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COMMENDATIONS

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

Linda Akers, United States Attorney, James Mueller, Barbara Goodman, Gerald S. Frank, Assistant United States Attorneys, and ***Jan Emmerich, Victim/Witness Coordinator*** (District of Arizona), by Stephen F. Pontesso, Warden, Federal Correctional Institution, Tucson, for their valuable participation in the District of Arizona Criminal Responsibility Symposium, and for their informative lectures on debt collection, victim assistance, and the role of the United States Attorney's office.

James R. Allison (District of Colorado), by Richard S. Glaser, Jr., Assistant United States Attorney and Chief of the Criminal Division, Greensboro, North Carolina, for his outstanding assistance and guidance in the preparation of a search warrant in a bankruptcy fraud case involving three individuals, four corporations, a bank and a bank president.

Monica Bachner (California, Central District), by Clint L. Howard, Special Agent in Charge, U.S. Secret Service, Los Angeles, for her informative lecture on electronic surveillance at a Wire and Electronic Interception Training program.

Donna Barrow (Alabama, Southern District), by Greg A. Shubert, Regional Inspector General for Investigations, Department of Agriculture, Atlanta, for her excellent representation and successful efforts on behalf of the Department of Agriculture in a criminal matter.

Robert Berg and ***Janice Ellington*** (Texas, Southern District), by Captain Jack O. Dean, Texas Rangers, Company "D", Department of Public Safety, San Antonio, for their valuable assistance and cooperative efforts in an investigation into misappropriation of funds from Corpus Christi State University.

Michael J. Bidwill (District of Arizona), by David R. Swickard, Law Enforcement Specialist, Grand Canyon National Park, for his excellent contribution to the success of a seasonal refresher course for park rangers at the Grand Canyon National Park.

Julie Fox Blackshaw (California, Central District), by Colonel Donald R. Reid, Air Force Office of Special Investigations, Western Procurement Fraud Region, Department of the Air Force, Los Angeles, for participating in a panel discussion addressing the impact of independent Air Force contracting actions on criminal procurement fraud investigations.

Edmund Booth, Jr. and ***Kenneth Etheridge*** (Georgia, Southern District), by Richard P. Wessel, Regional Administrator, Securities and Exchange Commission, Atlanta, for their valuable assistance and cooperative efforts in connection with a civil injunctive action. ***Paula Swann*** and ***Mary Lavender*** provided excellent secretarial support.

William Lee Borden, Jr. (Oklahoma, Western District), by Richard R. Baker, Supervisory Special Agent, FBI, Oklahoma City, for his outstanding prosecutive skill in a financial institution fraud case, resulting in a guilty plea to two counts of bank fraud.

Greg Bordenkircher (Alabama, Southern District), by Rear Admiral J. M. Loy, U.S. Coast Guard, New Orleans, for his professional skill in obtaining a prompt resolution of an assault case against two Coast Guard petty officers in the performance of their duties as federal law enforcement officers.

Robert E. Bulford and ***Joseph P. Schmitz*** (Ohio, Northern District), by Joyce J. George, United States Attorney for the Northern District of Ohio, for their professional competence, dedication and integrity in successfully prosecuting a number of corruption cases involving the Cleveland Police Department, and resulting in the conviction of 45 individuals, including 28 police officers.

Mark Byrne (California, Central District), by George J. Gerstenberg, District Director, Food and Drug Administration (FDA), Public Health Service, Department of Health and Human Services, Los Angeles, for his participation in a District Conference for FDA headquarters personnel.

Bill Campbell (Kentucky, Western District), by M. E. Smithberger, Special Agent in Charge, Naval Investigative Service Resident Agency, Department of the Navy, Columbus, Ohio, for his excellent training course for Special Agents of the Columbus Resident Agency and its five subordinate Resident Units from surrounding states on the subject of fraud against the United States through Department of Defense contracting.

Robert Cares and ***Joyce Todd*** (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for their outstanding efforts in obtaining indictments against a dozen members of a criminal enterprise involved in drug trafficking and money laundering. ***Ms. Todd*** was cited for her dedication in pursuing civil and criminal forfeiture of assets held by the conspiracy participants.

Julia Caroff (Michigan, Eastern District), by Calvin C. Lutz, State Director, Farmers Home Administration (FmHA), Department of Agriculture, East Lansing, for her excellent presentation at a County Supervisors' meeting on the FmHA program and agricultural lending in general, and also for her valuable legal representation and continued assistance.

Patricia A. Conover and ***Calvin C. Pryor*** (Alabama, Middle District), by Colonel C. Gordon Jones, Chief, Contract Litigation Division, Air Force Legal Services Agency, Department of the Air Force, Washington, D.C., for their professional assistance and advice regarding two contract violations cases, and for achieving outstanding results in both instances.

Salvador A. Dominguez (Ohio, Southern District), by Richard J. Malloy, District Director, Employment Standards Administration, Wage and Hour Division, Department of Labor, Columbus, for his professionalism and legal skill in bringing a criminal case to a successful conclusion.

Suzanne E. Durrell (District of Massachusetts), by Michael Callahan, Principal Legal Advisor, FBI, Boston, for her successful efforts in defending the interests of a Special Agent in a complex Bivens appeal case.

Frederick C. Emery, Jr. (District of Maine), by William S. Sessions, Director, FBI, Washington, D.C., for his excellent legal and organizational skills leading to the successful prosecution of seven individuals and five corporations engaged in a price fixing and fraud scheme involving the purchase of approximately $75 million of frozen seafood by the Department of Defense.

Patrick Flachs (Missouri, Eastern District), by Richard D. Ross, Director, Office of the Adjutant General, Emergency Management Agency, Department of Public Safety, Jefferson City, for his valuable contribution to the success of the 1992 Fourth Annual Conference of the State Emergency Management Agency and the Missouri Emergency Preparedness Association.

Annette Forde (District of Massachusetts), by Clinton I. Newman, Assistant General Counsel, Claims Division, Law Department, U.S. Postal Service, Washington, D.C., for her diligent efforts in successfully defending the interests of the U.S. Postal Service in a tort case.

Edward F. Gallagher, III and ***Gerald Doyle*** (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for their professionalism and legal skill in successfully prosecuting a complex bankruptcy fraud case.

Arthur I. Harris (Ohio, Northern District), by Barry M. Hartman, Acting Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, for his outstanding efforts and invaluable assistance in support of the activities of the Environment and Natural Resources Division.

Elizabeth Hartwig, Special Assistant United States Attorney (California, Central District), by Charlie J. Parsons, Official in Charge, FBI, Los Angeles, for her professional skill in securing the conviction of an escrow company owner on several felony counts, and for indicting two other principals on fifteen felony counts, including bank fraud, aiding and abetting, conspiracy, and money laundering.

Charles Holman (Michigan, Eastern District), by Michael L. Willis, Postal Inspector, U.S. Postal Service, Mobile, Alabama, for his exceptional efforts in successfully prosecuting a difficult and sensitive extortion case against a mail carrier.

Mel S. Johnson, Christian R. Larsen, and ***James L. Santelle*** (Wisconsin, Eastern District), by Toby M. Harding, Special Agent in Charge, FBI, Milwaukee, for their valuable participation as judge, prosecutor, and defense counsel in a moot court training session for FBI agents.

Gaynelle P. Jones and ***Julia Stern*** (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for their outstanding efforts in bringing a complex criminal case to a successful conclusion.

Sue Kempner and ***Claude Hippard*** (Texas, Southern District), by James A. Dahl, Manager, Forfeiture Branch, U.S. Postal Service, Washington, D.C., for their valuable contribution to the success of an Advanced Forfeiture Training Seminar held recently in Houston.

Marcus M. Kerner and ***Steve Larson*** (California, Central District), by Jack Fitzgerald, Chief Ranger, Channel Islands National Park, Ventura, for their participation in a refresher course for the Channel Islands National Park law enforcement staff.

Kristi D. Lee (Alabama, Southern District), by Gary A. Purvis, Senior Vice President, SouthTrust Bank, for her successful prosecution of a bank fraud case in which the defendant obtained a $69,000 loan by submitting a false financial statement indicating a net worth of $1,000,000 when, in fact, his net worth was zero.

John Lenoir (Texas, Southern District), by Gloria Aldridge, Chief Attorney, Houston Office, Region VI, Department of Housing and Urban Development, Houston, for presenting an excellent seminar on managing complex litigation, and for providing insight into litigation procedures.

Terry Lloyd (Georgia, Southern District), was presented an enforcement award by Garfield Hammonds, Jr., Special Agent in Charge, Drug Enforcement Administration, Atlanta, for his significant contribution to drug law enforcement.

K. Roxanne McKee (Texas, Western District), by Major General William C. Wilson, Texas Army National Guard, Adjutant General's Department, Austin, for her excellent representation and professionalism in obtaining the dismissal of an action brought by an ex-employee of the Adjutant General's Department.

Manuel Medrano (California, Central District), by Donald A. Radcliffe, District Director, Immigration and Naturalization Service, Honolulu, for his participation as an instructor at a training course for Special Agents of the Investigations Branch on the topics of asset forfeiture and the applicable statutes for money laundering. Also, by John P. Luksic, Special Agent in Charge, U.S. Customs Service, Los Angeles, for his excellent presentation on asset forfeiture procedures before first and second-line supervisors at a meeting in Las Vegas.

Raymond M. Meyer (Missouri, Eastern District), by Tyrone G. Barney, Chief, Criminal Investigation Division, Internal Revenue Service, Springfield, for serving on an asset forfeiture question and answer panel, and for providing valuable insight on forfeitures from the United States Attorney's perspective.

Richard Moore (Alabama, Southern District), by Renee D. Holloway, M.D., Birmingham, for his professionalism and skill in the successful prosecution of a medical insurance fraud case. (This 7-day trial was followed closely by the psychiatric and medical community.)

Jeffrey S. Paulsen (District of Minnesota), by John R. Fleder, Director, Office of Consumer Litigation, Department of Justice, Washington, D.C., for his valuable assistance and excellent representation in the successful prosecution of several Federal Food, Drug, and Cosmetic Act cases.

Tom Payne, Jay Golden, and ***Frank Violanti*** (Mississippi, Southern District), by K. D. Kell, Inspector in Charge, U.S. Postal Service, New Orleans, for their successful prosecution of a complex oil and gas lease scheme involving mail fraud, wire fraud, securities fraud, and money laundering. (The defendant was sentenced to serve 20 years.)

Robert D. Potter, Jr. (North Carolina, Eastern District), by Rear Admiral D. M. Williams, Jr., JAGC, Naval Investigative Service Command, U.S. Navy, Washington, D.C., for his outstanding service and guidance in the investigation of alleged contract fraud aboard a Greek vessel, resulting in over $1.6 million in recoveries for the U.S. Government.

Christopher P. Reynolds and ***Carol Sipperly*** (New York, Southern District), by James M. Fox, Assistant Director in Charge, FBI, New Rochelle, for their demonstration of professional and legal skill in the prosecution of a bribery and conspiracy case, resulting in convictions of all three defendants. ***Eric Hagans*** provided valuable paralegal support.

Steven M. Reynolds (Alabama, Middle District), by Charles W. Archer, Special Agent in Charge, FBI, Montgomery, for his outstanding efforts in prosecuting an individual who threatened an FBI agent and also threatened to blow up the FBI building.

Mary Rigdon (Michigan, Eastern District), by Rear Admiral P. E. Versaw, U.S. Coast Guard, Washington, D.C., for her success in obtaining a favorable decision in a Sixth Circuit Court of Appeals case involving novel issues related to the computation of retirement pay for a warrant officer who was demoted prior to his separation from Coast Guard service.

David C. Scheper and ***Steve Arkow*** (California, Central District), by William R. Barton, Inspector General, General Services Administration, Washington, D.C., for their special efforts in expediting the process for obtaining four search warrants for simultaneous execution by a multi-agency task force of federal and California investigators, which resulted in the seizure of property valued at about $2 million and extensive evidence to support criminal prosecution.

Eric M. Straus (Michigan, Eastern District), by Julian W. De La Rosa, Inspector General, Department of Labor, Washington, D.C., for his outstanding prosecutive efforts leading to a guilty verdict in a case involving tax fraud and violations of the Taft-Hartley Act.

Kathleen L. Torres (District of Colorado), by Charles J. Garcia, Equal Employment Manager, Bureau of Reclamation, Department of the Interior, Denver, for her valuable instruction to Reclamation managers and supervisors on the prevention of sexual harassment.

Stephen A. West (North Carolina, Eastern District), by William (Watt) Jones, Chief of Police, Bunn Police Department, for his invaluable assistance in the prosecution of a drug case and the subsequent seizure of real property and a convenience store.

William W. Youngman (District of Oregon), by Michael P. McCarthy, District Counsel, Department of Veterans Affairs, Portland, for his excellent representation and successful prosecution of two cases, one concerning a claim of medical negligence in psychiatric care and the other concerning premises liability.

Gordon Speights Young (Texas, Southern District), by Neil Cartusciello, Chief, Environmental Crimes Section, Environment and Natural Resources Division, Washington, D.C., for his special efforts in bringing the investigation, preparation, trial, appeal and final plea negotiations in a recent case to a successful conclusion.

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HONORS AND AWARDS

EASTERN DISTRICT OF ARKANSAS

Charles A. Banks, United States Attorney for the Eastern District of Arkansas, was commended by the U.S. Fish and Wildlife Service for his aggressive prosecution of wildlife violators in the State of Arkansas. When ***Mr. Banks*** heard news reports of the killing of three black bears in the White River National Wildlife Refuge, he personally spearheaded the prosecution of a Little Rock man charged with two of the shootings. He is also responsible for a Louisiana man receiving a 20-day jail sentence for a second offense of killing too many ducks. According to the Arkansas Democrat-Gazette, ***Mr. Banks'*** respect for our outdoors, interest in the environment, and disdain for those who abuse it has been the norm throughout the last five years under his direction.

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CENTRAL DISTRICT OF CALIFORNIA

At the 1992 Honor Awards Ceremony held recently in Rockville, Maryland, David A. Kessler, M.D., Commissioner of Food and Drugs, Food and Drug Administration, Department of Health and Human Services, presented the Commissioner's Special Citation to the following Assistant United States Attorneys for the Central District of California:

Julie Zatz, for her outstanding legal representation in multidistrict tort litigation involving the regulation of oral poliovirus vaccine.

Mark A. Byrne, for his exemplary service to the Food and Drug Administration in an interagency investigation leading to the arrest and prosecution of traffickers in anabolic steroids.

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

On July 10, 1992, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, will present the 1991 Director's Awards at a ceremony in the Great Hall of the Department of Justice. Participating in the ceremony will be Deputy Attorney General George J. Terwilliger, III and Associate Attorney General Wayne A. Budd. Mr. McWhorter will honor the men and women of the United States Attorneys' offices and the Executive Office for United States Attorneys for their outstanding representation of the United States in drug-related cases, violent crime, financial institution fraud, civil enforcement, financial litigation, and a wide spectrum of law enforcement efforts. The Award recipients are as follows:

For Superior Performance As An Assistant United States Attorney

California, Central District
Manuel A. Medrano
John L. Carlton
Robert L. Brosio
Kendra S. McNally
David H. Tennant

California, Eastern District
Christopher Nuechterlein

California, Northern District
Joann M. Swanson

California, Southern District
Phillip L. Halpern

Colorado
Thomas M. O'Rourke
Mark V. Jackowski

Connecticut
John H. Durham
Robert J. Devlin, Jr.
Peter JongBloed

District Columbia
Merrick B. Garland

Florida, Middle District
Michael L. Rubinstein

Georgia, Northern District
John G. Malcolm
H. Allen Moye

Hawaii
Thomas C. Muehleck

Idaho
George W. Breitsameter

Illinois, Central District
Kendall Tate Chambers

Illinois, Northern District
Helene B. Greenwald
Theodore T. Poulos
John J. Scully

Iowa, Southern District
Lester A. Paff
Kevin E. Vanderschel

Kentucky, Western District
Mary Monica Wheatley

Maryland
Katharine J. Armentrout
Jane F. Barrett

Massachusetts
Paul V. Kelly

Michigan, Eastern District
Sheldon N. Light

Michigan, Western District
Julie Ann Woods

New Jersey
Paul H. Zoubek

New York, Northern District
Kevin E. McCormack
Edward R. Broton

New York, Southern District
Howard M. Shapiro
James B. Comey, Jr.

New York, Eastern District
Charles E. Rose, Jr.
Gregory J. O'Connell
Kevin McGrath
Neil Evan Ross
Jerome C. Roth
Faith E. Gay

Ohio, Northern District
Bernard A. Smith
Nancy A. Vecchiarelli
James R. Wooley

Pennsylvania, Eastern District
Lois J. Davis
Thomas J. Eicher
Odell Guyton
Thomas H. Suddath, Jr.

Pennsylvania, Western District
Albert W. Schollaert

Tennessee, Eastern District
Harwell G. Davis, III
Pamela G. Steele

Texas, Northern District
Terrance John Hart
Joseph M. Revesz
Thomas M. Melsheimer

Texas, Southern District
Melissa Jo Annis

Texas, Western District
John F. Paniszczyn

Virginia, Eastern District
Robert J. Seidel, Jr.
Charles D. Griffith, Jr.
David T. Maguire
Stephen P. Learned
Justin W. Williams

Washington, Western District
Bruce D. Carter
Robert H. Westinghouse

West Virginia Southern District
Larry R. Ellis

Wisconsin, Eastern District
R. Jeffrey Wagner

Wyoming
Carol A. Statkus

For Superior Performance As A Special Assistant United States Attorney

Texas, Western District
Thomas C. Roepke

Utah
Mark H. Howard

West Virginia
Northern District
David J. Horne

For Superior Performance In Financial Litigation Or Asset Forfeiture

Ohio, Northern District
Marcia W. Johnson
Richard J. French
Arthur I. Harris
Holly Taft Sydlow
Alex A. Rokakis
Patricia A. Gober

Pennsylvania
Eastern District
Virginia R. Powel

South Carolina
J. Douglas Barnett

Texas, Western District
Patsy K. Ybarra

For Superior Performance In A Litigative Support Role

New Jersey
Roberta D. Klotz

Illinois, Northern District
Carolyn Dixon

New York
Northern District
Kathleen Massarotto

Executive Office for
United States Attorneys
Joan M. Benson
Paul V. Ross

For Superior Performance In A Managerial Or Supervisory Role

Arizona
Daniel G. Knauss

California, Central District
Steven Zipperstein

Georgia, Northern District
Gerrilyn Brill

Michigan, Eastern District
Patricia G. Blake

Rhode Island
Edwin J. Gale

Executive Office for
United States Attorneys
Nancy D. Allen

For Outstanding Performance In Law Enforcement Coordination

Alabama, Middle District
Emily T. Rutledge

For Outstanding Performance In Assistance and Management Of Witnesses

Illinois, Northern District
Kimberly Lesnak

For Outstanding Performance In Assistance To Victims Of Crime

Georgia, Middle District
Sandra Keil

For Superior Achievement In Furthering Equal Employment Opportunity

Michigan, Western District
Lena L. Newton

West Virginia, Southern District
Charles T. Miller

An ***Appreciation Award*** was also presented to the following for their contributions to the Executive Office for United States Attorneys and the United States Attorneys' offices:

Colorado
Betty A. Sears

Justice Management Division
Lee Lofthus
Peter T. McSwain

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ATTORNEY GENERAL HIGHLIGHTS

Attorney General Praises Department Of Justice Attorneys On Nationwide TV

On June 25, 1992, Attorney General William P. Barr appeared on the nationwide television show "Larry King Live." During the discussions concerning the Los Angeles riots, prisons, illegal immigration, and a variety of other law enforcement issues, the Attorney General stated as follows:

> . . . I think that every Attorney General who's served in the Department, whether he be Republican or Democrat, has come away with the same conclusion, and that is the people in the Department of Justice are second to none. They're professional, they're dedicated, they're aggressive prosecutors, and they're doing a superb job. They could be making a lot more out in the private sector. And they are part of the line of defense for innocent citizens in this country, protecting them from criminals.

* * * * *

Attorney General's Advisory Committee Of United States Attorneys

On June 29, 1992, Attorney General William P. Barr announced the appointment of two new members of the Attorney General's Advisory Committee of United States Attorneys. The new members are: ***David Jordan,*** District of Utah (Salt Lake City) and ***Richard Cullen,*** Eastern District of Virginia (Alexandria)

Mr. Jordan and Mr. Cullen replace Wayne A. Budd, former United States Attorney for the District of Massachusetts, who was appointed Associate Attorney General for the Department of Justice, and E. Bart Daniel, former United States Attorney for the District of South Carolina, who has returned to private practice. The following is a complete list of members:

Chairman:
J. William Roberts, Central District of Illinois

Chairman Elect:
Thomas W. Corbett, Jr., Western District of Pennsylvania

Vice Chairpersons:
Lourdes G. Baird, Central District of California
Mike McKay, Western District of Washington

Members:
Linda Akers, District of Arizona
Jean Paul Bradshaw II, Western District of Missouri
Michael Chertoff, District of New Jersey
Marvin Collins, Northern District of Texas
Richard Cullen, Eastern District of Virginia
Jeffrey R. Howard, District of New Hampshire
David Jordan, District of Utah
Timothy D. Leonard, Western District of Oklahoma
Otto Obermaier, Southern District of New York
Gene W. Shepard, Southern District of Iowa
Robert Q. Whitwell, Northern District of Mississippi
Jay B. Stephens, District of Columbia (ex officio)
Joseph M. Whittle, Western District of Kentucky (ex officio)

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DEPARTMENT OF JUSTICE HIGHLIGHTS

New Criminal Alien And Anti-Gang Initiatives

On June 23, 1992, at a Los Angeles Town Hall address, Attorney General William P. Barr announced the following initiatives relating to criminal aliens:

• A new deportation hearing program will be instituted in the Los Angeles County jail to ensure that criminal aliens who are in custody are deported as soon as their sentences are completed. Approximately 11 percent of the county jail population are criminal aliens.

• The names of some 10,000 criminal aliens who are currently on the streets and who are the subjects of outstanding deportation orders will be added to the FBI's national criminal information base known as NCIC. This will allow state and local law enforcement to verify whether a person who has been arrested is an alien with an outstanding deportation order. A current pilot project has demonstrated the success of this program.

• Space for 300 additional criminal aliens awaiting deportation will be made available at the Terminal Island Facility and the Los Angeles Detention center. This will help ensure that criminal aliens -- whether identified through the NCIC program or otherwise -- can be deported without having to be released to the streets where they may commit more crimes.

• A directive will be given to all federal prosecutors instructing them to take steps to secure a stipulation of deportation in negotiating plea agreements with criminal aliens. This would allow criminal aliens to be summarily deported upon completion of their sentence without the need for costly and protracted proceedings.

The Attorney General also announced that fifty new FBI agents will be assigned to California to join anti-gang violent crime squads. Of these new agents, twenty six will be added to the Central District (Los Angeles); nineteen will be assigned to the Northern District and targeted principally at the gang problem in Oakland; three will be placed in San Diego; and two in Sacramento. With the addition of these new agents, the Department of Justice will have augmented since January of this year federal anti-gang resources in California by 183 federal agents, 110 of which are being assigned to Los Angeles.

* * * * *

Prosecution Strategies Against Armed Criminals And Gang Violence

On June 9-11, 1992, the Criminal Division and the National District Attorneys Association co-hosted a conference in San Diego entitled "Prosecution Strategies Against Armed Criminals and Gang Violence: Federal, State and Local Coordination." Assistant Attorney General Robert S. Mueller, III, served as conference moderator.

The conference, the first of its kind, was sponsored by the National Institute of Justice, and was attended by over 200 prosecutors, including a number of United States Attorneys, Assistant United States Attorneys, District Attorneys, and other state and local prosecutors. Speakers focused on strategies used in such cases as the El Rukns prosecution in the Northern District of Illinois, and Jamaican posse homicide cases on the streets of New York.

The Terrorism and Violent Crime Section of the Criminal Division prepared and distributed to all attendees a monograph entitled Federal Firearms Statutes: Federal Prosecution Manual. A copy of the monograph is being distributed to all United States Attorneys.

If you have any questions or inquiries, please call the Terrorism and Violent Crime Section at (202) 514-1230.

* * * * *

OPERATION WEED AND SEED

Attorney General Discusses Weed And Seed Program

During the "Larry King Live" television show on June 25, 1992, Attorney General William P. Barr discussed Operation Weed and Seed. The following is an excerpt from the transcript:

Mr. Barr: . . . The Weed and Seed program was put out long before the [Los Angeles] riots, and the whole philosophy of the program was that we have to address the problem in the inner cities and we have to marry up strong law enforcement to provide security because, as you know, the principal victims of crime in this country are the minorities in the inner city. We have to provide that kind of security to attract jobs so these other social programs -- housing and education -- can work.

So what we wanted to do was marry up strong law enforcement, community policing which brings the police and the community together working in a partnership, and then focus the social programs on these neighborhoods. I think most people who have looked at the program think it is an excellent idea. It was out on the table for a long time.

Mr. King: Do you know anyone who doesn't like it?

Mr. Barr: Not so far.

Mr. King: Is it going to take off? Is it going to work?

Mr. Barr: Well, right now, we're waiting for Congress. The President has asked Congress to provide funds for this program. We have some weed money, so we have started to weed out some of the drug traffickers and gangs in these areas. But we need the seed money as well. We need to start up these programs.

* * * * *

Operation Weed And Seed In Chicago, Illinois

On June 2, 1992, a meeting of the Law Enforcement Steering Committee was convened to discuss the status of the Ida B. Wells Housing Development, which was chosen as the targeted development for the Operation Weed and Seed project in Chicago. At the meeting, ***Fred Foreman, United States Attorney for the Northern District of Illinois,*** and other federal, state, and local law enforcement officials were commended by Matt Rodriguez, Superintendent of the Chicago Police Department, for their outstanding success thus far in the organization and implementation of the Weed and Seed program.

When United States Attorney Foreman introduced Operation Weed and Seed on December 5, 1991, the Ida B. Wells Housing Development was a natural choice for its housing diversity in high rise, low rise, and row house configuration, and its high incidents of drug-related crime. On January 2, 1992, the operation began. A strategy was developed for narcotics officers to begin undercover narcotic purchases throughout the Ida B. Wells complex and for officers from Public Housing and Gang Crimes to conduct day-to-day aggressive street enforcement. In the process, they identified and arrested the offenders in possession of narcotics and firearms, gathered intelligence, and developed their cases. Search warrants were conducted in a timely manner and an administrative

staff and headquarters were organized to digest and computerize the information. An intensive series of raids began on April 6, 1992, involving 500 Chicago Housing Authority personnel and 300 law enforcement personnel. As of May 21, 1992, the 90-day operation has resulted in 738 arrests, 143 controlled deliveries of narcotics, 65 weapons recovered, $59,000 in cash seized, and the recovery of over $500,000 in narcotics.

Immediately following the sweep operation, 87 Chicago Housing Authority police officers were deployed to the Wells community to implement the community policing program. New construction and social services are developing. Regular foot patrols now monitor the development, using the new Wells police substation as a base. Police personnel have received additional training from the Chicago Commission on Human Relations and are planning for community service activities to be implemented once a "Weed" program coordinator is hired.

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ASSET FORFEITURE

Expedited Disposal Of Seized And Forfeited Real Property And Vehicles

On May 29, 1992, Henry E. Hudson, Acting Director, United States Marshals Service, issued a memorandum to all United States Marshals concerning expedited disposal of seized and forfeited real property and vehicles. Mr. Hudson advised that there are a number of things that can be done to decrease the size of the inventory and/or shorten the amount of time property is in custody. The U.S. Marshals Service is currently reviewing the real property inventory to identify forfeited properties that have been pending disposition for two years or more. Each district office having such property will be contacted within the next few weeks to review their strategy for disposal. Some of these properties may be eligible for the "Weed and Seed" initiative, whereby real property is donated to the local government. The Marshals Service is also working on new policies and procedures for the expedited disposal of forfeited vehicles.

Attached at the Appendix of this Bulletin as Exhibit A is a copy of "Interim Procedures for the Expedited Disposal of Low Value Vehicles." Mr. Hudson advised the U.S. Marshals to follow these procedures, and also to meet regularly with the United States Attorneys and the heads of the investigative agencies to:

a. promote adequate pre-seizure planning to prevent the seizure of "liabilities" that do not have punitive value;

b. encourage the use of existing "quick release" provisions and interlocutory sales;

c. ensure that court documents are written in such a way as to facilitate the expeditious disposition of property upon forfeiture; and

d. encourage the use of expedited procedures (especially the use of substitute res bonds) for conveyances seized in drug offense cases, in accordance with the Expedited Procedures for Seized Conveyances provided at Title 21 U.S.C. 881-1 and the Expedited Forfeiture Proceedings for Certain Property provided at Title 28 C.F.R. 1316.90.

If you have any questions, please call Gary Mead, Associate Director for Operations Support, U.S. Marshals Service, at (202) 307-9032.

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EQUITABLE SHARING

District Of Nebraska

On June 19, 1992, ***Ron Lahners, United States Attorney for the District of Nebraska,*** awarded $184,276.80 to Nebraska law enforcement agencies for their role in the investigation and prosecution of drug charges involving members of the Omaha Chapter of the Hell's Angels Motorcycle Club. The Douglas County Sheriff's Department received a check in the amount of $115,173 for its efforts; the Omaha Police Division received a check for $69,103.80; and the remaining monies were allocated as the federal government's share. These checks are the result of over $230,000 in cash and approximately ten pounds of methamphetamine seized from a private residence in Waterloo, Nebraska.

In October, 1990, approximately 107 local, state and federal law enforcement officers executed sixteen search warrants and arrested fourteen individuals. Five pled guilty in federal court to various drug, money laundering, and weapons charges. Five other individuals were convicted in federal court in May, 1992 of various drug and money laundering charges. All are awaiting sentencing. At least four others were arrested and criminally charged in state court, and were prosecuted locally by the Douglas County Attorney's office.

Mr. Lahners said, "The federal forfeiture laws have become a valuable tool in assisting law enforcement in drug investigations. We are transferring the financial burden of drug enforcement from the taxpayers to the drug dealers."

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Middle District Of Georgia

In a recent crack cocaine case, the ring leader and more than a dozen associates received federal sentences of up to life without parole for dealing more than 400 pounds of cocaine in poor Macon neighborhoods between 1986 and 1989. When the "corporation" fell, ***Sam Wilson,*** Assistant United States Attorney in charge of the Asset Forfeiture Division, and his specially trained staff began the legal procedure necessary to seize two houses, jewelry, cars, cash and other items belonging to those involved in the drug ring. The proceeds were divided among the local, state and federal agencies involved in the case. According to the Macon Telegraph, "the forfeitures closed the loop on a common approach to federal prosecutions in which criminals convert their dirty money into property and hidden bank accounts."

Since 1989, the United States Attorney's office for the Middle District of Georgia, under the direction of ***United States Attorney Edgar W. Ennis, Jr.,*** has collected $5 million in asset forfeitures and has disbursed $1.8 million to law enforcement agencies.

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District Of Maryland

On June 19, 1992, ***Richard D. Bennett, United States Attorney for the District of Maryland,*** and other law enforcement officials, presented a check in the amount of $240,000 to the Anne Arundel County Police Department as its share of forfeited assets from two joint narcotics investigations.

One case involved the seizure of more than $1.6 million in cash, resulting in $164,150.95 to Anne Arundel County. A suspected member of the Cali Cartel, the Colombian cocaine organization, used a Maryland corporation to purchase a large cargo ship. Agents working with the Organized Crime Drug Enforcement Task Force learned that the ship was to be sold and seized the proceeds before the funds were transferred to the Colombian nationals. Another case resulted in $79,704.29 being forfeited to the county after the county police assisted federal authorities in Alabama with a large narcotics investigation.

Mr. Bennett noted that the sharing of this money was an excellent example of the mutual cooperation essential to the control of crime and to the reduction of illegal drug activity in Maryland.

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CRIME ISSUES

Crime Victimization In Rural Areas

According to a National Crime Victimization Survey by the Bureau of Justice Statistics, rural residents are substantially less vulnerable to violent crime than people who live in cities or suburbs. People who live in rural areas -- 25 percent of the nation's inhabitants -- accounted for only about 16 percent of the country's violent victimizations during the years 1987 through 1989. Moreover, rural rates of personal theft and household crimes, such as burglary and motor vehicle theft, were at or near the lowest levels recorded since the national survey began in 1973. The report also includes other statistics as follows:

- The average annual overall rate of rape, robbery and assault among city dwellers was 92 percent higher than among rural residents and 56 percent higher than among suburban residents. However, the 1989 violent crime rate of 38.3 offenses per 1,000 city residents was 25 percent lower than it was during the 1981 peak rate of 51.6 offenses per 1,000 city inhabitants.

- Comparing the same years, suburban violent victimization rates dropped by 17 percent, from 32.8 victimizations per 1,000 suburban residents to 27.2 victimizations, and rural rates dropped by about 10 percent, from 24.4 to 22 victimizations.

- In both cities and suburbs, blacks were more frequently violent crime victims than were whites. In rural areas, however, the violent crime rate was higher among white residents.

- In all locations, households headed by Hispanic-Americans had higher rates of victimizations than did those headed by non-Hispanics.

- In all areas, people 12 through 24 years old had the highest rate of victimizations for crimes of theft and violence, while those 65 years old or more had the lowest rates.

- Although city residents experienced higher rates of victimization than either suburban or rural dwellers irrespective of age, rural residents older than 65 were more likely to be burglary victims than were their suburban counterparts.

- City and suburban violent crime victims reported more often than rural victims that their assailants were strangers. Rural violent crime victims said more frequently than victims who lived elsewhere that the offenders were relative or acquaintances.

- Less educated residents and those with low incomes were also more likely to have been violent crime victims irrespective of location.

- Motor vehicle theft rates were higher for those households with higher education and income levels regardless of residence location.

- City residents were substantially more likely than were rural residents to defend themselves with firearms when assaulted. Among urban victims of assault, 2.6 percent used a gun in self defense, compared to 1.8 percent among suburban residents and 0.5 percent among rural dwellers.

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Computer Ethics

On June 7, 1992, the Department of Justice and the Department of Education published a report calling upon the nation's local school systems to help their students understand the ethical questions and responsibilities involved in using advanced computer technology. The joint report noted that computer-related crime is a growing problem in today's society and stated that although financial losses vary widely, such abuses may range from $3 billion to $5 billion a year. Such crimes include the fraudulent use of telephone services, the distribution of stolen credit card numbers, embezzlement, the unauthorized copying of software, entering private data banks with false passwords, the destruction of data by computer viruses, automated teller machine fraud and other criminal acts made possible by newly developed technology.

In reviewing situations that border on ethical and unethical or legal and illegal behavior, the report examined such issues as physical and intellectual property rights, the right to privacy and limitations on the right to free expression. Some individual school districts and teachers have developed policies and curriculum to teach students how to be responsible computer users, such as:

- At the elementary school level, introduce key concepts, including definitions and relevant legal and historical information, then relate them as examples of personal relevance to the students.

- At the secondary level, involve students in mock trials of cases concerning the unethical use of technology and issue technology licenses to students who have been introduced to, and can demonstrate, an understanding of the responsible use of technology.

Copies of the report entitled "Ethical Use of Information Technologies in Education: Important Issues for America's Schools" may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 10850. The toll-free telephone number is: 1-800-851-3420.

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Largest Environmental Case Ever In The District Of South Carolina

On June 12, 1992, ***John S. Simmons, United States Attorney for the District of South Carolina,*** the Assistant Administrator for Enforcement of the Environmental Protection Agency, the Deputy Commissioner for Environmental Quality Control of the South Carolina Department of Department of Health and Environmental Control, and the Ninth Circuit Solicitor, issued a joint press release announcing that a federal grand jury in Charleston, South Carolina returned an Indictment against four corporations and three individuals on charges related to the illegal exportation of more than three thousand tons of hazardous waste to Bangladesh and Australia in October, 1991.

Gaston Copper Recycling Corporation, Gaston, South Carolina, in the course of its business, generates baghouse dust which is collected in large air filters attached to copper smelting furnaces. Baghouse dust is toxic for lead and cadmium, and thus is classified as a hazardous waste. Gaston Copper transported the baghouse dust without a manifest to Stoller Chemical Company located in Jericho, South Carolina. Stoller Chemical treated the baghouse dust without a permit and used it to make a fertilizer micronutrient that was also toxic for lead and cadmium. Micronutrients are typically mixed with commercial fertilizers and applied to the land. Stoller Chemical then shipped the hazardous micronutrient to Bangladesh and Australia without obtaining the consent of either receiving country. Stoller Chemical is also charged in a separate indictment with transporting various hazardous waste material and disposing of it in a wooded area near the plant.

The maximum sentences for the conspiracy and illegal treatment count are a fine of $250,000.00 for each individual defendant and $500,000.00 for each corporate defendant; and imprisonment of five years for the individual defendants and probation of five years for the corporate defendants. The maximum sentences for the illegal transportation and exportation counts are a fine of $250,000.00 for each individual defendant and $500,000.00 for each corporate defendant; and imprisonment of two years for each individual defendant and probation of five years for each corporate defendant.

Mr. Simmons said this is the largest environmental case ever brought in South Carolina and is evidence of our commitment to protecting our land, air and water. The cases have been assigned for prosecution to ***Assistant United States Attorney Ben A. Hagood, Jr.*** and ***Special Assistant United States Attorney Robertson H. Wendt, Jr.,*** Assistant Ninth Circuit Solicitor.

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Project Triggerlock

Summary Report

April 10, 1991 through May 31, 1992

Description	*Count*	*Description*	*Count*
Indictments/Informations	5,677	Prison Sentences	175,231 months
Defendants Charged	7,208		16 life sentences
Defendants Convicted	3,527	Sentenced to prison	2,101
Defendants Acquitted	155	Sentenced w/o prison or suspended	183

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.]

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PRISON ISSUES

Prisoners In 1991

Attached at the Appendix of this Bulletin as Exhibit B is a Bureau of Justice Statistics Bulletin, which provides a count of the nation's prisoners at the end of 1991.

The number of prisoners under the jurisdiction of federal or state correctional authorities at the end of 1991 reached a record high of 823,414. The states and the District of Columbia added 44,208 prisoners; the federal system, 4,176. The increase for 1991 brings total growth in the prison population since 1980 to 493,593 -- an increase of about 150 percent in the 11-year period.

The 1991 growth rate (6.2 percent) was less than the percentage increase recorded during 1990 (8.7 percent), and the number of new prisoners added during 1991 was 13,679 less than the number added during the preceding year (62,063). The 1991 increase of over 48,000 prisoners equals a demand for approximately 900 new prison beds per week nationwide. This compares to nearly 1,200 prison bedspaces per week needed in 1990. State prisons were estimated to be operating from 16 percent to 31 percent above their capacities at the end of 1991.

The report is based on information gathered from the departments of corrections in the 50 states, the District of Columbia, and the Federal Prison System.

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Jail Inmates 1991

Attached at the Appendix of this Bulletin as Exhibit C is a Bureau of Justice Statistics Bulletin entitled "Jail Inmates 1991." This Bulletin presents the findings from the 1991 Annual Survey of Jails conducted by the Bureau of Justice Statistics, Office of Justice Programs, which obtained data from 1,124 jails in 799 jurisdictions, approximately a third of all jails. The jails surveyed are facilities administered by local officials and designed to hold persons for more than 48 hours but usually for less than one year.

At midyear 1991 local jails in the United States held an estimated 426,479 persons, a 5.2 percent increase from midyear 1990. The average daily jail population for the year ending June 28, 1991, was 422,609, a 3.6 percent increase since 1990. The percentage growth in both the midyear count and the average daily population was significantly lower than the increases recorded between 1988 and 1989 (15.1 percent). Overall jail occupancy was 101 percent of the rated capacity of the nation's jails. Other survey findings include:

• During the year ending June 28, 1991, there were more than 20 million jail admissions and releases.

• Males constituted 90.7 percent and females 9.3 percent of all jail inmates. White non-Hispanics were 41.1 percent of the local jail population; black non-Hispanics, 43.4 percent; Hispanics, 14.2 percent; and non-Hispanics of other races, 1.2 percent of all inmates reporting race.

• Unconvicted inmates (those on trial or awaiting arraignment or trial) were 51 percent of the adults being held in jails; convicted inmates (those awaiting or serving a sentence or those returned to jail for violating probation or parole) were 49 percent.

• Jails were operating at 101 percent of rated capacity in 1991, down from 104 percent in 1990.

• There were 505 jurisdictions with at least 100 jail inmates as an average daily population in the most recent census (1988). In 1991, these jurisdictions operated 823 jails, which held a total of 343,702 inmates or about 81 percent of all jail inmates in the country.

In these jurisdictions --

• The overall occupancy rate was 107 percent of rated capacity;

• Rated capacity increased by 9 percent, an expansion nearly twice the rate of inmate population growth;

• Eighty five percent of the jurisdictions held inmates for other authorities;

• Forty seven percent of the jurisdictions held inmates because of crowding elsewhere, a 5 percent decrease from 1990;

• Of the 39,917 inmates held for other authorities in 1991, 23,495 were being held because of crowding elsewhere, principally in State prisons;

• Twenty seven percent of the jurisdictions had at least one jail under court order to limit population, and 30 percent were under court order to improve one or more conditions of confinement;

• Thirty eight percent of the jurisdictions reported at least one jail with an inmate death during the year;

• Five hundred forty six inmate deaths were reported for these facilities during year ending June 28, 1991, 51 percent from natural causes (other than AIDS);

• AIDS-related deaths accounted for 15 percent of all reported deaths.

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The report also examines time actually served by offenders released from federal prison between 1986 and 1990. The main findings include:

- The percentage of convicted federal offenders receiving a prison sentence, which may have included a period of probation, rose from 52 percent during 1986 to 60 percent in the first half of 1990.

- Offenders sentenced under the sentencing guidelines were more likely to go to prison than those sentenced before the guidelines went into effect: 74 percent of the guideline cases in 1990, compared to 52 percent of the pre-guideline cases in 1986.

- The number and percentage of federal offenders sentenced to prison increased primarily after 1988. Among those sentenced in federal district courts, the increased number of drug offenders accounted for most of the increase in sentences to prison.

- The average length of federal sentences to incarceration decreased between 1986 and 1990 for crimes other than drug offenses. However, because offenders sentenced under the provisions of the Act are not eligible for release on parole, the more recently committed offenders were likely to be incarcerated longer than their predecessors.

- The use of probation sentences decreased from 63 percent in 1986 to 44 percent in the first half of 1990.

- Federal prisoners first released in 1990 served an average of 19 months (75 percent of their court-imposed sentences). This was 29 percent longer than the average term served by prisoners first released in 1986.

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Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 4, No. 23, dated June 10, 1992, is attached as Exhibit E at the Appendix of this Bulletin.

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Federal Sentencing and Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit F is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 16, dated June 1, 1992, and Volume 3, No. 17, dated June 15, 1992, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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SOCIAL SECURITY ISSUES

Social Security Litigation

In the interest of ensuring the efficient management of the large Social Security court caseload, the Office of the General Counsel of the Department of Health and Human Services (HHS) periodically studies the transmission of teletypes by all United States Attorneys' offices to determine what aspects of the notification-of-suit process may require attention. The longstanding mutual goal of HHS and the Department of Justice has been receipt of notice of Social Security court filings from such offices within three days of service, preferably through teletype transmission. Notification by teletype alerts promptly those components of HHS responsible for assisting in the preparation of an initial response to suit.

Following a recent notification-of-suit study, Donald A. Gonya, Chief Counsel for Social Security, Department of Health and Human Services, Baltimore, Maryland, commended a number of United States Attorneys and staff for their prompt and timely transmission of notification of suit in Social Security cases. Mr. Gonya stated that such cooperation is of great value in processing the necessary administrative record and the government's suggested answer. The United States Attorneys were:

Jack W. Selden, Northern District of Alabama
Lourdes G. Baird, Central District of California
George L. O'Connell, Eastern District of California
Karen K. Caldwell, Eastern District of Kentucky
Stephen J. Markman, Eastern District of Michigan
John A. Smietanka, Western District of Michigan
Thomas B. Heffelfinger, District of Minnesota
Michael Chertoff, District of New Jersey
Joyce J. George, Northern District of Ohio
John S. Simmons, District of South Carolina.

Attached at the Appendix of this Bulletin as Exhibit G is a copy of that section of the United States Attorneys' Manual, 1-15.220, which provides detailed information with regard to teletyping notification of suit in Social Security cases.

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New Telephone And Facsimile Numbers For The General Counsel, Social Security Division

The telephone and facsimile numbers for the Social Security Division of the Office of the General Counsel, Baltimore, have been changed. The new numbers are:

Telephone number: (410) 965-3184 Facsimile number: (410) 965-3213

For information regarding the transmission of teletype notification of Social Security cases, the telephone number is: (410) 965-8157.

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POINTS TO REMEMBER

Equal Employment Opportunity

On June 24, 1992, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, forwarded to all United States Attorneys the Attorney General's Policy Statement concerning equal employment opportunity. A copy is attached at the Appendix of this Bulletin as Exhibit H.

Mr. McWhorter stated that he fully supports the objectives set forth by the Attorney General, which reaffirms the Department's commitment and determination in providing equal access to career opportunities for all citizens. The Department of Justice has worked to establish itself as a leader of public service and the Attorney General's policies will ensure we move forward with a progressive work force.

Mr. McWhorter commended all of the United States Attorneys' offices for their diligence in adhering to equal employment opportunity practices. He said, "Through our combined efforts, we have improved cultural awareness and made significant progress in providing information and training on diversity in the work place. We must continue our efforts to attract and retain qualified women, minorities and disabled persons. The renewed support from Attorney General Barr and the dedicated efforts of our Equal Employment Opportunity Staff, will assure greater responsiveness to the challenges and opportunities ahead."

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Witnesses And Witness Fees And Expenses

The Special Authorizations Unit (SAU) of the Justice Management Division, Department of Justice, has issued the following teletype to all United States Attorneys's office personnel and others concerning witnesses, witness fees and expenses:

Requests for Witness Expenses. Requests for witness expenses should contain the name, court docket number, and a short written description of the case. (Providing the legal citation of the case is unsatisfactory since SAU does not have convenient access to a law library.)

Use of Subpoenas. Attendance at pretrial conferences and the assistance of investigative personnel must be obtained by request -- not by subpoena. It is improper to issue subpoenas for pretrial conferences with witnesses, or to issue subpoenas to have investigative personnel attend trials to assist the Department of Justice attorneys. The use of subpoenas is limited to witness trial attendance.

Federal Government Employee Witnesses. For the attendance of Federal Government employees as witnesses, Form OBD-16, Request for Armed Forces or Government-Employee Witness, should be submitted at least two weeks prior to the appearance of the witness. Most agencies require (and the military insists) that a minimum of two weeks notice be provided in order to issue travel orders.

A. Chargeability. Please provide information regarding where, for which agency the employee/ witness worked at the time of the incident, and the subject of the testimony. When a government employee appears as a witness in a case involving his/her current agency, the current employing agency must bear the costs. When a government employee appears in a case not involving his/her current agency, the current employing agency must provide the travel orders and funding. The current agency is then allowed to bill the Department of Justice for travel expenses.

B. Military Addresses. Out-of-District military witnesses must be requested through SAU. Many requests are being submitted with only a base as an address. Please provide information regarding the employing unit, battalion, detachment, etc. so that orders for the travel of military employees can be issued directly to the employing units by the military JAG office.

C. Telephone Numbers. Please provide the telephone numbers of government employees/ witnesses. This information will assist SAU in contacting the employing offices to arrange for the travel of the witnesses.

D. Appearance Date. The appearance date on the request may be the date the Department of Justice attorney would like the witness in the attorney's office. (It does not have to be the court attendance date.) The number of days is calendar days, not court days, and the travel orders have to be written for calendar days.

Confidential Informants/Undercover Investigators. Please advise SAU if the witness is an undercover investigator or confidential informant. If necessary, an alias may be used for the witness. SAU does not wish to endanger the lives of witnesses.

Overseas Witnesses. The Department of State has requested a minimum of two weeks notice to overseas posts to provide advances to foreign witnesses. (This period of time is necessary for issuance of visas and/or other services required by the witness or resident country.) SAU should receive requests for foreign witnesses in sufficient time to forward the request to the overseas post in advance of the two-week time period.

In addition, please contact the Office of International Affairs of the Criminal Division (for criminal cases) and the Office of Citizens Consular Services, Department of State (for all cases) for guidance in obtaining foreign witnesses. Also, please follow any other regulations required by your respective offices.

Tax Identification Numbers. Tax identification numbers are required for all expert witness requests. They are employer identification numbers for companies and social security numbers for individuals. The tax identification number on the expert witness request should be that of the person/company receiving payment. If a person and a company are shown in Block 10 (Witness Name and Address) of the request, the tax identification number should be the party receiving the payment.

Criminal Justice Act (CJA) Fact Witness Vouchers. CJA Fact Witness vouchers should be signed by a Federal Public Defender or the Presiding Officer of the Court or the Clerk of the Court. Court-appointed attorneys should never be allowed to sign these vouchers.

Unusual expenses (child care, rental vehicles, extra pretrial conference days, etc.) for CJA Fact Witnesses must be specifically approved by the Presiding Officer of the Court. A general order to "pay the witnesses" is not sufficient to approve unusual expenses incurred by the CJA Fact Witness.

Expense Verification and Certification. Department of Justice attorneys are responsible for attendance attestation only (Form OBD-3, Part I, Line D). After witnesses have entered their expense claims (Form OBD-3, Part II), the fees and expenses must be verified and certified by an authorized certifying officer in the U.S. Marshals office (Form OBD-3, Part III). The U.S. Marshals offices are responsible for completion of the amounts column.

Payment of Forms OBD-3, Fact Witness Vouchers. Immediate payment of Fact Witness Fees and Expenses should be made to hostile and indigent witnesses. Payment to regular Fact Witnesses should be mailed within seven working days.

GTS Accounts for Fact Witnesses. The use of GTS accounts to pay for the transportation and lodging of fact witnesses by the United States Attorney's office is voluntary -- not mandatory. Many United States Attorneys' offices are not required to obtain GTS accounts for fact witnesses. This is a voluntary program.

If you have any questions, please contact the Special Authorization Office at (202) 501-8429. The SAU Fax number is (202) 501-8090.

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FINANCIAL INSTITUTION FRAUD

Large Monetary Recovery In The Northern District Of Iowa

On June 18, 1992, ***Charles W. Larson, United States Attorney for the Northern District of Iowa,*** presented a check in the amount of $3 million to representatives of the Farmers Home Administration (FmHA). This check represents part of a $4.2 million settlement in a civil fraud case against Production Credit Association of the Midlands (PCAM), a farmer-owned lending cooperative based in Omaha. The settlement related to allegations by the United States that, beginning in 1985, the Eastern Iowa Production Credit Association (EIPCA), which later merged into PCAM, defrauded the Department of Agriculture in connection wih twenty FmHA guaranteed loans in Iowa.

The FmHA guaranteed loan program provides government guarantees on loans to farmers made by commercial lenders. Production Credit Associations in Iowa participated in the program and obtained several million dollars in guarantees. The civil fraud settlement resolved the government's claim that EIPCA submitted to FmHA false information on twenty loans in order to recover at least $2.2 million under the Department of Agriculture's guarantee loan program. PCAM agreed to forfeit the $2.2 million plus $800,000 in interest. PCAM also paid $200,000 in investigative costs and $1 million in civil money penalties. In addition, the settlement provides that an additional thirty loans from across Iowa will be audited to determine if fraud was involved. If so, PCAM agreed to repay such amounts plus interest as well as the cost of this audit.

Mr. Larson said, "Fraud against the government cannot be tolerated. It costs all of us -- not only in tax dollars but also in the integrity of programs -- in this case, a program designed to assist honest, hard-working farmers. Those tempted by dishonesty must be aware that the price to them will be equally high."

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Financial Institution Prosecution Updates

On June 5, 1992, 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 May 31, 1992. "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	1,337	CEO's, Chairmen, and Presidents:	
Estimated Bank Loss	$2,915,670,196	Charged by Indictments/ Informations	132
Defendants Charged	1,869	Convicted	116
Defendants Convicted	1,509	Acquitted	1
Defendants Acquitted	37		
Prison Sentences	2,052 years		
Sentenced to prison	984	Directors and Other Officers:	
Awaiting sentence	243	Charged by Indictments/ Informations	416
Sentenced w/o prison or suspended	298	Convicted	370
Fines Imposed	$ 6,537,449	Acquitted	7
Restitution Ordered	$361,817,520		

Savings And Loan Prosecution Update

Informations/Indictments	695	CEOs, Chairmen, and Presidents:	
Estimated S&L Loss	$8,266,453,277	Charged by Indictments/ Informations	133
Defendants Charged	1,160	Convicted	97
Defendants Convicted	862	Acquitted	10
Defendants Acquitted	66 *		
Prison Sentences	1,715 years		
Sentenced to prison	545		
Awaiting sentence	170	Directors and Other Officers:	
Sentenced w/o prison or suspended	159	Charged by Indictments/ Informations	190
Fines Imposed	$ 10,761,461	Convicted	161
Restitution Ordered	$424,666,150	Acquitted	7

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

Credit Union Prosecution Update

Description	Count	Description	Count
Informations/Indictments	80	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$84,550,169	Charged by Indictments/ Informations	9
Defendants Charged	102	Convicted	7
Defendants Convicted	86	Acquitted	0
Defendants Acquitted	1		
Prison Sentences	124 years		
Sentenced to prison	67		
Awaiting sentence	8	Directors and Other Officers:	
Sentenced w/o prison or suspended	11	Charged by Indictments/ Informations	52
Fines Imposed	$ 15,700	Convicted	47
Restitution Ordered	$12,890,174	Acquitted	0

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CASE NOTES

MIDDLE DISTRICT OF GEORGIA

On June 5, 1992, a federal judge ruled that the Air Force could forbid a military base employee from driving to work in a truck displaying a homemade window sticker which "contains disparaging or embarrassing comments about the Commander in Chief of the United States of America" and is "improper for a military installation." Jesse Ethredge, a civilian aircraft mechanic at Robins Air Force Base for twenty-five years, contended that the military violated his First Amendment right to freedom of speech last October when it ordered him to remove the window sticker. In a lawsuit filed by the American Civil Liberties Union, Mr. Ethredge stated that military officials singled him out while allowing other political stickers on the base.

In the court's order denying preliminary injunctive relief, the judge stated that "military bases are unique; they are not in the same class as factories, shopping centers, or residential subdivisions. The mission of the military has always been to defend this country and if it is felt that this duty requires that certain First Amendment rights of those who work or live upon a base be reasonably curtailed to some extent, then the courts have for many years given the military leeway to do so. The plaintiff has worked at Robins Air Force Base for over twenty-five years and has a responsible job for which he is well paid. His job, however, requires certain sacrifices that he would not be forced to make if he worked somewhere else." A copy of the court's decision is attached at the Appendix of this Bulletin as Exhibit I.

Edgar W. Ennis, Jr., United States Attorney for the Middle District of Georgia, and ***Frank L. Butler, III, Assistant United States Attorney,*** representing the base, cited cases stating that federal courts must give great deference to commanders on matters affecting their bases. Mr. Butler said, "There is a difference in criticism and disparagement. The general was concerned with the content of the message. His decision was viewpoint neutral. . .The commander made the decision that it would undermine the military discipline on base."

Colonel Jerald D. Stubbs, Staff Judge Advocate, Headquarters Warner Robins Air Logistics Center, commended ***Assistant United States Attorney Butler*** for his outstanding efforts and for his

Colonel Jerald D. Stubbs, Staff Judge Advocate, Headquarters Warner Robins Air Logistics Center, commended ***Assistant United States Attorney Butler*** for his outstanding efforts and for his organizational skill and diplomacy in bringing this matter to a successful conclusion.

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CIVIL RIGHTS DIVISION

Supreme Court Invalidates City Hate-Crime Ordinance On First Amendment Grounds

On June 22, 1992, the Supreme Court issued its decision in R.A.V. v. City of St. Paul, Minnesota, No. 90-7675. The Court unanimously invalidated, as a facial violation of the First Amendment, a St. Paul ordinance that made it a criminal offense to "place[] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." All of the Justices agreed that the Court was bound by the interpretation of the ordinance by the Minnesota Supreme Court, which had held that it was limited to expressions that constituted "'fighting words,' i.e., conduct that itself inflicts injury or tends to incite immediate violence.'" The Court has previously held that statutes regulating "fighting words" are valid under the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The R.A.V. majority opinion, written by Justice Scalia, and joined by Chief Justice Rehnquist, and Justices Kennedy, Souter, and Thomas, nonetheless struck down the St. Paul ordinance because it proscribed some, but not all, "fighting words", on the basis of the content of the expression. In short, the majority opinion held that because the ordinance criminalized only "fighting words" relating to race and religion, it was facially invalid. The concurring justices, in separate opinions written by Justices White, Blackmun, and Stevens, would have invalidated the ordinance as overbroad. In their view, the Minnesota Supreme Court had defined the term "fighting words" and therefore the reach of the ordinance too broadly, to include not only expressive conduct that causes a breach of the peace, but also expression that "causes hurt feelings, offense, or resentment."

This case is distinguishable from federal prosecutions for cross-burnings and other racially motivated crimes under 18 U.S.C. 241 and 245, and 42 U.S.C. 3631. In contrast to the St. Paul ordinance, these statutes prohibit not mere expression, but intimidation, threats, and interference with federally guaranteed rights. The majority opinion, for example, specifically distinguished the St. Paul ordinance from 18 U.S.C. 871, which prohibits threats on the life of the President, because of the federal government's special interest in preventing such threats. The government has a similar interest in preventing interference with the rights guaranteed by federal statutes and the Constitution. The majority opinion also distinguished content-based regulation of expression where the statute is directed primarily at conduct rather than speech. As examples, it cited the prohibition of sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as well as other civil rights statutes, 18 U.S.C. 242, and 42 U.S.C. 1981 and 1982. The federal statutes applied in cross-burning cases similarly are directed at the defendants' conduct, i.e., the intentional intimidation of or interference with those who are exercising federally guaranteed rights. The fact that the victim's race may have been the motivation for the defendant's conduct and an element of the government's proof does not shield such conduct from regulation.

clearly intended as a threat of force. Since the R.A.V. decision, we have obtained both indictments and guilty pleas where the cross burning was intended to intimidate the victims and did constitute a threat of force.

R.A.V. v. City of St. Paul, Minnesota, No. 90-7675 (June 22, 1992)

Attorneys: Jessica Dunsay Silver - (202) 514-2195
Linda F. Thome - (202) 514-4706
Linda Davis - (202) 514-3204

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Supreme Court Rules In Higher Education Desegregation Case

On June 26, 1992, the Supreme Court issued its decision in United States v. Fordice, Nos. 90-1205, 90-6588, vacating and remanding the Fifth Circuit's en banc affirmance of the district court's judgment for the defendants. The Court held that the lower courts applied the wrong legal standard in ruling that Mississippi's adoption of race-neutral policies and practices had satisfied the State's obligation to dismantle its former de jure segregated system of colleges and universities. Under the correct standard, the Court held (slip op. 12):

> If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

The Court identified four "surviving aspects of Mississippi's prior dual system which are constitutionally suspect," emphasizing that this list was a nonexclusive one (slip op. 13). First, the Court found that the use of higher admission standards in the traditionally white universities, and use of the American College Test as the sole criterion for automatic admission were traceable to the dual system, had a segregative effect, and had not yet been adequately justified by the State (slip op. 14-18). Second, the Court concluded that the widespread duplication of programs was a remnant of the dual system, with little educational justification, which could be at least partially eliminated (slip op. 18-20). Third, the Court found that the universities' institutional missions had their roots in the dual system, and that it was "likely" that, when combined with other practices, the mission designations "interfere with student choice and tend to perpetuate the segregated system" (slip op. 21-22). The Court instructed the lower courts to determine on remand whether it would be "consistent with sound educational practices" to eliminate any such discriminatory effects" (slip op. 22). Fourth, the Court ruled that the lower courts should examine whether the maintenance of eight separate institutions perpetuated the dual system, and determine whether any of the universities should be closed or merged (slip op. 22-23). Finally, the Court rejected the contention that the State was required to increase the funding of the traditionally black universities solely to make them separate but equal institutions, but ruled that "[w]hether such an increase in funding is necessary to achieve a full dismantlement * * * is a different question, and one that must be addressed on remand" (slip op. 24).

United States v. Fordice, Nos. 90-1205, 90-6588 (June 26, 1992).
DJ 169-40-87.

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CIVIL DIVISION

Ninth Circuit Holds That Attorney General's Written Consent Is Required When Relator Settles False Claims Act Suit In Which United States Declined To Participate

On June 24, 1992, the Ninth Circuit held, citing the plain language of the False Claims Act, 31 U.S.C. § 3730(b)(1), that where a relator and defendant settle a suit in which the United States declined to participate, they must obtain the written consent of the Attorney General to the settlement prior to requesting dismissal from the district court. Earlier, the district court had held incorrectly that by declining to participate at the outset of the suit, the United States had given implied consent to any future voluntary dismissal. The Ninth Circuit also reversed the district court's denial of our motion to intervene for the purpose of reviewing its order striking our objection to the parties' settlement.

United States ex rel. Sylvester, et al. v. Covington Technologies Co., 91-55306 (9th Cir. June 24, 1992).

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Central District Of California Reduces Percentage Share Awarded To Qui Tam Plaintiff Who Planned And Initiated Part Of Violation

The district court reduced the percentage share awarded to a qui tam plaintiff on the grounds that the plaintiff planned and initiated part of the violation upon which the action was brought. In what may be the first decision invoking 31 U.S.C. § 3730(d)(3), Judge David V. Kenyon awarded the qui tam plaintiff less than the 15 percent as set forth in 31 U.S.C. § 3730(d)(1).

The qui tam plaintiff was one of two test technicians responsible for testing the flight data transmitters used on the Air Force air launch cruise missile. Barajas admitted under oath that he falsified tests on his own initiative primarily because he felt the components never failed any of the tests.

The Court adopted a three step process in determining the appropriate percentage to award to the relator: (1) significance of the information provided by the relator; (2) the relator's contribution to the prosecution of the action and the attainment of the settlement agreement; and (3) whether the information which formed the basis for the suit was known previously to the Government.

United States ex rel Barajas v. Northrop Corp.,
C.V. 87-7288 Kn(Kx) (C.D. Cal. May 15, 1992).

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Eastern District Of California Broadly Interprets Definition Of Reverse False Claim And Agency Of The Government

Relator asserted False Claims Act claims against participants in Department of Agriculture's lemon marketing program, who allegedly underreported lemon shipments, thereby underpaying fines and penalties assessed for shipments in excess of their quota. Despite the fact that the Lemon Administrative Committee (LAC), which administers the program, operates from assessments paid by fruit handlers, the court held that claims to the LAC were claims to "the Government" for purposes of the False Claims Act. The court further held that there was no false claim under § 3729(a) (1) or (2) involving government "property". The court also declared that any false reports submitted to the Government with the effect that payment of forfeitures or fines to the Government were avoided, constitute false claims within the meaning of the reverse false claims provision of 31 U.S.C. § 3729(a)(7).

United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.,
Civ No. CV-F-91-194-0WW (E.D. Cal. May 1992).

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Miscellaneous Qui Tam Occisions

United States ex rel. Janssen v. Northrop Corp., Civil No. CV 87-78-45 MRP (C.D. Cal. May 15, 1992) (Court granted Government's motion for summary judgment striking affirmative defenses of comparative negligence, laches, offset, ratification, lack of reliance, Government knowledge/estoppel, lack of duty, and unclean hands/estoppel; court also expressly held that the Truth in Negotiations Act, 10 U.S.C. § 2306, does not preempt the False Claims Act).

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Defenders Of Wildlife Lack Standing To Challenge A Regulation Limiting Consultation By The Department Of Interior Under Section 7 Of The Endangered Species Act (ESA)

Defenders of Wildlife brought this action to challenge a regulation promulgated by the Department of Interior which limited the consultation obligation found in Section 7 of the Endangered Species Act to agency actions "in the United States or on the high seas." The Eighth Circuit ruled that Defenders had standing, and went on to overrule Interior's conclusion that the Endangered Species Act (ESA) consultation obligation does not apply to agency projects in other countries.

The Supreme Court reversed, on grounds that Defenders had failed to make a showing of injury-in-fact sufficient to withstand the government's motion for summary judgment. The majority opinion, by Justice Scalia, found that affidavits of two members of Defenders who had once traveled to countries where American-supported projects are now allegedly harming endangered species were insufficient to show the necessary injury. Even assuming that the affidavits sufficiently showed that the projects were threatening the species of concern (a question which the Court did not reach), they did not show that damage to the species would produce "imminent" injury to the members in question. The fact that the members had visited the relevant areas before the projects commenced "proves nothing," and their profession of an intent to return "some day" was not enough to support a finding of the required "imminent" injury.

A plurality of the Court (Scalia, Rehnquist, White and Thomas) went on to find that Defenders also failed to demonstrate that the alleged injury would be redressed by invalidation of the challenged regulation. Since only the Secretary was a defendant, the agencies that were funding projects overseas that allegedly harmed Defenders' members would not be bound by a court decision. A further impediment to redressibility was the fact that the funding agencies supplied only a fraction of the total funding for the foreign projects at issue. It was entirely conjectural whether the foreign government sponsors of these projects would alter them in response to the judgment of an American court.

Justice Kennedy, joined by Souter, J., joined the majority's holdings regarding Defenders' failure to demonstrate either concrete personal injury or procedural injury. In light of this failure, these Justices would not have reached the issue of redressibility. Justice Stevens disagreed with the majority's conclusions regarding standing. He concurred in the judgment, however, on grounds that the Eighth Circuit erred in holding that ESA Section 7(a)(2) applied to activities in foreign countries. Justice Stevens relied on the presumption against extraterritorial application of legislation, the fact that Section 7(a)(2) contains no express indication that the consultation requirement applies extraterritorially, and the fact that other sections of the ESA, unlike Section 7(a)(2), specifically deal with the problem of protecting endangered species abroad. Justice Blackmun, joined by O'Conner, J., filed a dissent accusing the majority of "what amounts to a slash-and-burn expedition through the law of environmental standing."

Lujan v. Defenders of Wildlife, Sup. Ct. No. 90-1424 (June 12, 1992)
D.J. No. 90-8-6-77

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Take Title Provision Of The Low-Level Radioactive Waste Policy Amendments Act Of 1985 Held Unconstitutional

The Supreme Court considered constitutional challenges by New York and two of its Counties to the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Act contains three types of incentives for States, acting either alone or as members of interstate compacts, to provide for disposal of low-level waste: (1) payments to States and compacts that meet a series of interim goals or "milestones"; (2) access restrictions, including surcharges and outright bans on disposal, that the Act authorizes interstate compacts with disposal sites to impose on wastes generated within States or compacts that fail to meet the statutory milestones; and (3) a requirement that States and compacts

that do not provide for disposal by 1996 take title to low-level waste generated within their borders. The Court struck down the take-title provision as an impermissible attempt by Congress to conscript state executive and legislative authorities. However, the Court found that the monetary and access incentives were constitutional and severable from the take-title provision.

New York v. United States, S. Ct. Nos. 91-543, 91-558 & 91-563 (June 19, 1992) D.J. No. 90-1-24-335

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Department Of Interior's Regulations Allowing Snowmobile Use In Potential Wilderness Area Sustained

Seven environmental organizations sued to enjoin snowmobile use on the Kabetogama Peninsula within Voyageurs National Park in Minnesota, on the grounds that the Peninsula is part of a potential wilderness area. The district court refused to ban snowmobile use, the plaintiffs appealed, and the court of appeals affirmed.

Section 301(b) of the Voyageurs National Park Act of 1971, 16 U.S.C. 160f(b) -- which authorized the Park's establishment -- requires the Department of the Interior to recommend whether certain parts of the National Park, including the Kabetogama Peninsula, should be designated as wilderness. Section 303 of the Act, 16 U.S.C. 160h, also authorizes "appropriate provision for * * * the use of snowmobiles" within the Park.

The court of appeals rejected the plaintiffs' contention that the Wilderness Act of 1964, 16 U.S.C. 1131 et seq., required "that wilderness study areas [must] be managed as wilderness pending a review and ultimate decision on [wilderness] designation by Congress." (Under the 1964 Wilderness Act, motorized vehicles such as snowmobiles are generally forbidden in designated wilderness areas.) It also held that Interior's 1991 regulations, allowing regulated snowmobile use on Kabetogama Peninsula in the Park, were valid. Interior's decision permitting snowmobiles, although it had "troublesome aspects" which the court did not specify (slip op. 9), did not rise "to the level of being arbitrary and capricious."

Voyageurs Region National Park Ass'n v. Lujan, Civil Action No. 4-90-434 (D. Minn.); 8th Cir. No. 91-2023 (June 10, 1992) (Circuit Judges Gibson & Magill; Senior Circuit Judge Friedman (Fed. Cir.)): 90-1-0-2576

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Environment Protection Agency Not Required To Reopen Consultation Process Under Section 106 Of National Historic Preservation Act Many Years After Its Undertaking Is Completed

In 1974, the Environment Protection Agency (EPA) funded the construction of a sewage treatment system by the Loudoun County Sanitation Authority for the Village of Waterford in Virginia. The village, because of its Quaker past and its virtually unspoiled appearance since the early 1800s, is listed on the National Register of Historic Places. Consequently, in connection with the grant, EPA and the Sanitation Authority were required to, and did, comply with Section 106 of the National Historic Preservation Act (NHPA). They gave the Advisory Council on Historic Preservation (Advisory Council) and the Virginia State Historic Preservation Officer (SHPO) an opportunity to comment on the effect of the federal "undertaking" on the historic site. As a result of the consultation process, EPA, the SHPO and the Advisory Council entered into a Memorandum of Agreement (MOA) whereby EPA agreed to ensure that the Sanitation Authority submit any revision of the sewer system's final plans to the SHPO.

Twelve years after the completion of the system, because there was unplanned excess capacity, a developer asked Loudoun County and the Sanitation Authority for permission to hook up a proposed townhouse development outside the village at his own expense. The hookup would require additional lines, but no addition to the plant. The County and the Sanitation Authority indicated that they would grant the request. The Advisory Council and the SHPO interpreted the proposed hookup as a revision of the system's final plan that triggered anew EPA's obligation under the MOA. The Sanitation Authority did not request any additional money from EPA, nor did it consult with the SHPO. After EPA refused to reopen the Section 106 process, plaintiff, a citizens' association, filed suit seeking a declaration that Section 106 of the NHPA requires EPA to comply with the MOA by interceding in the proposed expansion of the sewer lines. The district court granted defendants' motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P., for lack of standing, and because EPA's decision not to intercede was within its prosecutorial discretion.

The Fourth Circuit affirmed. It held, first, that plaintiff had standing (which the government did not challenge on appeal); second, that prosecutorial discretion was not involved because once EPA entered into an MOA, it was enforceable as long as the agency was involved in the project; and third -- and most importantly -- that, while EPA is bound by the terms of the MOA during the life of the project, the language of Section 106 and the caselaw, indicate that the obligations of federal agencies apply only to an ongoing "undertaking" and do not apply after completion of the original project.

Waterford Citizens' Association v. William K. Reilly, Admr. of EPA, et al., 4th Cir. No. 91-2142 (June 15, 1992) (Sprouse, and Kiser and Blatt, D.J.J.) D.J. No. 90-5-1-1387

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Unsurveyed Island Within A Meandered Lake Passes By Operation Of Law To Successor-In-Interest To Patent Of Adjacent, Surveyed Shore Land

In this Quiet Title Act case, the Sixth Circuit affirmed the decision of the district court which held that title to a small unsurveyed island within a meandered lake passed by operation of state law to the successor-in-interest of the patent of the adjacent, surveyed shore lands. Wheeler v. United States, 770 F. Supp. 1205 (W.D. Mich. 1991).

Barbara W. Wolff v. United States, 6th Cir. No. 91-2252
(June 15, 1992) (Nelson, Siler & Krupansky)

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TAX DIVISION

Supreme Court Grants Certiorari In Case Involving The Applicable Limitations Period For "Flow Through" Items From Partnerships And Subchapter S Corporations

On June 22, 1992, the Supreme Court granted the taxpayer's petition for writ of certiorari in Bufferd v. Commissoner. This is one of the many cases recently considered by the appellate courts which present the question whether the running of the statute of limitations with respect to a "flow-through" entity, i.e., a Subchapter S corporation, a partnership, or a trust, precludes the Internal Revenue Service from adjusting the tax liability of a shareholder, partner, or beneficiary of that entity with respect to "flow-through" items. Here, the Second Circuit accepted our argument that, so long as the statute of limitations remained open with respect to the shareholder of a Subchapter S corporation, the Internal Revenue Service could assess a deficiency against that shareholder with respect to his share of his "S" corporation's income.

The Second Circuit's decision in this case and the Eleventh Circuit's more recent decision in Fehlhaber v. Commissioner, 954 F.2d 653 (1992), are in square conflict with the Ninth Circuit's decision in Kelley v. Commissioner, 877 F.2d 756 (1989), where the court ruled that no shareholder adjustments could be made after the limitations period ran on the return filed by the Subchapter S corporation. In light of the conflict among the circuits and the administrative importance of this issue, we acquiesced in the taxpayer's petition for certiorari.

* * * * *

Supreme Court Grants Certiorari On Important ERISA Issue

On June 8, 1992, the Supreme Court granted taxpayer's petition for writ of certiorari in Wood v. Commissioner, 955 F.2d 908 (4th Cir. 1992), a case involving the application of ERISA's prohibited transaction rules. At issue in this case is whether a plan sponsor's "funding" of a defined benefit retirement plan with notes payable to the sponsor constitutes a prohibited sale or exchange by a disqualified person within the meaning of Section 4975(c)(1)(A) of the Internal Revenue Code. If so, an excise tax is imposed upon the plan sponsor. The Supreme Court has not yet taken action on the Government's petition for certiorari in Keystone Consolidated Industries, Inc. v. Commissioner, 951 F.2d 76 (5th Cir. 1992), which presents the same issue.

The Government argued in each of these cases that the transfer of property in satisfaction of an obligation is a "sale or exchange" of the property transferred for income tax purposes. The Fifth Circuit in Keystone Consolidated Industries rejected this argument, holding that a transfer of property to a pension plan in satisfaction of a minimum funding obligation is not a sale or exchange of the property transferred. In Wood, the Fourth Circuit expressly rejected this holding.

The issue presented by these cases is extremely important to the administration of law respecting minimum funding requirements for pension plans under ERISA. If a plan sponsor is permitted to transfer property to a pension plan in satisfaction of its funding obligation, the Government's task of ensuring full funding of pension plans will be considerably more difficult because it will also have to assume the burden of valuing the transferred property.

* * * * *

Supreme Court Agrees With Government's Position That Creditors In Bankruptcy Case May Not Reach The Debtor's Interest In An ERISA-Qualified Pension Plan

On June 15, 1992, the Supreme Court ruled in Patterson v. Shumate that debtor's interest in an ERISA-qualified pension plan was not property of his bankruptcy estate. The United States had filed an amicus curiae brief in this case espousing this position.

Section 541(c)(2) of the Bankruptcy Code provides that a debtor's interest in a trust which is subject to transfer restrictions enforceable under "applicable nonbankruptcy law" is not included in the debtor's bankruptcy estate. The bankruptcy trustee argued here that "applicable nonbankruptcy law" was intended to encompass only state spendthrift trust law and not the ERISA-mandated anti-alienation clause contained in the debtor's pension trust. The Supreme Court diagreed, holding that the ERISA restriction on alienability was a restriction on transfer enforceable under "applicable nonbankruptcy law," and that, therefore, the pension could not be reached by the creditors of the estate. The Supreme Court noted that this result "gives full and approriate effect to ERISA's goal of protecting pension benefits."

* * * * *

Supreme Court Issues Adverse Decision in Firearm Excise Tax Case

On June 8, 1992, the Supreme Court affirmed, without an opinion for the Court, the unfavorable decision of the Federal Circuit in Thompson Center Arms v. United States. This case presented the question whether a package unit consisting of a pistol and a conversion kit that enables the pistol to be easily and quickly converted into a short-barrel rifle constitutes a "firearm" within the meaning of Section 5845(a)(3) of the Internal Revenue Code. The Federal Circuit concluded that prior assembly was required for such a package unit to be considered a "firearm" for this purpose.

Justice Souter, in an opinion joined by the Chief Justice and Justice O'Connor, concluded that the package unit was not regulated under the National Firearms Act (NFA), and thus was not taxable under Section 5845. Finding that the statutory language and legislative history of the NFA was ambiguous with respect to the status of package units, and that the violation of the NFA carried criminal sanctions without any requirement of willfulness, these Justices resolved the ambiguity in favor Thompson Center Arms. Justices Scalia and Thomas concurred in the judgment, albeit on a different rationale. Justice Scalia's opinion reasons that assembly is the sine qua non of taxability under Section 5845. Justices White, Blackmun, Stevens, and Kennedy dissented, agreeing with the position of the Government.

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Solicitor General Files Petition For Certiorari In Intergovernmental Immunity Case

On June 12, 1992, the Solicitor General filed a petition for writ of certiorari in United States v. State of California, et al., a case in which the United States seeks to recover $11 million in state sales and use taxes improperly imposed on a government contractor. Pursuant to its contract with Williams Brothers Engineering Company to manage oil drilling operations on federal land in California, the United States reimbursed the engineering company for sales and use taxes assessed against that contractor by the California State Board of Equalization for the years 1975 through 1981. The United States then brought this action to recover the taxes on the ground that they had been wrongfully imposed on Williams Brothers. The United States based its action upon the federal common law action of indebitatus assumpsit (quasi contract) for recovery of federal funds paid by mistake resulting in the unjust enrichment of California. The United States claimed that when it exercised a constitutional power in disbursing the funds to pay the tax, it had a right to sue under federal law in its courts to recover funds erroneously paid from the Federal treasury.

The District Court held that the suit was barred by the California statute of limitations on suits for the recovery of such taxes. The Ninth Circuit affirmed, rejecting the Government's contention that it was entitled to rely on the longer federal limitations period for suits by the United States in quasi contract. The Ninth Circuit held that no action lay in quasi contract here because the only dispute involved an interpretation of an exemption provision under California law.

This decision is in conflict with the Eleventh Circuit's decision in United States v. Broward County, 901 F.2d 1005 (1990), and is in substantial conflict with decisions of the Fifth, Sixth and Eleventh Circuits in United States v. Michigan, 851 F.2d 803 (6th Cir. 1988); United States v. Metropolitan Government of Nashville and Davidson County, Tenn., 808 F.2d 1205 (6th Cir. 1987); United States v. DeKalb County, 729 F.2d 738 (11th Cir. 1984); and New Orleans v. United States, 371 F.2d 21 (5th Cir.), cert. denied, 387 U.S. 944, reh'g denied, 389 U.S. 890 (1967).

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Ninth Circuit Rules That Taxpayer's Assertion of Mailing Is Sufficient to Satisfy Timely Mailing Is Timely Filing Rule of Code Section 7502

On June 5, 1992, the Ninth Circuit affirmed the adverse decision of the District Court in Lois Anderson v. United States. The issue presented in this case was whether the taxpayer could rely on the timely-mailing-is-timely-filing provisions of Section 7502 of the Internal Revenue Code to establish that her federal tax refund claim was filed timely. Section 7502 provides that tax returns and other documents due to be "filed" on a given date, e.g. April 15, are deemed to be filed when mailed, even though they are "delivered by United States mail" after the due date. Section 7502 further provides that a postal receipt indicating that a return or other document was sent by registered or certified mail shall constitute prima facie evidence of "delivery." Taxpayer here asserted that she sent her claim to the Internal Revenue Service by regular mail. The Internal Revenue Service, however, had no record of receiving any such claim.

The Ninth Circuit upheld the District Court's ruling that the taxpayer qualified for the timely-mailing-is-timely filing presumption of Section 7502 by introducing circumstantial evidence of the postmark (namely her own testimony that she watched a postal clerk affix a postmark on the date alleged to be the date of mailing) and by application of a common-law presumption that a properly mailed document is deemed to be delivered to the person to whom it is addressed. We argued that Section 7502, by its express terms, was unavailable here because taxpayer did not produce a timely postmarked envelope or certified mail receipt and did not offer any affirmative evidence that the claim in question had actually been delivered to the Internal Revenue Service.

In reaching this result, the Ninth Circuit adopted the reasoning of the Eighth Circuit's recent decision in Estate of Wood v. Commissioner, 990 F.2d 1155 (1990), and rejected the contrary reasoning of the Second and Sixth Circuits. See, Deutsch v. Commissioner, 599 F.2d 44 (2d Cir. 1979), cert. denied, 444 U.S. 1015 (1980); Miller v. United States, 784 F.2d 728 (6th Cir. 1986). As this issue is quite important to the Internal Revenue Service, Anderson could present the vehicle for resolution of the conflict by the Supreme Court.

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Eleventh Circuit Rules That Attorney Must Comply With Summons Seeking Information Regarding Cash Payments From Clients

On May 27, 1992, the Eleventh Circuit vacated the District Court's order in United States v. Robert A. Leventhal, remanding the case to the District Court with instructions to enforce the Internal Revenue Service's summons in its entirety. This is one of a series of summons cases concerning the IRS's ability to enforce Section 6050I of the Internal Revenue Code in cases involving cash payments of $10,000 or more received by attorneys. The law firm in question filed two incomplete IRS Forms 8300 which indicated that it had received separate payments of cash from clients, but failed to disclose the balance of the information regarding the transactions as required by Section 6050I (e.g., payor's name, addrss, and social security number). The District Court ordered the firm to release the "names" of the payors, but not the rest of the information requested on the Forms 8300.

The Eleventh Circuit held that the law firm had failed to show any reason that the summons should not be enforced in its entirety. Finding the Second Circuit's reasoning in United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991), to be "persuasive," the Eleventh Circuit further ruled that the Florida Bar's Rules of Professional Conduct did not prohibit the firm from disclosing the summoned information, that the information was not protected by the attorney-client privilege, and that the "last link" doctrine did not apply in this case. Finally, the Court of Appeals expressly noted its disagreement with the District Court's statement that the law firm could properly refuse to comply with the summons absent a court order.

On a related front, the United States District Court for the Northern District of Georgia, which had previously ordered the Garland law firm to provide the Internal Revenue Service with all information required under Section 6050I as to large cash payments received from clients, has now denied the respondent's application for a stay pending appeal. The District Court determined that the law firm had little chance of overturning the enforcement order on appeal.

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APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

(As provided for in the amendment to the Federal postjudgment interest statute, 28 U.S.C. §1961, effective October 1, 1982)

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	02-14-90	7.97%	05-31-91	6.09%
11-18-88	8.55%	03-09-90	8.36%	06-28-91	6.39%
12-16-88	9.20%	04-06-90	8.32%	07-26-91	6.26%
01-13-89	9.16%	05-04-90	8.70%	08-23-91	5.68%
02-15-89	9.32%	06-01-90	8.24%	09-20-91	5.57%
03-10-89	9.43%	06-29-90	8.09%	10-18-91	5.42%
04-07-89	9.51%	07-27-90	7.88%	11-15-91	4.98%
05-05-89	9.15%	08-24-90	7.95%	12-13-91	4.41%
06-02-89	8.85%	09-21-90	7.78%	01-10-91	4.02%
06-30-89	8.16%	10-27-90	7.51%	02-07-91	4.21%
07-28-89	7.75%	11-16-90	7.28%	03-06-92	4.58%
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%
09-22-89	8.19%	01-11-90	6.62%	05-01-92	4.40%
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%
11-16-89	7.69%	03-08-91	6.46%	06-25-92	4.11%
12-14-89	7.66%	04-05-91	6.26%		
01-12-90	7.74%	05-03-91	6.07%		

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

* * * * *

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New Hampshire	Jeffrey R. Howard
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
New York, N	Gary L. Sharpe
New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
North Carolina, W	Thomas J. Ashcraft
North Dakota	Stephen D. Easton
Ohio, N	Joyce J. George
Ohio, S	D. Michael Crites
Oklahoma, N	Tony Michael Graham
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Timothy D. Leonard
Oregon	Charles H. Turner
Pennsylvania, E	Michael Baylson
Pennsylvania, M	James J. West
Pennsylvania, W	Thomas W. Corbett, Jr.
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	John S. Simmons
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

ATTACHMENT

INTERIM PROCEDURES FOR THE
EXPEDITED DISPOSAL OF LOW VALUE VEHICLES

1. Definition of Terms as Used Herein:

   a. Low Value Vehicles: Regular production passenger and recreational vehicles, motorcycles, motorbikes, trucks and trailers having a book value between $0 and $500.

   b. Book Value: Loan value as stated in the applicable N.A.D.A. Value Guide, as of the date of seizure.

   c. Salvage Vehicle: Vehicle that is bought for the use or resale of its component parts.

   d. Scrap Vehicle: Vehicle that has no value except for its basic material, e.g., metal, rubber or glass content.

2. Policy.

   U.S. Marshals shall dispose of low value vehicles, which are forfeited and available for disposal, as soon as possible, but no later than 30 days following forfeiture. U.S. Marshals shall dispose of low value vehicles via sale to licensed salvage, junk, or scrap dealers, or recyclers. U.S. Marshals shall conduct such sales as frequently as may be necessary, e.g., biweekly, to remain in compliance with the 30 day standard.[1] Procedures for conducting such sales are being incorporated into the new seized/forfeited vehicle contracts to be accomplished by the contractor. The following procedures are provided in cases where the U.S. Marshal will be conducting such sales.

3. Procedures.

   a. U.S. Marshals shall establish a rotating list of dealers in order to promote competition within the industry. Any and all licensed salvage, junk, or scrap dealers, or recyclers (herein referred to as dealers) who are involved in legitimate business operations and are located within the judicial district, are eligible for inclusion on the list. Sources for compiling the

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[1]U.S. Marshals having a large work backlog in disposing of forfeited vehicles, may require additional time to begin complying with the 30 day standard. Marshals requiring such additional time should advise the Associate Director for Operations Support via memorandum.

list include, but are not limited to telephone, and trade and industry association directories.

b. Dealers shall be contacted on a documented, rotational basis. Low value vehicles shall be offered on an all-or-none basis, to at least three dealers and sold to the highest responsive dealer. A refusal to bid shall be noted in the file and the next dealer on the list shall be contacted. Three successive refusals to bid shall be grounds for removing a dealer from the list.

c. A bill of sale shall be issued by the Marshal for each vehicle sold, to enable the dealer to document the source of the salvaged/scrapped vehicle and/or its component parts. The bill of sale shall contain the words that the vehicle is being sold for salvage and/or scrap purposes only and is not to be retitled/reregistered as an operating motor vehicle.

d. Where feasible, the purchasing dealer should remove the vehicle(s) from the storage location as a condition of sale.

4. Exemption of Certain Vehicles. The Marshal may request that a particular low value vehicle be exempted from these procedures, if disposal by an alternate method will produce a return significantly higher than the book value, and the management and disposal costs associated with the alternate method are otherwise cost-effective. The exemption should be requested under the Significant Seized Property Decision procedure.

5. Contact. For additional information or assistance in implementing these procedures, please contact your Seized Assets Division Regional Office.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

EXHIBIT
B

Bureau of Justice Statistics Bulletin

Prisoners in 1991

By
Tracy L. Snell
BJS Statistician
and
Danielle C. Morton
Statistical Assistant

The number of prisoners under the jurisdiction of Federal or State correctional authorities at yearend 1991 reached a record high of 823,414. The States and the District of Columbia added 44,208 prisoners; the Federal system, 4,176. The increase for 1991 brings total growth in the prison population since 1980 to 493,593 — an increase of about 150% in the 11-year period (table 1).

The 1991 growth rate (6.2%) was less than the percentage increase recorded during 1990 (8.7%), and the number of new prisoners added during 1991 was 13,679 less than the number added during the preceding year (62,063). The 1991 increase translates into a nationwide need for approximately 900 prison bedspaces per week, compared to the nearly 1,200 prison bedspaces per week needed in 1990.

Table 1. Change in the State and Federal prison populations, 1980-91

Year	Number of inmates	Annual percent change	Total percent change since 1980
1980	329,821		
1981	369,930	12.2%	12.2%
1982	413,806	11.9	25.5
1983	436,855	5.6	32.5
1984	462,002	5.8	40.1
1985	502,752	8.8	52.4
1986	545,378	8.5	65.4
1987	585,292	7.3	77.5
1988	631,990	8.0	91.6
1989	712,967	12.8	116.2
1990	775,030	8.7	135.0
1991	823,414	6.2	149.7

Note: All counts are for December 31 of each year and may reflect revisions of previously reported numbers.

Prisoners with sentences of more than 1 year (referred to as "sentenced prisoners") accounted for 96% of the total prison population at the end of 1991, growing by 6.8% during the year (table 2). The remaining prisoners had sentences of a year or less or were unsentenced (for example, those awaiting trial in States with combined prison-jail systems).

The number of sentenced Federal prisoners increased at a faster rate than sentenced prisoners in the States during 1991 (12.3% versus 6.4%). While the rate of increase in the number of sentenced prisoners for State systems was lower than in 1990 (6.4% and 8.7%), the rate of increase in the Federal system was higher (12.3% and 7.7%).

The number of Federal prisoners with no sentences or sentences of less than a year decreased by 2,058 during 1991 (from 16,622 to 14,564), while the number of sentenced prisoners increased by 6,234.

Prison populations in New Mexico, West Virginia, and Wyoming decreased during 1991. The decrease in these 3 States totaled only 187 inmates. The highest percentage increases during 1991 were reported for Rhode Island (15.9%), Washington (14.5%), New Hampshire (14.2%), and Arkansas (13.9%). Ten States reported total prisoner population increases of 10% or more since yearend 1990.

California's increase of about 4,500 prisoners during the year was the largest gain in the number of prisoners for any single jurisdiction; however, 1991 was the first year since 1977 when California's rate of increase fell below the national average.

May 1992

This Bulletin presents counts of the Nation's prisoners at the end of 1991. The 1991 increase of over 48,000 prisoners equals a demand for approximately 900 new prison beds per week nationwide. State prisons were estimated to be operating from 16% to 31% above their capacities at yearend.

The 1991 growth rate was the lowest annual percentage change since 1984. During 1991, 12 States and the Federal prison system experienced growth of 10% or more in the number of sentenced prisoners. By contrast, in 1989, a year of peak growth, 29 States and the Federal system experienced such an increase. The number of sentenced prisoners increased more in 1991 than in any year from 1985 to 1988 but less than in the record years of 1989 and 1990.

The Bureau of Justice Statistics expresses its appreciation to the departments of corrections in the 50 States, the District of Columbia, and the Federal Prison System, that make it possible for us to gather and report data on the Nation's prisoners.

Steven D. Dillingham, Ph.D.
Director

Table 2. Prisoners under the jurisdiction of State or Federal correctional authorities, by region and jurisdiction, yearend 1990 and 1991

Region and jurisdiction	Total			Sentenced to more than 1 year			
	Advance 1991	Final 1990	Percent change, 1990-91	Advance 1991	Final 1990	Percent change, 1990-91	Incarceration rate, 1991*
U.S. total	823,414	775,030	6.2%	789,609	739,549	6.8%	310
Federal	71,608	67,432	6.2	57,044	50,810	12.3	22
State	751,806	707,598	6.2	732,565	688,739	6.4	287
Northeast	131,813	123,392	6.8%	127,934	119,063	7.5%	248
Connecticut	10,977	10,500	4.5	8,585	7,771	10.5	262
Maine	1,621	1,523	6.4	1,600	1,480	8.1	127
Massachusetts	9,058	8,273	9.5	8,998	7,899	13.9	150
New Hampshire	1,533	1,342	14.2	1,533	1,342	14.2	132
New Jersey	23,483	21,128	11.1	23,483	21,128	11.1	300
New York	57,862	54,895	5.4	57,862	54,895	5.4	319
Pennsylvania	23,388	22,290	4.9	23,386	22,281	5.0	192
Rhode Island	2,772	2,392	15.9	1,749	1,586	10.3	172
Vermont	1,119	1,049	6.7	738	681	8.4	125
Midwest	155,469	145,793	6.6%	155,140	145,480	6.6%	254
Illinois	29,115	27,516	5.8	29,115	27,516	5.8	246
Indiana	13,008	12,736	2.1	12,876	12,615	2.1	226
Iowa	4,145	3,967	4.5	4,145	3,967	4.5	144
Kansas	5,903	5,777	2.2	5,903	5,777	2.2	230
Michigan	36,423	34,267	6.3	36,423	34,267	6.3	387
Minnesota	3,472	3,176	9.3	3,472	3,176	9.3	78
Missouri	15,411	14,943	3.1	15,411	14,943	3.1	294
Nebraska	2,506	2,403	4.3	2,389	2,286	4.5	146
North Dakota	492	483	1.9	441	435	1.4	68
Ohio	35,750	31,822	12.3	35,750	31,822	12.3	323
South Dakota	1,374	1,341	2.5	1,374	1,341	2.5	190
Wisconsin	7,870	7,362	6.9	7,841	7,335	6.9	158
South	301,265	284,029	6.1%	291,807	275,217	6.0%	332
Alabama	16,760	15,665	7.0	16,400	15,365	6.7	392
Arkansas	7,709	6,766	13.9	7,667	6,718	14.1	314
Delaware	3,721	3,471	7.2	2,406	2,241	7.4	342
District of Col.	10,251	9,947	3.1	6,893	6,798	1.4	1,168
Florida	46,533	44,387	4.8	46,531	44,380	4.8	346
Georgia	23,644	22,345	5.8	22,859	21,605	5.8	342
Kentucky	9,799	9,023	8.6	9,799	9,023	8.6	261
Louisiana	20,464	18,599	10.0	20,307	18,599	9.2	466
Maryland	19,291	17,848	8.1	17,824	16,734	6.5	366
Mississippi	9,070	8,375	8.3	8,848	8,084	9.5	335
North Carolina	18,899	18,411	2.7	18,288	17,764	2.9	270
Oklahoma	13,376	12,285	8.9	13,376	12,285	8.9	414
South Carolina	18,312	17,319	5.7	17,173	16,208	6.0	473
Tennessee	11,502	10,388	10.7	11,502	10,388	10.7	227
Texas	51,677	50,042	3.3	51,677	50,042	3.3	297
Virginia	18,755	17,593	6.6	18,755	17,418	7.7	297
West Virginia	1,502	1,565	-4.0	1,502	1,565	-4.0	82
West	163,259	154,384	5.7%	157,684	148,979	5.8%	290
Alaska	2,720	2,622	3.7	1,841	1,851	-.5	344
Arizona	15,415	14,261	8.1	14,843	13,781	7.7	398
California	101,808	97,309	4.6	98,515	94,122	4.7	320
Colorado	8,347	7,671	8.8	8,347	7,671	8.8	247
Hawaii	2,688	2,533	6.1	1,979	1,708	15.9	172
Idaho	2,211	1,961	12.7	2,211	1,961	12.7	212
Montana	1,478	1,425	3.7	1,478	1,425	3.7	182
Nevada	5,879	5,322	10.5	5,879	5,322	10.5	477
New Mexico	3,119	3,187	-2.1	3,016	3,067	-1.7	191
Oregon	6,760	6,492	4.1	6,760	6,492	4.1	229
Utah	2,624	2,496	5.1	2,605	2,474	5.3	149
Washington	9,156	7,995	14.5	9,156	7,995	14.5	183
Wyoming	1,054	1,110	-5.0	1,054	1,110	-5.0	225

Note: The advance count of prisoners is conducted immediately after the calendar year ends. Prisoner counts for 1990 may differ from those reported in previous publications. Counts for 1991 are subject to revision as updated figures become available. Explanatory notes for each jurisdiction are reported in the appendix.
*The number of prisoners with sentences of more than 1 year per 100,000 resident population.

Rates of incarceration increase

On December 31, 1991, the number of sentenced prisoners per 100,000 residents was 310, also a new record. Eleven of the 18 jurisdictions with rates greater than the rate for the Nation were located in the South, 4 were in the West, 2 were in the Midwest, and 1 was in the Northeast.

Since 1980 the number of sentenced inmates per 100,000 residents has risen 123%, from 139 to 310. During this period, per capita incarceration rates have grown most rapidly in the Northeast, increasing by 185% (from 87 to 248), and the West, up by 176% (from 105 to 290). The per capita number of sentenced prisoners in the Midwest climbed 133% (from 109 to 254), and the rate rose 77% in the South (from 188 to 332). The number of sentenced Federal prisoners per 100,000 U.S. residents has increased 144% (from 9 to 22) over the same period.

Prison populations in Northeastern States grow the fastest

Regionally, during 1991 the percentage increase in the number of sentenced prisoners was highest in the Northeastern States, with a gain of 7.5% (table 3). The number of sentenced prisoners grew by 6.6% in the Midwest, 6.0% in the South and 5.8% in the West. The sentenced Federal prison population grew by 12.3%.

In 20 States the percentage change in the number of sentenced prisoners during 1991 was equal to or higher than that of 1990. Among these jurisdictions, nine had increases of at least 10%, led by Hawaii (15.9%), Arkansas (14.1%), and Massachusetts (13.9%).

Table 3. Annual change in the number of sentenced prisoners under the jurisdiction of State or Federal correctional authorities, by region and jurisdiction, yearend 1985 through 1991

Region and jurisdiction	Annual change						Annual percent change					
	85-86	86-87	87-88	88-89	89-90	90-91	1986	1987	1988	1989	1990	1991
U.S. total	41,614	38,593	44,791	75,554	58,232	50,060	8.6%	7.4%	8.0%	12.5%	8.5%	6.8%
Federal	3,836	2,992	2,584	5,061	3,642	6,234	11.7	8.2	6.5	12.0	7.7	12.3
State	37,778	35,601	42,207	70,493	54,590	43,826	8.4	7.4	8.1	12.5	8.7	6.4
Northeast	6,346	8,441	7,243	14,884	9,664	8,871	8.8%	10.7%	8.3%	15.7%	8.8%	7.5%
Connecticut	283	311	86	1,586	1,462	814	7.0	7.2	1.9	33.6	23.2	10.5
Maine	15	(4)	(18)	212	48	120	1.2	-.3	-1.5	17.4	3.4	8.1
Massachusetts	236	576	483	813	631	1,099	4.6	10.7	8.1	12.6	8.7	13.9
New Hampshire	99	85	152	147	176	191	14.5	10.9	17.5	14.4	15.1	14.2
New Jersey[a]	685	3,949	967	2,503	1,689	2,355	6.0	32.9	6.1	14.8	8.7	11.1
New York	3,942	2,393	3,700	6,685	3,663	2,967	11.4	6.2	9.1	15.0	7.1	5.4
Pennsylvania	1,046	1,081	1,637	2,575	1,823	1,105	7.4	7.1	10.1	14.4	8.9	5.0
Rhode Island	44	(16)	188	290	117	163	4.6	-1.6	19.0	24.6	8.0	10.3
Vermont	(4)	66	48	73	55	57	-.9	15.0	9.5	13.2	8.8	8.4
Midwest	7,481	8,141	9,507	15,795	9,434	9,660	7.9%	7.9%	8.6%	13.1%	6.9%	6.6%
Illinois	822	394	1,231	3,631	2,804	1,599	4.4	2.0	6.2	17.2	11.3	5.8
Indiana	196	671	637	949	395	261	2.0	6.7	6.0	8.4	3.2	2.1
Iowa	90	74	183	550	383	178	3.3	2.7	6.4	18.1	10.7	4.5
Kansas	613	436	154	(319)	161	126	13.0	8.2	2.7	-5.4	2.9	2.2
Michigan	2,987	3,137	3,733	4,027	2,628	2,156	16.8	15.1	15.6	14.6	8.3	6.3
Minnesota	119	84	253	304	73	296	5.1	3.4	9.9	10.9	2.4	9.3
Missouri	513	1,048	819	1,745	1,022	468	5.2	10.2	7.2	14.3	7.3	3.1
Nebraska	221	9	145	170	8	103	12.8	.5	7.4	8.1	.4	4.5
North Dakota	(14)	19	34	(10)	31	6	-3.7	5.3	8.9	-2.4	7.7	1.4
Ohio	1,599	1,777	2,222	4,076	1,284	3,928	7.7	7.9	9.2	15.4	4.2	12.3
South Dakota	13	83	(117)	236	85	33	1.3	7.9	-10.3	23.2	6.8	2.5
Wisconsin	322	409	213	436	560	506	6.0	7.2	3.5	6.9	8.3	6.9
South	11,683	8,823	13,143	23,669	22,448	16,590	6.0%	4.3%	6.1%	10.3%	8.9%	6.0%
Alabama	755	1,098	(245)	1,218	1,790	1,035	7.0	9.5	-1.9	9.9	13.2	6.7
Arkansas	90	740	520	345	172	949	2.0	15.7	9.6	5.8	2.6	14.1
Delaware	197	203	42	83	(43)	165	11.2	10.4	1.9	3.8	-1.9	7.4
District of Columbia	183	827	700	421	146	95	4.0	17.3	12.5	6.7	2.2	1.4
Florida	3,746	132	2,321	5,285	4,414	2,151	13.2	.4	7.2	15.2	11.0	4.8
Georgia	487	1,874	294	1,601	1,986	1,254	3.2	11.8	1.7	8.9	10.1	5.8
Kentucky	307	1,149	717	1,135	734	776	6.2	21.7	11.1	15.9	8.9	8.6
Louisiana	410	1,075	867	1,015	1,342	1,708	3.0	7.5	5.6	6.2	7.8	9.2
Maryland	256	353	660	1,806	1,356	1,090	2.1	2.8	5.1	13.3	8.8	6.5
Mississippi	353	158	532	449	384	764	5.7	2.4	7.9	6.2	5.0	9.5
North Carolina	366	(255)	133	377	1,136	524	2.3	-1.6	.8	2.3	6.8	2.9
Oklahoma	1,378	(69)	809	1,160	677	1,091	16.5	-.7	8.4	11.1	5.8	8.9
South Carolina	1,114	840	1,040	1,906	1,400	965	11.2	7.6	8.8	14.8	9.5	6.0
Tennessee	464	48	2,136	855	(242)	1,114	6.5	.6	28.0	8.7	-2.3	10.7
Texas	1,002	287	1,616	3,585	6,020	1,635	2.7	.7	4.2	8.9	13.7	3.3
Virginia	828	386	997	2,345	1,145	1,337	7.1	3.1	7.7	16.8	7.0	7.7
West Virginia	(253)	(23)	4	83	29	(63)	-14.7	-1.6	.3	5.7	1.9	-4.0
West	12,268	10,196	12,314	16,145	13,044	8,705	14.4%	10.5%	11.5%	13.5%	9.6%	5.8%
Alaska	136	101	95	46	(57)	(10)	8.9	6.1	5.4	2.5	-3.0	-.5
Arizona	765	1,520	1,020	1,148	1,055	1,062	9.2	16.8	9.7	9.9	8.3	7.7
California	9,399	7,087	8,968	10,558	9,784	4,393	19.4	12.3	13.8	14.3	11.6	4.7
Colorado[b]	516	869	1,070	1,232	353	676	14.2	20.9	21.3	20.2	4.8	8.8
Hawaii	93	11	(22)	242	(49)	271	6.5	.7	-1.4	16.0	-2.8	15.9
Idaho	104	(13)	149	266	111	250	7.7	-.9	10.4	16.8	6.0	12.7
Montana	(18)	96	64	57	97	53	-1.6	8.6	5.3	4.5	7.3	3.7
Nevada	780	(117)	447	231	210	557	20.7	-2.6	10.1	4.7	4.1	10.5
New Mexico	194	280	137	36	(53)	(51)	9.2	12.1	5.3	1.3	-1.7	-1.7
Oregon	394	687	534	753	336	268	9.0	14.4	9.8	12.6	5.5	4.1
Utah	122	92	107	424	106	131	7.5	5.3	5.8	21.8	4.5	5.3
Washington	(316)	(472)	(315)	1,112	1,067	1,161	-4.6	-7.1	-5.1	19.1	15.4	14.5
Wyoming	99	55	60	40	84	(56)	13.0	6.4	6.6	4.1	8.2	-5.0

Note: Sentenced prisoners are those with sentences of more than 1 year.
( )Indicates a decline in the number of sentenced prisoners.

[a]In 1987 New Jersey began to include in its jurisdiction count the number of State-sentenced prisoners held in local jails because of prison crowding.

[b]Colorado revised its numbers from 1985 to 1990.

Since December 31, 1985, net gains in the number of sentenced prisoners have averaged about 1,000 prisoners per week — a gain of about 912 State prisoners and 78 Federal prisoners per week over the period. The largest net gains have occurred in the South (309 inmates per week) followed by the West (233), the Midwest (192), and the Northeast (178). During 1991 the average growth in the number of sentenced State and Federal prisoners was equal to a demand for 963 additional bed-spaces per week, about 157 fewer than the average weekly growth in 1990 and nearly 500 per week less than in 1989.

The sentenced prisoner population increased in seven States by 90% or more since 1985: California (104%), Colorado (130%), Connecticut (112%), Kentucky (97%), Michigan (105%), New Hampshire (125%), and New Jersey (107%). California's increase of 50,189 sentenced prisoners since 1985 accounts for 69% of the increase for the West and 18% of the increase among all States over the period. In 1985, 10.8% of the Nation's sentenced State prisoners were in California; in 1991, 13.5%. (For additional State comparisons, see table 4.)

Female prisoner population grows at a faster pace

The number of female inmates (47,691) increased at a faster rate during 1991 (7.8%) than the number of male inmates (6.1%) (table 5). The number of sentenced

Table 4. The prison situation among the States, yearend 1991

10 States with the largest 1991 prison populations	Number of inmates	10 States with the highest incarceration rates, 1991*	Prisoners per 100,000 residents	10 States with the largest percent increases in prison population: 1990-91	Percent increase	1985-91*	Percent increase
California	101,808	Nevada	477	Rhode Island	15.9%	Colorado	129.9%
New York	57,862	South Carolina	473	Washington	14.5	New Hampshire	124.5
Texas	51,677	Louisiana	466	New Hampshire	14.2	Connecticut	112.3
Florida	46,533	Oklahoma	414	Arkansas	13.9	New Jersey	107.2
Michigan	36,423	Arizona	398	Idaho	12.7	Michigan	105.1
Ohio	35,750	Alabama	392	Ohio	12.3	California	104.0
Illinois	29,115	Michigan	387	New Jersey	11.1	Kentucky	96.7
Georgia	23,644	Maryland	366	Tennessee	10.7	Rhode Island	81.6
New Jersey	23,483	Florida	346	Nevada	10.5	Arizona	79.4
Pennsylvania	23,388	Alaska	344	Louisiana	10.0	Massachusetts	74.4

Note: The District of Columbia as a wholly urban jurisdiction is excluded.
*Prisoners with sentences of more than 1 year.

Table 5. Prisoners under the jurisdiction of State or Federal correctional authorities, by sex of inmate, yearend 1990 and 1991

	Men	Women
Total		
Advance 1991	775,723	47,691
Final 1990	730,795	44,235
Percent change, 1990-91	6.1%	7.8%
Sentenced to more than 1 year		
Advance 1991	745,510	44,099
Final 1990	699,064	40,485
Percent change, 1990-91	6.6%	8.9%
Incarceration rate, 1991*	599	34

*The number of prisoners with sentences of more than 1 year per 100,000 residents on December 31, 1991.

Table 6. Women under the jurisdiction of State or Federal correctional authorities, yearend 1991

Jurisdiction	Number of female inmates	Percent of all inmates	Percent change in female inmate population, 1990-91
U.S. total	47,691	5.8%	7.8%
Federal	5,654	7.9	7.6
State	42,037	5.6	7.8
States with at least 500 female inmates:			
California	6,302	6.2%	-3.1%
New York	3,368	5.8	25.2
Florida	2,639	5.7	-.9
Texas	2,483	4.8	13.1
Ohio	2,293	6.4	17.8
Michigan	1,734	4.8	2.7
Georgia	1,391	5.9	14.0
Illinois	1,257	4.3	6.3
Oklahoma	1,236	9.2	15.4
New Jersey	1,107	4.7	6.3
Pennsylvania	1,088	4.7	8.2
South Carolina	1,064	5.8	1.0
Alabama	1,055	6.3	10.5
North Carolina	1,020	5.4	7.9
Louisiana	995	4.9	28.4
Virginia	947	5.0	2.2
Arizona	939	6.1	12.5
Maryland	931	4.8	6.2
Missouri	821	5.3	5.7
District of Columbia	753	7.3	24.3
Indiana	706	5.4	3.7
Connecticut	660	6.0	-3.4
Massachusetts	610	6.7	4.8
Washington	539	5.9	23.9
Mississippi	533	5.9	19.0
Tennessee	518	4.5	32.8
Kentucky	513	5.2	7.1

male prisoners per 100,000 men in the resident population (599 per 100,000) was about 18 times that of sentenced female prisoners per 100,000 women in the resident population (34 per 100,000). At the end of 1991, women accounted for 5.8% of prisoners nationwide (table 6).

Overall, the 1991 growth rate in the number of female inmates (7.8%) was less than that for 1990 (8.9%). The rate of growth of female inmates declined in the West, from 7.9% in 1990 to .4% in 1991. This lower growth rate offset the higher growth rates in 1991 in the Northeast, Midwest, and South.

	Percent increase in female inmate population	
	1990-91	1989-90
U.S. total	7.8%	8.9%
Federal	7.6	18.5
State	7.8	7.7
Northeast	14.6	9.2
Midwest	7.6	6.3
South	10.0	7.8
West	.4	7.9

In 1991, 26 States, the District of Columbia, and the Federal system had more than 500 female inmates. Among these jurisdictions, 12 had increases of at least 10%, led by Tennessee's increase of 32.8% (from 390 in 1990 to 518 in 1991). New York's increase during 1991, 677 inmates, accounted for 19.6% of the nationwide increase of 3,456.

Local jails held more than 12,000 because of State prison crowding

At the end of 1991, 19 jurisdictions reported a total of 12,225 State prisoners held in local jails or other facilities because of crowding in State facilities (table 7).[1] Three States — Alabama, New Jersey, and Tennessee — accounted for more than half of the prisoners sentenced to prison but incarcerated locally. Three States — New Jersey, Tennessee, and West Virginia — held more than 10% of their State-sentenced prisoners in local jails because of State facility crowding. Overall, 1.5% of the State prison population was confined in local jails on December 31, 1991, because of prison crowding.

[1] State prisons include the District of Columbia

Prison capacity estimates are difficult to compare

The extent of crowding in the Nation's prisons is difficult to determine precisely because of the absence of uniform measures for defining capacity. A wide variety of capacity measures is in use among the 52 reporting jurisdictions because capacity may reflect both available space to house inmates and the ability to staff and operate an institution. To estimate the capacity of the Nation's prisons, jurisdictions were asked to supply up to three measures for yearend 1991 — rated, operational, and design capacities. These measures were defined as follows:

- Rated capacity is the number of beds or inmates assigned by a rating official to institutions within the jurisdiction.
- Operational capacity is the number of inmates that can be accommodated based on a facility's staff, existing programs, and services.
- Design capacity is the number of inmates that planners or architects intended for the facility.

Table 7. State prisoners held in local jails because of prison crowding, by State, yearend 1990 and 1991

States housing prisoners in local jails	Prisoners held in local jails: Number		As a percent of all prisoners	
	1990	1991	1990	1991
U.S. total	17,574	12,225	2.3%	1.5%
Alabama	858	1,245	5.5	7.4
Arizona[a]	52	49	.4	.3
Arkansas	777	87	11.5	1.1
Colorado[a]	653	81	8.5	1.0
District of Columbia	826	477	8.3	4.7
Idaho	123	103	6.3	4.7
Indiana[a]	757	773	5.9	5.9
Kentucky	693	866	7.7	8.8
Louisiana	4,493	...	24.2	...
Maine	10	2	.7	.1
Massachusetts[a]	430	785	5.2	8.7
Mississippi	775	847	9.3	9.3
New Jersey	2,741	3,523	13.0	15.0
Oklahoma	210	434	1.7	3.2
Oregon	61	0	.9	0
South Carolina	443	418	2.6	2.3
Tennessee	1,869	2,046	18.0	17.8
Utah	0	94	0	3.6
Vermont[b]	34	20	3.2	1.8
Virginia	1,569	0	8.9	0
West Virginia[a]	102	287	6.5	19.1
Wisconsin	98	88	1.3	1.1

... No data available.
[a]For States not including jail backups in their jurisdiction counts, the percentage of jurisdiction population was calculated using the total number of State inmates in jail and prison.
[b]Includes inmates housed in other States as a result of prison crowding.

Of the 52 reporting jurisdictions, 36 supplied rated capacities, 44 provided operational capacities, and 37 submitted design capacities (table 8). As a result, estimates of total capacity and measures of the relationship to population are based on the highest and lowest capacity figures provided. (Twenty-two jurisdictions reported 1 capacity measure or gave the same figure for each capacity measure they reported.)

Table 8. Reported Federal and State prison capacities, yearend 1991

Region and jurisdiction	Rated capacity	Operational capacity	Design capacity	Population[a] as a percent of Highest capacity	Population[a] as a percent of Lowest capacity
Federal[b]	43,753	...	...	146	146
Northeast					
Connecticut	8,935	10,928	...	100	110
Maine	1,193	1,193	1,193	136	136
Massachusetts	...	...	5,650	160	160
New Hampshire	1,318	1,542	1,162	99	132
New Jersey	...	...	14,898	155	155
New York	58,687	55,699	48,363	99	120
Pennsylvania	...	...	15,915	147	147
Rhode Island	3,042	3,042	2,789	91	99
Vermont	647	862	647	130	173
Midwest					
Illinois	23,961	23,961	20,217	122	144
Indiana	11,934	14,211	...	92	109
Iowa	3,003	3,003	3,003	138	138
Kansas	...	6,622	...	89	89
Michigan	26,209	...	...	139	139
Minnesota	3,414	3,414	3,414	102	102
Missouri	15,056	15,411	...	100	102
Nebraska	...	...	1,706	147	147
North Dakota	...	576	576	85	85
Ohio	...	...	20,783	172	172
South Dakota	1,189	1,130	1,189	116	122
Wisconsin	6,497	6,497	6,497	121	121
South					
Alabama	14,604	14,604	14,604	115	115
Arkansas	...	7,335	...	105	105
Delaware	2,915	3,138	2,015	119	185
District of Columbia	9,788	9,508	8,101	105	127
Florida	53,652	47,572	36,470	87	128
Georgia	...	22,895	...	103	103
Kentucky	8,455	8,270	...	116	119
Louisiana	15,493	15,493	15,493	132	132
Maryland	...	18,880	13,984	102	138
Mississippi	8,524	8,098	8,524	106	112
North Carolina	16,126	19,646	...	96	117
Oklahoma	8,964	11,243	...	119	149
South Carolina	16,138	16,138	12,335	114	149
Tennessee	9,409	9,349	9,642	98	100
Texas	47,770	50,698	62,212	83	108
Virginia	13,970	13,970	13,970	134	134
West Virginia	1,585	1,644	1,736	87	95
West					
Alaska	2,523	2,602	...	105	108
Arizona	...	14,994	...	103	103
California	...	...	55,692	183	183
Colorado	...	7,416	6,239	112	133
Hawaii	...	2,569	1,658	105	162
Idaho	...	2,086	1,831	106	121
Montana	1,117	1,441	1,117	103	132
Nevada	6,166	6,166	5,014	95	117
New Mexico	3,236	3,236	3,236	96	96
Oregon	...	6,690	...	101	101
Utah	3,131	2,890	...	84	91
Washington	5,452	6,710	6,710	137	168
Wyoming	88	777	619	136	198

... Data not available.
[a]Excludes inmates who had been sentenced to State prison but were held in local jails because of crowding and who were included in the total prisoner count.
[b]Excludes prisoners housed in contract or other non-Federal facilities.

Most jurisdictions are operating above capacity

Prisons generally require reserve capacity to operate efficiently. Prison dormitories and cells need to be maintained and repaired periodically, special housing is needed for protective custody and disciplinary cases, and space may be needed to cope with emergencies. At the end of 1991, seven States reported they were operating below 95% of their highest capacity. Forty-five jurisdictions and the Federal prison system reported operating at 100% or more of their lowest capacity; 38 of these held populations that met or exceeded their highest reported capacities.

Overall, at the end of 1991 State prisons were estimated to be operating at 116% of their highest capacities and 131% of their lowest capacities (table 9). Prisons in Southern States were found to be operating closest to their reported capacity on each measure. The Federal system was estimated to be operating at 46% over capacity.

An increasing percentage of prisoners admitted for drug offenses

Underlying the 116% growth in the State prison population during the 1980's was a change in the offense distribution: In 1989 an estimated 29.5% of persons admitted to State prison were drug offenders, up from 7.7% in 1981 (table 11). The number of prison commitments for drug offenses grew six-fold, from 11,487 in 1981 to 87,859 in 1989, while the total number of commitments doubled, from 149,186 to 297,827. The increase in prisoners admitted for drug offenses accounted for more than half of the growth in the total admissions to State prisons.

Growth in the number of persons arrested for drug law violations and an increase in the rate of incarceration for drug offenses account for the change in the prison offense distribution. Between 1981 and 1989, the estimated number of adult arrests for drug law violations increased by 166.6%, from 468,056 to 1,247,763 (table 12).

The impact of this increase in arrests was compounded by a rise in the rate of incarceration. In 1981 there were 24 drug offenders admitted to State prison for every 1,000 adult arrests for drug violations (table 13). By 1989 the rate increased to 70 admissions per 1,000 adult arrests.[a]

Newly available data permit estimates of the probability of incarceration

Previous BJS Bulletins have reported the ratio of prison commitments to adult arrests for selected serious crimes. This ratio was designed as an alternative to population-based measures. While population-based incarceration rates take into account the number of sentenced prisoners and the size of the resident population in a jurisdiction, the prison admission-to-arrest ratios show the use of prison relative to those arrests that account for a substantial proportion of prison admissions.

In the numerator of this ratio was the total number of court commitments for all offenses; in the denominator was the

[a]The 1990 rate could not be calculated. Although the number of adult arrests for drug law violations in 1990 was 1,008,332, data on the number of drug offenders admitted to State prisons were not available.

Table 9. State prison population and capacity, by region, 1991

Region	Prison population	Highest capacity	Lowest capacity	Population as a percent of Highest capacity	Population as a percent of Lowest capacity
U.S. total	749,318	647,160	572,487	116%	131%
Northeast	131,452	112,717	100,552	116	131
Midwest	155,469	123,582	117,147	126	133
South	299,219	297,351	247,364	101	121
West	163,178	113,510	107,424	144	152

Note: Population counts exclude prisoners sentenced to State prison but held in local jails.

Table 10. Population as a percent of reported capacity for State prisons, 1985-91

	State prisons
Highest capacity 1991	647,160
Lowest capacity 1991	572,487
Net change in capacity, 1990-91	
Highest	48,665
Lowest	29,297
Population as a percent of capacity*	
Highest	
1985	105%
1990	115
1991	116
Lowest	
1985	119%
1990	127
1991	131

Note: States were asked to report their rated, operational, and design capacities. Tabulations reflect the highest and lowest of the 3 capacities reported for 1985, 1990, and 1991. The Federal system did not report comparable capacity figures for 1991.
*Excludes inmates who had been sentenced to State prison but were held in local jails because of crowding and who were included in the total prisoner count.

Table 11. Court commitments to State prisons, by type of offense, 1960-89

Year	Number of court commitments: All offenses	Selected serious offenses	Drug offenses	Percent admitted for: Selected serious offense	Drug offenses
1960	74,952	40,924	3,148	54.6%	4.2%
1964	75,096	43,330	3,079	57.7	4.1
1970	67,304	39,777	6,596	59.1	9.8
1974	89,243	58,900	10,709	66.0	12.0
1978	112,874	72,578	9,481	64.3	8.4
1981	149,186	93,838	11,487	62.9%	7.7%
1982	164,648	105,539	13,336	64.1	8.1
1983	173,289	106,746	14,210	61.6	8.2
1984	166,927	87,971	18,529	52.7	11.1
1985	183,131	100,539	24,173	54.9	13.2
1986	203,315	106,740	33,140	52.5%	16.3%
1987	225,627	110,332	46,028	48.9	20.4
1988	245,310	112,843	61,573	46.0	25.1
1989	297,827	117,344	87,859	39.4	29.5

Note: Offenses include murder, manslaughter, sexual assault, robbery, aggravated assault, and burglary. Data for new court commitments for 1960-82 are from unpublished National Prisoner Statistics (NPS) reports on admissions and releases. Data for 1983-89 are from the National Corrections Reporting Program (NCRP).

estimated number of adult arrests for murder/nonnegligent manslaughter, rape, robbery, aggravated assault, and burglary.

$$\text{Previously reported ratio} = \frac{\text{All new court commitments}}{\text{Number of arrests for 5 serious offenses}}$$

Between 1960 and 1974 the prison admission-to-arrest ratio declined from 299 commitments per 1,000 adult arrests for the selected serious offenses to 155. In the late 1970's the ratio began to increase. By 1990, the ratio had more than doubled — to 367 court commitments per 1,000 adult arrests.

The previously reported ratio, however, should not be used as a measure of the probability of incarceration or as an indicator of the certainty of punishment. Data recently available from the National Corrections Reporting Program (NCRP) demonstrate that the changing offense distribution heavily influenced changes in this ratio. Admissions for drug offenses accounted for more than half (51.6%) of the total increase in the number of admissions (148,641) between 1981 and 1989; admissions for the selected serious offenses accounted for 15.8% of the increase.

A more refined ratio that includes the same types of offenses in the numerator and denominator shows that the probability of incarceration for persons arrested for serious offenses has not increased steadily over time. The ratio of prison admissions for murder, manslaughter, sexual assault, robbery, aggravated assault, and burglary to adult arrests for the same offenses increased from 100 commitments per 1,000 adult arrests in 1970 to 150 in 1983. The ratio fluctuated between 1984 and 1987 and then declined to 131 commitments per 1,000 adult arrests in 1989, which was below the level observed in 1981.

The data suggest that growth in the prison population before 1984 may have been linked to an increase in the probability of incarceration for serious offenses. Much of the growth since 1984, however, resulted from the doubling of the number of adult arrests for drug law violations and the tripling of the probability of incarceration for those arrestees.

Table 12. Estimated number of court commitments and adult arrests for selected serious offenses and drug offenses, 1960-90

Year	Estimated number of adult arrests		
	Selected serious offenses	All drug offenses	Drug trafficking
1960	250,465	–	–
1964	291,146	–	–
1970	395,679	322,314	–
1974	574,730	474,897	–
1978	616,656	479,950	86,391
1981	697,847	468,056	93,143
1982	754,742	584,850	119,309
1983	709,525	583,474	128,948
1984	679,032	623,719	137,218
1985	688,795	718,597	170,307
1986	757,587	742,687	186,414
1987	749,651	849,521	219,176
1988	840,633	1,050,576	287,858
1989	897,252	1,247,763	404,275
1990	881,466	1,008,332	318,633

Note: The number of adult arrests was derived from annual publications from the FBI on the number of murders/nonnegligent manslaughters, rapes, robberies, aggravated assaults, burglaries, and drug law violations reported to the public. The estimated number of adult arrests for these crimes was derived by multiplying the estimated total number of arrests by the percentage of known arrests of persons age 18 or older, as reported annually by the FBI. For 1960 and 1964, estimates of adult arrests were based on FBI data for total known arrests for those years and were weighted for reporting coverage. (See *Crime in the U.S., 1970*, tables 24 and 25.) The estimated number of adult arrests for drug trafficking was derived by multiplying the total number adult arrests for drug law violations by the percentage of arrests for sale or manufacture.
–Not available

Table 13. Court commitments to State prisons, relative to adult arrests for selected offenses, 1960-90

Year	Number of court commitments		
	For all offenses per 1,000 arrests for serious offenses	For selected serious offenses per 1,000 arrests for same offenses	For drug offenses per 1,000 arrests for all drug offenses
1960	299	163	–
1964	258	149	–
1970	170	100	20
1974	155	102	22
1978	183	118	20
1981	214	134	24
1982	218	140	23
1983	244	150	24
1984	246	130	30
1985	266	146	34
1986	268	141	45
1987	301	147	54
1988	292	134	59
1989	332	131	70
1990*	367	--	–

Note: Selected serious offenses include murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, and burglary.
--Not available.
*Data on the number of court commitments by type of offense were not available for 1990.

Methodological note

This Bulletin is based upon an advance count of prisoners conducted for the National Prisoner Statistics (NPS) program immediately after the end of each calendar year. A detailed, final count containing any revisions will be published at a later date.

Explanatory notes

Alabama. Capacity in community programs is not included in the reported capacity figures.

Alaska. Prisons and jails form one integrated system. All NPS data include, therefore, both jail and prison populations.

Arizona. Population counts are based on custody data. Population counts exclude 46 male and 3 female inmates housed in local jails due to overcrowding. Other expedited releases consist of inmates released by Early Parole Review (A.R.S. 31-233J).

California. Population counts are based on custody data.

Colorado. Population counts for "Inmates with over 1 year maximum sentence" include an undetermined number of "Inmates with a sentence of 1 year or less." Colorado revised the jurisdiction counts for 1985-90 to include inmates held in local jails due to overcrowding.

Connecticut. Prisons and jails form one integrated system. All NPS data include, therefore, both jail and prison populations.

Delaware. Population counts are based on custody data. Prisons and jails form one integrated system. All NPS data include, therefore, both jail and prison populations.

District of Columbia. In the District of Columbia, prisons and jails form one integrated system. All NPS data include, therefore, both jail and prison populations. Female releases are included in the counts for male releases. Female capacities are included in the male capacities reported.

Federal. Population counts for "Unsentenced inmates" include those who come under the jurisdiction of the U.S. Immigration and Naturalization Service. Female capacities are included in the male capacities reported.

Florida. Population counts are based on custody data.

Georgia. Population counts are based on custody data. Population counts exclude an undetermined number of inmates housed in local jails solely to ease overcrowding, awaiting pick-up.

Hawaii. Prisons and jails form one integrated system. All NPS data include, therefore, both jail and prison populations.

Illinois. Population counts are based on custody data. Population counts for "Inmates with over 1 year maximum sentence" include an undetermined number of inmates with sentence of 1 year or less."

Indiana. Population counts are based on custody data and exclude 773 inmates housed in local jails because of crowding.

Iowa. Population counts are based on custody data.

Kansas. Female capacities are included in the male capacities reported.

Maine. Female capacities are included in the male capacities reported.

Maryland. While population totals are actual manual counts, breakdowns for sentence length are estimates based on the actual sentence length breakdowns of Maryland's automated data system.

Massachusetts. Population counts are based on custody data. Population counts exclude 774 male and 11 female inmates housed in local jails because of crowding. Population counts for "Inmates with over 1 year maximum sentence" include an undetermined number of "Inmates with a sentence of 1 year or less." Population totals are actual counts; however, the totals by sex are estimates believed to be within 0.1% of the actual counts.

Michigan. Population counts are based on custody data. Capacity figures exclude the capacities of the Community Residential Program.

Mississippi. Female capacities are included in the male capacities reported.

Nevada. Other expedited releases consist of inmates released through mandatory parole.

New Jersey. Other expedited releases consist of inmates released under the provisions of the Intensive Supervision Program. This program was designed in response to prison overcrowding and is an intermediate form of punishment between incarceration and probation. Each of the male capacity figures include 595 bedspaces in county facilities.

North Carolina. While population totals are actual counts, the breakdowns for sentence length are estimates believed to be accurate to within 1% of the actual counts. Population counts exclude inmates housed in county jails for which the state government had parole authority. These inmates are not under the jurisdiction of the North Carolina Division of Prisons. North Carolina had an undetermined number of releases due to overcrowding.

Ohio. Population counts for "Inmates with over 1 year maximum sentence" include an undetermined number of "Inmates with a sentence of 1 year or less."

Oklahoma. Population counts for "Inmates with over 1 year maximum sentence" may include a small undetermined number of inmates with a sentence of 1 year.

Rhode Island. Prisons and jails form one integrated system. All NPS data include, therefore, both jail and prison populations.

Tennessee. Population counts are as of December 20, 1991. Population counts for "Inmates with over 1 year maximum sentence" include an undetermined number of "Inmates with a sentence of 1 year or less." Population counts include 1,744 males and 102 females housed in local jails because of crowding in State prison facilities and exclude 2,736 felons sentenced to serve time in local jails.

Texas. Population counts are based on custody data. The courts have ordered that the Texas Department of Criminal Justice Institutional Division (TDCJ-ID) cannot house more inmates than 95% of capacity. Approximately 2,928 beds are exempt from this rule, and the inmates in these beds do not count toward the calculation of 95% capacity. The population counts include all inmates within TDCJ-ID; however, the capacity figures exclude the 2,928 exempt beds.

Vermont. Population counts are as of December 5, 1991. Prisons and jails form an almost completely integrated system. However, some county and municipal authorities do operate local lockups. NPS data include both jail and prison populations. The capacity figures exclude the 34 male inmates housed in local lockups.

Virginia. Starting December 31, 1991, Virginia no longer reports "inmates with a sentence of 1 year or less."

Washington. Capacity figures exclude state work release facilities which housed 862 inmates on December 31, 1991. None of the work release capacity of 884 is specifically reserved for state inmates; capacity for inmates, parolees, probationers, and offenders serving partial confinement sentences is indistinguishable.

West Virginia. Population counts exclude 263 male and 24 female inmates housed in local jails because of crowding.

Wyoming. Population counts are based on custody data. Wyoming revised the June 30, 1991, female population counts. The male operational capacity figure is the absolute total bedspace available to Wyoming's Department of Corrections, and it includes 150 bedspaces in community centers not exclusively designated as male or female.

Danielle C. Morton and Tracy L. Snell wrote this report, under the supervision of Allen J. Beck and Lawrence A. Greenfeld. Tom Hester edited the report. Marilyn Marbrook, Betty Sherman, Jayne Pugh, and Yvonne Boston produced the report. Data collection and processing were carried out under the supervision of Lawrence S. McGinn and Gertrude Odom, assisted by Carol Spivey, U.S. Bureau of the Census.

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U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

EXHIBIT C

Bureau of Justice Statistics Bulletin

Jail Inmates 1991

By Louis W. Jankowski
BJS Statistician

At midyear 1991 local jails in the United States held an estimated 426,479 persons, a 5.2% increase from midyear 1990. The average daily jail population for the year ending June 28, 1991, was 422,609, a 3.6% increase since 1990. (See appendix table I.) The percentage growth in both the midyear count and the average daily population was significantly lower than the increases recorded between 1988 and 1989 (15.1%). Overall jail occupancy was 101% of the rated capacity of the Nation's jails. These findings are from the 1991 Annual Survey of Jails, which obtained data from 1,124 jails in 799 jurisdictions, approximately a third of all jails. The jails surveyed are facilities administered by local officials and designed to hold persons for more than 48 hours but usually for less than 1 year.

Other survey findings include:

- During the year ending June 28, 1991, there were more than 20 million jail admissions and releases.

- Males constituted 90.7% and females 9.3% of all jail inmates. White non-Hispanics were 41.1% of the local jail population; black non-Hispanics, 43.4%; Hispanics, 14.2%; and non-Hispanics of other races, 1.2% of all inmates reporting race.

- Unconvicted inmates (those on trial or awaiting arraignment or trial) were 51% of the adults being held in jails; convicted inmates (those awaiting or serving a sentence or those returned to jail for violating probation or parole) were 49%.

- Jails were operating at 101% of rated capacity in 1991, down from 104% in 1990.

- There were 505 jurisdictions with at least 100 jail inmates as an average daily population in the most recent census (1988). In 1991, these jurisdictions operated 823 jails, which held a total of 343,702 inmates or about 81% of all jail inmates in the country.

In these jurisdictions--

— the overall occupancy rate was 107% of rated capacity;

— rated capacity increased by 9%, an expansion nearly twice the rate of inmate population growth;

— 85% of the jurisdictions held inmates for other authorities;

— 47% of the jurisdictions held inmates because of crowding elsewhere, a 5% decrease from 1990;

— of the 39,917 inmates held for other authorities in 1991, 23,495 were being held because of crowding elsewhere, principally in State prisons;

— 27% of the jurisdictions had at least one jail under court order to limit population, and 30% were under court order to improve one or more conditions of confinement;

— 38% of the jurisdictions reported at least one jail with an inmate death during the year;

— 546 inmate deaths were reported for these facilities during the year ending June 28, 1991, 51% from natural causes (other than AIDS);

— AIDS-related deaths accounted for 15% of all reported deaths.

June 1992

This Bureau of Justice Statistics Bulletin presents findings from the Annual Survey of Jails, conducted on June 28, 1991. The survey provides estimates of the country's jail inmate population in the years between nationwide BJS jail censuses. This is the eighth survey in the series and the third following the 1988 Census of Local Jails.

We at BJS hope that this Bulletin will assist policymakers, practitioners, and the general public in assessing the current demands of a vital component of the Nation's criminal justice system.

The 1991 Annual Survey of Jails and this Bulletin would not have been possible without the generous cooperation of jail administrators and staff whose facilities were selected for the survey.

Steven D. Dillingham, Ph.D.
Director

One-day counts

On June 28, 1991 the estimated number of inmates held in local jails was 426,479, an increase of 5.2% over the number held on that day a year earlier (table 1). One in every 430 adult residents of the United States was in jail on June 28, 1991. Fewer than 1% of the inmates of the Nation's jails in 1991 were juveniles.

An estimated 2,350 juveniles were housed in adult jails across the country on June 28, 1991. Most juveniles in correctional custody are housed in juvenile facilities. (For a definition of juveniles, see *Methodology*.)

Table 1. Jail population: One-day count and average daily population, by legal status and sex, 1990-91

	Number of jail inmates		
	Annual Survey of Jails		Percent change,
	1990	1991	1990-91
One-day count			
All inmates	405,320	426,479	5.2%
Adults	403,019	424,129	5.2
Male	365,821	384,628	5.1
Female	37,198	39,501	6.2
Juveniles*	2,301	2,350	2.1
Average daily population			
All inmates	408,075	422,609	3.6%
Adults	405,935	420,276	3.5
Male	368,091	381,458	3.6
Female	37,844	38,818	2.6
Juveniles*	2,140	2,333	9.0

Note: Data for 1-day counts are for June 28, 1991.
*Juveniles are persons defined by State statute as being under a certain age, usually 18, and subject initially to juvenile court authority even if tried as adults in criminal court. Because less than 1% of the jail population were juveniles, caution must be used in interpreting any changes over time.

Table 2. Conviction status of adult jail inmates, by sex, 1990-91

	Number of jail inmates in Annual Survey of Jails	
	1990	1991
Total number of adult inmates	403,019	424,129
Convicted	195,661	206,458
Male	177,619	185,947
Female	18,042	20,511
Unconvicted	207,358	217,671
Male	188,202	198,681
Female	19,156	18,990

Note: Data are for June 29, 1990, and June 28, 1991. Annual Survey of Jails data may underestimate the number of convicted inmates and overestimate the number of unconvicted inmates. Some facility records do not distinguish inmates awaiting sentence (or other convicted persons) from unconvicted inmates. The 1989 Survey of Inmates in Local Jails figures indicate that 43% of the inmates were unconvicted and 57% were convicted.

Average daily population

The average daily population for the year ending June 28, 1991, was 422,609, an increase of 3.6% from 1990. The average daily population for males increased 3.6% from the number in 1990; during the same period, the female average daily population increased 2.6%. The average daily juvenile population for the year ending June 28, 1991, was 2,333.

Adult conviction status

At midyear 1991, convicted inmates made up 48.7% of all adult inmates (table 2). The number of convicted inmates increased 5.5% since June 29, 1990. Convicted inmates include those awaiting sentencing or serving a sentence and those returned to jail because they had violated the conditions of their probation or parole.

From 1990 to 1991 the number of unconvicted inmates increased 4.9%. Unconvicted inmates include those on trial or awaiting arraignment or trial.

Demographic characteristics

Males accounted for 90.7% of the jail inmate population (table 3). The adult male inmate population increased 5.1% since 1990. An estimated 1 in every 225 men and 1 in every 2,421 women residing in the United States were in a local jail on June 28, 1991.

Table 3. Demographic characteristics of jail inmates, 1990-91

Characteristic	Percent of jail inmates	
	1990	1991
Total	100%	100%
Sex		
Male	90.8%	90.7%
Female	9.2	9.3
Race/Hispanic origin		
White non-Hispanic	41.8%	41.1%
Black non-Hispanic	42.5%	43.4%
Hispanic	14.3%	14.2%
Other*	1.3%	1.2%

Note: Data are for June 29, 1990, June 28, 1991. Race was reported for 99% of the inmates in both years.
*Native Americans, Aleuts, Asians, and Pacific Islanders.

White non-Hispanics inmates made up 41.1% of the jail population; black non-Hispanics 43.4%; Hispanics, 14.2%; and other races (Native Americans, Aleuts, Asians, and Pacific Islanders), 1.2%.

Population movement

During the year ending June 28, 1991, there were more than 20 million admissions and releases from local jails, about equally divided between total admissions and releases (table 4). The estimated volume of admissions increased by 2% between 1990 and 1991. Total admissions and releases for the year ending June 28, 1991, were approximately 14,000 for juvenile females, 103,000 for juvenile males, 2.3 million for adult females, and 17.7 million for adult males. Admission and release data may include intrasystem transfers within jail jurisdictions. (For a discussion of reporting practices, see *Methodology*.)

Table 4. Annual jail admissions and releases, by legal status and sex, 1990-91

	Number of jail admissions and releases	
	1990	1991
Total admissions	10,064,927	10,266,267
Adults	10,005,138	10,206,086
Male	8,894,706	9,018,632
Female	1,110,432	1,187,454
Juveniles*	59,789	60,181
Male	51,226	53,257
Female	8,563	6,924
Total releases	9,870,546	9,929,347
Adults	9,811,198	9,873,048
Male	8,723,872	8,718,938
Female	1,087,326	1,154,110
Juveniles*	59,348	56,299
Male	50,913	49,571
Female	8,435	6,728

Note: Data are for years ending June 29, 1990, and June 28, 1991. Admissions and release data may include intra-system transfers within jail systems.
*Juveniles are persons defined by State statute as being under a certain age, usually 18, and subject initially to juvenile court authority even if tried as adults in criminal court.

Occupancy

The number of jail inmates increased 5.2% from 1990, while the total rated capacity of the Nation's jails rose 8.2% (table 5). Between June 29, 1990, and June 28, 1991, the percentage of rated capacity which was occupied fell 3 points to 101%.

Characteristics of jurisdictions with large jail populations

On June 28, 1991, 81% of the Nation's local jail inmates were housed in the facilities of 505 jurisdictions, each with an average daily population of at least 100 incarcerated persons at the time of the 1988 Census of Local Jails. These jurisdictions accounted for 823 jails holding 343,702 inmates. The annual growth in the number of inmates housed in large jails (4.8%) was lower than that of the total jail population during 1990-91 (5.2%).

Approximately 85% of the jurisdictions with large jail populations had one or more jails holding inmates for other authorities on June 28, 1991— approximately 2% fewer than in 1990 (Table 6). About 76% of the jurisdictions that were holding inmates for other authorities were holding them for State authorities. The number being held for State authorities in 1991 was 5% higher than in the previous year.

Approximately 12% of the inmates were being held for other authorities, 1,952 fewer than in 1990. Since midyear 1990, the number of inmates being held for local authorities increased by nearly 30%, while the number of inmates being held for Federal authorities decreased by 5%.

Approximately 47% of jurisdictions with large jail populations were holding inmates on June 28, 1991, because of crowding elsewhere. Of the 39,917 local jail inmates held for other authorities, 59% or 23,495 were detained due to crowding elsewhere, mostly in State prisons.

While overall occupancy in the Nation's jails was 1% above rated capacity in 1991, occupancy in jurisdictions with large jail populations was 7% above rated capacity (table 7). The number of large jail jurisdictions with at least 1 jail under court order to reduce crowding decreased from 142 in 1990 to 136 in 1991. Jail administrators responded to judicial demands by increasing the rated capacity of facilities in large jail jurisdictions by 9% in 1991— an expansion nearly twice as large as inmate population growth in large jail jurisdictions.

Table 5. Jail capacity and occupancy, selected years, 1978-91

	National Jail Census			Annual Survey of Jails		
	1978	1983	1988	1989	1990	1991
Number of inmates	158,394	223,551	343,569	395,553	405,320	426,479
Rated capacity of jails	245,094	261,556	339,633	367,769	389,171	421,237
Percent of rated capacity occupied*	65%	85%	101%	108%	104%	101%

Note: Data are for February 15, 1978, June 30, 1983, 1988, 1989, June 29, 1990, and June 28, 1991.
*Percent of rated capacity occupied is based on the 1-day count of inmates.

Table 7. Jurisdictions with large jail population: Rated capacity and percent of capacity occupied, 1990-91

Jurisdictions with large jail populations	Number of jurisdictions		Rated capacity		Number of jail inmates		Percent of capacity occupied	
	1990	1991	1990	1991	1990	1991	1990	1991
Total	508	505	294,965	322,577	327,917	343,702	111%	107%
Jurisdictions with no jail under court order to reduce population	366	369	149,339	165,132	162,792	172,369	109%	104%
Jurisdictions with at least one jail under court order to reduce population	142	136	145,626	157,445	165,125	171,333	113%	109%

Table 6. Jurisdictions with large jail populations: Impact of inmates held for other authorities, 1990-91

	Number of jurisdictions/inmates	
	1990	1991
Jurisdictions with large jail populations	508	505
Jurisdictions holding inmates for other authorities:*	444	427
Federal	246	239
State	346	323
Local	225	220
Jurisdictions holding inmates because of crowding elsewhere:	262	235
All inmates in jurisdictions with large jail populations	327,917	343,702
Inmates being held for other authorities:	37,965	39,917
Federal	8,182	7,792
State	26,277	27,577
Local	3,506	4,548
Inmates being held because of crowding elsewhere:	24,238	23,495

Note: Data are for June 29, 1990, and June 28, 1991, and cover all jurisdictions with an average daily inmate population of 100 or more at the time of the 1988 Census of Local Jails.
*Detail adds to more than total because some jurisdictions held inmates for more than one authority.

Jail administrators also responded to court directives to improve specific conditions of confinement. There were 149 large jail jurisdictions under court order for specific conditions in 1991, compared to 152 in 1990 (table 8). Fewer jurisdictions were operating under court orders to improve crowded living conditions, recreational facilities, visitation policies, food service, staffing patterns, grievance procedures, and counseling programs. However, as compared to 1990, 8 more jurisdictions were under court order in 1991 to improve medical facilities or services, 6 more to improve education or training programs, and 4 more for fire hazards (table 8).

Twenty-five largest jail jurisdictions

The Nation's 25 largest jail jurisdictions had between 1 and 17 jail facilities in their systems, and average daily populations ranging from 2,076 to 20,779 inmates (table 9). Nine of the jurisdictions were located in California, 4 in Texas, 3 in Florida, and 1 each in Arizona, District of Columbia, Georgia, Illinois, Louisiana, Maryland, Pennsylvania, New York, and Tennessee. Eight of the jurisdictions had a lower average daily population in 1991 than in 1990, and 11 had a lower population on June 28, 1991, than on June 29, 1990.

Table 8. Jurisdictions with large jail populations: Number of jurisdictions under court order to reduce population or to improve conditions of confinement, 1990-91

	Number of jurisdictions with large jail populations					
	Total		Ordered to limit population		Not ordered to limit population	
	1990	1991	1990	1991	1990	1991
Total	508	505	142	136	366	369
Jurisdictions under court order citing specific conditions of confinement	152	149	128	123	24	26
Subject of court order:						
Crowded living units	128	119	119	112	9	7
Recreation facilities	67	66	56	55	11	11
Medical facilities or services	50	58	41	45	9	13
Visitation practices or policies	42	36	37	31	5	5
Disciplinary procedures or policies	32	34	25	26	7	8
Food service	36	33	30	30	6	3
Administrative segregation procedures or policies	26	27	23	22	3	5
Staffing patterns	51	46	43	40	8	6
Grievance procedures or policies	34	29	28	24	6	5
Education or training programs	16	22	14	19	2	3
Fire hazards	14	18	11	18	3	0
Counseling programs	20	18	17	14	3	4
Inmate classification	37	37	32	34	5	3
Library services	50	50	41	38	9	12
Other	14	15	11	8	3	7
Totality of conditions	37	40	34	34	3	6

Note: Detail adds to more than the total number of jurisdictions under court order for specific conditions

Table 9. Twenty-five largest jurisdictions: Average daily population and one-day count, June 29, 1990, and June 28, 1991

Jurisdiction	Number of jails in jurisdiction		Average daily population during		Population on	
	1990	1991	1990	1991	June 29, 1990	June 28, 1991
Los Angeles County, Calif.	8	9	21,984	20,779	21,610	20,885
New York City, N.Y.	14	17	17,538	20,419	16,916	20,563
Cook County, Ill.	–	–	6,825	7,257	7,169	6,356
Harris County, Tex.	3	3	5,694	6,751	5,633	6,808
Dade County, Fla.	6	7	4,551	5,343	4,758	5,493
Dallas County, Tex.	4	4	5,860	5,247	5,306	4,686
Shelby County, Tenn.	2	2	4,932	5,008	4,894	5,755
Philadelphia County, Penn.	7	7	4,813	4,897	4,821	4,589
San Diego County, Calif.	12	12	5,089	4,660	4,803	4,303
Orange County, Calif.	3	3	4,370	4,378	4,402	4,390
Maricopa County, Ariz.	6	6	3,887	4,312	4,260	4,480
Santa Clara County, Calif.	7	7	4,177	4,072	4,217	4,166
Tarrant County, Tex.	3	4	2,958	3,779	3,339	4,000
Orleans Parish, La.	–	–	3,604	3,677	3,550	4,481
Broward County, Fla.	3	3	3,059	3,502	2,788	3,584
Orange County, Fla.	2	2	2,890	3,267	3,031	3,225
Sacramento County, Calif.	3	3	3,095	3,170	3,233	2,980
Fulton County, Ga.	4	4	2,517	2,983	3,151	2,969
Alameda County, Calif.	4	3	3,610	2,912	3,505	2,891
Baltimore City, Md.	4	4	2,678	2,828	2,708	2,894
San Bernardino County, Calif.	2	2	2,852	2,735	2,909	2,929
Washington, D.C.	1	1	1,692	2,365	1,692	2,356
Bexar County, Tex.	1	1	2,352	2,313	2,339	1,981
Riverside County, Calif.	4	4	2,110	2,240	2,111	2,174
Kern County, Calif.	3	3	2,383	2,076	2,595	1,770

–These jurisdictions provided a single report covering all of their jail facilities.

Inmate deaths

A total of 190 large jail jurisdictions (38%) reported one or more jails with an inmate death during the year ending June 28, 1991 (table 10). The comparative number from the previous year was 180 (35%). Three of every four deaths reported in jurisdictions with large jail populations in 1991 resulted from either natural causes other than AIDS (51%), or from suicide (24%). AIDS-related deaths accounted for 15% of the total; injury by another person, 3%; and accidents or undetermined causes, 7%.

Table 10. Jurisdictions with large jail populations: inmate deaths, 1990-91

Cause of death	Jurisdictions reporting deaths[a] 1990	1991	Inmate deaths 1990	1991
Total	180	190	494	546
Natural causes	96	116	208	278
AIDS	32	32	84	84
Suicide	102	89	148	131
Injury by another person	11	11	14	16
Other[c]	22	21	40	37

Note: Data are for the year ending June 29, 1990, and June 28, 1991, and cover all jurisdictions with an average daily inmate population of 100 or more at the time of the 1988 Jail Census. The number of deaths from AIDS and other natural causes may have been under-reported in some jurisdictions that transferred sick inmates to outside hospitals and other medical facilities.
[a]Detail adds to more than total because some jurisdictions reported more than one type of death.
[b]Exclude AIDS-related deaths.
[c]Includes accidents and undetermined causes of death.

Methodology

The 1991 Annual Survey of Jails was the eighth such survey in a series sponsored by the Bureau of Justice Statistics. The first was conducted in 1982. Complete enumerations of the Nation's jails are conducted every 5 years. Annual surveys — which collect data on all jails in jurisdictions with 100 or more jail inmates and on a sample of all other jails — are carried out in each of the 4 years between the full censuses. The reference date for the 1991 survey was June 28, 1991. Full censuses were done on February 15, 1978, June 30, 1983, and June 30, 1988.

A *local jail* is a facility that holds inmates beyond arraignment, usually for more than 48 hours, and is administered by local officials. Specifically excluded from the count were temporary lockups that house persons for less than 48 hours, physically separate drunk tanks, and other holding facilities that did not hold persons after they had been formally charged, Federal- or State-administered facilities, and the combined jail-prison systems of Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont. Included in the universe were five locally operated jails in Alaska and eight jails that were privately operated under contract for local governments.

The 1991 survey included 1,124 jails in 799 jurisdictions. A *jurisdiction* is a county, municipality, township, or regional authority that administers one or more local jails. The jails in 505 jurisdictions were automatically included in the survey because the average daily inmate population in these jurisdictions was 100 or more in the 1988 census. The jurisdictions with large jail populations, referred to as certainty jurisdictions, accounted for 823 jails and 343,702 inmates, or 81% of the estimated inmate population on June 28, 1991. Three certainty jurisdictions, each having only one jail facility, were excluded from the 1991 survey because the jail facility closed or became strictly a holding facility and therefore was out-of-scope for this survey. Information referring to certainty jurisdictions is presented at the jurisdiction level. Prior to 1987 these data were presented for individual jails. The other jurisdictions surveyed constituted a stratified random sample of those jurisdictions whose average daily population was less than 100 in the 1988 jail census.

Data were obtained by mailed questionnaires. Two followup mailings and phone calls were used to encourage reporting. The response rate was 99% for all jails. For the four jails in certainty jurisdictions and the one jail in a noncertainty jurisdiction not responding to the survey, data were adjusted by applying the average growth factor for facilities in the same stratum and region with the same type of inmates (men, women, or both sexes).

National estimates for the inmate population on June 28, 1991, were produced by sex, race, legal status, and conviction status; for the average daily population during the year ending June 28, 1991, by sex and legal status; and for admissions and releases during the year ending June 28, 1991, by sex and legal status. National estimates were also produced for rated capacity. Administrators of jails in jurisdictions with large jail populations provided counts of inmates held for other authorities, inmate deaths, and jails under court order.

Appendix table 1. One-day count and average daily population of jail inmates, selected years 1978-91

	Number of jail inmates					
	National Jail Census			Annual Survey of Jails		
	1978	1983	1988	1989	1990	1991
One-day count						
All inmates	158,394	223,551	343,569	395,553	405,320	426,479
Adults	156,783	221,815	341,893	393,303	403,019	424,129
Male	147,506	206,163	311,594	356,050	365,821	384,628
Female	9,277	15,652	30,299	37,253	37,198	39,501
Juveniles*	1,611	1,736	1,676	2,250	2,301	2,350
Average daily population						
All inmates	157,930	227,541	336,017	386,845	408,075	422,609
Adults	156,190	225,781	334,566	384,954	405,935	420,276
Male	146,312	210,451	306,379	349,180	368,091	381,458
Female	9,878	15,330	28,187	35,774	37,844	38,818
Juveniles*	1,740	1,760	1,451	1,891	2,140	2,333

Note: Data for 1-day counts are for February 15, 1978, and June 30, 1983, 1988, and 1989, June 29, 1990, and June 28, 1991.
*Juveniles are persons defined by State statute as being under a certain age, usually 18, and subject initially to juvenile court authority even if tried as adults in criminal court. Because less than 1% of the jail population were juveniles, caution must be used in interpreting any changes over time.

Sampling error

National estimates have an associated sampling error (standard error) because jurisdictions with an average daily population of less than 100 were sampled for the survey. Estimates based on a sample survey are apt to differ somewhat from the results of a survey canvassing all jurisdictions. Each of the samples that could have been selected using the same sample design could yield somewhat different results. Standard error is a measure of the variation among the estimates from all possible samples, stating the precision with which an estimate from a particular sample approximates the average result of all possible samples. The estimated relative sampling error for the total inmate population of 426,479 on June 28, 1991, was .50%, meaning that the reported total number of inmates may have varied by as much as 2,151 from the average result of all possible samples.

Results presented in this Bulletin were tested to determine whether or not statistical significance could be associated with observed differences between values. Differences were tested to ascertain whether they were significant at 1.96 standard errors (the 95-percent confidence level) or higher. Differences mentioned in the text meet or exceed this 95-percent confidence level. (See appendix table 2.)

Measures of population

Two measures of inmate population are used: the *average daily population* for the year ending June 28 and the *inmate count* on June 28 of each year. The average daily inmate population balances out any extraordinary events that may render the 1-day count atypical. The 1-day count is useful because some characteristics of the inmate population — such as race, ethnicity, and detention status — can be obtained for a specific date, but may not be available on an annual basis.

All calculations in this report involving general population figures used unpublished data from the Bureau of the Census projections of the population for July 1, 1991.

Population movement

Admission and release data include an unknown number of intrasystem transfers within jail jurisdictions. Some jurisdictions do not distinguish new bookings or formal discharges from entries and removals due to temporary absences from jail facilities. These temporary absences include court appearances, medical appointments, work release, substance abuse treatment or counseling, and other authorized absences.

Juveniles

State statutes and judicial practices allow juveniles to be incarcerated in adult jails and prisons under a variety of circumstances. *Juveniles* are persons who are defined by State statute as being under a certain age, usually 18 years, and who are initially subject to juvenile court authority even if tried as adults in criminal court. The Juvenile Justice and Delinquency Prevention Act of 1974 requires sight and sound separation from adults for those juveniles not tried as adults in criminal court but held in adult jails. A 1980 amendment to that 1974 act requires the removal of juveniles from local jails, except those juveniles who are tried as adults for criminal felonies. The proportion of juveniles who were housed in adult jails in accordance with these guidelines is not available.

Appendix table 2. Standard error estimates

Characteristic	Estimate	Standard error	Relative standard error percent
Total rated capacity	421,971	2,522	0.60%
Average daily population			
All inmates	423,512	1,975	0.47%
One-day count, 6/28/91			
All inmates	427,327	2,151	0.50%
Adults	424,977	2,140	0.50
Males	385,428	1,959	0.51
Females	39,549	326	0.82
Juveniles	2,350	161	6.86
Adult inmate status, 6/28/91			
Unconvicted	217,883	1,430	0.66%
Convicted	207,094	1,696	0.82
Race and Hispanic-origin			
White non-Hispanic			
Adults	172,789	1,782	1.03%
Juveniles	802	85	9.38
Black non-Hispanic			
Adults	183,142	1,648	0.90%
Juveniles	1,152	43	3.73
Hispanic			
Adults	60,021	570	0.95%
Juveniles	122	10	7.80
Other			
Adults	5,217	319	6.12%
Juveniles	174	117	67.10
Inmate population movement, July 1,1990 - June 28, 1991			
Admissions	10,283,913	187,512	1.82%
Releases	9,946,409	147,543	1.48

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Data used in this report will be available from the National Archive of Criminal Justice Data at the University of Michigan, 1-800-999-0960. The data sets will be archived as the Sample Survey of Jails.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

EXHIBIT
D

Bureau of Justice Statistics Special Report

Federal Offenses and Offenders

Federal Sentencing in Transition, 1986-90

By
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Federal sentencing practices changed substantially during the last half of the 1980's. Before the 1986 and 1988 anti-drug abuse laws that stiffened sanctions, the Sentencing Reform Act of 1984 (Public Law 98-473, 98 Stat. 1837 (1984), called "the Act" in this report) had already set in motion alterations of Federal practices. Among other reforms, the Act established the U.S. Sentencing Commission to develop guidelines, which scale punishments to the gravity of the offense and the offender's criminal record. The guidelines apply to Federal prisoners who committed their crimes on or after November 1, 1987.

Under the guidelines Federal prisoners are no longer released from prison to parole by the U.S. Parole Commission. Instead, judges impose prison sentences that are served in full, except for time off that prisoners earn for good behavior. Offenders are supervised following their release from prison only if a judge requires it as a part of the sentence.

Cases subject to the Act ("guideline cases") began to appear in appreciable numbers in 1988, the year after the guidelines went into effect. During 1988, 17% of the offenders convicted in Federal district courts were guidelines cases.[1] In 1989 the proportion increased to 51%, and in 1990, to 65%. This report summarizes the main trends in Federal sentencing. It compares sentences imposed before the Act in 1986-87 with those imposed between January 1988 and June 1990, when an increasing percentage of defendants were subject to the guidelines and faced stiffer mandatory sentences. The report also examines time actually served by offenders released from Federal prison between 1986 and 1990.

[1] See *Methodology*, page 10, for a discussion of which cases were included as guideline cases.

June 1992

The Sentencing Reform Act of 1984 introduced "truth in sentencing" to the Federal justice system. The act created a commission that specified sentencing guidelines, which went into effect in late 1987. Defendants convicted for crimes committed after the guidelines serve the actual amount of the sentence, minus a brief "good time" to enable authorities to manage inmates more easily. The guidelines take into account the gravity of the crime and the offender's criminal record. Released prisoners no longer serve time on parole unless judges expressly sentence them to supervision in the community.

This report on sentencing and time served is the first indepth analysis of these issues by the Federal Justice Statistics Program since 1987. It clearly traces changes in sentencing patterns and corresponding changes in time served in prison and supervision after incarceration.

Steven D. Dillingham, Ph.D.
Director

The main findings include:

- The percentage of convicted Federal offenders receiving a prison sentence, which may have included a period of probation, rose from 52% during 1986 to 60% in the first half of 1990.

- Offenders sentenced under the sentencing guidelines were more likely to go to prison than those sentenced before the guidelines went into effect: 74% of the guideline cases in 1990, compared to 52% of the pre-guideline cases in 1986.

- The number and percentage of Federal offenders sentenced to prison increased primarily after 1988. Among those sentenced in Federal district courts, the increased number of drug offenders accounted for most of the increase in sentences to prison.

- The average length of Federal sentences to incarceration decreased between 1986 and 1990 for crimes other than drug offenses. However, because offenders sentenced under the provisions of the Act are not eligible for release on parole, the more recently committed offenders were likely to be incarcerated longer than their predecessors.

- The use of probation sentences decreased from 63% in 1986 to 44% in the first half of 1990.

- Federal prisoners first released in 1990 served an average of 19 months (75% of their court-imposed sentences). This was 29% longer than the average term served by prisoners first released in 1986.

The Sentencing Reform Act of 1984

The Sentencing Reform Act of 1984 (Public Law 98-473, 98 Stat. 1837 (1984)), called "the Act" in this report, established the U.S. Sentencing Commission that had as one of its essential tasks the development of sentencing guidelines. This reform sought to reduce unwarranted disparities between the sentences imposed and the time in prison actually served.[2] The guidelines which the commission issued took effect on November 1, 1987, and applied to Federal offenses committed on that day or later. Sentencing of offenders convicted of crimes committed before that date was governed by the laws applicable before the Act's passage (called the "old law").

The report describes sentencing patterns which occurred during 1986-90. A variety of changes in criminal statutes, as well as shifts in prosecutorial priorities and composition of the offender pool, occurred during this period. Therefore, changes in sentencing patterns may not necessarily reflect the impact of any particular factor such as the guidlelines or provisions of the Act.

[2]U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (Washington, D.C.: June 18, 1987).

Persons sentenced to prison

The number of persons convicted in Federal district courts increased from 43,920 in 1986 to about 48,730 in 1990 — an average annual increase of about 2.6%.[3] Although this growth in the number of convictions had slowed from the 6.4% average annual rate for the period of 1980 to 1985, the likelihood of being sentenced to incarceration rose, from 52% in 1986 to 60% in 1990 (table 1).

The likelihood of receiving a sentence to prison varied according to offense category. Violent offenders were somewhat more likely to be incarcerated in 1990 than in 1986: 88% in 1990, compared to 83% in 1986. Convicted drug offenders were more likely in 1990 than in 1986 to receive a prison sentence — 86%, compared to 77%. The likelihood of incarceration increased slightly for public-order offenders (37% to 43%), and remained unchanged for property offenders (43% in 1986 and 1990).

[3]*Federal Criminal Case Processing, 1980-89, with Preliminary Data for 1990*, BJS report, NCJ-130526, October 1991, table 9. Figures for 1990 are preliminary.

As the number of convictions and the likelihood of being sentenced to prison increased, a substantially greater number of Federal offenders was sentenced to prison. From 1986 through 1988, the number of Federal offenders sentenced to prison remained between 23,000 and 23,600 per year. In 1989, the number increased to 27,377, and in 1990, to approximately 29,400.

This 1986-90 increase resulted largely from the growing number of persons sentenced to prison for drug offenses. The number of Federal drug offenders sentenced to prison rose 48%, while the number of persons sentenced to prison for all other types of crimes grew an average of 14%. By 1990 drug offenders accounted for nearly half (47%) of all persons sentenced to prison from Federal district courts, up from 40% in 1986 and 27% in 1980.

Table 1. Offenders convicted in cases terminated in U.S. district court: Number and percent sentenced to prison, by year and offense, 1986-89 and preliminary 1990

Most serious offense at conviction	Number of convicted offenders who were sentenced to prison[a]					Percent of convicted offenders who were sentenced to prison[a]				
	1986	1987	1988	1989	Preliminary 1990[b]	1986	1987	1988	1989	Preliminary 1990[b]
All offenses[c]	23,058	23,579	23,450	27,377	29,430	52.5%	53.0%	53.8%	58.5%	60.4%
Violent offenses	1,813	1,837	1,733	1,892	1,999	82.7	82.0	81.0	86.8	87.6
Property offenses	6,291	6,234	5,723	5,974	5,775	43.2	43.4	42.6	44.1	43.1
Fraudulent offenses	4,416	4,610	4,182	4,400	4,391	42.0	44.1	43.6	44.4	44.0
Other property offenses	1,875	1,624	1,541	1,574	1,384	46.6	41.6	40.0	43.3	40.5
Drug offenses	9,272	10,196	10,599	13,306	13,754	77.3	75.9	79.2	84.2	85.6
Public-order offenses	5,682	5,312	5,395	6,194	6,427	37.4	36.6	37.0	40.6	43.2
Regulatory offenses	688	601	640	746	757	34.2	32.5	32.6	36.9	38.3
Other public-order offenses	4,994	4,711	4,755	5,448	5,670	37.9	37.2	37.7	41.2	43.9

[a]Includes sentences to prison with or without probation.
[b]See *Methodology*, page 10.
[c]Total may include offenders for whom offense category could not be determined, but excludes offenders for whom sentence category could not be determined.

Comparing pre-guideline and guideline cases

Length of sentences to prison

Between 1986 and 1990, the average length of imposed prison sentences decreased substantially for nearly all types of crimes (table 2). The average sentence to prison for all violent crimes was 32% less in 1990 than in 1986: 90 months in 1990 compared to 132 months in 1986. Sentences to prison for property offenses were 35% shorter, and for public-order offenses, 25% shorter.

Part of the reason for the shorter average sentence was that progressively larger proportions of cases during the period were subject to the Act. Despite this downward trend, the overall average length of prison sentences given to all Federal offenders increased from 53 months in 1986 to 57 months in 1990. This increase resulted from the longer sentences given to drug traffickers outweighing the decline in sentences imposed on others. In 1986 the average prison sentence for drug trafficking was 64 months, and in 1990 it was 84 months.[4]

Likelihood of offenders going to prison

Offenders sentenced under the guidelines during 1988, 1989, and the first 6 months of 1990 were more likely, on the whole, to be sentenced to prison than were offenders sentenced during 1986 and 1987 under the old law (table 3). In 1986, 52% of all offenders sentenced under the old law were given incarceration terms, as were 53% of those sentenced during 1987. In the following year, 77% of all guideline cases resulted in incarceration sentences. The proportion remained constant in 1989, and decreased slightly to 74% during the first half of 1990.

[4]*Federal Criminal Case Processing, 1980-89, with Preliminary Data for 1990,* table 17. The category for drug offenses in table 2 of this report includes drug trafficking, drug possession, and other drug crimes. The average prison sentence for nontrafficking offenses in 1986 was 41 months and in 1990 was 13 months.

Within all offense categories, offenders sentenced under the guidelines were more likely to be sentenced to prison than those receiving pre-guideline sentences. During 1986 and 1987, 82% of those convicted of violent crimes were sentenced to incarceration; 91% to 92% of violent offenders were sentenced to prison in guideline cases disposed in 1988-90. Of offenders convicted of Federal drug crimes in 1986 and 1987 under the old law, more than 75% received sentences to prison; under the Act, those rates rose to around 86% to 90%.

Persons charged with public-order offenses — regulatory, weapons, racketeering, or immigration offenses and tax law violations — were more likely to be given prison terms after the guidelines went to effect. During 1986-87, 37% of convicted public-order offenders received prison sentences; from 1988 through the first half of 1990, about 71% to 75% of these offenders were incarcerated (table 3).

Not all of these changes can be attributed to the sentencing guidelines. Beginning in 1984, and every 2 years thereafter, Congress enacted laws that mandated minimum imprisonment terms for offenders convicted of drug or violent crimes. Although over 60 statutes in the Federal Criminal Code prescribe mandatory minimum penalties for Federal offenses, nearly all mandatory prison sentences imposed (94% during 1984-90) were for drug-law and weapons violations specified in 4 statutes.[5] Because a growing proportion of offenders sentenced after 1984 had violated these statutes, some of the increased rate of sentencing to prison, especially for drug crimes, resulted from these mandatory sentencing provisions rather than the guidelines alone.

For all offenses other than Federal drug crimes, the guidelines brought shorter maximum imprisonment sentences, on average (table 4). For example, the average sentence for violent offenses decreased from 132 months in 1986 and 126 months

[5]U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, D.C., August, 1991) p.10.

Table 2. Offenders convicted in cases terminated in U.S. district court: Average length of sentence to prison, by year and offense, 1986-89 and preliminary 1990

Most serious offense at conviction	Average length of sentence to prison				
	1986	1987	1988	1989	Preliminary 1990[a]
All offenses[b]	52.7 mos.	55.2 mos.	55.1 mos.	54.5 mos.	57.4 mos.
Violent offenses	132.0	126.2	110.7	90.6	89.8
Property offenses	34.3	32.5	31.5	26.0	22.3
Fraudulent offenses	32.8	31.1	31.0	26.1	22.3
Other property offenses	37.9	36.5	32.7	25.7	22.5
Drug offenses	62.2	67.8	71.3	74.9	81.2
Public-order offenses	36.9	35.5	30.7	27.6	27.7
Regulatory offenses	47.2	42.1	30.4	24.0	26.3
Other public-order offenses	30.8	32.2	30.7	28.1	27.8

[a]Includes preliminary count of all cases terminated during 1990.
[b]Total may include offenders for whom offense category could not be determined.

Table 3. Offenders sentenced to Federal prison: Pre-guideline and guideline cases, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Percent of convicted offenders who were sentenced to prison[a]				
	Pre-guideline		Guideline		
	1986	1987	1988	1989	1990[b]
All offenses	52.5%	53.0%	76.5%	76.9%	73.6%
Violent offenses	82.7	82.0	91.0	92.3	91.8
Property offenses	43.2	43.4	53.8	53.3	46.7
Fraudulent offenses	42.0	44.1	60.4	54.0	46.2
Other property	46.6	41.6	43.6	51.8	48.0
Drug offenses	77.3	75.9	85.8	89.5	89.0
Public-order offenses	37.4	36.6	74.7	71.2	71.4
Regulatory offenses	34.2	32.5	42.0	48.6	49.5

Note: Data for "other public-order offenses" are not presented because certain offenses included in that category are not covered by the guidelines. "Public-order offenses," however, reflects all cases. Overall, among guidelines cases, 7,197 defendants were convicted in 1988; 22,898 in 1989; and 14,075 in the first half of 1990. The guideline status could not be determined for 1,571 in 1988; 584 in 1989; and 113 in 1990.
[a]Includes sentences to prison with or without probation.
[b]Includes only cases terminated January 1 through June 30, 1990.

in 1987 to 87 months in 1990. Under provisions of the Act, judges were to impose sentences to be served in full, minus a small amount of good-time credits that offenders could receive for good behavior.[6] For most offenses, the guidelines were designed to approximate the time that prisoners actually served in confinement under the old law.[7]

Sentences for Federal drug offenders departed from the pattern for other types of offenders. Drug offenders convicted under the guidelines received a longer, not shorter, prison sentence on average: from 62 months in 1986 and 68 months in 1987 (pre-guideline), to 71 months in 1989 and 77 months in the first half of 1990. (See the box on this page.)

[6]Such credits are accumulated at the maximum rate of 54 days per year for all persons serving imprisonment terms longer than 12 months.

[7]Michael K. Block and William M. Rhodes, "The impact of the Federal sentencing guidelines," *NIJ Reports* (Sept./Oct. 1987) 205, p. 2.

Table 4. Average sentences to Federal prison: Pre-guideline and guideline cases, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Average length of imposed prison sentences				
	Pre-guideline		Guideline[a]		
	1986	1987[b]	1988	1989	1990[c]
All offenses	52.7 mos.	55.2 mos.	42.1 mos.	53.1 mos.	56.9 mos.
Violent offenses	132.0	126.2	63.0	83.2	86.7
Property offenses	34.3	32.5	14.5	15.5	16.4
Fraudulent offenses	32.8	31.1	13.1	13.3	13.4
Other property	37.9	36.5	17.7	20.5	23.5
Drug offenses	62.2	67.8	56.8	70.7	77.4
Public-order offenses	36.9	35.5	19.0	24.7	26.1
Regulatory offenses	47.2	42.1	23.4	22.3	21.1
Other public-order	30.8	32.2	18.6	25.0	26.8

Note: The number of guidelines cases in 1988 was 5,500; in 1989, 17,608; and in the first half of 1990, 10,361. The number of cases missing guideline designation in 1988 was 1,256; in 1989, 452; and in 1990, 95.
[a]Excludes nonguideline cases in 1988-90. See table 2 for average sentences of all cases.
[b]Includes a small number of cases sentenced under guidelines.
[c]Includes only cases terminated between January 1 and June 30, 1990.

Sentences to probation

From 1986 through the first half of 1990, the proportion of offenders sentenced to probation (whether combined with prison terms or not) declined from 63% to 44% (table 5).[8] The sharpest decrease occurred after 1988 and was especially pronounced for offenders convicted of violent or drug crimes. In 1988, 33% of violent criminals were sentenced to some type of probation sentence; in 1990, 19%. Over the same span of time, the percentage of convicted drug offenders sentenced to probation went from 30% to 17%.

The proportion of all offenders sentenced to "straight" probation, without any term of confinement, changed relatively little for the population as a whole from 1986 to

[8]The offenders include only those sentenced by the Federal district courts, excluding petty offenses.

Sentences imposed on offenders of Federal drug laws and the prison time the offenders serve

Congress and the Federal criminal justice system have placed a high priority on the enforcement of the Federal drug laws. This emphasis is evident in prosecution and sentencing patterns, as well as time served in prison. Between 1980 and 1990, the number of drug law offenders convicted in Federal district courts more than tripled, while the number of nondrug convictions increased by 32%. The proportion of convicted offenders sentenced to incarceration for drug crimes also rose over this period, from 72% in 1980, to 77% in 1986, to 86% in 1990. For drug traffickers, the likelihood of imprisonment increased from 77% in 1980 to 83% in 1986, and to 91% in 1990.*

The length of imposed incarceration sentences increased even more dramatically. The average sentence imposed on those convicted of drug crimes in 1980 was 47 months. By 1986, the average had risen to 62 months, and by 1990, to 81 months.

The 1986 and 1988 anti-drug abuse laws prescribed stiffer sentencing and mandatory minimum incarceration terms for Federal drug law offenders, especially traffickers. The combined effect of these laws and the sentencing guidelines has been to increase the length of incarceration sentences actually served by offenders.

Drug law offenders sentenced during 1990 under the guidelines will serve at least 66 months in prison, on average, and perhaps even more if they lose good-time credits for not complying with prison regulations. This represents a sharp increase in time served. Drug offenders released from Federal prison in 1986 served an average of 22 months; those released in 1990 served 30 months, on average. Dispositions and sentences reported for guidelines cases reflect only cases disposed of during the study period. No guideline cases requiring more than 2½ years from charge to final disposition were included.

The courts are also imposing terms of supervised release on most drug law offenders sentenced under the guidelines. During the first half of 1990, 87% of all offenders sentenced for Federal drug crimes were required to be supervised upon release from prison. Ninety-one percent of those convicted of trafficking offenses were so required. The average number of months to be served was 49 for all drug offenders combined, and 50 months for those convicted of trafficking.

Federal Criminal Case Processing, 1980-1989, with Preliminary Data for 1990, NCJ-130526.

1990. In 1986, 44% of all offenders were given straight probation sentences; in the first half of 1990, the proportion had declined to 38%.

A more dramatic change characterized the use of probation sentences in combination with incarceration in guideline cases. Whereas about a third of all offenders convicted of violent crimes received some kind of sentence to probation in the pre-guideline 1986-87 period, the proportion declined to less than a tenth of guideline cases sentenced for violent offenses during the first 6 months of 1990 (table 6).

Similar large declines occurred for sentences to probation for drug offenders (from 40% in 1986 and 35% in 1987 to 11% in 1990) and public-order offenders (from 72% in 1986 and 68% in 1987 to 28% in 1990). The decline in the percentage of property offenders sentenced to probation was somewhat less, from 76% and 73% in 1986-87 to 56% in 1990. This reduced frequency of sentences to probation reflects in part change in Federal law. The Act prohibited judges from sentencing to both prison and probation except when the guidelines recommend imprisonment of at least 1 month but not more than 6.

Time served in prison

Most of the prisoners released during 1986-90 were sentenced to prison under the laws in force before the Act's provisions took effect. Consequently, the U.S. Parole Commission determined the time of their release. After the U.S. Sentencing Commission promulgated its guidelines, the Parole Commission adopted release policies that reflected the sanctions recommended by the guidelines. The discussion that follows describes the time served by prisoners released under this transitional policy.

Table 5. Offenders sentenced to Federal probation: Type of sentence, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Percent of offenders sentenced to: Any probation[a] 1986	1987	1988	1989	1990[b]	Straight probation only 1986	1987	1988	1989	1990[b]
All offenses	62.5%	56.9%	54.6%	45.7%	43.9%	44.4%	38.5%	40.1%	37.3%	37.5%
Violent offenses	34.9	33.3	32.9	21.3	19.0	19.9	18.5	20.8	16.5	15.5
Property offenses	75.8	73.0	72.9	65.5	65.8	55.4	50.6	52.6	52.4	55.0
Fraudulent offenses	78.8	76.1	75.7	68.1	67.3	57.6	51.9	53.3	53.4	55.2
Other property offenses	68.0	65.1	65.5	58.6	61.7	49.7	47.0	50.6	49.6	54.5
Drug offenses	40.0	35.3	29.6	19.5	16.8	22.4	19.4	19.3	15.1	14.2
Public-order offenses	72.2	68.4	65.9	60.3	58.4	55.5	51.0	52.5	51.3	51.2
Regulatory offenses	77.7	76.1	74.0	68.7	67.3	63.8	60.6	61.7	60.2	60.6
Other public-order offenses	71.2	67.0	64.4	58.8	56.8	53.9	49.1	50.7	49.7	49.6
Number of offenders sentenced to probation	26,236	26,015	23,659	20,488	9,513	18,621	17,614	17,375	16,728	8,124

[a]Includes straight probation and any combination of incarceration with probation.
[b]Includes only cases terminated between January 1 and June 30, 1990.

Table 6. Offenders sentenced to any type of Federal probation: Pre-guideline and guideline cases, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Percent of offenders sentenced to probation[a] Pre-guideline 1986	1987	Guideline[b] 1988	1989	1990[c]
Violent offenses	35%	33%	16%	9%	9%
Property offenses	76	73	49	47	56
Fraudulent offenses	79	76	46	48	57
Other property offenses	68	65	54	46	53
Drug offenses	40	35	16	11	11
Public-order offenses	72	68	29	29	28
Regulatory offenses	78	76	61	52	52
Number of offenders sentenced to probation	26,236	26,007	1,884	5,410	3,821

Note: Data for "other public-order offenses" are not presented because certain offenses included in that category are not covered by the guidelines. "Public-order offenses," however, reflects all cases. Overall, among guidelines cases, 7,197 defendants were convicted in 1988; 22,698 in 1989; and 14,075 in the first half of 1990. The guideline status could not be determined for 1,591 in 1988; 584 in 1989; and 113 in 1990.
[a]Includes straight, mixed, and split probation sentences.
[b]Excludes nonguideline cases in 1986-90.
[c]Includes only cases terminated between January 1 and June 30, 1990.

In calendar year 1990 Federal offenders who were released from prison for the first time on a sentence imposed in a U.S. district court had served an average (mean) of 19 months, which amounted to 75% of the court-imposed sentence (table 7). Prisoners sentenced for violent offenses served an average time of more than 4 years, substantially longer than offenders sentenced for property, drug, or public-order crimes. Convicted murderers who were released served an average of over 7 years. Kidnapers served an average of more than 8 years.

While violent offenders served longer in prison than other Federal offenders, on average they served smaller fractions of their sentences in prison. Overall, violent offenders were released from prison after serving less than two-thirds of their maximum sentences; murderers and kidnapers were released after serving about half of their sentences.

When offenders are categorized by length of sentence imposed, within each category violent offenders spent slightly longer in prison than offenders convicted of other kinds of offenses (table 8). For example, violent offenders who were sentenced to a maximum prison term of 2 years served an average of 23 months before release, while other offenders with the same maximum sentence served about 10% less, 18 to 21 months.

On average, prisoners sentenced to less than 1 year served nearly all of their terms. A few exceeded their initial terms because they received sentences for crimes committed while in prison or for convictions following the original sentence. Those with 2-year sentences served 83% of the imposed term, those with 3-year sentences served 72%, and those with terms of 8 years served 53% of the imposed term. Persons sentenced to 10 years served an average of 48% of the maximum term imposed.[a]

[a]These numbers may differ from those reported by the Bureau of Prisons because they refer only to first releases of prisoners sentenced in Federal district courts for violations of the U.S. Code. The Bureau of Prisons typically counts all persons in its custody, including those returned to its custody for probation and parole violations, as well as some State, military, and District of Columbia prisoners.

Table 7. Prisoners released from Federal prison in 1990: Average time served to first release and percent of sentence served, by offense

Most serious offense at conviction[a]	Number of prisoners released	Average time served[c]	Percent of sentence served[b]
All offenses[b]	25,591	19.2 mos.	75.0%
Violent offenses	1,458	54.2 mos.	64.8%
Murder	43	92.3	53.2
Negligent manslaughter	28	23.0	78.4
Assault	401	45.0	69.1
Robbery	826	58.4	62.2
Rape	19	64.6	51.8
Other sex offenses	87	34.0	72.3
Kidnapping	31	106.3	50.5
Threats against the President	23	25.8	89.2
Property offenses	5,354.	16.3 mos.	76.2%
Fraudulent property	3,899	15.1	76.7
Embezzlement	400	11.6	82.9
Fraud	2,797	15.2	76.0
Forgery	323	14.6	73.5
Counterfeiting	379	19.0	78.0
Other property	1,455	19.6 mos.	74.8%
Burglary	79	27.2	73.3
Larceny	867	16.8	77.0
Motor vehicle theft	204	22.6	69.1
Arson	39	38.8	66.8
Transportation of stolen property	168	28.3	68.7
Other	98	8.5	82.0
Drug offenses	7,685	29.7 mos.	67.6%
Trafficking	7,279	30.7	66.6
Possession and other	394	10.6	87.7
Public-order offenses	10,899	8.6 mos.	81.0%
Regulatory offenses	477	18.2	78.7
Weapons	1,192	20.9	78.6
Immigration offenses	7,329	4.1	82.0
Tax law violations	449	12.0	73.1
Bribery	79	11.5	78.5
Perjury	67	13.2	80.2
National defense	24	20.7	83.6
Escape	157	18.4	92.8
Racketeering and extortion	475	31.2	64.3
Gambling	2	8.3	86.6
Liquor	2	11.2	91.7
Mail or transport of obscene materials	69	24.8	75.7
Traffic offenses	434	2.0	91.6
Migratory birds	34	7.3	94.1
Other[c]	109	13.9	100.5

Note: Includes prisoners first released after serving terms imposed by Federal district courts.
[a]Excludes prisoners with life sentences and others whose sentence could not be determined.
[b]Includes 195 prisoners whose offense category could not be determined.
[c]Average time served exceeded the average sentence because the sentence was the longest single sentence imposed but the time-served average includes time for all sentences.

Offender characteristics and time served

In general, offenders who were convicted at age 19 or 20 served shorter prison terms than offenders over age 20 (table 9). This difference may have reflected a number of separate factors. Younger offenders are less likely to have prior convictions, and for that reason judges may impose shorter sentences on them. The law also allows special sentences for some youthful offenders. Female prisoners generally served shorter terms than males because they were convicted of less serious offenses and tended to have fewer prior convictions.

Among offenders convicted of drug offenses, foreign nationals served slightly longer sentences than U.S. citizens. In contrast, noncitizens served much shorter sentences than U.S. citizens for "other" public-order offenses, including immigration offenses. Foreigners can violate immigration laws simply by illegal entry, whereas U.S. citizens convicted of immigration violations are often involved in more serious crimes.

For assault, robbery, immigration offenses, and tax law violations, black prisoners served longer prison terms than white offenders (table 10). In counterfeiting, theft of motor vehicles, regulatory offenses, and racketeering and extortion, white offenders served more time incarcerated than black prisoners. Hispanic offenders, who could be of any race, served prison terms similar to non-Hispanics in all categories except immigration law violations, for which Hispanics had a shorter average sentence.

Table 8. Prisoners released from Federal prison in 1990: Average time served to first release, by offense and sentence length

Sentence imposed*	Average number of months served in prison: All offenses	Violent offenses	Property: Fraud	Property: Other	Drug offenses	Public-order: Regulatory	Public-order: Other
	6 mos.	6 mos.	7 mos.	6 mos.	7 mos.	7 mos.	6 mos.	7 mos.
12	13	13	11	12	14	13	14
24	20	23	18	21	21	20	21
36	26	30	22	23	27	25	26
48	31	36	28	29	32	...	33
60	38	42	33	38	39	40	39
72	43	51	37	41	43	...	41
84	48	58	40	...	46	...	...
96	51	65	40	49	49	...	51
120	58	70	51	56	55	...	57

Note: Includes prisoners first released after serving terms imposed by Federal district courts. Excludes prisoners with life sentences and others whose sentence could not be determined, and prisoners for whom offense category could not be determined. The number of missing cases was 3,769.
... Fewer than 20 cases.
*Average time served exceeded the average sentence in some offense categories because "sentence imposed" refers to the longest single sentence imposed but time-served averages include time for all sentences.

Table 9. Prisoners released from Federal prison in 1990: Average time served to first release, by offense and offender characteristics

Offender characteristic	Average number of months served in prison: Violent offenses	Property: Fraud	Property: Other	Drug offenses	Public-order: Regulatory	Public-order: Other
All offenders	54.2mos.	5.1mos.	19.6mos.	29.7mos.	18.2mos.	8.1mos.
Age						
19-20	40.7	9.3	12.4	21.3	...	3.5
21-30	56.4	13.6	17.5	26.8	18.8	6.0
31-40	52.9	15.5	20.3	30.6	18.4	10.1
Over 40	54.6	16.0	22.2	33.9	16.8	14.4
Sex						
Male	55.1	15.9	20.9	30.5	18.7	8.3
Female	39.0	11.2	11.8	23.2	13.3	6.2
Ethnicity						
Hispanic	52.9	12.0	20.8	32.3	16.2	4.7
Other	54.3	15.5	19.5	28.4	18.6	16.4
Nationality						
U.S.	55.5	15.7	19.8	27.7	19.0	16.6
Other	33.9	12.3	17.0	34.4	15.3	4.8

Note: Includes prisoners first released after serving terms imposed by Federal district courts. Includes prisoners with life sentences and others whose sentence could not be determined. Excludes prisoners for whom offense category could not be determined. The number of cases missing data on average time served in 1990 was 195.
... Fewer than 20 cases.

Table 10. Offenders released from Federal prisons in 1990: Average time served to first release, by race and selected offenses

Offense	Average number of months served in prison: White	Black
Violent offenses		
Assault	37.1 mos.	60.5 mos.
Robbery	55.6	65.0
Kidnaping	98.3	...
Property offenses		
Embezzlement	10.9 mos.	10.3 mos.
Fraud	14.5	14.5
Forgery	17.6	16.2
Counterfeiting	19.9	18.6
Burglary	24.7	25.4
Larceny	17.1	18.3
Motor vehicle theft	29.2	23.6
Arson	28.7	...
Transport stolen property	28.6	28.3
Other property	9.9	8.8
Drug offenses		
Trafficking	25.9 mos.	26.1 mos.
Possession	10.1	10.9
Public order offenses		
Regulatory offenses	19.2 mos	17.6 mos.
Weapons	20.8	20.1
Immigration	4.8	10.6
Tax law	10.7	13.7
Bribery	10.7	...
Perjury	11.2	...
Escape	15.9	18.1
Racketeering and extortion	29.1	23.6
Mail or transport obscene material	13.4	...
Traffic	2.3	2.1
Migratory birds	2.7	...
Other	1.8	...

Note: Includes prisoners first released after serving terms imposed by Federal district courts. Excludes prisoners with life sentences and others whose sentence could not be determined. Excludes prisoners for whom offense category could not be determined. In 1990, 186 cases were missing race or offense of offender.
... Too few cases for reliable estimate.

Trends in time served

Offenders first released from prison in 1990 had served on average 29% more time than those released in 1984 (table 11). Although the time served in prison increased for every offense category, the largest increases were for regulatory offenses (from 13 months in 1984 to 18 months in 1990) and for drug offenses (from 22 months to more than 29 months). The proportion of the sentence served prior to first release from prison increased from 69% in 1984 to 75% in 1990 (table 12). Overall, and for most individual offenses, the percentage of sentence served increased the most in 1989 and 1990, as the earliest offenders sentenced under the provisions of the Act left prison. As mentioned above, these offenders were not eligible for release to parole supervision.

Time served in nonguideline and guideline cases

It is too early to determine the precise effect of the sentencing guidelines on time served in Federal prison. Relatively few offenders sentenced to prison in guideline cases have completed their terms, and those released in 1990 who were sentenced under the guidelines had received a sentence of less than 3 years.

The effect of the sentencing guidelines can be estimated, however, using the assumption that the prisoners earn the maximum permitted time off for good behavior. Prisoners sentenced under the guidelines to imprisonment longer than 1 year are awarded good-time credits. For each year of the sentence a prisoner can receive a credit of 54 days, unless the Bureau of Prisons determines that the prisoner has not complied satisfactorily with institutional regulations during the preceding year.

Table 11. Offenders released from Federal prison: Average time served to first release, by offense and year of release, 1984-90

Year of first release	Number of releases*	Average time served until first release: All offenses	Violent offenses	Property: Fraudulent	Property: Other	Drug offenses	Public order: Regulatory	Public order: Other
1984	16,758	14.9 mos.	49.9 mos.	12.6 mos.	16.5 mos.	21.9 mos.	12.6 mos.	6.5 mos.
1985	16,606	14.9	49.9	12.3	17.3	21.2	14.9	6.4
1986	22,122	14.9	49.6	13.5	19.3	22.1	15.9	6.0
1987	22,315	16.3	48.8	13.3	18.8	23.0	16.3	7.1
1988	22,022	18.7	54.2	14.8	21.0	25.2	18.3	8.5
1989	23,748	18.7	52.6	15.5	18.4	27.7	17.7	8.0
1990	25,591	19.2	54.1	15.1	19.6	29.6	18.2	8.1

Note: Includes only prisoners first released after serving terms imposed by Federal district courts.
*Includes prisoners with life sentences, others whose sentence could not be determined, and the following number of prisoners for whom offense category could not be determined:
1984 (403), 1985 (609), 1986 (522), 1987 (355), 1988 (220), 1989 (179), and 1990 (195).

Table 12. Offenders released from Federal prison: Percent of sentence served to first release, by offense and year of release, 1984-90

Year of first release	Number of releases	Average percent of sentence served until first release: All offenses	Violent offenses	Property: Fraudulent	Property: Other	Drug offenses	Public order: Regulatory	Public order: Other
1984	16,751	68.6%	49.2%	67.3%	65.6%	58.4%	69.5%	78.2%
1985	16,581	69.3	56.1	68.4	68.2	59.9	68.0	77.2
1986	22,117	67.5	53.8	65.8	64.0	59.0	66.9	75.2
1987	22,312	67.9	56.8	68.3	64.7	59.9	68.9	76.1
1988	22,013	66.9	57.6	67.7	65.6	58.3	67.6	76.1
1989	23,725	70.8	59.0	69.8	69.7	61.9	73.4	79.9
1990	25,574	75.0	64.8	76.7	74.8	67.6	78.7	81.1

Note: Includes only prisoners first released after serving terms imposed by Federal district courts. Excludes prisoners with life sentences and others whose sentence could not be determined.

If prisoners sentenced under the guidelines during 1990 receive full good-time credit, they will serve substantially more time, on average, than prisoners who were released during 1990 (table 13). Offenders sentenced under the guidelines for violent offenses in 1990 will serve 74 months in prison on average, compared to 54 months for offenders released in 1990. Federal drug offenders sentenced under the guidelines will serve 66 months in prison, compared to 30 months for prisoners releaseed in 1990. Those convicted of nonfraud-related property offenses and regulatory public-order offenses will serve the same time as their counterparts in the past, on average, while those convicted of fraud crimes will serve slightly shorter terms (12 months as opposed to 15 months served by those released in 1990).

These differences between the time served by those released in 1990 and the time expected to be served by those sentenced under the guidelines in 1990 may reflect not only changes in the sentencing laws but also differences in offense and offender characteristics of the two populations.

Supervised release

As part of the broader reform of Federal sentencing procedures, the Sentencing Reform Act of 1984 eliminated the U.S. Parole Commission's authority to release prisoners in advance of the time imposed by the court. The Act did provide for "supervised release," a period of time during which prisoners would be under supervision in the community. The sentencing judges must specify the length of supervision for such a release, if it is part of a sentence. Under the old system of parole supervision, released prisoners were required to be supervised in the community by Federal parole officers until the expiration of the court-imposed maximum sentence.

Judges are not required to impose supervised release. If they choose to do so, judges can sentence offenders to a term within a permitted maximum — up to 5 years for those convicted of the most serious felonies. The declared purpose of this change in law was to have the courts allocate resources for community supervision to only those offenders who were thought to require supervision, rather than to all persons who were released before their sentences expired.

Sixty-nine percent of all persons sentenced under the guidelines during the first half of 1990 were required to serve terms of supervised release after prison (table 14). Violent offenders (89%) and drug offenders (87%) were the most likely to have a supervised release; public-order regulatory offenders (64%) and property offenders (40%) were the least likely.

The average time to be served under supervision in the community after release from prison, by all offenders so sentenced, was 42 months. The longest average supervision terms were imposed on persons convicted of violent crimes, especially murder (39 months), robbery (44 months), kidnaping (52 months), and drug trafficking (50 months).

Congress gave Federal courts the authority to extend terms of supervised release up to the statutory maximum number of months and to terminate supervision early. The courts may also revoke supervision for violations of the terms and conditions of release and send offenders back to prison.

Table 13. Time served by prisoners first released in 1990 and estimated time to be served by prisoners sentenced in guideline cases during the first half of 1990, by offense

Most serious offense at conviction	Time served by prisoners released during 1990	Estimated time that prisoners sentenced during the first half of 1990 are expected to serve*
Violent offenses	54.1 mos.	74.0 mos.
Property offenses	16.3	14.6
Fraudulent offenses	15.1	12.0
Other property offenses	19.6	20.5
Drug offenses	29.6	66.1
Public-order offenses	8.6	22.8
Regulatory offenses	18.2	18.5
Other public-order offenses	8.1	23.4
Number of prisoners	25,591	10,361

Note: The number of prisoners released during 1990 for whom offenses could not be classified was 195.
*Assumes that all prisoners sentenced under the provisions of the Sentencing Reform Act of 1984 will earn the maximum amount of time off for good behavior.

Table 14. Offenders sentenced in guideline cases during the first half of 1990: Percent sentenced to supervised release and time to serve under supervision, by offense

Most serious offense at conviction	Prisoners sentenced in guideline cases, 1990: Percent sentenced to supervised release	Average length of supervision
All offenses	68.9%	42.1 mos
Violent offenses	88.7	40.6
Property offenses	40.0	31.8
Fraudulent offenses	39.1	31.2
Other property offenses	42.1	33.1
Drug offenses	86.5	49.2
Public-order offenses	63.9	30.5
Regulatory offenses	41.4	28.3
Other public-order offenses	68.7	30.8
Number of cases sentenced to supervised release	9,967	9,967

Methodology

Abt Associates Inc. calculated the tables in this report for the BJS Federal Justice Statistics Program (FJSP), based on data provided to the FJSP by Federal agencies. The Administrative Office of the U.S. Courts and the Bureau of Prisons provided the source files for this report.

Because some judges contested the constitutionality of the Act, a small proportion of cases that were eligible for sentencing under the guidelines were sentenced under the old law. In January 1989 the Supreme Court upheld the Act's constitutionality in *Mistretta* v. *U.S.*, Mo. 1989, 109 S.Ct. 647,448 U.S. 361.

Offenders sentenced under the old law prior to *Mistretta* are excluded from tables of guideline cases. Also excluded are offenders whose cases combined offenses committed both before and after the effective date of the Act. The term *guideline cases* refers to all other offenders whose offenses were committed after the effective date of the Act, regardless of whether the imposed sentence actually fell within the guideline range.

The classification of offenses is based primarily upon offense codes established by the Administrative Office of the U.S. Courts. Offenders are classified according to their most serious charge at conviction.

Sentences to incarceration are defined to include all imprisonment terms of longer than 4 days, regardless of whether this term was concurrent or consecutive with a period of probation, a fine, or any other condition.

The average length of imprisonment sentences for tables 2 and 4 includes only offenders who received sentences limited by an imposed maximum term. Offenders given a life sentence or a death sentence were excluded. The statistic tabulated is the mean value of the maximum term to be served, considering all consecutive and concurrent sentences.

In tables 1 and 2 preliminary data for 1990 are based only on transactions recorded prior to April 1, 1991.

In tables 3 and 4, data from the Federal Probation Sentencing and Supervision System files are used for the 1988-90 period because they indicate whether offenders were sentenced under the guidelines.

In tables 5 and 6, data from Federal Probation Sentencing and Supervision System files are used because they indicate whether offenders were sentenced under the guidelines. The tables may not correspond to those in other Federal Justice Statistics Program (FJSP) publications, which present the same categories from other source files.

Tables 7 to 12 are computed from data that the Bureau of Prisons supplied to the FJSP. Prisoners are classified according to the offense associated with the longest sentence actually imposed. Offense categories are based on combinations of offense designations used by the Bureau of Prisons. They are similar to the categories in other tables, but may not be directly comparable.

Tables 7 to 12 include only prisoners committed by U.S. district courts for violations of the U.S. Code. Other prisoners, such as probation and parole violators, and other types of offenders, such as those from the military, District of Columbia, or States, are excluded. Unlike BJS publications concerning State prisoners, which exclude prisoners serving sentences under 1 year, tables 7 to 12 include Federal prisoners who received sentences of any length. Offenses for a few offenders could not be classified; these offenders are excluded from the tables.

Time served is the number of months from the prisoner's arrival into custody of the Bureau of Prisons until first release from prison, plus any jail time served and credited. The calculation is the same as that currently used by the Bureau of Prisons, but the population to which the calculation is applied differs, as discussed above.

In table 13, estimates of average incarceration time to be served by those sentenced during the first half of 1990 were computed by assuming that offenders sentenced to a term of 1 year or less would serve their full court-imposed term, while those given a sentence that exceeded 1 year would receive the maximum amount of time off permitted for good behavior (good time) and would thereby serve 85% of their imposed term.

This Bureau of Justice Statistics Special Report was prepared by Douglas McDonald and Kenneth Carlson of Abt Associates Inc. They were assisted by Jan Chaiken, Frederick DeFriesse, Karen Rich, Irma Rivera-Veve, Laura Evers, Paul Scheiman, and Mila Ghosh. Carol Kaplan, assistant deputy director, reviewed this report, and Tom Hester edited it. Marilyn Marbrook, Tina Dorsey, Jayne Pugh and Yvonne Boston produced the report.

June 1992, NCJ-134727

Guideline Sentencing Update

FEDE

EXHIBIT E

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.

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Offense Conduct

DRUG QUANTITY

Second Circuit holds that uningestible, unmarketable portions of drug mixtures should not be counted, but Fifth Circuit reaffirms earlier holding that they should. The defendant in the Second Circuit had attempted to import cocaine dissolved in bottles of creme liqueur. The cocaine was distillable from the liqueur and weighed less than half of the total mixture, but the district court concluded that *Chapman v. U.S.*, 111 S. Ct. 1919 (1991) [4 *GSU* #4], mandated use of the entire drug mixture in setting the offense level.

The appellate court reversed and remanded, holding that *Chapman* was distinguishable and that the weight of unusable portions of a drug mixture should not be used under U.S.S.G. § 2D1.1: "In stark contrast to the LSD in *Chapman*, the 'mixture' here was useless because it was not ready for distribution . . . It could not be ingested or mixed with cutting agents unless and until the cocaine was distilled from the creme liqueur. After distillation, it could be sold . . . [and o]nly at that point, could Congress' rationale for penalizing a defendant with the entire amount of a 'mixture' sensibly apply." The court also stated that, "[b]ecause the creme liqueur must be separated from the cocaine before the cocaine may be distributed, it is not unreasonable to consider the liquid waste as the functional equivalent of packaging material, . . . which quite clearly is not to be included in the weight calculation. *See Chapman*, 111 S. Ct. at 1926." The court did, however, "emphasize the limited nature of our holding. The . . . creme liqueur is not a cutting agent or dilutant which, when mixed with cocaine, is ingestible. Cutting agents, of course, must always be factored into the weight calculation."

The Second Circuit is the third court of appeals to distinguish *Chapman* and exclude unusable portions of drug mixtures. *See also U.S. v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991) (methamphetamine mixture) [4 *GSU* #9]; *U.S. v. Rolande-Gabriel*, 938 F.2d 1231, 1237 (11th Cir. 1991) (cocaine mixture) [4 *GSU* #8]. But see cases below.

U.S. v. Acosta, No. 91-1527 (2d Cir. May 13, 1992) (McLaughlin, J.) (Van Graafeiland, J., dissenting). *See also U.S. v. Salgado-Molina*, No. 91-1644 (2d Cir. May 29, 1992) (per curiam) (following *Acosta*).

In the Fifth Circuit, defendants were sentenced on the basis of the entire weight of a methamphetamine mixture comprised of 95% waste product and 5% methamphetamine. The appellate court upheld the sentences, concluding that it was bound by its earlier decisions requiring use of the total weight of a drug mixture. *See, e.g., U.S. v. Baker*, 883 F.2d 13 (5th Cir. 1989) (use total weight of mixture containing methamphetamine even though most of mixture was waste material), *cert. denied*, 111 S. Ct. 82 (1990). Defendants claimed that *Chapman* "effectively overruled *Baker* and its progeny," but the court disagreed: "To the contrary, much of the language in *Chapman* supports this court's decision in *Baker*." *See also U.S. v. Restrepo-Contreras*, 942 F.2d 96, 99 (1st Cir. 1991) (use total weight of cocaine mixed with beeswax) [4 *GSU* # 12]; *U.S. v. Mahecha-Onofre*, 936 F.2d 623, 625-26 (1st Cir. 1991) (use total weight of cocaine and acrylic material chemically bonded together) [4 *GSU* #7].

U.S. v. Walker, 960 F.2d 409 (5th Cir. 1992).

Ninth Circuit holds that inclusion of drugs distributed by others before defendant's involvement requires specific finding that defendant could have reasonably foreseen earlier transactions. Defendant and five others were initially charged under a multiple-count drug conspiracy indictment, but defendant was later reindicted on, and pled guilty to, only one count of aiding and abetting a single drug distribution of 252 grams of cocaine on June 28, 1990. No evidence connected defendant with distribution of cocaine before that date, but the probation officer recommended that cocaine sales by other defendants on June 11 and 20 be included as relevant conduct under § 1B1.3(a)(2). The district court sentenced defendant on the basis of the 840 grams from all three transactions.

The appellate court remanded "for express findings regarding whether Chavez-Gutierrez was accountable for the June 11th and June 20th transactions." The court held that "under Section 1B1.3(a)(2), a district court must include the total amount of a controlled substance alleged in multiple counts if the defendant could have reasonably foreseen that other persons would commit the alleged crimes in furtherance of a joint agreement. The district court could not include the amount of cocaine distributed on June 11, 1990 and June 20, 1990, in calculating Chavez-Gutierrez's base offense level, unless the presentence report set forth facts showing that the defendant aided and abetted these sales or was a member of a conspiracy to distribute cocaine prior to June 28, 1990." *See also U.S. v. Edward*, 945 F.2d 1387, 1391–97 (7th Cir. 1991) (in conspiracy, must make specific findings as to amount of drugs "reasonably foreseeable" to each conspirator) [4 *GSU* #12]; *U.S. v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir.) (late-entering coconspirator responsible only for amounts reasonably foreseen), *cert. denied*, 112 S.Ct. 347 (1991) [4 *GSU* #2].

U.S. v. Chavez-Gutierrez, No. 91-30025 (9th Cir. April 24, 1992) (Alarcon, J.).

Adjustments

ACCEPTANCE OF RESPONSIBILITY

Eleventh Circuit holds that district court may not deny § 3E1.1 reduction for defendants' exercise of Fifth Amendment rights or the right to appeal. Defendants were convicted of various drug offenses. They argued on appeal that, although they had previously admitted their involvement in drug trafficking and expressed remorse, "the district court improperly conditioned the two level [§ 3E1.1] reduction on their accepting responsibility for their wrongs in open court and on their giving up their right to appeal."

The appellate court agreed and remanded for reconsideration: "The court's comments during sentencing demonstrate

that it balanced the evidence of acceptance of responsibility against the Appellants' exercise of their Fifth Amendment rights and their intent to exercise their right to appeal; this was improper.... The sentencing court is justified in considering the defendant's conduct prior to, during, and after the trial to determine if the defendant has shown any remorse through his actions or statements.... However, if a defendant has shown some sign of remorse but has also exercised constitutional or statutory rights, the sentencing judge may *not* balance the exercise of those rights against the defendant's expression of remorse to determine whether the 'acceptance' is adequate." (Emphasis in original.)

"Stated another way, the sentencing court may consider all of the criteria set out in the commentary to section 3E1.1 as well as any other indications of acceptance of responsibility and weigh these in the defendant's favor.... The exercise of [constitutional or statutory] rights may diminish the defendant's chances of being granted the two level reduction, not because it is weighed against him but because it is likely that there is less evidence of acceptance to weigh in his favor."

U.S. v. Rodriguez, 959 F.2d 193, 195–98 (11th Cir. 1992) (per curiam).

Departures

Mitigating Circumstances

Second Circuit upholds departure for extraordinary family circumstances, calls policy statements "interpretive guides" that are not the equivalent of Guidelines. In sentencing defendant for theft and bribery convictions, the district court departed downward ten offense levels because of defendant's family circumstances, which included sole responsibility for raising four young children. Defendant was sentenced to six months of home detention, plus supervised release and substantial restitution. The government appealed, arguing that under § 5H1.6, p.s.—"family ties and responsibilities... are not ordinarily relevant" for departures—family circumstances alone can never justify downward departure.

The appellate court upheld the departure and examined "the weight courts should give to such policy statements." The court concluded that "the policy statements cannot be viewed as equivalent to the Guidelines themselves," and that "courts must carefully distinguish between the Sentencing Guidelines and the policy statements that accompany them, and employ policy statements as interpretive guides to, not substitutes for, the Guidelines themselves." As to departures, "[t]he central question in any departure decision must be the one imposed by the statute: Is there an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission?" Policy statements are to be considered, but "do not render the statutory standard superfluous."

Applying "that standard to the question of family circumstances," the court concluded that the wording of § 5H1.6—that family circumstances are "not ordinarily relevant"—indicates it is "a 'soft' policy statement, rather than one with unequivocal language. If the Commission had intended an absolute rule that family circumstances may never be taken into account in any way, it would have said so.... Section 5H1.6's phrasing confirms the Commission's understanding that ordinary family circumstances do not justify departure but extraordinary family circumstances may." Here, the circumstances amply supported the district court's "finding that Johnson faced extraordinary parental responsibilities."

U.S. v. Johnson, No. 91-1515 (2d Cir. May 14, 1992) (Oakes, C.J.).

Criminal History

Career Offender Provision

U.S. v. Sahakian, No. 91-10199 (9th Cir. May 26, 1992) (Schroeder, J.) (Remanded: "following the November 1, 1989 revision of the definitional provision of U.S.S.G. § 4B1.2, being a felon in possession of a firearm is not a crime of violence for purposes of applying the Career Offender guideline." *See also* U.S.S.G. App. C (amendment 433) (Nov. 1991) ("'crime of violence' does not include the offense of unlawful possession of a firearm by a felon"). The Ninth Circuit previously held that under the pre-Nov. 1989 definition, felon in possession of a firearm was "by its nature" a crime of violence. *U.S. v. O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1990). However, the 1989 amendment "shifted the emphasis from an analysis of the 'nature' of the crime charged to an analysis of the elements of the crime charged or whether the actual charged 'conduct' of the defendant presented a serious risk of physical injury to another." Here, defendant was only charged with "possessing a firearm," which "does not have as an element the actual, attempted or threatened use of violence nor does the actual conduct it charges involve a serious potential risk of physical injury to another."). *Accord U.S. v. Fitzhugh*, 954 F.2d 253, 254–55 (5th Cir. 1992); *U.S. v. Johnson*, 953 F.2d 110, 113 (4th Cir. 1991). *Contra U.S. v. Stinson*, 957 F.2d 813, 814–15 (11th Cir. 1992) (reaffirming prior holding that unlawful possession is crime of violence despite amendments). *Cf. U.S. v. Doe*, 960 F.2d 221 (1st Cir. 1992) (citing § 4B1.2 and amendment 433 as support for holding that "the felon-in-possession crime is not a 'violent felony'" for purposes of 18 U.S.C. § 924(e)).

Probation and Supervised Release

Revocation of Probation

U.S. v. Byrkett, No. 91-3808 (8th Cir. Apr. 24, 1992) (per curiam) (Affirming 8-month prison term after revocation of probation for possession of drugs where guideline range for original forgery offense was 0–6 months and defendant was sentenced to 2 years probation. "We agree with the Ninth Circuit's analysis [in *U.S. v. Corpuz*, 953 F.2d 526, 528–30 (9th Cir. 1992) (*see* 4 *GSU* #15)] ... that the last sentence of [18 U.S.C.] section 3565(a) mandates a sentence of at least one-third of the original sentence of probation when the probationer violates the conditions of his probation by possessing controlled substances."). *Contra U.S. v. Gordon*, No. 91-3605 (3d Cir. Apr. 13, 1992) (as amended Apr. 30, 1992) ("original sentence" in § 3565(a) refers to original guideline range, not to term of probation imposed) [4 *GSU* # 21].

Revocation of Supervised Release

U.S. v. Cooper, No. 91-5455 (4th Cir. Apr. 24, 1992) (Sprouse, J.) (reversed: under 18 U.S.C. § 3583(e), "district court is without statutory authority to reimpose, after revoking, a term of supervised release"). *Accord U.S. v. Holmes*, 954 F.2d 270, 272 (5th Cir. 1992); *U.S. v. Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990). *Contra U.S. v. Boling*, 947 F.2d 1461, 1463 (10th Cir. 1991).

Certiorari Granted:

U.S. v. Dunnigan, 944 F.2d 178 (4th Cir. 1991) [4 *GSU* #10], *cert. granted*, 112 S. Ct. — (May 26, 1992) (No. 91-1300). Question presented: Does the Constitution prohibit district court from enhancing defendant's sentence under Sentencing Guidelines § 3C1.1 if the court finds that defendant committed perjury by denying guilt at trial?

EXHIBIT F

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 17 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | June 15, 1992

IN THIS ISSUE:

Pre-Guideline Sentencing, Generally

11th Circuit says court not required to explain pre-guidelines sentence within statutory maximum. (100) The 11th Circuit rejected defendant's claim that the district court erroneously failed to offer an explanation for the seven-year sentence it imposed in a pre-guidelines case. The sentence was well within the statutory maximum of 15 years allowed for defendant's two count felony. A district court is not required to explain a pre-guidelines sentence that is within the maximum provided by law. The issue of whether the district court's pre-guidelines sentence was illegally imposed is properly addressed by a motion to the district court under Fed. R. Crim. P. 35(a). No such motion was made in this case. *U.S. v. Blakey*, __ F.2d __ (11th Cir. May 20, 1992) No. 91-8111.

Guideline Sentencing, Generally

Article critiques guidelines interpretations, cites efforts at evasion. (110)(700) *In "Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers,"* Professor Daniel J. Freed argues that the guidelines often require sentences that conflict with participants' impressions of a just sentence and that judges have insufficient opportunities to depart from the guidelines in such situations. As a result, Freed claims, judges, prosecutors, and probation officers have discovered means to evade guidelines sentences. Freed argues that some of the problems with the guidelines result from the appellate courts' failure to distinguish policy statements from guidelines, to test the adequacy of Commission consideration before forbidding departure based on a factor, and to implement the statutory instruction to "reduce unwarranted disparity." Freed suggests a revised system. 101 YALE L. J. 1681-1754 (1992).

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700 **Departures, Generally (§5K)**
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880 **Habeas Corpus/28 U.S.C. 2255 Motions**

900 **Forfeitures, Generally**
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920 Procedural Issues, Generally
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940 Return of Seized Property/ Equitable Relief
950 Probable Cause
960 Innocent Owner Defense
970 Property Forfeited

Proceedings of sentencing conference reported. (110) In February 1992, the Yale Law Journal hosted a conference on the Federal Sentencing Guidelines. The keynote address of the conference, *"Sentencing Guidelines: A Need for Creative Collaboration"* by Marvin E. Frankel, and summaries of the remarks by other speakers, were printed in the Yale Law Journal. Frankel stressed the paucity of knowledge about what works at sentencing and advocated continued study. Other speakers addressed the history and structure of the guidelines, sentencing and the war on drugs, the allocation of discretion under the guidelines, and the future of the guidelines. 101 YALE L. J. 2043-75 (1992).

10th Circuit refuses to review alternate sentence under 1988 guidelines since defendant was properly sentenced under 1990 guidelines. (110)(132) The 10th Circuit refused to review defendant's claim that the court erred in imposing a 12-year alternate sentence under the 1988 guidelines. Since the district court properly sentenced defendant under the 1990 guidelines, the propriety of the alternate sentence under the 1988 guidelines was not necessary. The application of the 1990 guidelines did not violate the ex post facto clause. Defendant pled guilty to a conspiracy commencing at least as early as 1984 and continuing until the return of the indictment on January 10, 1991. *U.S. v. Burger*, __ F.2d __ (10th Cir. May 21, 1992) No. 91-3267.

2nd Circuit rejects district court's authority to sua sponte resentence defendant because of perceived sentencing disparity. (115)(716) Defendant had a guideline range of 10 to 16 months, and received a 12 month sentence for his embezzlement offense. One week later, the district court sua sponte reduced defendant's sentence to four months. In justifying the downward departure, the district court noted that the court had imposed a milder guidelines-mandated sentence on an unrelated defendant in a gun-trafficking case, which the court viewed as a far more serious offense than defendant's embezzlement. The 2nd Circuit held that the district court lacked the authority to resentence defendant for this reason. A district court has the power to correct sentencing errors only where the error was "obvious," and an egregious mistake has been made. Here, the district court's distress over the fact that the sentencing guidelines prescribed a lower sentencing range for a gun-trafficker than for an embezzler was not the kind of obvious error that a sentencing court has the power to correct. Moreover, even if the district court had the authority to alter its initial sentence, a perceived sentencing disparity between defendant and an unrelated defendant convicted of a different crime was not a proper ground for departure. *U.S. v. Arjoon*, __ F.2d __ (2nd Cir. May 18, 1992) No. 91-1654.

2nd Circuit affirms upward departure in criminal history and offense level based upon the same conduct. (125)(340)(510)(715) Defendant was deported after committing an aggravated felony. After illegally re-entering the United States and committing another crime, he pled guilty to unlawful presence in the United States. The district court departed from criminal history category IV to V pursuant to section 4A1.3, based in part upon the aggravated nature of the crimes underlying defendant's prior convictions. The court also departed upward by two offense levels under application note 3 to section 2L1.2 because defendant's deportation followed his conviction for an aggravated felony. The 2nd Circuit rejected defendant's claim that the two departures constituted impermissible double counting, holding that a criminal history departure and an offense level departure can be based upon the same act. A defendant's criminal history and offense level measure different things. Thus, this case involved

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the unusual situation where a prior act is relevant to determining both the defendant's criminal history category and the offense level for the charged conduct. While this may be double counting in a literal sense, double counting is permissible where a single act is relevant to two dimensions of the guidelines analysis. *U.S. v. Campbell*, __ F.2d __ (2nd Cir. May 22, 1992) No. 91-1624.

7th Circuit affirms that career offender treatment is not double enhancement of penalties. (125)(520) Defendant was convicted of a marijuana offense. Under 21 U.S.C. section 841(d)(1)(D), the maximum penalty for his offense was increased from five to 10 years because he had a prior controlled substance conviction. Defendant was also sentenced as a career offender under the sentencing guidelines based upon his prior drug offenses. Following the 9th Circuit's decision in *U.S. v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989), the 7th Circuit rejected defendant's claim that the application of the career offender provisions resulted in double enhancement of his punishment. The sentencing guidelines are not a separate statutory provision of penalties. They are intended to provide a narrow sentence range within the range authorized by the statute for the offense of conviction. *U.S. v. Moralez*, __ F.2d __ (7th Cir. May 20, 1992) No. 90-3661.

7th Circuit upholds application of guidelines where defendant did not prove withdrawal from conspiracy prior to guidelines'effective date. (132) The 7th Circuit affirmed the applicability of the guidelines to defendant since the government established that the conspiracy extended beyond November 1, 1987. One conspirator testified that he received a total of three or four separate kilogram deliveries of cocaine from another co-conspirator, and that the last delivery occurred sometime in the late fall of 1987 or early winter of 1988. After examining the co-conspirator's telephone toll records at trial, the conspirator stated that his beeper number appeared on the record four times in 1988. This evidence supported the conclusion that the conspiracy continued after November 1, 1987, the effective date of the guidelines. Moreover, defendant alleged, but failed to present evidence, that he had withdrawn from the conspiracy prior to November 1, 1987. *U.S. v. Agrell*, __ F.2d __ (7th Cir. May 27, 1992) No. 91-2568.

8th Circuit affirms that five-year enhancement for prior state drug conviction was not cruel and unusual punishment. (140)(242) Defendant received a five-year sentence enhancement under 21 U.S.C. section 841(b(1)(B), because he had a prior Illinois felony conviction for possession of methaqualone. He argued that since this was only a serious misdemeanor in many other states, the enhancement constituted cruel and unusual punishment and violated the equal protection clause. The 8th Circuit rejected the argument. Even if the Illinois statute was the most stringent in the 50 states, that severity did not render his sentence grossly disproportionate to his offense or to the punishment he would have received in other states. Section 841(b)(1)(B) does not require the sentencing court to compare how conduct has been classified in various jurisdictions. Nor did the enhancement violate equal protection. Imposing heavier penalties on persons with prior felony convictions is rationally related to the purpose of deterring repeat offenders. *U.S. v. Curtis*, __ F.2d __ (8th Cir. May 27, 1992) No. 91-1726.

Application Principles, Generally (Chapter 1)

6th Circuit holds that policy statements in section 7B1.4 are not binding but must be considered. (180)(800) The 6th Circuit held that the policy statements in guideline section 7B1.4 are not binding but they must be considered in sentencing for a violation of supervised release. This does not undermine the decision in *U.S.v. Levy*, 904 F.2d 1026 (6th Cir. 1990), which held that the language of section 5K1.1, also a policy statement, requiring a motion by the prosecutor before granting a substantial assistance downward departure, was binding on the court. A significant difference between Chapters 5 and 7 of the guidelines is that Chapter 7 has a lengthy introduction which explains why the Commission chose to promulgate policy statements for the revocation of supervised release. The explanation clearly indicates that the policy statements in Chapter 7 were intended to give greater flexibility. After a period of evaluation, the commission will promulgate revocation guidelines. *U.S. v. Cohen*, __ F.2d __ (6th Cir. May 22, 1992) No. 91-1786.

5th Circuit upholds sentence based upon aggregate value of all vehicles within course of conspiracy. (170)(220) Defendant was convicted of seven counts of illegal activities involving stolen vehicles. The district court determined defendant's base offense level on the basis of the aggregate value of eight vehicles. The 5th Circuit affirmed

that it was proper to base defendant's sentence on all of the vehicles involved in the conspiracy. Under guideline section 1B1.3(a)(1), a defendant is accountable for the conduct of others in furtherance of a jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. *U.S. v. Patterson*, __ F.2d __ (5th Cir. May 21, 1992) No. 91-1377.

Offense Conduct, Generally (Chapter 2)

2nd Circuit holds that "loss" should not be reduced by amount of stolen property returned before detection. (220) Defendant misappropriated for his own use 5,000 shares of stock held by his employer bank as collateral for a loan. Two months later, before the bank realized the crime, defendant returned 2,000 shares to the bank via electronic transfer. The 2nd Circuit held that the loss caused by defendant's embezzlement under section 2B1.1 should be based on the value of the full 5,000 shares of stock, and should not be reduced by the value of the stock returned. Loss under the guidelines includes the value of all property taken, even though all or part of it was returned. *U.S. v. Arjoon*, __ F.2d __ (2nd Cir. May 18, 1992) No. 91-1654.

11th Circuit affirms sentence based upon L-methamphetamine even though experts at trial did not specify type of methamphetamine involved. (240) Experts at trial testified only that the controlled substance seized was methamphetamine. Defendant contended that because the sentencing guidelines recognize two different forms of methamphetamine, and the expert at trial did not specify which form was involved in defendant's offense, his base offense level should be based on the less serious form, L-methamphetamine, rather than the more potent form D-methamphetamine. Since defendant did not raise this issue until sentencing, the 11th Circuit affirmed that it was proper for the district court to determine at sentencing that the harsher form of methamphetamine was involved and sentence him accordingly. *U.S. v. Patrick*, __ F.2d __ (11th Cir. May 18, 1992) No. 90-3451.

8th Circuit reaffirms constitutionality of 100:1 ratio for cocaine base in sentencing guidelines. (242) Guideline section 2D1.1(c) provides that one gram of cocaine base carries the same penalty as 100 grams of cocaine powder for the purpose of determining an individual's base offense level. Relying on Circuit precedent, the 8th Circuit summarily rejected defendant's claim that the 100:1 ratio discriminates on the basis of race in violation of the due process clause, equal protection clause and the eighth amendment. The court did note that were it writing "from a clean slate," it might accept as valid defendant's arguments regarding the disproportionate penalty. *U.S. v. Simmons*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-1368.

7th Circuit upholds drug quantity determination based upon thorough sentencing hearing. (250) The 7th Circuit upheld the district court's determination that 9.537 kilograms of cocaine should be attributed to defendants' conspiracy. The court conducted a thorough sentencing hearing. It arrived at 9.537 kilograms by judging the credibility of the witnesses and weighing the evidence from the trial. From its knowledge of the case, the court also assessed the information in the presentence report. It went through the report, paragraph by paragraph, with attorneys from both sides, accepting some findings and rejecting some others. The court found the report reliable as to amount because it contained information based on interviews with many of the defendants involved in the case. It also found one defendant responsible for one kilogram for which the jury acquitted him. *U.S. v. Banks*, __ F.2d __ (7th Cir. May 21, 1992) No. 90-1977.

8th Circuit rejects claim that only viable, female marijuana plants can be counted for sentencing purposes. (253) The 8th Circuit rejected defendant's claim that the district court should only have counted viable, female marijuana plants for purposes of determining her offense level under section 2D1.1(c). Previous caselaw established that a cutting with developed root hairs is a plant under the guidelines, regardless of viability. In addition, even though only female plants produce the controlled substance, THC, it was proper to include both male and female plants in the calculation of defendant's base offense level. The guidelines do not distinguish between male and female marijuana plants. *U.S. v. Curtis*, __ F.2d __ (8th Cir. May 27, 1992) No. 91-1726.

8th Circuit rejects drug calculation which relied on testimony of unreliable witness. (254)(770) The 8th Circuit reversed the district court's determination of drug quantity because it appeared to be based upon the testimony of an unreliable witness. The court relied upon the computation in defendant's presentence report, however, the

presentence report merely contained the vague statement that "information was developed at trial through witness testimony that [defendant's] organization distributed atleast 491.1 grams of crack cocaine." In order to reach the 491.1 gram figure, the presentence report would have to have considered an interview with one witness who proved to be inherently unreliable. This witness lied about drug tests which were administered to her while on probation. She also admitted that her drug use caused memory impairment, and her testimony indicated that she did not clearly remember the number of occasions on which she had purchased drugs from defendant. Thus, this witness' testimony lacked sufficient indicia of reliability to serve as a basis for calculating the quantity of cocaine base properly attributable to defendant. *U.S. v. Simmons*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-1368.

D.C. Circuit affirms that defendant who set up meeting between undercover agents and supplier could foresee drug quantity involved. **(275)** The D.C. Circuit affirmed that a defendant who arranged a meeting between an undercover agent and a heroin supplier could reasonably foresee the quantity of drugs involved in the conspiracy. Defendant set up and attended the original meeting in which the parties negotiated for the heroin, drove to another meeting with the main supplier, was present later in a discussion with that supplier just after the details of the delivery were discussed with the FBI agent and broker, and met with the supplier on the morning of the delivery when the shopping bag containing the heroin was in plain sight. Based upon this evidence, the trial court could conclude that defendant overheard or even participated in the discussion of how much heroin was involved. *U.S. v. Lam Kwong-Wah*, __ F.2d __ (D.C. Cir. May 19, 1992) No. 91-3131.

10th Circuit upholds loss calculation based upon finding inpresentence report. **(300)** Defendant claimed that since the four substantive counts to which he pled guilty all alleged that he had obtained a fraudulent loan of $5 million, the "loss" for purposes of guideline section 2F1.1 was $5 million. The 10th Circuit affirmed the district court's use of the "more than $80,000,000" in calculating the loss, based upon the presentence report's determination that the net total damages reflecting actual losses to RTC from defendant's involvement totalled $127,665,742. *U.S. v. Burger*, __ F.2d __ (10th Cir. May 21, 1992) No. 91-3267.

9th Circuit affirms that gun in upstairs bedroom was used to protect marijuana in garage. **(330)**. Defendant was convicted of unlawful possession of a firearm by a user of marijuana in violation of 18 U.S.C. section 922(g)(3). He argued that the district court erroneously denied him a six-level reduction in his base offense level because he possessed the gun for the purpose of protecting his home, his girlfriend and himself. He argued that such intent constituted a lawful purpose within the meaning of 2K2.1(b)(1). The 9th Circuit rejected the argument, holding that the district court did not clearly err in finding that the weapon was possessed in part to protect defendant's marijuana crop. There is no requirement that the guns and drugs be found in proximity to each other. *U.S. v. Gavilan*, __ F.2d __ (9th Cir. June 12, 1992) No. 91-50509.

2nd Circuit upholds seven offense-level departure even though court did not expressly consider intervening levels. **(340)(700)** The district court departed upward seven offense levels under application note 3 to section 2L1.2 because defendant illegally reentered the United States after being deported for committing an aggravated felony. The 2nd Circuit rejected defendant's claim that the extent of the departure was unreasonable because the district court failed to consider and reject each intervening offense level. Although a step-by-step procedure is mandated for criminal history departures, *see U.S. v. Kim*, 896 F.2d 678 (2nd Cir. 1990), no such rigid procedure is required for offense level departures. The court must make clear on the record how the court determined the magnitude of the departure. Here, the district judge concluded that the guidelines failed to take into account the amendment to immigration laws which increased the penalty from five to 15 years for defendants who were deported for committing aggravated felonies. *U.S. v. Campbell*, __ F.2d __ (2nd Cir. May 22, 1992) No. 91-1624.

Adjustments (Chapter 3)

11th Circuit upholds vulnerable victim enhancement for bank officer who embezzled money from elderly trust account holder even though bank reimbursed victims. **(410)** Defendant, a vice president and trust officer for a bank, embezzled $445,000 from trust accounts belonging to five elderly persons, none of whom lived independently. The 11th Circuit upheld a vulnerable victim enhancement under section 3A1.1 despite defendant's contention that the bank was actually the victim since it fully reimbursed the account

holders, and because the guideline offense was money laundering. The five account holders targeted by defendant were very old, infirm and no longer capable of managing their own financial affairs. Here, although ultimately the bank was the victim, that is only because defendant got caught. He embezzled the money intending to remain undiscovered. In that event, the account holders would have been the victim. The vulnerable victim enhancement does not require the victim to be the victim of the offense of conviction. *U.S. v. Yount*, __ F.2d __ (11th Cir. May 18, 1992) No. 91-3014.

7th Circuit affirms leadership enhancement for sole supplier of cocaine conspiracy. (431) The 7th Circuit affirmed a leadership enhancement based on evidence that defendant was the sole supplier of cocaine to the other members of the conspiracy and that defendant recruited two others into the conspiracy. *U.S. v. Banks*, __ F.2d __ (7th Cir. May 21, 1992) No. 90-1977.

5th Circuit rejects organizer enhancement based solely upon unsworn statement by Assistant U.S. Attorney. (432)(770) The 5th Circuit reversed the district court's determination that defendant was an organizer or supervisor of a stolen vehicle conspiracy because it was based solely upon an unsworn assertion by an Assistant United States Attorney. The unsworn assertions of the government's attorney do not provide, by themselves, a sufficiently reliable basis on which to sentence a defendant. *U.S. v. Patterson*, __ F.2d __ (5th Cir. May 21, 1992) No. 91-1377.

3rd Circuit affirms that section 3B1.3 does not bar upward departure based upon defendant's high-ranking government position. (450)(715) Defendant lied about his past and present cocaine use to obtain a position as assistant to the U.S. Attorney General. The district court departed upward because defendant held a high ranking position with the Department of Justice and because criminal behavior by public officials tends to erode public trust. Defendant claimed that the issues relating to his employment and to conduct affecting public trust were already considered by the guidelines in section 3B1.3. According to defendant, a combination of high-ranking position and criminal activity other than that which specifically falls under section 3B1.3 can never justify an upward departure. The 3rd Circuit rejected defendant's claim that section 3B1.3 barred an upward departure based upon his high-ranking position. The court also affirmed the district court's determination that in his position as assistant to the Attorney General, defendant was involved in preventing criminal activity by public officials. *U.S. v. Barr*, __ F.2d __ (3rd Cir. May 15, 1992) No. 91-5486.

11th Circuit affirms abuse of trust enhancement for bank officer who misappropriated money from trust accounts. (450) Defendant, a vice president and trust officer for a bank, misappropriated for his own use $445,000 from trust accounts at the bank. The 11th Circuit affirmed without discussion an enhancement under guideline section 3B1.3 for abuse of a position of trust. *U.S. v. Yount*, __ F.2d __ (11th Cir. May 18, 1992) No. 91-3014.

7th Circuit upholds obstruction enhancement based upon defendant's lies which misled government in prosecution of his supplier. (462) The 7th Circuit affirmed an enhancement for obstruction based upon defendant's lies to the government about his involvement and activities in the conspiracy. These lies misled the government in its attempt to prosecute his supplier. *U.S. v. Banks*, __ F.2d __ (7th Cir. May 21, 1992) No. 90-1977.

11th Circuit affirms separate grouping for two obstruction of justice counts. (470) Defendant, the owner of two car dealerships, was involved in a scheme under which rebate income was not reported to the IRS. When the IRS began to investigate the scheme at one dealership, defendant persuaded an employee of that dealership to take the blame for the tax offense. Two years later, when the IRS investigated the second dealership, defendant attempted to persuade an employee of that dealership to lie to the grand jury about his involvement in the offense. The 11th Circuit held that defendant's two counts for obstruction of justice were properly grouped separately. Defendant's conduct invaded two distinct societal interests: the proper conduct of the district court and of the federal grand jury. The second obstruction constituted significant additional criminal conduct. *U.S. v. Beard*, __ F.2d __ (11th Cir. May 18, 1992) No. 91-8012.

5th Circuit refuses to group together offenses involving receipt of stolen vehicles, alteration of a VIN and obtaining money by false pretenses. (470) Defendant was convicted of four counts of receipt and possession of stolen vehicles, four counts of alteration or removal of VINs, one count of buying or selling vehicles with an altered VIN, and one count of obtaining money by false pretenses.

The 5th Circuit held that it was error to group these all of these counts together. Since the counts involved different victims, they could only be grouped together under section 3D1.2(d). Section 3D1.2(d) allows grouping only if the offenses are of the "same general type." Under this, defendant's offenses could be grouped into three groups of closely related counts: one group involving receipt or possession of stolen vehicles, one group involving alteration of VINs, and one group involving the offense of obtaining money by false pretenses. Defendant's offenses could not be combined further. *U.S. v. Patterson*, __ F.2d __ (5th Cir. May 21, 1992) No. 91-1377.

7th Circuit denies acceptance of responsibility reduction to defendant who provided assistance after conviction but prior to sentencing. (488) The 7th Circuit rejected defendant's claim that he was entitled to a reduction for acceptance of responsibility even though he provided information to the government regarding an uncharged co-conspirator in an interview conducted after conviction but prior to sentencing. The reduction is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilty, is convicted, and only then admits guilt and expresses remorse. Moreover, it was questionable whether defendant even expressed true remorse, for during the interview, law enforcement officers terminated the conference after defendant lied in response to a question. *U.S. v. Agrell*, __ F.2d __ (7th Cir. May 27, 1992) No. 91-2568.

3rd Circuit denies acceptance of responsibility reduction although defendant went to trial to preserve issue for appeal. (490) The 3rd Circuit affirmed the district court's denial of a reduction for acceptance of responsibility even though defendant claimed he went to trial only to preserve the issue of the applicability of the "exculpatory no" doctrine to the facts of his case for appeal, not to context his factual guilt. The parties gave conflicting accounts of the course of the pre-trial negotiations, and the probation officer found that defendant's written statement acknowledging his offense "fell short as a direct acknowledgement of essential simple misconduct." *U.S. v. Barr*, __ F.2d __ (3rd Cir. May 15, 1992) No. 91-5486.

Criminal History (§4A)

6th Circuit rules that two offenses were not consolidated for sentencing even though sentence was pronounced on same day in same court. (504) The 6th Circuit affirmed that defendant's two prior armed robbery convictions were not consolidated for sentencing under section 4A1.2. Although final judgment was pronounced in both cases on the same day in the same court, the record as a whole reflected that the two convictions were, at all relevant times, treated separately and distinctly. There was no order by the trial court expressly or implicitly consolidating the cases for sentencing. In each case, there was a separate criminal complaint and separate indictment. The cases proceeded under separate court numbers. Defendant's guilt as to one robbery was determined by a jury on September 18, 1975, and he received a 12 year sentence. Defendant pled guilty to the second robbery on October 3, 1975, and received a 20 year sentence pursuant to a plea agreement. Thus, because the convictions constituted separate convictions for crimes of violence, defendant was a career offender. *U.S. v. Coleman*, __ F.2d __ (6th Cir. May 20, 1992) No. 91-5582.

7th Circuit affirms that guilty plea to prior offense was knowing, intelligent and voluntary. (504) The 7th Circuit upheld the inclusion of a 1970 conviction for smuggling marijuana in defendant's criminal history category, rejecting defendant's claim that he did not knowingly, intelligently and voluntarily enter his guilty plea. At the time, application note 6 to guideline section 4A1.2 stated that "sentences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted." The court examined the transcript from defendant's sentencing hearing and determined that the judge fulfilled his obligation to ensure that defendant's plea was knowingly, intelligently and voluntarily made. *U.S. v. Agrell*, __ F.2d __ (7th Cir. May 27, 1992) No. 91-2568.

7th Circuit affirms that prior misdemeanor conviction did not arise from unconstitutional guilty plea. (504) The 7th Circuit rejected defendant's claim that the district court included in its computation of his criminal history a prior misdemeanor conviction that arose from an unconstitutional guilty plea. Defendant bore the burden of proving that the prior conviction was constitutionally invalid. Defendant claimed that he was not represented by counsel on those charges, that no one told him of his constitutional rights regarding those charges, that he did not appear before a judge, and that he did not enter a formal guilty plea. The district court found that this testimony did not overcome evidence of the prior

conviction in state court records, which indicated that defendant was represented by counsel, that he signed a waiver of his right to trial by jury, and that he entered a formal guilty plea. *U.S. v. Banks*, __ F.2d __ (7th Cir. May 21, 1992) No. 90-1977.

8th Circuit finds that defendant was not held accountable for co-conspirators actions but merely sentenced as career offender. (520) The 8th Circuit rejected defendant's claim that the district court violated Fed. R. Crim. P. 11 by failing to advise him that he would be held accountable for his co-conspirators crimes. Defendant was not held accountable for his co-conspirator's crimes. The 210 to 262 month guideline range was applicable to defendant regardless of the conduct of his co-conspirator because defendant was sentenced as a career offender. As a career offender, defendant had to have at least an unadjusted offense level of 34 and a criminal history category of VI. After a reduction for acceptance of responsibility, this resulted in a guideline range of 210 to 262 months. *Rodriguez v. U.S.*, __ F.2d __ (8th Cir. May 21, 1992) No. 91-2531.

Determining the Sentence (Chapter 5)

5th Circuit refuses to grant credit for time spent in official detention to reduce a term of probation. (560)(600) Defendant argued that the time he served in prison prior to his sentencing should be credited towards the community confinement portion of the three year sentence of probation he eventually received. The 5th Circuit rejected this argument because the statute governing credit for time served, 18 U.S.C. section 3585(b), only allows credit for presentence official detention to be applied to a term of imprisonment, not a term of probation. Under the Supreme Court's recent decision in *United States v. Wilson*, 112 S.Ct.1351 (1992), a necessary condition to obtaining a section 3585(b) credit is that the offender must first exhaust his administrative remedies with the Bureau of Prisons. However, defendant was not committed to the custody of the Bureau of Prisons after sentencing and his sentence of probation is not supervised by the Bureau of Prisons. Thus, he cannot exhaust his administrative remedies before it. This scheme does not violate equal protection. *U.S. v. Dowling*, __ F.2d __ (5th Cir. May 21, 1992) No. 91-3554.

9th Circuit says pre-Guidelines sentence of incarceration on one count followed by probation on a second count was not a "split sentence." (570)(800) Before the guidelines, if a defendant was convicted of only one count, the only way he could be both incarcerated and placed on probation was to impose a "split sentence" under 18 U.S.C. section 3651. Here, the defendant was convicted of two counts, and received four years in custody on the first count, followed by five years' probation on the second count. The 9th Circuit held that this was *not* a "split sentence," because there were two separate counts. The district court properly corrected the Judgment and Commitment order later expressly to state that the imposition of sentence was suspended on the probation count. Accordingly, defendant's sentence was legal, and the district court had jurisdiction to revoke his probation. *U.S. v. Stephens*, __ F.2d __ (9th Cir. June 8, 1992) No. 91-50330.

5th Circuit says that in calculating release date of prisoner sentenced in Mexico, Parole Commission must use Mexican sentence as guideline sentence and give credits earned on that sentence. (590) Defendant received a 90-month sentence in Mexico for a drug crime. He was transferred to the United States pursuant to atreaty, and the Parole Commission determined his probable release date. A Mexican report noted that by working 765 days, defendant had earned good time credit of 383 days. The Parole Commission determined that defendant should be released after serving 63 months, and received a 27-month supervised release period. The 5th Circuit held that in determining defendant's release date, the Parole Commission must use the 90-month Mexican sentence as defendant's guideline sentence, and then give creditfor time served and good time credits earned on that sentence. *Cannon v. U.S. Department of Justice*, __ F.2d __ (5th Cir. May 19, 1992) No. 91-4340.

4th Circuit upholds fine that defendant would be unable to pay unless he and his wife sold their home. (630) The district court determined that defendant had sufficient assets to pay a fine for the cost of confinement based upon his interest in a $246,000 house that he and his wife owned as tenants by the entirety. The court recognized that defendant's and his wife's interests in the residence were not severable, and ordered that the fine should be a lien against his interest in the home if the home was sold. The 4th Circuit rejected defendant's claim that the fine violated 18 U.S.C. section 3572(d) because the fine was not due on a date certain or within five years. Section 3572(d) does not require that a court provide for payment

on a date certain or in installments. It requires immediate payment of any fine unless the court extends payments by providing for payment on a date certain or in installments. Because the district court judgment did not provide for other than immediate payment, the payment was due immediately, and the five-year limitation on installment payment schedules did not apply. *U.S. v. Gresham*, __ F.2d __ (4th Cir. May 18, 1992) No. 91-5124.

Departures Generally (§5K)

3rd Circuit holds court violated *Burns* notice requirement in departing upward for defendant's high-ranking position. (700) The government objected to defendant's initial presentence report because it failed to accord "sufficient recognition to the unique combination of offense and governmental position in defendant's case." The amended presentence report considered this issue, and concluded that this matter was better addressed, if at all, through a higher sentence within the applicable guideline range rather than through an upward departure. The district court commented that the probation officer had resolved all of the objections correctly. It then departed upward because defendant held a high-ranking position with the Department of Justice. The 3rd Circuit reversed, ruling that the district court failed to give reasonable notice of its intent to depart upward on grounds not identified in the presentence report or in a prehearing submission by the government, as required by *Burns v. United States*, 111 S.Ct. 2182 (1991). *U.S. v. Barr*, __ F.2d __ (3rd Cir. May 15, 1992) No. 91-5486.

7th Circuit holds that government is entitled to receive notice of intent to depart downward. (700) In *Burns v. United States*, 111 S.Ct. 2182 (1991), the Supreme Court held that a district court must give the defendant "reasonable notice" before it can depart upward on a ground not identified either in the presentence report or in a prehearing submission by the government. Relying on dicta in *Burns*, the 7th Circuit held that the government is entitled to similar notice before the district court may depart downward on a ground not identified in the presentence report on in a prehearing submission by the defendant. Because the government did not receive such notice, the case was remanded for resentencing. *U.S. v. Andruska*, __ F.2d __ (7th Cir. May 18, 1992) No. 91-2748.

2nd Circuit rules that return of stolen property did not justify downward departure. (715) The 2nd Circuit ruled that the fact that defendant voluntarily returned a portion of his stolen property did not justify a downward departure. This fact is taken into account in the acceptance of responsibility provisions. Application note 1(b) to section 3E1.1, which provides for a two-level reduction for acceptance of responsibility, expressly directs a sentencing judge to consider whether the defendant made restitution prior to the adjudication of guilt in determining whether such an adjustment is appropriate. Thus, the sentencing commission adequately considered restitution as a mitigating circumstance in formulating the guidelines. Defendant already received credit for his voluntary repayment of embezzled funds when he received his acceptance of responsibility reduction. *U.S. v. Arjoon*, __ F.2d __ (2nd Cir. May 18, 1992) No. 91-1654.

7th Circuit holds that defendant's continued involvement with fugitive was not aberrant behavior. (719) About a year after landing a sales job with a local car dealership, defendant became involved with a drug trafficker, separated from her husband, and moved into her own apartment. After the trafficker became a fugitive, defendant continued her involvement with him, and attempted to assist him in avoiding arrest. Defendant was found guilty of concealing a fugitive from arrest. The 7th Circuit reversed a downward departure based on defendant's "aberrant" behavior. The court found that the sentencing commission intended to permit a downward departure for aberrant behavior only under limited circumstances. Defendant's continued involvement with the trafficker after learning of his fugitive status, her efforts to help him evade the authorities, her refusal to acknowledge that she had engaged in wrongful conduct, and the repeated nature of her actions did not constitute aberrant behavior. The court expressly rejected the broad interpretation of aberrant behavior adopted by the 9th Circuit. *U.S. v. Andruska*, __ F.2d __ (7th Cir. May 18, 1992) No. 91-2748.

Sentencing Hearing (§6A)

8th Circuit rules court did not consider information from plea negotiations and defendant's later cooperation. (750) The 8th Circuit rejected as conclusory and without foundation defendant's claim that the district court improperly considered information derived from plea negotiations and defen-

dant's later cooperation with the government. Defendant did not specify what information was obtained during the plea negotiation or through his cooperation and thus used against him at sentencing. *Rodriguez v. U.S.*, __ F.2d __ (8th Cir. May 21, 1992) No. 91-2531.

D.C. Circuit refuses to require clear and convincing standard to determination of drug quantity. (755) Defendant was convicted of conspiracy to distribute a detectable quantity of heroin, but was found at sentencing, by a preponderance of the evidence, to be responsible for 3.4 kilograms of heroin. The D.C. Circuit rejected defendant's claim that the determination of drug quantity at sentencing was such a critical factor that it should be made on the basis of clear and convincing evidence rather than the lesser preponderance of the evidence standard. Although the Supreme Court has held that when a significant interest is at stake, due process may require a court to find particular facts under the clear and convincing standard, this additional protection has not been extended to sentencing considerations. The court did not foreclose the possibility that in extraordinary circumstances a clear and convincing standard may be required, but found that defendant's situation did not present such a circumstance. *U.S. v. Lam Kwong-Wah*, __ F.2d __ (D.C. Cir. May 19, 1992) No. 91-3131.

10th Circuit holds that defendant is not entitled to review resolution of disputed matters prior to sentencing. (765) The 10th Circuit rejected defendant's claim that the district court erred in failing to resolve disputed findings under Fed. R. Crim. P. 32(c)(3)(D) prior to the imposition of his sentence. Rule 32 does require the district court to reduce its findings regarding disputed materials to written form and attach them to the presentence report. The Rule does not expressly afford defendant the opportunity to review such findings prior to imposition of sentence. *U.S. v. Burger*, __ F.2d __ (10th Cir. May 21, 1992) No. 91-3267.

10th Circuit orders resentencing because probation officer relied on letters without disclosing them to defendant. (770) After defendant plead guilty to various conspiracy and bank fraud charges, the court found two letters from the FDIC alleging that defendant had tampered with witnesses, was capable of paying $6 million restitution with money hidden overseas, was responsible for the brutal rape of a former girl friend, and had laundered money through casinos. The court forwarded the letters to the probation officer but defendant did not receive copies. Prior to sentencing, the court conferred with the probation officer who "promoted" restitution in the amount of $6 million. The court ordered immediate restitution in the amount of $6 million. After sentencing, defendant learned of the letters and moved for resentencing. In denying the motion, the district court specifically stated that the two letters in dispute were not used in determining defendant's sentence. Nonetheless, the 10th Circuit ordered resentencing, since even if the district court did not rely on the letters, the probation officer clearly relied on them in "promoting" the restitution order. *U.S. v. Burger*, __ F.2d __ (10th Cir. May 21, 1992) No. 91-3267.

Plea Agreements (86B)

10th Circuit rules defendant did not show a fair and just reason for withdrawing his plea. (790) The 10th Circuit held that defendant did not present a fair and just reason for withdrawing his guilty plea. There was a factual basis for the plea. Contrary to defendant's assertion that his participation in the conspiracy terminated December 1988, the district court specifically found that he continued his participation and ownership in various entities and property which were obtained with money illegally defrauded from another corporation. Defendant was not misled as to which sentencing guideline would apply and the maximum sentence which he could receive. Defendant was informed of and clearly comprehended both the nature and consequences of his plea. His 12-year sentence was well within the maximum of five years for each count, or 25 years. The government did not breach the plea agreement by requesting restitution. Government agencies such as the FDIC and RTC qualify as victims under the Victim and Witness Protection Act of 1982. *U.S. v. Burger*, __ F.2d __ (10th Cir. May 21, 1992) No. 91-3267.

Violations of Probation and Supervised Release (Chapter 7)

5th Circuit says post-sentencing conduct may not be basis for upward departure in probation revocation. (800) Defendant had a guideline range of two to eight months, and received a sentence of four years probation. His probation was revoked after he got into a barroom brawl and his urine tested positive for marijuana. The district court relied upon these circumstances to impose a 16-

month sentence. The 5th Circuit held that when a defendant is sentenced after the revocation of his probation, the district court may not depart upward from the guideline range based upon the defendant's conduct occurring after the original sentencing. The court may depart upward from the guidelines, but must do so on the basis of information which was before the court and would have justified a departure at the original sentencing. *U.S. v. Williams*, __ F.2d __ (5th Cir. May 20, 1992) No. 91-8407.

Sentencing of Organizations (Chapter 8)

Articles discuss "credit for compliance" aspects of the new guidelines for sentencing of corporations. (840) A series of articles in the Corporate Conduct Quarterly, published by the Forum for Policy Research at Rutgers University, discuss the new guidelines for organizations. In *"The New Federal Sentencing Guidelines: Three Keys to Understanding the Credit for Compliance Programs,"* the principal drafters of the organizational guidelines, Sentencing Commission legal counsel Winthrop M. Swenson and Nolan E. Clark, explain that the organizational guidelines are structured to give credit to businesses that have effective programs to prevent and detect violations of law. The Commission "intended that punishment should be lighter for 'good citizen' companies who become entangled in the criminal law solely because of what is frequently called the 'rogue' employee." In other articles, William Lytton discusses *"The Criminalization of the American Corporation,"* and Joseph E. Murphy suggests *"12 Ways to Encourage Voluntary Compliance."* 1 CORP. CONDUCT QUARTERLY 1-7 (Winter 1991).

Article suggests limits on corporate probation. (840) The 1991 guidelines for the sentencing of organizations provide for a sentence of corporate probation, which permits a judge to monitor convicted companies and to force them to develop internal programs to prevent and detect misconduct. In *"Corporate Probation under the New Organizational Sentencing Guidelines,"* a student author advocates revising the guidelines to limit the probation sanction to only the most extraordinary situations. The author traces the development of the organizational guidelines and provides a summary of them. 101 YALE L. J. 2017-42 (1992).

Appeal of Sentence (18 U.S.C. §3742)

8th Circuit rules that government waived obstruction issue by failing to appeal it. (855) The 8th Circuit refused to review whether the district court should have adjusted defendant's sentence for obstruction of justice under section 3C1.1. Since the government did not raise this issue on appeal, the obstruction issue was not properly before the court. *U.S. v. Simmons*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-1368.

5th Circuit refuses to remand where possible error in criminal history did not change criminal history category. (865) The district court may have erroneously added three points to defendant's criminal history rather than one for three related prior convictions. Nonetheless, the 5th Circuit refused to remand for resentencing because it concluded that the district court would still impose the same sentence. Even if defendant's criminal history points were reduced from 12 to ten, he still would fall within criminal history category V and thus the alleged error had no effect on defendant's guideline range. The district court's written statement of reasons did not suggest that the district court's choice of a sentence within defendant's guideline range was influenced by his criminal history points. The district court was not under any factual misapprehension concerning the prior convictions, and it was undisputed that such offenses could properly be considered in determining defendant's sentence within his guideline range. *U.S. v. Johnson*, __ F.2d __ (5th Cir. May 20, 1992) No. 91-8526.

5th Circuit reviews de novo grouping of defendant's offenses. (870) The 5th Circuit found that the question of whether and how to group a defendant's offenses are legal questions, as they involve a purely legal interpretation of the guidelines terminology and the application of that terminology to a particular set of facts. Accordingly, it reviewed the district court's grouping of defendant's offenses *de novo*. *U.S. v. Patterson*, __ F.2d __ (5th Cir. May 21, 1992) No. 91-1377.

Forfeiture Cases

8th Circuit holds that federal forfeiture law supersedes Iowa homestead exemption. (910) The 8th Circuit rejected defendant's claim that the Iowa homestead exemption exempted her home from criminal forfeiture under 21 U.S.C. section 853(a). Under the Supremacy Clause of Article VI of the Constitution, federal law supersedes states

law where there is an outright conflict between such laws. Thus the federal forfeiture law clearly superseded the homestead exemption. To hold differently would destroy the uniformity of application of section 853(a) and would interfere with the intent of Congress. *U.S. v. Curtis*, __ F.2d __ (8th Cir. May 27, 1992) No. 91-1726.

10th Circuit affirms probable cause based on hidden currency and drug paraphernalia. (950) The 10th Circuit affirmed the district court's determination that there was probable cause to forfeit cash found in claimant's home and several vehicles owned by claimant. The unusually large amount of hidden currency ($149,442) and presence of drug paraphernalia, including packaging supplies and drug notations reflecting large drug transactions, established a sufficient nexus between the property and claimant's involvement in drug trafficking. Claimant did not establish that the money was from legitimate sources. The vehicles were also properly subject to forfeiture. One contained a loaded pistol and a notebook containing drug notations, which indicated that it had been used to facilitate drug trafficking. Moreover, a sufficient nexus was established between the purchase of the vehicles with cash and claimant's involvement in illegal drug transactions. Although the government did not tie the vehicles to a specific drug transaction, both were purchased with cash during the years when the district court found that claimants had failed to demonstrate legitimate alternate sources of income large enough to account for their cash expenditures. *U.S. v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two and 43/100 Dollars ($149,442.43) in United States Currency*, __ F.2d __ (10th Cir. May 27, 1992) No. 90-5261.

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

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Pre-Guideline Sentencing, Generally

2nd Circuit upholds increase in pre-guidelines sentence to make up for incorrect enhancement on guidelines count. (100)(110) Defendant's original sentence was based on both guidelines and pre-guidelines counts. On his first appeal, the 2nd Circuit reversed a guidelines enhancement which had resulted in a 10-month increase in defendant's sentence, and remanded for resentencing. On remand, the district court added 10 months to defendant's non-guidelines sentence and thus resentenced him to precisely the same total prison term originally imposed. The 2nd Circuit affirmed, since the prior opinion explicitly recognized the district court's authority to so increase the non-guidelines sentence. The remand was intended to resolve the factual question of whether the district court would have given a larger sentence on the non-guidelines counts if it had realized the enhancement was improper. *U.S. v. Hornick*, __ F.2d __ (2nd Cir. May 12, 1992) No. 91-1712.

9th Circuit holds that court need not explain reasons for 7-1/2 year sentence after 99-year sentence reversed. (100) Defendant was sentenced to 99 years' imprisonment after his first trial, including consecutive sentences of two years each for the three counts now at issue. After reversal and remand, he was sentenced to 2-1/2 years to run consecutively, on each of the same three counts. He argued that he was, in effect, punished for appealing. The 9th Circuit rejected the argument, noting that if his aggregate sentence after remand had exceeded the original sentence, vindictiveness would be presumed, absent an adequate explanation. But since the new sentence did not exceed the original sentence in this case, the district court was under no obligation to explain its reasons. *U.S. v. Todd*, __ F.2d __ (9th Cir.

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May 19, 1992) No. 90-10437.

Guideline Sentencing, Generally

Article notes possible reasons for expanding factors considered under guidelines. (110) In a book review entitled *"Federal Sentencing: Looking Back to Move Forward,"* Deborah Young suggests reform of the guidelines based on a study of preguidelines sentencing, S. Wheeler, K. Mann & A. Sarat, *"Sitting in Judgment: The Sentencing of White-Collar Criminals"* (1988). According to the study, preguidelines sentencing was not as unprincipled as is commonly depicted; indeed, judges tended to agree on the factors that were important in determining sentence. Among those factors were specific characteristics of the offender's situation that, Young notes, are often difficult to consider under the guidelines system. Further development of the guidelines system to accomodate such factors might be warranted, Young concludes. 60 CINN. L. REV. 135-51 (1991).

10th Circuit affirms referral of case for federal prosecution. (110) The 10th Circuit rejected defendant's claim that he should have been sentenced under state, rather than federal law. In *U.S. v. Andersen*, 940 F.2d 593 (10th Cir. 1991), the court upheld the referral for federal prosecution of a defendant originally arrested by multi-agency strike force. The ultimate decision whether to charge a defendant and what charges to file rests solely with state and federal prosecutors, even though law enforcement investigators may have some influence in charging decisions, and regardless of whether policies and guidelines exist at the agency level. Due process rights are not violated when a law enforcement agency refers a case to federal rather than state prosecutors, and a defendant is tried, convicted and sentenced in federal rather than state court. *U.S. v. Gines*, __ F.2d __ (10th Cir. May 13, 1992) No. 91-4046.

8th Circuit upholds enhancement for sexually abusing a child less than 12 years old. (125)(215) Defendant was convicted of aggravated sexual assault under 18 U.S.C. section 2241(c) for sexually abusing a child under the age of 12. The 8th Circuit rejected defendant's contention that an enhancement under section 2A3.1 based on the victim's young age was double counting. Although the age of the victim is an element of the offense under section 2241(c), guideline section 2A3.1 applies to offenses under section 2241 and to simple sexual assault under 18 U.S.C. section 2242. The application notes clearly state that the base offense level under section 2A3.1 represents sexual abuse as set forth in 18 U.S.C. section 2242. The sentencing commission obviously intended that the age of the victim and other elements of aggravated sexual assault be addressed through enhancements of the base offense level. *U.S. v. Balfany*, __ F.2d __ (8th Cir. May 13, 1992) No. 91-2526.

5th Circuit upholds court's discretion to collaterally review validity of prior convictions. (131)(504) Prior to November 1990, application note 6 to section 4A1.2 stated that sentences based on convictions "which the defendant shows to have been constitutionally invalid" should not be counted in a defendant's criminal history. Effective November 1990, the application note was amended to provide that sentences from convictions "which the defendant shows to have been *previously* ruled constitutionally invalid" are not to be counted. However, background note 6 to that section explicitly reserves "for court determination the issue of whether a defendant may collaterally attack at sentencing a prior conviction." The 5th Circuit, following the 2nd and 11th Circuits, held that this allows a district court, in its discretion, to inquire into the validity of prior convictions at the sentencing hearing. Because the amended applica-

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tion note is nothing more than a procedural provision that governs how challenges to prior convictions may be brought, application of the amended note to defendant did not violate the ex post facto clause. *U.S. v. Canales*, __ F.2d __ (5th Cir. May 7, 1992) No. 91-5644.

8th Circuit rules that defendant waived objection to application of amended guidelines. (131)(855) Section 2F1.1(b)(1)(J) of the 1987 guidelines establishes a nine-level enhancement if the value to be received from a bribe is between $1,000,001 and $2,000,000. Defendant's offense level was computed according to the 1989 guidelines, which provide for an 11-level increase when the benefit to be received is greater than $800,000 and less than $1,500,000. The 8th Circuit ruled that because defendant did not object to the apparently erroneous retroactive application of the 1989 guidelines, the error was waived. The apparent error did not result in a miscarriage of justice and thus was not plain error. *U.S. v. Ziglin*, __ F.2d __ (8th Cir. May 14, 1992) No. 91-3532.

8th Circuit finds district court did not erroneously apply recent guidelines amendments to defendant. (131) The 8th Circuit rejected defendant's claim that the district court erroneously applied the 1989 amendments to the sentencing guidelines to his conspiracy conviction. The initial draft of the presentence report contained an enhancement based on a section added to the guidelines by the 1989 amendments. The conduct in question was concluded by April 30, 1989, before the effective date of the amendments. After defendant's objection, the presentence report was changed to reflect this fact, although it did state that this issue might be grounds for an upward departure. The district court, however, did not depart upward, instead granting a downward departure. *U.S. v. Ziglin*, __ F.2d __ (8th Cir. May 14, 1992) No. 91-3532.

2nd Circuit applies guidelines to defendant who committed no predicate acts after effective date of guidelines. (132) Defendant was convicted of a RICO conspiracy which ran from 1973 to 1989. The 2nd Circuit upheld the application of the guidelines to defendant, even though he committed no predicate acts after November 1, 1987, the effective date of the guidelines. Defendant did not withdraw from the conspiracy, and therefore remained fully liable for the acts of co-conspirators. The RICO conspirators here continued to act after the effective date of the guidelines, with full notice of the consequences. Since defendant did not withdraw from the conspiracy, he could be charged with the notice that his co-conspirators had when they acted. *U.S. v. Minicone*, __ F.2d __ (2nd Cir. April 13, 1992), *amending* __ F.2d __ (2nd Cir. Jan. 23, 1992) No. 91-1014.

4th Circuit affirms that tax conspiracy continued past effective date of guidelines. (132) The 4th Circuit affirmed that defendant's tax conspiracy continued beyond November 1, 1987, the effective date of the guidelines. Defendant conspired with his co-conspirator to defraud the IRS by creating a $2.1 million false income tax deduction on defendant's 1984 income tax return. The deduction was based on the payment of that sum by defendant to the co-conspirator in a fraudulent settlement of a sham law suit. In an attempt to have the transaction withstand tax scrutiny, the co-conspirator believed he had to report the income. Because the co-conspirator did not file his 1984 tax return until June 1989, when he reported the $2.1 million as an income item, his conduct in furtherance of the conspiracy occurred during the period when the guidelines were applicable. *U.S. v. Hirschfeld*, __ F.2d __ (4th Cir. May 7, 1992) No. 91-5046.

8th Circuit upholds application of guidelines to "straddle" conspiracy. (132) The 8th Circuit affirmed the application of the guidelines to defendant's conspiracy, since although it began before the effective date of the guidelines, it ended after such date. All other counts against defendant occurred after the guidelines' effective date. *U.S. v. Davila*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

9th Circuit holds charging decision is reviewable only to determine whether it is based on race, religion, gender, etc. (135) Due process prohibits arbitrary or capricious charging decisions, *see U.S. v. Redondo-Lemos*, __ F.2d __ (9th Cir. Feb. 5, 1992) No. 90-10430. However, quoting *U.S. v. Diaz*, __ F.2d __ (9th Cir. Apr. 15, 1992) No. 91-30165, the 9th Circuit held that absent proof of discrimination based on race, religion, gender, or other similar grounds, "there is no judicial remedy to correct such violations." *U.S. v. Nance*, __ F.2d __ (9th Cir. Apr. 16, 1992), *amended* May 18, 1992, No. 91-30193.

Application Principles, Generally (Chapter 1)

9th Circuit upholds bodily injury enhancement for slapping bank teller's face. (160)(224) U.S.S.G. section 2B3.1(b)(3)(A) calls for a two level sentencing enhancement when a robber inflicts bodily injury on the victim. During the course of a bank robbery, the defendant twice slapped a bank teller, which left an outline of the defendant's hand imprinted on the victim's cheek and neck. The impact dislodged the teller's pierced earrings, cause her cheek to swell and the resulting pain required her to seek a doctor's care. The 9th Circuit followed the Fourth Circuit's ruling that a slap to the face constitutes "bodily injury." The panel also stated that under U.S.S.G. § 1B1.1 comment. (n.1), this was a significant injury. It was painful, obvious and of the type for which medical attention would ordinarily be sought. Alternatively, the panel upheld the defendant's sentence enhancement because the pain lingered for 24 hours and the repeated blows to the head were of the type for which medical attention would ordinarily be sought. *U.S. v. Greene*, __ F.2d __ (9th Cir. May 18, 1992) No. 91-50399.

2nd Circuit rules that erroneous downward departure based on sharing of illegal profits was harmless error. (170)(715) The district court departed downward in part because the proceeds of defendant's conspiracy were divided with another defendant. The 2nd Circuit rejected this as a ground for a downward departure, but found the error to be harmless. The commentary to guideline section 1B1.3 makes it clear that a defendant is accountable for the entire amount of money stolen during concerted criminal activity. Because the commission specifically addressed the issue of divided proceeds and decided that the entire amount should be included as part of each defendant's relevant conduct, it could not be said that defendant's splitting of proceeds with her co-conspirator amounted to a circumstance not adequately taken into consideration by the sentencing commission. *U.S. v. Johnson*, __ F.2d __ (2nd Cir. May 14, 1992) No. 91-1515.

2nd Circuit says that policy statements are merely interpretative guides and not substitutes for the guidelines. (180) In reviewing the district court's downward departure based upon defendant's family circumstances, the 2nd Circuit examined the weight courts should give to policy statements such as section 5H1.6. The statements warrant greater attention that ordinary legislative history, because Congress specifically directed sentencing courts to consider the policy statements. However, the policy statements cannot be viewed as equivalent to the guidelines themselves, since only the guidelines are submitted to Congress for approval. The policy statements are useful in determining whether to depart from a guidelines sentencing range. However, despite their usefulness, the policy statements do not render the statutory standard for departure superfluous. The central question in any departure situation is whether there is an aggravating or mitigating circumstance not adequately taken into consideration by the sentencing commission. *U.S. v. Johnson*, __ F.2d __ (2nd Cir. May 14, 1992) No. 91-1515.

Offense Conduct, Generally (Chapter 2)

2nd Circuit upholds application of specific offense characteristics for kidnapping despite acquittal. (215)(380) Defendant was convicted of conspiracy to kidnap and acquitted of the substantive crime of kidnapping. The 2nd Circuit upheld use of the specific offense characteristics for kidnapping in guideline section 2A4.1. The provision applicable to inchoate offenses, section 2X1.1, states that the base offense level is the base offense level for the substantive offense, plus any adjustments from the guideline for any intended offense conduct that can be established with reasonably certainty. Thus, the district court used the kidnapping base offense level of 24, and applied enhancements for ransom and for committing the offense in furtherance of another crime. The fact that the jury acquitted defendant of the substantive crime of kidnapping did not establish that he withdrew from the conspiracy before the ransom demand or the facilitation of another crime. Moreover, the fact that he was acquitted did not mean he was entitled to the three level reduction under section 2X1.1(b). *U.S. v. Patino*, __ F.2d __ (2nd Cir. May 6, 1992) No. 91-1646.

8th Circuit affirms that defendant had temporary custody of sexual abuse victim. (215) The 8th Circuit affirmed an enhancement under section 2A3.1 because the sexual abuse victim was in defendant's custody or control at the time of the abuse. Although defendant presented witnesses who testified that they had not seen defendant alone with the child, the child's mother testified that defendant was sometimes left alone with the child. At one point the mother invited defendant to abuse the child, but this did not alter the fact that defendant had custody or control of the child. Defendant was a close friend of the child's mother

and eventually became the child's stepfather. Although the child did not live with them and may have only met defendant a few times, defendant was certainly no stranger to the child. Defendant abused his relationship to the child and hence, the potential for greater and prolonged psychological damage to the child existed. *U.S. v. Crane*, __ F.2d __ (8th Cir. May 13, 1992) No. 91-2266.

8th Circuit reverses court's failure to enhance where defendant had custody and control of sexual abuse victim. (215) The 8th Circuit found that the district court erroneously failed to enhance defendant's sentence under section 2A3.1(b)(3) based upon his custody or control of a child which he sexually abused. Defendant and the child's mother lived together as husband and wife. Although they often disciplined their own children, testimony showed that they shared many household responsibilities, including caring for the children. During at least one of the assaults, the child was in defendant's sole custody and care. Moreover, the purposes underlying the enhancement applied in this case. Defendant was a member of the child's household, and effectively was the child's stepfather. Defendant not only abused the child, but he abused his relationship and the child's trust. Consequently, the potential for greater and prolonged psychological damage to the abused child existed. Senior Judge Heaney dissented. *U.S. v. Balfany*, __ F.2d __ (8th Cir. May 13, 1992) No. 91-2526.

8th Circuit affirms that threat to beat child with a belt justified enhancement under 2A3.1(b)(1). (215) The 8th Circuit affirmed an enhancement under guideline section 2A3.1(b)(1) based upon the district court's finding that defendant caused a child to engage in a sexual act by threatening the child with serious bodily injury. The child's aunt testified that the child told her that defendant had threatened to kill her mother and sister if she told anyone about the abuse. However, even without this hearsay evidence there was sufficient evidence to support the enhancement. The child testified that defendant threatened to beat her with a belt if she told anyone about the abuse. Although on its face this might not appear to be a threat of serious bodily injury, the threat must be viewed in the context of being made to an eight-year old child, not an adult. Moreover, it was reasonable to infer that defendant made the threat not only to prevent detection of his wrongdoing, but also to facilitate future assaults. *U.S. v. Balfany*, __ F.2d __ (8th Cir. May 13, 1992) No. 91-2526.

9th Circuit upholds enhancement for sexually abusing eight-year-old victim in defendant's custody. (215) U.S.S.G. section 2A3.1(b)(3)(1990) provides a two level enhancement "if the victim is in the custody, care, or supervisory control of the defendant." When the victim trusts or is entrusted to the defendant, this enhancement is appropriate. The defendant was convicted for two counts of sexually abusing the eight year old daughter of his common-law wife. The defendant was present at the victim's birth, they lived together and he had helped raise her. At the time of the second incident no one else was present at their home. The 9th Circuit held that under these facts the "victim was in the custody, care, or supervisory control of the defendant" and the enhancement was proper. *U.S. v. Castro-Romero*, __ F.2d __ (9th Cir. May 19, 1992) No. 91-30152.

10th Circuit affirms application of higher base offense level in kidnapping offense. (215) Guideline section 2A4.1(b)(5), the kidnapping guideline, provides that if the victim was kidnapped to facilitate another offense, and that offense level is greater, the other guideline should be applied. Defendant conceded that his victim was kidnapped to facilitate the commission of sexual abuse and extortion, and the guideline for sexual abuse would be higher. But he contended that because his kidnapping was intended to facilitate *two* other offenses, the section was ambiguous, and therefore the rule of lenity should be applied. The 10th Circuit found that section 2A4.1(b)(5) was not ambiguous. This is not changed by the fact that the defendant committed two offenses in connection with the kidnapping. A defendant's commission of a second additional offense cannot relieve him from responsibility for the more serious of the offenses. *U.S. v. Galloway*, __ F.2d __ (10th Cir. May 13, 1992) No. 91-4008.

10th Circuit affirms enhancement for abduction of sexual abuse victim. (215) Defendant was convicted of kidnapping, but because the kidnapping was committed to facilitate the commission of another offense, sexual abuse, guideline section 2A4.1 directed that defendant be sentenced under section 2A3.1, the sexual abuse guideline. He contended that an enhancement under section 2A3.1(b)(5) for abduction of the victim was improper because abduction of the victim was inherent in the crime of kidnapping. The 10th Circuit upheld the enhancement, because the base offense level for sexual abuse was determined without regard to whether or not the victim was abducted. Guideline section 1B1.5 states that an instruction to apply

another guideline refers to the entire guideline, i.e. the base offense level plus all applicable specific offense characteristics and cross references. *U.S. v. Galloway*, __ F.2d __ (10th Cir. May 13, 1992) No. 91-4008.

9th Circuit affirms enhancement where bank robber's note expressly threatened death. (224) Under U.S.S.G. section 2B3.1(b)(2)(D), a two level enhancement is appropriate when a bank robber expressly threatens death, *i.e.*, "Give me your money or you're dead," U.S.S.G. § 2B3.1, comment. (n.7). The 9th Circuit held that the bank robber's note stating, "Your money or your life -- quick!" was a sufficient threat of death to trigger the enhancement. The defendant's argument that the note did not express a threat of death was rejected as "facetious." *U.S. v. Bachiero*, __ F.2d __ (9th Cir. May 15, 1992) No. 90-50685.

8th Circuit affirms that value of bribe was equal to amount of tax liability defendant sought to avoid. (230) Defendant was convicted of bribing a public official. The 8th Circuit affirmed that the "value of the action received in return for the bribe" under section 2C1.1(b)(1) was equal to the tax liability he sought to eliminate. This amount was the $1,432,425 that he stipulated was the taxes that were to be "wiped off the books" as a result of the bribery scheme. *U.S. v. Ziglin*, __ F.2d __ (8th Cir. May 14, 1992) No. 91-3532.

7th Circuit holds that 21 U.S.C. 851(a)(2) does not require prior conviction to be by indictment. (245) Defendant received a mandatory minimum 10-year sentence because he had a prior drug felony. He argued that the 10-year minimum was unauthorized because 21 U.S.C section 851(a)(2) requires the prior conviction to be by indictment, unless the defendant waived indictment. Section 851(a)(2) provides: "An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed." Following the 9th and 10th Circuits, the 7th Circuit held that section 851(a)(2) refers to the conviction for which the enhanced sentence is sought, not the prior conviction on which enhancement is based. Defendant's interpretation would require an ex post facto increase in the punishment for a past prior offense, which is not permissible. *U.S. v. Burrell*, __ F.2d __ (7th Cir. May 11, 1992) No. 91-1808.

11th Circuit reaffirms that drug quantity need not be stated in indictment to trigger enhanced penalties. (245) At sentencing, the district court determined that defendant's offense involved 500 or more grams of cocaine, and therefore a mandatory minimum penalty of 60 months' imprisonment was applicable. The 11th Circuit upheld the mandatory minimum sentence even though defendant's indictment did not list drug quantity. The weight or quantity of a controlled substance is not an element of the offense that must be included in a section 841(a)(1) indictment. Because the quantity of drugs triggering the enhanced penalties provided in section 841(b) is relevant only at sentencing, there is no reason that the quantity involved must appear in the indictment if the defendant is otherwise on adequate notice that enhanced penalties are available. Here, the government's responses to the standing discovery order adequately put the defendants on notice of the quantity of cocaine allegedly involved. *U.S. v. Perez*, __ F.2d __ (11th Cir. May 14; 1992) No. 90-5779.

2nd Circuit says drug weight cannot include unusable portion of uningestible and unmarketable mixture. (251) Defendant brought six bottles containing a mixture of creme liqueur and cocaine into the United States. The creme liqueur was merely a mask to conceal the cocaine. Before the cocaine could be distributed, it would have to be distilled out of the liqueur. In its mixture form, the creme liqueur was not ingestible and therefore not marketable. The 2nd Circuit held that it was improper to base defendant's sentence on the total weight of the creme liqueur/cocaine mixture, rather than the weight the cocaine by itself. The court distinguished *Chapman v. United States*, 111 S.Ct. 1919 (1991), which held that for sentencing purposes, the weight of LSD includes weight of its carrier medium blotter paper. In *Chapman*, the LSD and blotter paper were both ingestible. However, in this case, the liquid waste could be viewed as the equivalent of packaging material. The critical issue is marketability, not purity. A defendant's culpability must be based on the amount of usable drugs he brings to market. *U.S. v. Acosta*, __ F.2d __ (2nd Cir. May 13, 1992) No. 91-1527.

Justice White would grant certiorari on extent to which weight of drug waste products should affect offense level. (251) Dissenting from denial of certiorari, Justice White noted that different courts of appeals calculate offense levels differently when a "non-marketable" mixture containing a controlled substance is involved. "[I]dentical

conduct in violation of the same federal laws may give rise to widely disparate sentences in different areas of the country." *Fowner v. U.S.*, __ U.S. __, __ 112 S.Ct. __ (May 18, 1992) No. 91-7169 (*White, J., dissenting from denial of cert.*).

9th Circuit holds that marijuana growers' punishment is rationally related to culpability. (253) Defendants claimed that when there are 50 or more plants, treating each as the equivalent of 1000 kilograms of marijuana is unconstitutional in that it (1) creates an irrebuttable presumption, which (2) does not permit consideration of the actual facts, and (3) creates a non-reciprocal irrebuttable presumption because the actual weight of the plants may be used to increase but not reduce the sentence. Relying on *U.S. v. Belden*, __ F.2d __ (9th Cir. Feb. 20, 1992) No. 91-30022, the 9th Circuit held that the penalties for marijuana growers are rationally related to Congress' view that large volume marijuana growers are more culpable than small volume growers, and all growers are more culpable than possessors of marijuana. The panel said the statute does not create a non-reciprocal irrebuttable presumption. *U.S. v. Jordan*, __ F.2d __ (9th Cir. May 19, 1992) No. 91-30190.

7th Circuit affirms that defendant intended and had ability to purchase 10 kilos of cocaine. (265) Defendant and his co-conspirator negotiated to purchase 10 kilograms of cocaine from an undercover agent. At one point, the deal appeared to be cancelled because the parties were unable to agree upon a place for the transaction to take place. However, the undercover agent called the co-conspirator directly and arranged to sell the first kilogram of the 10 kilogram purchase. Defendant argued that he should only have been sentenced on the basis of his intent to buy one kilogram, because the 10-kilogram deal had been abandoned at the time of his arrest. The 7th Circuit rejected this argument. Overwhelming evidence revealed that defendant had both the intent and the ability to buy 10 kilograms of cocaine. His co-conspirator had $109,000 in cash at the time of his arrest, meaning that defendant, through the co-conspirator was capable of purchasing all 10 kilograms. His intent to do so was demonstrated by his very specific negotiations as to price and amount. *U.S. v. Cea*, __ F.2d __ (7th Cir. May 14, 1992) No. 91-1492.

7th Circuit affirms that defendants agreed to purchase 500 pounds of marijuana. (265) The 7th Circuit affirmed that defendants agreed to purchase 500 pounds of marijuana from undercover agents, despite the fact that they only brought to the meeting enough cash to pay for 80 pounds. It was clear from defendants' conversation with the undercover agents that they wanted to purchase 500 pounds, but contested the terms of payment. Later conversations confirmed that the defendants wanted 500 pounds, but were having trouble raising the down payment. The cash defendants brought to the meeting was the down payment for the full 500 pounds. *U.S. v. Burrell*, __ F.2d __ (7th Cir. May 11, 1992) No. 91-1808.

8th Circuit affirms that uncharged drug sales in other states were part of same course of conduct as offense of conviction. (270) The 8th Circuit rejected defendant's claim that only the marijuana he distributed in the state of Nebraska should be included in the calculation of his base offense level. The guidelines expressly provide that the base offense level should be based on all acts that were part of the same course of conduct as the offense of conviction. There was no clear error in the district court's determination that defendant's distribution of marijuana to states other than Nebraska was part of the same course of conduct as the charged conspiracy. Defendant testified that he obtained this marijuana from the same sources as the marijuana sent to Nebraska and distributed it during the same time period. *U.S. v. Davila*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

D.C. Circuit rules that district court erroneously attributed drug sold by co-conspirator without determining foreseeability. (275) Defendant, a drug addict, led an undercover police officer to a drug dealer who sold the officer a $20 rock of crack. Defendant was sentenced not only for the 865 milligrams she distributed, but the 55 grams later found in the drug dealer's house. The D.C. Circuit remanded for resentencing because the district court failed to determine whether the 55 grams were foreseeable to defendant. In sentencing defendant, the court mistakenly assumed that it was bound to charge defendant with everything that the dealer had in his possession, regardless of foreseeability. *U.S. v. Perkins*, __ F.2d __ (D.C. Cir. May 8, 1992) No. 91-3174.

Article reviews issues raised by mandatory minimum for firearm use. (280)(330) Under 18 U.S.C. 924(c), Congress has dictated a five-year mandatory minimum for anyone convicted of using or carrying a firearm "during and in relation to" any crime of violence or drug trafficking crime. In *"Using a Firearm during and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 USC 924(c)(1),"* Michael

J. Riordan summarizes the legislative history of the provision and some of the case law construing it. Special attention is devoted to relationship that must exist between a firearm and a drug offense to support conviction, focusing on the purpose for which the gun is possessed and the question of constructive possession. The author also discusses application of the enhancement to multiple underlying offenses, aiding and abetting theories, and constitutional challenges to the provision, concluding that the statute is likely constitutional. 30 DUQUESNE L. REV. 39-60 (1991).

7th Circuit affirms loss amounts caused by negligence of intervening actors. (300) Defendants fraudulently obtained HUD-insured mortgage loans totalling $662,920 which they used to purchase several buildings. Defendants sold the buildings to a third party, who failed to make payments and HUD purchased the loans at a loss of $658,268. The 7th Circuit affirmed an enhancement under section 2F1.1(b)(1) based on a loss of between $500,001 and $1,000,000. Defendants argued that any losses suffered by HUD were unforeseeable and directly caused by intervening actors -- the new owner and HUD, which sold the properties at a fraction of their previous value. The 7th Circuit rejected the argument, holding that a victim's failure to mitigate and the negligence of intervening actors does not prevent attributing to a defendant the full amount of the loss. However, as discussed in former application note 11, where the total dollar loss that results from the offense overstates its seriousness, a downward departure may be justified. The district court did just that, departing downward by two levels based on its finding that some losses should not be attributed to defendants. *U.S. v. Miller*, __ F.2d __ (7th Cir. May 11, 1992) No. 91-1836.

4th Circuit rejects claim that 2J1.7 enhancement after successful appeal was vindictive. (320) Section 2J1.7 requires a three-level increase where the defendant is convicted of an offense while on release. The district court originally declined to impose the enhancement because it found that defendant's sentence was "sufficiently severe" without it. One reason the sentence was so severe was that the court had erroneously calculated defendant's criminal history. On defendant's first appeal, the 4th Circuit remanded for resentencing based on the error in calculating defendant's criminal history. At resentencing, the district court correctly computed defendant's criminal history and then imposed the three level enhancement under section 2J1.7. On defendant's second appeal, the 4th Circuit rejected defendant's claim that the enhancement was vindictive in retaliation for his successful appeal. A defendant cannot demonstrate a reasonable likelihood of vindictiveness based on a correct application of the guidelines that resulted in a higher guideline range. *U.S. v. Kincaid*, __ F.2d __ (4th Cir. May 7, 1992) No. 91-5377.

4th Circuit finds adequate notice of enhanced penalties for committing crime while on release. (320) 18 U.S.C. section 3147 and guideline section 2J1.7 provide for enhanced penalties for persons who commit an offense while on release. The 4th Circuit affirmed that defendant received adequate notice of the enhancements. *U.S. v. Cooper*, 827 F.2d 991 (4th Cir. 1987) states that the judicial officer authorizing release must advise the defendant of the conditions of release in a written statement and of the penalties for violating a condition of release, including the penalties for committing an offense while on release. Here, following the arraignment, the magistrate judge instructed defendant that "should you commit any crime while on release, there are minimum mandatory as well as increased maximum penalties that may apply." Moreover, the magistrate judge reviewed the release order with defendant, instructed him to read it, and obtained defendant's affirmative response when asked whether he understood the order. Finally, when ordering continuance of bond pending sentencing, the district court advised the parties, without objection from defendant, that the same conditions of release would apply. *U.S. v. Kincaid*, __ F.2d __ (4th Cir. May 7, 1992) No. 91-5377.

9th Circuit reverses for failure to use Tax Table for false statements to evade currency reporting requirements. (360) The Guidelines' Statutory Index is not dispositive authority on the proper guideline applicable to every statutory crime. When no guideline is directly on point, the most analogous guideline should be applied. While defendants were leaving the United States at the border with Mexico, they falsely reported they were carrying no cash in excess of $10,000. One of the defendants was carrying $31,000 in U.S. currency. The jury convicted both defendants of making false statements to a federal officer. At sentencing, the district court erroneously used U.S.S.G. § 2S1.3(a)(1) to set the base offense levels. The 9th Circuit reversed, holding that under these facts, the Tax Table in U.S.S.G. section 2T3.1 should be used because false statements about currency exporting can be viewed as violations of "trade regulations,"

and false statements to evade export restrictions are most analogous to making false statements to evade import restrictions. *U.S. v. Carrillo-Hernandez*, __ F.2d __ (9th Cir. May 12, 1992) No. 91-50213.

4th Circuit affirms determination of tax loss based on potential loss of future tax revenue. **(370)** Defendant falsely claimed a $2.1 million deduction on his 1984 income tax return. He argued that he should not have received an enhancement under section 2T1.3 on the basis of income understated because even without the false deduction, he had no gross income in 1984, and hence there was no "tax loss." The 4th Circuit affirmed the enhancement, because although there was no tax loss for 1984, the evidence revealed defendant's intent to carry forward the loss created by the deduction to reduce his taxable income in future years. The background commentary to section 2T1.3 points out that future tax loss is an appropriate consideration in evaluating the seriousness of an offense. Although the deduction did not produce a tax loss in the year that it was claimed, it set "the groundwork for evasion of a tax that was expected to become due in the future." It was appropriate for the district court to consider the potential loss of future tax revenue determined by a percentage of the amount of income that would be sheltered by the false deduction. *U.S. v. Hirschfeld*, __ F.2d __ (4th Cir. May 7, 1992) No. 91-5046.

Adjustments (Chapter 3)

11th Circuit upholds official victim enhancement for armed robbery of postmistress. **(410)** The 11th Circuit affirmed an official victim enhancement under section 3A1.2(a) for defendant's armed robbery of a postmistress. Defendant conceded that the postmistress was an official victim. Contrary to defendant's claim, the robbery was motivated by the victim's status as a postmistress. The record demonstrated that defendant robbed the postmistress because, as a postal employee, she was in possession of money orders and a money order validation machine. *U.S. v. Bailey*, __ F.2d __ (11th Cir. May 14, 1992) No. 91-3087.

4th Circuit upholds managerial enhancement for defendant who instructed a co-conspirator on selling drugs from defendant's home. **(431)** The 4th Circuit upheld a managerial enhancement under guideline section 3B1.1(c) based upon the determination that defendant exercised control over a co-conspirator by providing him with specific instructions on the circumstances under which he could sell narcotics from defendant's residence. The co-conspirator consummated drug transaction at defendant's direction, responded to defendant's instructions during an abduction of another drug dealer, and followed defendant's instructions to obtain a refund for a delivery of unsatisfactory cocaine. *U.S. v. Kincaid*, __ F.2d __ (4th Cir. May 7, 1992) No. 91-5377.

7th Circuit affirms that scheme involving innocent third parties was extensive. **(431)** The 7th Circuit affirmed that defendants' scheme to fraudulently obtain HUD-insured mortgage loans was "extensive" for purposes of enhancement under guideline section 3B1.1(a). The scheme involved four criminally responsible participants and "the unknowing services" of at least four other individuals. Although application note 2 references "many" outsiders, there is no prescribed minimum number of persons needed to permit an enhancement under section 3B1.1. All that is required to find that a scheme is "otherwise extensive" is that the defendant directed at least one criminal participant. The involvement of several other knowing and unknowing individuals was a sufficient ground for the district court to find that the scheme was extensive. *U.S. v. Miller*, __ F.2d __ (7th Cir. May 11, 1992) No. 91-1836.

7th Circuit affirms that defendants were leaders of fraudulent loan scheme. **(431)** The 7th Circuit affirmed that defendants were leaders of a fraudulent loan scheme. Defendants orchestrated the scheme by recruiting the services of both criminally culpable individuals and innocent third parties, and were in direct control of others, particularly two individuals who they directed in their role as phoney sellers of property. Defendants also received the bulk of the loan proceeds. *U.S. v. Miller*, __ F.2d __ (7th Cir. May 11, 1992) No. 91-1836.

7th Circuit rejects minor participant reduction for defendant who was "go-between" for undercover agents and drug buyer. **(455)** The 7th Circuit affirmed that defendant who served as a "go-between" for an undercover agent posing as a drug seller and a drug buyer was not entitled to a minor participant reduction. First, the district court did not erroneously focus on defendant's activities in the scheme, rather than his relative degree of culpability. Defendant's activities in the scheme were indicators of his relative culpability. Second,

substantial evidence supported the determination that defendant did not have a minor role in the conspiracy. Defendant contacted the drug buyer when the confidential informant asked him to locate a buyer for several kilograms of cocaine. Defendant spoke for the buyer during the negotiations, and aggressively tried to close the deal by persistently haggling over the details with the informant and undercover agent in the hopes that some transaction would occur. He also met personally with the informant and undercover agent and offered his house for completing the transaction. *U.S. v. Cea*, __ F.2d __ (7th Cir. May 14, 1992) No. 91-1492.

8th Circuit affirms obstruction enhancement based on defendant's threat to keep co-conspirator from going to authorities. (461) The 8th Circuit affirmed an obstruction of justice enhancement based upon defendant's threat to a co-conspirator to keep her from going to authorities. Note 3 to section 3C1.1 provide that an enhancement is proper when a defendant threatens a co-defendant or witness. *U.S. v. Davila*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

11th Circuit affirms obstruction enhancement for failure to disclose a prior conviction that did not affect criminal history calculation. (461) The 11th Circuit upheld an obstruction of justice enhancement based upon defendant's failure to reveal to his probation officer a prior misdemeanor conviction which, because it was uncounseled, could not be included in the calculation of his criminal history. The court rejected defendant's claim that the misrepresentation was not material since it did not affect his criminal history score and the correct information was readily available from other sources. The threshold for materiality is "conspicuously low." Material information is information that, if believed, would tend to influence or affect the issue under determination. The "issue under determination" when the probation officer inquires into past convictions is either what criminal history category should apply or what sentence within the calculated guideline range is appropriate. Defendant's misdemeanor conviction was material to the appropriate sentence within the guideline range. *U.S. v. Dedeker*, __ F.2d __ (11th Cir. May 13, 1992) No. 91-8042.

D.C. Circuit holds that defendant's perjury need not be implausible to justify obstruction enhancement. (461)(755) The D.C. Circuit held that a defendant's false testimony need not be implausible or particularly flagrant to justify the enhancement under section 3C1.1. The sentencing judge need only find that the defendant willfully committed, suborned or attempted to suborn perjury to obstruct justice. The admonition in application note 1 to evaluate the defendant's testimony "in a light most favorable to the defendant" apparently raises the standard of proof above the preponderance of the evidence standard applicable to most other sentencing determinations, but it does not require proof of something more than ordinary perjury. To limit enhancements only to internally inconsistent testimony or flagrant lying would be to reward the "polished prevaricator while punishing those less practiced in the art of deception." Here, the enhancement was proper, because although defendant's testimony was not wildly implausible, if believed, it would have been a complete bar to conviction. Judge Wald dissented. *U.S. v. Thompson*, __ F.2d __ (D.C. Cir. May 8, 1992) No. 91-3091.

Supreme Court grants certiorari to review obstruction enhancement where defendant denied guilt at trial. (462) Defendant was convicted of drug charges after she took the stand and denied everything. The 4th Circuit reversed an enhancement for obstruction of justice based on defendant's untruthful testimony, hearing that the enhancement would become "commonplace punishment for a convicted defendant who has the audacity to deny the charges against him." The court expressed concern that an automatic enhancement might persuade even an innocent defendant against testifying. On May 26, 1992, the Supreme Court granted certiorari to review this ruling. *U.S. v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), *cert. granted*, __ U.S. __, 112 S.Ct. __ (May 26, 1992), No. 91-1300.

10th Circuit affirms refusal to apply obstruction enhancement even though judge and jury did not believe defendant's testimony. (462) At defendant's trial for selling drugs to a government informant, defendant raised an entrapment defense, testifying that he had never sold drugs before this sale. Defendant was nonetheless convicted. The 10th Circuit affirmed the district judge's refusal to apply an enhancement for obstruction of justice, since the jury's conviction did not amount of a finding of perjury. The jury's rejection of the entrapment claim may have been based upon a finding that defendant was predisposed to commit the crime, rather than a disbelief of his testimony. Although the district court also found that (a) neither it nor the jury believed defendant's testimony, and (b) defendant was not truthful and

had not accepted responsibility, these statements did not constitute a finding of perjury. An appellate court will not reverse a district court's finding that an obstruction of justice enhancement is not appropriate unless the record clearly indicates that the defendant committed or suborned perjury. *U.S. v. Hansen*, __ F.2d __ (10th Cir. May 15, 1992) No. 91-3218.

9th Circuit requires formal order of consolidation before prior cases will be treated as related. (470)(504) For calculating criminal history points, prior sentences imposed in related cases are treated as one sentence. Cases consolidated for trial or sentencing are considered related. But the fact that concurrent sentences were imposed does not necessarily make the cases related for Guidelines' purposes. The 9th Circuit held that cases are "consolidated" if there is either (1) a formal court order of consolidation or (2) some other clear indication that the previous court considered the prior convictions to be equivalent to only one conviction for sentencing purposes. *U.S. v. Bachiero*, __ F.2d __ (9th Cir. May 15, 1992) No. 90-50685.

8th Circuit denies acceptance of responsibility reduction where primary motivation for cooperation was to obtain sentence reduction. (486) The 8th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility, even though defendant voluntarily admitted his involvement in the offenses to the government and offered to cooperate in further investigations. Defendant's primary motive in cooperating with the government was to obtain a reduction in his sentence, and was not based on a sense of remorse over his past conduct. Defendant also put the government to its burden of proof by pleading not guilty to all counts. *U.S. v. Davila*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

Article supports constitutionality of considering conduct unrelated to offense of conviction under 3E1.1. (482) In *"Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?,"* a student author describes the various approaches that courts have taken in considering whether a court may condition a downward adjustment for acceptance of responsibility on the defendant's acceptance of responsibility for conduct not included in the count of conviction. The author discusses the courts' various interpretations of 3E1.1, as well as the arguments that have been offered regarding whether the provision unconstitutionally burdens the defendant's fifth amendment right to silence, concluding that the constitution is not violated by permitting consideration of conduct not included in the offense of conviction. 65 ST. JOHN'S L. REV. 1077-1103 (1991).

7th Circuit denies acceptance of responsibility to defendant who raised entrapment defense. (488) The 7th Circuit affirmed that a defendant who admitted selling drugs to a confidential informant, but claimed entrapment, was not entitled to a reduction for acceptance of responsibility. "It is difficult for this Court to envision how the defendant argued that he affirmatively accepted responsibility for his criminal action when throughout the proceedings he maintained that his criminal action was not his fault, but rather, it was the result of government inducement." *U.S. v. Hansen*, __ F.2d __ (10th Cir. May 15, 1992) No. 91-3218.

7th Circuit denies acceptance of responsibility reduction to defendant who attempted to excuse himself. (488) The 7th Circuit affirmed the denial of a reduction for acceptance of responsibility to a defendant who sold cars to drug dealers in a manner which permitted the dealers to hide their drug proceeds. Defendant did not voluntarily withdraw from criminal conduct and did not plead guilty until the day of trial. More importantly, defendant sent a letter to the district court which the district court found "unbelievable." In the letter defendant attempted to excuse his conduct by claiming he did not know what the dealers were doing. *U.S. v. Antzoulatos*, __ F.2d __ (7th Cir. May 7, 1992) No. 91-1036.

Criminal History (§4A)

5th Circuit outlines factors for court to consider in determining whether to collaterally review prior conviction. (504) The 5th Circuit outlined the factors for a district court to consider in deciding whether to collaterally review the validity of a defendant's prior conviction. One factor is the scope of the inquiry that would be needed to determine the validity of the conviction. Another consideration is that of comity, especially where the challenged conviction is by a state court. A key consideration may be whether the defendant has a remedy other than the sentencing proceeding through which to attack the prior conviction. For example, a defendant convicted of a prior federal offense will normally have an alternative remedy such as a habeas corpus action or a coram nobis

proceeding. Where the issue is contested and its resolution not clearly apparent from the record, discretion should normally be exercised by declining to consider a challenge to a conviction by another court if the defendant has available an alternative remedy. *U.S. v. Canales*, __ F.2d __ (5th Cir. May 7, 1992) No. 91-5644.

8th Circuit upholds inclusion of exhibition of deadly weapon and petty theft in criminal history calculation. (504) The 8th Circuit upheld the inclusion in defendant's criminal history of prior convictions for exhibiting a deadly weapon in a threatening manner and petty theft. Under section 4A1.2(c), sentences for misdemeanor and petty offenses are counted, with the exception of certain specified offenses. Defendant's prior offenses were not on the exclusionary lists of subsections 4A1.2(c)(1) and (c)(2). *U.S. v. Ziglin*, __ F.2d __ (8th Cir. May 14, 1992) No. 91-3532.

1st Circuit affirms upward departure based on string of criminal behavior which continued while on pretrial release. (510) Although defendant fell into criminal history category IV resulting in a guideline range of 18 to 24 months, the district court sentenced defendant to 54 months. The 1st Circuit rejected defendant's claim that the district court failed to adequately explain its reasons for the upward departure. The district court adopted the facts in the presentence report, which related defendant's extensive criminal history in negotiating worthless instruments. Defendant received lenient treatment for these offenses. The court also cited defendant's criminal behavior while on pretrial release, noting that defendant committed perjury several times, and committed an additional theft and forgery after the district court had found defendant in violation of his plea agreement due to his perjury. The fact that defendant disregarded the seriousness of the charges against him and continued to engage in criminal behavior while on pretrial release was sufficiently unusual to depart from the guidelines. *U.S. v. Tilley*, __ F.2d __ (1st Cir. May 15, 1992) No. 91-1550.

8th Circuit affirms upward departure for lenient prior sentences, number of uncounted convictions, and fact that defendant dealt drugs to minors. (510) Defendant fell within criminal history category III based upon two prior marijuana convictions for which he received 10-year suspended sentences. The 8th Circuit affirmed an upward departure from a guideline range of 188 to 235 to a sentence of 264 months based upon the fact that (a) defendant had received extremely lenient punishment for his prior convictions, (b) there were a number of convictions which were not included in his criminal history because they were too old, (c) a cocaine conviction was not included in his criminal history because it was on appeal, and (d) defendant had dealt drugs with two persons under the age of 21. The district court reasonably concluded that defendant's long history in the drug trade and his failure to stop dealing even after his prior conviction indicated a long sentence was required to deter him from continuing his marijuana distribution. The extent of the departure was also reasonable, since his sentence fell well within criminal history category V. *U.S. v. Davila*, __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

8th Circuit examines underlying facts to affirm that felon's possession of a firearm is a crime of violence. (520) The 8th Circuit upheld the district court's determination that defendant's instant conviction for being a felon in possession of a firearm was a crime of violence. Defendant was convicted after he fired three live rounds from a Colt .45 into an occupied residence. *U.S. v. Leeper*, __ F.2d __ (8th Cir. May 13, 1992) No. 91-2905.

8th Circuit affirms that manslaughter and robbery are both crimes of violence. (520) Defendant argued that his manslaughter conviction was not a crime of violence for career offender purposes or a violent felony for purposes of 18 U.S.C. section 924(e) because his crime did not require an element of intent. The 8th Circuit affirmed that manslaughter was a crime of violence and a violent felony, noting that neither the guidelines or section 924(e) limit "crimes of violence" or "violent felonies" to intentional acts. By definition, manslaughter means that someone has been killed. Defendant was convicted because he shot someone through the head at close range and the victim eventually died. Thus, whether the focus was on the elements of the crime or the offense's underlying facts, manslaughter qualified as a crime of violence. Under recent Circuit precedent, defendant's prior robbery was per se a crime of violence. Because robbery cannot be committed without violence within the meaning of section 4B1.1, courts cannot examine the facts underlying each robbery. *U.S. v. Leeper*, __ F.2d __ (8th Cir. May 13, 1992) No. 91-2905.

9th Circuit holds that felon in possession of a firearm is *not* a crime of violence. (520) In *U.S. v. O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1990), the 9th Circuit held that the term "crime of violence" in

section 4B1.2 included possession of a firearm by a felon. On November 1, 1989, after the sentencing reviewed in *O'Neal*, the Sentencing Commission amended section 4B1.2, to shift the emphasis from an analysis of the "nature" of the crime charged to an analysis of the *elements* of the crime. Based on this amendment, the 9th Circuit held that the crime of possession of a firearm by a felon "does not have as an element the actual, attempted or threatened use of violence, nor does the actual conduct it charges involve a serious potential risk of physical injury to another." The court therefore concluded that the defendant's conviction of being a felon in possession of a firearm was not a conviction of a crime of violence under the 1989 amendment. The court said its conclusion was bolstered by the recent amendment to the application notes of section 4B1.2 which expressly states that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. *U.S. v. Sahakian*, __ F.2d __ (9th Cir. May 26, 1992) No. 91-10199.

11th Circuit reaffirms that despite conflicting commentary, a felon's possession of a firearm is a crime of violence. (520) The 11th Circuit held that defendant's prior conviction for being a felon in possession of a firearm was a crime of violence for career offender purposes. The court acknowledged that effective November 1, 1991, the sentencing commission amended the commentary to section 4B1.2 to provide that a crime of violence does note include a felon's possession of a firearm. However, in U.S. v. Stinson, 957 F.2d 813 (11th Cir. 1992), the court rejected the argument that this change in the commentary could overrule 11th Circuit precedent. *U.S. v. Adkins*, __ F.2d __ (11th Cir. May 14, 1992) No. 89-9005.

Determining the Sentence (Chapter 5)

5th Circuit holds that notice requirement for upward departures does not apply to restitution order. (610) The 5th Circuit rejected defendant's claim that he received inadequate notice of the government's intent to seek restitution from him. First, the notice requirements in *Burns v. United States*, 111 S.Ct. 2182 (1991) do not apply where the defendant's term of confinement is not an issue. Restitution is authorized by the guidelines and is not an upward departure. Second, although the notice received here was quite short, it was not per se inadequate. At best, defense counsel received notice of the restitution issue a day or two prior to sentencing. However, at the sentencing hearing, although counsel protested the late notice, he did not specify when he received notice and did not advise the court what evidence he would adduce at a hearing on the restitution issue. *U.S. v. Razo-Leora*, __ F.2d __ (5th Cir. May 15, 1992) No. 91-2144.

5th Circuit upholds $100,000 restitution for murder victim's widow. (610) The 5th Circuit affirmed a 100,000 restitution order for the widow of defendant's murder victim. The prosecution has the burden of demonstrating the amount of loss sustained by the victim and proving this loss by a preponderance of the evidence. Here, the prosecutor introduced a statement by the widow that her husband would have legally earned $950,000 over the next 20 years. Other evidence indicated that the victim received some income from a small trucking business and rent. At the time of his death, the victim was in his twenties. The $100,000 award to his widow was thus relatively conservative and assumed legitimate income by the victim of only $5000 a year with a work life expectancy of only 20 years. *U.S. v. Razo-Leora*, __ F.2d __ (5th Cir. May 15, 1992) No. 91-2144.

1st Circuit holds that indigent defendant may not receive an additional fine to meet the costs of supervised release. (630) Following the 10th Circuit's decision in *U.S. v. Labat*, 915 F.2d 603 (10th Cir. 1990), the 1st Circuit held that a district court may not impose a fine under section 5E1.2(i) to pay for the costs of incarceration or supervised release if the defendant is indigent for purposes of a punitive fine under section 5E1.2(a). If a defendant cannot pay a punitive fine, there is no basis for expecting that he will be able to pay for the expense of supervised release. Imposition of such a sanction would be meaningless and result in unnecessary recordkeeping. *U.S. v. Corral*, __ F.2d __ (1st Cir. May 15, 1992) No. 91-1271.

10th Circuit reverses special assessment imposed on forfeiture counts. (630)(900) Defendant was convicted of several fraud and money laundering counts. In addition, pursuant to 18 U.S.C. section 982, the jury ordered the forfeiture of certain items which defendant had purchased with fraudulently obtained money. The 10th Circuit ruled that the district court erroneously ordered defendant to pay a $50 mandatory special assessment on each of the forfeiture counts. Because he could not have been imprisoned for the forfeiture convictions under section 982, he should not have been ordered to pay

the $50 special assessments, which apply only to felonies. *U.S. v. Lovett*, __ F.2d __ (10th Cir. May 19, 1992) No. 91-6088.

2nd Circuit upholds downward departure based upon family circumstances. (690)(736) Section 5H1.6 states that family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the guideline range. The 2nd Circuit found that this meant that the sentencing commission took ordinary family circumstances into account when formulating the guidelines, and thus ordinary family circumstances do not justify a downward departure. Extraordinary circumstances, however, are by their nature not capable of adequate consideration, and therefore extraordinary family circumstances may justify a downward departure. Defendant faced such extraordinary family circumstances. She was a single mother who served as the sole support for her three small children under the age of six, her institutionalized daughter's six-year old child, and her 17-year old son. Extraordinary parental duties can constitute extraordinary family circumstances. *U.S. v. Johnson*, __ F.2d __ (2nd Cir. May 14, 1992) No. 91-1515.

Departures Generally (§5K)

Supreme Court says courts have limited power to review government's refusal to file substantial assistance motions. (710) In a unanimous opinion written by Justice Souter, the Supreme Court held that "federal district courts have authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," such as "race or religion." However, "a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing." Nor will "generalized allegations of improper motive." The defendant here failed to make a "substantial threshold showing; counsel "merely explained the extent of [defendant's] assistance to the Government." The Government's refusal to make the motion may have been based "not on a failure to acknowledge or appreciate [defendant's] help, but simply on its rational assessment of the costs and benefits that would flow from moving." *U.S. v. Wade*, __ U.S. __, 112 S.Ct. __ (May 18, 1992) No. 91-5771.

Supreme Court finds it unnecessary to decide whether 5K1.1 "implements" section 3553(c). (710) Guideline section 5K1.1 permits a court to depart downward from the *guidelines* on motion of the government where the defendant has provided substantial assistance in the investigation or prosectuion of another person. Title 18 U.S.C. section 3553(e) permits a court to sentence below a *statutory minimum* for the same reason. In this case, the guidelines were the same as the statutory minimum. In a unanimous opinion written by Justice Souter, the Supreme Court said, "we are not, therefore, called upon to decide whether section 5K1.1 'implement' and therefore supersedes section 3553(e), see *United States v. Ah-Kai*, 951 F.2d 490, 493-494 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711, 713-714 (9th Cir. 1991), or whether the two provisions pose separate obstacles, see *United states v. Rodriguez-Morales*, 958 F.2d 1441 (8th Cir. 1992)." *U.S. v. Wade*, __ U.S. __, 112 S.Ct. __ (May 18, 1992) No. 91-5771.

9th Circuit reverses district court's decision that extent of departure was limited to government's recommendation. (710) Once the government recommends a downward departure for substantial assistance, the district court has jurisdiction to depart below the government's recommendation. The government in this case recommended a four level downward departure. Defendant requested a further departure, but the district court refused, stating that it lacked jurisdiction to depart below the government's recommendation. The 9th Circuit reversed, holding that even though the government's recommendation is for a specific range, the district court has authority to go beyond the recommendation and depart to a greater extent. *U.S. v. Udo*, __ F.2d __ (9th Cir. May 12, 1992) No. 91-50797.

7th Circuit reaffirms that government's refusal to move for downward departure is not reviewable for bad faith or arbitrariness. (712) The 7th Circuit upheld the district court's failure to depart downward based on defendant's substantial assistance since the government did not move for one. The court reaffirmed its holding in *U.S. v. Smith*, 953 F.2d 1060 (7th Cir. 1992) that a court does not have the authority to make a substantial assistance departure under section 5K1.1 without a motion from the government. It also reaffirmed *Smith's* holding that the prosecutor's power to make or withhold a section 5K1.1 motion is a form of prosecutorial discretion which is not reviewable for arbitrariness or bad faith. A different rule does apply if the prosecutor promises to make a section 5K1.1 motion in return for a guilty plea, and then fails to make the motion. However, this was not

such a case. Here, the government agreed to dismiss counts against defendant and "in its sole discretion" to move for a downward departure if defendant provided substantial assistance. *U.S. v. Burrell,* __ F.2d __ (7th Cir. May 11, 1992) No. 91-1808.

8th Circuit affirms that court lacked authority to depart downward based on substantial assistance. (712) Defendant claimed that the district court had the authority to depart downward based on his substantial assistance because the government acted in bad faith in refusing his offer to cooperate in the investigation of other persons. The 8th Circuit rejected this contention. Defendant and the government did engage in plea negotiations pursuant to which defendant made an "off-the-record" statement to authorities naming the persons he knew were engaged in criminal activities. A letter sent to defendant, however, clearly indicated that the purpose of the statement was to enable the government to evaluate whether or not entering into a cooperation agreement was in its best interests. This letter could not have misled defendant into believing that the government would make a motion to depart if he cooperated. Although it was undisputed that defendant wanted to cooperate further with authorities, a desire to cooperate is not the same as substantial assistance. *U.S. v. Davila,* __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

10th Circuit rules that court lacked authority to make substantial assistance departure where government did not make motion. (712)(790) The 10th Circuit rejected defendant's claim that he should have received a downward departure based upon his substantial assistance, since the government did not make a motion under section 5K1.1. Lack of such a motion is a jurisdictional bar to a downward departure under section 5K1.1. This was not an egregious case where the prosecution stubbornly refused to file a motion despite overwhelming evidence that the accused's assistance was substantial. There was no merit to defendant's claim that the government agreed to make such a motion as part of its plea negotiations. The government denied making such an agreement, and defendant's plea agreement did not bind the government to make such a motion. Defendant agreed at his plea hearing that the plea agreement was the only agreement between him and the government, and could not now claim that there was an undisclosed oral agreement between them. *U.S. v. Glnes,* __ F.2d __ (10th Cir. May 13, 1992) No. 91-4046.

7th Circuit refuses to review sentence disparity between defendants with the same guideline range. (716)(775) Defendant and his co-conspirator both had applicable guideline ranges of 97 to 121 months, but defendant received a 105-month sentence, while his co-conspirator received a 97-month sentence. The district court based the difference upon the co-conspirator's relatively inactive role in the conspiracy, the government's recommendation for a minimum sentence, his promise to cooperate with the government and the fact that he forfeited $109,000 cash along with half of the assets of his jewelry store. Defendant argued that he was being punished for exercising his right to trial and for his lack of funds to forfeit. The 7th Circuit refused to consider this argument. As the court had found in defendant's first appeal, defendant's disparity of sentence was eclipsed by the district court's imposition of a sentence within the correct guideline range. *U.S. v. Cea,* __ F.2d __ (7th Cir. May 14, 1992) No. 91-1492.

8th Circuit rejects due process challenge based upon co-conspirators' disparate sentences. (716) The 8th Circuit rejected defendant's claim that the disparity between him sentence and those of his co-conspirators constituted a due process violation. Defendant failed to establish that he was similarly situated with his co-conspirators. Defendant was the "ring leader" of the conspiracy. Additionally, his co-conspirators entered into plea agreements. Thus, the disparity was easily explained. *U.S. v. Davila,* __ F.2d __ (8th Cir. May 15, 1992) No. 91-2850.

D.C. Circuit holds findings inadequate to support downward departure for diminished capacity. (730) The D.C. Circuit found that the district court failed to make adequate factual findings to support its downward departure based on defendant's diminished mental capacity, as required by 18 U.S.C. section 3553(c). The district court failed to adequately explore the extent to which defendant's mental capacity contributed to the offense. In addition, although one doctor testified that defendant's dependent personality was "strikingly beyond normal," it was not clear whether he was comparing defendant to the population at large or to other defendants who have committed similar offense. The district court did not explore whether the symptoms of defendant's dependent personality disorder were "substantially in excess" of those "ordinarily involved" in the offense for which she was convicted. *U.S. v. Perkins,* __ F.2d __ (D.C. Cir. May 8, 1992) No. 91-3174.

D.C. Circuit rules that court failed to adequately explain extent of departure. (730) At sentencing, the district court stated that if the government's position were correct, defendant would have a guideline range of 97 to 121 months. However, it then noted that it would have "no problem" with reducing defendant's sentence based on her minimal role, which would bring the guideline range down to 63 to 78 months. The court then departed downward based on defendant's diminished capacity to a sentence of 15 months. The D.C. Circuit ruled that the district court failed to give specific reasons explaining the extent of the departure. From the court's comments, it was impossible to determine whether the departure was seven years or three years. The court offered no clear explanation for the departure it chose. The structural principles of the guidelines- -uniformity and proportionality--require district courts to justify the magnitude of their departures for "diminished capacity." Section 5K2.12 itself provides a straightforward standard for evaluating diminished capacity departures: "a lower standard may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense." *U.S. v. Perkins*, __ F.2d __ (D.C. Cir. May 8, 1992) No. 91-3174.

Sentencing Hearing (§6A)

4th Circuit holds that court abused its discretion in denying government motion for continuance. (750) Shortly before his sentencing hearing, defendant raised objections to his presentence report regarding the amount of cocaine attributed to him for sentencing purposes. The government requested a continuance to allow it an opportunity to respond to the surprise objections by calling witnesses and offering other evidence. The 4th Circuit held that the district court's denial of the government's motion for a continuance constituted an abuse of discretion. By entertaining defendant's surprise objections to his presentence report yet refusing to permit the reasonable request of the government for a brief continuance, the district court effectively denied the government an opportunity to present relevant evidence. *U.S. v. Kincaid*, __ F.2d __ (4th Cir. May 7, 1992) No. 91-5377.

8th Circuit upholds preparation of two separate presentence reports for two convictions. (760) Defendant pled guilty to one count of conspiring to bribe a public official and one count of bribing a public officer. He objected to the fact that two presentence reports were prepared in his case, instead of one report that would have grouped the two convictions. The 8th Circuit upheld the preparation of two reports since defendant received the same sentence he would have received had the two convictions been covered in one presentence report. The reports noted that the sentences to be imposed should comply with the grouping provisions of the guidelines since the criminal conduct involved was one ongoing scheme. The reports also indicated that the sentences should run concurrently. *U.S. v. Ziglin*, __ F.2d __ (8th Cir. May 14, 1992) No. 91-3532.

Plea Agreements (§6B)

6th Circuit rules failure to advise educated and well-represented defendant of elements of offense was not harmless error. (780) The 6th Circuit vacated defendant's sentence because the district court failed to comply with Fed. R. Crim. P. 11 in accepting defendant's guilty plea. Rule 11 requires that the defendant be told the nature of the charge, and understand the elements of the offense. The failure to comply with Rule 11 is harmless if the variance from the procedure does not affect substantial rights. Here, the district judge assumed that because defendant had heard the government's case for three days and because he had a good lawyer and was well-educated, it did not need to interrogate the defendant at great length. While such a defendant may not need as much explanation as an unrepresented defendant, the district court must meet the minimum requirements of Rule 11. Failure to identify the elements of the offense is error and cannot be said to be harmless, even for an educated and well-represented defendant. The failure to notify defendant that his sentence would include a term of supervised release was also not harmless error. Nothing in the record suggested that defendant understood that his sentence would include a term of supervised release. *U.S. v. Syal*, __ F.2d __ (6th Cir. May 11, 1992) No. 91-1871.

1st Circuit affirms that defendant breached his plea agreement by testifying untruthfully before a grand jury and during a trial. (790) The 1st Circuit affirmed the district court's determination that defendant violated the terms of his plea agreement and consequently released the government from its obligations under it. The plea agreement required defendant to testify fully and truthfully at all proceedings at which his testimony

was requested. Defendant had performed a controlled buy for the government. However, the drug seller and two other witnesses testified that several days after the sale, defendant returned with a gun and demanded more cocaine from the seller. Defendant denied this at a grand jury proceeding, during a subsequent trial and at his sentencing hearing. The district court held an evidentiary hearing on the issue of whether or not defendant had violated his plea agreement, properly allocating the burden of proof to the government to show that there had been a substantial breach. The district court could properly conclude that defendant violated the terms of his plea agreement. Although defendant argued that the government breached the plea agreement by releasing his name to the press as a police informant, the district court was entitled to disbelieve his testimony in light of his other false testimony. *U.S. v. Tilley,* __ F.2d __ (1st Cir. May 15, 1992) No. 91-1550.

1st Circuit upholds denial of motion to withdraw guilty plea where defendant had nine months to consider plea. (790) The 1st Circuit found no abuse of discretion in the district court's denial of defendant's motion to withdraw his guilty plea. Defendant signed a plea agreement on July 6, entered his plea October 5 and received his presentence report November 23. By February, defendant was on notice of the government's position that defendant had breached the plea agreement and thus intended to recommend a sentence up to the statutory maximum. Defendant did not move to withdraw his plea until the morning of sentencing, April 10. In light of the fact that defendant had nine months during which to consider the consequences of his guilty plea, the absence of a viable defense, his breach of the plea agreement and the apparent lack of evidence pointing to his innocence, the district court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. *U.S. v. Tilley,* __ F.2d __ (1st Cir. May 15, 1992) No. 91-1550.

Appeal of Sentence (18 U.S.C. §3742)

9th Circuit says refusal to depart must be a clear exercise of discretion, or sentence will be reversed. (860) The district court erroneously stated that it could not depart below the level recommended by the government for substantial assistance. The government argued that reversal was not required because the district court would have given the same sentence regardless of its erroneous legal ruling. The 9th Circuit rejected the argument, even though the district court also stated that the government's suggested sentence was "not inappropriate." This statement did not clearly indicate that the district court would not have departed further if it had believed it could. At best, the remarks were ambiguous. The case was remanded for re-sentencing with instructions for the district court to exercise its discretion in sentencing anywhere below the statutory maximum. *U.S. v. Udo,* __ F.2d __ (9th Cir. May 12, 1992) No. 91-50797.

10th Circuit refuses to review failure to depart downward. (860) The 10th Circuit refused to review the district court's refusal to depart downward, since an appellate court does not have jurisdiction to review such a discretionary decision. *U.S. v. Gines,* __ F.2d __ (10th Cir. May 13, 1992) No. 91-4046.

11th Circuit gives plenary review to determination of whether defendant's failure to reveal prior conviction was an attempt to obstruct justice. (870) Defendant failed to reveal to his probation officer a prior misdemeanor conviction which, because it was uncounseled, could not be included in the calculation of his criminal history. The district court found that this constituted obstruction of justice under section 3C1.1. The 11th Circuit found that the question of whether a defendant's failure to disclose a previous conviction that cannot bear upon his criminal history calculation constitutes obstruction of justice involved a legal interpretation of section 3C1.1, and thus was subject to plenary review. *U.S. v. Dedeker,* __ F.2d __ (11th Cir. May 13, 1992) No. 91-8042.

Forfeiture Cases

8th Circuit reluctantly holds that 8th Amendment proportionality review does not apply to civil forfeiture cases. (910) The 8th Circuit held that 8th Amendment proportionality review does not apply to civil forfeiture actions. The court described its holding as "reluctant" because it believed that "as a modicum of fairness, the principle of proportionality should be applied in civil actions that result in harsh penalties." However, it felt restrained from so holding by prior cases. Nonetheless, the court expressed its hope that Congress would reexamine section 881 and consider adding a proportionality requirement into the statute, even though the Constitution does not mandate such a result. *U.S. v. One Parcel of*

Property Located at 508 Depot Street, Minnehaha County, South Dakota, __ F.2d __ (8th Cir. May 20, 1992) No. 91-2383.

5th Circuit remands because it was unclear whether district court applied correct burden of proof. (920) The district court dismissed the government's civil forfeiture action under 21 U.S.C. section 881(a)(7) against a house owned by claimant. The 5th Circuit remanded because it was unclear whether the district court applied the correct burden of proof. Once the government establishes probable cause to believe that the defendant real property violated section 881(a)(7), the burden shifts to the claimant to establish by a preponderance of the evidence that the property was not used for illegal activity. The government's burden of proof is the same for all forfeiture actions under section 881. The government bears the initial burden of demonstrating probable cause to believe that the property was used to distribute or store illegal drugs. If unrebutted, a showing of probable cause alone will support a forfeiture. *U.S. v. Land, Property Currently Recorded in the Name of Gerald Franklin Neff*, __ F.2d __ (5th Cir. May 15, 1992) No. 91-3422.

6th Circuit holds that government was not estopped by claimants' belief that appeal of conviction stayed the forfeiture. (920) Claimants originally filed petitions challenging the forfeiture of property under 21 U.S.C. section 853 based upon their co-conspirator's conviction of CCE charges. They then withdrew the petitions in the erroneous belief that the appeal of the criminal conviction stayed the forfeiture. The 6th Circuit rejected claimants' argument that the government was estopped from proceeding with the forfeiture. Several months before the forfeiture order was made, claimants' counsel stated in court his belief that an appeal would suspend any seizures until completion of the appeal. Neither the district court nor the assistant U.S. Attorney corrected this statement. However, the district court found that petitioners knew to file their petition within 30 days, they were aware that the petition was required to allow them to intervene in the action. Moreover, parties who assert estoppel must prove their reliance was induced, and there was no evidence of inducement. Finally, the district court conducted a review and concluded that petitioners had no interest in the properties. *U.S. v. Patrick*, __ F.2d __ (6th Cir.) No. 89-6410.

5th Circuit says that mere possession of small quantity of cocaine would not support a forfeiture. (950) In a forfeiture action against claimant's house, the government contended that the district court erroneously excluded claimant's admission that marijuana and cocaine were in his house in 1986. The 5th Circuit found that the district court did not "exclude" the evidence of the 1986 drug possession, but rather considered it and then held that the drug possession could not be a basis for the forfeiture of the house. The appellate court agreed that the 1986 drug evidence could not compel a forfeiture, since mere possession of a controlled substance is punishable under 21 U.S.C. section 844 by imprisonment for less than a year. Absent inferences that the small amount of cocaine found meant that larger amounts were stored on the premises or that defendant distributed cocaine from his house, such possession would not support a section 881(a)(7) forfeiture. *U.S. v. Land, Property Currently Recorded in the Name of Gerald Franklin Neff*, __ F.2d __ (5th Cir. May 15, 1992) No. 91-3422.

8th Circuit upholds summary judgment for government based on drug sale by defendant. (950) A customer met claimant at his auto body shop and agreed to purchase some cocaine. Claimant then left the body shop, went to his mobile home, and returned to the body shop, at which time he sold the customer two grams of cocaine. The next day, state police found a revolver, some marijuana, $3,300 in cash and some drug paraphernalia at the body shop, and cash, cocaine and a scale in the mobile home. In a forfeiture action against the body shop and the mobile home, claimant submitted an affidavit claiming the gun found in his shop was used to shoot sparrows and that he received no money from the drug sale. Based upon this evidence, the 8th Circuit affirmed the district court's grant of summary judgment in favor of the government. The government met its initial burden of showing probable cause to believe that the properties were used for prohibited purposes. Defendant failed to rebut this showing. His affidavit did not address, much less rebut, the essential elements of the government's affidavit. His affidavit did not dispute the government's claim that defendant sold drugs at the body shop, or that he used the mobile home to store drugs. *U.S. v. One Parcel of Property Located at 508 Depot Street, Minnehaha County, South Dakota*, __ F.2d __ (8th Cir. May 20, 1992) No. 91-2383.

Amended Opinions

U.S. v. Lopez-Gil, __ F.2d __ (1st Cir. Jan. 3, 1992), amended __ F.2d __ (1st Cir. May 14, 1992) No. 91-3532.

U.S. v. Streit, __ F.2d __ (9th Cir. Apr. 23, 1992), *amended* May 19, 1992, No. 90-10509.

U.S. v. McHenry, 952 F.2d 328 (9th Cir. 1991), *amended*, __ F.2d __ (9th Cir. May 19, 1992) No. 90-10423.

AFFIRMED BY SUPREME COURT

(712)(780) *U.S. v. Wade*, 936 F.2d 169 (4th Cir. 1991), *aff'd.*, __ U.S. __, 112 S.Ct. __ (May 18, 1992) No. 91-5771.

TABLE OF CASES

U.S. v. Sahakian, __ F.2d __ (9th Cir. May 26, 1992) No. 91-10199. Pg. 13

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U.S. v. Thompson, __ F.2d __ (D.C. Cir. May 8, 1992) No. 91-3091. Pg. 11

U.S. v. Tilley, __ F.2d __ (1st Cir. May 15, 1992) No. 91-1550. Pg. 12, 17

U.S. v. Todd, __ F.2d __ (9th Cir. May 19, 1992) No. 90-10437. Pg. 1

U.S. v. Udo, __ F.2d __ (9th Cir. May 12, 1992) No. 91-50797. Pg. 15, 17

U.S. v. Wade, __ U.S. __, 112 S.Ct. __ (May 18, 1992) No. 91-5771. Pg. 14, 15

U.S. v. Wade, 936 F.2d 169 (4th Cir. 1991), aff'd., __ U.S. __, 112 S.Ct. __ (May 18, 1992) No. 91-5771. Pg. 19

U.S. v. Ziglin, __ F.2d __ (8th Cir. May 14, 1992) No. 91-3532. Pg. 4, 7, 12, 17

EXHIBIT
G

1-15.220 Case Processing By Teletype With Social Security Administration

There is a teletype receiver at the Social Security Administration's Office of Hearings and Appeals in Falls Church, Virginia, which facilitates the processing of Social Security cases. Please include the routing signal address for the Office of Hearings and Appeals and the Office of General Counsel in Baltimore. The routing signal for both addresses is SSAGC. Each teletype on Social Security litigation (Social Security retirement, survivors and disability benefits; supplemental securty income and medicare benefits), will include:

A. Case name;

B. Plaintiff's Social Security number;

C. District court where case was filed;

D. Date the complaint was filed;

E. Date the United States Attorney was served;

F. Name and telephone number of the AUSA handling the case;

G. Date petition in forma pauperis was filed if applicable; if not applicable, N/A.

The essential transmittal must be sent within 3 days upon receipt of notification of suit to insure a timely answer.

The teletype receives only. It cannot transmit messages. The proper routing signal will be "RR AA SSAGC."

Any questions regarding teletyping notification of Social Security cases may be directed to the Office of General Counsel in Baltimore, Maryland, (410) 965-8157.

* * * * *

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

EXHIBIT H

June 1, 1992

MEMORANDUM TO: Heads of Department Components

FROM: William P. Barr
Attorney General

SUBJECT: Equal Employment Opportunity

I am pleased, personally, and as Attorney General, to add my support for President Bush's call for increased efforts to attract women, minorities, and disabled persons to the Federal Government. I am establishing, as one of the Department's major objectives, the marked improvement in the representation of individuals from these groups, particularly in high level and policy-making positions. I know that we have made progress in the Department's overall representation, for which we are proud, but much remains to be done.

The Department of Justice has a long and proud history as the nation's chief law enforcement agency. Our record of exemplary service to the American public is second to none. Among the many functions we perform, one of the most important is our role of protecting and enforcing the civil rights of all our citizens. Because of this role, I believe that we have a special responsibility to ensure that our employment programs are conducted in the fairest manner possible. We especially need to ensure that our recruitment and hiring processes reach qualified applicants in every segment of our society, and that all applicants are afforded fair and just consideration for employment, consistent with their qualifications and abilities.

The Department of Labor's Work Force 2000 Report indicates that over the next several years most of the new entrants into the work force will be women and minorities. The Department's work force will be impacted similar to other employers, as it becomes more varied and diverse in composition. No other work force issue presents as many challenges and opportunities. As managers, we will be challenged to recruit, train, and supervise people from diverse backgrounds and cultures, to respond to varied employee needs and expectations, to provide equal opportunities for advancement, and to create a work atmosphere where all employees are treated with respect.

Diversity is also a great opportunity, a chance to attract top candidates in the labor market, to benefit from the different views and perspectives that persons from different cultures and backgrounds provide, and to gain better performance from all employee groups.

I believe that a diverse work force that reflects the clientele that we serve is essential to the accomplishment of our mission, as well as to maintaining the confidence of the American people in the integrity of our justice system. A diversified work force, in my view, is more than an issue of fairness, it is a significant goal in and of itself.

I am establishing the following priority objectives for all departmental managers:

1. To increase awareness and understanding of our Equal Employment Opportunity (EEO) program and each individual manager's responsibility to support the program.

2. To increase the representation of women, minorities, and persons with disabilities in our key occupational categories throughout the grade structure and in policy-making positions. Particular attention will be focused on increasing representation in the SES.

3. To increase opportunities for all employees to advance to the level of their highest potential.

I have asked Harry Flickinger, Assistant Attorney General for Administration, to work closely with each component to assist you in meeting my objectives. Among the several initiatives that I have directed Harry to undertake is to arrange for the Department's law enforcement components to jointly conduct a series of job fairs on the campuses of women's colleges. This, I believe, will prove to be a significant step in helping the Department overcome a longstanding problem of underrepresentation of women in many of our law enforcement occupations.

We will also schedule a number of job fairs on college campuses and in areas where we are likely to attract significant numbers of minority applicants. You will be notified of the dates and locations of these events and I expect each component head to support this effort by attending personally and designating recruitment representatives to attend these events to provide information and answer questions from potential applicants.

Another important aspect of the Department's EEO program is processing complaints of discrimination. The Department should lead the Federal Service in providing prompt and equitable resolution of complaints. That is my goal for this agency. Few programs are more important or have greater need to be responsive than the discrimination complaints program.

During the next several weeks, we will focus our attention on identifying ways to bring about further improvements in this area. The Deputy Attorney General will shortly be addressing this issue with each of you.

I have also asked Harry Flickinger to schedule a Departmentwide Conference on Equal Employment Opportunity, to be held in Washington in September of this year, and to arrange a prominent role in the Conference for each bureau head. The Deputy Attorney General, the Associate Attorney General, and I will be present and actively involved, as well.

This Conference will provide an opportunity for in-depth discussion of many critical issues and for formulation of overall departmental strategies to address any program concerns. I will look to you to support this conference both through your personal participation and that of your key managers and your human resource specialists. Details on the conference will be provided in the near future.

I am eager to move forward toward implementing the actions identified, and I am counting on each of you, as well as the managers and employees in your component, to assist me in accomplishing these initiatives. I believe that all of us working together can make the Department of Justice a model employer.

EXHIBIT I

Filed 5:30 P. M.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JUN 05 1992

Nancy Carr

DEPUTY CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

JESSE ETHREDGE,	:	
Plaintiff,	:	
vs.	:	CIV. NO. 92-187-2-MAC(DF)
ROBERT HAIL, Deputy Base Commander of Robins Air Force Base, in his official capacity as an officer and agent of the United States Air Force, an agency of the United States of America,	:	PUBLISH
Defendant.	:	

FITZPATRICK, District Judge

On June 4, 1992, this Court held a preliminary injunction hearing in the above-styled case.

FACTS

Jesse Ethredge is a civilian aircraft mechanic employed by Robins Air Force Base ("RAFB"). He enters the base four to six days a week to do work and, until October 1991, used his Mazda truck for transportation to and from the base.

In 1984 Ethredge put a "bumper sticker"[1] on the window of his truck reading "Hell With Reagan". Ethredge changed his sign

[1] Plaintiff's message is not on a bumper sticker. It is composed of letter decals affixed to the widow on the back of the camper top on his truck. See Plaintiff's Exhibit 1. For lack of a better term, however, the Court will use the term "bumper sticker". The fact that Plaintiff message is not on a bumper sticker does not affect its analysis. At the hearing, the government stated that it would have prohibited a bumper sticker carrying Plaintiff's message.

when George Bush came into office. The new sign read "Read My Lips Hell With Geo Bush" and at the bottom of the rear window "Forgive Bush Not Egypt He Lied".

On April 5, 1990, Ethredge was stopped by the Armed Forces Traffic Control and issued a ticket for "Provoking Speech on a Truck". The citation was dismissed the next day because there was no such traffic offense. Plaintiff's Exhibit 2.

In February 1991, during Operation Desert Storm, Major General Richard F. Gillis, installation commander of RAFB, directed Colonel Robert Hail, Deputy base commander, to order Ethredge to remove the bumper sticker from his vehicle while on RAFB. Colonel Hail contacted Ethredge's supervisor and directed him to order Ethredge to remove the sign. Ethredge's superior refused to give him the order because he did not receive a written order. Colonel Hail assumed Ethredge complied with his order and notified General Gillis that his order had been carried out.[2]

On or about October 4, 1991, however, Colonel Hail learned that another Action Line Complaint[3] had been received concerning Ethredge's vehicle. Hail Affidavit at ¶ 7. On October 17, Hail issued an administrative order directing Ethredge to remove the sign while on RAFB. Id. at ¶¶. 5-7. The stated reason

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[2] Colonel Hail assumed Ethredge had complied with his order because he had to prepare a response to a Congressional Inquiry from the Honorable J. Roy Rowland, dated February 26, 1991, concerning Ethredge's contention that the order to remove the sign violated his constitutional rights. Hail Affidavit at paragraph 6; Plaintiff's Exhibit 3.

[3] Colonel Hail received complaints concerning Ethredge's sign from military personnel as well as civilian employees. Hail Affidavit at paras. 5, 7, 9.

for ordering removal was that the message contained "disparaging or embarrassing comments about the Commander in Chief of the United States." Plaintiff's Exhibit 4.

Other vehicles on the base, including a military vehicle, have pro-Bush, pro-Republican bumper stickers stating such sentiments as "Sam Nunn Wants Your Guns", "Support Desert Storm Troops", "Insured By Smith and Wesson", "Ross Perot for President", as well as bumper stickers expressing religious beliefs, opposing drug abuse, and stating preferences for athletic teams, leisure activities and radio stations. Ethredge Affidavit, McSwain Affidavit. None of these car owners have been ordered to remove their bumper stickers.

In order to comply with the regulation Ethredge would have to permanently remove the message from his truck. Consequently, since the date of the administrative order, he has driven a different vehicle to work.

On April 28, 1992, Plaintiff filed a motion for a preliminary injunction seeking to restrain Defendant from enforcing the RAFB regulation.

DISCUSSION

Generally, a Court may issue a preliminary injunction if the movant shows:

1. A substantial likelihood of prevailing on the merits of its claims;
2. A substantial threat that it will suffer immediate and irreparable injury;

3. That the threat of injury to the movant substantially outweighs the threatened harm injunctive relief may do to the defendants; and

4. That the injunction would not be adverse to the public interest.

W.E. Callaway v. Block, 763 F.2d 1283, 1287 (11th Cir. 1985); *Gresham v. Winderush Partners, LTD.,* 730 F.2d 1417, 1422-23 (11th Cir. 1984). The injunction should not be granted unless "the movant clearly carries the burden of persuasion as to all four prerequisites". *United States v. Jefferson County,* 720 F.2d 1511, 1519 (11th Cir. 1983).

SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff contends that his First Amendment rights were violated for the following reasons: (1) the regulation is viewpoint based and/or unreasonable; (2) his "bumper sticker" does not present a clear danger to military discipline, loyalty, or morale; and (3) the regulation restricts his freedom of expression rights and his right to travel.

Initially, the Court acknowledges that military regulations are entitled to a greater degree of deference that those affecting a civilian community. In *Goldman v. Weinburger* the Supreme Court stated:

> [o]ur review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws and regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to

> accomplish its mission the military must foster instinctive obedience, unity, commitment and esprit de corps.

475 U.S. 503, 507, 106 S. Ct. 1310, 1313, 89 L. Ed.2d 478 (1986)[4]. The military's "'primary business . . . [is] to fight or to be ready to fight wars should the occasion arise.'" *Greer,* 424 U.S. 837-838, 96 S. Ct. at 1217 (*quoting United States ex rel. Toth v. Quarles,* 350 U.S. 11, 17, 76 S. Ct. 1, 5, 100 L. Ed. 8 (1955)). Consequently, the military may impose restrictions on speech that would be unacceptable in the civilian community. The Supreme Court acknowledged this fact in *Parker v. Levy* when it stated:

> "In the armed forces some restrictions exist for reasons which have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the government to discharge its responsibilities unless it is both directed to inciting lawless action and is likely to produce such action. [Citations omitted]. *In military life, however, other considerations must be weighed.* The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is unprotected in the civil population may nonetheless undermine the effectiveness of the responsiveness to command. If it does it is constitutionally unprotected."

417 U.S. 733, 758-59, 94 S. Ct. 2547, 2563, 41 L. Ed.2d 439 (1974) (*quoting United States v. Priest,* 21 C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972). (Emphasis added).

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[4] *Goldman* addressed the issue of religious expression within the military context. The deference accorded the military, however, is applicable to the present case.

Viewpoint Based and Unreasonable

The validity of the government's limitation on Plaintiff's speech depends on the type of government property that RAFB is. *See Cornelius v. NAACP Legal Defense & Education Fund,* 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed.2d 567 (1985); *Perry Educ. Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 44, 103 S. Ct. 948, 74 L. Ed.2d 794 (1983). There are three types of government property ("fora"): traditional public fora, limited (or "created" or "designated") public fora, and nonpublic fora. RAFB is a nonpublic forum.[5] Access "to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Education Fund,* 473 U.S. 788, 806, 105 S. Ct. 3439, 3541, 87 L.

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[5] The Supreme Court has repeatedly indicated that military bases generally are not a public forums. *See Greer v. Spock,* 424 U.S. 828, 838, 96 S. Ct. 1211, 1217, 47 L. Ed.2d 505 (1976) ("[t]he notion that federal military reservations, like municipal streets and parks have traditionally served as a place for public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false."); *United States v. Albertini,* 472 U.S. 675, 686, 105 S. Ct. 2897, 2905, 86 L. Ed.2d 536 (1985) ("[m]ilitary bases generally are not public fora"); *see also Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 134, 97 S. Ct. 2532, 2542, 53 L. Ed.2d 629 (1977) ("a government enclave such as a military base [is] not a public forum.").

Flowers v. United States, 407 U.S. 197, 92 S. Ct. 1842, 32 L. Ed.2d 653 (1972), is the only case in which the Supreme Court held
that a street on a military base had been converted to a public fora. *Flowers*, however, involved exceptional circumstances. The street in question "was a public thoroughfare in San Antonio no different from all the other thoroughfare in that city" and the military had abandoned any right to exclude civilian vehicular or pedestrian traffic. *Greer v. Spock, 424* U.S. at 835, 96 S. Ct. at 1216.

At the hearing Plaintiff's counsel stated that he accepted that RAFB was a nonpublic forum for purposes of the preliminary injunction hearing.

Ed.2d 567 (1985).

Viewpoint Discrimination

Although military regulations are accorded deference, the military may not engage in viewpoint discrimination. *See Greer v. Spock,* 424 U.S. at 839, 96 S. Ct. at 1218 ("Fort Dix policy objectively and evenhandedly applied"); *Albertini,* 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed.2d 653 (1985); *M.N.C. Hinesville, Inc. v. Department of Defense,* 791 F.2d 1466, 1476 (11th Cir. 1986) ("no impermissible viewpoint discrimination found").

Plaintiff contends that the regulation is viewpoint based because it prohibits speech that is critical of George Bush. Defendant counters that the regulation is viewpoint neutral because it only prohibits speech that disparages or embarrasses the Commander in Chief of the United States military. The regulation states:

> bumper stickers or other similar paraphernalia which *embarrass or disparage the Commander in Chief* are inappropriate as they have a negative impact on the good order and discipline of the service members stationed at Robins AFB.

(Emphasis added).

First, the order prohibits speech disparaging the Commander in Chief, whether it be Dan Quayle, Ross Perot, Bill Clinton or George Bush. Additionally, the regulation does not prohibit criticism. Rather, it prohibits speech that disparages

the Commander in Chief.[6] Plaintiff's expression calls the Commander in Chief of United States military a liar and tells him to "go to Hell". Furthermore, none of the other bumper stickers present on base disparage the Commander in Chief. A bumper sticker for Ross Perot is implicitly an anti-Bush bumper sticker but it does not express that sentiment in a disparaging manner. Therefore, Defendant's failure to force the removal of other bumper stickers does not demonstrate that the regulation is viewpoint based. In fact, the presence of the Perot bumper stickers shows that anti-bush views are permitted. Consequently, the Court concludes that the regulation is viewpoint neutral.

Plaintiff contends that such a narrow interpretation of viewpoint neutrality is unsupported by case law and contradicts other Air Force Regulations. First, Plaintiff cites *Fire Fighters Assoc. v. Barry,* 742 F. Supp. 1182 (D.D.C. 1990), in support of his assertion that the regulation is not viewpoint neutral. In *Barry* the Court held that a fire department regulation prohibiting bumper stickers, which could be "construed as obscene, cause embarrassment or harassment of [fire department] members", 742 F. Supp. at 1186 n. 3, from being displayed on fire department property, was not viewpoint neutral. The Court stated that the regulation discriminated on the basis of viewpoint because bumper stickers consistent with departmental views were unlikely to be condemned by the regulation. In the present case, however, the regulation

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[6] "Criticism" is defined as "the passing of unfavorable judgment; censure, disapproval". *American Heritage Dictionary 314 (1981).* "Disparage" is "to belittle or sight, to reduce in esteem or rank." *Id.* at 379.

does not prohibit criticism of the Commander in Chief. Rather, it prohibits the criticism from being expressed in a disparaging manner.

Second, Plaintiff also contends other Air Force regulations evidence the viewpoint bias inherent in the regulation. Air Force regulations permit "materials [that] are critical of government policies of officials." *Air Force Regulation* 35-15(3). Additionally the regulations state that "installation commanders should encourage and promote . . . a wide range of viewpoints on public issues." *Id.* The Court notes, however, that these Air Force regulations are subordinate to and must be interpreted consistently with Article 88 and Article 134 of the Uniform Code of Military Justice.[7] These articles would subject an officer or an enlisted man to a court martial for displaying the very message that Plaintiff displayed. Thus, the Air Force regulations cited by Plaintiff do not demonstrate that the present regulation discriminates on the basis of viewpoint.

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[7] Article 88, 10 U.S.C. § 888, provides:

> Any commissioned officer who uses contemptuous words against the President, Vice President, Congress, the Secretary of Defense, the Secretary of the military department . . . shall be punished as a court martial may direct.

Additionally, an active duty enlisted member who attacked or defamed the Commander in Chief, or anyone else in the chain of command, as Plaintiff has done would be violating Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, which prohibits engaging in conduct to the prejudice of good order and discipline.

Reasonableness

"The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." *Cornelius,* 473 U.S. at 808, 105 S. Ct. at 3452. Additionally, the reasonableness of the regulation must be assessed in light of the purposes of RAFB and of the military necessity for good order and discipline.

First, Plaintiff contends that it is unreasonable to prohibit the criticism of someone simply because they are in the chain of command. Defendant contends that disparaging remarks directed towards anyone in authority can undermine discipline and morale, both of which are indispensable to good order and responsiveness to command. As previously stated, the regulation only prohibits speech that disparages or embarrasses the Commander in Chief. The military has an interest in maintaining order and discipline. Its interest in fostering respect for and obedience to those in the chain of command is not eliminated merely because a person in the chain of command is also a political figure. Respect for and obedience to the Commander in Chief is particularly important because "[t]he military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors." *Parker v. Levy,* 417 U.S. at 751, 94 S. Ct. at 2559.

Second, Plaintiff contends that the regulation is unreasonable because he is a civilian[8]. The applicable analysis forum analysis does not mandate that plaintiff's status be taken into consideration. Other courts have found that regulations prohibiting civilians from expressing views on military bases to be reasonable. *See Brown v. Glines,* 444 U.S. 348, 100 S. Ct. 595 (1980) (court upheld Air Force regulation that prohibited both military personnel and civilians from circulating petitions on its premises).

Third, Plaintiff contends that the regulation is unreasonable because it effectively restricts his freedom of expression off the base by requiring him to drive another vehicle without the message to work and because it restricts his right to travel. Plaintiff can drive his truck, message intact, anywhere he desires, except the base. He even could drive the truck to work so long as he covered or removed the prohibited expression while on base. Furthermore, Plaintiff's contention that the regulation restricts his right to travel is without merit. Therefore, the Court concludes that the regulation is reasonable because the military has an interest in promoting order and discipline and because it only prohibits the Plaintiff from displaying his bumper sticker on base.

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[8] The Court notes that military police may stop and search a civilian's car on a military base without probable cause. *See, United States v. Vaughan*, 475 F.2d 1262 (1973). The Court does not think that a civilian's First Amendment rights are accorded more value than his Fourth Amendment rights.

Danger to Military Discipline, Loyalty, and Morale

The government may only limit expression on a military base where it creates a "clear danger to military loyalty, discipline, *or* morale of members of the armed forces". ***Brown v. Glines,*** 444 U.S. 348, 349-50 n. 1, 100 S. Ct. 595, 597, n. 1. Plaintiff contends that there is no evidence that his speech affected the loyalty, discipline, or morale of any service personnel on RAFB.

The government, however, is not obligated to show proof of "actual harm". *Id.,* 473 U.S. at 810, 105 S. Ct. at 3453 ("government need not wait until actual havoc is wreaked to restrict access to a nonpublic forum"); *Priest v. Secretary of Navy,* 570 F.2d 1013 (D.D.C. 1977). In *Priest*, a former navy seaman sought collateral review of his conviction by court martial for violation of Article 134 of the Uniform Code of Military Justice. The defendant was convicted for distributing a newsletter urging insubordination. The Court noted that in an Article 134 case in which the First Amendment was a defense the court martial had to determine the potential for the words to erode loyalty, discipline and morale. In evaluating the sufficiency of the evidence, the court stated that "[t]he government does not have a burden of showing a causal relationship between [the defendant's] newsletter and specific examples of weakened loyalty, discipline or morale; the question . . . is whether there is a *clear tendency* to weaken them." *Id.,* at 1018.

Additionally, the Supreme Court has indicated that the judgment of military commanders should be given deference by the

courts because "[n]ot only are courts 'ill-equipped to determine the impact on discipline that any particular intrusion upon military authority might have ' [citation omitted] but the military authorities have been charged by the Executive and Legislative Branches with carrying out the nation's military policy." *Goldman*, 475 U.S. at 507-508, 106 S. Ct. at 1313.

The Court notes that General Gillis initially gave the order to remove the message given during Operation Desert Storm when obedience and morale were critical to RAFB's mission. His interest in morale and discipline did not end with the war. "[T]he necessary habits of unity and discipline must be developed in advance of trouble. *Goldman*, 475 U.S. at 508, 106 S. Ct. at 1313.

Plaintiff argues that *Barry* dictates that this Court find that there was not a clear danger to the discipline, morale and loyalty of the service personnel. In *Barry* the court held that a fire fighters bumper sticker calling his department a "joke" did not adversely affect the discipline and order of the fire station. In *Barry*, however, the court expressly rejected the defendant's analogy of a fire department to the military. The court stated that "[w]hile fire and police departments often are referred to as para-military associations, these organizations do not demand rigorous and unquestioning duty to the degree required by the military." 742 F. Supp. 1196-97 n. 25.[9]

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[9] Admittedly, the court made this statement in the context of a facial challenge to the fire departments Press Access regulations. This fact in no way changes the court's acknowledgement that the military is different than a civilian fire department. Plaintiff contends that while military regulations are less subject to facial challenges, the court in *Barry* applied the same standard to the bumper stickers that is to be applied in the

Plaintiff further argues that the Defendant's failure to prohibit his "Go to Hell Ronald Reagan" message demonstrates that there was no clear danger in the instant case. Defendant's failure to prohibit Plaintiff's earlier bumper sticker is not dispositive. General Gillis did not know about the bumper sticker until February of 1991. At that time he made the determination to prohibit it.

Plaintiff also contends that the objections of other military personnel do not justify restricting his speech. Concededly, the Supreme Court has routinely rejected "Heckler's Veto" arguments even when real violence is threatened. *See* ***Terminiello v. Chicago,*** 337 U.S. 1, 4 (1949); ***Gregory v. Chicago,*** 394 U.S. 111 (1969); ***Brown v. Louisiana,*** 383 U.S. 131, 133 (1966); ***Edwards v. South Carolina,*** 372 U.S. 229 (1963). Nevertheless, the complaints are evidence, which General Gillis took into

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present case, i.e., whether the bumper sticker presented a clear danger to order.

Plaintiff's argument suggests that the recognition of the military as a "specialized society" is only relevant when a litigant challenges a military regulation for facial invalidity. The Supreme Court implied otherwise when it stated that "while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those principles . . . doctrines of First Amendment overbreadth are not exempt from the operation of these principles" ***Parker v. Levy,*** 417 U.S. at 758, 94 S. Ct. at 2563. Thus, the recognition of the military's special status is not limited to overbreadth challenges. Furthermore, the court's statement in ***Barry*** acknowledged the military requires higher degree of order and discipline. Consequently, speech that might not have a clear tendency to weaken loyalty, discipline or morale in a fire department could have that tendency in the military context.

The recognition that the military requires a higher degree of order than fire departments would also serve to distinguish ***Hobbs v. Thompson,*** 448 F.2d 456 (5th Cir. 1971), which struck down a Macon ordinance that prohibited fire department employees from identifying themselves with any candidate for office because the bumper stickers would not adversely affect a fire fighter's firefighting ability.

consideration, when assessing whether Plaintiff's speech had a clear tendency to weaken discipline, loyalty and morale. Finally, as previously stated, a military member who displayed a sign similar to that displayed by Plaintiff would be subject to a trial by court martial under the Uniform Code of Military Justice. General Gillis determined that permitting a civilian to display such a message when Air Force personnel could not would have a tendency to "undermine good order, discipline, and responsiveness to command." Gillis Affidavit at para. 4. Consequently, the Court finds that Plaintiff's speech was a clear danger to the discipline, loyalty and morale of Air Force personnel on RAFB.

This court understands that there is a long tradition of open and free political dissent in this country. Our toleration of opposing views of how this country should be governed is one of the pillars upon which the United States was founded. Bumper stickers showing allegiance to one candidate or another are among the most popular and time-honored means of political expression. Indeed the relative absence of bumper stickers in this political year compared to former years shows a disinterest in candidates that is troubling. The South in particular has always enjoyed a zest for rambunctious politics that in an earlier day added spice to life, especially in the rural areas.

On the other hand, military bases are unique; they are not in the same class as factories, shopping centers, or residential subdivisions. The mission of the military has always been to defend this country and if it is felt that this duty requires that certain First Amendment rights of those who work or

live upon a base be reasonably curtailed to some extent, then the courts have for many years given the military leeway to do so.

The plaintiff has worked at Robins Air Force Base for over 25 years and has a responsible job for which he is well paid. His job, however, requires certain sacrifices that he would not be forced to make if he worked somewhere else. As Justice Holmes said a hundred years ago, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." HOLMES, J., *McAuliffe v. Mayor,* 155 Mass 215, 220 (1892).

The Court concludes that the Plaintiff has not shown a substantial likelihood of success on the merits. Since Plaintiff has failed to establish the first prerequisite to obtain a preliminary injunction the Court need not consider the remaining prerequisites.

CONCLUSION

Accordingly, for the reasons state above, Plaintiff's motion for a preliminary injunction is **DENIED.**

SO ORDERED, this 5 day of June, 1992.

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

DF/mkc

* U.S. G.P.O.:1992-312-344:60227