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COMMENDATIONS

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

Nancy Abell (Texas, Southern District), by Robyn Hermann, Chief, Civil Division, Office of the United States Attorney, Southern District of Florida, Miami, for her valuable assistance in obtaining a successful resolution in an adversary proceeding, thereby clearing the way for construction of a new federal building.

Bradley D. Barbin (Ohio, Southern District), and ***Shannon Ellis,*** Secretary, by Danny L. Dixon, Perry County Sheriff, New Lexington, for their assistance and kind hospitality extended to him and members of his department while working together on a matter of mutual interest.

Craig A. Benedict (New York, Northern District), by William Felder, Acting Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense, New York, for his successful prosecution of a defense procurement fraud case.

Edward R. Broton (New York, Northern District), by the Office of the Inspector General, Department of Agriculture, for his professionalism and legal skill in the prosecution of several individuals for fraud in connection with the Federal Food Stamp Program.

Edwin Brzezinski (Missouri, Eastern District), by Helen H. Mountford, Regional Counsel, Federal Highway Administration, Department of Transportation, Kansas City, for his valuable assistance and guidance essential to the successful outcome of a case filed against the Federal Highway Administration.

Daniel A. Caldwell (Georgia, Northern District), by William A. Hough, District Counsel, Corps of Engineers, Department of the Army, Savannah, for his excellent representation in successfully negotiating an agreement with the State Court facilitating compliance with Army regulations on the release of information.

David M. Curry (Pennsylvania, Western District), by L. P. Wietharn, Inspector in Charge, Pittsburgh, for his valuable assistance in the successful prosecution of several individuals for insurance company fraud.

Thomas Devlin (Georgia, Northern District), by John E. Alcock, Regional Forester, U.S. Forest Service, Department of Agriculture, Atlanta, for his outstanding assistance in prosecuting a former Forest Service employee for theft of government property.

Craig A. Gargotta (Texas, Western District), by Gloria Aldridge, Chief Attorney, Houston Office, Department of Housing and Urban Development, for his excellent representation and outstanding support in a complex bankruptcy proceeding.

John E. Green (Oklahoma, Western District), was presented a plaque by the National Association of Retired Postal Inspectors in recognition of his years of invaluable assistance to the U.S. Postal Inspection Service and in gratitude and high regard for his counsel and assistance.

Deborah Griffin (Alabama, Southern District), by Joe D. Whitley, United States Attorney for the Northern District of Georgia, on behalf of the Southeastern Drug Task Force, for her outstanding contribution to the success of a recent criminal prosecution.

Bert Isaacs (Texas, Southern District), by Ranor C. Fry, Chief Pretrial Services Officer, U.S. District Court, Houston, for his participation and excellent presentation at a recent seminar on the functions of the United States Attorney's office.

David A. Kubichek (District of Wyoming), by Michael J. Martin, Special Agent in Charge, Bureau of Land Management (BLM), Department of the Interior, Cheyenne, for his outstanding presentation on violations of federal mineral laws at a statewide BLM Petroleum Engineering Technicians Workshop.

Joseph Landolt (Missouri, Eastern District), by Gustave A. Schick, Assistant Inspector General, Office of Labor Racketeering, Department of Labor, Washington, D.C., for his excellent presentation at a training program in Seattle on the history of organized crime's control of labor unions and its attendant violence.

Sheldon Light (Michigan, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for his legal skill and expertise in the successful prosecution of a former Deputy Police Chief involved in an intricate pyramid scheme to defraud hundreds of investors.

Celeste K. Miller (District of Idaho), by D.K. Merrick, M.D., Boise, for her professional skill and high level of competence in prosecuting a complicated medical malpractice lawsuit.

Michael J. O'Leary (Georgia, Northern District), by David B. Mitchell, Supervisory Senior Resident Agent, FBI, Atlanta, for his successful prosecution of an individual for four bank robberies and use of a deadly weapon.

Marvin Opotowsky (Louisiana, Eastern District), was presented a special commendation award from the Bureau of Alcohol, Tobacco and Firearms for his successful prosecution of "Operation Hotline," a violent criminal activity and narcotics trafficking case in which 50 search warrants have been executed and approximately 55 arrests have taken place for narcotics and weapons violations.

Janet Parker (Michigan, Eastern District), by Hal N. Helterhoff, Special Agent in Charge, FBI, Saginaw, for her professional skill in coordinating search and seizure drug raids resulting in the arrest of 35 persons and the seizure of substantial quantities of cocaine, almost $100,000 in U.S. currency, and many weapons. ***Michael Hluchaniuk, James Brunson, Darlene Chubb, Deborah Keller,*** and ***Carol Atwood*** *provided valuable assistance.*

James L. Santelle (Wisconsin, Eastern District), by Dianne G. Van Riper, Regional Inspector General for Investigations, Department of Education, Washington, D.C., for his successful prosecution of an individual for filing false statements to obtain student loans.

Joseph P. Schmitz and ***Philip J. Tripi*** (Ohio, Northern District), by Robert L. Brown, District Director, Immigration and Naturalization Service, Cleveland, for their outstanding success in prosecuting a Yugoslav National for filing false claims to citizenship, passport and other identification documents for reentry into the United States after having been deported.

Charles W. Spillers (Mississippi, Northern District), by Earl C. Switzer, Resident Agent in Charge, U.S. Customs Service, Jackson, for his successful prosecution of numerous Customs cases during the past 18 months involving narcotics smuggling and international money laundering.

Nicolette S. Templer (Georgia, Northern District), by David B. Mitchell, Supervisory Senior Resident Agent, FBI, Atlanta, for her outstanding success in the prosecution of a complex bank robbery case involving the use of weapons and a bomb device.

William Woodard (Michigan, Eastern District), by William Coonce, Special Agent in Charge, DEA, for his professionalism and legal skill in the successful defense of a DEA agent in a civil trial.

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SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF FLORIDA

David McGee and ***Michael Simpson*** (Florida, Northern District), received the following letter of commendation dated April 19, 1991 from Attorney General Dick Thornburgh, Department of Justice, Washington, D.C.:

> Havana Police Chief, Phillip L. Fusilier, has written me concerning your work in the efforts to rid the town of Havana, Florida of its drug problems. Police Chief Fusilier credits you and others in the United States Attorney's office with ridding his community of drug dealers. I am aware of the many hours you spent in building a case against the former police officers involved in the cocaine distribution ring.
>
> Your efforts were responsible not only for the conviction of drug dealers who were a menace to society, but your work contributed greatly to a cooperative spirit between the Department and local authorities. I congratulate you on your success and commend you for a job well done.

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PERSONNEL

On June 3, 1991, ***Steven R. Schlesinger*** was appointed as the Director of the Office of Policy Development. ***Mr. Schlesinger was*** formerly the Director of the Bureau of Justice Statistics, Department of Justice, from 1983 until 1988.

Manuel A. Rodriguez, Legal Counsel, Executive Office for United States Attorneys, has joined the Office of International Affairs of the Criminal Division. His office address and telephone number are: Room 5100, Bond Building, 1400 New York Avenue, N.W., Washington, D.C. 20530. Telephone: (FTS) 368-0000 or (202) 514-0000.

Richard W. Sponseller, Assistant United States Attorney for the Middle District of Pennsylvania, has joined the Financial Litigation Staff of the Executive Office for United States Attorneys as Associate Director. His address and telephone number are: Room 6404, Patrick Henry Building, 601 D Street, N.W., Washington, D.C. 20530. Telephone: (FTS) 241-7017 or (202) 501-7017.

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CRIMINAL DIVISION REORGANIZATION

On May 14, 1991, Assistant Attorney General Robert S. Mueller, III, announced the appointment of six section chiefs as part of a Criminal Division reorganization to strengthen Department of Justice enforcement programs against violent crime, drug trafficking, money laundering, organized crime, terrorism, and computer fraud. They are:

James S. Reynolds, Chief of the new Terrorism and Violent Crime Section, formerly Deputy Chief of the General Litigation and Legal Advice Section. This new section will add resources to developing and prosecuting terrorism cases and will create new anti-gang and other violent crime initiatives.

Theodore S. Greenberg, Chief of the new Money Laundering Section, formerly Deputy Chief of the Fraud Section. This new section will expand attacks on drug-related money laundering and emphasize the use of money laundering statutes against all other types of criminal organizations.

Mary Lee Warren, Chief of the Narcotic and Dangerous Drug Section, formerly Chief of the Narcotics Unit in the United States Attorney's Office for the Southern District of New York. This section is developing new priority efforts against major drug trafficking organizations.

Paul E. Coffey, Chief of the Organized Crime and Racketeering Section, formerly Deputy Chief of this section. This section is intensifying enforcement against traditional organized crime and is working to prevent the growth of Asian organized crime and other emerging groups.

Mary C. Spearing, Chief of the General Litigation and Legal Advice Section, formerly Deputy Chief of the Child Exploitation and Obscenity Section. The General Litigation Section has just been given responsibility for more intensive prosecution of computer crimes.

George W. Proctor, Director, Asset Forfeiture Office, formerly Deputy Chief of the Organized Crime Section and United States Attorney for the Eastern District of Arkansas. The Department is expanding its programs to break up drug and other criminal organizations by seizing their illegal assets and having title forfeited to the government.

Other appointments to important posts are:

Dana D. Biehl, Deputy Chief for Terrorism. ***Mr. Biehl*** became a Department trial attorney in 1974 and most recently was a prosecutor in the General Litigation Section.

Mary A. Incontro, Deputy Chief for Violent Crime. ***Ms. Incontro*** was formerly an Assistant United States Attorney for the District of Columbia in 1981, and a prosecutor in the Organized Crime and Racketeering Section.

G. Allen Carver, Jr., Principal Deputy Chief of the Fraud Section, where he has been Deputy Chief. ***Mr. Carver*** joined the Department of Justice as a trial attorney in the General Crimes Section in 1972.

Thomas G. Snow, Deputy Director for Operations of the Office of International Affairs, where he has been Associate Director. ***Mr. Snow*** joined the Department as an attorney in the Civil Rights Division in 1982.

Michael A. DeFeo, Special Counsel for International Programs. ***Mr. DeFeo*** joined the Department as a prosecutor in 1963 in the Organized Crime and Racketeering Section, and most recently was a Deputy Chief of the section.

William J. Corcoran, Special Counsel to the Narcotic and Dangerous Drug Section and the Organized Crime Drug Enforcement Task Force Program. ***Mr. Corcoran*** joined the Department in 1972 as a drug prosecutor and has worked extensively on drug enforcement strategies in the section.

Michael F. Zeldin, Special Counsel for Money Laundering. ***Mr. Zeldin*** became a drug prosecutor in 1984 and has also been a specialist in the Division's programs to combat money laundering and to seize assets of drug traffickers.

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ATTORNEY GENERAL ISSUES

Attorney General Dick Thornburgh Resigns

On June 4, 1991, President Bush announced that Attorney General Dick Thornburgh will leave the Administration to run for a Senate seat from Pennsylvania. The President said, "I want to just take this opportunity to thank him, my friend and our able Attorney General, for his outstanding record as Attorney General and for his sound advice -- legal adviser to two presidents."

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Attorney General's Advisory Committee Of United States Attorneys

Subcommittee Update

Attached at the Appendix of this Bulletin as Exhibit A is an updated Subcommittee list of the Attorney General's Advisory Committee.

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Attorney General's Worklife Policy

On May 17, 1991, Attorney General Dick Thornburgh issued a memorandum to all Department of Justice employees addressing the issues of compensation, recruitment and retention, and worklife. He also announced the Department's policy on family leave, part-time employment, job sharing and flexiplace. A copy of this memorandum is attached at the Appendix of this Bulletin as Exhibit B.

About a year ago, the Attorney General established three task forces to deal definitively with these issues. He also served on the National Advisory Commission on Law Enforcement with the Director of the FBI, the Director of the Bureau of Prisons, and the Administrator of DEA. The commission made a number of significant recommendations to address longstanding pay and benefits issues for the government's law enforcement workforce, which were ultimately incorporated in the Federal Employees Pay Comparability Act of 1990. This legislation made sweeping improvements in compensation not only for law enforcement but for many other categories of employees as well and represents the first major government-wide pay reform in almost 30 years. (See, p. 172 of this Bulletin for a discussion of some of the features of the legislation which may impact on the United States Attorneys' offices.)

The Attorney General said, "The Department already leads the way in federal professional recruitment, and is second to none in career satisfaction. But I want the Department to be at the forefront of the emerging national recognition that times have changed and improved quality-of-life must be brought to the workplace now. Accommodating our quality-of-life needs will enhance recruitment even more, and will help us retain our best. We all share the deepest interest in achieving this result."

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CRIME ISSUES

Economic Crime Priorities

On May 18, 1991, William P. Barr, Deputy Attorney General, and Chairman of the Economic Crime Council, advised all United States Attorneys that following a review of the national priorities and special emphasis areas first designated in 1986 by the Economic Crime Council, on February 26, 1991, the Council realigned and redesignated the economic crime law enforcement areas, as follows:

National Priorities: 1) financial institution fraud, 2) defense procurement fraud, and 3) health care provider fraud.

Special Emphasis Areas: insurance/reinsurance fraud by insiders, boiler rooms/telemarketing, securities and commodities fraud, money laundering, international trade/customs fraud, Housing and Urban Development (HUD) mortgage fraud, computer fraud, and bankruptcy fraud.

A copy of Mr. Barr's memorandum is attached as Exhibit C at the Appendix of this Bulletin.

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ASSET FORFEITURE

Department Of Justice And Postal Inspection Service Share Milken Fine

On May 3, 1991, Attorney General Dick Thornburgh announced the transfer of over $22 million in federal forfeiture proceeds to the U.S. Postal Service Inspection Fund for their role in the investigation and prosecution of Michael Milken. The transfer is the first under a recent agreement between the Department of Justice and the Postal Inspection Service which provides for a sharing of proceeds from joint forfeiture cases involving both government agencies. The Attorney General noted that the U.S. Postal Inspection Service has been an enormously effective arm of the Justice Asset Forfeiture Program. Combining the forfeitures in the Drexel Burnham Lambert case and the Milken case, the Postal Inspection Service has been responsible for deposits of over $420 million to the Asset Forfeiture Fund since 1989. They are also taking the lead on several other multi-million dollar forfeiture cases.

Otto Obermaier, United States Attorney for the Southern District of New York, presented a check for $22,191,000 to Postmaster General Anthony M. Frank and Chief Postal Inspector Charles R. Clauson. The Milken case was prosecuted last summer in Mr. Obermaier's office and resulted in Milken's plea of guilty to six counts of fraud, payment of a criminal fine of $1.5 million, and the forfeiture of $198.5 million.

The Attorney General said, "I am deeply pleased that we are able to recognize in a tangible way the outstanding work that the Postal Inspection Service did in the Milken case." He also credited Mr. Obermaier's office in handling the difficult legal issues involved in the Milken prosecution.

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Skills Bank

The Executive Office for United States Attorneys is currently updating the Skills Bank for JURIS. (See, United States Attorneys' Bulletin, Vol. 39, No. 4, dated April 15, 1991, at p. 99.) The Asset Forfeiture Office (AFO) of the Criminal Division has advised that the Skills Bank Survey Form lists only civil asset forfeiture skills (**CIV07**-Asset Forfeitures), and there is no skill category for criminal asset forfeiture, a distinct skill. Asset forfeiture is an area of high priority in the Department and the need for Assistant United States Attorneys to consult with one another has become increasingly important as asset forfeiture work has become more sophisticated. There are an estimated 350 Assistant United States Attorneys who practice in the asset forfeiture area, civil or criminal or both. About 200 Assistant United States Attorneys are dedicated exclusively to asset forfeiture work.

To comply with AFO's request, an amended Survey Form is attached at the Appendix of this Bulletin as Exhibit D. Please note that a new category has been added: **CRM09 - Asset Forfeiture**. All Assistant United States Attorneys who have not already completed the Survey Form attached at the Appendix of the April issue of the Bulletin should do so immediately and forward no later than June 30, 1991, to: AUSA Skills Bank Update, Legal and Information Systems Staff, Room 129, 425 I Street, N.W., Washington, D.C. 20530, Attn: A. Carrigan. [Note: If you have already submitted the Survey Form, please do not send another one. The Skills Bank will be updated on a regular basis, and you will be given an opportunity to make any changes or amendments at a later date.]

If you have any questions or require assistance, please call Bonnie L. Gay, Attorney-in-Charge, or Taunya McKay, Freedom of Information/Privacy Act Unit, Executive Office for United States Attorneys, at (FTS) 241-7826 or (202) 501-7826.

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Quick Reference To Federal Forfeiture Procedures

The Asset Forfeiture Office of the Criminal Division has recently issued the second edition of Quick Reference to Federal Forfeiture Procedures, which addresses statutes, regulations, policy, memoranda of understanding, and advisory materials governing the seizure and forfeiture of property. The first edition was issued in August, 1990. (See, United States Attorneys' Bulletin, Vol. 38, No. 9, dated September 15, 1990, at p. 214.)

Quick Reference provides, in one document, most of the forfeiture procedures the practitioner needs to prosecute federal forfeiture actions. For selected forfeiture statutes, the Asset Forfeiture Office issued a publication entitled Compilation of Selected Federal Forfeiture Statutes in January, 1991. If you would like copies of these publications, please call the Asset Forfeiture Office at (FTS) 368-1263 or (202) 514-1263).

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Introduction To International Forfeiture

A publication entitled "An Introduction to International Forfeiture" has been issued jointly by the Asset Forfeiture Office and the Office of International Affairs of the Criminal Division. In 1986, Congress passed legislation authorizing the sharing of forfeited property with foreign governments. This initiative was strengthened by additional legislation in 1988 and has opened up a whole new area for use of the sharing incentive. The first incidences of international sharing

were with Canada and Switzerland. Presently there are several more under consideration with other countries. Many of the terms commonly used in international law, such as "letters rogatory" and "Mutual Legal Assistance Treaties" have only recently been introduced in the forfeiture practice. This publication explains how these terms and concepts are now integral to a comprehensive forfeiture effort.

Prosecutors involved in international forfeiture issues, such as identifying, freezing, repatriating, forfeiting, and sharing criminally derived assets located outside the United States should contact the Asset Forfeiture Office for further information and assistance. The telephone number is (FTS) 368-1263 or (202) 514-1263.

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Assets Seized In the Western District Of North Carolina

On May 16, 1991, Tom Ashcraft, United States Attorney for the Western District of North Carolina, announced that the dollar value of assets seized by the federal government from illegal activity in his district increased more than eight-fold in about a year's time. At the beginning of 1990, approximately $2 million in property had been seized and was pending for forfeiture. By early 1991 that figure was $16.5 million. Since the formation of the Asset Forfeiture Unit of the United States Attorney's Office in April, 1989, seizures and forfeitures have increased dramatically. In the two years since then, about 100 parcels of land have been seized in the district and vehicle and boat seizures have also increased significantly.

Mr. Ashcraft said that the work of the federal agents, and cooperating state and local officials is providing not only a deterrent to criminal enterprises but also more funds for law enforcement without an increase in taxes.

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DRUG ISSUES

First Death Sentence Under New Drug Law In The Northern District Of Alabama

On May 14, 1991, United States Attorney Frank Donaldson of the Northern District of Alabama announced that a Piedmont, Alabama drug kingpin has become the first person in the nation sentenced to death under the November, 1988 Continuing Criminal Enterprise statute. Besides the death sentence on a charge of causing the murder of a police informant, David Ronald Chandler, age 37, was sentenced to two concurrent life sentences for his convictions on charges of conspiracy to distribute in excess of 1,000 kilograms of marijuana and operating a continuing criminal enterprise. He was also sentenced to three six-year terms for money laundering convictions which the U.S. District Judge ordered to run concurrent with the life sentences. In addition, he received two five-year terms for firearms convictions to run consecutive to all other sentences.

This case was prosecuted by Assistant United States Attorney Harwell G. Davis, III and Special Assistant United States Attorney Joseph D. Hubbard, both assigned to the Organized Crime Drug Enforcement Task Force for the Northern District of Alabama. Mr. Donaldson stated that the prison sentences are governed by the federal sentencing guidelines and even if he is not executed, he will never be eligible for parole. The drug kingpin law allows execution when there has been a slaying in connection with drug activity.

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POINTS TO REMEMBER

United States Attorneys' Manual

The first update to the United States Attorneys' Manual was issued recently by the Executive Office for United States Attorneys. The update has been issued in four parts:

Volume I (yellow)	-	Contains changes to	-	Title 1- General Title 2- Appeals Title 3- Executive Office for United States Attorneys
Volume II (pink)	-	Contains changes to	-	Title 4- Civil Division Title 5- Environment and Natural Resources Title 6- Tax Division Title 7- Antitrust Division Title 8- Civil Rights Division
Volumes IIIa and IIIb (green)	-	Contains changes to	-	Title 9- Criminal Division
Volume IV (orange)	-	Contains changes to	-	General Index; U.S.C. Reference Table; C.F.R. Reference Table; Prior Approval Requirements Table

Each Volume has been issued separately. Those Manual holders of Volumes I and II should have received their first update. Updates to Volumes IIIa and IIIb, and Volume IV will be forthcoming. If you have any questions concerning your updates, please contact Regina Barrett, Editorial Assistant, or Judy Beeman, Editor, United States Attorneys' Manual, Executive Office for United States Attorneys, at (FTS) 368-6098 or (202) 501-6098.

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OBD-2, Notice To Fact Witness Appearing On Behalf Of The United States Government

The Special Authorizations Unit of the Justice Management Division has revised OBD-2, Notice to Fact Witness on Behalf of the United States, to provide additional information regarding the allowed and prohibited expenses for fact witness appearances. This form should be given to each fact witness at the same time the witness is summoned or subpoenaed.

Each office should receive 100 copies of the new OBD-2, and any editions of this form dated prior to September, 1990, should be discarded. Those offices that have prepared their own version of the form should make the necessary revisions to conform with the language on the new OBD-2. If you would like additional copies, please contact the Stocked Forms Warehouse. Their Fax number is: (301) 763-2411.

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OBD-47, Request, Authorization And Agreement For Fees and Expenses Of Witnesses

The Special Authorizations Unit of the Justice Management Division advises that Internal Revenue Service regulations require that tax identification numbers and social security numbers must be included in Block 10 of OBD-47, the Request, Authorization and Agreement for Fees and Expenses of Witnesses, and also on the invoice. If this information is omitted, the invoice will be returned to the office of the case/trial attorney, resulting in delayed payments to expert witnesses. Also, requests for unusual expenses for fact witnesses and pretrial conferences separate from trial attendance are being submitted without sufficient justification. A complete explanation of why the expense is necessary must be entered in Block 13.

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

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Psychiatric Examinations Of Prisoners And Defendants

Since passage of the Insanity Defense Reform Act of 1984, (P.L. 98-473, 18 U.S.C. 4241 et seq.), there has been some misunderstanding concerning the appropriate source for payment of fees charged for psychiatric examinations authorized or required by the Act. The Administrative Office for U.S. Courts for the Public Defenders Service also issued instructions concerning this policy. On August 11, 1989, the General Counsel of the Justice Management Division, who controls the Fees and Expenses of Witnesses appropriation (FEW), issued a legal opinion concerning the circumstances under which it is appropriate for the Department to pay for psychiatric examinations of defendants in criminal cases under this Act. (See, United States Attorneys' Bulletin, Vol. 38, No. 6, dated June 15, 1990, at p. 129.) In that opinion, the General Counsel discussed the American Rule, which has traditionally held that each party in litigation bears its own expenses absent a statute that shifts the burden of such expenses to one party or the other. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975). The opinion also states that the Insanity Defense Reform Act is not a fee-shifting statute and that expenses of examinations ordered under the statute should be allocated in the traditional fashion, as follows:

1) Expenses of examinations requested by the prosecutor are paid by the Department.

2) Expenses of an examination, ordered by the court under 28 U.S.C. 4242, to determine competency to stand trial, are usually paid by the Department, regardless of which party requested the examination. This is so because these examinations are essentially impartial examinations, the results of which are reported to both sides and the court.

3) Expenses of examinations ordered by a court on its own initiative are governed by Rule 706, and the court involved may allocate payment of these expenses between the parties in whatever method it deems appropriate. Usually, the party with the burden of proving the subject matter of the expert testimony is assigned the cost of the court-appointed expert; in criminal and condemnation cases, the government is always chargeable with the expenses of the expert, and in criminal cases the Department will virtually always be required to pay.

4) Expenses of examinations performed for a defense purpose, such as "second opinions" and examinations to determine sanity at the time of the offense, should be borne by the defendant or, in the case of an indigent defendant, should be borne by the Administrative Office for U.S. Courts out of the Criminal Justice Act (CJA) appropriation. The court must authorize the expenditure of CJA funds when authorizing an indigent defendant's request for the appointment of an expert, but care should be taken by the prosecutor to ensure that such an authorization is not confused with the court's role of appointing impartial expert witnesses under Rule 706.

An unopposed motion by the defendant for the Department to pay for a psychiatric examination will result in costs being assessed to the Department. While the Department may not wish to oppose a defendant's recommendation that appointment of an expert be authorized, prosecutors should challenge in a timely fashion (i.e., before they are issued) motions that would require the Department to pay for appointments that appear to be more appropriately charged to either the CJA appropriation or the defendant. When a psychiatric examination expense is properly chargeable to the Department, the Fees and Expenses of Witnesses appropriation should bear the cost, but that appropriation is not unlimited. Challenging improper charges will conserve the fund for our legitimate prosecutorial needs.

If you would like a copy of the legal opinion prepared by the Justice Management Division, please call Audrey Williams, Editor, United States Attorneys' Bulletin, at (FTS) 241-6098 or (202) 501-6098. Other questions should be directed to Legal Counsel, Executive Office for United States Attorneys, at (FTS) 368-4024 or (202) 514-4024.

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Record Six Million Dollar Civil Penalty For Environmental Violations

On May 15, 1991, the Department of Justice and the Environmental Protection Agency (EPA) announced that Wheeling-Pittsburgh Steel Corporation, Wheeling, West Virginia, has agreed to pay a civil penalty of over six million dollars, and to implement an extensive compliance program approved by the EPA in settling a major environmental suit brought against it under the Clean Water Act. Richard B. Stewart, Assistant Attorney General for the Environment and Natural Resources Division, said this penalty is the largest civil penalty ever imposed under the Clean Water Act. In the suit, the United States alleged that Wheeling-Pittsburgh was discharging pollutants from its Steubenville, Mingo Junction, and Yorkville, Ohio plants in violation of the Clean Water Act. Wheeling-Pittsburgh, which emerged from bankruptcy earlier this year, allegedly committed the violations while operating the plants after it filed for bankruptcy under Chapter 11 of the Bankruptcy Code.

Mr. Stewart said, "This settlement is a striking example of the type of aggressive enforcement of environmental laws that typifies this Administration. The message should go forth that violators of our pollution laws, even those who have sought protection from creditors under the bankruptcy code, do so at their peril. Illegal water pollution will not be tolerated."

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SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On May 13, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through April 30, 1991. "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.

Informations/Indictments	424
Estimated S&L Losses	$ 7.625 billion
Defendants Charged	718
Defendants Convicted	522
Defendants Acquitted	40 *
Prison Sentences	1,074 years
Sentenced to prison	315 (79%)
Awaiting sentence	137
Sentenced w/o prison or suspended	79
Fines Imposed	$ 8.031 million
Restitution Ordered	$ 270.041 million

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	88
Convicted	67
Acquitted	6
Directors and Other Officers:	
Charged by indictment/ information	131
Convicted	103
Acquitted	3

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

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* Includes 21 acquittals in U.S. v. Saunders, Northern District of Florida.

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SENTENCING REFORM

United States Sentencing Commission Survey

On May 14, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, advised all United States Attorneys that Congress mandated that the United States Sentencing Commission evaluate sentencing guidelines promulgated by the Commission in a four-year timeframe. About May 1, 1991, the Commission forwarded a questionnaire to selected United States Attorneys' offices. Those United States Attorneys who have received the questionnaire were asked to bear in mind the provisions of the United States Attorneys' Manual on survey requirements and access to open/closed case files (USAM 1-10.000 et seq.) and the Code of Federal Regulations on the release of information relating to civil and criminal proceedings (28 C.F.R. §50.2). Please refer to the United States Attorneys' Bulletin, Vol. 39, No. 3, dated March 15, 1990, at p. 66, for other information concerning surveys and audits.

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Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 2 dated May 7, 1991, and Volume 4, No. 3, dated May 22, 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. 22, dated April 22, 1991, and Volume 2, No. 23, dated May 6, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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LEGISLATION

Federal Debt Collection Procedures Act

The new Federal Debt Collection Procedures Act became effective on May 29, 1991. This Act will enhance the procedures to be used by attorneys for the United States in collecting money from debtors who have been sued to collect those debts. Some of the important provisions of the bill include:

1. The authority to recover from self-employed debtors, such as doctors and lawyers.

2. An additional limitation on the discharge of a student loan in bankruptcy. The government will have the ability to pursue collection of these debts for two additional years before student loans become eligible for discharge in bankruptcy.

3. Pre-judgment remedies that allow the government to locate and attach property if the debtor is attempting to fraudulently transfer assets or hinder the government's debt collection efforts. These remedies allow the court to preserve these assets until a judgment is entered against the debtor.

4. Denial of federal assistance to debtors who have a judgment entered against them under the Act. These debtors will not be eligible for federal programs unless they repay their debt to the United States. Only debtors receiving subsistence benefits, such as Aid for Families with Dependent Children and social security will be exempt from this provision.

5. The Uniform Fraudulent Transfer Act will permit the United States to recover property that debtors attempt to conceal to defeat collection efforts.

6. Permits the United States to enforce collection of its debts nationwide without the requirement that the judgment be transferred from a federal court in one state to another federal court.

7. Permits continuous garnishment authority.

8. Under this Act, a judgment lien attaches to all of the debtor's real property and has priority over all subsequent liens. This lien lasts for twenty years and may be renewed for an additional twenty-year period.

If you have any questions, please call Charles W. Larson, United States Attorney for the Northern District of Iowa, and Chairman of the Financial Litigation Subcommittee of the Attorney General's Advisory Committee, at (319) 363-6333.

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Congressional Funding Cuts

On May 7, 1991, Attorney General Dick Thornburgh forwarded a letter to Chairman Jim Sasser of the Senate Budget Committee expressing his concern over significant cuts in the levels of funding for federal law enforcement, recently adopted in the House and Senate Budget Resolutions for FY 1992. President Bush had proposed $14.8 billion for the Administration of Justice for FY 1992. The Senate reduced this figure to $14.2 billion; the House cut it to $13.2 billion.

The Attorney General warned that funding cuts will hamper the Department's expanded efforts in the war on illegal drugs in rural America, prosecution of new organized crime groups such as Asian gangs and Jamaican posses, and white collar and environmental criminals, and will also undercut the Department's responsibilities to 43 million citizens with disabilities under the Americans with Disabilities Act. He added that even the more modest cut in the House Resolution, which translates into approximately a four percent reduction in effort from the President's recommendation, poses substantial risks to our ongoing law enforcement programs. He said, "Our recent successes in convicting nearly 500 savings and loan executives and prosecuting large numbers of drug traffickers should not blind us to dimensions of the remaining challenges and the resources that will be required to free America's streets and neighborhoods from the fear which haunts all too many of our citizens."

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Joint Production Ventures

On April 29, 1991, Attorney General Dick Thornburgh and Secretary of Commerce Robert A. Mosbacher announced that they have forwarded to the 102nd Congress proposed legislation to improve the antitrust legal climate for joint production ventures. Noting the substantial progress made on similar legislation by the 101st Congress, Mr. Thornburgh and Mr. Mosbacher urged prompt enactment of the Administration's proposal.

The Administration's bill, the Cooperative Production Act of 1991, would extend the coverage of the National Cooperative Research Act, which currently only applies to joint research and development, to joint production ventures as well. The bill would require courts reviewing antitrust challenges to take into account the potential competitive benefits of joint production ventures and limit antitrust liability to actual rather than treble damages where the parties notify the antitrust enforcement agencies of their activities.

James F. Rill, Assistant Attorney General for Antitrust, emphasized the Department's continuing commitment to effective antitrust enforcement, and stated, "The Administration's bill would eliminate unwarranted antitrust deterrence of potentially procompetitive joint ventures while preserving antitrust safeguards against activities that on balance would harm competition and consumers."

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National Voter Registration Act

On April 24, 1991, S. 921, the National Voter Registration Enhancement Act, was introduced in the Senate by Senators Dole and Stevens. This bill is an alternative to S. 250 that was supported by the Administration in the 101st Congress, which permits, but does not require, states to adopt additional voter registration procedures. More importantly, it contains the Department's public corruption title, which is regarded as essential to fill in the gaps in current public corruption law, particularly provisions concerning election fraud. The Office of Legislative Affairs is working with interested United States Attorneys and Senate staff in an effort to advance this legislation. It is expected that action on both S. 250 and the alternative, S. 921, will await Senate consideration of campaign finance legislation.

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Terrorism Provisions In The President's Crime Bill

On May 16, 1991, representatives from the Justice Department and the State Department met with Senate Judiciary Committee staff to discuss the terrorism provisions in the President's crime bill. The purpose of the meeting was to provide background on the major provisions which include aviation terrorism, maritime terrorism, terrorism offenses and sanctions, and the removal of alien terrorists.

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Tribal Court Jurisdiction And The Indian Civil Rights Act

On May 9, 1991, Philip Hogen, United States Attorney for the District of South Dakota, testified before the Senate Select Committee on Indian Affairs regarding S. 972, a bill to expand the jurisdiction of tribal courts in misdemeanors to non-member Indians. This bill seeks to overrule Duro v. Reina, decided by the Supreme Court in 1990, which denied such court jurisdiction. Mr. Hogen testified in favor of expanded tribal court jurisdiction, but also urged the Senate to pass legislation to strengthen the Indian Civil Rights Act by guaranteeing broader civil rights to Indian defendants before tribal courts. Discussions are continuing with members and staff in support of such legislation. (See, United States Attorneys' Bulletin, Volume 39, No. 5, dated May 15, 1991, at p. 131, for previous testimony provided by Mr. Hogen on this legislation.)

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Hatch Act Repeal

On April 24, 1991, S. 914, the Hatch Act Reform Amendments, identical to the bill that was vetoed by the President in the 101st Congress, was introduced by Senator Glenn. The plans for action are not clear. Department representatives have met with State staff and representatives from the White House, Office of Personnel Management, and the Office of Special Counsel to develop a strategy and coordinate their efforts. There is no House counterpart to date.

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CASE NOTES

Supreme Court Holds That Federal Age Discrimination Complainants Must Wait At Least Thirty Days After Giving EEOC Notice Of Intent To Sue Before Bringing Civil Action

Charles Stevens suffered an adverse personnel action in his job at the IRS, which he alleged was due to unlawful age discrimination. He filed an administrative complaint, which was rejected as untimely. He appealed this timeliness decision administratively, and at the same time gave notice of his intent to bring a civil action against his employer if his complaint was not administratively resolved. The EEOC ultimately affirmed the rejection of his administrative complaint, whereupon Stevens sued in district court. The district court dismissed his complaint because (1) the complaint was not brought within 180 days of the adverse personnel action, and (2) the complaint was not brought within 30 days of his giving notice of intent to sue.

The Fifth Circuit disagreed with the first ground for dismissal, because only the notice of intent to sue need be given within 180 days. However, it affirmed the dismissal on the second ground. Stevens sought certiorari on this issue, and on the issue of whether, having invoked his administrative age discrimination remedies, he was required to exhaust them before bringing his civil action. Although we opposed certiorari on the grounds that Stevens had not adequately raised the issues in the courts below, we confessed error and agreed that Stevens was correct on both issues. The Supreme Court reversed and remanded, observing that the relevant statute clearly requires a federal age discrimination complainant to bring suit at least thirty days after giving notice of intent to sue, not within thirty days of giving notice of intent to sue.

Stevens v. Department of the Treasury, No. 89-1821, April 24, 1991.
DJ # 35-76-264

Attorneys: Michael Jay Singer - (FTS) 368-5432 or (202) 514-5432
Jonathan R. Siegel - (FTS) 368-4814 or (202) 514-4814

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Supreme Court Unanimously Holds That Pro Se Attorneys Are Not Eligible For Attorney Fee Awards

Petitioner, an attorney litigating pro se, won his civil rights action against the Kentucky Board of Elections and sought attorney fees under 42 U.S.C. 1988. The district court and Sixth Circuit denied fees, but the Supreme Court granted certiorari due to a circuit conflict. We filed a brief amicus curiae siding with Kentucky.

The Supreme Court unanimously affirmed, holding that the statutory term "attorney" contemplates an "attorney-client relationship as the predicate for an award under §1988." Furthermore, "the statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." Also, the Court specifically approved all the cases that have denied fees to non-attorney pro se litigants. The Court's language is broad enough to govern cases brought under FOIA, the Privacy Act, Equal Access to Justice Act, and other statutes awarding "attorney" fees.

Kay v. Ehler, No. 90-79 (April 16, 1991). D.J. # 145-0-3300

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Second Circuit Rules That Payroll Records Are Protected From Disclosure By FOIA Privacy Exemption

The Davis-Bacon Act and related statutes require contractors on various federally funded or assisted construction projects to pay "prevailing wages" to workers. In order to facilitate enforcement of these requirements, contractors are required to file with the contracting agency weekly payroll records setting forth each employee's employment status, hours worked, and wages and benefits paid. These records identify each worker by name and home address.

In this case, a union president sought release of such records for a particular HUD-assisted project; HUD released the records, but only after redacting the names and addresses of individual workers, to protect the workers' privacy. The district court upheld HUD's action, and the Second Circuit (Oakes, Miner, and Walker, JJ.) has now affirmed. Without deciding whether such records are "law enforcement records" subject to FOIA Exemption 7, the court held that the workers' identities can be protected under Exemption 6, because release of such personal financial information would be a "clearly unwarranted invasion of privacy." The court stressed the breadth of the privacy interests protected by Exemption 6, and held that such interests could not be overcome by purported "public interests" based on the use to which the requester proposed to put the information.

Hopkins v. United States Department of Housing & Urban Development, No. 90-6269 (April 1, 1991). D.J. # 145-17-4597

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Ninth Circuit Rejects Government's Request To Weigh Qualifications Of Experts In Medical Malpractice Appeal

In 1984, a Caesarean section was performed on a woman who was two months from her due date. The operation was performed by Army doctors only after numerous consultations within the hospital's obstetrical department and after the doctors had ascertained that the prospective mother suffered from a life threatening illness, severe pre-eclampsia. Both mother and child survived but the child contracted cerebral palsy. The family sued, claiming that the doctors should have put off the operation for several weeks and that, if they had, the child might now be normal. In the district court, the plaintiffs relied on their family obstetrician. The government presented world-famous experts in perinatology to support its contention that the care given was appropriate in every respect. The district court awarded the plaintiffs over $5 million. On appeal, we argued that the court's liability determination was clearly erroneous. The Ninth Circuit disagreed, noting that the plaintiffs' expert's testimony was a "coherent and facially plausible story." The court of appeals remanded the case to the district court, as a result of plaintiffs' cross-appeal, to clarify a contested ruling on the application of the Colorado cap on malpractice damages.

Christopher v. United States, Nos. 89-35786, 89-35892 (April 23, 1991).
D.J. No. 157-82-1372

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Eleventh Circuit Affirms District Court Order Quashing Subpoena Against Government AIDS Researcher

The plaintiffs in an AIDS product-liability suit against pharmaceutical companies subpoenaed a prominent AIDS researcher who is employed by the federal Centers for Disease Control (CDC). The plaintiffs sought testimony from the researcher regarding the state of scientific knowledge about AIDS in the early 1980s. The CDC withheld permission for the researcher to testify and moved to quash the subpoena. The district court granted the motion to quash, ruling that the cumulative impact of this and similar requests for the researcher's testimony would disrupt government AIDS research.

The Eleventh Circuit (Hatchett, Dubina, Hill) affirmed, largely for the reasons given by the district court. The Eleventh Circuit's decision should help the CDC to resist similar demands for testimony by AIDS researchers in other cases, including a related case now pending in the Ninth Circuit.

Moore v. Armour Pharmaceutical Co., No. 90-8422 (April 2, 1991).
D.J. # 145-0-3345

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Federal Circuit Holds That Former Service Member's Suit For Back Pay Should Have Been Transferred To The Claims Court

LTC. John F. Mitchell originally brought suit in the Claims Court to challenge his 1982 military discharge. He sought, among other things, active duty back pay. After voluntarily dismissing that action, he brought virtually the same suit in district court. We moved to dismiss or, in the alternative, to transfer the case to the Claims Court. The district court, relying on Bowen v. Massachusetts, 487 U.S. 879 (1988), denied our motion. We took an interlocutory appeal to the Federal Circuit pursuant to 28 U.S.C. 1292(d)(4)(A).

The Federal Circuit (Clevenger, Cowen, Rader) vacated and remanded the case with instructions to the district court to transfer it to the Claims Court. The appellate court agreed with us that even if Mitchell's claim could be characterized as specific relief which would otherwise be cognizable in the district court under 5 U.S.C. 702, it is nonetheless barred by 5 U.S.C. 704 because the Claims Court can provide complete relief via the Tucker Act in cases like Mitchell's. The court also held that the fact that Mitchell's claim might be time-barred in the Claims Court would not support APA jurisdiction in the district court, holding that "the Claims Court offers a full and adequate remedy even if Mitchell does not qualify to receive that remedy."

LTC. John F. Mitchell v. United States, No. 90-1408 (April 11, 1991).
D.J. # 145-14-2480

Attorneys: Barbara Biddle - (FTS) 368-2541 or (202) 514-2541
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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Secretary Of Commerce's Lifting Of Embargo Under Marine Mammal Protection Act Held Not Authorized

This case involves the application of the provisions in the 1988 amendments to the Marine Mammal Protection Act, 16 U.S.C. 1371(a) (2) (B), governing the incidental taking of dolphin by foreign tuna fishing fleets in the eastern tropical Pacific Ocean. The amendments require the Secretary of Commerce to determine that the incidental "taking" rate of the foreign fleet is comparable to that of the U.S. fleet for the same period of time. The amendments also require an embargo if the number of eastern spinner dolphin taken in any given year exceeds 15% of the total number of dolphins taken, even if the foreign fleet otherwise achieves a comparable overall incidental taking rate.

Earth Island Institute challenged the lifting of the embargo, arguing that the statute required a full years data to determine compliance with the eastern spinner dolphin limitation. The district court agreed and issued a preliminary injunction requiring the imposition of the embargo. The Ninth Circuit affirmed. The court rejected our argument that the reconsideration regulation was entitled to deference under Chevron v. NRDC, 467 U.S. 837 (1984), stating that an agency does not have discretion to issue a regulation which conflicts with statutory language and congressional purpose.

Earth Island Institute, et al v. Mosbacher, et al, 9th Cir. No. 90-16851 (April 11, 1991) (Schroeder, Canby, Noonan)

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Challenge To Agreement To Redress PCB Contamination In Waukegan Harbor Dismissed For Lack Of Standing

This is another successful preenforcement review decision under Section 113 of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Environmental Protection Agency (EPA) and Outboard Marine Corporation (OMC) entered into an agreement to redress PCB contamination at OMC's property at Waukegan Harbor. As part of this agreement, OMC committed to relocating before this summer a large marina from a contaminated portion of the site to another on-site area -- not contaminated with PCBs -- so that the cleanup would not interfere with recreation. After construction began, EPA determined that the new slip was located on land contaminated with PAHs and designated that area as a new Superfund site. North Shore Gas Company, as the primary potentially responsible party at this new site, has agreed to conduct a Responsible Investigation/Feasibility Study.

North Shore opposed the new slip's construction on the grounds that it would complicate investigation and make cleanup more expensive. Although EPA modified somewhat the construction plans, EPA insisted that construction go forward, because if the slip were not relocated, they could lose the cleanup agreement for the OMC site. North Shore sued for a preliminary injunction, alleging that the EPA could not construct the new slip on North Shore's Superfund site without completing an environmental impact statement under the National Environmental Policy Act and obtaining a permit under the Resource Conservation and Recovery Act (RCRA).

The court ruled that North Shore lacked standing because it alleged only economic injury and did not represent those whom environmental laws were designed to protect, even indirectly, through its rate payers. The court also rejected North Shore's contention that construction of the new slip (as distinct from the closing of the old slip) was not within the definition of a remedial action in this case and therefore not barred by Section 113(h). The court held that, as a "measure that is ordered as a part of a remedial plan * * * and is reasonably related to the plan's objectives so that it can be considered an organic element of the plan," the relocation was remedial within the meaning of Section 113(h). Posner then went on to speculate about an extreme hypothetical which he found troublesome, given the breadth of Section 113(h).

North Shore Gas Co. v. EPA, 7th Cir. Nos. 91-1077, 91-1383, (April 25, 1991) (Posner, Flaum, Manion)

Attorneys: M. Alice Thurston - (FTS) 368-2772 or (202) 514-2772
John A. Bryson - (FTS) 368-2740 or (202) 514-2740)

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Convictions Under Clean Air Act And CERCLA For Failure To Adhere To Work Practice Standards For Asbestos Demolition And Failure To Report Release Asbestos During Demolition Of Project Sustained

Buckley, a supervisor and executive of a demolition firm, was convicted of one violation of the Clean Air Act, 42 U.S.C. 7412(c)(l)(B), and of one violation of CERCLA, 43 U.S.C. 9603(b)(3), for failure to adhere to work practice standards for asbestos demolition and for failure to report the release of asbestos during a demolition project. On appeal, Buckley argued that the jury instructions had unconstitutionally allowed a conviction without any proof of scienter. A unanimous panel of the Sixth Circuit disagreed, pointing out that the trial court had clearly required the jury to find that Buckley knowingly failed to comply with the standards and that Buckley knew of the release of asbestos. In doing so, the court held these offenses were not specific intent crimes and that the trial court correctly instructed the jury that the statutes only required proof of knowledge of the emissions and not of the legal requirements. The court held that the hazardous nature of the substance gave constitutionally adequate notice of the likelihood of regulation and of possible criminal penalties.

Buckley also argued that a reference by the prosecutor to evidence previously excluded as too prejudicial required a mistrial. The court of appeals, however, concluded that under all the circumstances the trial court had not abused its discretion in refusing to grant a mistrial. The entire incident took less than a minute, the evidence was never shown to the jury, the jury was immediately instructed to ignore the remark, and the other evidence of guilty was convincing. Thus, the court affirmed Buckley's conviction on both counts.

United States v. Buckley, 6th Cir. No. 90-3615 (April 30, 1991)
(Ryan, Suhrheinrich, Circuit Judges; Zatkoff, District Judge)

Attorneys: John A. Bryson - (FTS) 368-2740 or (202) 514-2740
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Challenge To Federal Government's Continued Recognition Of Quinalt Indian Nation As Sole Governing Authority For Quinalt Indian Reservation Dismissed For Failure To Join Indispensable Party

Several groups of Indians and individual Indians with rights to the Quinault Reservation filed suit challenging the United States' continuing recognition of the Quinault Indian Nation as the sole governing authority for the Quinault Indian Reservation. The district court dismissed the action after concluding that the Quinault Nation is an indispensable party that cannot be joined in the action. The court of appeals affirmed, holding that the dismissal under Rule 19, Fed. R. Civ. P. was not an abuse of discretion. The majority opinion reasoned that the Quinault Nation are a necessary and indispensable party under Rule 19 and that because the Nation cannot be joined for reasons of sovereign immunity, the suit must be dismissed.

In his lengthy partial concurrence and dissent, Judge O'Scannlain stated that he did not believe that the Quinaults are either necessary or indispensable under Rule 19, or that it is too early to tell.

Confederated Tribes of the Chehalis Indian Reservation, et al v.
Manuel Lujan, 9th Cir. No. 90-35192 (April 3, 1991)
(Skopil and Fernandez; O'Scannlain, partially concurring and dissenting)

Attorneys: Jacques B. Gelin - (FTS) 368-2762 or (202) 514-2762
David C. Shilton - (FTS) 368-5580 or (202) 514-5580

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Interior's Determination That Royalties On Gross Proceeds From Sale Of Gas From Offshore Federal Lease Be Based On Value Of The Gas Placed In Marketable Condition Sustained

The Director of the Minerals Management Service (MMS) ordered Mesa Operating Limited Partnership (Mesa), which extracts natural gas from offshore federal leases, to pay royalties based on the value of the gas placed in marketable condition. That order was affirmed by the Interior Board of Land Appeals, and upheld by the district court. On appeal, the Fifth Circuit upheld the Department's interpretation of the federal regulations governing royalty valuation from federal leases as permissible.

The court determined that the regulations require payment of royalties on the "gross proceeds" from the sale of gas, which includes the costs of placing the gas in marketable condition because the federal leases and applicable regulations both require that the gas be placed in marketable condition and stipulate that the costs of placing the gas in marketable condition may not be deducted in calculating the royalty payment. The court rejected Mesa's contentions (1) that the Department's marketable condition rule conflicts with either congressional intent in Section 110 of the Natural Gas Policy Act, 15 U.S.C. 3320(a), or the practices under that Act of the Federal Energy Regulatory Commission; and (2) that the Department's rule cannot be reconciled with the Fifth Circuit's prior decision in Diamond Shamrock Exploration Corp. v. Hodel, 853 F.2d 1159 (5th Cir. 1988).

Mesa Operating Limited Partnership v. U.S. Department of the Interior, 5th Cir. No. 89-4775 (May 15, 1991) (Brown, Politz, Johnson)

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Clean Water Act Held To Waive Sovereign Immunity To Authorize Assessment Of Civil Penalties Against Federal Agencies

Following the lead of the Sixth Circuit and two district courts, the Tenth Circuit held that the Clean Water Act waives sovereign immunity and authorized assessment of civil penalties against federal agencies for violations of the Act. The court stated it had "no problem" finding that Section 1323(a)'s waiver for "process and sanctions" encompassed civil penalties, particularly since the same section states that the United States shall be liable for "civil penalties." The court also rejected our argument that the citizen suit provision's reference to appropriate penalties under Section 1319(d) effected a limitation since the federal government is not a "person" under the Act's general definition. The court concluded that the definition of person must be provided by the specific citizen suit provision, which includes the federal government.

Notably, unlike the Sixth Circuit case in which we are seeking certiorari, the Clean Water Act violation in the Tenth Circuit case concededly arose under federal law since the violated permit was issued by EPA.

Sierra Club and Colorado Environmental Coalition v. Manuel Lujan, Jr., 10th Cir. No. 90-1183 (April 10, 1991) (McKay, Aldisert, and McWilliams)

Attorneys: Ellen J. Durkee - (FTS) 368-4426 or (202) 514-4426
Jacques B. Gelin - (FTS) 368-2761 or (202) 514-2762

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TAX DIVISION

Indictment In Largest Bribery Case In The History Of The Internal Revenue Service

On May 8, 1991, the United States District Court for the Southern District of California unsealed a 201-count indictment against Robert A. Morales, Sr. and Robert A. Morales, Jr. Morales, Sr., a 30-year veteran of the Internal Revenue Service, and his son are charged with conspiring to defraud the United States and aiding in the preparation of false returns. Morales, Sr. is also charged with evading approximately $100,000 in personal taxes for 1986 through 1988 and laundering over $100,000 in purported drug proceeds which had been furnished to him by undercover agents.

Morales, Sr. was employed by the IRS from 1960 until his removal in March, 1990. The indictment alleges that Morales, Sr. accepted over $400,000 in bribe payments in return for ensuring no adverse audit determination would be made on a taxpayer's return, that the Morales set up sham corporations in order to facilitate the receipt of such bribe payments, and that the Morales placed a "ghost employee" on a taxpayer's payroll and then endorsed the "employee's" paychecks before depositing the paychecks into nominee bank accounts which they established and controlled.

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Abuses In The Electronic Filing Of Tax Returns

As a result of the Justice Department's joint efforts with the Internal Revenue Service to uncover and prosecute abuses in the electronic filing of tax returns, the Department of Justice announced the return of four indictments against nine individuals for filing false income tax refund claims. Shirley D. Peterson, Assistant Attorney General for the Tax Division said, "Because of the speed with which electronically filed refund claims can be processed, abuses of the electronic filing system must be detected and punished as quickly as possible. The Service and the Tax Division have responded by streamlining and expediting referrals of electronic filing fraud cases for grand jury investigations and for arrests and prosecution."

The IRS Commissioner agreed that moving aggressively on refund schemes is essential. He stated they sent more than $63 billion in tax refunds to nearly 68 million taxpayers and more than 7 million of those taxpayers filed electronically. Of all the cases indicted so far, it is estimated that the approximately 200 false and fictitious income tax returns electronically filed have claimed over $500,000 in phony tax refunds. Investigations are pending nationwide involving an estimated 2,000 to 3,000 additional false tax returns and claiming refunds in amounts estimated at between $2 and $6 million.

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Significant Decision In Statute Of Limitations Case Involving "Flow-Through Entities"

On April 18, 1991, the Second Circuit held in Siben v. Commissioner, that the Internal Revenue Service could determine deficiencies in taxes owing by partners so long as the statute of limitations had not run on the individual partners' returns. It further determined that the IRS could do so even though the statute of limitations had run as to the partnership itself. The Second Circuit thus declined to extend the reasoning of the Ninth and Eighth Circuits in Kelley

v. Commissioner, 877 F.2d 756 (9th Cir. 1989) (subchapter S corporation) and Fendell v. Commissioner, 906 F.2d 362 (8th Cir. 1990) (trust), which held that the running of the statute of limitations was controlled by the filing of informational returns by the flow-through entity. This same issue with respect to subchapter S corporations remains pending in the Eleventh Circuit in Felhaber v. Commissioner.

This issue is of substantial administrative importance to the IRS which has long treated the limitations period applicable to the taxpayer whose liability is in question as controlling. Thus, the timeliness of thousands of asserted tax deficiencies involving partnerships and other flow-through entities could be affected by the resolution of this issue.

* * * * *

New York Court Of Appeals Sustains Constitutionality Of Section 6408 Of The Internal Revenue Code, Which Bars Escheat To The States Of Unclaimed Federal Tax Refunds

On May 9, 1991, the New York Court of Appeals affirmed the order of the New York Appellate Division in In the Matter of Robert Abrams, Attorney General of the State of New York, which dismissed the escheat petition filed by the State of New York's Attorney General. In its petition, the State of New York sought to escheat all federal tax refunds that have gone unclaimed by its residents for more than seven years. Subsequent to the filing of the State's petition, Congress enacted Section 6408 of the Internal Revenue Code, which provides that no overpayment of any tax shall be refunded if the amount of such refund would escheat to a State or would otherwise become the property of a State under any type of abandoned property law. Both the constitutionality and the retroactive application of Section 6408 were challenged by the State of New York.

The New York trial court ruled that Section 6408 could not affect the State's rights with respect to refunds that had been unclaimed for more than seven years prior to the enactment of Section 6408 and ordered that such refunds be turned over to the State. The Appellate Division reversed, holding that Section 6408 was constitutional and that it applied to all unclaimed refunds including those that had remained unclaimed for seven years at the time that Section 6408 was enacted. The Court of Appeals affirmed, agreeing with the Appellate Division that the enactment of Section 6408 was within Congress' taxing power under the Constitution and that the application of the statute to defeat the State's claim to amounts that previously escheated to the State under its abandoned property law was constitutionally permissible.

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Sixth Circuit In Conflict With Fourth Circuit On Tax Treatment Of Back Pay Awards For Employment Discrimination

On April 5, 1991, the Sixth Circuit, in a 2-1 decision, reversed the favorable judgment of the District Court in Theresa A. Burke, et al v. United States. Taxpayers were three employees of the Tennessee Valley Authority (TVA) who received payments as part of the settlement of an action brought against TVA under Title VII of the Civil Rights Act of 1964. In this action, taxpayers alleged that TVA discriminated against female employees when it increased the salaries

of employees in certain male-dominated job categories but did not increase the salaries of employees in certain female-dominated job categories. TVA agreed to pay $5,000,000 in settlement of the claim, to be divided among affected employees. Taxpayers brought this refund action asserting that the amounts received in the settlement were excludable from gross income under Section 104(a)(2) of the Internal Revenue Code because they were received on account of personal injuries.

The District Court concluded that the amounts received represented back pay under Title VII and held that a Title VII back pay award is not damages for personal injury for purposes of Section 104(a)(2). The Sixth Circuit reversed, holding that gender discrimination is a personal injury. The Court concluded that taxpayers' loss of salary was merely a consequence of the personal injury. The Sixth Circuit's decision appears to be in direct conflict with the Fourth Circuit's decision in Thompson v. Commissioner, 866 F.2d 709 (4th Cir. 1989), which held that back pay received under Title VII and the Equal Pay Act is not excludable from gross income under Section 104(a)(2).

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Church Of Scientology Freedom Of Information Act Cases

The Church of Scientology or individual members of the Church have brought some 71 Freedom of Information Act suits against the Internal Revenue Service. These suits seek documents involving various IRS examinations and investigations into the Scientology organization. The plaintiffs in these suits uniformly commence burdensome discovery resulting in significant resource demands upon the IRS and the Tax Division. About 30 cases have been identified which are based on identical administrative requests and which appear suitable for coordination and management by the Judicial Panel on Multidistrict Litigation. Most of these cases have been filed in the Middle District of Florida. The Tax Division is seeking to have all these cases transferred there where they can be managed under the Panel rules.

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ADMINISTRATIVE ISSUES

Federal Employees Pay Comparability Act

The Federal Employees Pay Comparability Act (FEPCA) was passed in late 1990, Some features of the Act (H.R. 5241) and their possible impact on the United States Attorneys' offices (USAOs) are highlighted below. These authorities have been enacted and are now available for consideration.

Expanded Authority to Make Appointments Above the Minimum Rates -- May assist USAOs in recruiting non-attorneys from the private sector. The revised authority allows applicants with "superior qualifications" to be appointed, with the Justice Management Division's approval, at a rate higher than the first step of a grade level.

Impact on USAOs: -- May be helpful when recruiting for a hard-to-fill position such as an auditor or a computer systems analyst. For example, a position may only be classified at the GS-12 grade level but a highly-qualified applicant may currently be earning a salary equivalent to a GS-13. This authority could allow the applicant to be offered compensation at a GS-12, Step 7-- comparable to the applicant's current income. Please note that this authority is only applicable for initial federal government employment or reemployment in the federal service after at least a 90-day break in service.

Reemployment of Military and Civilian Retirees Without Loss of Pay or Annuity to Meet Exceptional Employment Needs -- Until passage of the FEPCA, reemployed annuitants had their salary offset by the amount of their annuity. Consequently, it was rare that an annuitant would return to employment with the federal government. This provision now allows, in unusual circumstances, reemployed annuitants to be excepted from the reduction in retired pay provisions of 5 U.S.C. §5532. The authority to approve these requests lies with the Office of Personnel Management (OPM). Requests are routed to the Attorney General via the Executive Office for United States Attorneys on a case-by-case basis for his approval. Then the requests are forwarded to OPM for final approval.

Impact on USAOs: May be useful when an employee possessing critical skills/knowledge, such as an Assistant United States Attorney who has the "historical" knowledge of a complex trial, has retired or is considering retirement. This feature would allow you to meet temporary emergency hiring needs or to better deal with those situations when your office has encountered unusually severe difficulty in recruiting or retaining a qualified candidate for a position.

Recruitment Bonuses, Relocation Bonuses, and Retention Allowances -- Although regulations have been issued, these programs will not be available until the Department of Justice has issued program guidelines. The regulations exclude Assistant United States Attorneys or Special Assistant United States Attorneys from these programs. The Executive Office for United States Attorneys has requested that these two groups of applicants/employees be "eligible" for bonuses and allowances. Guidelines, as drafted, only permit "bureau heads" to approve bonuses and allowances. Consequently, the authority to approve bonuses and allowances will not be redelegatable.

Impact on USAOs: May be useful in recruiting and retaining non-attorney applicants/ employees in hard-to-fill positions. The bonus programs are "contracts" between the USAO and the applicant/employee. The USAO agrees to pay a cash bonus, not to exceed 25 percent basic pay, while the applicant/employee promises to remain an employee of the Department of Justice for a specified minimum period of time. A retention allowance of up to 25 percent of basic pay may be authorized provided the employee possesses unusually high or unique qualifications, and, in the absence of a retention allowance, the employee would be likely to leave the federal service.

Expanded Payment of Travel Expenses for New Appointments and Interviews -- Regulations have been revised to remove the requirement for agencies to determine that a shortage of candidates exists before paying new appointees' travel and transportation expenses to first post of duty. The regulations also provide that agencies may pay candidates' travel expenses to report for interviews for any position. The regulations reinforce agency discretion in deciding whether to pay relocation or interview expenses for any position.

Impact on USAOs: Requests to incur these types of travel and transportation expenses will continue to be submitted to the Executive Office for United States Attorneys. It is recommended that requests be made only when staffing extremely hard-to-fill vacancies.

Payment for Overtime for Employees in Positions for Which a Special Rate of Pay Has Been Authorized -- Employees occupying positions that are covered by either a locality or special salary rate will have their overtime and compensatory time calculated using these higher rates. The calculations for overtime worked under 5 U.S.C. §5542(a) will be the lesser of one and one-half times the employee's rate of basic pay or one and one-half times the rate of basic pay for GS-10, Step 1, including any special rate that may have been authorized by OPM for GS-10, Step 1, under that authorization.

Impact on USAOs: These changes in calculating overtime and compensatory time currently affect only USAOs with recently-approved locality pay and USAOs with special salary rates in effect at the GS-10 grade level or above. Since these changes potentially could result in higher overtime and compensatory time expenses, affected USAOs may incur higher cost in managing their payrolls.

(This article was prepared by Gary Wagoner, Chief, Special Projects Branch, Personnel Staff, Executive Office for United States Attorneys. Your questions should be directed to your Administrative/Personnel Officer.)

* * * * *

Office Relocations In The Executive Office For United States Attorneys

The Financial Management Staff, the Policy and Analysis Staff of Information Management, and the Equal Employment Opportunity Staff, of the Executive Office for United States Attorneys, have moved to other locations in the Patrick Henry Building. The new addresses and the telephone and telefax numbers are as follows:

Financial Management Staff Room 6000, Patrick Henry Building 601 D Street, N.W. Washington, D.C. 20530	Telephone: Telefax:	(202) 219-1042 (FTS) 299-1042 (202) 501-6961 (FTS) 241-6961
Policy and Analysis Staff, Information Management Room 6438, Patrick Henry Building 601 D Street, N.W. Washington, D.C. 20530	Telephone: Telefax:	(202) 501-6598 (FTS) 241-6598 (202) 501-6961 (FTS) 241-6961
Equal Employment Opportunity Staff Room 6010, Patrick Henry Building 601 D Street, N.W. Washington, D.C. 20530	Telephone: Telefax:	(202) 501-6952 (FTS) 241-6952 (202) 501-6961 (FTS) 241-6961

Please refer to Volume 39, No. 5, United States Attorneys' Bulletin, dated May 15, 1991, at p. 141, for other relocations that have recently taken place within the Executive Office for United States Attorneys.

* * * * *

Freedom Of Information/Privacy Act Unit, Executive Office For United States Attorneys

To assist you in the performance of your day-to-day activities, attached at the Appendix of this Bulletin as Exhibit G is a list of contact persons in the United States Attorneys' offices throughout the country who handle Freedom of Information/Privacy Act matters, together with their telephone numbers.

The Freedom of Information/Privacy Act Unit of the Executive Office for United States Attorneys is always available to respond to any questions you may have. Their telephone number is (FTS) 241-7826 or (202) 501-7826.

* * * * *

Effects Of Part-Time Service On Employee Benefits

The Executive Office for United States Attorneys has received inquiries concerning part-time service and what effects, if any, this schedule would have on employee benefits. This question can be answered in a number of ways depending on the actual type of appointment (such as a permanent or temporary appointment), prior service, or a break in service of more than three days, all of which can affect the entitlement of benefits for a part-time employee. Part-time service is defined as working 32 hours or less per week. A general idea of a part-time schedule and the effects on noted benefits are as follows:

Health Benefits and Life Insurance. If the individual is appointed as a part-time permanent Assistant United States Attorney, he/she would be eligible for health and life insurance coverage unless the part-time employee's salary was such that it would not cover the cost of the premiums. The cost of the health insurance would be pro-rated based on the actual number of hours worked per pay period. The employee will actually pay more in health insurance premiums than a full-time permanent employee. In essence, if the employee does not earn a sufficient bi-weekly salary to cover the higher premiums, then he/she would be ineligible for health insurance coverage. This would not be the case for most Assistant United States Attorneys. For life insurance, the premiums are based on the basic annual salary and would be less costly to the employee.

If the individual is given a part-time temporary appointment not to exceed one year or less (in most cases this would apply to Special Assistant United States Attorneys), then he/she would not be eligible for health or life insurance coverage. However, most temporary employees may elect health insurance once their appointments are extended/converted beyond a year. In this case the employee would pay full cost of the insurance (both the government and employee shares). Again, the employee must earn a sufficient bi-weekly salary to cover the premiums. This provision does not exist for life insurance.

In the event an employee is converted from a full-time permanent position to a part-time permanent or temporary position, he/she may continue health and life insurance coverage. However, for health benefits it would be at a higher cost depending on the actual number of hours worked in a pay period.

If the individual is appointed on an intermittent appointment, then he/she would not be eligible for health coverage.

Retirement Coverage. If the individual is appointed as a part-time permanent employee in a covered position, then he/she would be covered by CSRS, CSRS-Offset or FERS, depending upon prior Federal service, if any. If he/she is eligible for retirement coverage, then he/she is also eligible to participate in the Thrift Savings Plan, after waiting the required time limit. The difference between part-time and full-time employment would be at the time of actual retirement. The time served as a part-time employee versus full-time is calculated differently.

If the individual is appointed as a part-time temporary employee for one year or less, or in a non-covered position, then in most cases the employee would pay into Social Security only. One exception to this rule is if the employee is converted from a full-time permanent appointment in which he/she was covered by a retirement system, then he/she may continue coverage under that retirement system.

Annual and Sick Leave Accruals. As a rule, anyone appointed for more than 90 days will accrue sick and annual leave, with the exception of employees appointed in an intermittent status. To earn annual leave, part-time employees must have a regularly scheduled tour of duty on at least one day of each week in the pay period. Employees with 1) less than three years of service earn one hour of annual leave for each 20 hours in a pay status; 2) three but less than 15 years of service earn one hour of annual leave for each 13 hours in a pay status; and 3) 15 or more years of service earn one hour of annual leave for each 10 hours in a pay status.

Employees who work on a part-time basis with an established tour of duty earn sick leave at the rate of one hour for each 20 hours of duty. Credit may not exceed 4 hours of sick leave for 80 hours of duty in any pay period.

For additional information, please contact the Administrative/Personnel Officer in your District.

* * * * *

CAREER OPPORTUNITIES

Middle District Of North Carolina

Robert H. Edmunds, Jr., United States Attorney for the Middle District of North Carolina, Greensboro, is currently hiring criminal attorneys for both drug and bank fraud work. The attorney positions to be filled are for an Assistant United States Attorney for OCDETF (Organized Crime Drug Enforcement Task Force) and an Assistant United States Attorney for FIRREA (Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

Any seasoned attorney who is willing to experience paradise first-hand should send a resume to Mr. Edmunds, P.O. Box 1858, Greensboro, North Carolina 27402. The telephone number is: (FTS) 672-6222 or (704) 371-6222.

* * * * *

Office Of The Pardon Attorney

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the Office of the Pardon Attorney. A decision has not yet been reached on whether the position will be full-time or part-time. Persons interested in either are invited to apply, and should indicate in their cover letter whether they want to be considered for full-time, part-time, or both. Responsibilities include the direction of investigations for executive clemency; the drafting of reports for the consideration and disposition of petitions for executive clemency; handling Congressional, case-related and miscellaneous correspondence of a legal or complex nature; and occasional research assignments.

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. Familiarity with Wordperfect and Lexis-Nexis is desirable. Applicants must submit a resume and writing sample to: Office of the Pardon Attorney, Department of Justice, Suite 490, Park Place Building, Chevy Chase, Maryland 20815, Attn: Raymond P. Theim. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 - $68,129). No telephone calls, please.

* * * * *

Office Of The U.S. Trustee, Omaha, Nebraska

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the U.S. Trustee's Office in Omaha, Nebraska. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, and 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the U.S. District Court.

Applicants must possess a J.D. degree and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Applicants should submit a resume and law school transcript to: Office of the U.S. Trustee, Department of Justice, Suite 450, 210 S. 16th Street, Omaha, Nebraska 67202, Attn: Patricia M. Dugan. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 - $68,129). This advertisement is open until filled. No telephone calls, please.

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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	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%	04-05-91	6.26%
11-18-88	8.55%	02-14-90	7.97%	05-03-91	6.07%
12-16-88	9.20%	03-09-90	8.36%	05-31-91	6.09%
01-13-89	9.16%	04-06-90	8.32%		
02-15-89	9.32%	05-04-90	8.70%		
03-10-89	9.43%	06-01-90	8.24%		
04-07-89	9.51%	06-29-90	8.09%		
05-05-89	9.15%	07-27-90	7.88%		
06-02-89	8.85%	08-24-90	7.95%		
06-30-89	8.16%	09-21-90	7.78%		
07-28-89	7.75%	10-27-90	7.51%		
08-25-89	8.27%	11-16-90	7.28%		
09-22-89	8.19%	12-14-90	7.02%		
10-20-89	7.90%	01-11-91	6.62%		
11-16-89	7.69%	02-13-91	6.21%		
12-14-89	7.66%	03-08-91	6.46%		

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

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UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	William T. McGivern
California, E	Richard Jenkins
California, C	Lourdes G. Baird
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Richard Palmer
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Dexter W. Lehtinen
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	D. Paul Vernier
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
Kentucky, E	Louis G. DeFalaise
Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Richard D. Bennett
Massachusetts	Wayne A. Budd
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Jerome G. Arnold
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

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

* * * * *

EXHIBIT A

5/17/91

ATTORNEY GENERAL'S ADVISORY COMMITTEE
OF UNITED STATES ATTORNEYS
SUBCOMMITTEES

Child Pornography/Obscenity Subcommittee
Margaret P. Currin, Eastern District of North Carolina, Chairman
W. Hickman Ewing, Jr., Western District of Tennessee
Jeffrey R. Howard, District of New Hampshire
Michael J. Norton, District of Colorado
Robert Q. Whitwell, Northern District of Mississippi
Deborah J. Daniels, Southern District of Indiana (Liaison)

Civil Issues & Tax Subcommittee
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J. Michael Fitzhugh, Western District of Arkansas
Tony M. Graham, Northern District of Oklahoma
Jeffrey R. Howard, District of New Hampshire
Gene W. Shepard, Southern District of Iowa
Lee Thompson, District of Kansas
James Eldon Wilson, Middle District of Alabama
Deborah J. Daniels, Southern District of Indiana (Liaison)

Controlled Substance Subcommittee
John W. Gill, Jr., Eastern District of Tennessee, Chairman
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William A. Kolibash, Northern District of West Virginia
Michael W. Norton, District of Colorado
Hinton R. Pierce, Southern District of Georgia
J. B. Sessions, III, Southern District of Alabama
Kenneth W. Sukhia, Northern District of Florida
Wayne A. Budd, District of Massachusetts (Liaison)

Drug Abuse Prevention & Education Subcommittee
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Daniel A. Bent, District of Hawaii
Joseph S. Cage, Jr., Western District of Louisiana
William C. Carpenter, Jr., District of Delaware
Robert W. Genzman, Middle District of Florida
John E. Lamp, Eastern District of Washington
Frederick J. Scullin, Jr., Northern District of New York
Charles H. Turner, District of Oregon
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Environmental Crimes Subcommittee
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John E. Fryatt, Eastern District of Wisconsin
Frederick J. Hess, Southern District of Illinois
George J. Terwilliger, III, District of Vermont
Robert J. Wortham, Eastern District of Texas
J. William Roberts, Central District of Illinois (Liaison)

Financial Litigation Subcommittee
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Michael M. Baylson, Eastern District of Pennsylvania
Marvin Collins, Northern District of Texas
Edgar W. Ennis, Middle District of Georgia
Joyce J. George, Northern District of Ohio
Philip N. Hogen, District of South Dakota
James J. West, Middle District of Pennsylvania
Deborah J. Daniels, Southern District of Indiana (Liaison)

Indian Affairs Subcommittee
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Doris S. Poppler, District of Montana
John W. Raley, Jr., Eastern District of Oklahoma
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Investigative Agency Subcommittee
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Michael W. Carey, Southern District of West Virginia
Richard S. Cohen, District of Maine
Frank W. Donaldson, Northern District of Alabama
Ronald F. Ederer, Western District of Texas
Richard A. Stacy, District of Wyoming
Deborah J. Daniels, Southern District of Indiana (Liaison)

Legislative Working Group
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E. Bart Daniel, District of South Carolina
Robert J. Wortham, Eastern District of Texas
J. William Roberts, Central District of Illinois (Liaison)

National Environmental Enforcement Council
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James J. West, Middle District of Pennsylvania

Office Management & Budget Subcommittee
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William L. Lutz, District of New Mexico
Mike McKay, Western District of Washington
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J. William Roberts, Central District of Illinois (Liaison)

Organized Crime & Violent Crime Subcommittee
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Joyce J. George, Northern District of Ohio
Andrew J. Maloney, Eastern District of New York
Stephen J. Markman, Eastern District of Michigan
Otto G. Obermaier, Southern District of New York
Dennis C. Vacco, Western District of New York
J. William Roberts, Central District of Illinois (Liaison)

Public Corruption Subcommittee
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Fred L. Foreman, Northern District of Illinois
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Sentencing Guidelines Subcommittee
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Ronald G. Woods, Southern District of Texas
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Southwest Regional Task Force Coordination
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William Braniff, Southern District of California
Ronald F. Ederer, Western District of Texas
Ronald G. Woods, Southern District of Texas
Wayne A. Budd, District of Massachusetts (Liaison)

White Collar Crime Subcommittee
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Maurice O. Ellsworth, District of Idaho
Stephen B. Higgins, Eastern District of Missouri
Stephen J. Markman, Eastern District of Michigan
Joe D. Whitley, Northern District of Georgia
Wayne A. Budd, District of Massachusetts (Liaison)

Bank Fraud Working Group
Richard Bennett, District of Maryland

Computer Office Applications Working Group
William Braniff, Southern District of California, Chairman
Daniel A. Bent, District of Hawaii
William C. Carpenter, District of Delaware
Robert J. Wortham, Eastern District of Texas

Criminal Fines Working Group
Michael M. Baylson, Eastern District of Pennsylvania

Criminal Rules Working Group
Dick Bennett, District of Maryland
Robert H. Edmunds, Middle District of North Carolina
Stephen J. Markman, Eastern District of Michigan
William T. McGivern, Northern District of California

Executive Working Group (Federal, State and Local Prosecutors)
Gene W. Shepard, Southern District of Iowa
J. William Roberts, Central District of Illinois

Executive Review Board (OCDETF)
John W. Gill, Jr., Eastern District of Tennessee
Wayne A. Budd, District of Massachusetts
Michael J. Norton, District of Colorado
J. William Roberts, Central District of Illinois

Operation Alliance Working Group
William L. Lutz, District of New Mexico, Liaison

Securities and Commodities Fraud Working Group
Otto G. Obermaier, Southern District of New York
Fred L. Foreman, Northern District of Illinois

Trigger-Lock Working Group
Lourdes G. Baird, Central District of California
Wayne A. Budd, District of Massachusetts
Thomas W. Corbett, Western District of Pennsylvania
Jeffrey R. Howard, District of New Hampshire
Stephen J. Markman, Eastern District of Michigan
J. William Roberts, Central District of Illinois
Jay B. Stephens, District of Columbia

Veterans Re-employment Working Group
Joe B. Brown, Middle District of Tennessee
Charles W. Larson, Northern District of Iowa

U.S. Attorney Representative to BOP Issues
Frederick J. Hess, Southern District of Illinois

EXHIBIT
B

Office of the Attorney General
Washington, D. C. 20530

May 17, 1991

MEMORANDUM

TO: All Department of Justice Employees

FROM: Dick Thornburgh
Attorney General

SUBJECT: Worklife Policy

Since my return to the Department, two and half years ago, I have had the opportunity to visit with many of you in your offices in 37 states and 22 countries. It is clear to me now -- as it was when I served as the United States Attorney for the Western District of Pennsylvania, and later as the Assistant Attorney General for the Criminal Division -- the greatest resource of this Department is our people.

We serve in a Department with a great tradition of professionalism and excellence. There are now 83,000 of us who are privileged to work for the Department of Justice: 32,000 in law enforcement, 16,000 in immigration, 19,000 in corrections, 12,000 in legal activities and the remainder in management, administrative and other activities. How well we do our jobs affects the quality of life of all Americans.

When I returned to the Department in August 1988, many of you expressed concerns about worklife issues. Compensation, of course, was a major issue, but by no means the only issue. You were concerned about the myriad of other worklife issues which affect our ability -- not only to recruit -- but to retain a quality workforce. Throughout the Department, you expressed concerns about our ability as an employer, to meet staff needs for flexibility in work schedules and place of work, part-time job opportunities, family leave for child and elder care and for other family commitments, day care, opportunities for volunteer work, fitness opportunities, improved office space and so on.

I want to take this opportunity to relate what we have been doing to address compensation and worklife issues over the past two years. I also want to announce the Department's policy on family leave, part-time employment, job sharing and flexiplace.

Frankly, some of these issues were being addressed even before I returned to the Department -- but not in a comprehensive, cohesive fashion. A year ago, I established three task forces to deal definitively with issues related to our attorney workforce. The three task forces addressed compensation, recruitment and retention, and worklife and reported back to me with a lengthy agenda of practical suggestions for improvement. This work has led to much of the progress that I will describe.

We are making headway in the compensation area. The Director of the Federal Bureau of Investigations, the Director of the Bureau of Prisons, the Administrator of the Drug Enforcement Administration and I all served on the National Advisory Commission on Law Enforcement (NACLE), a Commission which made a number of significant recommendations to address longstanding pay and benefits issues for the government's law enforcement workforce. The Commission's recommendations were ultimately incorporated in the Federal Employees Pay Comparability Act of 1990. This legislation made sweeping improvements in compensation not only for law enforcement but for many other categories of employees as well. The 1990 Act represents the first major government-wide pay reform in almost 30 years.

Within the Department, my Compensation Task Force dealt with pay issues affecting attorneys. The Task Force recommendations included accelerated promotions and shortened time-in-grade requirements, as well as increased use of cash awards. I am pleased to report that all the recommendations of this Task Force, for which the Department has existing authority, have been adopted in full. The one remaining recommendation -- the extension of the administratively determined pay system now used for U.S. Attorneys and U.S. Trustees and their assistants, to all attorneys in the Department -- requires approval outside the Department. We included this change in our FY 1992 budget request, but it was not approved. However, I will continue to press for approval of this important proposal in future years. I also recognize that many of you will not benefit from recent compensation reforms. I pledge to continue to look for other ways to improve your compensation as well.

Compensation for a job well done comes in many forms. I do not believe that any employer -- government or private -- can compete with us in terms of the variety and importance of the work that we do. Certainly, no law firm can compete with us in terms of the issues we represent -- nor in terms of our clients. We are unique in our ability to adopt as a guiding principle -- to do what is just and right, not only what our clients dictate.

But this is not enough in today's world. As I travel throughout the country and worldwide, staff and managers raise worklife issues. We as a society have seen what happens when we ignore or short-change our own needs or those of our families.

We, and society, need to recognize the importance of balance in our professional and personal lives.

As we look to the 21st century, this balance will become ever more important to everyone. Women, who in the past have been the traditional family care-givers in our society, will form a major portion of the new entrants into the workforce. Between now and the year 2000, two-thirds of the new entrants are expected to be women under the age of 40. Men, too, are recognizing the importance of balance in their professional and personal lives. Men are increasingly involved in family care. This role is expected to grow dramatically over the next decade. We need to acknowledge the future by starting to accommodate it now.

The Department already leads the way in Federal professional recruitment, and is second to none in career satisfaction. But I want the Department to be at the forefront of the emerging national recognition that times have changed and improved quality-of-life must be brought to the workplace now. Accommodating our quality-of-life needs will enhance recruitment even more, and will help us retain our best. We all share the deepest interest in achieving this result. But, perhaps even more important, our evolution to a kinder and gentler society demands that we offer tangible understanding and support.

Let us make clear our values in this area so that no one is left to speculate.

Effective today, the policy of this Department is to encourage the granting of up to six months leave to meet family needs. These needs include, but are not limited to, infant and child care and elder care.

Many of you have asked for definitive "rules" on what is and is not allowable in terms of leave. Well, unfortunately, life is not predictable. Nor are the needs of our Department. Family needs for extended leave must be balanced with the Department's operational needs. "Flexibility and responsibility" are the hallmarks. For some, this may mean that the work of an office cannot be accomplished with six months of leave for a key employee. But, I call on our supervisors to use ingenuity to try to best meet the needs of individuals as well as the Department. For those of you who are requesting or considering leave, I call on you to make your requests responsible and reasonable -- always thinking of how to respond best to the needs of your organization.

Job sharing -- filling one position with two part-time employees -- provides flexibility to the individuals and the Department alike. Despite these advantages, job sharing has been used only to a limited extent within the Department. I call upon

each manager to identify additional opportunities for part-time employment and for job sharing.

Furthermore, a government-wide pilot program which permits employees to work at home or other approved worksites has just been initiated. This pilot program called "Flexiplace" provides a means of responding to the demographic, societal and technological changes affecting today's workforce. Flexiplace, like flexitime (a program which allows different work schedules), and job sharing, will help employees balance work and family life. I encourage each supervisor not only to consider the benefits of flexiplace to your staff -- but to your organization as a whole. The Justice Management Division will be sending information on each of these programs to you shortly.

Day care is another issue which you raise repeatedly in our meetings. I am pleased to report to you that the Department of Justice in Washington, D.C., will have its own day care center -- opening this fall. I am as proud of this accomplishment as I was in winning my first case!

While I recognize that one day care center will not meet the needs of all 83,000 employees, it is my policy for the Department to incorporate day care facilities wherever possible in future building acquisitions.

There are many other worklife issues in which we are making headway. These include improved office space planning. We have persuaded the General Services Administration to provide additional space beyond their "average" allocations to accommodate the "related space" needs of our attorney workforces -- for libraries and conference facilities. Similarly, we are incorporating fitness facilities wherever possible and encouraging enhanced preventive health programs. I invite you to visit the recently opened facility in the Judiciary Center Building or the recently renovated facility in the Main Building. We are also making great strides in our planning for improved accessibility for our handicapped employees and starting this year we will begin actual construction on improved access at Main Justice, starting with the Great Hall.

One of the areas where we have made the most dramatic improvements is in the provision of computer support. It has been my goal to provide each Assistant United States Attorney with an EAGLE computer and by the end of this calendar year, EAGLE computers will be installed in nearly every U.S. Attorney's Office.

While litigating divisions have enjoyed the benefits of computerization for a longer time, we are now providing additional resources to expand and upgrade their systems. Finally, as a major initiative, we are developing a unified,

Department-wide case tracking system so that we can monitor our progress from investigation to prosecution, through judgment to recovery. Enhancement of computer systems in the components to lighten our burden and to make our work more efficient is a major activity as well. Department-wide, we now dedicate nearly 7 percent of our entire resources -- over $600 million -- to this important area.

We are systematically addressing all of the other recommendations made by my three task forces. At the request of many of you, we are revisiting our regulations on pro bono or volunteer work to ensure that we encourage volunteer work wherever possible with only the most essential constraints to avoid conflicts of interest. We will explore opportunities for rotational and developmental assignments and improved training and expand programs to provide for the upward movement of under-utilized talent within our workforce. We will take steps to improve the representation of minorities, women and persons with disabilities in our workforce. The Department is in a leadership role for implementation of the Americans with Disabilities Act. We must assure that we are a model employer as well.

We in Justice enjoy interesting work involving important issues affecting all Americans. We work with a top-flight, dedicated workforce. Now, it is time to become a leader in another area by providing a supportive work environment which makes the lives of our most important resource -- our people -- productive, flexible and enjoyable. The Department of Justice should be in the forefront. I look forward to working with each of you to make this happen.

U.S. Department of Justice

Office of the Deputy Attorney General

EXHIBIT C

The Deputy Attorney General

Washington, D.C. 20530

May 18, 1991

MEMORANDUM

TO: All United States Attorneys

FROM: William P. Barr
Deputy Attorney General
Chair, Economic Crime Council

SUBJECT: Economic Crime Priorities

In 1983, the Attorney General created the Economic Crime Council[1] to identify nationally significant economic crimes and recommend enforcement priorities. Economic crimes identified by the Council as rising to a level of national significance have been further designated as either national priorities or special emphasis areas. Designation as a priority reflects an impact on the nation of such significance as to pose a threat to the nation's financial/economic stability, national security, or both. Special emphasis areas, while having significant local impact, do not rise to the level of a national priority. It is recognized that no economic crime will occur in or to the same degree in all districts.

[1]The Council is composed of: the Deputy Attorney General (Chair); the Assistant Attorney General, Criminal Division (Chair, Operations Committee) and the Chief of the Fraud Section, Criminal Division (Executive Director); the Assistant Attorneys General of the Antitrust, Civil, Environment and Natural Resources, and Tax Divisions; 23 United States Attorneys; the Director, Executive Office for United States Attorneys; the Executive Assistant Director, Federal Bureau of Investigation; the Assistant Secretary for Enforcement, Department of the Treasury; the Assistant Chief Inspector, Office of Criminal Investigations, U.S. Postal Inspection Service; and an Inspector General representing the President's Council on Integrity and Efficiency.

Following a review of the national priorities and special emphasis areas first designated in 1986,[2] on February 26, 1991, the Council realigned and redesignated those economic crime law enforcement areas as follows:

National Priorities: (1) financial institution fraud, (2) defense procurement fraud, and (3) health care provider fraud.

Special Emphasis Areas: insurance/reinsurance fraud by insiders, boiler rooms/telemarketing, securities and commodities fraud, money laundering, international trade/customs fraud, Housing and Urban Development (HUD) mortgage fraud, computer fraud, and bankruptcy fraud.

Economic crimes designated as national priorities and special emphasis areas should be evaluated for local significance and emphasized in developing district priorities and in working with Law Enforcement Coordinating Committees.

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[2]As designated in late 1986, the national priorities were: (1) defense procurement fraud, (2) fraud in the banking industry, and (3) fraud against Medicare and Medicaid. The areas designated for special emphasis were: boiler rooms, insider trading, HUD mortgage fraud, bankruptcy fraud, and money laundering.

EXHIBIT D

_____ (1)

(ALL INFORMATION MUST BE TYPED OR PRINTED IN BLOCK LETTERS)
SKILLS BANK SURVEY FORM

LOCATOR INFORMATION (ALL AUSAS MUST COMPLETE ITEMS 1-7)

1. **NAME** (Last, First, M.I.) _____ (2)

2. **PHONE** (Commercial and FTS) _____ 8- _____ (3)

3. **DISTRICT** (e.g. NDVA) _____ (4) 4. **LOCATION** (city) _____ (5)

5. **CIRCUIT** (e.g. 02) _____ (6) 6. **YR. APPOINTED** 19____ (7)

7. **STATE BAR MEMBERSHIPS** (e.g., MD, WA): _____ (8)

SKILLS INFORMATION

CRIMINAL MATTERS: **CRM01**-Fraud; **CRM02**-General Litigation; **CRM03**-Internal Security; **CRM04**-Narcotics and Dangerous Drugs; **CRM05**-Organized Crime and Racketeering; **CRM06**-Public Integrity; **CRM07**-Procedures/Appellate/Other; **CRM08**-S&L Fraud; **CRM09**-Asset Forfeiture.

CIVIL MATTERS: **CIV01**-Commercial Litigation; **CIV02**-Federal Programs; **CIV03**-Torts; **CIV04**-Immigration; **CIV05**-Procedures/Appellate/Other; **CIV06**-Affirmative Civil Litigation; **CIV07**-Asset Forfeiture.

ANTITRUST MATTERS: **ATR01**-Civil; **ATR02**-Criminal.

LANDS MATTERS: **LDN01**-Civil; **LDN02**-Criminal.

CIVIL RIGHTS MATTERS: **CRT01**-Civil; **CRT02**-Criminal.

TAX MATTERS: **TAX01**-Civil; **TAX02**-Criminal; **TAX03**-Criminal, Indirect Methods; **TAX04**-Supplemental Issues/Topics.

CODE: _____ **DESCRIPTION:** _____ (9)

_____

_____

_____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

CODE: _____ **DESCRIPTION:** _____

_____

_____

_____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

CODE: _____ **DESCRIPTION:** _____

_____

_____

_____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

(USE CONTINUATION SHEET IF ADDITIONAL SPACE IS NEEDED.)

9. **WORK EXPERIENCE RELEVANT TO SKILLS:**
DATE: From: 19_____ To: 19_____ DESCRIPTION: _____

(USE CONTINUATION SHEET IF ADDITIONAL SPACE IS NEEDED.)

PARTICIPANT'S BACKGROUND

10. **EXPERIENCE AS AGAI INSTRUCTOR:**
CIVIL _____ **From:** 19_____ **To:** 19_____
CRIMINAL _____ **From:** 19_____ **To:** 19_____
APPELLATE _____ **From:** 19_____ **To:** 19_____

11. **EDUCATION (DO NOT LIST LAW DEGREE):**
YEAR: 19_____ **DEGREE:** _____ **MAJOR:** _____
YEAR: 19_____ **DEGREE:** _____ **MAJOR:** _____

12. **SPECIAL COURSES TAKEN:**
YEAR: 19_____ **COURSE:** _____
YEAR: 19_____ **COURSE:** _____

13. **LANGUAGE FLUENCY:** _____

14. **LICENSE(S) (DO NOT LIST LICENSE TO PRACTICE LAW):**
YEAR: 19_____ **TYPE:** _____
YEAR: 19_____ **TYPE:** _____

15. **PUBLICATION(S):**
YEAR: 19_____ **TITLE:** _____
YEAR: 19_____ **TITLE:** _____

(USE CONTINUATION SHEET IF ADDITIONAL SPACE IS NEEDED.)

16. **MILITARY SERVICE:**
BRANCH: _____ **RANK:** _____
STATUS: _____ **NONE** _____ **READY RESERVE** _____ **STANDBY RESERVE**
_____ **RETIRED RESERVE**

PRIVACY ACT STATEMENT

The collection of this information is authorized by 5 U.S.C. section 301, 44 U.S.C. section 519. The primary use of this information is for inclusion in a JURIS SKILLS BANK. Once collected, this information will be available to United States Attorneys, Assistant United States Attorneys, and Department of Justice personnel to locate Assistant United States Attorneys who have particular expertise, skills, or specific experience in an area in which advice or assistance is sought. Additional disclosures also will be made to the Executive Office for United States Attorneys to maintain a current skills inventory. Furnishing of skills information on this information on this form is voluntary and for the convenience of employees of the United States Attorneys' Offices.

EMPLOYEE SIGNATURE: _____ **DATE:** _____

NAME: _____

CONTINUATION SHEET

8. **SELECT FROM THE LIST OF SKILL CODES BELOW AND GIVE A DESCRIPTION OF YOU EXPERTISE, MONTHS OR NUMBER OF CASES WORKED IN A PARTICULAR AREA.**

CODE: _____ **DESCRIPTION:** _____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

CODE: _____ **DESCRIPTION:** _____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

CODE: _____ **DESCRIPTION:** _____

DATE (last case handled) _____ **NO. OF CASES** _____ **NO. OF MOS.** _____

9. **WORK EXPERIENCE RELEVANT TO SKILLS:**

DATE: From: 19_____ **To:** 19_____ **DESCRIPTION:** _____

DATE: From: 19_____ **To:** 19_____ **DESCRIPTION:** _____

11. **EDUCATION (DO NOT LIST LAW DEGREE):**

YEAR: 19_____ **DEGREE:** _____ **MAJOR:** _____
YEAR: 19_____ **DEGREE:** _____ **MAJOR:** _____

12. **SPECIAL COURSES TAKEN:**

YEAR: 19_____ **COURSE:** _____
YEAR: 19_____ **COURSE:** _____

15. **PUBLICATION(S):**

YEAR: 19_____ **TITLE:** _____

YEAR: 19_____ **TITLE:** _____

INSTRUCTIONS FOR COMPLETING THE AUSA SKILLS BANK SURVEY FORM

INTRODUCTION

The AUSA JURIS SKILLS BANK contains education, experience, and litigation expertise data on participating Assistants. The SKILLS BANK was developed and implemented to allow United States Attorney personnel to quickly find in-house litigation experts. The SKILLS BANK is only available to United States Attorneys' and Executive Office personnel. The litigating divisions of the Department may request information through the Executive Office for United States Attorneys' Legal Counsel. The first eight questions are mandatory. They must be answered by each Assistant. The Skills Information segment is voluntary (items 8-14).

SPECIFIC INSTRUCTIONS

Type or print all information. A continuation sheet is provided for recording additional skills.

ITEMS 1-7. Self-explanatory, follow guides on form. AUSAs MUST COMPLETE these items.

ITEM 8.

a. Select a code from the list provided. If the codes overlap, select the narrower of the two.

b. Provide an accurate and brief description of your skill area. You may describe your skill using keywords which begin with a general term and narrow to a more specific one. For example, White Collar Crime, Fraud, Advance Fee Scheme, or Torts, Asbestos, Defective Premises. Or you may describe your expertise by a citing a statute, e.g., 18 U.S.C. section 1001, False Statements.

c. Give the number of months you worked on cases and/or the number of cases you handled in your skill area.

ITEM 9. In this item, include all relevant work experiences to your skills area such judicial clerkships, law firm experience, and any legal teaching or lecturing experience.

ITEM 10. Check only if you have experience as an instructor at the Advocacy Institute and give date.

ITEM 11. List all educational degrees, EXCEPT law degree.

ITEM 12. List special courses taken, e.g. Computer Programming.

ITEM 13. List any languages in which you are fluent other than English.

ITEM 14. List any licenses you have, e.g. CPA. Do not include license to practice law.

ITEM 15. Give the year and title of any of your relevant publications (e.g. law review articles).

ITEM 16. Give branch, rank and status of military service. (**NONE** = not in a military reserve unit or retired reserve; **READY RESERVE** = liable for active duty in time of war or national emergency - by President, Congress or law; **STANDBY RESERVE** = liable for active duty in time of war or national emergency - Congress or law; **RETIRED RESERVE** = retired and, if qualified, liable for active duty only in time of war or national emergency - Congress or law.

Use the continuation form to record additional skills. Please sign and date the survey form as indicated and return to: AUSA SKILLS BANK UPDATE, Legal and Information Systems Staff, 425 I Street, NW, Rm. 129, Washington, DC 20530, ATTN: A. CARRIGAN

DOCUMENT 31

NAME:
PHONE:
809 753 4656
FTS 753 4656
DISTRICT: DIPR LOCATION: SAN JUAN CIRCUIT: 01
YEAR APPT: 83 STATE BAR: PR
SKILLS:
CRM CRM05 POLICE CORRUPTION, MAIL FRAUD, ARSON, THEFT FROM INTERSTATE
SHIPMENTS, DEVELOPMENT AND PROSECUTION OF CASES INVOLVING PUBLIC CORRUPTION
AND CONNECTION WITH ORGANIZED CRIMES, CASES OF ORGANIZATIONS DEALING WITH
INTERNATIONALLY WITH DRUGS, 60 MOS., 25 CASES, NOVEMBER 1987
WORK EXPERIENCE:
PROSECUTOR FOR THE LAST SEVENTEEN YEARS, BOTH STATE AND FEDERAL
EDUCATION: BBA 63 MANAGEMENT
LANGUAGE FLUENCY: SPANISH
UPDATE: 1988

Guideline Sentencing Update

FEDERAL JU

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

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

VOLUME 4 • NUMBER 3 • MAY 22, 1991

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit holds government may not limit substantial assistance motion to § 5K1.1 departure—sentencing court may also depart from statutory minimum pursuant to 18 U.S.C. § 3553(e). Defendant was subject to a ten-year mandatory minimum after pleading guilty to conspiracy to possess and distribute 437 kilograms of cocaine. The government moved for a substantial assistance departure, and at the sentencing hearing attempted to clarify that it was moving pursuant to § 5K1.1 but not § 3553(e). The court, however, departed below both the guideline range of 188–235 months and the ten-year minimum to impose a three-year term. The government appealed, contending the court lacked discretion to depart below the statutory minimum absent a motion specifying that the defendant had provided substantial assistance under § 3553(e) as well as § 5K1.1.

The court concluded that § 5K1.1 merely implements the statutory directive of § 3553(e) and 28 U.S.C. § 994(n) and does not create a separate method of departure: "[A]lthough 5K1.1 speaks initially in terms of 'departures' from the guidelines, section 994(n) and the Application Notes to 5K1.1 refer more generically to 'sentence reductions' and specifically refer to reductions below the statutory minimum as provided by 3553(e). In light of the substantial cross references between 5K1.1, 3553(e) and 994(n), we conclude that 994(n) and 5K1.1 do not create a separate ground for a motion for reduction below the guidelines exclusive of 3553(e)'s provision for reduction below the statutory minimum. Rather, 5K1.1 implements the directive of 994(n) and 3553(e), and all three provisions must be read together in order to determine the appropriateness of a sentence reduction and the extent of any departure."

"If we were to accept the government's position . . . we would have to find that Congress intended to vest with the prosecutor not only the authority to make the motion, but also the authority to set the parameters of the court's discretion. There is nothing in the legislative history, nor in the language of section 3553 or section 994 that suggests such a result. Thus, we reject the government's argument that this statutory scheme ultimately gives the prosecutor the power not only to notify the court of a defendant's substantial assistance, but to limit the judge's discretion to set the sentence by choosing to file its motion under 5K1.1 rather than § 3553(e)."

The court noted that this issue "appears to be one of first impression."

U.S. v. Keene, No. 89-50617 (9th Cir. Apr. 29, 1991) (Marsh, D.J.).

MITIGATING CIRCUMSTANCES

Ninth Circuit affirms downward departure, partly on basis of "aberrant behavior" and one defendant's "outstanding good deeds"; also holds that "unique combination of factors" may constitute a mitigating circumstance. Defendants pled guilty to conspiring to bribe and bribing an official of the Immigration and Naturalization Service. The guideline range for both defendants was 8–14 months, which required imposition of at least four months' imprisonment. *See* U.S.S.G. § 5C1.1(d)(2). The district court departed downward one offense level, giving defendants 6–12-month ranges and allowing the court to impose four months in home detention, *see* § 5C1.1(c)(2), five years' probation, and $15,000 fines (the amount of the bribe). The court held that several factors warranted departure: defendants did not seek or receive pecuniary gain, and there was no evidence of any other kind of benefit; the INS official influenced defendants to continue the scheme; one defendant attempted to back out after learning the scheme was illegal, and in the past had "gone to great personal expense to assist victims of crime or earthquake"; and defendants' conduct constituted "single acts of aberrant behavior," U.S.S.G. Ch. 1, Pt. A at 1.7.

The appellate court affirmed, finding that these circumstances were unusual and had not been adequately considered by the Sentencing Commission. In analyzing whether defendants' acts could be characterized as "single acts of aberrant behavior," the court reasoned that "it is fair to read 'single act' to refer to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime. In this case there are two crimes—the forming of the conspiracy and the offer of the money. The conspiracy and the offer are so closely related that for purposes of deciding whether they were aberrant they constitute a single act." The court "agree[d] with the government that absence of prior convictions is not enough to show that the act in question was single and aberrant," but held that the finding was warranted under the facts of this case.

As to the role of the government official in the offense, the court distinguished this case from one of "imperfect entrapment," which "is not a mitigating factor. *U.S. v. Dickey*, 924 F.2d 836 (9th Cir. 1991)." Here, "the person who solicited the acts was a government official whom the defendants had every reason to believe was aware of the law; he was not an undercover agent or other informant whose government status was not visible to the defendants. And the defendants themselves were 'innocents.' The conduct of the government official must be assessed not abstractedly in the air but in conjunction with the persons on whom the conduct has an impact."

The court also concluded that "the case of a defendant who had performed outstanding acts of benevolence" was not considered by the Commission and departure on that ground was not prohibited. The court reasoned that such acts "are not a necessary consequence of socio-economic status or community ties. The government conceded at oral argument that if Mother Teresa were accused of illegally attempting to buy a green card for one of her sisters, it would be proper for a court to consider her saintly deeds in mitigation of her sentence. With the principle established, it is only a matter of degree, and it seems entirely appropriate for outstanding good deeds ... to be considered as a relevant factor in determining whether there are mitigating circumstances."

Alternatively, the court held that "we may affirm on the basis of the record on the distinct and alternative ground that it is the convergence of all the factors that the court enumerated that constitutes the circumstances that led to its decision."

"The statute speaks in the singular of 'mitigating circumstance,' 18 U.S.C. § 3553(b). There is no reason to be so literal-minded as to hold that a combination of factors cannot together constitute a 'mitigating circumstance.' Given the Sentencing Commission's acknowledgement of 'the vast range of human conduct' not encompassed by the Guidelines, a unique combination of factors may constitute the 'circumstance' that mitigates. This conclusion is, indeed, required by the Guidelines themselves. The Commission says ... that the departure is to occur when 'a court finds an atypical case,' one 'where conduct differs significantly from the norm.' U.S.S.G. Ch.1, Pt.A, § 4(b). What the Commission has focused on is 'the case' conduct. Neither case nor conduct can be reduced to a single factor. Case and conduct are a total pattern of behavior."

This appears to be the first appellate decision to endorse a combination of factors approach. Two circuits specifically rejected a "totality of the circumstances" method for downward departures when the individual factors were not proper grounds for departure. *See U.S. v. Goff*, 907 F.2d 1441 (4th Cir. 1990); *U.S. v. Pozzy*, 902 F.2d 133 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990). *See also U.S. v. Rosen*, 896 F.2d 789 (3d Cir. 1990) ("combination of typical factors does not present an unusual case" warranting departure); *U.S. v. Carey*, 895 F.2d 318 (7th Cir. 1990) (vacating downward departure partly based on "cumulative effect" of factors that alone did not justify departure).

U.S. v. Takai, No. 90-10157 (9th Cir. Apr. 19, 1991) (Noonan, J.).

Aggravating Circumstances

U.S. v. Valle, 929 F.2d 629 (11th Cir. 1991) (per curiam) (affirming 716 F. Supp. 1452 (S.D.Fla. 1989) [2 *GSU* #11], wherein court departed from ranges of 30–37 months and 37–46 months to impose 15-year terms on defendants who robbed Wells Fargo truck of $17 million, hid all but $50,000 (which was recovered at the time of arrest), and refused to return remainder of money: "[T]he Guidelines do not contemplate a scenario such as this where the appellants expect to exploit the criminal justice system and enjoy the fruits of their crime following a relatively short period of incarceration. . . . To permit the appellants to keep the monetarily lucrative proceeds of their crime and yet serve no more prison time than if the money had been surrendered or otherwise recovered, would make a mockery of our system of justice. . . . Although 180 months is a severe departure from the applicable range . . . , we believe the sentences are appropriate and even necessary to insure respect for the law and, more specifically, to see that our system of punishment retains its deterrent effect").

Appellate Review

Proper and Improper Grounds for Departure

U.S. v. Diaz-Bastardo, 929 F.2d 798 (1st Cir. 1991) (holding that "a departure which rests on a combination of valid and invalid grounds may be affirmed so long as (1) the direction and degree of the departure are reasonable in relation to the remaining (valid) ground, (2) excision of the improper ground does not obscure or defeat the expressed reasoning of the district court, and (3) the reviewing court is left, on the record as a whole, with the definite and firm conviction that removal of the inappropriate ground would not be likely to alter the district court's view of the sentence rightfully to be imposed"). *Accord U.S. v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990); *U.S. v. Franklin*, 902 F.2d 501 (7th Cir.), *cert. denied*, 111 S. Ct. 274 (1990); *U.S. v. Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1144 (1990). *Contra U.S. v. Zamarippa*, 905 F.2d 337 (10th Cir. 1990); *U.S. v. Hernandez-Vasquez*, 884 F.2d 1314 (9th Cir. 1989) (per curiam).

Probation and Supervised Release

(Note: No cases cited in this section were subject to the Nov. 1, 1990 amendments to Chapter Seven of the Guidelines, which set forth procedures for determining sentences after revocation of probation and supervised release.)

Revocation of Supervised Release

U.S. v. Smeathers, 930 F.2d 18 (8th Cir. 1991) (per curiam) (in imposing two-year sentence for violation of supervised release on defendant originally sentenced to 14 months and three-year term of release, district court did not abuse its discretion by considering the conduct that caused the revocation, the factors listed in 18 U.S.C. § 3553(a), and the guideline range for the new criminal conduct; sentence was within maximum provided under 18 U.S.C. § 3583(e)(3) and was not limited by Guideline sentence for original offense, *accord U.S. v. Dillard*, 910 F.2d 461 (7th Cir. 1990); *U.S. v. Lockard*, 910 F.2d 542 (9th Cir. 1990); *U.S. v. Scroggins*, 910 F.2d 768 (11th Cir. 1990) (per curiam)).

Revocation of Probation

U.S. v. Alli, 929 F.2d 995 (4th Cir. 1991) ("upon resentencing, following revocation of probation, the court is limited to a sentence within the guidelines available at the time of the initial sentence"; the conduct that caused revocation may be considered in determining whether to revoke or modify probation, what sentence to select within the guideline range, and whether to depart if the grounds for departure were available at the initial sentencing). *Accord U.S. v. White*, 925 F.2d 284 (9th Cir. 1991); *U.S. v. Von Washington*, 915 F.2d 390 (8th Cir. 1990) (per curiam); *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990) (per curiam).

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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VOLUME 4 • NUMBER 2 • MAY 7, 1991

Departure

Second Circuit holds sentencing court may not depart downward because of disparity resulting from prosecutor's plea-bargaining practices. Defendant was originally charged with possession with intent to distribute more than five grams of crack, but pled guilty to possession of an unspecified quantity of crack, an offense with no mandatory minimum. Defendant was allowed to withdraw this plea, however, partly because the court determined defendant did not actually benefit from the agreement to plead to the lesser charge. He was then reindicted on the original charge plus a count of using a firearm during a drug offense, 18 U.S.C. § 924(c), which carries a mandatory consecutive five-year term. Convicted after a jury trial on both counts, his combined sentencing range was 147–168 months.

The district court found that it was "not unusual" for the U.S. Attorney to use § 924(c) "as a chip in plea bargaining"; that is, charging defendants who refuse to plead guilty with § 924(c) if that section is applicable, but allowing similarly situated defendants who plead guilty to avoid § 924(c) charges. Because of the difference between the statutory penalty mandated by § 924(c) and the otherwise applicable—and lower—two-level enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a weapon during a drug offense, the district court concluded that this plea-bargaining practice creates a disparity between those defendants who plead guilty and those who go to trial. Holding that this disparity was "unwarranted" and unforeseen by the Sentencing Commission, the court departed on the narcotics count and imposed a total 120-month sentence, which was within the range that would have applied if there had been no § 924(c) conviction but an enhancement under § 2D1.1(b)(1) instead.

The appellate court vacated the departure: "The Commission certainly considered that both the two-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(1) and the five-year mandatory consecutive sentence under § 924(c) could apply to the same defendant, and included in the Guidelines an explicit instruction that in such cases only the statutory penalty should be imposed. U.S.S.G. § 2K2.4(a), application note 2. Theoretically, this creates no 'disparity'; the defendant on whom the two-level enhancement is imposed may have engaged in criminal conduct similar to the conduct underlying a § 924(c) conviction, but he has not been 'found guilty of similar criminal conduct.' 28 U.S.C. § 991(b)(1)(B)."

The court rejected the idea that the plea bargaining practices of the U.S. Attorney created "'unwarranted disparity' in sentencing among similarly situated defendants. The 'disparity' identified by the district court . . . is not limited to the United States Attorney's decision to assert or forgo § 924(c) charges; it exists whenever the prosecutor exercises his broad discretion to forgo a charge on which a defendant could legitimately be prosecuted, convicted and sentenced. Whether the prosecutor declines to bring a charge at all, or, as is not uncommon, selects among a variety of applicable criminal statutes with different penalties, he is creating a 'disparity' between the sentences imposed on different defendants. And he undoubtedly has the authority to do so."

Noting that an upward departure affirmed in *U.S. v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988) had been imposed, in part, to "ameliorate to some extent the skewing occasioned by plea bargaining," the appellate court left open "the possibility that a prosecutor's charging decision or a plea agreement could also result in omitting a mitigating circumstance from the calculation of a guideline range, in which case a downward departure might be appropriate. Here, however, the only 'mitigating circumstance' identified is the fact that defendants who engaged in similar conduct but agreed to plead guilty to lesser charges received less punishment than [this defendant] would receive. No ground for departure pertaining specifically to this individual defendant, his conduct or his offense was identified. There is no viable claim before us of misconduct by the prosecutor or coercion of the defendant. . . . We are left, then, with no remaining basis for departure except the judge's disapproval of the manner in which the United States Attorney for the Eastern District of New York generally exercises his discretion in negotiating plea agreements in narcotics cases involving use of a firearm. We do not believe that substituting the judge's view of the proper general prosecutorial policy for that of the prosecutor constitutes a valid ground for departure."

U.S. v. Stanley, 928 F.2d 575 (2d Cir. 1991).

AGGRAVATING CIRCUMSTANCES

U.S. v. Hoyungowa, No. 89-10485 (9th Cir. Apr. 16, 1991) (Tang, J.) (district court may not depart pursuant to U.S.S.G. § 5K2.3, p.s., for extreme psychological injury to family of murder victim: "this Guideline applies by its plain terms only to the direct victim of the crime and not to others affected by the crime, such as [the victim's] family. . . . We hold that Guideline § 5K2.3 applies only to direct victims of the charged offense").

STATEMENT OF REASONS FOR DEPARTURE

U.S. v. Pergola, No. 90-1564 (2d Cir. April 10, 1991) (Kearse, J.) (although district court did not specifically explain why lesser departure would not suffice, statement that

"upward departure to the maximum term of the law is required by this case" implied that "anything less would be insufficient" and adequately supported departure under § 5K2.3 to statutory maximum of five years for defendant convicted of repeatedly threatening ex-girlfriend even after his parole was revoked for that conduct and he was ordered to stop; court distinguished *U.S. v. Kim*, 896 F.2d 678 (2d Cir. 1990) and *U.S. v. Schular*, 907 F.2d 294 (2d Cir. 1990), which had directed courts considering departures under § 5K to consider next higher offense levels in sequence, by noting that those cases "focused solely on the defendant's conduct" and not on "the effect of the crimes on the victims. Though in considering either type of circumstance the sentencing court should make clear on the record that it has considered lesser departures than the one eventually arrived at, the requirement of a specific step-by-step calculation and comparison is not particularly apt where, as here, (a) harm to the victim is at issue, and (b) the type of harm at issue is psychological rather than physical, making observation and quantification nearly impossible").

Mitigating Circumstances

U.S. v. Perez, 756 F. Supp. 698 (E.D.N.Y. 1991) (granting downward departure under § 5K2.0, p.s., from 41–51 months to the 15 months served in pretrial detention, for a "despondent and impecunious twenty-five year old woman, who has just experienced the sudden and unexpected death of her only child, a son born while she was in custody after her arrest for dealing in crack .... The Commission did not take into account the emotional blow dealt a mother who gives birth to a child while she is in custody, gives up her infant son to relatives because she cannot adequately care for it during her incarceration, and then is informed, while still in jail, of his sudden and inexplicable death. Even the most inhuman would consider this cruel punishment dealt by the fates sufficient retribution for her transgression. There are occasions where the law's implacability must bend and give homage through compassion to humanity's frailties and nature's cruelties. This is such a case.... The government does not object.").

Offense Conduct

Drug Quantity

U.S. v. Miranda-Ortiz, 926 F.2d 172 (2d Cir. 1991) (defendant, convicted of conspiracy to distribute cocaine after he joined conspiracy for only a single transaction involving one kilogram of cocaine shortly before conspiracy ended, should have offense level determined on basis of that one kilogram without also including 4–5 kilograms of cocaine distributed by conspiracy before he joined: "The late-entering coconspirator should be sentenced on the basis of the full quantity of narcotics distributed by other members of the conspiracy only if, when he joined the conspiracy, he could reasonably foresee the distributions of future amounts, or knew or reasonably should have known what the past quantities were"; fact that defendant was convicted of conspiracy to distribute more than five kilograms of cocaine is not binding at sentencing as to drug amount).

Adjustments

Role in the Offense

U.S. v. Caruth, No. 90-2079 (10th Cir. Apr. 16, 1991) (Anderson, J.) (agreeing with *U.S. v. Andrus*, 925 F.2d 335 (9th Cir. 1991) that "the Guidelines permit courts not only to compare a defendant's conduct with that of others in the same enterprise, but also with the conduct of an average participant in that type of crime.... In other words, resort may be had to both internal and external measurements for culpability," *accord U.S. v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989); court affirmed reduction for minor participant status, § 3B1.2(b), and denial of minimal participant status, § 3B1.2(c), because although defendant may have been least culpable member of extensive drug ring his actions were not necessarily minimal compared to average participants in this type of drug offense).

U.S. v. Martinez-Duran, 927 F.2d 453 (9th Cir. 1991) (even if statute of conviction incorporates managerial role in offense of conviction, defendant may receive § 3B1.1 enhancement for managerial role in related criminal conduct; here, defendant was convicted of renting or managing a building for the purpose of storing, distributing and/or using heroin, 21 U.S.C. 856(a)(2), but enhancement was proper because there was "ample evidence ... that he managed other drug-related activities and people").

Victim-Related Adjustments

U.S. v. Smith, No. 90-2017 (10th Cir. Apr. 16, 1991) (Brorby, J.) (vulnerable victim enhancement under § 3A1.1 is not limited to offense of conviction and could be given to bank robbery defendant for related conduct of stealing elderly woman's car that he then used in robbery—it was thus improper for sentencing court to use car theft as basis for departure rather than § 3A1.1 adjustment; however, "'elderly' status" does not per se demonstrate vulnerability, and § 3A1.1 "requires analysis of the victim's personal or individual vulnerability" to defendant's criminal conduct).

Criminal History

Calculation

U.S. v. Query, 928 F.2d 386 (11th Cir. 1991) (drug amounts from related state offense were properly added to offense level rather than using the state conviction to increase criminal history score even though state sentence was imposed prior to federal sentence—under § 4A1.2(a)(1) a "prior sentence" must be "for conduct not part of the instant offense," and here the state and federal offenses were part of the same course of conduct).

Sentencing Procedure

Hearsay

U.S. v. Query, 928 F.2d 386 (11th Cir. 1991) (not error for district court to rely solely on hearsay testimony from presentence reports of non-testifying co-conspirator to support findings as to amount of drugs, role of defendant, acceptance of responsibility, and obstruction of justice—defendant failed to show statements were unreliable, and "both the Sentencing Guidelines and case law from this circuit permit a district court to consider reliable hearsay evidence at sentencing").

EXHIBIT F

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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Guideline Sentences, Generally

D.C. Circuit rules suspended sentences are not permitted under the guidelines. (110)(550) Defendant contended that the six-month suspended sentence imposed upon her was not authorized by law. The D.C. Circuit agreed, ruling that the sentencing guidelines no longer permit suspended sentences. Accordingly, defendant's suspended sentence was vacated. *U.S. v. Mastropierro*, __ F.2d __ (D.C. Cir. April 23, 1991) No. 90-3186.

8th Circuit rejects collateral attack where defendant failed to challenge non-guidelines sentence in direct appeal. (110)(800) At sentencing, the district court held the guidelines unconstitutional, and gave defendant a 15-year non-guidelines sentence for his drug conviction. Following the Supreme Court's decision in *Mistretta v. U.S.*, 488 U.S. 361 (1989), the 8th Circuit reversed the ruling that the guidelines were unconstitutional, but affirmed defendant's non-guidelines sentence. Defendant did not seek review of that decision, but later attacked his sentence in this habeas corpus action, arguing that his sentence exceeded the appropriate guideline range. The 8th Circuit rejected argument, ruling defendant's failure to challenge his sentence in the direct appeal meant that he could not now collaterally attack his sentence. *U.S. v. Serpa*, __ F.2d __ (8th Cir. April 16, 1991) No. 89-2463.

7th Circuit rejects Presentment Clause challenge to guidelines. (115) In *Mistretta v. U.S.*, 109 U.S. 647 (1989), the Supreme Court distinguished the guidelines from the kind of legislation commonly passed by Congress which must be presented to the President for signature. Thus the 7th Circuit rejected defendant's claim that the guidelines are legislation promulgated in violation of the Presentment Clause. The guidelines are rules of court, and Congress has the power to delegate to the courts authority to make rules not inconsistent with the statutes and Constitution of the United States. The guidelines are constitutionally delegated rule making, not subject to the Presentment Clause. *U.S. v. Macias*, __ F.2d __ (7th Cir. April 18, 1991) No. 90-1208.

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D.C. Circuit reaffirms that guidelines apply only to offenses committed after November 1, 1987. (125) The D.C. Circuit rejected defendant's claim that the district court should have sentenced him under the sentencing guidelines. Defendant was convicted of conduct that ended in April 1986, and the guidelines apply only to offenses committed on or after November 1, 1987. Although defendant was also charged with a conspiracy ending after November 1, 1987, he was not convicted of that offense. *U.S. v. Hayes*, __ F.2d __ (D.C. Cir. April 9, 1991) No. 90-3123.

1st Circuit affirms applicability of guidelines where defendant failed to show he withdrew from conspiracy prior to effective date. (125)(380) Defendant contended that it was improper to apply the guidelines to his conspiracy conviction because the government produced no evidence of his involvement in the conspiracy after the effective date of the guidelines. The 1st Circuit held the guidelines were applicable to defendant's offense, since defendant failed to demonstrate that he withdrew from the conspiracy prior to the effective date. *U.S. v. Arboleda*, __ F.2d __ (1st Cir. April 8, 1991) No. 90-1374.

General Application Principles (Chapter 1)

10th Circuit rejects upward departure based on more than minimal planning and victim vulnerability. (160)(410)(746) The district court departed upward because it found that defendant's offense involved more than minimal planning and a vulnerable victim. The 10th Circuit reversed, finding that the district court failed to explain why the guidelines did not adequately take these factors into consideration. The district court "departed" by increasing defendant's offense level by four, which suggested that the court assessed two levels for each cited factor--the same offense level increase prescribed by the guidelines. Moreover, the circumstances did not justify a vulnerable victim adjustment under guideline section 3A1.1. An elderly woman is not per se a vulnerable victim. The victim's mental condition was normal, and the record was silent as to defendant's motivation in selecting this particular victim. The label "elderly" is too vague, by itself, to provide a basis for an unusual vulnerability finding. *U.S. v. Smith*, __ F.2d __ (10th Cir. April 16, 1991) No. 90-2017.

10th Circuit upholds consideration of drugs involved in dismissed counts. (170)(270) The 10th Circuit rejected defendant's contention that it was improper for the district court to consider drug quantities involved in counts which were dismissed under a plea agreement. The 10th Circuit had previously held that drugs not specified in the offense of conviction may be considered if part of the same course of conduct or common scheme or plan as the offense of conviction. *U.S. v. Gonzales*, __ F.2d __ (10th Cir. April 11, 1991) No. 89-2295.

11th Circuit upholds consideration of cocaine despite defendant's acquittal. (170)(270) Defendant contended it was error for the district court to consider cocaine involved in an offense of which defendant had been acquitted. The 11th Circuit found no error. The fact that government did not establish all of the elements of the acquitted count did not preclude the sentencing court from considering the underlying facts, if established by a preponderance of the evidence. In this case, defendant conceded her involvement with the drugs involved in the acquitted count, and there was no doubt that defendant was connected with all of the cocaine used to calculate her offense level. *U.S. v. Rivera-Lopez*, 928 F.2d 372 (11th Cir. 1991).

D.C. Circuit refuses to extend exclusionary rule to sentencing hearing. (170)(270)(770) The prosecution admitted that the police engaged in "some irregularity" when they conducted a warrantless entry to arrest defendant at his apartment. The parties agreed that the prosecution would not introduce at trial any of the evidence the police obtained during the warrantless entry. The D.C. Circuit upheld the use of this evidence at defendant's sentencing to determine his base offense level. Following other circuits, the court held that the deterrent effect would not outweigh the detrimental effect of excluding the evidence. There was no showing that

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the police purposely violated the Fourth Amendment to obtain evidence to increase defendant's sentence, and the police misconduct was minor. The court expressly left open the issue of whether suppression would be proper in circumstances where the police acted egregiously. Judge Silberman, concurring, was troubled by the incentive this rule created for police to seize evidence illegally. *U.S. v. McCrory*, __ F.2d __ (D.C. Cir. April 12, 1991) No. 89-3211.

10th Circuit holds that failure to follow commentary can constitute reversible error. (180) The application notes to the November 1990 guidelines made it clear that the obstruction guideline does not apply to making false statements, not under oath, to law enforcement officials, unless the statements significantly impeded the investigation. The 10th Circuit ruled that the failure to follow the guidelines commentaries can constitute reversible error. The error here was not harmless, since the district court did not specifically state that defendant's sentence would have been the same with or without the enhancement. *U.S. v. Urbanek*, __ F.2d __ (10th Cir. April 23, 1991) No. 90-3242.

10th Circuit affirms one-point adjustment for robbing a financial institution. (180)(220) The robbery guideline, section 2B3.1(b)(1) directs a sentencing court to treat the loss for a financial institution as at least $5,000, regardless of the amount actually taken. This results in at least a one-point upward adjustment. The background commentary states that a minimum enhancement is appropriate for robbery of a financial institution because they generally have more cash available, and whether the defendant obtains more or less than $2500 is largely fortuitous. Defendant contended that the amount he took was not "largely fortuitous" because he purposely limited the amount of money he took. The 10th Circuit rejected defendant's argument. The commentary is nothing more than a background explanation of the reason why robbery of a financial institution is treated more seriously than other robberies. The court gave more weight to application note 2, which confirms the guidelines' requirement that bank robbery results in a minimum one-level enhancement. *U.S. v. Fox*, __ F.2d __ (10th Cir. April 18, 1991) No. 90-2048.

Offense Conduct, Generally (Chapter 2)

6th Circuit holds that defendant who inadvertently injured victim "otherwise used" knife in offense. (210) Defendant contended that the district court incorrectly assessed a four-level enhancement for "otherwise using" a weapon, rather than the three-point enhancement for "brandishing" a weapon. The 6th Circuit found no clear error in district court's determination that defendant "otherwise used" the knife. The evidence established that he not only inadvertently injured his assault victim with the knife, but also intentionally held it against her throat while making threats against her life. *U.S. v. Hamilton*, __ F.2d __ (6th Cir. April 8, 1991) No. 90-5866.

8th Circuit upholds enhancement despite defendant's alleged belief that sexual assault victim was at least 16. (210) Defendant argued that the district court misapplied guideline section 2A3.1(b)(2)(B), which mandates a two-level increase in offense level if the sexual assault victim was under the age of 16. Defendant contended that since the sexual abuse of a minor statute provides as a defense the defendant's reasonable belief that the victim was at least 16, by analogy, so must the guidelines. The 8th Circuit rejected this argument. Nothing in section 2A3.1(b)(2)(B) suggests the existence of such an exception. Moreover, this defense applies only to sexual abuse of a minor, while defendant was also charged with aggravated sexual assault. *Arcoren v. U.S.*, __ F.2d __ (8th Cir. April 8, 1991) No. 90-5277.

8th Circuit holds that restraint of victim not is a specific offense characteristic of criminal sexual assault. (210)(410) Guideline section 3A1.3 provides for a two-level increase in offense level if a victim was physically restrained in the course of the offense, except where such restraint is an element of the offense, specifically incorporated into the base offense level, or listed as a specific offense characteristic. Defendant was sentenced for criminal sexual abuse under guideline section 2A3.1. He contended that restraint of the victim is a specific offense characteristic mandating a four-level increase in offense level when force is used. The 8th Circuit rejected this argument. Although "physically restrained" requires the use of force, the use of force does not necessarily entail physical restraint. *Arcoren v. U.S.*, __ F.2d __ (8th Cir. April 8, 1991) No. 90-5277.

7th Circuit rules government failed to prove any "loss" caused by contractor's fraud. (220)(300) Defendant and his wife obtained two government contracts by fraud. In the husband's case, the court calculated the loss as the difference between defendants' bids and the increased prices at which the two contracts were ultimately awarded to other contractors. In the wife's case, the court simply added together the defendants' two bids. The 7th Circuit found that not only was there was no rational reason to treat the two defendants differently, but that both calculations of "loss" were incorrect. The amount bid is not a reasonable estimate of loss where the contract is terminated before any money is paid. Moreover, the defendants did not intend to pocket the entire proceeds of the contract without performing services. The government may have incurred expenses in terminating the contract or in obtaining a substitute contract, but the government failed to present any evidence of such expenses. Thus, it was improper to increase either defendants' offense level based upon the amount of loss caused. *U.S. v. Schneider*, __ F.2d __ (7th Cir. April 16, 1991) No. 90-2230.

9th Circuit upholds downward departure based on government conduct, absence of pecuniary gain and "single act of aberrant behavior." (220)(721) Defendants were convicted of bribing an immigration officer. The judge departed downward by one point, and sentenced defendants to four months in home detention and $15,000 fines. The basis for the departure was "the pattern of government conduct, the defendants' attempt to play a more limited role, and the absence of pecuniary gain." The court also justified the departure on the ground that the defendants' conduct constituted "single acts of aberrant behavior." The government appealed, and Judges Noonan, Tang and Boochever affirmed. With regard to the agent's conduct, the court said "to lie to [the defendants], to deceive them, to conceal from them that their conversations were being taped and to fail to discourage them from their proposed crime were actions with an impact upon their conduct that are properly considered as mitigating." *U.S. v. Takai*, __ F.2d __ (9th Cir. April 19, 1991) No. 90-10157.

10th Circuit reverses offense level increase based upon involvement in organized scheme to steal vehicles. (220) Defendant was sentenced for altering motor vehicle identification numbers. The district court increased defendant's offense level from 8 to 14 under guideline section 2B6.1(b)(3), based on its determination that the offense involved an organized scheme to steal vehicles or vehicle parts. The 10th Circuit reversed. There was insufficient evidence to determine that the alteration or removal of the motor vehicle numbers by defendant was in furtherance of a scheme to receive stolen vehicles or vehicle parts. Defendant removed the identification number plates and placed them on other vehicles to give the impression that the vehicle was a later model. This practice, in combination with the alteration of odometer readings, furthered defendant's scheme to sell the cars to unsuspecting buyers at inflated prices. *U.S. v. Walker*, __ F.2d __ (10th Cir. April 22, 1991) No. 90-6115.

2nd Circuit finds jury need not determine drug quantity for mandatory minimum sentence. (245) Defendant contended that a district court cannot impose a mandatory minimum sentence under 21 U.S.C. section 841(b) without a jury finding, beyond a reasonable doubt, that the crime involved a quantity of drugs in excess of the amount required by statute. The 2nd Circuit rejected this argument, finding that quantity relates solely to sentencing. "[A]t sentencing, the district court is not limited to conclusions reached by the jury or even evidence presented at trial, but instead may consider any evidence that it deems appropriate." Dictum in an earlier 2nd Circuit case said only that the issue of quantity *may* be submitted to the jury. *U.S. v. Madkour*, __ F.2d __ (2nd Cir. April 11, 1991) No. 90-1397.

2nd Circuit upholds appealability of mandatory minimum sentencing scheme as to quantity of drugs. (245)(800) Defendant was sentenced for possessing in excess of 100 plants of marijuana, triggering a five-year mandatory minimum sentence. The 2nd Circuit rejected the government's contention that because defendant pled guilty, he waived the right to appeal all questions involving the quantity of drugs. Defendant preserved this issue for appeal by informing the court prior to sentencing that he intended to appeal the issue. Claims of improper application of mandatory minimum sentences are appealable, just as claims for improper application of sentencing guidelines, if the defendant first presented his argument to the district court for determination. *U.S. v. Madkour*, __ F.2d __ (2nd Cir. April 11, 1991) No. 90-1397.

6th Circuit upholds mandatory minimum sentence against due process challenge. (245)(710) Defendant contended that the mandatory minimum sentences required by 21 U.S.C. section 841(b)(1)(B)(iii) violate due process because 18 U.S.C. section 3553(e) allows a court to sentence below the mandatory minimum only upon motion of the government for substantial assistance. The 6th Circuit, following its recent decision in *U.S. v. Levy*, 904 F.2d 1026 (6th Cir. 1990), rejected this contention. Defendant argued that *Levy* did not control because it dealt with guideline section 5K1.1. However, this guideline was promulgated in response to 18 U.S.C. section 3553, and the guideline and parent statute are "substantively identical" for purposes of defendant's claim. The government's power to move for a downward departure is based on the reasonable assumption that the government is in the best position to advise the court of the extent of defendant's assistance. *U.S. v. Gardner*, __ F.2d __ (6th Cir. April 24, 1991) No. 90-2005.

7th Circuit finds no conflict between guidelines and minimum sentences set forth in Anti-Drug Abuse Act. (245) Defendant argued that the guidelines conflict with the Anti-Drug Abuse Act because the guidelines prescribe a minimum sentence greater than the minimum sentence set forth in the Anti-Drug Abuse Act. The 7th Circuit found no such conflict. Guideline section 5G1.1(c)(2) provides that a sentence may be imposed anywhere within the guideline range, provided that sentence is not less than any statutorily required minimum sentence. Here, the statutory minimum was 10 years and the guideline minimum, which defendant received, was 12 years and 7 months. *U.S. v. Macias*, __ F.2d __ (7th Cir. April 18, 1991) No. 90-1208.

7th Circuit holds court may not depart downward to impose probation under 21 U.S.C. 841(b)(1)(A). (245)(560)(710) Defendant's crime carried a mandatory minimum 10-year sentence under 21 U.S.C. section 841(b)(1)(A). The district court departed downward based on defendant's substantial assistance to authorities, and sentenced defendant to probation. The 7th Circuit remanded for resentencing, finding that section 841(b)(1)(A) prohibited a court from imposing probation in lieu of imprisonment. That section provides for a minimum 10-year term of imprisonment, and expressly

prohibits a court from placing on probation any person sentenced under the section. Permitting a court to then depart downward and sentence a defendant to probation would render the prohibition meaningless. *U.S. v. Thomas*, __ F.2d __ (7th Cir. April 11, 1991) No. 90-2183.

9th Circuit holds quantity of drugs is not an element of the offense but merely a sentencing factor. (245)(780) The 9th Circuit held that 21 U.S.C. section 841(a) "does not specify drug quantity as an element of the substantive offense of possession with intent to distribute; quantity is instead relevant to the penalty provisions of section 841(b), and is a matter for the district court at sentencing." Since the record did not reflect that the district judge made any determination of the quantity of marijuana possessed, the case was remanded for resentencing. *U.S. v. Sotelo-Rivera*, __ F.2d __ (9th Cir. May 1, 1991) No. 89-10082, *vacating* 906 F.2d 1324 (9th Cir. 1990).

New York District Court holds career offender guidelines did not consider gun use enhancements under 924(c). (245)(520)(721) Defendant was subject to a statutory minimum sentence of 15 years for possession of a firearm by a felon, plus 25 years for two counts of using a firearm during a violent crime. He was also classified as a career offender, with a guideline range of 47 to 52 years. Without the career offender enhancement, his guideline range would have been 92 to 115 months. The District Court for the Southern District of New York found that the guidelines did not adequately take into account the mandatory minimum sentences in 18 U.S.C. section 924(c) for using a firearm during a violent crime. The court found "no indication" that the Sentencing Commission "contemplated enhancing a sentence under both the career offender guideline and section 924(c)." Accordingly, the court departed downward and sentenced defendant to 40 years, the sentence which would have applied in the absence of the career criminal provisions. *U.S. v. Bernier*, 758 F.Supp. 195 (S.D.N.Y. 1991).

2nd Circuit rules government need not individually test each marijuana plant for presence of THC. (250) Defendant contended that the district court's findings as to the number of marijuana plants involved in his offense was clearly erroneous because the government actually tested only a small number of the plants for the presence of THC. The 2nd Circuit rejected this argument. In addition to the lab results of the tests for THC in a random sample of the plants, an experienced government agent also testified that a visual inspection of the plants led him to conclude that they were marijuana. This was sufficient for the district court to conclude that all of the plants were marijuana. *U.S. v. Madkour*, __ F.2d __ (2nd Cir. April 11, 1991) No. 90- 1397.

10th Circuit affirms use of stipulated projections of drug quantities. (250) Defendant contended that only the actual quantity of methamphetamine discovered at his laboratory should have been used to calculate his offense level, rather than the stipulated projections of drug quantities which could have been produced at the lab. The 10th Circuit affirmed the use of the stipulated projections of drug quantities. The stipulation was based on expert testimony estimating the drug quantity in terms of the amount capable of being produced, which is an acceptable method of computation under the guidelines and by the courts. *U.S. v. Haar*, __ F.2d __ (10th Cir. April 22, 1991) No. 90-2023.

7th Circuit upholds upward departure based on quantity of drugs to be distributed in prison. (255)(745) Defendant, a prison inmate, was convicted of using a communications facility to distribute heroin, which carries an offense level of 12 under guideline section 2D1.6. The district court departed upward to offense level 18 to reflect the seriousness of defendant's attempt to introduce 22 grams of heroin into a federal prison. Level 18 is the level applicable under the Drug Quantity Table for over 22 grams of heroin. The 7th Circuit affirmed. Generally, a departure from guideline section 2D1.6 based upon the quantity of drugs is authorized, but only to the extent that the amount grossly exceeds the amount established for the offense level. However, because this heroin was to be distributed in prison rather than on the street, a comparatively smaller amount of heroin was necessary to justify the departure. The extent of the departure was also reasonable. *U.S. v. Feekes*, __ F.2d __ (7th Cir. April 8, 1991) No. 89-3217.

10th Circuit affirms consideration of all drugs found in a restaurant operated by defendant. (260) The 10th Circuit found it was proper to hold defendant accountable for all of the cocaine seized at a restaurant, even though multiple parties were present at the time the cocaine was seized. Although none of the cocaine was on his person, defendant was in "direct control" of the restaurant at the time the search warrant was served. The cocaine was found in areas of the restaurant closed to the public, but accessible to defendant and his employees. Because the evidence showed that defendant and a co-defendant sold cocaine at the restaurant, and that the restaurant was operated as a partnership, the district court could conclude that the cocaine seized in the raid was part of a common scheme or plan. *U.S. v. Poole*, __ F.2d __ (10th Cir. April 4, 1991) No. 90-3184.

7th Circuit affirms sentence based on amount of cocaine defendant negotiated to sell. (265) The evidence showed that a co-defendant arranged to sell eight kilograms of cocaine to a "buyer" represented by a confidential informant and that the co-defendant telephoned defendant, his regular supplier of cocaine, who agreed to supply the eight kilograms. The next day, defendant delivered only five kilograms. The co-defendant told the undercover agent posing as the buyer that he could deliver the remaining three kilograms by 5 p.m. that day. The 7th Circuit held that this was sufficient for the district court to conclude that defendant conspired to distribute

eight kilograms of cocaine, and that defendant could supply the remaining amount of cocaine. *U.S. v. Macias*, __ F.2d __ (7th Cir. April 18, 1991) No. 90-1208.

11th Circuit finds drugs involved in state drug conviction to be relevant conduct. (270)(500) Defendant contended that the district court incorrectly considered his state conviction, involving 875 grams of methamphetamine, in determining his base offense level. He was convicted of the state charges after pleading guilty to the federal charge, but prior to sentencing. According to defendant, the state conviction should have been considered in his criminal history score, rather than as relevant conduct. The 11th Circuit rejected this contention. The source in both cases was a lab hidden in defendant's attic. The drugs in the federal case were possessed by defendant; in the state case, the drugs were in defendant's car, possessed by his common-law wife. *U.S. v. Query*, 928 F.2d 383 (11th Cir. 1991).

4th Circuit upholds enhancement for firearm found between box spring and mattress in defendant's bedroom. (284) Defendant was arrested for selling crack cocaine from his residence. A search conducted at his arrest uncovered a revolver hidden between the mattress and box spring in defendant's bedroom. This was sufficient for the 4th Circuit to summarily reject defendant's claim that his sentence should not have been enhanced for possession of a firearm during the commission of a drug crime. *U.S. v. Curtis*, __ F.2d __ (4th Cir. April 22, 1991) No. 90-5665.

10th Circuit upholds "Failure to Appear" guideline against statutory challenges. (320) Defendant claimed that it was improper to base the "failure to appear" guideline, section 2J1.6, on the maximum penalty for the underlying charge, rather than the sentence actually received. Defendant's maximum sentence for the underlying offense was five years, but he was actually sentenced was two concurrent 10-month terms. The 10th Circuit rejected defendant's argument that the guideline fails to comply with 18 U.S.C. section 3553's requirement that courts impose a sentence consistent with the seriousness of the offense. Following the 9th Circuit's reasoning in *U.S. v. Nelson*, 919 F.2d 1381 (9th Cir. 1990), the court found that there was a direct relationship between the length of the potential sentence and the seriousness of the failure to appear. The court also rejected defendant's argument that section 2J1.6 violates 28 U.S.C. section 994's requirement that all mitigating and aggravating circumstances be considered. The sentence actually imposed on a defendant is not an aggravating or mitigating circumstance. *U.S. v. Agbai*, __ F.2d __ (10th Cir. April 16, 1991) No. 90-1143.

8th Circuit adds criminal history points for escape committed while under criminal justice sentence. (350)(500)(680) Defendant argued that guideline sections 4A1.1(d) and (e), which add criminal history points for committing the offense of escape while under a criminal justice sentence, constituted impermissible double counting. The 8th Circuit, following the other circuit courts that have considered this issue, rejected this argument. The unambiguous language of the enhancement provision does not provide any exception for the offense of escape. Moreover, because the escape guideline applies to both an escape from prison and assisting an escape from prison, it was not impermissible to enhance a defendant's criminal history when the offense was committed by one already incarcerated. *U.S. v. Thomas*, __ F.2d __ (8th Cir. April 9, 1991) No. 90-2378.

Adjustments (Chapter 3)

8th Circuit affirms that defendant physically restrained sexual assault victim. (410) The 8th Circuit affirmed the district court's increase in offense level under guideline section 3A1.3, based upon defendant's physical restraint of his victims in the course of a sexual assault. The court rejected defendant's contention that "physical restraint" means the victim was tied, bound or locked up. These are merely illustrative examples and do not limit the type of conduct that may constitute a physical restraint. The record showed that defendant repeatedly pushed and grabbed the victims, preventing them from leaving the bedroom on numerous occasions. This was a sufficient basis to conclude that they were physically restrained under section 3A1.3. *Arcoren v. U.S.*, __ F.2d __ (8th Cir. April 8, 1991) No. 90-5277.

1st Circuit affirms leadership role of captain of boat smuggling marijuana. (430) Defendant was discovered by the Coast Guard on a boat carrying 131 bales of marijuana. Defendant challenged a four-point enhancement for being a leader of the marijuana operation, contending that he was merely a crew member and that he assumed the role of spokesperson with the Coast Guard because he was the only person on board who spoke English. The 1st Circuit upheld the enhancement. Defendant did more than answer the Coast Guard's questions. He authorized the Coast Guard to board the vessel and granted permission for them to search the vessel. After being taken into custody, three of his five co-defendants identified defendant as the captain of the vessel. *U.S. v. Piedrahita-Santiago*, __ F.2d __ (1st Cir. April 23, 1991) No. 90-1355.

6th Circuit remands because court incorrectly added only two points for leadership role. (430) Defendant argued that the district court erred in imposing a two-level enhancement for being a leader of an operation involving 5 or more people. The 6th Circuit rejected defendant's argument that he was not a leader, but found the district court did err in imposing only a two-level enhancement. Guideline section 3B1.1(a) requires a four-level enhancement for being a leader of an operation involving 5 or more persons. The evidence at trial indicated that defendant (a) recruited a co-conspirator to act as a courier between California and Ohio,

(b) made arrangements with the suppliers in California, and (c) made arrangements for the distribution of the marijuana in the Akron area, including "fronting" another co-conspirator large amounts for the sale. The testimony also established that four other people were participants in defendant's drug trafficking scheme. *U.S. v. Feinman*, __ F.2d __ (6th Cir. April 15, 1991) No. 90-3721.

7th Circuit affirms defendant's managerial role in directing prison conspiracy to distribute drugs. (430) The 7th Circuit affirmed the district court's upward adjustment of 3 levels under section 3B1.1(b) for defendant's role as a manager or supervisor in a prison conspiracy to distribute heroin. There were five criminally responsible participants, including three inmates and two outside assistants. Defendant directed one co-defendant to obtain an $800 money order to purchase the heroin, asked another to purchase the heroin, and when he failed, engaged the services of two other people. Defendant also used another prison inmate to relay messages to the inmate's girlfriend on the outside. *U.S. v. Feekes*, __ F.2d __ (7th Cir. April 8, 1991) No. 89-3217.

10th Circuit affirms that five participants were involved in criminal scheme. (430) Defendant argued that there were less than five participants and therefore it was improper to increase his offense level by four under section 3B1.1(a) based on his leadership role. The 10th Circuit rejected the argument, noting that the trial court found five participants: defendant, defendant's wife, defendant's daughter and two others. Defendant admitted the two others were involved, but denied his wife and daughter were participants. The 10th Circuit found that the evidence in the presentence report demonstrated by a preponderance that both defendant's wife and daughter were accomplices in his criminal activity. There was no evidence to the contrary. *U.S. v. Walker*, __ F.2d __ (10th Cir. April 22, 1991) No. 90-6115.

10th Circuit affirms leadership role for defendant who organized company used to commit fraud. (430) The 10th Circuit affirmed the determination that defendant had a leadership role in a criminal scheme to obtain fraudulent bank loans. The record indicated that defendant gave orders, came up with ideas, handled the finances, and organized the business entity doing business with the victim banks. *U.S. v. Kelley*, __ F.2d __ (10th Cir. April 8, 1991) No. 90-6136.

10th Circuit upholds leadership role for defendant who conducted negotiations with undercover agents. (430) The 10th Circuit upheld the district court's determination that defendant had a managerial or leadership role in a drug operation. The record indicated that defendant was involved in extensive negotiations with undercover agents and controlled the place and timing of drug transactions. He also asked the undercover agents, posing as buyers, to go directly through him to make their purchases. *U.S. v. Gonzales*, __ F.2d __ (10th Cir. April 11, 1991) No. 89- 2295.

10th Circuit rejects claim that jury should determine whether defendant had minor or minimal role. (440)(750) The 10th Circuit contended that the district court erred in failing to submit to the jury the question of whether defendant's role in the offense was a minor or minimal participant. Finding this to be a legal issue to be determined *de novo*, the court found nothing to suggest that the guidelines were intended to alter the usual rule reserving punishment issues for the district court. Asking a jury to decide such issues would likely "mislead and confuse a jury." *U.S. v. Pena*, __ F.2d __ (10th Cir. April 18, 1991) No. 89-2294.

10th Circuit affirms denial of minimal status to one-time drug courier. (430) Defendant contended that the court should have determined that he was a minimal participant, rather than a minor participant. The 10th Circuit affirmed the district court's denial of minimal status, although it noted that if the district court had determined that defendant was a minimal participant that finding would not have been clearly erroneous either. Defendant and his brother-in-law were arrested transporting 171 pounds of marijuana from New Mexico to New Jersey. Defendant contended that he merely accompanied his brother-in-law to New Jersey to visit his sick grandmother, and was unaware of the marijuana until part way through the trip. The appellate court noted that if the district court had accepted all of defendant's characterizations, it would have been "hard pressed" to find that defendant was not a minimal participant. However, the district court was not obligated to accept defendant's characterizations. *U.S. v. Caruth*, __ F.2d __ (10th Cir. April 16, 1991) No. 90-2079.

6th Circuit rules obstruction enhancement may be based on perjury at sentencing hearing. (460) Defendant contended that an obstruction of justice enhancement based upon his perjury at his sentencing hearing was inappropriate because his untrue statements were limited to specific areas he disputed in the plea agreement. The 6th Circuit rejected this argument. A defendant has the right to object at the sentencing hearing to factual findings relevant to the application of the guidelines. However, the right is not so broad as to entitle a defendant to perjure himself. "The oath a defendant takes before testifying at a sentencing hearing is no less sacred than the one he takes before testifying at trial." *U.S. v. Hamilton*, __ F.2d __ (6th Cir. April 8, 1991) No. 90-5866.

7th Circuit upholds obstruction enhancement based on defendant's false testimony. (460)(485) The 7th Circuit upheld the district court's decision to enhance defendant's sentence for obstruction of justice based upon his false testimony. Defendant testified that he lost all contact with a drug seller by mid-October. However, a tape recording from November 3 showed that defendant gave an informant directions as to

where to meet the seller. The finding of obstruction of justice was not clearly erroneous, and therefore the district court acted within its discretion in denying defendant a reduction for acceptance of responsibility. *U.S. v. Feekes*, __ F.2d __ (7th Cir. April 8, 1991) No. 89-3217.

10th Circuit affirms obstruction enhancement for defendant who used an alias. (460) The district court found that defendant had obstructed justice by withholding his true identity from law enforcement officials at the time of his arrest, and from the U.S. Magistrate at three separate court appearances. The 10th Circuit affirmed. Although Application Note 4 bars a sentence enhancement for use of an alias at arrest, Application Note 3(f) states that providing materially false information to a judge or magistrate merits an obstruction enhancement. Even if defendant was intoxicated at his arrest, he was not intoxicated each time he appeared before the magistrate. Although he gave his driver's license with his correct name to the FBI, he permitted the court to prosecute him under the alias. Moreover, even if defendant's attorney advised him to give an alias to the magistrate, the district court expressly found that defendant would have used an alias regardless of his attorney's advice. *U.S. v. Gardiner*, __ F.2d __ (10th Cir. April 16, 1991) No. 90-3240.

10th Circuit reverses obstruction enhancement for defendant who lied to IRS about income and bank accounts. (460) Defendant told IRS investigators that he had not worked and had no income or bank account during the years in which he did not file a tax return. He denied receiving income under a business name or alias, and contended that his failure to file tax returns was due to an alcohol abuse problem. These statements were all lies, and when confronted with evidence to the contrary, he immediately retracted his statements. Since none of these statements impeded the IRS investigation, the 10th Circuit reversed the enhancement for obstruction. The application notes to the November 1990 guidelines clarify that the obstruction guideline does not apply to making false statements, not under oath, to law enforcement officials, unless the statements significantly impede the investigation. *U.S. v. Urbanek*, __ F.2d __ (10th Cir. April 23, 1991) No. 90-3242.

11th Circuit affirms obstruction enhancement to defendant who directed wife to conceal drugs and money. (460) The 11th Circuit found that the evidence supported the district court's determination that defendant obstructed justice. Defendant made false statements to a probation officer and directed his wife to conceal money and drugs. In addition, defendant modified his attic in an effort to conceal the ongoing methamphetamine lab hidden there. *U.S. v. Query*, 928 F.2d 383 (11th Cir. 1991).

11th Circuit rejects acceptance of responsibility reduction for defendant who pled guilty. (485) The 11th Circuit found no error in the district court's denial of defendant's contention that he had accepted responsibility by pleading guilty and cooperating with authorities. Defendant refused to acknowledge his full participation to the probation officer, made false statements to the investigating agent, declined to inform authorities of the methamphetamine lab in his attic, and continued his criminal activity after his arrest through communications to his common-law wife. *U.S. v. Query*, 928 F.2d 383 (11th Cir. 1991).

Criminal History (§ 4A)

8th Circuit determines that six prior bad check convictions committed over two-year period were unrelated. (500) The 8th Circuit rejected defendant's contention that her six prior convictions for passing bad checks were related for criminal history purposes. She argued that they were related because they were all committed against financial institutions, involved an identical modus operandi and were all motivated to obtain money to support her drug habit. The 8th Circuit rejected this reasoning. Because the crimes were committed over the course of two years, involved different victims, occurred in different locations and were not consolidated for trial or sentencing, it was not clearly erroneous for the district court to determine the crimes were unrelated. If motive were dispositive as to a common plan or scheme, then virtually all prior convictions of a defendant could be characterized as related. A similar modus operandi is also not dispositive. *U.S. v. Lowe*, __ F.2d __ (8th Cir. April 16, 1991) No. 90-1950.

9th Circuit reverses sentence based on subsequently-vacated conviction, but remands for possible departure. (500) (740) A defendant is entitled to challenge the validity of a prior conviction used to enhance his criminal history score. Here the district court held a hearing, and rejected defendant's argument that his prior state conviction was invalid because his attorney had a conflict of interest. After he was sentenced, defendant filed a petition in California state court to vacate his 1973 conviction. The petition was granted, and the state did not appeal. He then returned to federal court arguing that the court was bound to respect the state court's judgment. The 9th Circuit agreed, holding that a federal court may not treat as valid a state conviction that no longer exists. The court noted, however, that on remand the district court was free under section 4A1.2, Application Note 6, to consider the underlying conduct as the basis for an upward departure pursuant to section 4A1.3. *U.S. v. Guthrie*, __ F.2d __ (9th Cir. April 25, 1991) No. 89-10340.

8th Circuit looks to underlying circumstances to determine that a felon's possession of a firearm is a crime of violence. (520) Following the 5th and 7th Circuits, the 8th Circuit held that courts should look beyond the statutory elements of a crime to determine whether an offense is a crime of violence for career offender purposes. Under this approach, defen-

dant, who was convicted of being a felon in possession of a firearm, committed a crime of violence. Defendant entered his wife's home with a sawed-off gun, late at night, without permission, and after having a threatening conversation with her earlier that evening. The court summarily rejected defendant's claim that the career offender sentence enhancement violates the 8th Amendment's prohibition against cruel and unusual punishment. *U.S. v. Cornelius*, __ F.2d __ (8th Cir. April 23, 1991) No. 90-2187SI.

10th Circuit reviews underlying conduct to determine felon's possession of a firearm is a crime of violence. (520) Defendant was convicted of possession of a firearm by a felon, and contended that he was improperly sentenced as a career offender because that offense is not a crime of violence. The 10th Circuit ruled that the November 1, 1989 amendments to section 4B1.2 and application note 2 make it clear that a sentencing judge may consider the underlying conduct in determining whether the offense is a crime of violence. Contrary cases cited by defendant concerned the whether prior convictions, rather than the current conviction, constituted crimes of violence. The court disagreed with the 9th Circuit's decision in *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990) that a felon's possession of a firearm necessarily constitutes a crime of violence. In this case, however, the offense clearly was a crime of violence, since defendant used the firearm to shoot another man in the leg. *U.S. v. Walker*, __ F.2d __ (10th Cir.) No. 89-5205.

Determining the Sentence (Chapter 5)

4th Circuit holds that sentence upon probation revocation may not exceed original guideline range. (560) Upon revocation of defendant's probation, the district court sentenced him to 15 months. Defendant's guideline range at his initial sentencing was six to 12 months. The 4th Circuit reversed, holding that under 18 U.S.C. 3565(a)(2), when probation given under a guideline sentence is revoked, the court is limited at resentencing to a sentence that was available at the time of the original sentence. Thus, defendant's sentence could not exceed 12 months. The post-sentencing conduct may be considered by the district court in deciding whether to continue probation or revoke it, what sentence to select within the guideline range, and even whether to depart from the guidelines, provided the conduct justifying departure was brought to the court's attention at the original sentencing. Judge Norton, dissenting, argued that section 3565(a)(2) permitted a court to resentence a defendant to any term up to the statutory maximum. *U.S. v. Alli*, __ F.2d __ (4th Cir. April 9, 1991) No. 90-5482.

8th Circuit affirms sentence upon revocation of supervised release that is longer than original sentence. (580) Defendant contended that the 18-month sentence he received upon revocation of his supervised release was unreasonable because it was longer than the 14-month sentence for his underlying conviction. The 8th Circuit found no error. 18 U.S.C. section 3583(e)(3) provides that upon revocation of a supervised release, a court may require the defendant to serve in prison all or part of the term of supervised release without credit for time served in post-release supervision. Defendant could thus have received a maximum sentence of 3 years, his term of supervised release. *U.S. v. Oliver*, __ F.2d __ (8th Cir. April 18, 1991) No. 90-5387.

8th Circuit upholds sentence upon revocation of supervised release that exceeds original guideline sentence. (580) Defendant was originally sentenced to 14 months imprisonment and three years supervised release. Defendant's supervised release was revoked, and in accordance with 18 U.S.C. section 3583(e), the district court considered the factors listed in section 3553(a) to determine the revocation sentence. The district court resentenced defendant to two years. The 8th Circuit rejected defendant's contention that the district court incorrectly focused on the revocation conduct rather than the original offense in applying the section 3553 factors. The court also rejected defendant's contention that it violated due process for the imposition of the two-year sentence to result in his serving a sentence greater than the maximum guideline sentence for the original offense. *U.S. v. Smeathers*, __ F.2d __ (8th Cir. April 11, 1991) No. 90-2634.

10th Circuit reverses $192,000 restitution order. (610) The 10th Circuit found there was no indication that defendant had the present ability to pay anything, and no indication that upon release from prison, she would have an earning potential which would enable her to comply with the restitution order. Accordingly, the $192,000 restitution order was reversed. *U.S. v. Dunning*, __ F.2d __ (10th Cir. April 8, 1991) No. 90-6139.

10th Circuit finds 60-year old woman unable to pay restitution. (610) The 10th Circuit reversed a $192,000 restitution order imposed upon a 60-year-old woman. Although present indigency is not a bar to restitution, the court saw no evidence that defendant had any assets, hidden or otherwise, to make such a payment, or that she had the earning potential to support a restitution order of that magnitude. *U.S. v. Kelley*, __ F.2d __ (10th Cir. April 8, 1991) No. 90-6136.

D.C. Circuit rules district court need not make express findings concerning defendant's financial ability to pay fine. (630) Defendants challenged their $5,000 fines, claiming error in the district court's failure to consider or make specific findings concerning their financial ability to pay the fines. The D.C. Circuit affirmed the fines, ruling that a district court need not make specific findings concerning a defendant's financial ability to pay a fine, and that the district court did consider defendants' ability to pay a fine. The judge expressly took into consideration the presentence report, which

detailed defendants' financial situation. Each defendant's counsel presented his client's financial situation to the judge, who stated he was "not so sure" of the defendants' inability to pay. It was not clearly erroneous to find that defendants could pay such a fine. Although currently unemployed and without substantial assets, each defendant was a healthy high-school graduate with additional vocational training. *U.S. v. Mastropierro*, __ F.2d __ (D.C. Cir. April 23, 1991) No. 90-3186.

10th Circuit vacates "additional fine" because no "punitive fine" was imposed. (630) The 10th Circuit vacated a fine of $80,633 for the cost of incarceration and the cost of supervised release imposed upon defendant. Under *U.S. v. Labat*, 915 F.2d 603 (10th Cir. 1990), where a "punitive fine" has not been imposed under guideline section 5E1.2(a) because of the defendant's inability to pay or burden to the defendant's dependents, then a district court may not impose an "additional fine" under section 5E1.2(i) for the costs of incarceration. *U.S. v. Estrella*, __ F.2d __ (10th Cir. April 19, 1991) No. 90-3182.

9th Circuit holds that in exercising discretion to impose consecutive sentences, court must follow the usual departure procedures. (660) In *U.S. v. Wills*, 881 F.2d 823 (9th Cir. 1989), the 9th Circuit held that a district court retains discretion under 18 U.S.C. section 3584(a) to sentence either concurrently or consecutively despite the guidelines. Here, the court held that in deciding to depart from the guidelines and impose consecutive sentences, the district court must follow the "usual departure procedures." This ruling is in accord with four other circuits. The case was remanded for resentencing. *U.S. v. Pedrioli*, __ F.2d __ (9th Cir. April 22, 1991) No. 90-10008.

8th Circuit affirms refusal to depart based on state's concurrent prosecution of same offense. (680)(722)(810) Defendant pled guilty in state court to drug charges and received a suspended sentence. Viewing this punishment as too lenient, the federal government decided to prosecute defendant for the same offense and related firearms charges. The 8th Circuit rejected defendant's argument that the court should have departed downward because he had already been sentenced in state court for the same crime. The state did not prosecute him for one of the firearms charges. Also, there was no double jeopardy violation, since the federal crime of drug possession is a separate offense from the state crime of drug possession, even if based upon the same act. Finally, even if the district court believed, as misrepresented by the government, that the firearm offense carried a five-year minimum, this had no "substantial influence on the sentence imposed." Judge Bright dissented. *U.S. v. Woodard*, 927 F.2d 433 (8th Cir. 1991).

Departures Generally (§ 5K)

4th Circuit finds no breach of plea agreement in government's failure to move for substantial assistance departure. (710)(790) The 4th Circuit rejected the government's contention that the mere fact that the government failed to move for the departure meant that the court lacked authority to depart on substantial assistance grounds. Since the plea agreement contained a contingent promise by the government to move for a downward departure, it was proper for the district court to determine whether the defendant satisfied his contractual obligations. In this case, defendant did not. An FBI agent testified that defendant was less than forthright in detailing his participation in the drug conspiracy, and that other officers involved believed as he did. The agent also testified that defendant refused to identify the person to whom defendant delivered 40 pounds of marijuana, and refused to acknowledge that certain lists found at his house were lists of drug buyers. *U.S. v. Conner*, __ F.2d __ (4th Cir. April 18, 1991) No. 90-5012.

6th Circuit declines to consider failure to depart from mandatory sentence where government did not make motion. (710) In *U.S. v. Dumas*, 921 F.2d 650 (6th Cir. 1990), the 6th Circuit upheld the district court's refusal to depart downward from defendant's mandatory sentence under 18 U.S.C. section 924(c). It found that 18 U.S.C. section 3553(e) and guideline section 5K1.1 only authorize departures from statutory minimum sentences, not statutory mandatory sentences. Section 924(c) creates a mandatory sentence. On the government's petition for rehearing, the 6th Circuit amended the opinion to reflect that it need not consider defendant's argument concerning the district court's failure to depart, since the government did not ask the district court to depart downward on the section 924(c) conviction. *U.S. v. Reed*, __ F.2d __ (6th Cir. April 16, 1991) No. 90-3130, *amending U.S. v. Dumas*, 921 F.2d 650 (6th Cir. 1990).

7th Circuit outlines parameters for downward departure based on substantial assistance. (710) The district court departed downward in part based on defendant's substantial assistance to authorities, but also improperly relied on defendant's burdensome family responsibilities. Because the 7th Circuit could not determine what portion of the departure reflected defendant's cooperation, it remanded for resentencing. In doing so, it suggested how the district court might properly link the degree of departure to the guidelines. The guideline most analogous to a downward departure for substantial assistance is guideline 3E1.1, which authorizes a two-level reduction for acceptance of responsibility. The two-level enhancement for obstruction of justice might also be relevant. "These provisions suggest that departures based on a defendant's cooperation with authorities may warrant something on the order of a two-level adjustment for each factor found by the court to bear similarly on its evaluation of the defendant's cooperation." While this provided

"imperfect guidance," the court "renewed its caution that 'departures of more than two levels should be explained with a care commensurate with their exceptional quality.'" *U.S. v. Thomas*, __ F.2d __ (7th Cir. April 11, 1991) No. 90-2183.

9th Circuit permits departure below mandatory minimum once government makes substantial assistance motion. (710) The government moved for a downward departure, stating that its motion was made under guideline section 5K1.1, not to 18 U.S.C. section 3553(e). The district court sentenced the defendant to three years, which was below the statutory minimum of ten years. On appeal, the 9th Circuit upheld the departure, stating that 28 U.S.C. section 994(n) and guideline section 5K1.1 "do not create a separate ground for a motion for reduction below the guidelines exclusive of 3553(e)'s provision for reduction below the statutory minimum." Rather, the court found that "5K1.1 implements the directive of 994(n) and 3553(e)." Accordingly, once the government filed a motion for departure, "it was within the sentencing court's authority to exercise its discretion in determining the appropriate extent of departure," including going below the mandatory minimum sentence. Judge Alarcon dissented at length. *U.S. v. Keene*, __ F.2d __ (9th Cir. April 29, 1991) No. 89-50617.

7th Circuit refuses to review refusal to depart downward where judge exercised discretion. (720)(810) The 7th Circuit refused to review the district court's failure to make a downward departure, where the record reflected that the district court considered the mitigating factors suggested by defendant, and expressly determined that no departure was warranted. Such an exercise of discretion is not reviewable by an appellate court. *U.S. v. Macias*, __ F.2d __ (7th Cir. April 18, 1991) No. 90-1208.

10th Circuit remands where it was unclear whether court understood it had authority to depart downward. (720) Defendant urged the district court to depart downward based upon his history of severe mental problems. The 10th Circuit remanded because it was unclear whether the district court exercised its discretion not to depart, a decision that is not reviewable, or interpreted the guidelines as depriving it of the authority to depart on these grounds. The district court stated only that it was denying defendant's request, but was interrupted by counsel and did not explain why. *U.S. v. Fox*, __ F.2d __ (10th Cir. April 18, 1991) No. 90-2048.

10th Circuit affirms downward departure based on defendant's family responsibilities. (721) The district court departed downward from 27 months and sentenced defendant to five years probation on the ground that defendant was a single parent who was the sole support of her 2-month old infant, her 16-year old daughter, and her daughter's 2-month old infant. Defendant also had a steady record of employment, no prior record of drug abuse, and no other felony conviction. The 10th Circuit affirmed, finding that the aberrational character of her conduct, combined with her responsibility to support two infants, supported the departure. It rejected the government's contention that a departure based on family ties and responsibilities was improper. The language of guideline section 5H1.6 implies that there may be extraordinary circumstances where family ties and responsibilities are relevant to the sentencing decision, and this was such a case. The extent of the departure was also reasonable. *U.S. v. Pena*, __ F.2d __ (10th Cir. April 18, 1991) No. 89-2294.

2nd Circuit finds no grounds for downward departure based on victim's wrongful conduct. (722) Defendant claimed the district court erred in believing that it lacked authority to depart downward from the guidelines under section 5K2.10, which provides for departure if a victim's wrongful conduct contributed significantly to provoking the offense behavior. The 2nd Circuit rejected defendant's contention, finding that defendant's "calculated conduct to extort money, over a period of months, belies his claim of provocation." *U.S. v. Warnock*, __ F.2d __ (2nd Cir. April 18, 1991) No. 91-1056.

7th Circuit rejects family responsibilities as grounds for departure. (722) The district court departed downward from a mandatory minimum 10-year term. Although the departure was based in part upon defendant's substantial assistance to authorities, the district court also took into account defendant's extremely burdensome family responsibilities. The 7th Circuit rejected this as grounds for departure. Guideline section 5H1.6 does not authorize a court to depart downward when a judge finds a defendant's family circumstances to be particularly compelling. Section 5H1.6 states that family responsibilities are relevant in determining whether to impose restitution and fines, and if probation is an option, whether probation is appropriate. There is nothing that suggests this list is illustrative, rather than exhaustive. Since the district court could not determine what portion of the departure was based upon family responsibilities, the case was remanded. *U.S. v. Thomas*, __ F.2d __ (7th Cir. April 11, 1991) No. 90-2183.

8th Circuit affirms denial of downward criminal history departure. (722) Defendant argued that the district court should have departed downward because his criminal history overstated the seriousness of his previous criminal activity. The 8th Circuit found the district court did not abuse its discretion. Although defendant argued his eight convictions for theft netting only a few hundred dollars were trivial in nature, the district court took a different view of defendant's "well-entrenched history of continuous criminal behavior." *U.S. v. Carlisle*, __ F.2d __ (8th Cir. April 10, 1991) No. 90-2476.

1st Circuit upholds upward departure where 23 potential criminal history points were excluded from score. (733)

Defendant pled guilty to three counts of possession of stolen mail. The district court departed upward from criminal history category V, finding that although defendant had 10 criminal history points, there were 23 potential criminal history points which were not included in the calculation. Some convictions were remote in time, and others were excluded because they culminated in short sentences. The district court found several of these convictions evidenced "similar misconduct" and others revealed "the same sort of dishonesty and misappropriation of other people's property" as defendant's instant offense. The 1st Circuit affirmed, finding that the case was "close to a textbook model of departure jurisprudence." The district court made detailed findings anchored in the record and applied the proper methodology. *U.S. v. Moore*, __ F.2d __ (1st Cir. April 23, 1991) No. 90-2226.

6th Circuit affirms upward departure based on defendant's long-time association with drug trafficking. (733) Defendant was convicted of conspiring to possess and distribute marijuana. The court departed upward from criminal history category V to category VI, finding that defendant's criminal history score did not reflect the seriousness of his conduct or the likelihood of recidivism. The 6th Circuit affirmed. Defendant had an extensive criminal history involving trafficking in various kinds of drugs. Defendant had obviously profited financially from his drug trafficking, and the court believed that because of this and his extensive drug trafficking history, he was likely to continue in that trade when released from prison. Defendant's long-time association with the drug trade was more serious than a random accumulation of criminal history points for various unrelated offenses. Judge Martin, dissenting in part, would not have upheld the departure, since all of defendant's prior criminal activity was taken into account by the guidelines. *U.S. v. Feinman*, __ F.2d __ (6th Cir. April 15, 1991) No. 90-3721.

7th Circuit finds prior dismissed burglary charges proper grounds for upward criminal history departure. (733) The district court departed upward in part because of two prior residential burglary charges which had been brought against defendant at the time he was arrested for burglarizing a bank. The residential burglary charges were dropped after defendant pled guilty to the bank burglary. The 7th Circuit upheld the prior charges as grounds for the upward departure. Although an arrest record by itself is not reliable, police records appended to the presentence report indicated that all three burglaries were committed the same day. At the time defendant was arrested with his brother for the bank burglary, police recovered items stolen from the residences in the brother's car. Moreover, defendant did not deny the underlying facts concerning his arrest, arguing instead that it was per se improper to consider an arrest which did not result in a conviction. *U.S. v. Terry*, __ F.2d __ (7th Cir. April 15, 1991) No. 90-2644.

7th Circuit rejects old summary court martial as basis for upward criminal history departure. (734) The 7th Circuit found that it was error for the district court to depart based in part upon a 1969 summary court martial that did not appear in defendant's criminal history calculation. First, the court martial happened over 19 years earlier, and resulted only in a fine. Guideline section 4A1.2(e)(3) expressly prohibits a court from counting such a sentence in a defendant's criminal history, which is evidence that the sentencing commission adequately considered this circumstance. Second, the guidelines also expressly prohibit counting military sentences imposed by a summary court martial. Thus, the Sentencing Commission already considered this factor and determined that it was inappropriate in calculating criminal history. *U.S. v. Terry*, __ F.2d __ (7th Cir. April 15, 1991) No. 90-2644.

2nd Circuit affirms upward departure based upon severe psychological harm to victim. (745) Defendant shot and killed his former wife. While on parole, he became involved with a new girlfriend and began to threaten her. Consequently, defendant's probation was revoked. Despite a prohibition from prison authorities, while in prison defendant sent his girlfriend over 60 threatening letters. The district court departed upward from 21 months and sentenced defendant to two concurrent terms of 60 months. The departure was based upon the severe psychological harm to the victim, under guideline section 5K2.3. The court "did not discount" the extreme character of defendant's conduct as an additional ground for departure under guideline section 5K2.8. The 2nd Circuit affirmed. It rejected defendant's contention that since the departure was based upon harm to the victim, evidence of defendant's conduct was not relevant to support the district court's conclusions. *U.S. v. Pergola*, __ F.2d __ (2nd Cir. April 10, 1991) No. 90-1564.

5th Circuit affirms upward departure based upon risk to public safety. (745) Defendant loaded 28 cases of explosives into a U-Haul trailer and drove them from Belton, Texas to Houston. The district court departed upward from 33 months, and sentenced defendant to 60-month concurrent terms on each count. The departure was based upon the risk the offense represented in the community. The 5th Circuit affirmed. Although the commentary to guideline section 2K1.3 suggests that public risk was considered by the sentencing commission, the degree of the risk was not. The court found that the commission did not contemplate the "unique danger of improperly hauling explosives through residential areas." Judge Rubin, concurring, found it inconsistent to conclude that the guidelines do not adequately consider the degree of harm, and then not require the judge to articulate reasons for the degree of departure. However, because the 5th Circuit does not require a district court to articulate reasons for the degree of the departure, he concurred. *U.S. v. Huddleston*, __ F.2d __ (5th Cir. April 11, 1991) No. 90-2428.

Sentencing Hearing (§ 6A)

9th Circuit holds that judge may not recommend against deportation for drug-related and aggravated felonies. (750) The 9th Circuit held that the 1990 amendment to 8 U.S.C. section 1251 divested judges of the authority to issue judicial recommendations against deportation for aliens convicted of drug related offenses and aggravated felonies. Moreover the amendment provides that it applies to all convictions entered "before, on or after" the effective date of the amendment. *U.S. v. Murphey*, __ F.2d __ (9th Cir. April 29, 1991) No. 90-10178.

10th Circuit finds district court did not exceed scope of remand by considering new factors at resentencing hearing. (750)(800) The district court originally departed upward based upon the force and violence used by defendant. The 10th Circuit vacated the sentence and remanded for resentencing, finding the district court's reasons for the departure insufficient. On remand, the district court departed upward based upon victim vulnerability and more than minimal planning. Defendant contended that the district court exceeded the scope of the remand by considering new factors at his resentencing. The 10th Circuit rejected this contention. The court's remand for resentencing was not a narrowly confined request for an explanation of the court's reasons for imposing the sentence. An order vacating defendant's sentence and remanding for resentencing "directs a sentencing court to begin anew, so that 'fully *de novo* resentencing' is entirely appropriate." *U.S. v. Smith*, __ F.2d __ (10th Cir. April 16, 1991) No. 90-2017.

2nd Circuit says judge may rely on evidence from suppression hearing at sentencing. (770) Defendant argued that the district court failed to preclude the possibility that defendant's testimony at his suppression hearing influenced the court's determination of the number of marijuana plants involved in defendant's offense. The 2nd Circuit found no error in the district court's determination. It was clear from the district court's statements that it did not rely upon any evidence that was presented at the suppression hearing. Moreover, even if the judge had relied upon such evidence, it would not be error. Illegally seized evidence is reliable, and if it is clear the evidence was not gathered for the purpose of improperly influencing the sentencing judge, then it is proper to consider in sentencing. *U.S. v. Madkour*, __ F.2d __ (2nd Cir. April 11, 1991) No. 90-1397.

3rd Circuit remands because one witness's testimony was insufficient to support five kilogram finding. (770) The district court found that defendant's conspiracy involved more than five kilograms of cocaine. Although the judge presided over the trial and thus had a detailed knowledge of the evidence, the judge made this finding based upon the testimony of a single prosecution witness. The 3rd Circuit remanded, finding that this testimony alone was insufficient to support the five kilogram finding. The only other evidence cited by the judge was the fact that the conspiracy lasted 13 months, but this fact alone also did not support the court's findings. On remand, there was nothing to prevent the district court from considering pertinent testimony given at a co-defendant's trial, so long as the testimony met standards of reliability. *U.S. v. Reyes*, __ F.2d __ (3rd Cir. April 11, 1991) No. 90-5401.

11th Circuit permits reliance upon hearsay statement in presentence report. (770) The 11th Circuit rejected defendant's contention that the district court erred in relying upon inadmissible hearsay to resolve disputed factual findings contained in the presentence report. Both the guidelines and circuit case law permit a district court to consider reliable hearsay evidence at sentencing. Defendant was given an opportunity at sentencing to challenge the evidence against him, and did not show that the hearsay statements considered by the court were unreliable. *U.S. v. Query*, 928 F.2d 383 (11th Cir. 1991).

9th Circuit holds that court's mention of one factor did not indicate a failure to exercise discretion in sentencing within the range. (775)(810) Defendant argued that the district court's citation of the defendant's criminal history as its reason for choosing the top of the applicable guideline range indicated that the district court failed to consider all of the factors in 18 U.S.C. section 3553(a). In a per curiam opinion the 9th Circuit held that this issue was appealable but ruled that "simply because the court in this case chose to mention one particularly important factor does not mean that it failed to consider the others, or that the sentence was imposed in violation of law." The sentence was affirmed. *U.S. v. Cervantes-Valenzuela*, __ F.2d __ (9th Cir. April 18, 1991) No. 90-50342.

Plea Agreements, Generally (§ 6B)

4th Circuit affirms denial of evidentiary hearing on defendant's motion to withdraw his guilty plea. (790) The 4th Circuit found no error in the district court's denial of defendant's request for an evidentiary hearing on his motion to withdraw his guilty plea. None of the factors typically considered in determining whether a defendant has met his burden under Fed. R. Crim. P. 32(d) were met. Defendant, a lawyer and former governor, was not convincing in claiming that his plea was not knowing and voluntary. Defendant never made credible assertions of his innocence, and there was a long delay between the time of his plea and time he moved to withdraw the plea. The fact that the government agreed, on the morning that defendant entered his plea, to proffer its factual basis in a more limited version than it originally intended did not affect the voluntariness of the

plea or the existing plea agreement. *U.S. v. Moore*, __ F.2d __ (4th Cir. April 23, 1991) No. 90-5819.

5th Circuit finds no breach of plea agreement in government's "inflammatory assertions" about defendant. (790) Defendant's plea agreement provided that the government would recommend a sentence at the low end of the guideline range. Defendant claimed that the government violated the plea agreement by making "inflammatory assertions" to the district court in the presentence investigation report. The report stated that defendant's transportation of explosive materials was "extremely unsafe" and could have caused "significant property damage and human casualty." The district court ultimately departed upward based on the public risk caused by the offense. The 5th Circuit found no plea violation. It was not reasonable for defendant to believe that the government would withhold pertinent sentencing information from the judge. *U.S. v. Huddleston*, __ F.2d __ (5th Cir. April 11, 1991) No. 90-2428.

Forfeiture Cases

9th Circuit retains jurisdiction even though currency was improperly transferred into the U.S. treasury. (920) Forfeiture proceedings are *in rem* actions, and therefore jurisdiction generally ends with removal of the *res*. Jurisdiction may be retained however where the *res* was removed accidentally, improperly or fraudulently. Here the district court prematurely entered judgment, and the clerk failed to give notice of the entry of the judgment. Moreover the clerk twice erroneously told counsel that the judgment had not been entered when it had been. The clerk could not find the file when counsel sought to review it. When counsel was able to obtain the file he could not find the judgment in the file. Finally the docket entries were out of order. On these facts, the 9th Circuit found excusable neglect for the claimant's failure to seek a stay of the judgment before the money was transferred to the U.S. Treasury. Accordingly the court retained jurisdiction over the money. *U.S. v. $29,959.00 U.S. Currency*, __ F.2d __ (9th Cir. April 24, 1991) No. 89-55367.

9th Circuit finds probable cause for forfeiture based on large amount of currency and drugs nearby. (950) The 9th Circuit found that $29,959.00 in cash kept in the home is "strong evidence that the money was furnished or intended to be furnished for drugs." Drugs and drug paraphernalia found in the yard and adjacent trailer "are also strong evidence of a drug operation." When the police arrived, one person was found stuffing bags of cocaine down the trailer kitchen sink. An officer testified that it is common for narcotics dealers to keep the proceeds of sales separate from the transaction and drug storage location. The 9th Circuit found these factors sufficient to constitute probable cause to seize the currency. *U.S. v. $29,959.00 U.S. Currency*, __ F.2d __ (9th Cir. April 24, 1991) No. 89-55367.

New York District Court holds matriarch of extended family was innocent owner of leasehold. (960) Claimant lived in a small three-bedroom apartment with 17 members of her extended family. The government instituted forfeiture proceedings against her leasehold interest after claimant's granddaughter was arrested for selling crack from the apartment. The District Court for the Eastern District of New York found that claimant was an innocent owner. Claimant repeatedly stated that she had no knowledge of drug activity in the apartment, and that she did not know of any possible illegal uses of the drug paraphernalia recovered from the apartment. When presented with anonymous charges of drug trafficking in her household, she promptly investigated the allegations, confronting her family members and questioning them about drug activity. She prohibited members of the household from having guests while she was away, and insisted that only family members answer the door. This testimony was not incredible. The apartment was not a crack house, and the government established only one drug sale and hidden drug paraphernalia. The granddaughter did forfeit whatever independent interest in the property she might have. *U.S. v. The Leasehold Interest in 121 Nostrand Avenue, Apartment 1-C, Brooklyn, New York*, __ F.Supp. __ (E.D.N.Y. March 26, 1991) 90 CIV 1607.

AMENDED OPINIONS

(140) *U.S. v. Ray*, 920 F.2d 562 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. April 23, 1991), No. 89-10218.

U.S. v. Dumas, 921 F.2d 650 (6th Cir. 1990), *amended, U.S. v. Reed*, __ F.2d __ (6th Cir. April 16, 1991) No. 90-3130.

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

General Application Principles (Chapter 1)

6th Circuit uses new amendment to interpret earlier guideline. (130) Guideline section 3C1.1 was amended in 1990 to specifically exclude from enhancement avoiding or fleeing from arrest. Although this amended guideline did not apply to defendant, the 6th Circuit held that "proper application of the Guidelines on a consistent basis warrants a remand for resentencing." *U.S. v. Sanchez*, __ F.2d __ (6th Cir. March 28, 1991) No. 89-2432.

8th Circuit upholds increase in offense level for value of plane and more than minimal planning. (160)(220) Defendant was convicted of conspiracy to transport a stolen aircraft. The district court increased his offense level because the airplane was worth over a million dollars and the offense involved more than minimal planning. The 8th Circuit upheld both adjustments. Although defendant presented evidence that the plane was worth less than one million dollars, there was conflicting evidence from witnesses who testified that the plane was worth several million dollars. Defendant had purchased disguises for himself and his girlfriend, which by itself, was sufficient to establish that the offense involved more than minimal planning. *U.S. v. Culver*, __ F.2d __ (8th Cir. March 28, 1991) No. 89-3008WM.

1st Circuit sentences defendant for additional marijuana that undercover agents placed in his car. (170)(260) The government intercepted a load of marijuana prior to delivery. Posing as the drug suppliers, undercover agents loaded 150 pounds of marijuana into the car defendant was supposed to use to transport 30 pounds of marijuana. Defendant argued that it was improper to sentence him on the basis of 150 pounds, since he negotiated, paid for and expected to receive only 30 pounds of marijuana. The 1st Circuit rejected this argument. At the time defendant went to retrieve the car, the undercover agents notified him that they had loaded the car with 150 pounds. Defense counsel acknowledged that defendant knew at the time he got into the car that he was transporting 150 pounds. Defendant accept

SECTION

ed delivery of a car containing 150 pounds with full knowledge that this was the quantity he would now be possessing. *U.S. v. Rosen*, __ F.2d __ (1st Cir. April 5, 1991) No. 90-1650.

7th Circuit finds that defendant had necessary scienter for firearm enhancement. (170)(284) A search of the car defendant was driving uncovered two bags of marijuana in a box in the back seat and two handguns in a briefcase in the rear. The car and the briefcase belonged to a co-defendant, who was not present at the arrest. Defendant challenged the firearms enhancement under guideline section 2D1.1(b) on the ground that the government failed to prove that he had any knowledge of the weapons' existence. The 7th Circuit agreed that language in the prior version of guideline section 1B1.3 (since eliminated in the November 1989 amendments) required that defendant have knowledge of the weapons in order to receive a section 2D1.1(b) enhancement. Nevertheless, the court upheld the enhancement, because the evidence demonstrated that defendant and the co-defendant worked closely with one another in the course of their drug conspiracy, and that defendant's sister and the co-defendant's wife were both linked to the weapons. *U.S. v. Fiala*, __ F.2d __ (7th Cir. March 28, 1991) No. 90-1489.

9th Circuit holds that application notes have the force of legislative history. (180) The 9th Circuit held that although it was not bound to follow the application notes to section 4B1.2, "the notes do have the force of legislative history." *U.S. v. Davis*, __ F.2d __ 91 D.A.R. 4363 (9th Cir. April 17, 1991) No. 89-10415.

Offense Conduct, Generally (Chapter 2)

9th Circuit reverses departure for extreme psychological injury to the victim's family. (210)(746) In departing upward the district court cited the "extreme psychological injury" to the victim's family, relying on guideline section 5K2.3. The 9th Circuit reversed, noting that the term "victim" in the applicable guidelines section 2A2.2(b) "includes only the direct victim of the crime charged and not others affected by it." The court noted that if section 5K2.3 applies to those affected by crimes such as the victim's family, "then the justice system would punish the murderer of the head of a household more harshly than the murderer of a transient." *U.S. v. Hoyungowa*, __ F.2d __ (9th Cir. April 16, 1991) No. 89-10485.

11th Circuit affirms that counterfeit currency detector is a "counterfeiting device" under section 2B5.1(b)(2). (220) The 11th Circuit affirmed the district court's decision to enhance defendant's sentence under guideline section 2B5.1(b)(2) for possessing a "counterfeiting device." The device possessed by defendant was an inexpensive detector costing about $20, and used by many legitimate businesses in the Miami area to detect counterfeit currency. Defendant contended that the enhancement was improper because he merely distributed the counterfeit currency. The 11th Circuit rejected this argument, holding that to permit enhancement for possession of a counterfeiting device, it is not necessary for the government to prove that the defendant was engaged in the production of counterfeit currency, or that the device possessed was ever used. The detector device could be used by counterfeiters as a means of quality control. Therefore, it was not unreasonable to find that it was a counterfeiting device. *U.S. v. Castillo*, __ F.2d __ (11th Cir. April 18, 1991) No. 89-6302.

10th Circuit calculates offense level based upon highest offense level in grouped counts. (240)(470) Defendant pled guilty to engaging in a continuing criminal enterprise, one of the predicate acts of which was manufacturing a quantity of methamphetamine. Defendant also pled guilty to manufacturing a quantity of methamphetamine. He contended it was error for the district court to calculate his offense level as 36, the base offense level for the manufacture of methamphetamine, rather than 32, which was the base offense level for engaging in a continuing criminal enterprise. The 10th Circuit rejected this argument, finding that since the offenses were grouped, the district court properly assigned defendant the highest offense level for the group. The court also rejected defense counsel's suggestion that the methamphetamine charge was a lesser-included offense of the con-

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tinuing criminal enterprise offense. *U.S. v. Morrow*, __ F.2d __ (10th Cir. April 2, 1991) No. 90-2102.

6th Circuit upholds sentencing for more than one kilogram of cocaine based on testimonial evidence. (250) Defendants argued that the district court's findings that 5 to 14.9 kilograms of cocaine were involved in their drug conspiracy was erroneous because only one kilogram was introduced into evidence at trial. The 6th Circuit upheld the district court's finding. A co-conspirator testified that he transported more than seven kilograms of cocaine at the request of one of the defendants. The fact that the evidence was testimonial and not physical was irrelevant. *U.S. v. Sanchez*, __ F.2d __ (6th Cir. March 28, 1991) No. 89-2432.

6th Circuit affirms drug calculation based upon amount defendant negotiated to sell to confidential informant. (265) Although defendant agreed to sell 500 grams of cocaine to a confidential informant, when defendant was arrested, he was in possession of only 300 grams of cocaine. The district court nonetheless sentenced defendant on the basis of the full 500 grams. The 6th Circuit upheld this determination. If a defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution is used to calculate the applicable amount. *U.S. v. Gonzales*, __ F.2d __ (6th Cir. April 3, 1991) No. 90- 1544.

6th Circuit affirms firearm enhancement based upon gun found in apartment leased by one of the co-conspirators. (284) Based on information from two suspects, police searched an apartment and uncovered a loaded revolver, $150 in cash, an apartment lease in the name of one of the defendants, a triple beam scale with cocaine residue, 31 zip lock bags containing cocaine, and a pager. The 6th Circuit upheld an enhancement based upon both defendants' possession of a firearm during a drug crime. The fact that the drugs and weapon were found in the same apartment provided ample evidence that the gun was used during the commission of a drug crime. The apartment was leased to one of the defendants and he was residing there when the weapon was found. This provided sufficient evidence to support the finding that this defendant was in constructive possession of the weapon. Because the defendant's possession was reasonably foreseeable, possession of the weapon was imputed to the other co-defendant. *U.S. v. Sanchez*, __ F.2d __ (6th Cir. March 28, 1991) No. 89- 2432.

6th Circuit upholds perjury sentence based on level for underlying offense. (320)(380) Defendant was convicted of perjury in connection with misrepresentations he made in a pro se challenge to a drug conviction. The 6th Circuit affirmed the district court's determination that defendant had a base offense level of 20 for his perjury conviction. Guideline section 2J1.3 states that if the perjury involved another criminal offense, guideline section 2X3.1 is to be applied if the offense level is greater than 12. Under section 2X3.1(a), the base offense level is six levels lower than the offense level for the underlying offense, but in no event less than four or more than 30. The underlying offense for the perjury conviction was defendant's drug conviction, which had a base offense level of 26. Therefore, the offense level for defendant's perjury conviction was 20. *U.S. v. Gomez-Vigil*, __ F.2d __ (6th Cir. April 3, 1991) No. 90-1534.

7th Circuit upholds use of hearsay testimony from co-defendant's cellmate. (330)(770) Defendant was convicted of constructing and placing more than a dozen bombs around a town. The district court sentenced defendant under guideline 2K1.4(c)(1) for having intended to cause bodily injury. Defendant claimed it was error for the district court to consider hearsay testimony in determining his sentence. The former cellmate of a co-defendant testified that the co-defendant told the cellmate that the co-defendant intended to kill a certain attorney with one of the bombs. The co-defendant's attempted murder of the attorney was attributable to defendant as a co-conspirator. The testimony was corroborated by the fact that the bomb found at the attorney's office was twice the size of any other bombs. The number of bombs and placement in the center of town, under bridges, and in other dangerous locations further evidenced the conspirator's intent to kill or cause injury. *U.S. v. Hubbard*, __ F.2d __ (7th Cir. April 4, 1991) No. 90-1049.

11th Circuit affirms that arson defendant knowingly created a substantial risk of death or serious bodily injury. (330) Defendant pled guilty to malicious damage to property by fire. The district court increased his offense level by 18 under guideline section 2K1.4(b)(1) because it found that defendant "knowingly created a substantial risk of death or serious bodily injury." The 11th Circuit affirmed. The district court found that defendant set the fire with multiple points of origin, surrounding businesses were at considerable risk, and the firemen who fought the blaze were substantially endangered. An inhabited apartment complex was located 35 feet from the burning building. These findings were made despite defendant's testimony that he had carefully set the fire to avoid creating such a risk. Given the district court's opportunity to judge defendant's credibility, the appellate court would not disturb the lower court's findings. *U.S. v. Wilson*, __ F.2d __ (11th Cir. April 2, 1991) No. 89-6317.

5th Circuit holds that export of venturi heaters for F-4 aircraft involved "sophisticated weaponry." (345) Defendant was convicted of various violations of the Arms Export Control Act. Guideline section 2M5.2 assigns a base offense level of 22 if such an offense involved "sophisticated weaponry," otherwise the offense level is 14. The district court assigned defendant an offense level of 22, reasoning that although the venturi heaters defendant attempted to export were not of themselves a sophisticated weapon, sophisticated weaponry was involved because the heater was de-

signed for the F-4 Phantom aircraft. The 5th Circuit affirmed this determination. Because the venturi heater ensures proper steerage of the aircraft, it is integral to the plane's fighting effectiveness. Thus, the heaters were involved in a tangible way with sophisticated weaponry. *U.S. v. Nissen*, __ F.2d __ (5th Cir. April 2, 1991) No. 90-2209.

Adjustments (Chapter 3)

9th Circuit rejects departure where victim was police officer because sentence was already adjusted for "official victim." (410)(746) Defendant's 210 month sentence already included an upward adjustment by three levels under section 3A1.2 for killing an "official victim." Nonetheless it appeared that the district court considered the fact that the victim was a police officer when it departed upward. In vacating the sentence on other grounds, the 9th Circuit emphasized that the departure could not be based on the victim's status as a law enforcement officer. The court rejected the government's argument that the murder was unusually aggravated because the officer had approached the defendant in a "nonconfrontational" manner and the defendant was a fugitive. The court held that these circumstances simply warranted application of the guideline for official victims and not departure from the guidelines. *U.S. v. Hoyungowa*, __ F.2d __ (9th Cir. April 16, 1991) No. 89-10485.

6th Circuit affirms leadership role for drug defendant. (430) The 6th Circuit affirmed the district court's finding that defendant was an organizer of a drug transaction. Defendant was the one who originally contacted the undercover informant to sell him drugs, and all contacts with the undercover informant were by defendant, not his co-defendant. Defendant was observed canvassing houses, presumably collecting the cocaine. Finally, defendant was observed leaving his own residence with a paper bag which contained cocaine. *U.S. v. Gonzales*, __ F.2d __ (6th Cir. April 3, 1991) No. 90-1544.

8th Circuit rejects minor role for pilot who was to fly stolen aircraft. (440) Defendant was convicted of conspiracy to transport a stolen aircraft. The 8th Circuit found that defendant, as the only conspirator involved who could pilot the plane, was not a minor participant, since defendant's role in the offense was "crucial." *U.S. v. Culver*, __ F.2d __ (8th Cir. March 28, 1991) No. 89-3008WM.

10th Circuit rejects minor participant status for driving car with drugs across border. (440) Defendant was arrested at the Mexican border after a search disclosed over 22 kilograms of marijuana hidden in the door panels of the vehicle he was driving. The 10th Circuit affirmed the district court's denial of a reduction based on defendant's minor role in the offense. The facts were almost a "carbon copy" of *U.S. v. Pelayo-Munoz*, 905 F.2d 1429 (10th Cir. 1990), in which the 10th Circuit held that a drug courier is not necessarily a minor participant. Here, the record did not require the district court to find defendant was a minor participant. Defendant was the driver and sole occupant of a vehicle which was carrying marijuana hidden in its door panels. Although defendant claimed not to have knowledge of the drugs, and suggested that they had been hidden in the car by its former owner, the district court was not obligated to accept this contention. *U.S. v. Rios-Ramirez*, __ F.2d __ (10th Cir. April 2, 1991) No. 89-2167.

7th Circuit finds defendant's engineering knowledge and explosives experience was a special skill. (450) Defendant was convicted of constructing and placing more than a dozen bombs around a town. The 7th Circuit affirmed the district court's determination that defendant's engineering knowledge and experience with explosives was a special skill within the meaning of guideline section 3B1.3. The notes to the guidelines cite chemists and demolition experts as examples of people to whom the special skill enhancement should apply. *U.S. v. Hubbard*, __ F.2d __ (7th Cir. April 4, 1991) No. 90-1049.

8th Circuit upholds enhancement for use of special skill by pilot involved in conspiracy to transport stolen aircraft. (450) Defendant was convicted of conspiracy to transport a stolen aircraft. He argued that an enhancement based upon his use of his special skill as a pilot was unwarranted because he was arrested before he had an opportunity to pilot the plane. The 8th Circuit rejected this, finding that defendant's skill as a pilot "extend[ed] to more than actually flying the aircraft. His skills were required to plan for fuel, devise flight paths, and to prepare the aircraft for flight after the undercover agent left." *U.S. v. Culver*, __ F.2d __ (8th Cir. March 28, 1991) No. 89-3008WM.

6th Circuit reverses obstruction of justice enhancement based upon defendant's abandonment of residence. (460) The district court found that defendants had obstructed justice by attempting to avoid apprehension by police. Upon the arrest of their co-conspirator, both defendants had abandoned the apartment they had previously occupied. The 6th Circuit reversed the obstruction enhancement. Defendants had no obligation to continue to reside at their known residence after the arrest of their co-conspirator. Although this did make their apprehension more difficult, it did not warrant the obstruction of justice enhancement. Guideline section 3C1.1 was recently amended to specifically exclude from enhancement avoiding or fleeing from arrest. Although this amended guideline did not apply to defendant, "proper application of the Guidelines on a consistent basis warrants a remand for resentencing." *U.S. v. Sanchez*, __ F.2d __ (6th Cir. March 28, 1991) No. 89-2432.

7th Circuit reverses obstruction enhancement which was based upon defendant's exculpatory statement. (460) During

a traffic stop, defendant told a trooper that there was nothing illegal in the car. A subsequent search of the car uncovered marijuana and two handguns. The 7th Circuit reversed an enhancement for obstruction of justice based upon defendant's exculpatory statement to the trooper. Although application note 3 of guideline section 3C1.1 excludes denials of guilt as grounds for an enhancement, the government contended that defendant's statement was not a denial of guilt because defendant was not accused of any crime. The 7th Circuit rejected this reasoning, finding no basis for distinguishing between those denials of guilt uttered before the initiation of legal proceeding and those spoken after such proceedings have begun. *U.S. v. Fiala*, __ F.2d __ (7th Cir. March 28, 1991) No. 90-1489.

8th Circuit finds reasons for denial of acceptance of responsibility reduction are ambiguous. (480) 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 for the first time that she lost control of the car when one of the passengers in the car grabbed her face and attempted to kiss her. The district court denied defendant a reduction for acceptance of responsibility. The 8th Circuit remanded for the district court to clarify its reasons for the denial. Defendant's failure to mention this possible mitigating factor at the time she was interviewed by an FBI agent after the accident did not merit the denial. Her trial testimony did not contradict this earlier statement, but simply explained in more detail how the accident occurred. It would also be improper to deny defendant the reduction because she testified at trial and did not plead guilty. However, if the court rejected defendant's acceptance of responsibility because it found that she lacked credibility, then the court could affirm her sentence. *U.S. v. Charger*, __ F.2d __ (8th Cir. March 29, 1991), *vacating U.S. v. Charger*, 924 F.2d 765 (8th Cir. 1991) No. 90-3632.

6th Circuit denies acceptance of responsibility reduction for defendant who committed drug crimes while out on bond. (485) The district court found defendant was not entitled to a reduction for acceptance of responsibility because she was involved in drug activity while out on bond pending sentencing. The 6th Circuit affirmed, finding that "[d]efendant's acts while on bond awaiting sentencing are not indicative of a person who is truly remorseful about her previous criminal conduct." *U.S. v. Lassiter*, __ F.2d __ (6th Cir. April 4, 1991) No. 90-3632.

9th Circuit denies acceptance of responsibility despite defendant's belated expression of remorse and repentance. (485) Defendant argued that the district court improperly denied acceptance of responsibility because he did not provide assistance to the government. The defendant made no statements to the arresting officers, and gave a false name until confronted with his driver's license. He pleaded not guilty and put the government to its burden of proof at trial. Although the defendant apologized to the court at the time of sentencing, the 9th Circuit held that the district court "was free to discount Restrepo's belated expression of remorse and repentance." The district court's denial of credit for acceptance of responsibility was not clearly erroneous. *U.S. v. Restrepo*, __ F.2d __ (9th Cir. April 10, 1991) No. 90-50092.

Criminal History (§ 4A)

3rd Circuit remands for determination of whether juvenile adjudications were related. (500) Defendant argued that his two juvenile adjudications should have been merged for criminal history purposes because the cases were consolidated for disposition and were therefore related. The 3rd Circuit found it was unclear whether the adjudications simply resulted in concurrent sentences or whether they were actually consolidated for sentencing. Concurrent sentences were imposed by two different judges on two different occasions. The case was remanded so that the precise sequence of events might be established. *U.S. v. Davis*, __ F.2d __ (3rd Cir. April 2, 1991) No. 90-1755.

3rd Circuit holds "sentence to confinement" has same meaning as "sentence of imprisonment." (500) Defendant contended it was error for the district court to assign two criminal history points for each of his indeterminate juvenile adjudications under guideline section 4A1.2(d)(2)(A), which applies only to adult or juvenile "sentences to confinement" of at least 60 days. The 3rd Circuit rejected defendant's interpretation. Guideline sections 4A1.1(a) and (b), which apply to offenses committed by defendants age 18 or over, assign criminal history points based on the "sentence of imprisonment," which is defined to mean "the maximum sentence imposed," rather than the length of time actually served. The court found that the term "sentence to confinement" had the same meaning as "sentence of imprisonment." Defendant's prior juvenile adjudications qualified for two criminal history points under section 4A1.2(d)(2) because in each case the "maximum sentence imposed" was at least 60 days. If this methodology overvalued the severity of prior juvenile adjudications, a district court could depart from the guideline range. *U.S. v. Davis*, __ F.2d __ (3rd Cir. April 2, 1991) No. 90-1755.

4th Circuit upholds use of state juvenile adjudications. (500) Defendant argued that it was improper to consider prior juvenile adjudications which were confidential and subject to expungement in calculating his criminal history score. The 4th Circuit rejected defendant's arguments. New York state law expressly permits the use of juvenile records by a later sentencing court unless the records have been sealed. Defendant failed to meet his burden of showing that his records were sealed. Moreover, even if state law sealed the records, this would not bar consideration of them under the guidelines. The guidelines expressly permit the court to

consider certain juvenile adjudications. The court also rejected defendant's contention that consideration of the juvenile adjudications violated due process. Defendant committed his juvenile offenses after the effective date of the guidelines, and thus was charged with notice that the juvenile crimes could be later used for sentencing under federal law. *U.S. v. Daniels*, __ F.2d __ (4th Cir. April 1, 1991) No. 90-5324.

4th Circuit holds that where facts are undisputed, determination of whether prior sentences are related is a legal determination. (500)(820) The 4th Circuit held that when the facts as to prior convictions and prior sentences are undisputed, the question of whether such prior sentences are "related" under guideline section 4A1.2(a)(2) is a legal determination. In addition, where the facts as to the three elements defining a career offender set forth in guideline section 4B1.1 are not in dispute, the question of whether a defendant is a career offender is a legal and not a factual determination. *U.S. v. Rivers*, __ F.2d __ (4th Cir. April 2, 1991) No. 90-5656.

4th Circuit reverses determination that prior armed robberies are "related" for career offender purposes. (520) The 4th Circuit reversed the district court's determination that defendant's two prior offenses were related and thus counted as one prior offense for career offender purposes. In the city of Baltimore, defendant received from one judge a 12-year sentence for armed robbery. Several months later, in the county of Baltimore, defendant received from a different judge a 16-year sentence for a different armed robbery. The district court found that given the unusual geographic location of Baltimore city and county, the concurrent sentences imposed were the "functional equivalent" of a consolidation under the guidelines. The 4th Circuit found that there was no factual or legal support for the district court's findings. The convictions were in different courts having separate jurisdictions and were entered five months apart. The district court's alternate holding that the crimes were part of a "common scheme" to support defendant's drug addiction was also clearly erroneous. The fact that both offenses were committed to support one drug habit did not make the offenses related. *U.S. v. Rivers*, __ F.2d __ (4th Cir. April 2, 1991) No. 90-5656.

11th Circuit includes prior military sentence for being AWOL in defendant's criminal history. (500) Defendant challenged the district court's inclusion in his criminal history score a prior sentence imposed by a military court for being absent without leave. The 11th Circuit rejected this challenge. Guideline section 4A1.2(g) specifically provides that sentences imposed by a general or special court martial for a military offense are counted for criminal history purposes. Defendant claimed his sentence should not have been counted because AWOL has no civilian counterpart, but is a uniquely military offense not relevant to a defendant's danger to the community or likelihood of recidivism. This argument was unsupported by the clear language of the guidelines. Moreover, section 4A1.2(c)(1) lists a series of minor offenses that are counted under certain circumstances, including offenses that are "similar" to those listed. A military AWOL is similar to the listed civilian offense of contempt of court and failure to obey a police officer, all of which involve a disregard for lawful authority. *U.S. v. Wilson*, __ F.2d __ (11th Cir. April 2, 1991) No. 89-6317.

9th Circuit holds that prior conviction is a felony if punishable by imprisonment for more than a year. (520) Defendant argued that his prior conviction under California Health and Safety Code section 11351 was a misdemeanor. The 9th Circuit rejected the claim, noting that the application note 3 to section 4B1.2, says that "prior felony conviction" means an offense punishable by imprisonment for more than one year, "regardless of the actual sentence imposed," and section 11351 provides for a sentence of up to four years. *U.S. v. Davis*, __ F.2d __ 91 D.A.R. 4363 (9th Cir. April 17, 1991) No. 89-10415.

9th Circuit finds, based on transcript, that prior conviction was for possession with intent to sell. (520) Section 4B1.1 provides that a defendant is a career offender if he has two prior felony convictions for crimes of violence or controlled substance offenses. Under section 4B1.2(2) "controlled substance offenses" include possession with intent to distribute, but not simple possession. Defendant argued that his prior conviction under California Health and Safety Code section 11351 was for simple possession. After reviewing the transcript of the plea hearing, however, the 9th Circuit rejected the argument." [The] plea hearing and the admissions of his lawyer [at the hearing] make it clear that the prior conviction was not for simple possession but rather was for possession with intent to sell." *U.S. v. Davis*, __ F.2d __ 91 D.A.R. 4363 (9th Cir. April 17, 1991) No. 89-10415.

3rd Circuit rules defendant whose drug offense was subject to statutory enhancement could also be treated as career offender. (520) Defendant pled guilty to two drug offenses. Because of his prior drug convictions, the offenses were subject to statutory enhancement under 21 U.S.C. section 841(b)(1), resulting in a minimum term of imprisonment of 10 years and a maximum term of life imprisonment. Defendant was also classified as a career offender due to the prior drug felonies. Because the statutory maximum for his offense had been enhanced to life imprisonment, as a career offender his offense level was 37 and his criminal history category was VI. Defendant contended that application of the enhanced penalty provision and the career criminal guideline resulted in double punishment for his prior convictions. The 3rd Circuit rejected this contention. Application note 2 to section 4B1.1 provides that "Offense Statutory Maximum" refers to the maximum term of imprisonment authorized for the offense of conviction. Moreover, the career offender provisions implement Congress' mandate to sentence career

criminals at or near the maximum term authorized by statute. *U.S. v. Amis*, 926 F.2d 328 (3rd Cir. 1991).

Determining the Sentence (Chapter 5)

California District Court denies custody credit for time spent in pretrial home confinement. (600) As a condition of his bond, defendant was "confined to his residence, except for court appearances, visits to his lawyer to assist in his defense, or such other absences as might be approved at least 24 hours in advance by Pretrial Services." To assure his compliance, defendant was required to wear an ankle bracelet which was electronically connected to a privately operated monitoring center. Defendant argued that the conditions of his release on bond were tantamount to incarceration, entitling him to 34 days credit for time served, under 18 U.S.C. section 3568. District Judge Wilson rejected the argument. The court distinguished *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) which held that a petitioner who was required to spend each evening and night in a community treatment center was entitled to credit for time served in custody. *U.S. v. Anderson*, __ F.Supp. __ 91 D.A.R. 4239 (C.D. Cal. Jan. 23, 1991) No. CR87-571-SVW.

Departures (§ 5K)

3rd Circuit reverses downward departure based on defendant's youthfulness, cooperation with authorities and family responsibilities. (722) Defendant was classified as a career offender based on three prior felonies, two of which occurred within several months of each other when defendant was 18 years old. The district court departed downward based on defendant's youthfulness and immaturity at the time he committed two of the prior offenses, the short time span between the commission of the offenses, defendant's prior cooperation with authorities and his dependent child. The 3rd Circuit reversed, finding that all of theses factors were adequately considered by the Sentencing Commission. A defendant's cooperation is not grounds for departure absent a government motion. A defendant's family responsibilities are also not ordinarily relevant. Judge Rosenn, dissenting, would have permitted a downward departure, and argued for a more flexible application of the career offender guidelines. *U.S. v. Shoupe*, __ F.2d __ (3rd Cir. March 29, 1991) No. 90-5604.

8th Circuit rejects downward departure based upon defendant's status as a biracial adopted child. (722) Defendant pled guilty to armed bank robbery. The district court departed downward because of defendant's adoptive background. Defendant is biracial, and was adopted at age 3 months by a white couple who did not realize that defendant was biracial. The 8th Circuit reversed, finding that a defendant's race or family situation was an improper ground for a downward departure. Although defendant argued that the departure was based upon his emotional and mental condition, the 8th Circuit found that the district court did not rely upon this as a reason for the departure. The disparity between the guideline sentencing range for this offense and a lower sentencing range applicable to defendant in a pending bank fraud case was also not a proper ground for the departure. The pending case was for making false statements in connection with a bank loan, an offense which was not comparable to armed robbery. Judge Heaney, dissenting, would have affirmed the trial court's exercise of discretion. *U.S. v. Prestemon*, __ F.2d __ (8th Cir. April 4, 1991) No. 89-5543.

6th Circuit vacates upward departure for failure to explain why lesser criminal history categories were insufficient. (730) Defendant fell within criminal history category II. However, because defendant was arrested for state drug charges while out on bond for the instant offense, the district court departed upward to criminal history category VI. The 6th Circuit vacated the sentence, finding that while a departure was appropriate in this case, the degree of the departure was not properly justified. First, the district court failed to justify the degree of departure, stating only that the intermediate criminal history categories were "too lenient." Moreover, the degree of departure was not adequately linked to the structure of the guidelines. If the order of defendant's crimes had been reversed, the sentencing guideline would add five criminal history points to defendant' score, placing her in category IV. Judge Jones concurred. *U.S. v. Lassiter*, __ F.2d __ (6th Cir. April 4, 1991) No. 90-3632.

6th Circuit affirms upward departure where consolidation of prior offenses prevented defendant from being a career offender. (733) Defendant had an offense level of 28 and a criminal history level of III, resulting in a guideline range of 97 to 121 months. The district court departed upward and sentenced defendant to 236 months, finding that defendant's prior criminal record had not been adequately reflected by the guidelines. Not only had two prior serious drug felonies been consolidated, but their consolidation prevented defendant from qualifying as a career offender. The 6th Circuit affirmed the upward departure. The district court correctly determined that the guidelines understated defendant's true criminal history. The direction and degree of departure was also reasonable. If sentenced as a career offender, defendant would have an applicable guideline range of 210 to 262 months. *U.S. v. Gonzales*, __ F.2d __ (6th Cir. April 3, 1991) No. 90-1544.

9th Circuit reverses criminal history departure for failure to explain extent of departure. (734) The 9th Circuit ruled that the district court sufficiently specified that defendant's Level I criminal history category failed to reflect his tribal criminal record of 16 offenses. However the court did not

explain how this tribal criminal record warranted all or part of the 90 month upward departure. The government conceded that the district court's failure to explain the level of its upward departure required remand for resentencing. *U.S. v. Hoyungowa*, __ F.2d __ (9th Cir. April 16, 1991) No. 89-10485.

1st Circuit reverses upward departure because improper ground for departure was "linked" to proper ground. (740)(746) Defendant was convicted of transporting a boatload of illegal aliens to Puerto Rico. The district court departed upward based upon inhumane treatment of the aliens and the dangerousness of the voyage. Following its decision in *U.S. v. Trinidad De La Rosa*, 916 F.2d 27 (1st Cir. 1990), the 1st Circuit found insufficient evidence of inhumane treatment to justify the departure. The court then held that a departure that rests upon both valid and invalid grounds may be affirmed as long as (a) the direction and degree of departure are reasonable in relation to the valid departure ground, (b) excision of the improper ground does not defeat the expressed reasoning of the district court, and (c) removal of the improper ground would not alter the district court's view of the sentence to be imposed. If the reasons for a departure provided by a district court appear intertwined, or the improper reason was the centerpiece of the reasoning, or the remaining ground cannot support the departure, the sentence should be vacated. In this case, the two grounds were linked together, and the sentence was vacated. *U.S. v. Diaz-Bastardo*, __ F.2d __ (1st Cir. March 29, 1991) No. 90-1800.

8th Circuit affirms upward departure where stolen plane was to be used to transport drugs. (745) Defendant was convicted of conspiracy to transport a stolen aircraft. The district court departed upward after finding that the crime was committed to facilitate the transportation of drugs. The 8th Circuit upheld the departure, noting that guideline section 5K2.9 authorizes an upward departure if the offense was committed to facilitate the commission of another offense. The court rejected defendant's claim that the district court gave inadequate reasons for imposing the increased sentence, even though the court did not specifically state the evidence upon which it was relying. The court also found there was sufficient evidence to support the district court's finding that defendant committed the crime to facilitate drug trafficking. There were statements made by the co-conspirators that part of the cost of the airplane would be paid in the form of cocaine. Drugs were referred to in the conversations between the agents and conspirators. There was also strong circumstantial evidence that the aircraft would be used to transport illegal goods to and from Columbia. *U.S. v. Culver*, __ F.2d __ (8th Cir. March 28, 1991) No. 89-3008WM.

8th Circuit affirms upward departure for extreme psychological injury to fraud victim. (745) Defendant pled guilty to two counts of credit card fraud and one count of mail fraud. The district court departed upward from a guideline range of 30 to 37 months, and sentenced defendant to 84 months. Defendant had a 15-year history of similar thefts, frauds and forgeries, most of which were conducted under other people's identities. The departure was based in part upon the severe psychological injury and property damage suffered by one of the men whose identity defendant frequently assumed. The 8th Circuit affirmed the upward departure. Defendant ruined the victim's academic record and "ruined and muddied and sullied forever" the victim's identity. Moreover, defendant did "not once complete[] a term of supervised release or probation without returning to his pattern of criminal activity and the same types of offenses against the same person without any regard for the consequences to himself or [the victim]." Senior Judge Heaney concurred in the result. *U.S. v. Perkins*, __ F.2d __ (8th Cir. April 4, 1991) No. 90- 1983.

Sentencing Hearing (§ 6A)

5th Circuit reverses district court's resentencing of defendant in absentia. (750) Defendant's original sentence was vacated because the district court improperly increased defendant's offense level by two based upon the vulnerable victim enhancement. On remand, the district court resentenced defendant, in absentia, to the maximum allowable sentence after deducting the two-level enhancement. The district court concluded that because the new sentence was less onerous than the original sentence, the resentencing proceeding was a "reduction in sentence" under Fed. R. Crim. P. 35, and the presence of the defendant was therefore not required under Rule 43(c)(4). The 5th Circuit once again vacated the sentence and remanded. In order to avoid a possible conflict with the 5th and 6th Amendments, the court held that a Rule 35(a) proceeding to "correct" a sentence on remand is not a "reduction in sentence" under Rule 43(c)(4) after the court of appeals has vacated the defendant's original sentence. Thus, a defendant has the right to be present and to allocute at the resentencing. *U.S. v. Moree*, __ F.2d __ (5th Cir. March 28, 1991) No. 90-1618.

6th Circuit holds that sentencing court is free to consider relevant evidence excluded at trial. (770) The 6th Circuit held that a sentencing court is free to consider relevant evidence excluded at trial in determining a defendant's sentence. *U.S. v. Sanchez*, __ F.2d __ (6th Cir. March 28, 1991) No. 89-2432.

Plea Agreements, Generally (§ 6B)

4th Circuit refuses to enforce alleged informal plea agreement. (780) Defendant argued that the district court erred in refusing to order specific enforcement of an alleged plea

agreement. He contended that shortly after his arrest, before counsel was appointed, he was told by a police detective that if he cooperated, the detective would see that defendant got less time. Defendant assisted the authorities in arresting his co-defendant, but the government did not move for a downward departure based on substantial assistance. The 4th Circuit found no error in the district court's actions. Defendant's written plea agreement did not require the government to file such a motion. At defendant's Rule 11 hearing, defendant and his counsel agreed that the written plea agreement was the entire agreement between the parties and that there were no separate agreements. *U.S. v. Daniels*, __ F.2d __ (4th Cir. April 1, 1991) No. 90-5324.

5th Circuit finds no error in court's failure to advise defendant of guideline range. (780) Defendant contended that the district court failed to inform him of the minimum and maximum penalties available under the sentencing guidelines. The 5th Circuit rejected this argument, since the court did advise defendant of the statutory maximum for the two offenses. Although it did not advise defendant of the applicable guideline range, this was not error. "We do not expect the trial court to be fully apprised of the relevant guideline computations when guilty pleas are accepted." *U.S. v. DeFusco*, __ F.2d __ (5th Cir. April 17, 1991) No. 90-4119.

7th Circuit finds district court need not consider defendant's sentence expectations prior to denying motion to withdraw plea. (790) The 7th Circuit found no abuse of discretion in the district court's denial of his motion to withdraw his guilty plea without considering evidence of defendant's expectation of his likely sentence. Before accepting the plea the district court conducted an extensive hearing, at which defendant admitted that he understood that his sentence would depend upon a number of factors and that the government was not bound to make any recommendation as to the specific sentence he would receive. Defendant was told he could be sentenced up to five years, and that he would have no right to withdraw his plea if his sentence was more severe than he expected. Allowing defendant to withdraw his plea because of "secret expectations that he harbored in the face of his directly contradictory sworn testimony would undermine the strong societal interest in the finality of guilty pleas." *U.S. v. Scott*, __ F.2d __ (7th Cir. April 5, 1991) No. 90-2288.

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

7th Circuit reviews "special skill" determination under two-part analysis. (820) Defendant challenged an enhancement under guideline section 3B1.3 for use of a special skill. The 7th Circuit found it should review the enhancement under a two-part analysis. The district court's factual findings are reviewed for clear error, and the legal meaning of the term "special skill" is determined *de novo*. *U.S. v. Hubbard*, __ F.2d __ (7th Cir. April 4, 1991) No. 90-1049.

Forfeiture Cases

2nd Circuit upholds admission of "erased" state arrest records in federal forfeiture proceeding. (900)(960) Claimant's sons were arrested on numerous drug charges for drug activity which took place in an apartment house owned by claimant. In a forfeiture proceeding against the apartment house, defendant asserted the innocent owner defense. The district court admitted evidence of claimant's sons' drug arrests into court, even though many of those arrests were subject to erasure under Connecticut state law. The 2nd Circuit upheld the district court's actions, finding that the federal interest in eradicating the drug trade prevailed over any interest in the confidentiality of the arrest records. *U.S. v. One Parcel of Property Located at 31-33 York Street, Hartford, Connecticut*, __ F.2d __ (2nd Cir. April 3, 1991) No. 90-6324.

7th Circuit rejects Federal Tort Claims Act claim for return of forfeited money. (900) About $16,000 allegedly belonging to claimant was administratively forfeited by the DEA. Claimant did not contest the forfeiture but submitted a request for remission, which the DEA denied. Claimant was also indicted for drug crimes, and the indictment sought forfeiture of various other properties and monies. Pursuant to a plea agreement, claimant agreed to the forfeiture of his residence and the prosecution agreed to dismiss all other portions of the indictment seeking forfeiture. Claimant continued to seek the return of the $16,000, bringing a suit under the Federal Tort Claims Act. The 7th Circuit affirmed the district court's dismissal of the suit for want of jurisdiction. The FTCA applies only to torts, and claimant's assertions did not amount to a tort under state law. An erroneous administrative decision is not a tort. To the extent his claim was based upon a breach of the plea agreement, the claim was a contract claim. To the extent claimant was contending the prosecution made misrepresentations in connection with the plea agreement, then the claim was excluded by section 2680(h) of the FTCA. *Paul v. U.S.*, __ F.2d __ (7th Cir. April 11, 1991) No. 89-3322.

9th Circuit finds that officer had qualified immunity from damages in seizing property for forfeiture. (900) Plaintiffs filed suit under 42 U.S.C. 1983 against a police officer who had seized and forfeited construction equipment owned by the plaintiffs. The equipment was used to bury two marine dry cargo containers used to grow marijuana. The district court dismissed the action on a motion for summary judgment, and on appeal the 9th Circuit affirmed. The court found that the officer's conduct was objectively reasonable. The seizure warrant was supported by probable cause and the officer's reliance on Washington's forfeiture statute was

not unreasonable. *Mills v. Graves*, __ F.2d __ 9th Cir. April 11, 1991) No. 90-35086.

11th Circuit affirms claimant's standing to challenge forfeiture. (920) The 11th Circuit affirmed the district court's determination that claimant had standing to contest the forfeiture of property of which she was the record owner. The government contended that bare legal title to the property was insufficient and that defendant did not exercise dominion and control over the property. Claimant's son used the property to facilitate the distribution of cocaine. Claimant testified that she and her son had an agreement under which she allowed him to live on the property rent-free until she retired. This arrangement would continue so long as he paid the bills and did not do anything illegal on the property. The warranty deed for the property was executed in claimant's name. Although it was suspicious that the property was purchased with $50,000 cash, there was testimony that the money was the proceeds of a legal settlement involving claimant's daughter. *U.S. v. Real Property & Improvements Located at 5000 Palmetto Drive, Fort Pierce, St. Lucie County, Florida*, __ F.2d __ (11th Cir. April 11, 1991) No. 90-5220.

9th Circuit says it was not unreasonable to seize heavy equipment for forfeiture under Washington state law. (950) Washington section 69.50.505(a)(6) permits the seizure and forfeiture of "all drug paraphernalia." Subsection (a)(2) permits the same treatment for "all raw materials, products, and equipment of any kind which are used . . . in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance." In this case, the officer interpreted the section to permit the forfeiture of heavy equipment used to bury two marine dry cargo containers in which marijuana was grown. The 9th Circuit held that the officer's reliance on the section was reasonable based upon the plain language of the statute and the absence of case law. Thus the officer had qualified immunity from damages in this civil suit. *Mills v. Graves*, __ F.2d __ 91 D.A.R. 4160 (9th Cir. April 11, 1991) No. 90-35086.

2nd Circuit finds no error in exclusion of expert's testimony as to defendant's state of mind concerning sons' drug activity. (960) Claimant's sons were arrested on numerous drug charges for drug activity which took place in an apartment house owned by claimant. In a forfeiture proceeding against the apartment house, defendant asserted the innocent owner defense. The 2nd Circuit upheld the district court's denial of a psychiatrist's testimony as to claimant's state of mind concerning her sons' drug activities. The expert was not disclosed on the pretrial preparation order and had spoken to claimant for the first time for about 10 minutes on the morning of his proffered testimony. The district court excluded the testimony on the grounds that there was no claim that claimant suffered from a mental defect and that the expert would be invading the province of the jury. This ruling was not an abuse of discretion. The sole issue at trial was whether claimant had knowledge of her sons' drug activities, a simple question for which the jury needed no help. *U.S. v. One Parcel of Property Located at 31-33 York Street, Hartford, Connecticut*, __ F.2d __ (2nd Cir. April 3, 1991) No. 90-6324.

11th Circuit affirms that claimant was innocent owner of property used by son to distribute drugs. (960) The 11th Circuit affirmed the district court's determination that claimant was an innocent owner of property which her son used to facilitate the sale of cocaine. The district court gave credibility to claimant's denial of any knowledge of her son's illegal transactions on the property, and found that claimant expressly prohibited any illegal use of the property. In addition, the FBI agent in charge of the investigation acknowledged that no contraband was ever seen on the property, no purchase or sale of illegal substances was ever observed on the property, no search warrant on the premises was ever executed, and no dogs were ever called in to sniff for drugs. The only evidence of drug use was the immunized testimony of a witness who claimed to have purchased drugs from the son, and informants who spoke to the FBI agent. *U.S. v. Real Property & Improvements Located at 5000 Palmetto Drive, Fort Pierce, St. Lucie County, Florida*, __ F.2d __ (11th Cir. April 11, 1991) No. 90-5220.

Vacated Opinion

(490) *U.S. v. Charger*, 924 F.2d 765 (8th Cir. 1991), *vacated and new opinion published, U.S. v. Charger*, __ F.2d __ (8th Cir. March 29, 1991) No. 90-3632.

EXHIBIT G

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