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COMMENDATIONS

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

Vickie Aldridge and ***Dennis Fisher*** (District of North Dakota), by Richard J. Morrissey, Chief Patrol Agent, U.S. Border Patrol, Grand Forks, for their skillful presentation of an immigration criminal case and for bringing the case to a successful conclusion.

David Atkinson (District of Virgin Islands), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his outstanding success in prosecuting two bribery cases, one of which involves the first white collar crime indictment ever handed down in St. Croix.

Laura Birkmeyer (California, Southern District), was presented the Gil Amoroso Memorial Award for her outstanding prosecution involving outlaw motorcycle gang investigations by the International Outlaw Motorcycle Gang Conference held in Orlando, Florida.

John Braddock (Texas, Southern District), by Richard D. Latham, Securities Commissioner, State Securities Board, Austin, for his professionalism and legal skill in obtaining a 47-count indictment and the subsequent conviction by a jury on every count.

Joseph Brannigan (California, Southern District), by Drew C. Arena, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his outstanding efforts on behalf of the United States in responding to a complicated extradition request from the Republic of South Africa.

Frank L. Butler, III (Georgia, Middle District), by John P. Byrnes, Attorney, Small Business Administration, Atlanta, for his valuable assistance and cooperative efforts in successfully resolving a complex civil action.

George W. Breitsameter (District of Idaho), by John F. West, Special Agent in Charge, Office of Assistant Inspector General for Investigations, Defense Criminal Investigative Service, Department of Defense, Oakland, California, for his outstanding legal skills in successfully prosecuting a complex government fraud case. Also, by T. Michael Dillon, Supervisory Senior Resident Agent, FBI, Salt Lake City, for his successful prosecution of a lengthy financial institution fraud case.

Anne Chain (Pennsylvania, Eastern District), by Stephen N. Marica, Assistant Inspector General for Investigation, Small Business Administration, Washington, D.C., for her excellent legal skills and ultimate success in the prosecution of a conspiracy case involving the filing of false statements to obtain a $4.8 million Navy contract.

Julia Craig, Gonzalo Curiel, and ***Brian Kelly*** (California, Southern District), by Joseph A. Charles, Acting Special Agent in Charge, U.S. Customs Service, San Ysidro, for their outstanding representation and cooperative efforts in the investigation and trial of a complex drug smuggling case.

Lynn E. Crooks (District of North Dakota), by Richard T. Lind, Assistant Special Agent in Charge, FBI, Minneapolis, for his excellent presentation on major cases in his District, and for his dedication and supportive efforts over the years.

Michael C. Daniel (Georgia, Middle District), by Richard Lewis Faber, Managing Attorney, North Branch, Office of Assistant Chief Counsel, Federal Aviation Administration, Atlanta, for his skillful and expeditious handling of a civil action on behalf of the FAA, and for obtaining a favorable decision in the matter.

Ken Dies (Texas, Southern District), by Sergeant Donald J. Lovvorn, Texas Department of Public Safety/Intelligence Service, and President, Texas Association for Investigative Hypnosis, Austin, for his outstanding presentation on forensic hypnosis in a capital murder case at a seminar at Sam Houston State University, Huntsville.

D. Thomas Ferraro (California, Southern District), was presented the Administrator's Award for Outstanding Group Achievement by Julius C. Beretta, Special Agent in Charge, Drug Enforcement Administration, San Diego, for his participation in the Triple Neck Scientific investigation, which created a major impact on methamphetamine manufacturers in San Diego County.

Jefferson M. Gray (District of Maryland), by Colonel Edwin F. Hornbrook, Chief, Claims and Tort Litigation Staff, Office of the Judge Advocate General, U.S. Air Force, Washington, D.C., for his valuable assistance in a complex civil action, and for bringing the matter to a successful conclusion.

Jack Hanley (Virginia, Eastern District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his excellent presentation on search warrants in government fraud investigations at a training program conducted by the Office of the Inspector General.

Robert T. Kennedy (District of Colorado), by Robert W. Jacobs, Deputy Chief, U.S. Probation Officer, U.S. District Court, Denver, for his valuable assistance and cooperative efforts in the management of a crisis situation involving an individual in violation of supervised release.

Ronald J. Kurpiers, II (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his investigative assistance and prosecutive efforts in obtaining guilty pleas and incarceration of several members of the Knox Street Gang, causing a major impact on theft from interstate shipment activity in the Chicago area.

Beth L. Levine and ***Nita L. Stormes*** (California, Southern District), by Harold J. Hughes, General Counsel, U.S. Postal Service, Washington, D.C., for their outstanding representation in obtaining a court ordered injunction against a potentially dangerous person representing a threat to the employees of the San Diego General Mail Facility.

Daniel Lopez Romo, United States Attorney, and ***Osvaldo Carlo*** (District of Puerto Rico), by Rosa C. Villalonga, Manager, Department of Housing and Urban Development, Caribbean Office, Region IV, San Juan, for their dedication, support and assistance during the Commonwealth's dissolution of the Puerto Rico Urban Renewal and Housing Corporation.

Daniel Lopez Romo, United States Attorney, and ***Luis A. Plaza*** (District of Puerto Rico), by James B. Thomas, Jr., Office of Inspector General (OIG), Department of Education, Washington, D.C., for their significant contributions to the investigative efforts of OIG staff in various complex and highly productive cases.

William R. Lucero (District of Colorado), by Robert L. Pence, Special Agent in Charge, FBI, Denver, for his outstanding prosecutive skills in the successful resolution of a complex securities case involving a pennystock brokerage firm and a number of fraudulent stock schemes.

William H. McAbee, II (Georgia, Southern District), by Thomas P. DeBerry, Assistant Director, Institute of Continuing Legal Education in Georgia, Athens, for his excellent presentation at the Federal Sentencing Guidelines Seminar held in Atlanta.

Robert McCampbell (Oklahoma, Western District), by Ira H. Raphaelson, Special Counsel, Office of the Deputy Attorney General, Department of Justice, Washington, D.C., for his outstanding accomplishments in charging numerous defendants in major bank cases in his capacity as Deputy Chief of the Criminal Division and Supervisor of the Financial Fraud Unit.

George Martin (Alabama, Southern District), by William P. Tompkins, District Director, Office of Labor Management Standards, Department of Labor, New Orleans, for his successful prosecution of an embezzlement case involving a labor union official.

Abby Meiselman (New York, Southern District), by Joseph F. Reinbold, Regional Inspector, IRS, New York, for her professionalism and legal skill in successfully prosecuting an embezzlement case against an IRS employee.

Duke Millard (Texas, Southern District), by Phillip J. Chojnacki, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Houston, for his valuable assistance in prosecuting federal firearms cases resulting in substantial prison terms for two notorious armed career criminals.

Kendall Newman (California, Southern District), by Robert J. De Monte, Regional Administrator-Regional Housing Commissioner, Department of Housing and Urban Development, San Francisco, for his successful efforts in settling litigation involving a retirement center in Escondido.

George F. Peterman (Georgia, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his valuable contribution to the investigation and prosecution of a violence-prone group who were robbing business establishments in Georgia and other areas in the Southeast.

Robert H. Plaxico (California, Southern District), by Lt. Col. J.E. Holmes III, Judge Advocate, U.S. Army Reserve, San Diego, for his excellent representation of an Army reservist involved in a contract dispute upon activation to serve in the Persian Gulf War.

Peter Prieto (Florida, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding prosecutive skill in obtaining a guilty verdict in a longstanding criminal case involving conspiracy, bank fraud, and embezzlement.

Jackie Rapstine (District of Kansas), by P. K. Kennedy, Director, Colmery-O'Neil Medical Center, Department of Veterans Affairs, Topeka, for her professionalism and legal skill in obtaining a favorable decision on behalf of the Medical Center.

H. Lee Schmidt (Oklahoma, Western District), by Derle Rudd, Regional Inspector, IRS, Dallas, for his professional and legal skill in bringing a bribery of a public official case to a successful conclusion.

J. Richard Scruggs and ***John Deits*** (District of Oregon), by Brian A. Riley, Chief of Police, City of Salem, Oregon, for their valuable assistance and cooperative efforts in the successful prosecution of a narcotics smuggling and distribution organization operating in Oregon, Washington, Arizona, California, and Mexico.

Jan Sharp (District of Nebraska), by Charles Lontor, Special Agent in Charge, FBI, Omaha, for his professionalism and legal skill in obtaining the conviction and subsequent resignation of a local politician in a complex bribery case.

Sheldon Sperling (Oklahoma, Eastern District), by Fred Means, Director, Oklahoma State Bureau of Narcotics and Dangerous Drugs, Oklahoma City, for his outstanding leadership and organizational skills in bringing a difficult criminal trial to a successful conclusion.

Michael P. Sullivan and ***John Schlesinger,*** by Thomas V. Cash, Special Agent in Charge, Drug Enforcement Administration, Miami, for their successful prosecution of Colonel Luis Arce-Gomez, former Minister of the Interior of Bolivia, on charges of conspiracy to import and distribute cocaine. Colonel Arce-Gomez was one of the army leaders of the so-called "Cocaine Coup" in 1980, that attempted to institutionalize cocaine smuggling from Bolivia to the United States. [Note: Michael Sullivan is the lead attorney in the Noriega trial on drug trafficking and racketeering charges.]

Tanya J. Treadway (District of Kansas), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for her professionalism and legal skill in obtaining the conviction of a bank officer on four counts of bank fraud and making false statements.

John J. Valkovci (Pennsylvania, Western District), by D. Brooks Smith, District Judge, U.S. District Court, Pittsburgh, for his excellent presentation on federal criminal practice at the Basic Federal Practice Seminar in Johnstown.

Edwin Vasquez and ***Warren Vasquez*** (District of Puerto Rico), were presented Certificates of Appreciation by George McNenney, Special Agent in Charge, U.S. Customs Service, Caribbean Area, in recognition of their significant contributions to the U.S. Customs Service, Ponce Enforcement Division, on drug trafficking in the South Coast of Puerto Rico during 1991.

Joseph Wilson and ***Bruce Green*** (Oklahoma, Eastern District), by Bob A. Ricks, Special Agent in Charge, FBI, Oklahoma City, for their successful prosecution of three Nigerian nationals involved in an international Securities fraud scheme.

James W. Winchester (District of Colorado), by Colonel Jeffrey M. Graham, Staff Judge Advocate, U.S. Air Force Academy, Colorado, for his excellent presentation on the Federal Tort Claims Act at a seminar held recently at the United States Attorney's Office.

Elizabeth C. Woodcock (District of Maine), was presented a Certificate of Recognition from John McCarthy, Special Agent in Charge, National Marine Fisheries Service, Department of Commerce, and a Certificate of Appreciation from Commander Paul D. Barlow, Chief, Law Enforcement Branch, U.S. Coast Guard, Bangor, for her successful prosecution of the first case of its kind in the Northeast under a 1983 amendment of the Magnuson Act, a federal conservation law that gives the Coast Guard authority to board vessels for enforcement purposes.

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF NORTH CAROLINA

William D. Delahoyde *and* ***Thomas P. Swaim,*** Assistant United States Attorneys for the Eastern District of North Carolina, were commended by Howard L. Marsh, Director, Pension and Welfare Benefits Administration, Department of Labor, Atlanta, for their excellent representation and cooperative efforts in the prosecution of Gary W. Felton, President of Income Security Corporation. The case involved fraud and embezzlement of a trust established to provide insured health benefits for coal industry companies and their employees and dependents. Such arrangements, known as Multiple Employer Welfare Arrangements, or "MEWAs" have become a major problem in the United States in the last several years, and the Department of Labor feels that the only effective means of controlling these entities is through the successful prosecution of those individuals who set them up to defraud employers and employees. This case is being used as an example at MEWA meetings and discussions throughout the Department of Labor on how a case should be handled and can be handled through effective cooperation and commitment from United States Attorneys' offices such as the Eastern District of North Carolina.

Another significant aspect of the case involved the seizure of over $575,000 in assets and the use of those monies to pay claims of defrauded individuals, which was initiated by Mr. Delahoyde and Mr. Swaim. This procedure has never been done, and the precedent setting process is now being used in similar cases across the country.

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PERSONNEL

On January 24, 1992, President George Bush announced his intention to nominate ***Shirley D. Peterson*** to be Commissioner of Internal Revenue. ***Ms. Peterson*** is the Assistant Attorney General for the Tax Division, Department of Justice.

On January 21, 1992, ***Jim McAdams*** was named Interim United States Attorney for the Southern District of Florida. ***Mr. McAdams*** was appointed Assistant United States Attorney in Miami on January 4, 1982, and was named Chief of the Narcotics Division in 1988.

On February 2, 1992, ***Douglas Frazier*** became the First Assistant United States Attorney for the Southern District of Florida. ***Mr. Frazier*** was formerly Acting Deputy Director in the Executive Office for United States Attorneys.

On January 13, 1992, ***William Ho-Gonzalez*** took office as Special Counsel for Immigration Related Unfair Employment Practices in the Department of Justice. ***Mr. Gonzalez*** was nominated by President Bush July 22, 1991, and confirmed by the Senate November 20, 1991.

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ATTORNEY GENERAL HIGHLIGHTS

Attorney General's Annual Awards

On January 31, 1992, Attorney General William P. Barr conducted the 40th Annual Awards ceremony at the Great Hall of the Department of Justice. The following is a list of some of the employees from the United States Attorneys' offices and the Department of Justice who received awards. Many other distinguished awards were presented to the Federal Bureau of Investigation, Drug Enforcement Administration, Immigration and Naturalization Service, and other components of the Department of Justice.

Attorney General's Award For Exceptional Service

Gloria A. Bedwell, Lead Attorney, Organized Crime and Drug Enforcement Task Force (OCDETF), Office of the United States Attorney for the Southern District of Alabama, successfully prosecuted three separate OCDETF drug smuggling cases of international importance during the period from June 1988 through June 1991. As a result of her dedication and skill, the smuggling organizations were destroyed, 94 defendants were convicted with five receiving life sentences, and more than $6 million was forfeited.

Mark M. Richard, Deputy Assistant Attorney General for the Criminal Division, for his significant and central role in handling a multitude of important Department investigations, prosecutions, policy determinations and negotiations for more then twenty years. Mr. Richard was credited with advancing U.S. efforts in national security, expanding intelligence collection and enhancing law enforcement, and also was praised for his negotiations with nations with which the United States has entered into Mutual Legal Assistance Treaties.

Attorney General's Award For Exceptional Heroism

Thomas L. Watson, Border Patrol Agent of the Immigration and Naturalization Service, for his exceptional bravery in risking his life to rescue an undocumented alien who fell into a flooded canal and was being swept downstream.

William French Smith Award For Outstanding Contribution To Cooperative Law Enforcement

The first William French Smith Award for Outstanding Contribution to Cooperative Law Enforcement is presented posthumously to the late Congressman Larkin I. Smith of Mississippi. Congressman Smith had an illustrious law enforcement career and was very active as Chairman of the Drug Education Subcommittee of the Law Enforcement Coordinating Committee (LECC) in the Southern District of Mississippi when he was Sheriff of Harrison County. The Congressman continued his efforts for cooperative law enforcement after his election to Congress in 1988. Congressman Smith died in a plane crash on August 13, 1989.

Distinguished Service Awards

Maria T. Arroyo-Tabin, Assistant United States Attorney for the Southern District of California, for her leadership as chief of the Criminal Division and her handling of a high profile criminal case which involved providing on-the-scene legal advice to the FBI and Bureau of Prisons hostage negotiating teams during an armed hostage situation at the Metropolitan Correctional Center in San Diego.

Terree A. Bowers, Chief Assistant United States Attorney for the Central District of California, for successfully handling complex criminal cases, ranging from terrorist and foreign intelligence cases to complicated savings and loan fraud cases.

Floyd I. Clarke, Deputy Director, Federal Bureau of Investigation, for his superb leadership skills, management abilities, and accomplishments in support of the Director of the FBI, and his efforts to implement progressive enhancements to all aspects of the FBI's programs.

Robin L. Greenwald, Assistant United States Attorney for the Eastern District of New York, for her successful efforts in environmental cases involving the actions of a homeowners' association that was threatening an endangered species, and oil spills in Arthur Kill that resulted in a payment of more than $10 million to the United States. [Note: Ms. Greenwald's husband, Assistant United States Attorney Peter R. Ginsberg, received the John Marshall Award for Trial of Litigation for his prosecution of 60 members of one of New York's largest and most violent drug organizations. They are the first husband and wife to receive Attorney General awards.]

James G. Sheehan, Chief, Civil Division, United States Attorney's Office, Eastern District of Pennsylvania, for his programs to promote effective joint or parallel development of civil and criminal fraud cases and for recovering more than $3 million in health care fraud from more than 400 defendants.

Eugene M. Thirolf, Senior Litigation Counsel, Office of Consumer Litigation, Civil Division, for his efforts to establish an effective federal law enforcement strategy for the investigation and prosecution of anabolic steroids traffickers, and for developing an innovative theory of prosecution that has resulted in the successful seizure of more than $20 million worth of drugs and contributed significantly in bringing steroid abuse to the public's attention.

Laurence A. Urgenson, Chief, Fraud Section, Criminal Division, for his exceptional legal scholarship and managerial skills that resulted in 107 defendants indicted, 88 convictions, the collection of $986,850 in fines, payment of $19.1 million in restitution and only four acquittals.

S.S. Ashton, Jr., Assistant Director, Bureau of Justice Statistics, Office of Justice Programs, for his contributions in designing and supervising the Criminal History Records Improvement Program, which is crucial to reporting dispositions, conducting background checks, identifying felons and is used in making a variety of public policy decisions.

Stanley F. Krysa, Director, Office of Criminal Enforcement for the Tax Division, for his thirteen years of leadership of the Division's criminal enforcement units, initially as Chief of the Criminal Section and more recently as Director of the four Criminal Enforcement Sections. Under his direction, the criminal enforcement sections posted a 95 percent conviction rate.

Gail B. Padgett, Associate Director, Office of Technical Assistance and Support, Community Relations Service, for formulating and implementing programs that provide quality service to the public, such as a toll-free telephone line for reporting incidents of hate violence and harassment.

Julie E. Samuels, Director, Office of Policy and Management Analysis, Criminal Division, for her role as Head of the Secretariat for the Chemical Action Task Force which insures that precursor and essential chemicals are not diverted to manufacture illicit drugs.

John Marshall Awards

Providing Legal Advice:	***Dominique Raia***, Staff Attorney, Federal Bureau of Prisons, New York
Handling of Appeals:	***John F. Daly***, Appellate Attorney, Appellate Staff, Civil Division
Preparation or Handling of Legislation:	***Patricia A. Cole***, Associate General Counsel, Immigration and Naturalization Service
Support of Litigation:	***Robert E. Bloch***, Chief, Professions and Intellectual Property Section, Antitrust Division
	David A. Brown, Assistant Chief, Criminal Section, Tax Division
Trial of Litigation:	***Peter R. Ginsberg*** and ***Edward A. Rial***, Assistant United States Attorneys, Eastern District of New York
	William A. Keefer, Deputy Chief, and ***Sara M. Lord,*** Trial Attorney, Public Integrity Section, Criminal Division
Participation in Litigation:	***Beth A. Kaswan***, Chief, Commercial Litigation Unit, Southern District of New York; ***Nancy G. Milburn***, Chief, Tax Unit, Southern District of New York; ***D. Patrick Mullarkey,*** Chief, and ***Douglas W. Snoeyenbos,*** Civil Trial Section, Northern Region, Tax Division; ***Robert C. Markham,*** Reviewer, Review Section, Tax Division
	Emily A. Radford, Trial Attorney, Office of Immigration Litigation, Civil Division

Asset Forfeiture: ***Katherine Kimi Deoudes,*** Deputy Director, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General

Interagency Cooperation In Support Of Litigation: ***Philip P. O'Connor, Jr.,*** Attorney, Office of District Counsel, Department of Veterans Affairs

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Civil Justice Reform

On January 24, 1992, Attorney General William P. Barr issued a memorandum to all Heads of Department Components and United States Attorneys concerning the implementation of Executive Order 12778 on civil justice reform. The Executive Order, which was signed by the President on October 23, 1991, and became effective on January 21, 1992, requires agencies to implement civil justice reforms applicable to each agency's civil litigation. For a copy of the Order and other background information, please refer to United States Attorneys' Bulletin, Vol. 39, No. 11, dated November 15, 1991, at p. 313, and Vol. 39, No. 12, dated December 15, 1991, at p. 343.

Attached to the memorandum was a "Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order 12778," which was forwarded to the Federal Register and published on January 30, 1992. A copy is attached at the Appendix of this Bulletin as Exhibit A.

The Executive Order requires the designation of certain persons to fulfill specific duties. Pursuant to the Order and the Preliminary Guidance, please note the following information:

1. The Executive Order requires each agency to designate persons to review agency requests for document discovery in litigation (section 1(d)(2)). Accordingly, each DOJ component head and United States Attorney should designate one or more senior lawyers within the component or United States Attorney's office to fulfill this function.

2. The Executive Order requires each agency to designate a "sanctions officer" to review motions for sanctions that are filed either by or against litigation counsel on behalf of the United States (section 1(f)(2)). Each DOJ component head and United States Attorney should designate sanctions officers.

3. Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, has been designated as the Department's coordinator for advice about implementing the Executive Order. Mr. Bransdorfer is located in Room 3137, Main Justice Building, and can be reached at (FTS) 368-3309 or (202) 514-3309. Each DOJ component head and United States Attorney should likewise designate an individual as the Executive Order coordinator for each component or office. In addition, each DOJ component and United States Attorney should carefully review the Executive Order and Guidance and submit any comments to Mr. Bransdorfer on or before July 20, 1992.

Additional guidance on implementation of the Executive Order will be issued as necessary as experience is gained from implementation.

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Americans With Disabilities Act

On January 26, 1992, a new civil rights law, the Americans with Disabilities Act of 1990 (ADA), Pub. L. 101-336, 104 Stat. 327, *to be codified* at 42 U.S.C. §12101, *et seq.* went into effect. This law places affirmative obligations on businesses and State and local governments to afford to individuals with disabilities a fair opportunity to participate in our national economy as employees, consumers, and taxpayers. Enactment of the ADA was a major accomplishment of the Bush Administration and the Department is committed to the effective and vigorous implementation and enforcement of the Act.

Attorney General William P. Barr has delegated responsibility for enforcing the Act to the Civil Rights Division. Accordingly, John R. Dunne, Assistant Attorney General for the Civil Rights Division, has prepared an article on the implementation of the Act and the Department's enforcement role, a copy of which is attached at the Appendix of this Bulletin as Exhibit B. The Department has also established the Office on the Americans with Disabilities Act within the Civil Rights Division. This office will, among other things, be responsible for 1) providing technical assistance to individuals and covered entities; 2) certifying that State and local accessibility codes meet or exceed the requirements of the ADA; and 3) initiating litigation to enforce titles II and III of the Act.

Any ADA complaint directed to a United States Attorney that alleges a violation of Title III of the ADA should be referred to any of the following Civil Rights Division attorneys in the Office on the Americans with Disabilities Act:

John L. Wodatch, Director	-	(FTS) 367-2227 or (202) 307-2227
L. Irene Bowen	-	(FTS) 367-2245 or (202) 307-2245
Joan A. Magagna	-	(FTS) 367-2227 or (202) 307-2227
Philip L. Breen	-	(FTS) 367-2227 or (202) 307-2227
Janet L. Blizard	-	(FTS) 367-2737 or (202) 307-2737

Any complaint that alleges a violation of Title II of the ADA should be referred to:

Stewart B. Oneglia	-	(FTS) 367-2222 or (202) 307-2222 or
Merrily Friedlander	-	(FTS) 369-7170 or (202) 616-7170

In addition, if a United States Attorney becomes aware of any lawsuits initiated by private litigants, the Civil Rights Division should be notified so that the Division may have an opportunity to get the Department's views before the courts.

The Americans with Disabilities Act has available materials on the ADA, including copies of the Department's regulations and explanatory materials for general public use. If you would like copies of any of these documents, please call: James D. Bennett -- (202) 434-9300

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New Health Care Fraud Initiatives

On February 3, 1992, Attorney General William P. Barr announced that the Department of Justice will strengthen the federal prosecution of health care fraud through the transfer of 50 FBI counterintelligence agents to specialized investigative units concentrating on health care cases. The Attorney General said the 50 agents will join 46 other agents and 100 Assistant United States Attorneys already investigating health care cases in 12 cities selected for its criminal and civil initiatives against health care fraud. The cities include: Baltimore, Chicago, Dallas, Detroit, Las Vegas, Los Angeles, Miami, New York City, Newark, New Orleans, Philadelphia, and Charlotte, North Carolina. These agents will work exclusively on the investigation of health care fraud and abuse offenses through the use of various investigative techniques, including special proactive projects. The FBI's efforts also will be focused on the use of criminal remedies and civil forfeiture of proceeds of this illegal activity.

General Barr, in noting recent major developments against health care fraud by United States Attorneys in Philadelphia, Newark and Boston, said the transfers will beef up Department investigative efforts that have been underway by the Executive Office of United States Attorneys (EOUSA), and the Civil, Antitrust and Criminal Divisions. EOUSA has allocated 10 additional positions to assist the 12 United States Attorneys' offices in combating health care fraud, which the General Accounting Office has estimated to cost Americans more than $50 billion each year.

The Civil Division will continue to coordinate investigations and prosecute matters of national significance through the Commercial Litigation Branch, which has brought legal actions against health care participants ranging from doctors to ambulance services. The Office of Consumer Litigation of the Civil Division has investigated and prosecuted cases involving generic drug firms and fraudulent testing, while working with the Federal Drug Administration on such matters as the counterfeiting of pharmaceutical products. The Antitrust Division's Professions and Intellectual Property Section has assigned 30 attorneys to investigate the activities of health care providers, purchasers and insurers to ensure there are no violations of the Sherman and Clayton Acts. The Criminal Division has assigned six attorneys to a new unit, the Health Care Fraud Unit, to better coordinate health care investigations and serve as a strategic reserve in prosecuting such cases.

The Attorney General said, "Clearly, we are not newcomers to the battle against health care fraud. In Philadelphia a federal grand jury indicted five persons on federal racketeering charges relating to the sale of health insurance. The Newark United States Attorney filed charges in a fraudulent X-ray film manufacturing and distributing scheme that may have cost 11 New Jersey and New York State hospitals millions of dollars. An antitrust lawsuit and proposed consent decree was filed in Boston that involved price-fixing of allergy services provided by a health maintenance organization."

This marks the second reassignment of FBI counterintelligence agents. On January 9, 1992, the Attorney General announced 300 agents would be reassigned to federal anti-gang task forces to assist state and local law enforcement efforts against gang crime. (See, p. 38 of this Bulletin.)

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New Prison Policy

On January 14, 1992, Attorney General William P. Barr addressed the California District Attorneys Association on the critical need for additional prison space at the state level and announced a policy change designed to help states achieve that goal. The Attorney General stressed the need for incarceration of violent offenders as the best means of reducing violent crime, called for reduced judicial interference in the running of prisons, and emphasized that court imposed relief should be tied to specific constitutional violations. In a change of policy, the Justice Department would be receptive to state efforts to remove court-imposed prison population caps that were not essential to remedy constitutional violations. The Attorney General said, "If we want to reduce violent crime, we must press ahead unrelentingly with the policy of incapacitating violent criminals through incarceration. The choice is clear: more prison space or more crime."

An excerpt of the Attorney General's remarks is attached at the Appendix of this Bulletin as Exhibit C.

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CRIME ISSUES

The President Addresses The Crime Bill

The following is an excerpt from the President's State of the Union Address delivered on January 28, 1992:

> . . . We must do something about crime and drugs. It is time for a major, renewed investment in fighting violent street crime. It saps our strength and hurts our faith in society, and in our future together. Surely a tired woman on her way to work at six in the morning on a subway deserves the right to get there safely. Surely it's true that everyone who changes his or her life because of crime -- from those afraid to go out at night to those afraid to walk in the parks they pay for -- surely these people have been denied a basic civil right.
>
> It is time to restore it. Congress, pass my comprehensive crime bill. It is tough on criminals and supportive of police -- and it has been languishing in these hallowed halls for years now. Pass it. Help our country.

* * * * *

VIOLENT STREET CRIME

New Anti-Gang Initiative

On January 9, 1992, Attorney General William P. Barr announced a significant expansion of federal initiatives to combat violent street crime committed by gangs. A Fact Sheet outlining the problem of violent gangs, the federal response, and new federal efforts is attached at the Appendix of this Bulletin as Exhibit D. The new initiatives include:

-- Reassigning 300 FBI agents from counter-intelligence works and targeting them specifically on violent crime activities committed by street gangs. The agents will be assigned to 39 cities across the United States where they will augment the work of more than 1,600 FBI agents already assigned to violent crime efforts. They will become part of gang squads like those already in existence in Washington, D.C. and Dallas, Texas. The reassignment of the FBI agents is the largest transfer of agents in the agency's history.

-- Establishing a joint FBI-Bureau of Alcohol, Tobacco and Firearms (ATF) national gang analysis center to assist federal, state and local law enforcement in combatting violent gangs.

-- Establishing FBI/ATF anti-gang task forces in four cities to utilize the combined strength of the two agencies to identify and destroy the most violent gangs in some of the hardest hit areas of the country.

The ATF has been in the forefront in using federal gun laws to dismantle and arrest entire gangs, and these efforts have won uniform praise from the United States Attorneys. The FBI also has established gang task forces in some cities, and has used federal racketeering laws and mandatory sentences for criminal use of firearms to charge, detain and ultimately convict entire gangs. For example, in Philadelphia a federal, state and local task force successfully used racketeering laws to remove completely the presence of deadly gangs from neighborhoods. In Chicago, the same laws were used to dismantle the "El Rukns" and "Vice Lords" street gangs.

The Attorney General said, "This large-scale reallocation of FBI resources has been made possible by the changes that have taken place in Eastern Europe and the Soviet Union. These changes, for the time being at least, have modified the espionage threat to the United States. In a very real sense these resources are a 'Peace Dividend' for the American people."

* * * * *

War On Violent Street Gangs In Progress

Attorney General William P. Barr recently announced the culmination of three investigations focusing on national violent drug trafficking organizations conducted through the efforts of Organized Crime Drug Enforcement Task Forces operating in Virginia, Washington, D.C., and throughout the country. The Attorney General also announced that 25 Drug Enforcement Administration (DEA) Special Agents will be assigned immediately from DEA Headquarters to the investigation of violent criminal activity and will join drug-related homicide and gang task forces in targeted cities.

Over 350 federal, local and state law enforcement officers dismantled two criminal enterprises known as the Bush/Davis Gang and the Rodriguez/Polanco-P Street Gang. These organizations demonstrated unparalleled violence in facilitating their narcotic trafficking activities along the East Coast, and it is believed that the P Street Gang has been responsible for a number of homicides and other violence, including bombings and arsons in order to ensure its organization's viability. The Bush/Davis organization moved a substantial part of its operation from Brooklyn, New York into Washington, D.C. and the Eastern District of Virginia. The organization received substantial quantities of cocaine from the Los Angeles area, which they converted into crack cocaine. The Los Angeles source of supply, who has been successfully prosecuted, was obtaining the cocaine directly from a Colombia source. During their active operation a police officer was killed, and another was seriously wounded.

The government has also charged 24 people in a 115-count indictment with operating a violent drug organization known as the R Street Crew operating in northeast Washington, D.C. Each defendant in this case could face a sentence of 30 years to life if convicted of all charges, and some could face life without parole.

The Attorney General said, "These cases are excellent examples of the way federal law enforcement, working with state and local law enforcement, can strike a blow to violent street gangs and against the acts of murder, drug trafficking and other violent crimes they commit. Removing the deadly presence of these gangs is the first step in reclaiming neighborhoods for the law-abiding citizens who live there."

* * * * *

FY 1993 VIOLENT CRIME BUDGET

On January 27, 1992, Attorney General William P. Barr announced that the total Department of Justice budget proposed for FY 1993 would be $11.3 billion, a 9 percent increase over FY 1992 and a 69 percent increase since the President took office. This increase includes an 8 percent increase in the Department's drug enforcement budget. The Attorney General also pointed out that the President's budget includes a 9.4 percent increase to fight white collar crime, which will fund 136 FBI agents and 60 new prosecutors. All the Department's law enforcement components will receive substantial increases under the President's budget: FBI - 11 percent increase; DEA - 10 percent increase; INS - 13 percent increase; and the United States Attorneys - 13 percent increase.

Operation Weed And Seed

The centerpiece of the President's FY 1993 law enforcement budget is the dramatic expansion of "Operation Weed and Seed," which the President is proposing to expand to a level of more than $500 million in total Administration spending in FY 1993. The Department of Justice will receive $20 million for United States Attorneys' offices, much of which will be passed on to state and local law enforcement for certain overtime costs, and $10 million to be distributed by the Office of Justice Programs to local jurisdictions. The Department will provide "Weed and Seed" grants to eight cities in 1992. This initiative began in 1991 with grants to Philadelphia, Trenton, and Kansas City.

Other Increases In the Violent Crime Budget

-- There will be 85 FBI agents shifted from counterintelligence activities to combat violent street gangs. (By the end of FY 1993, there will be over 2,000 FBI agents fighting violent gangs and street crime, an 83 percent increase from 1989.)

-- There will be 161 new prosecutors to prosecute violent criminals, gangs, and those who use firearms. (Under Project Triggerlock, the Department has charged over 4,300 gun carrying criminals in the past nine months.)

-- The President's budget seeks $411 million in additional funds for fighting drug trafficking. This represents an 8 percent increase in the FY 1992 appropriated level, and includes requests for 140 new DEA agents, 66 new FBI agents, 200 new Border Patrol officers, and 134 new drug prosecutors.

-- The President's budget includes $114 million for the Bureau of Prisons to activate over 4,600 new beds in FY 1993, and includes $239 million for design and construction which will result in an additional 3,482 beds.

-- There will be $100 million for the FBI's Integrated Automated Fingerprint Identification System and $3.4 million for felon identification in firearms sales to assist in the apprehension of violent felons by federal, state and local law enforcement and to keep violent criminals from acquiring firearms.

* * * * *

PROJECT TRIGGERLOCK

Enhanced Sentencing Under Project Triggerlock For Semiautomatic Weapons and Gang Involvement

On January 31, 1992, Attorney General William P. Barr issued a memorandum to all Federal Prosecutors concerning enhanced sentencing under Project Triggerlock for semiautomatic weapons and gang involvement. Since Triggerlock was announced on April 10, 1991, prosecutions have been initiated against 4,337 defendants. The efforts of the Federal Prosecutors have contributed to the goal of prolonged incarceration of the most serious armed offenders. To ensure these efforts have maximum effect, the Attorney General submitted a letter to the Chairman of the United States Sentencing Commission seeking changes to the guidelines that would provide more appropriate sentencing for gang members and career criminals. A copy of the Attorney General's memorandum, together with his letter to the U.S. Sentencing Commission, and other explanatory materials are attached at the Appendix of this Bulletin as Exhibit E.

Because the threat posed to public safety by violent offenders is too critical to await action by the Sentencing Commission, General Barr has asked all Federal Prosecutors to seek enhanced sentencing in appropriate cases under the existing guidelines. In cases involving firearms violations covered by Sentencing Guideline 2K2.1, prosecutors are directed to seek a two-level upward departure for the possession of a semiautomatic weapon by felons, fugitives, and prohibited persons. The effect of this enhancement will be to treat semiautomatic weapons more seriously than many other firearms and the same as automatic weapons. The Attorney General has also directed all Federal Prosecutors to seek an additional two-level departure in 2K2.1 cases involving semiautomatic weapons and weapons prohibited by 26 U.S.C. Section 5845(a) (e.g., sawed off shotgun, machine gun) for firearms offenses involving gang members. These departures, consistent with the current guidelines and supported by case law, will provide a uniform policy that reflects the priority the Attorney General places on attacking violent crime, particularly gang violence.

Recognizing that there may be unforeseen circumstances when the sound exercise of prosecutorial discretion would cause prosecutors not to seek an upward departure, a departure need not be sought when, based upon written justification, the United States Attorney personally determines it not to be appropriate. In order to track the progress of this policy, the Attorney General requests that all Federal Prosecutors report those cases where the departure was sought, whether the departure was granted, and those cases for which departure was not sought to the Assistant Attorney General, Criminal Division, on a monthly basis. This data will assist in formulating the Department of Justice's sentencing policy, particularly with respect to aggravating or mitigating circumstances.

* * * * *

Project Triggerlock

Summary Report

Cases Indicted From April 10, 1991 Through December 31, 1991

Description	*Count*	*Description*	*Count*
Indictments/Informations.....	3,364	Prison Sentences.....	3700 years; 2 life sentences
Defendants Charged.....	4,344	Sentenced to prison.....	597
Defendants Convicted.....	1,507	Sentenced w/o prison or suspended.....	59
Defendants Acquitted.....	50		

Numbers are adjusted due to monthly activity, improved reporting and the refinement of the data base. These statistics are based on reports from 94 offices of the United States Attorneys, excluding District of Columbia's Superior Court. [NOTE: All numbers are approximate.]

* * * * *

Project Triggerlock

Summary Report for the District of Columbia's Superior Court

Cases Indicted From April 10, 1991 Through December 31, 1991 for violation of 22 D.C. §3204(b) *

Description	*Count*	*Description*	*Count*
Indictments/Informations.....	392	Prison Sentences.....	462 years
Defendants Charged.....	412	Sentenced to prison.....	71
Defendants Convicted.....	138	Sentenced w/o prison or suspended.....	2
Defendants Acquitted.....	6		

NOTE: All numbers are approximate.

* 22 D.C. Code Section 3204(b) is the local equivalent of 18 U.S.C. Section 924(c).

* * * * *

Crime Against The Elderly

On January 29, 1992, Attorney General William P. Barr announced the National Sheriff's Association will receive a $217,000 federal grant to assist local law enforcement agencies in reducing crime against older Americans. In cooperation with the International Association of Chiefs of Police and the American Association of Retired Persons, the sheriffs will assist local law enforcement teams, elderly volunteers and victim service providers in coordinating their efforts to combat crime against the elderly and to aid victims. The National Institute of Justice, a component of the Department's Office of Justice Programs, is funding the project.

Under the program, called TRIAD, a special emphasis will be placed on economic crimes that plague older people, such as insurance fraud and various cash scams, as well as theft and violent crimes, especially including assault. Also, the program will explore ways to reduce the elderly's fear of crime and will target high-crime areas, such as inner-city public housing. The new program has been named TRIAD because of its three objectives: to reduce the rate of crime against older Americans, to expand community-based crime prevention efforts, and to expand crime victim assistance. Additional information about this project can be obtained by calling the National Sheriffs' Association in Alexandria, Virginia at (703) 836-7827.

* * * * *

DRUG ISSUES

National Drug Control Strategy

On January 27, 1992, President George Bush transmitted the fourth edition of the National Drug Control Strategy to the Speaker of the House and the President of the Senate. A copy was forwarded to each United States Attorney. This fourth edition, as with the previous three strategies, is the result of a thorough review of the Nation's drug policies and priorities. Throughout its preparation and evolution, the Office of National Drug Control Policy (ONDCP) has met and talked with hundreds of anti-drug experts, community leaders and officials from every level of government. Over the past several years, ONDCP has also sought comments and advice from the United States Attorneys, and has taken advantage of your expertise and experience in formulating anti-drug strategies. Your support and leadership in your area can significantly further the President's Drug Control Strategy.

If you have any questions or need information, please call ONDCP at (202) 467-9700.

* * * * *

Immigration And Naturalization Service (INS) Drug Interdictions

Gene McNary, Commissioner, Immigration and Naturalization Service, recently reported that El Paso Border Patrol Agents have interdicted more than three tons of cocaine with a street value of nearly $200 million in less than a week at two traffic checkpoints in New Mexico. These seizures are only two of many in recent weeks by the Border Patrol, and highlight the significant role of INS and the Patrol in deterring the entry of illegal drugs. The INS Border Patrol is the primary drug interdiction agency between ports of entry at the border, and is making a major effort along the Southwest border in particular to reduce supplies of cocaine, marijuana and other drugs.

In 1991, the Border Patrol made over 5,000 drug interdictions, seizing drugs valued at nearly $1 billion. The pace of seizures in early 1992 indicates that will be equaled or exceeded this year. In addition to the two recent cocaine interdictions at Las Cruces (2,837 pounds on January 14, valued at $90,777,600) and Alamogordo (over 3,300 pounds on January 20, valued at $106,360,320), other major seizures since early December include:

-- More than 1 1/2 tons of marijuana valued at $2.7 million at Falfurrias, Texas, on January 22;
-- 3 1/2 tons of marijuana valued at $5.9 million at Falfurrias, Texas, on January 13;
-- 161 pounds of cocaine valued at $5,150,400, near Brackettville, Texas on January 8;
-- 625 pounds of marijuana valued at $500,240 near Arivaca, Arizona on December 31;
-- 518 pounds of marijuana valued at $414,160, at Sonita, Texas, on December 31;
-- 282 pounds of cocaine valued at $4,520,000 at Salton City, California, on December 6;
-- 660 pounds of cocaine valued at $9,900,000 at Temecula, California, on December 6.

[Note: Values are determined locally, and differ from area to area.]

* * * * *

ASSET FORFEITURE

Legislation Effecting Transfer Of Real Property

On December 17, 1991, President George Bush signed into law legislation which would permit, by statute, the transfer of federally forfeited real property to state governments for recreational, historic purposes or for the preservation of natural conditions. The President's signing statement is as follows:

> Today I have signed into law S. 1891, an Act that amends the Public Health Service and Controlled Substances Acts.
>
> The Act has two provisions. Section 1 would broaden the authority of the Secretary of Health and Human Services to waive the recovery of Federal funds used in the remodeling, construction, and expansion of community mental health centers. Section 2 of S. 1891 would permit the Attorney General to transfer to states real property that has been forfeited under the Controlled Substances Act. States would have to use the property for recreational or historic purposes or for the preservation of natural conditions.
>
> It is my intent that transfers of property under Section 2 will be limited to situations in which the transfer will not breach the obligations of the United States to any State or local law enforcement agencies entitled by law to a share of the proceeds from the sale of such property. Moreover, I intend that the State and local agencies receiving transfers pursuant to Section 2 will assume responsibility for the payment of claims by innocent lienholders and for out-of-pocket expenses incurred by the United States in the seizure, management, or forfeiture of the property.

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POINTS TO REMEMBER

Attorney General's Honor Program

The Department of Justice announced that the Attorney General's Honor Program received a record 4,300 applications for the 1991-1992 program, a 47 percent increase over the 2,908 applications received last year, and a 92 percent increase from two years ago. Of the 4,300 applicants, approximately 200, or one of 22, will be hired.

The Honor Program, inaugurated in 1953, is the Department's entry-level program for new law graduates and judicial law clerks who are recruited throughout the year by Department representatives at law schools and various job fairs. It is regarded as the federal government's premier entry-level attorney recruitment program and offers the beginning attorney legal experience that would be difficult to duplicate elsewhere. Honor Program attorneys may participate in cases of national importance and play a significant role in department litigation almost from the moment they start. The Honor Program application process is conducted in the autumn for employment beginning the following calendar year. To prepare Honor Program attorneys to be effective litigators, training is offered through the Attorney General's Advocacy Institute. The program is extremely competitive and representational of the country. In a typical year, the Department receives applications from virtually all of the American Bar Association-accredited law schools in the country. The calibre of those hired is very high.

Attorneys who began their legal career as Honor Program recruits have distinguished themselves in the federal government, the judiciary, academia, private practice and industry. They include many current Department attorneys, including Robert Ford, Deputy Assistant Attorney General, Justice Management Division; Michael L. Paup, Deputy Assistant Attorney General, Tax Division; Mark Richard, Deputy Assistant Attorney General, Criminal Division; Stuart Schiffer, Deputy Assistant Attorney General, Civil Division; and James Turner, Deputy Assistant Attorney General, Civil Rights Division.

The largest increases in applications were for the Immigration and Naturalization Service, 131 percent; the Executive Office for U.S. Trustees, 114 percent; the Bureau of Prisons, 86 percent; the Tax Division, 65 percent; and the Antitrust Division, 51 percent.

* * * * *

FINANCIAL INSTITUTION FRAUD

Financial Institution Prosecution Updates

On December 6, 1991, the Department of Justice issued the following information describing activity in "major" bank fraud prosecutions, savings and loan prosecutions, and credit union fraud prosecutions from October 1, 1988 through December 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, or (d) involves other major factors. All numbers are approximate, and are based on reports from the 94 United States Attorneys' offices and from the Dallas Bank Fraud Task Force.

Bank Prosecution Update

Description	Count	Description	Count
Informations/Indictments	1,139	Sentenced to prison	763
Estimated Bank Loss	$2,741,436,519	Awaiting sentence	245
Defendants Charged	1,575	Sentenced w/o prison or suspended	249
Defendants Convicted	1,248	Fines Imposed	$ 4,840,081
Defendants Acquitted	24	Restitution Ordered	$ 312,364,034
Prison Sentences	1,541 years		

Savings And Loan Prosecution Update

Informations/Indictments	584	Sentenced to prison	461
Estimated S&L Loss	$10,502,783,879	Awaiting sentence	155
Defendants Charged	992	Sentenced w/o prison or suspended	118
Defendants Convicted	723	Fines Imposed	$ 13,654,436
Defendants Acquitted	57 *	Restitution Ordered	$ 403,238,001
Prison Sentences	1,495 years		

* 21 borrowers dismissed in a single case in a District Court.

Credit Union Prosecution Update

Informations/Indictments	68	Sentenced to prison	48
Estimated Credit Loss	$82,808,900	Awaiting sentence	15
Defendants Charged	87	Sentenced w/o prison or suspended	7
Defendants Convicted	70	Fines Imposed	$ 3,550
Defendants Acquitted	1	Restitution Ordered	$7,623,436
Prison Sentences	81 years		

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Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 14, dated January 17, 1992, is attached as Exhibit F at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit G is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 5, dated December 30, 1991, and Volume 3, No. 6 dated January 13, 1992, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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LEGISLATION

Multiparty, Multiforum Jurisdiction Act

On January 28, 1992, Stephen Bransdorfer, Deputy Assistant Attorney General for the Civil Division, testified before the Senate Judiciary Subcommittee on Courts and Administrative Practice concerning H.R. 2450, the Multiparty, Multiforum Jurisdiction Act, which passed the House near the end of the last session.

The Department supports the bill because, by conferring federal court jurisdiction for tort litigation arising out of a single accident involving more than 25 people, it would foster the fair and efficient resolution of burdensome, costly litigation. The bill is opposed by the plaintiffs' bar and some defendants because they believe that some of their rights would be compromised by the consolidation and choice of law provisions. In the Department's view, they would not sacrifice significant substantive rights and they would achieve important procedural improvements in terms of the length and cost of the litigation. Department representatives will continue to work with Senate staff to advance this legislation.

* * * * *

Cable Consumer Protection Act

On January 31, 1992, the Senate passed by a vote of 73-18, S. 12, a bill to reregulate the cable television industry. The Administration had threatened veto of S. 12 and supported instead a substitute sponsored by Senators Kerry and Packwood, which failed by a vote of 35-54. Despite the constitutional concerns that exist with regard to the bill's must-carry provisions, little, if any, debate occurred on this issue.

Although the House is expected to act on a cable bill in the near future, a consensus has not yet developed regarding the extent to which it would reimpose rate regulation or increase competition.

* * * * *

CASE NOTES

CIVIL DIVISION

Supreme Court Holds That Equal Access To Justice Act Does Not Apply To Administrative Deportation Proceedings

The Eleventh Circuit agreed with our view that the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(3) and 5 U.S.C. 504(a)(1), does not apply to administrative deportation proceedings. Because this holding squarely conflicted with the Ninth Circuit's holding in Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988) (en banc), however, and because we desired Supreme Court resolution of the matter after several other circuits rejected the reasoning and holding of Escobar Ruiz, we acquiesced in the petition for certiorari.

The Supreme Court granted the writ, and has now affirmed the court of appeals' holding. This ruling brings to a successful end the multicircuit litigation on this issue, and represents the government's first unqualified victory in an EAJA case in the Supreme Court.

Ardestani v. Department of Justice, No. 90-1141 (December 10, 1991).
DJ # 145-3-3045.

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Supreme Court Summarily Reverses Denial Of Qualified Immunity To Secret Service Agents For Arrest Of Individual Based On Their Reasonable Belief That He Threatened The Life Of The President

James Bryant brought this Bivens suit for damages against two Secret Service agents for arresting him allegedly without probable cause after he appeared at administrative offices at the University of Southern California where he made statements and gestures which were interpreted by University personnel as possible threats against the life of then-President Reagan. Bryant was arrested for violating 18 U.S.C. 871(a), which prohibits threats against the life or physical safety of the President. He was bound over by a magistrate without bond, and the government dismissed the charges two weeks later.

The district court denied the agents' motion for summary judgment on qualified immunity grounds, on the basis that further factual development was needed to determine whether probable cause existed in this case. On our interlocutory appeal the Ninth Circuit correctly re-cast the question as whether, based on clearly established law at the time they acted, the agents could reasonably believe they had probable cause. It then affirmed the denial of qualified immunity in this case, however, because the majority posited that a "more reasonable" interpretation of Bryant's actions would be that Bryant was attempting to warn of the intentions of others to harm the President. At our suggestion, the Supreme Court has now summarily reversed in a per curiam opinion reaffirming that qualified immunity turns on "whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."

Hunter v. Bryant, No. 90-1440 (December 16, 1991). DJ # 157-12C3395.

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Supreme Court Denied Certiorari In Case Involving Drug Testing Of Department Of Justice Attorney

The Supreme Court denied certiorari in this case. At issue was the legality of drug testing an applicant for an attorney position with the Antitrust Division, where the job did not involve any of the special safety, security or integrity considerations that would justify random testing of incumbent employees. In the D.C. Circuit, we had won before the panel in a split decision, after which six judges dissented from the denial of Willner's petition for rehearing en banc.

Willner v. Barr, No. 91-448 (December 16, 1991). DJ # 35-163298.

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Fifth Circuit Affirms District Court's Dismissal Of Disappointed Subcontractor's Challenge To The Department Of Veterans Affairs' (VA) Procurement Decision For Lack Of Standing

Contractors Engineers International,.Inc., d/b/a Trans-Vac Systems ("Trans-Vac"), a disappointed subcontractor, filed this action in district court against the Department of Veterans Affairs ("VA") for declaratory and injunctive relief and damages arising from the denial of an award of a subcontract to install a trash transport system in a VA hospital. The district court granted the VA's motion for summary judgment, holding that Trans-Vac failed to satisfy the test for disappointed subcontractor standing established in Amdahl Corp. v. Baldrige, 617 F. Supp. 501 (D. D.C. 1985).

The court of appeals unanimously affirmed in a per curiam decision (Thornberry, Davis, Wiener, JJ.). In this case of first impression in the Fifth Circuit, the court adopted the Amdahl criteria for determining whether a disappointed subcontractor has standing to challenge an agency's procurement decision. As the first appellate level precedent on this issue, this decision should prove useful in solidifying the rubric under which subcontractor standing will be analyzed.

Contractors Engineers Int'l, Inc. v. United States Dept. of Veterans Affairs, No. 91-8177 (December 4, 1991). DJ # 145-151-1097.

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Medicare Provider Hospitals Are Not Entitled To A Retroactive Change In Reimbursement Methods

Concerned about the escalating costs of Medicare, Congress in 1972 authorized the Secretary of the Department of Health and Human Services (HHS) to promulgate limits on "reasonable costs" for which hospital providers could be reimbursed. The Medicare Act also provides for the "making of suitable retroactive corrective adjustments where, for a provider of services * * *, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive."

In St. Paul-Ramsey Medical Center v. Bowen, 816 F.2d 417 (8th Cir. 1987), the Eighth Circuit joined other courts of appeals in greatly reducing the effectiveness of the cost limits by holding that this clause (known as "clause (ii)") permitted a hospital to obtain a retroactive change in the Secretary's methods of reimbursement (including the cost limits) if the hospital could show that the Secretary's method resulted in "inadequate reimbursement." In this case, six Nebraska hospitals contended that certain of the Secretary's cost limits rules (in particular, a wage index) resulted in inadequate reimbursement so that a retroactive change in methods was required under St. Paul-Ramsey. The district court granted relief in part and denied it in part, and both parties appealed. The Eighth Circuit (McMillian, Fagg, JJ., and Arnold, D.J.) has now reversed, agreeing with our arguments in toto. The court first dismissed the appeal of one of the hospitals because it was not named either in the notice of appeal or in the docketing statement filed within the sixty-day appeal period. Jurisdiction over an appellant, the court held, exists only when that party is named in the notice of appeal or "the functional equivalent of the notice of appeal." As to the Secretary's duty under clause (ii), the court held that St. Paul-Ramsey had been impliedly overruled by Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). Under Georgetown, the Eighth Circuit held, the Secretary's duty is to make case-by-case adjustments within the Secretary's cost limits methods, not to retroactively change those methods. This decision, upholding the HHS cost limits rules, should be helpful in confining the growth of Medicare expenditures.

The same issue is also pending in the Ninth Circuit, and this decision should provide further authority for a favorable ruling there.

Good Samaritan Hospital v. Sullivan, Nos. 90-1641, 1642 (December 30, 1991).
DJ # 137-45-206.

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Ninth Circuit Holds That FIRREA Supersedes Pre-FIRREA Capital Forbearance Agreements

This case is the latest in a series of challenges to the strengthened minimum capital standards mandated by the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). In 1987, federal thrift regulators entered into an agreement with private investors to forbear from enforcing then-existing minimum capital requirements against Far West Federal Bank. In 1989, Congress enacted FIRREA, which directs the Office of Thrift Supervision (OTS) to implement more stringent capital standards. When OTS tried to enforce those standards against Far West, Far West and its investors sued, claiming inter alia that FIRREA preserves rather than supersedes pre-existing capital forbearance agreements and that OTS was therefore acting ultra vires.

The district court agreed with the plaintiffs and enjoined OTS and FDIC from enforcing capital requirements more stringent than those in the 1987 agreement. On appeal, the Ninth Circuit (Browning, Canby, Trott) has now reversed. Joining prior decisions by the Sixth and Eleventh Circuits, the Ninth Circuit panel held that FIRREA's minimum capital requirements are applicable to all thrifts, including those that received more lenient pre-FIRREA capital forbearances. The panel held that the plaintiffs must look to the Claims Court if they wish to pursue a claim that FIRREA has taken their property under the Takings Clause.

Far West Federal Bank v. Director, OTS, No. 90-35752 (December 17, 1991). DJ # 145-3-3142.

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Arizona-Idaho Conservation Act Suspends Application Of Endangered Species Act And Allows Construction Of Telescopes Without Regard To Their Effect On Critical Habitat Of Mt. Graham Red Squirrels

The Ninth Circuit determined that the Arizona-Idaho Conservation Act ("AICA"), enacted as a rider to a 1988 appropriations bill, served to suspend application of the Endangered Species Act ("ESA") for construction of the first three of seven telescopes of an astrophysical observatory within the designated critical habitat of an endangered sub-species of red squirrel. The court interpreted the statutory language in light of the legislative history and concluded that Congress intended the first three telescopes to be built without further delay. In 56 pages, the court reviewed the complicated facts, the various claims and the numerous appeals, and found that this intent served to block all legal claims based on the ESA.

The court also determined that the AICA preempted application of the National Forest Management Act's requirement that a "viable" population of the squirrel be maintained. The court remanded for the limited purpose of determining whether any roads, required to be closed under the AICA, remained open illegally (a previous limited remand concerned allegations that the squirrel-monitoring program was inadequate and that, absent an adequate monitoring program, construction should not go forward). Thus, two fact-specific claims remain before the district court and will doubtless be the subject of further appeal.

Mt. Graham Red Squirrel v. Madigan, 9th Cir. Nos. 89-16138; 90-15400; 90-16125; 90-16172 (January 21, 1992) (Tang, Fletcher, Reinhardt)

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Placement Of Monitoring Wells On Scrub Land To Locate Contaminant Plume Emanating From Stringfellow Acid Pits Amounts To A Fifth Amendment Taking

This case was filed in 1984, seeking compensation ($4.5 million) for the government's use of the landowners' property -- undeveloped scrub land -- in efforts to locate the contaminant plume emanating from the Stringfellow Acid Pits hazardous waste site. EPA and the State of California had unsuccessfully sought the owners' consent to access to the property in the course of emergency cleanup operations, and had ultimately issued an Administrative Order pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 106, and proceeded to enter, and drill monitoring wells on, property owned but not used by the plaintiffs. As expected, the wells confirmed the presence of hazardous substances in the groundwater, migrating toward a public drinking water source.

The parties cross-moved for summary judgment on the liability aspect of the takings claim. We sought summary judgment that: (1) the United States' actions did not effect a taking because they constituted a necessary exercise of the police power to protect the public health; (2) the administrative order did not itself effect a taking; (3) the placement of monitoring wells and equipment on the property did not effect a per se taking under Loretto because they did not constitute a substantial permanent physical occupation of the property and were therefore subject to the balancing test set out in the regulatory takings cases; and (4) EPA was not liable for any taking effected by actions of the State of California. Partial summary judgment was granted for the United States on all but the question of whether monitoring wells constituted a permanent physical occupation of the property, and if so, whether they deprived the owner of any substantial property interest. The Claims Court then set a discovery schedule for the remaining issues, including valuation (terminating an earlier bifurcation order).

The United States then sought discovery of the specifics of the plaintiffs' contentions with regard to their loss of use and occupancy of the property by virtue of EPA's activities, which the owners failed to provide. The landowners first provided no response at all. When finally compelled to respond, they offered no new information instead reasserting their argument -- rejected by the court on summary judgment -- that the issuance of the order had so burdened their use and enjoyment of the property as to effect a taking of the entire property. After numerous orders to compel, accompanied by warnings of sanctions, the Claims Court dismissed the case as a sanction for the landowners' failure to provide the requested information, pursuant to Fed.R.Civ.P. 37. The landowners appealed the dismissal.

We argued that interlocutory orders do not "merge" into Rule 37 dismissals and therefore may not be appealed in conjunction with appeals from such dismissals, and that the Claims Court had not abused its discretion in ordering the sanction of dismissal here. The Federal Circuit disagreed, however, and held that the underlying rulings on summary judgment here were wrong and that they had "led the court down the wrong path" in ordering the discovery. It reversed the Claims Court's conclusion that EPA was not liable for the results of actions by the State of California, and affirmed the conclusion that the order was not itself a taking only to the extent of agreeing that if no action had been taken pursuant to it, no taking would result. It held that the record established a compensable taking by physical occupation, both by virtue of the placement of wells on the property and by virtue of the order's requirement that the owners permit access to the land for periodic monitoring of the groundwater at the wellsites. It made no reference to the nuisance exception and grounded the taking findings on the per se rule set out in Loretto. It reversed the dismissal and remanded the case for determination of the extent and value of the taking.

Henry Hendler, et al. v. United States, Fed. Cir. No. 90-5055 (December 31, 1991) (Archer, Plager, Clevenger)

Attorneys: E. Anne Peterson - (202) 514-3888 or (FTS) 368-3888
Anne S. Almy - (202) 514-2749 or (FTS) 368-2749

* * * * *

Challenge To Corps' Compliance With Section 106 Of The National Historic Preservation Act (NHPA) Is Not Moot So Long As Corps Licensing Or Permitting Has The Ability To Require Changes That Could Conceivably Mitigate Any Adverse Impact Of The Project

This case challenged the Corps of Engineers' decision that no Rivers and Harbors Act (RHA) Section 10 permits were required for either of two related riverfront development projects in New Orleans, an aquarium and a park, and that they could therefore proceed without consultation with the Advisory Council on Historic Preservation pursuant to the National Historic Preservation Act (NHPA). In an earlier phase of the litigation (Vieux Carre I), the Fifth Circuit affirmed that the aquarium project was outside the Corps' RHA jurisdiction. The park, however, is situated on a wharf in the Mississippi River that was reconstructed in 1946 under a Corps permit, and is therefore located within the Corps' regulatory jurisdiction. The Corps concluded that construction of the park did not require a new permit (or NHPA review), because its regulations include a "nationwide permit" for rehabilitation of existing permitted structures. The Corps concluded that construction of the park was permitted by the regulation, because it would not change the wharf's structure or maritime use.

The Court in Vieux Carre I questioned this conclusion and remanded the case to the district court with instructions for further consideration of the NHPA's application and a determination of whether the nationwide permit regulations had properly been relied on to authorize the project. Before the case was heard on the merits on remand, however, the park was opened to the public. The district court therefore dismissed the challenge as moot, holding that the "nationwide permit" for the park project had effectively expired upon the substantial completion of the project.

In its most recent opinion, the Fifth Circuit reversed the mootness finding on grounds that it improperly presumed answers to the questions on which the case had been remanded. It concluded that the district court had improperly assumed that the Corps' authority over the park had "expired" because the district court had never determined whether the Corps had correctly concluded that the park was within the nationwide permit in the first instance. It further concluded that because it had previously held that the Corps had violated its own regulations in applying the nationwide permit without considering historic impacts, the district court could not presume that there had ever been a valid nationwide permit for the park. It remanded for consideration of these issues. The Court of Appeals went on to hold that a challenge concerning NHPA compliance is not moot so long as the agency licensing or permitting an activity has the ability to require changes that could conceivably mitigate any adverse impact, and that the type of injury here could fit the "capable of repetition, yet evading review" exception to the mootness doctrine by virtue of Vieux Carre I's (bizarre) holding that the Administrative Procedure Act provides a cause of action to enjoin the agency but not the activities of permittees under the Rivers and Harbors Act.

Vieux Carre Property Owners, Residents and Associates v. Brown, 5th Cir. No. 90-3740 (December 26, 1991) (Garza, Weiner, Barksdale)

Attorneys: E. Anne Peterson - (202) 514-3888 or (FTS) 368-3888
Peter R. Steenland - (202) 514-2748 or (FTS) 368-2748

* * * * *

TAX DIVISION

District Court Rules That Federal Tax Lien Can Attach To A Fishing Permit

On January 10, 1992, the United States District Court for the District of Alaska ruled from the bench in John Lorentzen v. United States that a fishing permit is "property or rights to property" for purposes of a federal tax lien. This decision is significant because, although commercial fishing permits are exempt from most creditors under Alaska law, the Internal Revenue Service will now be able to reach these valuable property rights to collect tax owed by commercial fishermen in Alaska.

* * * * *

Second Circuit Rules In The Government's Favor In Important Statute Of Limitations Case Involving "Flow Through" Entities

On January 3, 1992, the Second Circuit affirmed the favorable decision of the Tax Court in Sheldon B. Bufferd v. Commissioner, holding that the Internal Revenue Service could assess a deficiency arising from a "flow through" item against a shareholder of a Subchapter S corporation where the statute of limitations on assessment remained open for the shareholder, even though it had expired with respect to the corporation. In so holding, the Second Circuit explicitly disagreed with the Ninth Circuit's decision in Kelley v. Commissioner, 877 F.2d 756 (1989). This issue is of substantial administrative importance to the IRS, which has long treated the limitations period applicable to the taxpayer whose liability is in question as controlling.

* * * * *

Third Circuit Rejects Challenge to the IRS's Use Of Mailing Labels That Bear The Taxpayer's Social Security Number In Privacy Act Case

On January 17, 1992, the Third Circuit affirmed without an opinion the favorable decision of the District Court in Ingerman v. United States. In this Privacy Act case, the plaintiff alleged that the Internal Revenue Service violates the Privacy Act by mailing tax return forms using mailing labels that show the taxpayer's social security number. The case was certified, over the Government's objection, to include all persons whose social security numbers have been shown on such forms -- i.e., virtually every individual who has filed a tax return and thereafter received forms for succeeding years. The suit sought injunctive relief and statutory damages of $1,000 for each such disclosure. The district court ruled that the Privacy Act was not violated by this practice and entered judgment in favor of the United States. The Government's potential liability in this case could have amounted to hundreds of billions of dollars.

* * * * *

Eighth Circuit Prospectively Rules That IRS Summonses Must Include Signed Certification That The Copies Are True And Correct Copies Of The Originals

On December 26, 1991, the Eighth Circuit reversed the unfavorable decision of the District Court in Mimick v. United States. As part of its investigation into the taxpayer's tax liabilities for 1986 and 1987, the Internal Revenue Service issued summonses for the production of certain records to the taxpayers and also to two banks as third-party recordkeepers. The taxpayers sought to quash the bank summonses, arguing that they were not enforceable because the agent serving them did not serve "attested" copies as required by Section 7603 of the Internal Revenue Code. In accordance with its standard practice, the IRS had served carbon copies of the original summonses which did not contain a signed notation that they were, in fact, correct copies. The District Court denied enforcement of the summonses on this basis.

On appeal, the Eighth Circuit agreed with the District Court's construction of the statute and held that Section 7603 requires service of a copy "which has been examined and compared with the original, with a certificate or memorandum of its correctness, signed by the persons who have examined it." The Court went on to hold, however, that because the IRS acted in good faith, and none of the parties lost substantial rights, the summonses in this case should be enforced.

* * * * *

Ninth Circuit Rules In Favor Of The Government In Bivens Action

On January 3, 1992, the Ninth Circuit reversed the adverse decision of the district court in Maraziti v. First Interstate Bank, et al., and held that summary judgment should have been granted in favor of two Internal Revenue Service agents sued under Bivens. Richard Thorpe filed a return that indicated he owed substantial tax liabilities and, although he failed at that time to make any payment, Thorpe requested the IRS to accompany him to a bank where he would effect payment. Thorpe then engaged in a complicated series of maneuvers, the net effect of which, as alleged by the plaintiff here, was a theft of monies that Thorpe "paid" to the IRS. The alleged victim of this "theft" then brought suit against Thorpe, the bank, and the IRS agents who accepted payment.

In reversing the decision of the district court, the Ninth Circuit held that the "victim"/plaintiff failed to establish that the agents' actions violated clearly established law. It rejected the plaintiff's argument that the agents' alleged seizure of money from Thorpe violated the "victim's" Fourth Amendment rights because the funds were received from Thorpe and because the Fourth Amendment is not generally implicated when the Government seizes property to collect delinquent taxes. It further held that the plaintiff failed to provide any legal support for his argument that the collection here violated his Fifth Amendment rights.

* * * * *

ADMINISTRATIVE ISSUES

Please note the following office relocations in the Department of Justice:

Executive Office for Asset Forfeiture

Executive Office for Asset Forfeiture
Room 832, 901 E Street, N.W.
Washington, D.C. 20004

Telephone: (FTS) 369-8000
(202) 616-8000
Telefax: (FTS) 369-8100
(202) 616-8100

Organized Crime and Drug Enforcement Task Force

Organized Crime and Drug
Enforcement Task Force
Market Square Building
Suite 245, 801 Pennsylvania Avenue N.W.
Washington, D.C. 20530

Telephone: (FTS) 368-1860
(202) 514-1860
Telefax: (FTS) 369-0884
(202) 616-0884

* * * * *

CAREER OPPORTUNITIES

Civil Rights Division

The Office of Attorney Personnel Management, U.S. Department of Justice, is seeking an experienced attorney for the position of Chief of the Voting Section, Civil Rights Division, in Washington, D.C. Responsibilities include directing the activities of a staff of over 70 attorneys and support personnel. The Voting Section is responsible for the enforcement of the Voting Rights Act of 1976, the Voting Accessibility for the Elderly and Handicapped Act, the Uniformed and Overseas Citizens Absentee Voting Act, and other statutory provisions designed to safeguard the right to vote of racial and language minorities, disabled and illiterate persons, overseas citizens, persons who change their residences shortly before a Presidential election, and persons 18 to 20 years of age. To carry out its mission, the Section brings lawsuits against states, counties, cities and other jurisdictions to remedy denials and abridgement of the right to vote; defends lawsuits that the Voting Rights Act authorizes to be brought against the Attorney General; reviews changes in voting laws and procedures administratively under Section 5 of the Voting Rights Act; and monitors election day activities through the assignment of federal observers under Section 8 of the Voting Rights Act.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least 4 1/2 years of post-J.D. experience. Applicants must submit a current SF-171 (Application for Federal Employment) or resume, along with a writing sample to: U.S. Department of Justice, Civil Rights Division, P.O. Box 65310, Washington, D.C. 20530-5310 - Attn: Sandra Bright.

Current salary and years of experience will determine the appropriate grade and salary level within the GM-15 range ($64,233-$83,502). No telephone calls, please.

* * * * *

Justice Management Division Personnel Staff

The Office of Attorney Personnel Management, U.S. Department of Justice, is recruiting an Attorney Advisor for the Personnel Staff, Labor Management Relations Group, Justice Management Division. The incumbent provides advice regarding adverse and disciplinary actions to the Employee Relations staffs of the Department's components; has primary responsibility for administering disciplinary and adverse actions, and the Departmental Order on grievance procedures; provides advice and guidance to the component's Employee Relations/General Counsel staffs regarding Merit Systems Protection Board (MSPB) appeals; is called upon on occasion to prepare briefs supporting or opposing appeals to the MSPB; provides advice to component Labor Management Relations staffs regarding grievance arbitration, unfair labor practices (ULP) and negotiability cases; drafts exceptions to arbitration awards and ULP decisions by administrative law judges for submission to the Federal Labor Relations Authority (FLRA); and drafts briefs in response to union negotiability appeals.

* * * * *

Office Of The U.S. Trustee
Las Vegas, Nevada; Roanoke, Virginia; and Hato Rey, Puerto Rico

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the U.S. Trustee's Office in Las Vegas, Nevada, Roanoke, Virginia, and Hato Rey, Puerto Rico. Responsibilities include assisting with the administration and trying of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the U.S. District Court.

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Applicants must submit a resume and law school transcript to:

Office of the U.S. Trustee
Department of Justice
600 Las Vegas Blvd., S. Suite 430
Las Vegas, Nevada 89101
Attn: Stephen I. Goldring

Office of U.S. Trustee
Department of Justice
210 Franklin Road, S.W., Room 806
Roanoke, Virginia 24011
Attn: Tom Kennedy

Office of U.S. Trustee
Department of Justice
Federal Building, Room 638
Chardon Street
Hato Rey, Puerto Rico 00918
Attn: Alejandro Oliveras

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary range in Las Vegas and Roanoke is GS-11 ($32,423 to $42,152) to GS-14 ($54,607 to $70,987). The possible grade/salary range in Hato Rey, Puerto Rico is GS-11 ($32,423 to $42,152) to GS-13 ($46,210 to $60,070). These positions are open until filled. No telephone calls, please.

* * * * *

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%	07-26-91	6.26%
03-10-89	9.43%	06-01-90	8.24%	08-23-91	5.68%
04-07-89	9.51%	06-29-90	8.09%	09-20-91	5.57%
05-05-89	9.15%	07-27-90	7.88%	10-18-91	5.42%
06-02-89	8.85%	08-24-90	7.95%	11-15-91	4.98%
06-30-89	8.16%	09-21-90	7.78%	12-13-91	4.41%
07-28-89	7.75%	10-27-90	7.51%	01-10-92	4.02%
08-25-89	8.27%	11-16-90	7.28%		
09-22-89	8.19%	12-14-90	7.02%		
10-20-89	7.90%	01-11-91	6.62%		
11-16-89	7.69%	02-13-91	6.21%		
12-14-89	7.66%	03-08-91	6.46%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	William T. McGivern
California, E	George L. O'Connell
California, C	Lourdes G. Baird
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Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
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Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	Frederick Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
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Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
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Mississippi, N	Robert Q. Whitwell
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Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

DISTRICT	U.S. ATTORNEY
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Nebraska	Ronald D. Lahners
Nevada	Leland E. Lutfy
New Hampshire	Jeffrey R. Howard
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
New York, N	Frederick J. Scullin, Jr.
New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
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Oklahoma, N	Tony Michael Graham
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Timothy D. Leonard
Oregon	Charles H. Turner
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Pennsylvania, M	James J. West
Pennsylvania, W	Thomas W. Corbett, Jr.
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Rhode Island	Lincoln C. Almond
South Carolina	E. Bart Daniel
South Dakota	Kevin V. Schieffer
Tennessee, E	Jerry G. Cunningham
Tennessee, M	Ernest W. Williams
Tennessee, W	Edward G. Bryant
Texas, N	Marvin Collins
Texas, S	Ronald G. Woods
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Terry M. Halpern
Virginia, E	Richard Cullen
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

EXHIBIT A

T. 12 N., R. 7 E.,
Secs. 29 to 32, inclusive.

IDI-15065 (SO dated January 14, 1922)

T. 7 N., R. 1 E.,
Secs. 19 and 28.

IDI-15062 (SO dated January 18, 1922)

T. 7 N., R. 1 W.,
Sec. 28.

IDI-15058 (SO dated February 29, 1904)

T. 7 N., R. 1 W.,
Secs. 23 to 25, inclusive.

IDI-14892 (SO dated February 28, 1903)

T. 1 N., R. 7 E.,
Secs. 9, 10, 14, 15, and 23 to 26, inclusive.
T. 1 S., R. 8 E.,
Sec. 6.
T. 1 N., R. 8 E.,
Secs. 19, 30, and 31.

IDI-08956 (BLM O dated October 24, 1958)

T. 6 N., R. 3 W.,
Sec. 10.

Payette-Boise Project

IDI-14993 (SO dated March 5, 1903)

T. 7 N., R. 1 W.,
Sec. 28.

IDI-14994 (SO dated February 29, 1904)

T. 7 N., R. 1 E.,
Secs. 17 to 19, inclusive, 21, 28, and 29

The withdrawn lands in the described sections contain 8,611.34 acres in Elmore, Valley, and Gem Counties.

The withdrawals are essential for protection of the Reclamation Projects. The withdrawals close the described lands to surface entry and mining, but not to mineral leasing. No change is proposed in the purpose or segregative effect of the withdrawals.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments in connection with the proposed withdrawal continuations may present their views in writing to the Idaho State Director at the above address.

The authorized officer of the Bureau of Land Management will undertake such investigations as are necessary to determine the existing and potential demand for the land and its resources. A report will also be prepared for consideration by the Secretary of the Interior, the President, and Congress, who will determine whether or not the withdrawals will be continued, and, if so, for how long. The final determination on the continuation of the withdrawals will be published in the Federal Register. The existing withdrawals will continue until such final determination is made.

Dated: January 16, 1992.

William E. Ireland,

Chief Realty Operations Section.

[FR Doc. 92-2150 Filed 1-29-92; 8:45 am]

BILLING CODE 4310-GG-M

DEPARTMENT OF JUSTICE

Office of the Attorney General

[Order No. 1561-92]

Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778

AGENCY: Department of Justice.

ACTION: Notice with request for comments.

SUMMARY: This notice promulgates a memorandum providing preliminary guidance to federal agencies regarding the implementation of those provisions of Executive Order No. 12778 (56 FR 55195, October 24, 1991) that concern the conduct of civil litigation with the United States Government, including the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. The Order authorizes the Attorney General to issue guidelines carrying out the Order's provisions on civil and administrative litigation. The guidelines issued here are interim guidelines. The Attorney General requests comments from federal agencies so that final guidelines may be drafted in light of the agencies' experience in applying the Order.

DATES: This action is effective January 24, 1992.

Comments are requested from federal agencies on or before July 20, 1992.

ADDRESSES: Comments should be sent to Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, Department of Justice, Main Building, room 3137, 10th & Pennsylvania Ave., NW., Washington, DC 20530, (202) 514-3309.

FOR FURTHER INFORMATION CONTACT: Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, Department of Justice, Main Building, room 3137, 10th & Pennsylvania Ave., NW., Washington, DC 20530, (202) 514-3309.

SUPPLEMENTARY INFORMATION: Executive Order No. 12778, which President Bush signed on October 23, 1991, is intended to "facilitate the just and efficient resolution of civil claims involving the United States Government." 56 FR 55195 (October 25, 1991). The Order, *inter alia*, mandates reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. These reforms apply to litigation begun on or after January 21, 1992.

The Order requires agencies to implement civil justice reforms applicable to each agency's civil litigation. It provides that the Attorney General has both the duty to coordinate efforts by federal agencies to implement the litigation process reforms and the authority to issue further guidelines as to the implementation and scope of the Order. (Exec. Order No. 12778, sections 4(a), (b) and 7(d).) Final guidelines, however, can most usefully be issued only after agencies and litigation counsel have had experience in applying the Order. That experience will offer a valuable basis for deciding how the final guidelines can best refine the operation of the Order.

The present guidelines, therefore, are offered as interim direction for applying the Order. Agencies and litigation counsel are requested to provide comments, on or before July 20, 1992, concerning their experience in carrying out the Order and their recommendations for revising this interim guidance. Comments should be sent to Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, Department of Justice, who has been designated as the Justice Department's coordinator for advice about implementing the Order.

Agencies should note in particular the Order's requirements concerning the designation of persons within each agency to act on litigation documents. First, each agency must establish "a coordinated procedure" that shall include review by a "senior lawyer" of any request for document discovery in litigation to determine that it meets the substantive criteria of section 1(d)(2). Second, the Executive Order mandates that each agency designate a "sanctions officer" to review motions for sanctions that are filed either by or against litigation counsel on behalf of the United States. (section 1(f)(2).) Third, the Attorney General recommends that each agency designate a specific individual to serve as the agency coordinator for implementation of the Executive Order. Details regarding these designations and other guidelines are contained in the memorandum.

By virtue of the authority vested in me by law, including Executive Order No. 12778 (56 FR 55195, October 25, 1991), I hereby issue the following memorandum:

Introduction

Executive Order No. 12778, which President Bush signed on October 23, 1991, is intended to "facilitate the just and efficient resolution of civil claims involving the United States Government." (56 FR 55195, October 25, 1991). The Order, *inter alia*, mandates

reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases. These reforms apply to litigation begun on or after January 21, 1992.

The Order authorized the Attorney General to issue guidelines carrying out the Order's provisions on civil and administrative litigation. Final guidelines, however, can most usefully be issued only after agencies have had experience in applying the Order. That experience will offer a valuable basis for deciding how the final guidelines can best refine the operation of the Order.

The present guidance, therefore, is offered as an interim direction for applying the Order's provisions concerning the conduct of civil litigation with the United States Government. Agencies are requested to provide comments, on or before July 20, 1992, concerning their experience in carrying out the Order and their recommendations for revising this interim guidance. Comments should be sent to Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division, Department of Justice (202-514-3309), who has been designated as the Justice Department's coordinator for advice about implementing the Order. Each agency is requested to designate its own coordinator for implementing the Order.

Pre-filing Notice of a Complaint

(Section 1(a))

The objective of sec. 1(a) of Executive Order No. 12778 is to ensure that a reasonable effort is made to notify persons against whom civil litigation is contemplated of the government's intent to sue and to provide disputants with an opportunity to settle the dispute without litigation.

This section requires either the agency or litigation counsel to notify each disputant of the contemplated action unless an exception to the notice requirement (set forth in 7(b)) applies. "Disputants" means persons from whom relief is sought in the contemplated civil action. The notifying persons shall offer to attempt to resolve the dispute without litigation. However, it is not appropriate to compromise litigation by providing pre-filing notice if the notice would defeat the purpose of the litigation.

Notice adequate to comply with section 1(a) can be provided either by the referring agency or by litigation counsel. If the referring agency provides the notice, it should supply the documentation of the notice to litigation counsel.

The section requires a "reasonable" effort to provide notification and to attempt to achieve a settlement. Both the timing and the content of a reasonable effort depend upon the particular circumstances. However, unless an exception set forth in section 7 (or otherwise provided for by the Attorney General) is applicable, complete failure to make an effort could not be deemed "reasonable."

If pre-complaint settlement efforts by government counsel require information in the possession of proposed defendants, litigating counsel or client agency counsel may request such information from defendants as a condition to settlement efforts. If proposed defendants refuse, or fail, to provide such information upon request within a reasonable time, counsel shall have no further obligation to attempt to settle the case prior to filing.

The Department of Justice retains authority to approve or disapprove any settlements proposed by the client agency or litigation counsel, consistent with existing law, guidelines, and delegations. The Order confers no litigating or settlement authority on agencies beyond any existing authority under law or explicit agreement with the Department.

Settlement Conferences

(Section 1(b))

As soon as adequate information is available to permit an accurate evaluation of the government's litigation position, litigation counsel shall evaluate the possibilities of settlement. Thereafter, litigation counsel has a continuous obligation to evaluate settlement possibilities. Litigation counsel is to offer to participate in a settlement conference or, when it is reasonable to do so, move the court for such a conference.

Prior to any such conference, litigation counsel should consult with the affected agency and with litigation counsel's supervisor. At the conference, litigation counsel should clearly state the terms upon which litigation counsel is prepared to recommend that the government conclude the litigation, but should not be expected to obtain authority to bind the government finally at settlement conferences. Final settlement authority is the subject of applicable regulations and may be exercised only by the officials designated in those regulations. The Executive Order does not change those regulations regarding final settlement authority.

The Executive Order does not constrain the government's full discretion to determine which government counsel represents the government at settlement conferences. Normally, a trial attorney assigned to the case will attend on behalf of the United States.

Section 1(b) does not permit settlement of litigation on terms that are not in the interest of the government; while "reasonable efforts" to settle are required, no unreasonable concession or offer should be extended or accepted. Likewise, this section does not countenance evasion of established agency procedures for development of litigation positions.

Alternative Methods of Resolving The Dispute In Litigation

(Section 1(c))

Section 1(c) encourages prompt and proper settlement of disputes.

The Executive Order does not permit litigation counsel to agree that ADR will result in a binding determination as to the government, without exercise of an agency's discretion. Likewise, the use of ADR does not authorize litigation counsel to agree to resolve a dispute in any manner or on any terms not in the interest of the United States.

Each agency should seek to use the skills of litigation counsel to bring about a reasonable resolution of disputes. Attorneys should bring the same high level of expertise to ADR proceedings as they bring to formal judicial proceedings. Disputes will be resolved reasonably if an ADR technique is used when the technique holds out a likelihood of success. Litigation counsel should consult with the affected agency as to the desirability of using ADR if resort to ADR is a reasonable prospect.

When evaluating whether proceeding with ADR is likely to lead to a prompt, fair, and efficient resolution of the action and thus be in the best interest of the government, government counsel should consider the amount and allocation of the cost of employing ADR.

Disclosure of Core Information

(Section 1(d)(1))

Section 1(d)(1) requires litigation counsel to make the offer to participate at an early stage of the litigation in a mutual exchange of core information as defined in sec. 1(d)(1). Reasonable efforts shall be made to obtain the agreement of other parties to such an exchange. When making the offer, litigation counsel should emphasize that the government is willing to be bound to exchange core information as defined in the section if, and only if, other parties agree to exchange this same information

and the court adopts the agreement as a stipulated order.

A mutually agreed-upon exchange of "core information" should occur reasonably early in the litigation, so as to serve its purpose of expediting and streamlining discovery. However, when the government is plaintiff, disclosure of "core information" need not be requested prior to receipt of opposing parties' answers to the complaint. Litigation counsel should not permit the core information disclosure offer requirement to delay the initiation of discovery.

Core information offers are not mandated if a dispositive motion is pending or if the exceptions to the ADR and core disclosure provisions set forth in section 7(c) (involving asset forfeiture proceedings and debt collection cases involving less than $100,000) apply. Nothing in section 1(d)(1) requires disclosure of information that litigation counsel does not consider reasonably relevant to the claims for relief set forth in the complaint.

In cases involving multiple opposing parties, the government may agree to disclose "core information" with individual opposing parties. It need not delay disclosure pending agreement by all of the parties unless individual exchange of core information would unfairly undermine the government's case.

All referrals from agencies requesting litigation counsel to file suit should include the "core information" described in this subsection. The identification of the location of documents most relevant to the case should be specific enough to enable litigation counsel to locate and, if necessary, retrieve the documents, and should specify the name, business address, and telephone number of the custodians of the documents. The identification of individuals having information relevant to the claims and defenses should include, where possible, current or last-known telephone numbers at which such persons can be reached.

In determining the extent to which compliance with this subsection is "practicable" in a given case, litigation counsel shall consider, *inter alia*, the utility of early issue-narrowing motions and devices, the scope and complexity of the disclosure that will be required, the time available to comply with the requirement, the extent to which disclosure of "core information" will expedite or limit the scope of subsequent discovery, and the cost to the government of compliance.

In cases where the government takes the position that the scope of judicial review of one or more issues involved in the litigation is limited to an agency's administrative record, identifying and affording access to the administrative record shall satisfy the requirements of this subsection with respect to such issues.

Litigation counsel is entitled to rely in good faith on the representations of agency counsel as to the existence, extent, and location of "core information."

Nothing in section 1(d)(1) prevents government counsel from seeking other discovery pursuant to the Federal Rules of Civil Procedure simultaneously with providing, or seeking, "core information" disclosure.

Review of Proposed Document Requests

(Section 1(d)(2))

Document discovery shall be pursued by government counsel only after complying with review procedures designed to ensure that the proposed document discovery is reasonable under the circumstances of the litigation.

When an agency's attorneys act as litigation counsel, that agency must establish a coordinated procedure, including review by a senior lawyer, before service or filing of any request for document discovery. The senior lawyer is to determine whether the proposed discovery meets the substantive criteria of section 1(d)(2). Cabinet or subcabinet officers, such as Assistant Attorneys General or Assistant Secretaries, officials of equivalent rank, and United States Attorneys, are authorized pursuant to this Memorandum to designate one or more senior lawyers for these purposes. While no particular title, level, or grade of senior lawyer is mandated, the persons designated should have substantial experience with regard to document discovery and should have supervisory authority. This designation should be made forthwith. If the designated senior lawyer is personally preparing the document discovery, further oversight is not necessary.

The designated senior lawyer reviewing document discovery proposals should determine whether the requests are cumulative or duplicative, unreasonable, oppressive, or unduly burdensome or expensive, and in doing so shall consider the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained in a manner that is more convenient, less burdensome, or less expensive than pursuit of the documentary discovery as proposed. Consideration of whether documents can be obtained from "more convenient, less burdensome, or less expensive" sources shall include consideration of the convenience, burden, and expense to both the government and the opposing parties.

In conducting this review of document requests, the senior lawyer is entitled to rely in good faith upon factual representations of agency counsel and the trial attorney. The review system should not be permitted to deter the pursuit of reasonable document discovery in accord with the procedures established in the Executive Order

Discovery Motions

(Section 1(d)(3))

The court shall not be asked to resolve a discovery dispute, including imposition of sanctions as well as the underlying discovery dispute, unless litigation counsel first attempts to resolve the dispute with opposing counsel or *pro se* parties. If pre-motion efforts at resolution are unsuccessful or impractical, a description of those efforts shall be set forth in the government's motion papers.

Litigation counsel, however, should not compromise a discovery dispute unless the terms of the compromise are reasonable.

Expert Witnesses

Section 1(e)

The function of section 1(e) is to ensure that litigation counsel proffer only reliable expert testimony in judicial proceedings. This practice, already widely used by the government, will enhance the credibility of the government's position in litigation and improve the prospects for a reasonable outcome of disputes warranting utilization of expert witnesses.

Litigation counsel shall use experts who have knowledge, background, research, or other expertise in the particular field of the subject to their testimony, and who base conclusions on widely accepted explanatory theories, i.e., those that are propounded by at least a substantial minority of experts in the relevant field.

In cases requiring expert testimony on newly emerging issues, litigation counsel shall ensure that the proffered expert and his or her testimony are reliable and meet the requirements of Rule 702 of the Federal Rules of Evidence. In evaluating the reliability of an expert's conclusions in new areas where there are no established majority or minority views, it is important for the trial attorney to keep in mind that only that theory, not the conclusion based on the theory, need be "widely accepted." Litigation

counsel may offer a "widely accepted explanatory theory" to support a conclusion in a novel area based on the qualifications of the expert to testify on that issue, the extent of peer acceptance or recognition of the expert's past work in the field, particularly of any work that is related to the issue on which the testimony is to be offered, and any other available indicia of the reliability of the proffered testimony. However, if an expert is unable to support the conclusion of "widely accepted" theories, the expert's testimony shall not be offered.

Litigation counsel shall offer to engage in mutual disclosure of expert witness information pertaining to experts a party expects to call at trial. "Expert witness information" within the meaning of this subsection should ordinarily include the expert's resume or curriculum vitae, a list of the expert's relevant publications, data, test results, or other information on which the expert is expected to rely in the case at issue, and any written reports or other materials prepared by the expert that the party expects to offer into evidence. The offer of mutual disclosure requirement (section 1(e)(3)) can be satisfied by an agreement to take depositions of experts that the parties plan to call to testify.

Litigation counsel shall not offer to pay an expert witness based on the success of the litigation. Similarly, litigation counsel should ordinarily object to testimony on the part of an expert whose compensation is linked to a successful outcome in the litigation and bring out on cross-examination of the expert such compensation arrangements or agreements. (See section 1(e)(4).)

Sanctions Motions

Section 1(f)

Litigation counsel shall take steps to seek sanctions against opposing counsel and parties where appropriate, subject to the procedures set forth in section 1(f) regarding agency review of proposed sanction filings. Before filing a motion for sanctions, litigation counsel should normally attempt to resolve disputes with opposing counsel. Of course, sanctions motions like all pleadings, should be filed only when there is a well-founded basis for the motion.

The Executive Order mandates that each agency which has attorneys acting as litigation counsel designate a "sanctions officer" to review proposed sanctions motions and motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers. (Section 1(f)(2).) The Executive Order requires that the sanctions officer or designee "shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a state court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States." The sanctions officer or his or her designee should be a senior lawyer with substantial litigation experience and supervisory authority.

The persons acting as sanctions officers within each agency should be designated specifically title or name. Action must be taken forthwith to designate sanctions officers within each agency. Cabinet or subcabinet officers, such as Assistant Attorneys General or Assistant Secretaries, officials of equivalent rank, and United States Attorneys are authorized pursuant to this Memorandum to designate sanctions officers meeting the criteria of this Memorandum.

Improved Use of Litigation Resources

Section 1(g)

Litigation counsel are to use efficient case management techniques and make reasonable efforts to expedite civil litigation as set forth in section 1(g)(1)-(4) of the Order.

In appropriate case, litigation counsel should move for summary judgment to resolve litigation on narrow the issues to be tried.

Litigation counsel should seek to stipulate to facts that are not in dispute and move for early trial dates where practicable. Referring agencies should identify facts not in dispute and inform litigation counsel of the fact of dispute and the basis of concluding that there is no factual dispute, as soon as it is feasible to do so. Litigation counsel should seek agreement to fact stipulations as early as practicable, taking into account the progress of discovery and after exercising sound judgment to determine the most appropriate and efficient timing for such stipulations.

At reasonable intervals, litigation counsel should review and revise submissions to the court and should apprise the court and all counsel of any narrowing of issues, resulting from discovery or otherwise. This requirement is not intended to suggest that litigation counsel should concede facts or issues as to which there is reasonable dispute, uncertainty, or inability to corroborate.

Fees and Expenses

Section 1(h)

Section 1(h) of the Executive Order provides that litigation counsel shall offer to enter into a two-way fee shifting agreement with opposing parties in cases involving disputes over certain federal contracts or in hay civil litigation initiated by the United States. Under such an agreement, the losing party would pay the prevailing parties's fees and costs, subject to reasonable terms and conditions. However, this section is to be implemented only "(t)o the extent permissible by law." The Executive Order requires the Attorney General to review the legal authority for entering into such agreements. Because no legislation currently provides specific authority for those agreements, litigation counsel shall not offer to enter into a two-way fee shifting agreement until legislation is enacted or other authority is provided by the Attorney General.

Principles to Promote Just and Efficient Administrative Adjudications

(Section 3)

Section 3 encourages agencies to implement the Administrative Conference's recommendations entitled "Case Management as a Tool for Improving Agency Adjudication" to the extent it is reasonable and practicable to do so (and to the extent it does not conflict with any provision of the Executive Order). The agency proceedings within the ambit of section 3 are adjudications before a presiding officer, such as an administrative law judge.

No Private Rights Created

(Section 6)

The Executive Order explicitly states that it does not create a private right of any kind or a right to judicial review. (section 6.) The qualifications stated in section of the Executive Order apply to this Memorandum as well.

Nothing in the Executive Order is designed to alter the substantive litigation position of the United States or its agencies.

The Executive Order assumes that litigation counsel will exercise professional judgment when representing the United States, its agencies, its officers, or any other persons.

Dated: January 24, 1992.

William P. Barr,

Attorney General.

[FR Doc. 92-2253 Filed 1-29-92; 8:45 am]

BILLING CODE 4410-01-M

EXHIBIT
B

THE AMERICANS WITH DISABILITIES ACT

On January 26, 1992, a new civil rights law, the Americans with Disabilities Act of 1990 (ADA), Pub. L. 101-336, 104 Stat. 327, *to be codified at* 42 U.S.C. § 12101, *et seq.* went into effect. This law places affirmative obligations on businesses and State and local governments to afford to individuals with disabilities a fair opportunity to participate in our national economy as employees, consumers, and taxpayers. Enactment of the ADA was a major accomplishment of the Bush Administration and the Department is committed to the effective and vigorous implementation and enforcement of the Act.

The responsibility to implement and enforce the ADA is divided among four Federal agencies:

- The Equal Employment Opportunity Commission (EEOC). EEOC has the primary responsibility for the implementation of title I of the Act, which prohibits discrimination on the basis of disability by any employer with 25 or more employees beginning July 26, 1992, or with 15 or more employees beginning July 26, 1994. EEOC's regulation implementing title I may be found at 56 Fed. Reg. 35,726 (July 26, 1991) *to be codified at* 29 C.F.R. pt. 1630).

- The Department of Justice (DOJ). Under the ADA, DOJ is responsible for implementing title II (subtitle A), which prohibits discrimination against people with disabilities in the programs and activities of public entities, and title III, which prohibits discrimination by public accommodations and imposes certain accessibility requirements on commercial facilities and professional testing services. In addition, DOJ is authorized to litigate individual title I (employment) cases referred to it by EEOC against public sector employers as well as any case involving a pattern or practice of employment discrimination by a public sector employer.

  DOJ has issued regulations to implement title II, 56 Fed. Reg. 35,694 (July 26, 1991) *(to be codified at* 28 C.F.R. pt. 35), and title III, 56 Fed. Reg. 35,544 (July 26, 1991) (*to be codified at* 28 C.F.R. pt. 36).

- The Department of Transportation (DOT). DOT is responsible for developing rules to implement both title II (subtitle B), which establishes detailed requirements for providing public transportation services to people with disabilities, and provisions of

title III that apply to transportation services provided by private entities. DOT has administrative enforcement responsbilities for alleged violations of the ADA's transportation requirements by public entities subject to title II of the ADA; but DOJ is the agency responsible for enforcing title III's transporation requirements.

DOT has issued a single regulation that implements the transportation provisions of titles II and III of the ADA. 56 Fed. Reg. 45,584 (September 6, 1991) (*to be codified at* 49 C.F.R. pts. 37 and 38).

The Federal Communications Commission (FCC). The FCC is responsible for implementing title IV of the ADA, which requires the establishment of telecommunications relay services to enable people who use TDD's (telecommunications devices for the deaf) to communicate with people who do not use TDD's. The FCC has also published an implementing regulation. 56 Fed. Reg. 36,729 (August 1, 1991) (*to be codified at* 47 C.F.R. pt. 64).

In addition, the Architectural and Transportation Barriers Compliance Board (Access Board), an independent Federal agency, is responsible for developing accessibility guidelines for the design and construction of buildings, facilities, and vehicles subject to the ADA, and for providing technical assistance to individuals and covered entities. The guidelines developed by the Access Board have been adopted as regulatory standards by DOJ and DOT.

DOJ's Role

DOJ is responsible for the implementation and enforcement of the provisions of the law that apply to State and local governments (title II) and those that apply to private entities that are public accommodations, commercial facilities, or entities that offer courses or examinations related to professional or occupational certification (title III). However, DOJ does not have sole enforcement authority. Each title also grants a private right of action to aggrieved individuals.

To enable DOJ to meet its obligation to enforce the ADA, the Attorney General has delegated responsibility for enforcing the Act to the Civil Rights Division. The Attorney General has asked the Civil Rights Division to encourage voluntary compliance with the ADA through an active outreach and public education effort and, where necessary, to initiate lawsuits against carefully targeted and selected entities who refuse to comply with this law.

The Department has established within the Division the Office on the Americans with Disabilities Act. This office will, among other things, be responsible for 1) providing technical assistance to individuals and covered entities; 2) certifying that State and local accessibility codes meet or exceed the requirements of the ADA; and 3) initiating litigation to enforce titles II and III of the Act. All cases and matters arising under title II or title III of the ADA will be handled by the Civil Rights Division.

Enforcement of Title III

Under Title III the Department may bring a civil action in any appropriate United States district court if it has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or that any person or group of persons has been discriminated against in violation of the Act and the discrimination raises an issue of general public importance. The remedies available in these proceedings include temporary, preliminary, or permanent injunctive relief, such as requiring that facilities be made accessible; requiring provision of an auxiliary aid or service; or modifying a policy, practice, or procedure. In addition, in a suit brought by the Department, the court may award other appropriate relief, including, if requested by the Department, monetary damages to individual victims of discrimination. Such monetary damages may not include punitive damages, but may include compensatory damages. DOJ may also seek, to vindicate the public interest, civil penalties in an amount up to $50,000 for a first violation, and up to $100,000 for any subsequent violation.

Enforcment of Title II

Enforcement of title II is similar to the enforcement of section 504 of the Rehabilitation Act. The Department is responsible for coordinating the administrative enforcement of title II. The Department's regulation designates eight Federal agencies, including the Department, to receive and investigate title II complaints.

The eight designated Federal agencies, their areas of responsibility, and the addresses to which complaints should be sent are the --

1) Department of Agriculture: All programs, services, and regulatory activities relating to farming and the raising of livestock, including extension services. Complaints should be sent to: Secretary, Department of Agriculture, 14th & Independence Avenue, S.W., Washington, D.C. 20250.

2) Department of Education: All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries. Complaints should be sent to: Office for Civil Rights, Department of Education, 330 C Street, S.W., Suite 5000, Washington, D.C. 20202.

3) Department of Health and Human Services: All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools, the operation of health care and social service providers and institutions, including "grass-roots" and community services organizations and programs, and preschool and day care programs. Complaints should be sent to: Office for Civil Rights, Department of Health & Human Services, 330 Independence Avenue, S.W., Washington, D.C. 20201.

4) Department of Housing and Urban Development: All programs, services, and regulatory activities relating to state and local public housing, and housing assistance and referral. Complaints should be sent to: Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, S.W., Room 5100, Washington, D.C. 20410.

5) Department of the Interior: All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums. Complaints should be sent to: Office for Equal Opportunity, Office of the Secretary, Department of the Interior, 18th & C Streets, N.W., Washington, D.C. 20547.

6) Department of Justice: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking finance, consumer protection, insurance, and small business; planning development, and regulation (unless assigned to other designated agencies); State and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies. Complaints should be sent to: Coordination and Review Section, P.O. Box 66118, Civil Rights Division, U.S. Department of Justice Washington, D.C. 20035-6118.

7) Department of Labor: All programs, services, and regulatory activities relating to labor and the work force. Complaints should be sent to: Directorate of Civil Rights, Department of Labor 200 Constitution Avenue, N.W., Room N-4101,

8) Department of Transportation: All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing. Complaints should be sent to: Office for Civil Rights, Office of the Secretary, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590.

Where violations of the Act are found, these agencies may seek to achieve voluntary resolution of the complaint. Because there is no nexus between title II coverage and the receipt of Federal funds, termination of funds is not an available remedy. If a designated agency can not obtain a voluntary resolution of a complaint, the investigating agency may refer the matter to the Department for litigation, or the complainant may initiate a private suit.

Contacts in the Civil Rights Division

The U.S. Attorneys can facilitate the Civil Rights Division's effort by referring any ADA complaint directed to a U.S. Attorney that alleges a violation of Title III of the ADA to John L. Wodatch, Director, Office on the Americans with Disabilities Act, Civil Rights Division. In addition, if the U.S. Attorneys become aware of any ADA lawsuits initiated by private litigants, the Civil Rights Division should be notified so that the Division may have an opportunity to get DOJ's views before the courts.

If you have any questions about the application of this Act, please call one of the following Civil Rights Division Attorneys: For title III of the ADA: John L. Wodatch, FTS 367-2227 or (202) 307-2227; L. Irene Bowen, FTS 367-2245 or (202) 307-2245; Philip L. Breen, FTS 367-2226 or (202) 307-2226; or Janet L. Blizard, FTS 367-2737 or (202) 307-2737. For title II of the ADA: Stewart B. Oneglia, FTS 367-2222 or (202) 307-2222 or Merrily Friedlander, FTS 369-7170 or (202) 616-7170. In addition, the Office on the Americans with Disabilities Act has available materials on the ADA, including copies of the Department's regulations and explanatory materials for general public use. If you would like copies of any of these documents, please call James D. Bennett, (202) 434-9300.

EXHIBIT
C

Department of Justice

EXCERPT OF REMARKS

BY

WILLIAM P. BARR
ATTORNEY GENERAL OF THE UNITED STATES

TO THE

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

1992 WINTER CONFERENCE

PALM SPRINGS, CALIFORNIA
JANUARY 14, 1992

IN CALLING FOR MORE PRISON SPACE, I RECOGNIZE THAT THE ABILITY OF STATES TO MANAGE THEIR OWN PRISONS HAS BEEN HAMPERED BY THE INVOLVEMENT OF FEDERAL COURTS IN THE DAY-TO-DAY OPERATION OF STATE FACILITIES. THE 70'S AND 80'S SAW A FLOOD OF LITIGATION IN THE FEDERAL COURTS BY STATE PRISONERS CHALLENGING PRISON CONDITIONS AS "CRUEL AND UNUSUAL PUNISHMENT."

DURING THIS PERIOD, SOME LOWER COURTS MISTAKENLY APPLIED A VAGUE "TOTALITY OF THE CIRCUMSTANCES" OR "OVERALL CONDITIONS" STANDARD TO FIND THAT STATES WERE IN VIOLATION OF THE EIGHTH AMENDMENT.

MANY COURTS WENT FAR BEYOND WHAT THE CONSTITUTION REQUIRES IN REMEDYING PURPORTED EIGHTH AMENDMENT VIOLATIONS -- SPECIFYING THE PARTICULARS OF PRISONERS' DIETS, EXERCISE, VISITATION RIGHTS AND HEALTH CARE. MOST BURDENSOME OF ALL, THESE DECREES IMPOSED LIMITATIONS OR CAPS ON THE POPULATION OF STATE PRISONS.

IN MANY CASES, THESE RULINGS -- WHICH ARE STILL IN EFFECT -- HAVE SUBSTANTIALLY INCREASED THE COSTS OF CONSTRUCTING AND OPERATING NEW PRISONS, AND MADE IT DIFFICULT FOR THE STATES TO USE THEIR EXISTING CORRECTIONAL FACILITIES EFFICIENTLY. THE POPULATION CAPS, IN PARTICULAR, HAVE IN SOME CASES WROUGHT HAVOC WITH THE STATE'S EFFORTS TO GET CRIMINALS OFF THE STREETS.

THESE POPULATION CAPS ARE OF SPECIAL CONCERN. THE FEDERAL SYSTEM IS NOT OPERATING UNDER BURDENSOME COURT DECREES, AND IN JANUARY 1991, OPERATED AT ABOUT 165% OF DESIGN CAPACITY, AND DID SO IN COMPLIANCE WITH THE CONSTITUTION. MANY STATES, HOWEVER, ARE REQUIRED BY JUDICIAL ORDER OR DECREE TO OPERATE <u>AT</u>, OR EVEN <u>BELOW</u>, DESIGN CAPACITY. INDEED, THE OVERALL STATE AVERAGE IN JANUARY 1991 WAS ABOUT 115% OF CAPACITY. IF THE STATES COULD OPERATE AT THE LEVEL OF THE FEDERAL PRISON SYSTEM, THAT WOULD MEAN AN ADDITIONAL 286,000 INMATE BEDS, WHICH TRANSLATES INTO A SAVINGS OF $13 BILLION IN CONSTRUCTION COSTS.

NOW, I AM <u>NOT</u> SAYING THAT EVERY STATE CAN OPERATE AT THE SAME LEVEL OF CAPACITY AS THE FEDERAL SYSTEM. A NUMBER OF FACTORS GO INTO WHETHER A STATE CAN PROPERLY OPERATE AT ANY GIVEN POPULATION LEVEL, INCLUDING STAFFING DECISIONS AND OTHER PRISON PROGRAM FEATURES. MY POINT HERE IS MERELY TO POINT OUT THE <u>ENORMOUS</u> POTENTIAL IN TERMS OF ADDITIONAL BEDSPACE THAT MAY BE AVAILABLE IF STATES ARE LEFT TO MANAGE THEIR OWN AFFAIRS.

IN MY VIEW, STATES SHOULD NOT BE ASKED TO OPERATE UNDER JUDICIAL DECREES THAT IN MANY INSTANCES WERE BASED ON DISCREDITED LEGAL THEORIES AND THAT IMPOSE UNDULY BURDENSOME RESTRICTIONS. WE MUST ALLOW STATE OFFICIALS TO EXERCISE THEIR LAWFUL DISCRETION. IT IS INCUMBENT UPON THE DEPARTMENT OF JUSTICE TO SUPPORT THOSE STATES THAT ARE OPERATING THEIR PRISONS IN GOOD FAITH COMPLIANCE WITH THE CONSTITUTION AND THAT SEEK RELIEF FROM THE UNDUE CONSTRAINTS OF PROTRACTED PRISON LITIGATION.

LET ME SET FORTH THE GENERAL PRINCIPLES THAT I BELIEVE ARE APPLICABLE IN THIS AREA:

FIRST -- AS THE SUPREME COURT HAS RECENTLY MADE CLEAR -- THE FEDERAL COURTS HAVE NO AUTHORITY TO HOLD THAT PRISON CONDITIONS ARE UNCONSTITUTIONAL UNLESS IT IS PROVEN THAT PRISON OFFICIALS HAVE ACTED WITH "DELIBERATE INDIFFERENCE" TO "THE MINIMAL CIVILIZED MEASURE OF LIFE'S NECESSITIES". IT IS NOT ENOUGH FOR A COURT TO FIND THAT THE "OVERALL CONDITIONS" IN THE PRISON ARE BAD OR SUBSTANDARD WHERE NO SPECIFIC DEPRIVATION OF A HUMAN NEED IS DEMONSTRATED.

SECOND, IN REMEDYING CONSTITUTIONAL VIOLATIONS, THE COURTS ARE NOT FREE TO ORDER PRISON OFFICIALS TO IMPROVE CONDITIONS BEYOND THE BASIC MINIMAL NECESSITIES REQUIRED BY THE CONSTITUTION. AS THE SUPREME COURT HAS RECOGNIZED, THE CONSTITUTION "DOES NOT MANDATE COMFORTABLE PRISONS," AND COURTS MAY NOT REQUIRE PRISON OFFICIALS TO FOLLOW WHAT SOME MAY THINK ARE "SOUND CORRECTIONAL PRACTICES."

THIRD, THE BUSINESS OF RUNNING PRISONS BELONGS TO THE APPROPRIATE STATE OFFICIALS, NOT TO FEDERAL JUDGES AND SPECIAL MASTERS. THE FACT THAT A COURT FINDS A CONSTITUTIONAL VIOLATION DOES NOT JUSTIFY COURT SUPERVISION OF PRISONS EITHER DIRECTLY OR THROUGH THE APPOINTMENT OF A SPECIAL MASTER. THE DUTY TO VINDICATE INMATES' CONSTITUTIONAL RIGHTS DOES NOT CONFER ON THE COURTS THE POWER TO MANAGE PRISONS. WHERE A COURT FINDS A CONSTITUTIONAL VIOLATION, IT SHOULD GIVE THE STATE THE OPPORTUNITY TO REMEDY THE VIOLATION WITHOUT TAKING OVER CONTROL OF THE PRISON SYSTEM.

MOREOVER, ONCE A STATE HAS CURED THE SPECIFIC CONSTITUTIONAL DEFECT IDENTIFIED BY THE COURT, ONGOING REMEDIAL DECREES SHOULD BE TERMINATED. COURT-IMPOSED ORDERS SHOULD NOT "OPERATE IN PERPETUITY." ONCE THE STATE HAS COME INTO COMPLIANCE WITH THE CONSTITUTION, NEITHER CONTINUING COURT SUPERVISION NOR PERMANENT CONDITIONS AND LIMITATIONS ARE APPROPRIATE. IF CONDITIONS AGAIN FALL BELOW THE CONSTITUTIONAL MINIMUM, THEN EITHER PRISONERS OR THE DEPARTMENT OF JUSTICE REMAINS FREE TO INITIATE A NEW ACTION.

FOURTH, MANY STATES ARE NOW OPERATING UNDER CONSENT DECREES THAT IMPOSE CONDITIONS THAT GO WELL BEYOND THE MINIMAL REQUIREMENTS OF THE CONSTITUTION. IN MOST CASES, THOSE DECREES WERE NEGOTIATED AT A TIME WHEN SOME LOWER COURTS THOUGHT THE EIGHTH AMENDMENT REQUIRED MORE AMBITIOUS IMPROVEMENTS BY THE STATES.

COURTS MUST BE READY TO VACATE OR MODIFY SUCH EXISTING PRISON CONSENT DECREES WHERE A STATE SEEKS SUCH MODIFICATION. WHERE THE CONSTITUTIONAL LAW HAS CHANGED, THE UNDERLYING PREMISES OF THE PARTIES' AGREEMENT ARE ERODED. THE STATE, WHICH HAS THE RIGHT TO RUN ITS OWN PRISONS, MUST BE GIVEN THE OPPORTUNITY TO REFORM OR RESCIND THE AGREEMENT. MOREOVER, IN CONSIDERING WHETHER TO VACATE OR MODIFY A PRISON CONSENT DECREE, THE COURTS

SHOULD ALSO CONSIDER CHANGES IN OTHER CONDITIONS AS WELL. BECAUSE OF THE UNIQUELY INTRUSIVE NATURE OF CONSENT DECREES GOVERNING THE OPERATION OF STATE PRISONS, COURTS SHOULD REMAIN FLEXIBLE IN ALLOWING THE STATE TO MODIFY OR ELIMINATE EVEN AGREED-UPON LIMITATIONS.

WITH THESE GENERAL PRINCIPLES IN MIND, LET ME DESCRIBE HOW THE JUSTICE DEPARTMENT WILL GENERALLY APPROACH PRISON LITIGATION:

(1) THE DEPARTMENT SHOULD NOT INITIATE PRISON LITIGATION, OR INTERVENE IN ON-GOING PRISON LITIGATION, UNLESS NECESSARY TO REMEDY SPECIFIC DEPRIVATIONS OF A PRISONER'S BASIC HUMAN NEEDS -- DEPREVIATIONS WHICH RISE TO THE LEVEL OF CRUEL AND UNUSUAL PUNISHMENT.

(2) IN PRISON LITIGATION, THE DEPARTMENT SHOULD SEEK TO REMEDY CONSTITUTIONAL VIOLATIONS, BUT SHOULD NOT SEEK TO IMPOSE ON THE STATES ADDITIONAL BURDENS NOT REQUIRED BY THE CONSTITUTION OR OTHER APPLICABLE FEDERAL LAW.

(3) WHERE A CONSENT DECREE OR OTHER JUDICIAL ORDER REMAINS IN EFFECT, THE DEPARTMENT SHOULD CONSIDER WHETHER TO SUPPORT A STATE'S REQUEST FOR MODIFICATION OF SUCH DECREE OR ORDER TO THE EXTENT NECESSARY TO REMOVE RESTRAINTS ON THE STATE NOT REQUIRED BY THE CONSTITUTION.

(4) THE DEPARTMENT SHOULD NOT ENCOURAGE CONTINUING COURT SUPERVISION OF STATE PRISONS, EITHER DIRECTLY OR BY SPECIAL MASTER, UNLESS SUCH SUPERVISION IS PLAINLY REQUIRED TO REMEDY A CONTINUING CONSTITUTIONAL VIOLATION.

(5) FINALLY, WHERE A STATE HAS REMEDIED PAST CONSTITUTIONAL VIOLATIONS, AND THERE IS NO INDICATION THAT THE STATE WILL REVERT TO SUCH UNLAWFUL PRACTICES, THE DEPARTMENT SHOULD SUPPORT TERMINATION IN A TIMELY MANNER OF ALL LITIGATION THAT LIMITS THE ABILITY OF A STATE TO RUN ITS OWN PRISON FACILITIES.

I WANT TO STRESS TWO IMPORTANT CAVEATS TO THE DIRECTION WE ARE TAKING ON PRISON LITIGATION:

FIRST, I AM NOT SAYING THAT ALL PRIOR FEDERAL COURT INVOLVEMENT IN PRISON LITIGATION WAS INAPPROPRIATE. ON THE CONTRARY, IN MANY INSTANCES, THE CONDITIONS IN STATE PRISONS GENUINELY DID FALL BELOW THE CONSTITUTIONAL MINIMUM, AND THE JUSTICE DEPARTMENT PLAYED A LEADING ROLE IN CHALLENGING THOSE CONDITIONS. THE DEPARTMENT OF JUSTICE WILL CONTINUE TO PROTECT VIGOROUSLY THE CONSTITUTIONAL RIGHTS OF STATE PRISONERS. ALTHOUGH WE BELIEVE THAT STATE OFFICIALS SHOULD HAVE DISCRETION TO RUN THEIR OWN PRISON FACILITIES WITHOUT UNDUE FEDERAL INTERFERENCE, WE WILL NOT TOLERATE GENUINELY UNCONSTITUTIONAL CONDITIONS, AND WE HAVE THE MEANS TO ENFORCE THE PROTECTIONS OF THE EIGHTH AMENDMENT.

SECOND, THE POLICIES I AM ANNOUNCING TODAY GOVERN ONLY THE DEPARTMENT'S ROLE IN LITIGATION CONCERNING PRISONERS WHO HAVE BEEN CONVICTED AND SENTENCED. THESE POLICIES DO NOT APPLY TO LITIGATION WITH RESPECT TO THE MENTALLY OR PHYSICALLY DISABLED, OR OTHER INSTITUTIONALIZED PERSONS. THESE PERSONS ARE OBVIOUSLY NOT TO BE SUBJECTED TO A PUNITIVE ENVIRONMENT, AND THEIR BASIC RIGHTS ARE CONTROLLED BY OTHER CONSTITUTIONAL AND STATUTORY PROVISIONS, NOT BY THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT.

NOR DO THESE POLICIES APPLY IN ANY WAY TO THE JUSTICE DEPARTMENT'S LITIGATION CHALLENGING UNLAWFUL RACIAL, ETHNIC, AND GENDER DISCRIMINATION. THE FEDERAL GOVERNMENT AND THE FEDERAL COURTS HAVE A SPECIAL OBLIGATION TO REMOVE THE CONTINUING VESTIGES OF DISCRIMINATION, AND THE PRINCIPLES THAT GOVERN INSTITUTIONAL LITIGATION IN THE PUNITIVE SETTING OF INCARCERATION OBVIOUSLY DO NOT CONTROL CIVIL RIGHTS LITIGATION.

EXHIBIT D

Department of Justice

FACT SHEET

THE PROBLEM OF VIOLENT GANGS

- There are estimated to be between 300,000 and 350,000 gang members in the United States. Gang activity includes outlaw motorcycle gangs, ethnic gangs, and street gangs.
- There are several nationwide as well as many local gangs. All of them engage in violent criminal conduct; many are engaged in illegal drug trafficking as well.
- A recent Department of Justice, Office of Justice Programs study in Texas found that children who attend schools in which gangs are present have a 50% greater likelihood of being victimized than children in schools where there are no gangs.

FEDERAL RESPONSE

- Task force investigations of violent gangs have proven effective.
- In Chicago, for example, numerous convictions have been obtained against the El Rukn gang. Since the arrests of 89 members and associates based on warrants issued in 1989, El Rukn gang has ceased to be the premier street gang in the Chicago area. In October, 1991, an investigation into the Vice Lords gang resulted in the indictment of 78 people in state and federal court on various narcotics, weapons and tax charges.
- In Philadelphia, the number of murders in 1991 was substantially reduced as a result of a federal, state and local task force that has been combating violent street gangs.
- Currently, 1,625 FBI agents are allocated to the violent crime area.
- There are at present 2,000 ATF agents assigned to investigate firearms and explosives cases. Of these, 425 are assigned to gang task forces.
- In Fiscal Year 1991 the Office of Justice Programs committed $5.2 million to programs addressing gangs and violence, as well as $11.1 million for community programs such as community based policing. An additional $472 million was provided to the states through grants which may also be used for these purposes.

- Funds provided in the last two years have assisted:

  San Diego: A project directed by the San Diego County District Attorney's Office that has successfully targeted hard core members of the Crips and Bloods involved in the trafficking of cocaine and other drugs, and drug-related violent crime. The project is now targeting Hispanic and Asian gangs in San Diego County.

  Thus far, 185 arrests have been made. Using confidential informants, videotaped buys, and vertical prosecution, the project has resulted not only in arrests and the seizure of drugs and weapons, but also a reduction in the number of "open air" drug markets in the County,. Most important, the project appears to have played a significant role in reducing the amount of violence associated with drug trafficking in San Diego County.

  Kansas City: A project directed by the Kansas City Police Department's Narcotics Enforcement Division that has successfully targeted Jamaican "posses," Crips and Bloods, and most recently, Cuban gangs. Using more traditional organized crime investigation techniques, the Kansas City project relies heavily on a local gang intelligence data base to target gangs involved in conspiratorial drug crime and street narcotics trafficking. "Crack houses" known to be operated by these gangs are also targeted.

  Over the last 18 months, 57 arrests have been made. In addition, over $1.2 million in drugs, contraband, and assets have been seized.

  Manhattan: The New York County District Attorney's Office will establish a strike force composed of prosecutors, DA investigators and police detectives to target controlling members of the Black park gang for prosecution on murder, drug trafficking, and/or criminal enterprise charges. The Black Park gang is believed to be responsible for high volumes of "crack" cocaine and heroin distribution, and an inordinate amount of drug-related violent crime in specific Manhattan neighborhoods.

  Tucson: the Tucson Police Department is establishing a hardcore Interdiction Team (HIT) in partnership with the Pima County Adult Probation Department, the Pima County Attorney's Office, the Tucson Development Services Department, and the Tucson Office of the Bureau of Alcohol, Tobacco, and Firearms. The team will concentrate its

investigative and prosecutorial efforts on the controlling members of the five (5) gang sets most actively involved with drug distribution and related violence in the Tucson Metropolitan Area.

NEW FEDERAL EFFORTS

- The reallocation of 300 additional agents is an almost 20% increase in FBI resources to be brought to bear on the problem of gangs and violent crime.

- The FBI and ATF will operate joint gang task forces in four cities, Atlanta, Baltimore, Dallas and Washington, D.C. A total of 57 additional FBI agents will be assigned to investigate violent crime in those cities.

- The remaining additional FBI agents will be assigned to gang squads in 35 cities experiencing significant gang related crime. FBI violent crime resources in California will increase by 51 agents, in Texas by 31 agents, and in New York by 26 agents. All affected FBI field offices will receive at least two additional agents; 14 of the 39 offices will receive 10 or more additional agents.

- A joint FBI/ATF national gang analysis center will be established to assist federal, state and local law enforcement in combating violent gangs.

- In Fiscal Year 1992, $6.7 million will be available from the Office of Justice Programs for gang and violence programs, $14.2 million will be available for community based programs, and $473 million will be provided to the states in formula grants that may be used for gang and violent crime programs.

EXHIBIT
E

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

January 31, 1992

MEMORANDUM

To: Federal Prosecutors

From: William P. Barr
Attorney General

Re: Enhanced Sentencing Under Project Triggerlock for Semiautomatic Weapons and Gang Involvement

Since Triggerlock was announced on April 10, 1991, prosecutions have been initiated against 4,337 defendants. Your efforts have contributed to the goal of prolonged incarceration of the most serious armed offenders.

To ensure our efforts have maximum effect, I have requested from the Sentencing Commission enhanced sentencing for felons and fugitives who possess firearms, particularly those who possess semiautomatic weapons. I am also seeking changes to the guidelines that would provide more appropriate sentencing for gang members and career criminals.

Because the threat posed to public safety by violent offenders is too critical to await action by the Sentencing Commission, I am asking each of you to seek enhanced sentencing in appropriate cases under the existing guidelines. In cases involving firearms violations covered by Sentencing Guideline 2K2.1, I am directing you to seek a two-level upward departure for the possession of a semiautomatic weapon by felons, fugitives, and prohibited persons. The effect of this enhancement will be to treat semiautomatic weapons more seriously than many other firearms and the same as automatic weapons.

I am also directing that you seek an additional two-level departure in 2K2.1 cases involving semiautomatic weapons and weapons prohibited by 26 U.S.C. Section 5845(a) (e.g., sawed off shotgun, machine gun) for firearms offenses involving gang members. These departures, consistent with the current guidelines and supported by case law, will provide a uniform policy that reflects the priority we place on attacking violent crime, particularly gang violence.

Recognizing that there may be unforeseen circumstances when the sound exercise of prosecutorial discretion would cause you not

to seek an upward departure, a departure need not be sought when, based upon written justification, the United States Attorney personally determines it not to be appropriate. In order to track the progress of this policy, I am further requesting that you report those cases where the departure was sought, whether the departure was granted, and those cases for which departure was not sought to the Assistant Attorney General, Criminal Division on a monthly basis. This data will assist us in formulating our sentencing policy, particularly with respect to aggravating or mitigating circumstances.

The following examples illustrate how the policy is to be implemented:

1. Felons and Fugitives in Possession of Semiautomatic Weapons

Federal prosecutors will request a two-level upward departure from the guideline range in Section 2K2.1 for any convicted felon whose offense involves a semiautomatic weapon, with an additional two-level enhancement if an aggravating circumstance exists.

In addition, prosecutors will request a two-level upward departure that will increase the base offense level for a prohibited person, such as a fugitive, from 14 to 16 under Section 2K2.1(a)(6), with a potential additional two-level enhancement if an aggravating circumstance exists.

2. Unlawful Gang Activities Involving Automatic or Semiautomatic Weapons

If a person involved in an unlawful gang-related activity is in possession of a fully automatic or semiautomatic weapon, in addition to the departure for semiautomatic weapons, federal prosecutors will request an additional two-level increase based on the involvement in gang crimes. Another two-level increase should be sought if aggravating circumstances exist.

The guidance for departures set forth in this memorandum is not meant to be exclusive; more egregious factual circumstances will warrant greater departures.

The rationale behind this enhanced sentencing is the mounting evidence that, in many American communities, semiautomatic and automatic weapons are the weapons of choice for gangs, drug dealers, and other violent offenders. During 1990 and 1991, ATF's National Tracing Center traced 55,845 crime-related handguns for law enforcement agencies. Of these, 60.6% of the weapons were identified as pistols, most of which are semiautomatic weapons. In fact, handgun traces over the past five years have shown an increased use of 9 millimeter, .25 caliber and .380 caliber guns to commit crimes. These are all primarily semiautomatic weapons and, because they are mostly flat, small, and readily concealable, they are used to commit a variety of crimes.

Gang violence is at a very high level. For example, in the first nine months of 1991, there were 561 gang-related homicides in Los Angeles city and county, most committed with guns. In addition, there were 1,000 drive-by shootings in Los Angeles in the first eight months of 1991, with 1401 victims -- a 20% increase over 1990. The violence experienced in that city is being felt nationwide, in part because gangs have expanded their sphere of operations.

You should continue to stress in your Project Triggerlock prosecutions the quality of prosecutions brought in your districts. This initiative is aimed at the most violent offenders. Tough federal sentences for armed career criminals, drug traffickers, and fugitives can have a substantial impact. The intensive prosecution of drug trafficking organizations in Philadelphia helped reduce drug-related homicides by 38% last year from 1990's record. The FBI's project to apprehend violent fugitives in Newark is believed by local police to have been responsible for a 13% reduction in violent crime in that city in 1991. These examples underscore our ability to have an impact on violent crime.

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

January 31, 1992

Hon. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Violent crime, particularly firearms violence, has become one of the most serious domestic problems facing this nation. To assist the states in their efforts against this violence, we have increased prosecutorial efforts against those armed career offenders who violate federal firearms offenses.

As the Sentencing Commission has long recognized, any concerted effort to combat violent crime must include tough sentences for firearms offenses and gang-related crime as a key component. The amendments effective November 1, 1991 to the firearms guideline, 2K2.1, are a significant step toward appropriate sentencing for firearms offenses.

Nonetheless, the penalties remain too low for those who traffick in, illegally obtain or illegally possess firearms. Until the Commission is able to act to increase the penalties for offenses involving semiautomatic weapons and gang member involvement, we have concluded that upward departures on these grounds should be sought. This, however, is only a stop-gap measure.

Tough sentences for firearms offenses and gang-related crime are essential to serve the deterrence, punishment, and incapacitation purposes of sentencing outlined in the Sentencing Reform Act of 1984. Incapacitating firearms offenders is crucial because it prevents the commission of violent crime. Moreover, stiff sentences for firearms offenses will have a profound deterrent effect by sending a message that society will not tolerate this lawlessness.

I have enclosed our recommendations for increasing the sentencing guidelines for firearms offenses, gang involvement, and career criminals. These amendments would greatly improve the operation of the guidelines in firearms cases and contribute to public safety.

I also am urging that the Commission act on our previous comments, transmitted October 3, 1991, which relate to career offenders, such as a new criminal history category VII for offenders with very high criminal history scores and the elimination of time limitations applicable to the career offender guideline.

We would be pleased to work with the Commission and its staff in preparing our proposals for public comment.

Sincerely,

William P. Barr
Attorney General

EXPLANATION OF CHANGES SOUGHT

The following sets forth our recommendations for increased guideline sentences for firearms crimes, gang-related offenses, and career offenders. These recommendations are in addition to those the Department has submitted previously in the current consideration period; we also discuss several previous recommendations to underscore the urgency of the changes needed. These recommendations set forth below are made under the current statutory framework. The Department will continue to seek legislative action from Congress in areas related to the recommendations below, including increased mandatory minimum sentences.

1. Enhanced Sentences for Illegal Possession or Use of Semiautomatic Weapons

Semiautomatic weapons have become the firearms of choice for many violent criminals and drug dealers. However, the guidelines fail to differentiate semiautomatic weapons from more conventional, limited revolvers.

Weapons such as 9-millimeter semiautomatic pistols, AK-47 assault rifles, and MAC 10s are high capacity weapons that allow the user to fire many shots in a short period of time and make it common for the users not only to kill the target of the crime but innocent bystanders as well. These weapons in the hands of felons and fugitives from justice also pose an extraordinary risk to law enforcement personnel.

Semiautomatic weapons are increasingly available and increasingly used to commit crimes. According to figures released by the Bureau of Alcohol, Tobacco and Firearms (ATF), during the early 1980's, six-shot revolvers accounted for about 70 percent of the handguns produced in the United States. By the end of the decade, this ratio had almost reversed, with semiautomatic pistols accounting for nearly 1.4 million of the two million handguns produced by U.S. manufacturers. During 1990 and 1991, ATF's National Tracing Center traced 55,845 crime-related handguns for law enforcement agencies. Of these, 60.6 percent of the weapons were identified as pistols, most of which were semiautomatic weapons. In fact, handgun traces over the past five years have shown an increased use of nine millimeter, .25 caliber and .380 caliber guns to commit crimes. These are all primarily semiautomatic weapons and, because they are mostly small, flat, and readily concealable, they are therefore used to commit a variety of violent crimes.

Gangs have also turned to semiautomatic weapons to further violent crime and drug trafficking. Gang members favor semiautomatic weapons because of the ease of conversion to fully-automatic firing mode.

The guidelines do not address semiautomatic weapons. Accordingly, several courts of appeals have expressed the view that the dangerousness of the weapon is an appropriate basis for upward departure from the firearms guideline. United States v. Sweeting, 933 F.2d 962 (11th Cir. 1991); United States v. Robinson, 898 F.2d 1111, 1118 (6th Cir. 1990); and United States v. Thomas, 914 F.2d 139 (8th Cir. 1990).

In order to achieve consistency in sentencing, we urge the Commission to increase the penalties for illegal possession of semiautomatic weapons by treating their possession so that the increased base offense levels provided for machineguns and short-barreled rifles and shotguns also apply to semiautomatic weapons. In addition, we believe that the sentencing for fugitive and felon possession of machine guns, sawed off shotguns, and semiautomatic weapons should also be increased, as we discuss below. See Section 3 below.

2. Enhancement for Offenses in Furtherance of Gang Activity

As the Commission knows, criminal street gangs pose a major threat to society. Crimes committed in association with or to promote the activities of a street gang are by their nature more dangerous than comparable crimes committed without a gang connection. Gangs intimidate law-abiding citizens, foil crime prevention efforts, and thereby succeed in their unlawful activities much more effectively than lone criminals.

The Justice Department estimates that there are between 300,000 and 350,000 gang members in this country. Although much gang activity is drug-related, police nationwide are seeing an alarming trend toward violence by gangs for many reasons (e.g., turf wars, murder for hire). Los Angeles has been particularly hard hit. In recent years the number of victims of gang killings in Los Angeles -- excluding Los Angeles County -- more than doubled from 317 in 1987 to 679 in 1990. In Los Angeles County, gang-related homicides rose at about the same pace to 690 in 1990, representing 40 percent of the county's killings.

The death toll in Los Angeles in 1991 is even more chilling. In the first nine months of 1991, there were 561 gang-related homicides in Los Angeles city and county, most committed with guns. The Los Angeles County Sheriff's Department reported 325 gang-related homicides in its jurisdiction, with 292 committed by firearms. That figure is more than ten times the number of U.S. combat fatalities during Operation Desert Storm. In addition, there were 1,000 drive-by shootings in Los Angeles in the first eight months of 1991, with 1401 victims -- an increase of 20% over 1990.

To reflect the increased seriousness of gang-related crime, the Commission should include a new provision in Chapter Three

that would provide an enhancement of at least four levels for any felony committed in association with a criminal street gang or by a member of a criminal street gang.

3. Increased Base Offense Levels For Firearms Violations by Felons, Fugitives and Gun Traffickers (Guideline § 2K2.1)

Section 2K2.1, providing the sentencing for the possession of firearms by felons, fugitives and other prohibited persons, should be increased four levels for each of the firearms guidelines' base offense levels (a) (1) - (6). These changes would result in significantly longer prison sentences for felons and fugitives who possess weapons.

Offense	DOJ Proposal	Current Sentencing Guidelines
Unlawful Possession of firearm by:		
(1) felon with at least 2 prior felony convictions of either a crime of violence or a controlled substance offense and the offense involved a firearm listed in § 5845(a) (machine gun, sawed-off shotgun)	30 (up to statutory maximum)	26
(2) felon with at least 2 prior felony convictions of either a crime of violence or a controlled substance offense	28	24
(3) felon with at least one prior felony conviction of either a crime of violence or a controlled substance offense, and the offense involved a firearm listed in § 5845(a) (machine gun or sawed off shotgun)	26	22
(4) felon with at least one prior felony conviction of either a crime of violence or a controlled substance offense	24	20
or is a prohibited person (e.g., fugitive) and the offense involved a firearm listed in § 5845(a) (e.g., machine gun or sawed off shotgun)	24	20
(5) if the offense involved a machine gun or sawed off shotgun	22	18

(6) if the defendant is a prohibited person (e.g., fugitive) 18 14

Aggravating Factor: Use in Connection with Another Felony Offense

The 2K2.1(b)(5) offense guideline should also be increased from 18 to 22 to reflect the serious nature of the "use[] or possess[ion] another felony offense." The cumulative offense level restriction of 29 should be eliminated. See 2K2.1(b)(4).

Gun Sales to Felons, Fugitives, and Other Prohibited Persons

Under the current firearms guideline, the offense of transferring a gun with knowledge or reasonable cause to believe that the purchaser is a convicted felon or other prohibited person is subject to a base offense level of just 12 (10-16 months of imprisonment for a first offender). If the defendant accepted responsibility for the offense, he could receive a probationary sentence with conditions of confinement. Such sentences are extremely low for this violation, knowingly arming a convicted felon. This violation of law is subject to a maximum of 10 years, like the offense of possession of a firearm by a convicted felon. 18 U.S.C. §§ 922(d), (g), and 924(a)(2).

Obviously, the knowing sale of firearms to convicted felons is a serious offense that has led to the proliferation of gun possession by criminals. At the increased base level of 16, the level the Department proposes, a first time offender would be sentenced to 21 to 27 months, a level which better reflects the serious nature of the offense.

The Department recognizes that the Commission's current 2K2.1 guideline was amended only last year, and that the amendment was helpful in incapacitating violent felons who possess firearms. However, despite last year's increase, the starting point and the enhanced sentences based on the nature of the prior convictions, fugitive status, or the type of firearm are still too low to protect society.

Example. Under the current guidelines, a defendant with one prior conviction, other than one for a crime of violence or drug offense, would be subject to offense level 14 under guideline § 2K2.1(A)(6). A level 14 offender with one prior conviction would be subject to a likely range of just 18-24 months (or less if his prior conviction resulted in a sentence of less than 60 days). Level 14 also applies to fugitives and other persons in prohibited categories who may have no prior criminal history and would be subject to a sentencing range of just 15-21 months.

The current guideline level of 14 for a previously convicted felon in possession of a firearm (at criminal history category II, 18-24 months or less; at category V, 33-41 months) is far removed from the ten-year statutory maximum. The current level is below the maximum even for a defendant who possesses numerous weapons. An across-the-board increase of four levels will convey to the many convicted felons, fugitives from justice, and other violators are not deterred from possessing firearms that violation of federal firearms law carries serious consequences.

4. Crime of Violence Definition

a. Modify Commentary to Make Clear that a Felon's Possession of a Firearm is a Crime of Violence

Just prior to the publication of the current guidelines manual, the Commission amended the commentary to the career offender definitional guideline. The amendment excluded from the definition of "crime of violence" the offense of possession of a firearm by a convicted felon. Guideline § 4B1.2, Application Note 2. This substantive amendment was made without the benefit of public comment or the 180-day review by Congress accorded to guideline amendments. The particular commentary in question operates as a guideline provision. That is, a court's failure to follow the new commentary might well be considered an incorrect application of the guidelines for purposes of appellate review, 18 U.S.C. § 3742. On this basis the Department had urged the Commission at its public meeting on the issue late last summer not to adopt the change.

The Commission should immediately reconsider the amended commentary and include the felon-in-possession offenses for purposes of the career offender guideline. Dangerous offenders who commit violent crimes and commit federal weapons offenses should be sentenced as career offenders if they have the requisite prior convictions. Such offenders are a danger to society, and their sentences should not be limited by the firearms guideline, § 2K2.1. Although the latter provides increases based on the nature of the prior offenses and on the basis of the offense in which the firearm is used, it does not provide sentences of the same magnitude as the career offender guideline. The career offender guideline assures a sentence at or near the statutory maximum by virtue of the offense levels established and utilization of criminal history category VI.

b. Modify Restrictive Definition of Crime of Violence to Include All Burglaries

While the most recent version of the guidelines improved the sentences for those previously convicted of crimes of violence, the effect of the sentence is hindered by the definition of

"crime of violence" in guideline § 4B1.2, which includes burglary as a crime of violence only when it involves a dwelling. The limitation is contrary to the violent crime definition found in the armed career criminal statute, 18 U.S.C. § 924(e)(2)(B). In fact, this difference is acknowledged by the guidelines at § 4B1.4, Application Note 1.

Burglary is, of course, not always called burglary. States routinely identify burglary with different labels, which are not limited to dwellings. Burglary should, therefore, be defined generically, not limited to dwellings, and thereby be deemed a violent crime for purposes of guideline § 2K2.1. The Supreme Court in Taylor v. United States, 110 S. Ct. 2143 (1990), recognized the problem in limiting the burglary definition:

> [I]f Congress had meant to include only an especially dangerous subclass of burglaries as predicate offenses, it is unlikely that it would have used . . . unqualified language . . . . 110 S. Ct. at 2157.

There is no persuasive reason why conviction of a burglary offense that the Supreme Court defines as a violent crime for purposes of the armed career criminal statute and that results in a 15-year mandatory minimum sentence should not also count as a crime of violence under § 2K2.1. We, therefore, request that the term crime of violence for purposes of the firearms guidelines be amended to reflect the Taylor interpretation.

5. Appropriate Sentencing of Career Criminals

In addition to the proposals which the Department is now seeking, we wish to underscore the urgent need for the amendments we suggested earlier in your comment period. Critically, the amendments earlier suggested by the Department (1) for the creation of a new criminal history category VII for offenders with high criminal history scores, (2) for the preclusion of downward departures for career offenders based on criminal histories, and (3) for the elimination of the time limitations applicable to the career offender guideline are needed now. Violent career criminals still commit a disproportionate number of crimes and must be incapacitated.

The 15-year time limitation in the current guidelines often makes it difficult to present the entire pattern of wrongdoing for repetitive, violent criminals. The Department has unsuccessfully urged this change for the past two years; respectfully, a change is needed now.

6. Increases for Offenses Involving Multiple Firearms

The 2K2.1 firearms guideline should also be amended to increase the level of incarceration more rapidly on the basis of

Some Examples of Effect of Proposed Sentencing Departure Policy

Current Guidelines		Proposed Upward Departure	Proposed Result
1-time felon	=20	No Change	20
1-time felon + machine gun	=22	No change	22
1-time felon + semi	=20	+2 levels	22
1-time felon + gang	=20	+2 levels	22
1-time felon +gang +semi	=20	+4 levels	24
1-time felon +gang +semi +other aggravating circumstances	=20	+6 levels	26
1-time felon +gang +machine gun	=22	+2 levels	24
1-time felon +gang +machine gun +aggravating circumstances	=22	+4 levels	26

2-time felon	=24	No change	24
2-time felon + machine gun	=26	No change	26
2-time felon + semi	=24	+2 levels	24
2-time felon + gang	=24	+2 levels	24
2-time felon +gang +semi	=24	+4 levels	28
2-time felon +gang +semi +other aggravating circumstances	=24	+6 levels	30
2-time felon +gang +machine gun	=26	+2 levels	28
1-time felon +gang +machine gun +aggravating circumstances	=26	+4 levels	30

Impact of Moving to Higher Sentencing Levels

Given the Sentencing Commission's criminal history category regime, moving from a level of 20 to 26 or from level 24 to 30, as proposed, can be quite significant for offenders with long criminal histories.

For example, an offender with 10-12 qualifying convictions [Category V] would, moving from level 20 to 26, have his minimum sentence rise from **63 months (about 5 years) to 110 months (almost 10 years).** Similarly, an offender with 10-12 qualifying convictions [Category V] would, moving from level 24 to 30, have his minimum sentence rise from **92 months (7 1/2 years) to 151 months (12 years, 7 months)** -- although the statutory maximum of ten years might truncate the sentence.

Even at a lower criminal history category I, the effect is less dramatic but still quite significant. Moving from 20 to 26 levels for a one-time felon is a move from a minimum of 33 **months to 63 months.**

EXCERPT FROM SENTENCING TABLE

Category:	I	II	* * *	V	VI
Priors:	(0 or 1)	(2 or 3)		(10-12)	(13 or more)
Offense Level					
20	33-41	37-46		63-78	70-87
21	37-46	41-51		70-87	77-96
22	41-51	46-57		77-96	84-105
23	46-57	51-63		84-105	92-115
24	51-63	57-71		92-115	100-125
25	57-71	63-78		100-125	110-137
26	63-78	70-87		110-137	120-150
27	70-87	78-97		120-150	130-162
28	78-97	87-108		130-162	140-175

EXHIBIT F

Guideline Sentencing Update

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

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

VOLUME 4 • NUMBER 14 • JANUARY 17, 1991

Sentencing Procedure

PRESENTENCE INTERVIEW

Sixth Circuit holds there is no Sixth Amendment right to counsel at presentence interview, but advises probation officers to honor such requests. Defendant met with the probation officer on three occasions, twice without counsel. Although nothing in the record indicated that he requested counsel or that his counsel advised the probation officer that no interviews should be conducted in the absence of counsel, defendant claimed on appeal that he was deprived of his Sixth Amendment right to counsel.

The appellate court affirmed, joining the Fourth, Fifth, and Seventh Circuits in holding that in a non-capital case the presentence interview is not a "critical stage of the prosecution" where the right to counsel attaches. *See U.S. v. Hicks*, 948 F.2d 877, 885–86 (4th Cir. 1991); *U.S. v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 792 (1991); *U.S. v. Jackson*, 886 F.2d 838, 845 (7th Cir. 1989) (per curiam).

However, the court agreed with the reasoning of *U.S. v. Herrera-Figueroa*, 918 F.2d 1430, 1437 (9th Cir. 1990) (as amended Feb. 5, 1991), in which the Ninth Circuit exercised its supervisory powers to require probation officers to honor requests for attorneys at presentence interviews. Because defendant had not made such a request here, the court did not specifically establish a similar rule, although it stated that it "would be prepared, in the exercise of our supervisory powers," to do so. The court did recommend that, "[i]f a defendant requests the presence of counsel—or if an attorney indicates that his client is not to be interviewed without the attorney being there—the probation officer should honor the request."

U.S. v. Tisdale, No. 90-3302 (6th Cir. Jan. 2, 1992) (Nelson, J.).

PROCEDURAL REQUIREMENTS

Eighth Circuit urges district courts to give "tailored explanations" for sentence when guideline range exceeds 24 months in order to avoid unnecessary appeals and remands. Defendant was sentenced at the top of the applicable guideline range of 168–210 months. He appealed, arguing that the district court had not adequately stated the "reason for imposing a sentence at a particular point within the range" as is required under 18 U.S.C. § 3553(c)(1) for ranges exceeding 24 months.

The appellate court affirmed, holding that the district court adequately explained the sentence in this case, but expressed concern "about the rising number of appeals involving section 3553(c)(1). In the interest of judicial economy, we urge sentencing courts to refer to the facts of each case and explain why they choose a particular point in the sentencing range. *U.S. v. Veteto*, 920 F.2d 823, 826 & n.4 (11th Cir. 1991); *see also U.S. v. Chartier*, 933 F.2d 111, 117 (2d Cir. 1991) (sentencing judge should demonstrate thoughtful discharge of obligation imposed by section 3553(c)(1) with degree of care appropriate to severity of punishment selected). In addition to informing the defendant and public why the sentencing court selected a particular sentence, the court's explanation 'provides information to criminal justice researchers' and 'assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements.' . . . We believe tailored explanations by sentencing courts will preclude many appeals and pointless remands. *See U.S. v. Georgiadis*, 933 F.2d 1219, 1223 (3d Cir. 1991)."

U.S. v. Dumorney, No. 91-1719 (8th Cir. Nov. 21, 1991) (Fagg, J.).

Seventh Circuit advises courts to refrain from imposing sentence on any Guidelines counts until judgment is reached on all counts. A jury found defendant not guilty on two counts, guilty on one count, and was unable to reach a verdict on two other counts. The district court granted a mistrial on the hung jury counts and sentenced defendant to 46 months on the count of conviction, but stayed execution of sentence pending appeal. The defendant did appeal his conviction and sought dismissal of the outstanding indictments on the hung jury counts. The appellate court held it did not have jurisdiction because there is no final, appealable judgment until the two outstanding counts are resolved. In addition, the sentence on the count of conviction "cannot be executed . . . until there is a final judgment on all counts of the indictment."

The court went on to emphasize that the Guidelines "have introduced a new problem into a situation like the one before us. When a defendant has been convicted on more than one count, certain grouping rules apply in determining the offense level. . . . Where conviction on one count of an indictment has occurred at an earlier time than conviction on other counts, we think that logic requires that § 3D1.1 be applied to all counts. . . . We suggest that in future cases like the present one the district court should not pronounce any sentence until it has disposed of all counts."

U.S. v. Kaufmann, No. 91-2294 (7th Cir. Jan. 7, 1992) (Fairchild, Sr. J.).

Supervised Release

Eighth Circuit holds that it was not "plain error" to impose 10-year term of supervised release agreed to in plea bargain; affirms rejection of plea agreement as too lenient compared to co-conspirators' sentences. Defendant pled guilty to drug and tax evasion charges as part of a non-binding plea bargain. The government agreed to move for a downward departure under U.S.S.G. § 5K1.1, p.s., from the agreed-upon guideline range of 97–121 months to a sentence of 27–33 months and 10 years of supervised release. The court

rejected the agreement, explaining that the maximum sentence of 33 months was unfairly low compared to sentences given to less culpable co-conspirators. A second plea agreement was reached with the same terms, except that the sentencing range was capped at 42 months. The district court accepted this agreement and sentenced defendant to concurrent terms of 39 months on the drug charge with 10 years of supervised release, 36 months on the tax evasion with one year of supervised release.

Defendant appealed, claiming that the district court abused its discretion by refusing the first plea agreement and that the 10-year term of supervised release exceeded the guideline maximum of 5 years. The appellate court affirmed, holding first that under § 6B1.2(b), p.s., the court properly used its discretion to reject the first agreement: "Prior to the Guidelines, a district court had broad discretion under Rule 11(e) to reject a negotiated plea agreement.... Here, the district court's reason for rejecting LeMay's first plea agreement was clearly an acceptable basis for exercising that discretion .... The Guidelines were not intended 'to make major changes in plea agreement practices.' U.S.S.G. § 1A.4(c). Although Chapter 6B imposes new substantive standards on the district court's task of accepting or rejecting plea agreements, it remains a discretionary task, reviewable on an abuse of discretion standard. Moreover, the district court's reason for rejecting LeMay's first plea agreement—that it provided an excessive downward departure from the Guidelines range—is a non-reviewable Guidelines decision."

As to the term of supervised release on the drug conviction, defendant "did not raise this issue in the district court, so it has been waived unless the district court committed plain error, resulting in a miscarriage of justice, by imposing a sentence in violation of law." Defendant was sentenced under 21 U.S.C. § 841(b)(1)(A), which for this defendant required a supervised release term of "at least" five years. Under the Guidelines, however, § 5D1.2(a) provides for a term of "at least three years but not more than five years." The court held that § 841(b)(1)(A) and § 5D1.2(a) "are easily reconciled if the term of supervised release authorized in § 5D1.2(a) is construed as a guideline range—three to five years—that is subject to the same departures that are applicable to the Chapter 5C imprisonment range." Also, the five-year limitation on supervised release in 18 U.S.C. § 3583(b) does not preclude a longer term because that section's "[e]xcept as otherwise provided" language allows for longer terms under § 841(b)(1)(A). The court concluded that the ten-year term "was consistent with the plea agreement, was within the court's statutory authority under § 841(b)(1)(A), and was part of a sentence that was accepted under § 6B1.2(b)(2) of the Guidelines because it 'departs from the applicable guideline range for justifiable reasons.' In these circumstances, even if LeMay did not waive this issue ..., we conclude that the resulting sentence was not illegal." *But cf. U.S. v. Esparsen*, 930 F.2d 1461, 1476–77 (10th Cir. 1991) (accepting government concession that six-year term of supervised release was improper for defendant sentenced under 21 U.S.C. § 841(b)(1)(B), which requires "at least" four-year term, because of 5-year limitation in 18 U.S.C. § 3583(b)(1)).

U.S. v. LeMay, No. 91-1604 (8th Cir. Dec. 24, 1991) (per curiam).

Departures

Mitigating Circumstances

U.S. v. Harpst, No. 91-3078 (6th Cir. Nov. 21, 1991) (Jones, J.) (Reversed—improper to depart downward because defendant's mental and emotional condition raised concerns that incarceration "might well end in his suicide." The court concluded that "the Bureau of Prisons is legally charged with providing adequate facilities and programs for suicidal inmates," and therefore "suicidal tendencies" are not a legally proper ground for departure. *See U.S. v. Studley*, 907 F.2d 254, 259 (1st Cir. 1990) (departure for mental and emotional reasons proper only where "defendant has an exceptional need for, or ability to respond to treatment [and] the Bureau of Prisons does not have adequate treatment services"). In addition, the fact that incarceration would make restitution and future employment less likely is not a valid ground for departure. *See U.S. v. Rutana*, 932 F.2d 1155, 1159 (6th Cir. 1991) ("economic considerations ... do not provide a basis for downward departure," reversing downward departure made because defendant's incarceration might result in loss of his employees' jobs).).

Extent of Departure

U.S. v. Molina, No. 90-3261 (D.C. Cir. Jan. 7, 1992) (Edwards, J.) (remanded—joining First, Fifth, and Tenth Circuits in "declin[ing] to adopt any specific procedure for use by sentencing courts in determining the appropriate extent of departure above criminal history category VI," holding only that "trial courts must supply some reasoned basis for the extent of post-category VI departures.... [and] follow some reasonable methodology, consistent with the purposes and structure of the Guidelines"). *See U.S. v. Ocasio*, 914 F.2d 330, 336-37 (1st Cir. 1990); *U.S. v. Russell*, 905 F.2d 1450, 1455-56 (10th Cir.), *cert. denied*, 111 S. Ct. 267 (1990); *U.S. v. Roberson*, 872 F.2d 597, 607 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989). *Cf. U.S. v. Schmude*, 901 F.2d 555, 560 (7th Cir. 1990) (instructing courts to use "percentage" approach to guide departure above category VI); *U.S. v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1990) (en banc) (approving *Schmude* approach).

Relevant Conduct

U.S. v. Barton, No. 90-2670 (8th Cir. November 21, 1991) (Beam, J.) (reversed—quantity of marijuana that was basis of 1983 state drug conviction (for which probation was imposed) could not be used as relevant conduct under U.S.S.G. § 1B1.3(a)(2) to determine base offense level for 1989 marijuana conviction, even though district court found that defendant had continued marijuana distribution activities during entire period: "[W]e are confident that the words 'all such acts and omissions' [in § 1B1.3(a)(2)] were not intended ... to include Barton's previous conviction.... The commentary to section 1B1.3 alludes to the limited scope of subsection (a)(2): '"Such acts and omissions" ... refers to acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable.' ... Under no circumstances could Barton now be criminally liable or 'accountable' in 1989 for the conduct that resulted in his conviction in 1983"; district court should have factored 1983 conviction into criminal history score instead).

EXHIBIT G

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Guideline Sentencing, Generally

7th Circuit upholds district court's ability to correct illegal sentence under Rule 35. (115) At defendant's original sentencing, the court departed downward and imposed no prison term based upon defendant's "extraordinary circumstances." Two weeks later, the judge, acting upon his own motion, vacated his sentencing order and resentenced defendant within the guideline range, finding that no adequate reason existed to make a downward departure. The 7th Circuit upheld the district court's ability to vacate defendant's sentence under the November 1, 1987 version of Fed. R. Crim. P. 35. Although the November 1, 1987, amendment dropped the provision expressly allowing a district court to correct an illegal sentence at any time, district courts have always had authority to correct illegal sentences even before Rule 35. Moreover, amendments to the Rule effective December 1, 1991 make the authority to correct illegal sentences explicit again. Defendant's first sentence was illegal because the judge failed to give specific reasons for the departure. *U.S. v. Himsel*, __ F.2d __ (7th Cir. Dec. 18, 1991) No. 90-3195.

5th Circuit rejects due process and equal protection challenges to career offender guideline. (120)(520) Defendant argued that the district court's use of his 1965 conviction to classify him as a career offender violated due process and equal protection. The use of this conviction was required by guideline section 4A1.2(e)(1) because defendant was incarcerated for the 1965 offense during the 15-year period prior to the instant conviction. The 5th Circuit rejected both of these constitutional challenges. There was no due process violation because the Constitution does not require individualized sentencing. The district court's consideration of past offenses occurring within 15 years of instant offense was rationally related to the goal of having dangerous criminals

serve longer sentences. *U.S. v. Guajardo,* __ F.2d __ (5th Cir. Dec. 19, 1991) No. 91-5508.

1st Circuit finds no double counting in enhancement for transferring guns to persons prohibited from owning firearms. (125)(330) Defendant was convicted of the interstate transportation and receipt of firearms. He received a two level enhancement under section 2K2.3(b)(2) for transferring the weapons to "a person prohibited by federal law from owning the firearm." The 1st Circuit rejected defendant's claim that the same behavior which provided the foundation for his own base offense was used to support the further adjustment under section 2K2.3(b)(2). Defendant's base offense level was for the transportation and receipt of guns across state lines without a license. His sentence was enhanced because he then transferred the guns to other Massachusetts residents who were prohibited from possessing guns purchased in Georgia. The sale of guns to others was not an element of the base offense level for transporting guns across state lines without a license. *U.S. v. Phillips,* __ F.2d __ (1st Cir. Dec. 27, 1991) No. 91-1176.

5th Circuit rejects double jeopardy challenge to consecutive sentences under sections 841(d) and 843(b). (125)(650) The 5th Circuit rejected defendant's claim that his consecutive sentences under 21 U.S.C. sections 841(d) and 843(b) constituted multiple punishment for the same offense. The two offenses require different elements of proof. Conviction under 843(b) requires proof that a defendant used a communications facility to facilitate the commission of a narcotics offense. A conviction under 841(d), however, requires proof that defendant possessed a precursor chemical with intent to manufacture a controlled substance. Moreover, neither offense is a lesser included offense of the other. *U.S. v. Martinez,* __ F.2d __ (5th Cir. Dec. 23, 1991) No. 91-8119.

1st Circuit rejects ex post facto claim based upon reliance upon policy statement that went into effect after crime. (131)(734) The district court departed upward based upon several grounds, including the fact that defendants' conduct was terrorism under guideline section 5K2.15. Defendants contended that the district court's reliance on the policy statement regarding terrorism violated the ex post facto clause because the statement was issued in November 1989, after the criminal acts were complete. The 1st Circuit found that although the district court improperly relied upon the statement, the error was "of no consequence." Defendants made no showing that the court's reliance upon section 5K2.15 resulted in the imposition of more severe punishment than otherwise would have been ordered. The trial court articulated a number of legitimate bases for the departure apart from terrorism. Moreover, even before the publication of section 5K2.15, the court was free to consider terrorism an aggravating factor not adequately considered by the sentencing commission. *U.S. v. Johnson,* __ F.2d __ (1st Cir. Dec. 19, 1991) No. 90-2010.

Dept. of Justice says organizational guidelines do not apply to offenses committed before November 1, 1991. (131)(840) On November 7, 1991, Robert S. Mueller, III, Assistant Attorney General for the Criminal Division of the Department of Justice, issued a memorandum to all federal prosecutors advising them that the position of the Department of Justice is that the new Guidelines for Sentencing of Organizations (Chapter 8 of the Guidelines Manual which became effective on November 1, 1991) are not retroactive. The memo says the new guidelines apply only to offenses committed on or after November 1, 1991, but not to offenses committed before that date, regardless of whether application of the guidelines would have a potentially advantageous or an adverse effect on the defendant.

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5th Circuit upholds cost of imprisonment fine against constitutional and statutory challenges. (135)(145)(630) The 5th Circuit rejected defendant's claim that the cost of imprisonment fine imposed under guideline section 5E1.2(i) was inconsistent with the purposes of sentencing under 18 U.S.C. section 3553(a)(2) and that it violated the due process clause. The court disagreed with defendant's argument that the sentencing purposes set forth in section 3553(a)(2) were wholly realized by the fine table and that the additional fine under section 5E1.2(i) rendered defendant's overall fine excessive. The fact that the fine is calculated by reference to the cost of imprisonment but the money collected is actually spent on unrelated functions did not render the fine irrational. *U.S. v. Hagmann*, __ F.2d __ (5th Cir. Dec. 18, 1991) No. 92-4031.

7th Circuit upholds constitutionality of 100 to one cocaine ratio in Drug Equivalency Table. (135)(242) The 7th Circuit rejected defendant's claim that the provision in the Drug Equivalency Table treating one gram of crack cocaine as equivalent to 100 grams of cocaine violated due process. Agreeing with other Circuit courts, the court found that the highly addictive nature of crack, its growing availability, and relatively low cost increased the risks associated with its use. The 100 to one ratio was rationally related to the purpose of combatting those increased risks. *U.S. v. Lawrence*, __ F.2d __ (7th Cir. Dec. 19, 1991) No. 90-1781.

7th Circuit upholds 72-month sentence for solicitation as not cruel and unusual. (140) The 7th Circuit rejected defendant's claim that his 72-month sentence for soliciting a prison inmate to join a bank robbery conspiracy constituted cruel and unusual punishment. The sentence defendant received was about half of the statutory maximum prescribed by Congress. The court rejected defendant's argument that solicitation and the underlying offense are treated equally under the guidelines: section 2X1.1(b)(3)(A) provides for a three-level reduction in base offense level for solicitation offenses. *U.S. v. Jones*, __ F.2d __ (7th Cir. Dec. 19, 1991) No. 90-3498.

D.C. Circuit rejects cruel and unusual punishment challenge to 17-1/2 year sentence for crack distribution. (140) The D.C. Circuit rejected defendant's claim that his 17-1/2 year sentence was so grossly disproportionate to his crime of crack distribution as to violate the 8th Amendment. Defendant's lengthy sentence was mostly the result of his classification as a career offender with three prior felony convictions. The 8th Amendment permits legislatures to combat recidivism by imposing lengthy sentences on criminals with a prior record. The fact that defendant would have received a much lower sentence if he had been prosecuted in the District of Columbia courts was not relevant. *U.S. v. McLean*, __ F.2d __ (D.C. Cir. Dec. 27, 1991) No. 90-3287.

4th Circuit reverses district court's application of fraud offense characteristics to counterfeiting offense. (150)(226) Defendant was sentenced under guideline section 2B5.1 for counterfeiting. Section 2B5.1(b)(1) provides that if the face value of the counterfeit items exceeded $2,000, then the base offense level should be increased using the table at section 2F1.1. In addition to increasing defendant's offense level using the table at section 2F1.1(b), the district court also applied section 2F1.1(b)(2), which provides a two-level increase for more than minimal planning. The 4th Circuit reversed. The language of section 2B5.1(b)(1) plainly refers only to the table at section 2F1.1(b)(1), not all of the specific offense characteristics incorporated in section 2F1.1. Section 1B1.5, which provides that unless otherwise indicated, an instruction to apply another guideline refers to the entire guideline, was not applicable. Here the language used expressly indicates the table, not the entire guideline. *U.S. v. Payne*, __ F.2d __ (4th Cir. Dec. 31, 1991) No. 90-5386.

6th Circuit rejects enhancement based on co-defendant's possession of weapon. (170)(286) Three defendants challenged their enhancement under guideline section 2D1.1(b) for possession of a firearm during a drug trafficking crime. The 6th Circuit affirmed the enhancement for two of the defendants, but reversed it for the third. The first defendant admitted to police that he had control over the pistol found in the apartment that served as headquarters for the drug operations. The second defendant was a co-conspirator of the first defendant, and the possession of the weapon was reasonably foreseeable. However, the enhancement could not stand for the third defendant, because he did not plead guilty to conspiracy. Although this distinction would be irrelevant under the current guidelines, it was relevant under the 1988 version of section 1B1.3. Because the third defendant's conviction was not for conspiracy, the government was required to demonstrate that the defendant possessed the weapon himself or aided and abetted the possessed of the firearm by another. Judge Jones dissented in part. *U.S. v. Tisdale*, __ F.2d __ (6th Cir. Jan. 2, 1992) No. 91-3302.

8th Circuit affirms 2A2.1(b)(4) enhancement even though defendant was not convicted of conspiracy.

(170) Defendant paid a confidential informant to kill a government witness. He received an enhancement under section 2A2.1(b)(4), which applies "if a conspiracy or assault was motivated by a payment or offer of money or other thing of value." The 8th Circuit rejected defendant's argument that the enhancement was improper because he was convicted of attempted murder rather than conspiracy or assault. Application note 1 to section 1B1.3(a)(1) makes it clear that a defendant need not be charged with conspiracy in order for the court to take into account conspiratorial conduct in applying the guidelines. *U.S. v. Sims,* __ F.2d __ (8th Cir. Dec. 27, 1991) No. 90-2701.

Offense Conduct, Generally (Chapter 2)

8th Circuit affirms use of weapon enhancement for defendant who gave informant gun to kill witness. **(210)** Defendant hired a confidential informant to kill a government witness. As part of the conspiracy, defendant gave the informant a gun to use to kill the witness. The 8th Circuit affirmed a three-level enhancement under section 2A2.1(b)(2)(C) for threatened use of a dangerous weapon. The court rejected defendant's claim that neither he nor the informant actually threatened to use the gun against the witness since the informant actually turned the weapon over to DEA agents. From the point of view of the victim, defendant's offense involved the threatened use of a dangerous weapon. *U.S. v. Sims,* __ F.2d __ (8th Cir. Dec. 27, 1991) No. 90-2701.

7th Circuit upholds application of section 2A6.1 to threats to assault IRS agent. **(215)** Defendant was convicted of violating 18 U.S.C. section 115(a)(a)(B) for threatening to assault an IRS agent with the intent to interfere with her official duties. The 7th Circuit affirmed the application of guideline section 2A6.1 to the offense rather than section 2A2.3. Although the commentary to section 2A2.3 lists 18 U.S.C. section 115(a) as a statute to which it applies and section 2A6.1 does not, section 2A6.1, which applies to threatening communications, was clearly more applicable than section 2A2.3, which applies to minor assaults. *U.S. v. Paclone,* __ F.2d __ (7th Cir. Dec. 26, 1991) No. 90-2825.

8th Circuit rules enhancement for use of force applies to offense of sexual abuse by force. **(215)** Defendant was convicted of aggravated sexual abuse by force. The district court refused to apply an upward adjustment for use of force under section 2A3.1(b)(1) because it believed the guidelines adequately took into account the force inherent in the offense. The 8th Circuit reversed, ruling that for the adjustment to apply, the government need not show a greater degree of force than necessary to sustain the conviction. *U.S. v. Amos,* __ F.2d __ (8th Cir. Dec. 24, 1991) No. 91-2338.

9th Circuit says command not to "pull the alarm or my friend will start shooting" was "express threat of death." **(224)** The district court increased defendant's sentence by two points under U.S.S.G. section 2B3.1(b)(2)(F) (formerly section 2B3.1(b)(2)(D)) because he uttered an "express threat of death." During the robbery, the defendant told the teller not to "pull the alarm or my friend will start shooting." The 9th Circuit held that these words would cause a reasonable person to "experience significantly greater fear than the level of intimidation that is necessary to constitute an element of the offense of robbery." Accordingly the court held that these words constituted an "express threat of death" within the meaning of the guidelines. *U.S. v. Strandberg,* __ F.2d __ (9th Cir. December 30, 1991) No. 90-10615.

2nd Circuit affirms use of retail value of bootleg videotapes. **(226)** Defendant was convicted of copyright offenses for copying and distributing videotapes without the consent of the copyright owners. Guideline section 2B5.3 directs a district court to increase the base offense level if the retail value of the infringing items exceeded $2,000. Defendant challenged the district court's calculation of the retail price, contending that the court should have relied upon testimony that bootleg movies sell for $10 to $15. The 2nd Circuit affirmed the use of the retail price, rather than the lower bootleg price paid by those who are aware that the copies they are buying are not legitimate. The unauthorized copies were prepared with sufficient quality to permit defendant to distribute them through normal retail outlets. The question would have been different if the copied tapes were of inferior quality and sold to consumers who paid a reduced price for them. *U.S. v. Larracuente,* __ F.2d __ (2nd Cir. Jan. 3, 1992) No. 91-1309.

5th Circuit reverses district court's addition of two separate sentences to reach statutory minimum sentence. **(245)(650)** Defendant was convicted of drug offenses involving more than 100 marijuana plants, with a minimum sentence of five years under 21 U.S.C. section 841(b). He was sentenced to 51 months. The court also sentenced him to nine months consecutively under 18 U.S.C. section 3147, because following his pretrial release he was convicted of misdemeanor assault in state court. The 5th Circuit held that the district court erred in im-

posing less than the statutory minimum for the drug offense. Guideline section 5G1.1(b) requires a district court to apply the statutory minimum when the guideline range is below the minimum. Although defendant was to receive an additional nine months for the assault, this should have been added to the drug sentence, for a total minimum sentence of 69 months. *U.S. v. Pace,* __ F.2d __ (5th Cir. Dec. 30, 1991) No. 90-8543.

8th Circuit upholds determination of plant number based upon testimony of two Forest Service agents. (253) The 8th Circuit rejected defendant's contention that it was error to base his sentence on 110 marijuana plants instead of 71. The district court's finding that there were 110 plants was supported by the trial testimony of two Forest Service agents. *U.S. v. Ulrich,* __ F.2d __ (8th Cir. Dec. 27, 1991) No. 91-1048WA.

10th Circuit affirms reliance on original weight of marijuana despite subsequent weighing showing smaller quantity. (253) After the government seized 38 bundles of marijuana in plastic wrap from defendant, both the Border Patrol and the DEA weighed the gross weight of the bundles at 43.55 kilograms. The presentence report listed the gross weight at 43.55 kilograms, and a net weight of 41.45 kilograms. The net weight was determined by reducing the gross weight by five percent to account for packaging. Before sentencing, defendant reweighed the marijuana at 37.01 kilograms. Nevertheless, the 10th Circuit affirmed the use of the original weight. Two identical weights were calculated at the time of the seizure using two different scales which were calibrated. The five percent reduction to account for the wrapping was reasonable. There was also evidence that defendant's reweighing was unreliable: only 36 bundles were weighed and the custodian testified that he had observed marijuana lose weight when stored over the summer. *U.S. v. Molina-Cuartas,* __ F.2d __ (10th Cir. Dec. 20, 1991) No. 90-2292.

5th Circuit affirms reliance on witness who defendant claimed was incredible. (254)(770) Defendant received a pre-guidelines sentence for drug trafficking and a guidelines sentence for witness tampering. The 5th Circuit affirmed the district court's determination of drug quantity and its reliance on an FBI agent's testimony about the witness tampering incident. The source of the information about drug quantity was phone calls intercepted with a court-approved wiretap. This contained more than a sufficient indicia of reliability to meet pre-guidelines standards for sentencing. Defendant's only objection to the FBI agent's testimony was that it was based on information supplied by the witness, who had not been truthful about another matter. However, credibility determinations are for the district court. *U.S. v. Galvan,* __ F.2d __ (5th Cir. Dec. 18, 1991) No. 90-2589.

8th Circuit upholds conversion of cash into drug quantity. (254) A witness testified that he saw defendant and her husband counting $10,000 to $20,000 and speculated that it was drug proceeds. The 8th Circuit upheld the district court's conversion of the cash into 448 grams of methamphetamine for sentencing purposes. The court rejected defendant's claim that there was insufficient evidence to establish that the money was drug money she had "earned." *U.S. v. Hughes,* __ F.2d __ (8th Cir. Dec. 20, 1991) No. 91-1282.

8th Circuit affirms drug calculation. (254) The 8th Circuit rejected defendant's claim that the district court improperly determined that he had been involved with at least 2 kilograms (about 4.4 pounds) of amphetamine. Testimony revealed that defendant often dealt in ounce and half-ounce amounts, sometimes received half-pound amounts, and once received two pounds from a co-defendant. *U.S. v. Hughes,* __ F.2d __ (8th Cir. Dec. 20, 1991) No. 91-1282.

8th Circuit rules marijuana transaction was not part of same course of conduct as cocaine conspiracy. (270) The 8th Circuit rejected the district court's determination that defendant's involvement in an attempted marijuana purchase was part of the same course of conduct as the cocaine conspiracy. Under *U.S. v. Lawrence,* 915 F.2d 402 (8th Cir. 1990), the distribution of marijuana and cocaine can be part of the same course of conduct if the facts reveal a "continuous pattern of drug activity." Here, there was nothing in the record linking the Florida marijuana negotiations with the Nebraska cocaine conspiracy. Two vague statements by government witnesses suggested defendant's involvement with marijuana, but were insufficient to establish a connection between the Florida transaction and the Nebraska conspiracy three months later. *U.S. v. Montoya,* __ F.2d __ (8th Cir. Dec. 26, 1991) No. 91-1369.

1st Circuit affirms firearm enhancement even though principal reason for gun was prior robberies in neighborhood. (284) Defendant was arrested after a search revealed drugs at the market she owned and operated. A gun was found hidden in a box underneath the counter where defendant was

working. The 1st Circuit affirmed an enhancement under section 2D1.1(b) for possession of a firearm during a drug trafficking crime. Defendant testified that the gun was there for protection because the market was in a bad neighborhood and had been robbed several times. This established that she was aware of the gun's presence. It was not clearly improbable to believe that defendant would have used the gun during the drug transaction if necessary. The fact that the principal reason for the gun was the previous robberies was not relevant. *U.S. v. Almonte,* __ F.2d __ (1st Cir. Dec. 27, 1991) No. 90-1939.

8th Circuit affirms firearm enhancement for drug dealer who kept weapons at his "home base." (284) The 8th Circuit affirmed an enhancement under section 2D1.1(b) based on evidence that defendant manufactured amphetamine, led a conspiracy to distribute amphetamine, and kept several guns at the "home base" of his drug operation. *U.S. v. Hughes,* __ F.2d __ (8th Cir. Dec. 20, 1991) No. 91-1282.

8th Circuit affirms firearm enhancement for weapon found in mobile home over which defendant had joint control. (284) The 8th Circuit affirmed a firearm enhancement under guideline section 2D1.1(b), rejecting defendant's claim that she did not possess the weapons (her husband did), and that the weapons were not connected to the drug offense. Defendant, along with her husband, exercised dominion over the mobile home where the guns were, which was sufficient to show she possessed the weapons. The mobile home was adjacent to the sheds that served as methamphetamine labs. There was evidence that a drug transaction took place in the mobile home and that defendant counted drug proceeds there. She retrieved the guns from the sheriff's office after her husband pled guilty to being a felon in possession of a firearm. *U.S. v. Hughes,* __ F.2d __ (8th Cir. Dec. 20, 1991) No. 91-1282.

8th Circuit upholds addition of criminal history points for prior conviction in failure to appear case. (320)(500) Defendant pled guilty to failing to surrender for service of a sentence for fraud. He contended that it was impermissible double counting for him to receive three criminal history points under section 4A1.1(a) for the fraud conviction, since the conviction was a necessary element of his instant failure to appeal offense. The 8th Circuit rejected this argument, since the unambiguous language of section 4A1.1(a) does not provide an exception for the offense of failure to appear for service of a sentence. Moreover, criminal history is calculated independently of offense level. The court also rejected defendant's claim that it constituted "double" double counting to add an additional two criminal history points under section 4A1.1(d) for committing the instant offense while under a criminal justice sentence. *U.S. v. Burnett,* __ F.2d __ (8th Cir. Dec. 19, 1991) No. 91-1734.

1st Circuit gives broad definition to "person prohibited by federal law from owning the firearm." (330) Defendant was convicted of the interstate transportation and receipt of firearms. He received a two level enhancement under section 2K2.3(b)(2), which is applicable if the defendant knew that a purchaser was a person prohibited by federal law from owning the firearm. The 1st Circuit rejected defendant's contention that the phrase "person prohibited by federal law from owning the firearm" refers only to those persons prohibited from possessing firearms under 18 U.S.C. section 922(g). There was no reason to limit the phrase to the class of people enumerated in section 922(g). The provision was designed to address a wide variety of firearms-related offenses. *U.S. v. Phillips,* __ F.2d __ (1st Cir. Dec. 27, 1991) No. 91-1176.

1st Circuit affirms that radio-controlled detonating device made from readily-available items was sophisticated weaponry. (345) Defendants, highly educated engineers, were involved in a conspiracy to manufacture and export explosives to Northern Ireland. The 1st Circuit affirmed the district court's determination that the offense involved the export of "sophisticated weaponry" under guideline section 2M5.2, even though almost all of the items defendants exported were readily available at hobby shops and electronic stores and had common, non-military applications. Defendants' ability to take readily available items and, using knowledge and skills gained through extensive education and training, rework them into a radio-controlled detonating device showed the sophistication of the work. *U.S. v. Johnson,* __ F.2d __ (1st Cir. Dec. 19, 1991) No. 90-2010.

7th Circuit affirms firearm and abduction enhancements for solicitation offense. (380) Defendant was convicted of soliciting another man to commit a bank robbery. In determining defendant's offense level, the district court added four points under section 2B3.1(b)(4)(B) for abducting a person, and four points under section 2B3.1(b)(2)(B) for use of a weapon. Defendant challenged the enhancements because under note 2 to section 2X1.1, in computing the offense level for solicitation, the court should not add levels for speculative specific offense characteristics. The 7th Circuit upheld the enhancements because they were not speculative. There was ample evidence that a firearm was to be

used and that the conspirators were planning to abduct the bank manager in order to get the keys to the bank vault. That the robbery never took place was irrelevant to the computation and did not change the evidence into mere speculation. *U.S. v. Jones,* __ F.2d __ (7th Cir. Dec. 19, 1991) No. 90-3498.

Adjustments (Chapter 3)

7th Circuit affirms official victim adjustment for threats to IRS agent. (410) Defendant was convicted of threatening to assault an IRS agent with the intent to interfere with her official duties. He was sentenced under guideline section 2A6.1, and received an adjustment under section 3A1.2 because of the official status of the victim. The 7th Circuit affirmed the official victim enhancement, rejecting defendant's claim that since the victim's status was an element of the crime, her base offense level considered the victim's official status. The victim's status was not incorporated into guideline section 2A6.1. *U.S. v. Pacione,* __ F.2d __ (7th Cir. Dec. 26, 1991) No. 90-2825.

8th Circuit affirms leadership role where person was helping defendant sell drugs. (431)(770) The 8th Circuit upheld a managerial enhancement under 3B1.1 despite defendant's claim that it was based on unreliable hearsay in the presentence report. The evidence supporting the enhancement was that (1) defendant sold cocaine to undercover officers, (2) admitted he lived on the second floor of the apartment in which police founds guns, four ounces of cocaine, and over $8,000 in cash, (3) a person in the apartment when defendant was arrested stated he was helping defendant sell drugs, and (4) three months later, defendant possessed $3,300 in cash. The district court did not have to rely the person's hearsay statement about helping defendant sell drugs, because defendant also volunteered this statement, on his recross-examination at trial. The sentencing court was entitled to rely on evidence presented at trial. *U.S. v. Roberts,* __ F.2d __ (8th Cir. Jan. 3, 1992) No. 91-2630.

6th Circuit rejects managerial enhancement for directing innocent employees in bank transaction. (432) Defendant bought a boat, paying $42,000 in cash as part of the vessel's $67,000 sales price. As a condition of purchase, he directed two employees of the boat seller to deposit the cash in amounts of less than $10,000. The 6th Circuit reversed an enhancement under guideline section 3B1.1(c) based upon defendant's direction of the seller's employees. The enhancement is not triggered by the use of the services of innocent people. The district court made no finding that the employees were anything but innocent dupes. *U.S. v. Kotoch,* __ F.2d __ (6th Cir. Jan. 2, 1992) No. 91-3364.

7th Circuit upholds obstruction enhancement based on defendant's perjury at trial. (461) Defendant received an obstruction of justice enhancement based upon his testimony that a prison inmate did not intend to participate in a bank robbery conspiracy, which conflicted with the inmate's conviction of conspiracy. Defendant contended that this was unfair because he only testified as to his perception of the inmate's intent, which did not amount to perjury. The 7th Circuit upheld the enhancement, finding it was supported by two theories. First, defendant's testimony concerning who initiated the robbery plan conflicted with the testimony of another conspirator. Second, defendant's testimony concerning the inmate's intent also justified the enhancement. The court rejected the 4th Circuit's decision in *U.S. v. Dunnigan,* 944 F.2d 178 (4th Cir. 1991), holding that an enhancement under section 3C1.1 based upon a defendant's perjury at trial was an unconstitutional infringement on the right to testify. *U.S. v. Jones,* __ F.2d __ (7th Cir. Dec. 19, 1991) No. 90-3498.

7th Circuit affirms obstruction enhancement based on three different stories defendant gave police. (461) Following his arrest, defendant told police that he kept cocaine in his apartment for his personal use and denied any knowledge of the source of the cocaine. Later that day, defendant gave a second statement in which he claimed that he purchased the cocaine from a drug dealer named "Solo," that he made crack from the cocaine, and that the crack was for his personal use. At trial, defendant denied any knowledge of the drugs which were found in his apartment. The 7th Circuit ruled that this was sufficient to support an enhancement for obstruction of justice. *U.S. v. Lawrence,* __ F.2d __ (7th Cir. Dec. 19, 1991) No. 90-1781.

1st Circuit reverses obstruction enhancement based on use of alias to obtain post office box and possession of loaded weapon at time of arrest. (462) Defendant pled guilty for failing to appear for trial on firearms charges. He received an enhancement for obstruction of justice because (a) when he was apprehended, he did not immediately comply with police orders to "get down" and was in possession of a loaded handgun and ammunition, and (b) he had rented a post office box under an alias. The 1st Circuit reversed. Obtaining the post office box to make it more difficult for authorities to locate him was not obstruction because application note 4(d) to

the November 1990 version of guideline section 3C1.1 prohibits an adjustment for fleeing from arrest. In addition, possession of a firearm and momentary hesitation in submitting to arrest did not create a risk of death or serious bodily injury as described in section 3C1.2. Although defendant's conduct came close to the line, something more, such as reaching for the gun, was required. *U.S. v. Bell,* __ F.2d __ (1st Cir. Jan. 2, 1992) No. 91-1479.

8th Circuit affirms district court's refusal to apply obstruction enhancement. (462) The 8th Circuit found no error in the district court's refusal to apply an enhancement for obstruction of justice based on defendant's testimony at trial. The district court determined that although defendant's testimony at trial differed from his statement to the police that consensual sexual contact did occur, the "general tenor" was similar. The defendant's mere denial of guilt is not a basis for the enhancement. *U.S. v. Amos,* __ F.2d __ (8th Cir. Dec. 24, 1991) No. 91-2338.

D.C. Circuit rules court was aware of its ability to grant acceptance of responsibility reduction to career offender. (480) The D.C. Circuit rejected defendant's claim that the district court mistakenly believed that it could not grant an acceptance of responsibility reduction to a career offender. The court stated that it adopted the presentence report with the exception of the recommended reduction for acceptance of responsibility. It found that defendant was not entitled to the reduction. This indicated that the court was correctly treating defendant's entitlement to the reduction as dependent on the facts. *U.S. v. McLean,* __ F.2d __ (D.C. Cir. Dec. 27, 1991) No. 90-3287.

D.C. Circuit rules court need not give notice of its intent to deny an acceptance of responsibility reduction. (480) Although the presentence report recommended a reduction for acceptance of responsibility, the district court denied the reduction after listening to defendant's explanation of his conduct. The D.C. Circuit rejected defendant's contention that he did not receive adequate notice that his acceptance of responsibility would be an issue at the sentencing hearing. The presentence report, given to defendant 10 days prior to the sentencing hearing, stated that the court would consider granting a downward adjustment. The burden was on defendant to demonstrate a recognition and affirmative acceptance of personal responsibility. If a defendant desires the reduction, he must be prepared to carry his burden of convincing the court by a preponderance of the evidence. *U.S. v. McLean,* __ F.2d __ (D.C. Cir. Dec. 27, 1991) No. 90-3287.

9th Circuit says defendant was not penalized for going to trial. (484) The 9th Circuit ruled that the district court's pretrial comment showed "only that the court wanted to make sure [defendant] knew that if he was convicted, the court might approve an upward departure" based on the nine counts of bank robbery the government dismissed just before trial. At sentencing the judge specifically stated that her refusal to reduce the sentence for acceptance of responsibility was not based on the defendant's decision to go to trial. Based on the evidence in the record, the 9th Circuit stated that "we would not be justified in disregarding her statement." *U.S. v. Hall,* __ F.2d __ (9th Cir. December 311, 1991) No. 91-50137.

9th Circuit finds remorse insincere where statements were made after "coaching" from defense counsel. (486) The district court relied on the probation officer's finding that defendant's professions of remorse were not sincere because they were made only after "coaching and direction" from counsel. On appeal, defendant claimed that the denial of the reduction was illegal because it resulted ultimately from his exercise of his rights to have counsel present at his presentence interview. The 9th Circuit rejected the argument, ruling that the court's reliance on the probation officer's observation "does not indicate the court felt that [defendant] should be punished for having counsel present to advise him, but simply that [defendant's] manner of responding did not reflect his own, genuine remorse. *U.S. v. Hall,* __ F.2d __ (9th Cir. December 311, 1991) No. 91-50137.

8th Circuit denies acceptance of responsibility reduction to marijuana grower. (488) The 8th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility where the district court stated "I believe you stand before me today believing that the whole world is wrong, that you have a right to grow on your land marijuana if you wish to." *U.S. v. Ulrich,* __ F.2d __ (8th Cir. Dec. 27, 1991) No. 91-1048WA.

8th Circuit denies acceptance of responsibility reduction to defendant who provided excuses for his crime. (488) The 8th Circuit found no error in the district court's denial of a reduction for acceptance of responsibility. Defendant had provided a number of excuses for his failure to appear offense, including fear of prison, car problems, death threats, temporary insanity and misinformation from his attorney. Although defendant submitted a letter to the district court asserting that "nobody is responsible for me not showing up, but me," this did not entitle him to

the reduction. *U.S. v. Burnett*, __ F.2d __ (8th Cir. Dec. 19, 1991) No. 91-1734.

9th Circuit says defendant was not punished for being mentally ill because his explanations were irrational. (488) Defendant argued that because he had a history of mental illness, his motive for, and explanations about the crimes were bound to be irrational and "[t]o withhold the reduction because of this irrationality would be to improperly punish him for being mentally ill." The 9th Circuit rejected the argument, stating that defendant was not denied the acceptance of responsibility reduction because of his "status" as a mentally ill person, but because his statements were not credible. The court also rejected the argument that the discrepancies were immaterial because they did not concern his "own involvement" but his explanations about the involvement of others. *U.S. v. Hall*, __ F.2d __ (9th Cir. December 311, 1991) No. 91-50137.

8th Circuit reverses acceptance of responsibility reduction where defendant withdrew guilty plea. (490) The 8th Circuit ruled that the district court erroneously granted defendant a reduction for acceptance of responsibility. Defendant pled guilty but later withdrew his plea, maintaining at trial that no sexual contact took place. The fact that defendant admitted to the crime and accepted responsibility when he entered his guilty plea became irrelevant once he proceeded to trial and denied the offense. *U.S. v. Amos*, __ F.2d __ (8th Cir. Dec. 24, 1991) No. 91-2338.

Criminal History (§4A)

5th Circuit finds no plain error in determination that prior conviction was not part of offense. (504)(855) Defendant contended for the first time on appeal that his state conviction for motorcycle theft was part of his federal drug conviction, and therefore it was error to consider it a prior conviction under section 4A1.2. The 5th Circuit found no plain error. Whether the state conviction involved conduct that was part of the federal offense was a factual issue for the district court to resolve. The documents which defendant presented on appeal were never presented to the district court. In addition, the sentence was within the guideline range that would have been applicable had the district court not counted the state conviction as a prior conviction. *U.S. v. Bleike*, __ F.2d __ (5th Cir. Dec. 20, 1991) No. 91-2143.

5th Circuit uses later state conviction to increase criminal history at second federal sentencing. (504) When defendant was originally sentenced, he had no prior convictions and fell into criminal history category I. However, state criminal charges were pending against him. When defendant was resentenced, he was placed in criminal history category II because in the meantime he had been convicted of the state charges. The 5th Circuit upheld the district court's use of the subsequent state conviction to increase defendant's criminal history at his second sentencing. The district court was not required to order the preparation of a revised presentence report when the case was remanded for resentencing. The original presentence report indicated that the state charges were pending, and defendant was on notice that the court was aware of the pending charges. *U.S. v. Bleike*, __ F.2d __ (5th Cir. Dec. 20, 1991) No. 91-2143.

8th Circuit refuses to consider whether prior conviction should be counted because it would not change criminal history category. (504) The 8th Circuit refused to consider defendant's argument that the district court erroneously included in his criminal history category a prior conviction more than 10 years old, because its exclusion would not change defendant's criminal history category. *U.S. v. Ulrich*, __ F.2d __ (8th Cir. Dec. 27, 1991) No. 91-1048WA.

5th Circuit upholds five year criminal history departure based on numerous convictions more than 15 years old. (510) The district court found that criminal history category VI did not adequately reflect the seriousness of defendant's past criminal conduct, since he had numerous convictions which were more than 15 years old and thus were excluded from the calculation of his criminal history. Accordingly, it departed upward by adding five years to defendant's mandatory 15-year sentence for possession of a firearm by a felon. The 5th Circuit affirmed the departure, finding both bases for the departure and the extent of the departure to be reasonable. *U.S. v. Webb*, __ F.2d __ (5th Cir. Dec. 23, 1991) No. 91-8111.

4th Circuit prohibits inquiry into underlying circumstances to determine what is a crime of violence. (520) The 4th Circuit held that in determining what is a crime of violence, a court may not look to the specific actions of the defendant, but only to the general elements of the offense of conviction. The Sentencing Commission's 1989 revision to the commentary to section 4B1.2 directs the sentencing court to look to the description of the defendant's actions as charged in the indictment. Thus, it appears to disfavor a wide-ranging inquiry into the specific circumstances surrounding a conviction. This conclu-

sion was supported by the recent revision of the commentary effective November 1, 1991, and the Supreme Court's interpretation of crimes of violence under 18 U.S.C. section 924(e). Although some courts have attempted to draw a distinction between prior offenses and instant offense, applying fact-specific analysis only to the instant offense, such an approach is unsupported by the language of the guidelines. *U.S. v. Johnson,* __ F.2d __ (4th Cir. Dec. 19, 1991) No. 90-5248.

4th Circuit rules felon's possession of a firearm is not per se a crime of violence. (520) Refusing to look into the underlying circumstances, the 4th Circuit held that a felon's possession of a firearm is not a crime of violence for career offender purposes. The danger inherent in the mere possession of a firearm is, in many cases, too highly attenuated to qualify the offense as a per se crime of violence. While a felon in possession of a firearm may pose a statistical danger to society, the court refused to interpret this statistical threat as evidence of a specific intent on the part of an individual defendant. *U.S. v. Johnson,* __ F.2d __ (4th Cir. Dec. 19, 1991) No. 90-5248.

6th Circuit holds defendant not entitled to section 851 notice for career offender enhancement. (520) Defendant was convicted of a drug offense under 21 U.S.C. section 841(a)(1). Because of his two prior armed robbery convictions, he was sentenced as a career offender under guideline section 4B1.1. The 6th Circuit rejected defendant's claim that he was entitled under 21 U.S.C. section 851 to notice of the court's intent to enhance his sentence based on his prior convictions. The mandatory protections of section 851 do not apply when a court sentences a defendant under the guidelines and an increase in sentence length occurs as a result of career offender status. *U.S. v. Meyers,* __ F.2d __ (6th Cir. Jan. 2, 1992) No. 91-1085.

8th Circuit affirms 10-year term of supervised release as provided in plea agreement. (580) Defendant's plea agreement provided for a downward departure in prison term, but a 10-year period of supervised release, rather than the three to five years called for in guideline section 5D1.2(a). The 8th Circuit rejected defendant's claim that the 10-year term of supervised release was illegal. The three to five year term in section 5D1.2(a) should be construed as a guideline range, subject to the same departures that are applicable to the Chapter 5C imprisonment ranges. *U.S. v. LeMay,* __ F.2d __ (8th Cir. Dec. 24, 1991) No. 91-1604.

9th Circuit holds robberies committed forty minutes apart were separate offenses under Armed Career Criminal Act. (520) The Armed Career Criminal Act, 18 U.S.C. section 924(e), requires a fifteen year minimum sentence for the illegal possession of a firearm if the defendant has three prior convictions for violent felonies or serious drug offenses. The prior offenses must be "committed on occasions different from one another." In this case, defendant robbed a 7-11 market in Downey, California at 9:45 p.m. and a Winchell's Donut House in Bellflower, California at 10:25 p.m. The district court, "struck by the harshness of the statute's application to a defendant who may have experienced one bad night," held that the two robberies amounted to one prior offense. On appeal, the 9th Circuit held that the prior convictions "arose from two separate and distinct criminal episodes," and required a fifteen year minimum sentence. *U.S. v. Antonie,* __ F.2d __ (9th Cir. December 31, 1991) No. 91-30017.

Determining the Sentence (Chapter 5)

8th Circuit upholds employment restrictions on supervised release term. (580) Defendant pled guilty to failing to surrender to serve his sentence for fraud arising from his sale of vending machines. The 8th Circuit upheld as a condition of supervised release the requirement that defendant be employed in a business which did not require travel or involve the sale of vending machines. Guideline section 5F1.5 provides that a court may impose a condition of supervised release prohibiting defendant from engaging in a specified occupation if the restriction is reasonably related to the offense and reasonably necessary to protect the public. The court did not err in failing to consider his age in requiring that defendant be employed, since the two-year term of supervised release ran concurrently to a five-year period of probation during which he was already required to be legitimately employed. *U.S. v. Burnett,* __ F.2d __ (8th Cir. Dec. 19, 1991) No. 91-1734.

7th Circuit says no restitution for amounts outside offense of conviction even if defendant agrees. (610) Defendant pled guilty to one count of theft involving property valued at $13,364. At sentencing, the government presented a letter which calculated the total amount stolen at $84,175.18, and then divided this by three in order to apportion the damages between defendant and the two co-conspirators. According to the letter, its purpose was "to afford the Court the opportunity to hold [defendant] accountable for one-third of the value of the property stolen"

($28,058.40). The 7th Circuit held that the $28,058.40 restitution order violated the Supreme Court's decision in *Hughey v. United States*, 110 S.Ct. 1979 (1990), because it exceeded the damages involved in the offense of conviction. This was not a case in which the defendant agreed to pay a specific sum of money. At the most, defense counsel's agreement with the letter was an acknowledgement of the accuracy of the government's figures. Moreover, even if the letter was an agreement by defendant to pay $28,058.40, parties cannot agree to waive the statutory restitution limits. *U.S. v. Braslawsky*, __ F.2d __ (7th Cir. Dec. 20, 1991) No. 90-3732.

9th Circuit permits restitution in conspiracy only for acts specifically found by the jury. (610) In *Hughey v. U.S.*, 110 S. Ct. 1979 (1990), the Supreme Court held that restitution under the Victim and Witness Protection Act, 18 U.S.C. section 3663(a)(1) must be limited to the loss caused by the offense of conviction. Here the defendants were convicted of conspiracy to commit mail and wire fraud and the district court awarded restitution to all "victims" of the conspiracy. The 9th Circuit reversed, holding that in a conspiracy, "a loss must result from the act or acts done in furtherance of the conspiracy, as specifically found by the jury." Because the verdict did not specify which acts the jury believed were committed, the court held that it was impossible to award restitution for the losses stemming from the conspiracy. *U.S. v. McHenry*, __ F.2d __ (9th Cir. December 27, 1991) No. 90-10423.

5th Circuit rules amount of fine indicated court considered defendant's ability to pay fine. (630) The 5th Circuit rejected defendant's argument that the district court failed to consider his ability to pay a $280,000 fine. The fine imposed was only a fraction of the maximum statutory fine of $4 million, which, along with the fact that the court waived the requirement that defendant pay interest, implied that the court considered defendant's ability to pay. Moreover, defendant had been convicted of importing over seven tons of marijuana into the United States. The court had reason to believe that defendant had access to funds exceeding those he voluntarily listed in his forma pauperis affidavit. *U.S. v. Hagmann*, __ F.2d __ (5th Cir. Dec. 18, 1991) No. 92-4031.

10th Circuit upholds pre-guidelines fine where defendant refused to reveal financial information. (630) In a pre-guidelines case, defendant contended that the district court failed to comply with the mandatory language of 18 U.S.C. section 3622(a)(3) in imposing a $30,000 fine because no evidence existed to support a finding that he was capable of paying the fine in one year. The 10th Circuit upheld the fine, since the record revealed that defendant had earned over $100,000 over the years and owned substantial real and personal property. He refused to furnish any information to the court concerning his financial status. If defendant felt the court had inadequate information to impose such a fine, he should have provided the information to the district court. *U.S. v. Burson*, __ F.2d __ (10th Cir. Dec. 20, 1991) No. 90-2162.

3rd Circuit upholds district court's discretion to impose consecutive sentences. (650) While awaiting a hearing on a parole violation, defendant walked away from custody. He was eventually apprehended and pled guilty to obstructing a court order. The sentence was ordered to run consecutively to the sentence defendant received for his probation violation. The 3rd Circuit upheld the consecutive sentences. Section 5G1.3, permitting concurrent sentences if the instant offense arose out of the same transaction as the unexpired sentence, was not applicable. Defendant's obstruction offense did not arise out of the same transaction as the sentence he received after his probation violation. For purposes of determining "the same transactions or occurrences" under section 5G1.3, if an offense is committed while a defendant is on parole, that offense is compared to the offense for which the defendant is on parole, rather than to the acts constituting the parole violation. *U.S. v. Chasmer*, __ F.2d __ (3rd Cir. Dec. 23, 1991) No. 91-5538.

3rd Circuit upholds consecutive sentence even though not indicated in written judgment. (650) Defendant's written judgment did not indicate that his sentence was to be consecutive to the sentence he was already serving. Nonetheless, the 3rd Circuit upheld the consecutive sentence because when an orally pronounced sentence conflicts with a judgment and commitment order, the orally pronounced sentence controls. The absence of an indication that the new sentence was to be consecutive to defendant's current sentence was "at most a clerical error subject to correction under Fed. R. Crim. P. 36." *U.S. v. Chasmer*, __ F.2d __ (3rd Cir. Dec. 23, 1991) No. 91-5538.

5th Circuit holds that district court was aware of its discretion to impose concurrent sentences. (650) Defendant pled guilty to two drug charges, one carrying a statutory maximum penalty of 120 months and the other carrying a statutory maximum penalty of 48 months. Defendant's guideline range was 262 to 327 months. In such a situation, guideline section 5G1.2(d) directs the district court to impose consecutive sentences for the two offenses. The 5th Circuit

rejected defendant's claim that in imposing consecutive sentences, the district court was unaware of its discretion under 18 U.S.C. section 3584 to impose concurrent sentences. The apparently contradictory provisions of section 5G1.2(d) and 18 U.S.C. section 3584 can be reconciled to mean that a sentencing court retains some discretion under section 3584 to impose a concurrent sentence, but that discretion is limited to the district court's power to depart from the guidelines. The appellate court assumed that the district court understood that under the guidelines, consecutive sentences were mandatory, but that it always had the authority to depart. *U.S. v. Martinez,* __ F.2d __ (5th Cir. Dec. 23, 1991) No. 91-8119.

5th Circuit upholds consecutive sentence despite contrary recommendation in plea agreement. (650) (780) The 5th Circuit upheld the district court's order of consecutive sentences, even though defendant's plea agreement recommended concurrent sentences. The recommendation was made under Fed. R. Crim. P. 11(e)(1)(B), which states that the district court is not bound by the recommendation. Moreover, the district court advised defendant it was not bound by the recommendation. *U.S. v. Bleike,* __ F.2d __ (5th Cir. Dec. 20, 1991) No. 91-2143.

5th Circuit finds nothing extraordinary about defendant's age or health to justify downward departure. (660)(736) Defendant argued that the district court should have departed downward from the guidelines because of his advanced age and poor health. The 5th Circuit upheld the refusal to depart. Although the language in sections 5H1.1 and 5H1.4 suggests that there may be extraordinary circumstances where age and health may be relevant to the sentencing decision, there was nothing about defendant's age (55) or health (cancer in remission, high blood pressure, a fused right ankle, an amputated left leg, and drug dependency) that would justify such a departure. The judge's statement that "the only way we're going to take care of this man's health problems is to keep him locked up because his self cure is not very good" did not show the judge refused a downward departure because of defendant's health problems. *U.S. v. Guajardo,* __ F.2d __ (5th Cir. Dec. 19, 1991) No. 91-5508.

5th Circuit reverses downward departure based upon community ties and defendant's redeeming characteristics. (690) The district court departed downward because of defendant's ties to the community and his history of community service. The judge also departed because he found that defendant was a "worthwhile person" with redeeming characteristics. The 5th Circuit reversed, ruling that neither of these was adequate grounds for a downward departure. Guideline section 5H1.6 provides that community ties are generally irrelevant to sentencing. The factors enumerated may supply a basis for determining what term of imprisonment is appropriate within the applicable guideline range, but they cannot be used to depart below the guideline range. Even if the judge thought defendant was a worthwhile person, Congress intended to eliminate these personal factors from sentencing. *U.S. v. O'Brien,* __ F.2d __ (5th Cir. Dec. 30, 1991) No. 90-8549.

Departures Generally (§5K)

8th Circuit reverses downward departure based upon the nature of defendant's forced sexual assault. (715) Defendant was convicted of aggravated sexual abuse by force. The 8th Circuit reversed the district court's downward departure to offense level 27 based upon the "nature" of defendant's forced sexual assault. Differences in the severity of the conduct underlying the charged offense were considered by the sentencing commission in determining the sentencing range. *U.S. v. Amos,* __ F.2d __ (8th Cir. Dec. 24, 1991) No. 91-2338.

1st Circuit affirms upward departure for terrorists exporting weapons to Northern Ireland. (725) Defendants were involved in a conspiracy to manufacture and export explosives to Northern Ireland. The district court departed upward because of the "cool deliberative, calculated" quality of defendants' discussions regarding the development of weapons which had the potential to kill numerous innocent people, the extreme amount of planning involved in the offense, the multiple occurrences of illegal conduct, and the threat to national security. The 1st Circuit affirmed, ruling that all of these factors were appropriate grounds for the departure. Section 5K2.8 specifically authorizes a departure for unusually cruel or extreme conduct. Although the court did not expressly mention section 5K2.8, it did rely upon section 5K2.14, which authorizes departures for endangering public welfare and national security, and comment 2 to section 2M5.2, which permits departures where an extreme amount of planning or sophistication, or multiple occurrences is found. *U.S. v. Johnson,* __ F.2d __ (1st Cir. Dec. 19, 1991) No. 90-2010.

Sentencing Hearing (§6A)

8th Circuit affirms denial of continuance of sentencing hearing despite attempt to discharge

counsel. (750) The day defendant's counsel filed objections to the presentence report, defendant sent a letter to counsel purporting to terminate their relationship. Defendant then retrieved his file from counsel and prepared and submitted his own objections to the presentence report, while counsel submitted a motion to withdraw. At the sentencing hearing a month after counsel's objections were filed, the court refused to permit counsel to withdraw and denied defendant's motion for a continuance. The 8th Circuit found no error despite defendant's claim that his counsel was unprepared for the hearing. Defense counsel had two weeks to prepare for the hearing with the file and a month to prepare without the file. The objections to the presentence report did not require additional testimony. At the hearing, counsel and defendant argued their respective objections and the court accepted one, which reduced defendant's total offense level. *U.S. v. Ulrich,* __ F.2d __ (8th Cir. Dec. 27, 1991) No. 91-1048WA.

9th Circuit holds that a defendant has a due process right to allocution at sentencing. (750) Federal Rule of Criminal Procedure 32 provides that defendants in federal criminal case must be allowed to personally address the court at sentencing. However, the courts have been split as to whether this right of allocution is constitutionally based. In this habeas corpus case filed by a California prisoner, The 9th Circuit explored the "ancient origins" of the common law right of allocution and held that a defendant has a due process right to speak to the trial court before sentencing *if he makes such a request.* The court thus invalidated the contrary ruling in *People v. Cross,* 213 Cal.App.2d 678, 682, 28 Cal.Rptr. 918 (1963). Since the California state judge in this case refused to permit defendant to speak despite his request, the case was remanded to determine whether the error was harmless. Judge Hall dissented. *Boardman v. Estelle,* __ F.2d __ (9th Cir. January 9, 1992) No. 90-55238.

6th Circuit finds no due process violation in permitting probation officers to prepare presentence report from notes. (760) The 6th Circuit rejected defendant's claim that it violated due process to permit a probation officer to prepare presentence reports from notes rather than verbatim transcripts. After the presentence report is prepared, copies of the report must be given to defendant and his counsel at least 10 days prior to sentencing. The defendant must be given the opportunity to present objections to the report, and the court must make factual findings as to each alleged inaccuracy in the report. Given these procedural protections, the fact that the probation officer may work from notes rather than from a verbatim transcript did not violate due process. *U.S. v. Tisdale,* __ F.2d __ (6th Cir. Jan. 2, 1992) No. 91-3302.

6th Circuit rejects 6th Amendment right to counsel at presentence interview with probation officer. (760) The 6th Circuit held that a defendant does not have a 6th Amendment right to counsel at the presentence interview with the probation officer. Because the probation officer does not act on behalf of the prosecution, the presentence interview in a non-capital case is not a "critical stage of the prosecution." Nonetheless, probation officers should honor a defendant's request that his attorney be present during the interview. Here, nothing in the record reflected that defendant ever asked to have his attorney present during the presentence interviews or that his counsel ever notified the officer that no interviews were to be conducted in his absence. *U.S. v. Tisdale,* __ F.2d __ (6th Cir. Jan. 2, 1992) No. 91-3302.

4th Circuit rejects claim that evidence of additional drug deal at sentencing was vindictive. (765) At defendant's sentencing hearing, a government witness testified about defendant's involvement in cocaine transactions that had not been mentioned at trial. The sentencing hearing was necessary because defendant challenged the findings in the presentence report. Defendant contended that she would not have faced the additional testimony had she not exercised her right to challenge the presentence report. Hence, she argued that the government's response to her challenge (bringing additional evidence to refute the challenge), constituted a vindictive attempt to chill her initiative. The 4th Circuit found no merit to the argument. Once issues in the presentence report are brought into dispute, both sides are free to present any relevant evidence to resolve the dispute. The convening of the post-trial sentencing hearing failed to create a "reasonable likelihood" that the government acted vindictively merely by following the procedures set forth in the guidelines. *U.S. v. Mabry,* __ F.2d __ (4th Cir. Dec. 24, 1991) No. 90-5490.

8th Circuit rules district court did not rely on hearsay in determining drug quantity. (770) The 8th Circuit rejected defendant's claim that the district court improperly relied on hearsay to establish the amount of amphetamine involved in his offense. The district court heard direct testimony from a DEA agent and a chemist at the sentencing hearing, and this evidence was not hearsay. Therefore, *U.S. v. Fortier,* 911 F.2d 100 (8th Cir. 1990), which held that hearsay evidence cannot be used at the sentencing hearing to enhance a sentence, is not applicable.

Moreover, *Fortier* has recently been called into question and may be overruled when the 8th Circuit decides *en banc U.S. v. Wise*, 923 F.2d 86, *vacated upon granting of rehearing en banc*, (8th Cir. March 15, 1991). *U.S. v. Hughes*, __ F.2d __ (8th Cir. Dec. 20, 1991) No. 91-1282.

Plea Agreements (§6B)

8th Circuit upholds district court's rejection of plea agreement containing sentence cap. (780) Defendant's first plea agreement provided that the government would move for a downward departure to a maximum sentence range of 27 to 33 months, and that defendant could withdraw his guilty plea if the district court rejected the downward departure motion. The district court rejected the plea agreement because the maximum 33-month sentence was unfairly low in comparison to the longer sentences the court had previously given to defendant's co-conspirators. The 8th Circuit found no abuse of discretion in the district court's rejection of the plea agreement, finding that the court's reason for rejection was clearly acceptable. Moreover, the district court's determination that the plea agreement provided for an excessive downward departure was a nonreviewable guidelines decision. *U.S. v. LeMay*, __ F.2d __ (8th Cir. Dec. 24, 1991) No. 91-1604.

Violations of Probation and Supervised Release (Chapter 7)

9th Circuit holds that probation violator in possession of drugs must be sentenced to one-third of original probation term. (800) 18 U.S.C. section 3565(a) provides that when a probationer is found in possession of a controlled substance, "the court *shall* revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." The 9th Circuit held that the term "original sentence" means not only the period of incarceration that could have been originally imposed but also the term of probation imposed after the original sentence. The court distinguished seemingly contrary rulings in *U.S. v. Alli*, 929 F.2d 995 (4th Cir. 1991), *U.S. v. Foster*, 904 F.2d 20 (9th Cir. 1990), *U.S. v. Von Washington*, 915 F.2d 390, 391 (8th Cir. 1990), and *U.S. v. Smith*, 907 F.2d 133, 135 (11th Cir. 1990), on the ground that those cases relied on section 3565(a)(2) which permitted the court to impose "any other sentence that was available under subchapter (A) at the time of the initial sentencing period." Here the original guideline called for incarceration for one to seven months and the court sentenced defendant to three years' probation. Thus it was proper on revocation of probation, to sentence him to one year in prison. *U.S. v. Corpuz*, __ F.2d __ (9th Cir. January 8, 1991) No. 91-10132.

Appeal of Sentence (18 U.S.C. §3742)

8th Circuit rules possible erroneous downward departure was not plain error. (855) At sentencing, the government failed to object to the court's decision to grant a downward departure because defendant had stopped using drugs for over a year prior to his indictment, had maintained steady employment during that time, and had been willing to provide assistance to the government. The 8th Circuit refused to review the government's objection to the departure, since it had not been raised below. The departure, even if erroneous, did not result in a miscarriage of justice, and therefore was not plain error. *U.S. v. Ragan*, __ F.2d __ (8th Cir. Jan. 3, 1992) No. 91-2098.

6th Circuit refuses to review refusal to depart based on duress defense. (860) Since the district court was aware of its ability to depart downward under guideline section 5K2.12 based on duress, and exercised its discretion not to depart, the 6th Circuit found no legal error in the district court's refusal to depart. *U.S. v. Meyers*, __ F.2d __ (6th Cir. Jan. 2, 1992) No. 91-1085.

8th Circuit refuses to review failure to depart downward despite recommendation in presentence report. (860) The 8th Circuit refused to review the district court's refusal to make a downward criminal history departure, despite a recommendation for such a departure in defendant's presentence report. A refusal to depart from the guidelines is generally not reviewable. *U.S. v. Hughes*, __ F.2d __ (8th Cir. Dec. 20, 1991) No. 91-1282.

Forfeiture Cases

3rd Circuit holds property pledged to obtain loan to finance drug transaction was forfeitable, even though funds were never used for that purpose. (900) The 3rd Circuit held that real property pledged to obtain a home equity loan to finance a drug purchase was forfeitable, even though the loan proceeds were not ultimately used to make the drug deal, and were returned to the bank. No distinction is made in the forfeiture statute, 21 U.S.C. section 881(a)(7), between an actual use and an intent to use property to facilitate a drug transaction. Here, claimant admitted

that he intended to use the loan proceeds to buy marijuana and that he took all necessary steps with the bank to obtain the loan. The only reason he did not use the funds was because they were not available in time to coincide with his trip to Arizona to buy the marijuana. *U.S. v. RD 1, Box 1, Thompsontown, Delaware Township, Juniata County, Pennsylvania,* __ F.2d __ (2nd Cir. Dec. 23, 1991) No. 91-5200.

CERTIORARI GRANTED

1.*U.S. v. Wade,* 936 F.2d 169 (4th Cir. 1991), cert. granted, *Wade v. United States,* 112 S.Ct. 635 (Dec. 9, 1991).

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

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Guideline Sentencing, Generally

9th Circuit rejects constitutional challenges to minimum life sentence for first degree murder. (120)(140) Defendants argued that their mandatory minimum life sentence for first degree murder under 18 U.S.C. section 1111(b) constituted cruel and unusual punishment, and violated equal protection and due process. The 9th Circuit rejected each of these arguments, relying on *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991). The court found no right to an individual assessment of the appropriateness of a life sentence, and no violation of the 8th Amendment's protection against cruel and unusual punishments. With regard to equal protection, the court noted that even though defendants convicted of murder under 21 U.S.C. section 848(e) may receive a sentence of between 20 years and death, the differences between that statute and section 1111(b) provide a rational basis for proscribing different punishments and for allowing sentencing discretion under 848(e). *U.S. v. LaFleur*, __ F.2d __, 91 D.A.R. 15410 (9th Cir. December 16, 1991) No. 89-50599.

7th Circuit affirms that concurrent sentences may be imposed for conspiracy and continuing criminal enterprise violations. (125)(240) The 7th Circuit held that it did not violate double jeopardy to impose consecutive sentences for violating 21 U.S.C. section 848 (engaging in a continuing criminal enterprise) and section 846 (conspiracy). However, because conspiracy is a lesser included offense, the punishment defendant receives cannot exceed the punishment authorized for the CCE offense. Here, the district court improperly permitted the conspiracy sentence to affect the length of the sentence for the CCE offense by grouping the two offenses together and then applying the guidelines. This resulted in offense level increases based on the quantity of drugs and defendant's role in the offense, which would not

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have been possible for a CCE conviction alone. Defendant's concurrent 365-month sentences for CCE and conspiracy was far longer than the maximum 188 month sentence defendant could have received for a CCE conviction alone. *U.S. v. Bafia,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 89-2167.

9th Circuit holds that guidelines do not permit court to count pre-guidelines conduct twice. (125) The 9th Circuit held that the sentencing guidelines do not "empower a sentencing court to count *again* the same loss the court already had considered in imposing a pre-guidelines sentence. Here, the district court may have considered the pre-guidelines loss incurred prior to November 1, 1987 in imposing the pre-guidelines sentence of five years, yet counted that loss again in calculating 51 month sentence under the guidelines. Since the record was unclear, the case was remanded to permit the court to consider the loss only once. *U.S. v. Niven,* __ F.2d __ (9th Cir. December 23, 1991) No. 90-50110.

D.C. Circuit holds using amended drug guideline violated ex post facto clause. (131)(245) Defendant was convicted of possession of more than five grams of crack cocaine. The version of section 2D2.1 in effect at the time defendant committed his offense provided for a sentence of zero to six months' imprisonment. However, 21 U.S.C. section 844(a), in effect when defendant committed his offense, mandated a minimum sentence of 5 years for possessing more than five grams of cocaine base. Defendant received a 63-month sentence based upon the amended version of section 2D2.1 in effect at the time he was sentenced. The D.C. Circuit ruled that the application of the amended version of section 2D2.1 violated the ex post facto clause because it effected substantive changes which increased defendant's sentence. Section 5G1.1(b) provides that where a mandatory minimum sentence is greater than the maximum of the applicable guideline range, the mandatory minimum is the guideline sentence. Thus, defendant should have received the mandatory minimum 60 month sentence. *U.S. v. Green,* __ F.2d __ (D.C. Cir. Dec. 13, 1991) No. 90-3103.

7th Circuit rules defendant did not withdraw from conspiracy. (132)(380) The 7th Circuit upheld the district court's determination that defendant did not withdraw from a drug conspiracy prior to the effective date of the guidelines. Although defendant testified that he told the conspiracy's leader that he no longer wished to participate, the district court was entitled to disbelieve that testimony and rely on the testimony of another cocaine purchaser and federal undercover agents who described defendant's involvement after his alleged withdrawal. *U.S. v. Bafia,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 89-2167.

7th Circuit rules defendant who ceased selling drugs after smashing co-conspirator's car did not withdraw from conspiracy. (132)(380) The 7th Circuit rejected defendant's claim that he committed no acts in furtherance of the conspiracy after the effective date of the guidelines. His acts were not part of a separate conspiracy as he contended. However, even if they were, and defendant committed no acts in furtherance of the conspiracy after the guidelines' effective date, he was still liable because he did not withdraw from the conspiracy. Although defendant demolished a co-conspirator's car and stopped selling cocaine for him because they were no longer on good terms, defendant did not perform an affirmative act renouncing the goals of the conspiracy. *U.S. v. Bafia,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 89-2167.

9th Circuit holds that mail and wire fraud are not continuing offenses. (132) The 9th Circuit held that 18 U.S.C. section 1341 and 1343, mail and wire fraud, are not continuing offenses because "each offense is complete when fraudulent matter is placed in the mail or transmitted by wire." Thus the district

court did not err in sentencing the defendant under pre-guidelines law for those counts committed prior to November 1, 1987. *U.S. v. Niven*, __ F.2d __ (9th Cir. December 23, 1991) No. 90-50110.

5th Circuit rejects due process claim based upon late receipt of affidavit supporting loss calculation. **(135)(761)** The presentence report calculated the loss at $37 million. Three days prior to sentencing, defendant submitted an objection to the presentence report contending that the loss was only $41,900. The prosecution responded by filing, less than 24 hours before the sentencing hearing, an affidavit from an FBI agent which explained in detail the government's calculation. The 5th Circuit rejected defendant's due process claim based upon his late receipt of the affidavit. The only reason the government's submission was at the "11th hour" was because defendant failed to submit his objections to the presentence report in a timely fashion. Defendant's attorney had the original presentence report for approximately five weeks prior to the sentencing hearing, and failed to respond until three days prior to sentencing. *U.S. v. Bachynsky*, __ F.2d __ (5th Cir. Dec. 13, 1991) No. 89-2742.

9th Circuit upholds life sentence without parole for crack dealer with three priors. **(140)** Defendant was convicted of possessing with intent to distribute 151.9 grams of 94% pure cocaine base. He had three prior California felony convictions for cocaine possession, and received the mandatory sentence of life imprisonment without possibility of parole under 21 U.S.C. section 841(b)(1)(A). The 9th Circuit rejected his argument that the sentence violated the 8th Amendment's ban on cruel and unusual punishment, citing *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991). The court rejected the argument that the 8th Amendment requires the judge to be able to consider mitigating circumstances, noting that *Harmelin* held that the 8th Amendment does not require individualized sentencing for sentences other than death. *U.S. v. Winrow*, __ F.2d __ (9th Cir. December 16, 1991) No. 89-50664.

9th Circuit rules that 18 U.S.C. 3661 does not conflict with Sentencing Guidelines. **(145)(660)** The district court published an opinion in *U.S. v. Boshell*, 728 F.Supp. 632 (E.D. Wash. 1990), ruling that there was a conflict between 18 U.S.C. section 3661 (which provides that no limit shall be placed on information concerning character, background and conduct of the defendant in determining sentence), and Guideline sections 5H1.1 to 5H1.6, which limit the use of specific offender characteristics in sentencing. On appeal, the 9th circuit found no conflict, ruling that the two provisions "may be reconciled by limiting consideration of offender characteristics to adjustments *within* the guideline range, and allowing departures from this range for offender characteristics only in extraordinary circumstances." *U.S. v. Boshell*, __ F.2d __ (9th Cir. December 20, 1991) No. 90-30115.

9th Circuit upholds reliance on uncharged non-federal relevant conduct in setting offense level. **(175)** Defendant pled guilty to two counts of making false statements for submitting false vouchers totaling $182. At sentencing the district court considered the entire amount of the false vouchers, $214,000, and increased his total offense level by one point for this "relevant conduct" under section 1B1.3(a)(2). On appeal, the 9th Circuit affirmed, holding that even *non-federal* relevant conduct can fall within guideline section 1B1.3. In addition, the court relied on *U.S. v. Mun*, 928 F.2d 323 (9th Cir. 1991) to hold that even if defendant were prosecuted by the state for the nonfederal conduct, that would not bar subsequent sentencing by a federal court based on the same conduct, because the double jeopardy clause does not prevent dual prosecution by separate sovereigns. *U.S. v. Newbert*, __ F.2d __ (9th Cir. December 20, 1991) No. 90-50642.

9th Circuit reaffirms that uncharged conduct may not form the basis for a departure in plea cases. **(175)(270)(718)(780)** In its original opinion in this case, the 9th Circuit held that it was bound by *U.S. v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1990) to hold that, where there is a plea agreement, the district court may not rely on uncharged bank robberies to depart upward from the sentencing guidelines. On December 24, 1991, the panel amended its opinion to add a footnote distinguishing *U.S. v. Loveday*, 922 F.2d 1411, 1417 (9th Cir. 1991), but leaving its original opinion intact. The court noted that the full court had been advised of the government's suggestion for rehearing *en banc* and no judge of the court has requested a vote on it." The petition for rehearing was denied. *U.S. v. Faulkner*, 934 F.2d 190 (9th Cir. 1991), *as amended* December 24, 1991.

Offense Conduct, Generally (Chapter 2)

9th Circuit requires mandatory life sentence for first degree murder. **(210)(650)** 18 U.S.C. section 1111(b) directs that a defendant convicted of first degree murder "shall . . . be sentenced to imprisonment for life . . . ." The 9th Circuit found that this language required a defendant convicted of first degree

murder to be sentenced to life in prison. The statute "leaves the sentencing court no discretion to impose a lesser sentence." Thus the court held that section 1111(b) "is a minimum sentence within the meaning of section 5G1.1." The court found no inconsistency between its ruling and 18 U.S.C. 3559, which defines first degree murder as Class A felony, nor section 3581 which states that the authorized terms of imprisonment for a Class A felony are "the duration of the defendant's life or any period of time." The court agreed with the 2nd and 3rd Circuits that section 3581 "is simply not intended to modify established statutory sentences." Judge Norris dissented. *U.S. v. LaFleur,* __ F.2d __ (9th Cir. December 16, 1991) No. 89-50599.

7th Circuit rejects departure for prior similar offenses because defendant already received enhancement. (220)(514) The district court departed upward in part because the similarity between defendant's instant conviction for interstate transportation of stolen property and his 1975 conviction involving stolen property showed a need for greater deterrence. The 7th Circuit rejected this as a proper ground for departure because defendant had already received a four-level enhancement under guideline section 2B1.2(b)(3)(a) for being in the business of receiving and selling stolen property. This enhancement adequately reflected the need for extra deterrence because only those who have previously engaged in significant illegal conduct similar to the instant offense would receive such an enhancement. Judge Kane dissented. *U.S. v. Connor,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 90-2669.

6th Circuit upholds application of section 2B3.2 to attempt to extort money to gain approval for rezoning. (224)(230) Defendant, an associate of a powerful politician, attempted to extort money from developers in order to obtain the politician's support for their rezoning bill. The 6th Circuit upheld the application of guideline section 2B3.2, which applies to threats to injure a person or drive an enterprise out of business. Defendant's exploitation of the developer's fears was based on the implied threat that, unless payments were made, rezoning would never take place, and the developers would suffer a devastating economic loss. Section 2C1.1, which applies to the bribery of a public official, was not applicable. Defendant was not a public official and the politician was to be bribed in a matter not involving his official actions, for he was not a member of the planning commission or the city council. *U.S. v. Williams,* __ F.2d __ (6th Cir. Dec. 17, 1991) No. 90-6600.

9th Circuit uses market value of counterfeited tapes in setting copyright offense level. (226)(330) Defendants were convicted of conspiracy to traffic in counterfeit labels and criminal infringement of copyright after customs agents discovered 2.6 million counterfeit audio tape labels, 11,700 counterfeit cassette tapes and tape duplicating machines. The court calculated the probable or intended loss under 2F1.1 as $10,454,400 by multiplying $4 per tape times 2,613,600 labels. On appeal, the 9th Circuit rejected the defendant's argument that the district court should have used the profit lost by the victims, i.e. the recording industry, rather than the market value of the tapes. Reliance on the market value of the counterfeited tapes was reasonable in a copyright case. *U.S. v. Hernandez,* __ F.2d __ (9th Cir. December 24, 1991) No. 90-50556.

4th Circuit affirms calculation of expected benefit from bribery scheme. (230) Defendant used a lobbyist to bribe legislators to pass legislation favorable to a company in which defendant had a 20 percent interest. The 4th Circuit affirmed an 11 level enhancement under guideline section 2C1.1(b)(2)(A) based upon defendant's expected receipt of over $800,000 as a result of the scheme. The district court properly included in the calculation the $500,000 that the company promised to pay defendant if the bill passed, even though the company later reneged on its promise. The evidence also supported the court's determination that defendant's 20 percent interest in the company, amounting to more than $600,000, was a benefit received from passage of the legislation, since passage of the legislation was essential to maintaining the company as an operating business entity. The court rejected the government's contention that the district court should have included in the calculation the total profit the companies involved would have received from the scheme. Unlike other provisions of the guidelines, section 2C1.1 does not focus on the total loss or harm caused by the offense. *U.S. v. Ellis,* __ F.2d __ (4th Cir. Dec. 12, 1991) No. 90-5726.

9th Circuit rejects challenges to mandatory sentence of life without possibility of parole. (245) Defendant, who was only 22 years old, argued that the mandatory life sentence without possibility of parole required by 21 U.S.C. section 841(b)(1)(A) was intended only to apply to "drug kingpins." He also argued that section 841 was in conflict with 18 U.S.C. section 3661 which provides that no limitation shall be placed on the information a court receives in imposing sentence. The 9th Circuit rejected each of these arguments, and also rejected arguments that section 841 was unconstitutionally vague, that it vio-

lated the 6th Amendment right to counsel, and violated equal protection because prosecutors allow some defendants but not others to cooperate and avoid the mandatory sentence. *U.S. v. Winrow,* __ F.2d __ (9th Cir. December 16, 1991) No. 89-50664.

1st Circuit affirms that defendant was aware of total amount of cocaine in his suitcase. (250) Defendant was arrested after 4,054 grams of cocaine were found in the walls of his suitcase and another 165.1 grams were found in an aerosol can in the suitcase. He contended that it was error to sentence him on the basis of the full quantity of cocaine because he was unaware of the 4,054 grams in the walls of the suitcase. The 1st Circuit found that the district court's determination that defendant was aware of the 4,054 grams was not clearly erroneous. Where there is more than one reasonable inference that may be drawn from undisputed facts, the court's choice from among supportable alternatives cannot be clearly erroneous. It was permissible to infer from the facts that defendant knew what was in the suitcase he was carrying. *U.S. v. Cetina-Gomez,* __ F.2d __ (1st Cir. Dec. 17, 1991) No. 91-1216.

7th Circuit upholds drug quantity calculation based on lowest weekly estimate. (254) The 7th Circuit affirmed the district court's determination that defendant possessed with intent to distribute 5,386.5 grams of cocaine over the course of a drug conspiracy. The district court multiplied the lowest weekly amount of cocaine defendant admitted receiving by the number of weeks he acted as a distributor. Defendant's admission was corroborated by several other distributors and by the large amounts of money defendant owed the drug leader. *U.S. v. Bafia,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 89-2167.

7th Circuit reverses determination that $117,000 listed in drug notes corresponded to five kilograms of cocaine. (254) Notes found in defendant's wallet at his arrest indicated transactions involving $117,000. A government agent testified that the notes indicated that defendant had control over $117,000 of cocaine. Based upon evidence of the going price for cocaine at the time of defendant's offense, the district court determined that defendant was responsible for over five kilograms of cocaine. The 7th Circuit reversed, noting that the drug notes did not refer to specific quantities or prices of cocaine, or even to cocaine. The district court relied on price data in the presentence report, which in turn relied upon a confidential source that indicated that a kilogram of cocaine cost $22,000 to $24,000. Given the prices quoted in the report, $117,000 could represent anywhere between 4.875 and 5.318 kilograms of cocaine. *U.S. v. Duarte,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 91-1203.

7th Circuit reverses aggregation of uncharged drugs because court failed to make relevant conduct determination. (270) Defendant was convicted of conspiring to distribute 1.177 grams of cocaine seized from him during his arrest. The district court included in the calculation of his offense level five kilograms of cocaine based on drug notes found in his wallet at his arrest. The 7th Circuit reversed, because the district court failed to determine that the transactions recorded in the drug notes were part of the "same course of conduct or common scheme or plan" as the offense of conviction. Nothing suggested a temporal, geographical or any other relationship between the transactions recorded in the notes and the offense of conviction. That the notes were found in defendant's wallet at the time of his arrest was not very probative. On remand, however, the government should be given the opportunity to connect the notes to the instant offense. *U.S. v. Duarte,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 91-1203.

5th Circuit affirms that presence of firearms was foreseeable in drug smuggling case. (284) The 5th Circuit upheld an enhancement for possession of a firearm during a drug trafficking crime, holding that the presence of the firearms was foreseeable to defendant. Defendant was offered $20,000 in Colombia to escort a "small package" to the United States. He stowed away for five days in cramped quarters with five other men, one of whom was carrying a sock full of bullets. The men, their clothes and their food all were in close proximity to the drugs and guns for the duration of the trip. *U.S. v. Ortega-Mena,* __ F.2d __ (5th Cir. Dec. 10, 1991) No. 91-2047.

3rd Circuit rules loss under fraud guideline is greater of actual, intended or probable loss. (300) Defendant induced a bank to make $13.75 million loan for a shopping center by falsely inflating the rental income from the center. After defendant defaulted, the bank received a deed in lieu of foreclosure and eventually sold the shopping center for $14.5 million, $750,000 more than the loan. The 3rd Circuit vacated the district court's determination that $13.75 million was the appropriate measure of loss under section 2F1.1, the fraud guideline. Loss under the fraud guideline is different than loss under section 2B1.1, the theft guideline. All thefts involve an intent to deprive the victim of the full value of the property taken, while fraud may not. In this case, defendant did fraudulently obtain $13.75 million, but he gave something in return: a mortgage of the prop-

erty. Loss under the fraud guideline should be calculated as actual loss (measured at the time of sentencing), unless the intended or probable loss is greater and is determinable. The court rejected defendant's claim that the loss should be reduced further to reflect other causes of the loss beyond the defendant's control. However, to the extent actual loss had other causes, the district court might depart downward to reflect this. *U.S. v. Kopp,* __ F.2d __ (3rd Cir. Dec. 4, 1991) No. 91- 5453.

5th Circuit upholds five level departure based on over $5 million in loss caused by fraud. (300)(715) The 5th Circuit affirmed a five level upward departure in offense level based upon the district court's determination that the loss caused by defendant's fraud was well in excess of $5 million. The record supported the determination that the loss substantially exceeded $5 million. The presentence report calculated the loss at between $15 and $37 million, and defendant presented no evidence to controvert the government's figures. Guideline section 2F1.1 in effect when defendant was sentenced contemplated losses of $5 million or less. It was reasonable for the district court to consider proposed amendments to section 2F1.1 as a yardstick to measure the appropriate number of levels to depart. *U.S. v. Bachynsky,* __ F.2d __ (5th Cir. Dec. 13, 1991) No. 89-2742.

9th Circuit includes $5 million check in loss despite argument that check could not have been taken seriously. (300) Commentary Note 10 to Guideline Section 2F1.1 says that the total dollar loss may overstate the seriousness of the offense when "an instrument . . . was so obviously fraudulent that no one would seriously consider honoring it . . . . In such instances a downward departure may be warranted." The 9th Circuit stated that this comment does mean that the check should not be included in the base offense level. Accordingly the court upheld the district court's inclusion of a $5 million check written on defendants Merrill Lynch account, finding that the defendants "intended to inflict a $5 million loss by attempting to pass the check." The court stated that the district court's decision not to depart downward was not reviewable on appeal. *U.S. v. Joetzki,* __ F.2d __ (9th Cir. December 19, 1991) No. 90-10312.

9th Circuit affirms offense level based on "intended loss" rather than "probable loss." (300) Defendants gained access to ATM account and personal identification numbers and were arrested in possession of approximately 1,480 encoded counterfeit ATM cards, 4,100 card with magnetic tape that had not yet been encoded and 800 cards to which magnetic tape had not yet been attached. The district court increased their offense level by 10 points, finding that the cumulative loss intended exceeded $2 million. Application Note 7 to section 2F1.1 provides that "if a probable or intended loss . . . can be determined, that figure [should] be used if it [is] larger than the actual loss." On appeal, the conspirators argued that the figures were speculative and not realistic. The 9th Circuit rejected the argument, holding that section 2F1.1 only requires a calculation of "intended loss" and does not require that the intention be realistic. *U.S. v. Koenig,* __ F.2d __ (9th Cir. December 19, 1991) No. 89-50523.

9th Circuit finds attempt guideline 2X1.1 inapplicable in setting fraud offense level under 2F1.1. (300)(380) Defendants were convicted of conspiracy to produce counterfeit ATM cards. They argued that they were entitled to a three-level reduction under section 2X1.1(b) because they had not completed the crime. The 9th Circuit rejected the argument, ruling that section 2X1.1 does not apply if the offense is covered by a more specific guideline, here section 2F1.1. Moreover, the crime of which the defendants were convicted, 18 U.S.C. section 1029, "expressly covers conspiracies and attempts to commit fraud." The court noted that the Sentencing Commission amended Commentary Note 9 to section 2F1.1 effective November 1, 1991 to require specifically that the "offense level" for "partially completed" offense "be determined in accordance with the provisions of 2X1.1." But the court ruled that this amendment amounted to a substantive change that was not in effect at the time of sentencing in this case. *U.S. v. Koenig,* __ F.2d __ (9th Cir. December 19, 1991) No. 89-50523.

9th Circuit upholds expert testimony that pornographic material showed a prepubescent minor. (310) The district court heard expert testimony from the state and the defendant regarding the ages of the children shown in the materials. The court gave the testimony of the government's expert more weight because she was "much more familiar with the area of inquiry . . . [and] has had greater experience in it." The 9th Circuit upheld the district court's finding as not clearly erroneous. *U.S. v. Cipollone,* __ F.2d __ (9th Cir. December 11, 1991) No. 90-50707.

9th Circuit groups separate instances of child pornography separately. (310)(470) The 9th Circuit upheld the presentence report's conclusion that counts I and IV of the indictment represented "factually unrelated instances of the same type of conduct occurring months apart, involving separate photographs or videotapes of different minors and

are, therefore, not grouped." The 9th Circuit held this was proper because the offense behavior was "not continuous" within the meaning of U.S.S.G. section 3D1.2(d). The court agreed with the 5th Circuit's decision in *U.S. v. Gallardo*, 915 F.2d 149, 151 (5th Cir. 1990), that "each separate use of the mail to transport or ship child pornography should constitute a separate crime because it is the act of either transporting or shipping that is the central focus of this statute." *U.S. v. Cipollone*, __ F.2d __ (9th Cir. December 11, 1991) No. 90-50707.

10th Circuit holds most analogous offense for false reports to airline was possessing dangerous weapons while boarding aircraft. (215)(330)(390) Defendant was convicted of making two false reports to an airline, in violation of 49 U.S.C. section 1472(m), for claiming that his ex-wife's suitor was on board carrying a handgun and explosives. There is no sentencing guideline for that offense. The 10th Circuit reversed the district court's application of guideline section 2A6.1 (Threatening Communications), holding that section 2K1.5 (Possessing Dangerous Weapons While Boarding an Aircraft) was the most analogous guideline. The offense of threatening communications is committed by making threats against a President, foreign dignitaries and a former President, or using the mail to make a threat. Defendant's conduct did not implicate any of these crimes. A closer parallel existed between his crime and the offense of carrying weapons aboard an aircraft. *U.S. v. Norman*, __ F.2d __ (10th Cir. Dec. 17, 1991) No. 91-3099.

Adjustments (Chapter 3)

5th Circuit affirms that victims of medical insurance fraud included defendant's patients. (410) Defendant, a physician, defrauded medical insurance companies and the Department of Defense by submitting false diagnoses in order to obtain payment for treatments not covered by his patients' policies. The 5th Circuit upheld a vulnerable victim enhancement under guideline section 3A1.1, rejecting defendant's claim that the only "victims" of his fraud were the insurance companies and the government, not his patients. For each false diagnosis submitted, an unwitting patient was made an instrument of the fraud. In addition, the weight loss and smoking cessation programs run by defendant were not merely controversial, but were frequently ineffective and in some cases actually harmful to the patients. *U.S. v. Bachynsky*, __ F.2d __ (5th Cir. Dec. 13, 1991) No. 89-2742.

8th Circuit affirms official victim adjustment for falsely reporting income to government employees who had role in foreclosure. (410) Defendant was convicted of filing more than fifty 1099 tax forms falsely reporting over $20 million of miscellaneous income to a judge, lawyers, bankers, county commissioners and other government employees who had a role in the foreclosure and liquidation of his farm. Relying on its recent decision in *U.S. v. Telemaque*, 934 F.2d 169 (8th Cir. 1991), the 8th Circuit affirmed an official victim enhancement under guideline section 3A1.2. *U.S. v. Citrowske*, __ F.2d __ (8th Cir. Dec. 12, 1991) No. 91-1701.

4th Circuit upholds leadership role of defendant who used lobbyist to bribe legislators. (431) Defendant used a lobbyist to provide state legislators with cash and other bribes to induce them to pass favorable legislation. He challenged a four level enhancement based upon his leadership role in the offense under section 3B1.1(a), claiming that because the lobbyist, rather than he, knew the senators necessary to obtain passage of the legislation, he did not exercise the requisite degree of control over the scheme. The 4th Circuit upheld the enhancement, since even if defendant did rely upon the lobbyist's contacts, this did not necessarily negate defendant's leadership role in the bribery scheme. The evidence also supported the district court's determination that the criminal activity was "otherwise extensive," since it involved four major participants as well as other lobbyists, legislators and their staffs. *U.S. v. Ellis*, __ F.2d __ (4th Cir. Dec. 12, 1991) No. 90-5726.

9th Circuit upholds finding that defendant was a manager, given "low burden of proof." (431) The district court found that defendant was a manager because he was "often on site," and "recruited and hired two of the illegal aliens" and gave them instructions on how to make the counterfeit tapes. The 9th Circuit affirmed, given "the low burden of proof required for sentencing, and our limited standard of review." *U.S. v. Hernandez*, __ F.2d __ (9th Cir. December 24, 1991) No. 90-50556.

9th Circuit upholds managerial role where defendant recruited another person and acted as manager. (431) The district judge based its increase on the fact that defendant helped recruit at least one other person and played a managerial role in the scheme. The 9th Circuit found this determination was not clearly erroneous. *U.S. v. Koenig*, __ F.2d __ (9th Cir. December 19, 1991) No. 89-50523.

7th Circuit rejects attempted escape as grounds for departure but would permit obstruction en-

hancement. (461)(514) The 7th Circuit rejected an upward departure based on defendant's attempted escape from custody prior to trial. The court agreed with the 8th Circuit's decision in *U.S. v. Cox,* 921 F.2d 772 (8th Cir. 1990) that an attempted escape did not justify a departure. The appellate court also disagreed with the district court's determination that only an "arbitrary" distinction between section 4A1.1(d) and (e), (pre-trial and post-trial detention), prevented the attempted escape from being included in defendant's criminal history. The Sentencing Commission could rationally decide that one who has been convicted of a crime is more dangerous than someone who has not yet been convicted. However, the court said the attempted escape would have warranted a two-level enhancement in offense level for obstruction of justice under section 3C1.1. Judge Kane dissented. *U.S. v. Connor,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 90-2669.

7th Circuit affirms obstruction enhancement based on defendant's perjury at trial. (461) The 7th Circuit affirmed the district court's determination that defendant had committed perjury at trial and earned a two-level enhancement for obstruction of justice. At trial, defendant testified that he had never received or sold cocaine. Given the verdict of the jury, the district court could only find that defendant lied. *U.S. v. Bafia,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 89-2167.

6th Circuit reverses obstruction enhancement because misrepresentations did not impede investigation. (462) The 6th Circuit reversed an enhancement for obstruction of justice under guideline section 3C1.1 based on the lies defendant told FBI agents during their investigation. Application note 4 specifically permits lies to investigating agents provided they do not significantly impede the investigation. Defendant's lies did not significantly impede the investigation, because the agents already knew the facts as corroborated by the agents' surveillance and tape recordings. Although defendant's failure to confess and cooperate when first approached by the government required the government to continue an investigation that might otherwise have been shortened, this is not grounds for an obstruction enhancement. *U.S. v. Williams,* __ F.2d __ (6th Cir. Dec. 17, 1991) No. 90-6600.

9th Circuit says that 25-mile high-speed chase was not obstruction of justice. (462) Defendant led the agents on a chase at speeds of over 100 miles per hour through villages and around various road blocks. He was finally stopped by an embankment, twenty-five miles later. Relying on *U.S. v. Garcia,* 909 F.2d 389, 392 (9th Cir. 1990), the 9th Circuit held that "fleeing from arrest" is not obstruction of justice and therefore it was error for the district court to enhance the defendant's sentence. "Moreover, whether a defendant recklessly endangered others while fleeing bears no logical relation to whether that defendant was obstructing the law enforcement officers who were attempting to apprehend him." The court noted that the guidelines were amended effective November 1, 1990 to provide an enhancement of two levels for recklessly endangering others during flight. *See* section 3C1.2. But that amendment took effect after defendant was sentenced. The court expressed no opinion on whether the facts of the case might justify an upward departure. *U.S. v. Christoffel,* __ F.2d __, 91 D.A.R. 15655 (9th Cir. December 19, 1991) No. 90-10405.

10th Circuit rules two false reports to airline should be grouped together. (470) Defendant was convicted of making two false reports to an airline, claiming that his ex-wife's suitor was on board carrying a handgun and explosives. The 10th Circuit held that under section 3D1.2 (b), the two counts should be grouped together. The counts were part of a single course of conduct with a single criminal objective, representing one composite harm to the same victim. The court rejected the government's contention that the airline was the "primary" victim of defendant's threats, and that defendant constituted a separate risk of harm to different flights, crews and passengers. Defendant did not target the airline for harm, he targeted his ex-wife's suitor. The scheme was motivated by only one desire: to "bring grief" to the suitor. *U.S. v. Norman,* __ F.2d __ (10th Cir. Dec. 17, 1991) No. 91-3099.

6th Circuit denies acceptance of responsibility where defendant denied essential facts of guilt. (488) Defendant, an associate of a powerful politician, attempted to extort money from developers in order to obtain the politician's approval for their rezoning bill. Defendant attempted to portray his contact with the developers as a legitimate business relationship in which he was to be a lobbyist, denied offering the politician any of the money he received from the developer, and stated that the developer, rather than he, brought up the subject of money. The 6th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility. Defendant put the government to its burden of proof and denied the essential facts of his guilt. *U.S. v. Williams,* __ F.2d __ (6th Cir. Dec. 17, 1991) No. 90-6600.

9th Circuit denies credit for acceptance of responsibility where defendant showed no contrition and

testified falsely. (492) Defendant testified at trial, admitting that he formed the companies, and that he made the representations for which he was charged. He also substantially cooperated with the government in this "complicated, document-laden proceeding." Nevertheless the district court found that defendant showed "no contrition," "testified falsely in certain instances," and was a "cold and callous individual" with no "redeeming" features. The 9th Circuit affirmed the district court's refusal to give credit for acceptance of responsibility. *U.S. v. Niven,* __ F.2d __ (9th Cir. December 23, 1991) No. 90-50110.

Criminal History (§4A)

9th Circuit affirms adjustment for being on unsupervised probation at the time of the offense. (500) Defendant argued that it was "pure fortuity" that he was on unsupervised probation at the time of the offense. The 9th Circuit found no inconsistency in the fact that if defendant had been jailed for the earlier offense rather than being given probation, he would have had a lower criminal history score: "A subsequently enhanced penalty is not an unfair exchange for a prior grant of leniency." *U.S. v. Niven,* __ F.2d __ (9th Cir. December 23, 1991) No. 90-50110.

7th Circuit rules that defendant's federal stolen goods and state weapons offenses were related. (504) On December 2, 1975, defendant was sentenced by a federal court for the sale and receipt of stolen goods. On April 20, 1976, he was sentenced by a state court for possession of a dangerous weapon on July 18, 1974, the date of his arrest for the federal offense. The district court treated the two offenses as separate in determining defendant's criminal history score. On appeal, the 7th Circuit reversed, holding that the two cases were "related" under guideline section 4A1.2(a)(2). The possession of the weapon occurred on the same date as the possession of stolen goods, even though defendant probably possessed the stolen goods for some time prior to his arrest. The court thought it likely that defendant had the weapons to defend himself and the stolen goods. The Sentencing Commission intended a broad definition of related cases. *U.S. v. Connor,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 90-2669.

8th Circuit affirms that separate proceedings by different jurisdictions were *not* related. (504) The 8th Circuit rejected defendant's claim that because he received concurrent sentences, two of his prior convictions had been "consolidated" for sentencing and thus were related cases under section 4A1.2. That defendant was convicted and sentenced in two separate proceedings by different courts having separate jurisdictions was by itself enough to support the district court's determination. Even if a single jurisdiction had imposed the sentences, the bare fact that the sentences were concurrent was insufficient to show consolidation. *U.S. v. Watson,* __ F.2d __ (8th Cir. Dec. 17, 1991) No. 91-1414.

9th Circuit upholds use of uncounseled conviction in criminal history. (504) The 9th Circuit held that "an uncounseled misdemeanor may be used to enhance a subsequent sentence where the lack of counsel is not due to operation of law, but because the defendant knowingly waived his right to counsel." *U.S. v. Niven,* __ F.2d __ (9th Cir. December 23, 1991) No. 90-50110.

9th Circuit refuses to entertain challenge to prior conviction raised for the first time on appeal. (504) Defendant argued that the district court erroneously added one point to his criminal history point total for a 1985 Arizona DUI conviction. Defendant argued that there was no factual basis for this conviction, but he did not raise this issue in the district court and failed to demonstrate that the case fell into one of the narrow exceptions to the rule that the court will not consider issues raised for the first time on appeal. Accordingly, the 9th Circuit declined to consider the issue. *U.S. v. Christoffel,* __ F.2d __ (9th Cir. December 19, 1991) No. 90-10405.

7th Circuit holds that old conviction with slight similarity to instant offense may be ground for upward departure. (510) The district court departed upward in part because one of defendant's prior felony convictions was excluded from his criminal history calculation. The 7th Circuit found that because there was a slight similarity between the prior offense and the instant offense, this could be a proper ground for departure. The old conviction was for an assault and battery on a deputy after defendant was arrested breaking into a private residence to steal antiques. The instant offense was for receiving and selling stolen goods. However, the district court did not focus upon this similarity in making its departure decision. Since the case was to be remanded on different grounds, the district court was free to consider the similarity between the offenses, the fact that defendant had been in jail for over half of the previous 15 years, the seriousness of his criminal history, and any other exceptional factors in determining whether to depart. *U.S. v. Connor,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 90-2669.

7th Circuit rejects related cases as grounds for upward departure. (514) The district court departed upward in part because several of defendant's prior convictions were excluded from his criminal history calculation because they were considered related under section 4A1.2. The 7th Circuit held that the related cases were not an appropriate ground for departure. Defendant's situation was not similar to the example in the guidelines, where a number of independent cases are consolidated for sentencing. Here, the related crimes all occurred on or near the same day. The court rejected the suggestion that crimes must have been against the same victim in order to be related. *U.S. v. Connor,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 90-2669.

Determining the Sentence (Chapter 5)

9th Circuit upholds restitution to bank for expenses in reprogramming ATM information. (610) The defendants discovered a way to decode ATM information and gained access to account numbers and personal identification numbers. The district judge ordered the conspirators to pay restitution to the Bank of America for expenses in reprogramming the ATM account information. On appeal, the 9th Circuit affirmed, ruling that the restitution order reflected losses to the bank resulting directly from the decoding of the stolen information and the manufacturing of the counterfeit ATM cards. "The award did not cover expenses ancillary to the actual loss, such as the salaries of witnesses." *U.S. v. Koenig,* __ F.2d __ (9th Cir. December 19, 1991) No. 89-50523.

9th Circuit holds that improper restitution required entire sentence to be vacated. (610) In *Hughey v. U.S.,* 110 S.Ct. 1979 (1990) the Supreme Court held that restitution under the Victim Witness Protection Act must be limited to the offense of conviction. Since the restitution order here exceeded that authorized by the Victim Witness Protection Act, the sentence was vacated. The court held that the appropriate remedy was to vacate the entire sentence even where only the restitution part of the sentence was invalid. *U.S. v. Niven,* __ F.2d __ (9th Cir. December 23, 1991) No. 90-50110.

9th Circuit remands for resentencing where court failed to specify that sentences were consecutive. (650) Defendant was sentenced to 65 months for multiple counts of mail and wire fraud. On appeal, he argued that his sentence should be reduced to 60 months, the statutory maximum for each count, because the district court failed to specify that the sentences were consecutive. The 9th Circuit rejected the argument but remanded the case to permit the district court to determine whether the sentences should run concurrently or consecutively. *U.S. v. Joetzki,* __ F.2d __, 91 D.A.R. 15642 (9th Cir. December 19, 1991) No. 90-10312.

8th Circuit reverses downward departure for spouse abuse, post-arrest education, and victim's conduct. (660)(730) Defendant stabbed a woman who was in the company of defendant's boyfriend. The district court departed downward because the defendant had been abused by her husband, and because she had obtained her GED degree after arrest, and because of the victim's wrongful conduct. The 7th Circuit reversed, noting that section 5H1.3 states that emotional conditions are not ordinarily relevant in determining whether to depart. Defendant's circumstances were not sufficiently unusual: the abuse occurred three years earlier, and her present boyfriend was not the abuser. Under section 5H1.2, education is not ordinarily relevant in determining whether to depart, and defendant's attainment of the GED was not sufficiently extraordinary. Finally, the victim's wrongful conduct did not provoke the offense as required for departure under section 5K2.10. Although the victim may have breached dating etiquette, that was not wrongful. *U.S. v. Desormeaux,* __ F.2d __ (8th Cir. Dec. 17, 1991) No. 91- 1495.

11th Circuit says exceptional recovery from drug-dependency may justify departure. (680)(736) The 11th Circuit, following the 1st Circuit's decision in *U.S. v. Sklar,* 920 F.2d 107 (1st Cir. 1990), held that a post-arrest, pre-sentence recovery from drug addiction is a factor adequately considered by the sentencing commission in fashioning the acceptance of responsibility reduction under section 3E1.1. However, a truly extraordinary post-arrest, pre-sentence recovery may exceed the degree of recovery contemplated in section 3E1.1 and therefore justify a downward departure. Section 5H1.4 does not prohibit a downward departure based on a drug recovery, it merely prohibits downward departures on the basis of a defendant's theoretical diminished capacity because of his drug dependence. However, defendant's situation did not merit a downward departure because her progress toward partial recovery during her five months in a court-ordered treatment plan was not sufficiently unusual to take her out of the heartland of cases. *U.S. v. Williams,* __ F.2d __ (11th Cir. Dec. 12, 1991) No. 90- 5886.

Departures Generally (§5K)

5th Circuit rules amended presentence report gave sufficient notice of upward departure. (700)(761) Defendant's original presentence report detailed the large loss caused by defendant's fraud, but did not make a recommendation for departure. An amended presentence report, filed 30 days later, recommended a departure based an the large amount of loss. Defendant was sentenced a week later. The 5th Circuit rejected defendant's contention that he did not receive sufficient notice of the district court's intention to depart upward. The amended presentence report put him on notice that departure was recommended. The timing of the notice was reasonable. The fact that defendant was not given more time following express notification of the contemplated departure was irrelevant because defendant, his counsel and his guidelines expert "surely recognized the significance of the disputed amount and had ample opportunity to present rebuttal evidence. *U.S. v. Bachynsky,* __ F.2d __ (5th Cir. Dec. 13, 1991) No. 89-2742.

9th Circuit says court may not depart downward to avoid unequal treatment of codefendants. (716) The 9th Circuit reasoned that a "downward departure to correct sentencing disparity brings a defendant's sentence more into line with his or her codefendant's sentence, but places it out of line with sentences imposed on all similar offenders in other cases .... The greater uniformity trumps the lesser disparity." Accordingly, the court held that a court may not depart downward for the purpose of avoiding unequal treatment of codefendants. *U.S. v. Mejia,* __ F.2d __ (9th Cir. December 24, 1991) No. 91-50005. [*Ed. note: But see below*]

9th Circuit says that departure to "equalize" codefendants' sentences may be warranted in unusual circumstances. (716) In *U.S. v. Ray,* 930 F.2d 1368, 1372-73 (9th Cir. 1990), the 9th Circuit said that where unusual circumstances are present, departure for equalization of codefendants sentences may be warranted. Here, as in *Ray,* the disparity was caused by the fact that some codefendants received pre-guidelines sentences giving the judge more discretion. The case was remanded to permit the district court to state its reasons as to how much, if any, of its downward departure was justified by the desire to equalize the codefendant's sentences. *U.S. v. Boshell,* __ F.2d __ (9th Cir. December 20, 1991) No. 90-30115. [*Ed. note: But see above*]

7th Circuit rejects co-defendant's possession of weapon as grounds for upward departure. (725) After the government discovered defendant was involved in a plot to escape from jail, the government made it appear as if the plot had been successful in order to apprehend defendant's accomplices. An informant, posing as a prisoner who had escaped with defendant, called one of defendant's outside accomplices and requested transportation. The accomplice recruited defendant's girlfriend to meet the informant. The girlfriend was arrested by an agent posing as an escaped prisoner, and was found to have brought a gun to the meeting. The 7th Circuit rejected the girlfriend's possession of the gun as grounds for an upward departure in defendant's case under guideline section 5K2.6. Defendant's attempted escape was frustrated by the government before the gun became involved. Judge Kane dissented. *U.S. v. Connor,* __ F.2d __ (7th Cir. Dec. 10, 1991) No. 90-2669.

8th Circuit rejects use of paid informant in controlled buy as grounds for downward departure. (730) Defendant was arrested after selling drugs to a paid informant. The 8th Circuit affirmed the district court's refusal to depart downward under sections 5K2.0, 5K2.10 or 5K2.12. Section 5K2.10 permits a downward departure if the victim's conduct contributed significantly to provoking the offense. As a matter of law, the actions of the government, admittedly not amounting to entrapment, did not constitute victim conduct sufficient to warrant a departure. Section 5K2.12, permitting a departure on the basis of coercion and duress, also did not apply as a matter of law. Defendant did not allege that the government made any threats to him or engaged in any unlawful activity. The district court's refusal to depart under section 5K2.0 was not reviewable on appeal. *U.S. v. Martinez,* __ F.2d __ (8th Cir. Dec. 11, 1991) No. 91-1482.

Sentencing Hearing (§6A)

9th Circuit rules that failure to afford allocution was harmless error. (750) Defendant asserted for the first time on appeal that he should have been permitted to address the trial court in person at sentencing, as required by Fed. R. Crim. P. 32(a)(1)(c). The 9th Circuit agreed that the failure to afford the defendant his right to personal allocution was error. But he district court "gave him the shortest sentence permitted for a defendant with his offense level and criminal history." "In other words, the court used all the discretion it had available." The district court had no authority to depart form the guidelines, and accordingly the 9th Circuit found no reversible error. *U.S. v. Mejia,* __ F.2d __ (9th Cir. December 24, 1991) No. 91-50005.

Plea Agreements (§6B)

5th Circuit holds that Rule 11 requirement of factual basis for plea does not apply to forfeitures. (780)(920) Defendant's plea agreement provided for the forfeiture of certain property. He contended that Rule 11(f)'s requirement of an adequate factual basis for a guilty plea applies equally to forfeiture orders, and that the government failed to establish an adequate factual basis for the forfeiture. The 5th Circuit held that Rule 11's requirement does not apply to an order of forfeiture. Instead, it would uphold a forfeiture order, "if the entire record which was before the court provided a factual basis for the forfeiture." There was such a factual basis here. The indictment alleged that all of the properties listed were acquired or maintained through defendant's racketeering activities, and listed how the properties were derived from the proceeds of those activities. The plea agreement listed all of the properties that defendant agreed to forfeit. At the plea hearing, defendant acknowledged that he understood that all of the property listed in the plea agreement was subject to forfeiture. *U.S. v. Bachynsky*, __ F.2d __ (5th Cir. Dec. 13, 1991) No. 89-2742.

5th Circuit rejects claim that plea agreement entitled defendant to withdraw plea if court sentenced him outside guideline range. (790) The 5th Circuit rejected defendant's claim that he was led to believe that under his plea agreement, if the court refused to sentence him within the guideline range, it was required to permit him to withdraw his guilty plea. Although the court's explanation of the circumstances under which defendant could withdraw his plea was confusing, the court clearly stated that defendant could only withdraw his plea if the court considered matters specifically excluded from consideration under the plea agreement. The court never told defendant that it would impose a particular guideline sentence or that it would not depart upward. Therefore, the court was under no obligation to permit defendant to withdraw his plea if it departed upward. *U.S. v. Bachynsky*, __ F.2d __ (5th Cir. Dec. 13, 1991) No. 89-2742.

Violations of Probation and Supervised Release (Chapter 7)

9th Circuit says probation revocation guideline is inconsistent with statute. (800) Section 7B1.4(a) was amended effective November 1, 1990 to direct the court, when revoking probation, to consider not only the conduct for which defendant was convicted, but the probation-violating conduct as well. By contrast, 18 U.S.C. section 3565(a)(2) specifies that when a court revokes probation, it must impose a sentence that was "available . . . at the time of the initial sentencing." Accordingly, the 9th Circuit held that the revised guidelines contradict the statute. "By directing sentencing courts to consider probation-violating conduct in calculating the new sentence, the guidelines run afoul of the plain language of section 3565." "In short, the new provisions require courts to impose sentences that, in many cases, were not 'available' at the time of initial sentencing." The court vacated the defendant's sentence and remanded for resentencing within the originally available range. *U.S. v. Dixon*, __ F.2d __ (9th Cir. December 16, 1991) No. 91-30136.

Appeal of Sentence (18 U.S.C. §3742)

9th Circuit refuses to review discretionary decision not to depart downward. (860) The 9th Circuit reiterated that the district court's discretionary decision not to depart downward from the guidelines is not subject to review on appeal. *U.S. v. Cipollone*, __ F.2d __ (9th Cir. December 11, 1991) No. 90-50707.

9th Circuit says that judge did not mistakenly believe that she lacked authority to depart. (860) At sentencing, the district judge stated that the "downward departure requested does not seem to me to have a basis." Reviewing this comment in context, the 9th Circuit held that the judge's comments "demonstrate that the district judge set the sentence after assessing the facts of the case and [defendant's] culpability, and not because she mistakenly believed that she lacked the authority to depart." Accordingly the decision not to depart was not reviewable on appeal. *U.S. v. Koenig*, __ F.2d __ (9th Cir. December 19, 1991) No. 89-50523.

9th Circuit holds that selection of sentence within range is not reviewable on appeal. (865) Defendant challenged his 41 month robbery sentence. Because he failed to ask the district court to depart downward, the 9th Circuit construed his challenge as an attack on the court's discretionary selection of a sentence within a properly calculated range. The court held that it lacked jurisdiction to hear such appeals. *U.S. v. Dixon*, __ F.2d __ (9th Cir. December 16, 1991) No. 91-30136.

8th Circuit reviews de novo determination of related cases. (870) The 8th Circuit reviewed de novo the district court's decision that defendant's prior convictions were not related under section 4A1.2.

U.S. v. Watson, __ F.2d __ (8th Cir. Dec. 17, 1991) No. 91-1414.

Forfeiture Cases

9th Circuit awards attorneys' fees for delay in investigating whether currency had innocent source. (930) There was probable cause for the government to seize $12,248 in U.S. currency found in the claimant's house during a search that uncovered drugs and guns. Nevertheless, the claimant explained that the money was from a Home Maintenance and Improvement Loan that he had obtained from the City of Oakland to renovate his home. The government disbelieved the claimant's story, but conducted no other investigation, and waited 15 months before filing forfeiture proceedings. Four years later, after a trial, the court found that the currency came from the loan and that the government had unreasonably delayed instituting and prosecuting the forfeiture, thus violating the claimant's due process rights. The court awarded attorneys fees for 160 hours at the rate of $102 per hour. On appeal, the 9th Circuit affirmed, agreeing that there was no substantial justification for the delay in the proceedings and that the claimant had been prejudiced. Judge Farris dissented. *U.S. v. $12,248 U.S. Currency,* __ F.2d __ (9th Cir. December 17, 1991) No. 90-15912.

Opinion Reversed

(145)(660) *U.S. v. Boshell,* 728 F.Supp. 632 (E.D. Wash. 1990), *reversed and remanded for resentencing,* __ F.2d __ (9th Cir. December 20, 1991) No. 90-30115.

Amended Opinion

(160)(175)(224)(270)(514)(520)(770)(780) *U.S. v. Faulkner,* 934 F.2d 190 (9th Cir. 1991), *amended* December 24, 1991.

TABLE OF CASES

* U.S. G.P.O.:1992-312-344-60056