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TABLE OF CONTENTS **Page**

TABLE OF CONTENTS

Please send name or address changes to:
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COMMENDATIONS

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

Marcia J. Allmand (California, Northern District), by Kenneth C. Thompson, Supervisory Special Agent, FBI, San Francisco, for her outstanding professional and legal skill in obtaining a guilty verdict of one of twenty-three defendants charged in a major bribery scheme involving the Immigration and Naturalization Service in the Northern District of California. (This victory could set a precedent in future proceedings in this case.)

David L. Allred (Alabama, Middle District), by J. W. Holland, Jr., Inspector in Charge, U.S. Postal Service, Birmingham, for his successful prosecution of a mail fraud case involving an elaborate scheme to defraud a local company of over $200,000.00.

Stan Blumenfeld and ***Faith Farlough*** (California, Central District), by William B. Senhauser, Attorney, Housing and Civil Enforcement, Civil Rights Division, Department of Justice, Washington, D.C., for their valuable assistance and cooperative efforts in a lengthy trial, resulting in a jury verdict for the plaintiffs on all claims and an award of $50,500 in monetary relief.

Mickale Carter and ***Susan Lindquist*** (District of Alaska), by John C. Curry, Assistant Chief Counsel, Federal Aviation Administration, Anchorage, for their major contribution to air safety in Alaska, and for their continuing legal support over the last two years.

Donald J. DeGabrielle (Texas, Southern District), by Suzanne M. Warner, Assistant Director, Attorney General's Advocacy Institute, Executive Office for United States Attorneys, Washington, D.C., for his excellent presentation on asset forfeiture at the Criminal Chiefs and Criminal AUSAs Seminar in San Diego.

Thomas DiBiagio (District of Maryland), by Gladys O. Jones, Group Supervisor, Bureau of Alcohol, Tobacco and Firearms, Baltimore, for his professionalism, valuable assistance, and continued support in the prosecution of armed career offenders and narcotics traffickers.

Salvador A. Dominguez (Ohio, Southern District), by Monty L. Rayburn, Director, South Central Ohio Task Force, Chillicothe, for his professional skill in obtaining a guilty plea from a narcotics trafficker, thereby preventing him from running his organization from state prison as had been done in the past.

Kenneth R. Fimberg (District of Colorado), by William S. Sessions, Director, FBI, Washington, D.C., for his professionalism and outstanding legal guidance in a difficult and complex environmental crimes investigation of the Rocky Flats Nuclear Weapons Plant, and for negotiating a guilty plea from Rockwell International to ten counts of serious federal environmental statutes, leading to the largest hazardous waste fine in U.S. history.

Edward Gallagher and ***Eric Nichols*** (Texas, Southern District), by Bruce Daniell, District Director, Office of Labor Management Standards, Department of Labor, Houston, for their success in obtaining federal felony convictions in two white collar crime cases.

Craig A. Gargotta (Texas, Western District), by Colonel Philip A. Meek, Chief, General Claims Division, Air Force Legal Services Agency, Headquarters U.S. Air Force, Washington, D.C., Michael D. Rigg, Agency Counsel, Office of General Counsel, Department of the Navy, Norfolk, Virginia, and Colonel Brian X. Bush, Chief, Personnel Claims and Recovery Division, Office of the Judge Advocate General, Department of the Army, Fort Meade, Maryland, for bringing a lengthy and complex bankruptcy proceeding to a successful conclusion. ***Laurie West*** provided valuable paralegal services.

Kathleen O. Gavin (District of Maryland), by Henry J. Schreiber, Vice President, Key Federal Savings Bank, Havre de Grace, for her successful prosecution of a bank employee who diverted more than $10,000 for her personal use.

Rafael Gonzalez (Michigan, Eastern District), by E. David Brockman, Assistant Attorney General, Department of Attorney General, Lansing, for successfully prosecuting an individual who made death threats against a state employee handling collection matters.

Lisa M. Griffin (District of Maryland), by Fred W. Bennett, Federal Public Defender, Baltimore, for her outstanding prosecutorial skill and keen insight in bringing a complex narcotics case to a successful conclusion.

Patrick Hanley (Ohio, Southern District), by Bill L. Barnett, Assistant United States Attorney for the Northern District of Alabama, Birmingham, Alabama, for his participation in the evaluation of the U.S. Attorney's office for the District of Minnesota, and for sharing his excellent legal skill and work experience.

James E. Johnson and ***Marion W. Payson*** (New York, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for their successful investigation and prosecution of members of the Flete/Espinal organization responsible for the theft and sale of late model vehicles in the New York area.

Cindy K. Jorgenson (District of Arizona) received a Certificate of Appreciation from Timothy J. Lee, Chief, Criminal Investigation Division, Internal Revenue Service, Phoenix, for her valuable assistance and cooperation in an investigation which involved the preparation of over fifty search and seizure warrants.

Susan Kempner and ***Claude Hippard*** (Texas, Southern District), by Gary E. Mead, Associate Director for Operations Support, U.S. Marshals Service, Arlington, Virginia, for providing a uniquely effective presentation on business seizures at the Seized Assets Division Conference in Corpus Christi, Texas.

Marcus Kerner (California, Central District), by James F. Hoobler, Inspector General, Small Business Administration, Washington, D.C., for his cooperative efforts in bringing a complicated guaranteed loan investigation to a successful conclusion.

Andrew Lachow, Daniel Richman, and ***Stuart Gra Bois*** (New York, Southern District), by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for their professionalism and legal skill in the extradition proceeding of an individual wanted for fraud by the South African government.

John Leonardo (District of Arizona), by Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, Department of Justice, Washington, D.C., for his outstanding efforts in securing the civil forfeiture of assets of a convicted drug trafficker valued at almost $12 million.

Charles Lewis (Texas, Southern District), by Brian M. Bruh, Director, Financial Crimes Enforcement Network (FinCEN), Arlington, for his excellent presentation on "Searches of Attorneys' Offices" at the Southwest Border Money Laundering Conference sponsored by the FinCEN and the Arizona Attorney General's office.

Richard H. Loftin (Alabama, Southern District) by Bruce P. Mirkin, Special Agent in Charge, Criminal Investigation Division, Environmental Protection Agency, Atlanta, for his successful prosecution of a difficult environmental criminal case, and for conveying the seriousness of environmental crime to both the regulated community and the general public.

Tom Luedke (District of Kansas) by Kamil D. Bishara, Area Administrator, Office of Labor-Management Standards, Department of Labor, Kansas City, for his outstanding pre-trial preparation and skillful presentation of an embezzlement case involving a labor union official.

Andrew M. Luger (District of Minnesota) formerly the Eastern District of New York, by James M. Fox, Assistant Director in Charge, FBI, New York, for successfully prosecuting two individuals operating a pet cemetery and a pet food chain, both of which were multi-million dollar entities predicated on fraud and deceit.

Mary Luxa (Iowa, Southern District), by Kamil D. Bishara, Area Administrator, Office of Labor-Management Standards, Department of Labor, Kansas City, for her successful efforts in obtaining guilty verdicts by a jury on each of the fourteen counts of the indictment.

Martin J. McLaughlin (Iowa, Northern District), by Cary H. Copeland, Director and Chief Counsel, Executive Office for Asset Forfeiture, Office of the Deputy Attorney General, Washington, D.C., for his litigation, negotiation, and management skills in securing more than $4 million in monetary recoveries in a case involving fraud against the Farmers Home Administration.

Mary Murgia (District of Arizona), by Vernadene Loveland, Federal Women's Program Manager, Luke Air Force Base, for her participation and excellent presentation at the "Equality Issues in the Workplace" seminar.

Charles R. Niven (Alabama, Middle District), by Robert R. Peter, Supervisory Special Agent; FBI, Mobile, for his successful prosecution of a six-count indictment of conspiracy, wire fraud, and interstate transportation of stolen property.

David Nutter (Georgia, Northern District), by Daniel R. Black, Associate Director (Compliance Operations), Bureau of Alcohol, Tobacco and Firearms (BATF), Washington, D.C., for his participation and valuable instruction at the courtroom testimony class for BATF inspectors in Glynco, Georgia.

Buddy Parker (Georgia, Northern District), by Otto G. Obermaier, United States Attorney for the Southern District of New York, for his outstanding assistance in obtaining a conviction in a complicated Polar Cap case, involving 80 counts of money laundering, conspiracy, and filing false 8300 forms.

Clifford J. Proud and ***Christopher W. Dysart*** (Illinois, Southern District), by William J. Doyle III, Inspector General, Railroad Retirement Board, Chicago, for their successful efforts during the trial of a recent case, and for providing a key element in protecting the integrity of the programs administered by the U.S. Railroad Retirement Board.

Richard L. Richards (Iowa, Southern District), by Colonel William P. Greene, Jr., Staff Judge Advocate, U.S. Army Combined Arms Command and Fort Leavenworth, Fort Leavenworth, Kansas, for his excellent representation and success in obtaining a fair settlement for both the plaintiff's estate and the United States.

Charles Sabalos (District of Arizona), by Donald K. Shruhan, Jr., Special Agent in Charge, U.S. Customs Service, Tucson, for his outstanding success in prosecuting three members of a major cocaine smuggling and trafficking organization operating in Arizona and Southern California.

James L. Santelle (Wisconsin, Eastern District), received a plaque of commendation from Arthur J. Harrington, Esquire, President, Milwaukee Bar Association, for his outstanding service as Editor-in-Chief of The Milwaukee Lawyer, the Association's publication, from 1989 to 1992.

Donald A. Scheer (Michigan, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for his significant contribution to the success of the public corruption case involving former members of the Detroit Police Department.

Jeff Sinek and ***Jeff Johnson*** (California, Central District), by Jack Zalewski, Group 6 Supervisor, Drug Enforcement Administration, Los Angeles, for their professionalism and legal skill in successfully prosecuting two cases resulting in arrests, guilty pleas, and/or convictions of seven individuals.

Robert Small (District of Minnesota) by Anthony J. Hope, Chairman, National Indian Gaming Commission, Washington, D.C., for his exemplary defense of the Commission's classification of keno under the Indian Gaming Regulatory Act.

Daniel Stewart (Missouri, Western District), by John R. Fleder, Director, Office of Consumer Litigation, Department of Justice, Washington, D.C., for his valuable assistance and cooperation in the successful prosecution of a number of individuals involved in the anabolic steroids black market.

Donald Waits (Mississippi, Southern District), by Kenneth R. Human, Chief Counsel, John C. Stennis Space Center, Stennis Space Center, Mississippi, for his excellent representation in a complex civil case and for obtaining a verdict in the government's favor.

Scott L. Wilkinson (North Carolina, Eastern District), by John J. Adair, Inspector General, Resolution Trust Corporation, Washington, D.C., for his outstanding success in the prosecution of several defendants who defrauded a savings and loan association of over $500,000 between September, 1990 and March, 1991.

Thomas Willcox, Special Assistant United States Attorney (Pennsylvania, Eastern District), by S. B. Billbrough, Special Agent in Charge, Drug Enforcement Administration, Philadelphia, for his valuable assistance and cooperative efforts in the prosecution of two forfeiture matters, both of which involved cocaine traffickers and large drug proceeds.

Bart H. Williams (California, Central District), by Manuel A. Rodriguez, Trial Attorney, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his thorough and expeditious handling of a request for extradition by the Canadian authorities, and for furthering the excellent working relationship between the United States and the Canadian Justice Departments.

Tanya Sue Wilson and ***Karen Stevens*** (District of Kansas), by Stephen J. Crimmins, Deputy Chief Litigation Counsel, Securities and Exchange Commission (SEC), Washington, D.C., for their excellent enforcement efforts leading to the successful completion of a collection case on behalf of the SEC.

Steven Witzel and ***Baruch Weiss*** (New York, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding efforts in successfully prosecuting two individuals involved in a complex bank fraud and money laundering case.

George A. Yanthis and ***Thomas Spina, Jr.*** (New York, Northern District), by John J. O'Connor, Special Agent in Charge, FBI, Albany, for their successful prosecution of a former county executive on corruption charges.

Kimberly M. Zimmer (New York, Northern District), by John J. O'Connor Special Agent in Charge, FBI, Albany, for her outstanding success in the prosecution of three defendants in an attempted bank robbery case.

SPECIAL COMMENDATION FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Robert DeSousa, James Gibbons, and ***Robert Long, Assistant United States Attorneys for the Middle District of Pennsylvania,*** were commended by David N. Startzell, Executive Director, Appalachian Trail Conference, Harpers Ferry, West Virginia, in a letter that states as follows:

> I am writing in behalf of the Appalachian Trail Conference, simply to express our appreciation for the work that you and your colleagues have done in behalf of the National Park Service's Appalachian Trail land-acquisition program. As a result of your work and the work of many others, the dream of a completely protected Appalachian National Scenic Trail, set aside for present and future generations to enjoy, is now becoming a reality. Thanks for the great work that you have done for the Appalachian Trail.

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SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF TEXAS

Gerald Carruth, Assistant United States Attorney for the Western District of Texas, was commended by Derle Rudd, Regional Inspector, Internal Revenue Service (IRS), Dallas, for his aggressive prosecutive efforts and the subsequent conviction of Lloyd Edward Ashford, a tax protester. Mr. Carruth recognized the potential for harm based on telephone threats made to IRS employees, and drafted the criminal complaint that resulted in Ashford's arrest. Upon executing the warrant for arrest, the arresting inspectors were assaulted by Ashford with a semi-automatic assault rifle, at which time Mr. Carruth diligently sought, and received a detention hearing resulting in Ashford's continued confinement throughout the proceedings. Mr. Ashford was subsequently convicted on a four-count indictment by a trial jury, and was sentenced to serve sixty-four months imprisonment, and three years supervised release. This prosecution and conviction sends a clear message to the Central Texas tax protest movement that threats and assaults of IRS employees will not be tolerated.

Gerald Carruth was also named "Outstanding Law Enforcement Officer of the Year" by the Board of Directors of the Hundred Club of Austin. This recognition is given only to those law enforcement officers who excel and in many instances go "above and beyond" the call of duty.

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SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Rudolf A. Renfer, Jr. and ***G. Norman Acker III, Assistant United States Attorneys for the Eastern District of North Carolina,*** were commended by David R. Chambers, Assistant Regional Attorney, Office of General Counsel, Department of Agriculture, Raleigh, for their valuable assistance and prompt action in the successful resolution of a Farmers Home Administration (FmHA) matter.

FmHA had a $1.6 million second lien on some real estate owned by Rossie Barefoot. Barefoot wanted to sell the land for $7 million. FmHA and the first lienholder agreed to release their real estate liens and take a security interest in the $7 million note receivable and Deed of Trust that Barefoot was receiving from the buyer. However, FmHA failed to properly handle the necessary documentation, and thus effectively released all collateral on a $1.6 million note and it became unsecured. The buyer defaulted on the note and filed bankruptcy. The Barefoots obtained a lifting of the stay and started a foreclosure on the property. At the foreclosure, Barefoot bid on the property and purchased the property in his and his wife's names. He then attempted to pay his bid price by crediting his bid of $2.6 million against the $7 million note. He asserted that the first lienholder may have an interest back in the land, but FmHA did not due to their failure to obtain or perfect any security interest in the $7 million note.

In order to stop Barefoot from actually obtaining the delivery of the deed and title, ***Rudolf Renfer*** and ***Norman Acker*** filed for an ex parte temporary restraining order and an action claiming constructive trust, resulting trust, specific performance, etc. They obtained a temporary restraining order within six hours of their first notification of the problem, and at the later preliminary injunction hearing obtained the injunction. The judge, although aghast at FmHA's lending judgment, verbally announced that in no way would Barefoot be allowed to perpetuate his idea. The judge advised that Barefoot should settle by putting FmHA and the first lienholder in the position they held prior to the sale.

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PERSONNEL

On September 9, 1992, ***Terree Bowers*** was appointed Interim United States Attorney for the Central District of California.

On September 15, 1992, ***Monte Stewart*** was appointed Interim United States Attorney for the District of Nevada.

On September 18, 1992, ***Henry Hudson*** was sworn in by Attorney General William P. Barr as Director of the United States Marshals Service. ***Mr. Hudson*** was formerly United States Attorney for the Eastern District of Virginia.

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ATTORNEY GENERAL HIGHLIGHTS

Hurricane Andrew

On September 2, 1992, Attorney General William P. Barr signed an emergency authorization allocating a total of $1.6 million in federal funds to Florida and Louisiana to support law enforcement programs in areas ravaged by Hurricane Andrew. Louisiana was authorized to receive $600,000 through the Emergency Federal Law Enforcement Assistance Program, and Florida was authorized to receive $1 million. The funds will be used by state and local law enforcement authorities to pay for law enforcement overtime, equipment and the restoration of essential communications networks.

The Attorney General toured the hurricane-ravaged South Dade County area on September 4, 1992, and met with Department of Justice employees and officials from the Drug Enforcement Administration, Federal Bureau of Investigation, Immigration and Naturalization Service, Bureau of Prisons, U.S. Marshals Service, and the United States Attorney's office. The tour included the Metropolitan Correctional Center and the Krome Avenue Detention Center. Mr. Barr received reports from each of these agencies detailing the impact the hurricane had on their employees and their law enforcement functions. Following the Krome Avenue Detention Center visit, Mr. Barr encouraged all people affected by the hurricane to avail themselves of all emergency relief services and assured the community that "we will not exploit this tragedy as an opportunity to enforce immigration laws." He said, "Those who are seeking emergency relief should do so without concern for their immigration status."

Among other concerns were that unscrupulous individuals would take advantage of this disaster to raise prices unfairly. He said, "Price gouging is deplorable. It is unconscionable to take advantage of a tragedy such as this to seek windfall profits. We are cooperating fully with state and local authorities to investigate allegations of price gouging. Any violations of law will be investigated and prosecuted vigorously."

General Barr noted that the Department of Justice, in conjunction with the Department of Housing and Urban Development (HUD) and local fair housing authorities, has established a joint task force to protect the rights of all residents against discrimination in housing based upon race, gender, disability, or family status. On September 4, 1992, attorneys with the Fair Housing Section of the Civil Rights Division and the United States Attorney's office in Miami, filed a complaint alleging that a black woman seeking housing in person at a 62-unit apartment complex in Hollywood, Florida was told that none was available. When the woman placed the same inquiry

later by telephone, she was told that apartments were available. Black and white "testers" inquired about housing at the apartment complex and received different responses as to the availability of apartments. The complaint seeks an injunction against discriminatory practices; compensatory damages; and a civil penalty. Mr. Barr said, "It is our obligation to ensure all residents seeking housing are treated fairly. We will not tolerate discriminatory practices by those who control housing. I encourage community members to report complaints at the South Florida fair housing task force."

The task force has established a bilingual fair housing hotline to receive such complaints. The hotline, available between 9:00am and 5:00pm Monday through Friday, is: **(305) 530-6440.**

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Hurricane Andrew Relief Fund

On September 21, 1992, Attorney General William P. Barr advised all Department of Justice employees that we have formally established the Department of Justice Employees' Disaster Relief Fund and applied to the Internal Revenue Service for tax-exempt status as a charitable trust, which we expect to be forthcoming. The Executive Committee of the Fund has met and sent the first allocation from the Fund -- $15,000 -- to a local committee in Miami which will make grants to Department employees in distress.

The response from Department employees to the call for assistance has been gratifying, but the need is extraordinary. If you have not yet contributed to the Fund, the Attorney General has asked that you consider doing so soon. You may contribute the Fund by sending your check or money order, payable to "DOJ Employees' Disaster Relief Fund" to: Department of Justice Federal Credit Union, DOJ Employees' Disaster Relief Fund, P.O. Box 782, Washington, D.C. 20044. Questions about the Fund may be addressed to John Vail, Director, Justice Management Division Personnel Staff, (202) 514-6788.

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Major BCCI Indictment Returned In The Northern District Of Georgia

On September 17, 1992, William W. Batastini, a former IRS agent and the former senior vice president and comptroller of the National Bank of Georgia (NBG), was indicted in the United States District Court for the Northern District of Georgia on charges of filing a false personal income tax return, misapplying bank funds, making false entries in bank records, receiving an unlawful gratuity, money laundering, and conspiring to defraud the United States. Also indicted in the conspiracy were Tariq Jamil, a former officer of NBG, Ghaith R. Pharaon, former owner of NBG, and Swaleh Naqvi, a former officer of the Bank of Credit and Commerce International (BCCI).

NBG was purchased by First American Bank in 1987 and renamed First American Bank of Georgia. Batastini was hired by NBG in 1980 as a Senior Vice President and Comptroller. He left the bank in 1987 to work for Pharaon's company, InterRedec, Inc., in Savannah, Georgia. Tariz Jamil was hired by NBG in 1980 as Executive Assistant to the President. Prior to that time, he worked at BCCI in London. After leaving NBG, Jamil returned to BCCI where he worked in London

and Hong Kong. Ghaith R. Pharaon is a Saudi Arabian businessman and former owner of NBG. In 1987, he sold his interest in NBG to Credit and Commerce American Holdings, the parent company of the First American Bank chain. Pharaon previously was indicted in Washington, D.C., on racketeering charges arising out of his participation with BCCI in the acquisition of Independence Bank in Encino, California, and a fraudulent bond issue at CenTrust Savings Bank in Miami. BCCi has pleaded guilty to co-owning NBG with Pharaon.

The seven-count indictment, returned in U.S. District Court in Atlanta, alleges among other things that Batastini received an unlawful payment in 1987 from BCCI and Pharaon as a reward for acts performed to benefit BCCI, Pharaon and others. The indictment alleges that one of the favors performed by Batastini was the use of $600,000 entrusted to the care of NBG to pay the interest owed by Pharaon on a personal loan from BCCI. The indictment also alleges that Batastini received a $95,000 as an unlawful reward at the direction of Jamil, Naqvi and Pharaon. The indictment also alleges the manner in which the payment was made was designed to deceive IRS so Batastini would not be required to report the payment as income. The indictment further alleges this payment was a result of BCCI's and Pharaon's desire to reward Batastini for his part in the sale of NBG to First American Bank and for other actions performed for Batastini, including a fraudulent $600,000 payment to BCCI on behalf of Pharaon.

If convicted on all counts, each of the defendants face the maximum penalties as follows: Batastini - 33 years in prison and $1,385,000 in fines; Pharaon - 15 years in prison and $758,000 in fines; Naqvi - 15 years in prison and $785,000 in fines; and Jamil - 10 years in prison and $535,000 in fines.

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Antitrust Division Receives Largest Civil Penalty Ever

The Department of Justice announced that Salomon Brothers Inc. will pay the United States $27.8 million under a court order approved on September 14, 1992 to settle charges it violated antitrust laws by coordinating the auction of U.S. Treasury notes. The settlement resolves a civil antitrust suit the Department brought against Salomon in May, 1992, alleging that Salomon and certain unnamed co-conspirators violated antitrust laws by entering into an agreement to coordinate trading in the May 1993 two-year notes auctioned by the Treasury in May, 1991. Pursuant to a final judgment entered by the court, Salomon will pay the United States $27.5 million, plus accrued interest, or a total of approximately $27.8 million.

In its complaint, the Department said that because of the conspiracy persons who sold the notes short were denied the benefits of free and open competition in the secondary (cash) and financing markets and that price and interest rate competition for notes was unreasonably restrained. Specifically, the complaint alleged that during June and part of July, 1991, Salomon and its co-conspirators "coordinated their efforts to limit the supply of May [1993] two-year notes available in the secondary and financing markets, thereby ensuring that persons who had sold the issue short in the when-issued market could obtain May [1993] two-year notes only by purchasing them at artificially high and non-competitive prices in the secondary market or by borrowing them in exchange for cash on which they received artificially low and non-competitive special rates in financing transactions in the financing market." The action against Salomon Brothers was brought pursuant to the Antitrust Division's asset forfeiture authority under Section 6 of the Sherman Act. In agreeing to settle the action, Salomon did not admit it had violated the law.

The $27.8 million asset forfeiture is part of a $290 million settlement between Salomon and the Department of Justice and the Securities and Exchange Commission announced May 20, 1992. (See, United States Attorneys' Bulletin, Vol. 40, No. 6, dated June 15, 1992, at p. 175.) The case against Salomon followed a year-long investigation of the "short squeeze" in the May 1993 two-year notes that occurred during the summer of 1991. The Antitrust Division's investigation of this "squeeze," as well as other conduct in the markets for United States Treasury securities, is continuing.

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1996 Summer Olympics In Atlanta, Georgia

On September 17, 1992, Attorney General William P. Barr announced that the National Institute of Justice (NIJ) will provide over $1 million in federal financial support to Georgia law enforcement agencies to support the development of a security and public safety plan for the 26th Olympiad, which will be held in Atlanta in 1996. The project includes a comprehensive study of public safety and security needs and will produce:

-- a comprehensive strategic plan to ensure the safety and security of the 1996 Games, encompassing all venues, events, participants and spectators;

-- a manual for law enforcement and criminal justice officials that describes public safety and security policies and procedures for international events;

-- training curricula and technical assistance for security personnel; and

-- information that describes advanced technological systems applicable to public safety and security concerns at international events.

The NIJ team will act as liaison with the Olympic Security Support Group (OSSG), an organization comprising all Georgia law enforcement chief executive officers with a direct involvement in the games, and through OSSG with the Atlanta Committee for the Olympic Games itself.

The Attorney General said, "It is a pleasure for the Department of Justice to join in partnership with those state and local agencies responsible for security at the 1996 Summer Olympics. I have directed NIJ and the FBI to make Olympic security a top priority to ensure the safety of all those participating in and attending the games in Atlanta."

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OPERATION WEED AND SEED

Executive Office For Weed And Seed

Deborah J. Daniels, Director of the newly-established Executive Office for Weed and Seed, and United States Attorney for the Southern District of Indiana, has made the following announcements:

Terrence S. Donahue has been named Assistant Director. Mr. Donahue is detailed from the Office of Justice Programs, where he remains the Acting Director of Planning, Management and Budget. He will be involved in both the "weed" and "seed" sides of the equation due to his extensive experience in both areas.

Thomas J. Rueter, also an Assistant Director, is on detail from the United States Attorney's office in the Eastern District of Pennsylvania, where he serves as Assistant United States Attorney. Mr. Reuter, who initiated Philadelphia's successful Violent Traffickers Program, will concentrate on the law enforcement aspects of the program.

William Modzeleski, formerly of the Department of Justice and currently Director of the Office of Drug Planning and Outreach for the Department of Education, is detailed from that office to serve as Assistant Director for the neighborhood revitalization component of the program. Mr. Modzeleski possesses vast knowledge and expertise in the programs offered by various federal agencies in support of the Weed and Seed effort.

Andrea S. Hillyer has been appointed General Counsel. Ms. Hillyer was formerly an Assistant to Tim Shea, Associate Deputy Attorney General, and has been involved with the Weed and Seed effort since February, 1992.

The mission of the Executive Office for Weed and Seed is to coordinate the efforts and communications of the Department of Justice and other federal agencies in Washington, D.C., and the United States Attorneys and other field offices, as well as to develop policy for the Weed and Seed program.

Address:	Executive Office for Weed and Seed Office of the Deputy Attorney General Suite 810, Washington Center Building 1001 G Street, N.W. Washington, D.C. 20530	Telephone: Fax:	(202) 616-1152 (202) 616-1159

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Weed And Seed Program In San Antonio

On September 4, 1992, Deputy Attorney General George J. Terwilliger, III, Ronald F. Ederer, United States Attorney for the Western District of Texas, and a number of law enforcement officials toured the San Antonio East Side and other sites targeted for the anti-crime Weed and Seed program. The tour included talks with a number of probationers chopping weeds as an alternative to sitting in jail. When one of the probationers was asked what he thought of the program, he responded, "I think it's a great idea. It helps the community, and it helps me."

The first stop on the tour was the site of the future Spring View Baseball Field where Bravo Company of the 420th Engineering Brigade from Fort Sam Houston is teaming up with the San Antonio Housing Authority to construct a ball field complete with bleachers. The Housing Authority will supply the materials and the Army will supply the engineering. The 420th Engineering Brigade will be able to train on the field because it is on federal land held in trust by the Authority, and the addition of the ball field will further improve the quality of life for youngsters in this district. It is estimated that if contracted out, the job would cost almost $200,000. The nearby Sonny Mitchell strip was once a haven for dope peddlers, but was seized by the federal government and became the "turning point" for cutting back drug traffic in this area.

Police Lieutenant Tyrone Powers told the group that since the Weed and Seed operation began in February, a total of 1,051 arrests have been made in the target area as compared to 891 made in the same time period in 1991. Deputy Attorney General Terwilliger said the program is not just making arrests, but also improvements by local government and neighborhood businesses. He said, "It gives people control of their lives and destiny instead of leaving it up to Washington."

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Satellite Prep School Program In Chicago

On September 8, 1992, Attorney General William P. Barr announced the opening of the first demonstration site of an early intervention model education program for elementary school children in the Ida B. Wells Public Housing Development, in conjunction with the Weed and Seed strategy in Chicago. With support from the Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP), the Chicago Housing Authority, and the Westside Preparatory School, the Satellite Prep School program is a national scope demonstration program to establish an early elementary school program to help prevent and deter delinquency. The program's mission is to establish preparatory schools for kindergarten through fourth-grade children living in public housing developments. The school is awaiting permanent facilities in the Ida B. Wells Housing Development, which is Chicago's weed and seed site.

The school is to be established and operated as an early intervention education model based upon the Marva Collins Westside Preparatory School educational philosophy, curriculum and teaching techniques, where building positive self-esteem is imbedded in a strong core of academics. The Collins Westside Preparatory School is a private institution in Chicago's inner city that has been working to raise the academic achievement level of low income, minority children. The Wells Prep School has a National Partnership Task Force with representatives from federal, state and local agencies which serves as a steering committee and provides guidance and direction to the local effort. The Task Force monitors the planning and implementation activities of local participants to ensure that the original delinquency prevention goals are being addressed. The local partnership has also been assisted in this program by three Wells Housing Development parent representatives.

Attorney General Barr said, "This innovative initiative represents the type of 'seed' program that is critical to the long-term prevention of crime. Early intervention through education, like that provided by the Wells Prep School, will prevent delinquency, reduce crime, and equip inner city youth with the skills and self-esteem needed to be productive citizens."

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PROJECT TRIGGERLOCK

Western District Of Texas Is Number One In Project Triggerlock

On September 2, 1992, Attorney General William P. Barr presented an award to Ronald F. Ederer, United States Attorney for the Western District of Texas, for ranking number one in the nation in prosecuting armed offenders in the "Project Triggerlock" program. During the time frame May 1991 to April 1992, Department of Justice figures show that the District (San Antonio, El Paso, Austin, Midland, Waco) has brought 270 criminal prosecutions against armed violators, nearly 15 percent more than any other District in the nation.

Project Triggerlock focuses law enforcement attention at local, state and federal levels on those serious offenders who violate the nation's gun laws. The Attorney General said that the Western District of Texas has aggressively prosecuted armed career criminals and drug dealers utilizing weapons to further their illicit businesses. He said, "I want these armed criminals to know that their illegal activities will not be tolerated and that they will be prosecuted to the full extent of the law."

Under 18 U.S.C. § 924(e), an armed career criminal, one who has three or more prior drug or violent crime felony convictions, and who is thereafter convicted in federal court of possession or receipt of a firearm, faces a mandatory minimum prison sentence of fifteen non-parolable years upon conviction. The Western District of Texas is utilizing this statute to put these armed career criminals away for fifteen-plus years, and will continue to do so. Many long sentences have been imposed in this District, in part because of the lengthy criminal histories:

James Galloway: Criminal history included twelve felonies. Sentenced to thirty years for possessing a 9mm pistol with ammunition.

Keith Ford: Criminal history included six felonies. Sentenced to 400 months for possessing a firearm. Ford allegedly ambushed an armed drug debtor, but Ford claimed self defense and no state prosecution was possible.

Bobby Joe Yeagin: Criminal history included nine prior felonies. Sentenced to 332 months for distribution of methamphetamine and possession of a firearm during a drug trafficking crime and possession of a firearm by a felon.

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Attorney General Presents Triggerlock Award To The Southern District Of Texas

On September 2, 1992, Ronald G. Woods, United States Attorney for the Southern District of Texas, was presented a plaque by Attorney General William P. Barr for ranking fifth (tie) in the nation for prosecutions under the "Project Triggerlock" program. General Barr also toured the Harris County Jail, which recently added an extension to make it the nation's largest county jail with a 4,500-bed capacity.

The Southern District of Texas (Houston, Brownsville, Laredo, Corpus Christi, McAllen) has had 205 Triggerlock defendants charged to date. The following are a few Triggerlock cases:

Delaskio Moore: Wounded one police officer and shot at other federal and state law enforcement officers who attempted to execute a search warrant at his house for narcotics. Moore was captured while scaling a fence behind the house in an attempt to flee. Moore was charged with assaulting a federal officer and using a firearm in relation to a crime of violence. He was convicted at trial and sentenced to 114 months in federal prison. (Houston office)

Jose Oscar Nino: An eight-time felon, Nino was indicted on April 10, 1992 (the first day of Triggerlock) for possessing a .25 caliber pistol and 357 magnum revolver loaded with hollow point ammunition. Nino had been convicted of eight felonies between 1957 and 1981. Prior to his arrest on the federal charges, Nino's most recent conviction had been for burglary for which he began to serve a life sentence in 1981 and was released on parole in December, 1989. Following a jury trial in federal court, Nino was sentenced to 235 months imprisonment, five years supervised release and a $1,000 fine. (Corpus Christi office)

Manuel Rodriguez Elias: Elias, who had just carried twenty six pounds of marihuana across the Mexican border near the Rio Grande River, failed to respond to a Border Agent's call, in Spanish and English, to "freeze, police." Instead, Elias raised a shotgun point blank at two Border Agents. Elias continued to ignore warnings to put his gun down and an Agent fired at Elias. Elias confessed that he had intended to shoot the officer to protect his marihuana. He was sentenced to five years imprisonment and three years of supervised release. (Brownsville office)

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Other High Ranking Districts In The Project Triggerlock Program

Other Districts recognized by Attorney General William P. Barr for their outstanding commitment and dedication to reducing violence by the prosecution of armed violent criminals and armed narcotics traffickers are:

- The ***Eastern District of Virginia (Richmond)*** ranked second with 229 defendants charged.
- The ***Northern District of Texas (Fort Worth, Dallas)*** ranked third with 210 defendants charged.
- The ***Western District of North Carolina (Charlotte)*** ranked fourth with 198 defendants charged. (This accomplishment is particularly notable because of the relatively modest office staff.)
- The ***Central District of California (Los Angeles)*** ranked fifth with 194 defendants charged. (This District tied with the Southern District of Texas.)

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Project Triggerlock
Summary Report

Significant Activity - April 10, 1991 through August 31, 1992

Description	*Count*	*Description*	*Count*
Indictments/Informations	6,902	Prison Sentences	22,170 yrs.
Defendants Charged	8,748	Sentenced to prison	2,990
Defendants Convicted	4,761	Sentenced w/o prison or suspended	315
Defendants Acquitted	216	Average Prison Sentence	89 months
Defendants Dismissed	446	Number Sentenced to Life or More than 15 Years	538
Defendants Sentenced	3,305		

Charge Information

Defendants Charged Under 922(g) w/o enhanced penalty	2,144
Defendants Charged Under 922(g) with enhanced penalty under 924(e)	475
Defendants Charged Under 924(c)	3,219
Defendants Charged Under Both 922(g) and 924(c)	568
Total Defendants Charged Under 922(g) and 924(c)	6,406
Defendants Charged With Other Firearms Violations	2,342
Total Defendants Charged	8,748

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CRIME/DRUG ISSUES

Attorney General Praises Organized Crime Drug Enforcement Task Forces

On September 3, 1992, Attorney General William P. Barr attended the national conference of the Organized Crime Drug Enforcement Task Forces (OCDETF) in San Antonio. OCDETF is comprised of thirteen regional task forces under the leadership of a "core-city" United States Attorney and coordinated by the Departments of Justice, Treasury and Transportation. The task forces draw on the expertise of the United States Attorneys' offices, the Drug Enforcement Administration, the FBI, the U.S. Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Immigration and Naturalization Service, the Internal Revenue Service, the U.S. Marshals Service, the U.S. Coast Guard, and state and local law enforcement agencies. They employ such investigative techniques as undercover and sting operations, electronic surveillance, financial investigations, investigative grand juries, and, where appropriate, offers of immunity. The Attorney General referred to the 900 federal agents and attorneys who comprise OCDETF as "a first-rate law enforcement team." He said, "This team forms a foundation for international cooperation which is vital to the long term victory over drug trafficking. We are pursuing a sound and balanced strategy on both the supply side and the demand side. And the fact is, that in pursuing this strategy over the past three years, we have made substantial and impressive progress in the war on drugs." The Attorney General said that since OCDETF's inception in 1982 --

- 21,741 members of major criminal drug trafficking organizations have been convicted, with more than 20,000 receiving prison sentences;
- OCDETF has posted an 86 percent conviction rate;
- More than $2 billion has been confiscated through asset forfeiture.

In addition, 300 upper-echelon drug dealers are serving life sentences, with 6,176 drug leaders, managers and other key drug violators serving more than ten years each in prison.

Other data involving illegal drug use since 1988 made public at the conference included: a 26 percent reduction in adolescent drug use, 11 percent more than the goal of a 15 percent decrease; a 13 percent reduction in current overall drug use, 2 percent less than the goal of 15 percent; a 63 percent reduction in adolescent cocaine use, more than double the goal.

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Illegal Sale Of Social Security Information In The District of New Jersey

On September 24, 1992, Michael Chertoff, United States Attorney for the District of New Jersey, testified before the Subcommittee on Social Security, House Committee on Ways and Means, concerning the illegal sale of social security information. The District of New Jersey has obtained indictments charging twelve individuals with participating in the illegal traffic in confidential information consisting of social security information or data drawn from the FBI's National Crime Information Computer System. These defendants have pleaded guilty to conspiring to violate one or more of the following three federal statutes: giving or receiving bribes (18 U.S.C. § 201); unlawfully accessing a federal computer (18 U.S.C. § 1030); and unlawfully disclosing taxpayer return information (26 U.S.C. §7213). The government workers convicted in these cases were two employees of the Social Security Administration and an agent of the Office of the Inspector General, Department of Health and Human Services. The remaining defendants were engaged in information brokering or private investigation.

Mr. Chertoff said that the demand for confidential personal information is growing, and social security and criminal history information is especially popular. Social security information includes wage and employment records, useful for prospective employers, marketing firms and even parties in lawsuits. There are more nefarious uses, including obtaining information to be used in submitting false loan applications in the names of unsuspecting citizens. Mr. Chertoff further stated that although the statutory law is probably adequate to address illegal transactions in confidential government information, the punishments received by violators are not particularly strong. The problem lies with the approach taken by the sentencing guidelines in these cases. For the most part, the crimes of bribery, larceny or unlawful accessing of computer databases carry rather low base punishment levels for purposes of sentencing guidelines calculations. The guidelines then provide for increasing punishment based upon the financial value of the property taken or illicitly sold. While this approach may be sound in cases where the value of the stolen property can be fully quantified, it tends to be inadequate in cases in which intangible items like information are involved.

Finally, experience shows that effective deterrence of business crime is enhanced when jail sentences are coupled with real economic punishment. Thus, information brokers who are tempted to shortcut the information gathering process by purchasing illicitly obtained confidential data should be subjected to penalties such as suspension of their businesses, or in the case of repeat offenders, outright forfeiture.

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Drug War In The Western District Of New York

On September 4, 1992, Dennis C. Vacco, United States Attorney for the Western District of New York, was joined by U.S. Senator Alfonse D'Amato, and Western New York federal law enforcement representatives in the distribution of approximately $450,000.00 to thirty state and local law enforcement agencies in the District. A multi-state investigation ultimately led to the seizure of over $500,000.00 worth of assets, including a residence in the City of Buffalo and several investment and bank accounts. Local police agencies and FBI agents from Denver, Miami, and Buffalo broke up a drug trafficking ring centered in Buffalo, New York that supplied narcotics to Pennsylvania, Indiana and Colorado. The profits from the drug trafficking organization were invested in bank and brokerage accounts in Philadelphia, Providence, Boston, and Buffalo. These accounts were seized and divided among the law enforcement agencies.

United States Attorney Vacco praised the law enforcement agencies for their coordinated efforts and also pointed out that the latest forfeiture figures during fiscal year 1992 in the Western District of New York bring the total amount to $3.5 million, thus surpassing last year's record total of $3.3 million.

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FOOD STAMP FRAUD

Misuse Of Food Stamps

On September 10, 1992, George J. Terwilliger, III, Deputy Attorney General, forwarded to all United States Attorneys a copy of a letter from Secretary of Agriculture Edward Madigan to Attorney General William P. Barr concerning a new USDA program to eradicate food stamp trafficking. (The letter is reprinted in Vol. 40, No. 9, United States Attorneys' Bulletin, dated September 15, 1992, at p. 278.)

Mr. Terwilliger has advised that the Executive Office for United States Attorneys (EOUSA) and the Fraud Section of the Criminal Division will be working together and with the Department of Agriculture on reviewing how the Department can most effectively support this initiative given the Department's current priorities and resources. Louis DeFalaise, Counsel to the Director, EOUSA, is handling this matter for EOUSA. His telephone number is: (202) 616-2128. Karen Morrissette, Deputy Chief, Fraud Section, is handling the matter for the Criminal Division. Her telephone number is: (202) 514-0640.

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Food Stamp Fraud In The Eastern District Of New York

On September 9, 1992, Andrew J. Maloney, United States Attorney for the Eastern District of New York, announced that three Brooklyn, New York businessmen waived indictment and pleaded guilty to committing more than $82 million in food stamp fraud. This case represents the largest food stamp fraud in the history of the food stamp program.

The investigation revealed that the owners of a wholesale meat company, Norbert Wholesale Meats Corporation, also known as J & D Meats Inc., unlawfully accepted approximately $82.2 million in food stamps in payment for meat from retail store owners from June, 1982 until July, 1991, when special agents of the Agriculture Department's Office of Inspector General executed a federal search warrant at the premises. The defendants redeemed the food stamps at a bank using the authorization of their small retail grocery store, also located in Brooklyn, New York, which ceased to do business as a retail store in the mid-1980's. J & D Meats has been unauthorized to participate in the food stamp program since May 1982, when authorizations for most wholesale firms were withdrawn in an effort to reduce food stamp fraud. J & D Meats provided a laundering outlet for store owners who had obtained food stamps illegally. The investigation found many of the defendant's customers were not authorized to accept food stamps from recipients, and several were stores that had been disqualified from the food stamp program for violating the program's provisions, including the prohibition on buying food stamps for cash. During 1990 alone, the defendants illegally redeemed over $12.8 million in food stamps which, according to Office of Inspector General estimates, amounts to approximately two percent of the total amount of food stamps redeemed in New York City that year.

Julie E. Katzman, Assistant United States Attorney for the Eastern District of New York, was the prosecutor in this case.

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Food Stamp Fraud In The Northern District Of Illinois

On September 22, 1992, Fred Foreman, United States Attorney for the Northern District of Illinois, and several state and local law enforcement officials, announced that federal and state criminal charges have been brought against eighty-nine individuals and two businesses for trafficking in food stamps. It was also announced that the assets of eight businesses have been seized as a result of their alleged involvement in the trafficking. The indictments are the culmination of separate year-long investigations by the Department of Agriculture and a Task Force headed by the Secret Service. The Task Force was comprised of law enforcement personnel from the Secret Service, the Bureau of Alcohol, Tobacco and Firearms, the U.S. Postal Inspection Service, the Chicago and Joliet Police Departments, and the Cook County Sheriff's office.

During the course of the investigation of the federally indicted defendants, undercover agents, representing that they had food stamps for sale, exchanged approximately $130,045.00 worth of food stamps for approximately $46,747.00 in cash, as well as for drugs, guns, alcohol, cars and other items received from the defendants. All of the defendants charged federally are charged with at least one instance of unlawfully purchasing food stamps. Some defendants are also charged with conspiracy and aiding and abetting in illegal trafficking in food stamps. The maximum penalty for each count of these charges is five years' imprisonment and a fine of $250,000. In addition, store owners who are convicted of food stamp trafficking are barred from the food stamp program for a period of eighteen months.

Other defendants are charged with trafficking in controlled substances. One defendant is also charged with using a minor to traffick in controlled substances, while another defendant is charged with interstate transportation of a stolen motor vehicle. These violations involve the illegal use of food stamps and also carry a maximum sentence of five years' imprisonment and a $250,000 fine per count.

United States Attorney Foreman said, "These investigations revealed that many store owners and managers are abusing the food stamp program, costing the taxpayers money and diverting important resources from those in need. In addition, in many areas, food stamps have become currency for criminals who exchange them for guns, drugs, and other items. In an age when many Americans are receiving some kind of food subsidy, the food stamp program cannot afford these abuses which undermine public support for the program and the critical needs it serves. My office will continue to work closely with the Department of Agriculture, the Secret Service, and other agencies to investigate and prosecute these crimes."

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CRIMINAL DIVISION ISSUES

Procurement Fraud Monograph Analyzing 18 U.S.C. § 1031

Gerald E. McDowell, Chief of the Fraud Section, Criminal Division, has advised that the Defense Procurement Fraud Unit has received a substantial number of inquiries from Assistant United States Attorneys concerning 18 U.S.C. § 1031, which generally prohibits procurement fraud involving contracts or subcontracts awarded by the United States valued at $1 million or more. To address those inquiries, a monograph is attached at the Appendix of this Bulletin as Exhibit A, which briefly analyzes Section 1031 and provides a sample form indictment charging a violation of Section 1031(a). Section 1031 is a powerful statutory weapon available for the prosecution of major procurement fraud. It combines the flexibility and breadth of the mail and wire fraud statutes while dispensing with their requirement that the Government prove either a use of the mails or a use of the wires in interstate or foreign commerce.

If you have any questions concerning the monograph, please call Scott W. MacKay, Fraud Section Trial Attorney, at (202) 514-0819.

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Confessions Outline From The District Of The Virgin Islands

David M. Nissman, Chief Assistant United States Attorney, Criminal Division, District of the Virgin Islands, and Ed Hagen, Assistant District Attorney, Lane County, Oregon, co-authored a book entitled "Law of Confessions." In order that prosecutors will have every issue covered when a confession issue is raised in court, Mr. Nissman and Mr. Hagen have also prepared a compact outline which summarizes all of the confessions issues. A copy of the confessions outline is attached at the Appendix of this Bulletin as Exhibit B.

If you have any questions, please contact David Nissman. His office address is: 1108 King Street, Suite 201, Christiansted, St. Croix, U.S. Virgin Islands 00820-4951.

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ENVIRONMENT AND NATURAL RESOURCES ISSUES

Enforcement Actions Filed In Sixteen States Against Pollution Law Violators

On September 10, 1992, the Department of Justice and the Environmental Protection Agency (EPA) announced the simultaneous filing of twenty-two enforcement actions and settlements for violations of five environmental statutes against facilities in three sectors -- pulp and paper manufacturing, metal manufacturing and smelting, and organic chemical manufacturing. Thirteen civil judicial and nine administrative enforcement actions and settlements were filed against twenty-three facilities in sixteen states under the Clean Water Act, Resource Conservation and Recovery Act, Clean Air Act, Toxic Substances Control Act, and Emergency Planning and Community Right-to-Know Act.

Ten enforcement actions against pulp and paper manufacturers were filed in Alaska, California, Connecticut, Florida, Maine, Massachusetts, New Jersey, New York, and Wisconsin. Other facilities in this industry have agreed to pay EPA more than $18 million in civil and criminal penalties in the past year, the largest being a recently-announced $13 million settlement and criminal fine. In addition, EPA has announced a modified consent decree with Louisiana Pacific (LP) concerning its facility in Samoa, California. LP has committed to install a new chlorine-free bleaching process, that will make it the first pulp mill in the United States to produce 100 percent of its pulp with no chlorine.

Total penalties of approximately $3 million will be paid by three metal manufacturing and smelting facilities in Indiana, Ohio, and Pennsylvania as part of the settlement of three judicial cases. In addition, new judicial enforcement actions were filed against facilities in Hawaii, Maryland, Michigan and Pennsylvania. Other companies in this industry will pay in excess of $16 million in the past year in resolution of judicial enforcement actions. Another $1.8 million in penalties has been proposed by EPA in administrative actions. In addition, $547,450 in penalties against three industrial organic chemical manufacturers in New Jersey and Utah were sought in complaints as part of EPA's multi-statute enforcement initiative. EPA has assessed $175,000 in fines on industrial organic chemical manufacturers over the past year.

Vicki A. O'Meara, Acting Assistant Attorney General, Environment and Natural Resources Division, said, "Effective enforcement of our environmental laws must be not only vigorous but also focused. Today's filings are a watershed in focused federal environmental enforcement. In coordination with EPA, we are targeting our enforcement on those industrial groups where our efforts will achieve the greatest benefit in protecting the public health and the environment."

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Major Settlement In New Bedford Harbor PCB Superfund Case

On September 4, 1992, the Department of Justice announced that the United States and the Commonwealth of Massachusetts have reached a $21 million settlement with Federal Pacific Electric Company of Cleveland, Ohio, and Cornell-Dubilier Electronics, Inc. of Wayne, New Jersey, the remaining two defendants in the New Bedford Harbor Superfund litigation. This settlement completes a larger $109 million package and will go toward funding the cleanup of the widespread PCP contamination of New Bedford Harbor; restoring injured natural resources of the Harbor area; and reimbursing the respective government agencies for funds already spent in enforcement, remedial investigation, feasibility studies and natural resource damage assessment costs. This settlement also represents the last in a series of settlements negotiated by the Department and the Commonwealth of Massachusetts.

Under the first settlement finalized in July 1991, Aerovox Incorporated and Belleville Industries Incorporated agreed to pay $13 million. The second settlement for approximately $75 million was finalized in February, 1992 with the AVX corporation. A. John Pappalardo, United States Attorney for the District of Massachusetts, praised the settlement and the efforts of all the parties involved, and emphasized his office's commitment to enforcing environmental laws and aiding in the cleanup of our natural resources.

This is one of the first natural resource damages cases filed under the Superfund statute, and one of the largest natural resource damages recoveries under the Superfund statute to date. Of the $109 million recovered, between $66 million and $76 million will go to fund the cleanup of the Harbor by EPA and $21 million to $31 million will be used by the natural resource trustees to restore or acquire substitutes for the injured natural resources of the Harbor. The remaining $12 million will reimburse the government's study and investigation costs.

Associate Attorney General Wayne Budd, formerly United States Attorney for the District of Massachusetts, said, "Today's results cap a long effort to ensure that the corporations which polluted New Bedford Harbor pay to clean up New Bedford Harbor. Polluters in other parts of the U.S. should know that they will be held responsible for the damage they do to the natural resources of this country. Removing PCBs from New Bedford Harbor is a significant step toward the larger goal of cleaning up the damage caused by those who would despoil natural resources throughout the nation."

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$125 Million Superfund Site Cleanup In Pennsylvania

On September 16, 1992, the Department of Justice announced that two firms (Rohm and Haas Company and the SmithKline Beecham Corporation) have agreed to spend approximately $125 million to clean up hazardous substances at the Whitmoyer Laboratories Superfund Site in Jackson Township, Lebanon County, Pennsylvania, under a civil complaint and proposed consent decree filed in U.S. District Court in Harrisburg, Pennsylvania. Whitmoyer Laboratories manufactured veterinary pharmaceuticals from 1934 to 1984 and produced, stored, and disposed of aniline and soluble arsenic compounds at the site. The company was bought by Rohm and Haas in 1964 and later sold to Beecham (now SmithKline Beecham). In 1982, Beecham sold the company, and it subsequently declared bankruptcy.

After placing the site on the Superfund National Priorities List, EPA successfully completed an emergency cleanup action to remove approximately 800 drums of hazardous material from the site in September, 1990. The agreement addresses the final, permanent cleanup of this high-priority site in accordance with the remedy selected by EPA. The remedy includes the incineration and solidification of concentrated contaminated wastes currently contained in a concrete vault, solidification of contaminated soils and sediments, fixation of lagoon wastes, demolition of buildings, biological treatment of soils contaminated with organic chemicals and extractment and treatment of contaminated groundwater. If tests performed during remedial design indicate that incineration is an inappropriate remedy for these wastes, EPA will select an alternate remedy for the concentrated contaminated wastes at that time. The two firms have also agreed to reimburse the United States the $250,000 incurred by EPA for past cleanup costs and for all future costs incurred by EPA in its oversight of the permanent cleanup.

Vicki A. O'Meara, Assistant Attorney General for the Environment and Natural Resources Division, said, "This consent decree is designed to send a message to companies and individuals alike that polluters will pay for jeopardizing environmental safety."

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FINANCIAL INSTITUTION FRAUD

Financial Institution Prosecution Update

On September 15, 1992, the Department of Justice issued the following information describing prosecutions of "major" frauds against covered by FIRREA and the Crime Control Act of 1990, from October 1, 1988 through August 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. This information is based on reports from the offices of the United States Attorneys, the Dallas Bank Fraud Task Force, and the New England Bank Fraud Task Force. Numbers may be adjusted due to monthly activity, improved reporting and the refinement of the data base.

Savings And Loan Prosecutions

Informations/Indictments	752
Estimated S&L Losses	$8,561,053,458
Defendants Charged	1,239
Defendants Convicted	954 (93%)
Defendants Acquitted	74 *
Sentenced to prison	623 (77%)
Awaiting sentence	165
Sentenced w/o prison or suspended	184
Fines Imposed	$ 15,448,836
Restitution Ordered	$ 502,493,101

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	145
Convicted	110
Acquitted	10
Directors and Other Officers:	
Charged by indictment/ information	203
Convicted	176
Acquitted	7

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

Bank Prosecutions

Informations/Indictments	1,530
Estimated Bank Loss	$4,013,947,141
Defendants Charged	2,159
Defendants Convicted	1,732
Defendants Acquitted	42
Prison Sentences	2,311 years
Sentenced to prison	1,142
Awaiting sentence	269
Sentenced w/o prison or suspended	337
Fines Imposed	$ 6,409,661
Restitution Ordered	$407,016,655

CEO's, Chairmen, and Presidents:	
Charged by Indictments/ Informations	146
Convicted	125
Acquitted	1
Directors and Other Officers:	
Charged by Indictments/ Informations	458
Convicted	412
Acquitted	7

Credit Union Prosecutions

Informations/Indictments	91
Estimated Credit Loss	$86,440,669
Defendants Charged	113
Defendants Convicted	104
Defendants Acquitted	1
Prison Sentences	137 years
Sentenced to prison	75
Awaiting sentence	16
Sentenced w/o prison or suspended	13
Fines Imposed	$ 18,200
Restitution Ordered	$ 13,549,871

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations	11
Convicted	10
Acquitted	0
Directors and Other Officers:	
Charged by Indictments/ Informations	60
Convicted	58
Acquitted	0

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POINTS TO REMEMBER

New Pay Day Alert

Laurence S. McWhorter, Director, Executive Office for United States Attorneys, reminds all employees of the Department of Justice that ***November 12, 1992*** will be the first regular pay day to fall on a Thursday under our new pay system with the National Finance Center. Please mark your calendar accordingly, and make sure that all employees in your office are notified of this important change.

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Antitrust Division Grand Jury Practice Manual

In the United States Attorneys' Bulletin, Vol. 40, No. 8, dated August 15, 1992, at p. 252, the Antitrust Division Grand Jury Practice Manual was made available upon request. This Manual, consisting of two large volumes, explains the policies of the Antitrust Division on grand jury investigations and the general strategy for prosecuting white collar criminal offenses.

Since copies are limited and the supply on hand is dwindling, please forward your request in writing, no later than November 1, 1992, to: United States Attorneys' Bulletin, Room 6021, Patrick Henry Building, 601 D Street, N.W., Washington, D.C. 20530, attn: Audrey Williams. The fax number is: (202) 219-1201.

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Antidiscrimination Grants Awarded

On September 3, 1992, the Department of Justice announced that twenty-two non-profit organizations will receive $3 million in grants to conduct public education programs on the rights of victims of employment discrimination and the responsibilities of employers under the antidiscrimination provision of the Immigration Reform and Control Act of 1986 (IRCA). The grants, made by the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), will go to organizations representing both employers and employees. They were selected competitively from over two hundred applicants.

The grants, which range from $49,280 to $250,000, will promote antidiscrimination education and awareness throughout the country and in local communities. Multi-lingual and multi-cultural antidiscrimination messages will be delivered to victims of discrimination where they work and learn. Employers will be reached at their places of business, through trade associations, and through other agencies that serve as sources of information.

William Ho-Gonzalez, Special Counsel, Office of Special Counsel for Immigration-Related Unfair Employment Practices said, "The purpose of this grant program is to increase awareness of the problem by tapping into the expertise and credibility of community-based and professional organizations, entities that are ideally suited for implementing effective public educational efforts. We have been very happy with the results of previous grants programs, and are pleased that we will be funding twice as many grantees as last year, thanks to the additional monies provided by Congress for this year's program. Nonetheless, the selection process was very difficult because there were many excellent proposals submitted which we are unable to fund."

The grant recipients are: American Council on International Personnel, New York; Asian Pacific Legal Center, Los Angeles; Catholic Charities, Dallas and San Diego; Catholic Community Services, Salt Lake City; Chicago Coalition for Immigrant and Refugee Protection, Chicago; Coalition of Florida Farmworker Organizations, Homestead, Fla., and Farmworker Legal Services, Rochester, New York; Florida Restaurant Association, Hollywood, Fla.; La Raza Centro Legal, San Francisco; La Voz Latina, Rockford, Ill.; Massachusetts Immigrant and Refugee Advocacy, Boston; Metropolitan Assistance Corporation, New York; National Council of Agricultural Employers, Washington, D.C.; National Immigration Law Center, Los Angeles; Northwest Immigrant Rights Project, Seattle; Ohio Restaurant Association, Columbus, Ohio; Organization of Chinese Americans, Washington, D.C.; Polonians Organized to Minister to our Community Inc., Brooklyn; Service Employee International Union, Washington, D.C.; Texas Restaurant Association, Austin; and United Way of Greater L.A., Los Angeles.

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 2, dated September 17, 1992, is attached as Exhibit C at the Appendix of this Bulletin.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit D is a copy of the Federal Sentencing and Forfeiture Guide Newsletter, Volume 3, No. 22, dated August 24, 1992, and Volume 3, No. 23, dated September 7, 1992, which is published and copyrighted by James Publishing Group, Santa Ana, California.

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LEGISLATION

Anti-Car Theft Act

The House Ways and Means Committee marked up H.R. 4542, the Anti-Car Theft Act, on September 21, 1992. The Committee examined only those provisions that require the Customs Service to supervise the transport of used cars from the country to prevent stolen automobiles from being exported. There is a difference of opinion as to whether certain parts of all car models should be marked with identifying numbers in an effort to track down stolen car parts. Concerning "car jackings," the bill would also make it a federal crime to steal a car when the owner is present. This legislation is expected to reach the floor by the end of September.

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Environmental Crimes Section

On September 10, 1992, the Energy and Commerce Subcommittee on Oversight and Investigations held a hearing on the enforcement of the environmental crimes statutes. The Subcommittee heard testimony from twelve individuals, most of whom are employed by the Environmental Protection Agency. The Subcommittee refused to permit the Chief of the Environmental Crimes Section, Neil Cartusciello, of the Environment and Natural Resources Division, to testify, nor would the Chairman of the Subcommittee accept the Statement that was prepared for the record. Consequently, there was no opportunity to respond to complaints about the Department's efforts in enforcing the environmental crimes statutes. The Department will continue to work with minority members and respond to press inquiries in order to balance the record.

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Immigration Summary Exclusion Authority

Before the Congress recessed in August, proposed legislation designed to address the growing problem of aliens who present fraudulent or no immigration documents at U.S. ports-of-entry was introduced in both the House (H.R. 5780, by Congressman Bill McCollum) and the Senate (S. 3214, by Senator Alan Simpson). The Department is working with Senate and House minority staff to negotiate this legislation into an immigration package as the end of the session draws near.

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CASE NOTES

CIVIL DIVISION

Fifth Circuit Rejects Irwin Tolling And Holds That 1991 Civil Rights Act Provision Extending Title VII Statute Of Limitations Does Not Apply Retroactively

Rowe, a former senior Department of Health and Human Services (HHS) attorney, alleged discrimination under 42 U.S.C. §§ 1981, 1983, 1985(3), and 2000e-16. The district court found Rowe's §§ 1981 and 1983 claims barred under Brown v. General Servs. Admin., 425 U.S. 820 (1976), and found Rowe's § 1985(3) claim barred as insufficiently distinct from his Title VII claim. After considering and rejecting Rowe's argument for equitable tolling in light of Irwin v. Veterans Administration, 111 S. Ct. 453 (1990), the court dismissed Rowe's Title VII claim on the grounds that he filed his request to reconsider his EEOC decision one day after the deadline.

In his reply brief on appeal, Rowe argued for the first time that the 1991 Civil Rights Act now allowed him to state claims under §§ 1981, 1983, and 1985(3). After we filed a supplemental brief arguing that the 1991 Act did not apply to Rowe's claims, Rowe and amicus National Employment Lawyers Association filed briefs raising the argument that the 1991 Act revived Rowe's Title VII claims by extending the filing time for Title VII claims. At oral argument, the Fifth Circuit requested that the government file a second supplemental brief on how a substance/procedure distinction would affect the court's retroactivity analysis.

The panel has now affirmed that the EEOC did not waive the government's right to challenge the timeliness of Rowe's Title VII claim, and that Rowe's tardiness does not merit equitable tolling under Irwin. Extending its recent holding in Johnson v. Uncle Ben's, Inc., No. 91-2590 (5th Cir. July 1, 1992), the court held that the 1991 Act's provision extending the statute of limitations does not apply retroactively to revive Rowe's extinguished Title VII claim. Adopting the argument advanced in our second supplemental briefs, the court stated that the arguably procedural statute of limitations "has substantive attributes" because Rowe is "attempt[ing] to use the Act to revive a right which we have determined to have been extinguished under the law as it was at the time of the events in question."

Rowe v. Sullivan, No. 91-4675 (August 5, 1992). DJ # 35-75-62.

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* * * * *

Sixth Circuit Holds That the Employees And Net Worth Of A Trade Association's Members Should Be Aggregated For Purposes Of Determining Whether The Trade Association Is An Eligible Party Under The Equal Access To Justice Act

Under the Equal Access to Justice Act (EAJA), a trade association with a net worth which does not exceed $7,000,000 and no more than 500 employees can receive a fee award if it meets other criteria set forth in the Act. 28 U.S.C. 2412(d)(2)(B). In this case, the fee applicant was a trade association whose membership list included GTE, Ford Motor Company and DuPont. (The association itself, however met the eligibility criteria.) We argued that the employees and net worth of the association's members should be aggregated to determine whether it was an eligible party for EAJA purposes.

The panel agreed. It held, first, that the aggregation issue must be addressed as a "prevailing party" issue and not as a possible "special circumstance" that would make a fee award unjust. Then, relying on the purposes of the EAJA, and the Model Rules of the Administrative Conference of the United States, the court held that when, as in this case, an association is litigating on behalf of its members, aggregation should be used unless the entity fits within one of the exceptions listed in 28 U.S.C. 2412(d)(2)(B). This ruling should prove helpful in other cases.

National Truck Equipment Association v. National Highway Traffic Safety Administration, No. 89-3713 (August 6, 1992). DJ # 80094-127

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* * * * *

Eighth Circuit Affirms Application of Nebraska Malpractice Damages Cap In Tort Action Against The Government

The government admitted liability in this Federal Tort Claims Act (FTCA) case arising out of severe injuries to plaintiff's son that occurred during his birth at a military hospital in Nebraska. Following a trial on damages only, the district court found that plaintiff's damages totalled almost $1.3 million but, applying the FTCA's "like circumstances" test, entered judgment for $1 million because a Nebraska statute limits recovery to that amount in suits against private health care providers that are "qualified" under the statute. Participation by health care providers in the Nebraska's statutory malpractice system is voluntary. Those that elect to participate must present proof that they carry a prescribed level of malpractice insurance, must contribute to a patient compensation fund to cover judgments between the statute's limit on individual provider liability ($100,000) and the overall cap on patient recovery ($1 million), and must post a notice that they participate in the system. Patients may "opt out" of the system, and retain the right to sue for unlimited damages, by notifying a state agency.

A divided panel of the court of appeals has now affirmed the district court's application of the $1 million cap to the United States under the FTCA. The court held that because the government was willing to pay damages up to $1 million, and thus placed no drain on the patient compensation fund, the government's failure to contribute to the fund or comply with the other specific requirements of the statutory scheme did not preclude an analogy between a federal hospital and a "qualified" private hospital. The government's willingness to pay damages up to the $1 million was the "functional equivalent" of compliance with those specific requirements, the court concluded.

Lozada v. United States, No. 91-2409 (September 9, 1992).
DJ # 157-45-411

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* * * *

Ninth Circuit Holds That Federal Government May Be Sued For Injunctive Relief Under 42 U.S.C. § 1983 If Plaintiff Brings Action Against Federal Officer In His Official Capacity, But Rules in Government's Favor On Grounds That Department Of Labor Did Not Act Under Color Of State Law In This Case

Plaintiffs brought this action against the Department of Labor (DOL) and the State of California to prevent DOL from recognizing Governor Deukmejian's attempt to terminate the State's OSHA program. The case became moot when a State referendum reversed the Governor's decision to terminate the "Cal-OSHA" program. Plaintiffs then sought fees against the United States under 42 U.S.C. §1988, arguing that they prevailed against the federal government under 42 U.S.C. §1983. The district court agreed and awarded §1988 fees. We appealed to the Ninth Circuit, arguing that the federal government is not a "person" subject to suit under §1983, that the federal government cannot violate §1983 because it cannot act under color of state law, and that we did not violate any federal law in the present case.

The Ninth Circuit has now reversed. The Court rejected our argument that the federal government is not a "person" that can be sued under §1983. The Court held that actions against federal officers in their official capacity for injunctive relief are not actions against the sovereign, and, thus, can be maintained under §1983. Further, the Court explained that the Administrative Procedure Act waives the federal government's immunity from injunctive suits. The Court also held that federal officials acting in their official capacity can act under color of state law if there is a "symbiotic relationship" with the state officials, such that the federal official's action can be fairly attributed to the state. However, the Court ruled that the federal officials here only acted under color of federal law. Accordingly, the Court held that plaintiffs did not prevail under §1983 fee award.

Isabel Cabrera v. Lynn Martin, Secretary of Labor, No. 90-16665
(August 21, 1992). DJ # 233-076-1337

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* * * * *

Tenth Circuit Says Damage Awards May Provide For Trusts With Full Provision To The Government Upon Death Of The Recipient

A severely handicapped child with a disputed life expectancy was awarded over $8 million in this FTCA medical malpractice lawsuit involving the federal government's Claremore Indian Hospital. The district court set up a trust for the child's benefit because of its concern that a lump

sum payment controlled by the parents might not be used properly for the child's benefit. The guardian ad litem who had been appointed at our request also asked for a full reversion to the government of the trust amount upon an early death of the child, because there was reason to believe the parents were more interested in their own rights as beneficiaries than their child's health. The district court refused this request because the court could find no precedent allowing such a provision.

The court of appeals has now agreed with us that a court may require fully reversionary trusts if that is in the best interests of the recipient. The appellate court cautioned, as we had requested, that the government's obligation to the recipient must, nonetheless, cease when it pays a fixed lump sum to fund that trust. The case has been remanded to the district court for a new ruling on whether a reversionary trust is appropriate here. In other parts of the decision, the court of appeals agreed with us that (1) a district judge cannot backdate his judgment so as to increase an interest award, (2) a guardian ad litem who is also acting as an attorney, must receive her compensation as litigation counsel from the damages award and not as costs, and (3) the so-called "offset approach" to present value calculations may not be relied upon without competent evidence to calculate the relevant interest and inflation rates.

Hull v. United States, Nos. 91-5091, 91-5092 (August 10, 1992).
DJ # 157-59N-180

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* * * * *

TAX DIVISION

Federal Circuit Rules That Greenmail Payments Are Not Deductible

On September 9, 1992, the Federal Circuit affirmed the Claims Court's judgment in Stokely-Van Camp, Inc. v. United States. This case, which involved over $12 million, presented two issues: (1) whether the premium paid by a corporation in purchasing its stock from its shareholders is deductible when the premium was paid to prevent a hostile takeover ("greenmail" payments); and (2) whether a subsidiary of the taxpayer qualified as a Domestic International Sales Corporation (DISC). The Claims Court ruled, and the Federal Circuit agreed, that the greenmail payments were not deductible and that the subsidiary was not a DISC.

* * * * *

Bankruptcy Court Considering Motion To Facilitate Sale of Coal Lands In Pennsylvania

The Internal Revenue Service has filed priority tax claims of approximately $4.1 million, and general unsecured claims in excess of $10 million in In re Blue Coal, a case which is now sixteen years old. The primary asset of the bankruptcy estate is 15,000 acres of residential property and coal land in the Wilkes-Barre, Pennsylvania area, which the bankruptcy trustee has been attempting to sell by a bulk sale for many years. Pointing to over a hundred attempts by potential purchasers to acquire smaller portions of the land, the Tax Division filed a motion with the Court asking it to require the trustee to sell the land in this manner, arguing that this would be the most effective means of liquidating this asset and satisfying the claims of all the creditors of the bankruptcy estate, which amount to $26 million.

Earlier this year, Congressman Paul Konjorski announced that the Department of Defense would fund an entity named the Earth Conservancy as an experimental environmental center to explore various new methods to clean up the environment. (Congressman Konjorski's brother is on the board of the Earth Conservancy). The Earth Conservancy planned to acquire the Blue Coal lands as its operational site, and it is our understanding that negotiations have taken place for a sale of this land with a proposed sales price of $12.5 million. Accordingly, we advised the Court that if the trustee desired an additional 60 days to continue negotiations with the Earth Conservancy prior to the Court considering our motion regarding the sale of smaller parcels of land, we would not object.

At a hearing on our motion on September 10, 1992, the Court noted that the record did not reflect any attempts by the Earth Conservancy to purchase the land. It then heard evidence that the sale of smaller parcels of land would produce sales proceeds in the range of $20 to $25 million. The Court has scheduled of final day of testimony on November 16, 1992, and it has indicated that it will rule on our motion that day.

* * * * *

Third Circuit Affirms Favorable Tax Court Decision In Important Case Involving Purchase Of Tax Benefits Under Safe-Harbor Leasing Rules

On September 9, 1992, the Third Circuit affirmed the favorable Tax Court decision in Armstrong World Industries v. Commissioner. This case involved over $20 million and presented the question whether certain transactions between Armstrong and Conrail, in which Armstrong essentially purchased investment tax credits and depreciation deductions from Conrail, met the so-called "safe-harbor leasing rules" of Section 168(f)(8) of the Internal Revenue Code. Under these safe-harbor rules, taxpayers could transfer tax benefits through sale-and-leaseback arrangements if they met certain requirements.

In this case, the Tax Court found that some of the leased properties were not placed in service within three months after the execution of their lease, and that they were thus ineligible for safe-harbor leasing treatment. The Tax Court also found that the taxpayer in one instance had not identified the specific property covered by the lease prior to the close of the taxable year, as required by the safe-harbor leasing rules. Finally, the Tax Court upheld the validity of a Treasury Regulation which prohibited immediate write-off of certain classes of property leased under a safe-harbor lease. Although safe-harbor leasing rules have been repealed, a number of cases involving a significant amount of revenue are still in the administrative pipeline.

* * * * *

Ninth Circuit Extends The Scope Of The Waiver Of Sovereign Immunity Under The Bankruptcy Code

On September 1, 1992, the Ninth Circuit entered adverse decisions in In Re: Kay S. Bulson and In Re: Keith F. Pinkstaff, et al., two bankruptcy cases involving the waiver of sovereign immunity of the United States under Section 106(a) of the Bankruptcy Code. Sovereign immunity is waived under that provision where the claim against the governmental unit is property of the estate and arises out of the same transaction or occurrence out of which such governmental unit's claim arises.

Here, the Ninth Circuit ruled that the debtors' claims for costs and attorneys' fees -- which stemmed from alleged willful violations of the automatic stay by the IRS -- satisfied the "same transaction or occurrence" requirement of Section 106(a) because the violations of the automatic stay occurred with respect to taxes for which the United States had filed claims in bankruptcy. The decisions are arguably in conflict with the Sixth Circuit's recent decision in In re Rebel Coal Co., 944 F.2d 320 (6th Cir. 1992), which effectively applied a stricter standard in determining whether there was a waiver of sovereign immunity under Section 106(a).

* * * * *

District Court Orders Enforcement of Section 6050I Summons, But Holds That It Is a "John Doe" Summons

On September 11, 1992, the United States District Court for the Eastern District of Tennessee entered its decision in United States v. Ritchie, et al., a case involving enforcement of a summons issued to the law firm, Ritchie, Fels & Dillard, P.C., seeking disclosure of information identifying clients who paid cash fees in excess of $10,000 pursuant to Section 6050I of the Internal Revenue Code.

The District Court ordered enforcement of the summons, but held that the summons was a "John Doe" summons subject to the requirements of Section 7609(f) of the Internal Revenue Code. In doing so, the Court found that the Internal Revenue Service was not conducting an investigation into the law firm's compliance with the reporting requirements of Section 6050I, apparently relying on a casual comment made by the revenue agent which was contradicted in a declaration by that same agent. Rather, the Court determined that the Internal Revenue Service was "making a general search for the identities of cash-paying clients," and that, accordingly, the summons must satisfy the requirements of Section 7609(f). Section 7609(f) requires court authorization before a "John Doe" summons can be served, but the District Court nevertheless found that the requirements of Section 7609(f) had been satisfied here, and ordered enforcement of the summons.

* * * * *

ADMINISTRATIVE ISSUES

Career Opportunities

U.S. Trustees Office, Houston And San Antonio, Texas

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the United States Trustee's Office in Houston, Texas. Responsibilities 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 Bankruptcy Court and the United States District Court.

The Office of Attorney Personnel Management is also seeking an experienced attorney to manage the legal activities of the U.S. Trustee's office in San Antonio. Responsibilities 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 participation in the administrative aspects of the Office.

For the U.S. Trustee's office in Houston, applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. For the U.S. Trustee's office in San Antonio, applicants must possess a J.D. degree for at least one year; be an active member of the Bar in good standing (any jurisdiction); possess extensive management experience; and have at least five years of bankruptcy law experience. Applicants must submit a resume, salary history, and law school transcript to: Office of the U.S. Trustee Office, 440 Louisiana, Suit 2500, Houston, Texas 77002, Attn: Christine A. March.

Current salary and years of experience will determine the appropriate grade and salary level. The possible range for Houston is GS-11 ($32,423 - $42,152) to GS-15 ($64,233 - $83,502). For San Antonio, the possible range is $64,000 to $85,000. These positions are open until filled. No telephone calls, please.

* * * * *

Federal 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% of time) will be required. Preference will be given to applicants with a strong federal and/or private sector labor relations background. 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, 3120 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 (32,423 - $42,152) to GS-13 ($46,210 - $60,070). This position is open until filled.

* * * * *

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%	03-09-90	8.36%	07-26-91	6.26%
11-18-88	8.55%	04-06-90	7.97%	08-23-91	5.68%
12-16-88	9.20%	05-04-90	8.36%	09-20-91	5.57%
01-13-89	9.16%	06-01-90	8.32%	10-18-91	5.42%
02-15-89	9.32%	06-29-90	8.70%	11-15-91	4.98%
03-10-89	9.43%	07-27-90	8.24%	12-13-91	4.41%
04-07-89	9.51%	08-24-90	8.09%	01-10-92	4.02%
05-05-89	9.15%	09-21-90	7.88%	02-07-92	4.21%
06-02-89	8.85%	10-27-90	7.95%	03-06-92	4.58%
06-30-89	8.16%	11-16-90	7.78%	04-03-92	4.55%
07-28-89	7.75%	12-14-90	7.51%	05-01-92	4.40%
08-25-89	8.27%	01-11-91	7.28%	05-29-92	4.26%
09-22-89	8.19%	02-13-91	7.02%	06-26-92	4.11%
10-20-89	7.90%	03-08-91	6.62%	07-24-92	3.51%
11-16-89	7.69%	04-05-91	6.21%	08-20-92	3.41%
12-14-89	7.66%	05-03-91	6.46%		
01-12-90	7.74%	05-31-91	6.09%		
02-14-90	7.97%	06-28-91	6.39%		

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

* * * * *

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* * * * *

EXHIBIT
A

Major Fraud Against the United States
18 U.S.C. § 1031

Scott W. MacKay
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The Defense Procurement Fraud Unit (DPFU) has recently received a substantial number of inquiries from Assistant United States Attorneys concerning 18 U.S.C. § 1031, which generally prohibits procurement fraud involving contracts or subcontracts awarded by the United States valued at $1 million or more. In an effort to address those inquiries, this monograph briefly discusses section 1031 and provides a sample form indictment charging a violation of section 1031(a). As there have been no reported decisions which interpret section 1031, the conclusions drawn are based upon the legislative history of section 1031 and cases discussing the analogous mail, wire and bank fraud statutes, 18 U.S.C. §§ 1341, 1343 and 1344.

The Statute

In response to its continuing concern over the widespread scope of procurement fraud against the United States, Congress enacted section 1031 to "provide federal prosecutors with an additional criminal statute targeting major procurement fraud committed against the United States . . . [and] to enhance the deterrence, prosecution, and punishment of such fraud." S. Rep. No. 100-503, 100th Cong., 2d Sess. 1 (1988), reprinted in 1988 U.S.C.C.A.N. 5969.

Section 1031, enacted as part of the Major Fraud Act of 1988, Pub. L. No. 100-700, § 2, 102 Stat. 4631 (1988), states in pertinent part:

> (a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent --
>
> (1) to defraud the United States; or
>
> (2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,
>
> in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

Section 1031 is applicable only to conduct occurring on or after November 19, 1988. However, as the fraud prohibited by section 1031 continues at least as long as the underlying scheme is being executed, the statute reaches a scheme which originated before November 19, 1988, but was executed, or attempted to be executed, after that date. See United States v. Mason, 902 F.2d 1434, 1437-38 (9th Cir. 1990)(no violation of Ex Post Facto Clause where evidence showed, as alleged in the indictment, that acts charged as separate executions of a bank fraud scheme occurred after 18 U.S.C. § 1344 became effective); United States v. Whitty, 688 F. Supp. 48, 52-53 (D. Me. 1988)(same).

Scheme or Artifice

Patterned generally after the bank fraud statute, 18 U.S.C. § 1344, H.R. Rep. No. 100-610, 100th Cong., 2d Sess. 6 (1988), the language of section 1031 is also similar to that found in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, from which the bank fraud statute was derived. S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3519 (18 U.S.C. § 1344 was "modeled on the present wire and mail fraud statutes which have been construed by the courts to reach a wide range of fraudulent activity.").

In that regard, the legislative history of section 1031 states that:

> [t]he phrase "scheme or artifice" should be interpreted in the same manner as that phrase is interpreted under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. According to well-established case law, the phrase "is to be interpreted broadly." McNally v. United States, 107 S.Ct. 2875, 2879-80 (1987).

S. Rep. No. 100-503, 100th Cong., 2d Sess. 11 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5975. To emphasize the broad reach Congress intended that section 1031 should have, the legislative history further notes, in referring to McNally, that "[t]he Court has interpreted the phrase 'to includ[e] everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.' Id." S. Rep. No. 100-503, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5975.

Section 1031 prohibits the execution of, or the attempt to execute, a "scheme or artifice" in two distinct circumstances:

where there is intent to defraud the United States or where there is intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises. A scheme executed with the intent to defraud the United States is actionable whether or not any false representations are made and a scheme to obtain money by false pretenses is equally actionable regardless of any intent to defraud. See United States v. Clausen, 792 F.2d 102, 104-105 (8th Cir. 1986)(phrases "scheme to defraud" and "scheme to obtain money by false or fraudulent pretenses, representations, or promises" in wire fraud statute should be read independently of one another), cert. denied, 479 U.S. 858 (1986).

A scheme or artifice executed with the intent to defraud the United States, prohibited by section 1031, necessarily includes a scheme to deprive the United States of a tangible property right as well as an intangible right of honest services. See 18 U.S.C. § 1346 (1988)("For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services."). Accordingly, in a procurement context, a scheme executed with intent to defraud the United States of any of the following property rights is apparently prohibited by section 1031: the right of the United States to control the way in which it spends its money, see United States v. Biaggi, 909 F.2d 662, 687 (2d Cir. 1990), cert. denied sub nom. Simon v. United States, 111 S.Ct. 1102 (1991); the right of the United States to receive full

value on the contracts it awards and to expect the contracting parties to proceed in good faith, see United States v. Telink, Inc., 681 F. Supp. 1454 (S.D. Cal. 1988), reconsidered, 702 F. Supp. 805 (S.D. Cal. 1988); and, the right of the United States to procure goods and services free from fraud, deceit, trickery and dishonesty, see United States v. Granberry, 908 F.2d 278 (8th Cir. 1990), cert. denied, 111 S.Ct. 2024 (1991); see generally 2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions § 40.13 (1990).

The phrase "false or fraudulent pretenses, representations, or promises" includes actual, direct false statements as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question and that were made or used with the intent to defraud. See United States v. Sawyer, 799 F.2d 1494, 1502 (11th Cir. 1986)(mail fraud prosecution), cert. denied, 479 U.S. 1069 (1987); see generally 2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions § 40.13 (1990).

To establish a violation of section 1031, it is not necessary that the Government prove that the defendant successfully executed or attempted to execute the scheme to defraud the United States or to obtain money by false pretenses. The gist of the procurement fraud prohibited by section 1031, like its mail, wire, and bank fraud counterparts, is the execution, or the attempt to execute, the scheme or artifice with the requisite criminal intent. The ultimate success or failure

of that effort is immaterial. See United States v. Kelley, 929 F.2d 582 (10th Cir. 1991), cert. denied, 112 S.Ct. 341 (1991).

Scienter Requirement

The scheme or artifice prohibited by section 1031 must be knowingly executed, or attempted to be executed, with either the intent to defraud the United States or the intent to obtain money or property by means of false or fraudulent pretenses, representations, or promises. Congress intended that the "'knowing' standard include[] the concept of willful blindness or deliberate ignorance as outlined in such decisions as U.S. v. Jewell, 532 F.2d 679 (9th Cir. 1976); U.S. v. Jacobs, 470 F.2d 270 (2d Cir.) cert. denied sub nom; Lavelle v. U.S., 414 U.S. 821 (1973) . . . As such it is the normal 'knowing' standard used in many Federal and state criminal statutes (See e.g., 18 U.S.C. 1344, 18 U.S.C. 1341, 18 U.S.C. 1028)." H.R. Rep. No. 100-610, 100th Cong., 2d Sess. 6 (1988). The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the United States in order to cause it to lose money, property, or other rights, or to result in a financial gain to the defendant. See United States v. George, 477 F.2d 508, 512 (7th Cir. 1973), cert. denied, 414 U.S. 827 (1973); see generally 2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions § 40.14 (1990).

Charging As A Separate Count Each Act In Execution Of The Scheme

Section 1031's operative language "whoever knowingly executes, or attempts to execute, any scheme or artifice" reasonably may be construed to allow charging as a separate count, each act in execution of, or in an attempted execution of, the major fraud scheme. Thus, in the typical procurement fraud case, each false statement (whether, for example, a false certification or a false or fabricated quality assurance inspection record or test result) or each claim or invoice (whether, for example, a false and fraudulent SF 1443, Contractor's Request for Progress Payment, DD Form 250, Material Inspection and Receiving Report, or an equitable adjustment claim) made to execute, or in an attempt to execute, the scheme or artifice, constitutes a separate act chargeable in a separate count.

The legislative history of section 1031 lends support for the argument that each act in execution or attempted execution of a major fraud scheme may be charged as a separate offense. In addressing the fine limitation language found in subsection 1031(c), discussed infra, the legislative history explains that Congress fully understood that multiple counts -- and multiple prosecutions -- could, and likely would, be brought for multiple acts in execution of a single major fraud scheme:

> Subsection 1031(c) provides that the "maximum fine imposed upon a defendant for a prosecution, including prosecution with multiple counts, under this section shall not exceed $10 million." This provision was included to address a concern that the government may charge in a single judicial proceeding that a large

> number of related incidents are separate violations of this section. The committee determined that, except as otherwise expressly provided in Section 1031(d), the aggregate of fines that a court may impose under this section in a single judiciary proceeding is $10 million for any single defendant, regardless of the number of counts or violations of this section which are alleged. This limitation does not prevent multiple proceedings, for example, where several independent schemes or artifices have been perpetrated by the same defendant. . . . It is the committee's view that a single corporate defendant should not be subjected to multiple $10 million fines where there is in fact a single scheme, regardless of the number of prosecutions brought.

S. Rep. No. 100-503, 100th Cong., 2d Sess. 12-13 (1988), reprinted in 1988 U.S.C.C.A.N. 5976.

In addition, the derivation of section 1031 from the mail and wire fraud statutes, in which each mailing or wire transmission in furtherance of the scheme can be prosecuted as a separate crime, e.g., United States v. McClelland, 868 F.2d 704 (5th Cir. 1989), further supports the argument that each execution or attempted execution of a major fraud scheme may be charged in a separate count.

Section 1031's derivation from the bank fraud statute, 18 U.S.C. § 1344, however, will likely be used by defendants to support an argument that multiple acts may be charged only as a single execution or attempted execution of the major fraud scheme, as there is a split among the circuits whether 18 U.S.C. § 1344 allows charging as a separate act each execution of a bank fraud scheme. Compare United States v. Poliak, 823 F.2d 371, 372 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988) and United States v. Schwartz, 899 F.2d 243 (3d Cir. 1990), cert. denied,

111 S.Ct. 259 (1990)(each forged check or check drawn on insufficient funds in prosecutions under 18 U.S.C. § 1344 was a separate act in execution of the scheme and was separately chargeable) with United States v. Lemons, 941 F.2d 309 (5th Cir. 1991)(in prosecution under 18 U.S.C. § 1344, separate check transactions related to fraudulent loan scheme were merely part of the execution of a single scheme to defraud and were not separately chargeable), rehearing, en banc, denied, 948 F.2d 1287 (5th Cir. 1991).

In Poliak, the Ninth Circuit, on examining the language of section 1344 which states "whoever knowingly executes" a scheme to defraud, rejected the argument that the ten counts charged in the indictment corresponding with the drawing of ten checks should be merged into a single scheme of bank fraud, and held:

> We believe this language plainly and unambiguously allows charging each execution of the scheme to defraud as a separate act. We find no legislative intent to the contrary. Here, Poliak wrote ten separate checks, each a different and separate execution of the scheme to defraud the banks.

823 F.2d at 372. In Schwartz, the defendant was charged with three counts of bank fraud consisting of his deposit of three checks drawn on accounts with insufficient funds. The Third Circuit, quoting the foregoing language from Poliak, held that "each deposit was a separate violation of 18 U.S.C. § 1344(a)(1), because in making each deposit Schwartz was executing his scheme to defraud [the bank]." 899 F.2d at 248.

The Fifth Circuit, in Lemons, considered and rejected the analysis of section 1344 applied by the Poliak and Schwartz

courts. Lemons was charged with, among other crimes, seven separate counts of bank fraud relating to his authorization, as a bank officer, of a large loan which included a hidden kickback for his benefit, and six subsequent discrete payments to Lemons, through an intermediary, of a portion of the kickback proceeds. The court contrasted the bank fraud statute with the mail and wire fraud statutes observing that the latter statutes "expressly punish separate acts in execution of a scheme to defraud," placing matter in the mail or using interstate wires, whereas the bank fraud statute "punishes '[w]hoever knowingly executes . . . a scheme or artifice to defraud.'" 941 F.2d at 318. The court further stated:

> The fact that each act in execution of a scheme is a punishable offense under the mail or wire fraud statutes does not allow reading the bank fraud statute to likewise punish each act in execution of a scheme or artifice to defraud. In short, the mail and wire fraud statutes punish each act in furtherance, or execution, of the scheme; but the bank fraud statute imposes punishment only for each execution of the scheme . . . Concerning Vernon, there was but one scheme and one execution. The movement of the benefit to Lemons, although in several separate stages or acts, was only part of but one performance, one completion, one execution of that scheme . . . To hold otherwise, on these facts, renders the reach of § 1344 potentially boundless.

Id. "The Lemons court thus concluded that the unit of prosecution of an 'execution' of a scheme, as used in Section 1344, is the completed scheme." United States Petition for Rehearing With Suggestion for Rehearing En Banc at 4, United States v. Lemons, 941 F.2d 309 (5th Cir. 1991)(No. 90-1287).

The narrow interpretation accorded section 1344 by the court in Lemons is unpersuasive when examined in the context of the language of the statute and its derivation from the mail and wire fraud statutes. First, the text of Section 1344 does not limit the scope of the term "executes." Moreover, as argued by the United States in its unsuccessful petition for a rehearing:

> [I]t is beyond challenge that Congress drafted Section 1344 on the lines of the mail and wire fraud statutes. In doing so, however, Congress did not limit its effort to pattern Section 1344 after Section 1341 and 1343 only in the breadth of the prosecutable fraudulent schemes. Thus, it is legitimate to contend that Congress knew and intended that Section 1344 be given the breadth of its mentor statutes in every respect, including that Section 1344 encompass multiple counts for a single scheme, since it is long settled that each use of the mail or wire facilities is a separate offense. The Ninth Circuit relied on this reasoning when it concluded that when Congress drafted Section 1344 expressly along the line of the mail and wire fraud statutes it made Section 1344 subject to a construction consistent with its models. Poliak 823 F.2d at 372 [footnote omitted].

United States Petition for Rehearing With Suggestion for Rehearing En Banc at 9-10, United States v. Lemons, 941 F.2d 309 (5th Cir. 1991)(No. 90-1287). Accordingly, the analysis of section 1344 in Lemons is not likely to convince a court that each act in execution or attempted execution of a major fraud scheme cannot separately be charged. This is particularly the case in view of the explicit acknowledgement in the legislative history of section 1031 that multiple counts for a single major fraud scheme may be brought in a single prosecution.

Jurisdictional Language

Section 1031 applies to the execution or attempted execution of a scheme to defraud:

> in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more

As explained in the legislative history, "[t]he phrase 'value of the contract' refers to the value of the contract award, or the amount the government has agreed to pay to the provider of services whether or not this sum represents a profit to the contracting company." S. Rep. No. 100-503, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5975-76.

Neither the statute nor the legislative history provides a definition for "contract" or "subcontract." However, the Federal Acquisition Regulation (FAR), the regulation which prescribes policies and procedures for the acquisition of goods and services by all Federal executive agencies, defines each term broadly. FAR Part 2.101 states that:

> Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contacts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilaterial [sic] contract modifications.

48 C.F.R. § 2.101 (1991).

FAR Part 44.101 defines "subcontract" as:

> any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

48 C.F.R. § 44.101 (1991)

The language of section 1031 appears to make prime contractors and subcontractors liable whether it is the prime contract or the subcontract that is valued at $1,000,000 or more. Thus, section 1031 may fairly be read to reach a subcontractor whose subcontract is valued at less than $1,000,000, provided that the prime contract, or any part thereof (e.g., other subcontracts, delivery orders, or purchase orders) meets the jurisdictional value of $1,000,000 or more.

This interpretation follows from the statute's failure separately to apply the $1,000,000 jurisdictional language to each category of persons or entities specified by the statute: contractor, subcontractor, and supplier. Section 1031 prohibits the execution or attempted execution of a fraud scheme "in any procurement of property or services." This prohibition applies to those involved in the procurement of such property or services either as a "prime contractor with the United States" or as a "subcontractor or supplier on a contract in which there is a prime contract with the United States." However, the statue conditions its applicability to these persons or entities in a general fashion by stating that the statute pertains to them only

"if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more." The plain meaning of this qualifying language is that any one of the categories of persons or entities described -- contractor, subcontractor, or supplier -- is subject to section 1031 provided any one of the component parts of the "procurement of property or services" -- whether a prime contract, subcontract, or constituent part thereof -- is worth more than $1,000,000.

Had Congress intended to limit the liability of each category of person or entity identified by section 1031 exclusively to those instances in which that person's or entity's component part of the procurement was valued at $1,000,000 or more, it would have done so explicitly and would have avoided the general qualifying language found in the statute. For example, had Congress intended to limit the scope of section 1031, it likely would have employed language similar to that which follows, which expressly limits liability to fraud schemes:

> in any procurement of property or services as a prime contractor with the United States, if the value of the prime contract is $1,000,000 or more, or as a subcontractor or supplier on a contract with the United States, if the value of the subcontract or any constituent part thereof, is $1,000,000 or more.

The failure of Congress explicitly to limit the jurisdictional language of section 1031, together with the plain language of the statute, supports the conclusion that contractors, subcontractors, and suppliers are liable for the execution, or attempted execution, of a major fraud scheme if any component of

the procurement of property and services -- the prime contract, subcontract, or any constituent part thereof -- have a value of $1,000,000 or more.

It may be argued that a more restrictive interpretation of the jurisdictional language would be inconsistent with the statute's purpose of defeating fraud in major procurements. Narrowly construing the jurisdictional language would allow subcontractors or suppliers to escape criminal liability for fraud having a substantial potential to disrupt, impair or impede a procurement of goods and services valued at $1,000,000 or more, merely because the subcontractor's or supplier's particular subcontract or contract award is less than $1,000,000.

On the other hand, the sole comment in the legislative history concerning the jurisdictional language in section 1031 suggests, by negative implication, that a subcontractor's liability may, in fact, be conditioned upon the subcontract award being valued at $1,000,000 or more: "a subcontractor awarded a subcontract valued at $1,000,000 or more is covered by this section, regardless of the amount of the contract award to the contractor or other subcontractors." S. Rep. No. 100-503, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5976. While this comment in the legislative history is not particularly illuminating, it may support the argument that the liability of each category of person or entity identified by section 1031 is limited exclusively to those instances in which that person's or entity's component part of the procurement was

valued at $1,000,000 or more. This argument is further strengthened by the rule of lenity which states that when there are two rational readings of a criminal statute, one harsher or more expansive than the other, the more expansive interpretation is appropriate only where Congress has spoken in clear and definite language. McNally v. United States, 483 U.S. 350, 359-360 (1987).

Because the statutory language is not clear and the legislative history does not explicitly address the issue, prudence dictates that prosecutors should consider charging a subcontractor with mail fraud, wire fraud, or another applicable violation, either alternatively or in lieu of a section 1031 count, where the value of the subcontract, as opposed to the prime contract, is less than $1,000,000.

Elements of the Offense

Based upon the language of the statute and the legislative history, the elements of section 1031 appear to be as follows:

1. The defendant [executed] or [attempted to execute] a scheme or artifice.

2. The defendant did so knowingly, and with the intent [to defraud the United States] or [to obtain money or property by means of false or fraudulent pretenses, representations, or promises].

3. The defendant [executed] or [attempted to execute] the scheme or artifice in a procurement of property or services

[as a prime contractor with the United States] or [as a subcontractor or supplier on a contract in which there was a prime contract with the United States].

4. The value of the [contract] [subcontract] [or any constituent part thereof], that is, the value of the [contract] or [subcontract] award or the amount the government agreed to pay for such property or services, was $1,000,000 or more.

Penalties

The maximum penalty for a violation of subsection 1031(a) is imprisonment of 10 years or a fine of $1,000,000 or both, unless the requirements for a higher penalty as provided in subsection 1031(b) are met. Subsection 1031(b) provides that the fine imposed may exceed the maximum provided for by the statute, subject to a $5,000,000 ceiling, if: (1) the gross loss to the government or the gross gain to the defendant is $500,000 or greater; or (2) the offense involves a conscious or reckless risk of serious personal injury. According to the legislative history, the "term 'serious injury' is intended to mean severe injury, such as fractures, severe lacerations, or damage to internal organs, or injury which could result in temporary or permanent disability, but does not necessarily mean life-threatening injury." S. Rep. No. 100-503, 100th Cong., 2d Sess. 12 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5976. The term "'conscious' means the defendant knew the risk . . . [and] the

term 'reckless' [is] to be interpreted consistently with the generally understood requirements for a finding of recklessness or criminal negligence. The term does not include negligent acts or omissions which may create grounds for liability in civil cases but which fall short of the standard for recklessness." Id.

Section 2(b) of the Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4631 (1988), directed that the United States Sentencing Commission "shall promulgate guidelines, or shall amend existing guidelines, to provide for appropriate penalty enhancements, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred." As a result, effective November 1, 1989, the United States Sentencing Commission Guidelines were amended by the addition of §2F1.1(b)(4), which provides for an increase in the base offense level for an offense involving fraud or deceit, to include a violation of section 1031, as follows:

> If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

Subsection 1031(c), which provides that the maximum fine imposed upon a defendant for a prosecution, including a prosecution with multiple counts, under section 1031 shall not exceed $10 million, "was included to address a concern that the government may charge in a single judicial proceeding that a large number of related incidents are separate violations of this section." S. Rep. No. 100-503, 100th Cong., 2d Sess. 12 (1988),

reprinted in 1988 U.S.C.C.A.N. 5969, 5976. Except as provided by subsection 1031(d), Congress intended that "the aggregate of fines that a court may impose under this section in a single judicial proceeding is $10 million for any single defendant, regardless of the number of counts or violations of this section which are alleged." Id. A corporation and its various parts or divisions that are included within the same corporation constitute the same defendant for purposes of this limitation. Id. The legislative history expressly addresses this limitation in the corporate context by stating:

> Some have expressed concern that the limitation in Subsection 1031(c) could be interpreted to permit prosecutors to bring multiple prosecutions against separate subsidiaries or divisions of a single corporate defendant, for conduct which would otherwise be prosecuted in a single proceeding, in order to circumvent the $10 million limitation. It is the committee's view that a single corporate defendant should not be subjected to multiple $10 million fines where there is in fact a single scheme, regardless of the number of prosecutions brought.

Id. However, Congress made it clear that this limitation "does not prevent multiple proceedings, for example, where several independent schemes or artifices have been perpetrated by the same defendant." Id.

Notwithstanding the foregoing limitations, subsection 1031(d) states that "[n]othing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant

to 18 U.S.C. § 3571(d)." For example, as noted by the legislative history, the court may impose a penalty based on 18 U.S.C. § 3571(d) "despite either the $1 million (or $5 million) maximum fine per count, or the $10 million cap on the aggregate fine for all counts." S. Rep. No. 100-503, 100th Cong., 2d Sess. 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5977.

In an effort to ensure a sentence under section 1031 that is "proportional to the offense" Id., subsection 1031(e) directs that the court consider the factors set forth in 18 U.S.C. §§ 3553 and 3572 and the U.S. Sentencing Guidelines in determining the amount of the fine to be imposed, including -- (1) the need to reflect the seriousness of the offense, including harm or loss to the victim and the gain to the defendant; (2) whether the defendant previously has been fined for a similar offense; and (3) any other pertinent equitable considerations.

Seven Year Statute of Limitations

Finally, and most significantly, subsection 1031(f) extends the statute of limitations for prosecutions under section 1031 to seven years. The legislative history points out that the extension of the statute of limitations does not affect the tolling of the statute of limitations as provided by 18 U.S.C. § 3292 or by other statutory or judicially established bases for tolling the limitations period. S. Rep. No. 100-503, 100th

Cong., 2d Sess. 14 (1988), reprinted in 1988 U.S.C.C.A.N. 5969, 5978.

Whistleblower Protection

Due to a drafting error, section 1031 has two subsections (g). The first subsection 1031(g), found in the original legislation, protects "whistleblowers" by providing a civil cause of action for a person who is discharged or otherwise adversely affected by an employer because of the person's actions in furtherance of a prosecution or investigation under section 1031. This provision is similar to one found in the False Claims Act, 31 U.S.C. § 3730h.

Reward Payments

The second subsection 1031(g) was added by the Major Fraud Act Amendments of 1989, Pub. L. No. 101-123, § 2, 103 Stat. 759 (1989), effective October 23, 1989. This subsection grants the Attorney General authority "in special circumstances" to make reward payments up to $250,000 from appropriated funds to persons who furnish information relating to possible prosecution under the Major Fraud Act. It also allows the Attorney General, when appropriate, to make application to the court to reimburse the Department of Justice for the reward from the criminal fine imposed upon a convicted defendant. Subsection 1031(g) also sets forth a number of instances where a reward is precluded, such as when a government employee provides the information in the

performance of official duties or when the person providing the information participated in the violations. See generally H.R. Rep. No. 101-273, 101st Cong., 1st Sess. 1-5 (1988), reprinted in 1989 U.S.C.C.A.N. 593-597.

A sample form indictment alleging a violation of 18 U.S.C. § 1031(a) is attached.

MAJOR FRAUD AGAINST THE UNITED STATES

18 U.S.C. § 1031(a)

THE CONTRACT AWARD

1. On or about _____ , the United States, in a procurement of (property) or (services), awarded (prime contract) or (subcontract) number _____ , to _____, the value of said (prime contract) or (subcontract) being in excess of $1,000,000.

THE SCHEME AND ARTIFICE

2. Beginning on or about _____ and continuing up to on or about _____ , in connection with the foregoing procurement, the defendant, _____, devised a [(scheme) (artifice) (scheme and artifice)] [to (defraud the United States) and (to obtain money or property by means of (false) (fraudulent) (false and fraudulent) (pretenses), (representations), and (promises)].

3. It was part of the (scheme) (artifice) (scheme and artifice) to (defraud the United States) and [(to obtain money or property by means of (false) (fraudulent) (false and fraudulent) (pretenses), (representations), and (promises)], that the defendant would and did * * * [describe the manner, method or means of the scheme or artifice].

EXECUTION OF THE SCHEME AND ARTIFICE

4. On or about _____ , within the _____ District of _____, and elsewhere, the defendant, _____, knowingly (executed) and (attempted to execute) the (scheme) (artifice) (scheme and artifice) with the intent --

a. (to defraud the United States); and

b. [to obtain money or property by means of (false) (fraudulent) (false and fraudulent) (pretenses), (representations), and (promises)],

in that he committed, or caused to be committed the following acts, [and in doing so caused (a gross loss to the United States)(a gross gain to defendant) of $500,000 or more][which acts involved a conscious and reckless risk of serious personal injury]: [describe specific acts in execution of the scheme, **charging each as a separate count**, e.g., each individual making or submission of false certifications or false or fabricated inspection, quality assurance records, or test results; each making or presentation of claims or invoices by submission of false and fraudulent Standard Forms 1443, Contractor's Request for Progress Payment, or DD Forms 250, Material Inspection and Receiving Report; each delivery of material not in conformance with contract specifications; or, each receipt of payment under the contract.] [note: charged conduct must have occurred on or after November 19, 1988 although the scheme may have originated prior to that date].

EXHIBIT
B

CONFESSIONS 1992

David M. Nissman
Assistant United States Attorney
District of the Virgin Islands

Ed Hagen
Assistant District Attorney
Lane County, Oregon

August 28, 1992

I. JACKSON DENNO HEARINGS

Foundation Questions: The following basic information will establish the voluntariness of a statement.

Date and Place of Statement

Persons Present

No threats or promises

No mental or physical disability

Other useful questions to be used in contested hearings:

How long did the questioning go on? Any breaks taken? Atmosphere relaxed?
Size of room, lighting, furniture, weather. Familiar surroundings for the defendant?
Did the defendant ask for food, water, coffee, cigarettes?
Free access to telephone and bathroom?
Did you make any promises about what the court or prosecutor would do?
Were you ever untruthful to the defendant? Play any tricks?
Did the defendant seem anxious to confess? Relieved to get it off his or her chest?

Where appropriate, it may also be useful to establish that the defendant has had other contacts with police.

THE MIRANDA RIGHTS

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have him present with you while you are being questioned and while you are required to face witnesses.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you if you request one.

These rights need not be word for word. Substance, not form, is the test. California v Prysock, 453 US 355, 359-60 (1981); Duckworth v Eagan, 109 S Ct 1875 (1989); United States v Contreras, 667 F2d 976 (11th Cir. 1982); United States v Sledge, 546 F2d 1120 (4th Cir.), cert. den, 430 US 910 (1977); United States v Olivares-Vega, 495 F2d 827 (2d Cir.), cert. den 419 US 1020 (1974); United States v Floyd, 496 F2d 982 (2d Cir.), cert. den 419 US 1069 (1974).

The rights need not be repeated after a break in questioning. Wyrick v Fields, 459 US 42 (1982).

THE WAIVER

5. Do you understand each of these rights as I have explained them to you?
6. Having these rights in mind, do you wish to go forward without a lawyer?

Question 5 is probably essential. Question 6 is optional; the decision to ask it is a tactical one to be made by the officer after weighing whether stronger evidence of a waiver is worth an incresed risk of an invocation. See Section VI WAIVING MIRANDA RIGHTS, infra.

Right to an in camera hearing: Defendant must make a timely motion for an in camera hearing. The defendant is also entitled to argue voluntariness to the jury, even after an adverse finding by the judge. See generally Jackson v Denno, 378 US 368 (1964).

Timing of the hearing: The hearing should be held prior to trial (before the first witness is sworn in a court trial, before the jury is sworn in a jury trial) so that the government's right to appeal can be preserved. A defendant's failure to request an in camera hearing at the trial court level effectively waives the hearing. Pinto v Pierce, 389 US 31 (1967).
Burden of proof: Two different voluntariness issues are routinely determined at these hearings: the voluntariness of the statement and the voluntariness of the Miranda waiver. The burden of proof on each issue is on the government by a preponderance of the evidence. Lego v Twomey, 404 US 477, note 1 (1972); Colorado v Connelly, 107 S Ct 505 (1986).

Rules of evidence: Since exclusion of evidence rather than guilt-or-innocence is the issue, strict rules of evidence do not apply. FRE 104(1); United States v Matlock, 415 US 164 (1974). The issue in the hearing is whether the confession was voluntary; whether it was actually made or reported accurately are purely jury issues.

II. VOLUNTARINESS

Before the Miranda decision in 1966, confessions were measured by an evolving voluntariness test founded on common law evidence rules and the due process clause of the 14th Amendment. There are at least three reasons why this body of law is still important today: 1) Statements admissible under Miranda can still be excluded as involuntary, 2) Statements taken in violation of Miranda might be admissible impeachment evidence; involuntary statements are not, and 3) Traditional voluntariness principles are used to test the voluntariness of Miranda waivers.

The standard: Statements are involuntary if the Court concludes from the totality of the circumstances that a defendant's will was overborne by physical or psychological pressure. "If his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." Culombe v Connecticut, 367 US 568, 602 (1961). The truth or falsity of the confession is not a relevant factor in determining voluntariness. The defendant does not have to acknowledge confessing in order to challenge the admissibility of the confession. White v Texas, 310 US 530 (1940). Police coercion is an essential element of a finding of involuntariness. Colorado v Connelly, 107 S Ct 505 (1986) (deranged murderer confesses to surprised policeman); Derrick v Peterson, 911 F2d 1366 (9th Cir. 1990).

Totality of the circumstances: From a prosecutor's standpoint, the key voluntariness concept is the principle that courts must look to the "totality of the circumstances" in determining voluntariness. Frazier v Cupp, 394 US 731, 739 (1969); Arizona v Fulminate, 111 SCt 1246 (1991). All the details of the interrogation and character of the accused must be assessed.

Threats: Confessions given under the influence of fear produced by threats are inadmissible. However, if the "threat" is simply an expression of the officer of an intent to do something that the officer is authorized to do, there is no constitutionally objectionable coercion.

Promises and offers of immunity: A confession extracted pursuant to an offer of immunity is inadmissible, regardless of the totality of the circumstances. However, an offer of immunity should be distinguished from a mere admonition to tell the truth and clear things up. Miller v Fenton 741 F2d 1456 (3d Cir 1984), reversed on procedural habeas corpus issue, 474 US 104, 106 SCt 445 (1985), conviction affirmed on remand, 796 F2d 598 (3d Cir. 598 (1986). Shotwell Manufacturing Co. v US, 371 US 341 (1963). A promise, by itself, does not make a confession involuntary; it is a factor in the totality of the circumstances. Arizona v Fulminate, 111 S Ct 1246 (1991) (jailhouse informant promises to protect defendant from other inmates).

Intoxication: While voluntary intoxication should be viewed as just one factor in a voluntariness analysis, extreme intoxication can by itself result in suppression. Unsworth v Gladden, 261 F Supp 897 (DC Or 1966), aff'd 396 F2d 373 (9th Cir 1967).

III. ILLEGAL DETENTION

Otherwise voluntary statements obtained during illegal detention may be suppressed as fruit of the poisonous tree. Lanier v South Carolina, 106 S Ct 297 (1985); Taylor v Alabama, 457 US 687 (1982). The focus on the inquiry is whether 1] the defendant is under arrest without probable cause, Dunaway v New York, 442 US 200 (1979); 2] subject only to a brief investigative detention based on reasonable suspicion, Terry v Ohio, 392 US 1 (1968); United States v Sharpe, 470 US 675 (1985); or 3] involved in a consensual encounter with the police, United States v Mendenhall, 446 US 200 (1980); INS v Delgado, 466 US 210 (1984); Florida v Rodriquez, 469 US 1 (1984); Florida v Bostick, ___US___, 111 SCt 2382 (1991). The Supreme Court will almost always never call a stationhouse interview a permissible investigative detention if the defendant has been directed to go to the station by the police, Dunaway v New York, 442 US 200 (1979). If the defendant consents to go to the stationhouse the interview is permissible. Oregon v Mathiason, 429 US 492 (1975).

Factors courts will use to determine if the defendant is seized: 1] the threatening presence of several officers; 2] the display of a weapon; 3] physical touching by the officer; 4] use of language or voice inflection indicating that compliance is mandatory. United States v Mendenhall, supra, 446 US at 554.

IV. CUSTODY

The federal standard: In Miranda v Arizona, 384 US 444 (1966), the Warren Court reasoned that depriving an individual of his liberty and subjecting him to interrogation is equivalent to compelling the person to speak in violation of the Fifth Amendment. Custody occurs when the defendant "has been taken into custody or otherwise been deprived of his freedom of action in any significant way." 384 US at 444. Today, Fifth Amendment custody means "formal arrest or restraint on freedom of movement of the degree associated with formal arrest." California v Beheler, 77 L Ed 2d 1275, 1279 (1983). This is a reasonable man standard. In determining custody, the "only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v McCarty, 82 L Ed 2d 317, 336 (1984).

There is no requirement to give Miranda warnings "simply because the questioning takes place in the stationhouse, or because the questioned person is one whom the police suspect." Oregon v Mathiason, 429 US 492, 495 (1977) (station house). Probation interviews are generally not custodial. Minnesota v Murphy, 104 S Ct 1136 (1984). Even jails can be non-custodial. Illinois v Perkins, 110 S Ct 2394 (1990) (planted jail stool pigeon); Hamilton v State, 490 A2d 763 (Md App 1985). As a practical matter it is always a good idea to tell a person he is not under arrest. See United States v. Griffin, 922 F2d 1343 (8th Cir. 1990), cert den., 111 SCt 708 (1991).

Traffic investigations: Roadside traffic investigations are not custodial. Pennsylvania v Bruder, 109 S Ct 205 (1988); Berkemer, supra; State v Smith, 301 Or 681 (1986).

V. INTERROGATION

Miranda rights are not required if the suspect is not being interrogated, because he is not being "compelled" to do anything in any constitutionally significant sense. Miranda v Arizona, 384 US 436, 478 (1966). Volunteered statements are not covered by Miranda.

Interrogation defined: Interrogation is "either express questioning or its functional equivalent . . . words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." Rhode Island v Innis, 446 US 291, 300-01 (1980) (officer tells partner, "God forbid if a handicapped child finds the shotgun and hurts himself." Murderer in back seat of patrol car breaks down and leads them to the murder weapon. Not interrogation); Arizona v Mauro, 107 S Ct 1931 (1987) (it is not interrogation where police allow defendant's wife to talk to him in the presence of an officer who was present and taping his conversation).

Routine booking in questions: Miranda rights are not required for routine booking in questions. Pennsylvania v Muniz. 110 S Ct 2638 (1990); Innis, supra. But see United States v Hinkley, 672 F2d 115 (DC Cir 1982) (25 minute psychiatric background interview with the man who shot President Reagan falls outside the exception). Pre-sentence report writers are not required to give Miranda rights. United States v Cortes, 922 F2d 123 (2nd Cir. 1990); Hall v State, 425 A2d 227 (Md App 1981); United States v Rogers, 899 F.2d 917 (10th Cir. 1990); United States v Jackson, 886 F2d 838 (7th Cir. 1989).

Public safety and threshold questions: The Miranda rule is not of constitutional dimension. It is a "prophylactic rule" protecting the Fifth Amendment privilege. Consequently, a balancing test is applied, and the rights will not be required in cases where "a situation posing a threat to the public safety outweighs the need for the prophylactic rule." New York v Quarles, 104 S Ct 2626 (1984) (police need not obtain a Miranda waiver before asking for the location of a gun). This exception does not depend on the subjective conclusions of the officers (the officers in Quarles had their guns holstered and felt that the situation was under control). See also People v Dean, 114 Cal Rptr 555 (1974) (locating kidnapped child).

A less firmly rooted exception involves "threshold" questions asked by startled officers arriving on a crime scene. Owens v United States, 340 A2d 821 (DC App 1975); Shy v State, 218 SE2d 599 (Ga 1975); State v Persinger, 433 P2d 867 (Wash 1967); State v Abbott, 445 P2d 142 (1968) (prison stabbing). Lack of custody might be a stronger argument in these types of cases.

VI. PRIVATE CITIZENS

The Miranda opinion expressly refers to questioning by "law enforcement officials." Miranda v Arizona, 384 US 436, 444 (1966). See also Burdeau v McDowell, 256 US 465 (1921). Consequently, it has no application to questioning by private citizens. See 31 ALR 3rd 656.

Courts may, however, find that law enforcement officials are using the private citizen as an agent. See Arizona v Mauro, 107 S Ct 1931 (1987) (police allow defendant's wife, at her insistence, to talk to him in the presence of an officer who the defendant knew was present and taping his conversation). **PRACTICE TIP:** If the court finds that a jail stool pigeon is an agent of the government, you may succeed by arguing that the questioning was not custodial. Illinois v Perkins, 110 S Ct 2394 (1990);

VII. WAIVING MIRANDA RIGHTS

The original Miranda decision, relying on Sixth Amendment right to counsel cases, adopted a strict standard for waiver. While Fourth Amendment waivers need only be voluntary, Schneckloth v Bustamonte, 412 US 218 (1973), a Miranda waiver must be both voluntary and intelligent.

Implied waiver: It does not, however, have to be explicit. An implied waiver can be found from the particular facts and circumstances of the accused and the interrogation. North Carolina v Butler, 441 US 369 (1979) (refused to sign waiver card).

Intelligent waiver: The "intelligence" element of a Miranda waiver is traditionally shown by having the officer testify to the defendant's affirmative response to the question, "Do you understand these rights?" There are reported decisions upholding waivers where this key question has not been asked and answered. United States v Rubio, 709 F2d 146 (2nd Cir. 1983); United States v Hayes, 385 F2d 375 (4th Cir. 1967). However, the absence of this question makes proving a waiver very difficult. Tague v Louisiana, 444 US 469 (1980). The defendant need not know all possible subjects of the conversation before he can make an intelligent waiver. Colorado v Spring, 107 S Ct 851 (1987) (arrested for firearms offense, questioned about a murder).

Attorney hired by family: If someone has retained counsel for a criminal suspect, and the police know about it and don't tell him, the waiver may still be effective. Moran v Burbine, 106 S Ct 1135 (1986). See also Harvey v State, 529 So2d 1083 (Fla 1988) (public defender hears about murderer's arrest, and goes down to police station to offer his services. They tell him to get lost. Even though Florida rejects Burbine on state constitutional grounds, the waiver is valid because nobody hired the public defender).

Voluntary waiver: The other element, "voluntariness," is analyzed under the same guidelines used in determining the voluntariness of a statement.

Ambiguous invocations: If the defendant makes an ambiguous statement about his right to silence or right to counsel, it may nevertheless be permissible to ask a clarifying question to determine if an ambiguous statement is an invocation. Smith v Illinois, 105 S Ct 490 (1984).

Examples of cases where defendant's ambiguous statements did not amount to an invocation:

SILENCE: Connecticut v Barrett, 107 S Ct 828 (1987) (wants to make oral, not a written statement); United States v Eaton, 890 F2d 511 (1st Cir. 1989) (when asked if

he wanted to waive, responded that it would depend on the questions; he would respond selectively); Commonwealth v Davis, 565 A2d 458 (Pa 1987) (told police that he wanted to talk to them, but wrote "no" on the waiver card); Heald v State, 492 NE2d 671 (Ind 1986) ("I don't believe I have anything else to add"); State v Westmoreland, 334 SE2d 223 (NC 1985) (fails to respond to many questions); People v Hayes, 699 P2d 1259 (Cal 1985) (asking if he has to go into details, since he has already confessed); State v Perkins, 364 NW2d 20 (Neb 1985) (defendant remains silent one half hour, ignoring repeated questions).

COUNSEL: United States v Scarpa, 897 F2d 63 (2nd Cir. 1990) (told police that he did not have a lawyer, but was going to get one); See also Fare v Michael C., 442 US 707 (1979) (request for juvenile probation officer); State v Bittick, 806 SW2d 652 (Mo App 1991) ("How do I get one of those appointed attorneys?"; State v Montez, 309 Or 564 (1990) ("I think I need a lawyer to talk about the rest of it so I don't get linked up."); Russell v State, 727 SW2d 573 (Tex App 1987), cert den 108 S Ct 164 (asks interrogators if they think an attorney is necessary); People v Benjamin, 732 P2d 1167 (Col 1987) (signs form request for determination of indigency); Massengale v State, 710 SW2d 594 (Tex App 1986) (tells his wife to 'get me a lawyer' in the presence of a police officer. Held: he did not "clearly assert" his right to an attorney to "authorities"); State v Shifflett, 508 A2d 748 (Conn 1986) (wants his attorney to make a package deal, refuses to sign the waiver); Heald v State, 492 NE2d 671 (Ind 1986) ("perhaps I should talk to a lawyer"); Cheatham v State, 719 P2d 612 (Wyo 1986) (told the police that he did not mind talking, but he would like to see an attorney); Hall v State, 336 SE2d 812 (Ga 1985) ("When do you think I'll get to see a lawyer?"); State v Baton, 488 A2d 696 (RI 1985) ("No, not at this time. I may need one -- I may need one later."); Cannon v State, 691 SW2d 664 (Tex Crim 1985), cert den 106 S Ct 897 (murderer displays attorney's business card and asks for lawyer; victim was the attorney's sister!); Muhammed v State, 316 NW2d 572 (Minn 1982) ("I will confess to my lawyer what is going down."); People v Pack, 240 Cal Rptr 367 (Cal App 1987) ("I think you ought to have somebody protecting me right now because I ain't too here, man. I don't even know where my left foot is.") Griffin v Lynaugh, 823 F2d 856 (CA5 1987) ("I think I want to talk to my lawyer." OK to go back later when the lawyer turns him down); State v Griffin, 754 P2d 965 (Utah App 1988) ("This is a lie. I'm calling an attorney"); Commonwealth v Gibbs, 553 A2d 409 (Pa 1989) ("Maybe I should talk to a lawyer. What good will it do me to tell you?").

A specific invocation of one or both of the Miranda rights (right to counsel, and to remain silent) greatly increases the burden on the government in proving a subsequent waiver. The waiver guidelines are different for the two types of invocations; waiver after assertion of the right to remain silent is easier to prove than waiver after assertion of the right to counsel.

Assertion of right to remain silent: In Michigan v Mosely, 423 US 96 (1976), a custodial suspect asserted his right to remain silent about a robbery. Two hours later he waived in respect to a murder and confessed. The waiver was valid because 1) police honored the assertion for a respectable period of time, 2) he made an explicit waiver after being readvised of his rights, and 3) the questioning concerned a different crime.

Assertion of right to counsel: Continued questioning of a custodial defendant after an assertion of the right to counsel is unlawful unless the defendant initiates further conversation. Edwards v Arizona, 451 US 477 (1981). An opportunity to talk to an attorney is not enough; the attorney must be present for any future police initiated interrogations. Minnick v Mississippi, 111 S Ct 486 (1990). This rule applies days later, even if the crimes are unrelated, and even if the second officer is unaware of the earlier invocation, so long as there has not been a break in custody since the initial invocation. Arizona v Roberson, 108 S Ct 2093 (1988). On the other hand, Edwards, Minnick, and Roberson may not apply if there has been a break in custody.

PRACTICE TIP: If there has been an invocation, it may pay to take a second look at custody. If the suspect is not in custody, and has not been formally charged, there is no right to court appointed counsel under the Fifth or Sixth Amendment, and Miranda/Escobedo do not apply. United States v Dawson, 400 F2d 194 (1968); Cannon v State, 691 SW2d 664 (Tex Crim 1985), cert den 106 S Ct 897; People v Davis, 553 NE2d 1008 (NY App 1990).

Initiation: For a brief period, the Oregon Supreme Court took the view that the "initiation" required by Edwards had to amount to a waiver in and of itself. Its knuckles were rapped in Oregon v Bradshaw, 103 S Ct 2830 (1983), which held that the defendant's question, "what is going to happen to me now?" qualified as an initiation, and that the subsequent conversation between the defendant and the officer could then be examined to see if there was a voluntary and intelligent waiver. An "initiation" is now defined as any statement by the defendant that evinces " . . . a willingness and a desire for a generalized discussion about the investigation; [and] not merely a necessary inquiry arising out of the incidents of the custodial relationship."

VIII. THE RIGHT TO COUNSEL

The federal right to counsel: In addition to the Fifth Amendment right to counsel created in the Miranda decision, there is a separate and distinct right to counsel under the Sixth Amendment. As we have seen above, the crucial element of the Fifth Amendment Miranda right to counsel is custody. The separate Sixth Amendment right to counsel comes into play when the suspect has been formally charged. Kirby v Illinois, 406 US 682, 688-89 (1972). It does not arise before that, even if the suspect has an attorney on

other charges and is the focus of a government investigation. Hoffa v United States, 385 US 293 (1966); United States v Mandujano, 425 US 564 (1976)(grand jury target/witness has no sixth amendment right to counsel); United States v Gouveia, 467 US 180 (1980)(convicted prisoner held in administrative detention as suspect in inmate murder not entitled to appointment of counsel).

A right to counsel claim becomes important in circumstances where the defendant has been formally charged, but is not in custody. The leading case is Massiah v United States, 377 US 201 (1964), which held inadmissible a police tape of an indictee's conversation with a police informer. However, a "Massiah" claim only applies to the indicted crime. See also Maine v Moulton, 106 S Ct 477 (1985) (evidence admissible in prosecution for conspiracy to kill government witness; inadmissible in the indicted case).

Waiver: As a general rule, Fifth and Sixth Amendment waivers of the right to counsel should be treated alike. A statement taken from a custodial suspect that satisfies Miranda is admissible, even if the suspect has already been indicted. Patterson v Illinois, 108 S Ct 2389 (1988); United States v Carria, 919 F2d 842 (2nd Cir. 1990) (need not advise defendant that he has been indicted).

Asking for an attorney at arraignment: A defendant's request for an attorney at arraignment is functionally equivalent to an Edwards invocation of the right to counsel. Michigan v Jackson, 106 S Ct 1404 (1986). This is true even if the officers are unaware of the request for counsel. Jackson, supra. Note that this is a Sixth Amendment, not Fifth Amendment rule, so it has no application to unrelated crimes. McNeil v Wisconsin, 111 S Ct 2204 (1991). Informing the court of an intent to hire an attorney, as opposed to a request for a court appointed attorney, does not constitute an invocation. Farrell v Haws, 739 F Supp 1237 (DC Ill 1990). In any event, just as in Fifth Amendment contexts, it is all right to question a defendant who has asked for counsel at arraignment, if the defendant initiates the further contact. See also State v Reese, 353 SE2d 352 (NC 1987) (valid waiver even though attorney instructed police not to talk to his client).

Ethical considerations: Prosecutors should be very careful about advising police to question represented defendants about the subject matter of the representation without the consent of the defense attorney. See DR 7-104 (A)(1). The Department of Justice has issued guidelines for these tricky situations and Department attorneys are advised to carefully review these guidelines and consult with superiors and legal counsel's office before proceeding into this murky quagmire. Other troublesome situations include scenarios where the defendant dislikes, mistrusts, or fears his attorney. (possible solution: tell the defendant to talk to the judge). Interviews with a defendant to prevent or solve crimes that the defendant did not commit may not directly involve the disciplinary rule,

particularly if the attorney is promptly informed after the contact.

IX. IMPEACHMENT

It is permissible to use a defendant's statements after an invocation of the right to counsel to impeach the testifying defendant. Oregon v Hass, 420 US 714 (1975).

You cannot impeach with involuntary statements. Mincey v Arizona, 437 US 385, 398 (1978). You cannot impeach with statements taken in violation of the Fifth Amendment self incrimination privilege. Portash v New Jersey, 440 US 450 (1979). It may be permissible to impeach with Sixth Amendment right to counsel violations. Michigan v Harvey, 110 S Ct 1176 (1990); Martinez v United States, 566 A2d 104 (DC App 1989).

You can impeach with pre arrest silence. Jenkins v Anderson, 447 US 231 (1980). You cannot impeach with the defendant's silence after Miranda. Doyle v Ohio, 426 US 610 (1976). You can impeach with post arrest, pre Miranda, silence. Fletcher v Weir, 455 US 603 (1982).

X. FRUIT OF THE POISONOUS TREE

Fruit of illegal searches and seizures: Statements obtained as a result of an illegal search or seizure are tested under the Fourth Amendment principles enunciated in Wong Sun v US, 371 US 471, 487-88 (1963). The test is whether the evidence has "been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong sun at 487-88. The evidence is admissible if the earlier illegality has been attenuated by time. United States v Ceccolini, 435 US 268 (1978).

Illegal detention: Otherwise voluntary statements obtained during illegal detention may be suppressed as fruit of the poisonous tree. Lanier v South Carolina, 106 S Ct 297 (1985); Taylor v Alabama, 457 US 687 (1982); State v Morgan, 106 Or App 138 (1991). This is not a per se rule, but is rather judged based on the totality of the circumstances. Rawlings v Kentucky, 448 US 98 (1980); Dunaway v New York, 442 US 200 (1979). Confessions made after an illegal detention becomes legal are not fruit of the poisonous tree. New York v Harris, 110 S Ct 1640 (1990).

Fruit of an involuntary confession: Where an otherwise voluntary confession follows an involuntary confession, the test is whether the two statements are so closely related that "the facts of one control the other." Leyra v Denno, 347 US 556, 561 (1954); US v Bayer, 331 US 532 (1947). These cases never use the phrase "fruit of the poisonous

tree." It is probably more accurate to look at the earlier involuntary confession as being factors to evaluate in the totality of the circumstances in determining whether the latter confession is voluntary.

Fruit of a Miranda violation: Since Miranda is merely a prophylactic rule without full constitutional force, a Miranda "failure to warn" violation does not have any fruit of the poisonous tree effect. Subsequent properly obtained confessions are admissible. Oregon v Elstad, 105 S Ct 1285 (1985), on remand 78 Or App 362. Some courts have extended this rule to invocation cases. United States v Cherry, 759 F2d 1196 (1985); Martin v Wainwright, 770 F2d 918 (11th Cir. 1985); Mundy v Commonwealth, 390 SE2d 525 (Va App 1990). Such an interpretation would severely undercut Edwards, and is difficult to argue post Minnick.

Miranda violations should have no fruit of the poisonous tree effect subsequent seizures of physical evidence. United States v Cherry, 794 F2d 201 (CA5 1986), cert den 107 S Ct 932; State v Wethered, 755 P2d 797 (Wash 1988); State v Miranda, 309 Or 121 (1990) (inevitable discovery). Unwarned statements may be lawfully used in search warrant affidavits. United States v Patterson, 812 F2d 1188 (9th Cir. 1987).

XI. MIRANDA AND PSYCHIATRISTS

Miranda warnings are required when psychiatrists work as agents for the government. Estelle v Smith, 451 US 454 (1981); Powell v Texas, 109 S Ct 3146 (1989). If the defendant is informed of Miranda rights by police, and then examined by psychiatrists, full rights may not need to be repeated.

An assertion of the right to remain silent is not admissible evidence on the issue of mental responsibility. Wainright v Greenfield, 106 S Ct 634 (1986). It is interesting to note that Justice Rehnquist, concurring in the result, felt that the use of an invocation of the right to counsel would be admissible.

XII. CO-DEFENDANT CONFESSIONS

In Bruton v United States, 391 US 123 (1968) the Supreme Court ruled that the Sixth Amendment's confrontation clause precluded the admission of a non-testifying co-defendant's (co-implicating) confession because the devastating effect of that evidence would make it extremely difficult for a jury to obey the trial court's limiting instruction (the above described confession would be inadmissible hearsay against the other defendant). The Bruton rule has produced its own progeny. A non implicating confession (one that does not implicate the co-defendant who did not make the statement) is not

affected by Bruton. A redacted confession that does not reference the other defendant[s] is admissible. Richardson v Marsh, 481 US 200 (1987). A co-implicating confesson is admissible if the defendant who made the confession testifies during the trial and is available to be cross-examined by the other defendant[s] implicated in the testifying defendant's confession. Nelson v O'Neill, 402 US 622 (1971). Interlocking confessions are inadmissible unless they it can be strongly demonstrated that they are reliable. Cruz v New York, 481 US 186 (1987). If the confession has some independant relevance other than the truth of the matter asserted (and is offered for that purpose) then Bruton does not apply. Tennessee v Street, 105 SCt 2078 (1985). A Bruton error is subject to harmless error analysis on appeal. Harrington v California, 395 US 250 (1969).

Practice Tips: Prosecutors can cure Bruton problems in three ways: 1] by instructing government agents to attempt to take two statements from confessing defendants. One statement can be a complete account of the crime with reference to all crime partners. A second statement should then be requested where the suspect is asked to describe his conduct alone. 2] by redacting a confession to eliminate all references to the non-confessing defendant. 3] by moving to sever jointly indicted defendants in order to eliminate any possibility of a Bruton problem.

XIII. MISCELLANEOUS

Grand Jury: No Supreme Court case requires prosecutors to advise grand jury targets of their Miranda rights, United States v. Washington, 431 US 181(1977), United States v Mandujano, 425 US 564 (1976)(grand jury appearance is not custodial for Miranda purposes), but DOJ policy requires that grand jury targets be issued a target letter advising them of their constitutional rights. In the Second Circuit warnings are required for grand jury targets. United States v. Jacobs, 547 F2d 772 (2d Cir. 1976), cert. dismissed, 436 US 931 (1978).

Grand Jury targets can be compelled to sign a form authorizing release of information by foreign banks because the act of signing the form is non testimonial. Doe v United States, 108 SCt 2341 (1988).

Border Stops: Routine customs inspections and other border encounters are not custodial and do not require Miranda warnings. United States v Martinez, 588 F2d 495 (5th Cir. 1979).

(Editor's Note: The authors prepared this outline from materials they are using to write a second edition of their book, Law of Confessions, published by Clark Boardman Callaghan.)

Guideline Sentencing Update

FEDERAL

EXHIBIT C

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

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

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Note to readers: The revised *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* has been mailed to all *GSU* recipients. You should receive a copy this week or next. Beginning with this issue of the *Update*, we will refer to relevant *Outline* sections in the case summaries.

Sentencing Procedure

DISMISSED COUNTS

En banc Ninth Circuit joins other circuits in holding that counts dismissed as part of plea bargain should be considered for relevant conduct in setting offense level. Defendant was indicted on fourteen counts relating to mail fraud. He pled guilty to two counts and the others were dismissed as part of the plea agreement. The district court included the loss from some dismissed counts in setting the offense level. In *U.S. v. Fine*, 946 F.2d 650 (9th Cir. 1991), the original appellate panel reversed, basing its holding on *U.S. v. Castro-Cervantes*, 927 F.2d 107 (9th Cir. 1990) (counts dismissed as part of plea bargain may not be used for departure).

The en banc court withdrew that part of the panel's opinion and affirmed the use of the dismissed counts. "The guidelines, interpreted in light of the application notes, are unambiguous. The fraud section of the guidelines says . . . that '[t]he cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction.' U.S.S.G. § 2F1.1, comment. (n.6).... The relevant conduct guideline... controls whether the dismissed counts should be used to measure the amount of loss .... The application note explicitly provides that 'multiple convictions are not required' for acts to be counted . . . .' U.S.S.G. § 1B1.3, comment. (n.2) . . . The relevant conduct provisions . . . , taken together with the fraud and grouping provisions, mean that conduct which was part of the scheme is counted, even though the defendant was not convicted of crimes based upon the related conduct."

The court stated this holding did not conflict with *Castro-Cervantes* or *U.S. v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991). "Both cases involve departures and non-groupable offenses, so they are distinguishable from cases involving groupable offenses and no departure.... In *Castro-Cervantes*, we recognized an implicit assurance that if the court accepted a plea bargain, then it would not depart upward from the sentence provided for by the Guidelines. The reasonable expectation upheld by *Castro-Cervantes*, of a sentence in accord with the Guidelines, was honored by the sentence imposed on Fine."

U.S. v. Fine, No. 90-50280 (9th Cir. Sept. 14, 1992) (Kleinfeld, J.) (en banc).

See *Outline* at II.D.4 and IX.A.1.

Departures

SUBSTANTIAL ASSISTANCE

Ninth Circuit holds district court has authority to review sua sponte government's decision not to file a substantial assistance motion and may depart, but remands for more specific findings. Defendants pled guilty to possession of heroin with intent to distribute, and each faced a range of 97–121 months and a ten-year mandatory minimum. They made several attempts to assist the government, but none of their information was confirmable or useful. The plea agreement did not require the government to move for departure under 18 U.S.C. § 3553(e) or § 5K1.1, p.s., and it did not do so. At the sentencing hearing the district court, on its own motion, continued sentencing, stated it would not sentence defendants to ten years, and ordered the government to "work something out." Later, though the government had not filed a motion, the court imposed 72-month sentences, stating departure was warranted because "factors that are being considered here are ones that are violative of due process and equal protection," and found that the government abused its discretion.

The appellate court remanded. It noted that in *Wade v. U.S.*, 112 S. Ct. 1840 (1992) [4 *GSU* #22], the Court stated that "'a prosecutor's discretion [under §§ 3553(e) and 5K1.1] is subject to constitutional limitations that district courts can enforce.' . . . Thus, a district court can review a prosecutor's refusal to file a substantial assistance motion and grant relief if the court finds that the refusal was based upon an unconstitutional motive . . . or upon due process grounds that the refusal was not rationally related to any legitimate state objective.".

"Generally, a defendant has no right to discovery, to an evidentiary hearing, or to a remedy unless she makes a substantial threshold showing with specific allegations of the improper reasons for the prosecutor's failure to move for departure. No evidence that the Government refused to move for departure because of suspect reasons, or reasons not rationally related to any legitimate government end, was presented by [defendants]. However, the supervisory powers of the court provide the authority to raise sua sponte matters that may affect the rights of criminal defendants.... That Judge Hatter raised the issue of whether departure would be appropriate was not error. Here, unlike the record in *Wade*, there is some indication of an unconstitutional basis for the Government's refusal to move for a downward departure as well as evidence of the defendants' assistance .... However, the precise nature of the constitutional violations noticed by the district court is unclear." Thus, remand is required for the district court to "clarify the legal basis of its sentencing decision [and] make such findings as . . . *Wade* requires."

U.S. v. Delgado-Cardenas, No. 91-50253 (9th Cir. Sept. 3, 1992) (Hug, J.).

See *Outline* at VI.F.1.b.iii.

U.S. v. Mittelstadt, 969 F.2d 335 (7th Cir. 1992) (Appeal dismissed: Court recognized that it would have been improper to delay ruling on § 5K1.1, p.s. motion in order to later assess defendant's cooperation at a Rule 35(b) proceeding, but held the transcript showed that the district court had in fact ruled on the motion at sentencing and refused to depart. "As is plain from the text of Rule 35(b) (which allows a reduction of sentence only 'to reflect a defendant's subsequent, substantial assistance'), and has been held by several courts, the rule is designed to recognize assistance rendered after the defendant

is sentenced. . . . It is not a substitute for section 5K1.1."). See *Outline* at VI.F.3.

U.S. v. Lockyer, 966 F.2d 1390, 1391–92 (11th Cir. 1992) (per curiam) (Affirmed: Downward departure for "substantial assistance to the judiciary" was not warranted for defendant who pled guilty at initial appearance and waived pretrial motions. The court distinguished *U.S. v. Garcia*, 926 F.2d 125, 127–28 (2d Cir. 1991) (affirmed downward departure for assistance to judiciary that "broke the log jam in a multi-defendant case") [3 *GSU* #20], holding that "to apply the *Garcia* reasoning to this case, which involves a single defendant who has pleaded guilty to a crime that he alone committed, would rob 'acceptance of responsibility' of substance and render it meaningless.").
See *Outline* at VI.F.1.b.i.

Offense Conduct

Calculation of Loss

U.S. v. Lghodaro, 967 F.2d 1028 (5th Cir. 1992) (per curiam) (Affirmed: Where codefendant's conduct is "part of the joint scheme or plan which [defendant] aided and abetted," amount of loss attributable to codefendant is also attributable to defendant, § 1B1.3(a)(1). Also, it is proper to use intended loss rather than actual loss, even though actual loss is easily calculated, § 2F1.1, comment. (n.7).).
See *Outline* at II.D.1 and 2.

More Than Minimal Planning

U.S. v. Doherty, 969 F.2d 425 (7th Cir. 1992) (Remanded: District court committed clear error in declining to consider whether "[d]rafting 40 overdue checks during a single month, few if any of which appear to have been purely opportune," constituted "repeated acts over a period of time," § 1B1.1, comment. (n.1(f)), thereby warranting more than minimal planning enhancement.). *Cf. U.S. v. Williams*, 966 F.2d 555, 558–59 (10th Cir. 1992) ("more than minimal planning is deemed present in any case involving repeated acts over a period of time") [4 *GSU* #24].
See *Outline* at II.E.

U.S. v. Romano, No. 91-1999 (6th Cir. July 16, 1992) (Merritt, C.J.) (Siler, J., dissenting) (Remanded: Error to apply enhancements both for leadership role under § 3B1.1(a) and for more than minimal planning. "[I]f certain conduct is used to enhance a defendant's sentence under one enhancement provision, the defendant should not be penalized for that same conduct again under a separate provision whether or not the Guidelines expressly prohibit taking the same conduct into consideration under two separate provisions. . . . We are persuaded that § 3B1.1(a) already takes into account the conduct penalized in § 2F1.1(b)(2) because, by its very nature, being an organizer or leader of more than five persons necessitates more than minimal planning."). *But cf. U.S. v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991) (not double-counting); *U.S. v. Boula*, 932 F.2d 651, 654–55 (7th Cir. 1991) (same).
See *Outline* at II.E and III.B.6.

Drug Quantity

U.S. v. Lanni, No. 91-1597 (2d Cir. July 24, 1992) (Meskill, J.) (Remanded: "[B]ecause 'the scope of conduct for which a defendant can be held accountable under the Sentencing Guidelines is significantly narrower than the conduct embraced by the law of conspiracy,' . . . a sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy. It is essential that a sentencing judge in a narcotics conspiracy make findings of fact regarding the amount of narcotics reasonably foreseeable by each defendant."). See *Outline* at II.A.2.

Adjustments

Role in Offense

U.S. v. Belletiere, No. 91-5615 (3d Cir. July 22, 1992) (Hutchinson, J.) (Remanded: Clear error to find defendant was organizer or leader, § 3B1.1(a), where he "made a series of unrelated drug sales" to six people, none of whom were "'led' or 'organized' by, nor 'answerable' to, the defendant. . . . Where an individual is convicted of a series of solitary, non-related crimes, such as a series of drug sales by one drug seller to various buyers, and there is no 'organization' or 'scheme' between the drug seller and buyers, or between the buyers themselves, that the defendant could be said to have 'led' or 'organized,' section 3B1.1 cannot apply."). *Accord U.S. v. Reid*, 911 F.2d 1456, 1465 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 990 (1991).
See *Outline* at III.B.2.

Obstruction of Justice

U.S. v. Belletiere, No. 91-5615 (3d Cir. July 22, 1992) (Hutchinson, J.) (Remanded: Clear error to find drug defendant attempted to obstruct justice by transferring his interest in marital property to estranged wife as part of separation agreement. Section 3C1.1 requires willfulness, and there was no indication defendant transferred property to try to avoid forfeiture. Also, fact that defendant tested positive for drugs after telling probation officer he did not use them was not proper basis for § 3C1.1 enhancement: "The commentary to section 3C1.1 makes it clear that the section's focus is on willful acts or statements intended to obstruct or impede the government's investigation of the offense at issue. . . . Belletiere's misstatement had nothing to do with the offenses for which he was convicted. Furthermore, [it] was not material to the probation officer's investigation in this particular case."). *See also U.S. v. Yates*, No. 91-1778 (1st Cir. Aug. 13, 1992) (Campbell, Sr. J.) (error to give § 3C1.1 enhancement to defendant who gave false name and thereby hindered investigation of charge that was dropped but not offense of conviction).
See *Outline* at III.C.1 and 4.

U.S. v. Ashers, 968 F.2d 411 (4th Cir. 1992) (Affirmed: "[P]roviding a falsified voice exemplar to an expert witness for the purpose of inducing him to testify that it was unlikely that it was Ashers' voice on an incriminating tape recording is encompassed within the obstruction of justice guideline." The district court also cited an improper ground for the enhancement, but the appellate court held remand was not required because there was a valid ground. The court noted that *Williams v. U.S.*, 112 S. Ct. 1112, 1118–19 (1992) [4 *GSU* #17], which held that remand is not required for a departure based on both valid and invalid factors if the same sentence would have been properly imposed absent the invalid factor, need not be applied because departures and enhancements "are fundamentally different under Guidelines jurisprudence," and thus *Williams* "is not applicable . . . when an appellate court is called upon to review a . . . decision to apply an enhancement to the offense level on alternative grounds.").
See *Outline* at III.C.2 and 4; X.D.

EXHIBIT D

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Pre-Guidelines Sentencing, Generally

7th Circuit remands for resentencing on all counts where sentence for one count was improper under pre-guidelines law. (100)(132) Defendant was convicted of 19 different fraud related counts, including one count of conspiracy to commit mail fraud. He was sentenced under pre-guidelines law on all counts to 27 years' imprisonment. The 7th Circuit agreed with defendant that he should have been sentenced under the guidelines for his conspiracy conviction, since the conspiracy "straddled" the guidelines' effective date. It found that resentencing was necessary for all counts, not just the conspiracy count, because the district court had an overall sentencing plan in mind when it imposed its sentence on each count. In order to allow the district court to reconsider its plan as a whole in sentencing defendant, resentencing on all counts was necessary. *U.S. v. Lowry*, __ F.2d __ (7th Cir. Aug. 6, 1992) No. 89-3618.

Guidelines Sentencing, Generally

10th Circuit holds that zero months imprisonment may be imposed where statute prohibits a term of probation. (110)(560) Defendant pled guilty to misapplying funds of a FDIC-insured bank, in violation of 18 U.S.C. section 656. This was a Class B felony, and under section 3561(a)(1), Class B felons may not be sentenced to a term of probation. Defendant had a guideline range of zero to six months. The district court, believing that section 3561(a)(1) required a term of imprisonment, sentenced defendant to 30 days in a halfway house and a three year term of supervised release. The 10th Circuit remanded for resen-

tencing, since the district court erroneously believed that a term of imprisonment was required. A sentence of zero months imprisonment is not literally a sentence of probation. Section 656, under which defendant was convicted, gives the court the option of imposing a fine or imprisonment or both. If section 3561(a)(1) were read as requiring a term of imprisonment, it would conflict with section 656, which clearly grants the option of no imprisonment. In such a case, the more specific statutory provision is controlling. *U.S. v. Elliott*, __ F.2d __ (10th Cir. Aug. 3, 1992) No. 92-3025.

7th Circuit holds that it cannot review refusal to grant government's motion for substantial assistance departure. (115)(715) Despite the government's motion for a substantial assistance departure, the district court refused to depart downward, stating that it could not evaluate the significance of defendant's cooperation "at this time," and that it would "partially deny" the government's motion and sentence defendant at the bottom, rather than the top, of his guideline range. Defendant argued that the district court improperly believed that it did not have to act on a section 5K1.1 motion at sentencing, but could postpone the question until Rule 35(b) proceeding, when more would be known about the actual value of the assistance. The 7th Circuit agreed that this would be an improper interpretation of Rule 35, which is designed to recognize assistance rendered after the defendant is sentenced. It did not believe, however, that the district judge was laboring under this misconception. The judge's comments merely meant he could not ascertain the significance of defendant's cooperation at the time of sentencing. Although some might argue that a judge should give the defendant the benefit of the doubt in this situation, an appellate court lacks authority to review a district court's refusal to depart downward. *U.S. v. Mittelstadt*, __ F.2d __ (7th Cir. July 20, 1992) No. 91-2352.

6th Circuit says enhancements for organizer role and more than minimal planning are improper double counting. (125)(160)(430) The 6th Circuit held that it was impermissible double counting to enhance defendant's sentence under section 3B1.1(a), for being the organizer and manager of criminal activity, and section 2F1.1(b)(2), for engaging in more than minimal planning. The court rejected *U.S. v. Curtis*, 934 F.2d 553 (4th Cir. 1991), which upheld such enhancements. Instead, it agreed with the 8th Circuit in *U.S. v. Werlinger*, 894 F.2d 1015 (8th Cir. 1990), which held that the Commission did not intend for the same conduct to be punished cumulatively under separate guideline provisions. Application note 3 to section 3B1.1(a) states that factors to consider in determining whether to apply the organizer enhancement include "the degree of participation in planning or organizing the offense." Thus, under the guidelines, the district court is instructed to take into account the planning that went into the offense under section 3B1.1(a). It would violate due process and principles of lenity to enhance defendant's sentence again for the same conduct under section 2f1.1(b)(2). Judge Siler dissented from this portion of the opinion. *U.S. v. Romano*, __ F.2d __ (6th Cir. July 16, 1992) No. 91-1999.

8th Circuit affirms that obstruction enhancement for failure to appear does not bar later prosecution for same conduct. (125)(460) Defendant received an enhancement for obstruction of justice after failing to appear at sentencing for an underlying drug offense. He received a 144-month sentence, of which 23 months were found to be attributable to the enhancement. The 8th Circuit ruled that double jeopardy did not prohibit defendant's subsequent conviction and sentence for failure to appear in violation of 18 U.S.C. section 3146. The district court avoided any double counting by reducing his guideline sentence for

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failure to appear by the 23 months that his prior sentence was enhanced due the failure to appear. *U.S. v. Bolding*, __ F.2d __ (8th Cir. July 22, 1992) No. 91-3757.

9th Circuit reverses consecutive sentences where loss on pre-guidelines count was included in guideline count. (125)(300)(650) Defendant was convicted of two counts of fraud, one of which occurred before the effective date of the guidelines. The district court imposed consecutive sentences, even though in computing the offense level for the guidelines count, it included losses attributable to the pre-guidelines count. On appeal, the 9th Circuit held that this resulted in double punishment in violation of the Double Jeopardy Clause. The sentence was vacated with instructions either to impose concurrent sentences or to keep the losses from the two counts separate in computing the offense level. *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

9th Circuit holds that amendment to 3B1.1 was a mere "clarification" and was therefore retroactive. (131)(430) Effective November 1, 1990, the introductory commentary to Part B of Chapter 3 of the Guidelines was amended to state that the defendant's role in the offense is to be based on all relevant conduct, and not solely on the count of conviction. Defendant argued that using this commentary to calculate his sentence for crimes committed before November 1990 violated the ex post facto clause. Relying on prior circuit precedent, the 9th Circuit rejected the argument, stating that the introductory commentary "merely clarified" section 3B1.1, and therefore may be applied retrospectively. *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

11th Circuit refuses to follow amended commentary prohibiting obstruction enhancement for contemporaneous destruction of evidence. (131)(180) (460) At the time of his arrest, defendant attempted to hand his jacket to a couple standing nearby. The jacket contained drugs. The 11th Circuit affirmed the enhancement, despite a November 1990 amendment to the commentary to section 3C1.1 which would seem to prohibit the enhancement in such a situation. That commentary provides that an attempt to dispose of material evidence made contemporaneously with arrest, shall not, by itself, be grounds for an obstruction enhancement. Since the 11th Circuit previously determined as a matter of law that an attempt to destroy evidence just before arrest constituted obstruction of justice, the court declined to be bound by guideline commentary changes unless or until Congress amends the guideline itself to reflect the change. *U.S. v. Louis*, __ F.2d __ (11th Cir. Aug. 10, 1992) No. 90-3778.

6th Circuit holds that unsuccessful attempts to collect drug money after guidelines' effective date were acts of conspiracy. (132) The 6th Circuit rejected defendant's claim that this was a pre-guideline case because his drug conspiracy ended before November 1, 1987. Twice in November 1987, a co-conspirator travelled to Detroit for the purpose of collecting money for heroin delivered in October 1987. The two trips, while unsuccessful, were acts in furtherance of the conspiracy. Thus, defendant was involved in a continuing offense that straddled the effective date of the guidelines, and could be sentenced under the guidelines without violating the ex post facto clause. *U.S. v. Markarian*, __ F.2d __ (6th Cir. June 24, 1992) No. 91-1771.

9th Circuit reiterates that mail fraud is not a continuing offense under guidelines, despite contrary ruling as to restitution. (132)(610) In *U.S. v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991), the 9th Circuit held that mail and wire fraud are not continuing offenses: "Each offense is complete when the fraudulent matter is placed in the mail or transmitted by wire, respectively." Defendant argued that *Niven* conflicted with *U.S. v. Angelica*, 859 F.2d 1390, 1393 (9th Cir. 1988) which held that a defendant could be required to pay restitution under the Victim and Witness Protection Act for all losses caused by his mail fraud scheme even though most of the fraudulent transactions occurred prior to the effective date of the act. The 9th Circuit found no conflict between the two cases, noting that *Angelica* was interpreting the Victim and Witness Protection Act, whereas *Niven* was interpreting the Sentencing Guidelines. Accordingly, the district court did not err in sentencing the defendant without resort to the guidelines. *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

8th Circuit rejects claim that IRS officials' setting of amount of loss in bribery case constituted sentencing entrapment. (135)(230) Defendant, a CPA, was suspected of "making illegal offers and compromises." To investigate, the IRS established a fictitious tax account for an undercover IRS agent and then filed fictitious federal tax liens against the agent in the amount of $116,156.22. After accepting the case, defendant eventually offered a bribe to the IRS agent assigned

to the case to eliminate the tax liability. Under section 2C1.1, the amount of the bribe was determined to be $116,156.22, the value of the benefit received. The 8th Circuit rejected defendant's claim that the government's actions in setting the amount of the fictitious tax account constituted "sentencing entrapment." For defendant to succeed, he would have to demonstrate that the IRS agents acted outrageously in overcoming a predisposition on his part only to offer bribes for clients whose tax liabilities were much smaller. In fact, there was some evidence that defendant was predisposed to deal in schemes with a high value. There was no evidence that the IRS was trying to obtain a particular sentence for him, since the undercover operation began prior to the effective date of the guidelines. *U.S. v. Stein*, __ F.2d __ (8th Cir. Aug. 10, 1992) No. 91-3368.

8th Circuit affirms that 15-year sentence for felon's possession of a firearm was not cruel and unusual. (140) The 8th Circuit affirmed that defendant's 15-year sentence for being a felon in possession of a firearm did not constitute cruel and unusual punishment. A mandatory life sentence without parole imposed for a drug crime does not violate the 8th Amendment. Neither does a 15-year sentence imposed on a felon with 14 previous convictions for crimes of violence. Judge Bright concurred, but felt it was a "travesty" to sentence defendant to a mandatory term of 15 years imprisonment under 18 U.S.C. section 924(e)(1) for possession of an old shotgun which he may not have even intended to use. *U.S. v. Rudolph*, __ F.2d __ (8th Cir. July 22, 1992) No. 91-1084.

Application Principles, Generally (Chapter 1)

6th Circuit remands for resentencing in light of en banc decision in Davern. (150) The district court, following a two track sentencing procedure, sentenced defendant to 24 months in the event the 6th Circuit decision in *U.S. v. Davern*, 937 F.2d 1041 (6th Cir. 1991) (*vacated on granting of rehearing en banc*), was upheld upon rehearing en banc, and a guideline sentence of 63 months if *Davern* was rejecting by the en banc court. Since the validity of the lesser sentence imposed by the district court depended upon the en banc decision, the 6th Circuit remanded to the district court for reconsideration of the sentence in light of that en banc decision. *U.S. v. Cummins*, __ F.2d __ (6th Cir. July 16, 1992) No. 91-6036.

10th Circuit upholds more than minimal planning enhancement for six embezzlements by bank employee. (160)(220) On six different occasions, defendant, a customer services officer at a bank, represented to elderly bank customers that she would take their deposit slips to a teller for deposit in the customer's account. Instead, she deposited the funds into accounts within her control. The 10th Circuit upheld an enhancement for more than minimal planning under section 2B1.1(b)(5). Under application note 1 to section 1B1.1, more than minimal planning is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Here, the district court heard evidence that five different dates were involved, and that each occasion involved repetition of essentially the same conduct. *U.S. v. Lee*, __ F.2d __ (10th Cir. July 23, 1992) No. 91-7042.

9th Circuit upholds reliance on relevant conduct to sentence for all losses arising out of mail fraud scheme. (170)(175)(300) Defendant argued that his offense level should have been calculated by the amount of the check mailed in count one, i.e. $580, rather than the amount of the total scheme to defraud, $38,906. He contended that his stipulation that the total losses exceeded $120,000 could not bind him to a sentence unauthorized by law. The 9th Circuit rejected the argument, relying on the "relevant conduct" section of the guidelines, section 1B1.3, and the cases of *U.S. v. Newbert*, 952 F.2d 281, 283-84 (9th Cir. 1991) and *U.S. v. Niven*, 952 F.2d 289, 291 (9th Cir. 1991). The court said that because "there was no dispute that the losses associated with counts I and II arose out of a common scheme or plan, the district court was required to take into account all losses associated with both counts when determining the appropriate offense level under section 2F1.1(b). *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

4th Circuit holds that uncharged fraud was not part of same course of conduct. (175)(300) Defendant was convicted of aiding and abetting his brother's fraud scheme for making fraudulent misrepresentations to his brother's creditor. The 4th Circuit reversed the district court's determination that defendant's involvement with his brother's separate fraud scheme against several life insurance companies was relevant conduct for purposes of determining the amount of loss under section 2F1.1. The life insurance fraud was not "part of the same course of conduct or common scheme or plan" as the offense of conviction. The

significant elements to be evaluated are similarity, regularity and temporal proximity between the offense of conviction and the uncharged conduct. The fact that the same three individuals were involved in the two schemes did not make the schemes sufficiently similar. In addition, defendant's willingness to aid his brother's fraudulent endeavors did not provide a sufficient link between the frauds. Moreover, the distinctions between the schemes were quite significant. *U.S. v. Mullins*, __ F.2d __ (4th Cir. Aug. 7, 1992) No. 92-5087.

9th Circuit says that even if *Fine* and *Castro-Cervantes* are still good law, there was no reliance on dismissed counts. (175)(780) In *U.S. v. Fine*, 946 F.2d 650, 651-52 (9th Cir. 1991), *rehearing granted*, 963 F.2d 1258 (9th Cir. 1992), and *U.S. v. Castro-Cervantes*, 927 F.2d 1079, 1081-82 (9th Cir. 1991) (amended opinion), the 9th Circuit held that a sentence cannot be based on conduct underlying counts dismissed pursuant to a plea bargain. In this case, the court noted in a footnote that *Fine* had been vacated and "an en banc panel of the court is now considering *Fine* and *Castro-Cervantes*." Nevertheless, the court said that "even if we assume" that those cases are "still valid authorities," they did not apply here, because the district court used only the losses associated with two mail fraud counts contained in the superseding information. *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

Offense Conduct, Generally (Chapter 2)

2nd Circuit upholds enhancement because conspiracy to commit robbery contemplated use of weapons. (224) Defendant was convicted of conspiring to obstruct commerce by robbery, in violation of the Hobbs Act. Guideline section 2B3.1(b)(2)(C) provides for an enhancement if a dangerous weapon was brandished, displayed or possessed in connection with a robbery offense. The 2nd Circuit affirmed an enhancement under section 2B3.1(b)(2)(C) because conversations between defendant's co-conspirators established that the conspiracy to commit robbery contemplated the use of firearms. First, it was inferable that they planned to be armed from the fact that they knew that non- cooperating persons would be present and that the store employed security guards. Second, one conspirator stated that he planned to pattern the robbery on another robbery he had committed, and during that robbery, one of robbers had stuck a gun in the store owner's back. Finally, in recorded conversations, two of the conspirators discussed their possession of "murrays," a code word the jury could infer meant guns. *U.S. v. Skowronski*, __ F.2d __ (2nd Cir. June 29, 1992) No. 92-1002.

2nd Circuit affirms that Hobbs Act violator was not entitled to conspiracy offense level reduction. (224)(290)(380) Defendant was convicted of conspiring to obstruct commerce by robbery, in violation of the Hobbs Act. For violations of the Hobbs Act, section 2E1.5 provides for application of the guideline involving the type of conduct at issue. Accordingly, the district court applied section 2B3.1(a), the robbery guideline. Defendant urged the court to reduce his offense level by three under section 2X1.1, which provides that the base offense level for conspiracy is the base offense level for the object offense, decreased by three levels. The 2nd Circuit affirmed that section 2X1.1 was not applicable to a Hobbs Act conviction. Section 2X1.1, by its terms, is to be used to decrease the offense level for a conspiracy conviction only when the conspiracy offense is not covered by a specific offense guideline. The Hobbs Act, unlike many other substantive provisions of the Criminal Code, specifically prohibits both substantive conduct and conspiracy. Since section 2E1.5 expressly covers Hobbs Act violations, that section of the guideline controls the determination of the offense level of a defendant who conspired to violate the Hobbs Act. *U.S. v. Skowronski*, __ F.2d __ (2nd Cir. June 29, 1992) No. 92-1002.

8th Circuit says bank robber's statement combined with gesture to possible gun under coat was an express threat of death. (224) After presenting a bank teller with a demand for money, the bank teller asked "Is this a joke?" Defendant put his right hand under his coat lapel as if he was concealing a weapon and responded "You don't want to find out." The 8th Circuit affirmed that the statement, combined with the appearance as if he had a gun under his coat, constituted an express threat of death under the 1990 version of guideline section 2B3.1(b)(2)(D). Defendant's threat was immediate: if the teller did not comply, he would carry out his threat. *U.S. v. Smith*, __ F.2d __ (8th Cir. Aug. 10, 1992) No. 91-3824.

11th Circuit sentences defendant who mailed threatening letter under extortion guideline. (224)(226) Defendant mailed several threatening letters to his girlfriend, threatening to harm her if she testified against him in his upcoming bank

robbery trial. Defendant was convicted of mailing a threatening letter with intent to extort a thing of value in violation of 18 U.S.C. section 876. The 11th Circuit affirmed that he was properly sentenced under section 2B3.2 (Extortion by Threat of Force), rather than section 2A6.1 (Threatening Communications). *U.S. v. Nilsen*, __ F.2d __ (11th Cir. Aug. 4, 1992) No. 90-5950.

7th Circuit upholds disparity between sentences for marijuana growers and distributors. (242) Guideline section 2D1.1(c) provides that for offenses involving 50 or more marijuana plants, each plant shall be treated for sentencing purposes as equivalent to one kilogram of marijuana, except that if the actual weight is greater, the actual weight should be used. In general, one marijuana plant produces much less than one kilogram of marijuana. Defendant, a marijuana farm worker, was sentenced based on the 12,500 marijuana plants produced by his farm, rather than the 400 kilograms of marijuana the plants produced. Thus, defendant received the same sentence as a dealer who distributed on the street many times more marijuana than defendant grew. The 7th Circuit rejected defendant's claim that his sentence violated the "overriding principles of proportionality and consistency" in the guidelines. Congress has taken a supply-side approach to the marijuana problem by determining that marijuana growers deserve greater punishment than marijuana distributors. Although some might question this approach, the court would not second guess the reasonable judgment of Congress. *U.S. v. Haynes*, __ F.2d __ (7th Cir. Aug. 4, 1992) No. 91-3858.

2nd Circuit affirms that judge, not jury, determines drug quantity for purposes of mandatory minimum sentence. (245)(755) The 2nd Circuit upheld the application of the enhanced sentencing provisions of 21 U.S.C. section 841(b) based upon the district court's determination that in excess of 100 kilograms of marijuana were involved in his offense. No specific jury finding as to drug quantity is necessary in order to apply the enhanced sentencing provisions of section 841(b). The district judge, rather than the jury must determine pursuant to section 2D1.4 the quantities involved in narcotics offenses. At sentencing, the amount of a controlled substance need only be proven by a preponderance of the evidence, and the district court's assessment of drug quantity is subject only to a "clearly erroneous" standard of review. *U.S. v. Moore*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

9th Circuit extracts pure methamphetamine from mixture to determine mandatory minimum. (245) 21 U.S.C. section 841(b)(1)(A)(viii) requires a 10-year mandatory minimum sentence for offenses involving over 100 grams of pure methamphetamine. In *U.S. v. Alfeche*, 942 F.2d 697 (9th Cir. 1991), the Ninth Circuit held that section 841 allows "pure" methamphetamine to be extracted from a mixture for purposes of sentencing. Consequently, it was proper to impose the mandatory minimum sentence where the defendant imported 906.2 grams of a substance which contained 779.9 grams of pure methamphetamine. *U.S. v. Asuncion*, __ F.2d __, (9th Cir. August 24, 1992), No. 90-10594.

7th Circuit upholds sentence of marijuana farm worker based on number of plants, rather than actual weight. (253) Defendant worked on a marijuana farm which harvested 12,500 plants, processed the plants into 400 kilograms of consumable marijuana, and distributed it to the wholesale market. Section 2D1.1(c) provides that for offenses involving 50 or more marijuana plants, each plant shall be treated as equivalent to one kilogram of marijuana, except that if the actual weight is greater, the actual weight should be used. The 7th Circuit rejected defendant's claim that the one plant/one kilogram ratio should be used only where the government has raided a marijuana growing operation prior to harvesting or processing and there is no actual weight to be used. The language clearly directs a court to use the conversion ratio except where the actual weight of the marijuana plants is greater. Thus, defendant was properly sentenced on the basis of 12,500 kilograms of marijuana, rather than the 400 actually produced by the farm. The conversion ratio is used only for defendants who are involved in the cultivation, harvesting or processing of plants, and does not cover the activities of one who enters the distribution chain after processing. *U.S. v. Haynes*, __ F.2d __ (7th Cir. Aug. 4, 1992) No. 91-3858.

2nd Circuit upholds determination of drug quantity using seized packages as average weight of other shipments. (254) The 2nd Circuit affirmed the district court's determination under section 2D1.1(c)(8) that defendants' conspiracy involved 400 kilograms (about 880 pounds) of marijuana. The warrant to search a co-conspirator's apartment described two UPS packages as weighing 36 and 55 pounds. Another co-conspirator testified that during a two-year period, drug shipments were sent by UPS over 12 times. Numerous other shipments

were delivered by car or truck, with most weighing from 30 to 40 pounds. Although the co-conspirator did not provide weight estimates of the dozen or so packages sent by UPS, it was logical for the district court to consider the weight of the seized packages as appropriate examples. *U.S. v. Moore*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

2nd Circuit affirms that prior cocaine purchases need not be connected to marijuana transaction to be relevant conduct. (260) Defendant pled guilty to a marijuana offense. The 2nd Circuit affirmed the district court's inclusion of three kilograms of cocaine as relevant conduct in calculating his base offense level. Quantities and types of narcotics uncharged in the offense of conviction can be included in a defendant's base offense level if they were part of the same course of conduct or part of a common scheme or plan. Unlike a common scheme or plan, the same course of conduct does not require a connection between the acts. The "same course of conduct" concept looks to whether the defendant repeats the same type of criminal activity over time. It does not require that acts be connected together. Instead, it focuses on whether defendant has engaged in an identifiable behavior pattern of specified criminal activity. Here, defendant's participation in two narcotics transactions during the same year as the offense of conviction had sufficient similarly and temporal proximity to the marijuana offense to constitute such a pattern of behavior. *U.S. v. Burnett*, __ F.2d __ (2nd Cir. June 30, 1992) No. 91-1666.

6th Circuit, en banc, remands to clarify why drugs in uncompleted transaction were excluded. (265) Based on the hearsay testimony by one witness, the district court determined by a preponderance of the evidence that defendant was involved with a scheme to import into the U.S. 2,500 kilograms of cocaine. However, the court excluded the 2500 kilograms from the computation of the base offense level because the scheme was too tenuous and remote, the drugs were only the subjects of conversation, and there had been no completed transaction. Finding the district court's statement confusing, the 6th Circuit, en banc, remanded to clarify why the 2,500 kilograms were excluded. Under section 2D1.4, the district court must include the "conversational cocaine" involved in the uncompleted conspiracy, if it concludes that defendant had the intention to produce or was reasonably capable of producing 2500 kilograms. Judge Krupansky, joined by Judges Nelson, Boggs, Norris and Batchelder, and Judge Kennedy, joined by Judges Nelson and Suhrheinrich, dissented. *U.S. v. Gessa*, __ F.2d __ (6th Cir. Aug. 7, 1992) No. 90-5825 (*en banc*)

2nd Circuit affirms that defendants could reasonably foresee that their drug conspiracy distributed over 10 kilograms of heroin. (275) Defendants were workers at one of the "spots" at which a large drug organization sold heroin. The 2nd Circuit affirmed that defendants could have reasonably foreseen that the organization distributed over 10 kilograms of heroin during their participation in its affairs. Seized drug records showed that $575,000 worth of heroin was sold from defendants' spot in 1988, and $265,000 in 1989. During the time that defendants were members of the organization, they attended several organization- wide social events hosted by the leader of the organization. In addition, defendants knew or should have known of the extent of the operation because of the professionally packaged nature of the heroin sold, the percentage basis on which they sold it, and the central management team to which they reported. *U.S. v. Rivera*, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

2nd Circuit remands for findings on amount of narcotics reasonably foreseeable to defendants. (275) Defendants were convicted of a drug conspiracy. The 2nd Circuit found that resentencing was necessary because the sentencing judge did not make findings with regard to the amount of narcotics that were reasonably foreseeable to each defendant. A defendant convicted of conspiracy may be sentenced for relevant conduct committed by a co-conspirator in furtherance of the conspiracy only if that conduct was reasonably foreseeable by the defendant. Because the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced under the law of conspiracy, a sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy. Judge Newman concurred. *U.S. v. Lanni*, __ F.2d __ (2nd Cir. July 24, 1992) No. 91-1597.

8th Circuit affirms that defendants were responsible for co-conspirators' drug quantities. (275) The 8th Circuit affirmed that in sentencing defendants for drug conspiracy, the district court properly considered amounts of drugs involved in the conviction of co-conspirators. There is no requirement that only amounts in a single defendant's indictment or conviction may be

considered in the calculation of that defendant's base offense level. The defendants are responsible for their own conduct and as much of the conduct of their co-conspirators in furtherance of the conspiracy that they either knew about or reasonably could foresee. *U.S. v. Swinney*, __ F.2d __ (8th Cir. July 30, 1992) No. 91-1294WM.

10th Circuit expresses concern at disparity between sentences of conspirators who cooperated and those who stood trial. (275)(716) In a large drug conspiracy prosecution against numerous defendants, the 10th Circuit affirmed the long sentences each defendant who went to trial received, since there was evidence that the district court carefully considered the extent of each defendant's participation in the conspiracy and the quantity of drugs that was reasonably foreseeable to each. However, it joined the district court in expressing its concern for the radical disparity between the sentences these defendants received (210 months, 210 months, 290 months and life imprisonment) and the sentences imposed upon those defendants who cooperated with the government (5 years probation, one year supervised release, five years supervised release, and 5 years probation). The concern was not obviated by the government's representation that it gave all of the defendants an opportunity to cooperate in exchange for leniency. "Rather, it is heightened by the prospect that the use of this tactic in a large-scale conspiracy prosecution might effectively chill a defendant's right to trial." *U.S. v. Evans*, __ F.2d __ (10th Cir. June 30, 1992) No. 90-5186.

11th Circuit affirms that drug seller on street was responsible for drugs found in nearby house and cars. (275) While waiting to conduct a search of a suspected drug house, police were called to a nearby location where open drug sales were taking place. Defendant, one of the participants, was arrested as he ran in the direction of the house. During the arrest, two people came out of the house and tried to talk to defendant. He attempted to give them his jacket. Police found chunks of 40 percent benzocaine crack cocaine in the jacket and $1,410 in small bills. A search of the house uncovered crack of the same 40 percent benzocaine mixture. A mini-van parked across the street contained cash and drugs, and the car parked in the driveway contained drug paraphernalia, a loose license plate for a different car registered to defendant and an insurance revocation notice addressed to him. The 11th Circuit affirmed that defendant could be held accountable for the crack found in the mini-van and the house. Defendant's involvement was supported by his flight toward the house, his conversation with the couple there and his efforts to give them the drugs in his jacket, the uniqueness of the drugs found in defendant's jacket, the house and mini-van, and the presence of his license tags and papers. *U.S. v. Louis*, __ F.2d __ (11th Cir. Aug. 10, 1992) No. 90-3778.

10th Circuit remands for statement of reasons for imposing firearm enhancement. (280)(765) The district court imposed an enhancement under section 2D1.1(b)(1) for possessing a firearm during a drug trafficking crime, but over objection, failed to make any oral or written findings to support the enhancement. Although the court stated it would prepare a short written ruling on each of defendant's objections, it never did. The 10th Circuit remanded for the court to state its reasons for attributing a weapon to defendant. Under 18 U.S.C. section 3553(c), the district court must make a generalized statement of its reasons for imposing a particular sentence so that the appellate court does not "flounder in the zone of speculation." A highly detailed statement is not necessary for review, but the appellate court must be able to tie the court's sentencing decision to a factual basis in the record to be assured that basis meets the proper legal standard underpinning the enhancement. A statement accepting the presentence report as corrected is insufficient. *U.S. v. Slater*, __ F.2d __ (10th Cir. Aug. 4, 1992) No. 91-3276.

6th Circuit affirms that unloaded semi-automatic weapon found in basement was connected to drug offense. (284) Defendant received a firearm enhancement under guideline section 2D1.1(b)(1) based on an unloaded Mac-10 semi-automatic firearm found in the basement of her apartment, the same apartment in which she allowed a co-conspirator to store cocaine. Defendant admitted constructive possession of the weapon but contended the enhancement was improper because it was improbable that the gun was associated with her drug activities: she was not the owner of the gun, she never handled the gun, and there was no trace of drugs or drug paraphernalia found in the basement near the gun. The 6th Circuit affirmed the enhancement, distinguishing *U.S. v. Garner*, 940 F.2d 172 (6th Cir. 1991). Although as in *Garner* the weapon was unloaded, it was found in the basement rafters, which indicated purposeful concealment rather than possession for a legal purpose. Also the semi-automatic weapon was the type of gun associated with drug activity. Even if defendant never actually possessed the weapon, she should have reasonably

foreseen that her co-conspirator would possess the gun during, and in connection with the drug conspiracy of which she was a part. *U.S. v. Chalkias*, __ F.2d __ (6th Cir. July 30, 1992) No. 91-3528.

11th Circuit upholds firearm enhancement based on uncharged co-conspirator's possession of firearm. (284) In *U.S. v. Otero*, 890 F.2d 366 (11th Cir. 1989), the court held that a firearm enhancement under section 2D1.1(b) may be based upon a co- conspirator's possession of a firearm if (a) the possessor was charged as a co-conspirator, (b) the co-conspirator possessed the firearm in furtherance of the conspiracy, and (c) the defendant was a member of the conspiracy at the time of the firearm possession. Defendant received a firearm enhancement based upon two accomplices' possession of a firearm. Neither accomplice was charged as a co-conspirator since one had died before the conspiracy ended, and the other cooperated with the government in exchange for immunity. The 11th Circuit affirmed the enhancement, holding that the sentencing guidelines do not require that the firearm possessor be charged as a co- conspirator if that co-conspirator dies or is otherwise unavailable for indictment. To the extent the words of the *Otero* opinion, as distinguished from the decision itself, suggest otherwise, those words are dicta and are not law. Judge Atkins dissented. *U.S. v. Nino*, __ F.2d __ (11th Cir. Aug. 6, 1992) No. 90-3622.

11th Circuit reaffirms that in certain situations enhancement may be based on uncharged co-conspirator's firearm possession. (284) Defendant contended that under *U.S. v. Otero*, 890 F.2d 366 (11th Cir. 1989), he could not be held accountable for his co- conspirator's possession of firearms since they were never charged as co-conspirators. Nevertheless, the 11th Circuit affirmed the enhancement. *Otero* involved identifiable co-conspirators; because their identify was known, they could be charged with conspiratorial activities. In *U.S. v. Nino*, __ F.2d __ (11th Cir. Aug. 6, 1992) No. 90-3622, decided four days earlier, the court held that the sentencing guidelines do not require that the firearm possession be a charged co-conspirator when that co-conspirator dies or is otherwise unavailable for indictment. Defendant's fellow conspirators were never identified and therefore were never available for indictment. *U.S. v. Louis*, __ F.2d __ (11th Cir. Aug. 10, 1992) No. 90-3778.

9th Circuit holds that violation of "judicial order" in 2F1.1(b)(3)(B) does not include bail order. (300)(320)(508) Guideline Section 2F1.1(b)(3)(B) provides: "If the offense involved . . . violation of any judicial or administrative order, injunction, decree or process, increase by two levels." The defendant here committed his mail fraud offenses while under a bail order containing a condition that he commit no crimes. The district court concluded that the bail order was a "judicial order" and increased his base offense level by two. On appeal, the 9th Circuit reversed, holding that the Sentencing Commission did not intend to include general bail conditions under the judicial orders covered by section 2F1.1. The court noted that two other guideline sections were applicable. Section 2J1.7 requires a three level enhancement for offenses committed while on release, and 4A1.3 allows the district court to depart upward if "the defendant was pending trial, sentencing or appeal or another charge at the time of the instant offense." *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

10th Circuit upholds determination of loss in bankruptcy fraud case. (300) Defendants were convicted of various charges stemming from a multitude of acts they committed to defraud their creditors during the course of bankruptcy proceedings. The 10th Circuit affirmed that the loss caused by defendants' fraud was in excess of $2 million under section 2F1.1. The parties stipulated that the inventory and accounts receivable of defendants' business had a value of $1.7 when defendants declared their insolvency, and that the secured parties would have suffered no loss had they exercised their rights to the collateral at this time. Instead, they permitted defendants to conduct a liquidation sale, at the end of which there was no money to pay creditors. Further, defendants embezzled in excess of $400,000 from the employees' pension and profit sharing plans and then concealed these monies from their creditors. These two amounts alone were sufficient to place the loss at over $2 million. *U.S. v. Levine*, __ F.2d __ (10th Cir. July 2, 1992) No. 91-1082.

11th Circuit affirms that proceeds from fraudulently transferred house were properly considered as loss under fraud guideline. (300) Defendant transferred property to his wife in an effort to avoid a tax lien. He contended that no loss enhancement should apply under section 2F1.1 because his wife was the one who received the proceeds of the sale of the house. The 11th Circuit affirmed that the $24,663 actually gained from the

sale of the house was the amount of loss. Defendant agreed that he intended to cause a loss to the IRS by transferring his real property to his wife. That his wife actually received proceeds from the sale was irrelevant to the loss defendant caused the IRS. The intended loss arguably could have been $106,790, the assessment on the lien notice that defendant attempted to void by altering and refiling it. *U.S. v. Shriver,* __ F.2d __ (11th Cir. Aug. 5, 1992) No. 91-3194.

11th Circuit upholds application of fraud guideline to defendant who attempted to evade collection of tax lien. (300)(370) Defendant obtained a certified copy of a federal tax lien filed by the IRS against property which he had transferred to his wife. He stamped the words "VOIDED BY FLORIDA STATUTES" on the lien, forged a signature, and filed the altered lien notice. He was convicted of attempt to obstruct the IRS, in violation of 26 U.S.C section 7212(a). He challenged the application of section 2F1.1, the fraud guideline, to his offense, arguing that the applicable guidelines were those listed in the statutory index, section 2A2.2 (Aggravated Assault) and section 2A2.3 (Minor Assault). The 11th Circuit upheld the application of section 2F1.1 to the offense. The introduction to the statutory index states that if in an atypical case, the guideline section indicated for the statute of conviction is inappropriate, the court is to use the guideline most applicable to the nature of the offense. Nothing in the facts suggested that defendant ever assaulted anyone in trying to meet his objective of defrauding the IRS. The district court's decision to apply the fraud guideline was appropriate. *U.S. v. Shriver,* __ F.2d __ (11th Cir. Aug. 5, 1992) No. 91-3194.

7th Circuit affirms reckless endangerment enhancement based upon fire's danger to passersby and firemen. (330) A defendant who set fire to his business challenged a 14-level enhancement under the November 1990 version of section 2K1.4 for recklessly endangering the safety of others. He argued that (a) he did not consciously seek to harm others, (b) he took precautions to safeguard others (such as blocking the store's entrance with two dumpsters) and (c) the location of the store made it unlikely that the fire would spread. Despite these claims, the 7th Circuit affirmed the enhancement. Reckless endangerment requires proof that the defendant specifically intended to cause the type of fire that could endanger others, not that the defendant consciously sought to harm others. The measures taken by defendant merely reduced, and did not eliminate the risk of harm to others. Even if the location of the store made it unlikely that the fire would spread, the enhancement is not limited to situations where the fire can spread to neighboring structures. The enhancement is applicable to fires that recklessly endanger passersby, such as the witness who was at the pay phone outside the store, or firemen who are dispatched to the scene. Judge Easterbrook concurred. *U.S. v. Guadagno,* __ F.2d __ (7th Cir. July 8, 1992) No. 91-2233.

8th Circuit reaffirms that section 2K2.1(b)(2) does not require defendant's knowledge that firearm is stolen. (330) Defendant was convicted under 18 U.S.C. section 922(b) of being a felon in possession of a firearm. He contended that it was error to enhance his sentence under section 2K2.1(b)(2) for the firearm's being stolen, since the government did not present evidence that he knew it was stolen. The 8th Circuit affirmed the enhancement, since section 2K2.1(b)(2) does not require that the defendant know the firearm was stolen. Defendant's claim that this was inconsistent with the scienter requirement in section 922(b) was rejected. Section 922(b) requires only that the firearm be knowingly possessed by a felon. The guideline addresses a matter not addressed by the statute. *U.S. v. Hernandez,* __ F.2d __ (8th Cir. Aug. 7, 1992) No. 91-3297MN.

2nd Circuit affirms that higher money laundering offense level does not require knowledge that funds were criminally derived. (360) Defendant was convicted of several counts of structuring financial transactions to evade reporting requirements. Guideline section 2S1.3 provides for a base offense level of 13 if the defendant structured transactions to evade reporting requirements, or made false statements to conceal or disguise the evasion of reporting requirements, or reasonably should have believed that the funds were criminally derived. Otherwise the offense level is five. The 2nd Circuit rejected defendant's claim that level 13 was only intended to cover those currency structuring transactions that involve illegally derived funds. Section 2S1.3 provides for a base offense level of 13 if the defendant structured transactions to evade reporting requirements, which is exactly what defendant did. The belief that funds were criminally derived provides an alternative basis for the level 13 base offense level; it is not a condition to the higher offense level. *U.S. v. Caming,* __ F.2d __ (2nd Cir. June 29, 1992) No. 92-1043.

Adjustments (Chapter 3)

10th Circuit rules that elderly female victims were not vulnerable. (410) Defendant, a customer services officer at a bank, represented to elderly female bank customers that she would take their deposit slips to a teller for deposit in the customer's account. Instead, she deposited the funds into accounts within her control. The 10th Circuit reversed a vulnerable victim enhancement, finding that although the elderly female bank customers were victims of the embezzlements, they were not vulnerable. The enhancement was based entirely upon the victims' membership in the class of "elderly" persons. There was no indication that the women were incompetent or incapable of handling their own affairs. The label "elderly" is too vague, standing alone, to provide a basis for a finding of unusual victim vulnerability. *U.S. v. Lee*, __ F.2d __ (10th Cir. July 23, 1992) No. 91-7042.

11th Circuit reverses vulnerable victim enhancement for legislator who extorted money from union official. (410) Defendant, a state legislator, was convicted of Hobbs Act violations for extorting money from a mining union official to obtain favorable action on a coal bill. The district court imposed a vulnerable victim enhancement under section 3A1.1 because of the importance of the coal bill to the officials' mining constituency. The 11th Circuit reversed the enhancement, finding that the vulnerability resulting from the official's responsibility to the union was not so unusual as to manifest the level of depravity contemplated by section 3A1.1. The official's concerns for his constituency made him no more vulnerable than the garden variety extortion victim. Judge Edmondson dissented. *U.S. v. Davis*, __ F.2d __ (11th Cir. Aug. 3, 1992) No. 90-7108.

2nd Circuit upholds managerial enhancement based upon co-conspirator's testimony and telephone and drug records. (431) Defendant worked at one of the "spots" from which a large drug organization sold heroin. He contended that he was not a manager in the organization, citing as evidence the fact that he never received any of the expensive gifts that the leader of the organization gave to his managers. The 2nd Circuit upheld the enhancement, in light of testimony by one co-conspirator (who was in charge of the distribution of heroin and collection of sales proceeds) that defendant was in charge of the organization's spot at 156th and Courtlandt, mobile telephone records reflecting about 60 phone calls from this co-conspirator to defendant, another co-conspirator's testimony that he was introduced to defendant as one of the people running the spot at 156th and Courtlandt, and an abbreviation of defendant's name found in the leader's handwritten drug records. *U.S. v. Rivera*, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

6th Circuit upholds organizing role of defendant who directed others to pick up heroin for him. (431) Defendant was convicted of drug conspiracy charges as a result of his involvement in the purchase of heroin. The 6th Circuit upheld an organizing role enhancement based on the testimony of the co-conspirator who delivered the heroin to defendant that persons other than defendant actually picked up the heroin. *U.S. v. Markarian*, __ F.2d __ (6th Cir. June 24, 1992) No. 91-1771.

8th Circuit affirms that defendant who had access to money orders was leader of stolen money order conspiracy. (431) Defendant stole postal money orders, which he and his co-conspirators altered and cashed. The 8th Circuit affirmed defendant's leadership role under section 3B1.1(a) based on his access to the money orders. Defendant could be an organizer or leader without having directly controlled his co-conspirators. He had sole access to the money orders, which were the essential ingredient of the crime. Defendant's position allowed him to control the timing and amount of money orders stolen and altered during the conspiracy. *U.S. v. Grady*, __ F.2d __ (8th Cir. Aug. 10, 1992) No. 92-1507EM.

8th Circuit affirms aggravating role enhancement for heroin seller. (431) Defendant was convicted of conspiring to distribute and possess heroin. The 8th Circuit affirmed an aggravating role enhancement under section 3B1.1(c) in light of evidence that defendant was involved with other heroin dealers, he sold a co-conspirator heroin, and knew that the co-conspirator sold heroin to others. *U.S. v. Briggs*, __ F.2d __ (8th Cir. July 14, 1992) No. 91-3414.

9th Circuit finds five people involved in "staged collision" that was a "necessary precursor" to defendant's social security fraud. (431) The district court found that five people participated in the staged automobile collision that was charged as part of the social security fraud and that defendant was their organizer and leader. Accordingly, four levels were added to defendant's offense level under 3B1.1(b). The introductory commentary to Chapter

3, Part B of the Guidelines, as amended November 1, 1990, states that all relevant conduct should be included in considering defendant's role in the offense. Here, the 9th Circuit found that the staged collision was a necessary precursor to defendant's social security fraud and therefore constituted an act in furtherance of that offense. The four level adjustment was affirmed. *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

10th Circuit affirms supervisory enhancement in fraud case. (431) Defendants challenged a two point enhancement under section 3B1.1(c) for their role in their fraud scheme, since the offense was committed "by individuals of roughly equal culpability." The 10th Circuit upheld the enhancement. The district court was presented with evidence that the offenses involved upward of eight participants. There was ample support for the district court's finding that defendants were not acting alone, but were instead carrying out a supervisory role over other participants in the offenses. *U.S. v. Hollis*, __ F.2d __ (10th Cir. July 31, 1992) No. 91-6290.

10th Circuit affirms that defendants, and not their attorneys, were leaders of bankruptcy fraud. (431) Defendants were convicted of various charges stemming from a multitude of acts they committed to defraud their creditors during the course of bankruptcy proceedings. The 10th Circuit affirmed that defendants, and not their attorneys, were the leaders of the fraud scheme. There was evidence that the wife directed the bookkeeper to give sale proceeds and accounts receivable proceeds directly to her so that she could deposit the monies in the law firm trust account, instructed the collector to send monies from the accounts receivable to her home, contacted the pension plan from which they embezzled with directions to convert assets to cash, and established a secret personal bank account into which funds were improperly diverted. The husband instructed the collector to send proceeds from the accounts receivable to their law firm, diverted monies to secret bank accounts controlled by defendants, and redeemed the pension plans' assets. Although the court did not identify five other participants, that is not necessary when the record plainly shows the existence of these facts. *U.S. v. Levine*, __ F.2d __ (10th Cir. July 2, 1992) No. 91-1082.

7th Circuit remands for district court to identify five participants in offense who were supervised by defendant. (432) The district court increased defendant's offense level by four for being a leader of criminal activity involving five or more participants. The enhancement was based upon information that defendant assumed leadership over an organized crime group. Although it did not doubt that this group included more than five persons, the 7th Circuit remanded for resentencing so that the district court could identify five participants in the instant offense, extortion. Once such five participants were identified, the district court must also determine whether defendant exercised leadership over all of the five participants. *U.S. v. Schweihs*, __ F.2d __ (7th Cir. Aug. 6, 1992) No. 90-1463.

5th Circuit rejects minor status for drug courier who had been with organization for one week. (445) Defendant and an accomplice were arrested in a Mexican hotel by Mexican police while waiting for dark so that they could pick up 720 kilograms of marijuana and transport it into the United States. After conviction in Mexico he was subsequently transferred to the United States where his release date was set by the U.S. Parole Commission with reference to his guideline sentence. Defendant claimed that he was entitled to a minor participant reduction because he was just a courier and had been with the organization for just one week. The 5th Circuit rejected this argument based upon the Parole Commission's findings that defendant was aware of the scope and structure of the operation. He knew where the marijuana was located, he had previously delivered 110 pounds to the border and he had been classified by the Mexican court as a serious offender. *Molano-Garza v. U.S. Parole Commission*, 965 F.2d 20 (5th Cir. 1992).

6th Circuit rejects minor role for active "ground floor" participant in drug conspiracy. (445) The 6th Circuit affirmed the denial of a minor participant reduction based upon the district court's determination that defendant was an active "ground floor" participant in the drug conspiracy. Defendant provided transportation to all the major figures in the conspiracy, was a direct associate of these major figures, was a drug courier, provided a storage place for cocaine and firearms, and was referred to by one witness as a co-conspirator's "right hand." *U.S. v. Chalklas*, __ F.2d __ (6th Cir. July 30, 1992) No. 91-3528.

10th Circuit affirms that drug courier was not entitled to mitigating role adjustment. (445) Although defendant and the government made a non-binding stipulation that defendant was a minimal participant, the district court refused to grant defendant either a minimal or a minor role

reduction. The 10th Circuit affirmed. Defendant was arrested on a train while transporting 42 pounds of marijuana from Los Angeles to Boston. A courier is an essential cog in any drug distribution scheme and in the instant case transporting 42 pounds of marijuana from Los Angeles to Boston was apparently quite important to all parties. Defendant's services were as indispensable to the completion of the criminal activity as those of the seller in Los Angeles and the buyer in Boston. To debate which was less culpable than the others was not productive. *U.S. v. Carter*, __ F.2d __ (10th Cir. July 31, 1992) No. 91-2243.

2nd Circuit upholds obstruction enhancement for defendant who punched and threatened suspected informant. (461) Defendant received an enhancement for obstruction of justice based on evidence that after his arrest and release on bail, he punched a co-defendant who he suspected was an informant and advised the co-defendant not to "come around" because defendant was going to "kick [his] ass." The 2nd Circuit upheld the enhancement. The evidence supported the determination that the co-defendant interpreted defendant's actions as a threat, that defendant intended to intimidate the co-defendant, and that defendant had the requisite specific intent to obstruct justice. *U.S. v. Rivera*, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

8th Circuit upholds obstruction enhancement for use of an alias on an affidavit of financial status. (461) The 8th Circuit upheld an enhancement for obstruction of justice based upon defendant's use of an alias on an affidavit of financial status provided to a parole officer. Previous cases have upheld the enhancement even when the police knew the defendant was using an alias. Here, the police did not know defendant's true identify, and therefore the enhancement was certainly appropriate. *U.S. v. Thompson*, __ F.2d __ (8th Cir. Aug. 3, 1992) No. 91-2802.

8th Circuit upholds obstruction enhancement for perjury at trial. (461) The 8th Circuit affirmed an enhancement for obstruction of justice based upon defendant's perjury at trial. The district court found defendant committed perjury when he denied having ever met or contacted two co-conspirators or having gone to California for a cocaine transaction. Defendant's testimony was in direct contradiction with one of his co-conspirator's testimony and to motel receipts and phone records that placed defendant in California. *U.S. v. Swinney*, __ F.2d __ (8th Cir. July 30, 1992) No. 91-1294WM.

8th Circuit affirms obstruction enhancement for defendant's testimony at trial that he never sold heroin. (461) Defendant received an enhancement for obstruction of justice because he testified untruthfully at trial. Defendant argued that he only denied the allegations in the indictment, and such an upward adjustment effectively punished him for testifying at trial. The 8th Circuit upheld the enhancement. Defendant's testimony that he never sold heroin to a co-conspirator directly contradicted the co-conspirator's testimony, and was inconsistent with the jury verdict. This testimony alone provided the basis for the upward adjustment. *U.S. v. Briggs*, __ F.2d __ (8th Cir. July 14, 1992) No. 91-3414.

9th Circuit finds that public identification of witness as "snitch" constitutes obstruction. (460) (461) Defendant wrote on a copy of a witness' cooperation agreement, "the rat" and "snitch" and sent copies to his sister, a minister, and the witness' mother. Copies were also circulated at a local restaurant and nightclub. Even though defendant testified he did not intend to hurt the witness, the district court found defendant had not been entirely candid regarding his reasons for the distribution and acted with a conscious intent to obstruct justice because he was angry at the witness. The Ninth Circuit affirmed, finding dissemination of the document could constitute an attempt to influence a witness and the conduct was sufficiently threatening to qualify as obstruction. The fact the witness testified in spite of the threats was irrelevant. Finally, even if the court were to consider the First Amendment argument raised for the first time on appeal, it would disagree because there is no right to make intimidating threats against government witnesses. *U.S. v. Jackson*, __ F.2d __, 92 D.A.R. 11818 (9th Cir. August 25, 1992), No. 91-30228.

10th Circuit affirms obstruction enhancement for advising witness to lie to FBI, participating in preparation of false deed, and threatening a potential witness. (461) The 10th Circuit affirmed that both defendants deserved an enhancement for obstruction of justice in light of evidence that the first defendant (with the second defendant present) told a witness to lie to the FBI, the second witness participated in the preparation of a false deed, and the first witness threatened a potential witness regarding her testimony. *U.S. v. Hollis*, __ F.2d __ (10th Cir. July 31, 1992) No. 91-6290.

11th Circuit vacates obstruction enhancement where no evidence that false statement to IRS agent impeded the investigation. (462) Defendant filed an altered federal tax lien in an effort to avoid the lien. Defendant told an IRS investigator that he had never seen the "voided" lien and did not know who had filed it. The 11th Circuit reversed an enhancement for obstruction of justice based upon defendant's false statement to the IRS investigator. Application note 4 to section 3C1.1 states that making false statements, not under oath, to law enforcement officers does not warrant an obstruction enhancement. There was no evidence in the record that defendant's false statement "significantly obstructed or impeded the official investigation. The government failed to refute defendant's claim that the IRS agent was never deceived by defendant's statement. The government had the burden of proving the applicability of the enhancement, and failed to meet its burden. *U.S. v. Shriver*, __ F.2d __ (11th Cir. Aug. 5, 1992) No. 91-3194.

9th Circuit says court did not improperly consider offenses outside the offense of conviction. (482) Defendant argued that the district court improperly denied the two level reduction because, while he admitted his guilt in committing a fraud, he stated that he also believed he was entitled to social security disability benefits based on his medical condition. The 9th Circuit rejected the argument, ruling that the district court did not expressly base its decision on defendant's statements regarding the social security benefits. Instead, the district court appeared to have relied on "the government's argument that [defendant] had shown no remorse for having committed his offense of conviction." *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

8th Circuit affirms constitutionality of denial of acceptance of responsibility reduction for failure to speak to probation officer. (484) The 8th Circuit summarily rejected defendant's claim that the denial of a reduction for acceptance of responsibility for not speaking to the probation officer penalized him for exercising his 5th Amendment right to remain silent. *U.S. v. Hernandez*, __ F.2d __ (8th Cir. Aug. 7, 1992) No. 91-3297MN.

7th Circuit says court could properly reject probation officers' acceptance of responsibility recommendation. (486) The 7th Circuit rejected defendant's claim that the district court should have deferred to the probation officer's recommendation that he receive a reduction for acceptance of responsibility. A probation officer's recommendation for such a reduction is not entitled to special deference. Defendant failed to accept responsibility for all of his criminal acts. Although he admitted committing the arson, he did not accept responsibility for his mail fraud. Even if the average person does not appreciate the statutory definition of mail fraud, defendant was convicted of having engaged in this conduct and therefore was required to accept responsibility for it in order to receive the reduction under section 3E1.1. Finally, the district judge found that defendant's purported "acceptance" came too late in the proceedings, and that his characterization of the fire he set as a "needless mistake that happened to him" was hardly an affirmative acceptance. Defendant's attempt to accept responsibility was in reality an effort to decrease his sentence. *U.S. v. Guadagno*, __ F.2d __ (7th Cir. July 8, 1992) No. 91-2233.

2nd Circuit upholds acceptance of responsibility reduction for defendant who gave inculpatory statement on arrest. (488) The 2nd Circuit affirmed the district court's reduction for acceptance of responsibility to a defendant who immediately gave an inculpatory statement upon arrest. Although the government claimed that the statement minimized his role in the marijuana trafficking scheme, the judge found the statement to be a sufficient acceptance of responsibility. *U.S. v. Moore*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

6th Circuit upholds denial of acceptance of responsibility reduction for defendants who minimized role. (488) The 6th Circuit rejected defendants' claim that they should have received a reduction for acceptance of responsibility based on their admissions of guilt made to the probation officer and to the district court after their convictions. The district court found that before, during, and after the trial, both defendants attempted to minimize their role in the drug conspiracy. This conclusion was reached after the court heard all the testimony at trial, the findings of the probation office, and the statements of the defendants themselves. *U.S. v. Chalkias*, __ F.2d __ (6th Cir. July 30, 1992) No. 91-3528.

10th Circuit affirms that defendants did not make "voluntary" restitution evidencing acceptance of responsibility. (488) Defendants argued that their "voluntary payment of restitution" and their willingness to enter into settlement negotiations evidenced their acceptance of

responsibility. The 10th Circuit upheld the denial of the reduction. Note 1(b) to section 3E1.1 refers to "voluntary payment of restitution prior to adjudication of guilt." Defendants signed a consent judgment as to $35,000 that had been seized, but this was done only after they had been found guilty. Likewise, they placed $55,000 in escrow prior to trial, but this would only be turned over if they were found guilty. Finally, defendants' willingness to settle prior to trial was not evidence of acceptance of responsibility. They offered to pay $90,000 in restitution in an attempt to avoid an indictment altogether. They also rejected proposals advanced by the government. Thus, they showed a willingness to concede responsibility only to the extent they could avoid the consequences of their criminal conduct. *U.S. v. Hollis*, __ F.2d __ (10th Cir. July 31, 1992) No. 91-6290.

2nd Circuit affirms acceptance of responsibility reduction for defendant who did not plead guilty. (490) Although defendant chose to go to trial rather than plead guilty, the 2nd Circuit affirmed the district court's reduction for acceptance of responsibility. Defendant cooperated with authorities upon his arrest by giving an immediate statement of what he maintained to be his involvement in the drug activity. The district court found sufficient acceptance of responsibility from this fact and the fact that defendant had confessed his involvement to his family and friends. Although some sentencing judges might require a greater showing of contrition, regret, or repentance, the district court was within its discretion to make the reduction. *U.S. v. Moore*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

Criminal History (§4A)

2nd Circuit holds that driving while ability impaired offenses are included in criminal history. (504) The 2nd Circuit reversed the district court's failure to include in defendant's criminal history his two prior convictions for driving while ability impaired (DWAI). The guidelines exclude certain misdemeanor convictions from a defendant's criminal history if they are similar to the offenses listed in section 4A1.2(c)(2). Among the listed offenses are hitchhiking, vagrancy, loitering and "minor traffic infractions." Application note 5 to section 4A1.2 states that convictions for driving while intoxicated or under the influence and similar offenses, whatever their name, are not minor traffic infractions. *U.S. v. Moore*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

9th Circuit affirms that prior sentence was not "part of the instant offense." (504) Defendant argued that his prior sentence for unlawful structuring of currency transactions, mail fraud, and subscribing to false tax returns should not have been considered a "prior sentence" under section 4A1.2 because it involved conduct (i.e. a fraud based on the same staged automobile accident), that was "part of the instant offense." He argued that the phrase "part of the instant offense" should be interpreted to mean "part of the same criminal scheme." The 9th Circuit rejected the argument, noting that even the prior mail fraud conviction and the present offenses of conviction had the "staged automobile collision" in common, "that fact does not necessarily make them part of the same offense." Moreover, in this case the prior mail fraud conviction was based on substantial conduct unrelated to the staged collision. Moreover the convictions for subscribing to false tax returns and unlawful structuring of financial transactions "necessarily involved conduct independent of the staged collision." *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

D.C. Circuit affirms that prior conviction was not part of instant offense for criminal history purposes. (504) Defendant contended that his Kansas City conviction should not have been included in his criminal history, but instead should have been grouped with the counts of his conviction and included in his base offense level. The D.C. Circuit rejected this argument. Under section 4A1.2(a)(1), any sentence previously imposed upon adjudication of guilt for conduct not part of the instant offense is treated as a prior sentence. The fact that defendant had not yet been sentenced for the Kansas City crime when he committed the present crime did not bar inclusion of the Kansas City offense. The Kansas City offense was also not part of the instant offense. It was plainly not an element of the present crime, nor was it "part" of the instant offense. The Kansas City offense was separate from the instant offense in time and place, and the fact that defendant used the same modus operandi in each case was irrelevant. *U.S. v. Johnson*, __ F.2d __ (D.C. Cir. July 31, 1992) No. 91-3137.

7th Circuit affirms upward departure based on reversed conviction. (510) The district court departed upward from criminal history category I to II based on a reversed conviction for possession of a wire communication intercepting device. The conviction was reversed because an appellate court

ruled that the device did not fit within the statutory requirements. The 7th Circuit affirmed that the departure was properly based on the reversed conviction because it provided reliable evidence of past criminal activity. Under note 6 to section 4A1.2, any conviction not counted in the criminal history score may be considered as grounds for departure is it provides reliable evidence of past criminal activity. Here, the decision reversing the prior conviction made it clear that defendant was using the device for the surreptitious interception of wire communications at the time of his arrest. Thus, the district court could consider that defendant had engaged in criminal activity involving the intentional interception of wire communications. Past criminal conduct need not be similar to the offense of conviction to be considered as a reason for departure. *U.S. v. Schweihs*, __ F.2d __ (7th Cir. Aug. 6, 1992) No. 90-1463.

11th Circuit upholds upward criminal history departure based on likelihood of recidivism. (510) Defendant, a computer hacker, received a one level upward criminal history departure based upon the district court's determination that his criminal history category did not reflect his recidivism. The 11th Circuit affirmed, in light of evidence that (a) defendant created, during the time he was on probation for an earlier hacking offense, a tutorial explaining how to break into certain telephone computer systems, (b) his continued hacking, and (c) the similarity of the crimes for which he had been convicted. Similarity of offenses has been closely linked to recidivism. *U.S. v. Riggs*, __ F.2d __ (11th Cir. Aug. 4, 1992) No. 90-9108.

11th Circuit affirms upward departure from category VI for crimes that were not included in criminal history. (510) Defendant's three prior bank robbery convictions were counted as one because they were consolidated for sentencing. The district court used the two uncounted conviction as a basis for departing upward from criminal history category VI, concluding that with six additional criminal history points for the two convictions, defendant would fall within hypothetical criminal history category IX. The court then extrapolated what his guideline range would be, and sentenced him within that range. The 11th Circuit affirmed the upward departure. Under guideline section 4A1.3(a), a prior sentence that was not used to calculate a defendant's criminal history can justify a departure from the guideline range. The sentencing court's statement that it was departing after reviewing the presentence report satisfied the requirements in 18 U.S.C. section 3553(c)(2) that a sentencing court articulate its specific reasons for departing. The methodology used by the district court in determining the extent of the departure was also proper. It was not necessary for the court to explain why categories VII and VIII were inappropriate. *U.S. v. Nilsen*, __ F.2d __ (11th Cir. Aug. 4, 1992) No. 90-5950.

2nd Circuit remands to determine whether prior conviction fell within 10-year period prior to instant offense. (520) Defendant was found to be a career offender based in part on a prior state conviction dated June 27, 1977. The parties disputed whether that conviction was within the 10-year period prior to the instant offense, and if so, whether it involved a sentence of over one year and one month. The 2nd Circuit remanded for resentencing since the district court erroneously believed that defendant had waived his objection to a prior conviction date of 1979. If the conviction was over 10 years prior to the instant offense, then the length of the imprisonment served governs whether the conviction should be counted for purposes of computing defendant's criminal history. *U.S. v. Moore*, __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

11th Circuit suggests that "higher authority" resolve whether felon's possession of a firearm is a crime of violence. (520) Following its decision in *U.S. v. Stinson*, 943 F.2d 1268 (11th Cir. 1991), the 11th Circuit affirmed that possession of a firearm by a convicted felon is a crime of violence for career offender purposes. However, two of the panel judges would not have adopted the per se rule in *Stinson*. Although they agreed that the Sentencing Commission could not, by amending the commentary to the career offender guidelines, change the settled law of the circuit, they would not have rejected the amended commentary where the case law is still unsettled in the Circuit. They suggested that to reach the goal of uniformity of sentences in criminal cases, a "higher authority" would have to settle the matter. *U.S. v. Bruce*, 965 F.2d 1000 (11th Cir. 1992).

Determining the Sentence (Chapter 5)

5th Circuit holds that Parole Commission setting release date for prisoner from Mexico need not impose statutory minimum term of supervised release. (580) Defendant was arrested in Mexico on drug charges and sentenced to nine years imprisonment. Pursuant to a treaty with

Mexico, defendant was transferred to the United States. Under 18 U.S.C. section 4106A(b)(A), the Parole Commission is directed to determine a release date and a period and conditions of supervised release. The combined periods of imprisonment and supervised release may not exceed the sentence imposed by the foreign court. The Parole Commission ordered that defendant serve a 91-month term of imprisonment followed by an eight-month term of supervised release. Defendant argued that the Commission improperly departed below the statutory minimum three-year term of supervised release under 21 U.S.C. section 841(b)(1)(C) so that it could order a longer term of imprisonment. The 5th Circuit held that the Parole Commission was not required to impose the statutory minimum period of supervised release under section 841(b)(1)(C), because it was only determining a release date and not sentencing defendant. *Molano-Garza v. U.S. Parole Commission*, 965 F.2d 20 (5th Cir. 1992).

7th Circuit holds that error in warning about supervised release did not entitle defendant to withdraw guilty plea. (580)(790) The district court advised defendant that in addition to his term of imprisonment, he faced a term of supervised release of four years to life. In fact, the term was eight years to life, and defendant actually received an eight year term of supervised release. The 7th Circuit held that the district court's error in advising defendant of his mandatory minimum term of supervised release was harmless, and did not entitle defendant to withdraw his guilty plea. Defendant's plea agreement did not promise that the term of supervised release would be at the low end of the range. The term he received fell within the range of the warning defendant received. *U.S. v. Saenz*, __ F.2d __ (7th Cir. July 17, 1992) No. 91-3265.

4th Circuit holds that restitution under VWPA cannot include consequential damages such as attorneys' fees. (610) As a result of defendant's fraudulent misrepresentations to his brother's creditor, the creditor delayed repossessing $45,000 worth of equipment which it had sold to the brother. By the time the creditor attempted to repossess the equipment, the brother had disposed of much of the property and most of it had to be sold at auction. The creditor also incurred legal expenses in repossessing the equipment and liquidating it. The 4th Circuit reversed a $42,500 restitution award, holding that an award of restitution under the Victim and Witness Protection Act (VWPA) cannot include consequential damages such as attorneys' and investigators fees expended to recover the property. Moreover, an award of restitution under the VWPA must be based on findings as to the value of the property as of the date of loss or the date of sentencing, and as to the value of any part of the property that is returned, as of the date of return. No such factual findings were made by the district court. *U.S. v. Mullins*, __ F.2d __ (4th Cir. Aug. 7, 1992) No. 92-5087.

9th Circuit holds that restitution in mail fraud case is not limited to amount of check mailed, but includes entire scheme. (610)795) Relying on *Hughey v. U.S.*, 495 U.S. 411 (1990), and *U.S. v. Snider*, 957 F.2d 703 (1992), defendant argued that the restitution exceeded that permitted by the Victim Witness Protection Act, 18 U.S.C. section 3579. *Hughey* interpreted that Act as limiting restitution only to losses underlying the offense of conviction, and not for related conduct. *Snider* concluded that a defendant could not be required to pay restitution beyond the offense of conviction even if the plea agreement so provided. In this case, the 9th Circuit held that the restitution did not go beyond the offense of conviction because "the fraud charged, and the restitution permitted, is clearly not limited to the amount of [the] check" in count one. Similarly, count two alleged a scheme to defraud an insurance company of $102,163.72 and alleged that in furtherance of that fraud, defendant caused a statement of his physical condition to be placed in the mail. The 9th Circuit held that the "valueless physical statement does not limit the amount of the fraud charged." *U.S. v. Scarano*, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143.

10th Circuit reverses restitution order which defendant lacked ability to pay. (610) The 10th Circuit reversed a $160,248 restitution order, finding that the district court improperly failed to consider defendant's financial condition and present and future ability to pay. Both defendant and the government conceded that defendant did not have a present ability to pay the restitution and that he did not have significant future earning capacity. Defendant had no assets, no steady employment, no source of income, a high school education, and debt of $700. Defendant had sought Aid to Families with Dependent Children and lived with his mother. *U.S. v. McIlvain*, __ F.2d __ (10th Cir. June 30, 1992) No. 91-6113.

2nd Circuit reverses fine that judge incorrectly thought was recommended by presentence report. (630) Defendant's presentence report indicated a guideline fine range of $17,500 to

$175,000, but stated that defendant owned no assets at the time, had no income or expenses, and did not appear to have the ability to pay a fine. Nonetheless, the district judge imposed upon defendant a fine of $17,500 "as recommended." The 2nd Circuit remanded for resentencing. The presentence report should not be read as recommending a fine in view of its conclusion that defendant did not appear to have the ability to pay a fine. In view of the confused state of the record on this issue, defendant's sentence was vacated and remanded for reconsideration of his sentence with respect to the fine. *U.S. v. Rivera*, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

10th Circuit remands to reimpose fine using proper fine range. (630) The district court calculated defendants' fine range to be $141,598 to $424,794, based on the pecuniary gain to defendants as the minimum, under section 5E4.2(c)(1)(B), and three times that amount as the maximum, under section (c)(2)(C). The district court then imposed the minimum fine on each defendant. However, the district court also ordered restitution by each defendant in the amount of $141,598, which had the effect under section 5E4.2(c) of reducing the minimum fine to $10,000. The 10th Circuit rejected defendants' attempt to simply revise the sentence and impose the minimum fine of $10,000, and the government's request to uphold the fine as still within the proper fine range. Instead, the court remanded the case to the district court to reconsider the imposition of the fine. It was impossible to determine whether the district court would have imposed a fine of $10,000, or $141,598, or some other amount, had it properly calculated the fine range. *U.S. v. Hollis*, __ F.2d __ (10th Cir. July 31, 1992) No. 91-6290.

9th Circuit rejects guideline challenges because the statutory minimum sentence controls. (650) Defendant argued that the district court improperly failed to make findings regarding role and acceptance of responsibility. Under section 5G1.1(b), because the statutory minimum sentence was greater than the relevant guideline range, the guideline range did not apply and the findings were irrelevant to the sentence. *U.S. v. Asuncion*, __ F.2d __ (9th Cir. August 24, 1992), No. 90-10594.

D.C. Circuit upholds consecutive sentences for instant and prior offenses. (650) The D.C. Circuit rejected defendant's claim that his sentence for the instant offense should run concurrently with his sentence for a prior offense. Under 18 U.S.C. section 3584(a), the district court's decision to impose the sentences consecutively was clearly within its discretion. If a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively. *U.S. v. Johnson*, __ F.2d __ (D.C. Cir. July 31, 1992) No. 91-3137.

10th Circuit holds that non-custodial sentences are not sole means of making physical impairment departures. (680)(736) Defendant requested a downward departure under section 5H1.4 based upon his physical and mental disabilities. The district court held that it was without authority to depart downward, since departures under section 5H1.4 are limited to those cases in which a defendant's physical impairment is so extraordinary that only a non-custodial sentence is appropriate. The 10th Circuit remanded for reconsideration of defendant's request, holding that section 5H1.4 is not so limited. The plain language of section 5H1.4 provides that an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range, and then gives as an example a situation where home detention is as efficient as, and less costly than, imprisonment. The example is the not exclusive means of following the policy statement, because such an interpretation would ignore the words "below the applicable guideline range." *U.S. v. Slater*, __ F.2d __ (10th Cir. Aug. 4, 1992) No. 91-3276.

Departures (§5K)

8th Circuit holds that court may not depart below mandatory minimum except for substantial assistance. (700) Defendant requested a downward departure from his mandatory minimum 15-year sentence under section 5K2.13 based upon his reduced mental capacity. The 8th Circuit affirmed that the district court lacked the authority to depart, since a court may depart below a mandatory minimum sentence only by motion of government and only to reflect substantial assistance by the defendant. *U.S. v. Rudolph*, __ F.2d __ (8th Cir. July 22, 1992) No. 91-1084.

2nd Circuit reaffirms that refusal to depart is not appealable. (712)(860) One defendant claimed that the district court should have made a downward criminal history departure and the other defendant claimed that the district court should have departed downward based upon her substantial assistance. The 7th Circuit refused to

review the refusals to depart. The first defendant's request for a downward departure would have no effect upon the mandatory minimum sentence he received, and a refusal to depart downward is not appealable. The second defendant's argument for a substantial assistance departure in the absence of a government motion was foreclosed by the absence of a credible assertion that the government's refusal to make the motion was based on an unconstitutional motive. *U.S. v. Rivera*, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

2nd Circuit reverses downward departure for cooperation made without government motion. (712) Despite the lack of a government motion under section 5K1.1, the district court departed downward, noting that defendant's cooperation had been of some assistance to the government and that such cooperation was evidence of his contrition. The 2nd Circuit reversed, reaffirming that downward departures based on "substantial assistance" to the government may be made only where the government has made a motion under section 5K1.1. Cooperation cannot be separated into its benefit to the prosecution and its evidence of contrition, with a sentencing judge free to assess the latter as a grounds for departure in the absence of a government motion. The government's decision not to move for a downward departure is reviewable only upon an adequately pleaded claim that the refusal was not rationally related to any legitimate governmental end. No such claim was made here. *U.S. v. Gonzalez*, __ F.2d __ (2nd Cir. July 24, 1992) No. 91-1690.

9th Circuit remands to clarify reasons for government's refusal to move for substantial assistance departure. (712) The government refused to move for a downward departure, stating that the defendants had not provided any useful assistance, and that the assistance of a third party, such as a defendant's sister, would be an inappropriate basis for departure. Nevertheless, the district court departed downward, stating that the "factors that are being considered here are ones that are violative of due process and equal protection," and "I have no reason to believe that they have not provided substantial cooperation, substantial assistance that they are capable of supplying." Relying on *Wade v. U.S.*, 112 S.Ct. 1840 (1992), the 9th Circuit noted that a district court can grant relief if it finds that the prosecutor's refusal to move for a substantial assistance departure "was based upon an unconstitutional motive, such as race or religion or upon due process grounds, that the refusal was not rationally related to any legitimate state objective." The 9th Circuit said that in this case "there is some indication of an unconstitutional basis for the government's refusal." Accordingly, the sentences were vacated and the case was remanded so the district court could "clarify the legal basis of its sentencing decision." *U.S. v. Delgado-Gardenas*, __ F.2d __ (9th Cir. Sept. 3, 1992) No. 91-50253.

7th Circuit upholds upward departure based on Hobbs Act violator's use of organized crime connections. (715) Defendant was convicted of various Hobbs Act violations for extorting money from local businessmen. The 7th Circuit upheld a seven level upward departure based upon defendant's use of organized crime connections in committing the offense. Since an organized crime connection is not an element of the Hobbs Act offense, it could not have been taken into consideration by the sentencing commission in determining the appropriate offense level under sections 2E1.5 and 2B3.2(a), and was an appropriate ground for a departure. The seven level departure was appropriate. The judge found the use of organized crime to be most analogous to the discharging of a firearm, which required a five level enhancement under section 2B3.2(b0(2)(A). The judge then found that the analogy was not perfect, and that use of organized crime was more harmful than discharging a weapon, and increased by two more levels. *U.S. v. Schweihs*, __ F.2d __ (7th Cir. Aug. 6, 1992) No. 90-1463.

8th Circuit upholds upward departure for threat to kill a policeman after release from prison. (715) Defendant was convicted of several counts of assaulting a federal officer. Defendant's probation officer reported that defendant stated that the day he was released from prison, a police officer was going to die. He was planning to shoot the first police officer who pulled him over "right in the face, that's how cold-blooded I'll be." The district court departed upward from offense level 26 to 28 based on the nature of the offense and defendant's failure to conform to the rules and regulations of society. The court also referenced defendant's history of "violent episodes." The 8th Circuit held that the district court was clearly permitted to consider defendant's significant history of violent episodes, use of weapons and continuing pattern of disrespect for, flight from and assault upon police officers. The district court was also permitted to consider defendant's capacity for future violence and recidivism, based upon the threats he made to his probation officer. *U.S. v. Cook*, __ F.2d __ (8th Cir. Aug. 5, 1992) No. 92-1241.

6th Circuit rejects disparate sentences as grounds for departure. (716)(860) Defendant claimed that his sentence was excessive because it was greater than that imposed on other individuals involved in related activities. Relying on Circuit precedent, the 6th Circuit rejected this claim. A district court may not depart downward under the guidelines for the purpose of harmonizing the sentences received by co-defendants. Because defendant's sentence was within the guideline range, to bring defendant's sentence into conformity with his co-defendants would require a downward departure. Defendant's co-defendants were not similarly situated. One co-defendant was not as involved in the fraud scheme and agreed to cooperate and make significant restitution. Another co-defendant received the same sentence as defendant. Moreover, defendant was the mastermind behind the scheme. *U.S. v. Romano*, __ F.2d __ (6th Cir. July 16, 1992) No. 91-1999.

10th Circuit refuses to review co-defendant's disparate sentences. (716) Defendant complained that his 57-month sentence was arbitrary, since his wife, who he contended was more culpable, received a 46-month sentence. The 10th Circuit refused to review the district court's reasons for imposing the different sentences. As long as the sentences fall within the applicable guideline range, they are not reviewable by the appellate court. *U.S. v. Hollis*, __ F.2d __ (10th Cir. July 31, 1992) No. 91-6290.

6th Circuit refuses to review refusal to depart based upon defendant's duress. (730)(860) The district court rejected defendant's request to depart downward under section 5K2.12 based upon coercion and duress. The 6th Circuit refused to review the refusal to depart, since (1) the district court properly computed the guideline range, (2) the district court was not unaware of its discretion to depart downward from the guideline range, and (3 the district court did not impose the sentence in violation of law or as a result of the incorrect application of the sentencing guidelines. *U.S. v. Chalkias*, __ F.2d __ (6th Cir. July 30, 1992) No. 91-3528.

Sentencing Hearing (86A)

6th Circuit affirms that drug quantity is not a jury issue. (755) The 6th Circuit summarily rejected defendant's claim that the amount of heroin involved in his offense was a jury issue, not a mere sentencing consideration. *U.S. v. Markarian*, __ F.2d __ (6th Cir. June 24, 1992) No. 91-1771.

Article argues that defendants have constitutional right to confront adverse witnesses at sentencing. (770) In "*An Argument for Confrontation under the Federal Sentencing Guidelines*," a student author argues that a criminal defendant has the right under the Confrontation Clause of the 6th Amendment and under the Due Process Clause of the 5th Amendment to confront adverse witnesses at his sentencing hearing. The author contends that the guidelines have transformed the sentencing hearing into a fully adversarial proceeding where adversarial safeguards are necessary. In addition, the author maintains that the guidelines give each defendant a liberty interest in receiving a sentence that is within a particular guideline range. This liberty interest and the increase in accuracy that would occur from permitting a defendant to confront adverse witnesses outweighs any administrative burden to the government or its interest in using confidential informants. 105 HARV. L. REV. 1880-99 (1992).

6th Circuit affirms that district court could disregard defendant's testimony concerning drug quantity. (770) Although defendant estimated that the drug quantity involved in his case was five kilograms of cocaine, the district court determined that defendant was responsible for 40 to 50 kilograms. The 10th Circuit affirmed that the district court could disregard defendant's testimony in favor of numerous other witnesses who testified that much larger amounts of cocaine were involved. *U.S. v. Chalkias*, __ F.2d __ (6th Cir. July 30, 1992) No. 91-3528.

2nd Circuit upholds inadequacy of criminal history as proper basis for sentence at top of guideline range. (775) The district court sentenced defendant to the top of his applicable guideline range, stating that it believed that defendant was a very violent and very dangerous young man and that criminal history category I inadequately reflected the seriousness of his past criminal conduct. The 2nd Circuit affirmed that this statement of reasons satisfied 18 U.S.C. section 3553(c)(1). *U.S. v. Rivera*, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

6th Circuit refuses to review stated reasons for sentence at top of guideline range. (775) The district court sentenced defendant at the top of her guideline range because it was disturbed by evidence that defendant had introduced her

brother-in-law to a co-conspirator so that he could purchase cheap cocaine from the co-conspirator. Defendant contended this was improper since the information was not contained in her presentence report and she did not have the opportunity to rebut this information. The 6th Circuit refused to review the district court's decision to sentence defendant at the top of her guideline range. The cases cited by defendant dealt with upward departures, whereas the information considered by the district court was not the basis of a departure. Moreover, defendant had notice of this information because it came from testimony given by her brother-in-law at trial. *U.S. v. Chalkias*, __ F.2d __ (6th Cir. July 30, 1992) No. 91-3528.

2nd Circuit says unsupported claims did not require evidentiary hearing on application to withdraw guilty plea. (790) The 2nd Circuit upheld the district court's refusal to hold an evidentiary hearing on defendant's application to withdraw his guilty plea. A defendant is not entitled to an evidentiary hearing as a matter of right, but must present some significant questions concerning the voluntariness or general validity of the plea to justify an evidentiary hearing. Defendant's claim that he was innocent of the gun charge was undercut by its timing, coming seven months after the plea. It also was directly contradicted by his incriminating statements at the plea allocution. His claim that he plead guilty based upon his attorney's incorrect advice regarding the terms of his cooperation agreement was contradicted by his admissions at the plea allocution that he had read the cooperation agreement and was familiar with its contents. Defendant's claim that his attorney was under a conflict of interest based upon unrelated charges pending against the attorney was also unsupported, since the attorney did not discover that he was under investigation until after defendant plead guilty. *U.S. v. Gonzalez*, __ F.2d __ (2nd Cir. July 24, 1992) No. 91-1690.

5th Circuit permits defendant to plead anew after court failed to advise him of mandatory minimum penalty. (790) The 5th Circuit held that the district court's failure to advise defendant at his plea hearing that he faced a mandatory minimum term of five years constituted a complete failure to address a Rule 11 core concern, and mandated that the plea be set aside. Rule 11 addresses three core concerns: (a) whether the guilty plea was coerced, (b) whether defendant understands the nature of the charges, and (c) whether the defendant understands the consequences of his plea. A complete failure to address any one of these core concerns when accepting a plea mandates reversal; Rule 11(h)'s harmless error analysis is inapplicable. The district court's failure to advise defendant of, and determine that he understood, the mandatory minimum sentence went to the heart of the requirement that a defendant understand the consequences of his plea. One of Rule 11's objectives is to insure that a defendant knows what minimum sentence the judge must impose. *U.S. v. Martirosian*, __ F.2d __ (5th Cir. July 27, 1992) No. 90-8327.

11th Circuit holds that "original sentence" in section 3565(a) does not refer to term of probation. (800) Under 18 U.S.C. section 3565(a), if a probationer is found to be in possession of a controlled substance, the court must revoke probation and sentence the defendant to not less than one-third of "the original sentence." Agreeing with the 3rd Circuit and disagreeing with the 9th Circuit, the 11th Circuit held that the term "original sentence" in section 3565(a) refers to the term of incarceration to which the defendant could have been sentenced, rather than the term of probation. Defendant pled guilty to a crime that carried a maximum sentence of six months. He had a guideline range of zero to six months, and received a sentence of five years probation. Defendant's 20-month sentence for violating his probation was in excess of the sentence which he could have originally received for committing the offense. Congress did not intend the term "original sentence" to mean the period of probation, because this would mean that a violation of probation would subject the defendant to more than three times the length of imprisonment he faced when sentenced for his crime. *U.S. v. Granderson*, __ F.2d __ (11th Cir. Aug. 4, 1992) No. 91-8728.

11th Circuit affirms that positive urinalysis demonstrated probationer's possession of drugs. (800) Defendant's probation was revoked under 18 U.S.C. section 3565(a) for possessing a controlled substance after his urine sample tested positive for cocaine. Defendant contended that the positive urinalysis demonstrated that he merely "used" drugs and not that he "possessed" cocaine. The 11th Circuit upheld the district court's finding that defendant possessed the cocaine. Application note 5 to guideline section 7B1.4 says that the district court may determine whether evidence of drug usage "established solely by laboratory analysis" constitutes possession of a controlled substance. Here, the district court reviewed the evidence, exercised its factfinding power and determined that defendant had possessed cocaine. Defendant gave

no reason to question the validity of the court's finding. *U.S. v. Granderson,* __ F.2d __ (11th Cir. Aug. 4, 1992) No. 91-8728.

Appeal of Sentence (18 U.S.C. §3742)

2nd Circuit holds that defendants waived their right to appeal sentences. (850) Defendants' plea agreements provided that should the district court sentence the defendant for one of their offenses within the range set forth in the agreement, then neither the government nor the defendant would file a notice of appeal for review of the sentence imposed on that offense. The 2nd Circuit held that since both defendants received sentences within the agreed range for the specified offense, they waived their right to appeal the sentences for that offense. *U.S. v. Rivera,* __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027.

2nd Circuit says that government may obtain permission to appeal sentence after filing notice of appeal. (850) Under 18 U.S.C. section 3742(b), the government may file a notice of appeal for review of sentence, but may not further prosecute the appeal without the personal approval of the Attorney General, Solicitor General, or designated Deputy Solicitor Generals. Defendant argued that the court did not have jurisdiction to review the government's appeal of a downward departure, since the government did not obtain written permission to appeal the sentence until two months after filing its notice of appeal. The 2nd Circuit affirmed its jurisdiction, holding that the personal approval requirement in section 3742(b) is not jurisdictional. Although language in the statute prior to the 1990 amendment supported the conclusion that the government was to obtain approval prior to filing the notice of appeal, the language of the amended statute clearly indicates that approval is necessary only before "further prosecution" of the appeal. *U.S. v. Gonzalez,* __ F.2d __ (2nd Cir. July 24, 1992) No. 91-1690.

11th Circuit holds that defendant waived objection to condition of supervised release by failing to object at sentencing. (855) Defendant, a computer hacker, was prohibited from owning or using without supervision a personal computer during his period of supervised release. The 11th Circuit held that defendant's objection to this condition was waived by his failure to object at sentencing. At the end of the sentencing hearing, defense counsel stated that his single objection was to an upward departure, and made no mention of the supervised release condition. Earlier in the hearing, counsel did comment that after his release defendant might need to earn his living as a solo computer programmer. The judge then explained that the condition was not meant to prevent defendant from earning a living with computers, but from doing it in an unsupervised way. Counsel's single comment could not be interpreted as an objection, in light of his later identification of another issue as his sole objection to defendant's sentence. *U.S. v. Riggs,* __ F.2d __ (11th Cir. Aug. 4, 1992) No. 90-9108.

2nd Circuit affirms that district court was aware of its authority to depart downward. (860) In rejecting defendant's request for a downward departure based upon his wife's medical condition, the district court stated "I am very sorry that that is the case, but I think the kind of conduct that this man was involved in, I cannot consider a downward departure." The 2nd Circuit affirmed that the district court was aware of its authority to depart downward. The court's statement indicated that in view of the seriousness of defendant's offense, it would be inappropriate to depart. *U.S. v. Caming,* __ F.2d __ (2nd Cir. June 29, 1992) No. 92-1043.

2nd Circuit says that whether a prior conviction should be counted in criminal history is a question of law. (870) The 2nd Circuit found that whether defendant's prior driving with ability impaired convictions should be counted for criminal history purposes is a question of law to be reviewed de novo. *U.S. v. Moore,* __ F.2d __ (2nd Cir. June 25, 1992) No. 91-1024.

Forfeiture Cases

2nd Circuit affirms its jurisdiction to review interlocutory seizure and closure of business. (905) In a civil forfeiture action brought under 18 U.S.C. section 981(a)(1)(A), the government seized claimant's business and hung an "Out of Business" sign outside its building. The district court subsequently denied claimant's motion to reopen the business. The 2nd Circuit upheld its jurisdiction to review the district court's interlocutory order, which required the business to remain closed. The order had the effect of an injunction and thus was appealable under 28 U.S.C. section 1292(a)(1). The ex parte seizure warrant, combined with the district court's subsequent refusal to vacate the seizure, had the same effect as if the district court had enjoined claimants from operating their businesses. The

consequences of the order were even more dire than if the district court had appointed a receiver to run the business pending final disposition of the case. Since section 1292(a)(2) grants appellate courts jurisdiction over appeals from interlocutory orders appointing receivers, an order such as this one must also be appealable. Judge Van Graafeiland dissented. *U.S. v. All Assets of Statewide Auto Parts*, __ F.2d __ (2nd Cir. Aug. 3, 1992) No. 92-6015.

2nd Circuit upholds its jurisdiction to review interlocutory order permitting government to sell claimants' home. (905) In a civil forfeiture action against claimants' home, the district court granted the government's motion for an order permitting the interlocutory sale of the property, with the proceeds of the sale to be held in escrow pending resolution of the forfeiture issues. The 2nd Circuit affirmed its jurisdiction to review the order under the collateral order doctrine. This doctrine allows an appellate court to review immediately a district court order affecting rights that will be irretrievably lost in the absence of an immediate appeal. Given the unique nature of real property and the unique relationship between a person and his or her home, the order qualified as an appealable order: it conclusively determined an important issue, one that is separate from the merits of the action and one that would be effectively unreviewable on appeal from a final judgment. *U.S. v. Esposito*, __ F.2d __ (2nd Cir. Aug. 3, 1992) No. 91-6322.

2nd Circuit refuses to vacate improper pre-hearing seizure and closure of business. (910) In a civil forfeiture action brought under 18 U.S.C. section 981(a)(1)(A), the government seized claimant's business and closed it. The district court subsequently denied claimant's motion to reopen the business. Claimant argued that the seizure of the company's assets, without a prior hearing or prompt post-seizure hearing, violated due process. The 2nd Circuit agreed that the district court's order was improper, but refused to vacate it because claimant failed to refute the government's case in any way. The lack of exigent circumstances combined with the drastic measures taken by the government led the court to conclude that the district court's approval of the ex parte, pre-notice seizure was erroneous. However, the court refused to vacate the order. Due process requires notice and an opportunity to be heard at a meaningful time. Claimant had that opportunity after the seizure, yet failed to present any evidence that would require a contrary result. Claimant, who would bear the burden of proof at the forfeiture trial, showed no likelihood of success on the merits. Judge Van Graafeiland dissented, believing the district court's order was proper. *U.S. v. All Assets of Statewide Auto Parts*, __ F.2d __ (2nd Cir. Aug. 3, 1992) No. 92-6015.

1st Circuit affirms that court clerk can issue arrest warrant in rem for civil forfeiture without prior determination of probable cause. (910) Relying on *U.S. v. Pappas*, 613 F.2d 324 (1st Cir. 1980), the district court held that the government must obtain a judicial finding of probable cause before "arresting" a property pursuant to a civil forfeiture action. The 1st Circuit reversed, holding that amended Rule C(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims clearly allows a deputy court clerk to issue an arrest warrant in rem pursuant to a civil forfeiture complaint, without a prior determination of probable cause by an independent judicial officer. This procedure does not violate the 4th Amendment, since it does not involve a government "seizure" of the real property. The marshal's posting of the arrest warrant serves as notice to the in rem defendant of the civil complaint filed against it. Claimant is not denied access to the property. The warrant merely brings the real property under the jurisdiction of the court. While the posting of an arrest warrant might hinder an owner's ability to sell the property, it does not amount to such a deprivation of property rights so as to warrant due process protection under the 5th Amendment. *U.S. v. Twp 17 R 4, Certain Real Property in Maine*, __ F.2d __ (1st Cir. July 29, 1992) No. 91-1932.

1st Circuit affirms that forfeiture complaint contained sufficient particularity. (920) The 1st Circuit affirmed that the government's forfeiture complaint contained sufficient particularity to satisfy Rule E(2)(a) of the Supplemental Rules for Certain Admiralty and Maritime Claims. The complaint was more than sufficient to support a reasonable belief that the government, at trial, could make a probable cause showing that most, if not all, of the defendant property was connected to illegal drug proceeds. The facts alleged in the complaint were sufficient to put claimant on notice, and provide him enough information to allow him to investigate and respond to the complaint. The complaint alleged that a fugitive from justice, acting under an alias, purchased the defendant properties with money he derived from trafficking of large amounts of controlled substances, as he was not in any other way employed during the time of the purchases. The complaint also alleged that these purchases took place between the years 1985 and

1988. *U.S. v. Twp 17 R 4, Certain Real Property in Maine*, __ F.2d __ (1st Cir. July 29, 1992) No. 91-1932.

2nd Circuit reverses order permitting government to conduct an interlocutory sale of claimants' house. (920) In a civil forfeiture action against claimants' home, the district court permitted an interlocutory sale of the property, with the proceeds of the sale to be held in escrow pending resolution of the forfeiture issues. The 2nd Circuit reversed, since the district court did not make any findings of fact or mention any of the factors listed in Supplemental Rule E(9)(b) for the interlocutory sale of seized property. Rule E(9)(b) allows a court to order an interlocutory sale of seized property if the property is perishable or liable to deterioration, if the expense of keeping the property is excessive, or if there is unreasonable delay in securing the release of the property. Although a building is subject to depreciation, real property is not, and there was no finding that the home was deteriorating while in custody. Moreover, the $675,000 sale price was too low given a four-month old appraisal valuing the property at $910,000. The government's expense of $22,000 for maintenance and repair during a four year period was not excessive. Any delay was principally the fault of the government. *U.S. v. Esposito*, __ F.2d __ (2nd Cir. Aug. 3, 1992) No. 91-6322.

District Court holds that in rem civil forfeiture is "remedial" and therefore applies retroactively. (920) In this civil forfeiture proceeding under the Financial Institution Reform, Recovery and Enforcement Act ("FIRREA)," the District Court noted that where Congressional intent is ambiguous, "a statute may be applied retroactively if it merely affects remedies and does not change substantive rights." The court held that in the context of FIRREA, in rem civil forfeiture resembles a remedial measure. "In contrast to FIRREA's criminal forfeiture and civil penalties provisions which attach to the person, 18 U.S.C. section 982, 1031, FIRREA's civil forfeiture provisions do not focus on the individual but rather his property." Thus the court upheld the forfeiture of the property that the claimant purchased after making false statements on his loan application prior to the effective date of the statute. The legislative scheme was remedial in nature and not substantive, and therefore could be applied retroactively. *U.S. v. 403-1/2 Skyline Drive, La Habra Heights, CA*, __ F.Supp. __ (C.D. Cal. Aug. 20, 1992) No. CV 92-1205 DT.

6th Circuit says innocent spouse is entitled to entire property held as tenant by the entirety and awarded in divorce. (970) Claimant, an innocent owner, and her husband, owned as tenants by the entirety a house which was the subject of a forfeiture action. In *U.S. v. Certain Real Property*, 910 F.2d 343 (6th Cir. 1990), the 6th Circuit held that the government was precluded from obtaining the husband's interest in the property unless claimant predeceased her husband or the entireties estate was otherwise terminated by divorce or joint conveyance. Unbeknownst to the district or appellate court, claimant and her husband were engaged in divorce proceedings, and prior to the original appeal, the divorce became final. The divorce court awarded claimant the entire house. The 6th Circuit affirmed the district court's determination that claimant owned the property free and clear of any interest by her ex-husband or the government. The federal forfeiture laws do not operate to destroy the fundamental characteristics given to real property by the states. The government could not step into the husband's place as a tenant by the entirety because the unities of time, title and person would be violated. However, the case was remanded for the district court to determine whether the state divorce court had all the facts before it in making its determination. Judge Krupansky concurred. *U.S. v. Certain Real Property Located at 2525 Leroy Lane, West Bloomfield, Michigan*, __ F.2d __ (6th Cir. Aug. 7, 1992) No. 91-2174.

7th Circuit affirms that funds, rather than account in which funds are located, must be traced to fraudulent activity. (970) Defendants sold stereo speakers using fraudulent sales techniques, and put the proceeds from the fraud in several different accounts. The United States brought a forfeiture action under 18 U.S.C. section 981 against the funds in these accounts. Claimants contended that they ended their fraudulent scheme in 1988, and the sums seized from the accounts in September 1989 could not be traced to their fraudulent scheme. The government contended that it did not matter whether the balances in the accounts could be traced to unlawful activity since the accounts were "involved in" the fraud during 1988. The 7th Circuit rejected the argument, holding that such tracing was necessary. "It makes no sense to confiscate whatever balance happens to be in a account bearing a particular number, just because proceeds of crime once passed through that account." Only property used in or traceable to "specified unlawful activity" is forfeit. However, the money seized in

this case was forfeitable. Claimants only admitted phasing out the use of one of their fraudulent sales techniques. Abandoning one deceitful device among a large repertory does not make the operation lawful. *U.S. v. $448,342.85,* __ F.2d __ (7th Cir. July 29, 1992) No. 91-2912.

Topic Numbers In This Issue

100, 110, 115, 125, 131, 132, 135,
140, 150, 160, 170, 175, 180,
220, 224, 226, 230, 242, 245, 253,
254, 260, 265, 275, 280, 284, 290,
300, 360, 370, 330,
410, 430, 431, 432, 445, 460, 461,
462, 482, 484, 486, 488, 490,
504, 510, 520, 560, 580,
610, 630, 650, 680,
700, 712, 712, 715, 716, 730, 736,
755, 765, 770, 775, 780, 790, 795,
800, 850, 855, 860, 870,
905, 910, 920, 970

TABLE OF CASES

U.S. v. Nilsen, __ F.2d __ (11th Cir. Aug. 4, 1992) No. 90-5950. Pg. 5, 16

U.S. v. Nino, __ F.2d __ (11th Cir. Aug. 6, 1992) No. 90-3622. Pg. 9

U.S. v. Riggs, __ F.2d __ (11th Cir. Aug. 4, 1992) No. 90-9108. Pg. 16, 22

U.S. v. Rivera, __ F.2d __ (2nd Cir. July 30, 1992) No. 91-1027. Pg. 7, 11, 13, 17, 18, 20, 22

U.S. v. Romano, __ F.2d __ (6th Cir. July 16, 1992) No. 91-1999. Pg. 2, 20

U.S. v. Rudolph, __ F.2d __ (8th Cir. July 22, 1992) No. 91-1084. Pg. 4, 18

U.S. v. Saenz, __ F.2d __ (7th Cir. July 17, 1992) No. 91-3265. Pg. 17

U.S. v. Scarano, __ F.2d __ (9th Cir. September 2, 1992) No. 91-10143. Pg. 3, 4, 5, 9, 11, 14, 15, 17

U.S. v. Schweihs, __ F.2d __ (7th Cir. Aug. 6, 1992) No. 90-1463. Pg. 12, 15, 19

U.S. v. Shriver, __ F.2d __ (11th Cir. Aug. 5, 1992) No. 91-3194. Pg. 9, 14

U.S. v. Skowronski, __ F.2d __ (2nd Cir. June 29, 1992) No. 92-1002. Pg. 5

U.S. v. Slater, __ F.2d __ (10th Cir. Aug. 4, 1992) No. 91-3276. Pg. 8, 18

U.S. v. Smith, __ F.2d __ (8th Cir. Aug. 10, 1992) No. 91-3824. Pg. 5

U.S. v. Stein, __ F.2d __ (8th Cir. Aug. 10, 1992) No. 91-3368. Pg. 4

U.S. v. Swinney, __ F.2d __ (8th Cir. July 30, 1992) No. 91-1294WM. Pg. 7, 13

U.S. v. Thompson, __ F.2d __ (8th Cir. Aug. 3, 1992) No. 91-2802. Pg. 13

U.S. v. Twp 17 R 4, Certain Real Property in Maine, __ F.2d __ (1st Cir. July 29, 1992) No. 91-1932. Pg. 23

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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IN THIS ISSUE:

Pre-Guidelines Sentencing

5th Circuit upholds reasonableness of pre-guidelines sentence. (100) For the pre-guidelines portion of his offense, defendant was convicted of three counts of money laundering, and received three concurrent 20-year terms. The 5th Circuit rejected defendant's claim that the sentences were plainly unreasonable. The sentences were ordered to run concurrently, rather than consecutively, and thus the district court gave defendant only one-third of the time he could have received. Moreover, the district court found that defendant's crimes were particularly egregious, injuring countless persons by depriving them of their rightful compensation for personal injury and property loss. *U.S. v. Green*, 964 F.2d 365 (5th Cir. 1992).

Guidelines Sentencing, Generally

5th Circuit upholds organizer enhancement based on co-conspirators' inadmissible confessions. (110)(431)(770) Six people arrested by border patrol agents confessed that they had been hired by defendants to transport marijuana across the border. Although these confessions were inadmissible at trial, they were used at defendants' sentencing to impose a leadership enhancement under section 3B1.1(c). The 5th Circuit affirmed the reliance upon the inadmissible confessions. Evidence that is inadmissible at trial may be considered in a sentencing hearing. The confessions had sufficient indicia of reliability, since they corroborated each other. Additionally, defendants rested separately from the other group of co-conspirators in the holding cell, dressed differently from the other group, and responded differently to police questioning. *U.S. v. Rojas-Martinez*, __ F.2d __ (5th Cir. July 29, 1992) No. 91-8218.

10th Circuit upholds use of illegally obtained evidence to deny reduction for acceptance of responsibility. (110)(480)(770) Defendant was convicted of transporting a minor across interstate lines for the purpose of engaging in prohibited sexual conduct. The district court denied him a reduction for acceptance of responsibility because he continued to engage in sex with minors while on bail. The identities of the minors were obtained after FBI agents told one of defendant's friends, in violation of state law, that defendant was infected with the AIDS virus. The 10th Circuit affirmed that the district court could properly rely upon the illegally obtained information to deny defendant a reduction for acceptance of responsibility. The possible deterrent effect of applying the exclusionary rule at sentencing did not outweigh the costs of withholding accurate information from the sentencing judge. There was no evidence that the FBI agents' actions were intended to secure an increased sentence. *U.S. v. Jessup,* 966 F.2d 1354 (10th Cir. 1992).

8th Circuit affirms denial of further reduction in defendant's sentence under Rule 35(b). (115) At sentencing, defendant received a downward departure based upon his substantial assistance. Several months later, the government moved to reduce his sentence even further pursuant to Fed. R. Crim. P. 35(b) based on defendant's post-sentencing cooperation. The 8th Circuit affirmed the district court's denial of the motion. The district court stated that it denied the motion because when it originally granted defendant the downward departure, it anticipated that defendant would continue to cooperate and had rewarded him accordingly. There was no abuse of discretion in the district court's denial of the motion. *Goff v. U.S.*, 965 F.2d 604 (8th Cir. 1992).

9th Circuit says disparity between guidelines sentence and co-conspirators' "old law" sentence did *not* violate equal protection. (120)(716) In *U.S. v. Ray,* 920 F.2d 562 (9th Cir.), as modified, 930 F.2d 1368 (9th Cir. 1990), the 9th Circuit permitted the district court to depart downward to equalize the defendant's guideline sentence with his co-defendants' non-guideline sentences which were imposed during the time the guidelines were held unconstitutional in the Ninth Circuit. The Ninth Circuit permits such "old law/new law" disparity departures, while forbidding disparity departures where all the co-defendants are sentenced under the guidelines. Here, the defendant argued that his 10 year guideline sentence violated equal protection because his co-conspirators' 10 and 13 year "old law" sentences were subject to greater good time credits and perhaps parole. In this reissued opinion, the court rejected the merits of the equal protection challenge, finding a district judge is not required to depart in order to equalize a defendant's sentence with that of a co-defendant not sentenced under the guidelines. The court lacked appellate jurisdiction to consider the discretionary refusal to depart. *U.S. v. Kohl,* __ F.2d __ (9th Cir. August 12, 1992), No. 91-30119, *withdrawing and superseding* 963 F.2d 268 (9th Cir. 1992).

5th Circuit includes embezzled funds in pre-guidelines counts in offense level for guidelines counts. (125)(220) Defendant committed a series of embezzlements and was sentenced under pre-guidelines law for the first 18 counts and under the guidelines for the last five counts. The 5th Circuit affirmed the district court's consideration of the funds involved in the pre-guidelines counts to determine defendant's base offense level for the guidelines counts. This case could not be distinguished from *U.S. v. Parks,* 924 F.2d 68 (5th Cir. 1991), which held that it was within the district court's discretion to impose consecutive sentences for pre-guidelines and guidelines offenses even if it used pre-guidelines conduct to determine the guideline offense level. *U.S. v. Gaudet,* __ F.2d __

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(5th Cir. July 10, 1992) No. 91-3647.

10th Circuit says using amended leadership guideline would violate ex post facto clause. **(131)(432)** Defendant was convicted of money laundering, but he received a leadership enhancement under guideline section 3B1.1(a) based upon his role in an uncharged fraud scheme. The 10th Circuit reversed, ruling that determining defendant's role based upon his role in relevant conduct would violate the ex post facto clause. In *U.S. v. Pettit*, 903 F.2d 1336 (10th Cir. 1990), it had held that the plain language of section 3B1.1 required the court to focus on the defendant' role in the offense of conviction rather than on other criminal conduct. After *Pettit*, the Sentencing Commission amended the commentary to section 3B1.1 to state that a defendant's role in the offense was to be determined on the basis of all relevant conduct. This amendment was effective November 1, 1990, after defendant committed his offense. In *U.S. v. Saucedo*, 950 F.2d 1508 (10th Cir. 1991), the court held that this amendment was a substantive change in the law and its application to offenses committed prior to the effective date of the amendment would violate the ex post facto clause. *U.S. v. Johnson*, __ F.2d __ (10th Cir. July 28, 1992) No. 91-5030.

5th Circuit says failure to treat series of embezzlements as "straddle" crimes was not plain error. **(132)** Defendant pled guilty to a series of 23 embezzlements. 18 occurred prior to the effective date of the guidelines, and five occurred after the effective date of the guidelines. Defendant was sentenced under pre-guidelines law for the first 18 counts, and was sentenced under the guidelines for the last five counts. He objected for the first time on appeal to the district court's application of pre-guidelines law to the first 18 counts, contending that the series of embezzlements was a continuing "straddle" crime to which the guidelines should be fully applicable. The 5th Circuit found that the failure to treat the embezzlements as a straddle crime was not plain error. Whether a number of embezzlements are continuing offenses depends on the particular facts of the case. If a court concludes that later embezzlements covered up earlier ones, it is entitled to find the offenses are continuing in nature. When a legal conclusion depends in part upon discreet factual findings and the court is never directed to those facts, its legal conclusion is almost never obviously wrong. *U.S. v. Gaudet*, __ F.2d __ (5th Cir. July 10, 1992) No. 91-3647.

9th Circuit applies amended guideline to conspiracy, but application to substantive counts was ex post facto. **(132)(380)** Agreeing with every other circuit that has addressed the issue, the 9th Circuit held that the amended guidelines applied to the conspiracy that continued after the date of the amendment. However, the court held that it was error to apply the amended guidelines to the substantive drug possession offenses which occurred prior to the effective date of the amended guidelines. The court held that this violated the ex post facto clause, and the case was remanded to the district court to resentence the defendant under the 1988 guidelines on the substantive counts. *U.S. v. Castro*, __ F.2d __ (9th Cir. August 17, 1992) No. 91-50369.

10th Circuit reaffirms that police referral to federal rather than state prosecutors does not violate due process. **(135)** Relying on *U.S. v. Anderson*, 940 F.2d 593 (10th Cir. 1991), the 10th Circuit affirmed that the local investigator's referral of defendant's case to federal, rather than state, prosecutors did not violate due process. Although police may have some influence on charging decisions, the ultimate decision about whether to charge a defendant and what charges to file rests solely with state and federal prosecutors. The absence of any written policies to guide police referral decisions did not violate due process. *U.S. v. Langston*, __ F.2d __ (10th Cir. July 2, 1992) No. 91-2003.

D.C. Circuit reverses downward departure based on government's transfer of case to federal court. **(135)(715)** Defendant was originally prosecuted in the D.C. Superior Court, but the U.S. Attorney's office dropped these charges in favor of a federal prosecution in order to take advantage of harsher federal penalties. The district court departed downward from the mandatory minimum penalty and the guidelines to impose a sentence like the one defendant would have received in Superior Court. Based on *U.S. v. Mills*, 925 F.2d 455 (D.C. Cir. 1991), *reheard en banc* 964 F.2d 1186 (D.C. Cir. 1992), the D.C. Circuit rejected this as a proper ground for a downward departure. *Mills* held that the transfer of cases from Superior Court to federal court did not violate due process. Similarly, the transfer of the case to federal court was not the sort of inappropriate manipulation of the indictment that might warrant a departure. The court reserved the question of whether prosecutorial misconduct of a constitutional dimension might warrant a departure from a minimum sentence. *U.S. v. Dockery*, 965 F.2d 1112 (D.C. Cir. 1992).

10th Circuit rejects 8th Amendment challenge to consecutive 30-year terms for drug offender. (140) Defendant was convicted of various drug and firearms offenses and received two consecutive 30-year terms of imprisonment. The 10th Circuit rejected the claim that the sentence violated the 8th Amendment because it was in effect a life term. A life sentence for a drug trafficker does not violate the 8th Amendment. *U.S. v. Sturmoski*, __ F.2d __ (10th Cir. June 3, 1992) No. 91-2209.

6th Circuit, en banc, rejects panel opinion in *Davern* and says guidelines are mandatory. (145) (150) In *U.S. v. Davern*, 937 F.2d 1041 (6th Cir. 1991), a 6th Circuit panel held courts should take a "flexible approach" to the guidelines by considering the facts in light of qualitative standards set forth in 18 U.S.C. section 3553(a). The 6th Circuit granted rehearing *en banc*, and rejected this flexible approach, finding that under 18 U.S.C. section 3553(b), the guidelines are a sentencing imperative. A district court must first determine a guideline sentence, and then consider whether there is an aggravating or mitigating circumstance not taken into account in setting the guideline sentence. Until the judge has determined a sentence under the guidelines, it is impossible to determine whether the mitigating or aggravating circumstances have in fact been taken into account in the guidelines. Judge Nelson, joined by Judges Guy, Suhrheinrich and Batchelder, concurred. Chief Judge Merrit, joined by Judges Martin and Jones, dissented. *U.S. v. Davern*, __ F.2d __ (6th Cir. July 21, 1992) No. 90-3681 (*en banc*).

Application Principles, Generally (Chapter 1)

3rd Circuit upholds downward departure for improper manipulation of indictment. (150)(715) Defendant embezzled bank funds and was convicted of embezzlement and tax evasion. The district court found that grouping of the two counts was not permitted under the guidelines, but that it was highly unusual for a defendant to be charged with both embezzlement and tax evasion for the moneys he embezzled. The court departed downward by two levels to correct this "inappropriate manipulation of the indictment." The 3rd Circuit upheld the departure, holding that a court may depart downward for manipulation of the indictment. Policy Statement 4(a) in Chapter 1, Part A in the Introduction to the Guidelines states that the Sentencing Commission 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. The district court properly fixed the amount of departure by reference to the two level increase caused by the failure to "group" the offenses. *U.S. v. Lieberman*, __ F.2d __ (3rd Cir. July 24, 1992) No. 91-5687.

7th Circuit requires enhancement where planning was more than "minimal" even if it was "typical." (160)(300) Defendant maintained two checking accounts. He purchased some stock, paying his brokerage house with a bad check drawn against one of his accounts. The next day he deposited into the first account a bad check drawn on his second account. Later, he deposited a check drawn on the first account into the second account. He continued this check kiting scheme for one month until he was caught. The 7th Circuit reversed the district court's determination that the offense did not involve more than minimal planning under 2F1.1(b)(2)(A). The court was willing to defer to the district court's determination that the offense did not involve more planning than is typical for the offense. However, the enhancement is also proper if the offender's crimes involved "repeated acts over a period of time, unless it is clear that each instance was purely opportune." Drafting 40 checks during a single month, few if any of which appeared to be purely opportune, fit this profile. *U.S. v. Doherty*, __ F.2d __ (7th Cir. July 24, 1992) No. 91-3291.

11th Circuit affirms dangerous weapon enhancement for possession of toy gun. (160)(224) Defendant was apprehended as he attempted to rob a bank. A toy gun which resembled an actual weapon was found in his pocket. He received an enhancement under section 2B3.1(2)(C) which applies "if a dangerous weapon (including a firearm) was brandished, displayed or possessed." Application note 1(d) of section 1B1.1 provides that where an object that appeared to be a dangerous weapon was brandished, displayed or possessed, treat the object as a dangerous weapon." Defendant conceded that a court could characterize a toy gun which is brandished or displayed as dangerous, but contended that a toy gun which is merely possessed is not dangerous. The 11th Circuit upheld the enhancement based upon defendant's possession of the toy gun. If a court finds that a particular toy gun is possessed by a defendant and "appears" to be a dangerous weapon if displayed, that is sufficient. Senior Judge Roney dissented. *U.S. v. Shores*, __ F.2d __ (11th Cir. July 22, 1992) No. 90-3462.

5th Circuit affirms that defendant was responsible for loss caused by brother in joint fraud scheme. **(170)(300)** Defendant and his brother each made numerous false claims on various insurance policies on the same car. The 5th Circuit affirmed that the value of the loss caused by defendant's conduct under section 2F1.1 properly included the fraudulent claims made by his brother, since the brother's conduct could be considered relevant conduct. The district court found that defendant's brother's conduct was part of a joint scheme or plan which defendant aided and abetted. While the court did not expressly state that it found the brother's conduct was reasonably foreseeable to defendant, the meaning of the court's finding was clear. *U.S. v. Lghodaro*, __ F.2d __ (5th Cir. July 24, 1992) No. 91-7322.

10th Circuit affirms that defendant was responsible for accomplice's actions in money laundering scheme. **(170)(360)** In determining the value of the funds laundered in defendant's money laundering scheme under guideline section 2S1.1(b), the district court considered the full amount of funds that defendant and his associate took from investors. The 10th Circuit affirmed that defendant was properly held accountable for the actions of his accomplice. Relevant conduct under section 1B1.3(a)(1) includes all acts which the defendant aided and abetted or for which he would otherwise be held accountable. Note 1 to section 1B1.3 indicates that conduct of others acting in concert with the defendant will be factored into the defendant's sentence. Here, there was abundant evidence at trial and at sentencing that defendant's accomplice was acting in concert with defendant in operating the scheme. *U.S. v. Johnson*, __ F.2d __ (10th Cir. July 28, 1992) No. 91-5030.

Offense Conduct, Generally (Chapter 2)

2nd Circuit holds court must sentence for "cocaine base" even though substance was not "crack." **(240)(242)** In *U.S. v. Jackson*, 768 F.Supp. 97 (S.D.N.Y. 1991), the district court held that the enhanced penalty provisions for crack cocaine in 21 U.S.C. section 841(b) and guideline section 2D1.1 were void for vagueness both on their face and as applied because they did not define the term "cocaine base." The court was influenced by the fact that the chemist who identified the substance as "cocaine base" also stated that the substance was not pure enough to be used as "crack." The 2nd Circuit reversed, noting that the provisions did not implicate First Amendment freedoms, and therefore they were not void on their face. With respect to defendant, the court found that "cocaine base" that is not pure enough to be used as "crack" still falls within the meaning of "cocaine base." Expert testimony established that there is an undisputed definition of "cocaine base," and that the substance in question met that definition. Although the substance was not crack, the court declined to equate cocaine base with crack. *U.S. v. Jackson*, __ F.2d __ (2nd Cir. June 15, 1992) No. 91-1664, *reversing* 768 F.Supp. 97 (S.D.N.Y. 1991).

4th Circuit rejects challenge to harsher penalties for crack than for powder cocaine. **(242)** Relying on a Minnesota case, defendants argued that the guidelines are unconstitutional because they impose more severe punishment for offenses involving crack than for those involving powder cocaine, which imposes a disproportionate punishment on blacks, who are the primary distributors and users of crack. The 4th Circuit rejected this argument. Under the federal equal protection standard, absent purposeful discrimination, differential impact is subject only to the test of rationality. Purposeful discrimination was not shown. There was a rational basis for the difference in penalties: crack is much more addictive than powder cocaine. It is also less expensive and more accessible. *U.S. v. Robinson*, __ F.2d __ (4th Cir. July 22, 1992) No. 91-5414.

5th Circuit affirms constitutionality of prohibiting departures below mandatory minimum except for substantial assistance. **(245)** Defendant contended that the court's inability to depart below his mandatory minimum five year sentence violated due process and equal protection. The only basis for departing below a mandatory minimum is substantial assistance to the government under 18 U.S.C. section 3553(e). Since couriers like defendant do not have access to information, he contended that this system unfairly provides kingpins, but not couriers, with a means of avoiding a mandatory minimum. The 5th Circuit affirmed the constitutionality of the scheme for departing below a mandatory minimum. Section 3553(e) is rationally related to the legitimate purpose of obtaining valuable information from drug criminals. It does not discriminate against a suspect class, nor is it arbitrary. Mandatory minimums and downward departures achieve different goals. *U.S. v. Rojas-Martinez*, __ F.2d __ (5th Cir. July 29, 1992) No. 91-8218.

11th Circuit holds that indictment which alleged in excess of 500 grams of cocaine gave notice of possible application of mandatory minimum. (245) Finding defendant responsible for more than five kilograms of cocaine, the district court sentenced him to 10 years, the mandatory minimum under 21 U.S.C. section 841(b)(1)(A)(ii). The 11th Circuit rejected defendant's claim that the indictment provided no notice that the 10 year minimum might apply. Defendant's indictment specified that the quantity of cocaine involved was 500 grams or more, which for notice purposes, encompassed all amounts over 500 grams. Moreover, defendant received notice of his sentencing prospects during his rearraignment and before entry of his guilty plea. *U.S. v. Zerick*, 963 F.2d 1487 (11th Cir. 1992).

2nd Circuit reverses consideration of weight of alcohol in which cocaine was mixed. (251) Defendant was arrested attempting to smuggle several liqueur bottles containing a liqueur/cocaine mixture into the United States. Based on *U.S. v. Acosta*, 963 F.2d 551 (2nd Cir. 1992), the 2nd Circuit reversed the district court's consideration of the combined weight of the liqueur/cocaine mixture for sentencing purposes. The cocaine was neither usable nor ingestible without a chemical extraction process, and was therefore not ready for either retail or wholesale distribution. Therefore, it was not unreasonable to consider the liquid waste the functional equivalent of packaging material which quite clearly is not to be included in the weight calculation. *U.S. v. Salgado-Molina*, __ F.2d __ (2nd Cir. May 29, 1992) No. 91-1644.

6th Circuit, en banc, affirms that defendant can be sentenced for drug quantity under negotiation. (251)(265) An undercover agent agreed to transfer to defendant 500 grams of cocaine, but the agent only transferred 85 grams of cocaine in a small plastic bag placed inside a mixture of 985 grams of powdered plaster of Paris. On rehearing *en banc*, the 6th Circuit did not review whether the weight of the plaster of Paris could be properly considered at sentencing, since the government conceded it could not be considered. But the court held that defendant could be sentenced on the basis of the entire 500 grams of cocaine he negotiated to purchase. Application note 1 to section 2D1.4 clearly authorizes the consideration of the weight of drugs under negotiation in an uncompleted distribution, and section 1B1.3 permits an unconvicted attempt or conspiracy to be considered as relevant conduct to a possession offense. The fact that attempts and conspiracies are inchoate crimes is immaterial so long as the conduct was part of the same course of conduct, common scheme or plan. Judge Nelson, joined by Judges Guy, Suhrheinrich and Batchelder, concurred. Chief Judge Merrit, joined by Judges Martin and Jones, dissented. *U.S. v. Davern*, __ F.2d __ (6th Cir. July 21, 1992) No. 90-3681 (en banc).

10th Circuit upholds calculation of laboratory capacity despite missing chemicals. (252) Defendant argued that it was improper to calculate his sentence based on his methamphetamine laboratory's productivity, since it was impossible for him to produce any methamphetamine because one of the necessary precursor chemicals was missing. The 10th Circuit held that it was proper to base defendant's sentence on the amount of methamphetamine the lab could have produced had the missing chemical been available. *U.S. v. Sturmoski*, __ F.2d __ (10th Cir. June 3, 1992) No. 91-2209.

8th Circuit reaffirms that for less than 50 marijuana plants, sentence must be based on actual weight involved. (253) In *U.S. v. Prine*, 909 F.2d 1109 (8th Cir. 1990) and *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990), the 8th Circuit held that in cases involving less than 50 plants, the district court may not use the one plant/100 gram conversion, but must calculate the sentence based on the actual weight of the marijuana involved. Here, following *Streeter* and *Prine*, the 8th Circuit reversed the district court's use of the one plant/100 grams ratio. The court acknowledged that effective November 1, 1991, the sentencing commission amended the commentary to section 2D1.1 to state that the ratio was premised on the fact that the average yield from a mature marijuana plant equals 100 grams of marijuana. However, this amendment was not in effect at the time of defendant's sentencing, and the court declined to apply it retroactively. The court refused to express an opinion regarding the effect of the amended commentary. *U.S. v. Evans*, 966 F.2d 398 (8th Cir. 1992).

10th Circuit affirms sentence based upon weight of damp marijuana. (253) At the time of defendant's arrest, DEA scales weighed the marijuana seized from defendant at 96 pounds. Several months later, prior to sentencing, defendant reweighed the marijuana at 79.9 pounds. The difference in weight was attributed to moisture. According to government experts, the marijuana had to be moist in order for defendant to transport

it in the manner he did, and dehydration in storage was common. Agreeing with the 7th Circuit's opinion in *U.S. v. Garcia*, 925 F.2d 170 (7th Cir. 1991), the 10th Circuit affirmed the sentence based on the weight of the damp marijuana. Unless otherwise specified, the weight to be considered is the "entire weight of any mixture or substance containing a detectable amount of [marijuana.]" Because marijuana was not otherwise specified, the entire weight, including any existing moisture content, is relevant for sentencing. The omission of the phrase "mixture or substance" in 21 U.S.C. section 841(b)(1)(D) did not signify a congressional intent to require the sentence to be based on the dry weight of the marijuana. *U.S. v. Pinedo-Montoya*, 966 F.2d 591 (10th Cir. 1992).

4th Circuit affirms determination of drug quantity based upon sales by one witness. (254) Defendants argued that they were responsible for less than 1.5 kilograms of cocaine, while the government argued that defendants were responsible for between five and 15 kilograms of cocaine. The district court sentenced defendants on the basis of between 1.5 and five kilograms, and the 4th Circuit affirmed. One witness testified that he sold $1,000 worth of cocaine a day for approximately four months. Based on the total monetary receipts from this source alone, and with testimony as to the costs per gram of crack, the court could find 2.56 kilograms. In addition to this witness's sales, the court heard the testimony of various other witnesses about trips to New York to buy crack, various purchases and sales of crack, and 462 grams introduced at trial. Out of leniency, and the desire to avoid double counting, the court found a total of 1.5 to 5 kilograms, which seemed quite fair to defendants. *U.S. v. Robinson*, __ F.2d __ (4th Cir. July 22, 1992) No. 91-5414.

6th Circuit upholds determination of drug quantity based upon unreported income. (254) The district court estimated that defendant sold a minimum of 7.409 kilograms of cocaine based on evidence that during the course of the conspiracy, she had $217,829 in unreported income. Based on witness testimony, the court determined that defendant sold the cocaine for an average price per ounce of $1400, meaning that each kilogram of cocaine produced $50,400 in gross profit. The court determined that defendant paid an average price of $21,000 per kilogram, which left a net profit per kilograms of $29,400. By dividing the net profit per kilogram into defendant's unreported income (217,829 divided by 29,400), the court determined that defendant sold 7.409 kilograms of cocaine. The 6th Circuit affirmed this calculation as not clearly erroneous. Defendant's claim that it was improper to assume the unreported income was from drug sales was rejected. Numerous other challenges by other defendants to the estimation of drug quantity were also summarily rejected. *U.S. v. Warner*, __ F.2d __ (6th Cir. July 27, 1992) No. 90-3753.

4th Circuit rejects enhancement for crack house count based on drug quantity. (260) Defendant was convicted of several drug offenses, including one count of maintaining a place for the distribution of a controlled substance, in violation of 21 U.S.C. section 856(a)(1). The 4th Circuit found that the district court improperly enhanced defendant's offense level for the section 856(a) violation based upon the drug quantity involved in certain transactions conducted by defendant. Guideline section 2D1.8, applicable to convictions under section 856(a), does not implicate the drug quantity table expressly or implicitly. Nothing in the plain meaning of section 2D1.8 permits enhancement for the possession, storing, manufacturing or use of a quantity of drugs. The use of the relevant conduct provision for a section 2D1.8 offense is limited to the firearm enhancement and any Chapter Three adjustments. Although drug quantity may be considered as grounds for an upward departure, the court did not even consider an upward departure. *U.S. v. Midgett*, __ F.2d __ (4th Cir. July 24, 1992) No. 91-5051.

7th Circuit affirms that information in presentence report gave defendant adequate notice of relevant conduct. (270) Based upon additional drug sales listed in defendant's presentence report, the offense level was increased from 12 to 26. The 7th Circuit affirmed that defendant had adequate notice that these additional sales would be considered relevant conduct for sentencing purposes. At defendant's first sentencing hearing, the government noted that it was not pressing the district court to use these additional sales as relevant conduct. Thus, the possibility of increasing defendant's guideline range based upon his additional drug sales was raised during his first sentencing hearing. Although at that point the government chose not to urge that approach, the issue was flagged for the defense and the defense clearly recalled the statement at the second sentencing hearing. Unlike a guidelines departure, enhancement based on relevant conduct is mandatory, not discretionary. Defendant had minimally adequate notice that the other drug sales might be used to enhance his sentence. *U.S. v.*

Thomas, __ F.2d __ (7th Cir. July 20, 1992) No. 91-1502.

7th Circuit affirms sentence on the basis of relevant conduct rather than departure. (270) The presentence report set the guideline range at 21 to 27 months for defendant's drug offense. The government argued for an upward departure based on defendant's presentence report in which he admitted selling at least 520 grams of cocaine from his gang's house. The district court found that such sales were relevant conduct, and sentenced defendant to 114 months. The 7th Circuit affirmed, rejecting defendant's claim that the district court had improperly departed. The decision was not a "departure" at all, but an adjustment based on relevant conduct not previously included in defendant's offense level. Although the district court failed to adequately explain why 500 grams were relevant conduct to the offense of conviction, it adopted the presentence report, which indicated a temporal and locational relationship among the drug sales in question. This supported the district court's finding of relevant conduct. *U.S. v. Thomas*, __ F.2d __ (7th Cir. July 20, 1992) No. 91-1502.

2nd Circuit remands to consider foreseeability of co-conspirators' crack involvement. (275) Defendant contended that he was unaware that the conspiracy of which he was a member involved types of narcotics other than heroin, and therefore it was error to sentence him on the basis of all seized drugs. The 2nd Circuit remanded, since the district court did not make findings as to whether defendant knew or could have reasonably foreseen his co-conspirators' possession of crack. A defendant who is a member of a drug conspiracy may be held responsible for all transactions which were either known or reasonably foreseeable to him. The sentencing court should make findings as to knowledge and forseeability issues. The guidelines place the burden of establishing the lack of knowledge and lack of foreseeability on the defendant. *U.S. v. Negron*, __ F.2d __ (2nd Cir. June 16, 1992) No. 92-1003.

8th Circuit rules defendant may only be sentenced for drugs he reasonably believed to be in package. (275) Postal inspectors intercepted a package containing 243 grams of crack, and replaced all but 10 grams with another substance. The package was then delivered to defendant's sister. That morning, defendant's personal supply of crack ran out and he called his cousin to get one-half gram from her. The cousin said her crack was at defendant's sister's house, and she would sell him some if defendant went with her to get it. Defendant then retrieved the package and was arrested. The 8th Circuit reversed the district court's determination that defendant was responsible for the 243 grams of crack originally in the package. Most drug offenders are well aware of the type and quantity of drug with which they are personally dealing. Here, however, defendant had no knowledge of the scope of his cousin's drug activities, and it was possible that he reasonably believed the package contained a much smaller quantity of cocaine, intended primarily for his cousin's personal use. If this was the case, defendant could only be held responsible for the smaller quantity he believed to be in the package. *U.S. v. Hayes*, __ F.2d __ (8th Cir. July 24, 1992) No. 91-3843SI.

4th Circuit upholds decision to seek firearm enhancement rather than charging 924(c) violation. (280) The 4th Circuit rejected defendants' claims that the prosecution's decision not to charge them with substantive violations of 18 U.S.C. section 924(c) but to seek enhancement for possession of a firearm during the commission of a drug offense under section 2D1.1(b)(1) violated their 6th and 14th Amendment rights. The U.S. Attorney has the responsibility to decide what charges to present to the grand jury. At sentencing, the district court has wide discretion in the sources and types of evidence used to determine the sentence. A defendant has the right to adequate notice of and an opportunity to rebut or explain information that is used against him. Both defendants were put on notice by the presentence report that firearms possession would be used at sentencing. They were also given the opportunity to rebut this information at sentencing. *U.S. v. Robinson*, __ F.2d __ (4th Cir. July 22, 1992) No. 91-5414.

4th Circuit affirms firearm enhancement for weapons kept in shoebox in girlfriend's apartment. (284) The 4th Circuit affirmed an enhancement under section 2D1.1(b)(1) based upon the district court's finding that defendant used firearms in the commission of a continuing criminal enterprise. The finding was supported by the testimony of defendant's girlfriend, who testified that defendant kept three firearms in a shoebox in her apartment. Defendant lived in the apartment and kept drugs there. The fact that there was no evidence that defendant carried a weapon during the commission of any of his crimes did not invalidate the enhancement: possession of a weapon on one's person is not necessary. The court also affirmed the enhancement for a co-defendant

based upon information in the presentence report that defendant had arranged for female employees of the drug organization to carry firearms and have them available in the areas where he was distributing crack. Defendant failed to respond to the presentence report. *U.S. v. Robinson*, __ F.2d __ (4th Cir. July 22, 1992) No. 91-5414.

5th Circuit upholds use of intended loss rather than actual loss in insurance fraud scheme. (300) Defendant and his brother each made numerous false claims on various insurance policies on the same car. Together, defendant and his brother filed claims totalling $58,816.07, although the amount actually received from the insurance companies was much less. The 5th Circuit affirmed that under comment 7 to section 2F1.1, it was proper to use the intended loss of $58,816.07 as the amount of loss, rather than the smaller amount actually received. Defendant's contention that intended loss is only to be used if actual loss is difficult to determine was incorrect. *U.S. v. Lghodaro*, __ F.2d __ (5th Cir. July 24, 1992) No. 91-7322.

1st Circuit affirms enhancement for obscene material depicting adult sadomasochism. (310) Defendant pled guilty to one count of conspiracy to sell a videotape depicting adult sadomasochism and violence and one count of distributing a videotape portraying a child involved in sexually explicit conduct involving neither violence nor sadomasochism. The counts were grouped together, and defendant was sentenced under section 2G2.2. The 1st Circuit affirmed an enhancement under section 2G2.2(b)(3) for an offense involving material that portrayed sadistic or masochistic conduct or other depictions of violence. The court rejected defendant's claim that the word "offense" in section 2G2.2(b)(3) encompassed only the child pornography offense and the district court could not properly consider the adult obscene matter depicting sadomasochism. Section 2G2.2 neither states nor intimates that sentencing courts are to exclude from consideration the specific offense characteristics relating to adult obscene matter. Moreover, section 2G3.1 authorizes an identical enhancement for adult obscene material. *U.S. v. Schultz*, __ F.2d __ (1st Cir. July 22, 1992) No. 92-1152.

1st Circuit permits collateral attack on prior convictions used to enhance under section 924(e). (330)(504) Under 18 U.S.C. section 924(e), a defendant convicted of unlawful firearm possession who has three or more past "violent felony" convictions is subject to a mandatory minimum sentence of 15 years. The 1st Circuit reversed the district court's ruling that a defendant may not collaterally attack a past conviction used to enhance his sentence under section 924(e). In *U.S. v. Paleo*, __ F.2d __ (1st Cir. June 15, 1992) No. 90-1598, decided several days earlier, the court held that a defendant may make such a collateral attack. *U.S. v. Desmarais*, __ F.2d __ (1st Cir. June 18, 1992) No. 91-2006.

10th Circuit says prison camp is not similar to community corrections center or halfway house. (350) Defendant escaped from a federal prison camp and was sentenced under guideline section 2P1.1. Section 2P1.1(b)(3) provides for a four level reduction in offense level "if the defendant escaped from the non-secure custody of a community corrections center, community treatment center, 'halfway house,' or similar facility." The 10th Circuit affirmed the district court's refusal to apply such a reduction to defendant, holding that a federal prison camp is not a facility providing non-secure custody which is similar to those facilities specified in section 2P1.1(b)(3). The facilities listed in the guideline are all integrated into the community. In contrast, a prison camp, even though there may be no perimeter barriers and residents may have some freedom to come and go, is an environment separated from the community. *U.S. v. Brownlee*, __ F.2d __ (10th Cir. July 27, 1992) No. 92-3072.

10th Circuit rejects adding money obtained by fraud to funds in money laundering scheme. (360)(470) Defendant defrauded investors out of millions of dollars. He was convicted of money laundering as a result of his use of the proceeds of his fraud to pay off his mortgage and to buy a car. In determining the offense level for the money laundering scheme under section 2S1.1(b), the district court added the funds obtained by fraud. This was based on section 1B1.3(a)(2), which provides that offenses which would require grouping with the offense of conviction under section 3D1.2(d) should be considered relevant conduct. The 10th Circuit reversed, ruling that the funds should not have been "grouped." Under section 2F1.1, the fraud guideline, the offense level is determined on the basis of the "loss" resulting from the fraud, whereas under section 2S1.1, the money laundering guideline, the offense level is determined largely on the basis of the value of the funds. These are not the same concepts. *U.S. v. Johnson*, __ F.2d __ (10th Cir. July 28, 1992) No. 91-5030.

Adjustments (Chapter 3)

1st Circuit upholds leadership role of seller of pornographic videotapes. (431) The 1st Circuit affirmed a two level enhancement under section 3B1.1(c) based upon defendant's leadership role in a conspiracy to distribute obscene videotapes. Defendant instructed a co-conspirator to bring the videotapes to a meeting with a government agent. The co-conspirator arrived with the tapes, and remained while defendant conducted the sale. Moreover, there was evidence that (a) defendant drew a diagram for the undercover agent, depicting himself at the apex of the criminal enterprise, (b) defendant possessed the greater capacity to reproduce videotapes, rented the office space where the tapes were reproduced, and rented storage space for the videotapes, (c) most of the pornographic material involved in the conspiracy were turned over to defendant by his co-conspirators, (d) when the co-conspirators were arrested, most of the tapes were seized from defendant, and (e) most of the 96 videotapes made available to government operatives were acquired from defendant. *U.S. v. Schultz*, __ F.2d __ (1st Cir. July 22, 1992) No. 92-1152.

6th Circuit holds that "participants" are not the same as "subordinates" for managerial purposes. (431) Defendant received an enhancement under section 3B1.1(b) for being the manager or supervisor of criminal activity that involved five or more participants or was otherwise extensive. Defendant challenged the enhancement since he only supervised two persons. The 6th Circuit upheld the enhancement, since the guideline refers to five or more "participants," not subordinates. There clearly were five or more participants in defendant's offense: in addition to defendant and the two employees he concededly supervised, there were at least two other individuals involved in the scheme. *U.S. v. Dean*, __ F.2d __ (6th Cir. July 8, 1992) No. 91-5970.

9th Circuit upholds finding that defendant was leader in the drug conspiracy. (431) Circumstantial evidence suggested that defendant exercised the decision-making authority in the conspiracy. The loading of the cocaine seemed to occur at his direction. He was the only member of the conspiracy present at all loadings of the cocaine into the tractor trailers. He delivered the cocaine in four of the five seizures. Thus, the 9th Circuit held that the district court's finding that defendant was the leader of the conspiracy was not clearly erroneous. *U.S. v. Castro*, __ F.2d __ (9th Cir. August 17, 1992) No. 91-50369.

3rd Circuit reverses leadership enhancement for drug seller who made a unrelated sales to different buyers. (432) The district court imposed a four-level enhancement under section 3B1.1(a) based on defendant's leadership of an extensive cocaine trafficking operation that involved five or more participants. The 3rd Circuit reversed, finding the evidence showed that defendant made a series of unrelated drug sales to different buyers, each of which constituted separate offenses for purposes of section 3B1.1(a). None of the buyers were "led" or "organized" by, nor "answerable" to, the defendant. With respect to two buyers, the evidence showed that defendant made a series of drug sales to them, but had no control over their use or resale of the cocaine. With respect to two other buyers, although defendant made the arrangement for the logistics of their communications and the drug sale, he exerted no influence over the buyers and no control over the resale of the cocaine or any further purchases. The evidence also failed to show any connection between the different buyers. *U.S. v. Belletiere*, __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5615.

9th Circuit reverses downward departure that was based on lesser culpability and disparity. (440)(716) The district court departed downward from a guideline range of 37-46 months to a 30-month sentence to eliminate the disparity between the co-defendant's 46-month sentence and to recognize defendant's lesser culpability. The 9th Circuit reversed because the district court failed to find that the lesser culpability was not adequately taken into consideration by the guidelines. The defendant received a four-level reduction based on his minimal participation. In addition, a district court may not depart downward to correct sentencing disparities between co-defendants sentenced under the Guidelines. *U.S. v. Petti*, __ F.2d __, (9th Cir. August 10, 1992), No. 91-50229.

9th Circuit says minimal role is determined by comparing conduct of co-participants. (443) The district court reduced defendant's offense level by four levels for minimal role. The government appealed, arguing that the defendant's conduct should be assessed against a hypothetical "average" participant and not the co-participants in the case. The 9th Circuit rejected the argument, finding the Commentary suggests that the relevant comparison for the four level reduction is to the conduct of the

co-participants in the case at hand. In addition, the court upheld the minimal participant finding, even though defendant had "something more than a complete absence of understanding." *U.S. v. Petti*, __ F.2d __, (9th Cir. August 10, 1992), No. 91-50229.

6th Circuit rejects minimal role for defendant who had knowledge of scope of the enterprise and the activities of others. (445) The district court denied defendant's request for a four point reduction under section 3B1.2 as a minimal participant because she had knowledge of the scope of the enterprise and the activities of others. The 6th Circuit concluded that this was a sufficient basis for refusing the four level reduction. Defendant actually received a two point reduction as a minimal participant, and bore the burden of proving the existence of a mitigating factor by a preponderance of the evidence. *U.S. v. Warner*, __ F.2d __ (6th Cir. July 27, 1992) No. 90-3753.

3rd Circuit reverses failure to apply abuse of trust enhancement to bank vice president. (450) Defendant, a bank vice president, was responsible for balancing the bank's suspense account, the account in which loan and fee payments received by the bank were placed pending transfer to other accounts. Over a four year period, defendant embezzled approximately $94,000 from this account. The district court refused to apply an abuse of trust enhancement because it found that bank embezzlement by definition implies breach of trust. The 3rd Circuit reversed, since previous cases have held that abuse of a position of trust is not included in the base offense level or specific offense characteristic applicable to bank embezzlement. Here defendant occupied a position of trust: he alone was responsible for balancing the suspense account and no one else was watching the account. Moreover, the ease with which he was able to effect the crime over a four year period showed the nexus between the position of trust which he held and the commission and concealment of the embezzlement. *U.S. v. Lieberman*, __ F.2d __ (3rd Cir. July 24, 1992) No. 91-5687.

5th Circuit affirms obstruction enhancement for interfering with state's investigation of offense. (461) Defendant, the Commissioner of Insurance for the State of Louisiana, assisted an insurance company by failing to investigate consumer complaints against the company and interfering with an audit designed to remove the company from a watchlist. He also misled the Insurance Commissioner of Alabama, at the time conducting its own investigation of the company, by indicating that the company was in good condition, despite knowledge of innumerable complaints against it. He also prevented Alabama from conducting an audit of a related insurance company. The 5th Circuit affirmed an enhancement for obstruction of justice based upon defendant's interference with the Alabama investigation of these companies. The court rejected defendant's claim that the enhancement was improper because the conduct alleged to have been the basis for the enhancement was part of the object offense. Defendant's conduct was an obstruction of an investigation that would have led to his prosecution for mail fraud. *U.S. v. Green*, 964 F.2d 365 (5th Cir. 1992).

2nd Circuit holds that obstruction of justice has stricter standard than preponderance. (462)(755) The district court imposed an enhancement for obstruction of justice based on its earlier finding that defendant had testified untruthfully at a suppression hearing. The 2nd Circuit remanded for resentencing, ruling that a district court cannot automatically impose an obstruction enhancement whenever a defendant's testimony has been rejected by a judge or jury. Application note 1 to section 3C1.1 has been interpreted as instructing the sentencing judge to resolve in favor of the defendant those conflicts about which the judge has no firm conviction. This standard is more favorable to the defendant than the preponderance of the evidence standard. If the district court must apply a more rigorous standard in evaluating a defendant's testimony for sentencing purposes, then the court may not automatically impose an obstruction enhancement whenever a defendant's testimony has been rejected by a judge or jury. The district court must make an independent finding, applying the standard prescribed by section 3C1.1. *U.S. v. Cunavelis*, __ F.2d __ (2nd Cir. July 21, 1992) No. 92-1092.

3rd Circuit reverses obstruction enhancement where defendant transferred his interest in house subject to forfeiture. (462) The district court imposed an enhancement for obstruction of justice based in part upon defendant's quit-claim of his interest in a residence to his wife, knowing that the house was subject to forfeiture. The 3rd Circuit reversed, ruling that the government failed to prove by a preponderance of the evidence that defendant "willfully" attempted to obstruct justice. The only references in the record as to why defendant quit-claimed his interest was his counsel's statement that it was done in an effort to resolve defendant's

ongoing marital problems concerning a separation agreement with his estranged wife. There was no finding by the district court that defendant acted willfully. Moreover, the government conceded that the quit-claim deed would have no real effect on the government's ability to gain the property through forfeiture. *U.S. v. Belletiere*, __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5615.

3rd Circuit rejects misrepresentation to probation about drug use as obstruction. (462) The district court imposed an enhancement for obstruction of justice based in part upon defendant's misrepresentation to his probation officer that he never personally used drugs. Defendant subsequently tested positive for cocaine use during a random drug test while he was free on bail. The 3rd Circuit rejected this as a proper ground for an obstruction enhancement. The commentary to section 3C1.1 makes it clear that the section's focus is on willful acts or statements intended to obstruct or impede the government's investigation of the offense at issue. Defendant's misstatement had nothing to do with the offenses for which he was convicted, and was not material to the probation officer's investigation of this particular case. Judge Alito dissented from this portion of the opinion. *U.S. v. Belletiere*, __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5615.

11th Circuit reverses obstruction enhancement for use of false name upon arrest. (462) The 11th Circuit reversed an enhancement for obstruction of justice based on defendant's use of a false name when he was first arrested. A clarifying amendment (which became effective after defendant was sentenced) to section 3C1.1 now states that providing a false name at arrest does not warrant an obstruction enhancement except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense. Here, there was no such evidence. Shortly after he was arrested, and prior to booking, defendant gave police his real name. *U.S. v. Shores*, __ F.2d __ (11th Cir. July 22, 1992) No. 90-3462.

3rd Circuit affirms downward departure for exceptional acceptance of responsibility. (480)(715) Although defendant received an adjustment for acceptance of responsibility, the district court found that defendant's conduct differed "from the norm" in terms of the kind and degree of his acceptance of responsibility and departed downward by one level. The 3rd Circuit held 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. Here, there was a sufficient basis for the departure. Defendant, a bank vice president who embezzled bank funds, not only began to make restitution to the bank shortly after his embezzlement was discovered, but also entered into an agreement to pay about $34,000 more than he thought was owed and to which he pled guilty. Besides admitting the full extent of his wrongdoing when confronted by bank officials, resigning his position, and making voluntary and truthful admissions to authorities (acts which would not take him out of the usual case), he met with bank officials to explain how in the future they could detect improper transactions. *U.S. v. Lieberman*, __ F.2d __ (3rd Cir. July 24, 1992) No. 91-5687.

5th Circuit affirms denial of acceptance of responsibility reduction to defendant who made no attempt to make restitution. (486) Defendant fraudulently obtained insurance proceeds. The 5th Circuit affirmed that defendant was not entitled to a reduction for acceptance of responsibility. Defendant made no effort to repay the insurance companies, and instead transferred funds that would have been available to repay them into an account in someone else's name. Defendant gave no assistance to authorities in the recovery of the money. *U.S. v. Lghodaro*, __ F.2d __ (5th Cir. July 24, 1992) No. 91-7322.

7th Circuit affirms denial of acceptance of responsibility reduction to defendant who blamed alcohol and friends. (488) Defendant told the judge that when he committed the instant offense, he was drinking a lot, and the alcohol caused him to "pay attention" to the informant. The judge denied the reduction, regarding this as an effort to shift responsibility from the defendant to "the demon alcohol and evil companions." The 7th Circuit affirmed, since there were no expiatory deeds by defendant in the record. The court acknowledged that the issue could be decided either way, and decided that the application note was on the right track in emphasizing deeds over words: "external, verifiable, expiatory acts over self-serving, unverifiable reports of interior mental states." Deeds not only are better evidence than words, but have value to law enforcement authorities. *U.S. v. Beserra*, __ F.2d __ (7th Cir. July 21, 1992) No. 91-3619.

11th Circuit upholds denial of reduction to defendant who blamed others for his involvement. (488) Defendant argued that it was

error to deny him a reduction for acceptance of responsibility since there was no factual basis in the record for the denial of his request. The 11th Circuit rejected this contention, since the defendant has the burden of proving his entitlement to such a reduction. Defendant's admission of involvement in the crime did not necessarily amount to an affirmative acceptance of personal responsibility for his criminal conduct. Defendant continued to blame his involvement on others, and did not point to anything else in the record indicating his acceptance of responsibility. *U.S. v. Shores*, __ F.2d __ (11th Cir. July 22, 1992) No. 90-3462.

2nd Circuit says that motion to withdraw guilty plea may not be grounds for denial of acceptance of responsibility. (490) The district court denied defendant a reduction for acceptance of responsibility because he had (unsuccessfully) moved to withdraw his guilty plea. Since the 2nd Circuit was remanding for resentencing on unrelated grounds, it expressed no view as to defendant's entitlement to such a reduction, except to note that the mere fact that a defendant has moved to withdraw a prior guilty plea does not necessarily warrant a denial of the reduction. Rather, the court must evaluate the reason for the attempt to withdraw the plea and assess the acceptance of responsibility question in that light. Where the quantity of narcotics is not an element of the offense, a defendant who admits he is a member of a narcotics conspiracy but seeks only an adjudication of the quantity of narcotics with which he should be personally charged for sentencing purposes should not on that account alone be denied credit for acceptance of responsibility. *U.S. v. Negron*, __ F.2d __ (2nd Cir. June 16, 1992) No. 92-1003.

Criminal History (§4A)

7th Circuit includes in criminal history a prior conviction for which court records were destroyed. (504) Defendant contended it was improper to include in his criminal history a prior DUI conviction because state court records were destroyed, and therefore there was no way of telling whether he was properly advised of his rights or knowingly entered his guilty plea. The 7th Circuit rejected this argument. When a defendant presents only conclusory challenges that lack both a factual and legal basis, the court and the government is not under any duty to make a further inquiry into the constitutional validity of a prior conviction. There is a presumption that constitutionally regular procedures were utilized during the proceedings. *U.S. v. Scroggins*, 965 F.2d 480 (7th Cir. 1992).

2nd Circuit says robberies committed over short period were not part of common scheme or plan. (520) Defendant was sentenced as a career offender based upon four prior armed robberies. In *U.S. v. Chartier*, 933 F.2d 111 (2nd Cir. 1991) (*Chartier I*), the 2nd Circuit remanded for the district court to determine whether defendant's offenses were committed as part of a common scheme or plan. On remand, the district court ruled that the offenses were not part of common scheme or plan, and resentenced defendant as a career offender, even though the four crimes involved the same modus operandi, were motivated by the same heroin addiction, and were committed within a short period of time. On defendant's second appeal, the 2nd Circuit affirmed. The statement in *Chartier I* that the circumstances would have "supported" a finding of common scheme or plan did not mean that such a finding was mandated. Defendant testified that he and his cohorts were "living for the moment" and had no long-range plans except to commit robberies when and as they ran out of money. Moreover, the identify of the other participants was not constant. Finally, there was evidence that one of the robberies was a spur-of-the-moment enterprise. *U.S. v. Chartier*, __ F.2d __ (2nd Cir. June 23, 1992) No. 91-1619.

9th Circuit reaffirms that possession of a firearm is not a crime of violence. (520) The 9th Circuit amended its opinion in this case to reject the government's argument that its prior holding (that possession of a firearm is not a crime of violence) places section 4B1.1 at odds with section 4B1.4 which describes the offense level for armed career criminals. The court pointed out that section 4B1.4(b)(2) makes reference to section 4B1.1 "*if applicable*." The court said that in this case section 4B1.1 is not applicable because the defendant "does not qualify as a career offender." Thus the court said that its opinion in *U.S. v. Sahaklan*, 965 F.2d 740 (1992) "does not render either section superfluous or otherwise subvert the intent of Congress and the Sentencing Guidelines Commission." *U.S. v. Alvarez*, 960 F.2d 830 (9th Cir. 1992) *amended*, __ F.2d __ (August 17, 1992) No. 90-50298.

Determining the Sentence (Chapter 5)

2nd Circuit reverses life term of supervised release in absence of grounds for departure. (580)(700)(855) The guidelines provided for a three to five year term of supervised release. Without stating that it was departing, the district court imposed a life term of supervised release. Although defendant failed to object at sentencing to the term of supervised release, the 2nd Circuit ruled that the term constituted clear error. The life term of supervised release was outside the guidelines range. Although departures can be made, a district court is required to state in open court the specific reason for imposing a sentence outside the guidelines range. Here, the sentencing judge announced that he would not be departing from the guidelines. *U.S. v. Pico*, 966 F.2d 91 (2nd Cir. 1992).

5th Circuit affirms order to relinquish personal pension to satisfy restitution order. (610) Defendant was convicted of embezzling from an employee pension plan. He asserted for the first time on appeal that the district court erred in ordering him to relinquish his personal pension to satisfy the restitution order, since the anti-alienation provision of ERISA precluded such an order. The 5th Circuit affirmed that the order was not plain error. Defendant's failure to object below precluded his relief. No judge can be expected to know every obscure rule of law. Thus, even if ERISA's anti-alienation provision preclude the use of his pension to satisfy his restitution obligation, the error was not obvious. *U.S. v. Gaudet*, __ F.2d __ (5th Cir. July 10, 1992) No. 91-3647.

2nd Circuit holds that Rule 11(e)(1)(C) prevented judge from departing further than plea agreement. (710)(780) Defendant's plea agreement provided that pursuant to Fed. R. Crim. P. 11(e)(1)C), in return for her guilty plea, the government agreed to a four-level reduction in offense level. The 2nd Circuit affirmed the district court's determination that it lacked discretion to reduce defendant's guidelines offense level by more than the four levels called for in the plea agreement. True, once the government has moved for a substantial assistance departure, it is within the sentencing court's authority to determine the appropriate extent of departure. However, this principle is inapplicable to plea agreements governed by Rule 11(e)(1)(C). Rule 11, and not guidelines section 5K1.1, controls the acceptance or rejection of plea agreements. The rule plainly contemplates that plea agreements executed pursuant to either subdivision (e)(1)(A) or (C) are binding on the district court. The district court may accept or reject such a plea agreement, but once the plea has been accepted, the court may not modify it. *U.S. v. Cunavells*, __ F.2d __ (2nd Cir. July 21, 1992) No. 92-1092.

Departures (§5K)

Article criticizes requirement of notice before departure. (700) *In Federal Sentencing Guidelines - The Requirement of Notice for Upward Departure*," a student author criticizes *Burns v. United States*, 111 S.Ct. 2182 (1991), in which the Court held that a sentencing court must provide notice when a departure is based on a ground not articulated in the presentence report or the government's prehearing submission. The author argues that the requirement is inconsistent with both the Sentencing Reform Act and the requirements of Federal Rule of Criminal Procedure 32, on which the Court relied. Moreover, the author maintains that the notice requirement violates principles of judicial neutrality by forcing a district court to state a preliminary position on the severity of the defendant's sentence before listening to the arguments at the sentencing hearing. 82 J. CRIM. L. & CRIMINOLOGY 1029-53 (1992).

7th Circuit affirms that district court lacked discretion to make substantial assistance departure in the absence of a government motion. (712) The 7th Circuit affirmed the district court's determination that it lacked discretion to depart based on defendant's substantial assistance in the absence of a government motion. *U.S. v. Baker*, 965 F.2d 513 (7th Cir. 1992).

11th Circuit affirms refusal to depart based on substantial assistance to the judiciary. (715) Defendant asked the district court to depart downward based on the assistance he provided to the judiciary. This assistance consisted of his willingness to dispense with a grand jury by announcing his desire to plead guilty at his initial appearance and the waiver of any pretrial motions. He argued that this saved substantial resources and freed the district court for other matters. The 11th Circuit affirmed the district court's refusal to depart downward on this basis, since defendant's conduct was taken into account by the acceptance of responsibility reduction under section 3E1.1. This case was distinguishable from *U.S. v. Garcia*, 926 F.2d 125 (2nd Cir. 1992), in which 2nd Circuit

upheld a downward departure for assistance to the judiciary. In *Garcia*, defendant's willingness to testify against other defendants broke a "log jam" in a multi-defendant case. Thus, even if assistance to the judiciary were a proper ground for a departure, this was not such a case. *U.S. v. Lockyer*, __ F.2d __ (11th Cir. July 23, 1992) No. 91-8721.

D.C. Circuit rejects downward departure based on alleged weaknesses in the government's case. (715) The D.C. Circuit affirmed the district court's ruling that it could not depart downward because of alleged weaknesses in the government's case. If the case had such vulnerability that a reasonable jury could not find guilt beyond a reasonable doubt, the court must grant a motion for acquittal. If the evidence withstands that test, as if did in this case, then to permit departures based only on an individual assessment of the evidence would invite the sort of discrepancies the guidelines were intended to minimize. *U.S. v. Brooks*, __ F.2d __ (D.C. Cir. June 19, 1992) No. 91-3235.

9th Circuit permits aberrant behavior departure for defendant with no prior record convicted of one isolated criminal act. (719) Defendant had no criminal history and was convicted of one isolated criminal act. The district court refused to depart downward, stating that even if aberrant behavior were a permissible basis for departure, the facts did not warrant a departure. The 9th Circuit reversed, finding a downward departure is available to a first time offender who has been convicted of one aberrant criminal act. In denying the government's petition for rehearing, the court deleted language from the original opinion which had stated that "the absence of evidence of continued criminality constitutes a finding of aberrancy" and "the district court erred in thinking that additional findings were necessary to give it the authority to depart down." *U.S. v. Morales*, 961 F.2d 1428, (9th Cir. 1992) *amended on denial of rehearing*, (9th Cir. August 12, 1992) No. 91-50513.

Article advocates downward departures for compulsive gamblers. (730) In "*Sentencing the Sick: Compulsive Gambling as the Basis for a Downward Departure under the Federal Sentencing Guidelines*," Lawrence S. Lustberg surveys the cases that have considered whether compulsive gambling constitutes a grounds for departure. While published decisions have rejected a departure, some unpublished district court opinions permit such departures. The author argues that such departures are appropriate under section 5K2.13 (diminished capacity), and that they are sometimes also appropriate under section 5K2.12 (duress) where the gambler has been threatened by a bookie demanding payment. The author also argues that departures are warranted by analogy to cases that have permitted departures for conduct tending to establish a defense for crime but falling short. 2 SETON HALL J. SPORT L. 51-76 (1992).

Article endorses departures for extraordinary family responsibilities. (736) In "The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities," a student author reviews conflicting directions in the Sentencing Reform Act as to the relevance of family responsibilities in determining sentence. The author argues that the guidelines themselves leave unclear how to treat the defendant with extraordinary family responsibilities. After noting a division of authority in the courts over how the guidelines should be construed, the author advocates departures from the guidelines for defendants with extraordinary family responsibilities or ties. 76 MINN. L. REV. 957-84 (1992).

7th Circuit affirms that court could not depart downward for defendant's drug rehabilitation. (736) The 7th Circuit rejected defendant's claim that the district court should have departed downward from the mandatory minimum sentence because of her substantial progress in a drug rehabilitation program. The mandate to the sentencing commission, 28 U.S.C. section 994(n), directed the commission to assure that the guidelines reflect the inappropriateness of imposing a sentence for the purpose of rehabilitating or providing the defendant with needed correctional treatment. Guideline section 5H1.4 provides that dependence or abuse is not a reason for imposing a sentence below the guidelines. *U.S. v. Baker*, 965 F.2d 513 (7th Cir. 1992).

2nd Circuit says defendant has the burden of proving lack of knowledge or foreseeability. (755) A defendant who is a member of a drug conspiracy may be held responsible for all transactions which were either known or reasonably foreseeable to him. The 2nd Circuit noted that the guidelines place on the defendant the burden of establishing the lack of knowledge and lack of foreseeability. *U.S. v. Negron*, __ F.2d __ (2nd Cir. June 16, 1992) No. 92-1003.

5th Circuit rules that use of presentence report did not constitute plain error. (760) Defendant contended for the first time on appeal that he was

not given an opportunity to review the presentence report prior to sentencing. The 5th Circuit found that since defendant did not object to this alleged error during sentencing, he could not raise this objection now absent plain error. Here, there was no plain error. At the sentencing hearing, the court handed the presentence report to defendant and asked whether he had had sufficient time to review it with counsel. Defendant consulted with his attorney and then answered in the affirmative. Moreover, defendant's complaints of error in the presentence report were merely general statements, and he did not specifically identify the facts he found to be incorrect. *U.S. v. Navejar*, 963 F.2d 732 (5th Cir. 1992).

7th Circuit remands because court failed to give notice of intent to depart upward. (700)(761) In sentencing defendant, the district court departed upward based on his criminal history. The government conceded, and the 7th Circuit agreed, that the case had to be remanded for resentencing under *Burns v. United States*, 111 S.Ct. 2182 (1991). *Burns* held that before a district court can depart upward on a ground not specified in the presentence report or in a prehearing submission by the government, Fed. R. Crim. P. 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling. Here, defendant was not given the proper notice. *U.S. v. Scroggins*, 965 F.2d 480 (7th Cir. 1992).

Sentencing Hearing (§6A)

7th Circuit upholds reliance on testimony of co-conspirator. (770) The district court found that defendant possessed in excess of seven kilograms of cocaine based on a co-conspirator's trial testimony concerning various deliveries and sales of cocaine to defendant. Defendant contended that it was improper to rely upon such testimony because it was unreliable and uncorroborated. The co-conspirator testified as part of his plea agreement, he admitted lying at his own sentencing shortly before defendant's trial and his testimony at trial differed significantly from what he had told police three months earlier. Nonetheless, the 7th Circuit upheld the reliance upon the co-conspirator's testimony. The information the co-conspirator gave was not totally uncorroborated: a yellow purse containing $14,000 was recovered from defendant's home. *U.S. v. Soria*, 965 F.2d 436 (7th Cir. 1992).

10th Circuit relies on documents to prove relationship between defendant and accomplice. (770) Defendant argued that the district court erroneously considered at sentencing two pieces of hearsay evidence that lacked sufficient indicia of reliability. The first item was a series of promissory notes between defendant and an accomplice and ranged in amount from one to 27 million dollars. The second item was a handwritten letter from defendant to the accomplice. The 10th Circuit affirmed the consideration of such items. First, the items were not hearsay under the rules of evidence since they were not offered to prove the truth of the matters asserted therein, but to prove that a relationship existed between defendant and the accomplice. The letter from defendant also constituted an admission against interest. Second, the items, which were seized from the accomplice at his arrest, had sufficient indicia of reliability. *U.S. v. Johnson*, __ F.2d __ (10th Cir. July 28, 1992) No. 91-5030.

Plea Agreements, Generally (§6B)

1st Circuit says erroneous advice about sentence if defendant went to trial was not grounds to withdraw plea. (790) Defendant contended that he had presented a "fair and just" reason for the withdrawal of his guilty plea based on his attorney's erroneous advice that he would face a longer sentence if he went to trial. In fact, defendant would have most likely received the same mandatory minimum 15 year sentence that he received after pleading guilty. The 1st Circuit affirmed the denial of the motion to withdraw the guilty plea. First, the plea colloquy indicated that defendant pled guilty primarily because he "wanted to get it over with," not because he hoped for a sentencing advantage. Second, counsel made defendant aware that a guilty plea would bring two minor sentencing benefits: the prosecutor would forego the right to ask for a sentence longer than 15 years, and defendant could ask for sentence to run concurrently with a state prison sentence which defendant was then serving. *U.S. v. Desmarais*, __ F.2d __ (1st Cir. June 18, 1992) No. 91-2006.

5th Circuit affirms that defendant was adequately informed of plea agreement's contents. (790) The 5th Circuit rejected defendant's claim that he was inadequately informed of the plea agreement's contents, including the 270-month sentence. The transcript of the plea hearing indicated that (a) defendant testified that he had reached a plea agreement with the government and had seen the written agreement, (b) the court, prosecutor and defense

counsel questioned defendant extensively about the plea agreement, its contents and its consequences, (c) defendant asked questions, all of which were answered, and (d) the 270-month sentence was referred to at least nine times. *U.S. v. Navejar,* 963 F.2d 732 (5th Cir. 1992).

11th Circuit finds government breached plea agreement by telling probation officer about additional drugs. (790) In this pre-guidelines case, as part of defendant's plea agreement, the government stipulated that two ounces of cocaine were the only quantity to be considered for sentencing purposes. Nonetheless, investigators revealed to the probation officer who wrote the presentence report that defendant was involved in over three kilograms of cocaine. The 11th Circuit held that this breached the stipulation as to the amount of cocaine. The government's statement at sentencing that it would stick to its stipulation was undermined by its statement to the court that its later investigations had revealed defendant's involvement with the larger quantity of cocaine. The court granted defendant's request for specific performance, and directed the presentence report to refer only to two ounces of cocaine as stipulated. *U.S. v. Boatner,* __ F.2d __ (11th Cir. July 10, 1992) No. 91-8058.

Appeal of Sentence (18 U.S.C. §3742)

5th Circuit rejects pro se appeal of guidelines sentence where no specific errors were asserted. (850) The 5th Circuit refused to review defendant's guideline sentence, since his pro se appeal neither alleged nor identified any defect in the calculation of his guideline sentence. A pro se appellant's one-page description of familiar rules, without even the slightest identification of any error by the district court is the same as if he had not appealed that judgment. *U.S. v. Navejar,* 963 F.2d 732 (5th Cir. 1992).

2nd Circuit rules that failure to object was not a waiver since court was aware of contention. (855) Defendant claimed on appeal that he should only have been sentenced on the basis of the seized heroin because he was unaware that his co-conspirators were involved with crack cocaine. Although defendant's counsel failed to raise this specific issue at sentencing, the 2nd Circuit held that the issue was not waived because the district court was aware of defendant's position. At his plea hearing, defendant consistently denied any knowledge that crack was involved in the conspiracy. Consistent with this, defendant's pro se letter to the court in support of his motion to withdraw his guilty plea stated again that defendant was unaware of the existence of the crack cocaine. At his hearing to withdraw his plea, defendant reiterated this position. Since defendant consistently and persistently denied to the court any knowledge of the crack, the district court had an adequate opportunity to consider that contention. *U.S. v. Negron,* __ F.2d __ (2nd Cir. June 16, 1992) No. 92-1003.

8th Circuit affirms that district court was aware of its authority to depart downward. (860) The 8th Circuit rejected defendant's claim that the district court erroneously believed that it did not have the authority to depart downward. A review of the transcript indicated that the district court was fully aware of its prerogative but nonetheless concluded that the facts of this case did not warrant a departure. *U.S. v. LaChappelle,* __ F.2d __ (8th Cir. July 8, 1992) No. 91-3103.

Forfeiture Cases

2nd Circuit holds that constructive trust theory did not warrant remission under 1963(1)(6)(A). (900) In lieu of a jury trial, defendant entered into a RICO Forfeiture Settlement Agreement pursuant to which he agreed to pay the government $4.5 million. In April, the parties orally agreed that further legal fees would be negotiated and presented to the court for approval. Certain unions petitioned the court to amend the February agreement so that the $4.5 million would be paid to them, not to the government. In July, the judge granted the unions' petition, finding that defendant held certain commissions as a constructive trust for the unions. Notwithstanding the July order, defendant's law firm and the government entered into several stipulations permitting the firm to be paid from proceeds from the sale of various assets. A subsequent district judge refused to approve the latest stipulation. The 2nd Circuit held that (a) the July order was not binding upon the law firm because it was not a party to the remission proceedings and it had a protectable interest in the funds, and (b) there was not a sufficient basis in the July order to support a finding that the property ordered forfeited should be remitted to the unions pursuant to section 1963(1)(6)(A). *U.S. v. Schwimmer,* __ F.2d __ (2nd Cir. July 13, 1992) No. 91-1629.

3rd Circuit affirms that civil forfeiture may be brought in the district of the criminal prosecution. (905) Claimant was indicted as a co-defendant in a money laundering prosecution in the District of New Jersey. The government brought a civil forfeiture action in the same district against claimant's accounts located in another district. Venue was authorized by 18 U.S.C. section 981(h), which permits a forfeiture proceeding against the property of a defendant to be brought in the district of the criminal prosecution. Relying upon cases which upheld a similar provision for drug cases in 21 U.S.C. section 881(j), the 3rd Circuit rejected a due process challenge to section 981(h). By limiting venue in civil forfeiture proceedings to those districts that have venue over a related criminal prosecution, section 981(h) prevents the government from seeking civil forfeiture in a court so inconvenient for the defendant that he is deprived of the fundamental fairness that is at the core of due process. *U.S. v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5470.

3rd Circuit holds that statute which gives venue outside district where res is located did not give court jurisdiction over the res. (905) In a civil forfeiture proceeding, 18 U.S.C. section 981(h) gives venue to a district court that does not have the res within its boundaries. The 3rd Circuit rejected the government's claim that this provision authorizes extra-territorial jurisdiction as well as venue over a res outside a district's boundaries. The court refused to imply a provision for nationwide service of process in section 981(h). Section 981(h)'s grant of venue still permits that court to adjudicate any rights criminal defendants may have in a res located elsewhere, without regard to service of process. Nonetheless, the government must still file a second civil forfeiture action in the district court where the res is found if it wishes to affect the rights of persons who are not subject to the territorial jurisdiction of the first district court. Thus, the default judgment in favor of the government on the forfeiture complaint was vacated. *U.S. v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5470.

1st Circuit upholds forfeiture of $2.3 million in property that was "source of influence" to RICO enterprise. (910) Defendant operated nightclubs, peep shows, movie theaters and adult bookstores. He was convicted of various RICO offenses as a result of using various "straw" persons and sham corporations to avoid paying license fees and back taxes. He contended that his corporation's criminal forfeiture of $2.3 million in property was so grossly disproportionate to the seriousness of the offense as to constitute cruel and unusual punishment. The 1st Circuit rejected this claim. Defendant based his argument on the bare assertion that the value of the forfeited property grossly exceeded the value of the license and back taxes. Bald assertions of this nature are insufficient. Forfeitures under 18 U.S.C. section 1963(a)(2)(D) apply to property "affording a source of influence over a criminal enterprise." Forfeiture is thus warranted only to the extent the jury determined the property was tainted by racketeering activity. Here, there was ample evidence that the forfeited properties were an indispensable component of defendant's scheme to deprive local authorities of back taxes. *U.S. v. Bucuvalas*, __ F.2d __ (1st Cir. July 22, 1992) No. 90-2180.

3rd Circuit affirms that corporate "straw man" for fugitive had no standing to contest forfeiture. (910) A corporation had legal title to certain accounts which were the subject of a civil forfeiture action brought by the government. The 3rd Circuit affirmed the district court's determination that the corporation lacked standing to contest the forfeiture because it was a mere "straw man" for its owner, a fugitive from justice. Courts have uniformly rejected standing claims by nominal or straw owners. Once the government made out a prima facie case that the corporation was a straw man, the corporation had the burden of establishing its independent power to control the accounts. The government showed that the corporation's directors were all members of the fugitive's family and that it was the fugitive himself who authorized the corporation to file its claim while he remained in Colombia. The corporation failed to show that it conducted any trade or business beyond holding legal title to various accounts. *U.S. v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc.*, __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5470.

11th Circuit holds that Rule 11 does not apply to a forfeiture provision in a plea agreement. (920) Defendant agreed as part of his plea agreement to forfeit under 21 U.S.C. section 853(a) the sum of $50,000. He claimed that Fed. R. Crim. P. 11(f) requires the trial court to determine that there is a factual basis to support the forfeiture as part of the plea. The 11th Circuit rejected this

argument, holding that Rule 11 does not apply to a forfeiture provision in a plea agreement. The language of section 853(a) indicates that forfeiture is a consequence of a defendant's drug activity rather than a determination of his culpability. Thus, a forfeiture provision in a plea agreement is not a plea to a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea. Because Rule 11(f) is applicable only to guilty pleas, a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain. *U.S. v. Boatner*, __ F.2d __ (11th Cir. July 10, 1992) No. 91-8058.

1st Circuit affirms that government is entitled to interest on proceeds from sale of forfeited property. (970) Defendant and the government agreed to permit certain property to be sold pending defendant's RICO trial, and the sale proceeds were placed in an interest-bearing escrow account. The jury returned a verdict of forfeiture pursuant to 18 U.S.C. section 1963(a)(2), and the principal and accrued interest in escrow was forfeited to the government. The 1st Circuit affirmed that the accrued interest was properly subject to forfeiture. Section 1963(c) provides that title to forfeitable property vests in the United States upon the commission of the act giving rise to forfeiture. Absent an express agreement to the contrary, interest earned on the sale proceeds belongs to the entity entitled to the escrowed principal. Contrary to defendant's assertion, the government did not waive it "relation back" rights. The written agreement authorizing the sale disclosed no waiver. *U.S. v. Bucuvalas*, __ F.2d __ (1st Cir. July 22, 1992) No. 90-2180.

Opinion Withdrawn and Superseded

(132)*U.S. v. Kohl*, 963 F.2d 268 (9th Cir. 1992) No. 91-30119, *withdrawn and superseded*, __ F.2d __ (9th Cir. August 12, 1992), No. 91-30119.

Opinion Reversed

(240)*U.S. v. Jackson*, 768 F.Supp. 97 (S.D.N.Y. 1991), *reversed*, __ F.2d __ (2nd Cir. June 15, 1992) No. 91-1664.

Rehearing En Banc Granted

(520)*U.S. v. McGlocklin*, 962 F.2d 551 (6th Cir. 1992), *rehearing en banc granted*, __ F.2d. __ (6th Cir. July 21, 1992) No. 91-6121.

Amended Opinions

(520)*U.S. v. Alvarez*, 960 F.2d 830 (9th Cir. 1992) *amended*, __ F.2d __ (August 17, 1992) No. 90-50298.

(265)(284)(445)*U.S. v. Gates*, __ F.2d __ (11th Cir. June 10, 1992) No. 91-8083, *republished* July 28, 1992, No. 91-8083.

(719)*U.S. v. Morales*, 961 F.2d 1428, (9th Cir. 1992) *amended on denial of rehearing*, (9th Cir. August 12, 1992) No. 91-50513.

Topic Numbers In This Issue

100, 110, 115, 120, 125, 131, 132,
135, 140, 145, 150, 160, 170,
220, 224, 240, 242, 245, 251, 252, 253,
254, 260, 265, 270, 275, 280, 284,
300, 310, 330, 350, 360, 380,
431, 432, 470, 480, 432, 440, 443, 445,
450, 461, 462, 480, 486, 488, 490,
504, 520, 580, 610,
700, 710, 712, 715, 716, 719, 736,
730, 755, 760, 761, 770, 780, 790,
850, 855, 860,
900, 905, 910, 920, 970

TABLE OF CASES

U.S. v. Brownlee, __ F.2d __ (10th Cir. July 27, 1992) No. 92-3072. Pg. 9

U.S. v. Bucuvalas, __ F.2d __ (1st Cir. July 22, 1992) No. 90-2180. Pg. 17, 18

U.S. v. Castro, __ F.2d __ (9th Cir. August 17, 1992) No. 91-50369. Pg. 3, 10

U.S. v. Chartier, __ F.2d __ (2nd Cir. June 23, 1992) No. 91-1619. Pg. 13

U.S. v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill, Lynch, Pierce, Fenner and Smith, Inc., __ F.2d __ (3rd Cir. July 22, 1992) No. 91-5470. Pg. 17, 18

U.S. v. Cunavelis, __ F.2d __ (2nd Cir. July 21, 1992) No. 92-1092. Pg. 11, 14

U.S. v. Davern, __ F.2d __ (6th Cir. July 21, 1992) No. 90-3681 (en banc). Pg. 4, 6

U.S. v. Dean, __ F.2d __ (6th Cir. July 8, 1992) No. 91-5970. Pg. 10

U.S. v. Desmarais, __ F.2d __ (1st Cir. June 18, 1992) No. 91-2006. Pg. 9, 16

U.S. v. Dockery, 965 F.2d 1112 (D.C. Cir. 1992). Pg. 3

U.S. v. Doherty, __ F.2d __ (7th Cir. July 24, 1992) No. 91-3291. Pg. 4

U.S. v. Evans, 966 F.2d 398 (8th Cir. 1992). Pg. 6

U.S. v. Gates, __ F.2d __ (11th Cir. June 10, 1992) No. 91-8083, republished July 28, 1992, No. 91-8083. Pg. 18

U.S. v. Gaudet, __ F.2d __ (5th Cir. July 10, 1992) No. 91-3647. Pg. 2, 3, 13

U.S. v. Green, 964 F.2d 365 (5th Cir. 1992). Pg. 1, 11

U.S. v. Hayes, __ F.2d __ (8th Cir. July 24, 1992) No. 91-3843SI. Pg. 8

U.S. v. Jackson, __ F.2d __ (2nd Cir. June 15, 1992) No. 91-1664, reversing 768 F.Supp. 97 (S.D.N.Y. 1991). Pg. 5

U.S. v. Jackson, 768 F.Supp. 97 (S.D.N.Y. 1991), reversed, __ F.2d __ (2nd Cir. June 15, 1992) No. 91-1664. Pg. 18

U.S. v. Jessup, 966 F.2d 1354 (10th Cir. 1992). Pg. 2

U.S. v. Johnson, __ F.2d __ (10th Cir. July 28, 1992) No. 91-5030. Pg. 3, 5, 9, 16

U.S. v. Kohl, __ F.2d __ (9th Cir. August 12, 1992), No. 91-30119, withdrawing and superseding 963 F.2d 268 (9th Cir. 1992). Pg. 2

U.S. v. Kohl, 963 F.2d 268 (9th Cir. 1992) No. 91-30119, withdrawn and superseded, __ F.2d __ (9th Cir. August 12, 1992), No. 91-30119. Pg. 18

U.S. v. LaChappelle, __ F.2d __ (8th Cir. July 8, 1992) No. 91-3103. Pg. 17

U.S. v. Langston, __ F.2d __ (10th Cir. July 2, 1992) No. 91-2003. Pg. 3

U.S. v. Lghodaro, __ F.2d __ (5th Cir. July 24, 1992) No. 91-7322. Pg. 5, 8, 12

U.S. v. Lieberman, __ F.2d __ (3rd Cir. July 24, 1992) No. 91-5687. Pg. 4, 11, 12

U.S. v. Lockyer, __ F.2d __ (11th Cir. July 23, 1992) No. 91-8721. Pg. 14

U.S. v. McGlocklin, 962 F.2d 551 (6th Cir. 1992), rehearing en banc granted, __ F.2d. __ (6th Cir. July 21, 1992) No. 91-6121. Pg. 18

U.S. v. Midgett, __ F.2d __ (4th Cir. July 24, 1992) No. 91-5051. Pg. 7

U.S. v. Morales, 961 F.2d 1428, (9th Cir. 1992) amended on denial of rehearing, (9th Cir. August 12, 1992) No. 91-50513. Pg. 14, 18

U.S. v. Navejar, 963 F.2d 732 (5th Cir. 1992). Pg. 15, 16

U.S. v. Negron, __ F.2d __ (2nd Cir. June 16, 1992) No. 92-1003. Pg. 8, 12, 15, 16

U.S. v. Petti, __ F.2d __ (9th Cir. August 10, 1992), No. 91-50229. Pg. 10

U.S. v. Pico, 966 F.2d 91 (2nd Cir. 1992). Pg. 13

U.S. v. Pinedo-Montoya, 966 F.2d 591 (10th Cir. 1992). Pg. 6

U.S. v. Robinson, __ F.2d __ (4th Cir. July 22, 1992) No. 91-5414. Pg. 5, 7, 8

U.S. v. Rojas-Martinez, __ F.2d __ (5th Cir. July 29, 1992) No. 91-8218. Pg. 1, 5

U.S. v. Salgado-Molina, __ F.2d __ (2nd Cir. May 29, 1992) No. 91-1644. Pg. 6

U.S. v. Schultz, __ F.2d __ (1st Cir. July 22, 1992) No. 92-1152. Pg. 9

U.S. v. Schwimmer, __ F.2d __ (2nd Cir. July 13, 1992) No. 91-1629. Pg. 17

U.S. v. Scroggins, 965 F.2d 480 (7th Cir. 1992). Pg. 13, 15

U.S. v. Shores, __ F.2d __ (11th Cir. July 22, 1992) No. 90-3462. Pg. 4, 11, 12

U.S. v. Soria, 965 F.2d 436 (7th Cir. 1992). Pg. 15

U.S. v. Sturmoski, __ F.2d __ (10th Cir. June 3, 1992) No. 91-2209. Pg. 4, 6

U.S. v. Thomas, __ F.2d __ (7th Cir. July 20, 1992) No. 91-1502. Pg. 7

U.S. v. Warner, __ F.2d __ (6th Cir. July 27, 1992) No. 90-3753. Pg. 7, 10

U.S. v. Zerick, 963 F.2d 1487 (11th Cir. 1992). Pg. 6

* U.S. G.P.O.:1992-312-344:60311