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COMMENDATIONS

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

Verne K. Armstrong and ***Holly Taft Sydlow*** (Ohio, Northern District), by Paul M. Levin, Supervisory Attorney, Claims Division, U.S. Postal Service, Washington, D.C., for their legal skill and expertise in negotiating a structured settlement resulting in a great savings to the U.S. Postal Service.

A. George Best (Michigan, Eastern District), by Michael P. Roy, Director, Criminal Justice Program, Alpena Community College, and Robert A. Reuther, Assistant Prosecutor, Alpena County Prosecutors Office, for his outstanding presentation on asset forfeiture law at a recent Drug Forfeiture Seminar.

John S. Bruce (North Carolina, Eastern District), was presented a plaque by the Richmond Field Office of the Defense Criminal Investigative Service for his "constant support, flawless guidance, and total dedication" in the successful prosecution of USA v. Earth Property Services, Inc.

Julia A. Caroff (Michigan, Eastern District), by Stuart A. Gold, President, Consumer Bankruptcy Assn., Southfield, for her excellent presentation at a recent mini-seminar sponsored by the Association.

Terry Clark (Texas, Southern District), by George D. Heavey, Assistant Commissioner, Office of Internal Affairs, U.S. Customs Service, Washington, D.C., for his outstanding leadership and ultimate success in two difficult trials involving false impersonation, theft of government property, and perjury.

William Delahoyde and ***Thomas Swaim*** (North Carolina, Eastern District), by Howard L. Marsh, Area Director, Pension and Welfare Benefits Administration, Department of Labor, Atlanta, for their valuable assistance and professionalism in prosecuting a complex case involving Multiple Employer Welfare Arrangements and the enforcement of the Employee Retirement Income Security Act.

Gerald Doyle, Gaynelle Jones and ***Julia Bowen Stern*** (Texas, Southern District), by J. Benny Crosby, Special Agent in Charge, U.S. Secret Service, Houston, for their successful prosecutive efforts in obtaining convictions in two significant fraud investigations.

W. Francesca Ferguson (Michigan, Western District), by Robert C. Bonner, Administrator, Drug Enforcement Administration, Washington, D.C., for her successful resolution of a major civil action resulting in the imposition of a large fine against a DEA registrant.

Richard S. Glaser, Jr. (North Carolina, Middle District), received a Certificate of Appreciation from the Inspector General of the Department of Health and Human Services, Atlanta, for his outstanding success in the prosecution of a major Medicare fraud case.

Deborah Griffin (Alabama, Southern District), by Charles W. Archer, Special Agent in Charge, FBI, Mobile, for her successful prosecution of a criminal case resulting in the dismantling of the largest and most violent drug organization in the Southern District of Alabama, seizure of several million dollars worth of assets received from illegal proceeds, and 42 drug dealers now behind bars.

Arthur I. Harris (Ohio, Northern District), by Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, D.C., for his success in obtaining the settlement of an environmental case which included excellent compliance provisions and a $1.5 million penalty.

Patricia Haynes (District of Columbia), by Peter F. Gruden, Special Agent in Charge, Drug Enforcement Administration, Washington, D.C., for her professionalism and legal skill in the successful prosecution of several cocaine dealers operating in the Washington, D.C. area.

Jane H. Jolly, J. Eric Evenson, J. Douglas McCullough, and ***Robert E. Skiver*** (North Carolina, Eastern District) were presented Certificates of Appreciation from Michael E. Grimes, Resident Agent in Charge, DEA, Wilmington, for their "outstanding contributions in the field of drug law enforcement."

Gerald F. Kaminski (Ohio, Southern District), by Steven A. Bartholow, Deputy General Counsel, Railroad Retirement Board, Chicago, for his excellent representation and successful resolution of a case in the Court of Common Pleas for Scioto County, Ohio.

Karl Knoche (Georgia, Southern District), by Garfield Hammonds, Jr., Special Agent in Charge, Drug Enforcement Administration, Atlanta, for his outstanding efforts and demonstrated ability in conjunction with the recent conviction of a DEA defendant.

William J. Kopp (Ohio, Northern District), by James A. Friedman, Attorney, Office of Labor Law, U.S. Postal Service, Washington, D.C., for his legal skill and professionalism in representing the U.S. Postal Service in an employment discrimination suit.

Warren D. Majors and ***Kent Anderson*** (Oklahoma, Western District), by Robert B. Bird, Assistant Regional Attorney, Department of Agriculture, for his consistently outstanding legal representation and excellent communications with the Office of General Counsel and other employees of the client agency.

Larry Marcy (Texas, Southern District), by David A. Bloomer, Attorney, Department of Veterans Affairs, Houston, for his professionalism and legal skill in the management of a Motion to Dismiss a complex civil case.

Virginia Mathis, Dan Drake, Steve Laramore, and ***Steve Winerip*** (District of Arizona), by James F. Ahearn, Special Agent in Charge, FBI, Phoenix, for their participation and special contributions to the success of a recent moot court training exercise.

John A. Morano, Jr. (Pennsylvania, Middle District), by James J. Hagen, Special Agent in Charge, Department of Defense Inspector General, Defense Criminal Investigative Service (DCIS), Chester, for his excellent presentation at a recent training program on the ramifications of a Bivens lawsuit and the use of civil remedies in DCIS-related cases.

Lester Paff and ***John Beamer*** (Iowa, Southern District), by James P. Barry, Cass County Attorney, and Larry Jones, Cass County Sheriff, Atlantic, Iowa, for their outstanding success in two narcotics prosecutions.

Buddy Parker (Georgia, Northern District), by Haig M. Soghigian, Jr., Acting Assistant Regional Commissioner (Enforcement), U.S. Customs Service, Boston, for his excellent presentation on money laundering at a training seminar for first line supervisors and Senior Special Agents of the U.S. Customs Service, Northeast Region.

Susan M. Poswistilo (District of Massachusetts), by Albert H. Ross, Regional Solicitor, Department of Labor, Boston, for her success in obtaining a voluntary dismissal of the federal defendant from a state court Freedom of Information Act case.

Linda Reade (Iowa, Southern District), by Dick Thornburgh, Attorney General, Department of Justice, Washington, D.C., for her excellent efforts in prosecuting a highly publicized case involving theft of thousands of library books from college and university libraries across the country with a value into the millions of dollars.

Mary M. Smith (Oklahoma, Western District), by Bob A. Ricks, Special Agent in Charge, FBI, Oklahoma City, for her valuable assistance to the FBI and other federal, state and local law enforcement agencies in processing a number of asset forfeiture cases, and her vast knowledge of the rules and regulations pertaining to seizure and forfeiture matters.

Linda K. Teal (North Carolina, Eastern District), by Paul Lyon, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Charlotte, for her outstanding success in the prosecution of a complex bank fraud and perjury case related to an arson investigation initiated in 1987.

Paul J. Van De Graaf (Pennsylvania, Eastern District), by Philip Newsome, Acting Regional Inspector, IRS, Philadelphia, for his dedicated service and cooperative efforts for the past four and a half years in a major project involving attempts by a segment of the Asian community to corrupt the integrity of the IRS.

Don Waits (Mississippi, Southern District), by Doug Lee, Mayor, and E. Doyle Jones, Chief of Police, City of Lucedale, for his valuable assistance, dedication and professionalism in successfully prosecuting a narcotics case on behalf of the City of Lucedale.

Melvin K. Washington (Wisconsin, Eastern District), was presented a plaque by Special Agent in Charge Donald C. MacLean, on behalf of the Department of Defense Criminal Investigative Service, Chicago, for his outstanding efforts in prosecuting a number of complex defense contractor fraud cases.

Lanny D. Welch (District of Kansas), by Thomas E. Den Ouden, Supervisory Senior Resident Agent, FBI, Springfield, Missouri, for successfully prosecuting a former President and Chief Executive Officer of a now defunct bank in Oswego for financial fraud.

William E. Yahner (Texas, Southern District), by Robert Fenner, General Counsel, National Credit Union Administration, Washington, D.C., for his professionalism and successful efforts in obtaining the voluntary dismissal of a civil suit resulting in a savings to the Share Insurance Fund of several hundred thousand dollars.

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SPECIAL COMMENDATIONS

Northern District of Ohio

Following her presentation to the Ohio Peace Officer Basic Training Class, ***Joyce J. George, United States Attorney for the Northern District of Ohio,*** was presented with a plaque and medal by Chief Martin Lentz of the Cleveland Heights, Ohio Police Department. This meritorious service award was given to Mrs. George for her leadership in bringing the various law enforcement agencies in the district together through task forces operated under the auspices of the United States Attorney's office. Chief Lentz said, "Mrs. George has contributed immeasurably to the suppression of illegal drug trafficking in the district."

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Middle District Of North Carolina

The Office of the United States Attorney for the Middle District of North Carolina, under the direction of ***Robert H. Edmunds, Jr.,*** was presented a Certificate of Appreciation from the Inspector General of the Department of Health and Human Services, Atlanta, for its "consistent support of criminal and civil cases" brought by that Department.

* * * * *

Director of Administration, United States Attorney's Office, Chicago

At the 1991 Partnership in Administration Conference recently conducted by the General Services Administration (GSA), Region 5 in Indianapolis, ***Jerome H. Stasiek,*** Director of Administration, Office of the United States Attorney in Chicago, was presented a regional client award. GSA issued the following statement:

> Beginning in 1965, with his selection as a summer aide in the Office of the U.S. Attorney in Chicago, his home town, Jerome Stasiek has progressed in responsibility and capability, serving as clerk, then administrative assistant. He currently serves as Director of Administration in the same office where he worked as a summer aide, now serving nearly 300 employees of the U.S. Attorney. He is an individual who is respected within his agency for his long-term commitment to the business of the court.
>
> It is not surprising that Jerome Stasiek is also well respected within GSA for his comprehensive knowledge of the needs of his office, for his ability to communicate those needs and thereby facilitate delivery of GSA services in a manner which is both efficient and timely. Jerome Stasiek is regarded by GSA employees as an individual who displays sensitivity and understanding of the difficulties that GSA may encounter and one who works with GSA to resolve problems in a courteous and constructive manner. In considering Mr. Stasiek for this award, great weight has been given to the enthusiastic recommendation of GSA employees who have regular contact with Mr. Stasiek. This endorsement is a meaningful testimony to his professionalism and contribution to the work of our agency.

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Successful Conclusion Of Mail Bomb Case In Alabama And Georgia

On June 28, 1991, Walter Leroy Moody, Jr. was convicted by a jury on all 71 counts in the mail bomb deaths of a federal judge in Alabama and a civil rights lawyer in Georgia. Attorney General Dick Thornburgh said that this conviction by federal prosecutors represents the successful culmination of one of the most intensive investigations and manhunts ever carried out by the Justice Department.

The Attorney General praised the Special Interagency Task Force for its outstanding investigative efforts in successfully completing this massive investigation in only eighteen months. The Task Force was composed of agents and investigators from the Federal Bureau of Investigation, Bureau of Alcohol, Tobacco and Firearms, United States Postal Service, United States Marshals Service, Internal Revenue Service, Georgia Bureau of Investigation, and the Mountainbrook (Alabama) Police Department.

General Thornburgh also praised the Justice Department team, led by Assistant United States Attorneys Louis J. Freeh, Howard M. Shapiro and John Malcolm, and Paralegal Specialist Mary Ellen Luthy. Major contributions were also made by United States Attorneys Joe D. Whitley of the Northern District of Georgia, Frank W. Donaldson of the Northern District of Alabama, and Otto G. Obermaier of the Southern District of New York; the Attorney General for the State of Alabama, and the Attorney General for the State of Georgia.

The Attorney General said, "These bombings were horrendous crimes which not only destroyed lives but represented a grave attack on the federal court system as well. The excellent cooperation between all the various agencies was the single most important factor contributing to this remarkable success."

[For background information concerning this case, please refer to Volume 39, No. 2, dated February 15, 1991, and Volume 39, No. 4, dated April 15, 1991, of the United States Attorneys' Bulletin.]

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PERSONNEL

On May 31, 1991, ***Edward G. Bryant*** was appointed United States Attorney for the Western District of Tennessee. ***Mr. Bryant*** was formerly in private practice in Jackson, Tennessee.

On July 1, 1991, ***Kenneth E. Melson*** became the Interim United States Attorney for the Eastern District of Virginia. ***Mr. Melson*** was formerly First Assistant United States Attorney in that office.

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Executive Office For United States Attorneys

Deborah C. Westbrook has joined the Executive Office for United States Attorneys as Legal Counsel, having most recently served as Assistant General Counsel in the Office of Inspector General, Department of Justice. She has previously worked at the Securities and Exchange Commission, Internal Revenue Service, the Commodity Futures Trading Commission, and is a former FBI Special Agent.

If you have any questions or need assistance, please call the Legal Counsel office at (FTS) 368-4024 or (202) 514-4024. The fax number is: (FTS) 368-1104 or (202) 514-1104.

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DRUG ISSUES

"Working Together To Tackle The Drug Problem"

On June 18, 1991, Attorney General Dick Thornburgh addressed the Second National Conference on State and Local Drug Policy in Washington, D.C. In attendance were federal, state and local law enforcement officials. A copy of the Attorney General's address entitled "Working Together to Tackle the Drug Problem" is attached at the Appendix of this Bulletin as Exhibit A.

The Director of the Office of National Drug Control Policy, Bob Martinez, later joined the group at the White House for a briefing on the crime bill scheduled for immediate action on the Senate floor. (For a status report on the bill, please refer to the Legislation section of this Bulletin, at p. 195.)

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War On Drugs

On June 6, 1991, Attorney General Dick Thornburgh distributed more than $500,000 from the Department of Justice's Asset Forfeiture Fund to Kansas law enforcement agencies for use in their efforts in the war against drugs. Most of the money which was distributed under the Department's equitable sharing program came from two drug seizure cases in Kansas.

The first case involved the government seizure of much of the Kansas property of Robert Rich, who was indicted in Louisiana, as a result of a 1989 drug conviction that included real property, vehicles, farm and ranching equipment and firearms. Rich was charged with purchasing the land with profits from his illegal amphetamine manufacturing and distribution ring that operated in the Midwest. The six parcels of land were sold May 14, 1991, at a public auction and yielded $355,000. Prior to that, the federal government seized from Rich and sold 88 horses for $196,500 and 22 head of cattle for $20,600, netting about $217,000. The second case resulted in a $98,000 forfeiture by the local Drug Enforcement Administration Task Force. In November, 1990, three defendants were indicted for possession with intent to distribute marijuana. A large amount of cash also was recovered.

In presenting the checks to ten law enforcement agencies, the Attorney General described the monetary return as "poetic justice." He also praised the office of United States Attorney Lee Thompson, the Drug Enforcement Administration, and the United States Marshals Service for their efforts in the seizure and processing of the assets.

* * * * *

High Intensity Drug Trafficking Area Program

The FY 1991 High Intensity Drug Trafficking Area (HIDTA) funding has been successfully completed. The final segment of the funds earmarked for state and local assistance was recently approved by the Office of National Drug Control Policy and the resources are being transferred to complete the distribution of $82 million to the five HIDTAs -- Houston, Los Angeles, Miami, New York/New Jersey, and the Southwest Border. The plans are viewed as a companion to the 1990 plans which allocated $10.7 million in HIDTA funds to the Southwest Border Area and $14.3 million to the Metropolitan Areas, almost evenly divided among the four cities.

The 1991 plans support multi-jurisdictional law enforcement initiatives which complement the efforts of federal, state and local law enforcement resources to dismantle significant drug trafficking organizations and their operations. HIDTA support continues for the programs that were established with 1990 funding, and the major thrust of 1991 priorities focus on areas of financial disruption, intelligence, technology, and violent gangs. The plans allocate $24.0 million for federal law enforcement initiatives in the Metropolitan Areas (Houston - $5.8 million; Los Angeles - $6.7 million; Miami - $6.1 million; New York - $3.8 million; Special Operations - $1.6 million); $18 million to the Southwest Border Area for federal initiatives; $8 million for technology research and development projects supporting investigations and operations, and assisting drug detection efforts in the HIDTAs; and $32 million for state and local law enforcement (Houston - $4.8 million; Los Angeles - $3.8 million; Miami - $4.5 million; New York - $6.8 million; Southwest Border Area -$12 million).

The following is a list of the High Intensity Drug Trafficking Area Coordinators, together with their addresses and telephone numbers:

Houston
Charles Lewis
United States Attorney's Office
515 Rusk Avenue
Houston, Texas 77002
Telephone: (713) 220-2185

Los Angeles
Steven Madison
United States Attorney's Office
312 No. Spring St.
Los Angeles, California 90012
Telephone: (213) 894-2434

Miami
Ms. Sonia O'Donnell
United States Attorney's Office
155 So. Miami Avenue
Miami, Florida 33130
Telephone: (305) 536-4471

New York/New Jersey
David Denton
United States Attorney's Office
One St. Andrews Plaza
New York, New York 10007
Telephone: (212) 791-0055

Southwest Border
Warren Reese
Suite 600
185 West "F" Street
San Diego, California 92101
Telephone: (619) 557-6850

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CRIME ISSUES

Organized Crime Drug Enforcement Task Forces (OCDETF)

On May 31, 1991, Attorney General Dick Thornburgh attended the annual Organized Crime Drug Enforcement Task Force (OCDETF) meeting in Tampa, Florida. Established by the President and funded by the Congress as the "flagship" of the federal drug enforcement effort, OCDETF is comprised of thirteen regional task forces which are coordinated by the Departments of Justice, Treasury and Transportation.

The thirteen regional Task Forces operate under the leadership of a "core-city" United States Attorney in each region and combine investigative expertise from the Drug Enforcement Administration, the Federal Bureau of Investigation, the Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, the Internal Revenue Service, the United States Marshals Service and the Coast Guard, as well as state and local law enforcement agencies. Since its formation in 1982, OCDETF has initiated nearly 3,500 investigations focused on the major sellers and distributors of narcotics and dangerous drugs. The Task Forces also have been instrumental in seizing assets totaling $789 million and property valued at more than $1 billion. Investigative techniques used by the Task Forces include undercover and sting operations, electronic surveillance, and financial investigations as well as investigative grand juries and where appropriate, offers of immunity. Factors contributing to the Task Forces' upward trend in the number of investigations and the quality of prosecutions include increased resources totaling $13.9 million in FY 1989 and $18.6 million in FY 1990.

The Attorney General said, "In the last eight years, the Task Forces have become the 'designated hitters' of our national drug control team. The combined skills of federal agents and prosecutors, working with over 1,200 state and local government agencies, have made a vast difference in concentrating our efforts on major organized criminal drug operations. The use of multi-agency task forces is the best way to cripple, dismantle, and destroy interstate and international drug trafficking and money laundering organizations."

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Biannual Report Of The Organized Crime Drug Enforcement Task Forces

On May 8, 1991, Attorney General Dick Thornburgh submitted a Biannual Report to the President on the Organized Crime Drug Enforcement Task Force Program, 1989-1990. This report notes that the Task Forces have initiated 3,486 investigations of major criminal drug trafficking organizations and have convicted 16,658 individuals who were members of these organizations. Of those convicted, 13,759 were sentenced to prison. The average prison term was 7.5 years. In 1989 and 1990 alone, 1,098 investigations were initiated and 2,973 indictments were returned. Other data summarized in the Report include:

-- Over 80 percent (2,817) of the 3,486 investigations involved cocaine, 42.8 percent marijuana, 24.9 percent heroin, 10.1 percent methamphetamine, 4.6 percent hashish, 3.2 percent methaqualone and 2.4 percent PCP.

-- 56.6 percent of OCDETF cases involved local investigators and 37 percent involved state investigators.

-- Drug distribution was the predominant criminal activity charged in 2,514 of the 2,973 OCDETF indictments.

-- 89.6 percent or 4,182 of those convicted in OCDETF cases in FY 1989-90 have gone to prison.

If you would like a copy of the OCDETF Biannual Report, please call (FTS) 368-1860 or (202) 514-1860.

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Gang Violence In Texas

A two-day field study was conducted by the Office of Justice Programs (OJP) of the Department of Justice on June 25 and 26, 1991, in Dallas, Texas. This study is one of a series of National Field Studies on Gangs and Gang Violence that OJP is conducting to examine the nature and scope of gangs, as well as strategies that have proven successful in preventing, disrupting, and controlling gang activity, violence, and drug trafficking. The first field study was held in Los Angeles in March. (See, Vol. 39, No. 4, United States Attorneys' Bulletin, dated April 15, 1991, at p. 92.)

The field study, chaired by Jimmy Gurule, Assistant Attorney General for the Office of Justice Programs, is part of a broader Justice Department initiative to step up federal prosecutions of gangs and gang activity. This broad Departmental initiative includes community outreach programs and field studies, as well as the establishment of prosecutorial task forces in the United States Attorneys' offices to handle firearms offenses and the creation of a Terrorism and Violent Crime Section within the Department's Criminal Division. The agenda includes a discussion of the scope of the gang problem in Texas; responses to Jamaican "posses"; community policing and community-based programs to prevent and suppress gang activity; public/private partnerships to combat gang violence; alternative opportunities for youth; correctional programs for gang members; and victims of gang crimes. Participating in the Dallas field study were the State Attorney General, United States Attorneys and Assistant United States Attorneys; representatives from federal law enforcement agencies; researchers; state and local law enforcement officials; directors of neighborhood-based gang prevention projects; business leaders; and school officials.

The Office of Justice Programs has made gang control programs one of ten priorities for federal grant funding during 1991 and has allocated more than $5 million this year for a comprehensive program to prevent and suppress illegal gang activity. A broad range of resources will be targeted across the full spectrum of OJP agency functions to confront the gang problem, including policy research, evaluation, program development, demonstration programs, training and technical assistance, and information dissemination, including a new gang data clearinghouse.

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CRIMINAL DIVISION ISSUES

Guides To Drafting Indictments

Since the publication of Guides to Drafting Indictments by the Criminal Division, the Department has received a number of suggestions for amendments and additions. A revision of the Guides is planned for late 1991. The Department continues to solicit your suggestions for this revision; these should be sent to the General Litigation and Legal Advice Section, Criminal Division, P.O. Box 887, Ben Franklin Station, Washington, D.C. 20044.

In the meantime, it has become evident that the form indictment for 8 U.S.C. §1326 (unlawful reentry of deported alien) is in error. It is the Department's position that a defendant's prior felony conviction is a penalty enhancement factor, not an element of the offense. A new form indictment for 8 U.S.C. §1326(b) is attached at the Appendix of this Bulletin as Exhibit B, and should be placed in your Guides in place of the older version.

* * * * *

Evidentiary Use Of Information Furnished Pursuant To An Amnesty Application Under The Immigration Reform And Control Act Of 1986

Mary C. Spearing, Chief, General Litigation and Legal Advice Section, Criminal Division, issued the following statement concerning evidentiary use of information furnished pursuant to an amnesty application under the Immigration Reform and Control Act:

> In his Brief in Opposition to the certiorari petition in Hernandez v. United States, No. 90-6499, the Solicitor General conceded that the Tenth Circuit had incorrectly interpreted the confidentiality provision of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3559 (Immigration Reform Act). The Tenth Circuit, said the Solicitor General, should not have interpreted the confidentiality provision of the Immigration Reform Act to allow the use of information furnished by Hernandez pursuant to an amnesty application in an unrelated criminal case. Hernandez was convicted of making a false statement in connection with the purchase of a firearm, and of receiving a firearm while an illegal alien. At trial the government introduced into evidence an INS computer printout; the printout indicated that Hernandez, subsequent to the charged firearms offenses, applied for amnesty so as to legalize his immigration status.
>
> Relying on the language of the Immigration Reform Act, and on the Supreme Court's decision in Baldridge v. Shapiro, 455 U.S. 345 (1982), the Solicitor General concluded that the information Hernandez furnished pursuant to his amnesty application should not have been admitted into evidence at his criminal trial. The Solicitor General noted that the issue is not one of substantial or continuing importance, and that, in the instant case, the erroneous admission into evidence of the information in the amnesty application was harmless error.
>
> Given the Solicitor General's confession of error, government attorneys should not rely upon the Tenth Circuit's opinion in Hernandez v. United States, 913 F.2d 1509 (10th Cir. 1990).

If you have any questions, please call the General Litigation and Legal Advice Section at (FTS) 368-1027 or (202) 514-1027.

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Career Opportunities In The Criminal Division

On April 1, 1991, Assistant Attorney General Robert S. Mueller, III, announced the reorganization of the Criminal Division. This reorganization created two new sections -- the Terrorism and Violent Crime Section and the Money Laundering Section, and included a number of other major changes. (See, United States Attorneys' Bulletin, Vol. 39, No. 4, dated April 15, 1991, at p. 90.) Both of these Sections are currently seeking experienced trial attorneys.

The new ***Terrorism and Violent Crime Section*** of the Criminal Division is recruiting trial attorneys to litigate cases around the country. This Section will provide legal advice and support, as well as litigation assistance, to Assistant United States Attorneys in cases involving international terrorism and violent crime by repeat offenders and organized groups. The duty station is Washington, D.C. and applicants must be willing to travel.

The Section will add resources to developing and prosecuting terrorism cases in light of greatly expanded federal criminal jurisdiction over international terrorist incidents. Attorneys in the Section are involved in the investigation and prosecution of terrorist activities occurring outside the territorial jurisdiction of the United States. The attorneys also investigate and prosecute a wide range of violent crimes, including offenses committed by chronic offenders and organized groups, using a full range of federal statutes to maximize the effectiveness of prosecutive efforts. The Section will create new anti-gang and other violent crime initiatives. One such initiative involves coordinating the efforts of federal, state and local law enforcement agencies in prosecuting firearms offenses. The aim of this initiative is to maximize the periods of incarceration of violent armed offenders in appropriate cases by using the enhanced sentencing provisions of federal firearms statutes.

Applicants must submit a resume or SF-171 (Application for Federal Employment) to: James S. Reynolds, Chief, Terrorism and Violent Crime Section, U.S. Department of Justice, Room 9300, Bond Building, 1400 New York Avenue, N.W., Washington, D.C. 20530. The telephone number is (FTS) 368-0849 or (202) 514-0849.

The newly created ***Money Laundering Section*** has several positions available for which experienced Assistant United States Attorneys are invited to apply. The Section has varied responsibilities including prosecuting money laundering cases, providing legal advice and assistance to the field in all aspects of money laundering investigations and prosecutions, policy development, initiating and commenting on legislation, and participating in a variety of international conferences, such as the Economic Summit's Financial Action Task Force and the Organization of American States Money Laundering Project.

This Section is seeking Assistant United States Attorneys with at least three years' experience prosecuting complex cases, including white collar crime. Interested applicants should submit a resume to, or call, Theodore S. Greenberg, Chief, Money Laundering Section, Criminal Division, U.S. Department of Justice, Room 4402, Bond Building, 1400 New York Avenue, N.W., Washington, D.C. 20530. The telephone number is: (FTS) 368-1758 or (202) 514-1758.

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ASSET FORFEITURE

Plea Agreements Affecting Forfeitability Of Assets Located Abroad

On May 9, 1991, the Criminal Division issued a bluesheet entitled "Plea Agreements Affecting Forfeitability of Assets Located Abroad," which affects Section 9-16.600 of the United States Attorneys' Manual. The Department of Justice has placed a high priority on seizing and forfeiting the proceeds of criminal activity, particularly those assets derived from, or which have facilitated, drug trafficking and money laundering. Until recently, federal prosecutors vigorously pursued forfeitable property only within the United States, implicitly conceding that once such assets leave this country they go beyond the confiscatory reach of our laws. To be truly effective, however, forfeiture increasingly requires an international law enforcement effort. This bluesheet sets forth Department policy regarding plea agreements, international seizures, and forfeiture of assets.

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

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Seized Cash Management Policy

On June 6, 1991, Cary H. Copeland, Director, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys and Department of Justice officials which restates and clarifies the existing policy on management of seized cash. A copy of the memorandum providing explicit instructions for all personnel handling cash seized for forfeiture is attached at the Appendix of this Bulletin as Exhibit C.

In the past, the Department has often held tens of millions of dollars in office safes and other locations throughout the country, which raises both financial management and internal controls issues. The Department must report annually to Congress on the level of seized cash not on deposit. The Attorney General has established the following policy on the handling of seized cash:

> Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Director, Executive Office for Asset Forfeiture, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the United States Marshal should occur within sixty (60) days of seizure or ten (10) days of indictment. (VII(I), Attorney General's Guidelines on Seized and Forfeited Property, July 1990).

If you have any questions regarding this policy, please call the Executive Office for Asset Forfeiture at (FTS) 368-0473 or (202) 514-0473.

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POINTS TO REMEMBER

Americans With Disabilities Act Technical Assistance Grant Program

On June 5, 1991, Attorney General Dick Thornburgh announced the start of the Americans with Disabilities Act (ADA) technical assistance grant program. The program's goal is to help speed private sector as well as state and local government's compliance with the ADA by providing $2.5 million to fund projects that will inform the private sector, state and local governments, and individuals with disabilities about their rights and responsibilities under the new law. The Department of Justice will receive proposals for various projects, including telephone information lines, public service pamphlets, training courses in ADA compliance, model programs that can be used to encourage voluntary compliance with the ADA, and programs aimed at resolving disputes while avoiding litigation. Projects can also focus on encouraging compliance with the ADA by particular types of covered entities such as restaurants, hotels and motels, retail stores and shopping centers, and the various components of state and local governments. The grant program is open to individuals, not-for-profit organizations, and state and local governments. Joint projects between the private sector and disability groups are particularly encouraged.

The Attorney General said that this grant money exists not just to provide information on how to make facilities accessible for disabled persons, but also to teach disabled and non-disabled persons about the ADA, and why the ADA can be a universally beneficial piece of civil rights legislation.

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Antitrust Assistance Program For Central And Eastern Europe

The Antitrust Division and the Federal Trade Commission (FTC) are embarking on a three-year program to provide technical assistance on competition policy issues to the newly-democratic countries of Central and Eastern Europe. This program is designed to help these countries make the transition from state-directed and state-owned economic regimes to vigorous economies based on principles of competition and free enterprise. The Agency for International Development has awarded the Antitrust Division and the FTC a total of $7.2 million to help fund the program.

During the past year, in response to requests by Central and Eastern European governments, Department and FTC antitrust teams have visited Poland, Czechoslovakia, Bulgaria and Hungary to discuss competition issues and law enforcement techniques; several of those governments subsequently have requested more in-depth cooperation. The Department and the FTC, in coordination with the State Department and AID, will place government attorneys and economists in Poland and Czechoslovakia for periods of three to six months at a time, in order to provide in-depth assistance to those countries' competition agencies. At the same time, Department and FTC officials with expertise in specific industries or business practices would make short-term visits to the Polish and Czechoslovak competition agencies to exchange views on problems of particular interest to those agencies. Short-term visits also could be made to Bulgaria, Hungary and possibly Romania in response to any requests by those countries for technical assistance on competition issues.

Attorney General Dick Thornburgh said, "Central and Eastern European countries have made remarkable strides toward creating democratic governments based on the rule of law. These brave people are now faced with the difficult task of transforming failed state-controlled economies into efficient market economies. Competition policy is a crucial component of that process, and this AID-funded program will permit the Department to do its part to help these countries help themselves."

* * * * *

Electronic Refund Filing Schemes

As noted in the United States Attorneys' Bulletin, Vol. 39, No. 6, dated June 15, 1991, at p. 170, the Department of Justice and the Internal Revenue Service have coordinated efforts to uncover and prosecute abuses in the electronic filing of tax returns. On June 5, 1991, the Department of Justice announced the indictment of three persons and the filing of an information against another in U.S. District Court in El Paso, Texas that involved the electronic filing of about $714,000 in false and fraudulent income tax refund claims. Three indictments on similar charges also were returned by a federal grand jury in Los Angeles.

The indictments involved the falsification of wage and tax statements (Forms W-2) which were used to prepare false or fictitious tax returns (Forms 1040) to claim a tax refund for the 1990 and 1991 filing seasons. The false refund claims were filed under the IRS' electronic filing program, which permits certain taxpayers to transmit tax returns to the IRS by computer. Refunds claimed on electronically filed returns may be received in a matter of days. Because of the speed with which electronically filed refund claims can be processed, the IRS and the Justice Department are working to detect and punish abuses of the electronic filing system as quickly as possible.

Shirley D. Peterson, Assistant Attorney General for the Tax Division, said, "These indictments demonstrate what we can accomplish when federal agencies join efforts. We are committed to ensuring integrity and fairness in the electronic filing program."

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Department Of Justice Symposium

The third in a series of Department of Justice symposia was held on June 27, 1991, in Washington, D.C. The topic of discussion was "Environmental Law: The Lessons of the Past Twenty Years for the Next Twenty," and was moderated by Richard Stewart, Assistant Attorney General for the Environment and Natural Resources Division. Attorney General Dick Thornburgh delivered the closing remarks.

Those serving on the panel were: Michael Deland, Council on Environmental Quality; Honorable Stephen Williams, Judge of the United States Court of Appeals for the District of Columbia Circuit; and Fredric Sutherland, President of the Sierra Club Legal Defense Fund.

* * * * *

SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On June 12, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through May 31, 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	455
Estimated S&L Losses	$ 7.722 billion
Defendants Charged	764
Defendants Convicted	550 (93%)
Defendants Acquitted	42 *
Prison Sentences	1,094 years
Sentenced to prison	326 (79%)
Awaiting sentence	148
Sentenced w/o prison or suspended	86
Fines Imposed	$ 8.091 million
Restitution Ordered	$ 270.703 million

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	95
Convicted	69 (92%)
Acquitted	6
Directors and Other Officers:	
Charged by indictment/ information	134
Convicted	109 (96%)
Acquitted	4

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

Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit D is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 24 dated May 20, 1991, and Volume 2, No. 25, dated June 3, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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LEGISLATION

S. 1241, The Anti-Crime Bill

The United States Senate was unable to complete action on S. 1241, the comprehensive anti-crime bill sponsored by Senate Judiciary Committee Chairman Joseph R. Biden, Jr. In a pre-recess flurry of activity, Congress adjourned debate on the bill until July 8, 1991.

The Senate voted in favor of an amendment that would limit the availability of federal habeas corpus review of convictions and sentences imposed in state courts. The members also voted to approve a compromise amendment that would require a five-day waiting period for a handgun. The compromise calls for eventual creation of a national system to provide for an instant background check on handgun buyers. In addition, the members approved mandatory prison sentences for criminals who fire or carry guns during a violent crime.

Other amendments that were approved would authorize the death penalty for crimes involving killings with guns that have crossed state lines; provide grants to states to help cover the costs associated with death penalty prosecutions; and allow Indian tribal governments to decide whether the death penalty should be carried out for crimes committed on Indian lands. The Senators rejected amendments that would have eased restrictions on evidence obtained without a search warrant and replaced the federal death penalty with mandatory life imprisonment.

* * * * *

Department Of Justice FY 1992 Appropriations

On June 13, 1991, the Department's FY 1992 appropriations bill was passed by the House. The bill includes money in the budget for funding "Death Penalty Resource Centers." These centers assist courts in providing counsel to convicted defendants facing the death penalty. An effort at full Committee markup to permit Bureau of Justice Assistance grant funds to be made available to state prosecutors for litigating habeas corpus cases in federal courts failed. The Justice Management Division plans to prepare an appeal letter addressing this and other concerns of the Department.

* * * * *

Joint Production Ventures

On June 25, 1991, the House Judiciary committee by a unanimous voice vote reported H.R. 1604, which would extend the antitrust protections of the National Cooperative Research Act to encompass joint production ventures. Although the thrust of H.R. 1604 comports with the Administration's bill, H.R. 1604 contains a limitation on foreign participation and a requirement for domestic basing of production facilities, which the Administration opposes.

The Senate Judiciary Committee's consideration of a similar bill, S. 479, has been delayed.

* * * * *

Price Fixing Prevention Act Of 1991

On June 25, 1991, the House Judiciary Committee by voice vote reported H.R. 1470, which would lower the evidentiary standard required to prove vertical price fixing. There is no indication when full House consideration will be scheduled.

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Telemarketing Fraud

On June 21, 1991, two subcommittees of the House Committee on Aging and the House Small Business Committee held the first in a promised series of hearings on telemarketing fraud. A representative from the FBI appeared on behalf of the Department and explained the Bureau's activities in this area.

The Department's report to Congress on telemarketing fraud has been cleared by the Office of Management and Budget and is pending transmittal. It recommends an amendment of the mail fraud statute to bring private carriers, such as UPS and Federal Express, within its coverage.

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CASE NOTES

CIVIL DIVISION

Supreme Court Holds That Prosecutor's Absolute Immunity From Damage Claims Only Extends To Functions That Are Intimately Associated With The Judicial Phase Of The Criminal Process

The Supreme Court has held that prosecutors have absolute immunity from damage claims arising out of their participation in a search warrant proceeding but have only qualified immunity for claims arising out of the provision of legal advice to the police. The Court explained that a prosecutor's court appearance and presentation of evidence in support of a search warrant should enjoy absolute immunity because such conduct is closely tied to the adjudicatory process and would have been protected by common law immunity principles. The Court, however, held that the provision of legal advice to the police did not warrant similar protection because it is too far removed from the judicial process, would not have been protected by common law immunity principles, and was less likely to generate vexatious litigation challenging the prosecutor's actions.

The decision suggests that any prosecutorial conduct involving an appearance before a judicial official will be protected by absolute immunity. It also suggests, however, that, unless an analogous immunity would have been recognized at common law, it will be difficult to establish absolute immunity for such other prosecutorial functions as investigating a charge or screening a case for indictment. The government participated in the case as amicus curiae.

Burns v. Reed, No. 89-1715 (May 30, 1991). DJ # 157-79-2472.

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Supreme Court Holds That 28 U.S.C. 1442(a)(1) Does Not Permit An Agency To Remove To Federal Court An Action Brought Against It In State Court

Plaintiffs in this case seek an injunction that bars the National Institute of Health (NIH) and other defendants from carrying out the euthanasia of several research primates known as the "Silver Spring Monkeys," and that grants custody of the monkeys to plaintiffs or members of the United States Congress. Plaintiffs initiated their suit in state court, and obtained a temporary restraining order (TRO) barring the euthanasia. NIH then removed the case to federal court under the federal removal statute, 28 U.S.C. 1442(a)(1), and sought to have the TRO lifted. When the District Court refused to lift the TRO, NIH and two of the other defendants appealed. The Fifth Circuit vacated the TRO.

The Supreme Court has now held that NIH improperly removed this action to federal court. The Court first rejected the Government's jurisdictional argument that, because the court of appeals found that plaintiffs lacked Article III standing to litigate over the monkeys, plaintiffs also lacked standing to challenge removal of the suit. Because plaintiffs' current injury is loss of their right to pursue this action in state court, they have the requisite adversariness on the removal question to confer standing. On the merits of the removal question the Court held that 28 U.S.C. 1442(a)(1), which provides that a defendant in a civil action filed in state court may remove the action to federal court if the defendant is "[a]ny officer of the United States or any agency thereof, or person acting under him [in a suit challenging] any act under color of such office...." grants removal power only to "any officer of the United States or [of] any agency thereof," and does not grant removal power to a federal agency. Accordingly, the Court directed that the action be remanded to state court, where any other possible basis for removal may be explored.

International Primate Protection League, et al. v. Administrators of Tulane Educational Fund, et al., No. 90-89 (May 20 1991).
DJ # 145-16-3259.

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Supreme Court Holds That Claim That Former Employer Sent An Allegedly Defamatory Recommendation Letter That Damages Professional Reputation And Results In Loss Of Employment Does Not State A Claim For Violation Of A Constitutional Liberty Interest, But At Most A Claim For Common Law Defamation

Plaintiff sued his former Department of Health and Human Services (HHS) supervisor for violating his constitutional right to liberty. Specifically, plaintiff claimed that the supervisor sent out an adverse recommendation which injured plaintiff's reputation and denied him his right to pursue his profession, as it caused him not to be hired in at least two instances. The defendant moved to dismiss and for summary judgment, in part relying on his right to qualified immunity. The district court denied the motion and ordered limited discovery.

On February 9, 1990, the court of appeals reversed, holding that the claims against the supervisor must be dismissed. The court explained that the defendant had qualified immunity unless plaintiff could show that the defendant violated clearly established rights. The court said the only possible established rights would have required plaintiff to prove that the supervisor sent the letter with malice. The court held that, under the "heightened pleading" standard which applies in qualified immunity cases when the defendant's state of mind is an element of the constitutional claim, a plaintiff cannot rely upon conclusory allegations of malice. The court found that plaintiff's allegations of malice were insufficient to overcome defendant's qualified immunity.

The Supreme Court has now held that plaintiff has not satisfied the first inquiry in the examination of a claim for qualified immunity - whether the complaint states a claim for violation of a clearly established constitutional right. Indeed, in an opinion written by the Chief Justice, the Court held that plaintiff's claim does not establish the violation of any constitutional right at all. Relying on Paul v. Davis, the Court ruled that plaintiff's allegations that his reputation was harmed by the allegedly defamatory recommendation and that his employment prospects were thus impaired, states at most a claim for common law defamation, but does not state a violation of any constitutional right.

Siegert v. Gilley, No. 90-96 (May 23, 1991). DJ # 157-16-9936.

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D.C. Circuit Reverses District Court Order Awarding Summary Judgment For The Nuclear Regulatory Commission In Freedom of Information Act Action Based Upon Its Conclusion That the Record Did Not Show That the Disputed Documents Contained Confidential Commercial Information Within Exemption 4

Plaintiff's Freedom Of Information Act (FOIA) action sought production of reports dealing with nuclear power plant safety prepared by an industry organization and furnished to the Nuclear Regulatory Commission (NRC) under a promise of confidentiality. The agency denied the request on the grounds that the documents contained confidential commercial information within exemption 4 of the FOIA. Although the district court initially granted summary judgment for the government, the Court of Appeals in a 1987 decision (830 F.2d 278) reversed and remanded for further development of the record. Upon remand, the district court again granted summary judgment for the government.

On appeal, the D.C. Circuit (Edwards, Williams, Randolph) reversed the district court's decision and remanded the case for further proceedings. Applying the test for confidentiality set forth in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, the Court held that the record did not show that the documents were confidential because their disclosure would either impair the government's ability to obtain information in the future, harm the competitive position of the submitter, or injure other governmental interests protected by this exemption. After rejecting the district court's rationale that disclosure here would impair government efficiency, the Court held that the record was insufficient to permit a determination whether disclosure of these records would cause an impairment in the quality of information that the agency now receives in them. Therefore, it remanded the case for further development of the record on this issue. In a concurring opinion in which Judge Williams joined, Judge Randolph stated that the disputed records were confidential under the common meaning of that term. Because the National Parks test for confidentiality is the law of the Circuit and the law of the case applied by the prior panel, Judge Randolph stated that he was bound to apply its test for confidentiality.

Critical Mass Energy Project v. Nuclear Regulatory Commission, et al., No. 90-5120 (April 30, 1991) DJ # 145-191-43.

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First Circuit Invalidates Administrative Construction Of Food Stamp Income Exclusion

The First Circuit has invalidated the Secretary of Agriculture's construction of food stamp provisions requiring that a household's eligibility for benefits be determined after excluding income earned by a child who resides in the household, who is a student, and who is under age eighteen. The Secretary had concluded that this income exclusion did not apply to minors who had their own children and who had established their own, independent food stamp households. The Secretary reasoned that by limiting the income exclusion to children under age 18, Congress did not intend to extend the exclusion to minors who had assumed the adult responsibilities of running their own food stamp households. Accordingly, the Secretary's regulations provided that the income exclusion was available only to minors who remained under the "parental control" of another household member. The Court, however, concluded that the Secretary's interpretation was contrary to the ordinary meaning of the term "child" and inconsistent with Congress' intent to avoid counting small, irregular sums of household earnings and to encourage teenagers to stay in school.

Dion v. Yeutter, No. 90-1896 (May 7, 1991). DJ # 145-16-3303.

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Ninth Circuit Goes Into Conflict With D.C. Circuit And Holds That Claims Arising In Antarctica May Not Be Brought Under Federal Tort Claims Act

Plaintiff brought this suit under the Federal Tort Claims Act (FTCA) alleging that her husband's death in Antarctica had resulted from the government's negligence. The district court dismissed on the ground that plaintiff's suit was barred by the "foreign country exception" to the FTCA.

The Ninth Circuit has now affirmed. The court declined to follow the D.C. Circuit's decision in Beattie v. United States, holding that claims arising in Antarctica could be asserted under the FTCA, concluding that this result was inconsistent with the structure of the Act and with the presumption against extraterritorial application of a statute.

Smith v. United States, No.89-35088 (May 1, 1991). DJ # 157-61-1836.

Attorney: Mark B. Stern - (202) 514-5089 or (FTS) 368-5089

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Writ Of Mandamus Orders The Department Of Interior To Complete Processing All Shale Claims, But Does Not Direct Interior To Issue Patents

In April 1986, Marathon Oil Company plaintiffs applied to the Interior Department for patents to oil shale placer mining claims whose locations allegedly predated the Mineral Leasing Act of 1920. (The Leasing Act withdrew oil shale from location and patenting pursuant to the Mining Act of 1872, 30 U.S.C. 21 et seq., but contains a saving clause for pre-existing "valid claims," 30 U.S.C. 193.) In 1988, Interior issued a final certificate stating that patents could issue provided that the discovery of a valuable mineral was verified. In 1989, Interior prepared an unsigned draft of its final mineral report, stating that Marathon's mineral claims showed such a discovery. No further action was undertaken by Interior, and in late 1989 brought suit.

In June 1990, the district court issued its judgment consisting of (a) a writ of mandamus requiring Interior to complete its administrative process forthwith, (b) an injunction, and (c) a summary judgment in Marathon's favor. The injunction ordered the Secretary of the Interior not only to complete administrative action on Marathon's patent application but also directed that the patents "shall issue on or before Friday, July 20, 1990." Interior obtained a stay of this injunction from the court of appeals pending its appeal.

The court of appeals affirmed to the extent that the district court required Interior to act on Marathon's application. It reversed to the extent that the district court ordered Interior to approve the application and to issue the patents. The court of appeals noted that, "while we expect the application to be approved, we recognize the possibility that [Interior] may decline to approve the application," and, in that event, directed Interior to state the reasons for its rejection "with sufficient particularity so that the district court can review [Interior's] decision for error if an appeal is taken." The court of appeals ordered Interior "to reach a decision and to report that decision to the plaintiffs and the district court within fifteen days," with the district court retaining discretion to alter this 15-day deadline. The court of appeals directed that its mandate issue forthwith. The 15-day deadline expires on July 3, 1991.

Marathon Oil Company v. Lujan, Secretary of the Interior, et al., 10th Cir. No. 90-1206 (June 18, 1991) (Aldisert (3d Cir.), Halloway, Ebel)

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TAX DIVISION

Supreme Court Grants Certiorari In Bankruptcy Case Involving The Taxation Of Liquidating Trusts

On May 28, 1991, the United States Supreme Court granted certiorari in Smith v. United States. This case involves the tax reporting and payment responsibilities of a liquidating trustee appointed in a multi-debtor Chapter 11 bankruptcy case. In this case, all of the debtors' assets were turned over to the trustee for distribution to creditors following sale of the assets. The Government argued that under the Internal Revenue Code the trustee was responsible for filing returns and paying taxes on the income earned by the debtor both before and after the creation of the liquidating trust. The Eleventh Circuit held that the trustee was not responsible for filing income tax returns or paying income taxes with respect to that income. According to the Eleventh Circuit, only the debtors, who no longer had any assets, had those responsibilities.

The United States and the debtors both petitioned for review in the Supreme Court on the ground that the Eleventh Circuit's decision is of great administrative importance. If this decision is allowed to stand, liquidating trusts may provide a vehicle for creditors in bankruptcy cases to avoid tax liabilities that would otherwise be entitled to priority over non-tax claims.

* * * * *

Petition For Certiorari Granted In In Re Holywell

The United States Supreme Court has granted the joint petition for certiorari filed by the Tax Division and the debtors in In re Holywell Corp.. The Eleventh Circuit held in this bankruptcy case, which could involve as much as $20 million, that the trustee of the liquidating trust set up under a bankruptcy loan of reorganization is not responsible for filing tax returns and paying taxes with respect to income generated by the trust.

Under a plan proposed by the Bank of New York, the major creditor of the debtors, the property in the debtors' estate was transferred to a liquidating trust for sale and distribution of the proceeds. The plan did not, however, provide for the payment of federal income taxes. The United States argued that the trustee nevertheless was responsible for reporting and paying taxes on the trust's capital gain and interest income.

A divided panel of the Eleventh Circuit held that the trustee of the liquidating trust was not required to file returns and pay taxes and concluded that the United States should seek payment of the taxes from the debtors themselves (even though they had been stripped of all assets). The dissenting judge noted that it was unclear how the debtors could pay the liability, since all of their assets had been taken over by the trustee under the plan.

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First Circuit Adopts Restrictive View Of Newly Enacted Church Audit Procedures

On May 29, 1991, the First Circuit affirmed the District Court's adverse decision in United States v. Church of Scientology of Boston, a summons enforcement case involving recently adopted provisions of the Internal Revenue Code concerning the audit of churches. Under Section 7611, the Internal Revenue Service may examine "church records" only "to the extent necessary to determine" a church's tax liability. The Government argued that, while the statute limited the purposes for which such an examination could be made, the Service was entitled to look at all potentially relevant information held by a church so long as the examination was being conducted for a permissible purpose.

The First Circuit squarely rejected this argument. It held that the "extent necessary" language in Section 7611 requires the IRS to explain why the particular documents it seeks will significantly help to further the purpose of its investigation. The First Circuit did not accept our view that this standard will hamper the IRS's investigatory activities.

This issue presented in this case is one of first impression and the resolution of it is of major importance to the administration of the federal tax laws.

* * * * *

Second Circuit Orders Disclosure Of Client Identity By Attorneys In Cash Fee Reporting Case

On June 7, 1991, the Second Circuit affirmed the decision of the District Court in United States v. Goldberger & Dubin, P.C., et al. In this case of first impression, the District Court ordered two New York law firms to comply with the reporting requirements of Section 6050I of the Internal Revenue Code by disclosing information identifying clients who paid cash fees in excess of $10,000. This information had been omitted by the firms on the Forms 8300 that they had filed with the Internal Revenue Service.

The Second Circuit rejected the attorneys' constitutional and attorney/client privilege arguments. The Court also held that state law codifying the attorney-client privilege must yield in the face of a countervailing federal statute and the strong public policy behind financial reporting legislation. The Court further stated that attorneys are subject to various civil and criminal penalties for noncompliance with Section 6050I, and that it is a lawyer's duty to counsel against nondisclosure of client information, "not to encourage it" [by filing Forms 8300 which fail to disclose the client/payor's identity].

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Fourth Circuit Sustains Liberal Standards Adopted By The Tax Court For Allowing Home Office Deductions

On June 5, 1991, a divided panel of the Fourth Circuit affirmed the adverse decision of the Tax Court in Soliman v. Commissioner. This case involved the deductibility of "home office" expenses. The taxpayer, an anesthesiologist, spent an overwhelming majority of his time at three hospitals where he treated his patients. He also maintained a home office, which he used only for performing essentially ministerial tasks that were incidental to his medical practice.

Under Section 280A of the Internal Revenue Code (which was adopted in 1976 to overturn the liberal rules previously applied in allowing such deductions), expenses incurred in maintaining a home office are deductible only if the home office constitutes the taxpayer's principal place of business. The Tax Court majority in this case, however, concluded that a home office should be deemed a taxpayer's "principal place of business" within the meaning of Section 280A whenever the office is essential to the taxpayer's business, he spends substantial time there, and no other location is available to perform the office functions of the business. This test, in our view, essentially emasculated Section 280A.

On appeal, we argued that the statute, in allowing a deduction only if the home office is the taxpayer's "principal" place of business, requires comparison of the importance of the various locations where a taxpayer carries out his trade or business. The Fourth Circuit majority disagreed and endorsed the Tax Court's liberal approach to the interpretation of Section 280A. A dissenter criticized the majority's approach on the ground that it "eliminates any need for comparing a taxpayer's use of several business locations to determine which constituted his 'principal place of business.'" The result here appears to be contrary to that reached by the Ninth Circuit in Pomerantz v. Commissioner, 867 F.2d 495 (9th Cir. 1988).

* * * * *

Ninth Circuit Goes Into Conflict With The Eleventh Circuit On The Applicability Of State Law Periods Of Limitations On Actions By The United States To Recover Illegally Collected State Taxes

On May 16, 1991, the Ninth Circuit affirmed the adverse judgment of the District Court in United States v. State of California and California State Board of Equalization, in which the United States sought to recover $11 million in state sales and use taxes which it asserted were illegally imposed on a government contractor. Pursuant to its contract with Williams Brothers Engineering Company to manage oil drilling operations on federal land in California, the United States reimbursed the latter for sales and use taxes assessed against that contractor by the California State Board of Equalization for the years 1975 through 1981. It then brought this action to recover approximately $11 million in California state taxes as being erroneously collected from Williams Brothers. The United States based its action upon the federal common law action of indebitatus assumpsit (quasi contract) for recovery of federal funds paid by mistake resulting in the unjust enrichment of California. The United States claimed that when it exercised a constitutional power in disbursing the funds to pay the tax, it had a right to sue under federal law in its courts to recover funds erroneously paid from the Federal treasury.

The District Court held that the suit was barred by the California statute of limitations on suits for the recovery of such taxes. The Ninth Circuit affirmed, rejecting the Government's contention that it was entitled to rely on the longer federal limitations period for suits by the United States in quasi contract. The Ninth Circuit held that no action lay in quasi contract here because the only dispute involved an interpretation of an exemption provision under California law. It further stated that the United States would have to pursue its claim in accordance with California administrative and judicial procedures, but recognized that its decision conflicted with that of the Eleventh Circuit in United States v. Broward County, 901 F. 2d 1005 (1990).

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Ninth Circuit Goes Into Conflict With First Circuit On Whether The Setoff Of A Tax Claim Against Amounts Otherwise Owing To The Taxpayer By The Government Constitutes A "Levy" Subject To The Statutory Procedures Provided For The Review Of Liens And Levies

On May 31, 1991, the Ninth Circuit, affirmed in part and reversed in part the favorable judgment of the District Court in Arford v. United States, involving the setoff of a tax claim against retirement pay owing to the taxpayer. The Air Force transferred a portion ($396) of taxpayer's retirement pay to the Internal Revenue Service to satisfy a portion of his unpaid tax liabilities. Mr. and Mrs. Arford thereupon brought this wrongful levy and quiet title action seeking to recover the amount of the setoff. The District Court dismissed the case for lack of jurisdiction, holding that neither the wrongful levy provisions of Section 7426 of the Internal Revenue Code nor the quiet title provisions of 28 U.S.C. §2410 were applicable under such circumstances.

On appeal, the Ninth Circuit agreed with the Government that the District Court did not have jurisdiction over the wrongful levy claims. The Ninth Circuit, however, disagreed with the Government's position that there was no waiver of sovereign immunity for the quiet title action under 28 U.S.C. §2410. It accordingly held that the District Court had jurisdiction over Mr. Arford's claims alleging procedural problems with the assessment. The Court rejected the Government's position, based upon United States v. Warren Corp., 805 F.2d 449 (1st Cir. 1986), that the transfer from the Air Force to the IRS was a setoff, as opposed to a levy, and did not depend on the existence of a lien on the property in question. We argued that quiet title actions under Section 2410 are permitted only to quiet title to property on which the Government claims a lien, and that the statute does not constitute a general waiver of sovereign immunity to challenge any and all collection actions by the Government. We further argued that Section 2410 does not apply where the Government claims title to the property in question (as it did here), as opposed to a lien interest (see Bertie's Apple Valley Farms v. United States, 476 F.2d 291 (9th Cir. 1973)). The Court simply disregarded these arguments, and concluded that a taxpayer should have the same rights with respect to an assertedly defective setoff as he would have with respect to a levy on amounts owing to him by a third party.

* * * * *

Dismissal Of Case Involving Constitutionality Of Dependency Exemption For Custodial Parent

In an interlocutory order dated June 10, 1991, the United States District Court for the Northern District of Ohio dismissed the causes of action against the Secretary of the Treasury and the Commissioner of Internal Revenue in Children and Parents Rights Association of Ohio v. Louis Sullivan, et al.

Plaintiff, a group representing non-custodial parents and their families in Ohio, alleges that Section 152(e) of the Internal Revenue Code, which provides that a dependency exemption is only allowable to the custodial parent, is unconstitutional. Plaintiffs also assert that the Child Support Enforcement Program (42 U.S.C. §651 et seq.) and state guidelines promulgated to assist in ensuring child support payments are unconstitutional. The District Court ruled that the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act required dismissal of the case with respect to the Secretary of the Treasury and the Commissioner of Internal Revenue.

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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%	06-28-91	6.39%
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%		
1 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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* * * * *

EXHIBIT
A

Department of Justice

"WORKING TOGETHER TO TACKLE THE DRUG PROBLEM"

REMARKS

BY

DICK THORNBURGH
ATTORNEY GENERAL OF THE UNITED STATES

TO THE

SECOND NATIONAL CONFERENCE

ON

STATE AND LOCAL DRUG POLICY

WASHINGTON, DC
TUESDAY, JUNE 18, 1991

Good morning. It's great to be back among the front line folks in the war on drugs. A special greeting to those of you I saw this spring at our first Violent Crime Summit, and to those of you I haven't seen since last year's state and local conference, it's good to be with you again.

Since we last met, substantial progress has been made in the war against drugs and violent crime. We are enjoying unprecedented international cooperation. Domestic law enforcement programs are achieving notable successes. A lot has happened, but in one important area, not much has happened.

As the President noted last week, his 100 day challenge to pass a crime bill has expired -- and the Congress has still left us without this important legislation. The President's Comprehensive Crime Bill will give us vital legal tools we need to do battle against violent crime -- violence that is aggravated by a flood of illegal firearms and fueled and funded by the drug traffic.

I remain optimistic that we can extricate this important legislation from the Congressional quagmire. Wouldn't it be gratifying if Capitol Hill were to give us a solid crime bill, not because of an impending election, but because this legislation is what the men and women on the front lines need to make America safe?

One particularly troublesome objection raised to this legislation would have the American people believe that this crime bill really doesn't matter because it only changes federal law, which involves only a small percentage of criminal law violators, and won't make a difference where the real action is -- at the state and local level.

But you and I know that is just not the case. Our critics discount the level of federal, state, and local interaction and cooperation. Take, for example, our flagship program, the Organized Crime Drug Enforcement Task Forces, where well over half of the cases were made with the assistance of local police. These cases, which are brought in federal court, target entire criminal organizations of drug traffickers, from the international kingpins down to the street-level dealers in your hometowns.

Or consider one of our newest programs, Operation Triggerlock, where every United States Attorney now has assigned a designated prosecutor to work with local authorities to target those particular criminal predators in their district who can be charged under the Federal Armed Career Criminal Act. Three prior state felony convictions for violent or drug offenses plus possession of a firearm will, under federal law, bring a swift

sentence of 15 years -- no probation, no parole, no plea bargaining, and no more problem to the community.

Or think about another of our current ventures. At the Justice Department, we are moving forward with the implementation of our "weed and seed" strategy. This is not a new program in the sense of a specific line-item in the budget. "Weed and seed" is a philosophy, a way in which the federal government views our responsibility to work with you at the state and local level to restore communities to the way we remember them in the good old days.

First we work with you to pull the "weeds," removing violent criminals, like drug dealers and gang members, from the community in coordinated sweep attacks. Then, we envision that various agencies from within the Justice Department can help plant the "seeds," working in partnership with others at the local level who will take the lead to help in rebuilding institutions and activities in these communities.

You can't tell me that federal law doesn't have an impact on state and local law enforcement! Perhaps that's why every major law enforcement organization in the country supports the President's bill. And I am sure your Congressmen and Senators will want to hear from you in this regard, as well!

There is one subject I would like to revisit with you this morning. At last year's conference, many of you will recall, I spoke about intermediate punishments, programs designed to fill the gap between probation and traditional incarceration. And we've taken considerable action since then. The Denial of Federal Benefits Program and the Civil Penalties Program have come on-line. Boot camp experiments are marching on. House arrests have multiplied. The use of intermediate punishments has grown significantly.

The common denominator of all of these programs is accountability -- holding individual drug users effectively accountable for their violations of society's laws and norms. This is the essence of law enforcement. We want drug kingpins held accountable. We want street dealers held accountable. And we want drug users held accountable.

Each of society's institutions must be dedicated as well to reducing the demand for drugs. This accountability message must be continually reinforced by the family, the school, the church, the workplace, and the community.

It goes without saying that the criminal justice system also has important responsibilities in the demand reduction arena.

Many of our drug abuse prevention and education efforts are well known to you. We fund programs such as DARE, the Drug Abuse Resistance Education effort that places police officers in elementary classrooms all over the country. Programs such as DEA's National Youth Sports Program, or the FBI's Boys and Girls Clubs, where special agents help teach children values, and how to distinguish right from wrong.

You may also be familiar with other community programs that we fund to help prevent drug use and the criminal activity that always follows in its wake. Programs such as Neighborhood Oriented Policing, where we help put the officer back on the beat. And, of course, who doesn't know about McGruff the crime prevention "spokesdog"?

However, other aspects of our demand reduction efforts are less well known. And they are less well defined.

Within the criminal justice system, we have a clientele who come to us already heavily involved with drugs. In fact, about half of those who enter the criminal justice system have a serious substance abuse problem. That is why the President's Drug Strategy appropriately places such a high priority on serving the treatment needs of this group.

The criminal justice system is uniquely situated to ensure that its clientele get involved in drug abuse education and treatment activities. Let's face it -- we, literally, have a captive audience!

The National Drug Control Strategy recognizes this need and suggests how we can meet it. It calls upon the criminal justice system to identify drug users throughout the system for referral elsewhere to treatment. And we have the means to do that identification. It's called drug testing.

As many of you know, I have long been a proponent of drug testing and argued personally before the United States Supreme Court the case that established our right to test federal employees. Drug testing is an important "early warning system" to alert criminal justice officials to potential risks to the community. Mandatory testing, with certain sanctions for coming up "dirty," provides a powerful incentive for offenders under correctional supervision to remain drug-free and to seek help for their addiction.

In short, I see drug testing as a valuable tool -- both as a diagnostic instrument and as a deterrent.

In the criminal justice setting, drug testing should be important from the moment an individual enters into our custody. Drug use is an important factor in decisions about pre-trial release, sentencing, and appropriate correctional system placement. Drug testing is also a useful tool to monitor offenders' behavior.

We have never been more serious about drug testing. The Administration's crime bill contains a section to formalize our nationwide program of drug testing for federal offenders on post-conviction release.

The President's crime bill also adds teeth to the call in each of the National Drug Control Strategies for conditioning eligibility for federal funding on a state's adoption of drug testing for targeted classes of offenders. These proposals are important and essential if we are to meet our public safety responsibilities. Yet, they are fair and sensitive to your budgetary concerns.

We have long been committed to working with you on the drug testing issue. Since 1988, the Justice Department has supported a drug testing project coordinated by the American Probation and Parole Association. Next month at APPA's conference, many of you will see the fruits of their exhaustive labors, a

comprehensive guide on policies and procedures for drug testing probationers and parolees. A sort of "everything you want to know about drug testing, but were afraid to ask" kind of compendium.

I commend this body of work to you. I know you will find it invaluable.

Inevitably, when we test for drugs we will find that many who have been remanded to our custody and care have substance abuse problems that need treatment. But who should provide this treatment? Who should decide what type of treatment is appropriate? And when do we intervene with these clients?

Let me try to answer these questions by first pointing to the federal model -- the Bureau of Prisons, where about half of their population has substance abuse problems.

The Bureau's program begins with appropriate assessment and classification. Their substance abuse treatment strategy follows through with a continuum of treatment services that begins with basic drug education programs, which are required for all inmates with substance abuse histories. The program also includes counseling services or placement in a comprehensive treatment unit.

The Bureau is also operating three pilot programs that represent state-of-the art efforts in residential treatment. And for those who have served their time, the Bureau also uses transitional services to ensure a smooth reintegration back into the community. Other than the education program which begins immediately, most services are tied to release dates.

I believe that this program has great promise. It is comprehensive and it is well-designed. But even a program this carefully planned must have built into it a rigorous research component to ensure that there is a thorough evaluation of its long-term impact. Because at this point, we still have some unanswered questions about what works in these settings and why.

How applicable is the Federal Bureau of Prisons model for state and local correctional agencies? On the one hand, you must consider that the federal population is generally with us for substantial periods of time, which in the case of drug treatment seems to have tremendous bearing on successful outcomes. On the other hand, our clients are not that dissimilar -- so what we learn in developing this program may be applicable for local prisons and jails.

In September 1989, our National Institute of Corrections convened a Task Force on Correctional Substance Abuse Strategies. Expert state and local practitioners representing jails, prisons, and community corrections met with corrections and treatment professionals from all across the federal government. Together they have formulated approaches to planning, implementing, and managing correctional substance abuse programs.

After 18 months of hard work, this Task Force has produced a path-finding guide called, "Intervening with Substance-Abusing Offenders: A Framework for Action." In this report, which will be released early next month, they found that there are some treatment programs that will work for offenders, that security and treatment concerns can be addressed simultaneously, that offenders need to be placed in appropriate programs, that linkages must be established between all service providers, and that accountability and evaluation are essential.

I would like to focus for a moment on those last two issues -- system linkages and accountability. It is critical for the supply reduction and demand reduction professionals to work together on treating drug abusing offenders. We come at the problem from different backgrounds and experiences, to be sure, with different skills and abilities, not to mention different orientations. But we can take the best that both have to offer

to reach this difficult population of the substance abusing offender.

The other matter that I want to emphasize is effectiveness. We must learn from our successes, and we must learn from our failures. We have our share of both in the law enforcement arena. And we have our share of both in the field of drug prevention and treatment.

Let me share with you a couple of examples. Several weeks ago Governor Martinez and I had the pleasure of getting a first-hand look at two exceptional programs in the Tampa, Florida area. We began the day with a visit to one of Tampa's Q.U.A.D. Squads, dedicated cadres of uniformed police officers working to take back the streets, block by block, quadrant by city quadrant, followed up by other city agencies to rehabilitate the neighborhoods -- a true "weed and seed" exercise.

Our next stop that morning was at Operation PAR, which provides prevention, education, and treatment services for juveniles and adults involved with drugs, many of whom probably entered the criminal justice system as a result of the Q.U.A.D. Squad's work!

Operation PAR has subjected itself to numerous evaluations and is committed to ensuring that their system maintains its integrity. We need more quality drug abuse education and treatment programs like this -- not just more programs for the sake of having more programs.

I have a very selfish motive for wanting to see these efforts succeed. Because the more successful we are in preventing and treating drug abuse, the easier our law enforcement jobs will become. We're counting on you to make a lasting difference. Because law enforcement alone cannot solve the drug problem.

As I have often said, "If we want to lose the war on drugs, we can just leave it to law enforcement." While our efforts to reduce the supply of drugs and to reduce the number of traffickers are essential, these efforts won't matter nearly as much in the long run as will our joint efforts to reduce the number of drug users and their appetite for these illegal substances.

I wish you well and Godspeed in your efforts.

EXHIBIT B

REENTRY OF DEPORTED ALIEN

(8 U.S.C. 1326)

On or about the _____ day of _____, 19____, in the _____ District of _____, the defendant, _____, an alien, knowingly and unlawfully entered (or attempted to enter) the United States at _____, _____, the said defendant having not obtained the consent of the Attorney General of the United States for reapplication by the defendant for admission into the United States, in violation of Title 8 United States Code, Section 1326.

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

EXHIBIT C

Washington, D.C. 20530

June 6, 1991

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, United States Marshals Service

FROM: Cary H. Copeland CHC
Director
Executive Office for Asset Forfeiture

SUBJECT: Seized Cash Management ~~Policy~~

This memorandum is to restate and clarify the existing policy on management of seized cash. In the past, the Department has often held tens of millions of dollars in office safes and other locations throughout the country. This raises both financial management and internal controls issues. The Department must report annually to Congress on the level of seized cash not on deposit.

The Attorney General has established the following policy on the handling of seized cash:

> **Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Director, Executive Office for Asset Forfeiture, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the United States Marshal should occur within sixty (60) days of seizure or ten (10) days of indictment.** (¶ VII(I), Attorney General's Guidelines on Seized and Forfeited Property, July 1990.)

Last year, the Executive Office for Asset Forfeiture initiated a program of periodic reviews of seized cash not on deposit with the Treasury. We have asked the Asset Forfeiture Office (AFO) of the Criminal Division to make telephonic contact with each Assistant U.S. Attorney (AUSA) and agent who is holding significant amounts of seized cash to determine if retaining the cash is warranted. This initiative has resulted in a sharp

reduction in the amount of seized cash being held in field locations, and a corresponding strengthening of internal controls over those funds.

This Office has recently received a report from the Asset Forfeiture Office (AFO) of the Criminal Division regarding cash seized for forfeiture but not on deposit with the Treasury as of January 31, 1991. The report indicated that many of the individuals contacted were not aware of the Department policy in this area or were not aware the policy applied to them.

Please ensure that all personnel handling cash seized for forfeiture are aware of the following points:

- The policy applies to all cash seized by the Department for purposes of forfeiture. Therefore, all seized cash must be turned over to the U.S. Marshal within the prescribed time frames.

- The policy applies with equal force to cash being forfeited administratively and to cash being forfeited judicially.

- An exception to the deposit policy may be granted if retention of the currency serves a significant evidentiary purpose. This may be due to the presence of fingerprints, packaging in an incriminating fashion, or presence of notations or writing.

- If the amount of seized cash to be retained for evidentiary purposes is less than $5,000, permission to retain the cash must be granted at a supervisory level within the seizing agency's field office for administrative cases or in the U.S. Attorney's Office for judicial cases.

- If the amount of seized cash to be retained for evidentiary purposes is $5,000 or greater, the request for an exemption must be forwarded to this Office. The request should include a brief statement of the factors warranting its retention and the name, position and phone number of an individual to contact regarding the request.

- If only a portion of the seized cash has evidentiary value, only that portion with evidentiary value should be retained. The balance should be deposited in accordance with Department policy.

Thank you for your assistance and cooperation in conducting the periodic seized cash surveys. Any questions regarding this policy may be directed to me on 202-514-0473 (FTS 368-0473).

EXHIBIT D

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 25 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | June 3, 1991

IN THIS ISSUE:

Cruel and Unusual Punishment

9th Circuit upholds life sentence without parole against Eighth Amendment challenge. (105) Defendant argued that his life sentence without parole for violating 21 U.S.C. section 848(b) violated the Eighth Amendment, in that Congress did not intend "small" kingpins like himself to get life without parole. The 9th Circuit rejected the argument, noting that the new mandatory life sentence for large drug dealers does not imply that Congress intended that only "king-kingpins" should be sentenced to life. The court noted that section 848(a) "still allows for life sentences without parole." *U.S. v. Lai*, __ F.2d. __ (9th Cir. May 22, 1991) No. 88-1279.

Guideline Sentencing, Generally

10th Circuit finds no error in court's comment that defendant's conviction would not necessarily result in incarceration. (110) Defendant was convicted of giving false statements to the FBI and to the grand jury. In response to defense counsel's statement during closing argument that defendant should not be sent to prison for his misstatements, the district court noted that defendant's conviction would not necessarily result in incarceration. Defendant contended that this deprived him of a fair trial. The 10th Circuit found no error. This discussion concerned only Count I, the charge of making false statements to the FBI. Under guideline section 2F1.1, the base offense level is 6. With a criminal history of I, and assuming no other adjustments, this resulted in a guideline range of 0 to 6 months. Therefore, with respect to this count alone, defendant would not necessarily face incarceration, and the court did not err in correcting defense counsel's statement. Moreover, it was improper for defense counsel to inform the jury of the defendant's possible punishment. *U.S. v. Jones*, __ F.2d __ (10th Cir. May 7, 1991) No. 90-6275.

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D.C. Circuit reverses district court's ruling that substantial assistance provision violates due process. (710) The D.C. Circuit reversed the district court's determination that the substantial assistance provisions of the guidelines violated substantive due process by precluding a defendant from contesting the prosecution's refusal to move for a downward departure based on the defendant's substantial assistance. Defendants have no right, in a non-capital context, to present potentially mitigating evidence in a sentencing proceeding. Congress could have made a defendant's assistance entirely irrelevant to sentencing. Moreover, a court may always consider a defendant's assistance in selecting a sentence from within the guideline range, even if it may not depart from the guidelines on that basis. The government motion requirement does not prevent a defendant from presenting pertinent information to the sentencing court, since defendant herself raised the issue of assistance at her sentencing hearing. Judge Ginsburg concurred. *U.S. v. Doe*, __ F.2d __ (D.C. Cir. May 24, 1991) No. 90-3027.

2nd Circuit holds jury need not determine whether offense continued past effective date of guidelines. (125)(380)(755) The sentencing guidelines mandated a sentence of life without the possibility of parole for defendant's continuing criminal enterprise conviction, but pre-guidelines law would have allowed the district court discretion to impose a prison term of 10 years to life. Because of the disparate sentences, defendant contended that in the absence of a specific jury determination that his offenses continued past the effective date of the guidelines, he must be sentenced under pre-guidelines law. The 2nd Circuit rejected this argument, holding that the determination of whether defendant's offense continued past the effective date of the guidelines is a sentencing factor, and may be resolved by the district court using the preponderance of the evidence standard. The court also rejected defendant's contention that a remand was necessary so that the district court could reconsider this issue in light of a subsequently discovered statement by a co-conspirator denying any dealing in narcotics after 1986. This statement was contradicted by substantial evidence presented at defendant's trial and by the co-conspirator's own subsequent testimony at the trial of others involved in defendant's scheme. *U.S. v. Underwood*, __ F.2d __ (2nd Cir. May 9, 1991) No. 90-1394.

Supreme Court declines to decide what is a "stipulation," noting that Commission has power to amend the guidelines retroactively. (130)(165)(795) The Supreme Court declined to resolve the conflict in the circuits over whether the defendant's mere assent to a set of facts can constitute a "stipulation" under section 1B1.2(a), noting that the Sentencing Commission has "already undertaken a proceeding that will eliminate circuit conflict" on that question. The court noted that Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect. 28 U.S.C. section 994(u). This power has been implemented in guideline section 1B1.10, which sets forth the amendments that justify sentence reduction. *Braxton v. United States*, __ U.S. __, 111 S.Ct. __ (May 28, 1991) No. 90-5358.

9th Circuit requires resentencing under guidelines in effect at the time of the offense. (130)(520) In ordering resenteincing for an armed career criminal under 18 U.S.C. section 924(e) the 9th Circuit ruled that the district court in resentencing should consider the guidelines in effect at the time of the offense and not the recently promulgated amended guideline. The court noted that in *Miller v. Florida*, 482 U.S. 423 (1987), the court held that retroactive application of revised guidelines violates the ex post facto clause. The court noted that effective Nov. 1, 1990, guideline 4B1.4 had been adopted with respect to sentence enhancements under 18 U.S.C. section 924(e). *U.S. v. Sweeten*, __ F.2d. __ (9th Cir. May 20, 1991) No. 90-30343.

2nd Circuit rejects sentence disparity between co-defendants as a ground for downward departure. (140)(722) The district court departed downward based in part on the disparity between the sentence imposed on a co-defendant and the sentence defendant would have received under the guidelines, despite the court's belief that defendant's was no more culpable than the co-defendant. Following recent circuit precedent, the 2nd Circuit found that disparity of sen-

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- Beverly Boothroyd

tences between co-defendants may not properly serve as a reason for departure. *U.S. v. Alba*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1523.

6th Circuit rejects downward departure based on defendant's ownership of business. (140)(722) Defendant pled guilty to 18 counts of knowing discharge of pollutants into a public sewer system. The district court departed downward and imposed probation and community service because defendant owned another business employing 26 people, and the business might fail if defendant were incarcerated. The 6th Circuit reversed, finding this was an improper ground for a downward departure. The court found "nothing special" about defendant's circumstances. "The very nature of the crime dictates than many defendants will likely be employers, whose imprisonment may potentially impose hardships upon their employees and families." The fact that a "harsh" fine had already been imposed was also not a ground for departure from the guidelines, since the guidelines have already taken fines into consideration. Finally, the fact that the downward departure made his sentence "uniform" with his co-defendants did not justify the departure, since there was a basis for the disparity. The co-defendants pled guilty to negligent, rather than knowing, violations of the Clean Water Act, and received reductions based on their minor roles in the offense. *U.S. v. Rutana*, __ F.2d __ (6th Cir. May 8, 1991) No. 90-3343.

10th Circuit affirms determination of different drug quantities for co-defendants. (140)(250) Defendant challenged the district court's determination that his co-defendant was responsible for less than 100 kilograms of marijuana, while he was responsible for more than 100 kilograms. Defendant contended that the court may not weigh the same evidence with respect to each defendant differently. The 10th Circuit affirmed, finding the disparate findings were not based on different interpretations of the same evidence. In determining the amount applicable to defendant, the court explained that its finding was supported by evidence not applicable to defendant. All marijuana transfers took place at defendant's business and thus he was responsible for them. In contrast, the co-defendant was a mere courier. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89-1109.

General Application Principles (Chapter 1)

7th Circuit affirms enhancement for both more than minimal planning and leadership of "otherwise extensive" criminal activity. (160)(430) Defendants conducted a massive mail fraud scheme. The district court enhanced defendants' offense level by two under guideline section 2F1.1(b)(2) for more than minimal planning and by four points under guideline section 3B1.1(a) for their roles as leaders of criminal activity that was "otherwise extensive." The 7th Circuit rejected defendants' claim that this constituted impermissible double counting. The "otherwise extensive" language applies to the number of the people involved in the operation, not the extent of the criminal activity. The purpose of section 3B1.1 is to increase the sentence due to a defendant's leadership role in an offense, not because the nature of the offense itself. Moreover, section 2F1.1(b)(2) allows for a two-point enhancement for either more than minimal planning or when the scheme to defraud involves more than one victim. Thus, defendants' offense level could have been increased by two levels regardless of their degree of planning, simply because there were 3,000 victims in their scheme. *U.S. v. Boula*, __ F.2d __ (7th Cir. May 14, 1991) No. 90-2399.

5th Circuit reverses finding that stipulation established more serious drug offense. (165)(240) The district court sentenced defendants under the guideline governing drug trafficking, rather than the guideline governing the offense of using a communications facility to commit a drug trafficking offense. Defendants had pled guilty to the latter offense. The government contended that defendants stipulated to the greater offense when they concurred in the factual basis for their plea. The 5th Circuit found that the stipulation did not specifically establish a more serious offense than the offense of conviction. At best, the stipulation showed that defendants were present during the commission of a drug trafficking offense, which is not enough to establish possession with intent to distribute. The sentencing court could not, as suggested by the government, rely on facts in the presentence report to establish the elements of the greater offense simply because defendants failed to object to those facts. The factual basis for each element of the greater offense must appear in the stipulated facts as made on the record. *U.S. v. Garcia*, __ F.2d __ (5th Cir. May 7, 1991) No. 90-8486.

3rd Circuit says court can consider only offense of conviction in making role adjustments for offenses prior to November 1, 1990. (170)(430) Following several other circuits, the 3rd Circuit held that for offenses committed prior to November 1, 1990, a district court may not consider all relevant conduct in determining a defendant's role in the offense. Rather, a court may consider only the conduct comprising the offense of conviction and any conduct in furtherance of the offense of conviction. For offenses committed after November 1, 1990, a court should consider all relevant conduct under guideline section 1B1.3. In this case, the finding that defendant supervised criminal activity involving five or more participants was clearly erroneous, since it was based on relevant conduct unrelated to the offense of conviction. *U.S. v. Murillo*, __ F.2d __ (3rd Cir. May 8, 1991) No. 90-3661.

5th Circuit rejects argument that Supreme Court case prevents consideration of conduct outside offense of conviction. (170) In *Hughey v. United States*, 110 S.Ct. 1979 (1990), the Supreme Court held that the Victim and Witness Protection

Act of 1982 ("VWPA") permits restitution only for the specific conduct that was the basis of the offense of conviction. A sentencing court cannot consider losses caused by conduct related to dismissed counts or uncharged conduct. Defendants contended that the phrase "commission of an offense," has the same meaning in the Sentencing Reform Act as it does in the VWPA. The 5th Circuit rejected this contention. The VWPA was passed long before the Sentencing Reform Act and was reenacted as part of a recodification and overhaul of federal criminal law. Although a court usually accords a similar meaning to similar language throughout a bill because it was drafted by one writer, such was not the case here. Moreover, the VWPA extended to judges a power they had never previously possessed. In contrast, the Sentencing Reform was enacted against a backdrop of hundreds of years of sentencing. The court refused to construe Congressional intent to change a long-standing practice without more explicit language. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

Offense Conduct, Generally (Chapter 2)

6th Circuit holds guidelines section 2K1.4 applies to cross-burning. (200)(330) Defendants were convicted of various offenses in connection with a cross-burning, including using fire to commit a felony. The 6th Circuit found that guideline section 2K1.4, entitled "Arson; Property Damage by Use of Explosives" applied to the offense, even though defendant's crime did not constitute arson. The government obtained convictions after a cross-burning incident for violations of 18 U.S.C. section 241 (conspiring to intimidate black dwelling holders because of race), 42 U.S.C. section 3631 (intimidating black dwelling holders by force or threat of force), and 18 U.S.C. section 844(h)(1) (using fire to commit a felony). The three guidelines used to determine the offense level were section 2H1.2 for the conspiracy, section 2H1.3 for the violation of the Fair Housing Act, and section 2K1.4 for the use of fire in the commission of a felony. The "use of fire" conviction is the offense underlying the conspiracy. *U.S. v. Gresser*, __ F.2d __ (6th Cir. May 28, 1991) No. 90-3414.

Supreme Court reverses where facts on which court relied at sentencing failed to establish the more serious charge of attempted killing. (210)(770) Defendant pleaded guilty to assault and firearms counts but not guilty to the more serious charge of attempting to kill a United States marshall. At the plea hearing, the government presented the facts of the crime to provide a factual basis for the pleas, and the defendant agreed with the facts as the government characterized them. Relying on section 1B1.2(a), over the defendant's objections, the court sentenced defendant as though he had been convicted of attempted killing, the only charge to which he had not confessed guilt. The Supreme Court reversed, ruling that the facts as stated by the prosecutor were not sufficient to establish an attempt to kill under 18 U.S.C. section 1114. Accordingly, defendant's sentence based upon the guideline for that offense could not stand. *Braxton v. United States*, __ U.S. __, 111 S.Ct. __ (May 28, 1991) No. 90-5358.

3rd Circuit rules abuse of trust is not an element of bank embezzlement. (220)(450) Defendant pled guilty to four counts of bank embezzlement. He contended it was improper to assess him a two-level enhancement for abuse of trust because abuse of trust was an element of his embezzlement offense. The 3rd Circuit rejected this, finding abuse of trust under the guidelines requires something more than mere embezzlement. The abuse of trust must have contributed in some substantial way to facilitating the crime and not merely provide an opportunity that could have as easily been provided to others. *U.S. v. Georgiadis*, __ F.2d __ (3rd Cir. May 23, 1991) No. 90-3224.

3rd Circuit finds no double counting in upward adjustment for amount of loss and enhancement for abuse of trust. (220)(450) Defendant pled guilty to four counts of bank embezzlement. He contended that the enhancement for abuse of trust was improper because abuse of trust was implicitly reflect in the adjustments made by the district court under guideline sections 2B1.1(b)(1) and (5), which increase a defendant's offense level based on the amount of loss and for more than minimal planning. The 3rd Circuit rejected this argument. The adjustment based on the amount of loss caused by defendant's embezzlement and the abuse of trust enhancement operate independently and respond to "different evils." "[I]t is not hard to imagine cases where the amount of money stolen by an embezzler will not depend on whether he abused any position of trust." Similarly, the enhancement for more than minimal planning and abuse of trust dealt with separate concerns. *U.S. v. Georgiadis*, __ F.2d __ (3rd Cir. May 23, 1991) No. 90-3224.

10th Circuit affirms that victim's psychological injury did not amount to "bodily injury" under the guidelines. (220) Defendant committed armed robbery of a credit union. The government contended that the district court erroneously failed to increase defendant's offense level under guideline section 2B3.1(b)(3) based on the "bodily injury" suffered by the teller of the credit union. The teller suffered psychological trauma as a result of her confrontation with defendant, needed to see a counselor and quit her job out of fear for her life. The 10th Circuit found no clear error in the district court's determination that there was no bodily injury. Without determining whether a purely psychological injury can ever amount to "bodily injury," evidence that the teller attended a single counseling session and changed occupations did not prove "an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." *U.S. v. Lanzi*, __ F.2d __ (10th Cir. May 9, 1991) No. 90-1036.

5th Circuit upholds distinction between cocaine and cocaine base. (240) The federal drug laws and the sentencing guidelines make the penalty for distributing cocaine base substantially greater than the penalty for distributing powdered cocaine. Defendants contended that cocaine and cocaine base are the same, and therefore the difference in penalty is unconstitutional. They further contended that if the two drugs are different, then the failure of the laws to define the differences makes the laws unconstitutionally vague. The 5th Circuit rejected both arguments. Cocaine base is a different drug from cocaine, and "even many children on the street know the difference between powdered cocaine and crack." Undefined words will be given their ordinary, contemporary, common meaning. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

9th Circuit declines to consider error in calculating guidelines where sentence was governed by mandatory minimum. (245) Defendant argued that the district court erred in computing his sentence under the guidelines. However, the length of defendant's sentence was not governed by the guidelines, because section 5G1.1(b) provides that "where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." Since defendant's sentence of five years was the mandatory minimum sentence under 21 U.S.C. section 841(b), "any error the district court may have committed in calculating defendant's sentence under the guidelines did not harm defendant." *U.S. v. Beltran-Felix*, __ F.2d. __ (9th Cir. May 28, 1991) No. 90-50079.

Supreme Court includes weight of blotter paper in determining the sentence for LSD. (245)(250) In a 7-2 opinion written by Chief Justice Rehnquist, the Supreme Court held that 21 U.S.C. section 841(b)(1)(B) which calls for a five year mandatory minimum sentence for distributing more than 1 gram of "a mixture or substance detaining a detectable amount" of LSD, requires that the weight of the carrier medium -- in this case blotter paper -- be included when determining the appropriate sentence. The court ruled that since the word "mixture" has no established common law meaning, it must be given its ordinary meaning. "The LSD crystals left behind when the solvent evaporates are inside of the paper, so they are comingled with it." The court also rejected the defendant's arguments that this interpretation violated due process or was unconstitutionally vague. Justices Stevens and Marshall dissented. *Chapman v. United States*, __ U.S. __, 111 S.Ct. __ (May 30, 1991) No. 90-5744, *affirming, U.S. v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) *en banc.*

9th Circuit holds that "mixture" rule applies even though mixture containing drugs is not marketable. (250) Defendant pled guilty to possessing with intent to distribute approximately 29 grams of methamphetamine contained in a liquid solution of 192 grams. The district court sentenced him under 21 U.S.C. section 841(b)(1)(B)(viii) to the mandatory minimum term of five year imprisonment and four years of supervised release. On appeal, defendant argued that the 192 gram solution of methamphetamine "was not in a *distributable* state." He argued that because the liquid solution was not yet "readily marketable," it should not have been used to find that he possessed more than 100 grams of a mixture containing methamphetamine. The 9th Circuit rejected the argument, ruling that the statute does not require that the mixture be "marketable." The court found no statutory exemption for the by products of methamphetamine manufacture. *U.S. v. Beltran-Felix*, __ F.2d. __ (9th Cir. May 28, 1991) No. 90-50079.

D.C. Circuit rules dilaudid is a "mixture or substance" containing hydromorphone. (250) Dilaudid is the brand name of a pharmaceutically manufactured drug, the active ingredient of which is hydromorphone, a controlled substance. Defendants pled guilty to drug offenses involving dilaudid pills. They contended their sentences should have been calculated according to the net weight of the hydromorphone, rather than the gross weight of the dilaudid. The D.C. Circuit held that under guideline section 2D1.1, dilaudid is a "mixture or substance" containing hydromorphone. The court refused to adopt a definition of the term "mixture or substance" since the Supreme Court was expected to decide this issue soon. However, under the two tests adopted by the federal courts to date, dilaudid qualified as a mixture or substance: one cannot pick a grain of hydromorphone off the surface of a dilaudid tablet, and hydromorphone is more or less evenly diffused throughout a dilaudid tablet. *U.S. v. Shabazz*, __ F.2d __ (D.C. Cir. May 28, 1991) No. 90-3244.

D.C. Circuit holds that sentence based on gross weight of drug did not violate 21 U.S.C. section 841(b)(1)(C). (250) Defendants pled guilty to drug offenses involving dilaudid pills, the active ingredient of which is hydromorphone, a controlled substance. They contended that sentencing them under guideline section 2D1.1 based on the total weight of the dilaudid, rather than the net weight of the hydromorphone violated 21 U.S.C. section 841(b)(1)(C). The D.C. Circuit rejected this reasoning, refusing to divine a Congressional intent that the total weight of the mixture or substance was irrelevant for all but the eight controlled substances specifically listed in the statute. The Sentencing Commission did not act unreasonably in refusing to treat hydromorphone differently. The court also rejected defendants' argument that application note 11 to guideline section 2D1.1 prohibited sentencing them according to the total weight. Note 11 provides guidance on how to determine the weight of controlled substances for sentencing purposes if the weight of the controlled substance is unknown. The weight of the dilaudid was known, even though each pill was not weighed. *U.S. v. Shabazz*, __ F.2d __ (D.C. Cir. May 28, 1991) No. 90-3244.

2nd Circuit holds court not bound by jury's findings as to drug quantity. (265)(770) A jury found by special interrogatory that defendants had conspired to distribute five or more kilograms of cocaine. Defendants argued that they should not have been sentenced on the basis of five kilograms because the evidence was insufficient to show that they intended or were able to sell more than two kilograms. The district court had rejected this argument, finding it was bound by the jury's verdict. The 2nd Circuit remanded for resentencing, finding the district court's view that it was bound by the jury's verdict to be erroneous. The government contended no remand was necessary, since the jury found each defendant had the requisite knowledge and intent beyond a reasonable doubt. Therefore, a sentencing court would have to make the same finding, since it need only make its findings by a preponderance of the evidence. The 2nd Circuit rejected this solution, finding that the sentencing court could make findings that differed from the jury's findings. Questions of inference and credibility are within the province of the finder of fact. *U.S. v. Jacobo*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1240.

7th Circuit reverses offense level calculation based upon defendant's statement that he could supply additional cocaine. (265) Defendant supplied one kilogram of cocaine to a co-conspirator, who had been expecting two kilograms. Defendant assured him that he would get the additional kilogram, and stated "if you want, even ten more I can get." The 7th Circuit reversed the calculation of defendant's offense level based upon the ten kilograms mentioned by defendant. Defendant's single comment was not sufficient to establish that the conspiracy had as its goal the distribution of 10 kilograms of cocaine. Such an amount was never mentioned to the undercover purchaser, there was no evidence of other buyers for such an amount, no price had been set or even quoted, and there was no evidence that defendant had in his possession, or had access to that amount of cocaine. *U.S. v. Ruiz*, __ F.2d __ (7th Cir. May 17, 1991) No. 90-1787.

5th Circuit upholds consideration of drugs outside offense of conviction. (270)(770) The 5th Circuit upheld the district court's calculation of defendant's offense level based upon drug quantities outside the offense of conviction. A co-conspirator established that defendant and his co-conspirators trafficked in up to 66 kilograms of cocaine, well above the threshold the court needed to support its sentence. This was reliable evidence that the court could consider, and the court was not limited to the amount of cocaine actually seized. There also was testimony of a special agent who concluded that defendant picked up couriers carrying kilogram sacks of cocaine, which independently supported the district court's finding. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

6th Circuit upholds consideration of relevant conduct despite defendant's acquittal. (270)(770) Defendant contended that his acquittal of one drug count barred the district court from considering this conduct in determining his base offense level. The 6th Circuit rejected this argument. In order to convict at trial, the government must prove the elements of the offense beyond a reasonable doubt, while the burden of proof at sentencing is the lesser preponderance of the evidence. Here, there was sufficient evidence of the prior drug involvement. Defendant supplier provided extensive testimony regarding defendant's involvement in drug trafficking and the amount of cocaine he supplied to defendant. *U.S. v. Moreno*, __ F.2d __ (6th Cir. May 9, 1991) No. 90-5832.

8th Circuit reverses offense level calculation based upon drugs to be produced from lab which was never found. (270) Defendant offered to sell an amphetamine lab for $50,000 to an undercover officer. Defendant claimed the lab was capable of producing seven or eight pounds of amphetamine. No transaction concerning this lab ever occurred and the officer never saw the lab in question. A few months later, defendant was arrested for attempting to deliver six ounces of amphetamine. The 8th Circuit reversed the district court's calculation of defendant's offense level based upon an intent to manufacture seven pounds of amphetamine. The drug lab defendant offered to sell the undercover agent was never shown to exist, no equipment or drugs of any kind were ever discovered, the officer never saw any drugs and did not smell on defendant's person the odor associated with amphetamine production. Defendant also had a propensity to exaggerate. Moreover, although defendant had agreed to sell six ounces of amphetamine, he was to obtain the drugs from his source. After leaving the money for the drugs with his source, the source would later inform defendant of the location of the amphetamine. These facts were not indicative of one who owned a drug lab. Judge Bowman dissented to this portion of the opinion. *U.S. v. Burks*, __ F.2d __ (8th Cir. May 14, 1991) No. 90-1310.

5th Circuit upholds sentencing defendant on the basis of entire quantity of drugs distributed by conspiracy. (275) Defendant contended that the district court erred by including cocaine that was part of a larger conspiracy in his base offense level calculations. He contended that he was involved in a small cocaine operation, only tangentially involved with the major one, and that he did not know that the larger conspiracy was occurring. The 5th Circuit rejected this. The government introduced credible evidence that the drug conspiracy involved defendant from the very start and that he worked for the other defendants. It was only later that defendant left the group to start his own subsidiary distribution ring, which continued to get cocaine from members of the old conspiracy. Furthermore, unrebutted government evidence showed that a joint venture was ongoing, with defendant as a member. Defendant was thus part of several groups which were connected with the original large conspiracy. Therefore charging him with knowledge of the entire

conspiracy and drug amounts was not error. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

7th Circuit affirms that three-kilogram sale was foreseeable to defendant. (275) Defendant agreed to help a government informant find buyers for large of amounts of cocaine that the informant claimed to have available. Defendant eventually located one such purchaser. In a recorded conversation, defendant and the informant set up a meeting for the transaction, but it was unclear from the conversation how many kilograms the purchaser was to buy from the informant. The informant brought three kilograms to the meeting, while the purchaser only brought enough cash for one kilogram. During the sales discussion between the purchaser and the informant, at which the defendant was not present, the purchaser requested the informant to "front" him the two additional kilos of cocaine. The 7th Circuit found no impropriety in sentencing defendant on the basis of three kilograms of cocaine. Defendant was convicted of conspiracy, and the district court had concluded that the sale of three kilograms to the purchaser was foreseeable. Defendant had earlier arranged a five-kilogram sale and therefore this finding was not clearly erroneous. *U.S. v. Boyer*, __ F.2d __ (7th Cir. May 7, 1991) No. 90-1705.

11th Circuit affirms offense level calculation based upon full amount of cocaine distributed by conspiracy. (275) Although defendant was convicted of conspiracy to distribute six and one-half grams of cocaine, he contended that he had no knowledge of that amount, and should have been sentenced on the basis of the four kilograms of which he had knowledge. The 11th Circuit affirmed the offense level calculation. The district judge stated that there was sufficient evidence from the trial of the co-conspirators that defendant knew about the full six and one-half kilograms. The district court offered defendant the opportunity to request an evidentiary hearing on this issue, and defendant refused. Moreover, the overt act of a co-conspirator is attributable to a defendant and may be used to calculate the proper sentence. *U.S. v. Ervin*, __ F.2d __ (11th Cir. May 22, 1991) No. 90-3153.

5th Circuit affirms both sentence enhancement for possession of firearm and sentence for felon's possession of a firearm. (284)(330) The 5th Circuit rejected defendant's argument that it violated double jeopardy for her to receive a sentence enhancement for possessing a weapon during the commission of a drug offense under guideline section 2D1.1(b)(1), and be sentenced, pursuant to her guilty plea, for being a felon in possession of a firearm. Defendant's argument "misperceive[d] the distinction between a sentence and a sentence enhancement." A sentence is for a crime and a sentence enhancement is an adjustment within the permissible range for that or another crime. Because the two are separate, consideration of the two in separate contexts is not improper. *U.S. v. Ainsworth*, __ F.2d __ (5th Cir. May 15, 1991) No. 90-8034.

8th Circuit upholds firearm enhancement for weapon found in defendant's home. (284) After meeting with a confidential informant who gave defendant $6,000 for the purchase of amphetamines, defendant left his home to deliver the money to his supplier. Defendant was arrested en route and a subsequent search of his house uncovered a semi-automatic pistol and three loaded clips. The 8th Circuit upheld an enhancement under guideline section 2D1.1(b)(1) for possession of a firearm during a drug trafficking crime. Despite defendant's contention that all of the conversations concerning the drug purchase took place outside his residence, and that he was headed away from his residence at the time of his arrest, the appellate court found that the district court's findings were not clearly erroneous. *U.S. v. Burks*, __ F.2d __ (8th Cir. May 14, 1991) No. 90-1310.

10th Circuit affirms enhancement based upon co-defendant's possession of firearm. (284) When police stopped a vehicle containing three men, defendant jumped out of the back seat and ran. Just prior to being caught, he threw a small bag of cocaine into a tree. One of the passengers of the vehicle told police he knew there was a handgun on the floor of the automobile between the front seats. The 10th Circuit affirmed a sentence enhancement based upon the co-defendant's possession of the gun. A sentencing court may attribute to a defendant a weapon possessed by a co-defendant if the possession of the weapon was known to the defendant or reasonably foreseeable by him. Here, one of the passengers stated he had participated in the transaction as a show of force, he knew the gun was available in the front seat of the automobile, and he knew a drug deal was taking place. It was not clearly erroneous for the district court to find that defendant was aware of his co-defendant's possession of the weapon or that such possession was reasonably foreseeable. *U.S. v. McFarlane*, __ F.2d __ (10th Cir. May 21, 1991) No. 90-3257.

7th Circuit vacates 10-level upward departure based upon large number of fraud victims. (300)(746) Defendants were convicted of conducting a massive mail fraud, resulting in an offense level of 21 under the guidelines. The 7th Circuit departed upward to level 31 on the ground that (a) the offense involved both more than minimal planning and more than one victim, (b) there were a large number of victims, and (c) the $7 million loss exceeded the $5 million floor in the highest loss category for fraud offenses. The 7th Circuit upheld the first ground for departure under application note 2F1.1, which specifies that departure may be warranted if two or more of the section 2F1.1(b)(2) provisions are satisfied. However, it rejected the latter two grounds. The number of victims is accounted for in the fraud guideline provisions by total dollar loss, rather than the number of victims. Moreover, although departure may be appropriate if the actual

loss "substantially exceeds" the $5 million floor, the $7 million loss did not qualify, given the $3 million difference between the last two loss levels in the table. Therefore, although one of the grounds for departure was warranted, the 10-level upward departure was an inappropriate degree of departure. *U.S. v. Boula*, __ F.2d __ (7th Cir. May 14, 1991) No. 90-2399.

11th Circuit affirms district court's actions despite failure to make explicit findings of fact and conclusions of law. (300)(750) Defendant argued that the district court failed to make explicit findings of fact and conclusions of law regarding controverted matters at sentencing as required by guideline section 6A1.3(b) and Fed. R. Crim. P. 32(c)(3)(D). The 11th Circuit found that there was adequate evidence to support the district court's summary disposition of defendant's objections. Defendant's argument for a downward departure under guideline section 5K1.1 was meritless because the government specifically declined to move for such a departure. Defendant's claim that an enhancement for more than minimal planning was prohibited because he already received an enhancement under guideline section 2F1.1(b)(2)(A) was also meritless. The commentary indicating that the adjustment was alternative, rather than cumulative, referred only to guideline section 2F1.1(b)(3). Finally, defendant's claim of acceptance of responsibility had no support in the record. Although defendant acknowledged responsibility for his criminal behavior, since his release on bond he committed nine additional offenses and faced trial in at least four cases involving seven additional charges. *U.S. v. Villarino*, __ F.2d __ (11th Cir. May 13, 1991) No. 89-6069.

5th Circuit upholds guideline governing failure to report for service of sentence. (320) Defendant argued that the sentencing commission exceeded its statutory authority in setting the offense levels for failure to report for service of sentence. He contended that guideline section 2J1.6 was irrational because it bases a defendant's offense level on the maximum potential penalty for the underlying offense, rather than on the defendant's actual sentence. The 5th Circuit rejected the argument, refusing to follow the 8th Circuit's opinion in *U.S. v. Lee*, 887 F.2d 888 (8th Cir. 1989), which invalidated the application of section 2J1.6 to defendants who abscond after sentencing when their sentence is a "fraction" of the maximum possible sentence. "Congress and the Commission could well have concluded that greater social harm may result when defendants convicted of more serious offenses fail to report for service of sentence, regardless of the actual sentence imposed for the underlying offenses." *U.S. v. Harper*, __ F.2d __ (5th Cir. May 22, 1991) No. 90-2192.

D.C. Circuit affirms enhancement for failure to appear based on offense charged. (320) Defendant was indicted on a charge of possession with intent to distribute five grams of cocaine base. He subsequently failed to appear for a status call. Defendant eventually was convicted of simple possession, a misdemeanor, and of failure to appear. The guideline provides that a sentence for failure to appear be enhanced in proportion to the maximum penalty authorized for the "underlying offense." The D.C. Circuit rejected defendant's argument that because the jury convicted him of only of possession, his sentence should not be enhanced on the basis of the felony with which he was charged. At the time defendant failed to appear for his status call before trial, only the offense of indictment was relevant. He could not have failed to appear with respect to any other crime. *U.S. v. Williams*, __ F.2d __ (D.C. Cir. May 21, 1991) No. 89-3174.

6th Circuit holds guidelines do not limit consideration of prior offenses for purposes of weapon enhancement under 18 U.S.C. 924(e). (330)(500) Defendant received a 15-year minimum term of imprisonment under 18 U.S.C. section 924(e). Relying upon guideline section 4A1.2, defendant argued that in applying section 924(e), felony convictions more than 15 years old should not be considered. The 6th Circuit rejected this argument, finding that guideline section 4A1.2 does not affect the statutory range set in section 924(e). Although the sentencing guidelines restrict the sentencing court's consideration of certain past offenses, section 924(e) does not. *U.S. v. Moreno*, __ F.2d __ (6th Cir. May 9, 1991) No. 90-5832.

11th Circuit affirms that cathode assembly for tube used in Hawk missile battery is "sophisticated weaponry." (345) Defendant was convicted of attempting to export to Iran a cathode assembly for a tube used in a Hawk missile battery. The 11th Circuit affirmed an increase in defendant's offense level under guideline section 2M5.2 based upon the involvement of "sophisticated weaponry." The court had "no difficulty concluding that the Hawk missile, and the cathode assembly that is part of its guidance system, constitutes sophisticated weaponry." *U.S. v. Chung*, __ F.2d __ (11th Cir. May 13, 1991) No. 90-8538.

6th Circuit directs district court to reconsider fine for each violation of Clean Water Act. (355)(630) Defendant was convicted of 18 counts of violating the Clear Water Act. In addition to other punishment, the district court imposed a fine in the amount of $90,000 on defendant, or $5,000 per violation. The case was remanded for resentencing on other grounds. In so doing, the 6th Circuit suggested the district court reconsider whether to fine defendant on all 18 counts of conviction. In setting the fine, the district court was acting under the erroneous impression that the $5,000 per violation was a mandatory minimum. While the total amount of the fine was technically proper, and while the guidelines state that some fine shall be imposed in all cases, the statute under which defendant was sentenced does not require a fine for each violation. Rather, 33 U.S.C. section 1319(c)(2) gives the sentencing court the option of imposing a fine or impris-

onment, or both. *U.S. v. Rutana*, __ F.2d __ (6th Cir. May 8, 1991) No. 90-3343.

8th Circuit affirms application of guidelines to defendant who organized tax conspiracy. (370)(410)(430) Defendant and other tax-protesters organized an elaborate scheme whereby a participant would file a fraudulent Form 1099 with the IRS falsely reporting the payment of income to a person who had "committed a wrong" against the participant, and then would file a tax return fraudulently claiming a refund for the money reported paid on the 1099. The victims of the conspiracy included a bankruptcy judge, a congressman, the Commissioner of the IRS, and numerous IRS agents and employees. The 8th Circuit affirmed that defendant was properly sentenced under guideline section 2T1.9, Conspiracy to Impair, Impede or Defeat Tax, rather than guideline section 2T1.3, Fraud and False Statements Under Penalty of Perjury. Given the victims of the fraud, it was also proper to increase her offense level under guideline section 3A1.3 for targeting official victims. The evidence also amply supported an enhancement for her role as manager or supervisor in the offense; defendant was one of the core members of the conspiracy and chiefly responsible for the manufacture and distribution of many of the fraudulent documents. *U.S. v. Telemague*, __ F.2d __ (8th Cir. May 28, 1991) No. 90-5468.

Adjustments (Chapter 3)

2nd Circuit upholds managerial role for defendant who obtained cocaine and recruited co-defendant. (430) The 2nd Circuit found the district court's determination that defendant played a managerial role was not clearly erroneous. Defendant had obtained cocaine and hired a co-defendant to carry it for him. *U.S. v. Jacobo*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1240.

5th Circuit affirms supervisory role for defendant who stored drug proceeds and distributed crack. (430) The 5th Circuit rejected defendant's challenge to a three-point adjustment for his supervisory role in a drug conspiracy. Defendant was more than just another drug runner; he was involved in both procuring and distributing drugs. Defendant's arrangement of a place to store the proceeds and undistributed crack not only included renting apartments, but actually purchasing and using an apartment complex to house a crack joint. This was sufficient involvement, even ignoring defendant's other activities, to support the inference that he exercised control over others. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

7th Circuit upholds defendant's organizing role even though another defendant also played an organizing role. (430) Defendant argued that he could not have been an organizer or supervisor because a co-defendant organized and supervised the transaction. The 7th Circuit rejected this argument. While the co-defendant played a significant role in the transaction, a finding that the co-defendant was an organizer would not preclude defendant from also receiving such an enhancement. Defendant need not control all aspects of the scheme to be an organizer or a supervisor. *U.S. v. Ramos*, __ F.2d __ (7th Cir. May 8, 1991) No. 90-2383.

7th Circuit affirms leadership role of drug supplier. (430) Defendant contended that he should not have received a two-level enhancement under guideline section 3B1.1(c) because he and his co-conspirators merely had a "buyer-seller" relationship. The 7th Circuit affirmed the enhancement, finding no clear error. The co-conspirators, whom the district court determined to be telling the truth, testified that defendant was the supplier of the cocaine, set the price for the cocaine, had decision-making authority over the details of the distribution of the cocaine, and physically oversaw a two-kilogram deal. Several of these factors were corroborated by the testimony of undercover agents. *U.S. v. Ruiz*, __ F.2d __ (7th Cir. May 17, 1991) No. 90-1787.

8th Circuit affirms that defendant supervised five or more participants in gambling operation. (430) The 8th Circuit found that there was sufficient evidence that defendant supervised five or more persons in his gambling business. One man accepted bets from others and passed them on to defendant for a percentage of the action. Three others also accepted wagers for others and turned them over to defendant. Testimony at trial also indicated that several bartenders at defendant's restaurant passed out line sheets, collected money, and paid off bettors for defendant. The enhancement was not improperly based upon defendant's role in collateral conduct, rather than the offense of conviction. Defendant was convicted of using interstate wire facilities to obtain gambling information while engaged in the business of gambling. Running a gambling business is a "fundamental aspect" of this offense, and therefore defendant's leadership role in that business was an appropriate basis for the leadership enhancement. *U.S. v. Sutera*, __ F.2d __ (8th Cir. May 15, 1991) No. 90-2479.

10th Circuit affirms leadership role of defendant who owned business in which marijuana transfers took place. (430) The 10th Circuit affirmed a four-level enhancement based upon the district court's finding that defendant was a leader or organizer of a marijuana conspiracy. There was evidence that extensive marijuana transfers took place at a business that defendant owned. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89- 1109.

5th Circuit rejects minor role reduction solely because defendant does less than other participants. (440) Defendant contended he was entitled to an offense level reduction based on his minor role. The presentence report indicated that defendant was only a "go-between," and not a supervisor, and that he would pick up cocaine, package it and give it to

couriers. The 5th Circuit acknowledged that defendant's role in the conspiracy was less than the supervisory roles of his co-conspirators, but found defendant was not entitled to the reduction. "It is improper to award a minor participation adjustment simply because a defendant does less than the other participants. Rather, the defendant must do enough less so that he at best was peripheral to the advancement of the illicit activity." Given defendant's "daily role" in the conspiracy, the district court did not err in finding defendant's participation was not minor. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

7th Circuit rejects minor role of "facilitator" of drug transaction. (440) Defendant located a drug buyer for a government informant. He contended that he should have received a reduction for being a minor participant, since he was merely a "facilitator" of the drug transaction. The 7th Circuit rejected this argument. Defendant, not the informant, pursued the contact with the ultimate purchaser of the drugs. The informant was unacquainted with the purchaser before defendant intervened and set up the transaction. The fact that the government requested an "aiding and abetting" instruction at defendant's trial did not preclude the court from denying the reduction. *U.S. v. Boyer*, __ F.2d __ (7th Cir. May 7, 1991) No. 90-1705.

3rd Circuit affirms abuse of trust enhancement for bank embezzler. (450) Defendant was an assistant vice president of a bank in charge of administering the bank's mortgage settlement closings. He pled guilty to four counts of embezzling bank funds by diverting money from mortgage settlements into his own accounts. The 3rd Circuit affirmed an enhancement for abuse of trust, finding the government carried its burden of proving by a preponderance of the evidence that defendant occupied a position of trust at the bank. *U.S. v. Georgiadis*, __ F.2d __ (3rd Cir. May 23, 1991) No. 90-3224.

5th Circuit upholds obstruction of justice enhancement for defendant who impeded perjury prosecution. (450)(460) The 5th Circuit upheld a three-level adjustment for substantial interference with the administration of justice and a two-level adjustment for obstruction of justice based upon defendant's efforts to impede the prosecution of his perjury. Defendant made further false statements to a grand jury, to an FBI investigator, and to his attorney after his trial. The court further agreed that defendant's role as a member of the police jury, which regulated and controlled the operation of bingo within the local parish, and his appearance before the grand jury in that role, provided a sufficient basis to support a two-level adjustment for abuse of a position of trust. *U.S. v. Pattan*, __ F.2d __ (5th Cir. May 10, 1991) No. 89-3451.

D.C. Circuit rejects special skill enhancement based upon defendant's ability to manufacture PCP. (450) The D.C. Circuit reversed a special skill enhancement under guideline section 3B1.3 based upon defendant's ability to manufacture PCP. Under the government's reasoning, the mere ability to commit a difficult crime would evidence a special skill. The court rejected this analysis and held that the special skill enhancement applies only if the defendant employs a pre-existing, legitimate skill not possessed by the general public to facilitate the commission or concealment of a crime. The use of the word "facilitate" suggests that the defendant knows how to commit the offense in the first place and that he uses a special skill to make it easier to commit the crime. The special skill necessary to justify an enhancement "must be more than the mere ability to commit the offense; it must constitute an additional, pre-existing skill that the defendant used to facilitate the commission or concealment of the offense." *U.S. v. Young*, __ F.2d __ (D.C. Cir. May 17, 1991) No. 90-3064.

2nd Circuit rejects change in appearance as grounds for obstruction enhancement. (460)(485) The district court gave defendant a two-level enhancement for obstruction of justice based upon (a) defendant's change in appearance prior to submitting to a grand jury subpoena for photograph, and (b) defendant's perjurious trial testimony. The 2nd Circuit rejected the first reason for the enhancement, but affirmed the enhancement on the second ground. The purpose of the photograph was to determine if a bartender who allegedly received counterfeit money from defendant could identify defendant from a photo spread. At the time defendant received the subpoena, he had bushy dark hair, was unshaven, wore glasses and was dressed in dirty clothes. He appeared for the photo session with short hair, was clean shaven, had no glasses and wore a suit. The 2nd Circuit found it natural that an individual served with an official document calling him to appear before federal authorities would attempt to make himself more presentable. Without evidence of an intent to deceive, a change in appearance alone will generally be an insufficient basis for an obstruction enhancement. However, defendant's perjury did justify the enhancement. Moreover, under the acceptance of responsibility provisions that existed at the time of defendant's sentencing, his perjury alone supported the district court's refusal to award an acceptance of responsibility reduction. *U.S. v. Bonds*, __ F.2d __ (2nd Cir. May 15, 1991) No. 90-1581.

5th Circuit affirms obstruction enhancement based on defendant's attempted escape from custody pending trial. (460) The 5th Circuit affirmed an obstruction of justice enhancement based upon defendant's attempt to escape from custody while awaiting trial. The November 1, 1990 guidelines specify that an attempted escape before trial is an obstruction of justice. Prior to this date, the guidelines did not specifically list attempted escape, however, the listed conduct was not exclusive. Since the administration of justice includes the ability of the government to produce persons in custody for their scheduled court dates, the administration of justice is obstructed when such persons escape from custody.

That the sentencing commission now explicitly lists attempted escape as justifying an obstruction enhancement supports this conclusion. *U.S. v. Valdiosera-Godinez*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-8212.

5th Circuit affirms obstruction enhancement for defendant who hid gun and drug money from arresting officers. (460)(485) When agents attempted to arrest defendant after a drug transaction, she ran away but was captured several minutes later. When apprehended, defendant was no longer in possession of the gun she had been carrying or the money from the drug sale. These were found hidden nearby, under a car and in a spare tire. The 5th Circuit upheld an enhancement for obstruction of justice, rejecting defendant's argument that the gun was irrelevant to her charge of conspiracy to distribute methamphetamine. The gun was relevant to defendant's criminal conduct, as it could have been used to "back up" her drug deals. In addition, the drug money given to defendant by undercover agents in the drug deal was very material. Moreover, defendant was properly denied a reduction for acceptance of responsibility, since the guidelines in effect at the time defendant was sentenced precluded a defendant who had obstructed justice from receiving a reduction for acceptance of responsibility. *U.S. v. Ainsworth*, __ F.2d __ (5th Cir. May 15, 1991) No. 90-8034.

7th Circuit affirms obstruction enhancement based upon defendant's lies. (460) Defendant received an enhancement for obstruction of justice for lying at trial. He contended that the statements which the district court found to be perjurious were nothing more than minor inconsistencies, and reflected an imperfect recollection rather than a conscious effort to mislead the jury. The 7th Circuit rejected this contention. All of defendant's "misstatements" served either to bolster defendant's entrapment defense or to exonerate a co-defendant. Given this pattern, it was not clear error for the district court to conclude that defendant's "misstatements" were outright lies intended to mislead the jury. *U.S. v. Rodriguez*, 929 F.2d 1224 (7th Cir. 1991).

7th Circuit rules district court may not rely solely upon guilty verdict to determine that defendant testified falsely. (460)(820) Defendant testified at his trial that he had never handed drugs to a co-conspirator for delivery to an undercover government agent. The jury found defendant guilty of several drug-related counts. The district court enhanced defendant's sentence for obstruction of justice, based entirely upon the jury's verdict. Reviewing the matter *de novo*, the 7th Circuit found that a district judge may not rely entirely upon a jury's guilty verdict to determine that a defendant obstructed justice by testifying falsely. The district court, "based upon its own observations of [defendant's] testimony and other evidence, must independently determine whether the defendant lied on the witness stand. Imposing the penalty automatically from a jury verdict that concededly does not establish the defendant lied in his testimony impinges upon the right to testify in one's behalf." *U.S. v. Lozoya-Morales*, __ F.2d __ (7th Cir. May 10, 1991) No. 90-2380.

11th Circuit affirms obstruction enhancement based upon defendant's false testimony. (460) The 11th Circuit found defendant's challenge to the two-level enhancement for obstruction of justice to be meritless. There was abundant evidence that defendant testified untruthfully in this case, and thus, an enhancement was in order. *U.S. v. Chung*, __ F.2d __ (11th Cir. May 13, 1991) No. 90-8538.

2nd Circuit directs reconsideration of acceptance of responsibility in light of remand on drug quantity issue. (485) The district court had denied defendant a reduction for acceptance of responsibility since defendant had only acknowledged responsibility for two kilograms of cocaine, and the jury had found defendant responsible for five kilograms. However, the 2nd Circuit had remanded the case for the sentencing judge to make its own independent determination of the quantity of cocaine involved in the offense. Therefore, the appellate court directed the district court to reassess defendant's entitlement to an acceptance of responsibility reduction in light of its own findings. *U.S. v. Jacobo*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1240.

11th Circuit denies acceptance of responsibility reduction to defendant who did not discuss offense until sentencing. (485) The 11th Circuit affirmed the district court's denial of reduction for acceptance of responsibility. The district court had held a hearing to consider defendant's request and denied it after finding that defendant allowed the case to proceed to trial and did not wish to comment on his involvement in the offense until he was actually sentenced. *U.S. v. Graham*, __ F.2d __ (11th Cir. May 22, 1991) No. 90-3452.

Criminal History (§ 4A)

5th Circuit rules crimes for which defendant was sentenced at one hearing were not consolidated. (500) Defendant was sentenced for two different unconnected offenses at the same sentencing hearing. He claimed that because the offenses were sentenced together, the district court should view them as "informally consolidated" for purposes of calculating his criminal history. The 5th Circuit rejected this argument. "Simply because the cases were sentenced together has little to do with whether they were in fact consolidated. . . . The state court was not required to send the defendant out of the courtroom before each sentence in order to ensure that the cases would not be deemed consolidated." A district court must decide for itself whether the offenses were related, with concurrent sentencing being "only one factor." *U.S. v. Ainsworth*, __ F.2d __ (5th Cir. May 15, 1991) No. 90-8034.

5th Circuit rules concurrent sentences do not make convictions related for criminal history purposes. (500) Defendant contended that his three prior state convictions were related cases and should have counted as one prior sentence for criminal history purposes. The 5th Circuit rejected this contention. Defendant received only six criminal history points for his three prior convictions. Three points were assessed for the 1984 and 1987 offenses, which were consolidated for sentencing, and three points were assessed for the 1985 conviction. Defendant's probation for the 1985 conviction was revoked as a result of the 1987 conviction, and he was re-sentenced to two years imprisonment. Although his sentence for the 1985 offense was served concurrently with the sentences for the 1984 and 1987 offenses, the sentences were not consolidated. Convictions are not related merely because the sentences run concurrently. *U.S. v. Castro-Perpia*, __ F.2d __ (5th Cir. May 17, 1991) No. 90-2639.

7th Circuit rules defendant did not prove prior convictions were constitutionally infirm. (500)(520) Defendant contended that he should not have been classified as a career offender because his two prior convictions were constitutionally suspect. He could not recall whether he had been informed of his rights before he entered his guilty pleas, and the record did not reflect whether he had been properly advised. The 7th Circuit found that defendant did not meet his burden of proving that the prior convictions were invalid. Defendant's could only muster "self-serving testimony" to support his claim, and even this testimony was "equivocal," since defendant could not say for sure that the court failed to warn him. Defendant did not have the court reporter's notes transcribed, and it was unclear whether the cost of doing so would be prohibitive. Defendant failed to follow other avenues, such as calling his prior trial counsel to testify about whether he received his warnings. Also, defendant had not challenged the validity of his sentences until now. *U.S. v. Boyer*, __ F.2d __ (7th Cir. May 7, 1991) No. 90-1705.

10th Circuit upholds use of state conviction for drugs that were found with weapons involved in offense. (500) Defendant argued that his prior state drug conviction could not be used to increase his criminal history because the cocaine that was the basis of the state case was found with the guns charged in the instant case. The 10th Circuit found the state conviction was properly included in computing defendant's criminal history. Although police seized the cocaine underlying the state conviction and the guns underlying the instant conviction from the same car, and the cocaine was admitted into evidence in the instant case, the presence of the cocaine was not part of the instant offense. The government did not tie the weapon offenses to the cocaine nor charge defendant with possession of cocaine. Instead, defendant was charged with carrying a weapon in relation to trafficking in marijuana. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89-1109.

10th Circuit rules defendant did not commit instant offense while under deferred criminal justice sentence. (500) The 10th Circuit found that the district court erroneously assessed defendant two criminal history points for committing the instant offense while under a criminal justice sentence. Defendant entered a plea and received a deferred sentence in 1984. Under Colorado law in effect at the time of defendant's sentencing, a sentence ordinarily could be deferred only for a period not to exceed two years from the date of entry of the plea. Thus, although termination of defendant's deferred sentence was not recorded until 1987, the deferred sentence terminated by operation of law in 1986. Because defendant did not commit the first of the instant offenses until April 1, 1987, he was not under a criminal justice sentence at the time of his first offense. However, no remand was necessary, since the error did not change defendant's criminal history category. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89-1109.

10th Circuit rules deferred judgment is not a deferred prosecution. (500) The 10th Circuit rejected defendant's contention that a prior Colorado deferred judgment was a "deferred prosecution" that should not have been included in his criminal history under guideline section 4A1.2(f). Under Colorado law, a defendant does not enter a plea in the case of a deferred prosecution, but does enter a plea in the case of a deferred judgment. Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved an admission of guilt. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89- 1109.

10th Circuit affirms use of conviction which was "set aside" under California law. (500) Defendant contended that the district court incorrectly included in his criminal history a prior sentence which had been expunged. The 10th Circuit rejected this contention, finding that even if defendant's sentence had been "set aside" at the time he was sentenced, it was properly included in his criminal history since it had not been set aside because of an error of law or innocence. Moreover, the fact that the sentence had eventually been expunged did not change the analysis since it was not expunged until after he was sentenced in the instant case. Therefore, at the time defendant was sentenced in the instant case, it was a prior conviction. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89-1109.

10th Circuit affirms inclusion of misdemeanor "menacing" in defendant's criminal history. (500) The 10th Circuit rejected defendant's claim that it was improper to assign him one point for his 1984 misdemeanor menacing conviction. The offense did not fall within the exception in guideline section 4A1.2(c)'s for minor traffic infractions or crimes similar to disorderly conduct. Under Colorado law, menacing is a crime against the person. *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89-1109.

11th Circuit holds defendant who had not surrendered for service of sentence was under criminal justice sentence. (500) Defendant was sentenced on a drug charge and was permitted to voluntarily surrender himself for service of sentence. He failed to report and was eventually apprehended. Defendant pled guilty to failing to surrender for service of sentence. The district court added two points to defendant's criminal history score because he committed the instant offense while under a criminal justice sentence. The 11th Circuit rejected defendant's argument that because he had not yet surrendered for service of his eight-year sentence, he was not under a criminal justice sentence. Defendant was under a criminal justice sentence from the time he was sentenced by the district court, regardless of when he was expected to begin serving that sentence. *U.S. v. Martinez*, __ F.2d __ (11th Cir. May 20, 1991) No. 90-8743.

11th Circuit upholds assignment of points for both prior sentence and commission of offense while under criminal justice sentence. (500)(680) Defendant contended that assigning him criminal history points under both guideline section 4A1.1(a), for his prior offense, and under guideline section 4A1.1(d), for committing the instant offense while under a criminal justice sentence for that offense, violated the double jeopardy clause. The 11th Circuit rejected this argument. The district court's assignment of points under both sections does not punish defendant more than once for the same offense, but only determined the severity of the his single sentence. Moreover, the application of both sections did not result in defendant receiving a sentence greater than the statutory maximum. *U.S. v. Martinez*, __ F.2d __ (11th Cir. May 20, 1991) No. 90-8743.

7th Circuit holds unarmed bank robbery is a crime of violence. (520) Defendant committed an unarmed bank robbery. The 7th Circuit held that such a bank robbery is a crime of violence for career offender purposes, and that it need not inquire as to the underlying circumstances. The federal bank robbery statute required the government to prove that defendant took the money by force and violence or by intimidation. Thus, "[a] defendant properly convicted of bank robbery is guilty per se of a crime of violence, because violence in the broad sense that includes a merely threatened use of force is an element of every bank robbery. Moreover, application note 2 to section 4B1.2 lists robbery as a crime of violence. The only time a judge is entitled to conduct an inquiry into the facts underlying the offense is where that offense can be committed without violence within the meaning of section 4B1.1. Federal bank robbery is not such an offense. *U.S. v. Jones*, __ F.2d __ (7th Cir. May 13, 1991) No. 90-3114.

11th Circuit affirms that robbery is crime of violence for career offender purposes. (520) The 11th Circuit affirmed the district court's determination that defendant's instant offense -- robbery -- was a crime of violence for career offender purposes. Section 4B1.2(1)(i), comment note 2, lists robbery as a crime of violence. *U.S. v. Graham*, __ F.2d __ (11th Cir. May 22, 1991) No. 90-3452.

Determining the Sentence (Chapter 5)

9th Circuit holds that a defendant may simultaneously be on parole and probation. (560)(590) The judgment stated that probation would begin "upon defendant's release from prison," not on release from detention or custody. Thus, regardless of how one might characterize his status, once he was released he was no longer in prison. Therefore his probationary term began on the date of his parole. The 9th Circuit held that "a defendant may simultaneously be on parole and probation." The court found nothing inherently-inconsistant about the two custodial formats. "They constitute two separate punishments for two separate crimes." *U.S. v. Laughlin*, __ F.2d. __ (9th Cir. May 21, 1991) No. 89-10641.

9th Circuit finds no error in revoking defendant's pre-guidelines probation. (560) Defendant argued that the government's failure to coordinate his release from prison through a community treatment center violated 18 U.S.C. section 3624(c) and caused him to commit the new offenses. He also argued that he was not given appropriate notice of the conditions of his probation and that his fraudulent application for a credit card did not violate the terms of his probation. The 9th Circuit rejected each of these arguments in turn. *U.S. v. Laughlin*, __ F.2d. __, 91 D.A.R. 5895 (9th Cir. May 21, 1991) No. 89-10641.

5th Circuit reverses order requiring defendant to pay costs of his incarceration. (630) Defendant argued that the trial judge improperly ordered him to pay $1220 per month to cover the costs of his incarceration, despite the recommendation of the presentence report that such costs not be imposed. The 5th Circuit agreed, finding no support for the proposition that defendant and his family would not be unduly burdened if required to cover the cost of his incarceration. The only income during defendant's incarceration was his wife's salary, which would not cover their necessary living expenses, let alone the cost of defendant's incarceration. If the family sold all of their assets, or were to use their assets as collateral, they could cover the incarceration for a little over a year, while defendant was sentenced to three years' imprisonment. *U.S. v. Pattan*, __ F.2d __ (5th Cir. May 10, 1991) No. 89-3451.

10th Circuit reverses district court's failure to order consecutive sentences under 18 U.S.C. section 924(c)(1). (680) Defendant was convicted of one count of armed robbery, in violation of 18 U.S.C. section 2113, and one count of using a firearm during the robbery, in violation of 18 U.S.C. section 924(c)(1). The district court sentenced defendant to 24

months on the robbery count, and 60 months on the firearm count. Notwithstanding the language of section 924(c), the district court ordered the sentences to run concurrently, rather than consecutively, finding that consecutive sentences would violate the double jeopardy clause. The 10th Circuit reversed, finding no double jeopardy concerns raised by consecutive sentences. Congress expressly authorized multiple punishments under section 924(c)(1). The plain language of the statute evinces a congressional intent that any defendant using a dangerous weapon in connection with a violent crime be sentenced to five years imprisonment, which five year sentence must run consecutively to that imposed for the violent crime. *U.S. v. Lanzi*, __ F.2d __ (10th Cir. May 9, 1991) No. 90-1036.

New York District Court departs downward to statutory minimum based upon defendant's cancer. (690)(722) During pretrial detention, defendant was diagnosed as having testicular cancer. He eventually pled guilty to drug charges, which resulted in an applicable guideline range of 151 to 188 months. Defendant moved for a downward departure under guideline section 5H1.4 and 5K2.0 on the ground that his metastasized cancer was a serious life-threatening illness constituting an extraordinary physical impairment. The government agreed at sentencing not to contest a court ruling that defendant's cancer was a mitigating circumstance not contemplated by the guidelines. Accordingly, the Eastern District of New York departed downward and sentenced defendant to five years imprisonment, the statutory minimum. Since no recommendation of leniency was made by the government, a term of imprisonment below the statutory minimum was not permissible. *U.S. v. Velasquez*, __ F.Supp. __ (E.D.N.Y. April 23, 1991) No. 89 CR 765.

Departures Generally (§ 5K)

D.C. Circuit rules substantial assistance provisions are not inconsistent with 28 U.S.C. section 994(n). (710) 28 U.S.C. section 994(n) provides that "The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance." Defendant contended that the government motion requirement of guideline section 5K1.1 was inconsistent with section 994(n). The D.C. Circuit rejected this argument, finding the Commission's exercise of its delegated powers was entitled to deference. The fact that Congress also drafted a substantial assistance provision containing a government motion requirement indicated that the Commission's approach was reasonable. Defendant also contended that section 994(n) conferred upon defendants a liberty interest in having their assistance considered during sentencing, and that therefore, section 5K1.1 violated minimum constitutional procedural requirements in effectuating that liberty interest. The D.C. Circuit found that section 994(n)'s language was too general to give rise to a protected liberty interest. *U.S. v. Doe*, __ F.2d __ (D.C. Cir. May 24, 1991) No. 90-3027.

D.C. Circuit provides for limited review of prosecutor's refusal to move for substantial assistance departure. (710) The district court erred in reviewing the government's decision not to move for a downward departure under an "arbitrary and capricious" standard of review. However, the D.C. Circuit found that the court may provide a limited review of the government's decision under the same standard currently employed by district courts to review other matters committed to prosecutorial discretion. Thus, it would be improper for the government to refuse to move for a departure in violation of the terms of a cooperation agreement, or to to punish the defendant for exercising a constitutional right, or on some unjustifiable basis such as race or religion. The present record did not reflect that the government exceeded its broad discretion in refusing to move for a downward departure. *U.S. v. Doe*, __ F.2d __ (D.C. Cir. May 24, 1991) No. 90-3027.

3rd Circuit rules sentencing court need not state on the record that it has considered the requested departure. (720)(810) Defendant argued that when a defendant requests a discretionary downward departure, a sentencing court must always indicate on the record that it knows it had authority to depart, considered the defendant's request to do so, and decided not to depart. The 3rd Circuit rejected this, and held that a sentencing court does not commit reversible error by failing to state expressly on the record that it has considered and exercised discretion when refusing a requested downward departure. The statute controlling judicial sentencing statements, 18 U.S.C. section 3553(c), does not require such a statement. *U.S. v. Georgiadis*, __ F.2d __ (3rd Cir. May 23, 1991) No. 90-3224.

3rd Circuit finds district court did consider defendant's request for downward departure. (720)(810) Defendant argued that it was not clear from the record that the district court considered his request for a downward departure. The 3rd Circuit disagreed. The transcript of the sentencing hearing showed that defendant's attorney requested a downward departure. The judge then stated that it was giving defense counsel's arguments "full weight" and had taken off one point in formulating the guideline range. *U.S. v. Georgiadis*, __ F.2d __ (3rd Cir. May 23, 1991) No. 90-3224.

2nd Circuit rules government may appeal because it did not receive proper notice of possibility of departure. (720)(800) Defendant argued that the government could not appeal the grounds relied upon by the district court to depart downward because the government failed to argue in the trial court that these factors were adequately considered by the sentencing commission. The 2nd Circuit found that because the government did not receive adequate notice of the possibility of

departure, and thus contest the accuracy of the factor and the propriety of its use as a basis for departure, the government had the right to appeal. Only one of the four factors relied upon by the district court was identified in the presentence report. *U.S. v. Alba*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1523.

2nd Circuit remands where some of the grounds for downward departure were invalid. (720) The district court articulated four grounds for a downward departure, two of which the 2nd Circuit found to be proper, and two of which were improper. Under circumstances like this, the appellate court could either remand the case for resentencing or weigh whether, reviewing only the proper factors, the magnitude of the departure was justified. The court refused to adopt a per se rule, and held that the reviewing court should decide on a case-by-case basis whether remand is required. The case at hand required remand. During the sentencing proceedings, the judge expressed "considerable doubt" whether or not he should depart. Thus, the appellate court could not be sure the judge would have chosen to depart to the same extent once the improper factors were removed from consideration. *U.S. v. Alba*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1523.

6th Circuit rules it has no jurisdiction to consider extent of downward departure. (720)(810) The 6th Circuit ruled that it had no authority to review defendant's argument concerning the extent of the district court's downward departure. Thus it should not accept jurisdiction over appeals based on factors which the defendant argues should have influenced the degree of a downward departure. *U.S. v. Gregory*, __ F.2d __ (6th Cir. May 13, 1991) No. 90-5695.

10th Circuit rules it has no jurisdiction to review extent of downward departure. (720)(810) The district court departed downward and sentenced defendant to 66 months. It refused to follow the government's recommendation of 48 months because it would result in a lower sentence than the court had imposed on a less-culpable defendant. The 10th Circuit found that it had no jurisdiction where the defendant complains that the extent of the downward departure was too small. Defendant's contention that the sentence imposed resulted from an incorrect application of the guidelines or in violation of the law was not persuasive. The record clearly indicated that the district court was aware that it had discretion to depart further, but did not. The court's statement that a lower sentence would be contrary to the "spirit" of the guidelines and would cause disparity did not indicate that the court believed it was barred from considering whether a full departure was warranted. *U.S. v. Bromberg*, __ F.2d __ (10th Cir. May 20, 1991) No. 89-2274.

2nd Circuit affirms extraordinary family circumstances as ground for downward departure. (721) The 2nd Circuit found that the record supported the conclusion that defendant's family circumstances were extraordinary, justifying a downward departure. Defendant had been married 12 years. He lived with his wife, two small children, disabled father, who depended upon defendant to get him in and out of his wheelchair, and his paternal grandmother. He had long-standing employment, and worked two jobs to maintain his family's economic well-being. The district court found that defendant's incarceration "might well result in the destruction of an otherwise strong family unit." Under these circumstances, relying upon defendant's family circumstances to depart downward was not an abuse of discretion. *U.S. v. Alba*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1523.

2nd Circuit affirms defendant's limited involvement in offense as ground for downward departure. (721) The district court departed downward based on four separate grounds, one of which was defendant's limited participation in the offense. Defendant only realized he was involved in a drug transaction "shortly before the incident" and his involvement was limited. A co-defendant stated that he deliberately did not disclose all of the details of the transaction to defendant. The 2nd Circuit found no abuse of discretion in the district court's reliance upon this factor. Defendant had no knowledge of the transaction or the contents of the package he transported until he was in the parking garage where he was arrested. The district court was entitled to find defendant's role was less than minimal. The district court also based the departure in part on its finding that defendant's knowledge of the specific amount of drugs in the transaction was not as clearly demonstrated as required by the guidelines. This essentially was another way of saying that defendant was unaware of the transaction's details, and therefore was improperly cited as an independent reason for a downward departure. *U.S. v. Alba*, __ F.2d __ (2nd Cir. May 23, 1991) No. 90-1523.

10th Circuit upholds upward departure for large military theft but remands for court to explain degree of departure. (745) Defendant pled guilty to selling stolen military equipment to undercover FBI agents. The district court departed upward from 37 months to 120 months, based upon the following factors: (a) the $10 million loss was well in excess of the $5 million maximum contained in the guidelines, (b) the disruption of government function caused by the effect defendant's actions had on the morale and pride of the military, and (c) defendant's lack of concern for the ultimate destination of the stolen equipment, which could affect national security. The 10th Circuit found that these were all proper grounds for an upward departure. However, to justify the extent of the departure, the district court made only a statement that anything less would have a serious adverse impact upon the pride and morale of the military. The court failed to draw analogies to the guidelines or explain the sentence in guideline terms. The 10th Circuit disagreed with defendant that the judge's statement, which referred to the judge's own military service, violated due process. However, the case was remanded for the district court to properly explain its rea-

sons for the extent of the departure. *U.S. v. Roth*, __ F.2d __ (10th Cir.) No. 90-4028.

Sentencing Hearing (§ 6A)

5th Circuit finds that under plain error standard it may review record as a whole to find support for adjustments. (760)(820) Defendant argued that the findings of fact contained in the presentence report did not support the adjustments made by the district court to his base offense level. The district court had adopted these findings of fact without making any additional findings. Because defendant failed to raise these issues in the district court, the 5th Circuit reviewed the issue under the plain error standard. It found that under this minimal review, it did not need to evaluate the adjustments based solely upon the district court's factual findings. Rather, the appellate court was free to consider all of evidence in the record supporting the adjustments, and would uphold the adjustments if the record as a whole demonstrated that the adjustments did not result in a miscarriage of justice. *U.S. v. Pattan*, __ F.2d __ (5th Cir. May 10, 1991) No. 89-3451.

5th Circuit affirms that court may consider relevant conduct detailed in factual portion of presentence report. (760)(770) Defendant contended that he was not given adequate notice of the relevant conduct for which he was held accountable, as the description of some of his conspiracy activity appeared in the factual portion of his presentence report, rather than in the section entitled "Relevant Conduct." The 5th Circuit rejected this contention, holding it is permissible for a sentencing court to consider relevant conduct detailed in the factual portion of a defendant's presentence report. The right to notice of relevant conduct does not require that the notice appear in the relevant conduct section, or even the main body, of the presentence report. *U.S. v. Thomas*, __ F.2d __ (5th Cir. May 23, 1991) No. 90-1530.

9th Circuit holds that asking defense counsel if he had reviewed presentence report with defendant complied with Rule 32. (760) Defendant argued that the judge was required directly to ask him if he had reviewed the presentence report and if it was accurate. The 9th Circuit rejected that argument based upon its earlier decision in *U.S. v. Lewis*, 880 F.2d 243 (9th Cir. 1989). Under *Lewis*, the district court met its burden under Rule 32(a)(1)(A) by directly asking defense counsel if he had reviewed the report with his client, and obtaining an affirmative answer in the defendant's presence at the sentencing hearing. *U.S. v. Maree*, __ F.2d. __ (9th Cir. May 22, 1991) No. 89-50188.

10th Circuit finds district court need not make findings concerning disputed application of the guidelines. (760) Defendant contended that the district court failed to comply with Fed. R. Crim. P. 32(c)(3)(D)'s requirement that the district court either make a finding as to the accuracy of any disputed factual matter or state that the controverted matter would not be relied upon in sentencing. Defendant had contested the presentence report's conclusion that his prior state conviction for misdemeanor menacing was not similar to disorderly conduct for purposes of exempting it from his criminal history under guideline section 4A1.2(c)(1), that a deferred judgment was a valid criminal justice sentence under guideline section 4A1.1(d), and that a prior state offense was not part of the instant offense. The 10th Circuit found that the district court was not obligated to make Rule 32(c)(3)(D) findings with respect to these disputed matters. Defendant challenged the application of the guidelines to an uncontested set of facts, which does not implicate Rule 32(c)(3)(D). *U.S. v. Cox*, __ F.2d __ (10th Cir. May 24, 1991) No. 89-1109.

Plea Agreements, Generally (§ 6B)

1st Circuit finds insufficient evidence of discriminatory plea bargain practice. (780) Defendant contended that the sentencing guidelines were applied to her in a manner that discriminated against her as a Colombian national. She alleged at the sentencing hearing that because of her nationality she was denied the opportunity to reach a plea agreement, whereas citizens of other countries were afforded plea bargains more liberally. The 1st Circuit, terming defendant's argument a challenge to the allegedly discriminatory exercise of prosecutorial discretion in the plea agreement process, rejected defendant's argument. There was no evidentiary record from which the court could evaluate defendant's claim of differential treatment. She did not raise the issue until sentencing, and no hearing was conducted by the district court. The only evidence was defendant's assertion that a single Spanish national in similar circumstances received more favorable treatment. Defendant's brief also made an unsupported reference to two other Colombian nationals who were denied plea agreements. "This meager, unsubstantiated proof [fell] woefully short of demonstrating a consistent pattern of unequal administration of the law." *U.S. v. Bemal-Rojas*, __ F.2d __ (1st Cir. May 17, 1991) No. 90-1762.

8th Circuit vacates sentence at top of guideline range because district court improperly considered defendant's alien status. (775)(810) Defendant was a Nigerian citizen who committed insurance fraud. The district court sentenced defendant at the top of the applicable guideline range because (a) the crime could have resulted in a much greater loss if the victims had failed to discover it, (b) defendant failed or refused to identify other participants in the fraud, and (c) defendant was not a citizen of the United States. The third factor was only in the judge's oral statements, and not his written order. The 8th Circuit found that because the district court's consideration of defendant's alien status was both an incorrect application of the guidelines and a viola-

tion of law, it had authority to review his sentence under 18 U.S.C. section 3742(e). Although two of the reasons mentioned by the judge were permissible bases for the sentenced imposed, the third was not. Because the appellate court could not be sure that the district court would have imposed the same sentence absent the impermissible consideration, the sentence was vacated, and the case remanded for reconsideration. *U.S. v. Onwuemene*, __ F.2d __ (8th Cir. May 16, 1991) No. 90-2865.

9th Circuit holds that court need only advise defendant of the statutory minimum sentence, not the minimum guideline sentence. (790) Rule 11(c)(1) of the Federal Rules of Criminal Procedure requires the sentencing court to "inform the defendant of ... the mandatory minimum penalty provided by law." Defendant argued that this meant that he was entitled to advice as to the minimum guideline sentence. The 9th Circuit rejected the argument, noting that this would be impossible because the presentence report is not prepared prior to the entrance of a guilty plea. "Rule 11 only requires the mention of a *minimum sentence* not the minimum *guideline* sentence." *U.S. v. Maree*, __ F.2d. __ (9th Cir. May 22, 1991) No. 89-50188.

Death Penalty

Supreme Court reverses death sentence for lack of advance notice to defendant of intent to impose it. (860) Prior to sentencing, the state filed a notice stating that it would not seek the death penalty. At the sentencing hearing, neither defense counsel nor the prosecutor discussed the death penalty. At the hearing's conclusion however the trial judge discussed the evidence and mentioned the possibility of death as a sentencing option, and thereafter sentenced defendant to death based on five specific aggravating circumstances. In a 5-4 opinion written by Justice Stevens, the U.S. Supreme Court reversed, holding that the sentencing violated due process because at the time of the hearing, defendant and his counsel did not have adequate notice that the judge might sentence him to death. Justice Scalia, with whom Chief Justice Reinquist, and Justices White and Souter joined, dissented. *Lankford v. Idaho*, __ U.S. __, 111 S.Ct. __ (May 20, 1991) No. 88-7247.

Forfeiture Cases

4th Circuit finds 16-month delay in filing judicial forfeiture action not unreasonable. (930) The DEA administratively forfeited defendant's car in November 1988. Defendant was incarcerated on unrelated charges, and never received actual notice of the forfeiture. Almost one year later, when defendant attempted to have the seized car returned to him, defendant learned of the forfeiture and sought to set it aside. The government, recognizing that the lack of notice may have rendered the administrative forfeiture void, filed the instant forfeiture action in federal court. The 4th Circuit rejected defendant's contention that the 16-month delay between the date the automobile was seized and the filing of the forfeiture action was an unreasonable delay that violated due process. Defendant did not challenge that the government reasonably believed that the car had been properly forfeited in the administrative action. Since the government believed the car had already been forfeited in the administrative action, it had no reason to initiate judicial proceedings. *U.S. v. Turner*, __ F.2d __ (4th Cir. May 14, 1991) No. 90-6788.

9th Circuit holds that third party may attach property held by the court in custodia legis. (940) Certificates of deposit totaling almost a million dollars were held by the district court *in custodia legis*. One of defendant's creditors obtained a writ of attachment from the district court, and thereafter the court denied the defendant's Rule 41(e) motion. Judges Thompson, Wallace and O'Scannlain upheld the writ of attachment, noting that although funds in the registries of federal courts are not as a general rule subject to writs of attachment or garnishment, the rule does not apply where the court in whose custody the property is located is the court that authorizes the writ. Accordingly, defendant's Rule 41(e) motion was properly denied and the funds in excess of fines and restitution were properly dispersed to the creditor. *U.S. v. Van Cauwenberghe*, __ F.2d. __ (9th Cir. May 20, 1991) No. 89-50275.

4th Circuit affirms that police had reasonable suspicion to support investigatory detention. (950) Defendant contested the district court's determination of probable cause to forfeit his car. Although defendant did not dispute the district court's finding that a substantial connection existed between the vehicle and the underlying criminal conduct, he contended that the finding of probable cause could not be sustained because the cocaine and drug paraphernalia found in the car were obtained as a result of an illegal investigatory detention. The 4th Circuit found that the police officer who found the drugs had a reasonable articulable suspicion sufficient to support an investigatory detention. The officer observed a woman enter a convenience store and leave with only a cup of water. The officer's training and past work caused him to suspect that the woman obtained the cup of water in order to "cook up" illegal drugs. This suspicion was heightened when he observed the woman return to a vehicle backed into its parking space, and parked far away from other vehicles in the lot. As the officer approached the car, he saw defendant nervously bend over as if to secrete something under the seat. When he ordered defendant to leave the car, he observed a white powder in between the seats in plain view. *U.S. v. Turner*, __ F.2d __ (4th Cir. May 14, 1991) No. 90- 6788.

4th Circuit rules lack of judicial determination of probable cause prior to seizure of vehicle did not violate 4th Amendment. (950) Upon the government's filing a forfeiture complaint, the district court clerk issues a warrant of arrest in rem, which serves to bring the res within the jurisdiction of the court and authorizes the government to seize the property. Defendant contended that the seizure of his vehicle pursuant to the warrant of arrest in rem violated the 4th Amendment because it was issued without a prior finding of probable cause. The 4th Circuit rejected this argument. When police have probable cause to believe a car contains contraband, they may seize it without a prior judicial determination of probable cause without violating the 4th Amendment. The justification for a warrantless seizure does not disappear merely because the vehicle has been impounded. In defendant's case, the police officer observed drug paraphernalia and a white powder between the seat of defendant's vehicle. Since the officer had reasonable cause to believe that the vehicle contained contraband, he was justified in seizing the automobile without a warrant. Since probable cause for the warrantless seizure did not dissipate, the lack of judicial determination of probable cause prior to seizure pursuant to the warrant of arrest in rem did not violate the 4th Amendment. *U.S. v. Turner*, __ F.2d __ (4th Cir. May 14, 1991) No. 90-6788.

4th Circuit holds arrest in rem warrants do not violate 4th Amendment. (950) Upon the government's filing a forfeiture complaint, the district court clerk issues a warrant of arrest in rem, which serves to bring the res within the jurisdiction of the court and authorizes the government to seize the property. Defendant claimed that district court clerks may not issue warrants because they are not judicial officers and cannot make probable cause determinations. He further contended that Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims violated the 4th Amendment by requiring clerks to issue an arrest warrant for the property without making a probable cause determination. The 4th Circuit rejected both arguments, holding that a warrant for arrest in rem serves merely to bring the res before the court, and is not a "warrant" within the meaning of the 4th Amendment such that the issuing authority must first make a probable cause determination. The document issued by the clerk, although designated a warrant, is more closely analogous to a summons which a district court clerk routinely issues as part of the clerk's ministerial duties. The court's holding was narrow, and did not address the question of whether the procedure would be constitutional if a clerk's warrant were relied upon for the seizure of property for which a warrant was required under the 4th Amendment. *U.S. v. Turner*, __ F.2d __ (4th Cir. May 14, 1991) No. 90-6788.

OPINION AFFIRMED BY SUPREME COURT

(250)(733) *U.S. v. Touby*, 909 F.2d 759 (3rd Cir. 1990), *affirmed on other grounds, sub nom. Touby v. U.S.*, __ U.S. __, 111 S.Ct. __ (May 20, 1991) No. 90-6282.

OPINION REVERSED BY SUPREME COURT

(165)(210)(410)(480)(795) *U.S. v. Braxton*, 903 F.2d 292 (4th Cir. 1990) *reversed, Braxton v. U.S.*, __ U.S. __, 111 S.Ct. __ (May 28, 1991) No. 90-5358.

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Pre-guidelines Sentencing, Generally

7th Circuit rejects claim that seven-year sentence for pre-guidelines offense constituted cruel and unusual punishment. (105)(145) In this pre-guidelines case, defendant contended that his seven-year sentence for attempted armed robbery was cruel and unusual punishment and was disproportionate compared to his co-defendants. The 7th Circuit rejected both arguments. Given defendant's "sordid record of criminal activity," a seven-year sentence on a maximum 50-year term was not cruel or unusual. Disparity among co-defendants' sentences does not alone prove abuse of discretion. In this case, there were valid reasons why two co-defendants received lesser sentences than defendant. One defendant had far less culpability, and the other defendant's sentence was imposed consecutively to an 18-year term of imprisonment. *U.S. v. Harty*, __ F.2d __ (7th Cir. April 26, 1991) No. 89-2641.

Guideline Sentences, Generally

3rd Circuit upholds guidelines against due process challenge. (115) Defendant contended that the sentencing guidelines on their face violate the due process clause because they transfer sentencing responsibility and discretion from the judiciary to the prosecution. The 3rd Circuit rejected this argument, noting that the district court case relied upon by defendant, *U.S. v. Roberts*, 726 F.2d 1359 (D.D.C. 1989), has not been well-received by any of the Circuits, including the District of Columbia Circuit. The enhanced role of the prosecutors does not lack a rational basis and thus does not violate due process. *U.S. v. Santos*, __ F.2d __ (3rd Cir. May 3, 1991) No. 90-1369.

3rd Circuit rejects due process challenge to substantial assistance provisions. (115)(710) The 3rd Circuit rejected defendant's claim that the substantial assistance provision of the guidelines violates due process by requiring a government motion to depart downward for substantial assistance. Eight courts of appeals have rejected the same argument.

SECTION

Moreover, the 3rd Circuit recently decided that Pennsylvania's Mandatory Minimum Sentencing Act did not violate due process by giving state prosecutor's discretion to depart below the statutory mandatory minimum sentence. The reasoning in that case was applicable here. *U.S. v. Santos*, __ F.2d __ (3rd Cir. May 3, 1991) No. 90-1363.

11th Circuit rejects claim that relevant conduct provisions are unconstitutional Bill of Attainder. (115)(170) Defendant argued that guideline section 1B1.3, which permits a court to consider conduct other than that for which a defendant was indicted, is an unconstitutional Bill of Attainder. This provision, defendant contended, takes discretion away from the sentencing court, forcing it to consider, in his case, a quantity of drugs other than the drugs he was convicted of distributing. The 11th Circuit rejected this argument, noting that under circuit precedent, Congress has the power to restrict judicial discretion. Moreover, the consideration of all relevant conduct is a traditional sentencing practice. *U.S. v. Bennett*, __ F.2d __ (11th Cir. April 25, 1991) No. 90-3261.

7th Circuit upholds application of guidelines to conspiracy that began prior to guidelines' effective date. (125)(380) Following circuit precedent, the 7th Circuit upheld the application of the guidelines to defendants' conspiracy that began prior to, but continued after, the effective date of the guidelines. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

8th Circuit upholds application of guidelines to conspiracy that continued after effective date of guidelines. (125)(380) Defendants argued that the guidelines did not apply to them. The only two overt acts in furtherance of the conspiracy alleged to have taken place after the guidelines took effect were those acts which served as the basis for substantive offenses charged in Count IV, of which they were acquitted. The 8th Circuit rejected defendants' argument, since defendants were convicted of Count I of the indictment, which expressly charged that the conspiracy continued until May 1988. *U.S. v. ABC, Inc.*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-1738.

5th Circuit remands to determine whether downward departure for co-defendant created inequitable disparity. (140) Defendant complained of the gross disparity between his five-year sentence and the one-year sentence his co-defendant received after a downward departure for substantial assistance. He maintained that he and his co-defendant were equally involved in the offense, but that he had less to offer the government because he knew less than his co-defendant. Defendant contended that he received a heavier sentence because he did not have as many bargaining chips as his co-defendant. The 5th Circuit could not determine from the record whether there was any merit to this complaint, and remanded the case to the district court to address this question. *U.S. v. Melton*, __ F.2d __ (5th Cir. April 25, 1991) No. 89-8016.

9th Circuit rules that disparity among codefendants is not a basis for attacking a guideline sentence. (140) Defendant argued that counting sentences for offenses occurring after the present offense promoted disparity in sentencing because one defendant will have a higher criminal history point total than another who committed the same offense, but had not yet been sentenced for it. The 9th Circuit rejected the argument, noting that "disparity in sentencing among codefendants is not, by itself, a sufficient ground for attacking an otherwise proper sentence under the guidelines." *U.S. v. Hoy*, __ F.2d __ (9th Cir. May 14, 1991) No. 90-30254.

General Application Principles (Chapter 1)

9th Circuit holds that toy gun is a "dangerous weapon" requiring enhancement under robbery guideline. (150)(220) The 9th Circuit held that it was improper to base an upward departure on the toy gun, because a toy gun is a "dangerous weapon," the use of which requires enhancement under the robbery guideline, section 1B1.1, comment (N.1)(d). The court noted that its recent decision in *U.S. v. Smith*, 905 F.2d 1296 (9th Cir. 1990), holds that even with regard to sentences before the November 1989 guidelines took effect, "toy guns

were to be treated as dangerous weapons for which enhancement was appropriate." *U.S. v. Faulkner*, __ F.2d __ (9th Cir. May 13, 1991) No. 89-10338.

9th Circuit finds no need to stipulate to more serious guideline, where it was already the one most applicable. (165) A court may base a sentence on a more serious offense where the guilty plea stipulation specifically establishes the more serious offense. *See* guideline section 1B1.2(a). However, the section 1B1.2(a) exception "only applies where the court is choosing a guideline *other than* the one most applicable to the offense of conviction." In this case the district court used the guideline most applicable to the offense charged, so there was no need for a stipulation. *U.S. v. Cambra*, __ F.2d __(9th Cir. May 15, 1991) No. 90-50442.

4th Circuit applies aggravated assault guideline to inmate who threw chair at corrections officers. (170)(210) The jury convicted defendant of using a deadly weapon during a prison riot and assaulting a correctional officer, based upon defendant's act of throwing a chair at the officer. He contended that the court erred in sentencing him under guideline section 2A2.2 because his conduct did not amount to aggravated assault. In the alternative, he argued that it was error to increase his offense level under section 2A2.2(b)(3)(A) because his assault did not cause bodily injury. The 4th Circuit rejected the arguments. Even if the chair defendant threw did not cause a specific injury, defendant participated in and aided a riot in which assaults that caused bodily injuries occurred. The defendant was accountable for these injuries as relevant conduct under section 1B1.3. *U.S. v. Bassil*, __ F.2d __ (4th Cir. May 6, 1991) No. 90-5678.

9th Circuit holds that plea bargain prevents judge from considering dismissed or uncharged counts in sentencing. (170)(220)(270)(770)(780) Relying on its amended opinion in *U.S. v. Castro-Cervantez*, 927 F.2d 1079 (9th Cir. 1991), the 9th Circuit reiterated that under guideline section 6B1.2, "a district judge may not first accept a plea bargain and then consider dismissed charges in calculating defendant's sentence." The court also rejected the government's argument that the sentence could be based on *uncharged* bank robberies. Although guideline section 1B1.4 permits a court to consider "any information" unless otherwise prohibited by law, the limitations imposed on departures by guidelines section 5K2.0 "also bar an upward departure on account of the eight [robberies] either not charged or dismissed as a result of the plea bargain." *U.S. v. Faulkner*, __ F.2d __ (9th Cir. May 13, 1991) No. 89-10338.

11th Circuit rejects enhancement based on defendant's use of firearm seven months after drug transaction. (170)(286) Seven months after a drug transaction involving a government informant, defendant discovered the informant, got into an argument with him and shot and missed him. The 11th Circuit reversed an enhancement based upon defendant's possession of a firearm during a drug transacti[on]. The only evidence of firearm possession was defendant's [act] of retaliation against the informant, which occurred seven months after the drug transaction. The court rejected the government's contention that since the altercation was about the drug transaction, the firearm could be tied in as relevant conduct. Guideline section 1B1.3 authorizes the use of relevant conduct "unless otherwise specified." The enhancement in section 2D1.1(b)(1) "would appear to be "otherwise specified," which precludes application of section 1B1.3. *U.S. v. Bennett*, __ F.2d __ (11th Cir. April 25, 1991) No. 90-3261.

9th Circuit rules that failure to follow commentary may be reversible error. (180) The 9th Circuit ruled that the Commentary to section 2N2.1 supported the district court's ruling that section 2F1.1 was the most applicable guideline in this case. The court noted that under section 1B1.7, failing to follow commentary that explains how a guideline is to be applied "could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal." *U.S. v. Cambra*, __ F.2d __(9th Cir. May 15, 1991) No. 90-50442.

9th Circuit notes that new amendment makes guidelines applicable to assimilated crimes and Indian offenses. (190) In its original opinion in this case, the 9th Circuit held [the] guidelines inapplicable to Indian offenses defined by state law. In denying rehearing, it amended its opinion to note that on November 29, 1990, Congress amended 18 U.S.C. section 3551(a) to make the guidelines applicable to assimilated crimes under 18 U.S.C. section 13 and Indian offenses under 18 U.S.C. section 1153. The court noted, however, that the amendment did not change the result in this case, "because the law in effect at the time of . . . sentencing controls the decision in this case." *U.S. v. Bear*, 915 F.2d 1259 (9th Cir. 1990) *amended*, __ F.2d __ (9th Cir. May 15, 1991), No. 89-30200.

Offense Conduct, Generally (Chapter 2)

9th Circuit upholds use of fraud guideline for selling misbranded steroids. (200)(300) Defendant was convicted of selling counterfeit steroids, misbranded human growth hormone, and anabolic steroids in violation of 21 U.S.C. sections 331 and 333. The statutory index to the guidelines, Appendix A, states that guideline section 2N2.1 applies to violations of 21 U.S.C. sections 331 and 333. Nevertheless, the 9th Circuit upheld the district court's sentence under [the] fraud and deceit guideline, section 2F1.1. Defendant "sold products counterfeited to represent different products made by reputable manufacturers." Thus, the district court was justified in concluding that the offense involved fraud and

deceit. *U.S. v. Cambra*, __ F.2d __(9th Cir. May 15, 1991) No. 90-50442.

3rd Circuit affirms upward departure based upon multiple assault victims. (210)(470)(745) Defendant and a codefendant assaulted three Assistant U.S. Attorneys but pled guilty to assaulting only one of them. The district court departed upward by three levels based on defendant's assault of multiple victims. The 3rd Circuit affirmed, finding no evidence that the sentencing commission considered multi-victim aggravated assaults in formulating guideline section 2A2.2(b)(1). The three-level departure was also reasonable, even though only two additional victims were involved. The district court structured the departure using the concept of grouping the counts, treating defendant as if he had been convicted of three counts of aggravated assault. *U.S. v. Johnson*, __ F.2d __ (3rd Cir. April 30, 1991) No. 90-5293.

3rd Circuit affirms that defendant who pointed gun at victim's head "otherwise used" the weapon. (210) Defendant approached his victim with a gun, pointed it at her head from a distance of one to two feet, ordered her not to start her car or he would "blow [her] head off," and demanded her money. The 3rd Circuit affirmed the district court's determination that defendant "otherwise used" the weapon, rather than merely "brandishing" it. The court construed brandishing a weapon as "denoting a generalized rather than a specific threat." In this case, defendant did not simply point or wave the firearm, but leveled it at his victim's head and made a specific threat. *U.S. v. Johnson*, __ F.2d __ (3rd Cir. April 30, 1991) No. 90-5293.

4th Circuit uses conspiracy guideline where defendant conspired to kidnap, torture and kill child for "snuff" film. (210)(380) Defendant was convicted of conspiracy to kidnap in connection with his plot to kidnap, sexually abuse, torture and finally kill a 12-year old boy for a "sex-snuff" film. Defendant received a 400-month sentence, and complained that although he was convicted of conspiracy to kidnap, he was sentenced as though he had committed first-degree murder. The 4th Circuit affirmed the sentence. The court correctly applied the conspiracy guideline, section 2X1.1, which references the guideline for the underlying offense -- in this case the kidnapping guideline, section 2A4.1. Under section 2A4.1(5), since the kidnapping was intended to facilitate other offenses, sexual abuse and murder, the court was directed to apply the guideline for that offense. This resulted in an offense level of 43, which was reduced to 40 under section 2X1.1, since the intended crime was not completed. *U.S. v. DePew*, __ F.2d __ (4th Cir. May 3, 1991) No. 90-5667.

4th Circuit affirms calculation of bribes based on amount defendant paid government employee. (230) Defendant ran a consulting firm that took bribes from a government defense contractor. Defendant then split the bribes with a government employee who supervised the award of government defense contracts. In total, defendant received approximately $188,000, $65,000 of which he paid to the government employee. The 4th Circuit affirmed the calculation of defendant's bribes as $65,000, under guideline sections 2C1.1(b)(2)(A) and 2F1.1(b)(1)(F). The guidelines provide that the offense level is to be adjusted by considering the greater of the value of the bribe or the benefit received in return for the bribe. Because the evidence did not disclose the profit the government contractor made on contracts for which it paid bribes, the court properly measured the value of the bribe by the amount defendant paid to the government employee. *U.S. v. Muldoon*, __ F.2d __ (4th Cir. April 30, 1991) No. 90-5020.

10th Circuit finds cuttings with root balls are marijuana plants under guidelines. (250)(820) Defendant urged the court to adopt a scientific or botanical definition of the term marijuana "plant." Under this definition a cutting does not become a plant until it develops its own means of obtaining energy through a gas exchange. Reviewing the matter *de novo*, the 10th Circuit rejected this definition, and found that the word "plant" under the sentencing guidelines should be given its ordinary and everyday meaning. Therefore, a marijuana plant includes cuttings with root balls. Congress intended to simplify, not complicate, the method of determining mandatory sentences. *U.S. v. Eves*, __ F.2d __ (10th Cir. April 29, 1991) No. 90-3230.

5th Circuit remands for district court to determine whether prior transactions were relevant conduct. (260) The district court stated that it found credible an informant's testimony that she had purchased cocaine from defendant eight to ten times prior to the offense of conviction, and would have no difficulty basing a finding on her testimony. Nevertheless, the court stated it would sentence defendant only on the basis of the instant transaction. The 5th Circuit found that it could not properly review the sentence without a finding on whether the prior conduct was part of the same course of conduct as the offense of conviction. The case was remanded to make this determination and to apply the guidelines accordingly. *U.S. v. Register*, __ F.2d __ (5th Cir. May 6, 1991) No. 90-8005.

1st Circuit affirms that defendant was capable of producing one kilogram. (265) Defendant contended it was improper to hold him responsible for the kilogram of cocaine he agreed to sell to undercover agents since the government (a) never produced the cocaine, and (b) never proved that he intended and was capable of producing the kilogram. The 1st Circuit rejected both arguments. First, there is no requirement that drugs be produced as evidence in order to be considered at sentencing. Second, the district court could have reasonably concluded that defendant was capable of producing the kilogram. Defendant agreed to sell the kilogram. Defendant also had demonstrated his ability to supply fairly substantial

quantities of cocaine, shown by his twice carrying one-eighth of a kilogram to meetings with the undercover agent. *U.S. v. Estrada-Molina*, __ F.2d __ (1st Cir. April 30, 1991) No. 90-2005.

2nd Circuit affirms that defendants negotiated to supply two kilograms of cocaine. (265) The 2nd Circuit rejected defendants' contention that there was insufficient evidence to show that they negotiated to supply, and were capable of supplying, two kilograms of cocaine. A police detective testified that he negotiated to purchase two kilograms of cocaine, and defendants confirmed that once they received payment, they would send for the two kilograms. An informant eventually purchased one kilogram from defendant, but the informant told the detective that defendants had agreed that if all went well, they would sell a second kilogram the next day. Moreover, defendants told the detective that if this sale went smoothly, there was no reason why they could not do a steady business. *U.S. v. Pimental*, __ F.2d __ (2nd Cir. May 2, 1991) No. 90-1539.

7th Circuit upholds sentencing defendant for drugs for which he received no monetary compensation. (275) Defendant and the government stipulated that he possessed a total of 630 grams of cocaine during a drug conspiracy. Defendant contended it was improper to hold him responsible for 196 grams of this total because he was merely transporting these drugs to other conspirators and he received no monetary benefit for this service. The 7th Circuit termed this a "ridiculous argument." A narcotics conspirator can be held accountable for all drugs involved in the conspiracy that the conspirator knew or should have reasonably foreseen. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

5th Circuit remands because district court failed to enhance defendant's sentence for possession of a firearm. (280) A search of the condominium from which defendant sold cocaine uncovered additional cocaine, money, drug paraphernalia and a gun. The district court refused to enhance defendant's sentence for possession of the firearm during the commission of a drug crime, finding it "improbable that the weapon was used in the commission of this offense." The 5th Circuit remanded because the district judge may not have considered *possession* to be a sufficient ground for sentence enhancement. *U.S. v. Register*, __ F.2d __ (5th Cir. May 6, 1991) No. 90-8005.

9th Circuit upholds use of monetary table for fraud even though government was the victim. (300) The monetary table in the fraud guideline is intended to reflect "the harm to the victim and the gain to the defendant." Federal agencies may be the victims of fraud in counterfeiting and misbranding drugs. The 9th Circuit ruled that there is no meaningful distinction between the government as victim and individual consumer victims. Accordingly it was appropriate for the court to adjust the guideline range based on the amount involved. *U.S. v. Cambra*, __ F.2d __(9th Cir. May 15, 1991) No. 90-50442.

7th Circuit holds supervised release is authorized by 18 U.S.C. section 3583. (380)(580) Defendant contended that it was improper to sentence him to a term of supervised release because the drug conspiracy statute then in effect, 21 U.S.C. section 846, only authorized a fine or imprisonment. Following the 2nd, 5th and 11th Circuits, the 7th Circuit held that the term of supervised release was authorized by 18 U.S.C section 3583 for violations of section 846 committed after November 1, 1987. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

Adjustments (Chapter 3)

4th Circuit affirms vulnerable victim enhancement for defendant who conspired to kidnap, torture and kill 12-year-old boy. (410) Defendant conspired to kidnap, sexually abuse, torture and finally kill a 12-year-old boy for a "sex-snuff" film. Defendant complained that it was improper to impose a vulnerable victim enhancement because the conspiracy did not progress to the point of a victim being selected, and there can be no increase for the vulnerability of an unknown victim. The 4th Circuit rejected this contention. The record was clear that only a young boy was the target of the criminal activity and his age and vulnerability could be considered as a specific offense characteristic under section 2X1.1. *U.S. v. DePew*, __ F.2d __ (4th Cir. May 3, 1991) No. 90-5667.

2nd Circuit denies minor status to defendant who participated with brothers in drug business on an equal basis. (430) The 2nd Circuit rejected defendant's claim that he was entitled to a reduction based upon his minor status in the drug transaction. Evidence revealed that defendant and his two brothers participated on an equal basis in their drug enterprise. Defendant was present on both occasions when a police detective negotiated to purchase drugs from the brothers. On the day the kilogram was delivered, defendant guarded the detective and the money while defendant's brothers obtained the cocaine. Moreover, on that day, defendant alone among the brothers possessed a weapon. *U.S. v. Pimental*, __ F.2d __ (2nd Cir. May 2, 1991) No. 90-1539.

4th Circuit affirms managerial role for defendant who negotiated bribes. (430) Defendant ran a consulting firm that took bribes from a government defense contractor. Defendant then split the bribes with a government employee who supervised the award of government defense contracts. The 4th Circuit affirmed the determination that defendant was a manager. Defendant "was more than a mere conduit of the bribes. He negotiated with [the government employee] over terms of payment and sent [another government contractor] false invoices for consulting services to enable the company

to conceal its corruption." *U.S. v. Muldoon*, __ F.2d __ (4th Cir. April 30, 1991) No. 90-5020.

7th Circuit affirms defendant's supervisory role over common-law wife. (430) Defendant admitted driving to Florida about 12 times to pick up quantities of cocaine which he then delivered to people in Milwaukee. During one of his trips, a confidential informant contacted defendant's home and arranged a drug transaction with defendant's common-law wife. The 7th Circuit affirmed a two-point enhancement based on defendant's supervision of his wife. Defendant and his wife were indicted together for conspiracy to possess and distribute cocaine. There was evidence that defendant and his wife consulted regarding the sale to the informant, that defendant was aware his wife sold cocaine, that defendant knew where his wife purchased the cocaine she sold and that he had introduced her to the supplier. Thus, it was proper for the district court to conclude the wife conducted drug sales for defendant while he was out of town. *U.S. v. Hernandez*, __ F.2d __ (7th Cir. April 29, 1991) No. 90-1341.

8th Circuit affirms leadership role of president of corporations. (430) Defendant and two corporations were convicted for violating federal obscenity laws. The 8th Circuit affirmed a four-level increase in offense level for defendant's leadership role in the offense, since defendant was "an active president of the defendant corporations." *U.S. v. ABC, Inc.*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-1738.

5th Circuit rules district court must articulate why defendant did not merit minor participant reduction. (440) Defendant argued that he was a minor participant in a drug sale because he was not involved in the negotiations and did not know the amount of contraband involved. He claimed his agreement to purchase some of the marijuana and permit the use of his truck constituted only a minor role in the offense. The district court had rejected this contention, finding that defendant was an "average participant." The court refused defense counsel's request to give reasons for refusing the minor participant reduction. The 5th Circuit ruled that "[t]he sentencing court must state for the record the factual basis upon which it concludes that a requested reduction for minor participation is, or is not, appropriate." The case was remanded for the district court to articulate the factual basis for the ruling. *U.S. v. Melton*, __ F.2d __ (5th Cir. April 25, 1991) No. 89-8016.

7th Circuit rejects minor role for drug courier. (440) Defendant contended that he was a minor participant in a drug conspiracy because he only acted as a "mule" carrying drugs for the conspiracy's leader. The 7th Circuit rejected this argument. Defendant acted as a courier twice, which prevented him from falling within the terms of application note 2 to guideline section 3B1.2. The controlling standard is whether defendant was substantially less culpable than the conspiracy's remaining participants, and he was not. Defendant's transportation of a total of 11 ounces of cocaine in two separate trips "can be considered nothing but playing an integral role in the conspiracy." *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

8th Circuit rejects minor status for defendant who contacted informant to purchase drugs. (440) Defendant contended that he was entitled to minor participant status because he made only a small financial contribution to a drug purchase and was only a middle man in the transaction. The 8th Circuit rejected this argument. The record showed that defendant contacted the government informant to arrange the cocaine transaction, flew to Colorado to meet with the source, and contributed his own money the complete the transaction. Defendant also admitted that he actively worked to arrange the transaction. *U.S. v. Olson*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-5444.

2nd Circuit affirms enhancement for abuse of trust for defendant who used stolen federal identification cards to commit fraud. (450) Defendant was able to obtain stolen Customs Service identification cards through his work as an undercover informant for the Customs Service. He fraudulently obtained almost $15,000 from several people by representing that he was a federal agent selling confiscated government property. The 2nd Circuit affirmed an enhancement based upon defendant's abuse of a position of trust under guideline section 3B1.3. Defendant obtained the identification because the Customs Service trusted him to work as an informant, and his display of the identification, in connection with his claim to be selling confiscated government property, significantly facilitated the offense. *U.S. v. Young*, __ F.2d __ (2nd Cir. May 3, 1991) No. 90-1570.

5th Circuit upholds upward departure based upon defendant's obstruction of justice, experience in law enforcement and danger to public safety. (460)(745) Defendant, a county sheriff, became involved in a conspiracy to manufacture and sell methamphetamine. The 5th Circuit upheld an upward departure based upon defendant's obstruction of justice, his experience in law enforcement and danger to public safety. Although defendant had already received a two-level increase in offense level for obstruction of justice, he had committed numerous acts of obstruction. He discussed with co-conspirators false statements to tell authorities, alerted a co-conspirator of an undercover operation, and instructed a co-conspirator to threaten a man who was speaking to authorities. Given defendant's egregious behavior in abusing his position as sheriff to further the drug conspiracy, it was reasonable for the district court to rely upon defendant's position as sheriff. It was also reasonable to rely upon the threat to public safety as a basis for departure. This justification is not limited to national public health and safety offenses. Defendant endangered public safety by recruiting a co-conspirator as a deputy sheriff, transferring a co-conspirator's parole supervision to defendant's county, and convinc-

ing another county to release a co-conspirator from jail. *U.S. v. Wade*, __ F.2d __ (5th Cir. May 3, 1991) No. 90-4248.

7th Circuit finds no breach of plea agreement in government's failure to recommend acceptance of responsibility reduction. (460)(485)(790) Defendant contended that according to his plea agreement, the government agreed to recommend a reduction for acceptance of responsibility. He further contended that the government's introduction of evidence concerning defendant's obstruction of justice breached the plea agreement because it was an attempt to deny defendant the acceptance of responsibility reduction. The 7th Circuit found no breach of the plea agreement. At the time the government entered into the plea agreement, it was unaware that defendant had sought the help of others to kill government witnesses. Once it learned of such attempt, the government was entitled to withdraw from the plea agreement on the ground defendant was not accepting responsibility for his crime and was in fact planning a more serious crime. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

7th Circuit affirms that defendant obstructed justice by attempting to hire inmate to kill witness. (460) Defendant challenged a two-level enhancement for obstruction of justice based upon his alleged attempt to hire an inmate to kill potential government witnesses. The 7th Circuit found that the enhancement was not clearly erroneous. Although the inmate's testimony was contradicted by defendant, "the district court made a well-reasoned determination, based upon the credibility of the respective witnesses." The inmate who testified as to the offer had "little motive to fabricate" his testimony, and his story was internally consistent and not contradicted by extrinsic evidence. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

8th Circuit upholds obstruction enhancement for defendant's escape from custody. (460)(470)(680) Defendant escaped from custody after being arrested for bank robbery. He was convicted of both armed robbery and escape from federal custody. Defendant contended that it was improper to increase his offense for obstruction of justice based upon the escape. The 8th Circuit rejected this argument, but did find that the district court erred in calculating defendant's offense level. The court did not group the two counts, resulting in a combined adjusted offense level of 20, to which the district court added two points for obstruction of justice. The two counts should have been grouped together under guidelines section 3D1.2(c), which provides for grouping when one count embodies conduct that is treated as an adjustment to another count. This is to prevent "double counting" of offense behavior. Once the counts were grouped, defendant only had a base offense level of 19, which did not reflect any increase based on his escape. Then it was proper to add two points to the offense level for his obstruction of justice. *U.S. v. Hankins*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-1046.

9th Circuit holds that "instinctive flight of a suspect" is not willful obstruction under 3C1.1. (460) When a customs inspector found marijuana in defendant's car at the border, defendant fled back into Mexico. He was later arrested at his home in the United States. Relying on its earlier opinion in *U.S. v. Garcia*, 909 F.2d 389, 392 (9th Cir. 1990), the 9th Circuit reiterated that the "instinctive flight of a suspect who suddenly finds himself in the power of the police" is not willful obstruction of justice under guideline section 3C1.1. Nevertheless, since the district court had also found that defendant had lied to the probation officer about his criminal history, the court upheld the obstruction enhancement on that independent basis. *U.S. v. Hernandez-Valenzuela*, __ F.2d __ 91 D.A.R. 5306 (9th Cir. May 7, 1991) No. 90-50435.

9th Circuit upholds enhancement even though one reason for enhancement was improper. (460)(775)(800) Defendant argued that because one of the district court's grounds for the obstruction enhancement was improper, the case must be remanded for resentencing under *U.S. v. Nuno-Para*, 877 F.2d 1409 (9th Cir. 1989). The 9th Circuit rejected the argument, noting that in *Nuno-Para* the district court had not clearly given alternative grounds for the extent of the departure. Here, the district court gave "two separate and sufficient grounds for the two-point obstruction enhancement." The court made clear that the grounds were "alternative, not cumulative." Since the obstruction enhancement here was proper on at least one ground, remand was not required. *U.S. v. Hernandez-Valenzuela*, __ F.2d __ 91 D.A.R. 5306 (9th Cir. May 7, 1991) No. 90-50435.

2nd Circuit denies acceptance of responsibility despite defendant's belated acknowledgement of guilt. (485) Defendant claimed he was entitled to a reduction for acceptance of responsibility for having stated, at sentencing: "Please forgive me for my participation in the transaction. . . . I will never do it again." The 2nd Circuit found the district court was entitled to reject this "belated acknowledgement of guilt." Defendant maintained his innocence throughout his trial, and attempted to minimize his guilt, even after his conviction. *U.S. v. Pimental*, __ F.2d __ (2nd Cir. May 2, 1991) No. 90-1539.

7th Circuit finds no acceptance of responsibility despite defendant's cooperation. (485) Despite defendant's cooperation with authorities in their investigation of drug trafficking, the district court denied defendant a reduction for acceptance of responsibility, and the 7th Circuit affirmed. Although defendant flew from Florida to Chicago with several ounces of cocaine hidden in his pants, defendant stated that he never knew he was transporting cocaine and never willingly participated in drug trafficking. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

7th Circuit denies acceptance of responsibility reduction to defendant who told probation officer he was not a drug dealer. (485) In his presentence interview with the probation officer, defendant denied that he was a drug dealer or that there was any drug conspiracy. Based on this, the 7th Circuit affirmed the denial of a reduction for acceptance of responsibility. Although defendant "expressed some remorse and greater truthfulness at the final hour, the moment of sentencing," it was proper for the district court to deny the reduction based upon his earlier conduct. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

11th Circuit rejects acceptance of responsibility reduction despite defendant's cooperation. (485) The 11th Circuit rejected defendant's contention that he was entitled to a reduction for acceptance of responsibility based on his voluntary assistance to authorities. "It is clear that a court can recognize a defendant's cooperation with the government yet still deny the two-point reduction under this guideline." In this case, defendant pled not guilty and went to trial, denied any responsibility for assaulting an informant and claimed to have acted in self-defense. *U.S. v. Bennett*, __ F.2d __ (11th Cir. April 25, 1991) No. 90-3261.

4th Circuit affirms acceptance of responsibility reduction even though defendant admitted only partial guilt. (490) Defendant was convicted by a jury of various bribery related counts. The government appealed the district court's decision to grant defendant a reduction for acceptance of responsibility, contending that defendant only admitted giving illegal gratuities. The 4th Circuit affirmed the reduction. Defendant had presented a proposed plea agreement in which he agreed to plead guilty to bribery on condition that he preserved the right to appeal certain matters. The government rejected this condition, so defendant went to trial. At trial, he did not testify or introduce any evidence. The 5th Circuit gave credit to defendant's pretrial offer to plead guilty to the greater offense of bribery as evidence of his acceptance of responsibility. *U.S. v. Muldoon*, __ F.2d __ (4th Cir. April 30, 1991) No. 90-5020.

Criminal History (§ 4A)

5th Circuit reverses determination that defendant was under criminal justice sentence when she committed current offense. (500) Defendant contended that the district court incorrectly assessed her two criminal history points for committing the instant offense while under a criminal justice sentence. The 5th Circuit agreed that defendant's probation had expired at the time of the current offense. Defendant's probationary period was scheduled to expire March 3, 1987. Several days before, the county authorities filed a motion to revoke the probation. No further action was taken, and over 26 months later, the motion was dismissed. Under Texas law, there are three elements which must be satisfied to extend probation beyond its original term or to revoke it: (a) the filing, within the probationary period, of a motion to revoke the probation period, (b) the issuance, within the probationary period, of a capias, and (c) a diligent effort to execute the capias and to conduct a motion on the hearing. The record only reflected the first element. There was no evidence that a capias was ever issued, and the record clearly reflected that the motion was not diligently addressed by the state court. *U.S. v. Baty*, __ F.2d __ (5th Cir. April 26, 1991) No. 90-1406.

7th Circuit relies on copy of certified state record of conviction to determine prior offense was not city ordinance violation. (500) Defendant argued that his prior conviction for unlawful use of a weapon was pursuant to a city ordinance rather than a state misdemeanor statute, and therefore the offense was improperly included in the determination of his criminal history. The 7th Circuit rejected this argument after obtaining a certified copy of the state court record, which clearly indicated that the conviction was for a violation of state law. The court further found that if defense counsel intended to contest the government's contention that the conviction was a state misdemeanor, then he was obligated to secure such a certified copy. Defense counsel engaged in either intentional misrepresentation of fact or was grossly negligent, and in either case, the court had "serious doubts concerning the question of whether [defendant's] attorney [had] violated the ABA Model Standards of Professional Conduct." *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

8th Circuit affirms inclusion of "diversionary disposition" in defendant's criminal history. (500) Defendant pled guilty in 1984 to possession of marijuana in violation of Minnesota law. The state court stayed the adjudication and placed defendant on probation. The 8th Circuit upheld the inclusion of this state probation sentence in defendant's criminal history. Guideline section 4A1.2(f) states that a diversionary disposition "resulting from a finding or admission of guilt" in a judicial proceeding is counted as a sentence under the guidelines. Defendant's guilty plea was an admission of guilt. The inclusion of the probationary sentence in his criminal history was not a violation of the 10th Amendment. *U.S. v. Frank*, __ F.2d __ (8th Cir. April 29, 1991) No. 90-5535.

9th Circuit holds that sentence for offense that occurred after present offense was "prior sentence." (500) Defendant argued that the court erred in counting the state convictions as "prior sentences" because the sentences -- as well as the conduct for which they were imposed -- occurred *after* the offense for which he was being sentenced. The 9th Circuit rejected the argument, noting that guideline section 4A1.2(a)(1) defines "prior sentence" as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of

the instant offense." The prior state sentences here fell squarely within this definition. *U.S. v. Hoy*, __ F.2d __ (9th Cir. May 14, 1991) No. 90-30254.

9th Circuit holds that defendant is entitled to a hearing on validity of prior conviction where record was silent as to waiver of rights. (500) Under the Commentary Note 6 to guideline section 4A1.2, the defendant has the burden of establishing the constitutional invalidity of a prior conviction. *U.S. v. Newman*, 912 F.2d 1119 (9th Cir. 1990). With respect to defendant's 1985 conviction for possession of a controlled substance, there was no court record that he waived his rights. Therefore the 9th Circuit held that the district court should have conducted a hearing on whether or not he had waived his rights at the time of the 1985 guilty plea. The case was remanded for a hearing. *U.S. v. Carroll*, __ F.2d __ (9th Cir. May 9, 1991) No. 90-10179.

9th Circuit holds that "set aside" conviction is an "expunged" conviction under section 4A1.2(j). (500) One of the defendant's prior convictions was a 1977 California robbery conviction which was "set aside" pursuant to California Welfare and Institutions Code section 1772(a). That section specifically releases a juvenile "from all penalties and disabilities resulting from the offense or crime for which he or she was committed." The 9th Circuit found that the commentary to section 4A1.2 "unnecessarily confuses this issue." Applying both a federal and a California explanation of "expunge" to the clear language of section 4A1.2(j), the 9th Circuit held that defendant's 1977 conviction was expunged and could not be used as a prior conviction under the career offender guideline, section 4B1.2. *U.S. v. Hildalgo*, __ F.2d __ (9th Cir. May 8, 1991) No. 89-50457.

2nd Circuit rejects claim that concurrent sentences were related for career offender purposes. (520) Defendant was sentenced as a career offender based upon four prior armed robberies. The government conceded that the three which were consolidated for sentencing in New York were "related," and thus only counted as one prior sentence for career offender purposes. Defendant contended that the fourth robbery in Massachusetts was also related since (1) it occurred during the three-week period of the New York offenses, (2) all four offenses were to support his drug habit, and (3) his Massachusetts sentence ran concurrently with the sentence for the New York robberies. The 2nd Circuit rejected this argument. The court refused to find that the situation was the "functional equivalent" of consolidation. Although defendant contended a court should examine whether the cases would have been consolidated if they had occurred within one jurisdiction, the court found such an inquiry too speculative. However, defendant's claim that the four offenses were part of a common scheme or plan might have merit. Since the district court failed to make such a finding one way or the other, the sentence was vacated and the case was remanded for this determination. *U.S. v. Chartier*, __ F.2d __ (2nd Cir. May 3, 1991) No. 90-1288.

2nd Circuit determines sequence in which prior offenses must take place under career offender provision. (520) In order to qualify as a career offender, a defendant must have two prior felonies which are either crimes of violence or controlled substance offenses. Defendant urged the 2nd Circuit to adopt a narrow interpretation of this requirement under which a defendant would only qualify as a career offender if his prior offenses were sequential: i.e., he commits the first qualifying offense, is arrested and convicted, and thereafter commits the second qualifying offense, is arrested and convicted, and thereafter commits the instant offense, and is arrested and convicted. Under this scenario, a defendant has two opportunities to "learn his lesson" prior to being sentenced as a career offender. The 2nd Circuit rejected this narrow approach and interpreted the guidelines literally: the prior convictions must precede the instant offense, but the first conviction need not precede the second offense. Otherwise, offenses could not be "related" if the second offense was not committed until after conviction on the first offense. *U.S. v. Chartier*, __ F.2d __ (2nd Cir. May 3, 1991) No. 90-1288.

4th Circuit reverses career offender ruling because defendant had not been sentenced for second offense at time of instant offense. (520) At the time defendant committed the instant offense, he had been convicted of and sentenced for one crime of violence and had pled guilty to a controlled substance offense. He was, however, awaiting sentencing for the drug offense. The 4th Circuit reversed the determination that defendant was a career offender, holding that a prior conviction does not become relevant for career offender purposes until sentence is imposed. This position is supported by the booklet "Questions Most Frequently Asked About The Sentencing Guidelines," which indicates that under guideline section 4B1.2, the date the defendant sustained a conviction is the date the sentence was imposed, not the date the plea was accepted or the guilty verdict entered. However, the pending controlled substance offense may be grounds for an upward departure, particularly since defendant's own conduct delayed his conviction. *U.S. v. Bassil*, __ F.2d __ (4th Cir. May 6, 1991) No. 90-5678.

9th Circuit holds that court may not justify degree of departure by analogy to the career offender guidelines. (520)(734) By the time of sentencing, the state of California had dismissed the charge that would have made defendant a career offender, even though he had pleaded *nolo contendere*. Nevertheless the district court departed upward on the ground that if the defendant had been convicted, he would have been subject to the career offender guideline. The 9th Circuit reversed, holding that it is unreasonable to base a departure on an analogy to the career offender guidelines. The career offender provisions make no exception to the requirement of a

conviction and are "too blunt an instrument" to serve as an analogy because they function as an "on/off switch." The case was remanded for resentencing. *U.S. v. Faulkner*, __ F.2d __ (9th Cir. May 13, 1991) No. 89-10338.

Determining the Sentence (Chapter 5)

8th Circuit upholds warrantless searches for drugs and alcohol as condition of supervised release. (580) The 8th Circuit rejected defendant's contention that it was improper to subject him, as a condition of supervised release, to warrantless searches for drugs and alcohol. The district court may order conditions of supervised release which are reasonably related to the nature and circumstances of the offense and history and characteristics of the defendant. *U.S. v. Sharp*, __ F.2d __ (8th Cir. May 2, 1991) No. 90-1622.

2nd Circuit vacates invalid restitution order. (610) The order to pay $20,400 restitution to three victims was invalid because defendant had not been advised at the time of his plea that restitution could be ordered, and the amount of restitution exceeded the $5,500 in the offense of conviction. As a remedy, defendant sought only to have the restitution reduced to $5,500, thereby waiving the Rule 11 defect. The government agreed to the reduction, but contended that on remand, the judge should have discretion to impose a fine. The district court had found defendant's financial condition was insufficient to warrant both, and declined to order a fine to "give priority to" the victims. The 2nd Circuit found that it would be proper on remand for the district court to impose a fine, now that the restitution order was invalidated. On remand, if the government agreed to forego restitution, the guilty plea would stand. If the government wished to obtain restitution (limited to $5,500), defendant must be given an opportunity to withdraw his plea. If restitution was not sought, or if defendant did not withdraw his plea and accepted a reduction in restitution to $5,500, the judge would be free to impose a fine up to an amount that, when added to the amount of restitution, did not exceed the original $20,400. *U.S. v. Young*, __ F.2d __ (2nd Cir. May 3, 1991) No. 90-1570.

8th Circuit remands for district court to consider restitution order. (610) Defendant was ordered to pay restitution in the amount of $1,927. The penitentiary in which defendant served took one-half of his income each month as a restitution payment, which defendant claimed left him with insufficient funds. After defendant's appeal was filed, he filed a motion with the district court for a more lenient restitution schedule. The district court informed him that because of his appeal, it no longer had jurisdiction to consider the matter. The 8th Circuit remanded this issue to the district court for consideration, since it was more likely to be familiar with defendant's family needs and terms and conditions of his punishment and restitution. *U.S. v. Hankins*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-1046.

10th Circuit vacates additional fine in absence of punitive fine. (630) In accordance with its decision in *U.S. v. Labat*, 915 F.2d 603 (10th Cir. 1991), the 10th Circuit vacated a $150,000 fine for the costs of incarceration and supervised release, since no punitive fine had been imposed. *U.S. v. Eves*, __ F.2d __ (10th Cir. April 29, 1991) No. 90-3230.

9th Circuit rejects downward departure for drug dependence. (690)(722) Defendant argued that his was not a drug dependence in the traditional sense, because he was addicted to opiates which resulted from legally prescribed drugs administered for medical treatment. Relying on several prior cases, the 9th Circuit rejected the argument, holding that guideline section 5H1.4 forecloses consideration of drug dependency as a ground for downward departure. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. May 15, 1991) No. 90-10214.

Departures Generally (§ 5K)

5th Circuit rules that government must move for downward departure if defendant relied upon government promise. (710)(790) Government counsel sent defense counsel a proposed plea agreement with a transmittal letter stating: "In addition, I will recommend departure to the court based upon your client's full and complete debriefing and substantial assistance to the government in resolving this case as outlined above." The plea agreement was silent on this matter, but did contain a provision that stated that it was the entire agreement between the parties. Defendant contended that the government's failure to move for a departure was a breach of the plea agreement. The 5th Circuit remanded for the district court to determine whether defendant, in reliance on the government's representation, accepted the government's offer and did all that he was capable of doing under the circumstances. If defendant performed his obligation, or was ready to perform his obligation but was unable to do so because the government had no further need or opted not to use him, then the government was obliged to move for the downward departure. The district court could then enter whatever sentence it deemed appropriate. *U.S. v. Melton*, __ F.2d __ (5th Cir. April 25, 1991) No. 89-8016.

8th Circuit holds it has no authority to review extent of downward departure for substantial assistance. (710) Defendant contended that the district court failed to depart below the statutory minimum sentence as promised in his plea agreement and as requested by the government in its motion under guideline section 5K1.1. The 8th Circuit rejected these arguments, since in sentencing defendant to 114 months, the district court did depart below the guideline range of 151 to 188 months and the statutory minimum of 120 months. Defendant essentially was arguing that the

court failed to make a substantial enough departure, a decision the court found unreviewable. *U.S. v. Sharp*, __ F.2d __ (8th Cir. May 2, 1991) No. 90-1622.

10th Circuit finds district court articulated sufficient reasons to deny downward departure. (720) In *U.S. v. Jefferson*, 925 F.2d 1242 (10th Cir. 1991), the 10th Circuit remanded the case for the district court to clarify why it concluded it lacked discretion to sentence defendants below their applicable guideline ranges. On remand, the district court explained that although if felt that the guideline sentence was unduly harsh, there were no grounds available that would justify the exercise of discretion for a downward departure for either defendant. The 10th Circuit found that the district court properly applied the guidelines and properly determined that there was no basis for a downward departure. *U.S. v. Jefferson*, __ F.2d __ (10th Cir. April 29, 1991) No. 90-8028.

1st Circuit reverses downward departure based upon defendants' responsibilities to their four-year-old son. (722) Defendant and her husband were convicted of mail fraud. The district court departed downward based upon defendants' responsibilities to their four-year-old son, and the 1st Circuit reversed. Defendants' responsibilities did not place them outside the "heartland" of typical cases. Moreover, the district court could have limited the impact on defendants' son by staying the execution of sentence of one parent until the other's sentence had been served. The district court's belief that the downward departures were "fair" compared to other defendants in other cases was also an improper ground for departure. *U.S. v. Carr*, __ F.2d __ (1st Cir. May 6, 1991) No. 90-2137.

8th Circuit finds district court properly refused to depart based on government misconduct. (722) Defendant contended that the district court incorrectly believed that it lacked authority to depart downward under guideline section 5K2.10 (victim's conduct contributed significantly to provoking the offense) and section 5K2.12 (offense committed because of serious coercion). He claimed that the government agents "entrapped" him by reducing the price at which they would sell cocaine to him, offering to deliver the drugs to him at no extra charge, and funding the purchase of airline tickets for him. The 8th Circuit found that the district court correctly applied the guideline and that the government's conduct was not an instigating factor. *U.S. v. Olson*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-5444.

9th Circuit rejects downward departure for diminished capacity based on involuntary drug use. (722) Section 5K2.13 permits a court to depart downward if the defendant suffered from diminished capacity that resulted from involuntary drug use, as long as the offense was nonviolent. However, there was no evidence in the record that defendant in fact had diminished capacity. Moreover his unarmed bank robberies were "violent offenses," making departure inappropriate. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. May 15, 1991) No. 90-10214.

9th Circuit rejects remoteness of prior conviction as a basis for downward departure. (722) Guideline section 4A1.2(e) already accounts for the remoteness of prior convictions by counting "any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense." Thus it was improper for the court to depart downward based upon the remoteness of the defendant's prior convictions. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. May 15, 1991) No. 90-10214.

9th Circuit reverses downward departure based on fact that prior criminal history was "merely" a parole violation. (722) Section 4A1.2(k) states in pertinent part, "revocation of probation, parole, supervised release, special parole, or mandatory release may affect the points for section 4A1.1(e) in respect to the recency of last release from confinement." The 9th Circuit held that therefore the Commission adequately considered "the effects of a parole violation," and the district court was in error to rely upon it in order to depart downward. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. May 15, 1991) No. 90-10214.

9th Circuit rules that downward departure because the sentence seemed "unusually high" was improper. (722) The district court reasoned that a downward departure was appropriate because the sentence seemed unusually high compared to those the court had seen for similar cases and crimes. The 9th Circuit reversed, holding that "the district court may not depart simply because it is unusual." *U.S. v. Sanchez*, __ F.2d __ (9th Cir. May 15, 1991) No. 90-10214.

9th Circuit rejects "confusion" and parties' expectations as a rationale for departure downward. (722)(790) The fact that all parties involved initially believed the sentence would be lower does not justify a departure on the basis of "confusion." As the court stated in *U.S. v. Selfa*, 918 F.2d 749 (9th Cir. 1990), "the district court regrettably is not usually in a position at the time of the plea to advise the defendant with any precision as to the range within which the sentence might fall." In any event, the 9th Circuit found that the analogy to *Selfa* was misplaced, because the defendant did not claim that he was misled or relied on the initial characterizations of what his sentence would be. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. May 15, 1991) No. 90-10214.

11th Circuit affirms upward departure based upon defendant's extensive criminal history and danger to public safety. (733) Defendant was convicted under the Armed Career Criminal Act of 1984, 18 U.S.C. section 924(e)(1), which mandated a minimum sentence of 15 years because he had three prior violent felonies. Because his applicable guideline

range was below the statutory minimum, the statutory minimum became defendant's guideline sentence. Nonetheless, the district court departed upward and sentenced defendant to 360 months, based on defendant's extensive criminal history and his danger to public safety. Defendant had 23 criminal history points, 10 more than necessary to classify him in the highest criminal history category. Defendant's prior convictions showed violent and dangerous conduct, all of which occurred with frequency and soon after his release from prison or placement on probation. The 11th Circuit affirmed. "Recognizing that the presumptive Guideline sentence of 15 years failed to reflect the egregious nature of [defendant's] criminal record, the district court reasonably enhanced his sentence in keeping with the goals of the Sentencing Guidelines." *U.S. v. Briggman*, __ F.2d __ (11th Cir. March 29, 1991) No. 89-6274.

11th Circuit affirms upward departure based upon defendant's refusal to return stolen $1.7 million. (745) Defendants stole $1.7 million from an armored car company. Only $50,000 of the stolen proceeds were ever recovered, and defendants refused to reveal the location of the remaining funds. The 11th Circuit upheld an upward departure from 46 months to the statutory maximum of 15 years, based on defendants' refusal to return the remaining money. The departure was not, as contended by defendants, improperly based upon the amount of money stolen, but upon defendants' "blatant flouting of the law." The evidence was sufficient to prove that defendants knew the present location of the money. One of the defendants was burning bank records at the time he was arrested. The extent of the departure was "appropriate and even necessary to insure respect for the law and, more specifically, to see that our system of punishment retains its deterrent effect." *U.S. v. Valle*, __ F.2d __ (11th Cir. April 25, 1991) No. 89-5780.

Sentencing Hearing (§ 6A)

5th Circuit rejects argument that district judge did not determine defendant's guideline range. (750) The 5th Circuit rejected defendant's argument that the district judge failed to determine his guideline range. The judge, at the sentencing hearing, accepted the PSI offense level of 34 by expressly overruling all of defendant's objections to the PSI, referring to the "calculated guideline range," and stating the maximum sentence as set out in the PSI. *U.S. v. Wade*, __ F.2d __ (5th Cir. May 3, 1991) No. 90- 4248.

2nd Circuit finds no due process violation in court's reliance upon evidence introduced at brothers' trial. (760)(770) The 2nd Circuit rejected defendant's contention that he was denied due process. Defendant argued that the district court failed to notify him that it would rely upon facts from his brothers' trial in setting defendant's base offense level. Although the presentence report did not specify that the facts from his brothers' trial would be used, the report did set forth all the facts established at that trial that the sentencing judge later relied on in determining defendant's offense level. *U.S. v. Pimental*, __ F.2d __ (2nd Cir. May 2, 1991) No. 90-1539.

7th Circuit finds no due process violation in district court's failure to make tentative findings. (760) Defendant argued that his due process rights were violated by the district court's failure to provide him, prior to sentencing, with tentative findings of fact as required by guideline section 6A1.3(b). The 7th Circuit found no due process violation. The caselaw interpreting section 6A1.3(b) does not rigidly require tentative findings. In this case, the district court "did more than simply comply with the basic policy underlying the Sentencing Guidelines and the Due Process Clause through its furnishing of the presentence report to [defendant] in a timely fashion, receiving his objections prior to hearing, allowing a full and complete opportunity to review and later to present extensive challenges [to] evidence and in resolving each and every factual question on disputed factual issues during an extended two-day sentencing hearing." *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

9th Circuit upholds finding of quantity of drugs even though jury did not determine the quantity. (770) Relying on *U.S. v. Jenkins*, 866 F.2d 331, 334 (10th Cir. 1989), the 9th Circuit held that the sentencing judge's determination of quantity of drugs was not affected by the fact (1) that the jury did not determine the quantity of drugs involved in the offense or (2) that it was possible that the jury had found that less drugs than the quantity required for the enhanced sentence had been involved. The amount required to enhance had been alleged in the indictment and the evidence showed that the defendant was in constructive possession of a sufficient quantity to warrant the enhanced penalty. *U.S. v. Powell*, __ F.2d __ (9th Cir. May 13, 1991) No. 89-10557.

11th Circuit affirms reliance upon co-defendant's testimony as to quantity of cocaine possessed by defendant. (770) Defendant was convicted of distributing 11.9 grams of cocaine to a co-defendant. The district court sentenced defendant on the basis of 90 grams, based the co-defendant's testimony that defendant had in his apartment 362 packets of cocaine base. Defendant challenged the district court's reliance upon this testimony, since the co-defendant had also testified that the bag of cocaine defendant gave to her contained 62 packets of cocaine, when in fact it had contained 92. The 11th Circuit upheld the district court's reliance upon this testimony. "The district court, having listened to all of the testimony, chose to accept, [the co-defendant's] testimony as to the total amount of cocaine [defendant] had in his possession. We cannot find error in that credibility choice absent a stronger showing than [defendant] put forward here." *U.S. v. Bennett*, __ F.2d __ (11th Cir. April 25, 1991) No. 90-3261.

2nd Circuit reviews statement of reasons. (775) As a career offender, defendant's original guideline range was 210 to 262 months. In sentencing defendant to 262 months, the district court observed that since a prior sentence of 10 to 15 years had not dissuaded him from a subsequent offense, a sentence at the bottom of the guideline range seemed insufficient. The 2nd Circuit was troubled by this statement of reasons under 18 U.S.C. section 3553(c)(1) in two respects. First, the prior 15-year sentence was subject to parole; defendant in fact served about nine years. A more relevant basis for comparison would be the amount of time served on the prior sentence. Second, the judge did not fully comply with section 3553(c)(1) by stating why he selected the particular sentence within the guideline range. He merely stated why the minimum sentence was inadequate. Since the sentence was being remanded for other reasons, the court urged the judge "to give renewed consideration to the selection of the particular sentence to be imposed within the guideline range." *U.S. v. Chartier*, __ F.2d __ (2nd Cir. May 3, 1991) No. 90-1288.

Plea Agreements, Generally (§ 6B)

2nd Circuit expresses concern with plea bargain process under the guidelines. (780) The 2nd Circuit expressed its concern with "the escalating number of appeals from convictions based on guilty pleas in which the appellant claims that he was unfairly surprised by the severity of the sentence imposed under the Guidelines." The court was particularly bothered by drug cases in which the defendant, at the time of entering his plea, was unaware of the quantity of drugs which could be included in the calculation of his offense level. It suggested that this problem could be remedied if the government would "sentence bargain," rather than "charge bargain." Alternatively, such appeals could be reduced if the government would inform defendant, prior to accepting plea agreements, of the likely range of sentences his plea would authorize under the guidelines. Although the government has no legal obligation to do so, providing defendants with this information would not be a great burden, particularly compared to having to brief and argue an entire appeal. *U.S. v. Pimental*, __ F.2d __ (2nd Cir. May 2, 1991) No. 90-1539.

4th Circuit rules district court need not sentence defendant in accordance with proposed conditional plea agreement. (780) The 4th Circuit rejected defendant's argument that he should have been sentenced in accordance with a proposed plea agreement. He attached to the proposal a condition permitting him to appeal the denial of his motion to exclude certain wiretaps. The government was unwilling to accept this condition, but agreed with the other provisions. The 4th Circuit found that the district court was not obligated to accept a conditional plea, and thus, not required to give effect at sentencing to a proposed conditional plea to which the government did not consent. *U.S. v. Muldoon*, __.F.2d __ (4th Cir. April 30, 1991) No. 90-5020.

7th Circuit holds plea agreement did not require government to deliver forfeited property free of encumbrances. (790)(900) Defendant's plea agreement provided for the forfeiture, sale and disposition of his business and farm assets, including the delivery of 21 head of forfeited cattle to defendant's daughters. Defendant claimed that because the plea agreement had a clause requiring the payment of all liabilities and encumbrances of his farm with proceeds from the sale of forfeited farm assets, the government was required to pay the encumbrances on the cattle delivered to his daughters. The 7th Circuit rejected this interpretation of the plea agreement. The plea agreement provided that the proceeds from the sale of assets were to be used to satisfy the encumbrances on the assets being disposed of by sale. The encumbrances on the assets being distributed in kind did not need to be satisfied. *Marx v. U.S.*, __ F.2d __ (7th Cir. April 26, 1991) No. 89-1603.

7th Circuit finds no breach of plea agreement in government's delay in delivering forfeited cattle. (790)(900) Defendant's plea agreement provided for the delivery of 21 head of forfeited cattle to defendant's daughters. The cattle were to be delivered to the daughters shortly after sentencing. While 19 of the cattle were delivered promptly, the remaining two were not delivered until seven months after sentencing. The 7th Circuit rejected defendant's claim that this delay was a breach of the plea agreement. The plea agreement provided that the cattle were forfeited to the government. The government had a statutory obligation acknowledged in the plea agreement to protect third-party interests and claims with respect to the forfeited assets. As such, the government delayed delivery of the two cows pending resolution of claims filed by lienholders under section 853(n). The delay in delivery of the cows until after the resolution of these claims was consistent with the parallel obligations placed upon the government. *Marx v. U.S.*, __ F.2d __ (7th Cir. April 26, 1991) No. 89-1603.

7th Circuit holds defendant may not rely upon plea agreement containing incomplete criminal history. (790) Defendant contended that the government breached his plea agreement by recommending he be classified in criminal history category III, rather than criminal history category I, as set forth in the plea agreement. The 7th Circuit found no breach. The plea agreement was based upon information "presently available" to the government. Defendant had not revealed two prior convictions for driving while intoxicated, which convictions were not discovered until the probation office conducted its presentence investigation. Defendant could not rely upon a plea agreement entered on the basis of an incomplete criminal history. *U.S. v. Osborne*, __ F.2d __ (7th Cir. April 22, 1991) No. 89-1182.

9th Circuit upholds use of stipulated value in sentencing. (795) Defendant argued that the amount involved in the

fraud related counts was unspecified, and therefore the district court erred in using the total $500,000 figure in computing his guidelines. The 9th Circuit rejected the argument noting that the stipulation specifically provided that the value involved in either of the counts was $500,000. Moreover the record contained evidence of an even higher amount of fraud. *U.S. v. Cambra*, __ F.2d __(9th Cir. May 15, 1991) No. 90-50442.

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

1st Circuit holds that timely motion for reconsideration tolls the running of appeal period. (800) Defendant contended that the government's appeal was not timely because it was not filed until 41 days after their convictions were entered. The government contended that since it had filed a motion for reconsideration, the sentences were non-final for purposes of commencing the 30-day appeal period. The 1st Circuit found the appeal was timely. The court agreed with the government that the district court retains some inherent power to correct sentences. The recent changes in Fed. R. Crim. P. 35 and the language of 18 U.S.C. section 3582(c) did not change the well-established rule that, when a timely motion for reconsideration is filed, the 30-day appeal period does not begin to run until the denial of the motion. *U.S. v. Carr*, __ F.2d __ (1st Cir. May 6, 1991) No. 90- 2137.

8th Circuit rules enhancement not appealable where sentence would be within new guideline range. (810) Defendant challenged a two-level enhancement in his offense level for obstruction of justice. The enhancement increased guideline from 18-24 months to 24-30 months. Defendant received a 24-month sentence. The 8th Circuit found the enhancement was not appealable, since defendant's sentence was within both guideline ranges. *U.S. v. ABC, Inc.*, __ F.2d __ (8th Cir. April 26, 1991) No. 90-1738.

Forfeiture Cases

7th Circuit rules criminal forfeiture must be established by a preponderance of the evidence. (900) Defendants complained that the district court erred by presenting two burdens of proof to the jury during the forfeiture portion of their trial: both a preponderance of the evidence and beyond a reasonable doubt. The 7th Circuit found no plain error. The district court's instructions mirrored the statutory language in 21 U.S.C. section 853. Once a defendant has been convicted of the substantive offense beyond a reasonable doubt, he is subject to criminal forfeiture under section 853, which requires the government to make its proof by only a preponderance of the evidence. The government was not required to prove beyond a reasonable doubt that defendant's assets were forfeitable. Thus it would be the government, rather than defendant who would have cause to complain about the "beyond a reasonable doubt" language used by the district court. *U.S. v. Simone*, __ F.2d __ (7th Cir. May 3, 1991) No. 88-3412.

7th Circuit affirms forfeiture despite reversal of one of defendant's drug convictions. (900) Defendant was convicted by a jury of a drug conspiracy and possession with intent to distribute cocaine, and cash found in his residence was ordered forfeited. On appeal, the conspiracy conviction was reversed, but the 7th Circuit affirmed the forfeiture order. Although the cash could not have been the proceeds of the cocaine offense for which he was convicted, the jury was entitled to believe that the cash was intended to facilitate the commission of the crime. The jury could conclude that defendant was in the drug business, and that the cash was an asset of that business. *U.S. v. Lamon*, __ F.2d __ (7th Cir. April 22, 1991) No. 90-1407.

11th Circuit affirms that cashier's check used to purchase stock was forfeitable. (900) The 11th Circuit found there was sufficient evidence for the jury to conclude that a cashier's check for $73,200 that defendant used to purchase stock was forfeitable. There was testimony that a stock broker had laundered money for defendant through the stock market, and that defendant's tax returns did not reflect investment profits. The check was dated four days after defendant was named in the initial indictment on drug charges and before he was arrested. *U.S. v. Elgersma*, __ F.2d __ (11th Cir. April 29, 1991) No. 89-3926.

11th Circuit rules criminal forfeiture must be proven beyond a reasonable doubt. (900) Declining to follow the 3rd, 7th and 9th Circuits, the 11th Circuit held that a criminal forfeiture under the Comprehensive Drug Abuse Prevention and Control Act must be proven beyond a reasonable doubt, rather than by a preponderance of the evidence. Finding the legislative history to be inconclusive, the court concluded that criminal forfeiture is a substantive criminal charge to be proved like any other. If the government fails to prove the criminal forfeiture under this higher burden, it is free to seek a civil forfeiture. Section 853(d) of the act does create a rebuttable presumption that property is forfeitable if the government proves, by a preponderance of the evidence, that the property was acquired during the time of the drug violation and there was no other likely source of income. But the presumption only identifies certain property "subject to forfeiture under this section." If the presumption is applicable, the government may use it as part of its overall forfeiture case, and the statutory burden of a preponderance of the evidence applies. For a forfeiture conviction to be complete, however, the government must show that the property was derived from proceeds obtained as a result of the criminal violations." Judge Anderson dissented. *U.S. v. Elgersma*, __ F.2d __ (11th Cir. April 29, 1991) No. 89- 3926.

11th Circuit finds no plain error in failure to make proper jury instruction concerning burden of proof. (900) The district court failed to instruct the jury that the government was required to prove the elements of forfeiture under 21 U.S.C. section 853(a) beyond a reasonable doubt. The judge correctly advised the jury that a preponderance of evidence was required to establish the presumption of forfeitability set forth in section 853(d), but was silent about the standard of proof for section 853(a). The 11th Circuit found that this was not plain error, since the jury was not substantially misled by the failure to instruct. The forfeiture proceeding was held the same day the jury returned the guilty verdicts on 13 criminal counts. The trial court charged the jury that the evidence from the criminal trial was to be incorporated into the forfeiture proceeding. The judge had previously instructed the jury before it began deliberations on the substantive criminal counts that it had to find defendant guilty beyond a reasonable doubt. It was "especially significant" that the jury did not forfeit all of the property requested by the government. *U.S. v. Elgersma*, __ F.2d __ (11th Cir. April 29, 1991) No. 89-3926.

11th Circuit rejects innocent owner defense for wife beaten by husband. (960) Claimant's husband sold drugs from the residence owned by claimant. Evidence revealed that the husband had (a) beaten to death his former wife, (b) on one occasion choked claimant, (c) threatened claimant, (d) owned several guns, and (e) was described by one witness as a "madman" and by another as "the devil." The 11th Circuit reversed the district court's determination that claimant did not consent to her husband's illegal use of the property and thus was entitled to the innocent owner defense. The court refused to substitute "a vaguely-defined theory of 'battered wife syndrome' for the showing of duress." In order to establish the duress defense, the threat must be immediate, rather than a "general concern that a coconspirator might retaliate." Nothing in the record suggested the husband threatened immediate retaliation if claimant did not cooperate. Claimant had ample opportunity to flee or to contact law enforcement agents concerning her husband's activities. *U.S. v. Sixty Acres in Etowah County*, __ F.2d __ (11th Cir. May 6, 1991) No. 90-7382.

AMENDED OPINION

(190) *U.S. v. Bear*, 915 F.2d 1259 (9th Cir. 1990), *amended*, __ F.2d __ (9th Cir. May 15, 1991) No. 89-30200.