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

United States Attorneys' Bulletin

Published by:
Executive Office for United States Attorneys, Washington, D.C.
Laurence S. McWhorter, Director

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VOLUME 40, NO. 9 **THIRTY-NINTH YEAR** **SEPTEMBER 15, 1992**

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COMMENDATIONS

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

Linda Anderson (California, Eastern District), by Janet L. Wold, Forest Supervisor, Stanislaus National Forest, Sonora, for her successful efforts in obtaining an order granting preliminary injunction against a miner who had been residing, polluting and mining on public land without approval since June, 1991.

Herbert A. Becker (District of New Mexico), by Robert T. Dale, District Manager, Bureau of Land Management, Department of the Interior, Albuquerque, for his valuable assistance and cooperative efforts in securing water rights for public lands after a 14-year battle to establish federal reserved rights to springs on the Red River and Rio Grande, and instream flows for the Wild and Scenic portion of the Red River.

Edward Bryant, United States Attorney, and ***Assistant United States Attorneys Dan Clancy*** and ***Vivian Donelson*** (Tennessee, Western District) by Kermit Perkins, District Director, Office of Labor-Management Standards, Nashville, for their successful prosecution of two labor union officials and their attorney, and for their persistent and vigorous enforcement of the Labor Management Reporting and Disclosure Act. ***Mamie Cox*** provided valuable assistance.

J. Michael Buckley (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his professionalism and legal skill in obtaining guilty verdicts of two drug traffickers after two days of jury deliberation.

Robert E. Bulford (Ohio, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding efforts in bringing the Cleveland Police Department corruption investigation to a successful conclusion.

Patricia R. Cangemi (District of Minnesota), by Donna Morros Weinstein, Chief Counsel, Region V, Office of General Counsel, Department of Health and Human Services, Chicago, for her distinguished service to the Region V office in its litigation in Minnesota, and especially for her excellent presentation before the Court of Appeals for the Eighth Circuit which resulted in a favorable decision.

Melanie D. Caro (District of Kansas), by John R. Shaw, Regional Counsel, Federal Bureau of Prisons, Kansas City, for her excellent preparation and argument contained in a brief filed with the Tenth Circuit Court of Appeals.

Shaun G. Clark (Louisiana, Eastern District), by Major John A. Arrigo, Staff Judge Advocate, Headquarters 14th Flying Training Wing, Columbus Air Force Base, Mississippi, for his professional skill in prosecuting an airman who had successfully evaded the criminal justice system for many years.

David J. Cortez (North Carolina, Eastern District), by Thomas L. Hartman, Superintendent, National Park Service, Department of the Interior, Manteo, for his valuable instruction and expertise at an in-service law enforcement training session.

Janet Craig (Texas, Southern District), by Adam C. Walmus, Acting Director, and Logan A. Slaughter, District Counsel, Department of Veterans Affairs, Houston, for her successful efforts in obtaining the acquittal of an employee on assault charges and for removing the case from the state court system. ***Howard Rose*** provided expert assistance.

David Debold (Michigan, Eastern District), by Richard J. Hoglund, Special Agent in Charge, U.S. Customs Service, Detroit, for his successful prosecution of a complex case involving illegal mail entries, and for collecting $264,519 in civil penalties, the largest amount ever collected for duty fraud in Detroit.

Don J. DeGabrielle (Texas, Southern District), by Linda M. Betzer, Assistant Director-Criminal, Office of Legal Education, Executive Office for United States Attorneys, Department of Justice, Washington, D.C., for his excellent presentation on the Conduct of Complex Investigations at a seminar in San Francisco.

William D. Delahoyde (North Carolina, Eastern District), by Judge Malcolm J. Howard, U.S. District Court, Greenville, for his professional and detailed presentation of a principally "circumstantial evidence" type of conspiracy, fraud, and money laundering case that resulted in a guilty verdict on all charged counts as to five individuals.

Carol Ann DiBattiste (Florida, Southern District), by R. T. Grudek, Postal Inspector in Charge, U.S. Postal Service, Miami, for her successful prosecution of a case involving the importation of cocaine from Calle, Colombia via the U.S. mails. Also, by Judge James Lawrence King, U.S. District Court, Miami, for her professional skill in conducting a jury trial involving the theft of seven limousines from the northeastern United States.

Kenneth Dies and ***Tom Meehan*** (Texas, Southern District), by Eloy Garcia, Jr., Assistant Special Agent in Charge, Drug Enforcement Administration, Houston, for assisting the Houston HIDTA Squad #4 Task Force in the trial of a money laundering case.

Marc Fagelson (Florida, Southern District), by Sheldon M. Kay, Assistant District Counsel, Internal Revenue Service, Sunrise, for his valuable assistance in obtaining a Rule 6(e) order to utilize grand jury materials from a criminal case, thereby clearing the way for a civil tax matter to proceed without delay.

Nathan A. Fishbach (Wisconsin, Eastern District), by Dale P. Boll, Director, Criminal Investigation Division, Environmental Protection Agency, Washington, D.C., for his significant victory in the first federal criminal trial involving the submission of false lab reports. (This prosecution may be viewed as a landmark case in the area of environmental labs.)

Edward F. Gallagher and ***Eric Nichols*** (Texas, Southern District), by Richard D. Ludwig, Supervisory Special Agent, FBI, Houston, for their professionalism and legal skill in the successful prosecution of a criminal case based largely on circumstantial evidence.

Ray Hamilton (District of New Mexico), by David E. Turner, State Executive Director, Agricultural Stabilization and Conservation Service (ASCS), Department of Agriculture, Albuquerque, for his excellent representation and spirit of cooperation over the past five years in a complex tort claims case of over $4 million filed against eighteen national, state and county ASCS employees.

John M. Haried (District of Colorado), by William J. Tattersall, Assistant Secretary for Mine Safety and Health, Department of Labor, Arlington, Virginia, for his significant victory in the first case west of the Mississippi River and outside the coal industry that has resulted in agents of mine operators going to prison for willfully violating the Federal Mine Safety Act of 1977.

Yoshinori H. T. Himel (California, Eastern District), by Helen Arena, Revenue Officer, Internal Revenue Service, Sacramento, for securing four writs of entry for seizures of property and for providing other valuable assistance and support during the course of complex negotiations with the taxpayers and their representatives.

William B. Howard (Texas, Southern District), by Ruben Monzon, Special Agent in Charge, Drug Enforcement Administration, Houston, for his outstanding prosecutive efforts in a difficult and novel case involving the enforcement of strict standards for controlled substance manufacturers.

Wendy Jacobus and ***Barbara Bisno*** (Florida, Southern District), by T. C. Doherty, Medical Center Director, Department of Veterans Affairs, Miami, for their excellent representation and for obtaining a favorable decision in a case that raised significant medical and legal challenges.

Diogenes Kekatos (New York, Southern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his excellent representation of the United States and the British Government in the appeal of the dismissal of extradition proceedings against a former member of the PIRA (Provisional Irish Republican Army).

Lynne W. Lamprecht (Florida, Southern District), by Joseph P. Salvemini, Assistant Special Agent in Charge, Drug Enforcement Administration, Fort Lauderdale, for her outstanding success in obtaining convictions of four defendants in a drug trafficking case.

Dexter Lee (Florida, Southern District), by Gary J. Takacs, Assistant United States Attorney and Chief, Civil Division, Middle District of Florida, Tampa, for his valuable assistance and outstanding cooperative efforts in bringing an unusual and complicated narcotics case to a successful conclusion.

Terry W. Lehmann (Ohio, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding professionalism and success in the prosecution of three individuals who defrauded over 90 investors across the country of $3.3 million.

Susan Lindquist and ***Mickale Carter*** (District of Alaska), by Major General Robert E. Murray, Acting Judge Advocate General, Department of the Army, Washington, D.C., for their successful efforts in favorably resolving a long-standing controversy between the Department of Defense and the Alaska Public Utilities Commission. Also, by James E. Armstrong, General Attorney, Regulatory Law Office, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for obtaining a court decision that provides an important interpretation and application of the Federal Supremacy Clause of the Constitution that will be invaluable for use as precedent in future cases before state regulatory commissions.

Gregory G. Lockhart (Ohio, Southern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his excellent presentations on "Probable Cause" and "Asset Forfeiture" at the Basic Narcotics Investigations School at the Wright Patterson Air Force Base in Ohio.

Mervyn Mosbacker, Laura Surovic, Mark Patterson and other ***Brownsville Office Staff*** (Texas, Southern District), by Leonard C. Lindheim, Special Agent in Charge, U.S. Customs Service, Brownsville, for their extraordinary efforts in the criminal investigation of sixteen people involved in a smuggling organization directly responsible for at least five murders. Thirteen people have been arrested and were either found guilty or pled guilty, and numerous vehicles and property were seized, while additional arrests and seizures occurred simultaneously in Michigan as a result of this investigation.

Joanne Rodriguez (District of Idaho), by Curtis G. Guiles, Chief, Criminal Investigation Division, Internal Revenue Service, Boise, for her demonstration of prosecutorial skill in a criminal tax trial which brought a guilty verdict after only an hour and fifteen minutes.

Michael Rogoff (New York, Southern District), by L. R. Heath, Inspector in Charge, U.S. Postal Service, New York, for his outstanding success in the prosecution of a bank fraud case involving numerous financial institutions.

Mark Rosenbaum (District of Alaska), by Neil C. Johannsen, Director, Department of Natural Resources, Anchorage, for his participation as an instructor at the in-service law enforcement refresher for park rangers held recently by Alaska State Parks.

Mary A. Sedgwick (California, Central District), by William B. Odencrantz, Regional Counsel, Western Regional Office, Laguna Niguel, and Gustavo De La Vina, Chief Patrol Agent, Immigration and Naturalization Service, San Diego, for her outstanding representation and success in obtaining a favorable ruling in litigation surrounding a tragic incident that occurred in Temecula.

Wevley William Shea, United States Attorney, and ***Staff*** (District of Alaska), by Floyd E. Cotton, Regional Inspector General for Investigations, Department of Agriculture, San Francisco, for their valuable assistance during the past five and a half years in their mutual efforts to manage and improve the operations of the United States Government through competent administration and diligent law enforcement.

Michael A. Thill (Indiana, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful prosecution of a Chicago La Cosa Nostra street crew leader and five co-defendants on racketeering charges stemming from illegal gambling and other activities.

Fred Weinhouse and ***Leslie Westphal*** (District of Oregon), by R. B. Madsen, Superintendent, Department of State Police, Salem, for their professionalism and dedicated efforts in the successful prosecution of at least 30 conspirators involved in a smuggling attempt off the southern coast of Oregon.

Treby McL. Williams (New York, Southern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for providing valuable assistance to the Office of International Affairs and the Government of the Republic of Turkey in the execution of a mutual legal assistance request.

George H. Wu (California, Central District), by William B. Odencrantz, Regional Counsel, Western Regional Office, Immigration and Naturalization Service, Laguna Niguel, for his outstanding efforts in defeating a temporary restraining order and obtaining the dismissal of a complaint by the City of Temecula against the Immigration and Naturalization Service.

Mike A. Zweiback and ***Barbara Curry*** (California, Central District) by Ronald L. Iden, Assistant Special Agent in Charge, FBI, Los Angeles, for their valuable assistance and continuing support of the efforts of the Los Angeles Task Force on Riot Related Crimes.

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF VIRGINIA

Robert E. Bradenham, II, Assistant United States Attorney for the Eastern District of Virginia, was commended by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his outstanding assistance in executing numerous letter rogatory requests from the Provincial Court in Innsbruck, Austria. The Innsbruck Court sought assistance in the prosecution of Austrian citizens Franz Weixelbraun and Walter Thaler for a double homicide committed in Poquoson, Virginia, in 1989.

In June, 1991, Mr. Bradenham executed the first of three letter rogatory requests from Austria seeking the deposition of eighteen U.S. witnesses who had refused to travel to Austria to testify at the first trial of Franz Weixelbraun. In October, he again offered his assistance in taking the testimony of three U.S. witnesses via a satellite video-conference from Richmond, Virginia to the Innsbruck Court. With only two weeks notice, he re-submitted his commissioner application to the court, prepared and issued subpoenas to the witnesses, and traveled to Richmond to supervise the video-conference. The Austrian Ministry of Justice informed the Office of International Affairs in December, 1991, that the first trial of Franz Weixelbraun, which had resulted in Weixelbraun's acquittal, had been declared a mistrial. The Austrian Supreme Court overruled the jury's verdict and declared that a new trial would need to be held before the Innsbruck Court.

The Office of International Affairs again sought the assistance of Mr. Bradenham in the execution of a third request for the testimony of four U.S. witnesses who had also refused to travel to Austria to testify at the second trial of Franz Weixelbraun and the trial of Walter Thaler. Mr. Bradenham scheduled and conducted depositions of these four witnesses within fifteen days of receipt of the request and also accommodated the requests of the Austrian judge, prosecutor, and defense counsel for Thaler and Weixelbraun to attend the depositions.

The trial was a landmark case in Austria and received much public attention in the Austrian press. Accordingly, the Austrian Ministry of Justice and the Innsbruck Court were extremely pleased with the expedient and excellent assistance their requests received. The industrious work of Mr. Bradenham was responsible for the successful execution of their requests.

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SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF FLORIDA

Larry Rosen, Assistant United States Attorney for the Southern District of Florida, was commended by R. Stan Kryder, Corporate Banking Executive, First Union National Bank of Florida, Miami, for his prompt response and successful resolution of a critical situation involving a fraudulently altered check. The incident began when the Clerk of the Court of Dade County apparently wrote a check in the amount of $20.00. The check found its way to Argentina where it was materially altered to reflect a different payee and the amount of the check was changed to $1,450,000.00. The check was deposited for collection with a bank in Argentina who, in turn, sent the check to its U.S. correspondent, American Express Bank, Ltd. That bank placed the check for collection through the Federal Reserve System and it was paid by First Union. Fortunately, the error was noted shortly thereafter while the funds were still in the possession of the American Express Bank.

First Union contacted the American Express Bank to notify them of the alteration. To their dismay, American Express refused to return the funds despite being provided with an Affidavit of Alteration by the Clerk of the Court, as well as an agreement from First Union indemnifying the American Express Bank in connection with returning the funds. Having made every possible effort to amicably resolve the matter, First Union was becoming increasingly concerned that the funds would be transmitted to Argentina.

Larry Rosen obtained an immediate seizure warrant to secure the funds prior to their possible transfer out of the country, and demonstrated a high degree of competence in reacting quickly to the exigencies of the situation.

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SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF NEW YORK

Anne Patterson and ***Karen Patton, Assistant United States Attorneys for the Southern District of New York,*** were commended by Robert F. Wagner, Jr., Chairman, New York City Board of Managers, for their participation in "Constitution Workers," a program for New York City high school students organized by *The Constitution Works* with the cooperation of the Special Committee on Public Service and Education of the Association of the Bar of the City of New York. Constitution Workers brought sixty juniors and seniors from twenty-two public high schools together with thirty-five volunteer attorneys to discuss various challenging issues related to the Bill of Rights. Ms. Patterson and Ms. Patton led one of four groups of students who met for six two-hour seminars over the course of the year, conducted open discussions, and reviewed background materials and homework assignments.

Other Assistant United States Attorneys who participated in discussions of the First, Fourth and Fifth Amendment issues were: ***James Cott, James Johnson, David Kelly, Abby Meiselman, Nancy Northrup, Maxine Pfeffer,*** and ***Craig Stewart.***

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PERSONNEL

On August 10, 1992, George J. Terwilliger, III, Deputy Attorney General, announced the appointment of ***Robert Q. Whitwell, United States Attorney for the Northern District of Mississippi,*** as Principal Associate Deputy Attorney General. He replaces ***Michael W. Carey,*** who has returned to his post as ***United States Attorney for the Southern District of West Virginia.***

On August 5, 1992, ***Steven D. Dillingham*** was named Acting Assistant Attorney General for the Office of Justice Programs. He succeeds Jimmy Gurule, who has returned to the University of Notre Dame law faculty.

On August 14, 1992, ***Edward F. Reilly, Jr.*** was sworn in as Chairman of the U.S. Parole Commission. ***Mr. Reilly,*** a 1961 graduate of the University of Kansas, was nominated to the post by President Bush and confirmed by the United States Senate on August 12, 1992.

On August 21, 1993, ***Joe L. Heaton*** became the Interim United States Attorney for the Western District of Oklahoma.

On August 10, 1992, ***John A. Mendez*** became the Interim United States Attorney for the Northern District of California.

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HONORS AND AWARDS

EASTERN DISTRICT OF VIRGINIA

Operation Illwind

On August 5, 1992, Director William S. Sessions of the Federal Bureau of Investigation, hosted a ceremony in his office to honor a number of attorneys who participated in "Operation Illwind." Director Sessions praised ***Joseph J. Aronica***, the Assistant United States Attorney in charge of the investigation, and ***Jack I. Hanly,*** and echoed the sentiments expressed by then-Attorney General Dick Thornburgh in 1991 that "Operation Illwind represents the most sweeping and successful operation against white collar fraud and defense procurement ever carried out by the Department of Justice." Judge Sessions also commended ***Henry E. Hudson,*** former United States Attorney for the Eastern District of Virginia, and now Acting Director of the U.S. Marshals Service, for his support during the investigation.

Director Sessions pointed out the fifty-six convictions of high government officials, including a former Assistant Secretary of the Navy and a former Deputy Assistant Secretary of the Air Force, corporate executives, consultants, and contractors, and emphasized as well the monetary recovery in excess of $225 million and economic loss recovery of an estimated $350 million. "Most importantly," he said, "these prosecutions have publicized the degree to which the Department of Defense procurement process was tainted by fraud and bribery and led directly to significant remedial changes in the process."

In Congress, the Procurement Integrity Act was a direct response to the investigation. Other Congressional proposals made in response to the investigation included: the establishment of a defense acquisition agency to perform all DOD acquisitions; removal of the Inspector General's office from within DOD and its establishment as an independent agency; and the Defense Acquisition Corps Act, which proposed to establish a professional corps of defense procurement specialists from within each service.

Numerous proposals were also made to restrict the "revolving door." The Department of Defense, in response to the investigation, recommended changes in the federal acquisition regulations to restructure the acquisition process in order to prevent the abuses uncovered in the investigation, and to make internal corporate ethics programs mandatory. In addition, on August 28, 1992, the seventh largest defense contractor, United Technologies Corporation, of Hartford, Connecticut, pled guilty to four felony counts and agreed to pay $6 million in criminal fines, costs of investigation, and civil damages. (For further details, see, Operation Illwind, at p. 279 of this Bulletin.)

Other attorneys commended by the Director were: ***Pamela J. Bethel,*** former Assistant United States Attorney; ***Donald Weber*** and ***Vernon King,*** Special Assistant United States Attorneys; ***Robert DeHenzel,*** former Department of Justice attorney; ***Janet Webb,*** Department of Justice attorney; and ***Nancy Newcomb,*** former Defense Logistics Agency attorney. The Director reflected that each Illwind team member should be proud of the Illwind accomplishments and their service to the American people in an area vital to national security. He said their dedication brings great credit on each member and the Department of Justice as a whole.

[**NOTE:** In February, 1991, ***Joseph J. Aronica*** received the Attorney General's Award for Distinguished Service as the attorney in charge and lead prosecutor, and ***Jack Hanly*** received the Director's Award for Superior Performance for his role in the investigation.]

Cecil B. Jacobson Case

Randy I. Bellows and ***David G. Barger*** were recognized by the U.S. Postal Inspection Service for their outstanding efforts on the Dr. Cecil B. Jacobson case. ***Mr. Bellows*** was presented the Chief Inspector's Award, which is the highest award given to non-inspection service employees. ***Mr. Barger*** received a Certificate of Appreciation for Meritorious Public Service.

Dr. Jacobson was found guilty on March 4, 1992 in a federal court in Alexandria, Virginia on 52 counts of mail fraud, wire fraud, travel fraud and perjury. The convictions arose out of the defendant's infertility practice located in Vienna, Virginia from 1976 to 1988.

Gang Violence

Nash W. Schott was presented an Outstanding Performance Award by Howard Golden, President of the Borough of Brooklyn, for his successful prosecution of a Brooklyn-based drug organization responsible for distributing cocaine and "crack" cocaine worth approximately $80 million over a three-year period. The prosecution was the culmination of a joint effort with the United States Attorney's office for the District of Columbia, the United States Attorney's office for the Eastern District of Virginia, and the King County District Attorney's office.

The case was initiated following the slaying of a Virginia police officer in Old Town Alexandria in March, 1989, and resulted in twenty-eight pre-indictment pleas of guilty to various narcotics-related offenses. There were five life sentences without parole, and an average term of incarceration of fourteen years without parole. In addition, thirty-six homicides were resolved in the New York/Washington metropolitan areas.

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EASTERN DISTRICT OF ARKANSAS

On August 6, 1992, ***Charles A. Banks, United States Attorney for the Eastern District of Arkansas,*** was presented a commendation plaque by the membership of the Arkansas Municipal Police Officers Association for his outstanding efforts on behalf of the Joint Jurisdiction Special Drug Response Team ("JJ"). The commendation was offered on behalf of the people of Jefferson, Lincoln, and Arkansas Counties, in expression of their appreciation for his interest, support and aggressive prosecution of drug crimes. "JJ" is a program designed to detect, apprehend and prosecute street-level drug use and violence by the use of multi-agency law enforcement, including federal, state, county and municipal agencies. Five "JJ" operations have been conducted within the past three years.

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DISTRICT OF SOUTH DAKOTA

On August 17, 1992, ***David Zuercher, Assistant United States Attorney for the District of South Dakota,*** was presented a Certificate and a gift of a wildlife print by the U.S. Fish and Wildlife Service for his superior service and aggressive prosecution of wildlife violators in the State of South Dakota over the past eleven years. ***Mr. Zuercher*** has proven time and again to be a formidable prosecutor when protected trust resources are violated. Two recent cases involving the illegal use of pesticides are representative of his continued interest in preserving our wildlife resources, and without his knowledge, skill, and outstanding ability, many environmental cases could not have been brought to a successful conclusion.

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A SPECIAL MESSAGE FROM THE ATTORNEY GENERAL

Hurricane Andrew Relief Fund

In a special message to all Department of Justice employees on August 31, 1992, Attorney General William P. Barr stated as follows:

> I know that many of you have already been involved in the response to the emergency created by Hurricane Andrew's devastation of South Florida and parts of Louisiana. In the finest tradition of this Department, many have already put in many extra hours and extra-ordinary efforts in maintaining public order and carrying out our important law enforcement missions. For that I offer my own and the Nation's gratitude.
>
> Now we must begin the vital process of rebuilding, including rebuilding the lives of Department employees. In response to this tragedy, we are already exploring the provision of administrative leave to employees who have been directly affected by the hurricane and the possibility of advancing pay and providing for immediate salary payments via drafts. Many of your colleagues have been left homeless by Hurricane Andrew; others have lost property; some may even have lost loved ones. To assist in their time of need, we have established a Hurricane Andrew Relief Fund, for which we are also seeking tax-exempt status. Employees who have been affected by the hurricane will be able to apply to the fund for financial assistance. You may contribute to the Fund by sending your check or money order, payable to "Hurricane Andrew Relief Fund" to: Department of Justice Federal Credit Union, Hurricane Andrew Relief Fund, P.O. Box 782, Washington, D.C. 20044.

I am sure that we can count on your generosity in responding to this call for assistance for your fellow employees. Questions about the Fund may be addressed to John Vail, Director of the Justice Management Division Personnel Staff, on (202) 514-6788.

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Hurricane Andrew And The Southern District Of Florida

On August 29, 1992, Roberto Martinez, United States Attorney for the Southern District of Florida, advised that immediately prior to Hurricane Andrew's arrival, the Southern District of Florida moved all files relating to ongoing investigations and prosecutions to secure areas. Although more than a dozen windows were damaged, files and documents relating to criminal investigations are substantially intact and the administration of the office is fully operational.

During the week of August 24, 1992, the office returned twenty-three indictments charging criminal law violations in the Miami area. The indictments were returned by a grand jury sitting in Fort Lauderdale. During this same period, federal law enforcement personnel arrested ten persons in the Miami area for federal criminal law violations. These individuals will receive their first appearances and arraignments in Fort Lauderdale. In order to accommodate the temporary setbacks of the disaster, continuances have been requested in many civil and criminal pending matters until September in order to enable the office to comply with its obligations under the law.

More than 35 of the 350 United States Attorney's office employees were permanently or temporarily rendered homeless. The office has provided assistance to these individuals and their families, and almost all employees have returned to work and have resumed their regular duties.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Independent Counsel

On July 9, 1992, a majority of the Democratic members of the Committee on the Judiciary, House of Representatives, requested the appointment of an independent counsel to investigate allegations of wrongdoing by unnamed "high-ranking officials of the Executive Branch." The letter of request states that the potential criminal conduct relates to activities by both unnamed current and former officials to illegally assist Iraq prior to its invasion of Kuwait and to attempt to conceal information about potential wrongdoing from Congress. Attorney General William P. Barr responded in a detailed letter dated August 10, 1992, that an examination of the Independent Counsel statute's clear language, as well as its legislative history, leads unavoidably to the conclusion that there is no basis for proceeding under the statute. A copy is attached at the Appendix of this Bulletin as Exhibit A.

The Attorney General stated that the Independent Counsel statute was never intended to supplant the Department's general responsibility to investigate allegations of wrongdoing within the government. The Department has a long record of vigorously investigating and prosecuting government officials who commit crimes against the United States. The Public Integrity Section in the Criminal Division was set up expressly for this purpose.

In this instance, career professionals in the Department carefully reviewed the letter of July 9, the Committee's hearings, and other materials in the Department's possession. Many of the matters raised in the letter had already been reviewed, and if appropriate, were under investigation by the Department. Further investigation was conducted by career prosecutors in the Public Integrity Section and agents of the FBI, both as part of the threshold review of the letter and as part of the Department's ongoing review and investigation of the underlying matters. Their work was reviewed by a number of career prosecutors in the Criminal Division. Without exception, every prosecutor reviewing the matter at every level of the Department is of the view that the criteria for invoking the Statute are not present.

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Food Stamp Trafficking

In a letter dated July 20, 1992, Secretary of Agriculture Edward Madigan thanked Attorney General William P. Barr, on behalf of the Department of Agriculture, for the legal services provided by the United States Attorneys' offices nationwide. Secretary Madigan said, "Your efforts to prosecute criminal and civil cases are vital to the integrity of our programs." The Secretary's letter further stated as follows:

> . . .We would like to advise you of a new project within the Food Stamp Program. With over $20 billion in benefit issuance to the public, the Food Stamp Program is the largest assistance program in the Department, and one of the largest in the Federal Government. The benefits, which are currently issued to over 25 million recipients, must be redeemed through the approximately 213,000 firms authorized by the Department to accept food stamps in exchange for eligible food items. While most coupons are used and redeemed properly, we know a significant amount of misuse exists. Of particular concern is food stamp trafficking, i.e., the exchange of coupons for cash at a discount. All such schemes must involve a redemption outlet, so we are concentrating our efforts at that level.
>
> The Department has initiated a nationwide review aimed at identifying, investigating and reporting to U.S. Attorney offices those authorized retailers engaged in major food stamp trafficking. Thousands of authorized food retailer redemption outlets are currently under analysis by the Food and Nutrition Service, the Agency responsible for administering the Food Stamp Program, and the Office of Inspector General. We expect numerous prosecutable cases will result from this activity. Techniques being used include the issuance of Inspector General subpoenas and service of search warrants in order to obtain wholesale food purchase records, to compare those records against food stamp redemptions over the same period of time.
>
> We believe Federal prosecution is a significant deterrent against food stamp trafficking. Therefore, it is our hope that as successful cases from this effort come to the U.S. Attorneys, full consideration will be given to their acceptance for expeditious prosecution. Such activity, especially in major food stamp issuance States like New York, Texas, California, Florida, Michigan, Illinois, and Ohio, is vital to the public image of the Food Stamp Program. We recognize the many competing matters presented to U.S. Attorneys, particularly in large metropolitan areas. However, any additional assistance your office can provide in promoting prosecution of food stamp trafficking cases will be greatly appreciated.

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Americans With Disabilities Act Conference In The Western District Of Michigan

On August 3, 1992, the United States Attorney's office, Western District of Michigan, under the direction of John A. Smietanka, the Civil Rights Division, under the direction of Assistant Attorney General John Dunne, and the Police Executive Research Forum, cosponsored a 3-day national conference for law enforcement officials. The conference entitled "Complying with the Americans with Disabilities Act: A National Conference for Law Enforcement," was held in Grand Rapids and was attended by approximately 200 people representing 36 states, including Guam and the District of Columbia. The Americans with Disabilities Act (ADA) requires state and local governments and private enterprises to deal with persons with disabilities, whether in employment decisions or in providing services, in a fair and non-discriminatory manner.

The main topic of discussion was Title II (Public Services: State and Local Government Activities) of ADA and how it affects law enforcement. Other issues were the hiring and selection process of law enforcement officials, medical examinations, psychological testing, as well as the vital steps necessary toward voluntarily complying with ADA regulations. John Dunne, the featured speaker at the conference, emphasized that education is the key to the successful implementation of ADA and its enforcement. Also addressing the conference was George Covington, Special Assistant on Disabilities Policy, Office of the Vice President of the United States.

In a letter dated April 21, 1992, to the conference attendees, Attorney General William P. Barr stated that the Department of Justice is fully committed to helping state and local governments meet their obligations under the Act. To this end, the Department is providing technical assistance concerning the Act's requirements. He said, "I hope that you will find the conference useful, and I can assure you that we are eager to work with you to achieve full compliance with the Act."

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Operation Illwind In The Eastern District Of Virginia

On August 28, 1992, Richard Cullen, United States Attorney for the Eastern District of Virginia, announced another milestone in the continuing Operation Illwind investigation. United Technologies Corporation (UTC) of Hartford, Connecticut, pled guilty to three felony counts in connection with the procurement of a Marine Corps Radar Control System, known as "ATACC," and involves UTC's wholly owned subsidiary, Norden Systems, Inc. UTC also pled guilty to one count charging that they conspired to defraud the United States and to convert procurement sensitive information. A third count charged the company with wire fraud, and a fourth count related to the Navy's procurement of F404 jet engines and involves UTC's Pratt and Whitney Division. This count charged UTC with conspiring to defraud the United States and to convert F404 pricing information.

As part of its plea agreement, UTC agreed to pay to the United States the maximum criminal fine of $500,000 per count for a total of $2 million. In addition, UTC agreed to pay $2.5 million in civil claims and $1.5 million for costs of investigation and prosecution.

United States Attorney Cullen said that this settlement raises to over $230 million the total of fines, penalties, civil recoveries and cost savings resulting from Operation Illwind.

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Major Civil Claims Settlement In The Northern District Of Georgia

On August 19, 1992, the Department of Justice announced that Rockwell International Corporation will pay the United States $5.1 million to settle civil claims the company withheld pricing data it should have disclosed to the government during contract talks with the Air Force. This agreement settles a civil suit alleging violations of the False Claims Act filed September 20, 1991, against Rockwell in the United States District Court in Atlanta.

In its complaint, the government alleged that Rockwell knowingly failed to provide the Air Force with cost or pricing data during the negotiations of two contracts in 1984 and 1987 for the procurement of module sets for the GBU-15 Modular Guided Weapons System, a precision guided bomb produced by Rockwell's Missile Systems Division in Duluth, Georgia. The government claimed the price paid by the Air Force for the weapons components was highly inflated because Rockwell did not disclose cost or pricing data such as lower quotes from subcontractors and data obtained during fact-finding visits to its subcontractors' facilities. Under the Truth in Negotiations Act, Rockwell was required to disclose to the Air Force during negotiations all cost and pricing data related to the cost of producing the units.

Stuart M. Gerson, Assistant Attorney General for the Civil Division, and Joe D. Whitley, United States Attorney for the Northern District of Georgia, said that during this period of tight budgets, especially in the area of defense procurement, it is imperative that the United States possesses all the information it needs to make the best choice in assuring that the public receives the highest value for its money in purchasing defense material.

[Note: On March 26, 1992, Rockwell International Corporation pled guilty to an information charging it with ten counts of environmental violations during its operation of the Rocky Flats Nuclear Weapons Plant near Boulder, Colorado, and agreed to pay $18.5 million in fines. See, United States Attorneys' Bulletin, Vol. 40, No. 4, dated April 15, 1992, at p. 98.]

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OPERATION WEED AND SEED

Executive Office For Weed And Seed

On August 10, 1992, George J. Terwilliger, III, Deputy Attorney General, announced the establishment of a Weed and Seed Executive Office under the direction of Deborah J. Daniels, United States Attorney for the Southern District of Indiana. This position became effective July 11, 1992, and will remain in effect until the end of the calendar year.

Mr. Terwilliger described the Weed and Seed program as a centerpiece of the Administration's efforts for long-term solutions to the crime problems in our urban areas. He said the test program was successful and we now have a Weed and Seed program in twenty United States Attorneys' offices. Ms. Daniels will coordinate and manage the Weed and Seed effort and report to the Deputy Attorney General.

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CRIME ISSUES

FBI's 1991 Uniform Crime Report

The FBI recently announced 1991 violent crime statistics indicating that the rate of reported violent crime increased by 3.6 percent between 1990 and 1991. In response, Attorney General William P. Barr stated that while the rate of violent crime in 1991 was unacceptably high, the increases in the crime rate over the last ten years are significantly lower than in the previous two decades. He said the FBI reports that the violent crime rate increased by 126 percent between 1960 and 1970 and by 64 percent between 1970 and 1980, but only by 22.7 percent between 1980 and 1990. The experience of the last 30 years makes clear that the imprisonment of chronic violent offenders has a dramatic positive effect on the amount of violent crime. In the 1960's and early 1970's, incarceration rates fell and crime rates skyrocketed. By contrast, when incarceration rates increased substantially in the 1980's, the rate of increase of crime was substantially reduced.

According to the FBI's statistics, much of the recent increase is a result of the juvenilization of violent crime. Attorney General Barr said that this trend clearly shows that we must enact wholesale reform of the juvenile justice system so that for the vast majority of juvenile offenders, their first brush with the law is their last, and that the small group of chronic, hardened, youthful offenders are incapacitated for extended periods. The long-term solution of the problem of juvenile crime falls largely outside of the law enforcement system. It requires strengthening those basic institutions -- the family, schools, religious institutions, and community groups -- that are responsible for instilling values and creating law-abiding citizens.

The Attorney General said, "There are two facts that hold true in the world of violent crime. First, a disproportionate amount of violent crime is committed by a relatively small group of chronic, violent offenders. This small segment of society commits a staggering number of crimes -- well over one hundred per year. Second, prosecutors and police officers must be given the tools necessary to identify and incarcerate this hard core group of repeat offenders. All too often, law enforcement's hard work is undermined by a 'revolving door justice' system that puts career criminals back on the street before they have served their entire sentence."

The Administration has a four-point agenda for fighting violent crime: 1) expanding resources to give law enforcement the tools it needs to fight the war against violent crime and drugs (federal law enforcement resources have increased by 60 percent over the last three years); 2) reform of the federal and state criminal justice systems; 3) high impact operations that target the most dangerous criminals through cooperative efforts with state and local law enforcement; and 4) integration of law enforcement with efforts to socially and economically revitalize the communities hardest hit by crime (Weed and Seed).

With regard to the second prong of reform, in the 1980's, federal law enforcement officers began to get the tools they needed to fight violent crime. Pretrial detention of dangerous defendants, adoption of sentencing guidelines, and construction of sufficient prison space helped keep violent offenders off the streets.

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Combating Violent Crime: 24 Recommendations To Strengthen Criminal Justice

Attorney General William P. Barr recently released a blueprint for fighting violent crime at the state and local level. (See, United States Attorneys' Bulletin, Vol. 40, No. 8. at p. 240.) The report sets forth the following 24 recommendations to strengthen the criminal justice system:

I. Protecting the community from dangerous defendants.

1. Provide statutory and, if necessary, constitutional authority for pretrial detention of dangerous defendants.

II. Effective deterrence and punishment of adult offender.

2. Adopt truth in sentencing by restricting parole practices and increasing time actually served by violent offenders.

3. Adopt mandatory minimum penalties for gun offenders, armed career criminals, and habitual violent offenders.

4. Provide sufficient prison and detention capacity to support the criminal justice system.

5. Provide an effective death penalty for the most heinous crimes.

6. Require able-bodied prisoners to work or to engage in public service to offset the costs of their imprisonment.

7. Adopt drug testing throughout the criminal justice process.

8. Utilize asset forfeiture to fight crime and to supplement law enforcement resources.

III. Effective deterrence and punishment of youthful offenders.

9. Establish a range of tough juvenile sanctions that emphasize discipline and responsibility to deter nonviolent first-time offenders from further crimes.

10. Increase the ability of the juvenile justice system to treat the small group of chronic violent juvenile offenders as adults.

11. Provide for use of juvenile offense records in adult sentencing.

IV. Efficient trial, appeal, and collateral attack procedures.

12. Enact and enforce realistic speedy trial provisions.

13. Reform evidentiary rules to enhance the truth-seeking function of the criminal trial.

14. Reform State habeas corpus procedures to put an end to repetitive challenges by convicted offenders.

V. **Detection and prevention of crime.**

15. Invest in quality law enforcement personnel and coordinate the use of social welfare resources with law enforcement resources.

16. Maintain computerized criminal history data that are reliable, accurate and timely.

17. Provide statutory authority for prosecutors to grant "use" and "transactional" immunity.

18. Provide statutory authority for electronic surveillance, pen registers, and trap and trace devices.

VI. **Respecting the victim in the criminal justice process.**

19. Provide for hearing and considering the victims' perspective at sentencing and at any early release proceedings.

20. Provide victim-witness coordinators.

21. Provide for victim restitution and for adequate compensation and assistance for victims and witnesses.

22. Adopt evidentiary rules to protect victim-witnesses from courtroom intimidation and harassment.

23. Permit victims to require HIV testing before trial of persons charged with sex offenses.

24. Notify the victim of the status of criminal justice proceedings and of the release status of the offender.

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District Of Columbia Receives Grant For Services For Victims Of Crime

On August 11, 1992, Jay B. Stephens, United States Attorney for the District of Columbia, announced that the Department of Justice has awarded a $324,000 grant to the Department of Human Services of the District of Columbia to provide services for victims of crime. This grant is from the Crime Victims Fund established by Congress in the Victims of Crime Act of 1984.

United States Attorney Stephens said that unlike most federal grants that are funded by taxpayers, this victim assistance grant is funded by criminals. The $324,000 grant comes entirely from federal criminal fines, penalties and bond forfeitures collected by United States Attorneys' offices and United States Courts. The funds will be used to assist organizations that counsel and assist families of homicide victims, rape victims, abused children and other victims of crime.

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Project Triggerlock
Summary Report

Significant Activity - April 10, 1991 through July 31, 1992
(In Cases Indicted Since April 10, 1991)

Description	*Count*	*Description*	*Count*
Indictments/Informations	6,437	Prison Sentences	19,432 years
Defendants Charged	8,200	Sentenced to prison	2,647
Defendants Convicted	4,416	Sentenced w/o prison or suspended	301
Defendants Acquitted	174	Average Prison Sentence	88 months
Defendants Dismissed	427	Number Sentenced to Life or More than 15 Years	465
Defendants Sentenced	2,948		

Charge Information

Defendants Charged Under 922(g) w/o enhanced penalty	2,144
Defendants Charged Under 922(g) with enhanced penalty under 924(e)	424
Defendants Charged Under 924(c)	3,055
Defendants Charged Under Both 922(g) and 924(c)	547
Total Defendants Charged Under 922(g) and 924(c)	6,170
Defendants Charged With Other Firearms Violations	2,030
Total Defendants Charged	8,200

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HEALTH CARE FRAUD

Operation Equine

On June 30, 1992, Attorney General William P. Barr and FBI Director William S. Sessions announced "Operation Goldpill," the most widespread criminal fraud investigation of the health care industry. (See, United States Attorneys' Bulletin, Vol. 40, No. 8, at p. 244.) Continuing its attack on health care fraud and abuse, the FBI has announced another initiative code-named "Operation Equine."

"Operation Equine" focuses on the use of blackmarket anabolic steroids. Over forty individuals in four states and two countries were indicted in July on felony charges in connection with illegal steroid distribution. Steroids are a synthetic version of the human hormone testosterone and are used extensively in veterinary medicine. Legitimately, steroids have limited human use, mainly in the treatment of certain diseases. Some athletes have found, however, that steroids can improve their performance. Taken internally, in conjunction with free-weight training, steroids promote extraordinary weight gain and muscular development. Over time, though steroids can cause severe harm to the body, such as hypertension, sterility, and irreversible heart and liver damage.

Two years ago, President George Bush signed the Anabolic Steroids Control Act of 1990, which placed twenty-seven anabolic steroids and their derivatives into the Schedule III classification of the Controlled Substances Act. This strictly limits how steroids can be used. Weight gain and enhancing athletic performance are not legitimate uses of steroids, even if authorized by a physician. Illegal steroid activity falls in three general areas: 1) by dispensing or selling legitimately made anabolic steroids; 2) by illegally manufacturing and selling steroids using clandestine laboratories; and 3) smuggling steroids into the United States for distribution on the black market. Director Sessions said that it has been estimated that more than one million people nationwide use steroids illegally and many people are not aware of the serious risks involved.

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Health Insurance Fraud In The Western District Of Washington

On August 21, 1992, Mike McKay, United States Attorney for the Western District of Washington, announced that a federal grand jury in Seattle returned a 44-count Indictment charging three men with organizing and executing a massive scheme to defraud thousands of persons and associations throughout the United States who had paid over $6 million in health insurance premiums for promised group health insurance coverage that was never provided.

During the 1980s, many individuals and small business associations throughout the United States sought relief from the rise in group health insurance costs by becoming members of Multiple Employers Welfare Arrangements ("MEWAs"). The purpose of MEWAS was to help obtain more affordable, fully insured, group health insurance coverage for individuals and businesses. The Indictment alleges that during the period from May, 1988 through October, 1989, the three defendants made sales presentations to small business groups, underpricing competing group plans, such as Blue Cross/Blue Shield and Aetna. Instead of arranging for group health insurance plans backed by legitimate and bona fide insurance companies, they created the appearance of legitimate full health insurance coverage but directed substantial sums in premium dollars for their own personal use. Ultimately, they converted more than $1 million in premium payments to their own benefit.

The Indictment concludes a two-year investigation by agents of the Office of Labor Racketeering, U.S. Department of Labor, San Francisco; the U.S. Postal Inspection Service, Seattle; the Criminal Investigations Division of the Internal Revenue Service in Seattle; the Washington State Insurance Commission; and prosecutors from the United States Attorney's office in Seattle.

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Stiff Sentence Imposed In Generic Drug Industry Case In The District Of Maryland

On July 10, 1992, a former top executive of Bolar Pharmaceutical Company, was sentenced to four years in prison and fined $1 million in federal court in Baltimore. The Executive Vice President of the drug company and seven others were accused of perpetrating a scheme to rig testing of their products on human subjects in their rush to get Food and Drug Administration (FDA) approval of various generic medications ahead of competitors in the multibillion-dollar generic drug industry. In addition, the members of the conspiracy took elaborate steps to obstruct the FDA, as well as Congressional and grand jury investigations of Bolar.

Bolar Pharmaceutical pleaded guilty last year to fraud and was fined $10 million after admitting it falsified drug testing records. The company substituted brand-name products for Bolar drugs in equivalency tests required by the FDA, including a popular hypertension medication. This and other Bolar products had more than $192 million in sales before they were taken off the market in 1989 and 1990. Bolar Pharmaceutical, once the nation's largest generic drug manufacturer, is headquartered in Copiague, New York, and continues to operate under new leadership.

These charges are the result of a joint investigation of fraud and corruption in the generic drug industry conducted by the United States Attorney's office for the District of Maryland; the Office of Consumer Litigation of the Department of Justice; the FDA; and the Inspector General of the Department of Health and Human Services. To date, thirty individuals and eight companies have been convicted in the probe. The Assistant United States Attorneys responsible for the outstanding results in this case are: ***Gary P. Jordan, Raymond Bonner, Christopher Mead,*** and ***Robert Thomas.***

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Guilty Pleas In the Eastern District Of Louisiana

On June 30, 1992, ***Harry Rosenberg, United States Attorney for the Eastern District of Louisiana,*** announced the indictments of five former hospital administrators for their roles in schemes that defrauded the hospital of a substantial sum of money in excess of $1,500,000.00 by using false invoices and nominee corporations. This prosecution is part of a continuing nationwide effort by the Department of Justice to eliminate health care fraud. (See, United States Attorneys' Bulletin, Vol. 40, No. 8, dated August 15, 1992, at p. 245.)

On August 19, 1992, all five defendants entered pleas of guilty to conspiracy to commit mail fraud, theft by fraud from a company receiving in excess of $10,000.00 from a federal agency, and illegal financial transactions. The maximum penalty under the applicable criminal statutes that could be imposed by the Court range from five to thirty-five years imprisonment, and fines from $250,000.00 to $1 million. United States Attorney Rosenberg said, "Fraud within the health care industry adds directly to the spiraling cost of hospitalization. It imposes a financial hardship on those already suffering from illness or in dire need of medical attention. The Health Care Fraud Task Force of the United States Attorney's office will continue to undercover and vigorously prosecute these crimes. The guilty pleas by these hospital executives does not end this complex investigation."

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FINANCIAL INSTITUTION FRAUD

Congressional Hearing On Financial Institution Fraud

On August 11, 1992, Ira H. Raphaelson, Special Counsel for Financial Institution Fraud, Office of the Deputy Attorney General, testified before the House Committee on Banking, Subcommittee on Financial Institutions, Supervision, Regulation and Insurance. Mr. Raphaelson provided a historical overview, followed by a discussion on resource allocations, case identification and initiation, enhanced training, reporting, and monetary enforcement.

Mr. Raphaelson also advised that on June 15, 1992, the Senior Interagency Group, which he chairs, formalized enhanced Policy Guidelines to facilitate monetary enforcement and data collection. A copy of the National Policy on Collection and Reporting Procedures for Restitution Payable to Financial Institution Regulatory Agencies is attached at the Appendix of this Bulletin as Exhibit B.

Studies conducted at Mr. Raphaelson's request and reported to Congress since March, 1992 indicate as follows:

- That by aggressively pursuing loss-based restitution regardless of the defendant's present ability to pay, the Department has created an inevitable gap between that which is ordered and that which is collected;

- In most cases, there is little or nothing left to collect or recover at the conclusion of the criminal process when sentencing occurs;

- A significant portion of cases involve judgement and commitment orders drafted by the courts in such a way that fines and orders of restitution are not immediately enforceable, and

- Considering all of the circumstances surrounding criminal debt collection, and debt collection in financial institution fraud cases in particular, the recovery of $37 million in court ordered restitution is not an insignificant accomplishment.

Additionally, the Justice Department has obtained more than $110 million in other forms of recoveries such as forfeitures and disgorgements in these cases -- $67 million of which was recovered in savings and loan cases. Regulatory agencies have recovered hundreds of millions more through administrative process and civil litigation, sometimes with the assistance of Justice Department attorneys as was the case in OTS' recovery of $41 million in the Lincoln Savings-related Kaye Scholer case.

Mr. Raphaelson reemphasized Attorney General Barr's unwavering commitment to vigorous pursuit of financial institution fraud -- the number one white collar crime priority of the Department of Justice.

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Financial Institution Fraud Updates

On August 17, 1992, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through July 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. All numbers are approximate, and are based on reports from the 94 offices of the United States Attorneys and from the Dallas Bank Fraud Task Force.

Savings And Loan Prosecutions

Description	Count	Description	Count
Informations/Indictments	732	CEOs, Chairmen, and Presidents:	
Estimated S&L Losses	$ 8,437,675,811	Charged by indictment/ information	139
Defendants Charged	1,204	Convicted	106
Defendants Convicted	925 (93%)	Acquitted	10
Defendants Acquitted	71 *		
Prison Sentences			
Sentenced to prison	602 (78%)		
Awaiting sentence	168	Directors and Other Officers:	
Sentenced w/o prison or suspended	170	Charged by indictment/ information	200
Fines Imposed	$11,310,836	Convicted	173
Restitution Ordered	$482,849,176	Acquitted	7

* 21 borrowers dismissed in a single case.

Bank Prosecutions

Informations/Indictments	1,456	CEO's, Chairmen, and Presidents:	
Estimated Bank Loss	$3,991,260,753	Charged by Indictments/ Informations	142
Defendants Charged	2,057	Convicted	122
Defendants Convicted	1,669	Acquitted	1
Defendants Acquitted	41		
Prison Sentences	2,239 years		
Sentenced to prison	1,108		
Awaiting sentence	245	Directors and Other Officers:	
Sentenced w/o prison or suspended	328	Charged by Indictments/ Informations	452
Fines Imposed	$ 6,385,661	Convicted	404
Restitution Ordered	$396,674,001	Acquitted	7

Credit Union Prosecutions

Informations/Indictments	87	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$85,205,669	Charged by Indictments/ Informations	10
Defendants Charged	109	Convicted	9
Defendants Convicted	98	Acquitted	0
Defendants Acquitted	1		
Prison Sentences	129 years		
Sentenced to prison	69		
Awaiting sentence	17	Directors and Other Officers:	
Sentenced w/o prison or suspended	12	Charged by Indictments/ Informations	58
Fines Imposed	$ 15,700	Convicted	55
Restitution Ordered	$13,285,929	Acquitted	0

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POINTS TO REMEMBER

Falsified Documents From The Republic Of Columbia

The Office of International Affairs in the Criminal Division ("OIA") has become aware of at least two occasions on which fraudulent documents, purported to be official documents from the Republic of Colombia, have been offered into evidence by defendants in the Southern District of Florida. In one instance, a defendant in a drug smuggling case presented to the court an alleged declaration by a co-conspirator made before a Colombian judge in Cali, where the co-conspirator admitted placing the cocaine in the luggage of the "innocent" defendant. The prosecutor became suspicious of the document and asked OIA to verify its authenticity. OIA, working through the Colombian Prosecutor General's office, contacted the Colombian judge who purportedly witnessed the statement. The judge confirmed that the document was a forgery and provided OIA with a certification to that effect. Upon being confronted with the Colombian judge's certification, the defendant withdrew the document. Another case involved a defendant who produced a document, notarized and certified by a Columbian official, showing that the defendant was a minor. OIA was able to locate the official who had allegedly issued the certification and was advised that the document was also a forgery.

In light of the foregoing, all federal prosecutors are advised to be on the alert for the possibility that any document purporting to be from Colombia may be of questionable origins. This may even include documents certified and authenticated by U.S. consular officials in Colombia or Colombian consular officials in the United States. If you are presented with suspicious Colombian documents, please contact Omar Ojeda, Trial Attorney, Office of International Affairs, (202/514-000) for assistance in verifying the origin and authenticity of such documents.

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Identification Badges

The Executive Office for United States Attorneys reminds all United States Attorneys' office personnel of Department of Justice policy and requirements concerning the issue, use, and control of identification badges. DOJ Order 1610.1A (10) states as follows:

> 10. IDENTIFICATION BADGES. Only Department law enforcement employees who are authorized by law to carry firearms and make arrests as part of their official duties may be issued or carry on their persons law enforcement identification badges. Authorized badges will remain the property of the U.S. Government, and will be controlled and protected against unauthorized use, using the same guidelines that are established for identification documents.

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United States Attorneys' Manual Bluesheets

Robert S. Mueller, III, Assistant Attorney General, Criminal Division, has issued two United States Attorneys' Manual bluesheets: USAM 9-16.000 - Approval Requirement for Alford Pleas - Reaffirmation and Clarification, dated July 22, 1992, and USAM 9-100.150 - Approval Requirement for Analogue Prosecutions under the Controlled Substances Analogue Enforcement Act - 21 U.S.C. §§ 802(32) and 813, dated July 29, 1992. Copies are attached at the Appendix of this Bulletin as Exhibit C.

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SENTENCING REFORM

Federal Prison Terms Under Sentencing Guidelines

In the United States Attorneys' Bulletin, Vol. 40, No. 7, dated July 15, 1992, page 212 of "Federal Prison Terms Under Sentencing Guidelines" was not printed. Attached at the Appendix of this Bulletin as Exhibit D is a reprint of the entire article. Exhibit D, "Federal Sentencing in Transition, 1986-90," to which the article refers, is not included in this report.

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Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 5, No. 1, dated August 26, 1992, is attached as Exhibit E at the Appendix of this Bulletin.

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Federal Sentencing Guide Newsletter

Attached at the Appendix of this Bulletin as Exhibit F is a copy of Federal Sentencing and Forfeiture Guide Newsletters, Volume 3, No. 20, dated July 27, 1992, and Volume 3, No. 21, dated August 10, 1992, which is published and copyrighted by James Publishing Group, Santa Ana, California.

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LEGISLATION

On August 12, 1992, Congress began a four-week annual recess. The United States Senate will return on September 8; the House of Representatives will return one day later.

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CASE NOTES

EASTERN DISTRICT OF VIRGINIA

Attached at the Appendix of this Bulletin as Exhibit G is a copy of a major forfeiture opinion in United States v. Swank Corp., _____ F.Supp. _____ (E.D.Va., July 1, 1992). This important forfeiture opinion was obtained in the Eastern District of Virginia (Richmond Division), regarding payment of attorney's fees from forfeitable assets, and their ability to forfeit an entire corporation. In this case, the government ended up forfeiting $1,040,655 and established a fund from corporate assets to pay approximately $3,500,000 in restitution to the scheme's victims. ***Wingate Grant*** and ***S. David Schiller,*** Assistant United States Attorneys for the Eastern District of Virginia, provided the following summary of what may be the first published decision on these issues. The decision also advances the use of forfeiture procedures in mail fraud, corporate fraud, and similar cases.

Defendant corporation, its CEO, and eleven salesmen were indicted for mail and wire fraud, as well as money laundering, based on a scheme to defraud customers of the defendant office supply products company. Upon return of the indictment, the court entered an ex parte restraining order enjoining the defendants from disposing of any property as described in the indictment or any other property in which they had an interest. The corporation itself was listed in the indictment as property involved in the money laundering transactions, and forfeiture of the corporation was sought on this basis. The defendants thereafter sought to lift the restraint on assets acquired prior to the mail fraud scheme in order to hire counsel of their choice arguing that such previously acquired property could not have been involved in the illegal activity. Alternatively, they argued that the corporate assets should be sufficient to pay any judgment of forfeiture. The court held:

1. The date of acquisition of assets was immaterial as the whole purpose of the substitute assets provision in the forfeiture statute, 21 U.S.C. §853(p), is to enable the government to satisfy an order of forfeiture out of property that is not otherwise subject to forfeiture.

2. Because the corporation itself was subject to forfeiture as property involved in the money laundering offense, the relation back doctrine of 21 U.S.C. §853(c) precluded use of the corporate assets to satisfy any forfeiture judgment. Such forfeiture judgment would be in addition to forfeiture of the corporation itself.

3. Defendants argued that the corporation could not be forfeited because the amount of laundered money was de minimis in relation to the value of the corporation and the legitimate business it conducted. The court rejected this argument stating that to forfeit a business the quantity of money involved can be relatively small so long as the quality of the relationship between the forfeitable property and the crime is substantial.

Upon conclusion of this case, in which all of the defendants have now pled guilty, U.S. District Court Judge Richard L. Williams commended Assistant United States Attorneys Grant and Schiller, and stated that this case presented a broad spectrum of legal and emotional issues that required a measure of skill and professionalism above and beyond the average case. He said, "It is always a pleasure for a judge to preside over a legal matter where the lawyers perform in an exemplary fashion."

If you have any questions or inquiries, please contact Wingate Grant or S. David Schiller at (804) 771-2186.

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CIVIL DIVISION

D.C. Circuit Grants Stay Pending Appeal From Preliminary Injunction Blocking Defense Department From Asking Questions In National Security Check

The Defense Department conducts periodic rechecks of civilian employees with national security clearances and also investigates the reliability of employees holding certain sensitive jobs. On April 15, 1992 Judge Harold Greene issued a preliminary injunction blocking this process insofar as DOD sought to learn about employees' criminal records, financial difficulties, drug and alcohol abuse and mental impairments.

The D.C. Circuit has expedited our appeal and has now granted our motion for a stay pending appeal (over the partial dissent of Judge Wald). The grant of the stay should have a helpful effect on the numerous lawsuits which challenge various aspects of the Government's security check programs.

National Federation of Federal Employees v. Greenberg, No. 92-5216 (August 7, 1992). DJ # 35-16-3560.

Attorneys: Barbara L. Herwig - 202-514-5425
Leonard Schaitman - 202-514-3441
Freddi Lipstein - 202-514-4815

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Second Circuit Orders Veteran's Complaint Against VA Dismissed For Lack Of Jurisdiction

John Larrabee is a disabled veteran of the United States Army. A non-service-related head injury left him with severe cognitive and behavioral problems. In June, 1988, he checked into the psychiatric unit of a VA hospital, where he has lived ever since. The VA, after giving him what it considered appropriate treatment, attempted to transfer him to a private nursing home for long-term care. Larrabee, via his conservator, sued, claiming that the VA had never treated his head injury, and that its attempt to transfer him violated his statutory right to treatment, his substantive due process right to minimally adequate medical care, and his procedural due process right to sufficient procedure before transfer.

The Second Circuit has now held that 38 U.S.C. § 511 bars all of Larrabee's claims. The court noted its prior holding that district courts have jurisdiction over facial constitutional challenges to veterans benefits legislation. But it held that all other claims, even constitutional ones, against the VA in veterans benefits matters must be brought via the exclusive appellate procedures Congress has established, not by a suit in district court. The court remanded the case to district court with instructions to dismiss.

John Larrabee v. Edward Derwinski, Secretary of Veterans Affairs, No. 92-6059 (June 26, 1992). DJ # 151-14-431.

Attorneys: Mark B. Stern - 202-514-5089
Jonathan R. Siegel - 202-514-4821

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Fifth Circuit Holds That Time For Filing An Employment Discrimination Complaint Begins To Run From Date Of Personnel Action, Not From Date Employee Apprehends That Employment Decision Was Motivated By A Discriminatory Purpose

The Air Force employed plaintiff as an EEO officer. After several women complained that he had sexually harassed them, the Air Force proposed to fire him. Plaintiff resigned the next day. Three years later, plaintiff allegedly discovered that an Anglo employee, who had also been accused of sexual harassment, had been investigated under different procedures and ultimately was not discharged. Within 30 days, plaintiff filed an informal complaint of discrimination, alleging that he had been forced to resign because he was Hispanic.

The Fifth Circuit has now held that the administrative charge filing period began to run with plaintiff's separation from employment.

Pacheco v. Rice, No. 91-5768 (July 1, 1992). DJ # 35-76-355.

Attorneys: Marleigh D. Dover - 202-514-3511

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Ninth Circuit Holds That A Denial Of Substitution Under The Westfall Act Is An Immediately Appealable Order; But, In Affirming That A Denial Of Qualified Immunity Is Also Immediately Appealable, The Court Holds That "One Such Interlocutory Appeal Is All That A Government Official Is Entitled To."

The Civil Division took an interlocutory appeal of the district court's failure to substitute the United States as defendant under the Westfall Act, and challenged as well the district court's denial of our motion to dismiss Bivens claims on qualified immunity grounds. The Ninth Circuit found that it had jurisdiction over both issues under the Cohen collateral order doctrine, and ordered the district court to substitute the United States as defendant on the common law tort counts. However, while finding jurisdiction to hear the qualified immunity appeal, the Court announced that henceforth, in the Ninth Circuit, one interlocutory appeal, taken either at the motion to dismiss or summary judgment stage, is "all that a government official is entitled to and all that we will entertain." The court then affirmed the district court's denial of qualified immunity -- meaning that in this case, if our summary judgment motion is denied, the defendant will have to stand trial.

Pelletier v. Behrens, June 29, 1992 (Nos 89-56265, 92-55023).
DJ # 145-12C-3950.

Attorneys: Barbara L. Herwig - 202-514-5425
Richard A. Olderman - 202-514-1838

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Ninth Circuit Holds That Question Of Whether A Federal Officer Is Entitled To Qualified Immunity Is A Question Of Law That The Court Must Decide At The Earliest Possible Point In The Litigation

Ten members of the organization Act Up! participated in a noisy demonstration outside the Food and Drug Administration offices to protest federal policies regarding testing and approval of drugs to combat AIDS. The United States Marshals Service arrested the demonstrators, loaded them in a van, and took them to a holding cell at the United States Courthouse where they were strip searched. The demonstrators brought a Bivens suit against the deputies for an unlawful search under the Fourth Amendment. The deputies moved for summary judgment on the ground that they were entitled to qualified immunity because they had reasonable suspicion that the demonstrators carried contraband in their winter clothing. The district court refused to consider the qualified immunity issue, holding that the question of whether the deputies reasonably could have believed that they had reasonable suspicion was a question for the jury.

The court of appeals has now reversed and remanded the case for a determination on the qualified immunity issue. The court held that qualified immunity is a question for the court, and not the jury, thereby reversing a position it has taken in previous cases. It viewed the facts as undisputed in this case and concluded that the determination should have been made at summary judgment. Only if a genuine issue of fact exists, the court emphasized, is the district court entitled to wait until after trial to decide the issue. Regardless of when the issue is decided, however, the court of appeals appears to have accepted the position that the question remains with the court. This decision will greatly aid Bivens defendants in the Ninth Circuit.

Act Up! Portland v. Bagley, No. 90-35888 (July 24, 1992). DJ # 157-61-1924.

Attorneys: Barbara Herwig - 202-514-5424
Barbara C. Biddle - 202-514-2541
Lori M. Beranek - 202-514-1278

* * * * *

Ninth Circuit Holds That Agency May, Consistent With The Fourth Amendment, Require Employees In Public Health, Safety-Sensitive, And Security-Sensitive Positions To Submit To Drug Tests Based On A Reasonable Suspicion Of Off-Duty Drug Use

Unions representing Department of Labor ("DOL") employees brought suit seeking to enjoin DOL from implementing its reasonable suspicion drug testing program. The district court held that the Fourth Amendment barred DOL from drug testing employees in safety-sensitive and security-sensitive positions based on a reasonable suspicion of off-duty drug use. We appealed, and the Ninth Circuit has now reversed.

The panel observed that the drug testing provision was being challenged on its face, and the unions therefore had the burden of establishing that "no set of circumstances exists under which the [provision] would be valid." The unions failed to meet this burden, held the panel, because the "need to preserve public health and safety and national security clearly justifies conducting a search when a reasonable suspicion is based on actual observation of [a relevant employee's] off-duty illegal drug use or impairment." The panel noted, moreover, that DOL's reasonable suspicion drug testing procedures minimize the intrusion on employees' privacy interests and adequately protect employees from arbitrary and unreasonable drug testing.

This is the first appellate decision explicitly upholding the testing of employees in safety-sensitive and security-sensitive positions based on a reasonable suspicion of off-duty drug use.

AFGE v. Martin, No. 91-15829 (July 7, 1992). DJ # 35-11-741.

Attorneys: Leonard Schaitman - 202-514-3441
E. Roy Hawkens - 202-514-5714

* * * * *

False Claims Cases

District Court For The District Of New Hampshire Holds Reverse False Claims Provision Of 1986 False Claims Act Amendments Can Only Be Given Prospective Effect

The court held that "reverse false claims" were not a source of liability under the False Claims Act prior to the amendments of 1986. The court further concluded that because the "reverse false claims" provision of the 1986 amendments created liability where it did not exist before, it affected the defendants' substantive rights and should only be given prospective effect.

United States v. American Heart Research Foundation Inc.,
Civ. No. 90-372-S (D. N.H. July 6, 1992).

Attorney: Paul Scott - (202) 307-0237

* * * * *

Miscellaneous Qui Tam Decisions

United States ex rel. Quinn, Civ. No. 91-2081 (HHG) (D.D.C. July 14, 1992) case dismissed on defendant's motion because (1) suit was based in part on information acquired through discovery in separate civil suit, which therefore constituted a public disclosure in a "civil hearing" under 31 U.S.C. § 3730(b)(4)(A), and (2) relator did not have requisite "direct or independent" knowledge; non-public information was insufficient because it was merely "background" information that enabled relators to identify the significance of the publicly disclosed information or was the results of an independent investigation based on the non-public information).

Attorney: Dara Pfeiffer (202) 514-9473.

* * * * *

TAX DIVISION

Federal Circuit Sustains Judgment In Favor Of Government In Case Involving Deductibility Of Department Of Energy Penalty Payments

On July 27, 1992, the Federal Circuit affirmed the favorable judgment of the Claims Court in Arkla, Inc. v. United States. In 1976, the Department of Energy commenced an audit of the taxpayer to determine whether it had violated federal regulations governing the pricing of petroleum products. Under these regulations, producers of petroleum products who charge amounts in excess of the amounts allowable under the pricing regulations are required to "refund" overcharges to the Department of Energy. For the years 1977 through 1979, the taxpayer claimed $6.1 million in deductions with respect to its potential liability to make overcharge payments to the Department of Energy. In 1980 and 1981, the taxpayer signed consent orders settling the Department of Energy's claim for approximately $2.8 million. On audit, the Internal Revenue Service disallowed the taxpayer's deductions for the years 1977 through 1979, determining that all the events necessary to permit a deduction in those years had not occurred. The taxpayer then filed a refund suit in the Claims Court, which sustained the Internal Revenue Service's position. The Federal Circuit affirmed, holding that taxpayer's liability was both contested and contingent during those years and that, accordingly, the "all events" test had not been met.

* * * * *

Fifth Circuit Sustains Liberal Application Of The Relief Provisions Allowing For The Delayed Perfection Of Estate Tax "Special Use" Valuation Elections

The Fifth Circuit on August 4, 1992, affirmed the adverse decision of the Tax Court in Estate of Malcolm McAlpine, Jr. v. Commissioner, concluding that the estate was entitled to special use valuation for property devised to three trusts despite the fact that the trust beneficiaries had not signed the recapture agreement required by Section 2032A of the Code. Under that section, certain property (principally property used for agricultural purposes) may be valued for estate taxes on the basis of its current use (as compared to its highest and best use) provided the heirs agree to the "recapture" of the resulting estate tax savings if they cease to use the property for a "qualified" use during the ten years after the decedent's death. The Tax Court held that the signature of the trustee of the trusts on the recapture agreement was sufficient to trigger the relief provisions of Section 2032A(d)(3), which generally provides that missing signatures on a recapture agreement may be supplied by the estate within 90 days of its being notified of an omission by the IRS.

We appealed this decision, arguing that the legislative history of Section 2032A(d)(3) made clear that it was to apply only where the agreement, as originally filed, was signed by at least one of the parties having a present or remainder interest (other than an interest having a relatively small value) in the trust property. We contended that the trustee did not possess such an interest in the estate property. Although the Fifth Circuit recognized that the legislative history of Section 2032A supported our position, it concluded that the trustee, by virtue of his control of the trusts created by the estate, had a sufficient interest in the property of the estate as to make the estate's election effective.

* * * * *

Fifth Circuit Upholds Tax Refund Based On Judicial Restructuring Of Multi-Party Transaction

On July 29, 1992, the Fifth Circuit affirmed the judgment of the District Court awarding the taxpayer a refund of $9 million in Adobe Resources Corp. v. United States. This case presented the question whether a new corporation formed from the tax-free consolidation of two existing corporations can carry post-consolidation tax losses back to one of the predecessor corporations. The Internal Revenue Code generally prohibits a corporation acquiring property in a tax-free reorganization from carrying post-acquisition losses incurred by it back to the acquired corporation's pre-merger years. When there is a tax-free consolidation of two corporations (i.e., a new corporation acquires the assets of the two corporations), this general rule prohibits the acquiring corporation from carrying post-acquisition losses incurred by it back to either of the acquired corporations' pre-merger years. Treasury regulations applicable to corporations filing consolidated returns provide an exception to this general rule under certain limited circumstances.

The District Court, pursuant to a jury verdict, permitted the carryback of losses. The Fifth Circuit affirmed, reasoning that the transaction could be restructured to result in the desired tax consequences. However, it is not certain that the parties would have agreed to structure the transaction in the manner suggested by the Court in the first instance, and the Court's decision appears to depart from "the established tax principle that a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred." Commissioner v. National Alfalfa Dehydrating, 417 U.S. 134, 148 (1974). We are currently considering whether to file a petition for rehearing.

* * * * *

Seventh Circuit Renders Decision That Will Make It Easier For Insurance Companies To Qualify For The Favorable Tax Treatment Extended To Life Insurance Companies

On July 24, 1992, the Seventh Circuit reversed the favorable judgment of the District Court in Harco Holdings, Inc. v. United States. This case, which involved $800,000, presented the question whether accrued unpaid losses should be taken into account in determining whether an insurance company is a life insurance company for tax purposes. Under the Internal Revenue Code, an insurance company is entitled to the favorable tax treatment extended to life insurance companies only if "its life insurance reserves . . . comprise more than 50 percent of its total reserves." (It thus behooves an insurance company seeking favorable tax treatment to increase the amount of its life insurance reserves and to deflate the amount of its "total reserves.") The term "total reserves" is defined as the sum, inter alia, of insurance reserves, plus "unpaid losses (whether or not ascertained)." The district court ruled that both accrued and unaccrued unpaid losses must be taken into account in determining a taxpayer's total reserves, which resulted in the taxpayer failing to qualify as a life insurance company.

The Seventh Circuit reversed, holding that the statutory scheme required a more limited reading of the term "unpaid losses." It determined that accrued unpaid losses constituted amounts payable and therefore should not be included in the taxpayer's total reserves. Thus, the taxpayer was entitled to the favorable tax treatment extended to life insurance companies. The Seventh Circuit's decision is in conflict with decisions of the Ninth Circuit and the Court of Claims.

Industry-wide this issue could have substantial revenue consequences.

* * * * *

Seventh Circuit Sustains Imposition Of The Excise Tax On "Prohibited Transactions" With Qualified Pension Trusts Against Trustee Of The Teamsters' Pension Fund

On August 7, 1992, the Seventh Circuit affirmed the favorable decision of the Tax Court in Thomas O'Malley v. Commissioner, which involved the imposition of an excise tax on a former trustee of the Pension Fund of the International Brotherhood of Teamsters (the "Pension Fund"). Under the Internal Revenue Code, an excise tax is imposed on the trustee of a pension plan if he participates in certain transactions that are viewed as compromising his fiduciary duty with respect to the plan. These "prohibited transactions" include, among other things, the expenditure of plan assets for a trustee's individual benefit.

The taxpayer here was previously convicted of bribery and fraud in connection with his activities as a trustee of the Pension Fund. The attorneys' fees and costs for his criminal defense were paid for by the Pension Fund. As a result, the Internal Revenue Service determined that the taxpayer was liable for the excise tax imposed on "prohibited transactions." The Tax Court agreed, and the taxpayer appealed, contending that he did not "participate" in the transaction because he abstained from voting on whether the Pension Fund should pay his attorneys' fees. The Seventh Circuit found this contention without merit, holding that the taxpayer's implied request for, and acceptance of, free legal defense constituted participation in the prohibited transaction.

* * * * *

Eleventh Circuit Affirms Denial Of $1.7 Million Tax Claim In Bankruptcy

In an unpublished one-word order issued July 13, 1992, the Eleventh Circuit affirmed the decision of the district court in Norris Grain Co. v. United States. After filing for bankruptcy, Norris Grain Co. filed an amended 1984 income tax return reporting tax owing of almost $1.6 million. A copy of that return was sent to the Internal Revenue Service office in charge of filing claims in bankruptcy cases. The Internal Revenue Service had previously filed a timely claim in the bankruptcy proceeding for $400 in interest arising from debtor's failure to pay timely the tax shown on its original return. Although the Internal Revenue Service received the amended return with sufficient time to file a timely amended claim, it did not file such a claim until well after the bar date for filing claims passed. The debtor thereafter objected to the Internal Revenue Service's amended claim as untimely, and the Bankruptcy Court denied the claim. The District Court affirmed.

On appeal, we argued that the Bankruptcy Court should have accepted the late-filed claim as the debtor acknowledged that it owed the tax and even provided for its payment in its reorganization plan. We further argued that debtor's own disclosure statement, which was filed before the bar date, served as an informal proof of claim for the Internal Revenue Service because it stated that the taxes were owing. The Eleventh Circuit affirmed the decision of the District Court without addressing the arguments presented by either side.

* * * * *

Physicians' Association Files Suit Seeking Refund Of Taxes On Unrelated Business Income

The American Academy of Family Physicians, a nonprofit organization, has filed a refund suit in the Western District of Missouri to recover over $3.2 million in taxes and interest on income alleged not to be associated with the organization's tax-exempt functions (so-called "unrelated business income"). The Academy sponsors group life and disability insurance plans, and the IRS determined that interest payments plaintiff receives on the reserves maintained by the insurer were unrelated business income. The IRS also determined that a portion of plaintiff's dues were actually circulation income from plaintiff's monthly publication, which is sent free of charge to members. In addition, the IRS determined that plaintiff's net receipts from its publication of monographs were taxable income.

The Academy paid the taxes resulting from these IRS determinations and now seeks a refund of those taxes.

* * * * *

ADMINISTRATIVE ISSUES

CAREER OPPORTUNITIES

Deputy Chief, Public Integrity Section, Criminal Division

The Office of Attorney Personnel, Department of Justice, is recruiting a Deputy Chief for the Public Integrity Section, Criminal Division. Responsibilities will include: supervising the conduct of investigations and litigation carried on by the lawyers and support staff of the Section (approximately 27); directly supervising prosecutions conducted by Section attorneys and coordinating the prosecution by U.S. Attorneys of criminal cases involving abuse of the public trust by elected or appointed public officials at all levels of government and of election crimes, the Independent Counsel Act, conflicts of interest and corruption cases brought under the Hobbs Act; supervising the preparation and review of indictments; supervising the drafting of Congressional testimony for pertinent hearings; and coordinating Department of Justice relations with Federal Agency Inspectors General and other interested and involved Agencies and Departments on related matters.

Qualifications for this position include: 1) experience in developing and litigating federal criminal cases; 2) experience dealing with complex legal and policy issues; 3) familiarity with federal regulatory and investigatory agencies; 4) significant experience in supervising the development and prosecution of criminal cases and reviewing the work product of attorneys; 5) ability to establish and maintain harmonious relationships with the public, members of Congress, and federal officials involved in public corruption related matters; 6) ability to formulate and implement Departmental policies on all matters pertaining to assigned areas; and 7) ability to serve as spokesperson for one's organization. Experience dealing with Independent Counsel Act and/or Election Crimes cases is highly desired.

Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and have at least four years post J.D. experience. Applicants are to submit a current Application for Federal Employment (SF-171) and a supervisory performance appraisal to: U.S. Department of Justice, Public Integrity Section, P.O. Box 27518, Washington, D.C. 20038, Attn: Michael Shepard.

Current salary and years of experience will determine the appropriate grade and salary level. The possible grade/salary range is GM-15 ($64,233 - $83,502). This advertisement will be open until filled.

* * * * *

Bureau of Prisons, Phoenix

The Office of Attorney Personnel Management, Department Of Justice, is recruiting an attorney for the Human Resources Management Division of the Federal Bureau of Prisons office in Phoenix, Arizona. Responsibilities will include providing legal advice and assistance to central office and field managers with regard to disciplinary and adverse personnel actions and other matters covered by the Federal Service Labor-Management Relations Statute (Chapter 71 of Title 5, U.S.Code); and acting as principal attorney in preparing and presenting the government's case before Administrative Judges of the Merit Systems Protection Board, Administrative Law Judges of

the EEOC and Federal Labor Relations Authority and independent arbitrators appointed by the Federal Mediation and Conciliation Service. The selectee will be responsible for all phases of case processing from pre-action inquiries through preparation of post-hearing briefs and appeals to administrative authorities. Other significant duties include participation in the negotiation and administration of a nationwide collective bargaining agreement and with ongoing labor relations with the union; and serving as an instructor on labor relations matters in management training programs.

Frequent travel to field stations (up to 50 percent of time) will be required. Preference will be given to applicants with a strong federal and/or private sector labor relations background, and to those with fluency in the Spanish language. Applicants must possess a J.D. degree, be an active member of the Bar in good standing, and have at least one year of post-J.D. experience. Applicants are to submit a resume and writing sample to: Bureau of Prisons, 320 First Street, N.W., Suite 301-NALC, Washington, D.C. 20534, Attn: Anne Beasley - (202) 724-3134.

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary range is GS-11 (32,434 - $42,152) to GM-13 ($46,210 - $60,070). This advertisement will be open until filled.

* * * * *

Office Of The U.S. Trustee
St. Louis; Fresno; San Antonio; Newark; Cleveland; And San Francisco

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the U.S. Trustee's Office in St. Louis, Fresno, San Antonio, Newark, Cleveland, and San Francisco. Responsibilities for the U.S. Trustee's Office in St. Louis, Fresno, and San Francisco include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the U.S. District Court. Responsibilities for the U.S. Trustee's Office in San Antonio, Newark, and Cleveland include assisting with the administration and trying of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the U.S. Attorney's office for possible prosecution, as well as supervising the administrative aspects of the office.

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). For St. Louis, Fresno, and San Francisco, outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. For San Antonio, Newark, and Cleveland, applicants must also have extensive management experience and at least five years of bankruptcy law experience.

Applicants should submit a resume and law school transcript to:

St. Louis
Office of the U.S. Trustee
Department of Justice
815 Oliver Street, Room 324
Kansas City, Missouri 64106
Attn: Carole E. Remy

Fresno
Office of the U.S. Trustee
Department of Justice
1130 O Street, Suite 1110
Fresno, California 93721
Attn: Edward Kandler

San Francisco
Office of the U.S. Trustee
Department of Justice
601 Van Ness Ave., Suite 2008
San Francisco, California
94102-6310
Attn: Patricia A. Cutler

Applicants should submit a resume, salary history and SF-171 (Application for Federal Employment to:

San Antonio	Newark	Cleveland
Office of the U.S. Trustee	Office of the U.S. Trustee	Office of the U.S. Trustee
Department of Justice	Department of Justice	Department of Justice
615 E. Houston St., Rm. 100	60 Park Place, Suite 210	113 St. Claire Ave. NE
San Antonio, Texas 78205	Newark, New Jersey 07102	Suite 200
		Cleveland, Ohio 44114

Current salary and years of experience will determine the appropriate salary level. The possible ranges for St. Louis, Fresno, and San Francisco are as follows:

St. Louis	-	GS-12 ($38,861 - $50,516) to GS-15 ($64,233 - $83,502)
Fresno	-	GS-11 ($32,423 - $42,152) to GS-13 ($46,210 - $60,070)
San Francisco	-	GS-11 ($35,017 - $45,524) to GS-13 ($49,907 - $64,876)

The salary ranges for San Antonio, Newark, and Cleveland are as follows:

San Antonio	-	$50,000 - $64,000
Newark	-	$50,000 - $64,000
Cleveland	-	$64,000 - $80,000

The positions are open until filled. No telephone calls, please.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	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%	01-10-92	4.02%
06-30-89	8.16%	10-27-90	7.51%	02-07-92	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%	01-11-91	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%	06-26-92	4.11%
12-14-89	7.66%	04-05-91	6.26%	07-24-92	3.51%
01-12-90	7.74%	05-03-91	6.07%	08-20-92	3.41%

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

* * * * *

UNITED STATES ATTORNEYS

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Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
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New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
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Ohio, S	D. Michael Crites
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Oklahoma, E	John W. Raley, Jr.
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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
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Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

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EXHIBIT A

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

August 10, 1992

Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515-6216

Dear Committee Member:

On July 9, 1992, a majority of the Democratic members of the House Committee on the Judiciary wrote me, pursuant to section 2(g) of the Independent Counsel Statute (the "Statute"), 28 U.S.C. 592(g), requesting the appointment of an Independent Counsel to investigate allegations of wrongdoing by unnamed "high-ranking officials of the Executive Branch" (the "Letter").

The Statute requires that when I receive a request pursuant to section 2(g), I report to the relevant Committee the reasons for my decision. This letter and the accompanying report (the "Report") constitute my response to the Letter.[1]

The Letter states that the potential criminal conduct relates to:

> activities by both current and former officials to illegally assist the regime of Saddam Hussein prior to the August 1990 invasion of Kuwait, and to attempt to conceal information about potential criminal activity from Congress through the making of false statements, the nonproduction, falsification or alteration of official records and other documents, and through otherwise misleading and obstructing Congress in investigating such matters.

For the reasons stated below, and detailed in the Report, I

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[1]Pursuant to section 2(g)(4) of the Statute, 28 U.S.C. 592(g)(4), I request that the Committee promptly make public this letter and the Report in their entirety.

have concluded that the criteria for invoking the Independent Counsel Statute are not present here.

The Letter, in contrast to previous Congressional requests for the appointment of an Independent Counsel, lacks the specificity required under the Statute. The Letter fails to identify any particular person alleged to have committed a crime, or to describe any particular acts alleged to constitute a crime. Instead, it relies on vague and conclusory assertions of wrongdoing by unnamed persons -- precisely the kind of "generalized allegation[s]" that the Statute and legislative history make clear are wholly inadequate as a basis for invoking the Statute. [See p. 6, infra.]

Although the Letter is inadequate on its face, our analysis of these matters did not begin or end with the Letter. So far as we can determine, all the allegations referred to in the Letter were previously in the public domain. In fact, well before receipt of the Letter, the Department was aware of, and was reviewing and, where appropriate, investigating those allegations as they arose. Substantial review and investigation was accomplished during this process, which remains ongoing for certain discrete matters. But none of the information developed during this investigative process meets the criteria for invoking the Statute.

To respond to the Letter, career professionals in the Department have carefully reviewed not only the Letter, but also the record of the Judiciary Committee hearings on this matter (the "Hearings"), as well as other relevant information gathered by the Department in the course of its ongoing review. Further investigation was conducted by career prosecutors in the Public Integrity Section and agents of the Federal Bureau of Investigation ("FBI"), both as part of the threshold review of the Letter and as part of the Department's ongoing review and investigation of the underlying matters.

My determination that the specialized procedures of the Statute are not applicable here is based on this extensive review and analysis, and is supported by the uniform view of the prosecutors at all levels of the Department who have reviewed this matter.

The Independent Counsel Statute applies where there is specific and credible information that a "covered person" -- one of a small group of senior officials expressly listed in the statute -- has committed a crime. The Letter has not provided, nor have we found, any such information. We are aware of no evidence that would support the criminal investigation of a "covered person" in connection with the matters raised by the Letter.

Nor does the Letter raise any allegations of wrongdoing by lower-level noncovered persons that would provide a basis for applying the Independent Counsel Statute. It appears that one of the central allegations is that loan proceeds guaranteed under the Commodity Credit Corporation ("CCC") program, or commodities sold under that program, were diverted by Iraq for military purchases. This Department, the Department of Agriculture, various Committees of Congress and the General Accounting Office ("GAO") have been investigating the possibility of such diversions. No one has yet established that any such diversion occurred. But even assuming that foreign entities and private intermediaries did engage in such a diversion, we have found no evidence that U.S. government employees knowingly participated in or facilitated any such diversion, or any other criminal conduct with respect to the CCC program with Iraq. [See pp. 8-9, infra.]

Other allegations about noncovered persons relate to conduct that is simply not criminal in any way. It is not a crime for the Executive branch to set up a coordination mechanism to handle Congressional information requests. Nor is it a crime for an Executive branch agency to raise objections to, or to oppose, an informal Committee request for information. [See pp. 9-11, infra.] Still other allegations are based on erroneous factual premises -- such as the suggestion that there were improprieties in the Department's handling of the investigation of Banca Nazionale del Lavoro ("BNL"). The factual record is clear that the Department officials involved in that case acted with dedication and rectitude, and there is not a shred of evidence that any Department employee acted improperly. [See pp. 11-13, infra.]

In sum, then, with the exception of two matters noted below, none of the allegations about noncovered officials warrant further inquiry. We have found them to be without substance and are aware of no evidence that would support a criminal investigation.

Two allegations about noncovered officials referred to in the Letter were already under investigation by the Department. These are what the Letter refers to as the "alteration" of Commerce Department documents and the alleged "contradictory" testimony of certain witnesses at Committee Hearings. The Independent Counsel Statute does not apply to either of these ongoing investigations. They are the kind of matters routinely handled by the Public Integrity Section, and I find no conflict of interest or any other circumstance that would preclude the Department from completing these investigations in the normal course.

As noted, the allegations referred to in the Letter have been the subject of substantial review by the Department starting well before receipt of the Letter. Thus, the decision that the

Statute is not applicable does not mean that the allegations will not have been properly reviewed. It means only that no basis has been shown for treating this matter under the specialized procedures of the Statute. Those allegations which warrant further inquiry will continue to be investigated by career professionals in the Department in the normal course.

If those ongoing investigations produce any information implicating the Independent Counsel Statute, we will comply with it fully. Moreover, if any Members have any information which they believe we have overlooked or failed to consider in reaching our decision, we request that they provide it to us promptly. In contrast to the Letter, any such submission should identify with particularity: (1) what crimes are alleged to have been committed, (2) who is alleged to have committed them, and (3) what specific factual information supports the allegation.

Discussion

As a general matter, it is the responsibility of the Department of Justice to investigate and prosecute all allegations of criminal conduct by any person subject to the jurisdiction of the United States, including allegations of wrongdoing by government officials. The Department has a long record of vigorously investigating and prosecuting government officials who commit crimes against the United States. Indeed, the Public Integrity Section in the Criminal Division was set up expressly for this purpose, and it has a track record that is above reproach.[2]

The Independent Counsel Statute does not supplant -- nor was it ever intended to supplant -- the Department's general responsibility to investigate allegations of criminal wrongdoing within the government. Rather, the Statute is designed to apply to certain exceptional cases. Accordingly, the Statute's specialized procedures are triggered in two specifically defined circumstances -- one mandatory and one discretionary.

The mandatory provision, 28 U.S.C. 591(a), requires the Attorney General to apply the procedures of the Statute if and when he receives specific information from a credible source sufficient to warrant a criminal investigation of a "covered person." "Covered persons" are a small group of the most senior officials in the Executive Branch who are specifically listed in the Statute, including the President, Vice President, Members of

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[2]The Department prosecuted over 1200 federal officials and employees -- including Department of Justice officials -- for public integrity violations in just the last two years for which final figures are available.

the Cabinet, senior White House staff, senior Department of Justice officials, and certain other senior government and campaign officials.

The discretionary provision of the Statute, 28 U.S.C. 591(c), authorizes, but does not require, the Attorney General to proceed under the Statute if: (i) he receives specific information from a credible source sufficient to warrant a criminal investigation of someone other than a covered person; and (ii) he determines that an investigation or prosecution of that person by the Attorney General or other officer of the Department "may result in a personal, financial or political conflict of interest." Even if the Attorney General finds a conflict of interest under this prong of the Statute, he need not invoke the Statute. Instead, the investigation may be handled by a Department official who has no "personal, financial or political conflict of interest," or a non-statutory special counsel may be appointed who would be part of the Department and who would exercise the powers of the Attorney General for purposes of the investigation.[3]

The threshold requirement for triggering the Statute under either the mandatory or the discretionary provision is the receipt of specific information from a credible source sufficient to constitute grounds to investigate whether some person -- covered or not -- has committed a federal crime. This requirement of specificity is an important safeguard against abuse under the Statute. The legislative materials strongly emphasize the need for "specific factual support," and "facts" indicating a crime, such as particular dates and places -- as opposed to a "generalized allegation of wrongdoing."[4] The Senate

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[3]It has been suggested by some that any allegation of wrongdoing involving Executive branch employees, even those who are not "covered persons", automatically creates a "political conflict" and mandates the appointment of an Independent Counsel. That suggestion is completely without merit. It is contradicted by the Statute itself -- there would be no point in having the Statute designate a category of very senior officials as "covered persons" if an allegation of wrongdoing against any government official required appointment of an Independent Counsel. It is also contradicted by the longstanding and now routine practice of the Justice Department investigating and prosecuting government officials below the "covered person" level.

[4]H.R. Rep. No. 95-1307, 95th Cong., 2d Sess. (1977) at 6 n.14; S. Rep. No. 95-170, 95th Cong., 1st Sess. at 52 (1977), reprinted in [1978] U.S. Code Cong. & Ad. News 4216, 4268; S. Rep. No. 97-496, 97th Cong., 2d Sess. at 12, reprinted in [1982] U.S. Code Cong. & Ad. News 3537, 3548; see also Nathan v. Smith, 737 F.2d 1069, 1074 (D.C. Cir. 1984) (Davis, J., concurring).

Report accompanying the 1983 amendments provides an example of what would constitute specific evidence: "[I]f a credible source informs the Department of Justice that a named, covered official took money on a given date, in a given place, and provides facts which indicate that it may have been a bribe, this information should trigger a preliminary investigation."[5]

Measured against these requirements of the Statute, the Letter is clearly deficient. The Letter contains no specific information (credible or not) concerning crimes by any person, let alone any "covered" person. Indeed, the Letter does not even contain any specific allegation (let alone information) concerning any crime alleged to have been committed by any person, covered or otherwise. In contrast to the example of specificity set forth in the Senate Report, which specified the individual, time and place of the receipt of money and evidence that it was a bribe, the Letter amounts to no more than an unsupported assertion that some unnamed person may have violated one of a number of listed statutes. For that reason, alone, the Letter does not constitute grounds to proceed under the Statute.[6]

Nevertheless, the Department has carefully considered the allegations in the Letter, the record of the Hearings, and other relevant information in our possession. Because these

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[5]S. Rep. No. 97-496, 97th Cong., 2d Sess. at 12, reprinted in [1982] U.S. Code Cong. & Ad. News 3537, 3548.

[6]In this respect, the Letter stands in sharp contrast to several previous Congressional submissions requesting appointment of an Independent Counsel. For example, the request for the appointment of an Independent Counsel to investigate former Housing and Urban Development Secretary Pierce identified specific testimony that was alleged to be perjurious and identified the contradictory evidence, and also set forth detailed allegations of the mismanagement techniques allegedly employed by Secretary Pierce. The letter requesting an Independent Counsel to investigate former Deputy Chief of Staff Deaver specified the individual the Members believed should be investigated, and specified four precise matters of alleged conflict of interest. The letter requesting appointment of an Independent Counsel to investigate assistance to the Contras specifically named individuals the Members believed should be investigated, described a specific incident which might constitute a violation of law, and referenced a staff report which provided additional details on alleged violations. While the letter requesting an Independent Counsel to investigate alleged misconduct by the Department of Justice in withholding EPA documents from Congress did not specifically name any individuals, it enumerated narrow acts of conduct alleged to be illegal, and was accompanied by a 1,284 page Committee report.

allegations had previously been in the public domain, even prior to the Letter, those allegations which warranted further inquiry were already the subject of ongoing review, and, where appropriate, investigation by the Department. In addition, further investigation has been conducted by career prosecutors in the Public Integrity Section and by the FBI.

Our review was conducted by career prosecutors in the Public Integrity Section who had no prior involvement in any aspect of the BNL matter. Their work was reviewed by a number of career prosecutors in the Criminal Division.

In addition, consistent with past practice, a senior prosecutor from outside of Main Justice was asked to review allegations involving the Criminal Division's role in the BNL case. In this case, Michael Chertoff, the U.S. Attorney for New Jersey, a career prosecutor with no prior involvement in the BNL matter, reviewed all allegations relating to the Criminal Division's handling of the BNL case.

Both Public Integrity's review and Mr. Chertoff's review, were further reviewed by George Terwilliger, Deputy Attorney General, a career prosecutor; and Ira Raphaelson, Counselor to the Attorney General, a career prosecutor and former head of the public integrity division in the U.S. Attorney's office in Chicago.

Without exception, every prosecutor reviewing this matter at every level of the Department is of the view that the criteria for invoking the Statute are not present here.

Based on our review, I have concluded that the criteria for invoking the Statute have not been met. Specifically, as to the mandatory provision of the Statute, I have concluded that there is no specific and credible information that a "covered person" committed a crime. As to the discretionary provision of the Statute, I have concluded that, for most of the allegations relating to noncovered government officials, there is no specific and credible information that any crime was committed. In two discrete matters where further inquiry as to noncovered officials is warranted, I find that there is no "personal, financial or political conflict of interest" which would preclude the Department from investigating and, if appropriate, prosecuting the individuals involved. These matters were under investigation by the Department prior to receipt of the Letter, and there is no reason to believe that the Department cannot continue to fully and fairly investigate them. As to those allegations relating to private parties (involving alleged irregularities in the CCC program and alleged export control violations) these also remain under investigation by the Department, and I find that there is no "personal, financial or political conflict of interest" that would preclude continued investigation by the Department.

The Report analyzes in detail all of the allegations we could identify from the Letter, the Hearings and other reported statements of which we are aware.

For purposes of this letter, I will only summarize our reactions to three central categories of allegations, namely: (1) that unnamed officials "illegally assisted the regime of Saddam Hussein"; (2) that unnamed officials attempted "to conceal information about potential criminal activity from Congress"; and (3) that the Department of Justice acted improperly in its BNL investigation.

1. Allegations that Unnamed Officials "Illegally Assisted" Iraq

The Letter refers vaguely to "activities by both current and former officials to illegally assist the regime of Saddam Hussein." Although the Letter does not specify who allegedly illegally assisted Hussein, or what form the illegal assistance allegedly took, based on the Hearings this allegation appears to refer to allegations that loan proceeds guaranteed under the CCC program, or commodities sold under that program, were diverted by Iraq for military purchases.

While the possibility of diversions has been investigated by the Departments of Justice and Agriculture, various Committees of Congress and the GAO, no one has yet established that any such diversion occurred. But even assuming that foreign entities and private intermediaries did engage in such a diversion, we have found no evidence that U.S. government employees knowingly participated in or facilitated any such diversion, or any other criminal conduct with respect to the CCC program with Iraq.

The evidence indicates that, in late 1989, as concerns about possible irregularities in the CCC program grew, Department of Agriculture and other government officials decided to conditionally continue with FY 1990 credits for Iraq while, at the same time, continuing to investigate allegations of irregularities and attempting to ascertain the nature and extent of possible official Iraqi involvement in any such irregularities. Pending the results of that further investigation, the Department of Agriculture divided the CCC credits into tranches for greater control. We have no information that any aspect of that decision was criminal.

Some public statements by certain Members of Congress seem to be based on the premise that it was somehow a crime for the government officials not to immediately and completely terminate the CCC program in the face of allegations and some emerging evidence of irregularities in that program.

It is unclear whether the Letter reflects such a view, but to the extent that it does, it is baseless. When faced with possible evidence of irregularities in a particular program, the decision whether to terminate the program completely or to take lesser steps to police the program pending further investigation, is entirely a policy and management decision. While the wisdom of that decision can be debated, the fact that it was not criminal cannot. It is no more a crime for Executive branch officials to continue to operate a program in the face of some evidence of irregularities than it is for Members of Congress to urge continued operation of the program in the face of such evidence (as happened here). A policy decision not to immediately terminate the CCC program based on the information available to officials at the time simply does not constitute a crime.

The Department is continuing to actively investigate the alleged improprieties in the CCC program. To the extent that, contrary to the evidence to date, that investigation reveals any evidence of participation by U.S. government officials, we will take all appropriate action, including any appropriate action under the Statute. [See Report at 21-24.]

2. Allegations Related to the Alleged Coverup or Obstruction of Congressional Investigations

Again, the Letter sets forth no specific conduct alleged to be criminal, simply asserting that there was an "attempt to conceal information . . . [and] otherwise mislead[] and obstruct[] Congress." Judging from the Hearings, the allegations fall into three basic groups: (i) the alleged use of "'formalized' procedures for screening or rebuffing Congressional requests for information"; (ii) alleged withholding of witnesses and information from Congress; and (iii) alleged false statements by various individuals.

The first category of allegations -- involving formalized procedures allegedly for withholding information from Congress -- simply do not allege crimes. Where, as here, requests for information are made to a number of different agencies it is not improper -- and certainly not illegal -- for those agencies to coordinate their responses. Indeed, the Executive Order on classified information and other publicly available Executive branch policies and procedures require such coordination to ensure that legitimate interests of the various agencies in protecting classified or other confidential information are served, and that consideration can be given to asserting applicable privileges. It is surprising that Members of the Committee would allege that there is something improper about this kind of coordination when, in the course of recent investigations, we have been told that House rules require that all subpoenas -- even those directed to individual members -- be

served on one central person, the House Counsel, to allow for coordination by the House and possible assertions of privilege. [See Report at 94-97.]

Similarly, as to the second group of allegations -- involving the alleged withholding of documents and witnesses from Congress -- there is nothing illegal in the Executive branch objecting to or opposing informal Congressional requests for information. Negotiations between the branches over the scope of such informal and even formal requests are commonplace. There is nothing illegal about the Executive branch objecting to the production of documents or witnesses based on concerns about the scope and reasonableness of the request, potentially applicable privileges, or other interests. Actions such as these have been an established -- and perfectly legal -- aspect of our government from its inception, and they are no more a crime than were the efforts by various Members of the House to limit the scope of the Department's document subpoenas in the House Bank matter. If Congress disagrees with the position taken by the Executive branch with respect to any documents, it has ample tools at its disposal to challenge that action. [See Report at 93-94.]

As to the third category -- the alleged false statements -- only one "covered person" is alleged to have made any false statements. As explained in the Report, his statements simply are not false. [See Report at 14-21.] The other alleged "contradictory" statements do not involve "covered persons". Certain allegations involving noncovered officials are under investigation by the Department. These are the kinds of allegations that are routinely investigated by the Public Integrity Section and there is no conflict of interest that precludes their handling these matters in the normal course. [See Report at 24-25.]

Substantial attention has been focused on the alleged "alteration" by Under Secretary Kloske (a noncovered person) of a Commerce Department document generated in response to a Subcommittee request for information relating to license applications for exports of dual use goods to Iraq from 1985 to 1990. That allegation is under investigation by the Public Integrity Section at the specific request of the Chairman of the Subcommittee involved. While the investigation is ongoing, the investigation to date would not support any suggestion that this incident was part of some larger effort to "coverup". Rather, the evidence, to date, indicates that no official above Mr. Kloske had any involvement in the decision to make the changes in question; that the "alteration" was a change in a shorthand description which he believed created an inaccurate perception in its original form; that he made the change only after consulting with the technical experts involved; that other information remaining in the document conveyed the key information about the items in question; and that the change was to a description in a

draft, rather than an alteration of a pre-existing record. [See Report at 26-31.]

There is no reason to believe that the Public Integrity Section of the Criminal Division cannot fully investigate and, if appropriate, prosecute those allegations warranting further review as it has with many similar allegations in the past.

3. Allegations Concerning the Department's Handling of the BNL Matter

Again, the Letter provides no specifics explaining what crimes may have been committed, or by whom, instead simply asserting that there were "irregularities in the Department's handling of a host of investigations." Indeed, it is not entirely clear if the allegations concerning the Department's handling of the BNL investigation are meant to allege crimes, or to suggest that we should conclude that the assertion of these allegations somehow precludes the Department from investigating the other matters alleged in the Letter. We conclude that they do neither because there was no wrongdoing in the Department's handling of the BNL matter. As detailed in the Report, the handling of the BNL investigation by the Department was entirely proper. [See Report at 32-87.]

The evidence shows that the BNL investigation was initiated by the Atlanta U.S. Attorney's office. As part of standard Department practice given the complex nature of the investigation and Atlanta's desire for assistance in certain international aspects of the investigation, the Criminal Division became involved in reviewing and assisting in that investigation. The record is clear that that review was initiated by career prosecutors pursuant to standard practice, and was in no way politically directed.

The Criminal Division career prosecutors raised issues and concerns that required more work to be done before the indictment was returned. The record is clear that these decisions were made by career prosecutors exercising their best professional judgment. Their sole desire was to strengthen and expand the case, not delay or limit it, and any suggestion to the contrary is unfounded and unfair. It is particularly ironic that two of the major sources of the alleged "delay" were the successful efforts by career prosecutors in Main Justice and Atlanta to ensure the prosecution of wrongdoing by Iraqis and to complete investigation of the possible involvement of BNL Rome in the scheme -- precisely the two points that certain Members have alleged were "covered up".

I am especially troubled by the fact that certain Members would repeat scurrilous charges against career prosecutors which are based on blatantly false "facts", notwithstanding that those

"facts" have been conclusively refuted in the Hearing record itself. For example, much emphasis has been given to statements by Judge Marvin H. Shoob suggesting the need for an Independent Counsel. Almost without exception, however, the "facts" cited by Judge Shoob to explain his conclusion have been shown to be incorrect.

Contrary to allegations repeated in the Hearing record, the plea agreement entered by defendant Paul Drogoul was exactly the one offered by the lead prosecutor (who, far from being excluded from the negotiations was in charge of them) two weeks before the plea (not the weekend before it); the other Assistant United States Attorney involved was not sent down from Main Justice; the prosecutors repeatedly stated on the record that Mr. Drogoul was free to make whatever statement he wanted; the record is clear that Drogoul had never prepared the "lengthy statement" Judge Shoob believed was being withheld; and the sentence calculated under the Sentencing Guidelines, which govern this case, is exactly the same for the 60 counts to which Drogoul pled as it would have been had be been convicted of all 347 counts. [See Report at 53-61.]

The allegation that the Department somehow tried to silence Drogoul is completely unfounded. Rather, the record is clear that the Atlanta prosecutors consistently sought his cooperation, that Drogoul offered a plea including no cooperation which was rejected by the prosecutors, that he finally capitulated and agreed to a plea requiring cooperation, and that the plea agreement includes extraordinary provisions to ensure that any and all information Drogoul provides can be made public by the Government, the Court or Drogoul.

Similarly, the allegations that the indictment ultimately returned was "smaller" than that initially contemplated, and that the "Federal attorney in Atlanta was instructed from on high in D.C. to postpone and delay" are both demonstrably wrong, as the Hearing record shows. The Report shows, in detail, the lack of merit to the myriad other allegations concerning the Department's handling of the BNL matter which have been recklessly repeated without regard for the facts, including, for example, the absurd and slanderous charge, apparently seriously made, that a career prosecutor secretly carried a large magnet into a government office to erase information on a computer tape.

While, as in any complex investigation, there were disagreements among the prosecutors involved, these represent honest differences among career professionals and they raise no question of criminal conduct. It simply is not a crime for the Department's Headquarters components like the Criminal Division to assist in and review investigations and prosecutions being conducted by U.S. Attorneys offices in the field. Indeed, that is one of the primary functions of the Headquarters components

and, far from being a crime, such review is an important check-and-balance for the American people, to ensure that the law is being fairly and uniformly applied. Nor is it an "irregularity" for disagreements to arise among prosecutors working on a case as to the timing of various steps, assessments of the evidence, theories to be pursued, witnesses to be interviewed and the countless other matters that make a successful investigation. Indeed, the existence of at least some disagreements among the professional prosecutors and investigators working on a case is the norm, not the exception, especially in large, complex investigations. It is not a crime.

What is especially disturbing about this attack on the Department is that it strikes at the very core of our daily work. Every day, prosecutors handling thousands of cases make tens of thousands of decisions concerning investigative and other steps which may "delay" the indictment of a particular case. Often these decisions are the subject of debate among fellow prosecutors and between prosecutors and their supervisors. This debate, though professionally motivated, is sometimes heated. The result is increased quality in our work and in the level of protection afforded citizens who may be affected by our work. If a prosecutor is to be subjected to a criminal investigation by an Independent Counsel simply because someone asserts that such debates were evidence of obstruction of justice, our ability to enforce the law would be seriously impaired and important safeguards built into our criminal justice system would be lost. The potential chilling effect on the healthy debate which regularly occurs in our work is unthinkable.

Conclusion

As noted at the outset, nothing in the Letter, the Hearings, or any other source of which we are aware, suggests the need to proceed under the Independent Counsel Statute. While it might be expedient to appoint an Independent Counsel anyway, or to delay the decision by conducting a redundant "preliminary investigation" under the Statute, doing so would be an abdication of my responsibility to enforce the law. The allegations have been and are being properly investigated, and it is clear that the criteria for invoking the Statute are not present. It would be as improper to apply the Independent Counsel Statute where the statutory basis does not exist as it would be to fail to apply the Statute if the statutory conditions were present.

As I also noted at the outset, certain allegations against noncovered persons remain under investigation by the Department. I reiterate my request that if any Members have any specific information of possible criminal conduct by Executive branch officials or anyone else they provide it to the Department promptly. Such information should specify what crimes are

alleged to have been committed and by whom, and what specific information supports the allegation.

Should we receive any information in the course of our ongoing investigations, from Congress, or from any other source, that implicates the Independent Counsel Statute we will continue to comply fully with its terms.

We have treated the Letter very seriously. Dedicated professionals in the Department have spent countless hours trying to make sense of the vague and conclusory allegations it contains. We have found those allegations to be hollow. What is especially troubling here is that the Letter was largely premised on "facts" which are untrue and which were established on the record to be untrue at and before the Hearings. Nevertheless they were repeated in the Letter.

Repeated and unjustified attacks on the integrity of the Department tear down the institution and undermine our ability to advance justice. As Attorney General, I believe strongly that we cannot allow the criminal process to be used as a political weapon or for partisan purposes.

The accompanying Report comprehensively addresses the allegations contained in the Letter and at the Hearings. I hope we can now get on with conducting the Nation's business in a productive and professional manner.

Sincerely,

William P. Barr
Attorney General

EXHIBIT
B

SENIOR INTERAGENCY GROUP

POLICY STATEMENT

Regarding

NATIONAL POLICY ON COLLECTION AND REPORTING PROCEDURES FOR RESTITUTION PAYABLE TO FINANCIAL INSTITUTION REGULATORY AGENCIES

Adopted June 25, 1992

I. Agencies' Input Into Restitution-Setting Process

A. Initial Contact - Department of Justice

1. In major cases,[1] the Financial Institution Fraud Coordinator in each United States Attorney's Office ("USAO") or Department of Justice trial attorney and the appropriate investigative agency will contact the responsible regulatory agency upon the opening of a financial institution fraud ("FIF") matter, to establish a line of communication for the ongoing exchange of information as the matter progresses. The name and address of the contact point in the regulatory agency should be obtained and this information provided to the USAO Victim/Witness Unit for routine notifications. The names of the Assistant United States Attorney ("AUSA") or trial attorney and the investigative agent(s) handling the matter should be made available to the regulatory agency.

2. In appropriate cases, exchanges of information can be accomplished in local or regional bank fraud working group meetings.

B. Initial Contact - Regulatory Agencies

1. In major cases, each regulatory agency will follow up with the appropriate investigative agency and/or the USAO or trial attorney on criminal referrals it has made, and on other criminal referrals which it deems appropriate for follow up, to establish a line of communication for the ongoing exchange of information as the matter progresses. The names of the case agent and the AUSA or

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[1] Major cases: any cases (1) in which the possible dollar loss to the financial institution(s) is $100,000 or greater; (2) in which the defendant was an officer, director, attorney or owner (including shareholder) of the financial institution; (3) in which the scheme involved multiple borrowers in the same financial institution; or (4) that involved other factors that warrant "major" status.

trial attorney should be obtained to facilitate future communications. The name and address of the regulatory agency contact point should be made available to the investigative agency and the USAO or trial attorney to facilitate communications and routine notifications.

2. In appropriate cases, exchanges of information can be accomplished in local or regional bank fraud working group meetings.

C. **Ongoing Contacts - Department of Justice**

In major cases, the AUSA or trial attorney handling the FIF matter/case will contact the regulatory agency at the following stages of the prosecution:

1. Pre-Indictment. Regarding proposed charges and proposed pleas in light of Hughey v. United States, 110 S. Ct. 1979 (1990), and to obtain any information necessary to the investigation, such as amount of loss to the financial institution;

2. Post-Indictment. Regarding proposed pleas or assistance required for trial; and

3. Post-Trial. Regarding information needed for the sentencing hearing.

D. **Ongoing Contacts - Regulatory Agencies**

In major cases, the regulatory agency will contact the AUSA or trial attorney handling the matter/case at the following times:

1. When information becomes available related to the amount of loss to the institution, in accordance with procedures mutually agreed upon by the regulatory agency and the AUSA or trial attorney;

2. When information becomes available related to assets in the defendant's possession or available to the defendant, in accordance with procedures mutually agreed upon by the regulatory agency and the AUSA or trial attorney;

3. Reasonable notice prior to filing or settlement of civil monetary penalty actions that raise issues under United States v. Halper, 490 U.S. 435 (1989);

4. When assistance is needed to obtain grand jury information under 18 U.S.C. § 3322; and

5. When information is to be provided to, or when it is requested by, the United States Probation Office or the Court.

E. Ongoing Contacts - Joint Responsibilities

In major cases, when parallel proceedings, or global settlements of civil, administrative, or criminal proceedings are in process or anticipated, the concerned regulatory agency or agencies will provide notice to the Department of Justice regarding such proceedings or proposed settlements. The Department of Justice will provide similar notice to the concerned agency or agencies.

II. Collection On Restitution Orders

In cases in which the Court orders restitution payable to a bank regulatory agency in its corporate, conservatorship, or receivership capacity, as appropriate:

1. The Department of Justice will:

A. Forward a copy of the judgment and commitment order to that agency through the Victim-Witness Unit of the appropriate USAO;

B. Enforce collection of the monies ordered by working with that agency to (1) identify the assets of the defendant; (2) reduce the restitution order to civil judgment, when appropriate; and (3) initiate judicial or other proceedings.

C. Notify that agency, or cause it to be notified, (1) by the Bureau of Prisons concerning the completion of the prison term; and (2) by the Victim/Witness Unit of the USAO concerning the completion of the appeal or any other reason that may legally delay the enforceability of the restitution order.

2. The regulatory agency to which restitution is payable will:

A. Track receipt of payments of that restitution; and

B. Report such restitution receipts to the Department of Justice.

III. Collection Reporting Responsibilities

Responsibilities for the uniform reporting of collections by the regulatory agencies through the Department of Justice to Congress are as follows:

1. Regulatory agencies that are the named recipients of criminal restitution orders will coordinate with and will provide regularly to the Priority Programs Team ("PPT"), Executive Office for United States Attorneys, Department of Justice, information they possess regarding the collection and reporting of restitution payment information. This is anticipated to be a short-term effort to reconcile collection information.

2. Regulatory agencies also will provide regularly to the PPT information they possess on recoveries obtained through enforcement and liquidation activities, including civil litigation and administrative proceedings.

SENIOR INTERAGENCY GROUP

RECOMMENDATION ON COLLECTION REPORTING RESPONSIBILITIES

The financial institution regulatory agencies and the Department of Justice:

1. Recommend funding and implementation of the National Fine Center in the Administrative Office for United States Courts, to the extent necessary to provide complete information regarding payment of fines and restitution, including an audit trail of payments received and disbursements made for restitution. Because this reporting system is underway and partially funded, an additional system managed by the Department of Justice would be duplicative and thus is not recommended; and

2. Will continue to work with the Administrative Office for United States Courts and its United States Probation Division in developing a suitable restitution tracking mechanism.

EXHIBIT C

Assistant Attorney General

Washington, D.C. 20530

JUL 22 1992

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Robert S. Mueller, III
Assistant Attorney General
Criminal Division

RE: Approval Requirement for Alford Pleas - Reaffirmation and Clarification

NOTE: 1. This is issued pursuant to USAM 1-1.550.
2. Distribute to holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-16.000

PURPOSE: This bluesheet reaffirms and clarifies that approval of an Assistant Attorney General is required for consent to Alford pleas. No substantive change in current policy is intended.

The following new section is added to 9-16.000.

9-16.015 Approval Required for Consent to Alford Plea

U.S. Attorneys are instructed not to consent to a so-called "Alford plea," where the defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty, except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, the Deputy Attorney General, or the Attorney General. In any case where the defendant tenders a plea of guilty but denies that he or she has in fact committed the offense, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty. See 9-27.440, infra (Principles of Federal Prosecution); 6-4.330, supra (approval of Alford pleas in tax cases).

U.S. Department of Justice

Criminal Division

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

JUL 29 1992

MEMORANDUM

TO: Holders of the United States Attorneys' Manual, Title 9

FROM: United States Attorneys' Manual Staff
Executive Office for United States Attorneys

Robert S. Mueller, III
Assistant Attorney General
Criminal Division

SUBJECT: Approval Requirement for Analogue Prosecutions under the Controlled Substances Analogue Enforcement Act - 21 U.S.C. §§ 802(32) and 813

NOTE: 1. This is issued pursuant to U.S.A.M. § 1-1.550
2. Distribute to holders of Title 9
3. Insert in front of affected section

AFFECTS: U.S.A.M. § 9-100.150

The following material supersedes and replaces Part B of U.S.A.M. § 9-100.150:

B. Approval Requirement

To ensure uniformity in analogue prosecutions and to avoid potential evidentiary issues, consultation with the Narcotic and Dangerous Drug Section, Criminal Division, at (202) 514-0917, is required prior to the presentation of an indictment to a Grand Jury.

Further information concerning this statute may be found in the Criminal Division's Handbook on the Anti-Drug Abuse Act of 1986 at 52-56.

EXHIBIT D

SENTENCING REFORM

Federal Prison Terms Under Sentencing Guidelines

The Bureau of Justice Statistics (BJS) has recently issued a Special Report entitled, "Federal Sentencing in Transition, 1986-90." A copy is attached at the Appendix of this Bulletin as Exhibit D.

This report, the first indepth analysis since 1987, summarizes the main trends in federal sentencing. It compares sentences imposed before the Sentencing Reform 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. It also traces changes in sentencing patterns and corresponding changes in time served in prison and supervision after incarceration.

The main findings include:

- In 1990, about 74 percent of the defendants sentenced under the Sentencing Reform Act of 1984 were sent to prison, compared to about 52 percent of the pre-guideline defendants sentenced in 1986.

- In 1986, about 77 percent of those convicted of drug crimes received prison terms. By 1990, approximately 89 percent of drug offenders sentenced under the guidelines received prison terms.

- Among offenders convicted of offenses other than those for which mandatory minimum sentences were enacted, the likelihood of a prison sentence also increased. Among those convicted of regulatory crimes, for example, 34 percent had received a prison sentence in 1986 compared to almost 50 percent of those sentenced under the guidelines in 1990.

- During 1989 sentences for violent crimes under the guidelines averaged 83 months, compared to 132 months for pre-guideline sentences in 1986.

- Sentences for property crimes during 1989 under the guidelines average 16 months, whereas pre-guidelines sentences in 1986 averaged 34 months.

Beginning in 1984 and every two years thereafter, Congress enacted laws that mandated minimum prison terms for defendants convicted of drug offenses or violent crimes. The average sentence for drug offenses increased from 62 months during 1986 to 71 months for guideline sentences during 1989. In addition,

- Drug offenders sentenced to prison under the guidelines in 1990 were expected to serve 5 1/2 years before release, more than twice the average amount drug offenders had served before release during 1986.

- Between 1980 and 1990, the number of drug offenders convicted in federal courts more than tripled, and convicted drug traffickers' chances of going to prison increased from 77 percent in 1980 to more than 90 percent in 1990.

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.

* * * * *

Guideline Sentencing Update

FEDERAL

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

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

VOLUME 5 • NUMBER 1 • AUGUST 26, 1992

General Application Principles

Sixth Circuit reissues *Davern* after rehearing en banc, finds that "the Guidelines are a sentencing imperative." The original panel had held that a district court should determine "at the outset of the sentencing process" whether there were aggravating or mitigating circumstances. If so, the court should then follow the statute, 18 U.S.C. § 3553, not the Guidelines, in sentencing defendant. *See* 4 *GSU* #6.

The en banc court held that a district court "must first determine a guideline sentence," which "is mandatory," and then may depart only if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b). In addition, a court does not have discretion to disregard the Guidelines if it considers the guideline sentence "greater than necessary to comply" with the purposes of sentencing in 18 U.S.C. § 3553(a). The court also held that the Guidelines accounted for a defendant who attempted to purchase 500 grams of cocaine but who received only 85 grams. The district court properly sentenced defendant based on 500 grams.

U.S. v. Davern, No. 90-3681 (6th Cir. July 21, 1992) (en banc) (Kennedy, J.) (Merritt, C.J., and Keith, Martin, Jones, JJ., dissenting), *superseding* 937 F.2d 1041 (6th Cir. 1991).

Departures

Mitigating Circumstances

Third Circuit affirms departure for "unusual degree" of acceptance of responsibility and for "inappropriate manipulation of the indictment." Defendant pled guilty to one count each of bank embezzlement and attempted income tax evasion. The sentencing court departed downward for two reasons. First, it reduced the offense level by one because defendant's acceptance of responsibility was unusual. The court stated that defendant "affirmatively c[a]me forward, as soon as he was confronted and started making restitution. Admitted the full amount that he thought was owed, but indeed, has even agreed to a larger amount that the bank has asserted, including interest. He has done everything conceivable. Voluntary and truthful admission to the authorities. I don't know anything more that he could do . . . ." Defendant also showed bank officials how to detect improper transactions in the accounts he had embezzled.

Second, the court departed downward two levels because it could not group the embezzlement and tax evasion charges under § 3D1.2. The court explained that it had never seen a defendant charged both with embezzlement and with tax evasion for the same embezzled sums, and noted that "the result . . . is unusual and disparate and constitutes, albeit, not in bad faith, an inappropriate manipulation of the indictment, which the Sentencing Commission asserts that I can control through the use of departure power."

The appellate court affirmed, first holding that "a sentencing court may depart downward when the circumstances of a case demonstrate a degree of acceptance of responsibility that is substantially in excess of that ordinarily present. . . . [W]e believe that Lieberman's post-offense ameliorative conduct adequately justified the district court's decision." *Cf. U.S. v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991) (district court should have considered whether timing and extent of restitution were sufficiently unusual to warrant departure: "the guidelines provide the district court with authority to depart downward based on extraordinary restitution"); *U.S. v. Carey*, 895 F.2d 318, 323 (7th Cir. 1990) (departure for acceptance of responsibility beyond two-level decrease in § 3E1.1 possible, but only in "unusual circumstances").

The court also held that "a sentencing court possesses the authority to depart downward based on the manipulation of the indictment"in a situation such as this, to "correct unwarranted sentencing disparities caused by charging decisions in those instances when grouping, which could also have compensated for the multiple charges, is unavailable. . . . [T]here is no indication either that the [Sentencing] Commission rejected the manipulation of the indictment charges as a basis for departure or that it intended to foreclose departures on this basis. On the contrary, . . . [it] 'recognized that a charge offense system has drawbacks' and that 'a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power.' U.S.S.G. Ch. 1, Pt. A, (4)(a), Policy Statement. . . . The adjective 'inappropriate' does not necessarily suggest bad intent on the part of the prosecutor, but can apply to prosecutorial zeal that results in charging a particular defendant disproportionately to others similarly situated."

U.S. v. Lieberman, No. 91-5687 (3d Cir. July 24, 1992) (Sloviter, C.J.).

Substantial Assistance

U.S. v. Urbani, 967 F.2d 106 (5th Cir. 1992) (Affirmed district court's refusal to hold an evidentiary hearing to examine the extent of assistance by defendant who claimed government arbitrarily refused to make a § 5K1.1 motion where government agreed to notify the court of defendant's cooperation, but did not obligate itself to file motion. The appellate court concluded that *Wade v. U.S.*, 112 S. Ct. 1840 (1992) [4 *GSU* #22], "made plain . . . that absent a substantial threshold showing of [] a constitutionally improper motive, district courts lack authority to scrutinize the level of the defendant's cooperation and interpose their own assessment of its value. Moreover, this limited scope of review forecloses even the need for an evidentiary hearing solely to document defendant's assistance. . . . [Defendant] has not at any point alleged an illicit motivation underlying the government's refusal to request a 5K1.1 departure. The entirety of his argument . . . has been that given his level of cooperation with the government, withholding a 5K1.1 motion was arbitrary and without justification. Thus, it is exactly the type of claim . . . that *Wade* indicates is unavailing and does not warrant an evidentiary hearing.").

Offense Conduct

Drug Quantity—Relevant Conduct

Eighth Circuit holds that original weight of drugs in package is not included as relevant conduct if defendant reasonably believed package contained less. Postal inspectors intercepted a package containing 243 grams of cocaine base, replaced all but ten grams with a substitute, and made a controlled delivery to defendant's sister. The same day, defendant asked a cousin for one-half gram of crack. The cousin agreed, informing defendant she had crack at his sister's house and would sell him some if he went with her to get it. She drove defendant to the house and parked a few blocks away. While his cousin waited, defendant located the package and began walking down the street to meet her, all as she directed. Before he reached her, he was arrested. He pled guilty to conspiracy to distribute cocaine base, was given a mandatory minimum ten-year sentence based on the 243 grams, and appealed.

The appellate court remanded, holding that defendant should be sentenced for the amount he "reasonably believed that the package contained." Defendant "was not found responsible for the conduct of others. Rather, the court based its drug calculation on Hayes' own act of picking up the package containing crack and walking down the street to meet his cousin. . . . Hayes testified that he never opened the package, and at no time prior to his arrest did he know that it contained a large quantity of crack. Additionally, Hayes apparently did not know that his act of bringing the package to his cousin was aiding the further distribution of the package's contents. Rather, . . . it is possible that Hayes reasonably believed the package contained a much smaller quantity of cocaine, intended primarily for his cousin's personal use. If this is the case, we do not believe that the entire amount of crack originally contained in the package should be attributable to Hayes . . . . The rationale for linking sentence length to the amount of drugs is that the more dangerous the drug and the larger its quantity, the more culpable the defendant. If Hayes at all times reasonably believe that the package contained a small amount of drugs, the 243 grams . . . does not reflect Hayes' culpability."

U.S. v. Hayes, No. 91-3843 (8th Cir. July 24, 1992) (Magill, J.).

U.S. v. Mitchell, 964 F.2d 454, 458–61 (5th Cir. 1992) (per curiam) (Remanded: Drug conspiracy defendant was not accountable for full twenty kilograms of cocaine in conspiracy. He had previously purchased small amounts from some of the conspirators, and tried to purchase two ounces from last shipment, but there was no evidence that he knew the extent of the conspiracy. "It is well established that district courts must consider the extent to which a larger drug enterprise is reasonably foreseeable to defendants involved in smaller or isolated transactions.").

Calculation of Loss

Sixth Circuit holds that where completed fraud could not possibly cause a loss, offense level cannot be increased by estimated loss. Defendant was convicted of several counts in a scheme to defraud insurance companies by getting false certification of his death and having his wife file claims for benefits. In addition, his wife applied for Social Security survivor's benefits using the false documents. The Social Security Administration (SSA) did not discover the fraud, but refused payment because defendant's wife was not eligible. As relevant conduct, the estimated potential loss to the SSA of $69,000 was added to the loss from the offenses of conviction.

The appellate court held that the $69,000 estimate should not have been included and remanded for resentencing: "We have before us the rare case where, in the face of complete success, the fraud generated no loss. . . . In such a case as this, where no dollar loss is possible for reasons entirely unrelated to the fraud or its discovery, the court does not have available to it the increases in sentencing level based on fraud loss. . . . The Government could, however, have sought an upward departure if the sentence based on the insurance loss amount did not reflect the seriousness of the harm caused by [defendant.]"

U.S. v. Khan, No. 91-1626 (6th Cir. July 14, 1992) (Merritt, C.J.).

U.S. v. Curran, 967 F.2d 5, 6 (1st Cir. 1992) (Affirmed: Amount of interest that would have been earned on embezzled funds may be used in calculating loss.).

Adjustments

Role in the Offense

U.S. v. Sostre, No. 91-1918 (1st Cir. June 29, 1992) (Fuste, Dist. J.) (Remanded: Defendant who brought drug buyers to sellers, made some arrangements and telephone calls, and possibly controlled a lookout, was not a manager or supervisor under § 3B1.1(b). He did not control the drugs, was not the principal in the drug transaction, and had to contact the sellers before making representations to buyers: "While [he] certainly played an essential role in the overall criminal conduct, we do not think that he acted in a managerial or supervisory capacity.").

Obstruction of Justice

U.S. v. Bernaugh, No. 91-6127 (10th Cir. June 24, 1992) (Anderson, J.) (Affirming adjustment where the district court found that defendant perjured himself under oath at his guilty plea hearing regarding the participation in a drug transaction of four codefendants who were proceeding to trial. Section 3C1.1 applies to obstruction "in the instant offense" and "'offense' may include the concerted criminal activity of multiple defendants. See U.S.S.G. Ch. 3, Pt. B, Intro. comment. Consequently, the section 3C1.1 enhancement applies . . . in a case closely related to [defendant's] own, such as that of a codefendant.").

Probation and Supervised Release

Imposition of Supervised Release

U.S. v. Pico, 966 F.2d 91, 92 (2d Cir. 1992) (per curiam) (Courts have authority to depart for supervised release. *Accord U.S. v. LeMay*, 952 F.2d 995, 998 (8th Cir. 1991) (per curiam) [4 *GSU* #14]. However, because court did not follow proper departure procedures, life term of supervised release must be remanded.).

U.S. v. Maxwell, 966 F.2d 545, 551 (10th Cir. 1992) (Affirmed: district court may impose consecutive terms of supervised release for multiple convictions.). *Accord U.S. v. Saunders*, 957 F.2d 1488, 1494 (8th Cir. 1992) [4 *GSU* # 20].

Criminal History

Consolidated or Related Cases

Note: The Ninth Circuit opinion in *U.S. v. Bachiero*, 964 F.2d 896 (9th Cir. 1992) (per curiam), reported in 4 *GSU* #25, was withdrawn and a substitute opinion was issued Aug. 4, 1992. The court remanded for resentencing, holding that the prior sentences at issue should be considered consolidated despite the lack of a formal order of consolidation.

EXHIBIT F

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 21 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | August 10, 1992

IN THIS ISSUE:

We welcome Judy Clarke as co-editor, beginning with this issue. Judy is a criminal defense attorney with McKenna & Cuneo in San Diego, and the former Executive Director of Federal Defenders of San Diego Inc. She is the author of the *Guideline Grapevine*, co-author of the *Federal Sentencing Manual* (Matthew Bender), and a contributor to *Practice Under the New Federal Sentencing Guidelines* (Prentice Hall).

Guidelines Sentencing, Generally

Article explains guidelines' philosophy and evaluates their success. (110) In "*The Federal Sentencing Guidelines: Striking an Appropriate Balance*," Judge William W. Wilkins, Jr., chairman of the United States Sentencing Commission, provides an overview of the important policy questions the Commission faced in formulating guidelines and a review of how the Commission resolved them. Among those issues were achieving proportionality, choosing between "real offense" and "charge offense" sentencing, the impact of a defendant's prior criminal history, the use of data related to prior judicial sentencing patterns, and the extent to which individual offender characteristics should be relevant to sentence. Judge Wilkins concludes that the guidelines have been beneficial, relying on a 1991 Commission study to argue that the guidelines have reduced disparity in sentencing. 25 U.C. DAVIS L. REV. 571-86 (1992).

Article examines reasons for guideline complexity. (110) In "*Complexity and Distrust in Sentencing Guidelines*," Ronald F. Wright notes that the guidelines have frequently been criticized as unduly complicated, and that calls have been made to simplify them. Wright explores the reasons that complex rules are chosen, concluding that the

Commission may have adopted its current approach in part because of fear that sentencing judges would not sentence offenders uniformly if given simpler but vague guidelines. While simple but specific rules could confine judicial discretion, Wright argues that such guidelines might omit important factors from consideration in formulating a sentence. Accordingly, he concludes, complexity may be preferable to its likely alternative. 25 U.C. DAVIS L. REV. 617-37 (1992).

Article surveys how guidelines have changed practice. (110) In "*Litigation-Enmeshed Sentencing: How the Guidelines Have Changed the Practice of Federal Criminal Law*," Owen S. Walker argues that sentencing under the guidelines has created so much litigation as to offset any advantage achieved in the areas of honesty and uniformity. Walker gives examples from several case files to demonstrate how fairly simple cases nevertheless can raise myriad guidelines issues. These issues have greatly decreased the number of cases that courts, prosecutors, and defenders can handle, Walker argues. He suggests two possible reforms: permitting the parties to compromise disputed guidelines issues rather than litigating them, and replacing the guidelines altogether with a system that relied instead on involving multiple judges in sentencing decisions. 25 U.C. DAVIS L. REV. 639-58 (1992).

Article examines guidelines under economic lens. (110) In "*An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions*," Kenneth G. Dau-Schmidt evaluates the costs of the guidelines system and the preexisting system of unfettered discretion. Noting that the costs of employing rules are highest in the context of complex decisions, Dau-Schmidt suggests that Congress could best meet its goals by replacing some of the current rules with more flexible standards that leave greater discretion to sentencing judges. 25 U.C. DAVIS L. REV. 659-78 (1992).

8th Circuit permits district court, on remand, to consider new challenges on same issue. (110)(850) The district court originally ruled that defendant was a career offender, but that he was not an armed career criminal because his 1970 breaking and entering conviction did not qualify as a predicate felony under 18 U.S.C. section 924(e). In the first appeal, the 8th Circuit affirmed that defendant was a career offender, but held that the 1970 convictions qualified as a predicate felony under section 924(e). Thus, the "armed career criminal" issue was remanded. At resentencing, defendant raised new grounds as to why he was not an armed career criminal and career offender. The district court refused to consider new evidence relating to these issues, but on appeal, the 8th Circuit reversed, noting that its previous opinion did not find that defendant was an armed career criminal, it simply held that the 1970 conviction did qualify as a predicate felony under section 924(e). Thus the district court was free to consider any new arguments relating to defendant's armed career criminal status. However, the career offender issue was foreclosed by the previous opinion. *U.S. v. Cornelius*, __ F.2d __ (8th Cir. July 2, 1992) No. 91-3351SI.

9th Circuit affirms refusal to consider exemplary behavior in prison in resentencing. (115)(850) At resentencing after remand from the 9th Circuit, defendant argued that the district court erred by failing to exercise its discretion to consider his exemplary behavior in prison as a basis for reducing his sentence. The district court felt it was barred by Fed. R. Crim. P. 35, as amended in November 1987, from such consideration. On appeal, the 9th Circuit agreed, noting that the district court's authority to modify a sentence under Rule 35 has been narrowed to cover only cases remanded for correction by the Court of Appeals.

The **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, annual supplements and biweekly newsletters. The main volume (3rd Ed., hardcover, 1100 pp.) and Volume 2 Supplement cover ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month a cumulative index to the newsletters is published with full citations and subsequent history.*

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The court said that 18 U.S.C. sections 3553 and 3661 "cannot be construed to extend consideration of post-sentencing conduct at resentencing" without "circumventing the express limitations of revised Fed. R. Crim. P. 35." *U.S. v. Gomez-Padilla*, __ F.2d __ (9th Cir. August 5, 1992) No. 91-50683.

9th Circuit upholds crack and powder cocaine guidelines against equal protection challenge. (120)(242) The 9th Circuit rejected an equal protection challenge to the sentencing provisions in 21 U.S.C. section 841(b)(1), and the sentencing guidelines, agreeing with *U.S. v. Lawrence*, 951 F.2d 751, 755 (7th Cir. 1991); *U.S. v. House*, 939 F.2d 659, 664 (8th Cir. 1991); *U.S. v. Avant*, 907 F.2d 623, 627 (6th Cir. 1990); *U.S. v. Thomas*, 900 F.2d 37, 39 (4th Cir. 1990); *U.S. v. Cyrus*, 890 F.2d 1245, 1248-49 (D.C. Cir. 1989); *and U.S. v. Solomon*, 848 F.2d 156, 157 (11th Cir. 1988). The court held that the statute and the guidelines were subject only to "rational basis" scrutiny, and found that "the distinction between crack and powder cocaine is "neither arbitrary nor irrational." *U.S. v. Harding*, __ F.2d __ (9th Cir. August 3, 1992) No. 91-50423.

9th Circuit finds no impermissible double counting in departing for probation violation warrant. (125) In departing upward from a guideline range of 51-63 months the district court imposed a sentence of 87 months relying in part on an unadjudicated Florida probation violation. The 9th Circuit found no impermissible double counting in considering the outstanding probation violation warrant as a basis for departure. The court found that multiple uses of a particular aspect of a defendant's past behavior are proper where each use serves a unique purpose under the guidelines. Including the defendant's probation status in the calculation of the criminal history score measured recidivism and did not require that the defendant be in violation of probation. Consideration of the violation reflected the district court's conclusion that the defendant's conduct in perpetrating the bank robberies was more severe because he had already committed the additional offense of violating his probation. *U.S. v. Starr*, __ F.2d __, 92 D.A.R. 10510 (9th Cir. July 29, 1992) No. 91-10215.

10th Circuit reverses failure to group drug count with failure to appear count. (125)(460)(470) Defendant was convicted in absentia of drug related offenses. Because of his failure to appear, his offense level for the drug charges was enhanced under section 3C1.1 for obstruction of justice. He also pled guilty to failure to appear and received a consecutive 30 month sentence. The 10th Circuit held that the district court misapplied the guidelines and remanded the case for resentencing. When a defendant is convicted of both an obstruction offense (such as failure to appear) and an underlying offense, the counts should be grouped. This follows from guidelines section 3D1.2 which prescribes that counts involving "substantially the same harm" should be grouped for sentencing purposes. Under note 6 to section 3C1.1, the offense level for that group of closely-related counts is the greater of the offense level for the underlying offense increased by the obstruction enhancement, or the offense level for the obstruction offense. *U.S. v. Lacey*, __ F.2d __ (10th Cir. July 9, 1992) No. 91-3255.

11th Circuit affirms that enhancement for carrying firearm during robbery and 924(c) conviction is not double counting. (125)(224)(330) Defendants were convicted of conspiracy to rob an armored car company and related firearms charges. They contended that their three level enhancement under section 2B3.1(b)(2)(C) for carrying a firearm during the commission of the conspiracy was double-counting, since they were also convicted of carrying a firearm during a crime of violence in violation of 18 U.S.C. section 924(c). The 11th Circuit affirmed that the enhancement under section 2B3.1(b)(2)(C) and the conviction under section 924(c) was not double counting. Each defendant was convicted under section 924(c) for possessing a firearm, but the three- level enhancement was based upon the other's possession of the firearm. Because two armed men perpetrating a robbery pose a much greater threat to the public than only one armed man, it was proper to increase each defendant's guideline score to reflect this more serious conduct. *U.S. v. Kimmons*, __ F.2d __ (11th Cir. July 8, 1992) No. 90-5413.

11th Circuit rejects ex post facto challenge because amendment to section 1B1.2(d) was clarification of existing law. (131)(165)(380) Guideline section 1B1.2(d) provides that a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted of a separate count of conspiracy for each offense that the defendant conspired to commit. Defendant argued that the application of this provision to him violated the ex post facto clause because it was not in effect at the time he committed his offense. The 11th Circuit rejected the ex post facto challenge, ruling that the guideline was a clarification of existing law

rather than a substantive change. *U.S. v. Kimmons,* __ F.2d __ (11th Cir. July 8, 1992) No. 90-5413.

9th Circuit rejects statutory challenges to the guidelines. (145) Defendant argued that the sentencing guidelines were inconsistent with the first sentence of 18 U.S.C. section 3553 which requires the court to "impose a sentence, sufficient but not greater than necessary, to comply with the purposes set forth in paragraph 2 of this subsection." He also argued that the "just punishment" specified by section 3553 is different from the "just deserts" referred to in the introduction to the guidelines, section 1A3. Moreover, defendant argued that it was improper for the Commission to impose sentences in drug cases based simply on the quantity of the drugs, rather that "the community view of the gravity of the offense." *See* 28 U.S.C. section 994(e)(2) and (4). Finally defendant argued that the Commission departed from its statutory mandate in failing to take into account "poverty and family responsibility." The 9th Circuit rejected each of these arguments in turn, finding no conflict between the guidelines and the statutes. *U.S. v. Quesada,* __ F.2d __ (9th Cir. August 5, 1992) No. 91-50479.

Application Principles, Generally (Chapter 1)

5th Circuit adjusts for acceptance of responsibility only after combined offense level is determined. (150)(470)(480) Defendant was convicted of two marijuana counts, which were grouped together, and an assault count, which was grouped separately. Defendant accepted responsibility for the two marijuana convictions, but refused to accept responsibility for the assault. Thus, the district court refused to reduce defendant's combined offense level for acceptance of responsibility. Defendant contended that he should have received the reduction in the offense level for the marijuana counts before computing the combined offense level for both groups. The 5th Circuit rejected the argument. The Application Instructions in Chapter One, Part B, sections 1B1.1(a)-(i), listing the steps to be followed in applying the guidelines, provide that an adjustment for acceptance of responsibility, if appropriate, is to be applied *after* the offense level for groups of multiple counts and the resulting combined offense levels have been computed. *U.S. v. Kleinebreil,* __ F.2d __ (5th Cir. July 7, 1992) No. 90-8375.

1st Circuit affirms that misrepresentation of investment results involved more than minimal planning. (160)(300) Defendant ran an investment business. When the investments began to perform badly, defendant began falsifying his periodic statements to his clients. He supported the misrepresentations by using new investors' capital as well as his own funds to finance redemptions and other interim payments to investors. Eventually, he lost all of the money entrusted to him. The 1st Circuit affirmed an enhancement for more than minimal planning under section 2F1.1(b)(2). Defendant did not act on the spur of the moment. He pieced together a "carefully orchestrated" series of mailings designed to create a false impression as to how the pooled investment fund was faring. Falsifying financial records on a monthly basis over a long period of time, and with sufficient artistry that dozens of investors were lulled into a misplaced sense of security, required forethought and cunning. *U.S. v. Tardiff,* __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

9th Circuit affirms that laceration requiring twenty-five sutures was "serious bodily injury." (160)(224) The presentence report said that defendant struck the victim twice on the head with a metal object resembling a gun, causing a laceration which required a two-layer closure using more than twenty-five sutures. Defendant argued that this constituted only "bodily injury" rather that "serious bodily injury." The 9th Circuit rejected the argument, holding that a two-layer closure involving more than twenty-five sutures constitutes "surgery," and warrants a four level increase in offense level. *U.S. v. Corbin,* __ F.2d __ (9th Cir. August 5, 1992) No. 91-10563.

5th Circuit upholds sentence based on more serious statutory violation. (165)(380) Defendant was convicted of a count alleging a conspiracy to violate two statutes: 21 U.S.C. sections 841(a)(1) and 856(a)(2). The jury's general guilty verdict did not specify whether defendant conspired to violate section 841, section 856, or both. The 2nd Circuit affirmed that defendant could be sentenced under the guideline applicable to the more severe section 841 violation. Guideline section 1B1.2(d) provides that a conviction on a count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense. Note 6 to section 1B1.2(d) states that where the jury's verdict fails to specify which of the charged offenses were the objects of the conspiracy, the defendant may be sentenced for the object offenses for which the

court, were it sitting as trier of fact, would convict the defendant. *U.S. v. Cooper*, __ F.2d __ (5th Cir. July 6, 1992) No. 91-2966.

11th Circuit upholds treating single conspiracy conviction as three offenses under section 1B1.2(d). (165)(380) Guideline section 1B1.2(d) provides that a conviction on a count charging a conspiracy to commit more than one offense must be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit. The 11th Circuit affirmed the district court's determination that defendant conspired to commit multiple robberies. Defendant admitted that along with his co-defendants he conspired to rob the Loomis armored car. Federal agents further testified that defendants monitored Wells Fargo and Brinks armored cars as they delivered cash to one store and two different banks. Defendants watched the armored cars from different perspectives on three different days. These exploits amounted to independent overt acts in furtherance of the conspiracy. Judge Clark dissented, believing that the application of section 1B1.2(d) was appropriate only if the evidence showed more than one conspiracy beyond a reasonable doubt. *U.S. v. Kimmons*, __ F.2d __ (11th Cir. July 8, 1992) No. 90-5413.

D.C. Circuit says crack house counts were not relevant conduct for sale count. (170)(260)(470) Defendant was convicted one count of aiding and abetting the distribution of crack cocaine, and five counts of maintaining a "crack house." For sentencing purposes, the five crack house counts were grouped together and the distribution count was grouped separately. In determining the base offense level for the distribution count, the district court considered as relevant conduct the drugs involved in all six counts. The D.C. Circuit reversed. The offense level for the distribution count should have been calculated solely on the basis of the quantity of cocaine actually purchased without consideration of the drugs recovered from the search of the crack house. Section 1B1.3(a)(2) authorizes the sentencing court to take into account as relevant conduct solely those offenses for which section 3D1.2(d) would require grouping of multiple counts. Violation of the crack house statute cannot by itself be relevant conduct in calculating the offense level for a distribution conviction because the former is not of a character for which section 3D1.2(d) would require grouping of multiple counts. *U.S. v. Lancaster*, __ F.2d __ (D.C. Cir. June 30, 1992) No. 91-3045.

Offense Conduct, Generally (Chapter 2)

5th Circuit upholds official victim enhancement for defendant convicted of assaulting federal officer. (210)(410) Defendant was convicted of assaulting a federal officer in violation of 18 U.S.C. section 111. He contended that an enhancement under section 3A1.1 based upon the official status of the victim was impermissible because the victim's official status was an essential element of the offense. The 5th Circuit upheld the enhancement, since guideline section 2A2.2, the guideline under which defendant was sentenced, did not reflect the official status of the victim. The Statutory Index lists either section 2A2.2 (Aggravated Assault) or section 2A2.4 (Obstructing or Impeding Officer) for section 111 violations. Section 2A2.4 does specifically incorporate the official status of the victim. However, it also specifically states that if the conduct constituted aggravated assault, apply section 2A2.2. Unlike the offense level for section 2A2.4, section 2A2.2 does not reflect the fact that the victim was a government official. *U.S. v. Kleinebreil*, __ F.2d __ (5th Cir. July 7, 1992) No. 90-8375.

10th Circuit affirms that district court could not depart downward from life sentence for murderer. (210)(700) Defendant was convicted of first degree murder pursuant to 18 U.S.C. 1111 and 1153. The 10th Circuit affirmed that the district court was required by section 1111 to impose a life sentence and it did not have the discretion to depart downward. Section 1111 provides that a defendant convicted of first degree murder "shall...be sentenced to imprisonment for life." Thus, section 1111 provides a statutorily required minimum sentence which would control over any other lesser sentence suggested under the guidelines. The sentencing scheme established by 18 U.S.C. section 3581(b)(1) in conjunction with 3559(a) does not supplant the statutory minimum sentence in section 1111. *U.S. v. Sands*, (10th Cir. July 7, 1992) No. 91-7027.

7th Circuit affirms physical restraint enhancement for defendant who forced tellers into unlocked bathroom. (224)(310) Defendant entered a bank carrying a sawed-off shotgun, pointed it in the direction of three bank tellers, and ordered them to retreat to a room at the rear of the bank. Once inside the room, he further directed them into a small restroom in the back of that room, and told them if they peeked out, he would

"blow [their] f---ing head off." The 7th Circuit affirmed an enhancement for physical restraint of the victims under guideline section 2B3.1(b)(4). Although the bathroom was unlocked, defendant issued a death threat to keep the victims in the room. "Force" is not limited to physical force, but also encompasses the operation of circumstances that permit no alternative to compliance. Here, defendant's victims were led to an isolated room within a room which was effectively secured by defendant's threats of death while carrying a sawed-off shotgun, as well as an admonition by defendant that an armed accomplice stood guard outside the door. *U.S. v. Doubet*, __ F.2d __ (7th Cir. July 20, 1992) No. 91-1979.

9th Circuit says note saying, "Your money or your life, quick," was a threat of death. (224) Application Note 7 to section 2B3.1 provides that a threat of death during a bank robbery may be made "in the form of an oral or written statement, act, gesture, or combination thereof." It gives as an example a written note saying "Give me the money or you are dead." The 9th Circuit held that the note defendant handed to the teller in this case was clearly covered by section 2B3.1. Accordingly her sentence was properly enhanced by two levels for expressly threatening death. *U.S. v. Bachiero*, __ F.2d (9th Cir. August 4, 1992) No. 90-50685.

11th Circuit affirms that loss included amount already in armored car. (224) Defendants were arrested for attempted robbery while waiting for an armored car to pick up cash from a jewelry store. They challenged the district court's determination that the loss from the offense under section 3B3.1(b) would have been in excess of $500,000, arguing that the potential loss was only $67,000, the amount the truck would have picked up from the store on the morning of the attempted robbery. The 11th Circuit affirmed the calculation, since the target of the robbery was the money already in the truck as well as the money from the store. Otherwise, defendants might have robbed the store instead of the armored car. Testimony from managers of all three intended victim corporations established that hundreds of thousands to millions of dollars were carried in the armored cars during the specific routes that defendants had targeted. *U.S. v. Kimmons*, __ F.2d __ (11th Cir. July 8, 1992) No. 90-5413.

4th Circuit upholds provision equating one marijuana plant to one kilogram of marijuana. (242)(253) Defendant argued that the requirement in section 2D1.1(c) that each marijuana plant be treated for sentencing purposes as the equivalent of one kilogram of marijuana violated due process because the average marijuana plant yields much less. The 4th Circuit, in accord with six other courts of appeals, upheld the one plant/one kilogram equivalence. In order to further the objective that growers be punished more severely than distributors, Congress could rationally create an irrebuttable presumption that each marijuana plant be treated as the equivalent of one kilograms of marijuana, even though the average plant might produce less than that amount. *U.S. v. Underwood*, __ F.2d __ (4th Cir. July 7, 1992) No. 91-5356.

8th Circuit says government waived objection to failure to impose mandatory minimum sentence. (245)(855) The government argued that because the district court found that defendant had aided and abetted the manufacture and distribution of 100 kilograms of cocaine, the district court erred by failing to impose the mandatory minimum sentence of 10 years, as required by 21 U.S.C. section 841(b)(1)(A). The 8th Circuit agreed that the mandatory minimum sentence of 10 years was applicable to defendant, but found that the government had waived this argument by failing to present it at sentencing. Although it was plainly an error for the district court to sentence defendant below the statute's minimum, defendant's 108-month sentence (as opposed to the statute's required 120 months) did not result in a miscarriage of justice. The government had ample notice and opportunity to object to the sentence after the district court notified it that the sentence might be as low as 108 months. *U.S. v. Posters 'N' Things*, __ F.2d __ (8th Cir. July 13, 1992) No. 91-2426.

11th Circuit upholds applicability of mandatory minimum sentence despite indictment's failure to allege drug quantity. (245) Defendant claimed that the statutory minimum sentence of 60 months under 21 U.S.C. section 841(b)(1)(B)(ii) for a drug offense involving over 500 grams of cocaine did not apply to her because the indictment did not allege that she was carrying 500 grams of cocaine. The 11th Circuit, relying upon *U.S. v. Cross*, 916 F.2d 622 (11th Cir. 1991), rejected this argument. The government need not allege in the indictment or prove at trial the specific amount of drugs involved in an offense in order to use such information to determine the relevant sentence under section 841(b)(1)(B). *U.S. v. Milton*, __ F.2d __ (11th Cir. July 13, 1992) No. 91-5481.

11th Circuit vacates sentence based upon total weight of cocaine and wine mixture. (251) Defendants transported into the United States eight wine

bottles containing wine, lactose and cocaine. The district court imposed sentences based on the total weight of the cocaine and the wine in which it was transported. Following *U.S. v. Rolande-Gabriel,* 938 F.2d 1231 (11th Cir. 1991), the 11th Circuit reversed. The wine was merely a medium for transporting the cocaine, and the cocaine/wine mixture was not in a state to be consumed by the ultimate user. Thus, the wine was like "packaging material." The sentencing court should have excluded the commercially unusable portions of the mixture containing cocaine. *U.S. v. Bristol,* __ F.2d __ (11th Cir. July 6, 1992) No. 91-5193.

8th Circuit upholds calculation of methamphetamine laboratory's capacity. (252) The district court found defendants were responsible for between 30 and 100 kilograms of methamphetamine based upon the presentence report's conclusion that defendants were able to produce 75 kilograms of methamphetamine at their laboratory. The 8th Circuit upheld the district court's calculation. With respect to the disputed five pounds produced at the laboratory, the district court could have reasonably relied on one defendant's statement that a co-defendant probably "cooked" another five pounds. As to the existence of an empty drum of precursor chemicals found in Chanute, Kansas, the court could have reasonably relied on the testimony of a Kansas agent and two chemists who observed the seized drug. Additionally, one defendant, during negotiations with undercover agents, admitted that he had previously purchased two 110 pound drums of precursor chemicals. Senior Judge Bright concurred separately to comment upon the "cruel" sentences imposed by the guidelines upon these first offenders. *U.S. v. Stockton,* __ F.2d __ (8th Cir. July 6, 1992) No. 91-2547.

8th Circuit upholds use of lightest known weight of blotter paper. (254) Of the 33,800 dosage units of LSD attributed to defendant, the actual weight of only 1800 was known. Those tested had weights ranging from .00692 grams per dose to .0055 grams per dose. Applying the rule of lenity, the district court attributed the lightest known weight to all dosage units. Defendant objected, contending that the court should have used the "Typical Weight Per Unit" table in application note 11 of section 2D1.1. This table lists a per-unit weight for LSD of only .05 milligrams. The 8th Circuit upheld the district court's use of the lightest known weight. Application note 11 to section 2D1.1 cautions that it should only be used when a more reliable estimate of weight is unavailable. While there may be situations where a sample is too small or too arbitrary to extrapolate fairly over a large number of dosage units that come from disparate sources, this was not such a case. Senior Judge Heaney dissented. *U.S. v. Martz,* __ F.2d __ (8th Cir. May 18, 1992) No. 91-3205NI.

7th Circuit affirms that one kilogram of cocaine was under negotiation. (265) The 8th Circuit affirmed the district court's determination that defendants negotiated for the sale of one kilogram of cocaine. The court relied upon an FBI agent's interpretation of coded conversations. The agent stated that terms like "a gallon of paint" and "track" "van" and "tractor," when used by the co-conspirators, indicated a kilogram of cocaine. Defendants did not contest the fact that they were discussing cocaine. This was not the case of a single off-hand comment being used as evidence of capability of producing a certain quantity of cocaine. Here not only were there recurrent conversations in which one defendant spoke as if he were capable of producing the negotiated amount, but there was evidence that the relationship between the defendants was friendly and suggested a mutual trust from which it could be inferred that one defendant had reason to believe that the other defendant could supply the negotiated amount. *U.S. v. Hughes,* __ F.2d __ (7th Cir. July 16, 1992) No. 91-1004.

8th Circuit rejects use of "baseless conclusion" by probation officer to resolve disputed issue. (270)(770) Defendant was indicted on various drug charges, but the government moved to dismiss two of the counts where the surveillance team had been unable to track a drug dealer. No evidence was introduced at trial relating to these transactions. Over objection, the court relied on the probation report's inclusion of these drug quantities in sentencing. The 8th Circuit reversed. Once a defendant objects, the government must establish the fact by a preponderance of the evidence. Once alerted to defendant's objections, the court had an obligation to receive evidence other than the probation officer's conclusions and make specific factual findings regarding the disputed facts. It was error to rely solely on a presentence report containing "a baseless conclusion" by a probation officer to resolve the fact in issue. *U.S. v. Bluske,* __ F.2d __ (8th Cir. July 2, 1992) No. 91-5518.

8th Circuit reverses enhancement where weapons found 2-1/2 months after last drug transaction. (286) Defendant made four drug sales to an informant between September to November

1990. Two sales took place at a business co-owned by defendant, and two occurred elsewhere. Two and a half months later, police seized three weapons from defendant's residence and one weapon from his business. The 8th Circuit reversed a weapons enhancement under section 2D1.1(b). There was no temporal or spatial relationship between defendant's drug trafficking and the weapons seized in his home. No drug transactions ever occurred there and no drugs or drug paraphernalia were discovered in the house. The weapon found in defendant's business also did not support the enhancement even though two drug transactions took place there several months earlier. There was no evidence that the firearm was possessed by defendant or was present at the time of the drug transactions. *U.S. v. Bost,* __ F.2d __ (8th Cir. July 6, 1992) No. 91-2447.

1st Circuit upholds use of gross amount of investors' loss in fraudulent case. (300) Defendant was convicted of mail fraud after fraudulently misrepresenting to investors the status of their investments. Defendant claimed that the lower court mistakenly focused on the gross loss of investors' funds, rather than the net loss. The 1st Circuit upheld the loss calculation, since the guidelines make it clear that the gross amount of victims' funds lost by reason of a defendant's criminal conduct can be an appropriate measure of the amount of loss for sentencing purposes. *U.S. v. Tardiff,* __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

1st Circuit upholds use of victim impact statements to determine loss. (300)(770) The 1st Circuit upheld the district court's reliance upon victim impact statements to determine the loss caused by defendant's fraud. The statements were regular on their face and were sworn to by the affected victims. They were the type and kind of evidence on which sentencing courts have commonly relied. Defendant produced no evidence suggesting that the affiants lacked personal knowledge of the matters contained in the statements. Thus, the victim impact statements were competent proof at sentencing and were properly treated by the court as reliable. *U.S. v. Tardiff,* __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

6th Circuit rejects loss enhancement based on estimate where actual loss is impossible. (300) Defendant and his wife attempted to defraud two life insurance companies by falsely claiming he was dead. The wife also filed an application with the Social Security Administration for survivor's benefits for herself and their five children, but the application was denied because defendant had not worked a sufficient number of quarters for his family to be eligible for survivor's benefits. The 6th Circuit held that the district court improperly included in the amount of loss under section 2F1.1 the estimated amount of loss on the social security claim. This was the rare case where, despite complete success, the fraud generated no loss. Although the deception was successful, the Social Security Administration did not and could not suffer any dollar loss based on payments to defendant because defendant's family did not qualify for survivor's benefits. An offense level may not be increased on the basis of an estimated fraud loss when no actual loss is possible. *U.S. v. Khan,* __ F.2d __ (6th Cir. July 14, 1992) No. 91-1626.

8th Circuit limits amount of loss in bankruptcy fraud case to amount of debt. (300) Defendant, an attorney, committed bankruptcy fraud by helping his bankrupt client sell his business to a third party buyer without the knowledge of the bankruptcy court. The district court properly used the going-concern value of the business rather than its liquidation value in calculating the value of the concealed assets. Additionally, the amount the third party buyer was willing to pay for the business was a valid measure of the business's value. But the 8th Circuit held that the court erred in treating the amount the client was to receive under an employment agreement as part of the purchase price for the business. This amount was clearly compensation to the client for post-sale services. It was also error to determine the loss without consideration of the amount of the bankrupt client's debts. The amount of debt places a cap on the intended loss when an individual debtor or the sole owner of a corporate debtor is the party who benefits from the concealment of assets. *U.S. v. Edgar,* __ F.2d __ (8th Cir. July 9, 1992) No. 91-2480NE.

8th Circuit upholds refusal to group child pornography counts. (310)(470) The district court refused to group two child pornography counts together for sentencing purposes. Although the two counts involved pictures of two different children, defendant argued that the counts should have been grouped because the primary victim was the same in both counts: society. The 8th Circuit affirmed the district court's refusal to group the two counts. Analyzing the legislative history of the child pornography laws, the court found that the primary victim of these crimes was the child, not society.

Because the crimes involved two different victims, grouping would have been improper. Moreover, the fact that the pictures were received on different dates required a finding of separate crimes because the act of shipping or receiving the pornography is the focus of offense. *U.S. v. Rugh*, __ F.2d __ (8th Cir. July 7, 1992) No. 92-1114MN.

7th Circuit upholds reckless endangerment enhancement for attempted arsonist. (330) Defendant attempted to hire an undercover agent to burn down his tavern. Despite defendant's claim that he did not intend to hurt anyone, the 7th Circuit upheld a 14 level enhancement under guideline section 2K1.4(b)(2) for recklessly endangering the lives of others. Defendant planned to start a fire using flammable liquids in a storefront on a busy city street. His tavern was adjacent to a hardware store where flammable liquids were stored. Next to this hardware store was a building containing five apartments. Also, defendant disconnected his alarm system to prevent early warning of the hazard. Based on all of these factors, it was not clearly erroneous to find that defendant recklessly endangered lives. Judge Easterbrook concurred in the decision, but felt that evidence should have been presented as to the potential danger. *U.S. v. Foutris*, __ F.2d __ (7th Cir. July 8, 1992) No. 91-2124.

9th Circuit says court may consider loss of parole eligibility in deciding whether to depart downward. (350)(590)(715) Defendant argued that the court erred by ordering his sentence to run consecutively to the pre-guidelines sentence he was serving when he escaped. He argued that there should be a per se rule requiring the court to depart downward by ordering a concurrent sentence for a defendant who commits a subsequent crime while serving a pre-guidelines sentence, because the Parole Commission is almost certain to increase the time that the defendant will serve on his original sentence. The 9th Circuit, following the 6th Circuit's decision in *U.S. v. Stewart*, 917 F.2d 970, 974 (6th Cir. 1990), rejected the argument, stating that although the district court "may consider a defendant's loss of parole eligibility as a factor in its decision whether to depart downward, it is not required to grant the departure." Since all parties agreed that the district court exercised its discretion here, the appeal was dismissed. *U.S. v. Moss*, __ F.2d __ (9th Cir. August 5, 1992) No. 91-10619.

Adjustments (Chapter 3)

5th Circuit reverses official victim enhancement for marijuana distribution offense. (410)(470) When police attempted to enter his apartment to investigate drug charges, defendant shot a police officer. He was convicted of two marijuana counts, which were grouped together, and an assault count, which was grouped separately. The district court assessed an official victim enhancement under section 3A1.1 for both the marijuana group and the assault group. The 5th Circuit reversed the official victim enhancement for the marijuana group. The guidelines would allow an increase in the offense level for the marijuana group based on the official status of the assault victims only if the assault and marijuana counts comprised a single group. The counts could not properly be grouped together, and therefore the district court erred in applying the enhancement to the marijuana conviction. *U.S. v. Kleinebreil*, __ F.2d __ (5th Cir. July 7, 1992) No. 90-8375.

8th Circuit rejects claim that defendant was equal participant in drug conspiracy. (431) Defendant's sentence was enhanced under section 3B1.1(c) for his leadership role in a drug conspiracy. He argued that this was improper because not enough participants were criminally responsible. All but one of his original co-conspirators were cleared of charges, and defendant contended that the remaining co-conspirator participated equally with him. The 8th Circuit upheld the enhancement, since section 3B1.1(c) does not depend on the number of participants. Defendant's claim that he and his co-conspirator were equal participants was rejected. The district judge based his finding in part on testimony and evidence he heard in presiding over the co-defendant's trial. Moreover, defendant's attorney conceded at sentencing that defendant set the price for one of the drug transactions, and that defendant was the most culpable because he was chemically dependent during the time of the heroin transactions. *U.S. v. Bost*, __ F.2d __ (8th Cir. July 6, 1992) No. 91-2447.

8th Circuit upholds organizer enhancement despite less than overwhelming evidence. (431) The 8th Circuit affirmed a four-level enhancement under section 3B1.1(a) based on defendants' organizer status in criminal activity that involved five or more participants. In light of the evidence presented at the first defendant's trial on the CCE count, his challenge was wholly without merit.

With respect to the other defendant, while the evidence was less than overwhelming, it was still sufficient to justify the enhancement. That defendant conceded that he "organized" his girlfriend. He fronted cocaine to one subdealer, called her daily to monitor her progress in selling it, and used her house to store cocaine. Defendant threatened two other subdealers when they failed to pay him on time, and taught one of them how to cut cocaine to earn a larger profit. There was also evidence that two additional subdealers were "organized" by defendant. These subdealers each bought cocaine from defendant on a regular basis, which defendant knew was being resold. *U.S. v. Holt,* __ F.2d __ (8th Cir. July 14, 1992) No. 91-2357MN.

5th Circuit reverses supervisorial enhancement based on related conduct. (432)(470) Defendant was convicted of two marijuana counts, which were grouped together, and an assault count, which was grouped separately. He received a supervisorial enhancement for both the marijuana group and the assault group based upon his supervisorial role in the marijuana offense. The 5th Circuit reversed the enhancement for the assault group. The guidelines do not permit characteristics of one count to be used to adjust the offense level for another count unless those counts are in the same group. *U.S. v. Kleinebreil,* __ F.2d __ (5th Cir. July 7, 1992) No. 90-8375.

1st Circuit affirms that investment advisor abused position of trust. (450) Defendant ran an investment business. When the investments began to perform badly, defendant began falsifying his periodic statements to his clients. He supported the misrepresentations by using new investors' capital as well as his own funds to finance redemptions and other interim payments to investors. Eventually, he lost all of the money entrusted to him. The 1st Circuit affirmed an enhancement for abuse of a position of trust. The primary trait that distinguishes a person in a position of trust from one who is not is the extent to which the position provides the freedom to commit a difficult-to-detect wrong. The extent to which the position assists the defendant in covering up a wrong previously committed is also a badge of a position of trust. Almost by definition, a money manager or financial adviser who is entrusted with broad discretionary powers with respect to other peoples' money occupies a position of trust. *U.S. v. Tardiff,* __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

4th Circuit upholds obstruction enhancement based on falsification of voice exemplar. (461) The district court enhanced defendant's offense level for obstruction of justice, finding that he committed perjury during his trial and that he intentionally disguised his voice when preparing a voice exemplar for examination by a defense witness. The 4th Circuit affirmed that the falsification of the voice exemplar justified the obstruction enhancement. Although the perjured testimony was an improper ground for an obstruction enhancement under *U.S. v. Dunnigan,* 944 F.2d 178 (4th Cir. 1991), the enhancement could nonetheless be affirmed. Even if one basis for an enhancement is erroneous, if the enhancement was applied properly on an alternative basis, the resulting adjusted offense level is correctly determined. *U.S. v. Ashers,* __ F.2d __ (4th Cir. July 8, 1992) No. 90-5914.

7th Circuit affirms obstruction enhancement based on independent finding of perjury. (461) Defendant claimed that the district court, which cited perjury as the basis for an obstruction of justice enhancement, grounded its determination on the jury's guilty verdict rather than an independent finding of perjury. The 7th Circuit affirmed that the district court had made an independent determination of defendant's perjury. The district court considered not only the jury verdict, but also defendant's own statements, and independently assessed the credibility of that testimony. Defendant offered a detailed explanation of his whereabouts the morning of the instant offense, which both the jury and the judge rejected. *U.S. v. Doubet,* __ F.2d __ (7th Cir. July 20, 1992) No. 91-1979.

8th Circuit reverses obstruction enhancement for failure to resolve disputed facts. (462)(765) The sentence was enhanced for obstruction of justice based on the presentence report's recommendations. The 8th Circuit reversed. Defendant specifically objected to the allegations in the presentence report. The district court -- without requiring the government to produce evidence, without conducting an evidentiary hearing, and without making a specific finding -- simply adopted the presentence report. The presentence report was not evidence. If the district court relied upon threats allegedly made to government witnesses, the court should have required the government to produce evidence of those threats. If the enhancement was based on the belief that defendant committed perjury, the district court should have made a more specific finding to that

effect. *U.S. v. Holt*, __ F.2d __ (8th Cir. July 14, 1992) No. 91-2357MN.

5th Circuit says acceptance of responsibility provisions do not require self-incrimination. (484) Defendant accepted responsibility for two marijuana convictions, but refused to accept responsibility for an assault because state charges related to the assault were pending against for the same conduct. Following its decision in *U.S. v. Mourning*, 914 F.2d __ (5th Cir. 1990), the 5th Circuit rejected defendant's claim that the district court's denial of a reduction for acceptance of responsibility violated his 5th Amendment rights against self-incrimination. Affording the possibility of a more lenient sentence does not compel self-incrimination. The government is permitted to reward contrition, and this is not the same as compelling self-incrimination. There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level. *U.S. v. Kleinebrell*, __ F.2d __ (5th Cir. July 7, 1992) No. 90-8375.

4th Circuit says period prior to consultation with attorney may be considered for acceptance of responsibility purposes. (488) Without the benefit of counsel, defendant entered into a written plea agreement admitting his manufacture of marijuana. Several months later he was indicted and counsel was appointed to represent him. He then pled guilty pursuant to the plea agreement. The district court denied him a reduction for acceptance of responsibility because he continued to use marijuana for about five months after entering into his plea agreement. The 4th Circuit affirmed, rejecting defendant's claim that the period prior to consultation with an attorney may not be considered for acceptance of responsibility purposes. Defendant did not need a lawyer to tell him that the use of marijuana was illegal. *U.S. v. Underwood*, __ F.2d __ (4th Cir. July 7, 1992) No. 91-5356.

8th Circuit denies credit for acceptance of responsibility where defendant denied guilt until convicted. (488) Defendant, an attorney, was found guilty of bankruptcy fraud and conspiracy to commit bankruptcy fraud. The 8th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Prior to being found guilty by a jury, defendant denied any intent to defraud creditors. Only after the jury returned its guilty verdict did defendant voluntarily relinquish his license to practice law and state that he accepted the jury's verdict and thought it correct. It was not error to deny the reduction based upon defendant's refusal to admit an essential element of bankruptcy fraud before his conviction. *U.S. v. Edgar*, __ F.2d __ (8th Cir. July 9, 1992) No. 91-2480NE.

8th Circuit denies acceptance of responsibility reduction to defendant who only admitted partial involvement. (488) The 8th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility. Defendant only admitted partial involvement in the conspiracy and only to a limited portion of the methamphetamine manufactured. He initially declined to discuss his involvement in the case and later admitted cooking only seven pounds of methamphetamine. This was much less than the amount established at trial. Additionally, defendant denied being in Kansas City to negotiate the purchase of laboratory equipment. *U.S. v. Stockton*, __ F.2d __ (8th Cir. July 6, 1992) No. 91-2547.

Criminal History (§4A)

8th Circuit reaffirms that predicate convictions may be collaterally attacked for armed career offender enhancement. (504) Defendant received an enhanced sentence as an armed career criminal under 18 U.S.C. section 924(e) on the basis of three prior convictions. The district court refused to consider defendant's claim that one of those convictions was invalid because it was based on an involuntary guilty plea. The 8th Circuit, following *U.S. v. Day*, 949 F.2d 973 (8th Cir. 1991), held that a defendant may collaterally attack the validity of a prior conviction used as a basis for enhancing his sentence under section 924(e). The court distinguished *U.S. v. Hewitt*, 942 F.2d 1270 (8th Cir. 1991), which held that a defendant could *not* collaterally attack a prior conviction used to calculate his criminal history under the sentencing guidelines. *Hewitt* is applicable only to the sentencing guidelines. *U.S. v. Cornelius*, __ F.2d __ (8th Cir. July 2, 1992) No. 91-3351SI.

9th Circuit withdraws contrary opinion; holds that prior sentences were related. (504)(470) Withdrawing its prior opinion filed on May 15, 1992, the 9th Circuit noted that application note 3 to section 4A1.2(a)(2) states that "prior sentences are considered related if they . . . (3) were consolidated for trial or sentencing." Here, the defendant had been sentenced to identical concurrent sentences in the same proceeding in Los

Angeles Superior Court. Although the offenses had not been formally consolidated by the state courts, the 9th Circuit ruled that it was compelled by its recent decision in *U.S. v. Chapnick*, 963 F.2d 224, 228-29 (9th Cir. 1992), to hold that these prior sentences were "consolidated for sentencing" and were therefore "related." Thus, for purposes of calculating the defendant's criminal history, these prior sentences were treated as one sentence. *U.S. v. Bachiero*, __ F.2d (9th Cir. August 4, 1992) No. 90-50685.

9th Circuit upholds consideration of probation violation and similar priors in departing based on criminal history. (504)(510) The district court departed upward in this bank robbery case from a guideline range of 51-63 months to a sentence of 87 months. The departure was based on the inadequacy of the defendant's criminal history reflected by an outstanding warrant for violation of probation, a 1975 conviction for possession of stolen property and a 1976 conviction for embezzlement. The 9th Circuit upheld the criminal history departure, finding that the prior convictions were evidence of similar misconduct as both the bank robberies and the prior offenses were "crimes of theft." Inquiry into the specific facts of the prior convictions was not necessary. The defendant had adequate notice of the intention to depart. The departure from Category II to Category IV was properly guided by analogy and the district court's implicit finding that Category III was inaccurate because the defendant's criminal history was so egregious. *U.S. v. Starr*, __ F.2d __, 92 D.A.R. 10510 (9th Cir. July 29, 1992) No. 91-10215.

3rd Circuit says government need not file section 851 notice of intent to seek career offender status. (520)(761) Defendant alleged that the district court erred in sentencing him as a career offender because the government failed to give him notice of his career offender status before trial under 21 U.S.C. section 851(a)(1). The 3rd Circuit rejected this claim, holding that section 851(a)(1) does not require the government to file notice in order to sentence a defendant as a career offender. Section 851(a)(1) requires the government to file a pretrial information only if it intends to seek a sentence beyond the maximum provided by the statute. *U.S. v. Day*, __ F.2d __ (3rd Cir. July 13, 1992) No. 91-1938.

3rd Circuit says counsel's failure to advise defendant of career offender status in rejecting plea may be ineffective assistance. (520)(880) Defendant was sentenced as a career offender and received a 22-year sentence. In 2255 petition, he claimed that he had received ineffective assistance of counsel in refusing to accept an offer of a five-year sentence because his counsel had mistakenly advised him that he faced only an 11-year maximum sentence if he went to trial. He was not advised of the effect career offender status would have on his potential sentence. The district court dismissed the petition without holding a hearing. The 3rd Circuit reversed, holding that the substandard performance of counsel could have prejudiced defendant. "Familiarity with the structure and basic content of the [guidelines] (including the definition and implications of career offender status) has become a necessity for counsel who seek to give effective representation." Even though defendant received a fair trial, he still could have suffered prejudice, because the right to effective assistance of counsel guarantees more than a right to a fair trial. *U.S. v. Day*, __ F.2d __ (3rd Cir. July 13, 1992) No. 91-1938.

9th Circuit says "aider and abettor" of crime of violence is equally guilty. (520) Defendant was convicted as an aider and abettor in the prior crime of malicious destruction of a truck. He argued that because he was vicariously liable and played only a minimal role the court erred in finding him to be a career offender based on the prior offense. The 9th Circuit rejected the argument, stating that it was foreclosed by the commentary to section 4B1.2 which states, "the terms 'crime of violence' and 'controlled substance offense' included the offenses of aiding and abetting, conspiring and attempting to commit such offenses." *U.S. v. Morrison*, __ F.2d __ (9th Cir. August 5, 1992) No. 91-10491.

9th Circuit uses "categorical" approach in finding that explosives offense was a crime of violence. (520) Defendant was sentenced as a career offender. He argued that his prior conviction for aiding and abetting malicious destruction by use of explosives in violation of 18 U.S.C. section 844(i), was not a crime of violence under 4B1.1. The 9th Circuit said that the "categorical" approach in *Taylor v. U.S.*, 495 U.S. 575 (1990), meant that "while not all crimes resembling burglary are burglary, once a crime has been defined as burglary, it necessarily is a crime of violence." Thus, with regard to the explosives offense here, it did not matter that the offense *actually* involved only damage to property. Since defendant could not argue that his firebombing of the truck did not involve use of explosives, he could not argue that it did not involve a serious potential risk of physical

injury to another. *U.S. v. Morrison*, __ F.2d __ (9th Cir. August 5, 1992) No. 91-10491.

Determining the Sentence (Chapter 5)

5th Circuit upholds consecutive sentences under section 5G1.2(c). (650) Defendant received consecutive sentences for conspiracy to commit an offense and for an offense that was the sole object of that conspiracy. He argued that this violated 28 U.S.C. section 994(1)(2). The 5th Circuit upheld the consecutive sentence under 5G1.2(c). That section authorizes consecutive sentences in one limited situation: If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. Here, count three carried the highest statutory maximum of 120 months. The sentence imposed on that count was 91 months, less than the total punishment of 121 to 151 months. Thus the district court also properly sentenced defendant to 30 months consecutive for a drug count. *U.S. v. Kleinebreil*, __ F.2d __ (5th Cir. July 7, 1992) No. 90-8375.

Departures (§5K)

5th Circuit upholds refusal to hold hearing to consider substantial assistance departure. (712) Defendant appealed the district court's refusal to hold an evidentiary hearing to examine the extent of defendant's assistance to the government under section 5K1.1. The 5th Circuit, affirmed, following the decision in *Wade v. U.S.*, 112 S.Ct. __ (May 18, 1992) No. 91-5771. Under *Wade*, the government's decision not to file a motion for a substantial assistance departure may be reviewed only if the refusal was based on an unconstitutional motive such as race or religion. Absent a "substantial threshold showing" of such an improper motive, courts lack authority to scrutinize the level of the defendant's cooperation. This limited review forecloses the need for an evidentiary hearing solely to document the defendant's assistance. Here, defendant did not allege an illicit motivation underlying the government's refusal to request a section 5K1.1 departure, and thus, no evidentiary hearing was warranted. *U.S. v. Urbani*, __ F.2d __ (5th Cir. July 13, 1992) No. 91-3696.

7th Circuit places burden on defendant to show improper motive for refusal to file substantial assistance motion. (712) The 7th Circuit affirmed the district court's determination that in the absence of a government motion, the defendant has the burden of demonstrating that a departure under section 5K1.1 was justified. Under *Wade v. U.S.*, 112 S.Ct. __ (May 18, 1992) No. 91-5771, the district court can review a refusal to file a substantial-assistance motion by the prosecutor if the denial is based on an unconstitutional motive. However, the defendant has no right to an evidentiary hearing unless he makes a "substantial threshold showing." *U.S. v. Egan*, __ F.2d __ (7th Cir. July 9, 1992) No. 90-3008.

9th Circuit says defendant waived departure argument by failing to raise it in district court. (715)(855) At oral argument, the defendant asked the court to remand the case to permit the district court to exercise its discretion to depart downward on the basis of such factors as youthful lack of guidance. The 9th Circuit rejected the argument, stating that because the defendant failed to present this issue to the district court, "we deem it waived." *U.S. v. Quesada*, __ F.2d __ (9th Cir. August 5, 1992) No. 91-50479.

4th Circuit holds that factual finding underlying refusal to depart is not subject to review. (730)(860) Defendant requested a downward departure based upon diminished capacity pursuant to section 5K2.13. The district court refused, concluding that any diminished capacity was the result of voluntary drug use. Based on *U.S. v. McCrary*, 887 F.2d 485 (4th Cir. 1989), defendant argued that the appellate court had jurisdiction to review a refusal to depart where that refusal is based upon a clearly erroneous finding of fact. The 4th Circuit rejected the argument, stating that it had no jurisdiction to review a refusal to depart downward. *U.S. v. Bayerle*, 898 F.2d 28 (4th Cir. 1989) makes it clear that the only circumstance in which review is available is when the district court mistakenly believes that it lacks the authority to depart. To the extent that *McCrary* stands for the proposition that the factual findings underlying a district court's refusal to depart is subject to review, that case has been effectively overruled by *Bayerle*. *U.S. v. Underwood*, __ F.2d __ (4th Cir. July 7, 1992) No. 91-5356.

8th Circuit affirms that age, employment history and family circumstances did not justify downward departure. (736) Defendant argued for a downward departure based on her age, her employ-

ment history and the fact that if she were incarcerated, her granddaughter would have to live with her mother, an alleged drug and alcohol abuser. Although it was unclear whether the district court exercised its discretion not to depart or whether it believed that it lacked discretion to depart, the 8th Circuit affirmed because the court lacked authority to depart. Defendant's age alone (64) was not a permissible basis for departure. Her health was good, and defendant did not otherwise show her age to be an extraordinary circumstance. Similarly, defendant's employment was not a permissible basis for departure when she otherwise showed no atypical circumstances. Finally, although extraordinary family circumstances may justify a departure, defendant's situation was not extraordinary. *U.S. v. Harrison*, __ F.2d __ (8th Cir. July 16, 1992) No. 92-1350.

8th Circuit affirms downward departure for defendant who aided and abetted drug offense by selling drug paraphernalia. (738) Defendant was convicted of aiding and abetting the manufacture and distribution of cocaine as a result of her business which sold drug paraphernalia. The court departed downward from 188 months to a sentence of 108 months, because it found that the Sentencing Commission, in determining the appropriate range for aiding and abetting the sale and manufacture of controlled substances, did not have in mind this type of case. The 8th Circuit affirmed that as a matter of law, the circumstances of defendant's aiding and abetting conduct was sufficiently unusual to warrant a departure. Defendant's only involvement in the manufacture and distribution of cocaine was as a seller of diluent. *U.S. v. Posters 'N' Things*, __ F.2d __ (8th Cir. July 13, 1992) No. 91-2426.

Sentencing Hearing (86A)

1st Circuit affirms that defendant was given sufficient opportunity to rebut presentence report. (765) The 1st Circuit rejected defendant's claim that he was not given a sufficient opportunity to either rebut the assertions in the presentence report or to counter the impressions that the district court received from certain victim impact statements presented with the presentence report. The presentence report was completed July 9 and was promptly sent to defendant for review. Defendant sent a 10 page reply to the probation officer in July. The district court then granted defendant's request for more time to prepare his response and sentencing was delayed until September 20. Defendant then filed a supplementary response on August 20. At the sentencing hearing on September 20, the prosecutor presented the same information defendant had previously received and reviewed. Defendant did not move for a further continuance and did not request an evidentiary hearing or offer any evidence. *U.S. v. Tardiff*, __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

1st Circuit affirms that reliance upon presentence report did not violate Confrontation Clause. (770) The 1st Circuit rejected defendant's claim that the district court's reliance upon the presentence report to assess the loss caused by his offense violated the Confrontation Clause. In the usual case, a defendant's 6th Amendment right to confront the witnesses against him does not attach during the sentencing phase. *U.S. v. Tardiff*, __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

Appeal of Sentence (18 U.S.C. §3742)

1st Circuit refuses to review refusal to depart. (860) The 1st Circuit refused to consider defendant's claim that the district court should have departed downward. A district court's refusal to depart from a correctly calculated sentencing range, regardless of the suggested direction, is not an appealable one. *U.S. v. Tardiff*, __ F.2d __ (1st Cir. July 8, 1992) No. 91-2040.

8th Circuit affirms that it cannot review refusal to depart downward. (860) The 8th Circuit refused to review the district court's decision to depart downward. The district court's conclusion that mitigating circumstances justifying a departure did not exist was an exercise of discretion that is not reviewable on appeal. Senior Judge Heaney dissented. *U.S. v. Edgar*, __ F.2d __ (8th Cir. July 9, 1992) No. 91-2480NE.

11th Circuit refuses to review sentencing challenge because same sentence would have been imposed under new range. (865) Defendant had a guideline range of 51 to 63 months, but claimed that she should have been sentenced under a lower but overlapping range. The 11th Circuit refused to consider her claim because it was satisfied that the same 60-month sentence would have been imposed under either guideline range. The district judge stated that "60 months is fair whatever side you take." He further stated that although defendant might have been a candidate for a 51 month sentence he would not have given it to her. Thus, the record reflected that defendant would have

received a 60 month sentence regardless of which range applied. *U.S. v. Milton*, __ F.2d __ (11th Cir. July 13, 1992) No. 91-5481.

Habeas Corpus/28 U.S.C. 2255 Motions

3rd Circuit rejects claim that district court was unaware of its ability to depart downward. (880) In a petition brought under 28 U.S.C. section 2255, defendant argued that the district court was unaware of its ability to depart downward based upon the overrepresentation of his criminal history. The district court dismissed the section 2255 petition. The 3rd Circuit affirmed, since the district judge who ruled on defendant's petition was the same judge who had sentenced him, and his opinion confirmed that he recognized his power to depart. *U.S. v. Day*, __ F.2d __ (3rd Cir. July 13, 1992) No. 91-1938.

4th Circuit refuses to consider ineffective assistance claim brought on direct appeal. (880) Defendant contended that he was denied effective assistance of counsel at sentencing because his lawyer failed to move for a downward departure based upon a number of factors. The 4th Circuit rejected without prejudice the ineffective assistance claim. Ordinarily, claims of ineffective assistance must first be presented in the district court in a 28 U.S.C. section 2255 proceeding. The issue may be confronted on direct appeal only when the records supports an ineffective assistance claim. This was not such a case. *U.S. v. Underwood*, __ F.2d __ (4th Cir. July 7, 1992) No. 91-5356.

Forfeiture Cases

2nd Circuit reverses denial of motion to return seized property. (940) While arresting petitioner at the airport on drug charges, the government seized $2,483, petitioner's passport, his return air ticket and his garment bag and its contents. Petitioner's initial motion to return his property was denied on condition that, within 30 days, formal forfeiture proceedings were commenced. The DEA then sent petitioner a Notice of Seizure of the money, but not the air ticket. After the DEA denied petitioner's request for remission, the district court again denied the petition. The 2nd Circuit reversed, ruling that where criminal proceedings have already been completed, the court should treat a Rule 41(e) motion as a civil complaint. Although the passport had to be retained until deportation proceedings were concluded, there was no reason for the government's continued retention of the ticket. The appellate court rejected the contention that it lacked jurisdiction to review the DEA's administrative forfeiture. The government claimed that since petitioner did not pay the $250 cost bond, petitioner elected his remedy. However, since the government had taken all of petitioner's money, this argument was rejected. On remand, the district court should appoint counsel for petitioner so that he could defend his property from forfeiture in a trial. *Onwubiko v. U.S.*, __ F.2d __ (2nd Cir. July 15, 1992) No. 91-2591.

Opinion Withdrawn and New Opinion Filed

(224)(470)(504) *U.S. v. Bachiero*, __ F.2d __ (9th Cir. May 15, 1992) No. 90-50685, *withdrawn and new opinion filed*, __ F.2d __ (9th Cir. August 4, 1992) No. 90-50685.

Rehearing En Banc Granted

U.S. v. Lambert, 963 F.2d 711 (5th Cir. 1992), rehearing en banc granted, __ F.2d. __ (July 14, 1992) No. 91-1856.

Amended Opinion

(120)(140)(210)(650) *U.S. v. LaFleur*, 952 F.2d 1537 (9th Cir. 1991) *amended on denial of rehearing en banc*, (9th Cir. August 4, 1991) No. 89-50599.

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Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 20 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | July 27, 1992

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New Feature: At the suggestion of Berkeley attorney Bruce Cohen, from now on each newsletter will include a list of all topic numbers indexed in that newsletter. *See* page 11.

New Books: The new softbound 434-page "Volume Two" cumulative supplement was shipped to subscribers last week, along with an attractive loose-leaf binder for your newsletters. If you did not receive yours, please contact the publisher at (714) 755-5450.

Application Principles, Generally (Chapter 1)

7th Circuit affirms that ticket broker's purchase of stolen strips of World Series tickets involved more than minimal planning. (160) Defendant, a ticket broker, arranged to purchase 30 strips of tickets to the post-season games of the Minnesota Twins, which the seller was going to steal from the Twins' vault. Over the course of two weeks, defendant and the seller negotiated the details of the delivery and sale in a series of telephone conversations. To reduce his risk in the event the Twins did not play a sufficient number of games, defendant made plans to travel to Las Vegas to bet against the Twins. He purchased 30 different money orders in the amount of $1,000 apiece to protect himself from theft and to allow him to buy fewer strips if the seats were not as promised. The 7th Circuit affirmed that the offense involved more than minimal planning. The extended phone conversations, plans to reduce the risk in Las Vegas, and the purchase of 30 money orders prior to a carefully arranged meeting showed that this was not a spur of the moment deal. *U.S. v. Mount*, __ F.2d __ (7th Cir. June 25, 1992) No. 92-1087.

11th Circuit rules that "Don't do anything funny or I'll be back" is not an express threat of death.

(180)(224) Defendant received an enhancement under section 2B3.1(b)(2)(D) for making an express threat of death during a robbery. The 11th Circuit reversed, ruling that his statement to the bank teller, "Don't do anything funny or I'll be back," was not an express threat of death. The court declined to read broadly the commentary that applies to enhancement for defendants who have instilled "significantly greater fear than that necessary to constitute an element of the offense of robbery." The commentary to the guidelines does not have the force of law, but serves as an aid in interpreting the guidelines. Here, section 2B3.1(b)(2)(D) was not ambiguous, and a broad reading of the commentary might conflict with the clear language of the guideline. Thus, the court interpreted the commentary narrowly to apply the enhancement only to defendants who have engaged in conduct that would instill in the victim a reasonable fear for his or her life. The threat to come back was not an express threat of death. While it implied physical harm, and may well have implied death, the threat of death was not direct, distinct or express. *U.S. v. Tuck,* __ F.2d __ (11th Cir. June 29, 1992) No. 91-8781.

Offense Conduct, Generally (Chapter 2)

5th Circuit affirms use of retail value of stolen goods to prove wholesaler's loss. (220) Defendant was convicted of theft under 18 U.S.C. section 659. He received a five-point enhancement under section 2B1.1(b)(1)(F) based on a loss in excess of $10,000. The loss valuation was based upon the retail value of the goods, including warehousing and shipping costs. Defendant argued that the restitution amount, $4,564.80, should be used as the amount of loss. Since the goods he stole were being shipped wholesale, the wholesaler was the victim and the retail value was a speculative future value. The 5th Circuit rejected the argument. In *U.S. v. Payne,* 467 F.2d 828 (5th Cir. 1972), the court had previously determined that "value" under section 659 meant the greater of the wholesale or retail price. The 8th Circuit was in accord. Moreover, even if the wholesale value were the proper measure, the $4,564.80 restitution figure was not the wholesale value of the stolen goods, but the manufactured cost of the product. There was no clear error in including shipping and warehouse costs in the calculation. *U.S. v. Watson,* __ F.2d __ (5th Cir. June 30, 1992) No. 91-7369.

8th Circuit affirms harsher sentences for crack cocaine than for powder cocaine. (242) Defendant argued that the more severe sentence he received for his offense involving crack cocaine, as opposed to cocaine powder, violated his equal protection rights. He asserted that the higher penalties for crack have a racially discriminatory impact because locally, blacks accounted for 100 percent of those sentenced for possession of crack, but only 27 percent of those sentenced for possession of cocaine powder. Following previous Circuit decisions, the 8th Circuit rejected this claim. Congress had a rational basis for imposing harsher penalties for crimes involving crack because of crack's potency, its highly addictive nature, its affordability, and its increasing prevalence. Senior Judge Heaney, joined by Senior Judge Lay, concurred only because they felt bound by prior Circuit decisions. *U.S. v. Willis,* __ F.2d __ (8th Cir. June 26, 1992) No. 91-2467.

3rd Circuit upholds reliance on hearsay to determine drug quantity. (245)(770) The 3rd Circuit upheld the district court's reliance on a pretrial statement by one witness to determine drug quantity. The witness stated that prior to her arrest she and one of the defendants brought between two to four pounds of heroin per month from Los Angeles during the period of April 1986

The **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, biannual supplements and biweekly newsletters. The main volume (3rd Ed., hardcover, 1100 pp.), and Volume 2 Supplement, cover ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month a cumulative index to the newsletters is published.*

Annual subscription price: $295
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Publisher:
- Kathy McCoy

through September 1987. Based on this statement, the district court attributed 15.5 kilograms of heroin to defendants. This calculation did not affect one defendant's mandatory life sentence under 21 U.S.C. section 841(b)(1)(A)(i), since the jury found beyond a reasonable doubt that defendant conspired to possess in excess of one kilogram of heroin. The statement was not admitted into evidence at trial and the jury did not rely on it in any way. Although neither defendant had the opportunity to cross-examine the witness about her statement, reliable hearsay is generally admissible. The credibility of the witness was for the district court to determine. *U.S. v. McGlory*, __ F.2d __ (3rd Cir. June 19, 1992) No. 90-3604.

3rd Circuit affirms 841(b) enhancement for priors even though state law no longer made offense a felony. (245) Under 21 U.S.C. section 841(b)(1)(A), a defendant with two or more prior felony drug convictions is subject to a mandatory life sentence. Defendant was convicted in 1971 of possession of cocaine under a Pennsylvania law which made it a felony. Effective 1972, that law was repealed. Under the new law, possession of cocaine was reduced to a misdemeanor. Defendant contended that his conviction could not be considered a felony because, if he were convicted of the same conduct today, it would only be a misdemeanor under Pennsylvania law. The 3rd Circuit rejected this interpretation, despite defendant's analogy to guideline section 4B1.2, which defines a prior felony conviction in terms of the penalty for the offense. Tremendous confusion in sentencing would result if the sentencing court had to analyze the current status of every prior state law under which a defendant was previously convicted. Judge Becker concurred. *U.S. v. McGlory*, __ F.2d __ (3rd Cir. June 19, 1992) No. 90-3604.

10th Circuit affirms that defendant was accountable for full 300 kilograms involved in drug transaction. (275) Defendant argued that he should only be held accountable for 200 of the 300 pounds of marijuana involved in a drug transaction. The 10th Circuit rejected the argument. As part of his plea allocution, defendant admitted that he possessed with intent to distribute 298 pounds of marijuana. The district court implicitly ruled that defendant knew or should have known that his transaction involved 300 pounds of marijuana. In addition, the evidence indicated that the defendants intended to pay $650 per pound of marijuana. Thus, the $200,000 defendant was carrying was more consistent with a purchase of 300 pounds of marijuana (costing approximately $195,000) than a purchase of 200 pounds of marijuana (costing approximately $130,000). *U.S. v. Bernaugh*, __ F.2d __ (10th Cir. June 24, 1992) No. 91-6127.

1st Circuit affirms that co-conspirator's firearm possession was foreseeable based on large quantity of money and drugs. (284) The 1st Circuit affirmed a two-level enhancement under 2D1.1(b)(1) for defendant based upon a co-conspirator's possession of a gun during a drug transaction. Defendant set up the transaction and knew that a large quantity of money ($28,000) and drugs (one kilogram of almost pure cocaine) would be exchanged. In addition, a large number of co-conspirators were present at the transaction as a show of force. Thus, it would be "reasonably foreseeable" to expect a co-defendant to possess such a weapon. *U.S. v. Sostre*, __ F.2d __ (1st Cir. June 29, 1992) No. 91-1918.

1st Circuit upholds firearm enhancement for weapons purchased by spouse for "home protection." (284) Defendant was involved in her husband's drug trafficking business, which he conducted from their residence. A search uncovered drugs and two guns which had been purchased by defendant's husband for "home protection." The husband had a "concealed guns" permit. Defendant testified that she never handled the weapons, but admitted knowing where they were located. The 1st Circuit affirmed an enhancement under section 2D1.1(b)(1) for possession of a firearm during a drug trafficking crime. The fact that there may have been an alternative, legal basis for the guns' possession did not, by itself, prevent the enhancement. When the weapon's location makes it readily available to protect the participants or the drugs and cash during the commission of the illegal activity, there is sufficient evidence to connect the weapons to the offense. *U.S. v. Corcimiglia*, __ F.2d __ (1st Cir. June 26, 1992) No. 91-2290.

7th Circuit says that loss caused by theft of World Series tickets includes difference between the face value and market price of tickets. (300) Defendant arranged to purchase 30 strips of tickets to the post-season games of the Minnesota Twins. The tickets were to be stolen by the seller from the vault of the Twins. So that the Twins would not detect the theft and invalidate the tickets, the seller intended to replace the tickets with $12,000, the face value of the tickets. Defendant, however, was to pay the seller $30,000 for the tickets. Defendant argued that the loss to the Twins under section 2F1.1 caused by his offense was zero, since the

$12,000 to be placed in their vault would have reimbursed them in full for the face value of the tickets. The 7th Circuit rejected this argument, finding that the difference between the face value and market price of the tickets was an element of value. The team had business reasons to set the face value of the tickets at a price below market and would derive value (out of which defendant attempted to defraud it) by selling the tickets to its loyal fans at that lower price. *U.S. v. Mount*, __ F.2d __ (7th Cir. June 25, 1992) No. 92-1087.

2nd Circuit applies obstruction of justice guideline to defendant who refused to testify. (320)(390) Defendant was convicted of criminal contempt under 18 U.S.C. section 401 for refusing to testify at the trial of a reputed mobster. The 2nd Circuit affirmed that defendant was properly sentenced under section 2J1.2 (Obstruction of Justice), rather than section 2J1.5 (Failure to Appear by a Material Witness). Since no guideline has been provided for criminal contempt, section 2X5.1 provides for the application of the most analogous guideline. Notwithstanding *U.S. v. Underwood*, 880 F.2d 612 (1st Cir. 1989), the most analogous guideline for defendant's refusal to testify was obstruction of justice. Here, the district court specifically found that defendant intended to obstruct justice. The distinction between good faith and bad faith plays a central role in choosing an applicable sentencing guideline in cases of criminal contempt. *U.S. v. Remini*, __ F.2d __ (2nd Cir. June 18, 1992) No. 92-1033.

7th Circuit reverses sentence for committing offense while on bail. (320)(650) Guideline section 2J1.7 provides for a three level enhancement if 18 U.S.C. section 3147 applies because the defendant committed the offense while released on bail. Section 3147 requires a consecutive 10-year sentence. With the three levels, defendant had a minimum guideline range of 87 months. But since he was currently serving a 101 month sentence, the district judge thought that a total sentence of 188 months was too long, and instead imposed a 147-month sentence, to run concurrently with the 101 month sentence. The 7th Circuit remanded for resentencing. The application notes to section 2J1.7 provide that to comply with section 3147, the court should state on the judgment form what part of the sentence is attributable to the underlying offense and what part is attributable to the enhancement. The portion attributable to the enhancement must run consecutively to any other sentence of imprisonment. *U.S. v. Wilson*, __ F.2d __ (7th Cir. June 24, 1992) No. 90-2640.

10th Circuit enhances fraud sentence based on risk to firefighters and surrounding buildings. (330) Defendant and her husband burned their business in order to collect insurance proceeds. Defendant contended that she should have been sentenced under section 2K1.4(a)(3) since the prosecution in this case was for fraud, rather than section 2K1.4(a)(2), which applies when the offense carries a substantial risk of death or injury. The 10th Circuit rejected defendant's claim that her actions did not present a substantial risk of injury or death. The firefighters were in danger of physical injury or death by the threat of a flashback explosion. Moreover, the heat and smoke in the building required them to take precautions to avoid further injury. Finally, property of others was damaged or placed at risk. *U.S. v. Grimes*, __ F.2d __ (10th Cir. June 26, 1992) No. 91-6227.

10th Circuit rejects minor participant and "not for profit" reductions for transporter of illegal aliens. (340)(445) Defendant was convicted of transporting illegal aliens. He contended that he was entitled to a reduction under section 3B1.2 for being a minor participant and under section 2L1.1(b)(1) because he did not commit the crimes for profit. The 10th Circuit rejected the argument. Four of defendant's passengers testified that defendant stopped the car before the Border Patrol checkpoint, unloaded the passengers, drove the car through the checkpoint, and then stopped to pick the passengers up on the other side. One witness testified that he paid defendant $750. *U.S. v. Uresti-Hernandez*, __ F.2d __ (10th Cir. July 2, 1992) No. 91-2207.

11th Circuit affirms reasonableness of six level departure for distributing drugs in prison. (350)(470)(500)(738) Defendant smuggled drugs into jail and distributed them to other inmates. Because of the small quantity, defendant's base offense level was only 12 under section 2D1.1. The district court departed upward six levels by analogy to section 2P1.2(a)(3), which sets a base offense level of six for providing contraband in a federal penal facility in violation of 18 U.S.C. section 1791. The 11th Circuit affirmed, observing that the sentence did not exceed what defendant would have received if he had been convicted under section 1791. The section 1791 count would not be grouped with his drug counts under section 3D2.1(a) or (b), since different societal interests are harmed by the two offenses. Nor would the two counts be grouped on the basis of drug quantity under section 3D2.1(d), since section 2P1.2 is specifically excluded from the

operation of section 3D1.2(d). Finally, the two criminal history points that defendant was assessed under section 4A1.1(d) for being under a criminal justice sentence at the time of the offense did not adequately consider his imprisonment status. *U.S. v. Ponder,* __ F.2d __ (11th Cir. June 26, 1992) No. 91-8374.

Adjustments (Chapter 3)

2nd Circuit affirms vulnerable victim enhancement for prison guard's attack on inmate. (410) Defendant, a prison guard, assaulted an inmate in front of three other officers. He was convicted of civil rights violations. The 2nd Circuit upheld a two level vulnerable victim enhancement under section 3A1.1. Defendant argued that the vulnerability of the inmate was merely a result of his status as a guard, a factor already taken into consideration by guideline section 2H1.4. The appellate court rejected this reasoning since the civil rights statute does not necessarily contemplate a victim who is in custody and under defendant's control. The victim was vulnerable because he was in defendant's custody and was surrounded by four guards when the assault took place. *U.S. v. Hershkowitz,* __ F.2d __ (2nd Cir. June 30, 1992) No. 91-1700.

4th Circuit upholds leadership role for Dilaudid dealer. (431) The 4th Circuit held that the district court's application of a four-level leadership enhancement under section 3B1.1 was not clearly erroneous. Defendant directed the distribution of Dilaudid by four others. Detailed financial records of drug transactions totalling $26,000 were recovered in one of these distributor's homes with defendant's fingerprints on them. While this evidence was not "overwhelming," it was sufficient. *U.S. v. Melton,* __ F.2d __ (4th Cir. July 1, 1992) No. 90-5056.

10th Circuit upholds leadership adjustment for drug source who controlled the manner and place of delivery. (431) Undercover agents negotiated the purchase of cocaine from defendant and a co-defendant. The 10th Circuit upheld an enhancement under section 3B1.1(c) based on defendant's leadership role in the offense. Throughout the transaction that involved the co-defendant, defendant acted as the "source" and directed the co-defendant's actions. During the negotiations for the purchase of the cocaine, the co-defendant repeatedly checked with defendant and acted pursuant to the directions that he received from defendant. This evidence demonstrated that defendant controlled both the manner and place of delivery. *U.S. v. Hernandez,* __ F.2d __ (10th Cir. June 24, 1992) No. 91-2245.

10th Circuit affirms leadership enhancement for "moneyman" or "banker" of drug transaction. (431) The 10th Circuit affirmed a four-level enhancement under 3B1.1(a) based upon defendant's leadership role in a drug transaction. The district court's findings that five or more participants were involved was not clearly erroneous. There were six co-defendants who were also convicted for their involvement in the transaction. At the plea hearing, defendant admitted that he recruited four of the co-defendants to engage in the transaction. He also did not challenge the allegation that he was the "moneyman" or "banker" referred to in a tape recorded conversation with a police detective, and that he provided transportation and expenses for the individuals he recruited. There was also evidence that defendant engaged in negotiations concerning the transaction and that he took possession of at least seven of the eight boxes of marijuana prior to his arrest. *U.S. v. Bernaugh,* __ F.2d __ (10th Cir. June 24, 1992) No. 91-6127.

10th Circuit upholds consideration of information presented at trial of co-defendants. (431)(770) Defendant contended that in determining he was a leader under section 3B1.1(a), the district court erred by relying in part upon information presented at the trial of his co-defendants. The 10th Circuit upheld the consideration of such information. In making its findings, a district court can use any reliable evidence, including hearsay testimony from a separate trial. *U.S. v. Bernaugh,* __ F.2d __ (10th Cir. June 24, 1992) No. 91-6127.

1st Circuit reverses supervisory role enhancement for drug "steerer." (432) Defendant was characterized as a drug "steerer" by both sides. A steerer was defined as one who "directs buyers to sellers in circumstances in which the sellers attempt to conceal themselves from casual observation." The 1st Circuit reversed a "supervisor" enhancement under section 3B1.1(b). Although defendant contacted the source and escorted the purchasers to the room where the transaction took place, nothing in the record indicated that defendant held a supervisory role in the conspiracy. At no time did defendant have control

over the cocaine, nor was he the principal with whom the government agents transacted the sale. Before making representations to the buyers, defendant always had to check with his co-defendants. Defendant did not exercise control over any of the other co-defendants, with the possible exception of his brother, who served as a lookout. *U.S. v. Sostre*, __ F.2d __ (1st Cir. June 29, 1992) No. 91-1918.

1st Circuit affirms that drug "steerer" was not minor participant. (445) Defendant contended that he deserved a minor role reduction because he was merely a "steerer" in the drug sale, i.e. one who makes the arrangements for a drug sale. The 1st Circuit affirmed that defendant was not entitled to the reduction. Defendant made the initial contact with the drug source, revealed both the price and quantity of drugs to be sold, used his house for the transaction, and remained present during the transaction. *U.S. v. Sostre*, __ F.2d __ (1st Cir. June 29, 1992) No. 91-1918.

2nd Circuit affirms obstruction of justice enhancement for suborning perjurious testimony. (461) Defendant was given an obstruction of justice enhancement for suborning perjury from one of his witnesses. He argued that the enhancement was improper based on application note 1 to section 3C1.1, which "instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction." The 2nd Circuit affirmed the enhancement largely because the trial judge had firm reasons for giving the enhancement. He found that (a) the witness's testimony was false, (b) the falseness was intended to help defendant, and (c) the falseness was suggested by defendant. The court rejected defendant's argument that the enhancement may only be applied when there is "no explanation for the inconsistency between the verdict and the defendant's testimony other than purposeful perjury." *U.S. v. Johnson*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1082.

4th Circuit affirms obstruction enhancement for attempted escape. (461) Defendant attempted to escape from custody by kicking a deputy and running 20 yards down the hall before being apprehended. Defendant admitted the escape attempt, but claimed he was trying to seek help from a doctor for his untreated drug addiction. The 4th Circuit affirmed an enhancement for obstruction of justice under section 3C1.1 based on the attempted escape. Note 3(e) indicates that an attempted escape is grounds for the adjustment, and no exception is made for the reason underlying the attempt. *U.S. v. Melton*, __ F.2d __ (4th Cir. July 1, 1992) No. 90-5056.

10th Circuit upholds obstruction enhancement for defendant who lied at plea hearing to protect co-conspirators. (461) Defendant and several co-defendants were arrested for their participation in a "reverse buy" of marijuana. Four of the defendants chose to go to trial while defendant pled guilty on the eve of his scheduled trial. The 10th Circuit upheld an enhancement for obstruction of justice under section 3C1.1 based on defendant's false testimony at his plea hearing concerning the roles of the co-defendants who were to go to trial. Defendant lied about the roles of his friends in order to protect them, notwithstanding the overwhelming evidence of the friends' guilt. The obstruction enhancement applies where a defendant attempts to obstruct justice in a case closely related to his own, such as that of a co-defendant. Moreover, defendant's perjury with respect to the actors associated with him in the transaction could have been an attempt to affect his own sentencing, to hide his role in the offense. *U.S. v. Bernaugh*, __ F.2d __ (10th Cir. June 24, 1992) No. 91-6127.

10th Circuit affirms obstruction enhancement based on efforts to get co-defendant to retract information provided to police. (461) The government introduced evidence that defendant, while incarcerated at the county detention center, asked his co-defendant to retract the information the co-defendant had already provided to authorities. Defendant told the co-defendant that if he would tell the police that he had obtained the cocaine from someone other than defendant, then defendant would obtain a lawyer for the co-defendant. The 10th Circuit affirmed that this was a sufficient ground for an obstruction of justice enhancement under guideline section 3C1.1. Attempting to influence the testimony of a potential witness can form the basis for an obstruction enhancement. *U.S. v. Hernandez*, __ F.2d __ (10th Cir. June 24, 1992) No. 91-2245.

2nd Circuit denies acceptance of responsibility reduction to defendant convicted of criminal contempt for refusing to testify. (488) Defendant was convicted of criminal contempt under 18 U.S.C. section 401 for refusing to testify at the trial of a reputed mobster. He moved to dismiss the indictment on the grounds that exculpatory evidence -- he acted on the advice of counsel -- was withheld from the grand jury. The trial court ruled

that his reasons for refusing were irrelevant. At sentencing, defendant contended that he was entitled to a reduction for acceptance of responsibility because he admitted in his statement to the probation department that he had refused to testify, and that because the trial court ruled that his reasons for refusing were irrelevant, he effectively admitted all essential elements of the crime of contempt. The 2nd Circuit affirmed the denial of the reduction. Even if the trial judge ruled that defendant's alleged reasons for refusing to testify did not establish a defense, this did not mean that defendant accepted responsibility for his conduct. Quite to the contrary, he insisted that he was entitled to act as he did and continued to insist the same on appeal. *U.S. v. Remini,* __ F.2d __ (2nd Cir. June 18, 1992) No. 92-1033.

D.C. Circuit denies acceptance of responsibility reduction to defendant who pled guilty to protect co-defendant. (488) The district court believed that defendant pled guilty for reasons other than a sincere acceptance of responsibility, i.e., he pled guilty to protect his co-defendant, who defendant claimed was not involved in the drug transaction. The D.C. Circuit affirmed that the denial of a reduction for acceptance of responsibility was not clearly erroneous, since the judge was in the best position to make that credibility determination. *U.S. v. Washington,* __ F.2d __ (D.C. Cir. June 30, 1992) No. 91-3094.

10th Circuit denies credit for acceptance of responsibility despite stipulation. (490)(795) Defendant contended that he was entitled to an acceptance of responsibility reduction because he pled guilty and the parties stipulated to the adjustment. The 10th Circuit rejected this argument. First, this type of stipulation did not bind the sentencing court. Second, defendant bore the burden of proving by a preponderance of the evidence that he was entitled the reduction. Defendant never made a statement accepting criminal responsibility. His guilty plea, without more, did not automatically entitle him to the reduction. *U.S. v. Hernandez,* __ F.2d __ (10th Cir. June 24, 1992) No. 91-2245.

4th Circuit denies acceptance of responsibility reduction where defendant received obstruction enhancement. (492) The 4th Circuit affirmed the district court's denial of a reduction for acceptance of responsibility since defendant had also received an enhancement for obstruction of justice. Note 4 of section 3E1.1 provides that an enhancement for obstruction of justice ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. *U.S. v. Melton,* __ F.2d __ (4th Cir. July 1, 1992) No. 90-5056.

Criminal History (§4A)

2nd Circuit says defendant has burden of proving that prior crimes are related. (504)(520)(755) Defendant was classified as a career offender based on two prior gas station holdups which were committed within 15 minutes of each other. The district court rejected defendant's claim that the offenses were related, and the 2nd Circuit affirmed. The court observed that the government has the burden of showing that the defendant has at least two prior convictions for the specified crimes. But, if there is question as to whether those crimes were committed pursuant to a single common scheme or plan, the burden is on defendant to show (a) the existence of such a scheme or plan, and (b) the connection between the acts and the plan. The court also rejected defendant's contention that temporal proximity alone sufficed to show a common scheme. The mere goal of obtaining money cannot be the type of scheme or plan that permits a defendant to escape career offender status. *U.S. v. Butler,* __ F.2d __ (2nd Cir. June 23, 1992) No. 91-1349.

11th Circuit refuses to consider underlying facts in finding that attempted arson was a crime of violence. (520) Defendant was sentenced as a career offender based on prior convictions for attempted arson and armed robbery. He argued that the district court should not have ruled that attempted arson was a crime of violence without considering the actual facts of his conviction. The 11th Circuit held that the district court properly refused to review the underlying circumstances in determining that the attempted arson was a crime of violence. Section 4B1.2(a) and application note 2 to section 4B1.1 designate arson as a crime of violence. Note 2 also states that qualifying predicate offenses include *attempted* crimes of violence. Further scrutiny was unwarranted: the analysis of a crime under section 4B1.1 should focus on the statute which defines the offense, not defendant's actual conduct. The 1973 armed robbery conviction was also a proper predicate offense because defendant was incarcerated for that offense within the 15-year period prior to the instant offense. *U.S. v. Mendoza-Cecelia,* __ F.2d __ (11th Cir. June 24, 1992) No. 90-5815.

Determining the Sentence (Chapter 5)

9th Circuit remands where plea stipulation required choice between honesty to defendant and disclosure to Parole Commission. (580)(780) (795) The plea agreement stipulated that the quantity of cocaine was less than 5 kilos, that there would be no minimum mandatory sentence, and the sentence would be "paroleable." However, the pre-sentence report accurately stated that the scheme involved more than 18 kilograms of cocaine. To avoid the discrepancy in the amount of drugs, the district court ordered the PSR to be amended before it was sent to the U.S. Parole Commission. Nevertheless, both versions of the PSR were received by the Parole Commission, which asked the AUSA to explain the discrepancy. The AUSA responded that 18 kilograms was the correct amount, and said the government would oppose parole. On appeal, the 9th Circuit expressed its disappointment that "the government may have placed itself between the rock of disclosure to the Parole Commission and the hard place of honesty in its dealings with the defendant." The court found the plea agreement ambiguous, and remanded the case for the district court to decide what obligations the agreement imposed on the government. *U.S. v. Anderson*, __ F.2d __ (9th Cir. July 13, 1992) No. 91-50113.

9th Circuit upholds six year supervised release term despite five year limit in section 5D3.2(a). (580) Defendant argued that the district court erred in sentencing him to six years of supervised release under the Anti Drug Abuse Act of 1986 (ADAA), 21 U.S.C. section 841(b)(1)(C). He pointed out that section 5D3.2(a) of the Sentencing Guidelines establishes a maximum of five years of supervised release. The 9th Circuit rejected the argument, noting that the ADAA contains no maximum term of supervised release, and in *Gozlon-Peretz v. U.S.*, 111 S.Ct. 840, 848-49 (1991), the Supreme Court held that the ADAA authorizes supervised release for narcotics offenses occurring between October 27, 1986, and the effective date of the Sentencing Guidelines, November 1, 1987. Since the defendant's offense occurred during this period, the ADAA-mandated time period for supervised release applied. *U.S. v. Anderson*, __ F.2d __ (9th Cir. July 13, 1992) No. 91-50113.

8th Circuit, en banc, rules that presentence time spent in halfway house is not "official detention." (600) Disagreeing with the 9th Circuit, and agreeing with the 1st, 2nd, 4th, 5th, and 10th Circuits, the en banc 8th Circuit held that the time defendant spent in a halfway house prior to trial and sentencing did not constitute "official detention" under 18 U.S.C. section 3585(b). Thus, he could not receive custody credits for the time spent in the halfway house. The court found the statutory language ambiguous, and observed that the Bureau of Prisons reasonably resolved this ambiguity by differentiating between residential community centers and jail-like facilities based on the amount of restraint used at the facility. Judge Loken concurred. Senior Judge Heaney, joined by Chief Judge Lay and Judges McMillian, Arnold, and Gibson dissented, believing that the degree of confinement and restraint was sufficient in this case to constitute official detention. *U.S. v. Moreland*, __ F.2d __ (8th Cir. June 30, 1992) No. 90-5375MN (en banc).

10th Circuit reverses restitution order because of defendants' inability to pay. (610) The district court ordered defendants to pay restitution of $128,279.05 in three annual payments of $42,000 following release. The 10th Circuit vacated the restitution order, since there was no evidence in the presentence reports indicating that either defendant had the capacity to earn sufficient income following release to pay that amount. In one defendant's case, the district court had said that it was "doubtful" that she could pay much of the restitution. Given one defendant's financial status and six dependent children, the likelihood of her earning sufficient income to meet her financial responsibilities and pay the restitution was slight. The other defendant's earning capacity was no less dismal. *U.S. v. Grimes*, __ F.2d __ (10th Cir. June 26, 1992) No. 91-6227.

Departures (§5K)

9th Circuit amends opinion to delete statement that court was bound by government recommendation. (710) In its original opinion, summarized on page 285 of the Volume 2 Supplement to the *Federal Sentencing and Forfeiture Guide*, the 9th Circuit held that "the court had no authority to depart downward below the statutory minimum on the basis of [defendant's] aberrant behavior, *nor for that reason to depart below the government's recommended downward departure once the minimum sentence level had been breached.*" On April 29, 1992, the opinion was amended to delete the italicized phrase. *U.S. v. Valente*, 961 F.2d 133 (9th Cir. 1992).

2nd Circuit finds insufficient basis for government's refusal to move for downward departure. (712)(790) Defendant's plea agreement provided that if in the "sole and unfettered discretion" of the government, defendant's cooperation warranted a downward departure, the government would make a motion under section 5K1.1. After defendant and his brother -- who was also a cooperating witness -- testified, the government refused to move for the departure. It gave as its reasons: 1) defendant's cooperation was untimely, 2) defendant was more culpable than the co-defendant against whom he had testified, 3) defendant pled guilty only because his brother had done so, 4) the plea agreement benefitted defendant in other ways, 5) the "substantial assistance" clause in the plea agreement was not bargained for, and 6) defendant's trial testimony was inconsistent with the testimony of his brother. The district court found that the government acted in good faith in refusing to move for a downward departure, but the 2nd Circuit remanded for reconsideration, ruling that none of the stated reasons were sufficient. Even if the district court thought that defendant had testified falsely, the court failed to say so. The case was remanded for further consideration of the good faith issue, with a key issue being the veracity of defendant's testimony. *U.S. v. Knights,* __ F.2d __ (2nd Cir. June 23, 1992) No. 92-1016.

4th Circuit affirms upward departure for murder related to defendant's drug crime. (718)(721)(755) Defendant was convicted of drug crimes. The district court departed upward based on evidence that defendant had killed a government informant to protect his drug business. On appeal, the 4th Circuit affirmed. First, there was ample testimony at sentencing to support the finding that defendant killed the informant. Second, it was not improper to base a departure on a crime for which defendant had not been convicted. The death was related to defendant's drug business and was therefore relevant conduct for sentencing purposes. Proof beyond a reasonable doubt was not required. Third, the informant's murder was an aggravating factor not identified in the guidelines. Section 5K2.1 provides that if an offense resulted in death, an upward departure may be warranted. Finally, the extent of the departure, from a range of 70-87 to a sentence of 240 months, was not unreasonable. The court analogized to section 2D1.1(a)(2) (applicable where death results from drug use), section 2A1.1 (applicable to 1st degree murder) and the federal death penalty statute. *U.S. v. Melton,* __ F.2d __ (4th Cir. July 1, 1992) No. 90-5056.

Sentencing Hearing (§6A)

11th Circuit upholds consideration of information from related case. (770) Defendant argued that the district court departed upward because his offense was part of the corruption in the sheriff's office, and that this was improper because the court learned of this from another case in which defendant was not a party. The 11th Circuit found no error. First, although the sentencing court stated that the corruption was an additional aggravating factor, it then stated that it would not add any additional enhancement because of that fact. Second, defendant had sufficient notice to have responded to this information. The presentence report noted that defendant's father was involved in drug trafficking and was making payments to members of the sheriff's department for protection, and that defendant, a prison inmate, was being supplied drugs by his father. Third, there was testimony in defendant's trial indicating that deputies working in the jail knew about drug abuse among inmates but took no action to end it. *U.S. v. Ponder,* __ F.2d __ (11th Cir. June 26, 1992) No. 91-8374.

Appeal of Sentence (18 U.S.C. §3742)

10th Circuit reaffirms that it lacks jurisdiction to consider extent of downward departure. (860) Although defendant received a substantial downward criminal history departure, he contended on appeal that his base offense level should have similarly been reduced. The 10th Circuit held that it lacked jurisdiction to consider the issue. Neither a failure to depart downward, nor the extent of a downward departure when one occurs, confers jurisdiction on the appellate court. *U.S. v. McHenry,* __ F.2d __ (10th Cir. July 6, 1992) No. 91-4190.

7th Circuit reviews possible sentencing errors even though sentence fell within corrected guideline range. (865) The district court determined that defendant had an offense level of nine with a guideline range of six to 12 months. The court imposed a six-month sentence. Defendant argued that his adjusted offense level was four and his guideline range was zero to six months. The 7th Circuit rejected the government's claim that the choice of offense levels was irrelevant since the sentence chosen by the district court fell within both guideline ranges. An appellate court

may be confident that the choice of range did not affect the sentence when the district judge says so. But here, the judge said nothing on this issue, and the appellate court doubted that the offense level had no effect on the sentence, since six months was the floor of the range the court used and the pinnacle of the range defendant proposed. *U.S. v. Mount*, __ F.2d __ (7th Cir. June 25, 1992) No. 92-1087.

Forfeiture Cases

5th Circuit upholds forfeiture of sheep under Lacey Act because Pakistan law prohibited export. (900)(960) The 5th Circuit affirmed summary judgment in favor of the government in a forfeiture action brought against a sheep imported by claimant into the United States from Pakistan. The action was brought under the forfeiture provisions of the Lacey Act. The court held that the forfeiture statute provides for strict liability, and contains no "innocent owner" defense. Once the government establishes probable cause, the burden shifts to the claimant to establish either that a defense to the forfeiture applies or that the property is not subject to forfeiture. Thus, the government needed to establish only that importation of the sheep violated the laws of Pakistan. The Pakistani Imports and Export Act prohibited the sheep's export out of Pakistan. Although defendant possessed an export permit issued by the province of Baluchistan, this permit was void to the extent it conflicted with the Imports and Export Act. *U.S. v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, __ F.2d __ (5th Cir. June 30, 1992) No. 91-7085.

11th Circuit holds that district court should have bifurcated civil forfeiture trial to prevent jury from hearing hearsay. (920) In a civil forfeiture action, claimant asked for a bifurcated trial: a bench trial to determine probable cause, and a subsequent jury trial on the issue of the innocent owner defense. Defendant argued that this was necessary to prevent the jury from considering hearsay that would be admissible on the issue of probable cause. The district court refused. On appeal, the 11th Circuit reversed, holding that it was error allow the government to present hearsay evidence before the jury. The judge's curative instruction was insufficient to erase the prejudice. He did not tell the jury it could not use hearsay for the truth of the matter asserted, but told them to use the hearsay as background. The hearsay contained references to claimant's supposed financial backings of a known drug lord, and to numerous reports detailing incidents of drug dealing near the subject property. The district court erred in refusing to bifurcate the trial. *U.S. v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida*, __ F.2d __ (11th Cir. June 26, 1992) No. 89-5590.

2nd Circuit says prisoner's motion to return seized property is not mooted by government's destroying or declaring it forfeit. (940) After defendant's arrest, the government seized property from his apartment. Some of the property was later forfeited and some of it was destroyed. However, two years after the seizure, other property, including computer hardware and software, remained in the government's possession. Defendant filed a motion seeking the return of his property, and the government was directed to show cause why the relief should not be granted. Thereafter, the government destroyed the software and the computer hardware was transferred to the DEA for administrative forfeiture. The government advised the court that all of defendant's property that had not been forfeited, destroyed, or transferred to the DEA would be turned over to him. The district court ruled that this mooted the defendant's motion. On appeal, the 2nd Circuit reversed, holding that the government's "conspicuous evasion" of a court order did not divest the district court of jurisdiction. The court was ordered to determine whether damages were appropriate for the destroyed software, and to conduct a hearing on return of the hardware or damages if it was not returned. *Soviero v. U.S.*, __ F.2d __ (2nd Cir. June 24, 1992) No. 91-2521.

11th Circuit holds that innocent owner must prove *either* lack of knowledge *or* lack of consent to drug activities. (960) The innocent owner provisions in 21 U.S.C. section 881(a)(7) provides a defense to the forfeiture of property for those owners who can prove that they had no knowledge of illegal activity occurring on their property *or* who did not consent to that activity. The 11th Circuit held that this means an owner can avoid forfeiture by proving *either* ignorance *or* non-consent. Cases which require owners to prove both non-consent and ignorance read section 881(a)(7) incorrectly. *U.S. v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida*, __ F.2d __ (11th Cir. June 26, 1992) No. 89-5590.

11th Circuit holds that lack of consent requires proof that claimant made all reasonable efforts

to prevent illicit use of his property. (960) The jury was presented with a special interrogatory concerning claimant's innocent owner defense which asked whether claimant proved, by a preponderance of the evidence, that he did everything that he could reasonably be expected to do to prevent the subject property from being used for drug activity. The 11th Circuit held that this accurately stated the law in the circuit under 21 U.S.C. section 881(a)(7). The same standard applies to actions under section 881(a)(6). Nonetheless, the court erred in failing to instruct the jury on the definition of consent and the "all reasonable efforts" standard. The court should have made clear that the standard does not require the claimant to make all efforts, but merely all reasonable ones. The "all reasonable efforts" standard can be satisfied by contacting and cooperating with law enforcement authorities, especially when a claimant is unable to halt drug traffic on his own. *U.S. v. One Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Florida,* __ F.2d __ (11th Cir. June 26, 1992) No. 89-5590.

Amended Opinion

(355) *U.S. v. Atkinson,* __ F.2d __ (9th Cir. Apr. 27, 1992) No. 91-30084, *amended,* July 22, 1992).

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EXHIBIT G

FILED
JUL - 2 1992
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA)
)
v.) CR 92-59
)
SWANK CORPORATION, et al)

ORDER

This matter is before the Court on the Defendant's Motion to Modify the Restraining Order entered by the Court on April 20, 1992. Also pending is the Receiver's Application for Determination of Authority to Pay Legal Expenses.

For the reasons stated in the accompanying Memorandum Opinion, the Defendant's motion is DENIED IN PART and GRANTED IN PART. Only the property known as Partridge Hill Farm will be removed from the purview of the Restraining Order. In addition, consistent with the Supreme Court's opinion in Caplin & Drysdale v. United States, 491 U.S. 617 (1989), the Receiver is INSTRUCTED to not pay the legal expenses of the Swank Defendants out of corporate funds.

It is so ORDERED.

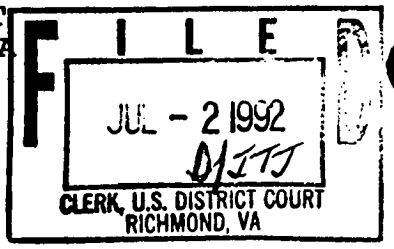
Let the Clerk send a copy of this Order to all counsel of record.

7/2/92
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division



UNITED STATES OF AMERICA	)	
	)	
v.	)	CR 92-59
	)	
SWANK CORPORATION, et al	)	

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motion to Modify the Restraining Order entered by the Court on April 20, 1992. Also pending is the Receiver's Application for Determination of Authority to Pay Legal Expenses.

For the reasons stated below, the Defendant's motion is denied in part and granted in part. In addition, the Receiver is instructed to not pay the legal expenses of the Swank Defendants out of corporate funds.

FACTUAL BACKGROUND

In 1972, Donald Swank, Sr. founded the Swank Corporation, an office supplies sales business, and he remains its president and sole stockholder. By the late 1980's, the Swank Corporation had over 600 accounts with businesses, law firms, and other customers situated throughout the eastern portion of the United States, from Philadelphia to Atlanta. It earned gross annual sales of several million dollars per annum.

On April 20, 1992, Swank and eleven of the Corporation's sales representatives were indicted for conspiracy, mail fraud, bank

fraud and money laundering. On May 19, 1992, a superseding indictment added additional counts of money laundering and witness tampering. Counts 36-41 of the superseding indictment allege six violations of 18 U.S.C. § 1956(a)(1)(A)(i), which total $4,982,369 in laundered money. Each of these counts demands that the Defendants "forfeit all property . . . involved in said offense and all property traceable to such property" pursuant to 18 U.S.C. §982.

Upon the Government's motion, the Court entered an ex parte order on April 20, 1992, which, inter alia, restrained and enjoined the Swank Defendants from "transferring, conveying, liquidating, encumbering, wasting, secreting, modifying the terms of or otherwise disposing of any real or personal property described in the Indictment in this case or any other property in which they have an interest . . . ." (emphasis added.) The Restraining Order contains only one proviso for relief from its restraint:

> In the event that a defendant desires to transfer, convey, liquidate or encumber any property and if the United States consents to such transfer, the transfer may be made upon condition that all sales proceeds shall be placed in escrow in an account(s) approved by counsel for the government. In the event that forfeiture is ultimately ordered, any funds received from the sale of property for the actual property forfeited shall be substituted for the actual property and such funds shall also be available to satisfy an order forfeiting substitute assets pursuant to 21 U.S.C. § 853(p) and 18 U.S.C. § 982(b)(1)(A) . . . .

By Order dated June 9, 1992, leave of Court was granted to Thomas Williamson, Jr. for a special appearance to make the instant motion. The sole purpose of the motion is to permit the release of assets to Mr. Swank to enable him to retain counsel of his

choice -- namely, the law firm of Williamson & Stoneburner. Swank seeks the entry of an order modifying the Restraining Order for the purpose of permitting Swank to alienate, transfer, convey, liquidate or encumber real estate owned by Donald Swank personally and acquired prior to 1987.

ARGUMENT AND DISCUSSION OF AUTHORITY

I. MOTION TO MODIFY RESTRAINING ORDER

A. Applicable Law: The Substantial Connection Standard

Criminal forfeiture proceedings are actions in personam. United States v. Amend, 791 F.2d 1120, 1128 (4th Cir. 1986). Thus, forfeiture is imposed "directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture." United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979). The Government must allege forfeiture in the indictment and must carry the burden of proof beyond a reasonable doubt. Fed. R. Crim. P. 7(c)(2).

The applicable federal criminal forfeiture sections set forth the statutory requisites. 18 U.S.C. § 982(a)(1), provides in pertinent part, as follows:

> The Court, in imposing sentence on a person convicted of an offense in violation of . . . section 1956 or 1957 of this Title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such offense.

This provision goes on to state that property subject to forfeiture under § 982(a)(1), any seizure or disposition thereof, or any judicial proceeding in relation thereto, shall be governed by

sections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853). Id. at § 982(b)(1)(A).

Section 982(a)(1)(A) of Title 18 U.S.C. has been construed as authorizing an entire bank account or business which was used to "facilitate" the laundering of money in violation of 18 U.S.C. § 1956. See, e.g., United States v. All Monies ($477,048.62) In Account No. 90-3617-3, 754 F.Supp. 1467, 1473 (D. Haw. 1991). The Fourth Circuit has interpreted this concept of "facilitation" to require that the forfeited property be used in "substantial connection" with the criminal activity. To be forfeitable, there must be a substantial connection between the property and the illegal activity. United States v. Schifferli, 895 F.2d 987, 989-990 (4th Cir. 1990). There must be more than an incidental connection between the property and the illegal activity, but the property need not be indispensable to the commission of the offense. United States v. Premises Known as 3639-2nd St., N.E., 869 F.2d 1093, 1096 (8th Cir. 1989). Nor does the property need to be exclusively used for illegal activities. Schifferli, 895 F.2d at 991. If a portion of the property is used to facilitate the offense, then all of the property is forfeitable. United States v. Santoro, 866 F.2d 1538, 1542 (4th Cir. 1989). In sum, any property involved in illegal activity may be said to "facilitate" the criminal activity, and thereby causes such property to be forfeitable.

B. Property Acquired Prior to 1987

Under the "substantial connection" standard, the property in question must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. Schifferli, 895 F.2d at 990. The earliest year in which the Swank Defendants are alleged to have committed criminal offenses is 1987. Prior to 1987, Swank had acquired a number of parcels of real estate. These properties, Swank argues, were not "involved "in the alleged offenses of money laundering nor do they constitute property "traceable to such property." Accordingly, Swank contends that these parcels of real estate are not subject to forfeiture pursuant to 18 U.S.C. § 982 and should not, therefore, be subject to pre-trial restraint.

Because there is no "substantial connection" between the restrained property and the criminal activity, Swank maintains that the Restraining Order obtained by the Government works an impermissible restriction on real estate or other property which was purchased or obtained by the Swank Defendants prior to the alleged date of the commission of the specified unlawful activity. In short, Swank asks that be allowed to use such assets as he sees fit, including retaining legal counsel of his choice.

C. Restraint of Pre-1987 Property as "Substituted Assets"

The Government does not disagree with Swank's contention that the assets held by Swank in his individual capacity and acquired prior to 1987 have no "substantial connection" with Mr. Swank's alleged illegal activity. However, with one exception, the Government objects to modifying the Restraining Order. The United

States argues that the date of acquisition of Swank's properties is immaterial, as the whole purpose of the statutory provision providing for substitution of assets is to enable the government to satisfy an order of forfeiture out of property which is not otherwise subject to forfeiture. 21 U.S.C. § 853(p); see In re Billman, 915 F.2d 916, 921 (4th Cir. 1990) ("the purpose of § 1963(d)(1)(A) is to preserve pending trial the availability for forfeiture of property that can be forfeited after trial"),[1] cert. denied, 114 L.Ed. 711 (1991).

21 U.S.C. § 853(p) states in full:

> If any of the property described in subsection (a), as a result of any act or omission of the defendant --
> (1) cannot be located upon the exercise of due diligence;
> (2) has been transferred or sold to, or deposited with a third party;
> (3) has been placed beyond the jurisdiction of this court;
> (4) has been substantially diminished in value; or
> (5) has been commingled with other property which cannot be divided without difficulty;
> the court shall order the forfeiture of any property of the defendant up to the value of any property described in paragraphs (1) through (5).

The superseding indictment charges six discrete counts of money laundering which total $4,982,369 in laundered money. This money is alleged to have been laundered through the corporate accounts of the Swank Corporation. Of the amount of money alleged to have been laundered, $1,482,369 is money that presumably has

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[1]Section 1963(d)(1)(A) is essentially identical to 21 U.S.C. § 853(e)(1)(A) which is applicable in this proceeding as incorporated by 18 U.S.C. § 982(b)(1)(A). In fact, the Fourth Circuit has recognized the "analogous provisions dealing with forfeiture arising out of trafficking in drugs" in Billman. 915 F.2d at 921.

long since been spent, either through payment of salaries or expenses of the corporation, and any of that money which Donald Swank personally received has likewise been dissipated. The balance of $3,500,000 is within the custody of the Court but, as is discussed below, cannot be used to satisfy an order forfeiting substitute assets. If Mr. Swank is convicted of counts 36-41, he will be personally liable to the United States in a judgment for $4,982,369. The United States maintains that the Court has no choice but to continue to restrain assets worth at least that amount if there is to be any reasonable likelihood that an order of forfeiture against Donald Swank could ever be satisfied.

The Government's position is strongly supported by the recent Fourth Circuit opinion of In re Billman, 915 F.2d 916 (4th Cir. 1990). In Billman, a RICO case that involved similar forfeiture provisions to those of the instant case, a third party petitioned the court to release from restraint certain funds that had been given the third party by the defendant. In releasing the funds from restraint, the district court held that the forfeiture statute provides authority to restrain prior to trial "only those assets which the government proves are connected to the [defendant's] alleged racketeering activity." Id. at 917. Based on the inferences drawn by the district court, the Fourth Circuit assumed that the funds in question were not the product of illegal activity. Id. at 920.

Despite this assumption, the Fourth Circuit overruled the trial court. The Billman court noted that forfeiture is an in

personam proceeding and that forfeiture constitutes partial punishment for the offense. Id. (citing United States v. Conner, 752 F.2d 566, 576 (11th Cir. 1985)). Thus, "a forfeiture money judgment can be satisfied out of any of the defendant's assets." Billman, 915 F.2d at 920 (citing United States v. Ginsburg, 773 F.2d 798, 800-03 (7th Cir. 1985)). Consequently, after a conviction on a forfeiture count, the district court may order forfeiture of the defendant's substitute assets.

The Billman Court then examined the question of whether substitute assets could be restrained pending trial and ruled in the affirmative. 915 F.2d at 920-21. With an eye to the remedial purposes of the forfeiture statute, the court read the provision allowing for a restraining order in connection with the substitute assets provision as calling for the preservation and restraint of substitute assets pending trial. Id. at 921; see also United States v. Skiles, 715 F.Supp. 1567 (N.D. Ga. 1989) (holding in the drug trafficking context that the government is allowed to restrain "additional" assets, pre-trial, to ensure sufficient assets for forfeiture).

The Fourth Circuit in Billman relied on United States v. Monsanto, 109 S. Ct. 2657 (1989), in concluding that the statute should be construed to authorize pre-trial restraint of substitute assets. 915 F.2d at 921. The Supreme Court in Monsanto had stated that "[p]ermitting a defendant to use assets for private purposes that, under [21 U.S.C. § 853(c)], will become the property of the United States if a conviction occurs, cannot be sanctioned." 109

S.Ct at 2665. Lastly, the Fourth Circuit held that the pre-trial restraint of substitute assets violates neither the defendant's Sixth Amendment right to counsel nor the Due Process Clause of the Constitution. Billman, 915 F.2d at 922.

The Defendant labels Billman a "result-oriented" decision and asks this Court to limit the holding in that case to its particular facts. However, while the crime underlying the Billman case may be more serious than that alleged here, this Court cannot casually disregard the statutory construction and general principles set forth by the court in Billman, as the Defendant requests.

Furthermore, the cases cited by the Defendant, United States v. Chinn, 687 F. Supp. 125 (S.D.N.Y. 1988) and United States v. Jackson, as support for its argument are inapposite and unpersuasive. First, both decisions pre-date the Fourth Circuit's opinion in Billman. In addition, the Billman Court expressly criticized the reasoning of Chinn.[2] 915 F.2d at 919. The Defendant also stands on shaky ground in relying on Jackson. In that case, the reason why the district court declined to grant a pre-trial order restraining the defendant's substitute assets was because the criminal activity was alleged to have taken place before the effective date that 21 U.S.C. § 853(p) (the substitute

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[2]The Fourth Circuit in Billman stated that:

> The district court's decision is consistent with the only reported case that deals with pretrial restraint of substitute assets in the hands of a third person. United States v. Chinn, 687 F.Supp. 125 (S.D.N.Y. 1988).

The Fourth Circuit then proceeded to reverse the district court's decision.

assets provision) was incorporated by reference into 18 U.S.C. §982(b). 718 F.Supp. at 1292. The court in Jackson expressly reserved to a later time a ruling on the question that is now before the Court regarding Mr. Swank. Id. at 1293.

In its initial brief, the Defendant makes the following statement:

> The government may contend the pre-1987 real estate may be restrained as 'substituted assets.' . . . However, the other assets restrained by the Restraining Order should be sufficient to satisfy any forfeiture verdict.

(Def. Br. at 11.) This statement appears to reflect a misunderstanding as to the operation and interplay of the substitute assets provision and outright forfeiture of assets used to facilitate criminal behavior. See 21 U.S.C. § 853(p); 18 U.S.C. § 982.

The indictment alleges that the Corporation is "property involved in" the offense of money laundering and 18 U.S.C. §982(a)(1) mandates the forfeiture of such property. The Government claims that the corporate bank accounts were used to conduct financial transactions involving the proceeds of monies which represent the proceeds of mail fraud activity in violation of 18 U.S.C. § 1956(a)(1), and, if the jury so finds, this requires forfeiture of the Corporation itself. The ability to forfeit a business entity which is used to facilitate the offense of money laundering is well established. See, e.g., United States v. South Side Finance Inc., 755 F.Supp. 791, 797-98 (N.D. Ill. 1991) (a business through which laundered money is moved is forfeitable as property involved in the money laundering offense). Accordingly,

any particular asset of the Swank Corporation, including the $3.5 million in cash, will be forfeited upon conviction, and, therefore, must be restrained in order to preserve the asset for forfeiture. 21 U.S.C. § 853(e)(1); see Billman, 915 F.2d at 921.

If the Defendants believe that assets of Swank Corporation could be used to satisfy any judgment of forfeiture directed to Donald Swank personally, they are mistaken; such a result would not be possible if the jury also forfeits the Swank Corporation as "property involved in" the illegal transactions. Under the relation back doctrine of 21 U.S.C. § 853(c), all "right, title, and interest in property [subject to forfeiture] vests in the United States upon the commission of the act giving rise to forfeiture . . ." Thus, assuming a favorable jury verdict for the prosecution, the Corporation will be deemed to be property of the United States as of some point in time long before any money judgment of forfeiture is imposed on Mr. Swank personally. Any order of forfeiture for substitute assets would have to be satisfied out of something which was not itself subject to forfeiture. Any other construction would allow one to satisfy a substitute forfeiture judgment with property that belongs to the United States and thereby render meaningless the substitute asset provision of the statute. In short, if Swank Corporation is forfeited as property involved in the offense, and if Donald Swank is found guilty of violating 18 U.S.C. § 1956 and ordered to forfeit the money involved in those transactions, nothing held by Swank Corporation could be used to satisfy the personal money

judgment against Mr. Swank.

The Defendant disputes the fact that the entire Swank Corporation may be subject to forfeiture as property involved in the offense under 18 U.S.C. § 982(a)(1). The Defendant reasons that because the amounts alleged to have been laundered through the corporate accounts are de minimis in relation to the value of the assets and the extent of legitimate business of the Swank Corporation, it would be unjust for the entire corporation to be forfeited. This argument, however, has been rejected by the courts of this circuit and others.

Even if a portion of the property sought to be forfeited is used to "facilitate" the alleged offense, then all of the property is forfeitable.[3] Moreover, the facilitation of a single felony offense is sufficient to justify forfeiture. See United States v. Santoro, 866 F.2d 1538, 1542 (4th Cir. 1989). The so-called "substantial connection" test is not a measure of the amount of money laundered, and the proportionality between the value of the forfeitable property and the severity of the injury inflicted by its use is irrelevant. See United States v. Premises Known As 3639-2nd St. N.E., 869 F.2d 1093, 1096 (8th Cir. 1989). In other words, the quantity of money laundered can be relatively small, so long as the quality of the relationship between the forfeitable property and the crime is substantial. See id. at 1098 (Arnold,

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[3]"Facilitating" property occurs when the property as used makes the underlying criminal activity less difficult or "more or less free from hindrance." United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990).

C.J. concurring).

In this case, the Government alleges that the Defendants cleared the proceeds of specified mail fraud activity through the Swank Corporation's bank accounts. Limiting forfeiture under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds with legitimate money that facilitates the laundering and enables it to continue. See United States v. Certain Funds on Deposit in Account No. 01-0-71417, 769 F.Supp. 80, 84-85 (E.D.N.Y. 1991).

D. Partridge Hill Farm

The Government states that Donald Swank personally owns at least three parcels of improved real estate and three parcels of land. These are 2934 Everleigh Way, Fairfax; 3147 Ellenwood Drive, Fairfax; 166 Kirkbride Road, Vorhees NJ; and land in the Columbia area of Goochland County. Because of the need to restrain sufficient assets which could be available to satisfy an order forfeiting substitute assets, the United States believes that the Court should maintain the restraint on these properties. Indeed, this appears to be the only property of Donald Swank which could be used to satisfy a substitute asset order.

However, with respect to the property known as Partridge Hill Farm, the Government does not oppose modification of the Restraining Order so as to release this property from any restraint

associated with this case. Since the time the Restraining Order was entered, the Government has learned that this property is held as tenants by the entirety by Donald Swank and Betty Swank, and not as an individual asset of Mr. Swank. Because of the practical considerations associated with forfeiture of property held as tenants by the entirety, the Government does not object to a modification of the Restraining Order to release this one property from restraint.

Inquiry to the Goochland tax assessor's office indicates that the assessed value of Partridge Hill Farm is $367,000. Thus, it is possible that Mr. Swank's one-half interest in the property would be sufficient to allow him to borrow against the equity in the farm a sufficient sum of money which could be used to retain counsel of his choice.

F. Conclusion

In this case, the Government has identified the theories upon which the various assets are subject to forfeiture, i.e., outright in the case of the Corporation, and as potential substitute assets in the case of most property Swank owns personally. Assets that have been targeted and restrained as potentially forfeitable cannot be used to pay legal fees. Mr. Swank's real property holdings are potentially forfeitable as substitute assets. Thus, the Restraining Order will not be modified to allow Mr. Swank to sell off his assets. The only exception to this ruling is Partridge Hill Farm, which will be removed from restraint and which can be used by Mr. Swank to pay his legal fees.

The Court is frankly concerned by the scope and breadth of the potential forfeiture judgment which may be rendered against Mr. Swank. As president and sole stockholder of the Swank Corporation, Mr. Swank stands to lose millions if his corporation is forfeited as property involved in the offense of money laundering. Above and beyond this loss, Mr. Swank could be called upon personally to satisfy a forfeiture claim of almost $5 million. While the Court realizes that the federal forfeiture provisions are purposely broad remedies, it is certain that they were not intended to provide an unconstitutional windfall for the government. Thus, the Court wishes to make clear that nothing in the Court's opinion today forecloses the possibility that a given use of the forfeiture statutes may violate the Excessive Fines Clause of the Eighth Amendment.

Forfeiture under section 853 is clearly "punishment" as that term is used in the Eighth Amendment. Moreover, the Supreme Court has held that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Solem v. Helm, 463 U.S. 277 (1983). This Court recognizes that a district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds. Although this question is not now before me, the Court recognizes that before forfeiture is ultimately ordered, a district court must make a determination, based upon appropriate findings, that the interest ordered forfeited is not so grossly disproportionate to the offense committed as to violate

the Eighth Amendment. See United States v. Busher, 817 F.2d 1409 (9th Cir. 1987). If, at a later date, the Defendant raises a claim that the full force of permissible forfeiture under 18 U.S.C. § 982 and 21 U.S.C. § 853 may be grossly disproportionate to the offense committed, this Court will discharge its constitutional function by giving the matter careful scrutiny.

II. RECEIVER'S APPLICATION FOR DETERMINATION OF AUTHORITY TO PAY LEGAL EXPENSES

The Receiver, Kevin Huennekens, also asks the Court to make a determination as to whether the Receiver is authorized to pay certain legal expenses of the Swank Corporation. On May 1, 1992, the Receiver was presented with a number of invoices requesting payment of certain retainers and other legal expenses incurred by Swank Defendants in connection with this case. Since this date, the Receiver has received additional requests for payment of legal fees and for reimbursement of legal fees incurred. More such requests are likely to be forthcoming.

The Receiver has located a corporate resolution dated September 12, 1991, approving reimbursement of expenses incurred by certain of Swank Corporation's employees in connection with this case. But for the forfeiture action pending against the company and the Restraining Order previously entered, it would appear that the invoices represent legal obligations of the company. The

Receiver seeks advice as to whether to pay these invoices or not.[4]

The Government opposes the payment of any of the matters set forth in the application by the Receiver. The Receivership Order has allowed the Corporation to stay in business, but nothing in that Order was intended to permit the corporation's assets to be used to pay expenses that were incurred by individual employees of the Corporation. The fact that the Corporation purportedly passed a resolution authorizing advancement of legal expenses in connection with the criminal case does not change the fact that the asset (the Corporation) out of which those expenses are sought to be paid is subject to forfeiture. The Supreme Court has specifically held that property subject to forfeiture may not be used to pay counsel fees. Caplin & Drysdale v. United States, 491 U.S. 617 (1989). Clearly, the corporate defendant has no right to diminish the asset to be forfeited, the corporation itself, for attorney's fees or any other expense. In agreeing to the Receivership Order, the Government only consented to allowing the Corporation to continue to do business. It did not agree to letting assets which are subject to forfeiture to be used by the Defendants to pay off legal debts.

Caplin & Drysdale has made this issue very clear. The

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[4]The Court has dealt with this issue before. On May 5, 1992, Defendant Arrington filed a motion for relief from the Restraining Order in which he sought permission to have payment of counsel fees made to his attorney, Mr. Dohnal, with a provision that such fees be not subject to forfeiture. Counsel for Defendants Belcher and Clark orally joined in this motion. The Court's Order of May 13, 1992 resolved these claims against Messrs. Arrington, Belcher, and Clark.

Government is correct -- assets subject to forfeiture cannot be used to pay legal fees. Thus, the Receiver is instructed not to pay the legal invoices.

In the event that this case does not result in an order of forfeiture, the Corporation will be free to pay such of its debts as it chooses. Should the Corporation be forfeited to the United States, there exist two potential mechanisms whereby individuals who have a claim against the Corporation may seek redress. First, any person asserting a legal interest in property that has been forfeited may petition the Court for a hearing to adjudicate the validity of his interest in the property. In appropriate instances, the Court may grant relief. 21 U.S.C. § 853(n). Secondly, a person adversely affected by a forfeiture may seek relief through a petition for remission or mitigation directed to the Attorney General. Section 853(i) provides that the Attorney General is authorized to grant petitions for mitigation or remission of forfeiture or take any other action to protect the rights of innocent persons which is in the interests of justice. 21 U.S.C. § 853(i).

CONCLUSION

For the reasons stated above, the Defendant's motion to modify the Restraining Order is denied for the most part, with the exception that Partridge Hill Farm will be removed from the purview of the Order. In addition, the Receiver be instructed to not pay the legal expenses of the Swank Defendants out of corporate funds.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

7/2/92
DATE

Richard L. Williams
UNITED STATES DISTRICT JUDGE

* U.S G.P.O.:1992-312-344:60283