), by Carl A. Schultz, Supervisory Special Agent, FBI, St. Louis, for his special assistance and cooperative efforts in complying with regulations concerning the drug evidence destruction program. Also, by Kevin F. O'Malley, Vice-Chair of the Criminal Law Section of the Bar Association of Metropolitan St. Louis, for organizing and presenting a program on federal criminal appointments.

J.B. Sessions, United States Attorney, Gloria Bedwell, and ***Staff*** (Alabama, Southern District), by Robert C. Bonner, Administrator, Drug Enforcement Administration, Washington, D.C., and Peter K. Nunez, Assistant Secretary (Enforcement), Department of the Treasury, Washington, D.C., for their outstanding success in the prosecution of several drug traffickers and other related defendants. Four life-without-parole sentences were imposed in this case and two associates of the Luchese family were among those convicted and sentenced.

Michael Solis (Georgia, Middle District), by Garfield Hammonds, Jr., Special Agent in Charge, Drug Enforcement Administration, Atlanta, for his excellent presentation on "Federal Prosecutions" at a two-week Drug Investigations School held recently in Macon.

Stephen G. Sozio (Ohio, Northern District), by Michael L. King, Chief of Police, City of Wadsworth, for his guidance in the seizure of over $80,000 through the Federal Adoptive Seizure Program and his valuable assistance in other drug-related crimes.

Julie Stern and ***John Lancaster*** (Texas, Southern District), by John F. McAuliffe, Supervisory Special Agent, FBI, Houston, for their professional skills in obtaining convictions of several individuals in a criminal case.

Darryl A. Stewart (Tennessee, Middle District), by Kermit Perkins, District Director, Office of Labor-Management Standards, Department of Labor, Nashville, for his success in prosecuting a labor union for violations of the Labor-Management Reporting and Disclosure Act.

Bruce J. Teitelbaum, Leo M. Dillon, *and* ***Stephen R. Kaufman*** (Pennsylvania, Western District), by William Sessions, Director, FBI, Washington, D.C., for their outstanding efforts and organizational skills in prosecuting the most significant organized crime case in the Western District of Pennsylvania.

Dale E. Williams (Ohio, Southern District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his legal skill and professionalism in the prosecution of a government employee for theft of government property.

Judith S. Yogman (District of Massachusetts), by Thomas Hughes, Special Agent in Charge, FBI, Boston, for her excellent legal assistance and prompt response to the needs of the FBI over a period of many months.

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ATTORNEY GENERAL PRESENTS JUSTICE DEPARTMENT AWARDS

Attorney General Dick Thornburgh recognized approximately 54 Department of Justice employees at the 39th Annual Awards program on February 8, 1991. The highest award, the Attorney General's Award for Exceptional Service, was presented to ***Dr. Bruce Budowle*** of the Federal Bureau of Investigation, for his work in developing DNA profiling techniques. ***Dr. Budowle*** is considered the primary spokesman for the forensic science community regarding DNA analyses of forensic samples. His efforts have brought about one of the most significant scientific advances in the history of the FBI laboratory and for law enforcement nationwide.

The ***FBI's Hostage Rescue Team*** also received a Special Appreciation Award for its tactical support in response to a number of major events in the United States, and for assisting in reestablishing order after Hurricane Hugo in St. Croix, and in drug arrests and raids in Miami.

The Attorney General's Award for Exceptional Heroism was presented to Drug Enforcement Administration Special Agents ***Moses Ambriz; Hawthorne L. Hope, Jr.;*** DEA Enforcement Specialist (Medic) ***Thomas South;*** and Immigration and Naturalization Service Border Patrol Agent ***Amancio Cantu Jr.***, for their role in "Operation Snowcap," an undercover operation in a notorious Bolivian drug buying market.

The Attorney General's Medallion was presented to Border Patrol Agents ***Ted Jordan*** and ***Keith Connelly*** (posthumously) as a result of their heroic actions in a gunfight with alien smugglers on the United States-Mexican border in California. For reasons unknown, the smugglers opened fire during discussions over the release of an INS informant. ***Mr. Connelly*** died at the scene and ***Mr. Jordan*** sustained a life-threatening gunshot wound. He has now returned to duty at the Fresno Border Patrol Station.

Many other distinguished awards were presented to the Federal Bureau of Investigation, the Drug Enforcement Administration, Immigration and Naturalization Service, and other components of the Department of Justice.

The Assistant United States Attorneys and some Department of Justice attorneys who received awards are as follows:

Distinguished Service Awards

Joseph J. Aronica, Assistant United States Attorney, Eastern District of Virginia, for exceptional service as attorney in charge and lead trial counsel during "Operation Illwind," an investigation of defense procurement fraud.

Robert J. Bondi, Assistant United States Attorney, Southern District of Florida, for his record of excellence during the past ten years in successfully investigating and prosecuting major fraud and narcotics cases, particularly the Kramer drug smuggling and money laundering case.

Russell Hayman, former Assistant United States Attorney for the Central District of California, for his extraordinary efforts in successfully prosecuting "Operation Pisces," "Operation Polar Cap," the Uhler/LaForce investigation, and U.S. v. Villabona. Some of the cases were handled simultaneously.

Louis J. Freeh, Assistant United States Attorney for the Southern District of New York, for outstanding leadership in the investigation and indictment of Walter Leroy Moody, Jr. for the mail-bombing murders of a judge and an NAACP attorney and alderman. (See, United States Attorneys' Bulletin, Vol. 39, No. 2, dated February 15, 1991, at p. 25.)

Ernst D. Mueller, Assistant United States Attorney for the Middle District of Florida, for almost ten years of tireless efforts to extradite, try, and convict Colombian drug cartel members, especially Carlos Enrique Rivas-Lehder. At considerable personal peril, ***Mr. Mueller*** has contributed in large part to many of the successes in the war on drugs.

John P. Pucci and ***Ronald H. Levine,*** Assistant United States Attorneys, and ***Pamela Donleavy,*** Special Assistant United States Attorney, Eastern District of Pennsylvania, for their successful prosecution of four corrupt officers of the Philadelphia Police Department's once elite undercover narcotics squad.

James P. Turner, Deputy Assistant Attorney General, Civil Rights Division, for his service as Acting Assistant Attorney General from December 1988 through April 1990, and for his inestimable contributions to the Department of Justice for more than 25 years.

James G. Bruen, Special Litigation Counsel for the Commercial Litigation Branch of the Civil Division, for his tireless efforts in minimizing losses to the government from defaulted Rural Electrification Administration loans.

Jeffrey L. Weiss, Kenneth G. Leutbecker, Amy F. Dale, Jay E. Laroche, Rosa Urquiola, Ernest Van Stallworth, and ***Efrain Martinez,*** all of the Community Relations Service, for their outstanding team effort to develop a plan for humanitarian shelter and health care to thousands of undocumented aliens from Central America, especially Nicaragua, who came to south Texas in 1988 as a result of deteriorating political, economic, and social conditions in their native lands.

John Marshall Awards

Providing Legal Advice:	***Alexander S. White,*** Assistant Chief for Support of Litigation, Organized Crime and Racketeering Section, Criminal Division.
Handling Appeals:	***Roger W. Haines, Jr.,*** Assistant United States Attorney for the Southern District of California.
Preparation or Handling of Legislation:	***Jennifer Haverkamp,*** Attorney Advisor, Policy, Legislation and Special Litigation Section, Environment and Natural Resources Division.
Trial of Litigation:	***Leslie R. Caldwell*** and ***Peter T. Sheridan,*** Assistant United States Attorneys for the Eastern District of New York.
	James H. Rodio, Trial Attorney, Northern Criminal Enforcement Section, Tax Division.
Participation in Litigation:	***JoAnn J. Bordeaux***, Deputy Director for Environmental and Occupational Disease Litigation, Torts Branch, Civil Division.
	Thomas M. Durkin, Assistant United States Attorney, Northern District of Illinois.
	William F. Fahey, Assistant United States Attorney, Central District of California.
Support of Litigation:	***Anthony V. Nanni***, Chief, Litigation I Section, Antitrust Division.
	Serena H. Ross, former Assistant United States Attorney, Eastern District of Pennsylvania.
Interagency Cooperation In Support of Litigation:	***Michael R. Gillett***, Special Assistant United States Attorney, Chief Felony Prosecutor, Office of the District Attorney, Dallas, Texas.
	Robert Mooney and ***David P. Nelson***, Special Assistant United States Attorneys, Trial Attorney-Enforcement Staff, Securities and Exchange Commission.

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ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

Subcommittees

Attached at the Appendix of this Bulletin as Exhibit A is a list of the members of the Subcommittees of the Attorney General's Advisory Committee of United States Attorneys.

For a complete list of members of the Attorney General's Advisory Committee, please refer to Volume 39, No. 1, of the United States Attorneys' Bulletin, dated January 15, 1991, at p. 5.

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PERSONNEL

On February 22, 1991, ***John F. Hoehner*** became the Interim United States Attorney for the Northern District of Indiana. ***Mr. Hoehner*** was previously the First Assistant United States Attorney in that District.

On February 19, 1991, ***Stephen H. Greene*** became Acting Deputy Administrator at the Drug Enforcement Administration. ***Mr. Greene*** formerly served as Director of Operations at DEA.

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Executive Office For United States Attorneys

(Col.) Wayne A Rich, Jr., Deputy Director, Executive Office for United States Attorneys, has been called to Active Duty as Staff Judge Advocate in El Toro, California.

Douglas Frazier, Assistant United States Attorney, Middle District of Florida, has been named Acting Deputy Director for the Executive Office for United States Attorneys, and will work directly with the Special Counsel for Financial Fraud, of the Office of the Deputy Attorney General.

Thomas G. Schrup, Director, Office of Legal Education, Executive Office for United States Attorneys, has joined the Criminal Division to establish a new Office of Professional Development under the direction of Assistant Attorney General Robert Mueller.

Nancy Hill has been named Acting Director of the Office of Legal Education, and will continue her responsibilities as the Director of the Attorney General's Advocacy Institute.

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OPERATION DESERT STORM

Northern District Of Ohio

Joyce J. George, United States Attorney for the Northern District of Ohio, has advised that on the evening of January 23, 1991, her office was served with a petition for a writ of habeas corpus and a request for a temporary restraining order. An emergency hearing was scheduled the next morning on the plaintiff's request to be removed from his active duty assignment in Saudi Arabia pending an evidentiary hearing on his petition.

Research revealed that the court lacked jurisdiction over plaintiff's petition because neither plaintiff's "body" nor his commanding officer (or a person in the chain of command) were located in the court's jurisdiction and plaintiff had not exhausted his administrative remedies. Since plaintiff and his Commander were physically located in Saudi Arabia, the court lacked jurisdiction under 28 U.S.C. §2241. Schlanger v. Seamans, 401 U.S. 487, 489-491 (1971); see also, Strait v. Laird, 406 U.S. 341, 344-345 (1972). Plaintiff's only recourse was to file in a district where a person "in the chain of command" was located.

The court also lacked subject matter jurisdiction because plaintiff failed to exhaust his administrative remedies. Part 75 of 32 C.F.R. contains the Department of Defense regulations covering conscientious objector applications. Until plaintiff has exhausted his administrative remedies under these regulations, a federal court cannot intervene. Schlesinger v. Councilman, 420 U.S. 738, 758-759 (1975); Parisi v. Davidson, 405 U.S. 34, 37 (1972); Woodrick v. Hungerford, 800 F.2d 1413, 1416-1418 (5th Cir. 1986) cert. denied, 481 U.S. 1036.

After hearing arguments of counsel and considering the case law cited by the United States Attorney's office, the court dismissed plaintiff's petition for lack of jurisdiction from the bench. The court's written opinion which followed the dismissal is attached at the Appendix of this Bulletin as Exhibit B.

If you have any questions, please contact Marcia Johnson, Chief, Civil Division, United States Attorney's Office, Northern District of Ohio, at (216) 363-3932, or James L. Bickett, Assistant United States Attorney, at (216) 363-3914.

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Temporary Protected Status For Nationals Of Lebanon, Liberia, And Kuwait

On February 22, 1991, the Department of Justice approved the designation of Temporary Protected Status (TPS) for over 50,000 nationals of Liberia, Lebanon, and Kuwait currently in the United States. The designation of the countries becomes effective upon publication in the Federal Register, and will last for a period of one year. The designation of TPS for these nationals results in a stay of deportations, and provides them work authorization in the United States for that period. It is estimated that approximately 51,000 persons in this country on a temporary basis may be affected by the decision. These include 27,000 Lebanese, 14,000 Liberians, and 10,000 Kuwaitis.

The Immigration Act of 1990, signed by the President on November 19, 1990, authorizes the Attorney General to grant such status to aliens in the United States who are nationals of countries that are subject to armed conflict, natural disaster, or other extraordinary conditions.

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INSPECTOR GENERAL ISSUES

Change In Field Organization And Staff Titles Of The Investigations Division, Office Of The Inspector General

Steve Turchek, Deputy Assistant Inspector General for Investigations, of the Office of the Inspector General, has advised that on February 3, 1991, a number of changes to field elements in the Investigations Division, Office of the Inspector General (OIG), went into effect. Some of these changes will impact on routine dealings between the United States Attorneys' offices and OIG.

To reflect the law enforcement authority held by Special Agent managers in the field, as opposed to other OIG field managers, the titles "Special Agent in Charge (SAC)" and "Assistant Special Agent in Charge (ASAC)" will replace "Regional Inspector General" and "Assistant Regional Inspector General." The Regional Office title will be replaced by "Field Office," bearing the name of the city in which the office is located. Also, some Area Offices will now be known as "Resident Offices."

The former five Regional Offices have been replaced by seven Field Offices. The former Southeastern Region has been split into the Washington Field Office and the Miami Field Office, and the Northern Region has been divided into the Chicago Field Office and the San Francisco Field Offices. Please note that the former Puerto Rico Area Office, now known as the "San Juan Area Office," will report to the new Miami Field Office.

Attached at the Appendix of this Bulletin as Exhibit C is a list of Investigations Division Field Offices, including the reporting resident or area office, if any, the names of each office's SAC and/or ASAC, and their telephone numbers; a map that shows the geographic area covered by each Field Office; and a list of each offices' mailing address and street location.

If you have any questions, please call Steve Turchek or SAC/Operations, Thomas J. Bondurant, at (202) 633-3510.

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DRUG ISSUES

Attorney General Meets With The President Of Colombia

On February 26, 1991, Attorney General Dick Thornburgh met with Colombian President Cesar Gaviria, Minister of Justice Jaime Giraldo and Procurator General Carlos Arrieta to discuss joint efforts in combatting illegal narcotics trafficking. To assist in the cooperative effort, a Declaration of Intent was signed by the United States and Colombia. The Declaration sets forth a procedure for each country to use rendering assistance in investigations and prosecutions of drug cases. Assistance may be denied by either party if such assistance would jeopardize an ongoing investigation or pending prosecution. Both countries recognize that differences in our laws and procedures may mean that providing assistance in certain cases might make it impossible to go forward with prosecutions in the United States. Thus, all necessary steps will be taken to insure that these prosecutions, supporting evidence, and necessary witnesses are not jeopardized or compromised in any way by arrangements made under the Declaration of Intent.

The Attorney General said, "We share a common goal with the Colombian government--the removal of these traffickers from our societies and the dismantling of the drug organizations they operate."

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"The Crimes Of Mingo County"

Joe Savage, Assistant United States Attorney for the Southern District of West Virginia, Huntington, was assigned to a narcotics investigation in rural Mingo County. The investigation uncovered a major drug dealing operation involving crime, corruption, and lawlessness among the local residents of Kermit, West Virginia and surrounding areas, City Hall, the police, and local political bosses. A story about Mr. Savage's experience in unraveling this bizarre case appears in the March, 1991 issue of the Reader's Digest, at page 19, entitled "The Crimes of Mingo County."

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The Administration's Drug Program

The Edward Byrne Memorial State and Local Law Enforcement Assistance Program has seen dramatic growth in the Bush Administration. The President's first budget requested $350 million to fund state grants, which was later increased by $100 million by Congress. Over the last two years, there has been a 218 percent increase in available resources. In Fiscal 1991, the Administration's entire $490 million request was appropriated by Congress, with $17 million earmarked for the FBI's National Crime Information Center (NCIC) 2000 project. The remaining $473 million will go toward funding state grants. The Department, in administering these funds, is encouraging states to incorporate National Drug Control Strategy recommendations into their programs.

The Attorney General said, "These vital funds represent one of our most effective weapons in protecting neighborhoods from drug trafficking and the violence it spawns. With a $28 million increase in funding over last year, Bureau of Justice Assistance grants will continue to augment state and local law enforcement agencies' budgets with federal funds, thus allowing us to concentrate our crime fighting efforts where they are needed the most."

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War On Drugs
(Grants Targeted For Fighting Crime And Drugs)

Attorney General Dick Thornburgh has announced a number of grants targeted for fighting crime and drugs in a number of states. The awards are the first in Fiscal Year 1991 from a $473 million formula and discretionary grant program of the Justice Department's Bureau of Justice Assistance (BJA). The program is designed to give state and local law enforcement agencies the opportunity to draw the funds from BJA as needed, much like money is withdrawn piecemeal from a checking account. The Attorney General said, "This program works well because it gives state and local law enforcement officials the flexibility they need to solve their own unique problems."

Alabama will receive $7,023,000, a $430,000 increase over last year, and will give $3,601,394, or 51.28 percent, to its local police and sheriff departments. Sixty-five percent, or $4.5 million, will be dedicated to the continuation of its 24 multi-jurisdictional drug law enforcement task forces with additional task forces planned to cover the entire state.

Alaska will receive $1,821,000, a $117,000 increase over last year. These funds will be used to continue its marijuana eradication efforts, hire and train additional law enforcement officers and prosecutors, purchase communication and surveillance equipment, and strengthen interdiction efforts at airports and deep sea ports.

Arkansas will receive $4,543,000, a $283,000 increase over last year, and will distribute $2,624,945, or 57.78 percent, to its local law enforcement groups. Arkansas will continue to support 26 to 28 multi-jurisdictional drug task forces within the state's 24 judicial districts encompassing all significant law enforcement agencies and prosecuting attorneys.

California will receive more than $43 million in federal funds, a $3.5 million increase over last year, and will distribute $27,782,736, or 64.37 percent, of the total to local law enforcement agencies. The funds will also support a recently implemented statewide task force called "Operation Crackdown," which consists of 11 enforcement and two money laundering teams targeting Colombian drug cartels, and street gangs engaged in cocaine trafficking and related money laundering activities.

Colorado will receive $5,863,000, a $365,000 increase over last year, and will use its funds to support its eight multi-jurisdictional task forces, increase the technological capabilities of urban law enforcement agencies, find cost effective measures to reduce repeat offenders and crime driven by drug abuse, institute court delay reduction policies, and investigate money laundering.

Connecticut will receive $5,750,000, a $345,000 increase over last year, and will use its funds to support its state-wide narcotics task force, expedite court management of narcotics cases, and expand drug testing of prisoners and parolees.

Delaware will receive $2,032,000, a $142,000 increase over last year, and will expand its court management of narcotics cases, hire more law enforcement officers and prosecutors, and increase drug testing of prisoners and parolees.

Florida will receive $19,414,000, slightly more than a $1.5 million, or 8.8 percent, increase over last year, and will distribute $12,644,338, or 65.13 percent, to local law enforcement agencies, as well as maintain a number of ongoing anti-drug programs.

Guam will receive $1,262,000, a $93,000 increase over last year, and will use its funds to expand and improve its investigations into money laundering and drug interdiction efforts at airports and commercial ports. The territory also plans to increase the number of drug detecting dogs and continue training customs agents in surveillance techniques to improve the detection and seizure of drugs aboard incoming planes and ships.

Idaho will receive $2,526,000, a $168,000 increase over last year, and will continue its 15 multi-jurisdictional drug task forces which cover 37 of the state's 44 counties, as well as provide funding for a number of anti-drug abuse programs.

Indiana will receive $9,160,000, a $580,000 increase over last year, and will award nearly $4.3 million, or 47 percent, to the state's multi-jurisdictional drug law task forces consisting of 60 law enforcement and prosecutory agencies. The state will also continue its support of a number of initiatives, including marijuana eradication, pharmaceutical diversion, and other programs.

Iowa will receive $5,172,000, a $312,000, or six percent, increase over last year, and will distribute $2,393,084, or 46.27 percent, to local law enforcement agencies. This state will dedicate $1,500,000 for maintenance and formation of multi-jurisdictional drug law enforcement task forces.

Kansas will receive $4,698,000, a $301,000 increase over last year, and will use its funds to support its multi-jurisdictional task forces, investigate clandestine illegal drug laboratories, end delays in the court process, and expand its supervision of parolees. The state will also concentrate drug control efforts in low-income housing projects.

Kentucky will receive $6,457,000, a $377,000 increase over last year, and will establish two new multi-jurisdictional task forces, improve its criminal history recordkeeping process, intensify investigations of clandestine illegal drug laboratories, and expand treatment and drug testing of prisoners and parolees.

Louisiana will receive $7,406,000, a $395,000 increase over last year, and will use nearly $2.4 million, or 32 percent, to support its forty multi-jurisdictional drug task forces which integrate law enforcement agencies at the state and parish levels. The state will also support a computerized intelligence network for law enforcement at all levels, and other drug-related crime programs.

Maryland will receive $7,858,000, a $555,000 increase over last year, and will further develop innovative ways to disrupt and apprehend drug users and distributors, establish a regional drug control laboratory, continue marijuana eradication, and strengthen interdiction efforts at its international airport and deep water ports.

Nebraska will receive $3,391,000, a $214,000 increase over last year, and will use its funds to support its multi-jurisdictional task forces. The number of task forces has grown from three in 1987 when Nebraska received its first block grant, to eight today that encompass the entire state. Drug control efforts include surveillance, detection of drug manufacturing labs, public awareness campaigns, crime stopper hotlines, and marijuana eradication.

Nevada will receive $2,667,000, a $239,000 increase over last year, and will use its funds for the development of sophisticated, automated information and recordkeeping systems and expedited court management of narcotics cases. The state will expand drug testing and treatment of prisoners and parolees, as well as institute mandatory jail sentences and fines for first time drug offenders.

New Hampshire will receive $2,661,000, a $191,000 increase over last year, and will use its funds to support multi-jurisdictional task forces, and hire and train law enforcement officers and prosecutors, and upgrade information sharing systems. Since the state began receiving formula grants in 1987, the number of drug enforcement units has tripled and the number of investigators has quadrupled. Drug testing of prisoners and parolees will also be expanded.

New Jersey will receive $12,265,000, a $727,000 increase over last year, and will use the funds to enhance the state's multi-jurisdictional task forces and to support intra-state interdiction efforts through aggressive drug patrols on state highway and on drug trafficking routes. In urban areas, the state will increase its surveillance of drug activity, undercover and sting operations, and visible police patrols that discourage potential drug buyers.

North Carolina will receive $10,577,000, a $723,000 increase over last year, and will give $4,157,818, or 39.31 percent, to local police and sheriff departments. More than half of its award will be used to expand its multi-jurisdictional law enforcement task forces and to support other enforcement initiatives.

Ohio will receive $16,858,000, a $1,038,000 increase over last year, and will fund its 34 narcotics and multi-jurisdictional task forces, train law enforcement officials in all phases of the criminal justice system, and improve court management of narcotics cases.

Oklahoma will receive $5,750,000, a $332,000 increase over last year, and will use its funds to attack drug distribution networks at every point, from the field to laboratory to the consumer. Investigating smuggling operations and marijuana eradication are also high priorities, as well as increasing law enforcement personnel, and improving training and equipment.

Oregon will receive $5,143,000, a $374,000 increase over last year, and will pursue gang-related crime and drug distribution, marijuana eradication, and drug testing of prisoners and parolees. The state will also fund expedited court management of narcotics cases and efforts to combat organized crime and money laundering.

Pennsylvania will receive $18.5 million, a $1,114,000 increase over last year. The Pennsylvania State Police will receive approximately $2.3 million to continue existing programs and launch new programs, and the commonwealth will fund a wide array of criminal justice initiatives ranging from drug offender supervision in a jail setting to electronic monitoring and other drug-related crime programs.

Tennessee will receive $8,214,000, a $538,000 increase over last year, and will give $4,288,529, or 52.21 percent, to its local law enforcement agencies. To support street level enforcement efforts, $2.8 million is earmarked for eight urban metropolitan areas and $1.2 million to support 21 rural judicial district drug task forces.

Texas will receive $25,672,000, an increase of over $1,673,000 over last year, and will expend $19,379,201, or 75 percent of its total award to continue its proven approach of pooling personnel, equipment and resources, will seek to increase the number of narcotics officers, and upgrade equipment necessary for effective apprehension. The state will continue to support pretrial drug testing programs, financial investigations programs, and criminal justice information system improvements.

Utah will receive $3,530,000, a $233,000 increase over last year, and will continue to support its twelve multi-jurisdictional task forces, continue marijuana eradication efforts, train law enforcement personnel, and the investigation of clandestine illegal drug laboratories. The state will also pursue gang-related crime and child abuse.

Virginia will receive $9,892,000, a $685,000 increase over last year, and will continue to support its sixteen multi-jurisdictional drug enforcement task forces, seven regional drug prosecutors, improve the state's forensic laboratory, and continue expansion of drug enforcement training opportunities.

Washington will receive $7,955,000, a $616,000 increase over last year, and will continue support of its 23 multi-jurisdictional task forces, interdict and dismantle clandestine illegal drug laboratories, marijuana eradication, and train additional law enforcement officials. The state will also continue to fund its gang prevention and drug-related domestic violence prevention programs.

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CRIME ISSUES

The Organized Crime Drug Enforcement Task Force Program

Pursuant to the recommendation of all Organized Crime Drug Enforcement Task Force Executive Review Board members, Attorney General Dick Thornburgh ordered the adoption of The Organized Crime Drug Enforcement Task Force Program Guidelines, December, 1990. The revised Guidelines incorporate changes that were important to all of the participating agencies and will be very beneficial to the continued successful operation of the Program. They are intended to assist United States Attorneys, Special Agents in Charge, local criminal investigation chiefs for Task Force agencies, and other investigative and prosecutorial personnel in managing the Organized Crime Drug Enforcement Task Forces.

The Guidelines have been distributed to all United States Attorneys, and other Department components and federal agencies. To order additional copies, please call the Organized Crime Drug Enforcement Task Force Administrative Unit at (FTS) 368-1860 or (202) 514-1860.

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National Crime Victims Rights Week

The Office for Victims of Crime (OVC), Office of Justice Programs, Department of Justice, has announced that the 1991 commemoration of National Crime Victims Rights Week has been scheduled for the week of April 21-27, 1991, in Washington, D.C.

Nearly every year since 1983, OVC has supported a Presidential Proclamation setting aside one week in April to recognize outstanding individuals for their significant contributions on behalf of crime victims. Those chosen for special recognition in 1990 were joined by OVC Director Jane Burnley, and approximately 150 victims rights leaders in the White House Rose Garden where they were presented with engraved plaques from President Bush and Attorney General Thornburgh. While the specifics of a national ceremony have not yet been determined, OVC is looking forward to a memorable event for 1991.

This observance has, over the years, generated gubernatorial proclamations, and many national, regional and local crime victims activities. Awareness of the victims rights movement has been heightened through public service messages on radio and television, memorial vigils, and educational programs that have been presented at schools and other organizations in order to educate students and citizens about crime, victimization, and our criminal justice system. These undertakings and special public events, recognizing local citizens for outstanding contributions, serve to further the victims rights movement. Nearly 2,500 letters were sent out by OVC to support groups and organizations, United States Attorneys, Victim-Witness Coordinators, and concerned individuals asking for assistance in identifying people who have made significant contributions to improving the treatment of crime victims, and who deserve national recognition.

OVC received a large number of nominations last year and final selections were especially difficult because there were so many deserving candidates. Nominations are reviewed for uniqueness of the contribution; the impact of the service on the community; the influence of the contribution for positive, long-term changes; for the initiation of grass roots organizations; and length of service, taking into account whether the service was performed as a volunteer or as a paid professional undertaking laudable efforts beyond those for which he or she was being compensated. Stephen McNamee, former United States Attorney for the District of Arizona, and Jan Emmerich, LECC/VW Coordinator for the District of Arizona, were among those who received awards in previous years.

For more information about National Crime Victims Rights Week, please call John Dawson, Acting Deputy Director, Office for Victims of Crime, at (202) 514-6444 or (FTS) 368-6444.

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Crime Victims Fund

The Crime Victims Fund was established by the Victims of Crime Act. Virtually all criminal fines, as well as all assessments and bail bond forfeitures, are deposited in the Crime Victims Fund. Ninety percent of the fund is returned to the states, on a pro-rata by population basis, for use in victim assistance programs. By enforcing criminal fines, you not only punish convicted criminals, but also provide assistance to crime victims. At present, and through this fiscal year, there is a cap on the fund of $125 million. For FY 1992 through FY 1994, the cap on the Fund will increase to $150 million. Criminal collections exceeded the cap on the Fund in both FY 1989 and FY 1990.

The Executive Office for United States Attorneys and the Office for Victims of Crime (OVC), of the Office of Justice Programs, wish to publicize the role of the United States Attorneys in assisting crime victims through aggressive and energetic fine enforcement. Whenever a fine of $100,000 or more is paid, please advise Nancy Rider, Assistant Director, Financial Litigation Staff, Executive Office for United States Attorneys, who will forward this information to the Office for Victims of Crime. That office will then coordinate with the United States Attorney's office to alert the public to the successful fine collection effort, and how it will help local crime victims.

Nancy Rider's address and telephone number is: Room 6404, Patrick Henry Building, 601 D Street, N.W., Washington, D.C. 20530 - (FTS) 241-7017 or (202) 501-7017. Her fax number is: (FTS) 241-6961 or (202) 501-6961.

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Crime Victims On Indian Reservations

The Office for Victims of Crime, Office of Justice Programs, Department of Justice, has awarded $80,500 to the State of Idaho, and $140,000 to the State of Montana to improve or expand services for victims of federal crimes on Indian reservations. These grants are from the Crime Victims Fund, and will help to provide direct services to victims of violent crime, including: crisis intervention and support for victims immediately following a violent crime; emergency or temporary shelter for victims of family violence; mental health counseling for victims and their families; and help in participating in federal criminal justice proceedings. Funds also may pay for training for law enforcement personnel and salaries for victims service providers.

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Pretrial Release Of Felony Defendants

The Bureau of Justice Statistics, a component of the Office of Justice Programs of the Department of Justice, has issued a report entitled "Pretrial Release of Felony Defendants." The study, which examined sample data of 47,000 felony cases filed during February 1988, representing 75 of the most populous counties in the United States, found that approximately two-thirds of the felony defendants were released pending the disposition of their cases.

Almost one-half of all pretrial releases took place on the day of the arrest or the following day. About 18 percent of all defendants released were rearrested for another felony, and of those rearrested on additional felony charges, about two-thirds were released into the community. The study also found that among the one-third of the felony defendants who were not released, eight out of nine did not post bail and the remainder were held without bail, generally because of the seriousness of the offenses with which they were charged. Other findings were:

-- Defendants accused of murder were less likely to be released before trial than were other defendants. For example, 39 percent of the murder defendants were released, compared to 55 percent of those accused of rape, 69 percent of those accused of drug sales and 86 percent of the people accused of driving-related felonies. About 26 percent of those charged with murder were held without bail.

-- In general, defendants confined until trial differed from those who were released by the seriousness of their current charges and/or their previous criminal convictions. Twenty-five percent of those kept in custody were charged with a violent felony, compared to 19 percent of the released defendants. One half of the defendants held until trial had been convicted in the past of a felony compared to one-quarter of the defendants released before trial. Twenty-six percent of the felony defendants confined had five or more previous convictions, whereas 11 percent of the released defendants had five or more convictions.

-- Fugitive warrants were issued for approximately one-quarter of the felony defendants on pretrial release because they failed to appear in court. About one-third of those for whom a warrant was issued were returned to court within one month and about one-half were returned within three months. About 34 percent had not been returned before the end of the year-long study.

-- Released defendants with lengthy criminal records (five or more prior convictions) were twice as likely to be rearrested on new felony charges as were defendants with no such prior convictions (30 percent compared to 15 percent).

-- About 52 percent of the rearrested defendants were rearrested for the same type of felony as the charge pending against them.

-- One-half of those rearrested for another felony were rearrested within 64 days or less from the time of their pretrial release.

The Bureau also noted that defendants charged with drug crimes (72 percent) or public-order offenses (70 percent) were more likely to be released than were people charged with violent offenses (59 percent) or property offenses (62 percent). Among felony defendants released prior to trial, 66 percent were convicted, and 50 percent of those convicted received a sentence of incarceration. Among defendants detained until trial, 79 percent were convicted and 83 percent of these received a sentence that included incarceration.

Copies of the "Pretrial Release of Felony Defendants, 1988" (NCJ-127202), may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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ASSET FORFEITURE

Asset Forfeiture Fund

On January 31, 1991, Attorney General Dick Thornburgh announced that in the last six years the Justice Department's Asset Forfeiture Fund has collected more than $1.5 billion in "illegal booty." The report, issued annually, shows that in 1990 alone, $460 million in cash and property were deposited into the fund, a 28 percent increase over FY 1989. Forty million dollars in forfeited property was pressed directly back into official law enforcement service. The report, prepared by the Executive Office for Asset Forfeiture in the Deputy Attorney General's office, also details the disbursements from the fund. Since FY 1985, more than half a billion dollars has been shared with state and local law enforcement agencies, $200 million in FY 1990 alone. In addition, $491.6 million from the forfeiture fund has gone to prison construction. Last year alone, the fund provided $115 million for the construction of federal prison cells. In FY 1990, $116.7 million from the fund went to federal law enforcement agencies, $16.6 million to the Office of National Drug Control Policy to fight the war on drugs, and $55.9 million for forfeiture-related expenses, such as paying the liens held by innocent third parties and other maintenance-related expenses.

The Attorney General said, "The role played by police, sheriff and highway patrol officers in the war on drugs cannot be understated. As a result, they deserve to--and do--share equitably in the proceeds of these investigations. While most of the sharing occurs as a result of joint federal-state-local operations, we also welcome the so-called 'adoptive forfeiture' in which law enforcement agencies in areas with weak state or local laws ask us to use federal laws to forfeit illegal booty. In such cases, the local law enforcement agencies receive all the money back, less a standard share for the federal government's effort involved in processing the case. Under laws passed in 1986 and 1988 we shared seized funds with foreign governments as well. Canada and Switzerland each received $1 million in connection with their cooperation in freezing the assets of Banco de Occidente, which was believed to be laundering drug profits." Currently, there are 35,000 parcels of real and personal property that have been seized and are awaiting forfeiture with an estimated value of $1.3 billion.

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SAVINGS AND LOAN ISSUES

Dallas Bank Fraud Task Force

In the United States Attorneys' Bulletin, Volume 39, No. 2, dated February 15, 1991, at p. 31, the Department of Justice announced that two co-owners and co-chairmen of the Guaranty Federal Savings and Loan Association in Dallas, Paul S. Cheng and Simon E. Heath, were sentenced to 30 and 20 years in prison after being convicted in August, 1990, on charges of savings and loan fraud.

Two attorneys who were with the Fraud Section of the Criminal Division at the time of the trial played a major role in the successful prosecution of this case. They are Keith Fleischman, now Assistant United States Attorney for the District of Connecticut, and Tom McQuillan, now Assistant United States Attorney for the Eastern District of Virginia. Also participating in this case as co-counsel was Fraud Section Attorney Robert E. Hauberg, Jr. of the Dallas Bank Fraud Task Force.

Attorney General Dick Thornburgh praised the prosecutors and the Dallas Bank Fraud Task Force for their work in this case and the ongoing investigation of fraud in the savings and loan industry.

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Savings And Loan Prosecution Update

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

Informations/Indictments		351
S&Ls Victimized		537
Estimated S&L Losses	$	7.451 billion
Defendants Charged		618
Defendants Convicted		433
Defendants Acquitted		18
Prison Sentences		936 years
Sentenced to prison		251 (79%)
Awaiting sentence		122
Sentenced w/o prison or suspended		69
Fines Imposed	$	4.865 million
Restitution Ordered	$	246.811 million
CEOs, Board Chairmen and Presidents:		
Charged by indictment/information		76
Convicted		58
Acquitted		6
Directors and other officers:		
Charged by indictment/information		107
Convicted		84
Acquitted		3

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

[NOTE: "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution.]

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POINTS TO REMEMBER

The 1992 Budget

On February 4, 1991, Deputy Attorney General William P. Barr announced that the Department of Justice will seek a 1992 budget of $10.6 billion, a 14 percent increase in total funding availability compared to 1991. The Bush Administration has been carrying out a substantial buildup of law enforcement resources. This 1992 request ensures that this buildup will continue at a steady pace. If this request is enacted, the Department of Justice's budget will have grown by 58 percent during the first three years of the Bush Administration.

If you would like a copy of Mr. Barr's statement, please call Judy Beeman, Editor, or Audrey Williams, Assistant Editor, United States Attorneys' Bulletin, at (FTS) 241-6098 or (202) 501-6098.

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Court Authorized Procedures For Taking And Using Alien Material Witness Depositions

During the past several years, a number of cases have arisen in the Fifth and Tenth Circuits concerning the preservation of testimony of alien material witnesses awaiting the trial of defendants accused of alien smuggling offenses. Trial courts have attempted to eliminate the prolonged incarceration of alien material witnesses by ordering that depositions be taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure and 18 U.S.C. §3144 to preserve testimony in the interests of justice. After such witnesses are deposed, they are normally transferred to the custody of the Immigration and Naturalization Service and then deported. In the event that these witnesses do not appear to testify at the trial of those accused of alien smuggling, the court may permit the use of the depositions as substantive evidence at trial, pursuant to Rule 804 of the Federal Rules of Evidence, based upon the unavailability of the witnesses.

The General Litigation and Legal Advice Section of the Criminal Division has prepared a statement addressing this issue, which is attached at the Appendix of this Bulletin as Exhibit D. If you have any questions, please call Richard Shine, Senior Legal Advisor, at (202) 514-1026 or (FTS) 368-1026, or Jennifer Levy, Trial Attorney, at (202) 514-1050 or (FTS) 368-1050.

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Operation Garbage Out

The Attorney General has directed that the Department of Justice have one Departmental case management system. We must be accountable for our cases to the Office of Management and Budget and to the Congress, and data integrity is critically important to our efforts in a number of ways. To this end, on October 31, 1990, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, launched a new program for Fiscal Year 1991 called "Operation Garbage Out." This program is a major effort to improve the quality of the data contained in the United States Attorneys' caseload management systems, to report more accurately to the Office of Management and Budget and to the Congress, and to better inform the public of what each United States Attorney's office is doing.

Michael Bailie, Associate Director of the Information Management Staff of the Executive Office for United States Attorneys, has primary responsibility for the direction of Operation Garbage Out, which involves a simultaneous, three-pronged attack: 1) update the civil and criminal databases to reflect current and correct information; 2) provide additional training to docket personnel and their supervisors, including Administrative Officers and Systems Managers, to ensure that they have the necessary skills to maintain the data and to recommend steps to improve its quality and utilization locally; and 3) increase management accountability for and Assistant United States Attorney involvement in the quality of local databases.

On February 4, 1991, Director McWhorter issued a detailed plan to all United States Attorneys which provided complete instructions and deadlines for carrying out this program. He requested that each United States Attorney and Assistant United States Attorney commit himself/herself to the improved integrity of the case management system. On February 7, 1991, Director McWhorter issued additional instructions concerning reporting the value of claims referred. He advised that Tim Murphy, Associate Deputy Attorney General, has asked that we find a solution to the problems, and noted that Judge Murphy will be requesting reports on a regular basis.

The Information Management Staff stands ready to work with you in identifying your requirements and to assist you in any way in meeting our goals. If you have any questions or require further information, please call the Information Management Staff, at (FTS) 241-8222 or (202) 501-8222.

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Americans With Disabilities Act Regulations

On February 27, 1991, Attorney General Dick Thornburgh announced that the draft regulation prohibiting discrimination by state and local governments against qualified individuals with disabilities was on display at the Office of the Federal Register in Washington, D.C. The rule is a companion to the regulation published by the Department of Justice on February 21, 1991, which established the requirements of the Americans with Disabilities Act for public accommodations and commercial facilities. Following publication of the second regulation in the Federal Register on February 28, a 60-day public comment period began. The Department of Justice is also hosting a series of public hearings across the United States to receive public comments regarding the regulation. The requirements of the new Americans with Disabilities Act regulation are patterned on those that apply to federally assisted programs under Section 504. The regulations are highlighted as follows:

1. A state or local government entity may not refuse to provide an individual with a disability an equal opportunity to participate in or benefit from its program simply because the person has a disability;

2. State and local governments are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do;

3. Separate programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities;

4. State and local governments are required to provide appropriate auxiliary aids, such as sign language interpreters where necessary, to ensure that communications with individuals with disabilities are as effective as communications with others;

5. All newly constructed state and local government buildings and facilities must be readily accessible to and usable by individuals with disabilities;

6. Existing government buildings and facilities are not required to be made accessible, but state and local governments are required to make services, programs, and activities provided in inaccessible facilities available to individuals with disabilities through alternative methods.

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Policy On Use Of Official Stationery For Certain Purposes

On February 11, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, issued a memorandum to all United States Attorneys and employees of the Executive Office for United States Attorneys reiterating Department of Justice policy on the use of official stationery for communicating personal views about convicted criminal defendants to probation offices and the courts.

Employees may communicate their views privately, but must seek supervisory approval before doing so. The purpose of this prohibition is to avoid the suggestion that what is expressed represents the views of the Department as a whole, rather than that of the individual writer. Employees are reminded to use the same rationale when drafting letters of recommendation for former or current employees or other individuals.

This subject was also addressed in detail by Director McWhorter in Volume 37, No. 3, of the United States Attorneys' Bulletin, dated March 15, 1989, at p. 80.

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Inspector General And General Accounting Office Audits/Surveys

On February 28, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised that the Inspector General (IG) and General Accounting Office (GAO) audit/survey approval functions have been transferred from Legal Counsel to the Evaluation and Review Staff (EARS). Approval for surveys from Departmental components, outside agencies, and Congress, which relate to prosecutive issues will also be handled by EARS. Surveys/audits which are case specific, relate to misconduct matters, or list the Freedom of Information/Privacy Acts or their systems remain within the scope of Legal Counsel's mission.

If contacted by either the Inspector General's office, or members of GAO, please verify with EARS that such audits/reviews have been approved by the Executive Office for United States Attorneys. Please keep in mind the provisions of the United States Attorneys' Manual (USAM 1-10.000 et seq.) and the Code of Federal Regulations (28 C.F.R. §50.3) when responding to survey/audit requests.

If you have any questions, please call Geralyn Dowling, Evaluation and Review Staff, at (FTS) 241-6930 or (202) 501-6930.

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SENTENCING REFORM

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 3, No. 18 dated January 31, 1991, and Volume 3, No. 19, dated February 27, 1991, is attached as Exhibit E at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit F is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 16 dated January 28, 1991, and Volume 2, No. 17, dated February 11, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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LEGISLATION

Money Laundering

On February 27, 1991, the House Banking Subcommittee on Financial Institutions approved H.R. 26, the Money Laundering Enforcement Amendments of 1991. This bill would authorize banking regulators to revoke the charter or appoint a conservator for an institution convicted of money laundering schemes, and is designed to cut off an avenue used by drug traffickers to conceal and store drug profits.

Similar legislation was passed by the House and Senate last year, but the measure was killed in the final hours of the Congressional session.

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Ban On Honoraria

On February 27, 1991, the Senate Governmental Affairs Committee approved S. 242 by voice vote. The House Judiciary Subcommittee on Administrative Law and Governmental Relations also approved its bill, H.R. 325, by voice vote. Both measures would lift the restriction for federal workers at the GS-15 level or below. In general, political appointees and some high-level officials would still be barred from accepting honoraria.

The 1989 Ethics Reform Act prohibited all federal employees, except Senators and Senate staff, from accepting honoraria as of January 1, 1991. Federal employees would not be able to use government time or resources to pursue outside activity, or accept payment from anyone whose interests could be substantially affected by an employee's official duties.

Both Houses will consider amendments and revisions to the bill in the coming weeks.

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Resale Price Maintenance

On February 21, 1991, James F. Rill, Assistant Attorney General for the Antitrust Division, submitted a statement to the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Judiciary Committee concerning S. 429, a bill to amend the Sherman Act regarding retail competition. This bill would make proving violations of the Sherman Act easier in cases involving nonprice distribution arrangements between manufacturers and distributors, and is nearly identical to S. 865 which was introduced in the last Congress. Assistant Attorney General Rill expressed opposition to the bill.

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Women's Equal Opportunity Act Of 1991

On February 21, 1991, Senator Robert Dole introduced the "Women's Equal Opportunity Act of 1991." This legislation will address sexual harassment in the workplace, domestic and street violence, and artificial barriers to job placement and promotion.

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CASE NOTES

CIVIL DIVISION

The Supreme Court Unanimously Agrees With Our Position That The Preponderance Of The Evidence Standard Should Apply When Determining Whether Fraud Debts Are Exempt From Bankruptcy Discharge

Section 523(a) of the Bankruptcy Code exempts certain types of debts from discharge, including fraud debts. A majority of the circuits held that in order to qualify for this exemption a creditor must prove fraud by clear and convincing evidence. These holdings were very troubling to the federal government since most federal fraud statutes -- e.g., the False Claims Act, Medicare fraud, securities fraud, etc. -- only require proof of fraud by a preponderance of the evidence. Under the majority view, if we received a fraud judgment under one of these federal statutes and then the defendant filed for bankruptcy, we would have to reprove the fraud all over again under the higher standard of proof in order to qualify for the discharge exemption. In light of our strong interests, we filed an amicus brief in this case asking the Court to adopt the preponderance standard. Now, in an unanimous opinion, the Court has agreed with our position.

Grogan v. Garner, S. Ct. No. 89-1149 (Jan. 15, 1991).
DJ # 145-0-3221

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Robert M. Loeb - (202) 514-4027 or (FTS) 368-4575

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D.C. Circuit Holds President Is Not An Agency Within The Meaning Of The APA; That The Presidential Records Act Precludes Judicial Review; But That The Federal Records Act Permits Judicial Review Of Recordkeeping Guidelines Concerning National Security Council Computer Messages

As the Reagan Administration drew to a close, plaintiffs brought suit seeking to prevent the deletion of computer messages from the White House computer systems and to require computer users to print all such messages in hard copy and designate them as either Presidential records or federal agency records. The district court denied the government's motion for summary judgment, concluding that the Administrative Procedure Act (APA) provides plaintiffs the authority to gain judicial review of their claims that the President had not complied with the Presidential Records Act and the Federal Records Act. We sought certification of the order, which the court granted and the court of appeals accepted our interlocutory appeal.

The court of appeals (Wald, D.H. Ginsburg, Randolph) has now reversed the district court's holding that the President is subject to the APA, holding squarely that the President is not an "agency" within the meaning of the APA. Moreover, the court held that the Presidential Records Act impliedly precludes judicial review of the President's compliance with that Act. These holdings dispose of a significant part of the action.

The court rejected our argument that the Federal Records Act also precludes judicial review of records creation, but held that the scope of judicial review should be limited to whether the guidelines provided NSC staff were arbitrary and capricious. The court held that plaintiffs could not test each individual staffer's compliance with recordkeeping responsibilities under the statutes; however, the court did permit some limited discovery to determine whether the documentary guidelines in the record constituted the total guidance provided to NSC staff.

Armstrong v. Bush, (D.C. Cir. 90-5173) January 25, 1991.
DJ # 145-1-2062.

Attorneys: Leonard Schaitman - (202) 514-3441 or (FTS) 368-3441
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Matthew M. Collette - (202) 514-1673 or FTS/368-1673

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First Circuit Affirms District Court's Dismissal Of Misdemeanor Traffic Offense Charges Against Customs Officer Who Was Acting In The Course Of Duty When They Allegedly Were Committed

Defendant, a U.S. Customs Officer, participated in the seizure of 162 kilograms of cocaine. He was ordered to drive to headquarters to obtain a van so the cocaine could be transported and secured. While on his way, he was stopped by local traffic police and although he identified himself and his mission, he was issued criminal citations for six alleged traffic offenses. We represented the defendant, and removed the criminal case to federal court.

Following a hearing on the removal, the district court not only upheld removal but also sua sponte dismissed the charges. Puerto Rico appealed, arguing that the sole purpose of the hearing was to determine whether a colorable federal defense existed, and that the court erred in dismissing the charges. We pointed out that Puerto Rico had the opportunity to present evidence at the hearing, which it failed to do, and that it also failed to proffer in its opening brief, in a reply brief, or at argument any evidence that the officer was acting other than in the course of duty. The First Circuit has now affirmed both removal and dismissal, because the district court properly found, after adequate notice to the parties, that the federal officer was absolutely immune from criminal prosecution for acts that occurred in the course, and as a necessary part of, his ongoing federal duties.

People of Puerto Rico v. Luis A. Torres Chaparro, No. 90-1722
(January 17, 1991). DJ # 157-35-1449

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Marc Richman - (202) 514-5735 or (FTS) 368-5425

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Second Circuit Holds That Plaintiff Did Not Suffer Injury In Fact And Therefore Lacked Standing To Bring A First Amendment Suit Either On His Own Behalf Or Pursuant To A Jus Tertii Theory

Plaintiff, a former employee of General Electric, Inc. (GE) at the Knolls Atomic Power Laboratory (KAPL), brought a First Amendment challenge to a Security Newsletter issued in September 1988 by GE and the Department of Energy. The Newsletter was part of a security program designed to prevent unauthorized disclosures of classified or militarily sensitive information. Plaintiff contended, however, that the restrictions in the Newsletter were overbroad and chilled employees' rights to make disclosures regarding alleged health, safety, and environmental problems at KAPL. The district court rejected plaintiff's claim and plaintiff appealed.

The court of appeals held that plaintiff's suit should be dismissed because plaintiff lacked standing. Plaintiff did not show present injury because he had not been prosecuted or otherwise punished for conduct that was proscribed by the challenged Newsletter, nor did plaintiff show a concrete threat of future injury in light of KAPL's explicit policy that its security program should not discourage the proper reporting of health, safety, or environmental concerns. Plaintiff's assertion that he "feel[s] that he is subject to possible prosecution" under the September Newsletter does not constitute cognizable injury, stated the court, because plaintiff failed "to proffer some objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity." Finally, the court held that plaintiff's failure to demonstrate some cognizable injury barred him from advancing a First Amendment claim on behalf of other GE employees pursuant to the jus tertii doctrine: "This slender exception to the [standing doctrine] . . . does not affect the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction. . . . Rather, the exception only allows those who have suffered some cognizable injury, but whose conduct is not protected under the First Amendment, to assert the constitutional rights of others."

This opinion should be of substantial assistance in future First Amendment cases involving standing and jus tertii issues.

Bordell v. Department of Energy, No. 90-6176 (January 11, 1991).
DJ # 145-19-650

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

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Fourth Circuit Holds That The Virginia Cap On Malpractice Awards Applies To All Claims Derived From The Injury To The Patient, Including Claims Of Emotional Distress

This case involves the Virginia Medical Malpractice Act, which caps damages at $750,000. The district court awarded $750,000 to a child for injuries arising out of medical malpractice, and awarded an additional $300,000 to the child's parents. We argued on appeal that the award to the child's parents was derivative, and hence within the statutory cap. We also argued that no post-judgment interest could be paid on any damage award until the district court judgment became final, and a transcript of the judgment was filed with the Comptroller General, as required

by 31 U.S.C. 1304(b)(1)(A). Finally, we defended against plaintiffs' claim that the Virginia cap did not apply in their FTCA action because by state law the cap applied only to institutions licensed by the state, and thus not to federally operated hospitals.

The Fourth Circuit has now ruled in our favor on all points. The panel held that in an FTCA action the United States may avail itself of the Virginia cap; that the cap applies to all derivative claims, including emotional distress, medical expenses, transportation, and lost income; and that the provisions of 31 U.S.C. 1304(b)(1)(A) must be followed by plaintiffs.

Starns v. United States of America, January 9, 1991 (No. 89-2789).
DJ # 157-79-2698

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
Richard A. Olderman - (202) 514-3542 or (FTS) 368-3542

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Seventh Circuit En Banc Narrows Class Size In Social Security Class Action Concerning Combination Of Non-Severe Impairments

In 1984, Congress prospectively amended the Social Security Act to require that in claims for disability benefits, the Secretary must consider the combined effect of all impairments, even if some or all are not severe, in determining whether the claimant meets the threshold level of severity needed at step 2 of the sequential evaluation process. In an Illinois-wide class action with approximately 90,000 class members, the district court determined that the rule requiring combination of impairments must also be applied retroactively to all persons denied benefits on this basis between 1979 and the 1985 changes in the regulations to implement the 1984 amendment. The court decided that the Secretary had waived the application of the 60-day statute of limitations of 42 U.S.C. 405(g), allowing the relief to be given to persons denied as much as four years prior to the complaint, because we did not timely plead the issue. It also determined that no class members needed to exhaust their administrative remedies.

In 1985 the Seventh Circuit affirmed, but the Supreme Court granted certiorari, vacated the Seventh Circuit decision, and remanded for reconsideration in light of Bowen v. Yuckert, 482 U.S. 137 (1987). The district court on remand adhered to its earlier rulings. On our second appeal, the Seventh Circuit, after argument before a panel but prior to the panel decision, ordered reargument en banc. In its opinion, the en banc court has now reaffirmed its prior holding that the combination policy violated the Act. The court held, however, that class members who had failed to exhaust their administrative remedies prior to the filing of the complaint must be excluded from the class. This eliminates approximately two-thirds of the class, substantially reducing the Secretary's burden in the case. Nevertheless, the court neglected to rule on whether class members whose time to exhaust had not yet expired when the complaint was filed were required to timely exhaust, even though this was extensively briefed and was the main subject of the en banc reargument. As a result, the decision sub silentio excuses exhaustion for those class members.

Edna Johnson v. Sullivan, No. 89-2676 (December 28, 1990). D.J. # 137-23-915

Attorneys: Robert S. Greenspan - (202) 514-5428 or (FTS) 368-5428
Frank A. Rosenfeld - (202) 514-2498 or (FTS) 368-2498

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Ninth Circuit Affirms District Court's Determination That Labor Union Had Failed To Present Prima Facie Evidence That Department Of Labor Investigation Threatened First Amendment Rights

This case involves a Union's attempt to block on First Amendment grounds a Department of Labor (DOL) investigation of a Union-related Political, Educational, and Charitable Fund. In a prior decision, the Ninth Circuit had reversed a district court decision granting enforcement of DOL subpoenas, which, among other things, would result in disclosure of the Fund's contributors. While holding that First Amendment rights were implicated, the court of appeals remanded for a determination of whether the Union could establish on the basis of "objective and articulable facts" a prima facie case of First Amendment infringement. The district court then held that an affidavit by the Fund's Treasurer -- that contributions had dramatically declined since DOL's enforcement efforts were reported in the press -- did not meet the prima facie requirement.

On appeal, the Ninth Circuit affirmed. The court elaborated on the two tier analysis involved in the prima facie test: first there must be a demonstration of "a causal link between the disclosure and the prospective harm to associational rights," and second, the organization must be the type "where exposure could incite threats, harassment, acts of retribution, or other adverse consequences that could reasonably dissuade persons from affiliating with it." The court held that the Union had satisfied neither of these requirements. This decision's explication of First Amendment requirements will be important in our pending Ninth Circuit appeal in Dole v. Service Employees, Local 280, involving a protective order issued in connection with a DOL investigation, as well as in several other cases raising the Amendment as a bar to disclosure of information to DOL.

Dole v. Local Union 375, Plumbers International Union of America, AFL-CIO, et al., No. 90-35111 (Dec. 28, 1990). DJ # 145-10-3476

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Tenth Circuit Holds That Labor Department Proceeding To Enforce The Service Contract Act Is Exempt From Bankruptcy Code's Automatic Stay

The Tenth Circuit has held that an administrative proceeding to enforce the minimum wage standards of the Service Contract Act is an exercise of the government's police or regulatory power and is therefore exempt from Bankruptcy Code provisions that automatically stay other civil or administrative actions brought against a debtor. The Court first held that it had appellate jurisdiction over the question, even though the district court had remanded the matter to the bankruptcy court for resolution of a damages issue. Applying the Cohen collateral order doctrine, the Court reasoned that the imposition of the Bankruptcy Code stay conclusively determined an important legal question, that the government would be unable to vindicate statutory rights absent an immediate appeal, and that the stay issue was conceptually distinct from the pending claim for damages. It therefore held that the stay order was a final decision appealable under 28 U.S.C. 158(d).

On the merits, the Court held that enforcement of the Service Contract Act, which sets minimum wage standards on certain government contracts, served important public policy interests rather than the pecuniary interests of the government and was therefore exempt from the Bankruptcy Code's automatic stay.

Eddleman v U.S. Dept. of Labor, No. 88-2793 (January 15, 1991).
DJ # 77-13-674

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Jeffrey Clair - (202) 514-4027 or (FTS) 368-4027

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CIVIL RIGHTS DIVISION

Supreme Court Holds School Districts May Be Released From School Desegregation Decrees After Demonstrating That They have Continuously Complied With The Decree And That Compliance Has Eliminated The Vestiges Of Past Discrimination

On January 15, 1991, the Supreme Court issued its opinion in Board of Education of Oklahoma City Public Schools v. Dowell, No. 89-1080. The case addressed whether, and when, a school district that has been operating under a court-ordered school desegregation decree may be released from court supervision, with full control of the district returned to local officials.

In an opinion by Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, and Kennedy, the court held that the court of appeals erred in holding that a school district could not be released from a desegregation decree without demonstrating, under the standard of United States v. Swift & Co., 286 U.S. 106, 199 (1932), that continued implementation of the decree was causing the school system "grievous wrong evoked by new and unforeseen conditions." The court held that a desegregation decree is intended to be a temporary remedy, and so Swift was an improperly difficult standard to satisfy. Because a school desegregation decree is intended to remedy a constitutional violation, the court held that it should be dissolved after compliance with a remedial decree had eliminated vestiges of discrimination "to the extent practicable."

In determining when that occurs, courts should focus on two factors: whether the school district has been complying in good faith with the decree since it was entered, and whether during that period the vestiges of past discrimination have been eliminated to the "extent practicable." The determination of whether those vestiges have been eliminated requires an examination of all aspects of school operations -- student and faculty assignments, transportation, extra-curricular activities, and facilities, The court also stated that once a school district has been released from a desegregation decree, any challenges to subsequent school actions are to be judged under existing Equal Protection Clause standards.

Board of Education of Oklahoma City Pulbic Schools, Independent School District No. 89, Oklahoma County, Oklahoma v. Robert L. Dowell, et al., No. 89-1080 (January 15, 1991). DJ # 169-60-3

Attorneys: David K. Flynn - (202) 514-2195 or (FTS) 368-2195
Mark L. Gross - (202) 514-2172 or (FTS) 368-2172

* * * * *

TAX DIVISION

Summons Enforcement Action Filed Against Attorney With Respect To Cash Fee Reporting

On January 31, 1991, a summons enforcement action was filed against an attorney, Robert A. Leventhal, personally and in his representative capacity as a partner/officer of Leventhal and Slaughter, P.A., of Orlando, Florida. The action seeks judicial enforcement of an Internal Revenue Service summons served on Leventhal to obtain information omitted from two Forms 8300 which reported the receipt of currency in excess of $10,000. Claiming attorney-client privilege, Leventhal refused to provide information regarding the identity of the persons making the cash payments.

Mr. Leventhal was formerly the attorney-in-charge of the Orlando branch office of the United States Attorney's office for the Middle District of Florida. Robert Genzman, United States Attorney for the Middle District of Florida, has recused himself and his staff from participation in this case, except for logistical support and assistance.

* * * * *

Five Indicted For Conspiracy And Motor Fuel Excise Tax Evasion

On January 30, 1991, a federal grand jury returned a five-count indictment in the Eastern District of New York, which charges five individuals who worked in the wholesale gasoline business with one count of conspiracy and four counts of attempting to evade gasoline excise taxes in excess of $14 million on the sale of more than 155 million gallons of gasoline over a 27-month period.

According to the indictment, the alleged conspirators conducted "tax free" purchases and sales of gasoline, when, in fact, the transactions required the payment of gasoline excise taxes. The payment of excise taxes was evaded and the scheme concealed by means of the creation of so-called "burn companies," short-lived entities with few or no assets for which false invoices, books and records were prepared that reflected "tax included" transactions when no tax was actually paid. The indictment also alleges that false statements were made to Internal Revenue Service personnel and to a federal grand jury in furtherance of the scheme.

* * * * *

Second Circuit Reverses Tax Court Ruling That Limited Imposition Of The Civil Fraud Penalty To Cases Of Underpayment Resulting Directly From The Fraudulent Conduct

On January 24, 1991, the Second Circuit reversed the decision of the Tax Court in Arc Electrical Construction Co. v. Commissioner, which held that the civil fraud penalty could be imposed only for understatements of tax resulting directly from the fraudulent conduct. The Tax Court had held that the civil fraud penalty could not be imposed for understatements in prior years which resulted indirectly from the carryback of legitimate credits generated by the fraudulent treatment of other items. Taxpayer fraudulently overstated its cost of goods sold and underreported its tax liability for 1977. This understatement of tax freed a new jobs credit for carryback to 1974. The Tax Court sustained the fraud penalty for 1977, but set aside the penalty for 1974 on the ground that the jobs credit itself was legitimate and hence its carryback could not give rise to the fraud penalty.

On appeal, the Government argued that taxpayer's refund based on the carryback to 1974 was no less an "underpayment * * * due to fraud" within the meaning of Code Section 6653(a), than the understatement for 1977, and that a taxpayer who understated his income for a particular year should not be able to avoid the fraud penalty (or any other penalty applicable to tax understatement) simply because he was able to reap the benefit of his fraud in a year other than the one in which the fraudulent return was filed.

The Second Circuit agreed. It held that the 1974 refund was made possible by the fraud for 1977, and the jobs credit, like an operating loss carryback, was simply the vehicle for expanding that fraud.

* * * * *

Fifth Circuit Rules Against Government In Oil And Gas Tax Appeal

On January 31, 1991, the Fifth Circuit affirmed the unfavorable decision of the Tax Court in Houston Oil and Minerals Corp. v. Commissioner, holding that overriding royalty interests in oil and gas leases are not "oil, gas, or geothermal property" for purposes of recapturing previously deducted intangible drilling costs under Section 1254 of the Code. The decision permits a taxpayer to carve out overriding royalties and thus to dispose of essentially all the value of oil and gas leases, yet avoid the recapture of intangible drilling costs. This decision will cost the Treasury $13 million and may sound the death knell for another multi-million dollar case.

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ADMINISTRATIVE ISSUES

Career Opportunities

Financial Litigation Staff, Executive Office For United States Attorneys

The Executive Office for United States Attorneys is seeking applicants for the position of Assistant Director of the Financial Litigation Staff. The role of the Financial Litigation Staff is to support the Offices of the United States Attorneys in their responsibilities for the collection of debts owed to the United States Government.

The Assistant Director will report to the Deputy Director, and will be responsible for the supervision of the Financial Litigation Staff comprised of three attorneys and ten support positions. The incumbent will work closely with the Attorney General's Advisory Committee's Subcommittee on Financial Litigation and with Judge Tim Murphy, Associate Deputy Attorney General, in setting priorities and goals to improve upon the work of the United States Attorneys in the financial litigation area.

Within the next year, extensive emphasis will be placed on the training of personnel in the implementation of the Debt Collection Act. In addition, a number of ongoing major initiatives will be pursued in the area of criminal fines, restitution, affirmative civil litigation, and other collection work. The incumbent will have extensive liaison with client agencies and other government offices.

Questions concerning this position should be directed to Doug Frazier, Acting Deputy Director, at (FTS) 368-2123 or (202) 514-2123, or Dick DeHaan, Deputy Director, Administrative Services, at (FTS) 241-6924 or (202) 501-6924.

* * * * *

Office Of Attorney Personnel Management

The Office of Attorney Personnel Management, Department of Justice, is seeking an attorney for its area of responsibility in attorney personnel management operations and issues. The office is responsible for personnel management (e.g., recruitment/hiring, promotions/incentive awards/disciplinary actions/terminations) for the Department's 7,000 attorneys. The attorney will review background investigations conducted by the Federal Bureau of Investigation and make suitability adjudications based on them. The attorney will also perform research on a variety of personnel-related legal issues, review guidance from the Office of Personnel Management, review requests for exceptions to Department policy, formulate and manage the office budget, and manage the office's computer network and database of personnel actions. The responsibilities may also include some legal recruitment activities.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year of post-J.D. experience. A background which includes budget and/or computers, especially managing a local area network, is highly desirable. Applicants should submit a resume and writing sample to: U.S. Department of Justice, Box 1, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530. Current salary and years of experience will determine the appropriate grade and salary levels. The possible hiring range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 - $68,129). No telephone calls, please.

* * * * *

Fraud Section, Criminal Division

The Office of Attorney Personnel Management, Department of Justice, is seeking experienced trial attorneys for the Fraud Section of the Criminal Division to conduct investigations and prosecutions of criminal cases throughout the United States involving thrift institutions that have failed. The duty station will be in Washington, D.C., but the cases are nationwide and there will be extensive travel; on average, 50 percent of an attorney's time will be in travel status.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least three years post-J.D. experience, and trial experience. Applicants should submit an SF-171 (Application for Federal Employment) to: U.S. Department of Justice, Fraud Section, Criminal Division, P.O. Box 28188, Central Station, Washington, D.C. 20538.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible hiring range is GS-12 ($37,294 - $48,481) to GS-15 ($61,643 - $80,138). Positions are available immediately. No telephone calls, please.

* * * * *

Commercial Litigation Branch, Civil Division

The Office of Attorney Personnel Management, Department of Justice, is recruiting experienced trial attorneys for the Commercial Litigation Branch, Civil Division. This Branch, the largest Branch in the Division, handles cases that involve billions of dollars in claims, both by and against the government. This Branch prosecutes claims for the recovery of monies fraudulently secured or improperly diverted from the United States Treasury, defends the country's international trade policy, and defends and asserts the government's contract and patent rights. In addition, the Branch protects the government's financial and commercial interests under foreign treaties and collects monies owed the United States as a result of civil judgments and compromises.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least one year post-J.D. experience. Applicants should have a strong interest in trial work and an exceptional academic background; a judicial clerkship or comparable experience is highly desirable. Applicants may call (202)/(FTS) 307-0387 and/or submit a resume and writing sample to: Robert M. Hollis, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C. 20044.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-12 ($37,294 - $48,481) to GS-15 ($61,643 - $80,138).

* * * * *

Attorney General's Advocacy Institute

The Attorney General's Advocacy Institute, Executive Office for United States Attorneys, is currently considering applicants for the position of Criminal Assistant Director. (Notification via teletype was sent on February 14, 1991.) In addition, applicants who may be interested in the Civil Assistant Director position should contact Nancy Hill, Acting Director, Office of Legal Education, at (FTS) 368-4104 or (202) 514-4104. Individuals who are selected for these positions will serve on a detail not to exceed one year.

* * * * *

Alternate Work Schedule Reporting Requirements

Gary Wagoner, Chief, Special Projects Branch of the Personnel Staff, Executive Office for United States Attorneys, reminds you that if there are employees in your office working alternate work schedules, including flexible and compressed tours of duty, an SF-52 (Request for Personnel Action) must be prepared for those employees going on or off the alternate work schedule. These SF-52s, reflecting the employee's specific days and hours of duty, should then be forwarded to your servicing personnel management specialist for processing. The authority to establish alternative work schedules was delegated to all United States Attorneys on September 10, 1989. Some employees of United States Attorneys' offices have been authorized to work on alternate schedules; others are seeking approval to change their current schedules.

If you have any questions, or require guidance in completing the SF-52 form, please contact your Administrative Officer or servicing personnel management specialist.

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Health Benefits Program

Steve Muir, Chief, Labor and Employee Relations Branch, Executive Office for United States Attorneys, advises that, along with an increase in health insurance premiums, the Federal Employees Health Benefits Program now requires prepaid plans and fee-for-service plans to include a pre-admission certification provision. This pre-admission certification provision makes the employees responsible for ensuring that the requirement is met.

The employee must check, or confirm that the personal physician has checked, with the health plan before being admitted to the hospital. Although this provision differs from plan to plan, it ensures that hospital admissions are medically necessary for the type of treatment the employee (or covered members) require, and that the insurance pays only for the number of hospital days required to treat the condition. If the confirmation does not take place, there will be a $500 penalty incurred by the employee.

In order to eliminate any unforeseen costs, you should become familiar with your plan's cost containment provisions.

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Performance Work Plans and Performance Appraisals

Paul Ross, Employee Relations Specialist, Executive Office for United States Attorneys, advises that, in an effort to assist managers and supervisors in formulating annual progress reviews and overall performance appraisals, the Personnel Staff has recently issued procedures to complete Department of Justice Performance Appraisal Form DOJ-522. The procedures are published in the Administrative Procedures Handbook Issuance (APHI), PERSONNEL, Chapter 430, #1. This document provides information from current rating cycles to required personal data.

One of the most important aspects of the APHI, and good performance management, is the completion of progress reviews. This discussion between a supervisor and subordinate employee, if completed in a timely manner, can virtually eliminate any roadblocks in proposing performance-based actions (i.e., unsatisfactory appraisals, demotions, removals). The progress review also gives the employee an overview of how well he/she is completing related job functions. Management and supervisory officials are "shooting themselves in the foot" when a performance-based action is proposed without a Performance Work Plan or a timely progress review.

All employees, whether attorney or non-attorney, are required to have annual performance appraisals. The fact that some attorney staff have reached the pay cap, or non-attorney staff have reached the maximum salary for their specific grade levels, does not eliminate management's responsibility to complete and issue performance work plans, conduct at least one formal progress review, and complete written annual performance appraisals/evaluations.

If you have any questions, please contact your District's Administrative Officer or Personnel Officer.

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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%	07-17-90	7.88%
06-02-89	8.85%	08-24-90	7.95%
06-30-89	8.16%	09-21-90	7.78%
07-28-89	7.75%	10-27-90	7.51%
08-25-89	8.27%	11-16-90	7.28%
09-22-89	8.19%	12-14-90	7.02%
10-20-89	7.90%	01-11-91	6.62%
11-16-89	7.69%	02-13-91	6.21%
12-14-89	7.66%		

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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EXHIBIT
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2/14/91

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EXHIBIT B

FILED

JAN 25 11:15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRYAN A. CENTA, Petitioner,	)	1:91 CV 0124
vs.	)	O R D E R
HONORABLE MICHAEL P. W. STONE, et al., Respondents.	)	

Battisti, J.,

Petitioner Bryan Centa is a United States Army soldier currently on active duty in Saudi Arabia. Before the court is a petition for a writ of habeas corpus, an application for a temporary restraining order, and a motion for a preliminary injunction. Due to the absence of jurisdiction in the Northern District of Ohio, all are DENIED and DISMISSED.

I. FACTUAL BACKGROUND

According to the facts alleged in the petition, the Petitioner enlisted in the Army in March, 1990 on a delayed entry basis. On November 15, 1990 he reported to his assignment in Mainz, Germany.

Petitioner alleges that his recruiting officer repeatedly assured him that he would not be sent to Saudi Arabia should he opt for active duty status.

Petitioner further alleges that around the time that he

was told that his unit would be going into combat in Saudi Arabia, he was becoming aware of his conscientious opposition to participation in war of any form. The basis for this opposition is alleged to be strongly held religious, moral and ethical beliefs. There was, however, no detailed information provided in the petition, nor does the Petitioner claim to be a member of any organized religion.

Petitioner claims that on December 12, 1990 he filed an application for discharge and to be classified as a conscientious objector, and was later counseled by an unidentified Army Chaplain who verified that his beliefs were firmly held and recommended that his application be approved. Petitioner does not describe the current status of his application review, nor does he claim to have exhausted his administrative remedies.

Finally, the Petitioner alleges that on January 3, 1991, he was shackled and forced to board a plane to Saudi Arabia where he is currently in imminent danger of being involved directly in warfare or combat.

The instant petition was filed on January 23, 1991, and sought the issuance of the writ against the "Honorable Michael P.W. Stone, Secretary of the Army, and General H. Norman Shwarzkopf, Commander, Operation 'Desert Storm'". The court noted a probable lack of jurisdiction and instructed the parties to appear before it on the morning of January 24, 1991 to provide oral argument on the question. Following the

arguments, the petition, application and motion were all denied and the parties were advised that an order and opinion would follow seasonably.

II. DISCUSSION

The remedy sought by Petitioner is one provided by federal statute. 28 U.S.C. §§ 2241 et seq. (1988). Among other things, the law provides that the Great Writ shall not extend unless the petitioner is in custody. 28 U.S.C. § 2241 (1988). In addition, it states that all writs of habeas corpus "shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243 (1988).

It is clear that this court has no power to entertain the instant habeas petition. In Schlanger v. Seamans, 401 U.S. 487, 490 (1971), it was held that the absence of a soldier's custodian from the territorial jurisdiction of the district court in which a habeas petition is filed is fatal to the jurisdiction of that court. The Court employed a definition of custodian which included a soldier's direct commanding officer or any officer along the chain of command.

While the Court developed an exception to Schlanger in Strait v. Laird, 406 U.S. 341 (1972), the instant case does not fall within the bounds of the exception. Strait involved a reservist who was not on active duty. Id. at 341. As a reservist his "nominal commanding officer" was the Commanding Officer of the Reserve Officer Components Center at Fort

Benjamin Harrison, Indiana. Id. at 342. The petitioner in Strait, however, had at all times been domiciled in California and all meaningful contacts with the Army had occurred in California. Id. at 343. The Court held that in light of the control exerted over the petitioner in California, the "nominal commanding officer" could be deemed to be present in California. Id. at 345. Accordingly, the Court found that the exercise of jurisdiction by the California court was proper. Id.

The Strait case has been limited to its facts and is not applicable to the instant case in which neither the Petitioner nor his custodians are within the territorial jurisdiction of the Northern District of Ohio. See Eisel v. Secretary of the Army, 477 F.2d 1251, 1263 (D.C. Cir. 1973) (noting that the Strait exception rested upon the petitioner's status as an inactive reservist and the fact that the commanding officer was merely "the keeper of some records in an obscure place where the petitioner had never been.").

Although there is no federal district in which both the petitioner and at least one of his custodians are present, this does not defeat the petitioner's ability to seek the issuance of a writ of habeas corpus. In Ex Parte Hayes, 414 U.S. 1327, 1327-28 (1973), a soldier on active duty in Germany who was faced with a similar jurisdictional dilemma filed a petition for a writ of habeas corpus directly with Justice Douglas, who noted that although the soldier's immediate

commanding officer was outside the territorial limits of any district court, others in the chain of command were not. The Secretary of the Army, for example, was, for the purposes of a suit against him in his official capacity, located in the District of Columbia. Id. at 1328. He also noted that the District Court for the District of Columbia had asserted jurisdiction over at least one such case in the past. Id. Accordingly, he transferred the case to the District Court for the District of Columbia. Id. at 1329.

Petitioner may be able to refile this petition in another district within which one of the respondents is present. He may not, however, proceed in the Northern District of Ohio.[1]

Accordingly, the petition, application and motion are DENIED and DISMISSED.

IT IS SO ORDERED.

Frank J. Battisti
United States District Judge

[1] The government suggested at oral argument that an alternative ground for dismissal may lie in the Petitioner's failure to exhaust administrative relief. See Parisi v. Davidson, 405 U.S. 34, 35 (1972) (stating that "[w]hen a member of the armed forces has applied for a discharge as a conscientious objector and has exhausted all avenues of administrative relief, . . . he may seek habeas corpus relief in a federal district court . . . "). In the instant matter, the Petitioner has failed to plead exhaustion, or any facts sufficient to support a decision by the court on the matter of exhaustion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRYAN A. CENTA,

Petitioner,

vs.

HONORABLE MICHAEL P. W. STONE, et al.,

Respondents.

1:91 CV 0124

JUDGEMENT ENTRY

Battisti, J.,

In accordance with the order filed in the above captioned case, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition for a writ of habeas corpus is DENIED and DISMISSED.

IT IS SO ORDERED.

Frank J. Battisti
United States District Judge

FILED
91 JAN 25 AM 11:15
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CLEVELAND

EXHIBIT C

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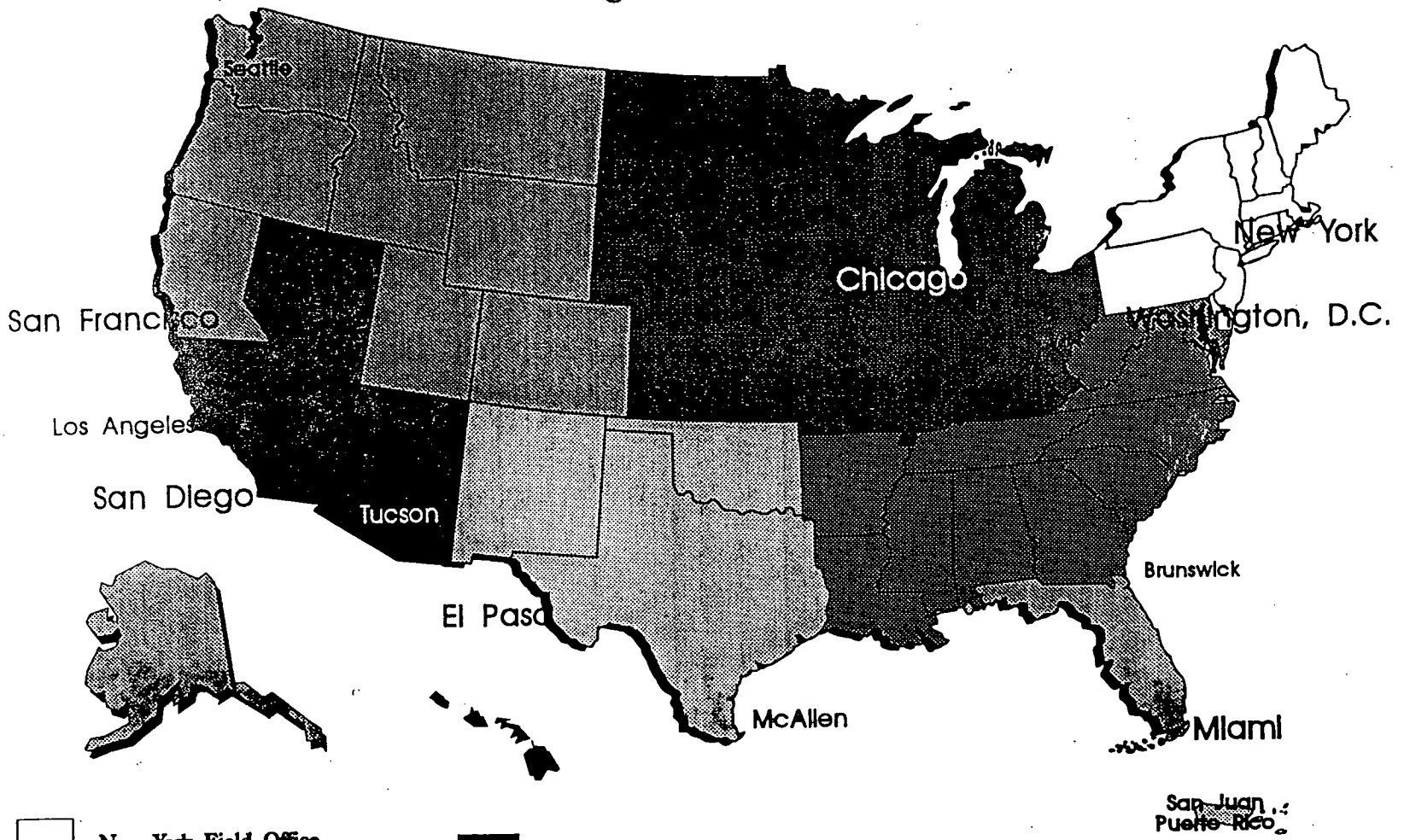

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EXHIBIT
D

COURT AUTHORIZED PROCEDURES FOR TAKING AND USING ALIEN MATERIAL WITNESS DEPOSITIONS

During the past several years, a number of cases have arisen in the Fifth and Tenth Circuits concerning the preservation of testimony of alien material witnesses awaiting the trial of defendants accused of alien smuggling offenses. Trial courts have attempted to eliminate the prolonged incarceration of alien material witnesses by ordering that depositions be taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3144 to preserve testimony in the interests of justice. After such witnesses are deposed, they are normally transferred to the custody of the Immigration and Naturalization Service and then deported. In the event that these witnesses do not appear to testify at the trial of those accused of alien smuggling, the court may permit the use of the depositions as substantive evidence at trial, pursuant to Rule 804 of the Federal Rules of Evidence, based upon the unavailability of the witnesses.

In several districts in the Fifth and Tenth Circuits, United States Attorney's Offices have taken and sought to use the depositions of alien material witnesses pursuant to standing District Court orders requiring the release of alien witnesses after a specified period of pretrial detention if trial has not occurred by the expiration of that period. Many of these District Court orders, however, include an exception or waiver of the mandatory release provision that allows for extended detention for alien material witnesses in certain circumstances. In districts where standing District Court orders exist, the United States Attorney's Office should enter the order into the record of the alien smuggling case. If the applicable standing District Court order allows for an exception to automatic release of an alien material witness, the United States Attorney's Office should seek to invoke the exception and ask for continued detention and should obtain the court's denial of this request on the record. After denial of the request for continued detention, the United States Attorney's Office should ask the court for permission to take a deposition of the witness, and make a showing as to why the deposition is necessary in the pending case.

Defendants usually object to the taking and using of alien material witness depositions, citing violations of the Confrontation Clause. Two recent Tenth Circuit opinions, however, demonstrate that under certain circumstances, such depositions can be taken and later used at trial without violating a defendant's right to confront the witnesses against him. In United States v. Eufracio-Torres, 890 F.2d 266 (10th Cir. 1989), the court established steps that the government must take to comply with Fed.R.Crim.P. 15, 18 U.S.C. § 3144 and Fed.R.Evid. 804 in order to preserve the testimony of alien material witnesses through depositions and protect the use of such depositions at trial from

a Confrontation Clause challenge. The procedures enunciated in Eufracio-Torres were recently reaffirmed by the Tenth Circuit in United States v. Lopez-Cervantes, No. 89-2100 (November 1, 1990).

Through these cases, the Tenth Circuit has determined that a Rule 15 deposition of an alien material witness is a trustworthy form of evidence that allows the defendant to challenge the statements made when the deposition is taken. The government should instruct the witness at the time that the deposition is taken that he or she can be criminally charged if he or she lies during the deposition. Whenever possible, the deposition should be scheduled to allow for the defendant to attend. In all cases, the defendant, through counsel, must be afforded the opportunity to cross-examine the witness during the deposition. At the conclusion of the deposition, the government must utilize "reasonable means" to assure that the alien material witness will attend trial. The government should serve a trial subpoena upon the witness at the end of the deposition, ask the witness to return to the jurisdiction for trial, instruct the witness how to reenter the United States for his or her appearance at trial, advise the witness that his or her travel expenses are reimbursable after he or she returns for trial, and inform the witness that he or she will be paid a fee for appearing at trial. The government should also attempt to obtain the witness' oral commitment to return for trial. The Tenth Circuit has held that these procedures constitute "reasonable efforts in good faith to obtain the attendance" of an alien material witness at trial, and that if the witness subsequently does not appear, the deposition can be used as substantive evidence at trial despite a defense objection pursuant to the Confrontation Clause.

Given the strong competing interests of the Fifth Amendment procedural due process rights of the alien witness versus the defendant's Sixth Amendment right of confrontation, courts can be expected to require strict compliance with the procedures outlined above before permitting the use of deposition testimony where the witness does not return to testify at trial. United States Attorneys Offices are therefore advised to review carefully the Eufracio-Torres and Lopez-Cervantes decisions and make every effort to comply with the procedures established therein.

For further information and guidance concerning this issue, United States Attorney's Offices are advised to contact Richard Shine, Senior Legal Advisor, General Litigation and Legal Advice Section, Criminal Division, at 368-1026 (FTS) or (202) 514-1026 (commercial), or Jennifer Levy, Trial Attorney, General Litigation and Legal Advice Section, Criminal Division, at 368-1050 (FTS) or (202) 514-1050 (commercial).

EXHIBIT E

Guideline Sentencing Update

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

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

VOLUME 3 • NUMBER 18 • JANUARY 31, 1991

Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit holds downward departure may be permitted for "aberrant behavior" by first-time offender, but not for defense of "imperfect entrapment." Defendant, who pled guilty to counterfeiting, received a downward departure in his sentence for substantial assistance, 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, p.s. He appealed, arguing that the district court erred by concluding that it could not consider an additional departure based on defendant's claims that his actions constituted "aberrant behavior" and that he had a defense of "imperfect entrapment."

The appellate court remanded, holding that the Guidelines do not preclude a downward departure for aberrant behavior: "It is clear under the Guidelines that 'aberrant behavior' and 'first offense' are not synonymous. The Guidelines make due allowance for the possibility of a defendant being a first offender. . . . Nevertheless, the Guidelines recognize that a first offense may constitute a single act of truly aberrant behavior justifying a downward departure. *See* Guidelines Manual, Ch. 1, Part A, para. 4(d) (with respect to first offenders, 'the Commission . . . has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures')." *Accord U.S. v. Russell*, 870 F.2d 18 (1st Cir. 1989) (district court has discretion to make downward departure for aberrant behavior). *See also U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990) (holding that check-kiting scheme carried out over 15-month period could not qualify as "a single act of aberrant behavior").

The court held, however, that as a matter of law a defense of imperfect entrapment cannot justify a downward departure, agreeing with the Eighth Circuit's conclusion in *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990).

U.S. v. Dickey, No. 89-50340 (9th Cir. Jan. 23, 1991) (Leavy, J.).

Third Circuit holds departure by analogy may be considered for defendant who cannot qualify for mitigating role in offense adjustment because only other "participant" in offense was undercover agent. Defendant pled guilty to receipt of child pornography through the mail. He had responded to an ad placed by an undercover postal inspector, and after corresponding for several months ordered four magazines. The district court sentenced him to 12 months, the low end of the guideline range, after denying an adjustment under U.S.S.G. § 3B1.2 for a mitigating role in the offense and ruling it could not depart downward for mitigating circumstances.

The appellate court affirmed the denial of the § 3B1.2 adjustment. It agreed with other circuits that have held that role in offense adjustments require other "participants" who are "criminally responsible." *See, e.g., U.S. v. DeCicco*, 899 F.2d 1531 (7th Cir. 1990); *U.S. v. Gordon*, 895 F.2d 932 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990); *U.S. v. Carroll*, 893 F.2d 1502 (6th Cir. 1989). *But see U.S. v. Anderson*, 895 F.2d 641 (9th Cir. 1990) (§ 3B1.1(c) may be applied because codefendant was tricked into committing offense). Here, defendant was the only "participant" because the government agent was not criminally responsible.

The court held, however, that a departure could be made by analogy to § 3B1.2: "If the Guidelines authorize departure in 'an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm,' Ch. 1, Pt. A, 4(b), a fortiori they authorize departure in an atypical case where an adjustment would otherwise be authorized for the same conduct but, for linguistic reasons, the adjustment Guideline does not apply. That is to say, the fortuitous fact that § 3B1.2 linguistically could not apply to [defendant] because [the undercover agent] was not a criminally responsible 'participant' does not render [defendant's] conduct significantly different from that of a defendant in similar circumstances who might qualify for an offense role adjustment. . . . [W]e hold that when an adjustment for Role in the Offense is not available by strict application of the Guideline language, the court has power to use analogic reasoning to depart from the Guidelines when the basis for departure is conduct similar to that encompassed in the Role in the Offense Guideline." *See also U.S. v. Crawford*, 883 F.2d 963 (11th Cir. 1989) (affirming upward departure for aggravating role in offense even though conduct did not technically meet definition in § 3B1.1).

The court "emphasize[d] the limited nature of the departure" it authorized: it applies only where there is one "participant" because with more "there can be no departure by analogy because the adjustment guideline is applicable of its own force." In remanding, the court noted that defendant "is only entitled to a departure by analogy . . . if the district court finds that he would have been entitled to [a § 3B1.2] adjustment had [the undercover agent] qualified as a participant." Also, any departure "would be limited to the 2 to 4 level adjustment downward on the bases set forth in § 3B1.2."

U.S. v. Bierley, No. 90-5099 (3d Cir. Dec. 28, 1990) (Sloviter, J.).

First Circuit holds that rehabilitation efforts after arrest and indictment may be ground for downward departure, but only in unusual case. Defendant, who pled guilty to two drug offenses, was given a downward departure based on his efforts between indictment and sentencing to end his drug addiction. The government appealed.

The appellate court reversed, holding that departure for rehabilitation may be considered, but that this defendant's efforts were not "unusual enough to merit" departure. "[T]he mere fact of demonstrated rehabilitation between date of arrest and date of sentencing cannot form the basis for a downward departure . . . . [However], in an appropriate case, a defendant's pre-sentence rehabilitative efforts and progress can be so significant, and can so far exceed ordinary expectations, that they dwarf the scope of pre-sentence rehabilitation contemplated by the sentencing commissioners when formulating section 3E1.1. We hold, therefore, that a defendant's rehabilitation might, on rare occasion, serve as a basis for a downward departure, but only when and 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.'" *Accord U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989). *But see U.S. v. Pharr*, 916 F.2d 129 (3d Cir. 1990) ("post-arrest drug rehabilitation efforts and the potential effect of incarceration on these efforts are not appropriate grounds for discretionary departure"); *U.S. v. Van Dyke*, 895 F.2d 984 (4th Cir. 1990) (rehabilitative conduct after arrest accounted for in § 3E1.1, not proper basis for departure).

U.S. v. Sklar, 920 F.2d 107 (1st Cir. 1990).

Aggravating Circumstances

U.S. v. Loveday, No. 89-50388 (9th Cir. Jan. 8, 1991) (Hall, J.) (affirming upward departure for defendant who had manufactured several homemade bombs and was convicted of possession of unregistered firearm and sentenced under U.S.S.G. § 2K2.2 (Oct. 15, 1988)—in drafting § 2K2.2 "the Commission did not have in mind the unique dangers homemade bombs pose to public safety," so departure warranted under either § 5K2.0, p.s. or § 5K2.14, p.s. (Public Welfare)).

U.S. v. Wylie, 919 F.2d 969 (5th Cir. 1990) (affirming upward departure for drug conspiracy defendant based on her "allowing the use of drugs in front of children in her home, her being the chief financial supply for the purchase of cocaine, her coercion of others, and her concealment of her role as a drug trafficker" through intimidation and bribery).

Substantial Assistance

Second Circuit outlines procedure for challenging government refusal to move for substantial assistance departure. Defendant entered into a cooperation agreement with the government that provided the government would move for a substantial assistance departure, 18 U.S.C. § 3553(e), U.S.S.G. § 5K1.1, p.s., if defendant "made a good faith effort to provide substantial assistance." The agreement explicitly established that evaluation of defendant's performance was in the sole discretion of the government. The government did not move for departure at sentencing and defendant appealed, claiming that the prosecutor was required to respond to defendant's "suggestion" that the refusal was made in bad faith and that he was entitled to a hearing on the issue.

The appellate court first determined that the government's refusal to move for a departure for substantial assistance must be made in good faith: "it is plain that where the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the sole discretion of the prosecutor, that discretion is limited by the requirement that it be exercised fairly and in good faith. The government may reject the defendant's performance of his or her obligations only if it is honestly dissatisfied."

The court then outlined the procedure for challenging a refusal: "Defendant must first allege that he or she believes the government is acting in bad faith. Such an allegation is necessary to require the prosecutor to explain briefly the government's reasons for refusing to make a downward motion. Inasmuch as a defendant will generally have no knowledge of the prosecutor's reasons, at this first or pleading step the defendant should have no burden to make any showing of prosecutorial bad faith. Following the government's explanation, the second step imposes on defendant the requirement of making a showing of bad faith sufficient to trigger some form of hearing on that issue. *See* Guidelines § 6A1.3[, p.s.]."

Here, "the defendant never took the first step." His statements never directly alleged bad faith, and his attorney even admitted at one point that the government's refusal might be meritorious. Thus, defendant was not entitled to an explanation by the government or an evidentiary hearing.

The court also denied defendant's claim that the district court should have departed under § 5K2.0, p.s., even if the government's refusal was in good faith. The court agreed such a departure "would have been theoretically possible" because one of defendant's claimed acts of assistance—saving the life of a DEA informant—"is not a grounds for departure taken into account by the Guidelines," including § 5K1.1. However, defendant failed to properly raise this issue below.

U.S. v. Khan, 920 F.2d 1100 (2d Cir. 1990).

Determining the Sentence

Sentencing Factors

U.S. v. Lara-Velasquez, 919 F.2d 946 (5th Cir. 1990) (district court erred in holding it could not consider defendant's rehabilitative potential in setting sentence within guideline range: "Guidelines do not preclude consideration of a defendant's rehabilitative potential as a mitigating factor within an applicable range of punishment. Indeed, the Sentencing Guidelines expressly permit the district court to consider all relevant and permissible character traits of the defendant in assessing a sentence within a particular range," U.S.S.G. § 1B1.4).

Offense Conduct

Weapons Possession

U.S. v. Agron, 921 F.2d 25 (2d Cir. 1990) ("stun gun" meets definition of "dangerous weapon" for purposes of U.S.S.G. § 2D1.1(b)(1) enhancement).

Sentencing Procedure

U.S. v. Crecelius, 751 F. Supp. 1035 (D.R.I. 1990) (using Fed. R. Crim. P. 36 (Clerical Mistakes) or "alternative ground . . . of the Court's inherent power to amend its sentence," to change 12-month sentence to 12 months and one day—court had "clearly expressed its intent to sentence [defendant] to the minimum sentence" under guideline range of 12–18 months, but a "sentence of 12 months plus 1 day is actually a lesser sentence because it makes the recipient eligible to earn a reduction in the time to be served for good behavior," in this case 54 days, *see* 18 U.S.C. § 3624(b)).

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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

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Relevant Conduct

First Circuit distinguishes between related and unrelated conduct that may be used as relevant conduct in setting offense level. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. In determining the amount of drugs involved, the district court included amounts from four uncharged transactions it concluded were "part of the same common scheme" as the conspiracy. The last of these transactions was consummated solely by defendant's wife without his knowledge, but was included because his wife (who was a co-conspirator) "paid off part of [his] previous debt to the drug supplier, thereby benefiting [defendant]."

The appellate court held that inclusion of the fourth transaction was an improperly broad interpretation of the relevant conduct provision, U.S.S.G. § 1B1.3(a)(2): "In all of the cases cited by the government, a defendant was held responsible under § 1B1.3(a)(2) for other conduct of his or her own that either was an uncharged part of the crime of conviction, or a repetition of the crime. . . . [Defendant's] only connection with the [fourth] transaction was as a beneficiary of someone else's criminal activity, a link that had nothing to do with his conduct. To significantly increase [his] sentence based on a transaction in which he took no part strikes us as such a substantial step away from 'charge offense' sentencing that it could not have been contemplated as within the § 1B1.3(a)(2) exception."

Even if defendant's acceptance of a benefit from the transaction "in some way could be deemed culpable conduct, that conduct was distinctly different from the crime of conviction. . . . His after-the-fact connection to the [fourth] transaction would reveal nothing about his culpability as a drug conspirator, and therefore would not be relevant in determining his offense level for the charged crime." The court cautioned that "§ 1B1.3(a)(2) is not open-ended in allowing a sentencing court to take into account criminal activity other than the charged offense. . . . The goal of the provision . . . is for the sentence to reflect accurately the seriousness of the crime charged, but not to impose a penalty for the charged crime based on unrelated criminal activity."

The court noted, however, that under § 1B1.4 the fourth transaction could be taken into account in setting the sentence within the guideline range or in deciding whether to depart.

U.S. v. Wood, No. 90-1599 (1st Cir. Feb. 1, 1991) (Coffin, Sr. J.).

Offense Conduct

DRUG QUANTITY—SETTING OFFENSE LEVEL

U.S. v. Smallwood, 920 F.2d 1231 (5th Cir. 1991) (in calculating offense level for defendant convicted of possession with intent to distribute methamphetamine, court properly estimated "practical yield" of defendant's laboratory based on amount of precursor chemical, even though at time of arrest lab was non-operational and other necessary precursors were not present: "The size or capability of any laboratory involved is relevant to th[e drug quantity] calculation. U.S.S.G. § 2D1.1, comment. (n.12) (directing application of § 2D1.4, comment. (n.2)). Neither immediate nor on-going production is required. Instead, this guideline permits the court to examine the overall scheme and to infer circumstantially either the total drug quantity involved in the offense conduct or the capability of its production. *U.S. v. Evans*, 891 F.2d 686, 687 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 2170 (1990); *U.S. v. Putney*, 906 F.2d 477, 479 (9th Cir. 1990)").

Departures

EXTENT OF DEPARTURE

U.S. v. Thornton, 922 F.2d 1490 (10th Cir. 1991) (affirming departure for drug defendant because she gave drugs to her 14-year-old daughter, but vacating computation of departure that used offense level increase as guide; appellate court held that giving drugs to daughter was "prior uncharged criminal conduct" that was not adequately reflected in defendant's criminal history category, and therefore departure should be made by adjusting criminal history category under U.S.S.G. § 4A1.3, p.s.). *See also U.S. v. Fortenbury*, 917 F.2d 477 (10th Cir. 1990).

U.S. v. Fonner, 920 F.2d 1330 (7th Cir. 1991) ("Just as other-crime evidence cannot lead to a departure exceeding the increase that would have resulted had the defendant been charged with and convicted of the additional offenses, [*U.S. v.*] Ferra, 900 F.2d [1057 (7th Cir. 1990)], so a defendant's past cannot justify an increase in criminal history category exceeding the level that would have been appropriate had the facts been counted expressly"; sentence remanded because departure to 120 months from 30–37-month range was unreasonable—had district court included in criminal history score all uncounted criminal acts that formed basis of departure, resulting range would have been only 51–63 months).

U.S. v. Delvecchio, 920 F.2d 810 (11th Cir. 1991) (court may not automatically use career offender sentence to calculate extent of departure for defendant who missed career offender status only because two prior drug convictions were consolidated for sentencing, *see* U.S.S.G. §§ 4A1.2(a)(2), comment. (n.3), and 4B1.2(3)(B); a departure in this instance is appropriate if the consolidation of sentences underrepresents defendant's criminal history, *see* § 4A1.3, p.s., but "the court cannot . . . hold that because the defendant almost falls within the definition of career offender . . . it automatically will treat him as such. . . . [T]he court should examine the defendant's actual criminal history, keeping in mind the con-

cerns underlying the career offender classification, and determine . . . what sentence is warranted given (1) the seriousness of the past offenses and (2) the recidivist tendencies of the defendant."). *Cf. U.S. v. Jones*, 908 F.2d 365 (8th Cir. 1990) (using career offender provision to guide departure for defendant who missed career offender status only because he was not yet sentenced on prior violent felony conviction).

Mitigating Circumstances

U.S. v. Wright, No. 90-5653 (4th Cir. Jan. 31, 1991) (Murnaghan, J.) (reversed—fact that inmate defendant, after conviction on instant offense of drug possession with intent to distribute while in prison, would have parole date for earlier, unrelated crimes deferred 26 months was not factor Sentencing Commission failed to adequately consider and thus could not support downward departure).

Aggravating Circumstances

U.S. v. Pulley, 922 F.2d 1283 (6th Cir. 1991) (affirming departure pursuant to U.S.S.G. § 5K2.7, p.s., "Disruption of Governmental Function," based on defendant's actions in persuading family members to commit perjury and a co-defendant to "walk away from a confession" that he had obtained drugs from defendant; such conduct was not adequately accounted for in obstruction of justice guideline, § 3C1.1, and defendant had already received an enhancement under that section for his own perjury).

U.S. v. Fonner, 920 F.2d 1330 (7th Cir. 1991) ("Mental health is not a solid basis on which to depart upward. U.S.S.G. § 5H1.3 bans resort to mental health except as provided elsewhere, and the only proviso, § 5K2.13, allows downward (but not upward) departures for non-violent offenses. A conclusion that the defendant is unusually likely to commit more crimes (perhaps because of mental problems) is a different matter and, in principle, could be a basis of upward departure; nothing in § 4A1.3 or elsewhere forbids its use. Still, a judge is walking on eggs, for this consideration overlaps (if it does not duplicate) the recidivism penalty built into the guidelines. Judges may not engage in double counting.").

Adjustments

Victim-Related Adjustments

U.S. v. Winslow, No. 90-033-N-HLR (D. Idaho Jan. 17, 1991) (Ryan, C.J.) (denying vulnerable victim enhancement, U.S.S.G. § 3A1.1, because no actual victims were specifically targeted—while evidence indicated that general intent of defendants' conspiracy was "to kill, wound or maim certain victims chosen solely because of their race, religion and/or sexual preferences, . . . there was no evidence of any actual victims, but instead the only evidence was the defendants' talk and speculation concerning the intended victims").

Multiple Counts

U.S. v. Barron-Rivera, 922 F.2d 549 (9th Cir. 1991) (court properly placed count of felon in possession of firearm with count of illegal alien in possession of firearm in one group, and count of being alien unlawfully in U.S. after deportation in separate group, because latter offense did not involve "substantially the same harm" under U.S.S.G. § 3D1.2 as the first two; defendant's argument—that because illegal alien counts could conceivably be grouped together, and weapons counts were, that all three should be grouped together—"is a classic case of bootstrapping" that would distort the aim of § 3D1.2 "by combining dissimilar offenses to reduce punishment").

U.S. v. Wilson, 920 F.2d 1290 (6th Cir. 1991) (reversed—error not to group all six counts of using an interstate commerce facility in attempt to commit murder; grouping of five counts involving telephone discussions to arrange killing and one count involving letter mailed by defendant containing money for hit man was required under § 3D1.2(b) because all "involve the same victim" and were "connected by a common criminal objective"—the death of the victim).

Obstruction of Justice

U.S. v. St. Julian, 922 F.2d 563 (10th Cir. 1990) (affirming U.S.S.G. § 3C1.1 enhancement for failure to appear at sentencing hearing, which delayed sentencing for ten days). *See also U.S. v. Teta*, 918 F.2d 1329 (7th Cir. 1990) (§ 3C1.1 enhancement for intentional failure to appear for arraignment).

Criminal History

Calculation

U.S. v. Vanderlaan, 921 F.2d 257 (10th Cir. 1990) (sentence imposed under provisions of Narcotic Addict Rehabilitation Act, 18 U.S.C. §§ 4251–55 (repealed Nov. 1, 1986), was "sentence of imprisonment" pursuant to U.S.S.G. § 4A1.2(e) that may be counted toward career offender status).

Determining the Sentence

Sentencing Factors

U.S. v. Hatchett, No. 90-8030 (5th Cir. Jan. 30, 1991) (Barksdale, J.) (pursuant to 28 U.S.C. § 994(d) and U.S.S.G. § 5H1.10, p.s., socioeconomic status may not be considered in sentencing under the Guidelines, either within the range or for departure; sentences must be remanded because it was not clear whether district court improperly considered defendants' social position and educational opportunities).

Consecutive or Concurrent Sentences

U.S. v. Brown, 920 F.2d 1212 (5th Cir. 1991) (per curiam) (district court has discretion to order that guideline sentence for bank robbery would be consecutive to any later state sentence imposed on pending state charges from same robbery).

Applying the Guidelines

Amendments

U.S. v. Lam, No. 90-3005 (D.C. Cir. Jan. 25, 1991) (Wald, J.) (holding that version of U.S.S.G. § 1B1.3(a) prior to Nov. 1989 amendment, which contained "scienter requirement," should have been applied to drug conspiracy defendant whose offense, trial, and presentence report occurred before that date—the amendment effected a substantive change in the law that could adversely affect defendant's sentencing and its retroactive application would violate the ex post facto clause of the Constitution; thus, in setting base offense level court must determine quantity of drugs defendant "knew or reasonably could have foreseen . . . was involved in the conspiracy"). *See also U.S. v. Suarez*, 911 F.2d 1016 (5th Cir. 1990) (scienter required for possession of weapon during drug offense, U.S.S.G. § 2D1.1(b), prior to Nov. 1, 1989); *U.S. v. Burke*, 888 F.2d 862 (D.C. Cir. 1989) (same).

EXHIBIT F

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 16 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | January 28, 1991

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Pre-Guidelines Sentencing, Generally

9th Circuit rejects habeas claim that refusal to apply Washington sentencing guidelines retroactively violated due process, equal protection and the Eighth Amendment. (100) A Washington state prisoner serving a 280 month sentence filed a federal habeas petition arguing that the 1981 Washington sentencing guidelines should be applied to him retroactively. He argued that failure to apply the state guidelines to him violated due process, equal protection and cruel and unusual punishment. The 9th Circuit rejected each of his claims in turn, finding that the Washington sentencing guidelines did not create any special liberty interests for prisoners sentenced earlier. *McQueary v. Blodgett*, __ F.2d __ (9th Cir. Jan. 10, 1991) No. 89-35817.

9th Circuit finds no evidence that defendant was penalized for going to trial. (100) Defendant argued that he was penalized for exercising his right to trial because he received 20 years for conspiracy while his co-defendants who pled guilty received at most a five-year sentence. The 9th Circuit rejected the argument, pointing out that the district court found that defendant was "far and away the first and most culpable in committing these crimes." Defendant did not receive the maximum sentence and the sentence did not offend the eighth amendment. *U.S. v. Jerome*, __ F.2d __, 91 D.A.R. 1034 (9th Cir. Jan. 24, 1991) No. 87-1386.

2nd Circuit holds court must impose life imprisonment for first-degree murder. (105)(210) Defendant was convicted of first-degree murder, and pursuant to 18 U.S.C. section 1111 sentenced to life imprisonment without parole. The 2nd Circuit rejected defendant's argument that the Sentencing Reform Act and the sentencing guidelines conferred on a sentencing court the discretion to impose a lesser sentence. The abolition of parole under the sentencing guidelines did not change this analysis. A life sentence without the possibility of parole did not violate the 8th Amendment's prohibition against cruel and unusual punishment. *U.S. v. Gonzalez*, __ F.2d __ (2nd Cir. Jan. 9, 1991) No. 90-1283.

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Guidelines Sentencing Generally

8th Circuit rejects "sentencing entrapment" claim. (110) Defendant claimed that the government agent engaged in "sentencing entrapment" by repeatedly purchasing drugs from her for the sole purpose of increasing the amount of drugs in the conspiracy and defendant's sentence. The 8th Circuit rejected this claim. Although the court was "not prepared to say there is no such animal as sentencing entrapment," the record revealed that defendant was predisposed to help the government agent find drugs in whatever quantities he desired. *U.S. v. Lenfesty*, __ F.2d __ (8th Cir. Jan. 9, 1991) No. 90-5132MN.

8th Circuit affirms life sentence for felon in possession of firearm. (115)(330) Defendant contended that the guidelines violated his 8th Amendment right against cruel and unusual punishment by requiring him to be sentenced to life imprisonment for being a felon in possession of a firearm. The 8th Circuit rejected this argument. Although the sentence was severe, it was within the statutory maximum. The court also rejected without discussion defendant's argument that the guidelines violate the presentment clause. *U.S. v. Williams*, __ F.2d __ (8th Cir. Jan. 4, 1991) No. 90-1847.

9th Circuit upholds the guidelines against due process challenge. (115) Relying on the decision in *U.S. v. Ortega Lopez*, 684 F.Supp. 1506 (C.D. Cal. 1988)(*en banc*), defendant argued that the guidelines unconstitutionally denied due process because they do not permit adequate discretion to impose an individualized sentence. The 9th Circuit rejected this argument based on earlier cases similarly rejecting it. Defendant also relied on *U.S. v. Davis*, 715 F.Supp. 1473 (C.D. Cal. 1989), arguing that the guidelines violate due process because they permit a sentencing court to rely on facts not proved beyond a reasonable doubt. The 9th Circuit noted that the *Davis* rule had been rejected by two earlier 9th Circuit cases, "and we decline to resurrect it now." Accordingly the court held that the guidelines do not violate due process. *U.S. v. Ramos*, __ F.2d __ (9th Cir. Jan. 17, 1991) No. 89-50242.

9th Circuit holds that guidelines apply to "window period" between Gubiensio and Mistretta. (125) When the defendant pled guilty, he was on notice that the guidelines were part of a properly enacted statutory scheme and that the Supreme Court had already granted certiorari in *Mistretta*. Thus even though the 9th Circuit had held the guidelines unconstitutional in the *Gubiensio-Ortiz*, the 9th Circuit held that "there was no unfairness in applying the guidelines" despite the different conditions which existed when defendant pled guilty. *U.S. v. Ramos*, __ F.2d __ (9th Cir. Jan. 17, 1991) No. 89-50242.

8th Circuit rejects piecemeal application of prior version of guidelines. (130)(240) Defendant was convicted of selling methamphetamine near a school. Prior to November 1, 1989, section 2D1.3(a)(2)(B) required doubling the base offense level in such a case. At that time, methamphetamine was not listed separately in section 2D1.1, so the offense level had to be generated from the drug-equivalency table. After defendant's crime, the sentencing commission changed both provisions, with the net effect of increasing the base offense level. Because the net sentencing range under the guidelines in effect when defendant committed the crime was less than under the amended guidelines, the district court used the prior version of the guidelines. On appeal, defendant sought to maintain the prior favorable drug-equivalency provision, while obtaining the benefit of the favorable change in section 2D1.3(a)(2)(B), i.e., no doubling in offense level. The 8th Circuit rejected this piecemeal application of the guidelines. The two provisions "move in concert," and the old version of section 2D1.3(a)(2)(B) must be applied with the old version of section 2D1.1. *U.S. v. Lenfesty*, __ F.2d __ (8th Cir. Jan. 9, 1991) No. 90-5132MN.

Arkansas District Court finds ex post facto violation in application of amended guidelines. (130) Defendant was sen-

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tenced November 20, 1990 for firearms offenses committed prior to November 1, 1990. Under the November 1, 1990 guidelines, defendant had a guideline range of 24 to 30 months. Under the version of the guidelines which applied at the time defendant committed the offense, defendant had a sentencing range of 10 to 16 months. The District Court for the Eastern District of Arkansas found that application of the amended guideline would violate the ex post facto clause. The retroactive application of the guidelines would disadvantage defendant by more than doubling his term of imprisonment. *U.S. v. Vastelica*, __ F.Supp. __ (E.D. Ark. Nov. 27, 1990) No. LR-CR-89-103.

General Application Principles (Chap. 1)

10th Circuit remands for resentencing where district court used wrong sentencing range. (150) The presentence report fixed defendant's offense level at 24 and criminal history category at II, and then incorrectly stated that this resulted in a guideline range of 63 to 78 months. The actual range was 57 to 71 months. In sentencing defendant to 70 months, the district judge clearly indicated that he understood that defendant had a guideline range of 63 to 78 months. The 10th Circuit remanded for resentencing under the correct guideline range. *U.S. v. Gallegos*, __ F.2d __ (10th Cir. Jan. 7, 1991) No. 90-2006.

3rd Circuit rejects increase for both more than minimal planning and fraud involving more than one victim. (160)(300) Defendant was convicted of wire fraud. At the time of his sentencing, guideline section 2F1.1(b)(2) provided that "[i]f the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase [the offense level by] 2 levels." The district court found that both more than minimal planning and more than one victim was involved, and accordingly increased defendant's offense level by four. The 3rd Circuit found that imposing a four level increase when both these factors were present would "undermine the intent of section of 2F1.1(b)(2)," and that only a two level increase was appropriate. *U.S. v. Astorri*, __ F.2d __ (3rd Cir. Jan. 22, 1991) No. 90-3277.

Offense Conduct, Generally (Chapter 2)

1st Circuit upholds calculation of loss caused by defendant's theft. (220) Defendant was a bank teller convicted of conspiring with two other bank employees to obtain fraudulent loans. Defendant contended that her offense level was incorrectly increased by six under guideline section 2B1.1 based upon her involvement in a theft of between $20,000 and $50,000. The 1st Circuit upheld the determination. The record contained evidence of checks totalling $44,000 which were issued on the basis of false application information. *U.S. v. Moore*, __ F.2d __ (1st Cir. Jan. 15, 1991) No. 90-1324.

6th Circuit upholds inclusion of drugs not charged in the indictment. (270) Defendant contended it was improper to sentence him on the basis of the 883 marijuana plants actually recovered by authorities, rather than the 100 plants charged in his indictment. The 6th Circuit rejected this contention. The guidelines clearly permit the consideration of drugs not specified in the count of conviction if they were part of the same course of conduct or part of a common scheme. *U.S. v. Morrow*, __ F.2d __ (6th Cir. Jan. 10, 1991) No. 89-5418.

10th Circuit upholds consideration of marijuana defendant stored in shed on property. (270) Defendant contended that it was improper to consider 189 pounds of marijuana stored in a shed located on his property in sentencing him. On the date of defendant's arrest, he had 314 pounds of marijuana stored in his shed. He and a co-defendant loaded 125 pounds of the marijuana into the co-defendant's car, and the co-defendant and another individual attempted to sell the marijuana to an undercover agent. Shortly after the aborted sale, defendant was arrested and the remaining 189 pounds of marijuana were seized. The 10th Circuit upheld the district court's calculation. It found that possession of the 189 pounds of marijuana was part of the same course of conduct as the possession of the 125 pounds of marijuana, and therefore was properly included in the determination of defendant's offense level. *U.S. v. Gallegos*, __ F.2d __ (10th Cir. Jan. 7, 1991) No. 90-2006.

1st Circuit affirms enhancement based upon co-defendant's possession of firearm. (284) One defendant and a co-defendant were arrested attempting to purchase 100 pounds of marijuana from a government informant for the sum of $80,000. The other defendant was arrested for his role in brokering the deal. The 1st Circuit upheld the enhancement of both defendants' sentences based upon the co-defendant's possession of a gun. The court found that it was "fairly inferable" that the co-defendant's possession of the gun was foreseeable given the intended exchange of a large quantity of controlled substances for a large amount of cash between drug dealers doing business together for the first time. Defendants presented no evidence to rebut this presumption. *U.S. v. Bianco*, __ F.2d __ (1st Cir. Jan. 8, 1991) No. 90-1550.

3rd Circuit upholds separately grouping fraud and tax evasion counts. (300)(370)(470) Defendant pled guilty to one count of wire fraud and one count of income tax evasion in connection with a fraudulent stock brokerage scheme. The 3rd Circuit found that the district court properly increased defendant's offense level for his tax evasion conviction. The tax evasion and fraud counts did not involve the same victims and thus grouping under guideline section 3D1.2(a) was in-

appropriate. The fraud count did not embody the conduct treated as a specific offense characteristic under the tax evasion count, and thus grouping under guideline section 3D1.2(c) was inappropriate. *U.S. v. Astorri*, __ F.2d __ (3rd Cir. Jan. 22, 1991) No. 90-3277.

11th Circuit says voluntary return to custody may be grounds for downward departure but defendant returned too late. (350)(720) Defendant escaped from a minimum security prison camp. The district court departed downward in part because defendant voluntarily returned to custody three and one-half months after the escape. Guideline section 2P1.1(b)(2) provides for a reduction in offense level based upon a voluntary return to custody less than 96 hours after the escape. The 11th Circuit found that the guidelines do not adequately consider a prisoner's voluntary return to custody more than 96 hours after the escape, and thus this could be, in appropriate circumstances, grounds for a downward departure. However, the court concluded that an escapee's return after three and one-half months was too late to support a reasonable departure. *U.S. v. Weaver*, __ F.2d __ (11th Cir. Jan. 15, 1991) No. 89-7295.

1st Circuit finds that defendant disrupted a public utility as part of environmental offense. (355) Defendant was convicted of knowingly discharging into the city sewer system excessive amounts of zinc and cyanide. His offense level was increased by two levels, under guideline section 2Q1.2, for disrupting a public utility. The 1st Circuit found that the evidence was sufficient to support the enhancement. Witnesses at trial testified that the pollution generated by defendant's company very likely caused serious harm to the city sewage treatment plant, killing beneficial microorganisms and rendering its operations much less efficient. A report indicated a 43 percent decrease in zinc levels after defendant's company ceased operations. Numerous statements in the record indicated that the treatment plant spent an additional $1,000 to $10,000 per month to compensate for the damage caused by the company's discharge. The district court did not abuse its discretion in failing to hold an evidentiary hearing on whether a public utility was disrupted. *U.S. v. Wells Metal Finishing, Inc.*, __ F.2d __ (1st Cir. Jan. 4, 1991) No. 90- 1321.

2nd Circuit affirms defendant knew money was criminally derived. (360) Defendant was convicted of failing to file a currency report, and his sentence was enhanced under guideline section 2S1.3 after the judge found that defendant knew or believed that the funds were criminally derived. The 2nd Circuit found that there was sufficient evidence to justify the enhancement. There was testimony by the probation officer that defendant told him he knew the money was "probably narco dinero," which was supported by notes the officer took during the presentence interview. Defendant presented a facially implausible story that after one brief meeting with a total stranger, he was given a radio containing $876,000 in negotiable money orders, and thought the money was "profit from raffles." This story was particularly implausible since defendant was arrested attempting to board a plane to Colombia. *U.S. v. Cortes*, __ F.2d __ (2nd Cir. Dec. 26, 1990) No. 90-1408.

5th Circuit upholds departure in misprision case where defendant committed underlying offense. (380)(745) Defendant, the Superintendent of Eduction for a local school system, was convicted of misprision of the felony of mail fraud. The district court departed upward from a guideline range of zero to four months and sentenced defendant to 15 months. The district court based the departure upon the fact that it had "no doubt" that defendant could have been convicted of the underlying offense of mail fraud, that defendant's offense was a public trust offense, and that defendant had received no imprisonment for a recent state conviction for fraudulently claimed travel expenses. The 5th Circuit upheld the departure. The guideline range for misprision does not contemplate defendant's guilt of the underlying offense. Defendant was correct that his sentencing range already included a two level increase for his role as a person occupying a position of trust. However, the appellate court found it "apparent" that the district court's upward departure was not based upon that fact. *U.S. v. Pigno*, __ F.2d __ (5th Cir. Jan. 16, 1991) No. 90-3476.

Adjustments (Chapter 3)

3rd Circuit upholds vulnerable victim enhancement where defendant defrauded his girlfriend's parents. (410) Defendant was a stockbroker who defrauded his clients, including his girlfriend's parents, out of various sums of money. The 3rd Circuit upheld the district court's determination that defendant's victims were vulnerable based upon his victimization of his girlfriend's parents. The district court had found that the relationship between defendant, his girlfriend and her parents rendered the parents unusually susceptible to defendant's persistent requests for more investments funds. Defendant even promised to marry his girlfriend in order to obtain additional money from them. *U.S. v. Astorri*, __ F.2d __ (3rd Cir. Jan. 22, 1991) No. 90-3277.

8th Circuit finds young store clerks are not vulnerable victims. (410) Defendant passed falsified money orders at stores which defendant targeted because they were staffed by young clerks, whom defendant considered "young and inexperienced." The 8th Circuit reversed the enhancement of defendant's sentence based upon the vulnerability of the victim. The clerks who accepted the falsified money orders were not physically or mentally disabled, nor were they of such youthful ages as to give rise to any presumption of unusual vulnerability. There was no evidence of the victim's vulnerability other than defendant's statement of this method of operation in targeting a large, loosely defined group. *U.S. v. Paige*, __ F.2d __ (8th Cir. Jan. 11, 1991) No. 90-1091.

1st Circuit affirms leadership enhancement for supplier of heroin. (430) Defendant contested the propriety of enhancing his offense level for being a leader of a criminal activity involving more than one but less than five participants. The 1st Circuit upheld the enhancement. The district judge specifically found that defendant was the heroin supplier for a co-defendant and outranked him in the heroin hierarchy. Defendant retained dominion over the drugs and the co-defendant, "like many other salesmen, had to check with the proprietor before making any commitments to would-be purchasers." *U.S. v. Akitoye*, __ F.2d __ (1st Cir. Jan. 10, 1991) No. 90-1292.

5th Circuit remands for reconsideration of defendant's leadership role where co-defendant's conviction is reversed. (430) Defendant was found to be an organizer, leader, manager or supervisor based upon the district court's finding that defendant led a co-defendant into the commission of the drug offense. However, the 5th Circuit found that there was insufficient evidence to sustain the co-defendant's conviction. Therefore, the appellate court also vacated defendant's sentence and remanded the case to the district court for reconsideration of defendant's role in the offense. *U.S. v. Pigrum*, __ F.2d __ (5th Cir. Jan. 16, 1991) No. 90-1310.

9th Circuit rules that organizer or leader need not directly manage all five codefendants. (430) Defendant argued that guideline section 3B1.1 did not apply to his case because he did not directly manage all five codefendants. The 9th Circuit rejected the argument, noting that 3B1.1 only requires that the activity *involve* five or more participants. The commentary also recognizes that there can be more than one organizer or leader. The court upheld the four-level adjustment in this case. *U.S. v. Smith*, __ F.2d __ (9th Cir. Jan. 25, 1991) No. 89-30309.

1st Circuit refuses to require obstruction enhancement where defendant's testimony was in conflict with court's findings. (460) The government argued that the district court improperly failed to enhance defendant's sentence for obstruction based upon defendant's testimony at trial. Defendant had denied possessing a key to an apartment, yet the district court found defendant was a manager based on the court's determination that defendant possessed the key. The jury's finding of guilt was further evidence of perjury, since defendant's version of the facts was in almost total conflict with the testimony of the government witnesses. The 1st Circuit rejected these arguments. The fact that a sentencing judge bases his or her decision to increase a defendant's offense level on a fact which the defendant's own testimony negated during trial does not require the court to enhance the defendant's sentence for obstruction of justice. Moreover, "to hold that a jury's verdict of guilty beyond a reasonable doubt on the basis of evidence which was in direct conflict with a defendant's testimony signals perjury would in effect amount to punishing a defendant for exercising his right to take the witness stand in his own defense." *U.S. v. Martinez*, __ F.2d __ (1st Cir. Jan. 9, 1991) No. 89-2044.

1st Circuit upholds obstruction of justice enhancement based on defendant's perjury. (460)(820) The district court increased defendant's offense level for obstruction of justice based on the judge's belief that the defendant perjured himself during trial by testifying in a self-serving "cock and bull story." The 1st Circuit upheld the enhancement. However, an upward adjustment for obstruction of justice requires "more than a mere conflict in the trial testimony or a jury's rejection of a defendant's alibi or denial of guilt." Because the determination is "fact-oriented," an appellate court will review the district court's findings under a clearly erroneous standard. Here the district court's findings were not clearly erroneous. Defendant's trial testimony where he disclaimed knowledge of the heroin and the marked money found in his apartment, and attempted to characterize his subordinate as the villain "could most charitably be described as fanciful." *U.S. v. Akitoye*, __ F.2d __ (1st Cir. Jan. 10, 1991) No. 90-1292.

8th Circuit upholds obstruction of justice enhancement based upon flight from police. (460) Defendant argued that his flight from authorities did not qualify as obstruction of justice under guidelines section 3C1.1. The 8th Circuit rejected this argument. Defendant's actions were not merely an "instinctual attempt to evade arrest." Defendant raced down a highway, drove on the shoulders, went around road blocks, and crossed the median with the Highway Patrol in hot pursuit. Defendant collided with an occupied car while trying to cross the median, then drove away from the scene of the accident. He threw torn falsified money orders, a military identification card, and business cards from the windows of his car. He did not stop until confronted by an armed state trooper. Defendant endangered others' lives and destroyed incriminating evidence, which supported the finding of obstruction of justice under the guidelines in effect on the date defendant was sentenced. *U.S. v. Paige*, __ F.2d __ (8th Cir. Jan. 11, 1991) No. 90-1091.

8th Circuit affirms obstruction of justice enhancement for defendant who threw drugs out of car window during traffic stop. (460) The vehicle defendant was driving was pulled over after police observed a traffic violation. As police approached the vehicle, defendant threw a plastic bag out of the passenger window. The bag contained cocaine, and a subsequent search of the vehicle revealed additional cocaine. The 8th Circuit upheld a sentence enhancement for obstruction of justice based upon the act of tossing the cocaine out of the window. The court rejected defendant's argument that tossing the cocaine was an impulsive act, similar to flight to avoid apprehension. "Such an act was a deliberate attempt to conceal or destroy material evidence from police . . ." The court also rejected defendant's argument that he was not at-

tempting to obstruct the "instant offense," since the "instant offense" was the traffic violation. The term "instant offense" refers to the offense of conviction, in this case possession with intent to distribute cocaine. *U.S. v. Dortch*, __ F.2d __ (8th Cir. Jan. 18, 1991) No. 89-2145.

9th Circuit holds that 1987 version of section 3E1.1 precluded finding of acceptance of responsibility where defendant obstructed justice. (480) Relying on its opinion in *U.S. v. Avila*, 905 F.2d 295, 298 (9th Cir. 1990), the 9th Circuit held that the 1987 version of application note 4 to U.S.S.G. section 3E1.1 "expressly precluded a finding of acceptance of responsibility where a defendant is found to have obstructed justice." Although the 1989 version of application note 4 permits adjustments in "extraordinary cases," the 9th Circuit refused to apply the new amendment retroactively to give defendant the benefit of the two point reduction. *U.S. v. Audelo-Sanchez*, __ F.2d __ (9th Cir. Jan. 11, 1991) No. 89-50651.

2nd Circuit denies acceptance of responsibility reduction to defendant who refused to admit guilt. (485) Defendant contended he was wrongfully denied a reduction for acceptance of responsibility because he entered a conditional plea and continued to challenge federal jurisdiction. The 2nd Circuit rejected this contention. Defendant was denied the reduction because at sentencing, he stated "I will go to my grave saying I did nothing wrong." Judge Lasker dissented, finding defendant's statement was only evidence of defendant's disagreement with the law as he now understood it. *U.S. v. Cook*, __ F.2d __ (2nd Cir. Jan. 7, 1991) No. 90-1070.

3rd Circuit finds no acceptance of responsibility despite contrary government recommendation. (485) Defendant's plea agreement stipulated that defendant accepted responsibility. During his plea hearing, defendant admitted his guilt and affirmed to the court that he was responsible for each element of the offense. However, the probation officer alleged in the presentence report that during an uncounseled interview, defendant denied having knowingly participated in his offense. Despite the government's recommendation at the sentencing hearing to the contrary, the sentencing judge refused to grant defendant a reduction for acceptance of responsibility. The 3rd Circuit upheld the judge's actions. The judge was not bound to grant a reduction simply because of defendant's guilty plea or because of the stipulation contained in the plea agreement. The conclusion was based upon uncontested material contained in the presentence report. Although defendant had been granted a downward departure for substantial assistance, there was "nothing inherently inconsistent" in finding that defendant had substantially assisted the government but had not accepted responsibility. *U.S. v. Singh*, __ F.2d __ (3rd Cir. Jan. 17, 1991) No. 90-5518.

8th Circuit denies acceptance of responsibility reduction despite defendant's acknowledgement of guilt. (485) Defendant argued that statements made by him acknowledging his guilt in the presentence report and during allocution at sentencing entitled him to a downward adjustment for acceptance of responsibility. The 8th Circuit rejected this claim, noting that this adjustment does not apply to a defendant who only admits guilt after putting the government to its burden of proof at trial by denying essential elements of guilt. *U.S. v. Stuart*, __ F.2d __ (8th Cir. Jan. 16, 1991) No. 90-5201MN.

8th Circuit rejects acceptance of responsibility reduction to defendant who received obstruction of justice enhancement. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he voluntarily surrendered to authorities, acquiesced in the forfeiture of his vehicle, cooperated with the probation officer, withdrew his motions to suppress evidence, and entered a plea of guilty. The 8th Circuit rejected this argument, since at the time defendant was sentenced, the guidelines provided for no reduction for acceptance of responsibility where a defendant obstructed justice. *U.S. v. Dortch*, __ F.2d __ (8th Cir. Jan. 18, 1991) No. 89-2145.

Criminal History (§ 4A)

4th Circuit upholds career offender status even though one of defendant's felonies was committed over 15 years ago. (520) Defendant claimed that his 1969 conviction for attempted armed robbery should not have been counted as one of the two requisite offenses necessary to place him in career offender status, since it was committed more than 15 years prior to the current offense. The 4th Circuit rejected this contention. The second sentence of guideline section 4A1.2(e) provides that prior sentences resulting in incarceration during any part of the 15-year period prior to the current offense are included in the career offender calculation. Defendant was not released from prison on the attempted armed robbery charge until 1976, within the 15-year period. *U.S. v. Powell*, __ F.2d __ (4th Cir. Jan. 7, 1991) No. 89-5809.

8th Circuit affirms that state misdemeanors may be felonies for career offender purposes. (520) Defendant contended that he was improperly classed as a career offender because state law considered some of his previous crimes as misdemeanors rather than felonies. Following Circuit precedent, the 8th Circuit rejected this argument. "How a state views an offense does not determine how the United States Sentencing Guidelines view that offense." *U.S. v. Lenfesty*, __ F.2d __ (8th Cir. Jan. 9, 1991) No. 90-5132MN.

9th Circuit says conviction on which parole was revoked within fifteen years counts for career offender status. (520) Appellant argued that by the time his parole was revoked, he was already back in prison for a 1967 robbery. The 9th Cir-

cuit rejected this argument, ruling that appellant was incarcerated for "both the 1967 and the 1964 robbery." Thus his incarceration for both offenses was "within fifteen years of the present offense. He was properly found to be a career offender under section 4A1.2(e)(1). The court also rejected appellant's argument that he was entitled to credit for the two years between the issuance and execution of the parole violator warrant. The parole board had discretion to defer execution "until the expiration of the subsequent sentence." *U.S. v. Harrington*, __ F.2d __, (9th Cir. Jan. 18, 1991) No. 90-30103.

9th Circuit rules that appellant's career offender status made "double counting" argument irrelevant. (520) Appellant argued that the district court should have reduced his armed robbery offense level of 19 by two points to avoid double counting for the use of a firearm. The 9th Circuit rejected the argument because appellant was a career offender with an offense level of 34, and therefore the specific offender characteristic of possession or a firearm under section 2K2.4 "is not relevant." *U.S. v. Harrington*, __ F.2d __, (9th Cir. Jan. 18, 1991) No. 90-30103.

11th Circuit reverses career offender determination because prior offenses were consolidated for sentencing under Rule 20. (520) Defendant had two prior felony drug convictions. Although the offenses were committed over two years apart and the charges that led to the convictions were filed in different district courts, the defendant's request to have the cases consolidated for sentencing under Fed. R. Crim. P. 20(a) was granted. The 11th Circuit reversed the district court's determination that defendant was a career offender. Under the career offender guidelines, two convictions which were consolidated for sentencing under Rule 20 count as only one prior sentence, and thus defendant was exempt from career offender status. *U.S. v. Delvecchio*, 920 F.2d 810 (11th Cir. 1991).

11th Circuit finds two crimes committed on different days were properly counted as separate crimes for career offender purposes. (520) Defendant contended that his two prior convictions for burglary were related and should not have been counted separately for career offender purposes either because they were part of common scheme or because the sentences were consolidated. The 11th Circuit rejected this argument. The district court's finding that the burglaries were not part of a common scheme was not clearly erroneous, given that they were committed over a month apart. The fact that his sentences ran concurrently was not the determinative as to whether the sentences were consolidated for sentencing. Defendant's sentences were imposed on different days by different judges. The sentences were imposed for different crimes committed on different days against different victims. Therefore, the district court's determination that the crimes were not consolidated for sentencing was not clearly erroneous. *U.S. v. Veteto*, __ F.2d __ (11th Cir. Jan. 7, 1991) No. 90-8117.

Determining the Sentence (Chapter 5)

1st Circuit upholds payment of city fine as condition of supervised release. (580) Defendant was convicted of knowingly discharging into the city sewer system excessive amounts of zinc and cyanide. Defendant contended that the district court improperly conditioned his term of supervised release on the payment of a $60,000 fine due the city. He argued that the fine actually represented restitution to the victim, no basis for restitution was established, and it was an abuse of discretion to condition supervised release on the payment of a fine which the court knew defendant could not pay. The 1st Circuit rejected these contentions. A sentencing court may impose conditions on a term of supervised release to the extent the conditions are reasonably related to the nature and circumstance of the offense. The city fined defendant $60,000 for violating his sewer permit. This fine was reasonably related to the offense, and its payment was an appropriate condition of defendant's term of supervised release. *U.S. v. Wells Metal Finishing, Inc.*, __ F.2d __ (1st Cir. Jan. 4, 1991) No. 90-1321.

Kansas District Court holds it need not give credit for time served upon revocation of supervised release. (580)(600) In a case involving the revocation of a term of supervised release, the Kansas District Court concluded that the determination of whether to give a defendant credit for time already served under the primary term of incarceration was a matter within the discretion of the district court. However, the total length of imprisonment imposed for the primary offense and supervised release violation is subject to the absolute limits set forth in 18 U.S.C. section 3583(e)(3). *U.S. v. Medrano-Gonzalez*, __ F.Supp. __ (D. Kansas. Nov. 26, 1990) No. 89-10074-01.

Departures Generally (§ 5K)

11th Circuit adopts three step review for departure cases. (700)(820) The 11th Circuit, following the 1st Circuit's opinion in *U.S. v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989), adopted a three step analysis to review departure cases. First, the appellate court will determine whether the guidelines adequately consider a particular factor which would preclude a district court from relying upon it as a basis of departure. Second, the court must determine whether there exists sufficient factual support for the departure. A district court's findings may only be reversed if clearly erroneous. Finally, the direction and degree of departure must be measured by a standard of reasonableness. In doing so, the appellate court must consider the factors to be considered in

sentencing in light of the reasons for the imposition of the particular sentence as stated by the district court. *U.S. v. Weaver*, __ F.2d __ (11th Cir. Jan. 15, 1991) No. 89-7295.

7th Circuit finds defendant not entitled to departure for substantial assistance. (710) Defendant argued that a prosecutor may not arbitrarily refuse to make a motion for a downward departure based on a defendant's substantial assistance, and that due process requires a case-by-case review of the reasons the prosecutor failed to authorize the departure. The 7th Circuit found that it need not decide whether the Constitution calls for a review of the section 5K1.1 decision more searching than ensuring that the prosecutor did not base a decision on prohibited criteria such as race or speech. Defendant in this case agreed to assist the prosecutor in another case, and then gave testimony that assisted the defense, leading to defendant's indictment for perjury. Thus, the prosecutor in this case "understandably doubt[ed]" the value of information offered by defendant, whose testimony could now be impeached by the perjury indictment. These considerations afforded a "rational basis for declining to make a motion under section 5K1.1." *U.S. v. Bayles*, __ F.2d __ (7th Cir. Jan. 18, 1991) No. 90-2129.

1st Circuit reaffirms that it lacks jurisdiction to review extent of downward departure. (720)(800) On the government's recommendation, the district court departed downward from the 10 year statutory minimum and sentenced defendant to 60 months imprisonment. The 1st Circuit refused to review defendant's complaint that the extent of the departure was "too stingy" given his minimal participation in the offense. "[W]e have no jurisdiction to review the extent of a downward departure merely because the affected defendant is dissatisfied with the quantification of the district court's generosity." *U.S. v. Pomerleau*, __ F.2d __ (1st Cir. Jan. 10, 1991) No. 90-1383.

1st Circuit rejects claim that sentence was excessive. (720)(800) Defendant argued that the sentence he received was excessive. The 1st Circuit rejected this claim. Defendant conceded that the sentencing guidelines applied, that the sentencing court correctly applied the guidelines to impose a sentence with the guideline range, and that his sentence was not otherwise imposed in violation of law. Essentially, defendant was complaining about the district court's refusal to depart downward, which is not appealable. *U.S. v. Martinez*, __ F.2d __ (1st Cir. Jan. 9, 1991) No. 89-2044.

11th Circuit affirms downward departure based on over-representation of criminal history and effect on parole eligibility. (721)(730) Defendant escaped from a minimum security prison camp. The district court departed downward in part because the crime subjected defendant to a double penalty: first, it lengthened defendant's prison term by delaying his eligibility for parole, and second, it subjected him to a second prison term to be served consecutively to the first. The 11th Circuit found this was proper grounds for a downward departure. The district court also departed because it found that the guideline sentence was more severe than it needed to be to have a deterrent effect. The 11th Circuit found that this was simply a different way of saying that defendant's criminal history score over-represented the likelihood that he would recidivate, and thus was proper grounds for departure. The court also found the extent of the departure was reasonable. *U.S. v. Weaver*, __ F.2d __ (11th Cir. Jan. 15, 1991) No. 89-7295.

2nd Circuit rejects small quantity of drugs as a basis for downward departure from career offender guideline. (722) Defendant was arrested for selling one-half gram of cocaine. Since he had two prior felonies, he was sentenced as a career offender to 168 months. The district court refused to depart downward on the basis of the small quantity of drugs involved in the offense, concluding that this was not a proper basis for a downward departure from the career offender guidelines range. The 2nd Circuit agreed. The career offender guidelines do implicitly consider the quantity of drugs involved in an offense. The career offender base offense level is derived from the statutory maximum penalty, which in turn is based on the quantity of drugs involved. A sentencing court has discretion to give additional consideration to drug quantity when determining where in the applicable guideline range a defendant should be sentenced. The 2nd Circuit also rejected defendant's argument that the length of time that elapsed since his prior felony convictions provided a basis for a downward departure. *U.S. v. Richardson*, __ F.2d __ (2nd Cir. Jan. 4, 1991) No. 90-1272.

10th Circuit upholds criminal history departure but remands for district court to explain reasons for extent of departure. (730)(733) Under the guidelines, defendant's three felony convictions for first-degree murder, solicitation and kidnapping were treated as one prior sentence. The district court departed upward on the basis that treating these three convictions as one did not adequately reflect the seriousness of the defendant's criminal history. The 10th Circuit upheld this as a proper ground for an upward departure, but remanded the case for the district court to articulate reasons for the degree of the departure. A court may use "any reasonable methodology hitched to the Sentencing Guidelines to justify the reasonableness of the departure . . . [W]hatever the method of reference is, it must be explicit." The 10th Circuit also found there was no error in the district court's refusal to consider as a mitigating factor the fact that defendant alleged that he had been beaten by prison guards after he attempted to escape. *U.S. v. Rivas*, __ F.2d __ (10th Cir. Jan. 11, 1991) No. 89-6271.

10th Circuit holds giving drugs to child may be grounds for upward criminal history departure. (730)(746) Defendant pled guilty to conspiracy to distribute methamphetamine.

The district court departed upward in offense level because defendant admitted giving drugs to her minor daughter. The 10th Circuit held that the act of giving drugs to one's minor child might justify an upward departure, but only in criminal history category rather than offense level. Defendant's prior acts of giving drugs to her child were not part of the crime of conspiracy for which defendant was charged convicted. Therefore, it was not an "extraordinary aspect of the offense for which [she] was charged." The prior acts were, however, prior criminal conduct which were not considered in her criminal history, and thus could be the basis for making an upward criminal history departure. *U.S. v. Thornton*, __ F.2d __ (10th Cir. Jan. 8, 1991) No. 89- 6415.

11th Circuit holds district court may not automatically depart because defendant was almost a career offender. (740) Defendant would have qualified for career offender status except that his two prior felony drug crimes, which occurred at a different time and place, were consolidated for sentencing. The district court found that if it could not sentence defendant as a career offender, then it would depart upward and sentence defendant to 262 months because defendant's criminal history was equivalent to that of a career offender. The 11th Circuit remanded for resentencing, finding the district court failed to ascertain defendant's appropriate offense level, criminal history category, or guideline range prior to making the departure. Although a departure might well be justified, a departure must be considered within the framework of the guidelines and justified by degrees. A departure to the career offender level can only be made after consideration of several intermediate levels. "What the court cannot do is hold that because the defendant almost falls within the definition of career offender ... it automatically will treat him as such." *U.S. v. Delvecchio*, 910 F.2d 810 (11th Cir. 1991).

3rd Circuit upholds upward departure based upon extreme psychological injury caused by defendant's fraud. (745)(820) Defendant's fraudulent stock scheme swindled various people, including several elderly people, out of large sums of money. The district court increased defendant's offense level under guideline section 5K2.3 for infliction of extreme psychological injury. The appellate court found sufficient evidence to support this finding. At least two of the couples were elderly and lost their entire life savings. One of the women was forced to seek treatment for high blood pressure, and continued to be under a doctor's care. One of men who was already in poor health displayed adverse physical and behavioral effects. Judge Hutchinson, dissenting in part, argued that the district court's findings were clearly erroneous because they were based upon unsupported lay statements. He also found that the victims' age and financial circumstances were already considered in the guidelines. *U.S. v. Astorri*, __ F.2d __ (3rd Cir. Jan. 22, 1991) No. 90-3277.

4th Circuit affirms upward departure based on defendant's "propensity not to follow regulations." (745)(770) Defendant was a doctor convicted of making unauthorized prescriptions after his registration number permitting him to prescribe controlled substances expired. He had been directed by a DEA investigator to stop making the unauthorized prescriptions, but continued making them. Evidence was presented at sentencing that defendant had been denied admission privileges at one hospital and had lied on applications for DEA registration. Relying on defendant's "propensity not to follow regulations," the district court departed upward from a guideline range of two to eight months, and sentenced defendant to 15 months. Defendant objected to the use of this evidence. The 4th Circuit affirmed the sentence, rejecting all of defendant's arguments. *U.S. v. Pelaez*, __ F.2d __ (4th Cir. Jan. 7, 1991) No. 89-5594.

6th Circuit affirms upward departure for defendant who persuaded others to perjure themselves. (745) The district court granted the government's request for an upward departure pursuant to guideline section 5K2.7, based upon defendant's disruption of a government function. Defendant colluded with a co-defendant to prevent the use of the co-defendant's confession in which defendant was implicated. Defendant also induced others to perjure themselves concerning defendant's role in the offense. The 6th Circuit found that this justified the upward departure. Even though the district court already increased defendant's offense level for obstruction of justice based upon defendant's false testimony, this did not prevent the upward departure. The departure was not based on defendant's perjury, but on his actions to induce others to perjure themselves. *U.S. v. Pulley*, __ F.2d __ (6th Cir. Jan. 10, 1991) No. 90-5211.

Sentencing Hearing (§ 6A)

7th Circuit upholds reliance upon drug ledger in calculating drug quantity. (770) Defendant contended that he did not receive adequate notice that the district judge would rely on a drug ledger to determine the quantity of drugs involved in his conspiracy. The 7th Circuit found that the district court complied with guideline section 6A1.3 and Fed. R. Crim. P. 32. At the sentencing hearing, the judge discussed the testimony of the government agent concerning the drug quantities contained in the ledger. This was more than sufficient to alert defendant that the court would rely on the agent's testimony in determining the quantity of drugs that would be used to set defendant's offense level. *U.S. v. Cagle*, __ F.2d __ (7th Cir. Jan. 9, 1991) No. 90- 1956.

8th Circuit finds reliance on hearsay violated confrontation clause but was harmless error. (770) The probation officer prepared defendant's presentence report based on files of the U.S. Attorney in charge of the prosecution. As a result, the officer reported statements of witnesses who he had not

personally interviewed, and who did not testify or make the statements under oath. The only witness presented at sentencing was the probation officer, who testified to the manner of his preparation of the presentence report. The 8th Circuit found that this procedure violated defendant's rights under the Confrontation Clause, but that the error was harmless. The district court failed to determine whether each hearsay statement objected to fit within an exception to the hearsay rule or bore some "particularized guarantees of trustworthiness." The error however, was harmless because the district court had already heard adequate testimony at trial to support each sentence enhancement defendant received. *U.S. v. Lowrimore*, __ F.2d __ (8th Cir. Jan. 11, 1991) No. 90-1952WA.

9th Circuit reverses sentence based on appellant's statements made under assurance of confidentiality. (770) During a state-ordered psychiatric evaluation, appellant made incriminating remarks. The Oregon statute provided that "[n]o statement made by a defendant under this section ... shall be used against the defendant in any civil proceeding or in any other criminal proceeding." Nevertheless, the district court concluded that it could consider the evaluation "as it deems fit." The 9th Circuit reversed, holding that the district court's use of the Oregon psychiatric evaluation violated appellant's "constitutional privilege not to have incriminating statements used against him without his consent." *U.S. v. Harrington*, __ F.2d __, (9th Cir. Jan. 18, 1991) No. 90-30103.

11th Circuit reverses for failure to adequately explain reasons for sentence within guideline range. (775) Defendant was a career offender with an applicable guideline range of 168 to 210 months. The district court sentenced defendant to 200, explaining that this sentence just "seem[ed] right." The 11th Circuit found that the district court failed to properly explain its reasons for sentencing defendant at this particular point within the guideline range. A sentencing court is required to state the reason for imposing a sentence at a particular point within the guideline range when the range exceeds 24 months. "[A]ll sentences should seem "right" to the sentencing judge; hence a judge's view that a given sentence is appropriate, without more detail, is a truism and not an explanation." *U.S. v. Veteto*, __ F.2d __ (11th Cir. Jan. 7, 1991) No. 90-8117.

9th Circuit holds that defendant need not be advised about the guidelines at the time of the guilty plea. (790) Defendant argued that the revival of the sentencing guidelines by the U.S. Supreme Court by *Mistretta*, rendered his earlier plea uninformed and unintelligent. The 9th Circuit rejected the argument, stating that at the time defendant entered his guilty plea the district court was not obliged to advise him of the applicability of the guidelines or that he would be ineligible for parole on the conspiracy count. Rule 11 requires only notification of the statutory maximum and minimum sentences. *U.S. v. Ramos*, __ F.2d __ (9th Cir. Jan. 17, 1991) No. 89-50242.

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

5th Circuit upholds factual findings where defendant failed to object in district court. (800) Defendant argued that the district court failed to make specific findings of fact to justify its upward departure. Since defendant did not make any factual challenges in the district court, and admitted the accuracy of the facts presented to the district court, the 5th Circuit refused to consider whether the factual basis supporting the departure was accurate or sufficient. *U.S. v. Pigno*, __ F.2d __ (5th Cir. Jan. 16, 1991) No. 90-3476.

Death Penalty Cases

Supreme Court reverses death sentence for failure to treat adequately defendant's nonstatutory mitigating evidence. (865) Defendant was convicted of two murders in Florida. At the advisory sentencing hearing, the jury found mitigating circumstances and recommended life imprisonment on both counts. The trial judge overrode the recommendation as to one count and sentenced the defendant to death. On appeal, the Florida Supreme Court concluded that there was insufficient evidence of two of the aggravating circumstances relied on by the trial judge but affirmed the death sentence on the ground that the trial court had found no mitigating circumstances. The U.S. Supreme Court reversed the death sentence, in an opinion written by Justice O'Connor and joined in by Justices Marshall, Stevens, Blackmun and Souter. The majority held that the Florida Supreme Court acted arbitrarily and capriciously by failing to treat adequately the defendant's nonstatutory mitigating evidence. Justices White, Rehnquist, Scalia and Kennedy dissented. *Parker v. Dugger*, __ U.S. __, 111 S.Ct. __, 91 D.A.R. 947 (Jan. 22, 1991) No. 89-5961.

Forfeiture Cases

7th Circuit upholds forfeiture against 8th Amendment challenge. (910) Defendant argued that the forfeiture of 5.5 acres of land violated the 8th Amendment by being grossly disproportionate to the offense committed. The 7th Circuit rejected defendant's argument. The district court had found that the warehouse buildings located on the property had been used to store and distribute over 300 pounds of marijuana over a three-month period. Defendant was in the upper tier of the conspiracy to distribute marijuana. The fact that the warehouse system itself only occupied 1.5 of the 5.5 acres of the property forfeited, and that defendant also used the warehouse for a legitimate business, did not show a gross disproportionality between defendant's offense and his entire

penalty. *U.S. v. Vriner*, __ F.2d __ (7th Cir. Jan. 3, 1991) No. 90-2111.

5th Circuit orders DEA to review merits of petitioner's request for remission. (920) Petitioner filed a motion with the DEA for expedited release of cash which had been seized from him during his arrest. The DEA denied the motion because he used the wrong form. Petitioner filed no other petitions, and the DEA administratively forfeited the funds. The 5th Circuit found it had authority to review the agency's actions to determine whether the agency followed the proper procedural safeguards. Judicial review on the merits of an administrative forfeiture is barred when the petitioner elects an administrative remedy rather than a judicial one. However, in this case, the DEA did not substantively review petitioner's case, choosing instead to dismiss the petition solely because it was not in the correct form. "The facts of this case illustrate the ordinary citizen's worst nightmare and his attorney's worst fears of the morass of unreviewable, short-fused administrative regulatory practice." The court denied the petition to release the property, but remanded the case to the DEA to consider the substance of petitioner's claim for remission. *Scarabin v. Drug Enforcement Administration*, 919 F.2d 337 (5th Cir. 1990).

11th Circuit holds bailee must name bailor in complaint. (920) Money was seized from an automobile registered in claimant's name. Claimant filed a claim to the money, stating that he was the bailee of the money. The complaint did not identify the bailor nor state whether claimant would or could name the bailor. The 11th Circuit held that claimant must name his bailor. Rule 6(c) of the Supplemental Rules for Certain Admiralty and Maritime Claims requires a bailee to state in the complaint that he or she is "duly authorized to make the claim." Since the Circuit had not previously ruled on this issue, the court remanded the case to permit claimant to amend his claim to name his bailor. *U.S. v. $260,242.00*, 919 F.2d 686 (11th Cir. 1990).

11th Circuit permits innocent lienholder to recover attorneys' fees and costs as provided in loan documents. (920) A bank sought to recover amounts owing on promissory notes secured by a deed of trust on parcels of property that were forfeited to the government. The 11th Circuit reversed the district court and held that in addition to recovering the unpaid principal balance on the notes, plus interest, the bank could recover attorneys' fees and costs as provided for in the loan documents. To deny such fees and costs would deprive the bank of its rights in the forfeited property. *U.S. v. Six Parcels of Real Property Situated in Blount County, Tennessee*, __ F.2d __ (11th Cir. Jan. 7, 1991) No. 89-7889.

11th Circuit holds bond posted by claimant to suspend forfeiture proceeding is cost bond. (920) Eight months after succeeding in its forfeiture action, the government filed a motion seeking the release of claimant's cost bond. The district court awarded the government the entire sum of the bond on the theory that it was a penal bond subject to forfeiture if the property was forfeited. The 11th Circuit reversed, finding that the bond was a cost bond, not a penal bond. Although the statute describes the face amount of the bond as a "penal bond," the statute clearly places only the costs of the proceeding at risk. To adopt the government's view would "sanction the imposition of a penalty on any person who simply seeks to challenge a forfeiture proceeding." The claimant would suffer two penalties, the forfeiture of the property itself and the bond, "solely for taking a view contrary to the one which was ultimately successful." The government had waived its right to tax costs in view of the lapse of time and the fact that the final judgment had stated that no costs would be taxed. *Real Property and Residence Located at Route 1, Box 111, Firetower Road, Semmes, Mobile County, Alabama*, __ F.2d __ (11th Cir. Jan. 7, 1991) No. 89-7194.

5th Circuit finds probable cause based on substantial connection between bank account and drug trafficking proceeds. (950) The 5th Circuit found that the government had established probable cause to believe that there was a substantial connection between cash contained in claimant's bank account and drug transactions. The account was opened a short time after a load of marijuana arrived, and cash deposits totalling $315,000 were received over a short period of time. Part of the funds in the account were used to purchase a luxury car for claimant's nephew, who was arrested and subsequently convicted on drug trafficking charges. Claimant purchased assets totalling $75,000 with cash over an eight-month period, despite tax returns showing an adjusted gross income of approximately $40,000. Finally, and most importantly, claimant was identified as a "money man" by two individuals involved in drug trafficking. Although claimant testified that the money in the account was from his business, which he conducted in cash, claimant did not call any witnesses or introduce any evidence to corroborate the work performed or the payments received for this work. *U.S. v. One 1987 Mercedes 560 SEL*, 919 F.2d 327 (5th Cir. 1990).

5th Circuit holds government established probable cause that defendant sold drugs from home. (950) The 5th Circuit upheld the district court's determination that the government had shown probable cause that claimant distributed illegal drugs to a government informant. Tapes of the conversation between claimant and the government informant were difficult to understand, but clear enough to support the government's contention that defendant sold the drugs to the informant. The government submitted affidavits from two FBI agents who monitored the conversations and swore that the informant left claimant's house with the drugs given to him by claimant. Lab tests confirmed that the substances the informant gave the FBI agents were illegal narcotics. Defendant's affidavit denying the government's allegation was in-

sufficient to rebut the government's evidence. Claimant provided no facts that would support his contention, and did not offer any interpretation of the tapes that would contradict the government's version of the facts. *U.S. v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas*, 919 F.2d 994 (5th Cir. 1990).

2nd Circuit reverses summary judgment for determination of whether claimants consented to drugs on property. (960) Claimants received a letter from a city councilman advising them of drug activity in their leased building. Claimants contacted the councilman, who advised claimants to consult an attorney. Claimants promptly consulted an attorney, who advised them that mere allegations of drug use were insufficient to justify eviction. Therefore, claimants did not attempt to evict the tenants. The 2nd Circuit reversed a summary judgment order in favor of the government. Under the court's recent decision in *U.S. v. 141st Street Corp.*, 911 F.2d 870 (2nd Cir. 1990), mere knowledge of drug activity is insufficient grounds for forfeiture. A claimant is entitled to an innocent owner defense by establishing *either* lack of knowledge of drug activity, or lack of consent to the illegal activity. The case was remanded to determine whether the claimants' actions constituted taking "all reasonable steps" to prevent the illicit use of the property. *U.S. v. Certain Real Property and Premises, Known as 418 57th Street, Brooklyn New York*, __ F.2d __ (2nd Cir. Dec. 26, 1990) No. 90-6197.

5th Circuit remands for determination on whether spouse is innocent owner. (960) The government established probable cause that claimant's house, which she owned with her husband, had been used by her husband to distribute and store drugs. The 5th Circuit remanded the case for the district court to determine whether the illegal acts were conducted without her "knowledge or consent." The government presented no evidence that claimant was involved in any drug related activity, or that she participated any drug transactions between her husband and a government informant. Claimant's denials, which were not contradicted by the government, raised a genuine issue regarding her knowledge and consent. Since the government met its burden of showing probable cause, after remand, claimant would have to prove by a preponderance of the evidence that the drug activity in her home took place without her knowledge or consent. *U.S. v. Lot 9, Block 2 of Donnybrook Place, Harris County, Texas*, 919 F.2d 994 (5th Cir. 1990).

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 17 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | February 11, 1991

IN THIS ISSUE:

Guideline Sentences, Generally

9th Circuit rules that provisional sentence under 18 U.S.C. section 3552(b) is appealable. (110)(800) Defendant was sentenced under 18 U.S.C. section 3552(b) to a provisional sentence of five years, and ordered committed to the Bureau of Prisons for further physical and mental examination. As required by the statute, the study was limited to sixty days, after which the defendant would return to district court for a final sentence. Relying on interpretations of the predecessor statute, 18 U.S.C. section 4208(b), the 9th Circuit held that imposition of a provisional sentence constituted a final order subject to appeal. *U.S. v. Donaghe*, __ F.2d __ (9th Cir. Jan. 31, 1991) No. 90-30105.

9th Circuit holds that limits on availability of probation do not violate the Congressional mandate. (120)(560) Defendant argued that the Sentencing Commission ignored the legislative requirement for a separate type-of-sentence guideline; that is, a two stage inquiry which first asks whether a defendant should be imprisoned (or granted probation) and then asks how long imprisonment or probation should last. The 9th Circuit rejected this argument, holding that 28 U.S.C. sections 994(a)(1)(A)-(B) does not "mandate" a separate sentencing guideline for probation. Moreover Congress did not intend 18 U.S.C. section 3561 to require that probation be available to all categories of defendants. "Although the Commission certainly could have been more lenient in its treatment of the subject of probation it was not required to be so." *U.S. v. Martinez-Cortez*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-50665.

9th Circuit holds that 10 percent projected increase in federal prison population did not violate 28 U.S.C. section 994(g). (120) The guidelines state that they will lead to an estimated 10% increase in the federal prison population over a 10 year period. Defendant argued that this impact violated 28 U.S.C. section 994(g) which requires that the guidelines "be formulated to minimize the likelihood that the federal prison population will exceed the capacity of the federal

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prisons." Agreeing with other courts that have addressed this issue, the 9th Circuit found no violation of the Congressional mandate. *U.S. v. Martinez-Cortez*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-50665.

9th Circuit holds that mandatory supervised release for felonies does not violate Congressional mandate. (120)(580) Defendant argued that the Sentencing Commissions' requirement of mandatory supervised release following incarceration for any person convicted of a felony violates its Congressional mandate under 28 U.S.C. section 994(a)(1)(C). The 9th Circuit rejected the argument, noting that Congress did not specify whether the Commission was to create a discretionary structure, a quasi discretionary structure, or a mandatory structure. Accordingly the Commissions' establishment of mandatory supervised release "while not particularly magnanimous," was "sufficiently reasonable." *U.S. v. Martinez-Cortez*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-50665.

9th Circuit holds that mandatory fines are not inconsistent with the Commissions' general mandate. (120)(630) Defendant argued that the guidelines violate their Congressional mandate by establishing mandatory fines rather than discretionary fines. The 9th Circuit rejected this argument, noting that the primary purpose of the guidelines was to limit discretion. Moreover, under the guidelines judges have discretion to waive any fine upon a finding of inability to pay or undue burden on a defendant's dependants. *U.S. v. Martinez-Cortez*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-50665.

9th Circuit rejects argument that GAO study of the guidelines' impact was untimely and a "sham." (120) Defendant argued that the General Accounting Office study of the guidelines' potential impact was both untimely and a "sham." The 9th Circuit noted that this argument had been rejected by the 5th Circuit in *U.S. v. White*, 869 F.2d 822 (5th Cir. 1989), on the ground that the determination was essentially a political question outside the province of the judiciary. The 9th Circuit found the reasoning of the *White* court compelling and adopted it here. *U.S. v. Martinez-Cortez*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-50665.

7th Circuit affirms application of guidelines to conspiracy that began prior to effective date of guidelines. (125)(380) Defendant contended that it violated the ex post facto clause to apply the guidelines to his conspiracy offense since he engaged in acts before, as well as after, the effective date of the guidelines. The 7th Circuit, following recent Circuit precedent, found no ex post facto violation. *U.S. v. McKenzie*, __ F.2d __ (7th Cir. Jan. 22, 1991) No. 89-3177.

9th Circuit upholds rescinding parole date after Mistretta. (125)(590) After the 9th Circuit held the guidelines unconstitutional, the Parole Commission granted petitioner a presumptive parole date. Soon after, however, the Supreme Court upheld the constitutionality of the guidelines in *Mistretta v. U.S.*, 488 U.S. 361 (1989). Thereafter, the Parole Commission notified petitioner that its previous action was in error, and that he would serve an unparolable sentence under the guidelines. On appeal from the denial of his habeas petition, the 9th Circuit upheld the Parole Commission's decision, noting that *Mistretta* was fully retroactive. The court also rejected the petitioner's argument that the government was "estopped" to reverse its decision. Petitioner failed to demonstrate that he relied to his detriment on the Commission's short-lived decision. *Marsh v. Taylor*, __ F.2d __ (9th Cir. Jan. 28, 1991) No. 89-56247.

D.C. Circuit holds previous version of guidelines required proof that defendant should have known weight of drugs in conspiracy. (130)(170)(270) Defendant argued that the trial court incorrectly failed to find that he knew or reasonably could have foreseen the weight of the heroin to be distributed by his conspiracy. The D.C. Circuit agreed that the guidelines in effect prior to November 1, 1989 required proof that defendant knew or should have known the weight of the heroin to be distributed. Under the amended guidelines, scienter is not required. Since this was a substantive change, defendant must be sentenced under the guidelines in effect at the time of his offense. The case was remanded for the district court to determine whether defendant had the requi-

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site scienter. *U.S. v. Lam Kwong-Wah*, __ F.2d __ (D.C. Cir. Jan. 25, 1991) No. 90-3005.

11th Circuit rejects claim based on disparity of sentence. (140) Defendant claimed that his sentence was excessive since a comparison of the offenses of defendant and a co-defendant showed that although both participated almost equally in the offense, defendant's guideline sentence was substantially greater than the co-defendant's sentence. The 11th Circuit upheld defendant's sentence, noting that it previously had rejected as "frivolous" challenges to sentencing because a co-defendant received a less severe penalty. *U.S. v. Hendrieth*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 89-3672.

D.C. Circuit upholds mandatory minimum sentence despite disparity with codefendant who pled guilty. (140) The D.C. Circuit rejected defendant's argument that his mandatory minimum sentence was too harsh in comparison to a sentence given a similarly-situated defendant who had been given the opportunity to plea bargain. Plea bargaining is not a right guaranteed to defendants. *U.S. v. Braxton*, __ F.2d __ (D.C. Cir. Feb. 1, 1991) No. 89-3225.

7th Circuit rejects claim based upon disparity of co-defendant's sentence. (145) In a pre-guidelines case, defendant claimed that because he exercised his right to go to trial, he was subjected to a harsher sentence than his co-defendants who pled guilty. The 7th Circuit found no evidence in the record to support this argument. The trial judge presented reasonable and valid reasons for the sentence she imposed upon defendant. Defendant's sentence fell far short of the statutory maximum for his offenses. *U.S. v. James*, __ F.2d __ (7th Cir. Feb. 1, 1991) No. 89-3119.

General Application Principles (Chapter 1)

1st Circuit finds drug transaction not part of common scheme with offense of conviction. (170)(270) Defendant's offense level was calculated by considering drug quantities involved in four transactions other than the charged transaction. He contended that this was error because the four transactions were not part of the same common scheme as the charged transaction. The 1st Circuit rejected defendant's contention as to three of the other transactions, but agreed with defendant as to the fourth. The three transactions involved defendant personally obtaining cocaine from a source in New York and delivering it to a co-conspirator in Maine, the same pattern of conduct that formed the basis for the charged conspiracy. The fourth transaction, however, was consummated solely by defendant's wife, and defendant did not even know about it until it was over. Although defendant benefitted from the transaction, this conduct was distinctly different from the crime of conviction. *U.S. v. Wood*, __ F.2d __ (1st Cir. Feb. 1, 1991) No. 90-1599.

5th Circuit upholds inclusion of cocaine involved in conspiracy. (170)(275) Defendant claimed it was improper to consider cocaine in calculating his offense level since he pled guilty to an offense concerning only the drug ecstasy. The 5th Circuit rejected this argument, since the guidelines provide that a defendant is accountable for conduct of others in furtherance of the execution of joint criminal activity that was reasonable foreseeable to defendant. *U.S. v. Hatchett*, __ F.2d __ (5th Cir. Jan. 30, 1991) No. 90-8030.

9th Circuit upholds departure based on "cache of weapons." (170)(745) Defendant objected to the district court's use of information about his cache of weapons as a basis for departure because it was not specified in the information to which he pled guilty. Relying on section 1B1.3, which permits consideration of "relevant conduct," and section 1B1.4, which permits a district court to consider "any information concerning the background, character, and conduct of the defendant unless otherwise prohibited by law," the 9th Circuit upheld the district court's consideration of the cache of weapons as a basis for departure. *U.S. v. Nakagawa*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-10564.

11th Circuit upholds consideration of conduct relating to counts on which defendant was acquitted. (170)(755) The 11th Circuit held that a district court may consider evidence of the defendant's conduct relating to counts on which the defendant was indicted but acquitted at trial. Acquitted conduct may be considered because a verdict of acquittal demonstrates a lack of proof beyond a reasonable doubt, which is a standard of proof higher than that required for consideration of relevant conduct at sentencing. *U.S. v. Averi*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 89-7718.

11th Circuit upholds consideration of funds found in defendant's apartment. (170)(360)(755) Defendant pled guilty to money laundering, and was sentenced on the basis of $378,000 found in his apartment. The government contended that the district court misapplied the relevant conduct provision of the guidelines by failing to consider the amount of money involved in the total scheme rather than just the funds attributable directly to defendant. The 11th Circuit upheld the district court's action. The government bore the burden of proof on this issue. A review of the record indicated that the district court understood it was to consider the total amount of funds involved in the criminal conduct. The district court's calculation included the funds seized at defendant's apartment and the monies he admitted delivering that day. *U.S. v. De La Rosa*, __ F.2d __ (11th Cir. Jan. 28, 1991) No. 89-5517.

9th Circuit finds record inadequate on whether defendant's statements were used in violation of plea agreement. (185)(780) In a letter confirming defendant's cooperation agreement, defense counsel stated that the parties agreed

that defendant's statements would not be used against him, either as evidence or cross-examination if no plea agreement was reached. Although defendant included the letter in the excerpts of the record on appeal, it was apparently not part of the record in the district court. The prosecution did not dispute the authenticity of the letter, but the 9th Circuit found the record insufficient to entertain defendant's contention that his statements were used against him at sentencing in violation of the plea agreement. The court did not know the full terms of the verbal agreement, and had "no way of determining what, if any, information that was used at sentencing was derived from information supplied by [defendant] pursuant to the February cooperation agreement." *U.S. v. Nakagawa*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-10564.

Offense Conduct, Generally (Chapter 2)

10th Circuit upholds sentencing felon in possession of firearm on the basis of underlying state crime. (210)(330)(380) Defendant committed a "drive-by shooting" and was convicted of being a felon in possession of a firearm. The 10th Circuit found that defendant was properly sentenced under the aggravated assault provisions of guideline section 2A2.2. Defendant claimed that the district court used the superseded version of guideline section 2K2.2(c)(1), which provided that if the defendant used the firearm to commit another offense, a court should apply the guideline for such other offense or section 2X1.1. The new version of the guidelines deleted the reference in section 2K2.2(c)(1) to "for such other offense or," and provide that a court should apply section 2X1.1. The 10th Circuit found that both versions call for cross reference to section 2X1.1, and through that section the court is directed to look at the underlying conduct. Section 2X1.1 is a conduit which directs a court to look at the underlying offense -- in this case aggravated assault. The 10th Circuit also rejected defendant's argument that it was beyond the sentencing commission's authority to enhance his firearms sentence on the basis of the state offense of aggravated assault. This did not federalize a state crime, but merely allowed the sentence for the charged crime to reflect the reality of the crime. *U.S. v. Willis*, __ F.2d __ (10th Cir. Jan. 31, 1991) No. 90-6137.

2nd Circuit upholds calculation of loss based upon entire sum on money embezzled by defendant. (220) Defendant, a bank employee, embezzled approximately $750,000 in loan processing fees by instructing loan customers to make checks payable to an account maintained by defendant and his wife at another bank. Defendant contended that the district court improperly viewed the entire $750,000 as "Loss" under guideline section 2B1.1, because the bank would not have been entitled to retain the amounts it charged as processing fees since the amounts exceeded the bank's costs. The 2nd Circuit found defendant's argument to be meritless. Loss is not limited to the harm done by the defendant when, for some reason, the amount taken exceeds the harm. Moreover, if the bank was not entitled to keep the entire sum it charged, it must repay that amount to its customers. The bank and the borrowers together suffered a total loss of $750,000. *U.S. v. Cea*, __ F.2d __ (2nd Cir. Jan. 31, 1991) No. 90-1245.

9th Circuit holds that road flare was "dangerous weapon" when used in bank robbery. (220) The 9th Circuit found that it was not clearly erroneous for the district court to find that a road flare is dangerous per se, because an ignited flare may be used to inflict bodily injury. "Like toy or inoperable guns that are thought to be loaded, a road flare thought to be dynamite instills fear in victims and bystanders, creating the risk of violent response." The court added, however, that the district court may consider the actual nature of the device in sentencing within the range. "There is an entirely different risk of harm when a robber uses a mock weapon instead of a loaded firearm." *U.S. v. Boyd*, __ F.2d __ (9th Cir. Jan. 31, 1991) No. 90-30110.

9th Circuit reverses where bank robbery sentence was improperly based on combined loss of 4 robberies. (220)(470) While the loss from the four robberies totalled more than $10,000, no single robbery involved such a loss. Section 3D1.2(d) specifically excludes bank robbery from the group of offenses for which the total loss from all offenses is to be added together to determine the offense level. Thus the 9th Circuit held that "rather than adding the total loss for all counts, the district court should have calculated the offense level for each count separately and then applied the upward adjustment provided for by the guidelines for convictions on multiple counts. See section 3D1.4. Since the sentence was based on an incorrect application of the guidelines, the case was remanded for resentencing. *U.S. v. Boyd*, __ F.2d __ (9th Cir. Jan. 31, 1991) No. 90-30110.

5th Circuit upholds upward departure from mandatory minimum sentence based on underrepresented criminal history. (245)(733) Based on defendant's 12 prior felonies, his sentence was enhanced under 18 U.S.C. section 924(e)(1), resulting in a mandatory minimum sentence of 15 years. The 5th Circuit upheld an upward departure to a 17-year sentence based upon an underrepresentation of defendant's criminal history. The sentencing judge had noted that defendant's 12 prior felonies were four times as many as necessary to invoke the sentence enhancement provisions of section 924(e)(1), and that each time defendant had been released on parole in the past he had promptly returned to criminal activity. The amount of the departure was also reasonable. *U.S. v. Fields*, __ F.2d __ (5th Cir. Jan. 29, 1991) No. 90-4375.

D.C. Circuit upholds mandatory minimum sentence and guidelines against constitutional challenges. (245)(710) Defendant argued that the application of a mandatory minimum sentence deprived him of due process and equal protection, since there is no opportunity to depart downward even though this was his first offense. The D.C. Circuit summarily rejected this argument, finding the mandatory minimum sentence a valid exercise of legislative prerogative. Defendant also contended that the provision permitting a downward departure from a mandatory minimum based on a defendant's assistance to the government was unconstitutionally narrow, since it is the only method to obtain a downward departure from a mandatory minimum but it is unavailable to a defendant who is unable to help the authorities. The D.C. Circuit rejected this argument, finding that the public interest in obtaining valuable information provided a reasonable basis for drawing this distinction. *U.S. v. Braxton*, __ F.2d __ (D.C. Cir. Feb. 1, 1991) No. 89-3225.

7th Circuit upholds sufficiency of evidence to determine cocaine quantity. (250)(770) Defendant coordinated a drug importation and distribution network that paid couriers to transport drugs and money between various locations. Defendant contended that his offense level of 32 was incorrect because the prosecution did not prove that the contents of various courier packages contained 18.5 kilograms of cocaine. The 7th Circuit rejected defendant's contention. The prosecution proved that the couriers made at least 16 trips carrying one to three packages of cocaine per trip. The last packages delivered prior to defendant's arrest contained cocaine. Some of the couriers saw cocaine in several of the packages, and defendant was observed weighing and packaging cocaine in his hotel room. On several occasions, defendant and others informed the couriers that they were carrying kilogram amounts in each package, and that each package would bring between $12,000 and $16,000. This evidence was sufficient for the jury to convict defendant, and therefore was sufficient for purposes of proving the amount of cocaine for sentencing. *U.S. v. McKenzie*, __ F.2d __ (7th Cir. Jan. 22, 1991) No. 89-3177.

7th Circuit rejects need for special jury verdict as to amount of cocaine involved in offense. (250)(270)(760) Defendants alleged that the district court erred in refusing their request for a special verdict to the jury that would determine the amount of cocaine involved in their offense. The 7th Circuit rejected this argument, finding no special verdict was needed. First, juries only determine guilt or innocence, while punishment is the province of the court. Second, the appellate court must give great deference to the district court's factual findings, including the calculation of the quantity of drugs involved in the offense. Third, the amount of cocaine was described in the substantive counts of the indictment, so the jury was effectively required to determine the weight as part of the determination of guilt. Finally, several of the counts overlapped for purposes of counting the amount of cocaine involved, and therefore, the government and defense counsel agreed on 18.5 kilograms for purposes of sentencing. A special interrogatory to the jury would be superfluous. *U.S. v. McKenzie*, __ F.2d __ (7th Cir. Jan. 22, 1991) No. 89-3177.

8th Circuit upholds estimating quantity of drugs based upon amount of cash seized. (250) The district court determined that $112,867 seized was the monetary equivalent of 940 grams of crack, in light of testimony that crack was routinely sold for $120 per gram. Adding 940 grams to the 233.88 grams of drug seized, the district court determined that the conspiracy involved the distribution of 1,173.88 grams of cocaine base. The 8th Circuit upheld the calculation. The commentary to guideline section 2D1.4 suggests that where the amount seized does not reflect the scale of the offense, the sentencing judge may approximate the quantity, and may consider the price generally obtained for the substance. *U.S. v. Stephenson*, __ F.2d __ (8th Cir. Jan. 25, 1991) No. 89-2472.

9th Circuit considers actual amount of methamphetamine rather than charged amount. (270) The commentary to section 1B1.3 states that "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct . . . as the count of conviction." Thus the 9th Circuit held that the court did not err by considering the actual amount of methamphetamine rather than simply the charged amount. *U.S. v. Nakagawa*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-10564.

9th Circuit permits departure for possession of weapons during drug offense even though that factor was already considered. (284)(330)(680)(745) Defendant argued that his possessing a weapon during commission of the drug offense contributed to his sentence on the 18 U.S.C. section 924(c) weapons charge, and therefore was not a permissible ground for departure. The 9th Circuit rejected the argument, noting that the policy statement to section 5K2.6 permits such departures even if the guidelines take weapon possession into consideration, as long as that factor "is present to a degree substantially in excess of that which is ordinarily involved in the offense of conviction." The court agreed with the district court's assessment that defendant's arsenal of 18 firearms, some fully automatic, elevated the factor of weapon possession to an extraordinary level and rendered it a suitable ground on which to depart. The court also rejected defendant's argument that this violated double jeopardy. *U.S. v. Nakagawa*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-10564.

3rd Circuit reverses failure to group together firearms offenses. (330)(470) Defendant pled guilty to possession of firearms by a felon, delivery of firearms to a common/contract carrier, and possession of an altered firearm. The 3rd Circuit found that the district court improperly

failed to group together these charges. The possession of firearms by a felon count and the possession of an altered firearm count should have been grouped under guideline section 3D1.2(c), which provides for the grouping of offenses in which one count is also a specific offense characteristic of another count. The guidelines provide for an increase in offense level for possession of a firearm by a felon if the firearm has an altered or obliterated serial number, and defendant received such an increase. In addition, grouping of the offenses of possession of a firearm by a felon and delivery to a common/contract carrier was required because to hold otherwise would provide enhanced punishment for defendant's status as a felon, rather than additional conduct. *U.S. v. Riviere*, __ F.2d __ (3rd Cir. Jan. 31, 1991) No. 90-3128.

11th Circuit upholds enhancement based upon reasonable belief that money was criminally derived. (360) Defendants were convicted of failing to report the transport of over $10,000 in currency out of the United States. The 11th Circuit found that it was proper to increase their offense level by five under guideline section 2S1.3(b) based upon defendants' reasonable belief that the money was related to drug activity. One defendant admitted in her written statement that it was logical to assume that the money was drug related, and the other defendant admitted that he assumed that the money was drug related due to the nature of the business. The government need not show actual knowledge. *U.S. v. Ortiz-Barrera*, __ F.2d __ (11th Cir. Jan. 28, 1991) No. 89-5288.

Adjustments (Chapter 3)

7th Circuit upholds leadership role of defendant who directed drug couriers and managed funds. (430) Defendant coordinated a drug importation and distribution network that paid couriers to transport drugs and money between various locations. The 7th Circuit upheld the district court's determination that defendant was an organizer or leader. The scope of the illegal activity was extensive, encompassing several couriers, cross-country trips, and numerous drug-for-money transactions. Defendant was the "linchpin" of the operation. He ordered couriers from the supply cities to the destination cities, ordered payments and provided funds. He also selected the couriers' clothing so that they would be less conspicuous when travelling. *U.S. v. McKenzie*, __ F.2d __ (7th Cir. Jan. 22, 1991) No. 89-3177.

11th Circuit upholds leadership enhancement based upon defendant's role in offense of conviction. (430) The government contended that the district court should have increased defendant's offense level by three based upon his role as a high level manager of a criminal enterprise involving five or more participants. Defendant only received a two level increase based upon his role as an organizer of criminal activity involving less than five participants. The 11th Circuit upheld the district court's determination. Although defendant may have been involved with other individuals in other criminal activity, a sentencing court may only focus upon a defendant's role in the offense of conviction rather than other criminal conduct in which he may have engaged. Defendant's offense of conviction was money laundering, in which he acted with only two other individuals. *U.S. v. De La Rosa*, __ F.2d __ (11th Cir. Jan. 28, 1991) No. 89-5517.

11th Circuit affirms leadership role of defendant who arranged sale of counterfeit money. (430) Defendant was approached in Florida by another individual who asked defendant to accompany him to Canada to distribute counterfeit money. Defendant instead offered to distribute the money in Florida, and then arranged to sell a substantial amount of the currency in Florida. The 11th Circuit upheld a determination that defendant was a leader or an organizer. Defendant made the arrangements to sell the money in Florida and had complete responsibility for its sale. Defendant also enlisted the aid of another individual as an accomplice. *U.S. v. Hendrieth*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 89-3672.

3rd Circuit finds counsel ineffective in failing to argue that defendant was a minor participant. (440) Although the presentence report indicated that defendant's role in an extensive cocaine conspiracy may have been limited to being a courier on several occasions, defendant's counsel did not argue for an adjustment based upon defendant's role in the offense. The 3rd Circuit found that this failure constituted ineffective assistance of counsel, and remanded the case for the district court to consider this argument. The statement in the presentence report put counsel on notice that it might have been fruitful to seek a downward adjustment. There was "no rational basis to believe that [defendant's] trial counsel's failure to argue adjustment was a strategic choice." *U.S. v. Headley*, __ F.2d __ (3rd Cir. Jan. 24, 1991) No. 90-1025.

9th Circuit holds that agreement that defendant was "less culpable" did not prevent government from arguing against "minor role." (440)(790) The plea agreement stated that the defendant would "be free to argue" for a two point reduction for "minor role" in the crime. The agreement also stated that defendant was "less culpable" than his codefendants. At sentencing, the government argued against a two point reduction in offense level for minor participant, and the defendant argued that this was a breach of the plea agreement. The 9th Circuit rejected the argument, holding that "being less culpable and obtaining minor participant status are not necessarily synonymous." The court found that the language of the plea agreement prevented defendant from claiming that he "thought" the government meant to equate "less culpable" with "minor participant." *U.S. v. Andrus*, __ F.2d __ (9th Cir. Feb. 5, 1991) No. 90-30018.

9th Circuit holds that minor participant adjustment requires comparing defendants with each other and with elements of crime. (440) In *U.S. v. Howard*, 894 F.2d 1085 (9th Cir. 1990), the court questioned whether "section 3B1.2 requires a court to compare a defendant's conduct with the conduct of other codefendants as opposed to comparing defendant's conduct with the conduct of an average participant in the type of crime in question." Here, the 9th Circuit resolved the question, agreeing with the 4th Circuit in *U.S. v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989), that the court should look "at both the relative culpability of the defendants vis a vis each other, and of each in relation to the elements of the offense." The defendant here had a methamphetamine lab in his basement, with which he was actively involved. The 9th Circuit found that he was not "substantially less culpable" than his codefendants, nor was he a minor participant in terms of the elements of the offense, nor in comparison with the average participant in such a crime. The district court did not clearly err in refusing a minor participant reduction. *U.S. v. Andrus*, __ F.2d __ (9th Cir. Feb. 5, 1991) No. 90-30018.

11th Circuit reverses obstruction of justice enhancement where defendant was already sentenced for contempt of court. (460) Defendant refused to testify at a co-conspirator's trial after being granted immunity, and was found guilty of criminal contempt. Later, when defendant was sentenced for related cocaine convictions, the district court enhanced defendant's sentence for obstruction of justice based upon defendant's refusal to testify. The 11th Circuit reversed, finding that the sentencing guidelines prohibit this result. Guideline section 3C1.1 provides that where a defendant is convicted of contempt, the obstruction of justice enhancement is not to be applied "except where a significant further obstruction occurred. . . ." *U.S. v. Williams*, __ F.2d __ (11th Cir. Jan. 29, 1991) No. 89- 8643.

6th Circuit upholds acceptance of responsibility provisions against 5th and 6th Amendment challenges. (480) Defendant contended that guideline section 3E1.1 had an unconstitutional chilling effect on her 5th Amendment right against self-incrimination and her 6th Amendment right to a jury trial by forcing her to plead guilty in order to receive the reduction in offense level. The 6th Circuit rejected these arguments, noting that section 3E1.1 authorizes adjustments for those who go to trial, and there is no guarantee that one who pleads guilty will receive the reduction. Although section 3E1.1 might affect how criminal defendants choose to exercise their constitutional rights, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." *U.S. v. Cordell*, __ F.2d __ (6th Cir. Jan. 30, 1991) No. 90-3011.

2nd Circuit rejects acceptance of responsibility reduction for defendant who did not jump bail or commit perjury. (485) Defendant contended he was entitled to a reduction for acceptance of responsibility because, unlike his co-defendants, he did not jump bail (despite his alien status) or commit or assist in committing perjury during the course of his trial. The 2nd Circuit rejected this contention. The record was devoid of any affirmative acceptance of responsibility for the crimes. Abstaining from the commission of a crime or from impropriety is not evidence of acceptance of responsibility. *U.S. v. Ibanez*, __ F.2d __ (2nd Cir. Jan. 15, 1991) No. 90-1246.

7th Circuit rejects acceptance of responsibility reduction for defendant who stated he had made mistakes. (485) The 7th Circuit rejected defendant's contention that he was entitled to a reduction for acceptance of responsibility. Defendant made no factual basis for the reduction other than a statement he made to the court at sentencing that he had "made mistakes" in life. The showing was insufficient to overcome the great deference to which this determination of the district court was entitled. *U.S. v. McKenzie*, __ F.2d __ (7th Cir. Jan. 22, 1991) No. 89-3177.

8th Circuit refuses acceptance of responsibility reduction despite government admission that defendant did not lie. (485) When defendant was asked about his cocaine source and to whom he intended to deliver his cocaine, defendant expressed his belief that a government informant was his source and that the person to whom he was to deliver the cocaine did not exist because the entire deal was a government set-up. The government claimed that both of these statements were erroneous. The district court denied defendant a reduction for acceptance of responsibility in part because defendant lied to the probation officer regarding the details of his offense. At oral argument, the government conceded that nothing in the record showed that defendant actually lied, other than the fact that his version of the events was erroneous. The 8th Circuit upheld the denial of the reduction, finding that the district court based its denial on broader grounds than its finding that defendant had lied. Chief Judge Lay, dissenting, would have remanded the case to the district court for reevaluation in light of the government's admission that defendant did not lie. *U.S. v. Morales*, __ F.2d __ (8th Cir. Jan. 17, 1991) No. 89-5606.

8th Circuit reverses denial of acceptance of responsibility reduction based upon defendant's failure to advise FBI of complete facts surrounding accident. (490) Defendant was convicted of involuntary manslaughter for driving her car in a grossly negligent manner, resulting in the death of a passenger. At trial, defendant testified that she had lost control of the car when another passenger in the car had grabbed her face and tried to kiss her. The sentencing court denied a reduction for acceptance of responsibility because she failed to advise an FBI agent who interviewed her after the accident about the passenger's role in the accident. The 8th Circuit reversed, since at the FBI interview defendant did not volunteer any statements and merely responded "yes" or "no" to

the FBI agent's factual reconstruction of the accident. Moreover, she had suffered a head injury and knew that her son had been injured and her nephew killed. The government had misrepresented to the sentencing court that defendant had not testified accurately about the quantity of beer she had consumed the night of the accident. Moreover, defendant acknowledged that her drinking contributed to the accident. Judge Arnold dissented, finding that her trial testimony was an attempt to blame another individual. *U.S. v. Charger*, __ F.2d __ (8th Cir. Jan. 28, 1991) No. 90-5194.

11th Circuit affirms acceptance of responsibility reduction for defendant who assisted government in investigation. (490) The government objected to the district court's two level reduction for acceptance of responsibility. The 11th Circuit found that the determination was not without foundation, and upheld the reduction. After being confronted by police, defendant agreed to permit the police to search his car and apartment, provided them with address of a co-defendant, advised the police of the location of an apartment containing both cocaine and money, and admitted that he was in the cocaine business. The record reflected that defendant was extremely cooperative in the initial stages of the investigation and made it possible for the government to make the arrests in the case. "The government's theory that [defendant] should not benefit from this acceptance of responsibility because he cooperated only in the hope that he would avoid arrest does not persuade us to override the considered judgment of the district court on this issue." *U.S. v. De La Rosa*, __ F.2d __ (11th Cir. Jan. 28, 1991) No. 89-5517.

Criminal History (§ 4A)

2nd Circuit upholds criminal history calculation based upon finding that defendant was on probation at time of offense. (500) Defendant received two criminal history points because he committed his offense while on probation. Defendant contended that this was improper because his probation was terminated prior to the commission of the offense. The 2nd Circuit rejected this contention. Although defendant's counsel had objected to this portion of PSI, the probation officer had attached a signed addendum noting that he had spoken with defendant's probation officer, who confirmed that defendant was not terminated early from supervision as he claimed. Defense counsel implicitly conceded this point in calculating defendant's guideline range. The district court was entitled to consider the failure of defendant and his counsel to support their "bald, unsubstantiated statement that defendant was not on probation at the time of his offense." *U.S. v. Ibanez*, __ F.2d __ (2nd Cir. Jan. 15, 1991) No. 90-1246.

2nd Circuit refuses to reconsider criminal history calculation where sentence imposed fell within new guideline range. (500)(810) Defendant argued for the first time on appeal that the district court improperly added points to his criminal history for various uncounseled convictions. The 2nd Circuit declined to consider whether uncounseled convictions can properly be considered in calculating a defendant's criminal history score. Defendant received a 77 month sentence. Even if the district court erred, the reduction of criminal history points would result in a guideline range of 63 to 78 months. Since defendant could have received exactly the same sentence in the absence of the alleged error, the error could not have affected substantial rights. *U.S. v. Arigbodi*, __ F.2d __ (2nd Cir. Jan. 25, 1991) No. 90-1527.

5th Circuit refuses to consider possible miscalculation of criminal history where defendant failed to raise issue below. (500)(820) Defendant contended that it was fundamentally unfair to calculate his criminal history score based on the sentencing date of past crimes, as opposed to the commission date of those crimes. Defendant made no objection to either the PSI's assessment of his past sentences or the district court's computation of his criminal history. The 5th Circuit found that because defendant failed to raise these objections below, it could not review them now absent plain error. The error asserted involved the technical application of a single guideline and was not obviously of constitutional magnitude. Therefore, the court refused to consider the merits of defendant's argument. *U.S. v. Lopez*, __ F.2d __ (5th Cir. Jan. 23, 1991) No. 89-5703.

5th Circuit affirms that deferred adjudication probation is criminal justice sentence. (500)(820) Defendant challenged the addition of two points to his criminal history score because he committed the instant offense while under a criminal justice sentence, contending that his Texas deferred adjudication probation was not a criminal justice sentence. The 5th Circuit reviewed the issue for plain error, since defendant did not urge his objection at sentencing or otherwise object to the presentence report. A criminal justice sentence is defined as a sentence countable under guideline section 4A1.2. Since the court had held in another case that a Texas deferred adjudication probation could properly be counted as a prior sentence, there was no plain error. *U.S. v. Hatchett*, __ F.2d __ (5th Cir. Jan. 30, 1991) No. 90-8030.

8th Circuit finds no double counting in calculation of criminal history score. (500) Defendant received one criminal history point for his prior sentence of probation, and two criminal history points because he committed the current offense while on probation. The 8th Circuit rejected an argument that this was impermissible double counting. The provisions involved two distinct considerations. The one point merely addressed prior criminal conduct generally. The two points addressed the recency of the prior criminal activity. *U.S. v. Stephenson*, __ F.2d __ (8th Cir. Jan. 25, 1991) No. 89-2472.

8th Circuit upholds assessment of criminal history points for prior state conviction for which no incarceration was ever served. (500) Defendant contended that three criminal history points were improperly assessed for a prior state court conviction for which no period of incarceration was served. Defendant had been tried, convicted and sentenced in Arkansas state court to three years imprisonment for keeping a gambling house. This conviction was affirmed by the Arkansas Supreme Court, but for some inexplicable reason, defendant was never picked up by the Arkansas authorities and consequently, he never served a single day of this state conviction. The 8th Circuit rejected defendant's contention that for criminal history purposes, his conviction should be treated as if it had been suspended. The state took no affirmative steps to relieve defendant of his obligation. It was also proper to add two points to defendant's criminal history score for committing the current offense while under a criminal justice sentence. Actual incarceration is not required to qualify as a criminal justice sentence. *U.S. v. Thompson*, __ F.2d __ (8th Cir. Jan. 30, 1991) No. 90-1918.

D.C. Circuit upholds determination that defendant was a career offender. (520) Defendant contended that the district court improperly classified him as a career offender because his prior conviction for robbery was not necessarily a crime of violence and the judge failed to consider mitigating circumstances surrounding his offense in making the career offender determination. The D.C. Circuit rejected this contention. The judge considered the circumstances of defendant's robbery conviction and concluded they did not justify a departure. While the judge did not expressly address the violent nature of the robbery conviction, the judge had before him and examined the facts of the offense and those facts supported the conclusion that it was a crime of violence. *U.S. v. Butler*, __ F.2d __ (D.C. Cir. Feb. 1, 1991) No. 89-00135.

Determining the Sentence (Chapter 5)

9th Circuit finds no error in failure to allow probationer to view his probation file. (560) Prior 9th Circuit precedent held "that failure to allow a probationer to view his probation file prior to a revocation hearing violates neither Fed. R. Crim. P. 32.1(a)(2)(B) nor due process if the government does not use it as evidence against the probationer." In this case, the only records not made available were the probation officer's notes reflecting office visits by the probationer. The government did not offer any evidence in its case in chief from these records. Defense counsel opened the inquiry and was furnished "candid unsurprising answers, none of which added to or detracted from the evidence that established the parole violations." *U.S. v. Donaghe*, __ F.2d __ (9th Cir. Jan. 31, 1991) No. 90-30105.

9th Circuit limits probation revocation sentence to range available at the time of initial sentencing. (560) 18 U.S.C. section 3565(b) states that upon revocation of probation the court shall impose any other sentence that was available "at the time of the initial sentencing." Following the 8th and 11th Circuits, the 9th Circuit held that in resentencing after a probation violation, the court is "constrained by the offense level, criminal history category, and sentencing range determined during the initial sentencing." The court added however that the court may consider the conduct that resulted in the probation revocation in "determining the appropriate sentence to impose within the initial guideline range. And the court can consider the conduct in considering whether to depart, provided that the facts warranting departure were available at the initial sentencing. "In other words the court cannot make additional factual findings to justify a departure, but can reconsider its original decision not to depart in light of the defendant's subsequent actions." *U.S. v. White*, __ F.2d __ (9th Cir. Jan. 29, 1991) No. 89-50430.

5th Circuit finds failure to inform defendant of maximum term of supervised release was harmless error. (580)(790) Defendant contended that his plea should be vacated because the district court failed to advise him of the maximum possible period of supervised release. The court informed defendant twice that the maximum possible penalty was 20 years imprisonment and/or a one million dollar fine, and in addition, a term of supervised release of at least three years. Defendant ultimately received a five year term of supervised release. The 5th Circuit found that it was harmless error to fail to advise defendant of the maximum term of supervised release. It was unreasonable to believe that defendant would not have pled guilty had he been advised of the maximum term for supervised release. *U.S. v. Hatchett*, __ F.2d __ (5th Cir. Jan. 30, 1991) No. 90-8030.

9th Circuit rules that supervised release provision became effective October 27, 1986. (580) Relying on its earlier opinion in *U.S. v. Torres*, 880 F.2d 113, 115 (9th Cir. 1989), the 9th Circuit held that the supervised release provision, Pub. Law 99-570 section 1002, 100 Stat. 3207, became effective the day it was enacted, October 27, 1986. Accordingly, the defendant was subject to supervised release. *U.S. v. Clay*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-30328.

9th Circuit holds Parole Commission cannot limit parolees' right to confront witnesses. (590) Parole Form F-2 allowed a parolee to request a "local revocation hearing" at which adverse witnesses could be called, only if the parolee could certify that he or she had "not violated any of the conditions of [his or her] parole or mandatory release." Because the petitioner here admittedly had violated two non-criminal parole conditions, Form F-2 barred him from requesting a local revocation hearing. At the subsequent institutional hearing, his request to confront adverse witnesses on the more serious parole violations was denied. Judges Boochever, Nelson

and Trott held that this violated due process. The court said that "admitting some, but not all, parole violations is hardly a volitional waiver of the right to confront." *White v. White*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-15376.

9th Circuit finds no right to credit for time served in state prison on state charges. (600) Petitioner argued that the federal detainer prevented him from making bail on his state charges. The 9th Circuit held that he was entitled to credit for the time he otherwise would have been out on bail if (1) the federal detainer had been "the sole reason for the denial of bail," and (2) the state failed to credit his state sentence for that time. Here the defendant was already serving his state sentence by the time the detainer was lodged. Therefore even if he was denied bail, the federal detainer could not have been the sole reason for that denial. Moreover, there is no statutory provision that accords a prisoner credit against a federal sentence for time served in a state prison on a state charge. *Tucker v. Carlson*, __ F.2d __, 91 D.A.R. 1535 (9th Cir. Feb. 5, 1991) No. 88-15568.

5th Circuit remands because sentencing judge may have improperly considered defendants' socioeconomic status. (690)(775) Defendant was one of five defendants sentenced on drug trafficking charges. In response to defendant's request for a downward departure, the judge commented upon defendant's high intelligence, his material advantages, and his educational opportunities, suggesting that an individual with such advantages might be punished more harshly under the law than one with mitigating circumstances. The judge then reiterated these comments to at least one of the other defendants. The 5th Circuit vacated the sentences of all five defendants and remanded for resentencing. A defendant's socioeconomic status is never relevant for sentencing. Although the judge, acting as amicus curiae, contended that he was merely lecturing the defendants, the 5th Circuit found that it could not ascertain whether from the record whether the judge considered the impermissible factors. *U.S. v. Hatchett*, __ F.2d __ (5th Cir. Jan. 30, 1991) No. 90-8030.

Departures Generally (§ 5K)

1st Circuit upholds different departures imposed by different sentencing judges. (700) Defendant was prosecuted in two separate criminal proceedings: one in which he was convicted after a jury trial of eight drug related counts, and the other in which he pled guilty to one count of conspiracy. In the case involving the jury trial, the district judge departed upward from a guideline range of 41 to 51 months and sentenced defendant to 135 months. In the plea bargain proceeding, the district court departed upward from criminal history category III to criminal history category IV, resulting in a guideline range of 27 to 33 months, and a sentence of 33 months. The 1st Circuit addressed the disparity in sentencing departures, noting that "it was at least possible that, while taken separately, each sentence could withstand appellate scrutiny, taken together they may indicate some problem with the procedures used." However, it upheld the two departures. Although both judges received essentially the same presentence report, the sentencing judge who presided over the jury trial heard tape recordings of the defendant as he engaged in cocaine transactions and received a "very damning" sentencing memorandum from the government detailing defendant's criminal involvements. Taking the sentences together or separately, there was no reversible error. *U.S. v. Rodriguez-Cardona*, __ F.2d __ (1st Cir. Jan. 23, 1991) No. 89-1611.

1st Circuit finds government's refusal to file motion for substantial assistance departure was not arbitrary. (710) Defendant claimed his right to due process was violated when the court denied his request for a downward departure based upon his substantial assistance. The 1st Circuit upheld the district court's actions. The constitutionality of the requirement that the government make a motion for a substantial assistance departure had previously been upheld by the Circuit court. There was no evidence that the government's failure to make such a motion was arbitrary. Defendant provided no assistance prior to his trial but, after he was convicted, sought to help. By then, all co-defendants but one were convicted. While defendant cooperated to some unspecified degree as to that one co-defendant, the government's case against the co-defendant was already strong. *U.S. v. Bannister*, __ F.2d __ (1st Cir. Jan. 25, 1991) No. 90-1633.

7th Circuit upholds requirement of government motion for substantial assistance departure. (710) Defendant contended that guideline section 5K1.1 violated due process by placing sentencing authority in the hands of the prosecutor, and by depriving defendant of an opportunity to be heard. The 7th Circuit rejected defendant's argument, finding defendant's argument indistinguishable from an argument rejected in a previous Circuit case. The government's refusal to make the departure motion was a reasonable exercise of its wide discretion under section 5K1.1. Defendant's attempted assistance was minimal. The court refused to require a district court to entertain a section 5K1.1 motion by the defense merely because the defendant alleges bad faith or vindictiveness by the government. *U.S. v. Donatiu*, __ F.2d __ (7th Cir. Jan. 22, 1991) No. 89-2906.

7th Circuit upholds no downward departure where government failed to make motion for substantial assistance. (710) Defendant contended that his sentence should have been mitigated to account for the substantial assistance he claimed to have provided the government. The government not did move for such a reduction. Although defendant presented evidence that the government's failure to make such a motion was unreasonable, the 7th Circuit upheld the failure to depart. The government motion requirement does not vio-

late due process. Moreover, the district court did not believe defendant's declarations that his cooperation warranted a reduction in sentence and made an express finding that defendant had not substantially assisted the government. *U.S. v. Wilson*, __ F.2d __ (7th Cir. Jan. 23, 1991) No. 90-1987.

9th Circuit holds that extent of downward departure is not reviewable on appeal. (710)(810) Relying on prior circuit authority, the 9th Circuit held that the extent to which a district court chooses to exercise its discretion in fixing a downward departure is not reviewable on appeal. *U.S. v. Dickey*, __ F.2d __ (9th Cir. Jan. 23, 1991) No. 89-50340.

11th Circuit upholds requirement of government motion for substantial assistance departure. (710) Defendant argued that the guideline provision for a substantial assistance departure violates due process because the prosecutors rather than the judges effectively determine the sentence when they move, or fail to move, for a departure. The 11th Circuit rejected this argument without discussion, following the decisions of other circuits. *U.S. v. Hernandez*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 89-3395.

1st Circuit refuses to review failure to depart downward. (720)(810) Defendant argued that the judge, when sentencing him, should have departed downward in order to reflect that defendant had suffered a pre-trial confinement under unconstitutional conditions. The 1st Circuit refused to review the district court's actions, finding no extraordinary circumstances to justify it. *U.S. v. Porter*, __ F.2d __ (1st Cir. Jan. 30, 1991) No. 90-1191.

9th Circuit says first offense may sometimes justify downward departure for "aberrant behavior." (720) The 9th Circuit found that under the guidelines, "aberrant behavior" and "first offense" are not synonymous. The guidelines "make due allowance for the possibility of a defendant being a first offender." Nevertheless, "the guidelines recognize that a first offense may constitute a single act of truly aberrant behavior justifying a downward departure." In this case, it was not clear that the district judge understood that he could have departed downward on this basis, and therefore the case was remanded for the district court to rule on it. *U.S. v. Dickey*, __ F.2d __ (9th Cir. Jan. 23, 1991) No. 89-50340.

10th Circuit remands where judge stated he had no discretion to depart downward. (720) The 10th Circuit found that the trial judge committed plain error when he sentenced defendants under the expressed belief that he had no discretion to consider a downward departure under the guidelines. The judge stated that "I have spoken against the guidelines, because I believe that they are harsh. I believe that they should give the sentencing judge a discretion, and these guidelines don't . . . I have no discretion in the matter." *U.S. v. Jefferson*, __ F.2d __ (10th Cir. Jan. 31, 1991) No. 90-8028.

3rd Circuit finds "single parent" status not grounds for downward departure. (722) Defendant was a single mother with five children under the age of 11. The district court denied a downward reduction on the basis of defendant's family ties and responsibilities on the ground that it lacked legal authority. The 3rd Circuit afirmed, noting that section 5H1.6 provides that family ties and responsibilities are "not ordinarily relevant" in determining whether a departure is justified. Although the "not ordinarily relevant" language suggests that "in extreme circumstances" departure based on family ties and responsibilities may be permissible, defendant did not present extreme circumstances. The imprisonment of a single parent is not extraordinary. Imposition of a prison sentence normally disrupts parental relationships. *U.S. v. Headley*, __ F.2d __ (3rd Cir. Jan. 24, 1991) No. 90-1025.

4th Circuit rejects downward departure based upon deferral of parole. (722) Defendant was an inmate convicted of possession with intent to distribute crack cocaine. Defendant, a career offender, had a guideline range of 168 to 210 months. The district court departed downward by at least 120 months based solely upon a 26 month deferral of parole for unrelated crimes, and sentenced defendant to 48 months. The 4th Circuit reversed, finding that the sentencing commission adequately took parole deferral into consideration in formulating the guidelines. Moreover, consideration of parole deferral as a factor justifying leniency in sentencing undermines congressional intent to mete out more severe punishment for career offenders. In addition, a 120 month downward departure for a 26 month parole deferral was unreasonable. *U.S. v. Wright*, __ F.2d __ (4th Cir. Jan. 31, 1991) No. 90-5653.

9th Circuit rejects "imperfect entrapment" as basis for downward departure. (722) Defendant argued that the government informant "talked him into" printing the counterfeit money, and that this government misconduct constituted "imperfect entrapment" justifying a downward departure. Agreeing with *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990), the 9th Circuit held that governmental misconduct should not mitigate the sentence of an admittedly guilty defendant. Judge Reinhardt dissented. *U.S. v. Dickey*, __ F.2d __ (9th Cir. Jan. 23, 1991) No. 89-50340.

D.C. Circuit finds downward departure not authorized because diminished capacity was the result of substance abuse. (722) Defendant contended that the district court improperly refused to consider a departure based upon defendant's diminished capacity because the judge mistakenly believed that Congress had foreclosed consideration of diminished capacity as a mitigating factor when it eliminated it as an affirmative defense. The D.C. Circuit rejected this argument, noting that defendant's psychologist's letter expressly stated that defendant did not meet the guidelines criterion for reduced mental capacity and that the cause of any re-

duced capacity was defendant's substance abuse. *U.S. v. Butler*, __ F.2d __ (D.C. Cir. Feb. 1, 1991) No. 89-00135.

1st Circuit upholds departure of three times guideline range. (733)(745) Defendant had an offense level of 20, and fell within criminal history category III, resulting in a guideline range of 41 to 51 months. The district court departed upward, increasing the offense level to 28 and determining that defendant more properly fell within criminal history category VI. Defendant was sentenced to 135 months. The district court identified ten specific reasons for the departure, including the fact that defendant had ordered the murder of an informant, was implicated in another murder, had planned to murder a district attorney, had used a minor as a messenger in his drug business, was one of the most important drug traffickers in Puerto Rico, and derived significant income from drug trafficking. The 1st Circuit upheld the departure, finding the judge made a "well-supported determination that [defendant's] conduct was so egregious as to merit upward departure." Several of the factors relied upon by the judge (defendant's importance as a drug supplier, his use of a minor in his business, the amount of money involved) were proper grounds for departure. The degree of the departure was also reasonable, for defendant appeared to be a "lifetime criminal offender, one who has shown no respect whatsoever for the law or any other social institutions." *U.S. v. Rodriguez-Cardona*, __ F.2d __ (1st Cir. Jan. 23, 1991) No. 89-1611.

1st Circuit affirms upward departure where defendant was on conditional release when current offense was committed. (734) The district court departed upward from criminal history category I to criminal history category II because defendant committed the current offense while on conditional release pending final disposition of an unrelated state heroin trafficking charge. Defendant had pled guilty to the charge but had not yet been sentenced. The 1st Circuit upheld the departure, noting that guideline section 4A1.3 authorizes an upward departure if the defendant committed the instant offense while on bail or pretrial release for another serious offense. Although defendant contended that the amount of heroin involved was too small to give rise to any significant understatement of the seriousness of his criminal history, if defendant had been finally sentenced on the state court charge, he would have been subject to a mandatory minimum sentence of 10 years for the offense of conviction in the current case. *U.S. v. Polanco-Reynoso*, __ F.2d __ (1st Cir. Jan. 25, 1991) No. 89-2162.

1st Circuit upholds finding that defendant had urged son to rob bank to obtain bail money. (745)(770) The district court departed upward and required defendant to serve an additional two months in prison because it found that defendant had urged his son to rob another bank to obtain bail money for defendant. Defendant argued that the evidence was insufficient to support the finding since the government put pressure on his son to testify by offering him immunity. The 1st Circuit rejected this argument. The son's testimony was corroborated by a letter that defendant sent to another son. Moreover, the issue was one of credibility, and the district court was authorized to accept the son's testimony as true. *U.S. v. Porter*, __ F.2d __ (1st Cir. Jan. 30, 1991) No. 90-1191.

3rd Circuit reverses upward departure made on the basis of disruption of government function. (746) Defendant assaulted five federal marshalls transporting him to the airport for a commercial flight to Puerto Rico. As a result, the commercial airline refused to accept defendant as a passenger, and the marshalls were forced to charter a private flight to transport defendant. Defendant pled guilty to assaulting one of the marshalls. The district court departed upward based on defendant's disruption of a government function. The 3rd Circuit reversed, finding that defendant's conduct did not cause a significant disruption which would rise to the level of a circumstance not considered by the sentencing commission. Assault of a federal marshall inherently disrupts a government function because it interferes with the marshall's performance of his or her duties. Rescheduling defendant's transportation was a one-time effort by the marshall's office in which they were performing their usual functions. That the marshalls had to repeat their task was neither unusual nor significant because assault on a marshall during transportation is likely to require that other arrangements be made. *U.S. v. Riviere*, __ F.2d __ (3rd Cir. Jan. 31, 1991) No. 90-3128.

6th Circuit reverses upward departure which was based upon crime's impact upon society. (746) Defendant was convicted of being a felon in possession of a firearm after being involved in a fight in a store. The district court departed upward because it found that defendant's crime had a "major impact on society." Defendant showed "a total disregard for any of the rules of society in relation to this particular crime. . . .[and] "has done so in relation to his whole total life." The 6th Circuit found that the circumstances relied upon by the sentencing judge were not sufficiently unusual to warrant an upward departure. The very factors relied upon by the court were the same factors that led to a criminal history category of VI for defendant. *U.S. v. Wolak*, __ F.2d __ (6th Cir. Jan. 18, 1991) No. 89-2275.

Sentencing Hearing (§ 6A)

9th Circuit upholds having presentence psychiatric study done by Bureau of Prisons. (750) Under 18 U.S.C. section 3552, a presentence psychiatric study "shall be conducted in the local community . . . unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons." Here, the district court found that appellant's release into the local community to have such a study performed presented a "risk of flight." The 9th Circuit

found this conclusion was supported by the record and that this constituted a compelling reason for the study to be done by the Bureau of Prisons. *U.S. v. Donaghe*, __ F.2d __ (9th Cir. Jan. 31, 1991) No. 90-30105.

8th Circuit upholds use of preponderance of the evidence standard at sentencing hearing. (755) The 8th Circuit rejected defendant's argument that it had recently changed the burden of proof that the government must bear from a preponderance of the evidence to clear and convincing evidence. The court had merely noted in a previous case that a district court did not err in using the higher standard of proof to make factual findings. *U.S. v. Nassif*, 921 F.2d 168 (8th Cir. 1990).

9th Circuit remands to permit district court to make findings on controverted facts in the presentence report. (760) Defendant contested various statements in the presentence report, including statements that the conspiracy charge was his second offense, that the government dropped additional charges against him as part of a plea bargain, that he had been paid by his codefendants not to cooperate with the government, and that he had been convicted of resisting arrest in 1974. The district court failed to address these controverted issues, and accordingly the 9th Circuit remanded the case for resentencing in compliance with Rule 32(c)(3)(D). *U.S. v. Clay*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-30328.

1st Circuit upholds findings based upon defendant's statements, presentence report, and official sources. (770) Defendant claimed that the district court's sentence was based upon unreliable and uncorroborated information. The 1st Circuit upheld the district court's findings. The transcript of the sentencing proceedings showed that the judge relied on information from the defendant's own recorded statements, from the presentence report (to which defendant objected only as to its failure to recognize his acceptance of responsibility), and from the government's sentencing memorandum, which was based on official sources (tape recordings of drug deals played at trial, witness interviews, and statements by FBI agents, Puerto Rico police officers, and confidential sources). The judge specifically found this information to be reliable, and that finding was not clearly erroneous. *U.S. v. Rodriguez-Cardona*, __ F.2d __ (1st Cir. Jan. 23, 1991) No. 89-1611.

8th Circuit upholds enhancement based on finding that defendant was source of heroin that contributed to death. (770) Defendant complained that there was insufficient evidence to enhance his sentence based on the fact that heroin that he supplied contributed to a death. The 8th Circuit rejected this contention. The district court reviewed relevant portions of the trial transcript, the medical examiner's report, a letter prepared by an investigator for the defendant, a medical reference, a statement by the dead man's widow, and the autopsy report. The court adopted the pathologist's report ruling that heroin was a contributing factor in the death. The district court found by a preponderance of the evidence that the heroin was traceable to defendant. There was no abuse of discretion or violation of due process. *U.S. v. Nassif*, 921 F.2d 168 (8th Cir. 1990).

9th Circuit rules that sentencing court did not rely on information which defendant claimed was inaccurate and improper. (770) The 9th Circuit stated that "consideration of evidence outside the record of conviction for sentencing purposes is reviewed for an abuse of discretion." Reliance on materially false or unreliable information is an abuse of discretion. However, if the court did not rely on the inaccurate information, the sentence will be affirmed. Here the district court clearly stated that it was not considering the prosecution's version of the presentence report. The court also indicated that it would not consider the allegations of drug trafficking in this tax case. These statements were sufficient to satisfy the substantive requirements of Rule 32 Fed. R. Crim. P. *U.S. v. Ayers*, __ F.2d __ (9th Cir. Jan. 29, 1991) No. 89-10306.

Plea Agreements, Generally (§ 6B)

9th Circuit upholds plea even though defendant was not advised that he would receive a term of supervised release. (790) The court advised defendant that the maximum penalty was a $1,000,000 fine and 20 years in custody. In fact, the maximum penalty was a $2,000,000 fine, 40 years in custody and 4 years of supervised release. 21 U.S.C. 841(b)(1)(B). Defendant was sentenced to 10 years in custody plus 4 years of supervised release. The 9th Circuit held that since defendant knew he could be sentenced to a term as long as the one he eventually received, the failure to inform him of the supervised release term did not affect his substantial rights. Here, even if the defendant's supervised release were revoked on its last day, and he were compelled to serve 4 additional years in prison, his liberty would be restricted one day less than 18 years, and would still be within the 20 year maximum he was informed he could receive. *U.S. v. Clay*, __ F.2d __ (9th Cir. Jan. 30, 1991) No. 89-30328.

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

9th Circuit rejects mootness argument where sentence could have collateral consequences. (800) The government argued that defendant's sentencing appeal was moot because he had served his 12 month sentence. The 9th Circuit rejected the argument, holding that "when a sentence imposed may have collateral consequences for a defendant and any possible future sentencing, the appeal from such a sentence, even if already served, is not moot." The court noted that because the defendant was sentenced to a term of imprisonment in excess of 60 days, any possible future sentencing under the

guidelines would result in an automatic increase of his criminal history score by two points. Accordingly his appeal was not moot. *U.S. v. Dickey*, __ F.2d __ (9th Cir. Jan. 23, 1991) No. 89-50340.

7th Circuit refuses to review 97-month sentence imposed upon 69-year-old woman. (810) Defendant challenged the length of her 97 month sentence on drug charges, arguing that, because she was nearly 69 years old when sentenced, she was likely to die in prison. The 7th Circuit found that since the sentence was within the guideline range, it was without jurisdiction to review the sentence. *U.S. v. Solis*, __ F.2d __ (7th Cir. Jan. 25, 1991) No. 90-2065.

D.C. Circuit applies plain error standard to issues raised by defendant for first time in modified docketing statement. (820) Defendant failed to raise objections to the sentencing guidelines in district court. He argued that the plain error standard of review by the appellate court should not apply since he did raise the issues in his modified docketing statement filed in the appellate court. The D.C. Circuit rejected this argument, noting that the notice to the appellate court of the issues defendant intended to raise did not overcome the district court's lack of opportunity to rule on the challenges. *U.S. v. Braxton*, __ F.2d __ (D.C. Cir. Feb. 1, 1991) No. 89-3225.

Forfeiture Cases

1st Circuit holds that claimant is not entitled to reimbursement for improvements added to property after commission of drug crimes. (900) The drug transactions giving rise to the forfeiture occurred during December 1988 and January 1989. Prior to that time, defendant had begun remodeling his house. Despite his arrest on January 10, 1989, defendant continued to install improvements on the property. Defendant contended that the improvements made after January 10, 1989 did not fall within the definition of real property used to facilitate a drug transaction, and sought reimbursement from the government for the value of the improvements. The 1st Circuit upheld the summary denial of defendant's claim. All title and interest in the property vested in the United States upon the commission of the drug crimes. Once this occurred, defendant could not retain or acquire any interest in the property. The court acknowledged that the same rule might not apply to a proceeding under section 881(a)(6), which provides for the forfeiture of property purchased with drug proceeds. *U.S. v. Land and Building at 2 Burditt Street, Everett, Massachusetts*, __ F.2d __ (1st Cir. Jan. 30, 1991) No. 90-1309.

11th Circuit upholds forfeiture of entire property based upon one drug transaction. (910) Claimant contended that forfeiture of his entire property would be disproportionate, since only one drug transaction took place in the driveway of his residence. The 11th Circuit upheld the forfeiture. The 8th Amendment proportionality arguments cited by defendant do not apply in civil forfeiture cases. The forfeiture statute explicitly allows for forfeiture of entire parcels. The use of the property for the drug deal was neither incidental or fortuitous, since defendant expressly arranged for it to occur there. *U.S. v. Real Property and Residence at 3097 S.W. 111th Avenue, Miami, Florida*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 88-6194.

2nd Circuit, en banc, holds that defendant is entitled to pretrial hearing on seizure of assets needed to retain counsel. (920)(950) Under 21 U.S.C. section 853(e)(1)(A), the government may obtain an ex parte restraining order based on a narcotics indictment alleging that, upon conviction, certain property will be subject to forfeiture. On remand from the Supreme Court, the 2nd Circuit, en banc, held that the 5th and 6th Amendments require an adversary, post-restraint, pretrial hearing in order to continue to restrain assets needed to retain counsel of choice. The hearing will determine whether there is probable cause for the forfeiture. The court is not bound by the Federal Rules of Evidence, and the grand jury's determination of probable cause may be reconsidered. Concurring, Chief Judge Oakes, and Judges Winter, Miner, Altamari, and Walker, agreed that the 5th and 6th Amendments required a hearing, but argued that the statute should be declared unconstitutional, rather than rewritten by the courts. Judge Cardamone dissented, finding the statute constitutional as written. *U.S. v. Monsanto*, __ F.2d __ (2nd Cir. Jan. 9, 1991) No. 87-1397.

11th Circuit determines forfeiture complaint is stated with sufficient particularity. (920) The 11th Circuit rejected claimant's argument that the forfeiture complaint against claimant's property was not stated with sufficient particularity. The complaint described how, when and where a 10 kilogram cocaine delivery occurred. The complaint named two of the participants, including claimant, referred to a third participant, and described the role each participant played in the narcotics exchange. Although defendant cited many cases arising under 21 U.S.C. section 881(a)(6), in these cases the connection between the property and the violation is often indirect and a factual tracing in the complaint is often required to support the probable cause violation. In cases such as this arising under 21 U.S.C. section 881(a)(7), the connection between the property and the violation is often direct and clear. *U.S. v. Real Property and Residence at 3097 S.W. 111th Avenue, Miami, Florida*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 88-6194.

11th Circuit holds that order granting certificate of reasonable cause is not appealable order in forfeiture proceeding. (920)(950) The district court issued a certificate stating that there was reasonable cause for the seizure of the defendant property. The 11th Circuit held that such an order is not a final judgment, and thus not appealable. *U.S. v. One Thou-*

sand Six Hundred Thirty Dollars ($1,630.00), __ F.2d __ (11th Cir. Jan. 29, 1991) No. 90-7369.

11th Circuit finds sufficient connection between property and drug transaction. (950) Defendant contended that in order to forfeit property under 21 U.S.C. section 881(a)(7), the government must establish probable cause to conclude a "substantial connection" exists between the property at issue and a narcotics transaction, and that the government failed to do so. The 11th Circuit refused to determine whether a "substantial connection" standard or a "sufficient nexus" standard was sufficient, since in this case the connection between the property and the drug transaction was sufficient to support the forfeiture. Claimant orchestrated a narcotics delivery which occurred on the driveway of his residence. He had insisted that the transaction take place on familiar territory, and later led the buyer to his residence. The property played a central role in the transaction, facilitated the transaction, and was properly forfeited. *U.S. v. Real Property and Residence at 3097 S.W. 111th Avenue, Miami, Florida*, __ F.2d __ (11th Cir. Jan. 30, 1991) No. 88-6194.

Amended Opinion

(480)(760) *U.S. v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. February 5, 1991).