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COMMENDATIONS

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

Leslie K. Baker (District of Oregon), by Undersheriff Charles H. Fessler, Director, Regional Organized Crime Narcotics Task Force, Portland, for her successful prosecution of a 17-defendant drug case involving the first known Colombian drug smuggling organization in Oregon. All defendants were convicted at trial or by plea.

Bradley D. Barbin, Gary L. Spartis and ***David J. Bosley*** (Ohio, Southern District), by Jerry McCartney, Chief of Police, and Sgt. Anthony F. Andriano, Narcotics Division, Steubenville Police Department, for their valuable assistance and cooperative efforts in obtaining a 100 percent conviction rate in the prosecution of drug cases in the City of Steubenville.

R. Daniel Boyce (North Carolina, Eastern District), by Anthony E. Daniels, Assistant Director, FBI Academy, Quantico, Virginia, for his excellent presentation of an interstate insurers case at an Insurance Fraud Seminar for FBI agents and two law enforcement officers from England. Also, by Leonard E. Adams, Regional Audit Manager, Bureau of Alcohol, Tobacco and Firearms, Atlanta, for his excellent presentation on money laundering and asset forfeiture at the NAR/SER RAM Conference.

Douglas C. Bunch (Missouri, Western District), by Thomas E. Den Ouden, Supervisory Senior Resident Agent, FBI, Springfield, for his valuable assistance and success in obtaining the conviction of an individual for two bank robberies.

Don Burkhalter (Mississippi, Southern District), by William P. Tompkins, District Director, Office of Labor-Management Standards, Department of Labor, New Orleans, for his outstanding prosecutive efforts in a credit union embezzlement case of a labor union official.

David M. Conner (District of Colorado), by Frederick J. Koch, Regional Manager-Corporate Security, Continental Airlines, Inc., Los Angeles, for his legal skill and expertise in successfully prosecuting a former employee for the interstate sale of aircraft parts belonging to Continental.

Charles L. Dause and ***Paul W. Hobby*** (Texas, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for their successful prosecution of a bank official who defrauded a savings institution of more than $25 million, resulting in the failure of the institution.

Connie DeArmond (District of Kansas), by Michael J. O'Brien, District Counsel, IRS, Oklahoma City, for her excellent representation and prompt action in bringing a bankruptcy case to a successful conclusion.

Robert DeSousa (Pennsylvania, Middle District) received a Certificate of Appreciation from Michael M. Linder, Medical Center Director, Department of Veterans Affairs, Wilkes-Barre, for his outstanding legal representation provided to the Department of Veterans Affairs and, in particular, the Medical Center, over the years.

Ernest J. DiSantis, Jr. (Pennsylvania, Western District), by Thomas P. Gleason, Supervisory Special Agent, FBI, Pittsburgh, for his professional and legal skill in obtaining a guilty verdict on all thirty-seven counts of a mail fraud and income tax evasion case in which several hundred funeral directors throughout Ohio and Pennsylvania were defrauded of nearly $9 million in pre-need funeral expenses from thousands of their clients.

Salvador A. Dominguez (Ohio, Southern District), by Don Mapley, Resident Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Columbus, for successfully prosecuting members of a drug organization responsible for trafficking cocaine from Miami to Columbus.

Andrew S. Dunne (District of Minnesota), by Nicholas V. O'Hara, Special Agent in Charge, FBI, Minneapolis, for his outstanding efforts in successfully prosecuting a kidnapping case, complicated by the fact that the kidnappers were juveniles.

Robert H. Edmunds, Jr., United States Attorney, and ***Douglas Cannon, Assistant United States Attorney*** (North Carolina, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for obtaining the conviction of a former city Winston-Salem alderman and two political allies for extortion and related offenses in a longstanding public corruption case known as "Mushroom Cloud."

Laura M. Everhart (Virginia, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for her outstanding success in six major illegal drug cases, resulting in the conviction of fifty three defendants and the seizure of more than $1 million, and for enhancing the working relationship between the FBI and other law enforcement agencies.

Edward F. Gallagher and ***Eric J. R. Nichols*** (Texas, Southern District), by Richard D. Ludwig, Supervisory Special Agent, FBI, Houston, and Stephen F. Jeroutek, Area Administrator, Office of Labor Management Standards, Department of Labor, Dallas, for their outstanding prosecutive skill in a union funds embezzlement case, resulting in a guilty verdict on all six counts after only three hours of jury consideration.

Patrick J. Hanley (Ohio, Southern District), by Allen K. Tolen, Special Agent in Charge, FBI, Cincinnati, for his success in obtaining a conviction in a criminal case involving 150 government exhibits introduced by seventeen witnesses during six days of testimony.

Robert W. Haviland (Michigan, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for successfully prosecuting a complicated bankruptcy and mail and tax fraud case, resulting in a sentence of 23 years in federal custody, $2 million in fines, and $4 million in restitution.

Michael Heavican and ***Stephen Von Riesen*** (District of Nebraska), by William S. Sessions, Director, FBI, Washington, D.C., for obtaining convictions of several individuals connected with the Omaha Chapter of the Hells Angels Motorcycle Gang who were indicted for illegal drug and weapons violations.

Gregory A. Hough (District of Kansas), by Robert B. Davenport, Director, Kansas Bureau of Investigation, Division of the Office of Attorney General, Topeka, for his successful prosecution of three major narcotics traffickers, all of whom received substantial prison time.

James B. Letten and ***Steven J. Irwin*** (Louisiana, Eastern District), by William P. Tompkins, District Director, Office of Labor Management Standards, Department of Labor, New Orleans, for their successful prosecution of a Baton Rouge City Attorney and other city officials, typifying the excellence of the Organized Crime Unit of the Eastern District of Louisiana.

Linda B. Lipe (Arkansas, Eastern District), by Jesse Tabor, Chief Border Agent, U.S. Border Patrol, New Orleans, for her outstanding legal skill and tireless prosecutive efforts in a number of immigration criminal cases, and for bringing these cases to a successful conclusion.

Lillian Lockary (Georgia, Middle District), by Walter W. Kelly, Standing Chapter 12 Trustee, U.S. Bankruptcy Court, Albany, for her professionalism and legal expertise in successfully resolving a complicated bankruptcy case.

William H. McAbee II (Georgia, Southern District), by Leonard D. Freedman, Regional Director, Office of Internal Affairs, U.S. Customs Service, Miami, for his successful prosecution of a former employee for theft of government monies.

Robert McCampbell and ***Kerry Kelly*** (Oklahoma, Western District), by Floyd W. Ratliff, Jr., Supervisory Special Agent, FBI, Oklahoma City, for their outstanding efforts in the prosecution of a complex financial crimes case which resulted in convictions for bank fraud, mail fraud, money laundering and tax violations.

Raymond A. Nowak (Texas, Western District), by Peter M. Murphy, Counsel for the Commandant, Headquarters, U.S. Marine Corps, Washington, D.C., for his excellent representation and subsequent successful disposition of a contract dispute case brought against the Marine Corps Exchange.

Nancy A. Nungesser and ***Carter K. D. Guice*** (Louisiana, Eastern District) were presented Certificates of Appreciation by Johnny F. Phelps, Special Agent in Charge, Drug Enforcement Administration (DEA), New Orleans, for their valuable support of the Diversion Group of the New Orleans Field Division, and for securing significant monetary settlements from DEA registrants who committed acts of civil violations.

Leon J. Patton (District of Kansas), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for his valuable assistance and cooperation in the successful apprehension of a fugitive and the preparation of a search warrant affidavit based on Title III information provided by the Denver FBI Division.

Robert L. Rawls (Texas, Eastern District), by Frank DeGeorge, Inspector General, Department of Commerce, Washington, D.C., for obtaining the convictions of a CPA and his accounting firm for diverting funds and personnel staff of a minority business development center, and for making false claims and statements to a federal agency.

Mark Rosenbaum (District of Alaska), by Burdena G. Pasenelli, Special Agent in Charge, FBI, Anchorage, for his demonstration of legal skill, dedication and cooperation in obtaining the conviction or pleading of four individuals for eight separate bank robberies in Anchorage.

Ronald F. Ross (District of New Mexico), by Major Joseph T. Frisk, Litigation Attorney, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for his excellent representation and support in a complex medical malpractice suit that resulted in a settlement favorable to the United States.

Wevley William Shea, United States Attorney; Jackie Clark (Receptionist); ***Carol Ross*** (Secretary); and ***Clay Powell*** (Paralegal) (District of Alaska), by Captain Michael L. Dorsey, District Legal Officer, Seventeenth Coast Guard District, U.S. Coast Guard, Juneau, for their kind hospitality, administrative support, and valuable contributions to the successful prosecution of a Coast Guard deserter.

Jim Sutherland (District of Oregon), by Michael J. Norton, United States Attorney for the District of Colorado, Denver, for providing valuable assistance and support in a case arising from a large canyon fire, and for sharing his vast legal expertise as an experienced litigator of forest fire cases.

Thomas Swaim and ***Stephen West*** (North Carolina, Eastern District), by Gerald R. Michael, Assistant Chief, Albemarle Police Department, for conducting an excellent training class for members of the USA Drug Task Force on money laundering.

Stephen D. Taylor (District of Colorado), by John G. Freeman, Inspector in Charge, U.S. Postal Service, Denver, for his excellent representation and diligent efforts in bringing a civil case to a successful conclusion.

Kathleen L. Torres (District of Colorado), by Philip W. Perry, Special Agent in Charge, Drug Enforcement Administration (DEA), Denver, for her excellent presentation on sexual harassment during a series of events recognizing the Federal Women's Program in the Rocky Mountain Division of DEA.

Tanya J. Treadway (District of Kansas), by Douglas W. Buchholz, Special Agent in Charge, U.S. Secret Service, Kansas City, for her professionalism and legal skill in the successful prosecution of a complex bank fraud case.

G. Elaine Wood (New York, Southern District), by Michael W. Riordan, Jr., Project Manager, Department of Veterans Affairs, Washington, D.C., for her demonstration of professionalism and legal skill in a lengthy and complex contract dispute case, which resulted in an outstanding victory for the U.S. government.

Gordon A. D. Zubrod (Pennsylvania, Middle District), by William S. Sessions, Director, FBI, Washington, D.C., for his professional skill in successfully prosecuting a high profile and extremely sensitive illegal drug case involving two former high-level officials of the Department of Justice.

SPECIAL COMMENDATION FOR THE EASTERN DISTRICT OF VIRGINIA

Stephen D. Schiller, Assistant United States Attorney for the Eastern District of Virginia, was commended by William S. Sessions, Director, FBI, Washington, D.C., for his aggressive and expeditious prosecutive efforts in a number of significant white collar crime cases. ***Mr. Schiller*** was also presented a plaque by Robert Satkowski, Special Agent in Charge, FBI, Richmond, in appreciation for his dedicated efforts and support of the 1992 FBI White Collar Crime Program.

Director Sessions noted Mr. Schiller's substantial role in implementing the Financial Institution Fraud Fast Track Program for the Eastern District of Virginia. This program has greatly expedited the prosecution of financial institution fraud matters that normally would not fit Federal prosecutive guidelines, to include fifty nine indictments, nineteen felony convictions, two informations, and restitutions totalling over $20,000 in less than one year.

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SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

At a meeting of the Organized Crime Drug Enforcement Task Force (OCDETF) in Clarksburg, West Virginia, represented by five federal agencies and five non-federal agencies, ***William A. Kolibash, United States Attorney for the Northern District of West Virginia,*** and ***Thomas O. Mucklow, OCDETF Assistant United States Attorney,*** were presented plaques by Jack Schroeder, District Director, and Larry R. Mincks, Group Manager, Criminal Investigation Division, Internal Revenue Service, Parkersburg, for their valuable assistance and support over the past ten years of the OCDETF program. Mr. Kolibash was recognized for his dedication to the task force concept and for forming the first task forces in West Virginia as early as 1979 which served as a model for OCDETF. He was also recognized for his outstanding success in seizing assets and making awards far in advance of the forfeiture program. In addition, asset forfeiture checks totalling approximately $5,000.00 were presented to the Wheeling Police Department and the Ohio County Sheriff's Department.

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ATTORNEY GENERAL HIGHLIGHTS

Joint Communique Between The United States And The Russian Federation

On October 13, 1992, Attorney General William P. Barr met with Nikolay V. Federov, the Minister of Justice of the Russian Federation, during an official visit by Mr. Federov to the United States. The Justice Minister and the Attorney General exchanged views about cooperation between the Ministry of Justice and the Department of Justice in the context of the reforms taking place in the Russian Federation. Noting the great political and economic significance of the changes now occurring in Russia, they expressed a mutual interest in the development and reinforcement of institutions that would contribute to building a democratic and free society in the Russian Federation. The Attorney General referred to the recently passed legislation known as the Freedom Support Act, which includes a mandate to promote these and other goals in Russia and other States of the former Soviet Union.

The Attorney General suggested that he send a representative to the Russian Federation to discuss concrete proposals for achieving the Act's institution building objectives. Such proposals could include a number of useful and innovative plans that were put forward by the Minister of Justice. The Minister of Justice agreed that such a visit should take place in the near future.

* * * * *

OPERATION GUNSMOKE II

On October 27, 1992, Attorney General William P. Barr and Director Henry E. Hudson, U.S. Marshals Service, announced that 200 law enforcement officials have launched a major anticrime campaign in a selected number of cities across the country to apprehend fugitives wanted by federal, state and local authorities for sex offenses. The targets of Operation Gunsmoke II are fugitives who used violence in committing sex crimes, were armed or committed sex crimes against children. The operation, conducted by the Marshals Service and state and local law enforcement agencies, began on October 13, 1992, and will continue for a period of approximately six weeks.

The investigative teams will operate in the Washington, D.C. area, including Baltimore and Northern Virginia; Houston, San Francisco, Boston, Tallahassee, and Columbia, South Carolina. Additional target cities include: Atlanta, Tampa, Sacramento, Oklahoma City, Philadelphia and Pittsburgh, El Paso, Wichita, and St. Louis. They will include 100 Deputy United States Marshals and 100 state and local law enforcement officers.

In a similar, ten-week operation last spring, the Marshals Service and other federal, state and local law enforcement agencies arrested 3,313 violent criminals in more than 40 cities and seized more than 730 guns and other weapons. (See, United States Attorneys' Bulletin, Vol. 40, No. 5, dated May 15, 1992, at p. 137.)

The Attorney General said, "With Gunsmoke II, we hope to continue the huge success of the earlier operation. This time we will concentrate on those criminals who have used or threatened violence in the commission of sex crimes or who have sexually attacked innocent children. We want as many of these fugitives behind bars as possible."

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OPERATION WEED AND SEED

Official Recognition Procedure For Weed And Seed Sites

Attached at the Appendix of this Bulletin as Exhibit A is a memorandum dated October 7, 1992, to all United States Attorneys from Deborah J. Daniels, Director, Executive Office for Weed and Seed. Ms. Daniels is asking all federal agencies to identify those programs which complement the Weed and Seed initiative, and to target those resources toward communities which have developed a coordinated Weed and Seed strategy. To assist the agencies in identifying those communities, the Executive Office for Weed and Seed has developed an official recognition process for communities which wish to benefit their citizens by employment of a Weed and Seed strategy.

Please review the memorandum and share the attachments with the Weed and Seed Steering Committee(s) which you have convened in your district. You may submit proposals as soon as they reach the stage in which you can certify that they have met all the requirements as indicated in Exhibit A. At that time, the Executive Office for Weed and Seed will begin the recognition procedure and report back to you at the earliest opportunity.

If you have any questions or require further information, please call the Executive Office for Weed and Seed at (202) 616-1152.

* * * * *

Weed And Seed In Philadelphia

On October 26, 1992, Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, announced that for the first time in the United States, federally forfeited real estate is being transferred to community groups for use in anti-drug activities as a part of the Department of Justice's Weed and Seed program. Attending the press conference were Henry Hudson, Director, U.S. Marshals Service, Kevin Moley, Deputy Secretary, Department of Health and Human Services, and a number of state and local law enforcement officials. Mr. Baylson said, "This is another proud first for Philadelphia -- which originated the Weed and Seed strategy."

One of the three federally forfeited properties was transferred to the Associacion de Puertorriquenos en Marcha, Inc. (APM) and will be used as a drug treatment center. Another property was transferred to Community United Neighbors Against Drugs (CUNAD), to be used as a satellite office, and the third property was transferred to United Neighbors Against Drugs (UNAD) to be used to conduct drug prevention programs, job training programs and educational programs for children and adults. All three properties are located in the West Kensington area of Philadelphia, a Weed and Seed target area.

Weed and Seed is a Department of Justice program designed to weed violent criminals and drug dealers from neighborhoods and then seed the neighborhoods with public and private services, community-based policing, and incentives for neighborhood revitalization. This program now includes the transfer of property forfeited from criminals and drug dealers to local public agencies and private non-profit organizations. The agencies and organizations must use the property in a manner that promotes the goals of the Weed and Seed program.

Under the forfeiture laws, the United States Attorney files civil suits to forfeit property which was used to facilitate drug transactions, or was purchased with drug proceeds. The U.S. Marshals Service usually sells forfeited properties. Non-federal agencies that assisted in the investigation leading up to forfeiture receive a share of the proceeds from the sale, and the U.S. Treasury receives the balance. The Philadelphia Police Department and the Pennsylvania Attorney General's office, Bureau of Narcotics Investigation have agreed to waive their shares of the proceeds so that the community groups may receive these properties through Weed and Seed.

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Weed And Seed In Richmond, Virginia

On October 13, 1992, Attorney General William P. Barr announced that the Bureau of Justice Assistance, a component of the Office of Justice Programs, will provide up to $15,000 in assistance to the Henrico County (Richmond) Virginia Police Department to host an intensive training conference on community and problem-oriented policing. The conference will provide an overview of community and problem-oriented policing focusing on the specific activities involved, the investment necessary to implement the activity, the importance of police-community cooperation, departmental policies necessary for community policing, and the impact the approach has had on the problems of drug trafficking and gang-related violence. The conference, scheduled for early 1993 in Richmond, will be conducted by the Police Executive Research Forum, Washington, D.C. It will be open to senior corporate, government, and law enforcement officials throughout the Richmond metropolitan area. Richmond is one of twenty demonstration sites across the country implementing the Weed and Seed strategy.

The Attorney General said, "Community policing is one of four elements that is essential for the success of the Weed and Seed strategy. Under community policing, law enforcement works closely with residents of the community to develop solutions to the problems of violent and drug-related crime. Community policing serves as a bridge -- a vital link -- between the law enforcement and neighborhood revitalization components of Operation Weed and Seed."

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Weed And Seed In Atlanta, Georgia

On October 15, 1992, Deputy Attorney General George J. Terwilliger, III, announced that Atlanta, Georgia, will receive a total of $300,000 to enhance the "seed" component of its Operation Weed and Seed program. The Bureau of Justice Assistance (BJA), a division of the Department's Office of Justice Programs, is awarding $200,000 to implement Safe Haven Multi-Service Educational Centers in Atlanta. Another $100,000 will be provided as part of a subsequent award under a national Weed and Seed initiative developed jointly by the Departments of Justice, Education, and Housing and Urban Development. The new funds are in addition to a grant of $613,000 Atlanta received on May 1, 1992, to begin implementing a Weed and Seed program.

Safe Haven is a primary "seeding" component to organize and deliver an array of educational and other youth and adult-oriented human services in an environment that is free from drugs and crime. Safe Haven programs operate before, during, and after hours in neighborhood schools, community centers, or other centrally-located facilities in public housing developments and other high-crime areas. The programs offer prevention, treatment, educational, recreational, cultural, and other activities for young people from public housing developments or other high-crime areas who are at high-risk of becoming involved in drug and alcohol abuse and delinquent activity. Program participants include the school superintendent, the principal, representatives from local social services, health, and educational agencies, parents, local law enforcement officials, and public housing officials.

Deputy Attorney General Terwilliger said, "The Safe Haven program will make a significant contribution to the overall effectiveness of Atlanta's Weed and Seed program. Human service agencies have been spending billions of dollars on social service programs, but all too often these are uncoordinated and provided independently in environments that are not safe for the youth or adults they are designed to serve. The Safe Haven program is designed to alleviate this problem and maximize the effect of these important programs."

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National Conference Of Black Mayors, Atlanta, Georgia

On October 15, 1992, Deputy Attorney General George J. Terwilliger, III, announced that the Bureau of Justice Assistance (BJA) has awarded a $100,000 grant to the National Conference of Black Mayors in Atlanta, Georgia, to provide training and technical assistance to Mayors in the existing twenty Weed and Seed pilot and demonstration sites, and other sites planning to implement Weed and Seed. Under the grant, the National Conference of Black Mayors will develop a curriculum to increase Mayors' understanding of the purposes of Operation Weed and Seed, and the role of the Mayor in the development and implementation of Weed and Seed projects; provide technical assistance and training based on this curriculum to Mayors in sites currently implementing Weed and Seed projects or planning to establish Weed and Seed in their communities; and convene an exploratory forum to promote innovative ideas for public-private partnerships to enhance Weed and Seed strategies.

The Deputy Attorney General said, "The National Conference of Black Mayors has long been recognized for the leadership it provides to officials in hundreds of cities. Mayors have and will continue to play an essential role in the implementation of Weed and Seed. The Department is proud to work with the National Conference of Black Mayors to ensure the effective and successful establishment of this program in communities across the nation."

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Southern Christian Leadership Conference And The Wings Of Hope Anti-Drug Program

On October 15, 1992, Deputy Attorney General George J. Terwilliger, III, announced that the Bureau of Justice Assistance (BJA), has awarded a $250,000 grant to the Southern Christian Leadership Conference (SCLC) to implement its Wings of Hope Anti-Drug Program in up to twelve of the target neighborhoods in Operation Weed and Seed demonstration sites. The Wings of Hope program works to develop church and community-based partnerships with police to combat crime, violence, and substance abuse in inner-city neighborhoods with high numbers of minority residents. BJA currently provides funding to support the Wings of Hope program in five communities in the Atlanta, Georgia, metropolitan area. This initiative will allow SCLC to demonstrate effective strategies for community revitalization in Weed and Seed project sites. The objectives of the Wings of Hope program are:

- To build and maintain community partnerships to plan and implement innovative community-based anti-drug initiatives in public housing units and drug-infested neighborhoods;

- To educate, train, and mobilize public and private service providers, law enforcement, businesses, churches, community groups, residents, and youth in state-of-the-art crime and drug prevention and mentoring programs;

- To improve deteriorating social and economic conditions in targeted neighborhoods;

- To refine community adoption programs for at-risk families in high-risk neighborhoods through services provided by churches, community groups, and public and private agencies to make people feel less vulnerable to substance abuse, drug trafficking, and victimization;

- To provide alternatives to youth gang involvement; and

- To provide training to help communities working with drug treatment centers to institute new or different strategies to enhance the recovery of drug addicts.

Deputy Attorney General Terwilliger said, "The Wings of Hope Anti-Drug Program is an excellent example of coalition and partnership building at the grassroots level to reduce crime, drugs, and violence."

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Business Alliance Program Of The Florida Chamber Of Commerce

On October 8, 1992, Deputy Attorney General George J. Terwilliger, III, announced that the Bureau of Justice Assistance (BJA) has awarded the Florida Chamber of Commerce $96,550.00 to establish a Business Alliance program in existing Weed and Seed communities and to enhance its drug-free workplace assistance programs.

The Florida Chamber of Commerce has been working in partnership with the Governor's Drug-Free Communities Program, and its drug-free workplace assistance programs have become a national model in achieving results among small and mid-sized businesses. Through a privately sponsored matching-grant program, the Chamber has assisted numerous local chambers in establishing programs committing business resources to fighting drugs in the workplace. It is anticipated that over $103,000.00 in matching funds will be provided by small businesses to support this effort.

Under this grant, the Florida Chamber of Commerce will focus on:

- Fostering economic recovery within existing Weed and Seed sites by training local businesses to develop Business Alliances designed to strengthen legitimate community organizations and activities, expanding the drug-free workplace program, and educating communities on how to obtain support from businesses;

- Developing a model for the establishment of Business Alliance programs through local Florida chambers of commerce and providing training and technical assistance, needs assessments, information dissemination, and ultimately implementing economic revitalization, job and life skills and mentoring progress within targeted areas;

- Introducing model Business Alliance programs across the State of Florida and nationally.

Deputy Attorney General Terwilliger said, "The Florida Chamber of Commerce is to be commended for recognizing the role and responsibility of the private sector in providing leadership and resources to restore our nation's most blighted communities and assist in building solid economic futures. Through these and similar efforts, neighborhoods can become safe places in which all citizens can live and work, free from fear and violence."

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Operation PAR (Parental Awareness And Responsibility), St. Petersburg, Florida

On October 9, 1992, Deputy Attorney General George J. Terwilliger, III, announced that the Bureau of Justice Assistance (BJA) has awarded a $200,000 grant to Operation PAR (Parental Awareness and Responsibility), St. Petersburg, Florida, to provide drug prevention and treatment training and technical assistance to the twenty Operation Weed and Seed demonstration sites. Operation PAR, a private and non-profit organization, will play an important role in enhancing "seeding" activities within the Weed and Seed neighborhoods.

Seeding activities involve public, private, and community coordination to prevent crime and violence by concentrating a broad array of human services --- drug and crime prevention programs, drug treatment, educational opportunities, family services, and recreational activities -- and economic opportunities in the targeted neighborhoods to create an environment where crime cannot thrive. Under this grant, Operation PAR will conduct an assessment to determine the individual training and technical assistance needs of each of the Weed and Seed sites; develop and disseminate a drug prevention and treatment training and technical assistance implementation guide and a resource manual; and provide regional training workshops and follow-up technical assistance for representatives from the Weed and Seed sites.

The Deputy Attorney General said, "The ultimate objective of Weed and Seed is to involve everyone in the effort to eliminate crime and revitalize crime-plagued neighborhoods. Involvement of the private sector and community-based organizations is of paramount importance to the success of this program."

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Weed And Seed Funds For San Diego's Drug Control Program

On October 6, 1992, the Office of Justice Programs, Department of Justice, announced a $162,396 award to the San Diego Association of Governments to enhance arrestee drug use data for the city's Weed and Seed program area. The project results will be used to develop drug control and drug treatment programs.

The National Institute of Justice (NIJ), the Department's research component in the Office of Justice Programs, sponsors Drug Use Forecasting (DUF) programs throughout the nation in which estimates of drug use among booked arrestees are determined through voluntary tests and interviews. The testing program enables cities to estimate the rate and types of drug use among those people who pass through their criminal justice systems. This new grant will enlarge the DUF interview to include additional questions on user perception of treatment needs, history of previous drug treatment and previous participation in other social service programs. Of particular importance will be information on the arrestee's legal residence. Knowing whether arrestees in the Weed and Seed area are residents or outsiders will be useful in planning both apprehension and prevention programs and in deciding where to locate drug treatment facilities.

Steven D. Dillingham, Acting Assistant Attorney General, Office of Justice Programs said, "We greatly need better information about drug use patterns among various urban population groups. This grant will help us make important decisions based on accurate data."

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DRUG ISSUES

Operation Green Ice

On September 28, 1992, the Department of Justice announced the culmination of high-impact initiatives that were conducted with law enforcement officials of eight nations which resulted in the dismantling of major money laundering operations directed by the Cali and Medellin cocaine cartels. Attorney General William P. Barr said, "This is yet another strike against the Cali cocaine cartel, as we hit the global money laundering network hard. This worldwide operation shows the success of the international cooperation and intelligence work we have been putting in place. As I have been saying from the start, we anticipate that these building blocks will lead to greater successes against the cocaine cartels."

Operation Green Ice was initiated by the Drug Enforcement Administration more than two years ago. It was conducted with the cooperation of the U.S. Marshals Service, the FBI, the Treasury Department, national police agencies in eight countries and other federal, state and local authorities throughout the United States. The investigation had as its objective the infiltration of money laundering enterprises of targeted kingpin organizations that were run by leaders of the major Colombian cocaine cartels, principally the Cali cartel. Undercover agents posed as money laundering facilitators and used informants to identify several major drug money brokers in Colombia. These Colombian brokers acted as middlemen between Cali cartel kingpins in Colombia and money laundering organizations in the United States. Beginning in San Diego and Los Angeles, the investigations took undercover agents to Houston, Fort Lauderdale, Miami, Chicago and New York to pick up money and to establish "fronts," such as leather goods shops, in these cities. The fronts were used to launder drug money profits by the importation of merchandise, thus "legitimizing" the exporting of U.S. currency to banks in Colombia. As the investigation

developed, cartel operatives asked the undercover agents to provide money laundering services in Europe, Canada and the Carribean. This permitted Operation Green Ice to expand into a coordinated international law enforcement effort involving the cooperation of law enforcement counterparts in Colombia, Spain, Italy, the United Kingdom, Canada and the Cayman Islands, as well as the United States.

- In the United Kingdom, Her Majesty's Customs and Excise Service seized approximately $6.0 million, arrested three cell members and seized approximately 43 kilos of cocaine.

- In Italy, the Servicio Centrale Operativo (SCO) arrested 39 cell members and associates of two organized crime families, seized $1.0 million and instituted a large-scale cocaine investigation.

- In Canada, the Royal Canadian Mounted Police (RCMP) arrested one individual and seized approximately $1.6 million.

- In Spain, the National Police arrested 4 cartel cell members.

Deputy Attorney General George Terwilliger said, "These initiatives. . .account for a total of 167 arrests and the seizure of more than $54 million in cash and property worldwide. This is truly a high-water mark in international cooperation against the Cali and Medellin Cartels.

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Drug War In The District Of Alaska

Wevley William Shea, United States Attorney for the District of Alaska, was recognized by the Western State Information Network (W.S.I.N.) of Sacramento, California, for his efforts in promoting cooperation among the federal, state and local law enforcement agencies in Alaska in the investigation and prosecution of illegal drug traffickers. W.S.I.N. lends a tremendous amount of support to law enforcement in the five western states through intelligence sharing, training, equipment loans, and monetary support.

In a letter dated August 19, 1992, Michael C. Kolivosky, Director (retired), Alaska State Troopers, stated that Alaska presents many unique circumstances for law enforcement. The large geographic expanse of territory, extreme weather conditions, as well as a limited quantity of personnel all make the task of law enforcement difficult. Alaska's state laws have been inadequate to aggressively pursue large scale drug trafficking that we are now seeing in the state. The United States Attorney's office has been committed to vigorously assisting Alaska law enforcement through the use of federal laws and prosecutors in cases where existing state law simply fell short. Mr. Kolivosky stated, "Through your efforts the level of cooperation among Alaska law enforcement agencies in drug investigations and prosecutions has never been higher."

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Mountain View, Alaska

The following is an excerpt from a letter to the United States Attorney's office for the District of Alaska from the Mountain View Community Council:

The Mountain View Community Council and the residents of Mountain View are deeply indebted to you for your recent efforts in our behalf. When the drug trade rotated again into our neighborhood, in force, in the Fall of 1991, the situation grew out of control and became intolerable. We had to call for help.

The planning and the coordination of the multi-agency task force took a huge amount of doing, and the results are spectacular. We have our neighborhood back at a level of peace and tranquility not experienced for several years. The reduced level of vehicular traffic attributed to both Vendors and Buyers is truly remarkable. It is quiet now. The confidence of success! How sweet it is!

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CRIME ISSUES

Attorney General Barr Speaks Out On Juvenile Crime

On October 9, 1992, Attorney General William P. Barr addressed the problem of juvenile crime. He stated:

> "Today the rate of juvenile crime is continuing to increase, and this increase is driving much of the general rise in violent crimes we are seeing. For example, between 1965 and 1989, the arrest rate for juveniles for murder almost tripled. One thing is clear: if we are going to deal effectively with violent crime in general, we are going to have to improve the way we deal with juveniles. Our juvenile justice system needs to do two things better: First, it has to be better at intervening early enough to divert troubled youths away from a career of crime. Second, it has to be more effective at identifying and dealing with the chronic offender who has embarked on a career of crime."

The Attorney General added, "I believe [the following] programs will help reform the juvenile system."

New Correctional Options For Youthful Offenders, Including Boot Camps

On October 9, 1992, Attorney General William P. Barr announced the awarding of $11 million by the Bureau of Justice Assistance (BJA), Office of Justice Programs, to support projects in seven states which will demonstrate correctional options programs for youthful offenders. These include community based incarceration, weekend incarceration, electronic monitoring and intensive probation combined with educational, drug treatment, job training and health services.

The Florida Department of Corrections, the Maryland Department of Correctional Services, and the New Hampshire Department of Corrections, were each awarded $2,470,000; the Alameda County, California Probation Department was awarded $1,950,000 to develop and implement programs incorporating a wide range of correctional options for youth offenders. The Cook County, Illinois Sheriff's Office, the St. Louis, Missouri Medium Security Institution, and the Kentucky Department of Corrections were each awarded $420,000 to develop and implement boot camp prison programs. And $399,904 was awarded through the Department's National Institute of Justice to the San Francisco based National Council on Crime and Delinquency to conduct evaluations of these efforts.

- The Florida Department of Corrections will implement a program entitled Drug Punishment Program, aimed at youthful offenders 14 to 21 years of age who have been convicted of non-violent drug-related crimes and who are in need of drug rehabilitation, and for whom less restrictive drug treatment programs have been ruled out. The program will require several months in a secure residential setting followed by additional time in a non-secure facility for transition back to the community. The program will provide an array of social and educational services and include periodic mandatory drug testing throughout the period. Programs will be established in Hillsborough, Manatee, Pinellas, and Sarasota counties; the cities of Sarasota, Tampa and St. Petersburg; and at locations within the 7th, 8th, 9th, 10th and 13th Judicial Districts.

- The New Hampshire Department of Corrections will establish a program entitled Prescriptive Alternatives to Traditional Housing which will be comprised of three new facilities, including a post-release facility, all located at the State's Lakes Region Facility in Laconia. The New Hampshire program, which will target offenders 18 to 30 years of age, will encompass a number of highly supervised intermediate sanctions including a modified boot camp program and pre- and post-release social, educational and substance abuse services.

- The Maryland Department of Corrections will establish a program entitled A System of Sanctions for Youthful Offenders. The program consists of a state-wide program of intermediate sanctions including boot camp prisons, regimented housing, day reporting, and electronic monitoring. The program, which will incorporate mandatory drug testing and post-release services, will target offenders 16 to 30 years of age.

- The Alameda County Probation Department, awarded $1,950,000, will target youthful offenders 18 to 29 years of age for a program entitled Intermediate Sanctions for Drug Using Youthful Offenders in the Form of a Drug Abuse Control Center. This program is a highly supervised day reporting program which will be offered as a condition of probation or deferred prosecution. Through the Center, offenders will receive a variety of services including treatment. Participation will also require mandatory drug testing.

Programs undertaken by Cook County, St. Louis and Kentucky will establish secure boot camp facilities combining discipline and social support.

- The Cook County Sheriff's Office will establish the Cook County Boot Camp which will serve non-violent offenders ages 17 to 24 years of age. The program will incorporate military training principles, discipline, and methods to instill responsible behavior and self-esteem combined with substance abuse treatment, educational and job training services.

- The St. Louis Medium Security Institution will target offenders ages 17 to 25 for its Bootstrap Partnership Program. Again a highly regimented and disciplined environment will be combined with educational, social and job training services.

- The Kentucky Department of Corrections will establish a fifty-bed boot camp prison facility at the Roederer Correctional Complex in LaGrange under its Youthful Offender Boot Camp Program. This facility will house offenders between the ages of 18 and 26 in a highly disciplined and regimented secure facility which will also offer an array of social, educational and job training services.

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New Federal Funding For Los Angeles

On October 9, 1992, Attorney General William P. Barr issued a total of $3 million in federal funds to the Los Angeles Police Department (LAPD) and the Los Angeles Metropolitan Task Force on Violent Crime to aid the area's law enforcement efforts against gang violence. The federal/state/local Task Force investigates criminal gang activity, including murder, arson, assault, firearms violations, drug distribution and conspiracy.

The Task Force will receive $2 million from the Department of Justice. These funds were made available through the Asset Forfeiture Fund and will be used for overtime pay of LAPD officers and other state and local law enforcement agencies aiding the Task Force, and equipment and other material needed by the Task Force. LAPD will receive $1 million, representing its share of a recent federal forfeiture stemming from the obscenity case of Multi-Media, Inc., a Florida company formerly in the business of producing and distributing mail-order obscenity materials. The LAPD conducted all of the surveillance on the Los Angeles corporate locations of Multi-Media. The LAPD Vice Section participated in test buys of obscenity materials and, based on two decades of experience in obscenity investigations, has proven itself invaluable in providing intelligence on companies and individuals involved in the obscenity industry.

The Attorney General said, "I particularly want to thank the Administrative Vice Section of the LAPD for its outstanding investigative efforts on obscenity cases. This $1 million equity sharing check represents part of the largest forfeiture ever received in an obscenity case."

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PROJECT TRIGGERLOCK
Summary Report

Significant Activity - April 10, 1991 through September 30, 1992

Description	*Count*	*Description*	*Count*
Defendants Charged.....	9,253	Prison Sentences.....	25,331 yrs.
Defendants Convicted.....	5,171	Sentenced to prison.....	3,391
Defendants Acquitted.....	242	Sentenced w/o prison	
Defendants Dismissed.....	526	or suspended.....	309
Defendants Sentenced.....	3,700	Average Prison Sentence.....	90 months

Charge Information

Defendants Charged Under 922(g) w/o enhanced penalty.....	2,191
Defendants Charged Under 922(g) with enhanced penalty under 924(e)...	425
Defendants Charged Under 924(c).....	3,352
Defendants Charged Under Both 922(g) and 924(c).....	576
Total Defendants Charged Under 922(g) and 924(c) and (e).....	6,619
Defendants Charged With Other Firearms Violations.....	2,634
Total Defendants Charged.....	9,253

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FINANCIAL INSTITUTION FRAUD

Banca Nazionale del Lavoro (BNL)

On October 16, 1992, Attorney General William P. Barr announced the appointment of Judge Frederick B. Lacey as Independent Counsel, pursuant to 28 CFR Part 600. Judge Lacey will perform the following tasks: 1) investigate all aspects of the production of CIA documents and information concerning BNL loans to or on behalf of Iraq; 2) review the Department's entire handling of the BNL matter; 3) advise the Attorney General on an ongoing basis concerning the conduct of the Department's continuing investigation and prosecution of all aspects of the BNL case; 4) advise the Attorney General of any other areas which he feels should be reviewed based on any information that he learns; 5) supervise any applicable preliminary inquiries or preliminary investigations under the Independent Counsel statute; and 6) ultimately, prepare reports for Congress and the public on what he learns in the course of his review.

Judge Lacey most recently won acclaim for his work in cleaning up the Teamster's Union as a court-appointed independent administrator. Formerly the United States Attorney for the District of New Jersey, he won a national reputation for fighting public corruption. Later, he served with distinction as U.S. District Court Judge for the District of New Jersey for fifteen years. He was a judge on the Foreign Intelligence Surveillance Court, and served concurrently as a judge on the Temporary Emergency Court of Appeals. Thus, he may be the only jurist to serve on three courts at the same time. During his last four years on the Bench, from 1982 to 1986, Judge Lacey was a member of the Judicial Ethics Committee of the Judicial Conference of the United States.

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Financial Institution Prosecution Update

On October 23, 1992, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through September 30, 1992. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution, or (d) involved other major factors. 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 are adjusted due to monthly activity, improved reporting and the refinement of the data base. (All numbers are approximate.)

Savings And Loan Prosecutions

Informations/Indictments	786
Estimated S&L Losses	$8,932,212,084
Defendants Charged	1,289
Defendants Convicted	994 (93%)
Defendants Acquitted	78 *
Sentenced to prison	648 (77%)
Awaiting sentence	169
Sentenced w/o prison or suspended	193
Fines Imposed	$ 15,953,486
Restitution Ordered	$ 536,373,267

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	147
Convicted	115
Acquitted	10
Directors and Other Officers:	
Charged by indictment/ information	212
Convicted	182
Acquitted	7

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

Bank Prosecutions

Informations/Indictments	1,626	CEO's, Chairmen, and Presidents:	
Estimated Bank Loss	$4,081,455,289	Charged by Indictments/ Informations	149
Defendants Charged	2,304	Convicted	129
Defendants Convicted	1,850	Acquitted	1
Defendants Acquitted	43		
Prison Sentences	2,410 years		
Sentenced to prison	1,202		
Awaiting sentence	295	Directors and Other Officers:	
Sentenced w/o prison or suspended	369	Charged by Indictments/ Informations	480
Fines Imposed	$ 6,573,161	Convicted	432
Restitution Ordered	$431,653,346	Acquitted	7

Credit Union Prosecutions

Informations/Indictments	101	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$129,456,844	Charged by Indictments/ Informations	12
Defendants Charged	132	Convicted	10
Defendants Convicted	111	Acquitted	0
Defendants Acquitted	1		
Prison Sentences	141 years		
Sentenced to prison	80		
Awaiting sentence	15	Directors and Other Officers:	
Sentenced w/o prison or suspended	16	Charged by Indictments/ Informations	68
Fines Imposed	$ 21,200	Convicted	60
Restitution Ordered	$ 13,634,256	Acquitted	0

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CRIMINAL DIVISION ISSUES

Foreign Travel And Host Country Clearance Related To Criminal Matters

Attached at the Appendix of this Bulletin as Exhibit B is a memorandum prepared by George W. Proctor, Director, Office of International Affairs, Criminal Division, concerning the procedures for obtaining authorization for foreign travel by Assistant United States Attorneys and Department of Justice attorneys on official business related to criminal matters. As a general proposition, some form of host country notification is required for any foreign travel by U.S. Government employees traveling on official business.

The memorandum explains the requirements of the Departments of Justice and State to secure authorization for the foreign travel, and includes the following samples of forms and other related documents: Attachment A - DOJ Form 504, "Notification of Foreign Travel" (for those travellers having

access to classified information); Attachment B - the State Department's "Foreign Travel Request -- International Judicial Assistance"; Attachment C - the Executive Office for United States Attorneys (EOUSA) directive requiring simultaneous request approval from the Office of International Affairs (OIA) and EOUSA; Attachment D - a list of appropriate OIA recipients of these forms; and Attachment E - a list of appropriate Citizens Consular Services (CCS) recipients.

Both DOJ Form 504 and the State Department Foreign Travel Request should be submitted as soon as the attorney knows he/she is required to travel and, in any event, at least two weeks prior to travel. This time frame allows EOUSA to forward the paperwork to the State Department, which in turn contacts the U.S. Embassy in the host country. The Embassy then makes any required notifications of host country officials and secures any necessary authorizations.

Should you have any questions concerning these procedures, contact Lydia Ransome, Executive Office for United States Attorneys, at (202) 219-1042, or Judi Friedman, Office of International Affairs, Criminal Division, at (202) 514-0041.

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Arrest Of Foreign Nationals

All United States Attorneys' offices are reminded of Section 9-1.173 of the United States Attorneys' Manual, which states that where nationals of foreign countries are arrested on charges of federal criminal violations, the United States Attorney has the responsibility to ensure that the treaty obligations of the United States concerning notification of the consular officer of the country of which the arrested person is a national are observed. The procedure to be followed when the arrest is by an officer of the Department of Justice is specified in 28 C.F.R. §50.5.

Please make note that the telephone number listed in the Manual to call for information concerning the treaty obligations of the United States in the event of the arrest of a foreign national, a consul, or member of the consular staff has been changed to (202) 514-0000.

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CIVIL DIVISION ISSUES

Alternative Dispute Resolution (ADR)

On September 24, 1992, Stuart M. Gerson, Assistant Attorney General, Civil Division, distributed a monograph to all United States Attorneys, Department of Justice components, and Federal agencies. This monograph, entitled "Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts," is to assist and encourage litigation counsel in the use of Alternative Dispute Resolution or ADR. Assistant Attorney General Gerson advised that it is essential that counsel understand where ADR, both informal and formal, fits into the litigation process.

Ten copies of the monograph were sent to each United States Attorney's office. If you would like additional copies, please contact Colonel Tim Naccarato, Special Counsel to Assistant Attorney General Gerson. The telephone number is: (202) 514-3886. The fax number is: (202) 514-8071.

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Toxic Torts

The Torts Branch of the Civil Division has an Environmental and Occupational Disease Litigation Section which has cognizance over claims for damages for personal injuries or property damage from environmental contamination, occupational exposure to chemicals, or other toxic exposure. Many environmental cases with tort claims are sent only to the Environment and Natural Resources Division (ENR). Although ENR normally is quick to recognize the tort element and refer it to the Torts Branch, occasionally a time lag occurs. Assistant Attorney General Stuart Gerson of the Civil Division requests your assistance in seeing that such cases are referred to both Divisions.

If you have any questions, please call J. Patrick Glynn, Director, Torts Branch, Civil Division, at (202) 501-7040.

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POINTS TO REMEMBER

"Global" Plea Agreements

J. William Roberts, Chairman, Attorney General's Advisory Committee of United States Attorneys, reminds all United States Attorneys of the Department's policy on "global" plea agreements. The policy, which is set forth at Section 9-27.641 of the United States Attorneys' Manual, is reprinted below.

Multi-District (Global) Agreement Requests

No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the U.S. Attorney(s) in each affected district(s) and/or the Assistant Attorney General of the Criminal Division.

(REQUESTING DISTRICT/DIVISION SHALL MAKE KNOWN TO ANY OTHER AFFECTED DISTRICT(S)/DIVISION):

(1) The specific crimes allegedly committed in affected district(s) as disclosed by the defendant. (No prosecution agreement should be made to any crime not disclosed by the defendant.)

(2) Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.

(3) The proposed agreement to be made to the defendant and the applicable sentencing guideline range.

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Banner Year For Debt Collection In The Northern District Of California

John A. Mendez, United States Attorney for the Northern District of California, recently announced that debt collection in the Northern District of California has exceeded $15 million this year. The District collected almost $7 million more than last year, and more than the entire office budget for the office's criminal and civil litigation.

The exact amount collected during Fiscal Year 1992, which ended September 30, was $15,200,287. Of that sum, $3,798,861 resulted from the forfeiture of assets involved in criminal activities. $5,198,180 of the amount collected consisted of payments for criminal fines, special assessments, bail bond forfeitures and restitutions. United States Attorney Mendez stated that the increase in collections is attributable to his office's priority of assisting the Department's nationwide effort to improve the collection of federal debts.

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U. S. Trustee Program Initiative

On September 28, 1992, the Department of Justice announced the results of the first six months of a U. S. Trustee Program initiative to close thousands of bankruptcy cases that have remained open since 1979 and to increase the efficiency and effectiveness by which all cases are administered. The U. S. Trustee Program was created to bring greater supervision to the administration of bankruptcy estates and was placed within the Department's jurisdiction. Previously the judiciary supervised private trustees and debtors. The program, which inherited a large caseload, was established on a nationwide basis in 1986 and by 1989 assumed responsibility over the supervision of bankruptcy estates filed after 1979. As of July 15, 1992, 47 percent of Chapter 7 bankruptcy cases, filed before 1989, were closed with 17,600 remaining open. As of January 15, 1992, there were approximately 33,100 Chapter 7 bankruptcy cases pending that were filed prior to 1989. All of the cases were commenced subsequent to the effective date of the Bankruptcy Reform Act of 1978.

Chapter 7 of the Bankruptcy Code provides that upon a debtor filing a bankruptcy petition, a private trustee is appointed to liquidate the debtor's assets and distribute the proceeds to the debtor's creditors. Private trustees have pledged to close overwhelming numbers of the remaining old cases unless there is justification for them to remain open. Failure to abide by these commitments will lead to the imposition of sanctions against trustees ranging from suspending the trustee from receiving future cases to seeking a court order to remove the trustee. The U.S. Trustee Program has devoted significant efforts to bring the administration of Chapter 7 estates more in line with traditional fiduciary standards. These efforts have included imposing periodic reporting requirements on the part of private trustees and greater scrutiny over their conduct, including audits of their operations and review of the fees and costs charged to the estates.

Since the beginning of the year, the Trustees' program has pursued two goals: first, that cases are concluded expeditiously; and second, that cases are administered consistent with the interest of the beneficiaries of the estates, the creditors. Since the program expanded, and as a result of enhanced supervision, thirty-three trustees or employees of trustees have been prosecuted for embezzling estate funds. Since January, 1992, four private trustees and three employees of private trustees have pled guilty to embezzling estate funds. Enforcement motions were filed against twenty nine trustees for slow or ineffective administration of cases. Eight trustees were permanently suspended from receiving future cases.

John Logan, Director of the Executive Office for U.S. Trustees, said, "A fundamental element of the fair administration of justice is the adherence to fiduciary standards of those entrusted with bankruptcy estate monies. The results of the United States Trustee Program's actions demonstrate that the Department will not tolerate those who transgress the standards of the law and seek to fulfill their own self-interests."

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Redress Payments To Japanese-Americans Interned During WW II

The Department of Justice announced that redress payments for 25,000 Japanese-American World War II internees born on or before December 31, 1943, or their surviving heirs, began on October 1, 1992. Each recipient will receive $20,000 under the Civil Liberties Act Amendments of 1992, which were signed into law by President Bush on September 29. The amendments authorized an additional $400 million in funding for the program, with $350 million used to complete payments to all remaining eligible Japanese-Americans and $50 million used to create a public education program on Japanese-American internment during World War II. Since the program's inception in October, 1990, $1 billion in redress payments have been made to 50,000 individuals. John R. Dunne, Assistant Attorney General in charge of the Civil Rights Division, said, "This action fulfills our nation's commitment to members of the Japanese-American community who were the victims of a sad chapter in our nation's history."

The Office of Redress Administration (ORA) will notify by mail individuals expected to receive payment during FY 1993. Beginning November 2, 1992, eligible individuals who have not yet received their redress payment may call ORA at (202) 219-6900. The Telephone Device for the Deaf (TDD) phone number is (202) 219-4710.

The Civil Liberties Act of 1988, the statute creating the redress program, limits annual redress payments to $500 million. After the FY 1993 payments, approximately 5,000 eligible individuals can expect payment in FY 1994. The 1988 Act states that the Department should endeavor to make payments in chronological order, with the oldest recipients receiving payment first.

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Processing Procedures For Complaints Of Discrimination 29 Code Of Federal Regulations Part 1614

Effective October 1, 1992, the processing of complaints of discrimination are governed by new regulations, 29 CFR Part 1614. This rule revises the way that federal agencies and the Equal Employment Opportunity Commission (EEOC) will process administrative complaints and appeals of employment discrimination filed by federal employees and applicants for employment.

Under Part 1614, aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult an EEO counselor prior to filing a complaint in order to try to informally resolve the matter. The individual must initiate this contact within 45 calendar days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action. If the counselor is unable to resolve the matter of concern, a complainant has the right to file a formal complaint.

Investigations are conducted by persons officially designated and authorized to conduct inquiries into matters raised in equal employment opportunity complaints. The authorization includes the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality. The agency is required to conduct a complete and fair investigation of the complaint and issue a notice of final action within 180 days. Failure to meet this timeframe permits EEOC's Administrative Judge to draw an adverse inference.

Within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an Administrative Judge or may receive an immediate final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief shall be provided. The final decision shall advise the complainant of his or her right to appeal to EEOC.

Attached at the Appendix of this Bulletin as Exhibit C is a flowchart outlining the steps in the processing of complaints. If you have any questions, please call the Equal Employment Opportunity Staff, Executive Office for United States Attorneys, at (202) 514-3982.

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OFFICE OF LEGAL EDUCATION

Office Of Legal Education Courses

Carol DiBattiste, Director of the Office of Legal Education (OLE), Executive Office for United States Attorneys, is pleased to announce projected course offerings for the months of December 1992, through March 1993, for personnel in United States Attorneys' offices and the Department of Justice.

Please note that the courses listed below are tentative only. OLE will send a teletype to all United States Attorneys' offices and a memorandum to all Department of Justice Divisions approximately eight weeks prior to the commencement of the course, officially announcing the course and requesting nominations. Once a nominee is selected, OLE funds all costs for personnel from United States Attorneys' offices and other DOJ personnel.

December, 1992	*Course*	*Participants*
2-4	Money Laundering	Attorneys
7-10	Asset Forfeiture	AF Support Staff
7-11	Appellate Advocacy	Attorneys
14-17	Civil Federal Practice Seminar	D.C. Area Attorneys
15-17	Indian Gaming	Attorneys
January, 1993		
4-15	Civil Trial Advocacy	Attorneys
11-15	Basic Debt Collection	Financial Litigation Support Staff
11-15	Federal Practice Seminar (Criminal)	Attorneys
12-14	Asset Forfeiture Attorney Training	5th Circuit
20-22	Health Care Fraud	Attorneys
25-29	Support Staff Training (Criminal and Civil)	GS 4-7 - 9th Circuit Region
26-28	Bankruptcy Fraud	Attorneys
February, 1993		
1-4	Criminal	Paralegals
1-12	Criminal Trial Advocacy	Attorneys
2-4	Advanced Asset Forfeiture	AF Attorneys
16-18	Automating Financial Litigation	Financial Litigation Attorneys and Support/System Managers
17-19	Money Laundering	Attorneys
22-25	Advanced Financial Institution Fraud	Attorneys
23-26	Federal Practice Seminar (Civil)	Attorneys

March, 1993	*Course*	*Participants*
1-5	Support Staff Training (Criminal and Civil)	GS 4-7 - 5th Circuit Region
1-5	Appellate Advocacy	Attorneys
2-5	Complex Litigation	Attorneys
8-19	Asset Forfeiture Advocacy	AF Attorneys
9-11	First Assistants Seminar	Large U.S.A. Offices
9-12	Advanced Evidence	Attorneys
15-18	Advanced Narcotics	Attorneys
17-19	Developments in Torts Law	Attorneys
22 - Apr 2	Civil Trial Advocacy	Attorneys
23-26	Basic Paralegal Skills (Criminal & Civil)	Legal Technicians and Paralegals
31 - Apr 2	Criminal Chiefs	Small and Medium U.S.A. Offices

If you have any questions or require further information, please call the Office of Legal Education at (202) 208-7574. The fax number is: (202) 208-7235.

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Sentencing Guidelines Videotapes

During the first week of October, the Office of Legal Education (OLE) sent to all United States Attorneys a videotape and written materials explaining the November 1, 1992, amendments to the Sentencing Guidelines. OLE encourages local reproduction of the videotape and accompanying materials for training purposes. Also available upon request are videotapes (set of nine) of the Sentencing Guidelines Seminar held May 27-29, 1992, in Washington, D.C. Anyone interested in receiving these videotapes should contact Ted McBride or Hilda Hudson at (202) 208-7574.

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SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 3, dated September 29, 1992, is attached as Exhibit D at the Appendix of this Bulletin, which is published by the Federal Judicial Center, Washington, D.C.

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Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit E is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 24, dated September 21, 1992, Volume 3, No. 25, dated October 5, 1992, and Volume 3, No. 26, dated October 19, 1992, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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LEGISLATION

The 102nd Congress stands adjourned, sine die, as of October 9, 1992.

Money Laundering

The Money Laundering Improvement Act of 1992 (H.R. 6048), one of the Department's top law enforcement enhancement priorities for 1991-92, was signed by the President as a part of the Conference Report to accompany H.R. 5334, which amends and extends certain laws relating to Housing and Community Development.

Crime Control

The President signed H.R. 5716, which will extend for two years the authorization of appropriations for certain programs under Title I of the Omnibus Crime Control and Safe Streets Act of 1968.

The President signed H.R. 4542, which is intended to reduce the number of "car-jacking" incidents nationwide. Among other provisions, the bill makes "car-jacking" -- defined as the armed robbery of a vehicle while the owner is present -- a Federal crime, carrying a penalty of fifteen years in prison.

New Forfeiture Statutes Enacted By Congress

Attached at the Appendix of this Bulletin as Exhibit F is a summary of the most important provisions of the new forfeiture statutes enacted by Congress, together with the text of the statutes as amended and the legislative analysis. This summary was prepared by Stefan D. Cassella, Trial Attorney in the Asset Forfeiture Office of the Criminal Division. For further information, excerpts from the Congressional Record, and other background information, please call Mr. Cassella at (202) 514-1263.

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Juvenile Justice

Congress enacted and sent on to the President H.R. 5194, which amends the Juvenile Justice and Delinquency Prevention Act of 1974, and which authorizes appropriations for fiscal years 1993, 1994, 1995, and 1996. This is a priority of the Department.

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Immigration - Summary Exclusion Authority

After several attempts to negotiate some form of legislative language in order to enact "summary exclusion" authority, consensus could not be reached to include it in an immigration package at the end of the 102nd Congress. Given the position on "summary exclusion" taken by the House of Representatives, the only immigration-related legislation to be enacted and sent on to the President during the last week before adjournment included the Chinese Student Adjustment Act; legislation to facilitate the immigration of Soviet scientists; and legislation addressing immigration inspection at airports.

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SUPREME COURT WATCH

An Update Of Supreme Court Cases From The Office Of The Solicitor General

Selected Cases Argued In October, 1992

CIVIL CASES

Republic National Bank v. United States, No. 91-767 (argued October 5)

This case involves appellate jurisdiction over in rem civil forfeiture proceedings. The government took the position that if a claimant loses in the district court and fails to post a supersedeas bond, and the government thereafter removes the res (be it tangible property or money) from the jurisdiction of the court, then the court of appeals loses jurisdiction to hear the claimant's appeal.

Bray v. Alexandria Women's Health Clinic, No. 90-985 (reargued October 6)

Various abortion clinics sued under 42 U.S.C. 1985(3) to halt blockades by Operation Rescue that were designed to hinder abortion-related activities. The government argued that Section 1985(3) provided no cause of action because the blockading activities are aimed at all persons involved in abortions and are not based on animus toward women generally, and because no showing of purposeful interference with the right of interstate travel had been made.

Church of Scientology of California v. United States, No. 91-946 (argued October 6)

The IRS requested that a California state court provide certain tapes filed in a private case in that court. The district court ordered the California court to comply, which it did. The church appealed, but the government maintained that the appeal was moot: because the government has already obtained the tapes, any appellate opinion would be advisory.

Reves v. Ernst & Young, No. 91-886 (argued October 7)

Creditors of a bankrupt sued the bankrupt's accounting firm under RICO Section 1962(c). The government, concerned about the ramifications for criminal RICO cases, argued as amicus curiae that Section 1962(c) does not require that a defendant must manage, lead, control, or operate an enterprise to be held liable. Rather, the conduct or participation requirement of the statute is met when the defendant engages in racketeering activity via the enterprise to further the enterprise's objectives; when he uses the enterprise's resources or his association with the enterprise to facilitate his crimes; or when he engages in criminal activity designed to corrupt the enterprise's actions.

United States v. Parcel of Land, No. 91-781 (argued October 13)

This case involves the extent of the innocent owner defense to civil forfeiture cases. The government argued that only claimants who acquired an interest in the property before the act triggering forfeiture may assert the innocent owner defense.

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CRIMINAL CASES

Parke v. Raley, No. 91-719 (argued October 5)

This case involves statutes that permit states to enhance sentences for criminal violations based on defendants' prior convictions. The defendant challenged the validity of two prior convictions on the ground that his guilty pleas were not knowing and intelligent under Boykin v. Alabama. The United States, as amicus curiae, argued that legislatures need only act rationally in defining crimes and fixing punishments. Hence, to prove a due process violation, the defendant must show that the prior conviction was so fundamentally flawed (as by a complete denial of the right to counsel) that the legislature would have acted irrationally to impose a more severe sentence because of it.

Montana v. Imlay, No. 91-687 (argued October 7)

Imlay was charged in state court with sexual assault on a minor. He denied wrongdoing but was convicted. Under his sentence, to receive probation instead of prison he had to complete a counseling program. All the outpatient programs required that he acknowledge his guilt, however, which he refused to do. The United States, as amicus curiae, contended that offering a more lenient sentence in exchange for a confession does not violate the privilege against self-incrimination because silence is not penalized. The case is particularly relevant because U.S.S.G. 3E1.1(a) allows offense level reductions for acceptance of responsibility.

Herrera v. Collins, No. 91-7328 (argued October 7)

This case presents the questions whether the Eighth Amendment forbids the execution of someone who has a plausible claim of actual innocence, and whether the Due Process Clause requires courts to review claims of actual innocence based on newly discovered evidence. The United States argued that the Eighth Amendment addresses only the ultimate penalty (sentence), not trial processes (conviction). The government also contended that due process does not require a state to establish a means to challenge convictions based on new evidence, especially when executive clemency remains available.

* * * * *

Questions Presented in Selected Cases in Which the Court Recently Granted Cert

CIVIL CASES

United States v. Texas, No. 91-1729 (granted October 5)

Whether the United States retains its common-law right to collect prejudgment interest on debts owed by the States.

Buckley v. Fitzsimmons, No. 91-7849 (granted October 5)

Whether a prosecutor is immune from civil liability for actions taken in a pre-indictment investigation and for statements at a press conference announcing the indictment.

Daubert v. Merrell Dow Pharmaceuticals, Inc., No. 92-102 (granted October 13)

Whether the Frye test, which bases the admissibility of scientific evidence on its general acceptance in the field, survived the enactment of the Federal Rules of Evidence.

Keene Corp. v. United States, No. 92-166 (granted October 19)

Whether, under 28 U.S.C. 1500, the Claims Court lacks jurisdiction of a case if, at any time during Claims Court proceedings, the plaintiff has another case involving the same claim pending against the United States in another court.

* * * * *

CRIMINAL CASES

United States v. Landano, No. 91-2054 (granted October 5)

Whether exemption 7(D) of FOIA, 5 U.S.C. 552(b)(7)(D), which covers the withholding of law enforcement information, protects all information gathered by the FBI in a criminal investigation, absent evidence negating the presumption of confidentiality for a particular source.

Minnesota v. Dickerson, No. 91-2019 (granted October 5)

Whether the Fourth Amendment permits a "plain feel" exception to the warrant requirement.

Deal v. United States, No. 91-8199 (granted October 5)

Whether a defendant convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c), which increases penalties for the use of firearms in the commission of crimes of violence or drug offenses, is subject to the statute's more severe sentence for "second or subsequent" convictions.

Smith v. United States, No. 91-8674 (granted October 5)

Whether the exchange of firearms for narcotics involves the "use" of a firearm in the commission of a drug crime, resulting in enhanced penalties under 18 U.S.C. 924(c)(1).

Sullivan v. Louisiana, No. 92-5129 (granted October 19)

Whether a jury instruction constitutionally deficient under Cage v. Louisiana, 111 S. Ct. 328 (1990), because it equated "reasonable doubt" with "grave uncertainty" and "actual substantial doubt" and required only a "moral certainty" of guilt, may be harmless error.

* * * * *

CASE NOTES

Northern District Of Alabama

Eleventh Circuit Holds That Parole Commission Rescission Guidelines Not Subject To Ex Post Facto Challenge

On August 10, 1992, in a case of first impression, the Eleventh Circuit held that United States Parole Commission rescission guidelines are not "laws" within the purview of the ex post facto clause. Citing Dufresne v. Baer, 744 F.2d 1543 (llth Cir. 1984), cert. denied. 474 U.S. 817 (1985), which held that Parole Commission parole guidelines are not subject to ex post facto challenge, the Court found no significant distinction between parole guidelines and rescission guidelines as rescission guidelines "are nothing more than a subcategory of the parole guidelines and as such are subject to being amended by the Parole Commission..." The inmate, citing Marshall v. Lansing, 839 F.2d 933 (3d Cir. 1988), had argued that the rescission guidelines are "disciplinary penalties" designed to be punitive in nature and that he was entitled to application of the rescission guidelines in effect upon the date of his disciplinary infraction rather than those in effect at the time of his parole hearing (which were more severe).

Kelly v. Southerland, 91-7168 (11th Cir. August 10, 1992)

Attorney: Winfield Sinclair, Assistant United States Attorney for the Northern District of Alabama - (205) 731-1785

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Clean Water Act Violations In The Northern District Of California

On October 7, 1992, John A. Mendez, United States Attorney for the Northern District of California, announced the indictment of Alfred Benjamin Saroni, III, President of two California food corporations, for allegedly dumping industrial waste water into the Oakland Estuary and San Francisco Bay in violation of the Clean Water Act of 1972. Mr. Mendez noted that this was the sixth federal criminal case nationwide under the Clean Water Act involving food products industrial waste water, and the first such federal case involving the San Francisco Bay. He emphasized that the prosecution of environmental criminal offenses impacting the San Francisco Bay is a priority for his office,

Sarman, Inc., d/b/a A&L Trucking, engaged in the transportation of liquid food products, such as vinegar and vegetable oil. Saroni Sugar and Rice operates a wholesale food products warehouse under the name of Saroni Total Food Ingredients. The five-count indictment charges that Saroni and others were involved in a scheme to haul acidic waste water in tanker trucks and trailers from food processors in Fairfield and Sonoma which was then illegally discharged into a storm drain at the Saroni warehouse. The storm drain led directly to the Oakland Estuary and the San Francisco Bay. The indictment also charges that Saroni trucked the industrial waste water to the Bay Area, because the Fairfield and Sonoma sanitary sewer districts refused to accept the waste water based on its chemical and biological characteristics, including its low pH. It is estimated that 126,000 gallons of industrial waste water were dumped into the San Francisco Bay over a three-month period.

United States of America v. Alfred B. Saroni III, et al, No. 92-0484-BAC (October 7, 1992)

Attorney: Dennis Michael Nerney - (415) 556-8512

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CIVIL DIVISION

In Accordance With Government's Amicus Submission, D.C. Circuit Holds That 1991 Civil Rights Act's Amendment To 42 U.S.C. 1981 Does Not Apply Retroactively

In a case involving claims of religious discrimination in the termination of a private contract, the D.C. Circuit [Buckley, Sentelle, JJ.; Wald, J., dissenting) has now joined four other circuits which have held that provisions of the Civil Rights Act of 1991 do not apply retroactively.

After a comprehensive review of prior precedent, the court first concluded that "the greater weight of authority * * * establish[es] that as between the two propositions that statutes presumptively apply to pre-enactment conduct and that they presumptively apply only to post-enactment conduct, the latter prevails." Slip op. 23. In addition, although the court recognized that the distinction was not "wholly satisfactory," it stated that the presumption against retroactive application "must apply in the case of changes in substantive law," while the presumption in favor of retroactivity "must pertain to 'remedial provision[s].'" Id. at 25. In this case, the court held that the 1991 Act's amendments to section 1981, which amended that provision to forbid discrimination in the termination of contracts, were substantive and therefore did not apply retroactively, even if the parties might have thought that, at least when they acted (prior to Patterson v. McLean Credit Union, 491 U.S. 164 (1989)), such discrimination was already prohibited.

Judge Wald dissented, stating that in her view "the most satisfactory -- although admittedly not the only defensible -- reconciliation of the * * * cases" requires the courts, "in the absence of a direction from Congress, to apply the law in effect at the time [it] render[s] [its] decision, unless * * * that would upset the reasonable expectations of the parties concerning the legal consequences of their conduct at the time they acted." Dissent at 1.

The decision in the case is an important victory on this issue and should aid our efforts to prevail in the many similar cases in the D.C. Circuit and elsewhere.

Gersman v. Group Health Ass'n. No. 89-5482 (September 15, 1992)
DJ # 145-0-3606.

Attorneys: Stuart M. Gerson, Assistant Attorney General
Marleigh D. Dover - (202) 514-3511
Jacob M. Lewis - (202) 514-5090

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Fourth Circuit Overturns District Court Ruling That Savings And Loan Was Entitled To Rescission Of Prior Acquisitions, Holding That Regulators Had Not Agreed To Permit Thrift To Use Supervisory Goodwill Irrespective Of Future Regulatory Changes

This case involved a challenge by a Virginia savings and loan to the strengthened thrift capital standards implemented under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). The district court found that, in approving a series of acquisitions by the thrift, government regulators had entered into an implied contract permitting the institution to use supervisory goodwill, an intangible asset, to satisfy thrift capital standards over as much as twenty five years. The court found that FIRREA, which precluded the use of such goodwill, had frustrated the parties' expectations, and therefore ordered that the prior acquisitions could be "rescinded" if regulators took action against the institution that substantially burdened its operations.

The court of appeals (Russell, Butzner, Simons (district judge)) has now unanimously reversed. After dismissing the claims against the FDIC on ripeness grounds, the court found that the district court -- rather than the Claims Court -- had jurisdiction over the thrifts' claims against OTS, because those claims were for declaratory and not monetary relief. However, the court concluded that the thrift had not obtained any contractual rights that would entitle it to relief against the imposition of the federal statute. In accordance with the rule that contracts with the federal government will not be construed to waive sovereign power absent "unmistakable terms," the appeals court refused to conclude that federal regulators had impliedly guaranteed to the thrift that it could use supervisory goodwill in the face of a contrary regulatory scheme. "If Charter wanted to avoid the risk of regulatory change," the court concluded, "it could have demanded more explicit assurances." Slip op. at 18.

Because of its disposition of the merits, the court had no occasion to address our argument that rescission would in any event be a wholly inappropriate form of relief. Nonetheless, the decision is another important victory in this much-litigated area.

Charter Federal Savings Bank v. Office of Thrift Supervision,
Nos. 91-2647 and 91-2708 (September 25, 1992). DJ # 145-3-3275

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Eleventh Circuit Reverses District Court And Holds That The United States May Not Be Estopped From Disclaiming A "Settlement" Of Litigation Entered Into By An Agency Without Litigating Authority

In this case the wife of a businessman signed as guarantor of a loan for $500,000. Her husband, after defaulting on the loan, left the country. Interest on the loan eventually made the total due almost one million dollars. The Small Business Administration (SBA) sued on the guarantee in a suit conducted by the United States Attorney. Eventually, the SBA Claims Review Committee "settled" the case for $75,000, issued a written release, and deposited the check to its account. At this point the United States Attorney's office notified the defendant that the case could be settled only by the Assistant Attorney General in Washington. When the settlement was sent to Washington, it was rejected.

The district court held that the government was equitably estopped from denying the settlement. A unanimous panel of the Eleventh Circuit has reversed. The court of appeals held that under 28 U.S.C. 516 and 519, only the Attorney General and his designate had authority to settle the claim, and thus no estoppal could lie against the United States, for the SBA clearly acted outside the scope of its authority. The court also held that since the loan was made out of congressionally appropriated funds, the Supreme Court's decision in OPM v. Richmond absolutely precluded an estoppel against the government.

United States v. Walcott, No. 91-8381 [September 11, 1992).
DJ # 105-19M-162.

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Eleventh Circuit Upholds Constitutionality Of Section 27A Of Securities Exchange Act

In Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773 (1991), the Supreme Court adopted an extremely short limitations period for private 10b-5 actions and made the new time limit retroactive. To protect 10b-5 plaintiffs who had brought suit in reliance on longer limitations periods, Congress enacted Section 27A of the Securities Exchange Act. Section 27A reinstates pre-Lampf limitations periods for 10b-5 actions filed before Lampf, thereby effectively eliminating the retroactive effect of Lampf. Section 27A has been the subject of constitutional challenges by scores of securities defendants, who claim that it violates the separation of powers doctrine and due process and equal protection principles. We intervened in this case, among others, to defend the constitutionality of Section 27A. The 11th Circuit has now upheld Section 27A's constitutionality by a 2-1 vote (Cox, Clark; Wellford (6th Cir), dissenting).

Henderson v. Scientific-Atlanta, No. 91-8938 (September 11, 1992).
DJ # 145-0-3582.

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Scott R. McIntosh - (202) 514-4052

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False Claims

Eastern District Of New York Holds 1986 Amendments May Be Applied Only On A Prospective Basis

The Eastern District of New York held that the 1986 amendments to the False Claims Act do not apply retroactively. The court relied in part on the presumption in favor of a prospective application, as articulated in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), and also reasoned that substantive rights and liabilities had been fundamentally affected by the amendments in light of the newly extended statute of limitations, increased civil penalties and treble damages. The court also rejected the Government's argument that statutes which merely clarify the law are entitled to retroactive application, and suggested that the application of the additional claims and penalties may violate the Ex Post Facto Clause of the Constitution.

United States v. Target Rock Corp., CV-90-4414, (E.D. N.Y. June 30, 1992)

Attorney: Deborah Zwany - (718) 656-2898.

* * * * *

Central District Of California Imposes Sanctions On Relator's Counsel, Using Comparable Market Rates To Calculate Government's Attorneys' Fees

The relator in a qui tam case filed a motion for relief in which his counsel accused a former Assistant United States Attorney (AUSA) of perpetuating a fraud on the court. The court found the motion to be frivolous and granted the government's request for sanctions. The government argued that the court should impose $13,625 in "Rule 11" sanctions on the attorney who signed the motion for relief. The

government calculated this sum based on comparable market rates of $250 and $275 per hour for the AUSAs who opposed the motion. The government also argued that the court should impose additional sanctions pursuant to its inherent sanctioning power (and payable to the court clerk) upon all of the relator's attorneys responsible for the motion and its personal attack upon the former AUSA. The court granted the government's request and imposed sanctions totalling $23,625. The court found that the requested $13,625 in attorneys' fees was reasonable. Relying on its inherent sanctioning power, it also imposed an additional $10,000 in sanctions against the relator's law firm "to punish the relator's counsel for their conduct in regard to this motion."

United States ex rel. Barajas v. Northrop Corporation, Civ. No. 87-7288 KN(KX) (C.D. Cal. May 15, 1992).

Attorney: Frank D. Kortum - (213) 894-5710

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United States District Court For The Northern District Of Illinois Orders Production Of Agency's Investigative Memo And Recommendation Relating To Qui Tam Action In Which Government Declined Intervention

After the Government declined to intervene in a qui tam action, the relator subpoenaed the Office of Inspector General's investigative report and recommendation. The Government moved to quash the subpoena on the grounds that the subpoenaed materials were protected by the work product doctrine. The Court denied the Government's motion to quash, holding that the Government was not a party and the work product rule may only be invoked by parties to the suit.

United States ex rel. Hindo v. University of Health Sciences

Attorney: Harold Malkin - (202) 307-0196

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Middle District Of Louisiana Rules False Claims Amendments Do Not Apply Retroactively And Rules Against U.S. On Summary Judgment

Relying on recent cases decided under the Civil Rights Act of 1991, the court ruled that the False Claims Act Amendments of 1986 do not apply retroactively. The Court also largely denied the United States' motion for summary judgment based on collateral estoppel against defendants who were previously convicted of or admitted to bid rigging.

The case involves bid rigging on a power plant project that was funded by government loans and loan guarantees. The power plant's owner contended that it has the claim under the antitrust laws. Under its False Claims Act claim, the U.S. asserted that the measure of damages was the inflation on the bid due to the bid rigging, and that the damages transferred to the U.S. when the owner of the power plant went into default on its loans. The court rejected the argument that the Government must prove that the bid rigging caused the loan default, and held that the United States need only establish some relationship between the fraud and the damages claimed, following the decision in United States v. First National Bank of Cicero, 957 F.2d 1362 (7th Cir. 1992).

The Court also ruled that the United States was unable to establish damages in this case. The payments on the default were nowhere tied to particular contracts, such as the electrical construction contract. Thus, the U.S. could not establish damages tied specifically to rigged contracts, and the power plant -- not the U.S. -- is entitled to any damages the jury may award in the trial.

United States v. Fischbach and Moore, Civ No. 90-239-A
(M.D.La. Oct 9, 1992)

Attorney: Betsy Cavendish - (202) 514-6832

* * * * *

Ninth Circuit Rules On Public Disclosure And Original Source Issues And Holds That Liability Under The False Claims Act Requires More Than Innocent Mistakes And Negligence

Relator filed a qui tam suit, involving three allegations about which there had been no public disclosure and one allegation which rehashed what already had been publicly disclosed. Although relator had direct and independent knowledge of the publicly disclosed allegations, he had played no part in their public disclosure. The Ninth Circuit reaffirmed that if there has been no public disclosure, a relator need not show he is the original source. The court also held that the claim regarding the fourth allegation was barred because if there has been a public disclosure, qui tam jurisdiction extends only to those who had direct and independent knowledge of the fraud and who played a direct or indirect part in the public disclosure. The court further stated, "[q]ui tam suits are meant to encourage insiders privy to a fraud on the government to blow the whistle... in such a [statutory] scheme, there is little point in rewarding a second toot."

The court also held that innocent mistakes and negligence may not form the basis for liability under the False Claims Act. Allegations that work was of "low quality" or "faulty" are insufficient without specific allegations that defendant acted with the requisite knowledge. The "scienter" requirement under the Act is something less than under common law fraud. The court further noted that the fact that the government knew about the mistakes and limitations and that the defendant was open with the government, "suggests that while [the defendant] might have been groping for solutions, it was not cheating the government in the effort."

Wang ex rel. United States Wang v. FMC, No. 91-15789
(9th Cir. Sept. 17, 1992)

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

Federal Agencies Acted Reasonably In Limiting The Secondary Impacts Analysis Of An Environmental Impact Statement To Four Specified Light-Dry Industries That Could Be Developed At A Proposed Marine Dry Cargo Terminal On Sears Island In Maine

This is one of several actions challenging federal support of a port project being built by the State of Maine in Searsport. The First Circuit in this case upheld the adequacy of the Federal Highway Administration's (FHWA) Environmental Impact Statement on the port project, and in the process established some principles which should be helpful in our National Environmental Policy Act (NEPA) litigation generally. The Court first rejected Sierra Club's argument that FHWA was required to explain in the EIS its reasons for limiting the discussion of secondary impacts to the possible impacts of four "light-dry" industries. The Court ruled that nothing in NEPA requires an EIS to explain how the agency determined the scope of the EIS. The reviewing court should review whether agency scoping decisions are arbitrary or capricious by examining the administrative record, or, if the administrative record does not satisfactorily explain the scoping decisions, by reviewing affidavits of agency decision makers.

The Court next upheld the district court's conclusion that it was not arbitrary or capricious for FHWA to find that the four light industries were the only foreseeable secondary impacts of the projects. Judge Keeton, loyal to his torts background, analyzed the issue as whether a particular secondary impact was "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." He stressed that the duty to discuss particular impacts among all the types of potential impacts is not an "absolute" or "strict" duty but "one measured by an objective standard," determined "from the perspective of the person of ordinary prudence in the position of the decisionmaker at the time the decision is made about what to include in the EIS." Under this standard, it was not arbitrary for FHWA to forecast that the four light industries which port officials were actively seeking to attract were the foreseeable secondary effects of the port project. The Court found that the possibility that "heavy" industry would be induced by the port was too speculative to require discussion in the EIS.

Sierra Club v. Marsh, 1st Cir. No. 92-1312 (September 30, 1992)
(Torruella, Boudin, Keeton)

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Government's Settlement With Landowner Of Surface Mining Control And Reclamation Act (SMCRA) Reclamation Fee Liability Does Not Preclude Government's Claim Against Mining Contractors For Unpaid Fees, Interest, Penalties And Administrative Costs

These consolidated cases concern the liability for reclamation fees under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. 1201 et seq. In the first case, Red River Coal Co., which owned coal reserves in Virginia, settled a case for unpaid fees with the government and sued the coal operator, Manning, to recover under a contract between them. In the second case, the government (Interior), which had settled part of its claim with Red River Coal with prejudice, sued to recover the unpaid portion of the fees from Manning. In the first case, the district ruled in favor of Red River; in the second, the court held that the government was barred from recovering by reason of res judicata.

The Fourth Circuit affirmed the first judgment, which did not affect the government. In the second case, relying on Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912), Tavery v. United States, 897 F.2d 1032 (10th Cir. 1990), and the policies underlying SMCRA, the court of appeals reversed, holding that where Red River and Manning were jointly and severally liable under SMCRA for reclamation fees, they were not "in privity" for res judicata purposes.

United States v. Red River Coal Co., 4th Cir. Nos. 91-1110 and 91-1148
(October 1, 1992) (Wilkinson, Wilkins and Luttig)

Attorneys: Jacques B. Gelin - (202) 514-2762
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TAX DIVISION

Supreme Court Grants Certiorari In Intergovernmental Immunity Case

On October 5, 1992, the Supreme Court granted the Government's petition for writ of certiorari in United States v. State of California, et al., a case in which the United States sought to recover $11 million in state sales and use taxes improperly imposed on a government contractor. Pursuant to its contract with Williams Brothers Engineering Company to manage oil drilling operations on federal land in California, the United States reimbursed the latter for sales and use taxes assessed against that contractor by the California State Board of Equalization for the years 1975 through 1981. The United States then brought this action to recover the taxes as being wrongfully imposed on Williams Brothers, relying on the federal common law action of indebitatus assumpsit (quasi contract) for recovery of federal funds paid by mistake resulting in the unjust enrichment of California. The United States claimed that when it exercised a constitutional power in disbursing the funds to pay the tax, it had a right to sue under federal law in its courts to recover funds erroneously paid from the Federal treasury.

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

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

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Supreme Court Grants Certiorari in Case Involving Important ERISA Issue

On October 5, 1992, the Supreme Court granted the Government's petition for writ of certiorari in Keystone Consolidated Industries, Inc. v. Commissioner, a case involving the application of ERISA's prohibited transaction rules. At issue in this case is whether a plan sponsor's "funding" of a defined benefit retirement plan with real property constitutes a prohibited sale or exchange by a disqualified person within the meaning of Section 4975(c)(1)(A) of the Internal Revenue Code. If so, an excise tax is imposed upon the plan sponsor. On June 8, 1992, the Supreme Court granted the taxpayer's petition for writ of certiorari in Wood v. Commissioner, a case presenting the same issue where the plan sponsor funded the plan with notes payable to it.

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

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

* * * * *

Fourth Circuit Rules That Tax Imposed On Pension Plan Reversion Entitled To Priority In Bankruptcy

On October 2, 1992, the Fourth Circuit affirmed the favorable decision of the District Court in In re C-T of Virginia, Inc., which presented the question whether the tax imposed under Section 4980 of the Internal Revenue Code on the reversion of assets to an employer upon the termination of a qualified pension plan is entitled to priority in a Chapter 11 bankruptcy proceeding. The Internal Revenue Service filed an unsecured priority claim here for $285,443 in taxes imposed under Section 4980. The remaining unsecured creditors objected to the priority status of this claim, contending that Section 4980 imposes a penalty which is not entitled to priority under the Bankruptcy Code. The Bankruptcy Court agreed with this objection.

On appeal, the District Court reversed, finding that the tax imposed under Section 4980 was not a punitive penalty, but rather that it was in the nature of an excise tax and thus entitled to priority. The Fourth Circuit agreed.

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ADMINISTRATIVE ISSUES

Executive Office For United States Attorneys

Equal Employment Opportunity Staff (EEO)

The Equal Employment Opportunity Staff has moved to the Main Justice Building. Their address and telephone number is:

Equal Employment Opportunity Staff
Room 1618, Department of Justice
9th and Constitution Avenue, N.W.
Washington, D.C. 20530

Telephone: (202) 514-3982
Fax: (202) 514-0323

Law Enforcement Coordinating Committee/Victim Witness Staff (LECC)

The LECC/Victim Witness Staff has moved to the offices vacated by EEO. Their office address and telephone number is:

Room 6010, Patrick Henry Building
601 D Street, N.W.
Washington, D.C. 20530

Telephone: (202) 501-6952
Fax: (202) 501-6961

The following list depicts those issues which should be addressed specifically to the Evaluation and Review Staff or to the Office of Legal Counsel of the Executive Office for United States Attorneys:

Office of Legal Counsel

- Conflicts of interest
- Freedom of Information Act/Privacy Act requests
- JURIS Skills Bank
- Firearms Policy
- Sensitive Case Reports
- Adverse actions on attorney and support personnel
- United States Attorney pay and leave
- Assistant United States Attorney hiring information
- Special Assistant United States Attorney Program
- Attorney salaries
- Cross-designations
- Survey matters (from Members of Congress or Committees only)

Their office, telephone and fax numbers are:

Room 1629, Department of Justice
9th and Constitution Avenue, N.W.
Washington, D.C. 20530

Telephone: (202) 514-4024
Fax: (202) 514-1104

Evaluation and Review Staff

- Priority Programs Team issues (including Financial Institution Fraud, Project Triggerlock, Weed and Seed, insurance fraud and corruption, health care fraud, computer fraud, securities and commodities fraud and telemarketing fraud)
- Full-time permanent position/full-time equivalent workyear allocation processes
- Staffed branch office requests
- Stay-in-School requests
- Coordination of survey matters (including requests from Departmental offices, boards, divisions, field offices or Bureaus [Inspector General and General Accounting Office Liaison]; by other persons or organizations outside the Department, including the private sector; other United States Government offices; or the General Accounting Office)
- United States Attorneys' offices Legal, Administrative and Financial Litigation Unit peer evaluations
- Internal Management Controls
- Senior Litigation Counsel Designation Program
- Authorized for Pay Attorney Supervisory Positions
- Pay adjustments for Authorized for Pay attorney supervisors and Senior Litigation Counsels

Their office, telephone and fax numbers are:

Room 6102, Patrick Henry Building
601 D Street, N.W.,
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* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	03-09-90	8.36%	08-23-91	5.68%
11-18-88	8.55%	04-06-90	7.97%	09-20-91	5.57%
12-16-88	9.20%	05-04-90	8.36%	10-18-91	5.42%
01-13-89	9.16%	06-01-90	8.32%	11-15-91	4.98%
02-15-89	9.32%	07-27-90	8.24%	12-13-91	4.41%
03-10-89	9.43%	08-24-90	8.09%	01-10-92	4.02%
04-07-89	9.51%	09-21-90	7.88%	02-07-92	4.21%
05-05-89	9.15%	10-27-90	7.95%	03-06-92	4.58%
06-02-89	8.85%	11-16-90	7.78%	04-03-92	4.55%
06-30-89	8.16%	12-14-90	7.51%	05-01-92	4.40%
07-28-89	7.75%	01-11-91	7.28%	05-29-92	4.26%
08-25-89	8.27%	02-14-91	7.02%	06-26-92	4.11%
09-22-89	8.19%	03-08-91	6.62%	07-24-92	3.51%
10-20-89	7.90%	04-05-91	6.21%	08-20-92	3.41%
11-16-89	7.69%	05-03-91	6.46%	09-18-92	3.13%
12-14-89	7.66%	05-31-91	6.09%	10-16-92	3.24%
01-12-90	7.74%	06-28-91	6.39%		
02-14-90	7.97%	07-26-91	6.26%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	John A. Mendez
California, E	George L. O'Connell
California, C	Terree Bowers
California, S	William Braniff
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Delaware	William C. Carpenter, Jr.
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Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
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Indiana, S	Deborah J. Daniels
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Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
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Michigan, W	John A. Smietanka
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Mississippi, S	George L. Phillips
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Missouri, W	Jean Paul Bradshaw

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

* * * * *

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Weed and Seed

EXHIBIT A

Washington, D.C. 20530

October 7, 1992

MEMORANDUM

TO: All United States Attorneys

FROM: Deborah J. Daniels, Director
Executive Office for Weed and Seed

RE: Official Recognition Procedure for Weed and Seed Sites

Since the establishment of Project Weed and Seed by the Department of Justice in 1991, and the funding of 19 pilot and demonstration sites, many additional communities have begun to develop Weed and Seed strategies. These strategies are based on the Weed and Seed founding philosophies: they provide for the coordination of strong law enforcement in the community with community policing and community revitalization efforts for maximum utilization of all available resources; they provide for a strategy developed within the community, with the active input of community residents, rather than a "one size fits all" program dictated from Washington; and they involve members of the community with representatives of federal, state and local government as well as not-for-profit agencies and the private sector working together to develop this locally driven, coordinated strategy.

We are asking all federal agencies to identify those programs which complement the Weed and Seed initiative, and to target those resources toward communities which have developed a coordinated Weed and Seed strategy. To assist the agencies in identifying those communities, we have developed an official recognition process for communities which wish to benefit their citizens by employment of a Weed and Seed strategy.

Please review the enclosed document and share it with the Weed and Seed Steering Committee(s) which you have convened in your district. If one or more communities in your district wish to be recognized, please follow the steps provided under Procedure for Seeking Official Recognition. Each community should be treated separately for this purpose.

Please note that, after a package has been put together by your Steering Committee that meets the general requirements of the enclosed policy, you will be asked as U.S. Attorney to "certify...that the community comprehensive plan meets the parameters of the steps for official recognition." This may be done in the form of a one-page letter from you appended to the comprehensive plan, which should then be sent to this office. The comprehensive plan should include a detailed program strategy outlining ongoing and proposed activities in the target area, in the law enforcement, community policing, "seeding" and economic development areas; as well as resources which have been identified and/or committed to support these activities. Many resources are available on the state and local level, in not-for-profit agencies, in private foundations and in private enterprise which will, in addition to specified federal discretionary and/or block grant programs, support such strategies.

You may submit proposals as soon as they reach the stage in which you can certify that they have met all the requirements as indicated in the enclosure. At that time, we will begin the recognition procedure and report back to you at our earliest opportunity.

This is an exciting new development in the Weed and Seed Initiative, which signifies the dawning of the long-awaited expansion of the Weed and Seed program throughout the country. The employment of this process should go a long way toward assisting members of your community in deriving positive results from their hard work in developing a coordinated strategy. I encourage communities across the country to take advantage of this opportunity.

Enclosure

United State Department of Justice
Office of the Deputy Attorney General
Executive Office for Weed and Seed

Operation Weed and Seed

"Weed and Seed is not so much a new spending program as a whole new method of operating. Let me tell you how it works. As the first step, Federal, State, and local law enforcement officers concentrate their efforts on neighborhoods like this one. Working with you, the community, they *weed* out the gangs, the criminals, and the crack heads, and the drug dealers. And as the streets are reclaimed from the criminals, community policing is put in place to help hold every inch of the ground that we've taken. And police commanders attend community meetings, officers patrol neighborhoods on foot, and residents feel safe knowing who is on the beat in their area.

And finally, the broad array of Federal, State and local government and private sector community revitalization programs are brought to bear on the community, to *seed* in long-term stability, growth, and opportunity. Drug prevention programs, Head Start, job training, health care programs, community development grants -- all are applied together in one place and at one time in a true working partnership with the community."

President George Bush, *speaking to community residents in a Dallas neighborhood*, September 28, 1992

Overview of the Weed and Seed Strategy

The Weed and Seed strategy is a focused, comprehensive effort to revitalize high-crime, low-income neighborhoods. The goal is to "weed out" violent crime, drug use, and gang activity from selected neighborhoods and then to help prevent crime from reoccurring by "seeding" those sites with a wide range of public and private efforts to empower and develop them.

The key element of the Weed and Seed initiative is the development of a comprehensive strategy. The success of the strategy depends on improved coordination by law enforcement, community groups, and social service agencies--government and private--to work together to revitalize distressed neighborhoods.

These groups coordinate by means of participation on one or more committees organized under the leadership of the United States Attorney.

Foundations of the Strategy

- the importance of coordinating law enforcement and neighborhood revitalization efforts so that both can be more effective--because social regeneration efforts can't work where people are afraid to take advantage of them;

- the role of the U.S. Attorneys as coordinators of this effort, using their many local contacts in law enforcement, government, and social service;

- the importance of improved coordination among all levels of government, the community, and the private sector in dealing with the problems of targeted areas;

- the importance of community involvement, both in terms of community policing in combatting drugs and violent crime and community expression of views on seeding needs and methods;

- the importance of focusing on one or a few neighborhoods, to concentrate law enforcement and revitalization activities;

- the crucial role of local law enforcement officials both in the development of a strong law enforcement approach and their role in community policing, a vital element of the strategy;

- the role of the Federal criminal justice system, both as a partner and as a model for strengthening State law enforcement--removing the worst criminals from the streets and avoiding the "revolving door" which would return them there--through measures such as pretrial detention, determinate sentencing, and prison construction;

- the importance of flexibility in the implementation of government programs, so that they can contribute to seeding efforts in a tailored and comprehensive way;

- the role of core values such as self-restraint and respect for the rights of others as a root cause of law-abiding behavior and the absence of those values as a root cause of criminal behavior; and

- the potential for fostering those core values by means of opportunity/empowerment initiatives (such as enterprise zones, school voucher programs, and public housing tenant management and ownership programs).

The Decision to Become a WEED AND SEED COMMUNITY

Weed and Seed is first and foremost a strategy, not another grant program, to empower communities to reclaim their neighborhoods. Many communities are taking steps to implement the Weed and Seed strategy by utilizing existing resources in lieu of seeking grant funding. The decision to refrain from seeking grant funding produces a greater level of commitment and cooperation among the partners in the leveraging of existing resources. This is the philosophy underlying Weed and Seed, in that the strategic and coordinated deployment of law enforcement and social service resources should cause them to complement each other to produce a more efficient and effective utilization of these resources.

Implementation of the Weed and Seed strategy is encouraged, and communities which are implementing the strategy can be designated as "Officially Recognized Weed and Seed Communities" by the Federal Government. Communities officially recognized as Weed and Seed Communities will be able to more readily access existing Federal, State, and local resources by virtue of the fact that they have in place a recognized, comprehensive, community based strategy. Federal agencies will, where possible, target and direct resources to Weed and Seed Communities. Officially recognized Weed and Seed Communities are demonstrating a comprehensive approach which is consistent with the National Drug Control Strategy.

Official recognition also helps energize the community, and will help stimulate private sector participation in the economic revitalization process. In short, if your community is interested in implementing the Weed and Seed strategy, or is already implementing the Weed

and Seed strategy, then your community should seek to be officially recognized as a "Weed and Seed Community" by the Federal government.

REQUIREMENTS

The basic requirements which must be met in order to qualify for designation as an Officially Recognized Weed and Seed Community are:

1. An organized steering committee, convened by the U.S. Attorney, which reflects the major principle of partnership and which involves Federal, State, and local government, the community, and the private sector.

2. A defined, targeted neighborhood, selected by the Steering Committee; and a needs assessment of the target neighborhood, conducted with the active involvement and input of the residents of that neighborhood.

3. Identification of existing and future resources by all members of the steering committee that can be directed to meet those needs identified by residents of the neighborhood and a strategy/plan for targeting and delivery of resources.

4. A comprehensive law enforcement strategy to weed out the criminal element from the neighborhood, and implementation of community policing in the neighborhood.

5. A comprehensive neighborhood revitalization plan that addresses the social, economic, and physical restoration problems in the target area.

6. A detailed implementation plan addressing all of the primary elements of the Weed and Seed strategy (prevention/intervention/treatment, law enforcement, community policing, and economic revitalization) and their interrelationship and specifying the existing and new resources that will be dedicated to implement the strategy.

7. A locally based assessment and monitoring mechanism.

Procedure for Seeking Official Recognition

A community seeking designation as an Officially Recognized Weed and Seed Community should follow seven steps:

Step 1: An interested community should establish contact with the United States Attorney, who convenes a formal steering committee.

Step 2: The steering committee, through the guidance and facilitation of the United States Attorney, produces an implementation plan.

Step 3: When all the groundwork is done, and all the requirements listed above have been met, the United States Attorney transmits the plan to the Attorney General, certifying that the community comprehensive plan meets the parameters of the steps for official recognition.

Step 4: The Attorney General reviews the plan and assigns a review team to assess the plan and compliance with the requirements.

Step 5: Once assessed and certified by the Attorney General as meeting the minimum requirements, the community will be notified it has preliminarily been officially recognized as a Weed and Seed Community.

Step 6: The plan is then circulated to the other Cabinet Secretaries comprising the Interagency Council on Weed and Seed for their approval and certification.

Step 7: Following approval of the Interagency Council, the community is officially recognized as a "Weed and Seed Community". As each agency reviews the community plan seeking official recognition, each agency will also be placing its own program components on notice that resources can and should be directed to that community.

For more information, contact:

EXECUTIVE OFFICE FOR WEED AND SEED
OFFICE OF THE DEPUTY ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE
1001 G STREET N.W., SUITE 810
WASHINGTON, DC 20001
(202) 616-1152

EXHIBIT
B

FOREIGN TRAVEL AND HOST COUNTRY CLEARANCE

RELATED TO CRIMINAL MATTERS

This memorandum explains the requirements of the Departments of Justice and State[1] to secure authorization for the foreign travel of Assistant United States Attorneys and Department of Justice attorneys on official business related to criminal matters.[2] Specifically covered are the actions that must be taken by attorneys to obtain "host" country clearance, i.e., the process by which U.S. Government officials acquire the concurrence of a foreign government's authorities to carry out official functions in that country.

As a general proposition, some form of host country notification is required for any foreign travel by U.S. Government employees traveling on official business. Among the functions necessitating host country clearance in connection with criminal matters, even pursuant to a letter rogatory or mutual legal assistance treaty request, are 1) meeting with private persons or public officials; 2) conducting interviews or depositions or making other inquiries; or 3) travel in conjunction with prisoner transfers and extraditions matters.[3]

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[1]Department of Justice guidelines concerning foreign travel by prosecutors can be found in the United States Attorneys' Manual, Title 9, Sections 2.151, 13.500, 13.534 and 13.535, and Title 3, Section 3.730.

[2]Such "official business" includes criminal investigations and prosecutions, and ancillary civil or administrative actions such as civil forfeiture actions.

[3]While travel to attend international conferences or for speaking engagements does not require host country clearance, the State Department foreign travel questionnaire explained in the text should be completed and submitted to Citizens Consular Services (CCS), marked "For Information Only," in order that the cognizant Embassy be aware of Americans involved in official activities.

THE FORMS

In addition to the standard travel authorization (DOJ Form 501), when the travel is related to international judicial assistance, two other forms must be completed before approval for foreign travel and host country clearance will be granted: 1) DOJ Form 504, "Notification of Foreign Travel" (for those travellers having access to classified information) (Attachment A); and 2) the State Department's "Foreign Travel Request for International Judicial Assistance" (Attachment B).

Form 504 is prepared by the USAO/DOJ attorney and returned to and reviewed by the Department's Security Staff. It is designed to ensure the protection of both the individual traveller and national security interests. The Department Security Officer will determine whether a special defensive security briefing is required, depending on the country to be visited, and will also advise the traveller if the scope or duration of the stay should be limited.

The State Department's travel questionnaire requires the USAO/DOJ attorney to provide specific, detailed information about the trip and its objective. The purpose of the questionnaire is twofold: 1) to advise the U.S. Ambassador in that country of the activities of U.S. Government officials operating there[4] and 2) to permit an informed decision by the host country as to whether to grant the clearance. The consequence of not filing this form and obtaining host country clearance may run from mere embarrassment and inconvenience to detention or arrest at the border.

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[4]The Ambassador may advise the State Department to deny the official's request, though such action is rare.

THE PROCESS

AUSAs should submit the State Department questionnaire to the Executive Office for U.S. Attorneys (EOUSA) in matters involving criminal investigations or prosecutions, or civil forfeitures derived therefrom.[5] (EOUSA should be contacted to determine whether the particular traveller must submit Form 504.) A copy of the State Department questionnaire should be sent contemporaneously to the Office of International Affairs, Criminal Division, pursuant to the attached EOUSA directive, dated November 3, 1992. (Attachment C) A list of appropriate OIA recipients of these forms is also attached. (Attachment D)

Criminal Division attorneys who have a security clearance should submit Form 504 directly to the DOJ Security Staff, as indicated on the form, and the State Department questionnaire directly to CCS (copy to OIA), per the list indicating appropriate CCS recipients. (Attachment E) The fax number for CCS is (202) 647-6201; the fax number for OIA is (202) 514-0080.

Both forms should be submitted as soon as the attorney knows he/she is required to travel and, in any event, at least two weeks prior to travel. This time frame allows EOUSA to forward the paperwork to the State Department, which in turn contacts the U.S. Embassy in the host country. The Embassy then makes any required notifications of host country officials and secures any necessary authorizations.

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[5]The Civil Division's Office of Foreign Litigation should be contacted in cases that are purely civil in nature.

AUTHORIZATION AND APPROVAL TO TRAVEL

For both AUSAs and Department attorneys, the Department will not grant authorization to travel until it receives State Department approval. The approval process used by State includes consultation with OIA to determine whether OIA has been previously contacted and, if required, has approved the travel.[6] EOUSA will advise the AUSA that travel has or has not been authorized. OIA will notify Criminal Division attorneys as to authorization.

Should you have any questions concerning these procedures, contact Lydia Ransome, EOUSA (202) 219-1042, or Judi Friedman, OIA (202) 514-0041.

[6]All travel to continental Europe requires OIA approval. (USAM 9-2.151)

ATTACHMENT A

U.S. Department of Justice

Notification of Foreign Travel

Part A. Request by Department of Justice

Date _____

Through: Security Staff
Department of Justice
Washington, D.C.

From:

Traveler's Name and Title

Date(s) of Travel

Cities/Countries to be Visited

Purpose

Anticipated Contact with US and Foreign Officials

State Department Post Services Requested

Part B. Return to Department of Justice

Date _____

TO: Director, Security Staff
Attn: Foreign Travel Unit
Room 6744 Main Building
Department of Justice
Washington, D.C. 20530

_____ This office has no objection to the proposed travel.

_____ Remarks: _____

Signature _____

Organization _____

Previous editions obsolete

FORM DOJ-384
AUG. 87

ATTACHMENT B

FOREIGN TRAVEL REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE

1. Cities, Countries to be visited. _____

_____

2. Names of each individual (including non-government) traveling abroad for purposes of investigation and their titles, district, work and home telephone numbers (please use commercial numbers).

_____

_____

_____

_____

3. Dates of intended travel/itinerary. (departure/arrival from U.S. to foreign country and from foreign country to U.S.) If not sure of dates, give approximate dates, e.g. "on/about 3/26/92."

_____

_____

_____

4. Name of case/docket number: _____

_____

5. Background:

a. Nature of the case (briefly)? _____

_____

_____

_____

b. What stage is case (investigation, indictment, trial)

_____

_____

c. How sensitive is the case in your estimation? _____

_____

d. How much forfeiture money (if any) is involved in case, (i.e., will money be returned to the U.S. Treasury?) _____

_____

_____

e. What are the estimated case costs to be incurred by the Government? _____

_____

6. Purpose of investigation; in particular specify interviewing witnesses, taking depositions, meeting with officials, or reviewing documents:

_____

_____

_____

7. Names and nationalities of persons to be interviewed/deposed. Include addresses and telephones numbers if available. _____

_____

_____

_____

8. Is the prosecution of a foreign national(s) foreseen? If yes, provide name and nationality. _____

_____

9. Has Interpol or other police agency cleared visit and are police prepared to cooperate? Please explain in detail.

_____

_____

_____

10. Have U.S. Embassy/consulate or Foreign embassy/consulate officials in the foreign countries been consulted regarding travel? If so, whom? _____

_____

_____

11. What type of U.S. passport (tourist or official) will be used for each traveler? Have the passports been appropriately visaed for entry into the foreign country? _____

_____

12. What level of U.S. government security clearance does each traveler have, e.g., confidential, secret, top secret? If traveler has no clearance, please so indicate. _____

_____

_____

13. Is assistance of the American Embassy/consulate or other personnel required to (check items that pertain and briefly explain in space provided):

a.__ choose hotel and make reservations (need exact dates for each traveler);
b.__ meet travelers at airport;
c.__ assist in securing office space at post;
d.__ provide consular officer to administer oath;
e.__ provide stenographer, court reporter, or interpreter;
f.__ Other _____

_____

_____

_____

14. Give Dept. of Justice fund code and appropriation number against which Embassy/consulate services or hotel bill can be charged. If individual credit card is used, give type of credit card, number and experation date. _____

_____

15. Any other details which would help us and that we should know about to ensure that difficulties do not arise? _____

_____

_____

_____

16. Approving offices in legal division, Department of Justice.

_____

_____

17. Approving officials in Office of International Affairs.

_____

_____

U.S. Department of Justice ATTACHMENT C

Executive Office for United States Attorneys

Office of the Deputy Director — *Washington, D.C. 20530*

NOV - 3 1992

MEMORANDUM: All United States Attorneys

FROM: Michael W. Bailie
Deputy Director

BY: Michael T. McDonough
Assistant Director
Financial Management Staff

SUBJECT: Foreign Travel Requests

This memorandum updates teletype FMS/FT-92-001 dated February 4, 1992. You are advised that in addition to submitting their foreign travel requests to EOUSA, all attorneys traveling to foreign areas are required to simultaneously submit a completed copy of the foreign travel questionnaire to the Office of International Affairs (OIA). OIA has requested the change to ensure adequate processing time.

The role of OIA is to guarantee that the efforts in connection with the contemplated travel do not conflict with other ongoing law enforcement initiatives or violate treaty requirements. The attorneys of OIA are available to counsel and assist attorneys on foreign travel related issues that will aid in meeting the objectives of the travel.

For more information on OIA representatives that handle specific foreign countries, please contact Mr. George W. Proctor, Director, Office of International Affairs at (202) 514-0000. The fax number for OIA is (202) 514-0080.

ATTACHMENT D

OFFICE OF INTERNATIONAL AFFAIRS
Criminal Division
U.S. Department of Justice
1400 New York Avenue, N.W., Rm. 5100
Washington, D.C. 20530
(202) 514-0000
Facsimile: (202) 514-0080

COUNTRY ASSIGNMENTS

Linda Candler Associate Director	Africa (All Countries) Caribbean (English Speaking and Haiti) Republic of Ireland United Kingdom and its Dependencies
Richard C. Owens Associate Director Mutual Legal Assitance	Europe (All Countries except United Kingdom and Republic of Ireland) Caribbean (Aruba, Guadaloupe, Martinique, and Netherlands Antilles)
Mary Jo Grotenrath Associate Director Extradition	Europe (All Countries except United Kingdom and Republic of Ireland) Caribbean (Aruba, Guadaloupe, Martinique, and Netherlands Antilles)
Mary B. Troland Associate Director	North America (Mexico) Central America (All Countries) South America (All Countries) Caribbean (Dominican Republic and Cuba)
Matt Bristol Associate Director	Asia (All Countries) Middle East (All Countries)
Lisa Cacheris Associate Director	Australia, Canada, New Zealand, and Pacific Islands

OFFICE OF CITIZENS CONSULAR SERVICES (CCS)
(Room 4817 N.S.)

TITLE	NAME	TEL NO.	AREA
Director, Acting	CALLOW, Thomas W.	647-4556	
Secretary	GIBSON-MARTIN, Delilia	647-3666	
Acting Deputy Director	BETANCOURT, Edward A.	647-2617	

CHILD CUSTODY DIVISION

Chief	DONAHUE, Linda	647-2569	AF/E.EUROPE/EGYPT/ISRAEL MAGHREB/SCANDINAVIA/U.K.
Consular Officer	MARKEY, Jack	647-2579	ARA/FRA/GER/GREC/IRN/ITAL INDIAN SUBCONTINENT/MALTA PORTUGAL/SPAIN/SWITZERLAND
Consular Officer	SCHULER, James L.	647-2606	EAP/AUSTRIA/CAN/CYP/IRLND IRQ/JOR/LEB/LUX/NETH/SAUDI PENINSULA/SYRIA/TURKEY

HOSTAGE RELIEF PROGRAM

Consular Officer	COLWELL, Bill	647-2803	

7 FAM REVISIONS

Consular Officer	CHEEVERS, Joseph	647-2602	

AFRICAN AND FEDERAL AGENCIES' SERVICES DIVISION (OCS/CCS/AF)

Chief	HEGARTY, Patrick	647-1217	
Secretary	CADE, Tina	647-4994	
Attorney Adviser	MESZAROS, Michael	647-1982	TOTALIZATION/AF/Voting
Consular Officer	LONON, A. Maxine	647-3149	FED BENEFITS/AF BACKUP

EAST ASIA & PACIFIC SERVICES DIVISION (OCS/CCS/EAP)

Acting Chief	GAW, Monica A.	647-3676	JAPAN, PACIFIC ISLANDS PHILIPPINE CITIZENSHIP CASES A - E
Secretary	MAZON, Wendy	647-3675	
Consular Officer	FOO, Jenny J.	647-2740	CHINA, MONGOLIA, SINGAPORE, VIETNAM, PHILIPPINES CITIZENSHIP CASES F-K
Consular Officer	SMITH, Fred	647-2480	AUSTRALIA/HONG KONG/INDONESIA MALAYSIA/PAPUA NEW GUINEA/ TAIWAN/PHILIPPINE CITIZENSHIP CASES L-O
Consular Officer	BEATTY, Michael	647-2766	LAOS/CAMBODIA/KOREA/PHILIPPINE NON CITIZENSHIP AND PHILIPPINE CITIZENSHIP CASES P-S
Consular Officer	MAYR, Thomas H.	647-2749	BRUNEI, BURMA, NEW ZEALAND, THAILAND, PHILIPPINE CITIZENSHIP CASES T- Z

EUROPE AND CANADA DIVISION (OCS/CCS/EUR)

Acting Chief	BETANCOURT, Edward A.	647-2617	
Secretary	REDMOND, Saynora A.	647-3445	
Secretary	DOBBS, Michael	647-2688	
Consular Officer	DONLON, Steven	647-2580	CZECHOSLOVAKIA/GERMANY HUNGARY/OSI/SWEDEN
Consular Officer	Vacant	647-2568	ALBANIA/BULGARIA/FINLAND POLAND/ROMANIA/AUSTRIA
Attorney Adviser	COOPER, Beth	647-2798	ICELAND/ITALY/PORTUGAL/SPAIN COMMONWEALTH OF INDEPENDENT STATES/GEORGIA (Former USSR), CROATIA, SLOVINIA et al (Former Yugoslovia), LATVIA/LITHUANIA/ESTONIA
Consular Officer	OLIVER, Joan R.	647-2815	CYPRUS/GREECE/MALTA NETHERLANDS/NORWAY SWITZERLAND/TURKEY
Consular Officer	TEDESCO, Marco	647-3208	CANADA/FRANCE/HUNGARY LUXEMBOURG/MONACO
Consular Officer	WATERS, Donna L.	647-3683	BELGIUM/BERMUDA/DENMARK IRELAND/UNITED KINGDOM

INTER AMERICAN SERVICES DIVISION (OCS/CCS/ARA)

Chief	KORNBLUTH, David A.	647-3713	
Secretary	SHELTON, Naomi	647-3712	
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Consular Officer	GLOVER, Thomas	647-3180	ANTIGUA, BAHAMAS, BARBADOS, CUBA, DOMINICAN REPUBLIC, FRENCH ANTILLES, GRENADA, HAITI, JAMAICA, NETHERLANDS ANTILLES, TRINIDAD
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Consular Officer	QUEEN, Richard	647-3495	

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Consular Officer	BEVINS, Randall	647-2591	ISRAEL/KUWAIT/OMAN/ QATAR/SAUDI ARABIA/UAE/ WEST BANK/YEMEN
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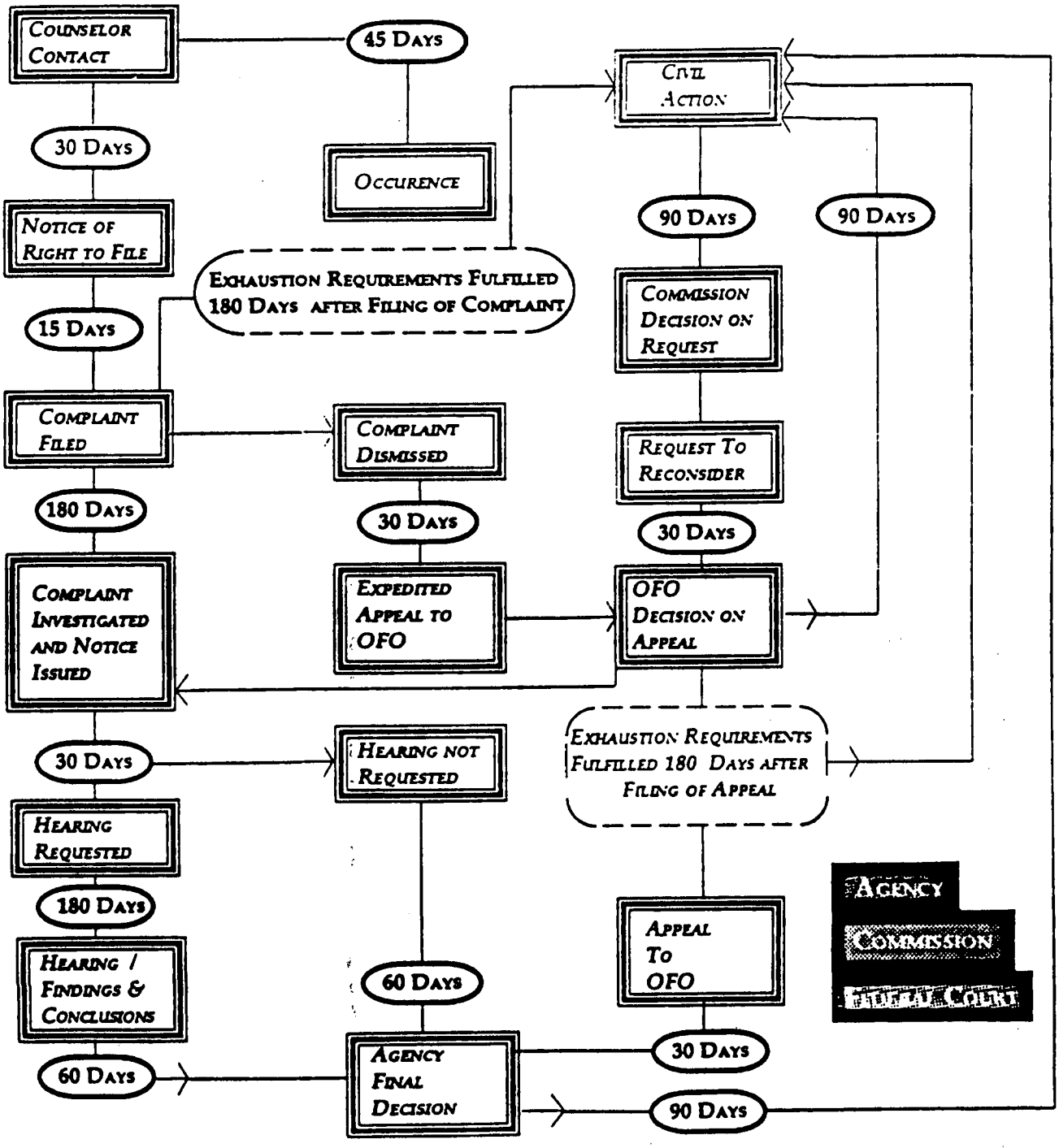
EXHIBIT C

OVERVIEW OF FEDERAL SECTOR COMPLAINT PROCESSING UNDER 29 C.F.R. PART 1614



FEDERAL JUDICIAL CENTER

EXHIBIT D

Guideline Sentencing Update

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

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

VOLUME 5 • NUMBER 3 • SEPTEMBER 29, 1992

General Application Principles

RELEVANT CONDUCT

En banc Eighth Circuit reissues *Galloway*, holds relevant conduct provision is authorized by statute and is constitutional. Defendant pled guilty to one count of theft from interstate shipment. The PSR included seven similar but uncharged offenses as relevant conduct, which roughly tripled the guideline range. The district court held that use of the uncharged conduct would violate the Fifth and Sixth Amendments and did not consider it in sentencing defendant. An appellate panel affirmed, but did not address the constitutional issues. Instead, it held that the sentencing statute did not authorize the Sentencing Commission to promulgate the relevant conduct provisions of § 1B1.3(a)(2) to encompass separate uncharged property crimes. *U.S. v. Galloway*, 943 F.2d 897 (8th Cir. 1991) [4 *GSU* #8].

The en banc court reversed and remanded for resentencing. The court first determined that statutory authority exists for adoption of a relevant conduct guideline that includes uncharged conduct: "[T]he reference to 'circumstances... which ... aggravate the seriousness of the offense,' 28 U.S.C. 994(c)(2), is direct language showing clear intent ... to support enactment of ... § 1B1.3(a)(2). Even if it is not so clear, we have no doubt that, taken with the more general language in section 994(c) and 18 U.S.C. § 3553(a)(2) and § 3661, there is sufficient and permissible statutory underpinning to support section 1B1.3(a)(2) and its required consideration of all 'acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction.'" The court noted that "[t]hree other circuits have concluded that statutory authority exists for enacting a relevant conduct guideline." *See U.S. v. Davern*, 970 F.2d 1490 (6th Cir. 1992) (en banc); *U.S. v. Thomas*, 932 F.2d 1085, 1089 (5th Cir.), *cert. denied*, 112 S. Ct. 264 (1991); *U.S. v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990).

As to the constitutional issues, the court held that "section 1B1.3, as applied here, does not transgress the limits of due process. Because a defendant's uncharged crimes are treated as sentencing factors, the rights to indictment, jury trial, and proof beyond a reasonable doubt simply do not come into play. *McMillan* [*v. Pennsylvania*, 477 U.S. 79 (1986)] explicitly rejected the argument that the sentencing phase requires a more stringent standard of proof than a preponderance of evidence. ... Our conclusion ... is further bolstered by the opinions of the Third, Seventh, and Ninth Circuits in *U.S. v. Mobley*, 956 F.2d 450 (3d Cir. 1992), *Ebbole* and" *U.S. v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1564 (1992). "All three of these decisions rest on an interpretation of *McMillan*, and all conclude that a sharp distinction exists between conviction and sentencing." The court stated that "due process may be violated if the punishment meted out following application of the sentencing factors overwhelms or is extremely disproportionate to the punishment that would otherwise be imposed," but held that the increase here was not "so extreme or overwhelming as to raise due process concerns."

The court concluded by noting that while the Guidelines "certainly channel the court's discretion in sentencing, ... significant responsibility ... remains with the district judge. ... When uncharged conduct is alleged as relevant conduct to substantially increase the sentencing range, district judges are authorized to require the United States Attorney to undertake the burden of presenting evidence to prove that conduct. In the final analysis, the determination of what is relevant conduct is a factual question to be decided by the district judge."

U.S. v. Galloway, No. 90-3034 (8th Cir. Sept. 17, 1992) (en banc) (Gibson, J.) (Arnold, C.J., Beam and McMillian, JJ., Lay and Bright, Sr. JJ., dissenting).

See *Outline* generally at I.A.

SENTENCING FACTORS

U.S. v. Jones, No. 91-3025 (D.C. Cir. Aug. 14, 1992) (Williams, J.) (Mikva, C.J., dissenting) (Affirmed: District court may impose higher sentence within guideline range because defendant elected to go to trial instead of pleading guilty. The government refused to plea bargain, defendant was convicted at trial and, after receiving a reduction for acceptance of responsibility, had a guideline range of 121–151 months. The court imposed a sentence of 127 months, stating that it would have imposed the minimum had defendant pled guilty. The appellate court held that sentencing courts have authority "to consider the institutional value of guilty pleas as an explicit, independent basis of sentence adjustment.").

See *Outline* at I.C.

Challenges to Guidelines

Third Circuit holds that § 5E1.2(i) cost of imprisonment fine is not authorized by Sentencing Reform Act. Defendant pled guilty to bribery offenses. At sentencing the district court imposed a fine for the cost of defendant's imprisonment under § 5E1.2(i) ("... the court shall impose an additional fine that is at least sufficient to pay the costs to the government of any imprisonment ..."). Defendant claimed the fine was not authorized by statute and was unconstitutional.

The appellate court agreed that § 5E1.2(i) is invalid because it is not authorized by statute: "[T]he Act does not authorize the assessment of a fine to pay for the costs of a defendant's imprisonment. Certainly, there is no specific reference in the statute to recouping the costs of imprisonment as an appropriate goal of sentencing. Nor do we believe that assessing fines for that purpose is subsumed within the more general provisions of the Act." The court rejected the government's argument that the fines, which actually go to victim compensation via the Crime Victims Fund, are justified as restitution: "On its very face, the guideline states that the costs will be paid to the government in an amount based on the costs of imprisonment. It stretches credulity to assume that the 'purpose' of this fine is other than to compensate the government ... for the costs it incurs for incarcerating a defendant."

The court thus did not have to determine whether the fine violates due process, but noted that "if the guideline is a method for assessing restitution, it runs the risk of being irrational."

The Fifth and Tenth Circuits have upheld § 5E1.2(i). See *Outline* at V.E.2 and generally at XI.B.

U.S. v. Spiropoulos, No. 91-6058 (3d Cir. Sept. 25, 1992) (Becker, J.).

Sentencing Procedure

Evidentiary Issues

En banc Eighth Circuit holds that Confrontation Clause does not apply to sentencing hearing. Defendant's offense level was increased for being an organizer, § 3B1.1(a), on the basis of hearsay testimony. In *U.S. v. Wise*, 923 F.2d 86 (8th Cir. 1991), the original appellate panel reversed the sentence because the district court had not undertaken the Confrontation Clause analysis required by *U.S. v. Streeter*, 907 F.2d 781, 792 (8th Cir. 1990). Because *Streeter* "conflicts with previous decisions of this court," the en banc court addressed "what we assumed in *Streeter*, that is, whether sentencing under the Guidelines is so different from previous practice that the Confrontation Clause should apply to evidence introduced at sentencing proceedings."

The court concluded that, while the Guidelines have "wrought substantial changes in federal sentencing procedures, . . . the sharp distinction between conviction and sentencing that antedated the Guidelines still exists." Alluding to *Galloway, supra*, the court stated that "[j]ust as increasing a defendant's sentence on the basis of relevant conduct does not constitute a conviction for a separate offense, so also establishing a defendant's role in the offense on which he has been convicted does not constitute a criminal prosecution within the meaning of the Confrontation Clause. . . . The right to confront witnesses, therefore, does not attach. . . . We therefore overrule our holdings to the contrary in" *Streeter* and *U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990) [3 *GSU* #12].

As in *Galloway*, the court recognized "that in certain instances a sentence may so overwhelm or be so disproportionate to the punishment that would otherwise be imposed absent the sentencing factors mandated by the Guidelines that due process concerns must be addressed." In this case, however, the increase based on the hearsay approximately doubled the sentencing range (to 37–46 months), which was "less than that which *Galloway* held did not trigger due process concerns."

The court also endorsed the Guideline's "standard for the consideration of hearsay testimony at sentencing" as set forth in § 6A1.3, p.s. and the commentary. The parties must have the opportunity to present information on any disputed factor and any information used must have "sufficient indicia of reliability to support its probable accuracy. . . . Unreliable allegations shall not be considered."

U.S. v. Wise, No. 90-1070 (8th Cir. Sept. 17, 1992) (en banc) (Wollman, J.) (Arnold, C.J., Lay, Sr. J., and McMillian, J., dissenting).

See *Outline* at IX.D.1.

Offense Conduct

Drug Quantity—Relevant Conduct

Third Circuit outlines principles for "accomplice attribution" of drug quantities. Defendants were convicted on one count of conspiracy to distribute heroin and six telephone counts. The sentencing court attributed to both defendants drug amounts distributed by the conspiracy before they joined it and amounts supplied to the conspiracy by other conspirators. It also attributed to one defendant amounts supplied by the other. The appellate court remanded, holding that while the latter attribution was supported by the evidence, it could not determine from the record whether the other attributions were appropriate. The court also set forth "general principles for determining relevant conduct" in cases of "accomplice attribution" under § 1B1.3(a)(1).

Noting that early cases had often "interpreted the relevant conduct provision very broadly," the court determined that the 1989 amendment to application note 1 of § 1B1.3 "makes clear that the standard for accomplice attribution is significantly more stringent . . . . [R]ather than evaluating accomplice attribution in light of the scope of the conspiracy as described in the count of conviction and the defendant's awareness of the possibility that co-conspirators would distribute amounts in addition to those amounts distributed by the defendant, courts should look to the defendant's role in the conspiracy. . . . [W]hile it is appropriate to hold a defendant who exhibits a substantial degree of involvement in the conspiracy accountable for reasonably foreseeable acts committed by a co-conspirator, the same cannot be said for a defendant whose involvement was much more limited." The court noted that illustration e in the commentary to § 1B1.3 "confirms our view that the crucial factor in accomplice attribution is the extent of the defendant's involvement in the conspiracy." The court emphasized that "in deciding whether accomplice attribution is appropriate, it is not enough to merely determine that the defendant's criminal activity was substantial. Rather, a searching and individualized inquiry into the circumstances surrounding each defendant's involvement in the conspiracy is critical to ensure that the defendant's sentence accurately reflects his or her role."

As to amounts distributed before the defendants entered the conspiracy, "the relevant conduct provision is not coextensive with conspiracy law. . . . In the absence of unusual circumstances, not present here, conduct that occurred before the defendant entered into an agreement cannot be said to be in furtherance of or within the scope of" the activity that the defendant agreed to undertake.

U.S. v. Collado, No. 91-1492 (3d Cir. Sept. 16, 1992) (Becker, J.).

See *Outline* at II.A.2.

Departures

Substantial Assistance

U.S. v. Spiropoulos, No. 91-6058 (3d Cir. Sept. 25, 1992) (Becker, J.) (Affirmed: District court could limit extent of § 5K1.1, p.s. departure on the ground that defendant's cooperation, through no fault of his own (target of investigation died), was not valuable. Section 5K1.1 "makes crystal clear that . . . a court should examine the 'usefulness' of the defendant's cooperation. . . . [I]t was consistent with the [Sentencing Reform] Act and the Guidelines for the district court to temper the extent of its downward departure because the defendant's cooperation proved unhelpful to the government." The court emphasized, however, "that cooperation need not result in a prosecution or conviction to justify a large downward departure. In some cases, assistance to an investigation may be sufficient in and of itself. The critical point is that the Guidelines preserve the discretion of the district court with respect to the extent of section 5K1.1 departures." The court also noted that, once a § 5K1.1 motion is filed, "the government cannot dictate the extent to which the court will depart.").

See *Outline* at VI.F.2 and 3.

EXHIBIT E

Federal Sentencing and Forfeiture Guide

NEWSLETTER

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

Vol. 3, No. 26 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | October 19, 1992

IN THIS ISSUE:

Guidelines Sentencing, Generally

Article disputes some claims of excessive disparity, focuses on excessive uniformity. (110) In "*Assessing the Federal Sentencing Process: The Problem is Uniformity, not Disparity*," Stephen J. Schulhofer rigorously examines the methodology employed by Judge Gerald W. Heaney in an earlier work concluding that the guidelines had increased disparity. Schulhofer disputes many of Heaney's conclusions. While Schulhofer agrees that there is evidence of guidelines circumvention, he concludes that this phenomenon does not demonstrate an increase in disparity. Guidelines circumvention is a symptom, Schulhofer argues, of excessive uniformity under the guidelines -- the tendency of the guidelines to treat unlike offenders similarly. This tendency is particularly pronounced in drug cases, but is exacerbated in all cases by courts' unduly grudging view of their departure powers. 29 AM. CRIM. L. REV. 833-73 (1992).

Article explores alternate perspectives on sentencing reform. (110) In "*Individualized and Systemic Justice in the Federal Sentencing Process*," Barbara S. Meierhoefer argues that tensions between notions of individualized justice and systemic justice explain why certain sentencing issues are difficult to resolve. The author notes the interplay between reducing unwarranted disparity and providing for sufficient sentencing flexibility. She also examines the conflict between procedural and comparative aspects of the concept of fairness. For example, she argues that proposals to move toward an "offense of conviction" model for sentencing favors perceived procedural fairness over the goal of reducing sentencing disparity. She proposes alternatives that might balance these interests in a more satisfactory way. 29 AM. CRIM. L. REV. 889 (1992).

Senior Judge Bright protests draconian guideline sentence for first-time drug offender. (110) The 8th Circuit rejected defendant's challenge to the determination of his offense level, noting that it had previously rejected identical arguments from his co-conspirators. Senior Judge Bright concurred separately to question the 235-month sentence imposed by the guidelines on this first-time drug offender. Defendant, who came from a stable background and a good family, would spend almost 20 years in prison. Judge Bright asked whether "the draconian sentences for first offenders demanded by the guidelines make any sense in the face of strong evidence that a prisoner could be rehabilitated rather than virtually destroyed by a lengthy incarceration?" *U.S. v. Appleby,* __ F.2d __ (8th Cir. Sept. 25, 1992) No. 91-2602.

11th Circuit holds that plea agreement required hearing to consider defendants' cooperation. (115) (780) Defendants' plea agreements required each defendant to cooperate with the government and obligated the government to fully apprise the district court of the nature and extent of their cooperation. This information was not presented at sentencing due to the ongoing nature of their cooperation. When the cooperation was complete, defendants and the government joined in motions for reduction of sentence pursuant to Fed. R. Crim. P. 35(b). The 11th Circuit held that the plea agreements obligated the district court to grant the request for an evidentiary hearing. Although the decision whether or not to grant an evidentiary hearing is generally committed to the discretion of the district court, once the judge accepted this agreement, he was obligated to accept the government's proffered information. Judge Hatchett dissented. *U.S. v. Yesil,* 968 F.2d 1122 (11th Cir. 1992).

9th Circuit finds no double counting in increases for serious bodily injury and obstructing justice. (125) The defendant assaulted his ex-girlfriend, breaking her jaw. When a park ranger came to the girlfriend's rescue, the defendant ordered her to tell the ranger that everything was all right. When she did not comply, he hit the ranger and ran. The district court increased the offense level under section 2A2.3(b)(3)(B) for serious bodily injury and also two levels under section 3C1.1, for obstruction of justice. The fact that the single act of beating the girlfriend caused both serious bodily injury and helped obstruct justice was not impermissible double counting. Unless the conduct punished by one guideline is akin to a lesser included offense of another guideline, considering the same act and applying two guidelines is not double counting. *U.S. v. Snider,* __ F.2d __, (9th Cir. Oct. 2, 1992), No. 91-10554.

6th Circuit finds no ex post facto problem because amendments did not change guideline range. (131) Defendant's presentence report calculated his guideline range under the guidelines in effect at the time of the offense. The magistrate's report recommended adoption of the presentence report's sentencing calculations, finding the same sentencing range appropriate, but using the November 1989 guidelines, which went into effect after defendant committed his offense. The district court adopted the presentence report, but it was unclear what version of the guidelines were used. The 6th Circuit found that because application of the guidelines in effect at the time of sentencing led to no harsher sentence, the magistrate's use of the November version of section 2K2.3 was appropriate and created no ex post facto problems. If the district court erroneously relied on the presentence report's use of the old guidelines, the error was harmless. *U.S. v. Holmes,* __ F.2d __ (6th Cir. Sept. 16, 1992) No. 91-5365.

9th Circuit finds sentencing in absentia violated

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

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due process. (135)(750) Petitioner was sentenced *in absentia* by the State of California to 12 years in state prison. The sentencing occurred 1 1/2 years after he pled guilty and after California had extradited him to Idaho. After Idaho quashed California's detainer, the California court imposed the sentence *in absentia*. The 9th Circuit found that petitioner did not waive his federal constitutional right to be present at sentencing and that the sentencing violated due process. The majority also held that *in absentia* sentencing is a "structural error" that cannot be harmless. Judge Poole dissented because petitioner could have invoked his right to be present at sentencing using the procedures provided under the Interstate Agreement on Detainers. He also failed to exhaust the remedies available to him and impeded California's efforts to procure his presence by contesting the detainer. *Hays v. Arave*, __ F.2d __ (9th Cir. Oct. 7, 1992), No. 90-16775.

3rd Circuit holds that SRA does not authorize fine for cost of imprisonment. (145)(630) The 3rd Circuit held that a fine under section 5E1.2(i) to pay to the government the costs of imprisonment was not authorized by the Sentencing Reform Act (SRA). Neither 18 U.S.C. section 3553(a), which sets forth the purposes in sentencing, nor section 3572(a), which details the factors to consider in imposing a fine, authorize fines to pay for the costs of incarceration. Although the fines collected under section 5E1.2(i) are actually used to provide restitution to crime victims, the court rejected restitution as a purpose of the fine. The plain language of the guideline, rather than the ultimate manner in which the money is spent, controls the analysis of the guideline. Moreover, if the purpose of the guideline were restitution, it might be irrational, because the cost of a victim's incarceration bears no apparent relationship to the amount that a particular victim has been injured. *U.S. v. Spiropoulos*, __ F.2d __ (3rd Cir. Sept. 25, 1992) No. 91-6058.

Application Principles, Generally (Chapter 1)

1st Circuit holds that 23 forged travel expense vouchers involved more than minimal planning. (160)(300) Over a period of four years, defendant defrauded the Commonwealth of Massachusetts by falsifying his travel expense vouchers and altering the underlying support documents. The 1st Circuit reversed the district court's determination that the mail fraud offense did not involve more than minimal planning under section 2F1.1(b)(2). Defendant's fraudulent scheme involved repeated acts over a four-year period, and could not be characterized as purely opportune. Conduct is purely opportune only if it is spur of the moment conduct, intended to take advantage of a sudden opportunity. The intricate detail involved with some of the alterations, as well as the necessity that defendant undertake several steps in order to secure payment for the fraudulent vouchers, belied his claim that the alterations were done on the spur of the moment. *U.S. v. Rust*, __ F.2d __ (1st Cir. Sept. 24, 1992) No. 92-1251.

10th Circuit affirms that embezzlement involved more than minimal planning. (160)(220) Defendant, the comptroller for a business, added commission checks to the business's normal bank deposit tickets and withdrew an equivalent amount of cash, thus keeping the total amount of the deposit the same. She then failed to record the business's receipt of the commission checks. The 10th Circuit affirmed that the embezzlements involved more than minimal planning under section 2B1.1(5). Defendant had access to the commission checks and concealed them until the time was right to make the switch for cash on the deposit slips. These actions involved repeated acts and required planning over an extended period of time. *U.S. v. Chimal*, __ F.2d __ (10th Cir. Sept. 24, 1992) No. 91-2223.

5th Circuit considers relevant conduct in determining loss under theft guideline. (175)(220) Defendant was convicted of 14 counts of altering vehicle identification numbers. The 5th Circuit found that since the retail value of each vehicle was agreed upon by the parties, and since retail value was a practical measure of loss, the district court erred in considering incidental costs before retail value. However, the error was harmless since using retail value would have increased defendant's base offense level. There was evidence that 30 cars were involved in defendant's scheme. Each had a retail value of $20,000, resulting in a total loss of $600,000. Defendant's sentence was based on a loss of between $350,000 and $500,000. It would be proper for the district court to consider all of these vehicles as part of defendant's relevant conduct, for purposes of determining his base offense level. *U.S. v. Thomas*, __ F.2d __ (5th Cir. Sept. 16, 1992) No. 91-4542.

Offense Conduct, Generally (Chapter 2)

6th Circuit affirms that purpose of kidnapping was robbery, not murder. (215)(380) Police uncovered a plot to kidnap the owners of two jewelry stores, possibly murder them, and then rob their stores. Defendant was sentenced under section 2X1.1 (Attempt, Solicitation or Conspiracy), which dictates the use of the base offense level from the guideline for the object offense. The introduction to Chapter 3 directs a court to use the offense level for the most serious offense, i.e., kidnapping. Section 2A4.1(b)(5) states that if the victim was kidnapped to facilitate the commission of another offense, the guideline for the other offense should be applied if it would result in a higher base offense level. The government argued that defendant intended to commit murder. The 6th Circuit rejected this, since the kidnapping was not meant to facilitate the commission of a murder. Rather, defendant's notes indicated that his goal was to rob the jewelry stores, and the kidnapping and murder were meant to facilitate the commission of the robbery. *U.S. v. Holmes,* __ F.2d __ (6th Cir. Sept. 16, 1992) No. 91-5365.

6th Circuit holds that defendant's intention to cause life-threatening injury was not speculative. (215)(380) Defendant planned to kidnap the owners of two jewelry stores, possibly murder them, and then rob their stores. Section 2X1.1 (Attempt, Solicitation or Conspiracy) dictated the use of the base offense level from the guideline for the object offense, which in this case was kidnapping. The district refused to apply a four level increase under section 2A4.1(b)(2) for "life threatening bodily injury," finding such an assumption to be too speculative. The 6th Circuit found that defendant's intent to inflict life-threatening bodily injury was not speculative, since the jury found that defendant intended to murder several people as part of his plan. *U.S. v. Holmes,* __ F.2d __ (6th Cir. Sept. 16, 1992) No. 91-5365.

5th Circuit considers loss, rather than retail value, in determining enhancement under section 2B6.1. (220)(300) Defendant was convicted of altering motor vehicle identification numbers. Section 2B6.1 directs that if the retail value of the motor vehicles or parts involved exceeded $2,000, the base offense level should be increased by the corresponding number of levels from the fraud table in section 2F1.1. The fraud table provides for increases if the loss exceeded $2,000. The 5th Circuit rejected defendant's argument that the district court should have used retail value, rather than loss, in determining the amount of enhancement under section 2B6.1. Section 2B6.1 clearly directs a district court, upon finding that the retail value exceeded $2,000, to use the amount of loss in applying the loss table in section 2F1.1. Neither section 2B6.1 nor 2F1.1 mention using retail value in applying the loss table in section 2F1.1. *U.S. v. Thomas,* __ F.2d __ (5th Cir. Sept. 16, 1992) No. 91-4542.

8th Circuit holds that "cocaine base" includes crack or cocaine that can be smoked. (242) The 8th Circuit rejected defendant's argument that the term "cocaine base" in guideline section 2D1.1 was unconstitutionally vague. A term is not void for vagueness simply because courts of appeal differ in their definitions. Defendant's chemist testified that defendant's 12 rock-like substances were cocaine base and not cocaine and that he could differentiate between the two drugs. The court rejected defendant's claim that under *U.S. v. Buckner,* 894 F.2d 975 (8th Cir. 1990), the presence of hydroxyl radical determined whether a substance was cocaine base. It agreed with the 9th Circuit in *U.S. v. Shaw,* 939 F.2d 414 (9th Cir. 1991) that Congress and the sentencing commission must have intended the term "cocaine base" to include "crack" or "rock cocaine," which means cocaine that can be smoked. *U.S. v. Wheeler,* __ F.2d __ (8th Cir. Aug. 13, 1992) No. 92-1024.

1st Circuit holds that application of amended drug guideline violated plea agreement. (245)(790) As part of defendant's plea agreement, the government agreed that if the case had gone to trial, it would not have proven defendant's conduct continued past November 18, 1988, the date that amendments to 18 U.S.C. section 848 increased the mandatory minimum sentence from 10 to 20 years. The corresponding sentencing guideline, section 2D1.5, was amended effective October 15, 1988 to increase the base offense level from 32 to 36, resulting in an increase in the minimum sentence from 10 years to 15 years. The 1st Circuit held that the government's recommendation to apply the amended version violated the plea agreement. By recommending a sentencing range whose lowest end before adjustments was 15 years and eight months, the government effectively withdrew the better part of its promise. The breach was not harmless error. Judge Cyr concurred and dissented in part. *U.S. v. Roberts,* __ F.2d __ (1st Cir. Sept. 17, 1992) No. 91-1721.

5th Circuit finds no plain error in failure to use Drug Table to convert phenylacetone to methamphetamine. (250) Defendant pled guilty to possession of 1348 grams of phenylacetic acid with intent to manufacture methamphetamine. To determine the base offense level, the district court converted the 1348 grams of phenylacetic acid to 674 grams of phenylacetone, and then converted that amount to 505.5 grams of methamphetamine. Defendant argued for the first time on appeal that in converting the phenylacetone into methamphetamine, the district court should have applied the Drug Equivalency Table rather than the DEA formula. The 5th Circuit found no plain error in the district court's use of the DEA conversion formula. Neither the sentencing guidelines nor any other authority required the district court to apply the Drug Equivalency Tables. Its failure to do so was not plain error. *U.S. v. Surasky*, __ F.2d __ (5th Cir. Sept. 16, 1992) No. 91-8304.

3rd Circuit reverses estimation of drug quantity as speculation. (254) The 3rd Circuit ruled that the district court's estimation that one drug transaction involved 62.5 grams of heroin amounted to speculation. The evidence regarding this transaction consisted of transcripts of two taped telephone calls in which defendants agreed to supply heroin to a co-conspirator. Neither call contained any reference to quantity. The presentence report observed that based on "other telephone calls" the government stated that this conversation referred to 62.5 grams of heroin. However, the report did not explain what those other calls were. The government's argument that the calls must have referred to at least 62.5 grams because defendants always dealt in quantities of at least that amount was speculation. *U.S. v. Collado*, __ F.2d __ (3rd Cir. Sept. 16, 1992) No. 91-1492.

4th Circuit upholds estimate despite failure to determine drug sampling's standard deviation. (254)(770) Defendant was arrested with 85 capsules of heroin in his digestive tract. A DEA chemist testified that he determined the weight of the heroin by weighing a small sample of the capsules, and extrapolating the total weight from that sample. Defendant claimed the estimate was unreliable, since the chemist did not know the standard deviation of the sample he selected. The 4th Circuit rejected defendant's contention that the guidelines require such scientific or statistical precision in the calculation of drug quantities. Other practices used by federal courts, such as converting money into drug quantity based on the drug's street value, yield only very rough estimates of quantity. A district court's finding of quantity is not erroneous if based on evidence possessing sufficient indicia of reliability to support its probable accuracy. The chemist's testimony met that standard. *U.S. v. Uwaeme*, __ F.2d __ (4th Cir. Sept. 14, 1992) No. 91-5784.

9th Circuit finds prior felony conviction is *element* of offense of reentry after deportation, not a sentencing factor. (340)(750) Title 8, U.S.C., section 1326(a) makes it a two-year felony to reenter the U.S. after deportation. Subsection (b)(1) increases the maximum sentence five years if the alien was deported after a felony conviction. Relying on *U.S. v. Arias-Grandos*, 941 F.2d 996 (9th Cir. 1991), the 9th Circuit held that subsections (a) and (b)(1) of 8 U.S.C. section 1326 describe two different crimes with different elements and maximum sentences. In order to charge and sentence a person under section 1326(b)(1) which carries a five-year maximum penalty, the indictment must include the element that the person was convicted of a prior felony. The 9th Circuit's interpretation of the illegal entry statute, 8 U.S.C. section 1325, makes it clear that a previous conviction for illegal entry is an element of the felony offense under section 1325. This supports a similar interpretation for the reentry after deportation statute. *U.S. v. Campos-Martinez*, __ F.2d __ (9th Cir. Oct. 5, 1992), No. 91-50756.

3rd Circuit outlines standard for accomplice attribution of drug quantities. (275) Defendants were convicted of a drug conspiracy and several related counts. In determining the amount of drugs attributable to each defendant, the 3rd Circuit outlined the standard for attributing to a conspirator drug quantities distributed by an accomplice. The court noted that early cases interpreted the relevant conduct provisions very broadly, but that the Sentencing Commission amended application note 1 to section 1B1.3 effective November 1989 to make the standard for accomplice attribution "significantly more stringent." Rather than evaluating the scope of the conspiracy as described in the count of conviction and the defendant's awareness of the possibility that co-conspirator would distribute quantities in addition to amounts distributed by defendant, courts should look to the defendant's role in the conspiracy. While it is appropriate to hold a defendant who exhibits a substantial degree of involvement in the conspiracy accountable for reasonably foreseeable acts committed by a co-conspirator, the same cannot be said for a defendant whose involvement

was much more limited. *U.S. v. Collado,* __ F.2d __ (3rd Cir. Sept. 16, 1992) No. 91-1492.

3rd Circuit says defendant cannot be sentenced for drugs distributed before he joined conspiracy. (275) The district court attributed to defendants amounts distributed by the conspiracy as early as April 1988, even though there was no evidence of their involvement until September 21, 1988. The 3rd Circuit remanded, because the court made no finding as to when defendants' membership in the conspiracy began. It would be improper to attribute to defendants amounts distributed by their co-conspirators before they entered the conspiracy. "The relevant conduct provision limits accomplice attribution to conduct committed in furtherance of the activity the defendant agreed to undertake. In the absence of unusual circumstances, not present here, conduct that occurred before the defendant entered into an agreement cannot be said to be in furtherance of or within the scope of that agreement." *U.S. v. Collado,* __ F.2d __ (3rd Cir. Sept. 16, 1992) No. 91-1492.

3rd Circuit affirms that brothers were responsible for drugs distributed by each other during conspiracy. (275) The 3rd Circuit affirmed that it was proper to attribute to two brothers drug sales made by the other to a third party during the course of their conspiracy. Not only were the brothers aware of each other's transactions, they also assisted each other to some extent in those transactions. For example, during one recorded phone call, one brother told the buyer that his brother had everything ready for a scheduled drug deal. Moreover, a witness testified that she accompanied the buyer to the apartment the brothers shared to obtain heroin and that on at least one of those visits, both brothers were present. *U.S. v. Collado,* __ F.2d __ (3rd Cir. Sept. 16, 1992) No. 91-1492.

3rd Circuit remands for determination of whether defendants were responsible for drugs third parties supplied to their co-conspirators. (275) Defendants were convicted of drug conspiracy charges for selling heroin to their co-conspirators. They contended that it was improper to attribute to them amounts supplied to the conspiracy by other persons. The 3rd Circuit remanded, because the factual findings of the district court were insufficient to resolve this issue. "In the absence of factual findings on the scope of [defendants'] agreement with their co-conspirators, the reasonable foreseeability to them of the transactions, and the degree of their involvement in the conspiracy, we cannot determine whether accomplice attribution of these amounts is justified." *U.S. v. Collado,* __ F.2d __ (3rd Cir. Sept. 16, 1992) No. 91-1492.

6th Circuit says defendant could foresee transaction involved 15 kilograms of cocaine. (275) Defendant was involved in a conspiracy to purchase 15 kilograms of cocaine from undercover agents. The 6th Circuit affirmed that defendant could reasonably foresee that the transaction involved 15 kilograms. Defendant was the "bag man" in the deal; he both carried and saw the money. There was also evidence that he admitted that the cocaine was going to be resold for $40,000 per kilogram. The district court's inference that he knew how much cocaine was involved was a reasonable one. *U.S. v. Sims,* __ F.2d __ (6th Cir. Sept. 25, 1992) No. 91-1363.

6th Circuit remands because record did not reflect reasons for offense level selection. (275) Defendant was involved in a conspiracy to purchase 15 kilograms of cocaine from undercover agents. The 6th Circuit found that the record was insufficient to support the determination that he was responsible for all 15 kilograms, since the record did not reflect the guideline range or the manner in which the district court reached it. After sentencing his co-conspirators, the court merely stated "I need not repeat the scoring for [defendant], I think the record clearly reflects the Guideline range and the manner in which the Court reached it." *U.S. v. Sims,* __ F.2d __ (6th Cir. Sept. 25, 1992) No. 91-1363.

8th Circuit affirms firearm enhancement for marijuana farmer who kept weapons in bedroom with drugs. (284) Defendant was arrested for growing marijuana on his farm. A search of the farm and outbuildings uncovered various marijuana cultivation items. A number of unloaded weapons, including two automatic pistols and an automatic rifle, were found in defendant's bedroom. The 8th Circuit affirmed an enhancement for possession of a firearm during a drug trafficking crime. Although defendant had many hunting weapons, the proximity of automatic weapons, albeit unloaded, in his bedroom where he also kept marijuana, exacerbated the danger of drug-related violence. It was not clearly improbable that the weapons were connected to the offense. *U.S. v. Rowley,* __ F.2d __ (8th Cir. Sept. 23, 1992) No. 91-3308.

4th Circuit holds that loss under section 2F1.1 does not include projected profits. (300) Defendant fraudulently solicited funds from investors, and paid old investors their "profits" with money from new investors. The parties agreed that defendant defrauded investors of $8.8 million in lost principal and $16.2 million in principal and projected profits. The 4th Circuit held that the district court improperly included in the loss calculation under section 2F1.1 the projected profits the investors would have earned on their investments. The projected profits were not "probable and intended" consequences of defendant's scheme under application note 7 to section 2F1.1. The sentencing commission meant to limit "probable and intended" provision to attempt crimes. Defendant's crime was fully realized, and the extent of the loss from his fraud was $8.8 million, the amount of out-of-pocket funds actually taken by defendant in the course of his scheme. *U.S. v. Bailey*, __ F.2d __ (4th Cir. Sept. 16, 1992) No. 91-5303.

10th Circuit holds that bank's actual loss should not exceed amount in settlement agreement. (300) Defendant submitted false financial statements to a bank in order to obtain a $1.25 million line of credit. The district court determined that the amount of loss under section 2F1.1(b)(1) was the entire $1.25 million. The 10th Circuit remanded for reconsideration of this issue. Under *U.S. v. Smith*, 951 F.2d 1164 (10th Cir. 1991), the greater of actual or intended loss may be used to enhance, but actual loss should be measured by the net value, not the gross value, of what was taken. The bank reduced its claim against defendant in a settlement agreement to $312,340. It would be "incongruous" to hold that the actual loss to the bank was greater than the amount the bank now sought to collect. The settlement agreement could be viewed as an offset: defendant has forgone his claims against the bank in exchange for a reduction of the debt owing to bank. *U.S. v. Gallegos*, __ F.2d __ (10th Cir. Sept. 15, 1992) No. 91-2259.

10th Circuit reviews loss determination under clearly erroneous and de novo standard. (300)(870) The 10th Circuit held that a district court's determination of loss under section 2F1.1 is reviewed under the clearly erroneous standard, but the factors a district court may properly consider are reviewed de novo. *U.S. v. Gallegos*, __ F.2d __ (10th Cir. Sept. 15, 1992) No. 91-2259.

6th Circuit affirms that defendant's perjury in court was "in respect to a criminal offense." (320)(380) Defendant was convicted of eight counts of making a false statement before a court, after he recanted in court incriminating testimony he had given against his drug co-conspirators. Section 2J1.3(c)(a) provides that if the offense involved perjury "in respect to a criminal offense," apply section 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if it results in a higher offense level. The 6th Circuit affirmed that defendant's perjury was "in respect to" the drug conspiracy. The false testimony was intended to grant the co-conspirators a new trial. Accordingly, section 2X3.1 was applicable. Defendant was an unindicted co-conspirator and an active member of the conspiracy who was granted immunity from prosecution in exchange for testimony. He became an accessory after the fact when he committed perjury to assist his co-conspirators in obtaining a new trial. *U.S. v. Colbert*, __ F.2d __ (6th Cir. Aug. 11, 1992) No. 91-2057.

7th Circuit refuses to include underlying offense in criminal history of defendant who failed to report for trial. (320)(500) Defendant failed to report for trial on drug charges. After he was located, he was found guilty of the drug charges. He was subsequently found guilty of a failure to appear charge. At sentencing on the failure to appear charge, the district court included in his criminal history his conviction for the underlying drug offense. The 7th Circuit found that this was improper under application note 4 to guideline section 2J1.6. That note provides that if the defendant is sentenced on the underlying offense before the failure to appear offense, criminal history points are to be imposed for the underlying offense only where the failure to appear offense constituted a failure to report for service of sentence. Since defendant's case involved a failure to report for trial, his drug conviction should not have been included in his criminal history. *U.S. v. Lechuga*, __ F.2d __ (7th Cir. Sept. 18, 1992) No. 91-3007.

7th Circuit says sentence for failure to appear may not exceed sentence for underlying offense. (320)(470) Defendant failed to report for trial on drug charges. After he was located, he was convicted of the drug charges. In a second proceeding, he was found guilty of failing to appear. The case was remanded for resentencing because the district court improperly calculated defendant's criminal history. In so remanding, the 7th Circuit ruled that when a defendant is convicted of two crimes that would be grouped in a single trial, the

second sentence must be commensurate with the sentence defendant would have received at a single trial, even if the court must depart downward to achieve this result. If defendant's drug charge and failure to appear charge had been grouped in a single proceeding, he would have had a sentencing range of 78 to 97 months. Since defendant already received two concurrent 75-month sentences on the drug charges, on remand his sentence on the failure to appear charge could not exceed 22 months. *U.S. v. Lechuga*, __ F.2d __ (7th Cir. Sept. 18, 1992) No. 91-3007.

6th Circuit vacates sentence for 922(g) firearms charge that exceeded statutory maximum. (330) One defendant was sentenced to 121 months on a 18 U.S.C. section 922(g), to be served concurrently with a drug sentence, and a second defendant was sentenced to 188 months on the section 922(g) charge, to be served concurrently with a drug sentence. The 6th Circuit vacated the sentence because they exceeded the statutory maximum. Section 924(a)(2) provides for a statutory maximum of 10 years for violations of section 922(g). *U.S. v. Sims*, __ F.2d __ (6th Cir. Sept. 25, 1992) No. 91-1363.

6th Circuit says most analogous guideline for firearm offense was 2K2.2, not 2K2.3. (330)(390) Defendant was found guilty of two counts of transporting a firearm in interstate commerce with intent to commit a felony, in violation of 18 U.S.C. section 924(b). Because the guidelines did not specifically address violations of section 924(b), section 2X5.1 instructed the district court to apply the most analogous guideline. The 6th Circuit affirmed that the pre-November 1989 version of section 2K2.2 (Receipt, Possession or Transportation of Firearms), rather than the pre-November 1989 version of section 2K2.3 (Prohibited Transactions in or Shipment of Firearms) was the most analogous guideline for the offense. Although the violations addressed by section 2K2.2 were not perfectly analogous to the section 924(b) violation, since defendant's crime did not involve a specially regulated weapon, that section was clearly more analogous than section 2K2.3. *U.S. v. Holmes*, __ F.2d __ (6th Cir. Sept. 16, 1992) No. 91-5365.

9th Circuit finds multiple convictions under 18 U.S.C. 924(c) require multiple enhanced penalties. (330) Defendant was convicted of three bank robberies and three counts of using a firearm in a crime of violence in violation of 18 U.S.C. section 924(c). The district court sentenced the defendant to five years on the first count, twenty years on the second count and twenty years on the third count, all to be served consecutively. The 9th Circuit affirmed, finding that the meaning of "second or subsequent conviction" in section 924(c) is plain and does not require that any offense underlying that conviction follow a first conviction. The only circuit to hold to the contrary is the 10th Circuit in *U.S. v. Abreu*, 962 F.2d 1447 (10th Cir. 1992) (en banc). Judge Fetcher dissented, finding that Congress created an "incentive plan" for felons to abandon their firearms and that they should have a five-year opportunity to learn from their initial mistakes. *U.S. v. Neal*, __ F.2d __, (9th Cir. Oct. 5, 1992), No. 91-10078.

9th Circuit holds that smuggling 800 handguns did not justify an upward departure. (345)(734) Defendant was arrested for smuggling 74 handguns into the Philippines. He admitted smuggling 800 guns in two years. He pled guilty to violating 22 U.S.C. section 2778 and 22 CFR 127.2. While free on bail awaiting sentencing, he was caught shipping another 70 handguns, and again pled guilty. He was sentenced to consecutive terms for the two offenses, but in *U.S. v. Pedrioli*, 931 F.2d 31, 33 (9th Cir. 1991), the 9th Circuit reversed. On remand, the district court departed upward because of the "extremity of the crime." On appeal, the 9th Circuit again reversed, holding that 800 handguns did not justify a departure. The court rejected the district court's finding that the handguns were intended to "wage war." Moreover, the "mere fact that the handguns were intended for a military purpose," by itself, "cannot support departure under 2M5.2." Chief Judge Wallace dissented. *U.S. v. Pedrioli*, __ F.2d __ (9th Cir. Oct. 13, 1992) No. 91-10392.

5th Circuit says money laundering enhancement is triggered by belief that funds were criminally derived. (360) The 1988 version of guideline section 2S1.3(b)(1) provided for an increase in base offense level for money laundering if the defendant "knew or believed that the funds were criminally derived." Despite this language, defendant argued that the increase only applies if the defendant *knew* the funds were criminally derived. The 5th Circuit affirmed that the enhancement applied if the defendant "knew or believed" the funds were criminally derived. Although a sentence in the background section of the application notes to section 2S1.3 states in part that the increase applies if the defendant knew the funds were criminally derived, the unambiguous language of the guideline controls. *U.S. v. Levy*, 969 F.2d 136 (5th Cir. 1992).

Adjustments (Chapter 3)

4th Circuit reverses refusal to impose managerial enhancement upon drug "entrepreneur." (431) The 4th Circuit reversed the district court's refusal to impose a managerial enhancement upon a drug dealer that the district court described as just "an entrepreneur." The evidence showed that defendant drove his co-defendant, a 18-year old woman of limited intelligence, to New York, bought the crack by himself, had the co-defendant buy a girdle in which to hide the packages of crack, took her to the bus station and bought her a bus ticket to Norfolk, Va., and then met her in Norfolk and told her to go wait in his car. The appellate court criticized the district court for refusing to apply the enhancement so that defendant would not receive what it viewed as too harsh a sentence. "Attempts, in effect, to manipulate the Guidelines in order to achieve the 'right result' in a given case are inconsistent with the Guidelines' goal of creating uniformity in sentencing." *U.S. v. Harriott,* __ F.2d __ (4th Cir. Sept. 24, 1992) No. 91-5793.

7th Circuit affirms leadership enhancement for drug supplier. (431) The 7th Circuit affirmed a two level increase under section 3B1.1(c) based on defendant's leadership role in a cocaine distribution conspiracy. In a narcotics-selling network that included numerous others, defendant was the "ultimate supplier, the Big Cheese." He was the one seen counting stacks of money in his apartment. *U.S. v. Jackson,* __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-2969.

8th Circuit reverses organizing role enhancement based on defendant's use of cousin's address. (432) Defendant was convicted of drug charges for being a marijuana farmer. The district court imposed a two-level organizer enhancement under section 3B1.1(c) based on the sophistication of defendant's farm and his use of cousin's address to receive some growing equipment. The 8th Circuit reversed, finding the use of the cousin's address was insufficient to justify the enhancement. The cousin only knew that defendant was using his address to receive "stuff" he wanted to hide from his wife, not what the "stuff" was. There was no evidence of any sales or of any salesmen who defendant directed or supplied or supervised. In order to be an organizer, there must be underlings or subordinates. *U.S. v. Rowley,* __ F.2d __ (8th Cir. Sept. 23, 1992) No. 91-3308.

6th Circuit rejects minor role for "bag man" in drug deal. (445) The district court refused to find that defendant was a minor participant in a drug deal because he was the "bag man." Defendant had control of the $330,000 that his co-conspirators were to use to purchase cocaine from the undercover agents, and he zipped open the bag so that the agents could see that the money was there. The 6th Circuit refused to reverse this finding, even though the presentence report labeled defendant and two others who received the minor role reduction as equally culpable. It was the district judge, not the probation officer, who presided at trial and understood the "interstices" of the case. *U.S. v. Sims,* __ F.2d __ (6th Cir. Sept. 25, 1992) No. 91-1363.

10th Circuit affirms that comptroller who embezzled company's checks abused a position of trust. (450) Defendant, the comptroller for a business, added commission checks to the business's normal bank deposit tickets and withdrew an equivalent amount of cash, thus keeping the total amount of the deposit the same. She then failed to record the business's receipt of the commission checks. The 10th Circuit affirmed that defendant abused a position of trust under section 3B1.3. Although embezzlement by definition involves an abuse of trust, embezzlement by someone in a significant position of trust warrants the enhancement when the position substantially facilitated the commission or concealment of the crime. Defendant's position substantially facilitated her crime and enabled her to escape detection. She had complete access to the commission checks and her position enabled her to alter deposit slips without arousing suspicion. *U.S. v. Chimal,* __ F.2d __ (10th Cir. Sept. 24, 1992) No. 91-2223.

Article recommends different approach to perjury at trial. (460) In "*Balancing the Need for Enhanced Sentences for Perjury at Trial under Section 3C1.1 of the Sentencing Guidelines and the Defendant's Right to Testify,*" Peter J. Henning reviews the varying approaches courts have taken to the question of when the obstruction of justice enhancement should be applied to a defendant who testifies at trial but is convicted, noting that some courts almost automatically enhance the sentence in such cases while some take the position that almost any such enhancement is overly burdensome on defendant's right to testify. The author finds both approaches problematic. He

recommends that courts not feel bound by the jury's verdict in assessing whether perjury was committed. He also suggests that the enhancement be limited to "egregious cases" of perjury and that the court carefully consider the effect the adjustment could have on future defendants' decisions whether to testify, exercising special caution in applying the enhancement where defendant has been convicted on all counts. 29 AM. CRIM. L. REV. 933-60 (1992).

6th Circuit upholds obstruction enhancement for perjury at trial. (461) Defendant was convicted of being a felon in possession of a firearm. He received an enhancement for obstruction of justice based upon his testimony at trial that the firearms and ammunition found in his possession belonged to his girlfriend. He argued that the jury verdict was not inconsistent with his testimony, since they could have believed his testimony, but still found that his conduct constituted possession of firearms. Thus, he contended, the enhancement had a chilling effect on his right to go to trial and testify. The 6th Circuit affirmed the obstruction enhancement. The district court evaluated the evidence, made a credibility determination, and found that the defendant perjured himself while testifying under oath. *U.S. v. Bennett*, __ F.2d __ (6th Cir. Sept. 21, 1992) No. 91-6149.

7th Circuit upholds obstruction enhancement for failure to report drug arrest while on bond. (461) After defendant's arrest, he was released on bond. The conditions of his release included the requirement that he report to the probation office all contact with law enforcement officers regarding criminal matters within 24 hours. At a bail revocation hearing, defendant failed to mention that he recently had been arrested by local police for heroin possession. Defendant challenged for the first time on appeal an enhancement for obstruction of justice based on this conduct. The 7th Circuit affirmed that the enhancement was not plain error. It was well within the discretion of the district court to consider defendant's violation of his bail conditions as an attempt to obstruct justice. *U.S. v. Jackson*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-2969.

9th Circuit finds threat to witness was obstruction. (461) Defendant was convicted of assaulting his girlfriend and breaking her jaw. When a park ranger came to the girlfriend's rescue, the defendant ordered her to tell the ranger that everything was all right. When she refused to comply, he ran. The two-level increase for obstruction of justice was justified as an attempt to intimidate the girlfriend into staying quiet, rather than merely a request to help the defendant avoid arrest. The analogy to instinctive flight was not persuasive. Finally, threatening a witness leads to a section 3C1.1 increase regardless of whether there is a material hindrance to the investigation as a result. *U.S. v. Snider*, __ F.2d __, (9th Cir. Oct. 2, 1992), No. 91-10554.

4th Circuit reverses district court's finding that defendant accepted responsibility. (480) The district court granted defendant a reduction for acceptance of responsibility because defendant acknowledged to his probation officer that he had been convicted and had to serve his sentence. The probation officer stated that defendant seemed to want to talk about his conviction but did not do so, and that defendant might have been protecting someone. The 4th Circuit found the reduction to be clearly erroneous. The appellate court then criticized the district court for only applying the reduction so that defendant would not receive what it viewed as too harsh a sentence. "Attempts, in effect, to manipulate the Guidelines in order to achieve the 'right result' in a given case are inconsistent with the Guidelines' goal of creating uniformity in sentencing." *U.S. v. Harriott*, __ F.2d __ (4th Cir. Sept. 24, 1992) No. 91-5793.

7th Circuit affirms denial of acceptance of responsibility based on adoption of presentence report. (480)(765) The 7th Circuit rejected defendant's claim that the district court improperly failed to consider whether he was eligible for a reduction for acceptance of responsibility. The presentence report addressed defendant's refusal to accept responsibility, and defendant failed to object to this portion of the presentence report. Although the district court did not consider a reduction for acceptance of responsibility (because it was not raised), the court adopted the factual findings in the presentence report. *U.S. v. Shetterly*, __ F.2d __ (7th Cir. Aug. 10, 1992) No. 91-2313.

10th Circuit denies reduction to defendant who denied offense during and after trial. (486) The 10th Circuit affirmed that defendant was not entitled to a reduction for acceptance of responsibility. She denied any criminal wrongdoing relating to the counts charged in the indictment at trial, and she persisted in this denial following her conviction during her presentence interview. *U.S. v. Chimal*, __ F.2d __ (10th Cir. Sept. 24, 1992) No. 91-2223.

7th Circuit denies reduction to defendant who blamed victim for the crime. (488) The 7th Circuit affirmed the denial of a reduction for acceptance of responsibility. Neither defendant's letter to his probation officer purporting to accept responsibility nor his written statement purporting to accept responsibility recognized that he was at fault and responsible for the kidnapping and resultant batteries. If anything, his statement sought to blame the victim for the crime. *U.S. v. O'Neal*, 969 F.2d 512 (7th Cir. 1992).

8th Circuit denies acceptance of responsibility reduction to defendant who denied involvement in conspiracy. (488) The district court denied defendant a reduction for acceptance of responsibility under section 3E1.1 since he continued to deny the existence of the conspiracy for which he was convicted. The 8th Circuit affirmed that this was not an abuse of discretion. *U.S. v. Rowley*, __ F.2d __ (8th Cir. Sept. 23, 1992) No. 91-3308.

7th Circuit denies acceptance of responsibility reduction to defendant who did not voluntarily surrender. (494) Defendant failed to appear for trial on drug charges. He was apprehended over two years later in a different city carrying a false driver's license under another name. In sentencing him on the failure to appear offense, the 7th Circuit affirmed a denial of a reduction for acceptance of responsibility, in light of defendant's failure to surrender voluntarily and his own false identification to officers at his arrest. *U.S. v. Lechuga*, __ F.2d __ (7th Cir. Sept. 18, 1992) No. 91-3007.

Criminal History (§4A)

4th Circuit says convictions for "breaking or entering" were violent felonies. (500) Defendant received an enhanced sentence as an armed career criminal under 18 U.S.C. section 924(e) and guideline section 4B1.4. The 4th Circuit held that defendant's prior North Carolina "breaking or entering" convictions were generic burglaries, and thus qualified as violent felonies. The Supreme Court held in *Taylor v. United States*, 495 U.S. 575 (1990) that a person has been convicted of burglary for section 924(e) enhancement purposes if the crime has the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime. The North Carolina statute allows conviction on a showing of breaking *or* entering, not breaking and entering. However, even if defendant gained entry into the buildings without breaking, the entry was still unlawful because defendant had the intent to commit a felony. *U.S. v. Bowden*, __ F.2d __ (4th Cir. Sept. 21, 1992) No. 91-5333.

4th Circuit refuses to review criminal history calculation for armed career criminal. (500) Defendant, an armed career criminal, argued that two of his prior convictions should not have been included in his sentencing calculation because they were obtained in violation of his constitutional rights. The 4th Circuit refused to review this issue, since the effect of the armed career criminal enhancement of 18 U.S.C. section 924(e) and guideline section 4B1.4 was to make irrelevant for sentencing purposes all of defendant's prior convictions save those predicate offenses that triggered the enhancement. *U.S. v. Bowden*, __ F.2d __ (4th Cir. Sept. 21, 1992) No. 91-5333.

5th Circuit holds that prior sentence must be a distinct offense from the offense of conviction. (504) Defendant argued that his previous state sentence for theft should not have been included in his criminal history because it was part of his instant offense of altering motor vehicle identification numbers. The 5th Circuit affirmed that the theft conviction was properly included in defendant's criminal history. The critical inquiry is not whether the offenses are related, but whether the prior conduct constituted a "severable, distinct offense" from the offense of conviction. Because defendant's convictions for theft and altering VINs involved distinct offenses with different elements, and the convictions for each offense involved different vehicles, the theft sentence was a prior sentence under section 4A1.2(a)(1). *U.S. v. Thomas*, __ F.2d __ (5th Cir. Sept. 16, 1992) No. 91-4542.

6th Circuit affirms unusually high likelihood of recidivism as basis for criminal history departure. (510) The 6th Circuit affirmed that defendant's unusually high likelihood of recidivism justified a five-month upward departure. The court acknowledged that upward departures for reasons of recidivism should be "rare events." However, guideline section 4A1.3 suggests that while the criminal history scoring system accounts for a "general" recidivist tendency among criminal defendant, certain defendants pose a significantly greater risk. Defendant had been tried eight times in the past 18 years for over a dozen offenses, excluding the present case. He was sentenced to more than 12 years in prison, served nearly eight of those years, and escaped from prison once. In addition to

the instant offense, defendant had three prior federal convictions for illegal possession of firearms. He committed the instant offense nine days after being released from custody for a prior firearms offense. *U.S. v. Bennett*, __ F.2d __ (6th Cir. Sept. 21, 1992) No. 91-6149.

Determining the Sentence (Chapter 5)

5th Circuit holds five-year supervised release term for Class C felony exceeded statutory maximum. (580) Defendant pled guilty to possession with intent to distribute cocaine base in violation of 21 U.S.C. section 841(a)(1). He was sentenced under section 841(b)(1)(C), which provides for a minimum term of supervised release of three years. As a Class C felony, 18 U.S.C. section 3583(b)(2) limited the term of supervised release to three years. The 5th Circuit vacated the five-year term of supervised release because it exceeded the statutory maximum. Section 5D1.2 does not mandate a different result. That section provides that if a defendant is convicted under a statute that requires a term of supervised release, the term should be three to five years, or the minimum required by statute, whichever is greater. The purpose of section 5D1.2 is to ensure that where there is a minimum term of supervised release required by statute, that minimum will be imposed over a lesser guideline term. *U.S. v. Kelly*, __ F.2d __ (5th Cir. Sept. 21, 1992) No. 92-8222.

Supreme Court dissenters would grant certiorari to resolve conflict over parole eligibility. (590) Prisoners sentenced prior to November 1, 1987 are subject to 18 U.S.C. 4205(a), which states that the maximum term of imprisonment before parole eligibility is (1) one-third of a sentence for a term of years, or (2) ten years of a life sentence and of a sentence of more than 30 years. Nevertheless, the Eleventh Circuit affirmed the district court's minimum 20-year sentence, relying on section 4205(b)(1), which provides that a district court may "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." The Fifth, Ninth, Eighth and Tenth Circuits agree that this section permits a minimum parole eligibility of more than 10 years. The First, Third, Sixth and Seventh circuits are to the contrary, and Justices White and O'Connor would have granted certiorari in this case to resolve the conflict. *Costa v. U.S.*, 113 S.Ct. __ (October 13, 1992) No. 91-1849 (White and O'Connor, J.J., dissenting from denial of certiorari).

4th Circuit rules district court improperly failed to consider defendant's ability to pay $16 million restitution order. (610) The 4th Circuit held that the district court violated the VWPA by ordering defendant to make restitution of $16 million without sufficiently inquiring into his ability to comply. In fashioning a restitution order, a trial court must consider the amount of loss sustained by the victims, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents. Defendant had a net worth of $41,000. When engaged in his concert promotion business, his business was worth $200,000 annually, and he held a 25 percent interest in another promotions firm. However, defendant would be unable to engage in his business during his prison term or during his three years of supervised release. The only comment on the record suggesting that the district court considered defendant's financial ability to pay the $16 million order was "I wouldn't count on them getting [the $16 million], but that's what we're going to impose anyway." *U.S. v. Bailey*, __ F.2d __ (4th Cir. Sept. 16, 1992) No. 91-5303.

4th Circuit holds that restitution to investors not named in indictment does not violate *Hughey v. United States*. (610) The 4th Circuit held that the requirement that defendant pay restitution to defrauded investors other than those specifically named in the indictment did not violate *Hughey v. United States*, 495 U.S. 411 (1990). *Hughey* held that restitution may be imposed only for losses caused by the offense of conviction. Here, unlike *Hughey*, defendant pled guilty to a broad indictment charging him with defrauding investors of monies in excess of $15 million. The only monetary amount listed in the indictment was in excess of $15 million, and the trial court's award of $16 million in restitution did not violate that provision (nor significantly exceed the floor amount specifically identified). The names listed in the indictment only represented contacts defendant made through the mail or the telephone system; the individuals counts did not mention monetary amounts allegedly obtained through each specific contact. *U.S. v. Bailey*, __ F.2d __ (4th Cir. Sept. 16, 1992) No. 91-5303.

6th Circuit affirms imposition of consecutive sentences for multiple false statement charges. (650) Defendant was convicted of making false

statements to a grand jury or court. His guideline range was 108 to 135 months, and he received a total sentence of 135 months, comprised of (a) concurrent 60-month sentences on counts one through four; (b) concurrent 60-month sentences on counts five and six, to run consecutively to the sentences in (a); and (c) 15-month concurrent sentences on counts seven and eight, to run consecutively to the sentences in (b). The 6th Circuit affirmed that under guideline section 5G1.2(d) it was proper to impose consecutive sentences. That section provides that if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, to the extent necessary to produce a combined sentence equal to the total punishment. *U.S. v. Colbert,* __ F.2d __ (6th Cir. Aug. 11, 1992) No. 91-2057.

Article advocates flexibility in sentencing older defendants. (670) In "*The Sentencing of Elderly Criminals,*" a student author provides an overview of the type of crimes most commonly committed by the elderly. The author also addresses the guidelines' approach to sentencing the elderly, noting that courts have been reluctant to sentence elderly criminals differently from younger ones; this approach is compared to the approach of various states. The author advocates increased consideration of a defendant's age, arguing that a prison sentence for an elderly defendant is unequal to the same sentence for a younger defendant, because the sentence is a larger part of the elderly defendant's remaining life expectancy. 29 AM. CRIM. L. REV. 1025-44 (1992).

Departures (§5K)

Article advocates increased use of departure powers. (700) In "*Departures from the Guideline Range: Have We Missed the Boat, or Has the Ship Sunk?*", Judy Clarke and Gerald McFadden analyze the legislative history of the Sentencing Reform Act. In that history, they find support for the proposition that courts should be more willing to consider departures than current case law and guideline provisions suggest. In particular, the authors claim that 18 U.S.C. section 3553(a) has been inappropriately overlooked as a source of departure authority. The authors conclude that there is only a rebuttable presumption that an individual sentence should be within the applicable guideline range, with judges retaining special control over the relevance of particular characteristics of the offense and the offender. 29 AM. CRIM. L. REV. 919-32 (1992).

3rd Circuit says court may consider usefulness of cooperation in determining extent of departure. (710) Defendant's assistance in the investigation of a bribery scheme became almost useless when the target of the investigation died. The 3rd Circuit held that in determining the extent of the downward departure, the district court could consider the fact that defendant's cooperation proved to be less useful than anticipated. The Sentencing Reform Act, makes it clear that the Commission shall define the specific method for determining the extent of a downward departure. Section 5K1.1(a)(1) clearly authorizes a district court, in determining the extent of a departure, to consider "the significance and usefulness of the defendant's assistance," taking into consideration the government's evaluation of the assistance rendered. The government's report to the district court on the usefulness of his cooperation did not breach the plea agreement. *U.S. v. Spiropoulos,* __ F.2d __ (3rd Cir. Sept. 25, 1992) No. 91-6058.

8th Circuit refuses to review government's refusal to make substantial assistance motion. (712) Defendant's plea agreement provided that the government would advise the court of any substantial assistance provided by defendant, and might, in its sole discretion, move for downward departure under section 5K1.1. At sentencing, the government acknowledged that defendant had cooperated and recommended a sentence near the bottom of his guideline range. However, it declined to make a section 5K1.1 motion or to put on the record its reasons for not making the motion. The 8th Circuit affirmed that in the absence of a government motion, the district court properly denied defendant's request for a downward departure. Defendant's plea agreement preserved the government's discretion not to file a substantial assistance motion. Defendant did not allege that the government refused to file the motion for suspect reasons. *U.S. v. Romsey,* __ F.2d __ (8th Cir. Sept. 22, 1992) No. 91-3204.

6th Circuit reverses downward departure even though defendant never approached intended kidnap victims. (715) Police uncovered a plot by defendant to kidnap the owners of two jewelry stores, possibly murder them, and then rob their stores. Defendant was convicted of transporting a firearm in interstate commerce with intent to commit a felony, in violation of 18 U.S.C. section 924(b). As a result of the interplay between the

firearms, conspiracy and kidnapping guidelines, defendant had a guideline range of 121 to 151 months. The district court departed downward to only 36 months, in part because section 924(b) is used almost exclusively after a crime has been committed, and the victims here were never even confronted by defendant. In addition, it found that the psychological evaluation was insufficient to determine defendant's intent or a prognosis for future dangerous behavior. The 6th Circuit reversed, finding neither reason supported a downward departure. Nothing in the wording of section 924(b) or guideline sections 2K2.3 or 2X1.1 contains a requirement that the intended offense be consummated. *U.S. v. Holmes,* __ F.2d __ (6th Cir. Sept. 16, 1992) No. 91-5365.

5th Circuit affirms that bank robbery was not aberrant act. (719) Defendant challenged the district court's refusal to depart downward on the grounds that his bank robbery was a one time act of aberrant behavior. Without determining whether aberrant behavior can ever justify a downward departure, the 5th Circuit affirmed that defendant's behavior was not aberrant. Although the guidelines do not define "aberrant behavior," it requires more than an act which is merely a first offense or "out of character" for the defendant. Those considerations are taken into account in calculating the defendant's criminal history category. Defendant's act was neither spontaneous nor thoughtless. One of his demand notes was dated several days before the robbery. *U.S. v. Williams,* __ F.2d __ (5th Cir. Sept. 21, 1992) No. 92-3028.

1st Circuit affirms upward departure for disrupting government functions by extorting money from contractors. (725) Defendant, the mayor of Pawtucket, pled guilty to a RICO violation. The predicate acts consisted of 15 acts of extortion in connection with the award of municipal contracts. The district court departed upward under section 5K2.7 for significant disruption of a governmental function. Defendant argued that the departure was not justified because interference with a government function was inherent in the offense. The 1st Circuit rejected the argument, holding that in determining whether interference is inherent in the offense, the district court properly looked to the RICO offense of conviction, not the substantive crime of extortion. Defendant's conduct significantly disrupted a city function: he caused the "wholesale derangement" of the city's bid process. The nine month departure, amounting to a 15 percent increase in sentence, was reasonable. *U.S. v. Sarault,* __ F.2d __ (1st Cir. Sept. 15, 1992) No. 91-1180.

2nd Circuit affirms downward departure based on defendant's efforts at drug rehabilitation. (736) The 2nd Circuit affirmed a downward departure from 51 months to probation, based on defendant's efforts at drug rehabilitation. The court rejected the view that rehabilitation is no longer a goal of sentencing. Although the Sentencing Reform Act rejects imprisonment as a means of promoting rehabilitation, Congress expressed no hostility to rehabilitation as an objective of sentencing. The court also rejected the argument that the sentencing commission gave adequate consideration to drug rehabilitation in promulgating section 5H1.4 or section 3E1.1. The departure in this case was proper. The judge did not depart simply because defendant entered a rehabilitation program: he considered all pertinent circumstances, including the nature of defendant's addiction, the characteristics of her program, the progress she was making, the objective indications of her determination to rehabilitate herself, her therapist's assessment of her progress, and hazards of interrupting that progress. *U.S. v. Maier,* __ F.2d __ (2nd Cir. Sept. 23, 1992) No. 92-1143.

Sentencing Hearing (§6A)

3rd Circuit finds no fault with statement that defendant was "malicious" and "driven by avarice." (750) Defendant argued that his sentence violated Fed. R. Crim. P 32 and his due process rights because the district court relied on false information, i.e., that defendant was "malicious" and "driven by avarice." The 3rd Circuit affirmed, finding no Rule 32 or due process violation. First, Rule 32 was not implicated because there was no factually inaccurate statement in the presentence report. Second, although the court's statement was arguably a mischaracterization, it was not the result of misinformation. *U.S. v. Spiropoulos,* __ F.2d __ (3rd Cir. Sept. 25, 1992) No. 91-6058.

Article attacks constitutionality of preponderance standard at sentencing. (755) In "*The Preponderance of Evidence Standard at Sentencing,*" Steven M. Salky and Blair G. Brown argue that the constitution requires a higher burden of proof than preponderance of the evidence, at least when disputes about uncharged conduct significantly affect a defendant's sentence. The authors argue that the Sentencing Reform Act gives rise to a distinct liberty interest in a sentence

below the statutory maximum. Employing the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the authors conclude that the preponderance standard often fails to comply with constitutional requirements of due process. 29 AM. CRIM. L. REV. 907-18 (1992).

3rd Circuit says that when district court fails to make independent findings, appellate court must look to presentence report for factual support. (760) The 3rd Circuit noted that when the district court makes no independent findings of fact in relation to sentencing issues, but merely adopts the reasons set forth in the presentence report, it would view the report as containing only findings of facts that support the court's sentencing decision. *U.S. v. Collado*, __ F.2d __ (3rd Cir. Sept. 16, 1992) No. 91-1492.

7th Circuit finds no jurisdiction to review proper sentence despite improper tirade by judge. (775) Defendant, a citizen of Mexico, entered the United States illegally on numerous occasions and was deported almost as many times. At sentencing, defense counsel requested defendant's sentence be suspended on condition of deportation. This angered the sentencing judge, who delivered a lengthy harangue about aliens who illegally reenter the United States. Defendant was then sentenced to the top of his guideline range. The 7th Circuit found that although the judge's tirade was inappropriate, it had no jurisdiction to review defendant's sentence since it was within his proper guideline range. Since defendant's sentence was within his guideline range, it was not an "incorrect application" of the guidelines. *U.S. v. Lopez*, __ F.2d __ (7th Cir. Aug. 21, 1992) No. 91-3200.

Appeal of Sentence (18 U.S.C. §3742)

1st Circuit declines to determine standard of review for breach of plea agreement. (790) Defendant argued that the government breached its plea agreement. In determining the appropriate standard of review, the 1st Circuit noted that recent precedent suggested that the question was one of law subject to plenary review, while other cases held that the district court's determination of breach or no breach was a factual question reviewable for clear error only. The court declined to resolve this apparent conflict, since under either standard, the government breached its agreement with defendant. *U.S. v. Jackson*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-2969.

Violations of Probation and Supervised Release (Chapter 7)

9th Circuit finds magistrate judge has jurisdiction to revoke supervised release term. (800) In *U.S. v. Williams*, 919 F.2d 266 (5th Cir. 1990), the 5th Circuit held that a magistrate judge does not have the power to revoke a term of supervised release. Here, the defendant consented to be tried before a United States magistrate judge and pled guilty, receiving a one-year term of supervised release to follow a custodial term. The defendant then violated the conditions of his supervised release and objected to the magistrate's jurisdiction to revoke the supervised release term and impose imprisonment. The 9th Circuit declined to follow *Williams*, instead concluding that where a defendant has consented to trial, judgment and sentencing before a U.S. magistrate judge under 18 U.S.C. section 3401, the magistrate judge has jurisdiction to impose and to revoke a term of supervised release in accordance with 18 U.S.C. §3583(a) and (e). *U.S. v. Crane*, __ F.2d __ (9th Cir. Oct. 3, 1992), No. 91-50685.

9th Circuit finds fugitive status and state custody tolls supervised released term. (800) Defendant argued that the court had no jurisdiction to revoke his term of supervised release because the one-year term had expired when he appeared before the court. However, after service of less than half of the one-year term, the defendant absconded and was ultimately arrested by state authorities and received a state sentence. The court held that the time the defendant was on fugitive status and in state custody tolled the period of supervised release. In so holding, the court rejected the defendant's argument that 18 U.S.C. §3583(e)(3) does not specifically provide for the tolling of a supervised release term. *U.S. v. Crane*, __ F.2d __ (9th Cir. Oct. 3, 1992), No. 91-50685.

Sentencing of Organizations (Chapter 8)

Article recommends considering civil penalties at sentencing. (840) In "*Coordinating Sanctions for Corporate Misconduct: Civil or Criminal Punishment*," David Yellen and Carl J. Mayer examine the proliferation of civil sanctions that appear to serve "punitive" purposes. The authors argue that both constitutional law and sound punishment theory suggest the need to consider such civil penalties

when making criminal sentencing decisions for the same conduct. The sentencing guidelines' recent treatment of organizational defendants increases both the need for coordination and the opportunity to coordinate. Though the authors' primary focus is the corporate defendant, they suggest that their analysis also may be applicable to individual defendants who are subject to civil penalties. 29 AM. CRIM. L. REV. 961-1024 (1992).

Appeal of Sentence (18 U.S.C. §3742)

4th Circuit interprets waiver of appeal to preserve right to challenge application of the guidelines. (850) Defendant's plea agreement provided that he waived "any appeal and the right to exercise any post-conviction rights . . . if the sentence imposed herein is within the guidelines . . . and the enhanced sentencing provision of 18 U.S.C. section 924(e)." On appeal, defendant argued that he should not have been sentenced as an armed career criminal pursuant to section 924(e) and guideline section 4B1.4. The 4th Circuit interpreted the plea agreement as preserving defendant's right to appeal the application of the guidelines and the armed career criminal enhancement of section 924(e). Because defendant was arguing that his sentence was not "within the guidelines," the government's request to dismiss the appeal was denied. *U.S. v. Bowden,* __ F.2d __ (4th Cir. Sept. 21, 1992) No. 91-5333.

5th Circuit finds defendant did not waive appeal since term of supervised release exceeded statutory maximum. (850) Defendant's plea agreement acknowledged that the district court had jurisdiction to impose any sentence within the statutory maximum set for his offense, and defendant waived the right to appeal his sentence on any ground, except an upward departure. The 5th Circuit held that since defendant's term of supervised release exceeded the statutory maximum for the offense, it constituted some form of upward departure and therefore defendant was not bound by his waiver of appeal. *U.S. v. Kelly,* __ F.2d __ (5th Cir. Sept. 21, 1992) No. 92-8222.

5th Circuit holds that defendant waived his right to appeal as part of plea agreement. (850) The 5th Circuit ruled that defendant waived his right to appeal his sentence as part of his plea agreement. Although defendant's plea agreement did not promise a specific sentence, the uncertainty of the sentence did not render the waiver uninformed. He was aware that the court would sentence him under the guidelines, and that the court had the power to depart. He was also aware of the maximum terms of imprisonment and supervised release applicable to his crime. The district court's statement at sentencing that defendant had the right to appeal did not negate the knowingness of the waiver. The government's failure to correct the court's misstatement did not constitute a breach of the plea agreement. Judge Parker concurred specially, finding the court bound by an unpublished opinion to uphold the waiver, but urging the full court to examine whether a defendant can waive the right to appeal his sentence. *U.S. v. Melancon,* __ F.2d __ (5th Cir. Sept. 3, 1992) No. 91-4627.

4th Circuit refuses to review failure to depart downward despite large restitution. (860) Defendant challenged the district court's failure to depart downward in light of his alleged substantial restitution to one of his defrauded investors. Defendant claimed that during the year preceding his indictment, he made restitution to a major investor in his business in the amount of $7.4 million. The 4th Circuit affirmed that it lacked jurisdiction to review the refusal to depart. When the record is silent with respect to a judge's refusal to depart downward, the appellate court cannot infer that the judge believed he lacked authority to depart. Instead, the appellate court must find the judge merely exercised his discretion under the guidelines not to depart. *U.S. v. Bailey,* __ F.2d __ (4th Cir. Sept. 16, 1992) No. 91-5303.

7th Circuit reaffirms that district court exercised discretion in refusing to depart downward. (860) The 7th Circuit found that it had no jurisdiction to review the district court's refusal to depart downward, since it was clear from the record that the court exercised its authority in refusing to depart. The court stated all of the things urged by defendant were taken into account by the guidelines, and that it did not see any reason to depart from the guidelines. *U.S. v. Shetterly,* __ F.2d __ (7th Cir. Aug. 10, 1992) No. 91-2313.

Forfeiture Cases

9th Circuit holds guilty plea did not collaterally estop defendant from contesting forfeiture. (900) The defendant pled guilty to knowing and intentionally manufacturing marijuana in her mobile home. The government sought to forfeit the mobile home and the land which it occupied, under

21 U.S.C. section 881(a)(7). The district court dismissed the defendant's claim for the land, holding that she was collaterally estopped from challenging the forfeiture because of her guilty plea. On appeal, the 9th Circuit reversed, because the defendant's claim was based on the argument that the tract of land consisted of two separate lots, rather than one single lot as the government claimed. Since this issue was not resolved in the criminal case, she was not precluded from contesting the forfeiture. *U.S. v. Real Property Located at Section 18,* __ F.2d __ (9th Cir. Sept. 30, 1992) No. 91-35121.

9th Circuit affirms that defendant had no standing to challenge forfeiture. (920) The claimant argued that although he never legally married Carlson, they lived together between approximately 1970 and 1987, and jointly purchased both the land and the mobile home. The district court rejected the argument, because the land was titled to Carlson as a single woman. The claimant asserted that he and Carlson had a verbal agreement that the land and mobile home would be equally divided if they split up. But this was rebutted by the fact that they did split up in the fall of 1987, and title to the real property remained exclusively with Carlson and title to the mobile home remained with claimant. In addition, the claimant continued to pay at least $400 per month to Carlson to use her property to operate a shake mill on the property. On these facts, the 9th Circuit upheld the district court's finding that the claimant had no interest in Carlson's real estate. *U.S. v. Real Property Located at Section 18,* __ F.2d __ (9th Cir. Sept. 30, 1992) No. 91-35121.

7th Circuit holds that appeals from Rule 41(e) orders should be treated as civil for purposes of timing appeal. (940) The district court denied defendant's motion under Fed. R. Crim. P. 41(e) for the return of seized evidence. Losing parties in criminal cases have only 10 days to appeal under Rule 4(b), while defendant took 25 days. The 7th Circuit found the appeal timely, ruling that appeals from orders granting or denying motions under Rule 41(e) should be treated as civil appeals. *U.S. v. Taylor,* __ F.2d __ (7th Cir. Sept. 18, 1992) No. 91-2770.

7th Circuit refuses to return seized weapon to felon who failed to provide evidence of ownership. (940) More than a year after defendant's conviction on armed robbery charges, the prosecutor filed a motion asking the court's permission to destroy a gun defendant had in his possession when arrested. Defendant filed a demand for the return of the gun, which the district court treated as a motion for return of seized evidence under Fed. R. Crim. P. 41(e). The 7th Circuit affirmed the denial of the motion because defendant failed to present evidence that he owned the gun. Records showed its sale by a gun shop, and the buyer reported that he traded the gun to a person other than defendant. Defendant failed to present evidence of his ownership of the gun because he feared prosecution for being a felon in possession of a firearm. A party who asserts the privilege against self-incrimination must bear the consequence of a lack of evidence. *U.S. v. Taylor,* __ F.2d __ (7th Cir. Sept. 18, 1992) No. 91-2770.

8th Circuit rules that affidavit denying government's claim did not rebut probable cause showing. (950) To show probable cause in support of the forfeiture of claimant's automobile, the government presented a DEA agent's affidavit describing claimant's cocaine sales to undercover agents and included a confidential informant's report that defendant used the car to retrieve cocaine from his stash. To rebut this probable cause showing, claimant offered an affidavit in which he denied using the car when dealing cocaine. The 8th Circuit affirmed the district court's determination that defendant's blanket denials were insufficient to rebut the government's showing of probable cause to believe the car was forfeitable. The affidavit did not show that the car was not used in drug trafficking activities. Defendant did not dispute the government's claim that he sold drugs to undercover officers or offer any explanation of how he traveled to and from his stash without using his car. *U.S. v. One 1982 Chevrolet Corvette,* __ F.2d __ (8th Cir. Sept. 14, 1992) No. 92-1573WM.

9th Circuit rejects innocent owner defense even though owner moved before marijuana was found. (960) The claimant separated from the woman with whom he had been living and moved out of the mobile home in August, 1987. The woman continued to live in the mobile home, and the claimant continued to operate a shake mill on the property. On several occasions after he moved out, he was allowed to use the telephone in the mobile home and once or twice, the bathroom. Two years after the claimant had moved out, federal agents executed a search warrant at the mobile home. They found 66 live marijuana plants, equipment for a marijuana-growing operation, and various quantities of processed marijuana. Based on the claimant's knowledge of the smell of marijuana, the boarded up windows, and his visits

9th Circuit upheld the district court's finding that he was not an "innocent owner." *U.S. v. Real Property Located at Section 18,* __ F.2d __ (9th Cir. Sept. 30, 1992) No. 91-35121.

Clarified Opinion

(590) *Cannon v. U.S. Department of Justice,* 961 F.2d 82 (5th Cir. 1992), clarified on denial of rehearing, *Cannon v. U.S. Department of Justice,* __ F.2d __ (5th Cir. Sept. 17, 1992).

Opinion Withdrawn and Reissued Under Different Name

(680)(715)(730)(736)(775) *U.S. v. West,* __ F.2d __ (9th Cir. Sept. 18, 1992), No. 91-30085 withdrawn, and reissued as *U.S. v. Roe,* __ F.2d __ (9th Cir. Oct. 6, 1992), No. 91-30085.

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Federal Sentencing and Forfeiture Guide

NEWSLETTER

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

Vol. 3, No. 25 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | October 5, 1992

IN THIS ISSUE:

Enclosed with this issue is a table produced by the Sentencing Commission in its 1991 Annual Report: *Factors Found by Appellate Courts to Warrant a Downward Departure*. Additional tables will be included in upcoming issues.

Pre-Guidelines Sentencing, Generally

9th Circuit upholds preguidelines sentence based on evidence from pretrial motions. (100)(750) (850) The 9th Circuit rejected defendant's argument that testimony given at pretrial hearings was false. Defendant offered no evidence to contradict the government's evidence. One cannot allege "there are mistakes and then stand mute without showing why they are mistakes." The court also rejected defendant's argument that he had no prior notice that the court would rely on the evidence presented at previous evidentiary hearings. The court found no general right to an evidentiary hearing at sentencing, noting that the presentence report put the defendant on notice that the facts from the prior hearings supported by the sworn testimony of witnesses, were before the court. The court was not persuaded by defendant's argument that since the hearings were concerned with disqualifying his lawyer, he had no compelling motive to cross-examine the witnesses who were stating and implying that he was a marijuana smuggler. *U.S. v. Kimball*, __ F.2d __ (9th Cir. September 17, 1992) No. 91-10207.

Guidelines Sentencing, Generally

7th Circuit says enhancements based on total value of stolen goods and more than minimal

planning were not double counting. (125)(220) Defendant pled guilty to one count of knowingly possessing a stolen motor vehicle. In calculating the value of the stolen property under section 2B1.2, the district court took into account the value of all three of the stolen vehicles found on defendant's farm, even though he pled guilty to possessing only one of them. The court also imposed an enhancement for more than minimal planning under section 2B1.2(b0(4)(B), finding that defendant committed repeated acts because he possessed three separate vehicles. The 7th Circuit rejected defendant's claim that the more than minimal planning enhancement constituted impermissible double counting. Even though his possession of these vehicles had been considered as part of the relevant conduct in determining his offense level, the two enhancements addressed different aspects of the offense, and were not mutually exclusive. *U.S. v. Nafzger*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3292.

7th Circuit permits enhancements under 21 U.S.C. section 841 and career offender provisions. (125)(520) Defendant contended that sentencing him as a career offender violated double jeopardy. As a result of the prior drug conviction, 21 U.S.C section 841(b)(1)(C) enhanced his sentence to a 30-year maximum, while the career offender provision increased his base offense level from 32 to 34. The 7th Circuit rejected his argument, since the career offender provision merely increased his sentence within statutory limits. As a career offender, defendant had a guideline range of 262-327 months, while the statute provided a maximum 360 month prison term. Because defendant's 262 month sentence was within the statutory range sanctioned by Congress, it did not violate the double jeopardy clause. *U.S. v. Saunders*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-3841.

9th Circuit says guidelines insure that gun is not "double counted." (125)(315)(330) The 9th Circuit noted that the commentary to the firearm guideline, section 2K2.4, specifically provides that to avoid double counting, if a defendant is sentenced under section 2K2.4 and is also sentenced for an underlying offense, any enhancements for firearm use should not be applied with respect to the underlying offense. Thus, in this civil rights case, the court should have applied the aggravated assault guideline, section 2A2.2(b)(3)(B), but should not have added five levels for the specific offense characteristic of discharging a firearm as provided for under that guideline. *U.S. v. McInnis*, __ F.2d __ (9th Cir. September 28, 1992) No. 90-50693.

5th Circuit affirms cross-reference to offense level for pre-guidelines offense. (130)(230) Defendants were convicted of accepting a bribe in connection with the sentencing of a drug conspirator. Because the bribe was for the purpose of facilitating another offense, under the 1990 version of guideline section 2C1.1 and section 2X3.1, defendant's offense level was based on the offense level for that other criminal offense, the drug conspiracy. The 5th Circuit affirmed that the cross-reference to the drug offense was proper, even though the drug offense was committed prior to the effective date of the guidelines. Pre-guidelines conduct may be considered in arriving at the guideline offense level. All of defendant's conduct occurred after the guidelines were in place, so there were no ex post facto concerns. *U.S. v. Collins*, __ F.2d __ (5th Cir. Sept. 10, 1992) No. 91-3778.

8th Circuit affirms referral of case for federal prosecution despite lack of written guidelines. (135) Relying on *U.S. v. Williams*, 746 F.Supp. 1076 (D. Utah 1990), defendant argued that he should not have been sentenced under the guidelines because of the lack of written guidelines governing the referral of cases for state or federal prosecution. The 8th Circuit disagreed, noting that the 10th Circuit has reversed this case and that every circuit court of

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appeals to consider the issue has rejected this district court's reasoning. *U.S. v. Beede*, __ F.2d __ (8th Cir. Aug. 21, 1992) No. 91-3208.

7th Circuit rejects 8th Amendment challenge to 262-month drug sentence despite co-conspirator's 16-month sentence. (140) Defendant was convicted of drug conspiracy charges, and as a career offender, received a 262-month sentence. The 7th Circuit rejected defendant's claim that the sentence constituted cruel and unusual punishment because it was disproportionate to his crime and to the 16-month sentence of a co-conspirator. The 8th Amendment forbids only extreme sentences that are grossly disproportionate to the crime. Defendant's harsh sentence was not grossly disproportionate to either the crime or his co-conspirator's relatively light sentence. Congress made clear that it considers repeat drug violations among the gravest offenses in the federal code. Defendant's heavy punishment resulted from his classification as a career offender, and a decision not to cooperate with authorities. His co-conspirator had no criminal record and cooperated with authorities from the start. *U.S. v. Saunders*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-3841.

7th Circuit affirms that career offender status may be based on one prior crime of violence and one prior drug crime. (145)(520) Defendant argued that section 4B1.1, the career offender guideline, exceeds the authority of 28 U.S.C. section 994(h)(2) by imposing career offender status on defendants with only one prior crime of violence and one prior drug crime. The 7th Circuit rejected this reading of section 994(h)(2). Such a construction ignores the plain language of section 994(h). *U.S. v. Saunders*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-3841.

8th Circuit, en banc, considers uncharged property crimes as relevant conduct. (145)(170) (220) Defendant pled guilty to one count of theft from an interstate shipment. The government sought to include seven uncharged thefts in the sentencing calculation, pursuant to the relevant conduct guideline, section 1B1.3. The district court refused, holding section 1B1.3 unconstitutional. A panel of the 8th Circuit found it unnecessary to reach the constitutional issues, ruling that consideration of the uncharged thefts under the relevant conduct guideline exceeded the statutory authority granted to the Sentencing Commission. On rehearing en banc, the 8th Circuit reversed and held that section 1B1.3(a)(2) is authorized by statute and is not unconstitutional. The broad grants of authority in 28 U.S.C. section 994(c)(2) gave the Sentencing Commission full authority to adopt a relevant conduct guideline. The court also held that consideration of uncharged conduct at sentencing does not violate constitutional rights to indictment, jury trial or proof beyond a reasonable doubt. The guidelines' use of relevant conduct does not effectively transform the sentencing phase into a new guilt phase: uncharged conduct is a sentencing factor, not a new element of the offense. Judges Beam, Bright, Lay and McMillian dissented. *U.S. v. Galloway*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-3034 (*en banc*).

Application Principles, Generally (Chapter 1)

7th Circuit remands for reconsideration of whether defendant committed repeated acts over a period of time. (160)(220) Defendant was arrested in possession of three stolen motor vehicles. The district court imposed an enhancement for more than minimal planning under section 2B1.2(b)(4)(B), finding that defendant committed "repeated acts" because he possessed three separate vehicles. It also found that these acts took place "over time" because defendant possessed them on the date of his arrest, and therefor must also have possessed all three vehicles prior to that date. The 7th Circuit remanded for reconsideration of whether defendant committed repeated acts over a period of time. Just because defendant had all three vehicles in his possession at his arrest did not mean that he also must have possessed them before that date. In addition, the court inferred that defendant had committed repeated acts simply because he possessed three vehicles, without determining whether the vehicles were obtained on one occasion or several. *U.S. v. Nafzger*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3292.

10th Circuit affirms that doctor's Medicare/ Medicaid fraud involved more than minimal planning. (160)(300) Defendant, a doctor, committed numerous acts of fraud involving Medicare and Medicaid. The 10th Circuit affirmed that his offense involved more than minimal planning under guideline section 2F1.1. Defendant submitted numerous false billings involving many different patients, and his fraudulent practices were aimed at three different federal programs with distinct billing procedures, different regulations, and coverage for different services. The nature of the fraud varied: some billings were for services not performed at all, some for services done by a different provider, and some for services claimed to have been performed when in fact others were per-

formed. His staff was directed to file false claims, and threatened with job loss if they did not do so. *U.S. v. Abud-Sanchez*, __ F.2d __ (10th Cir. Aug. 17, 1992) No. 91-2221.

4th Circuit holds that enhancement based presentence interview violated plea agreement. (185)(790) Defendant, a former state representative, accepted a bribe from an undercover informant in return for his support of a bill. Before indictment, defendant filed a campaign disclosure form reporting the bribe as a campaign contribution. His plea agreement provided that information provided in cooperating would not be used against him. Nevertheless, his sentence was enhanced for obstruction of justice based on his admission to probation officers that he filed the campaign disclosure form because a co-conspirator advised him that he might be under investigation. The 4th Circuit held that use of that statement as support for the enhancement violated the plea agreement and guideline section 1B1.8 and was plain error. Application note 5 to section 1B1.8, effective November 1991, clarifies that section 1B1.8's protection includes information provided to a probation officer. *U.S. v. Fant*, __ F.2d __ (4th Cir. Sept. 10, 1992) No. 91-5853.

Offense Conduct, Generally (Chapter 2)

4th Circuit holds that Sentencing Reform Act abolished parole for murderer's life sentence. (210)(590) Defendant received a sentence of life imprisonment without parole for first-degree murder, in violation of 18 U.S.C. section 1111. The 4th Circuit rejected defendant's argument that the Sentencing Reform Act of 1984 did not abolish parole for a sentence of life imprisonment under section 1111. Prior to the Sentencing Reform Act, two sections, 18 U.S.C. section 4206(d) and 4205(a), provided the possibility of parole for those sentenced to life under section 1111. Those two sections were repealed by the Sentencing Reform Act. The fact that neither the Act nor its legislative history specifically expresses the intent to abolish parole for life sentences was irrelevant. *U.S. v. Analla*, __ F.2d __ (4th Cir. Sept. 11, 1992) No. 91-5552.

5th Circuit finds insufficient evidence linking defendant to additional counterfeit bills. (226) Defendant was convicted passing six counterfeit $20 bills identified by the government as "14923" bills. He received an enhancement under the guidelines for passing more than $2,000 in counterfeit currency, even though the offense of conviction only involved $120. The enhancement was based on testimony by a government agent that 107 of the 14923 bills had been passed in South Texas during the same period. The agent testified that she had attended the counterfeiting trial of defendant's brother, who lived in Michigan. At that trial, the printer of the bills stated that he had sent the brother $60,000 in 14923 bills. The 5th Circuit ruled that the agent's testimony was insufficient to support the enhancement. Of the many establishments where the 107 bills had been recovered, in only nine cases did employees identify defendant as ever having been in the establishment. No link was ever established between defendant and the other 98 counterfeit bills. *U.S. v. Acosta*, __ F.2d __ (5th Cir. Aug. 27, 1992) No. 91-5690.

7th Circuit affirms that two notices taken together satisfied section 851. (245) The government filed notice under 21 U.S.C. section 851 that a sentencing enhancement would be sought based upon defendant's prior convictions. However the notice did not specify which prior convictions would be used. The government later filed a second notice stating that it intended to offer evidence of defendant's two prior state felony drug convictions. The 7th Circuit affirmed that even though the first notice was defective and the second notice was filed for another reason, the two notices, taken together, satisfied the requirements of section 851. Section 851 does not specify the particular form which a notice of enhancement must take and the government's filings, taken together, provided defendant with reasonable notice and an opportunity to be heard. *U.S. v. Belanger*, __ F.2d __ (7th Cir. Aug. 12, 1992) No. 91-3070.

8th Circuit rejects mandatory minimum sentence as grounds for downward departure. (245)(715) Defendant's guideline range was 78 to 97 months, but the district court departed downward to 60 months, citing the Sentencing Commission's failure to consider the mandatory minimum sentences contained in 21 U.S.C. section 841(b). The 8th Circuit reversed, noting that the commentary to section 2D1.1 indicates that the base offense levels in section 2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the minimum levels established by statute. Offense levels 26 and 32 establish guideline ranges with a lower limit as close the statutory minimum as possible. Had defendant possessed between five and 20 grams of crack, he would have received an offense level of 26 and a sentencing range of 63 to 78 months, which is close to the mandatory minimum 60 months. However, de-

fendant possessed 23 grams of crack and so had an offense level of 28, which produced a guideline range of 78 to 97 months. Judge Bright dissented. *U.S. v. Lattimore,* __ F.2d __ (8th Cir. Sept. 3, 1992) No. 91-3454MN.

3rd Circuit holds that 65.1 grams of cocaine and 2976 grams of boric acid was not a "mixture." (251) Defendants attempted to sell a DEA informant three one-kilogram packages purporting to be cocaine. The packages actually contained 65.1 grams of cocaine and 2976 grams of boric acid, but they were constructed to fool an unsuspecting buyer into believing that they were comprised entirely of cocaine. The 3rd Circuit held that the boric acid and cocaine blocks were not a "mixture" for purposes of sentencing under section 2D1.1. First, the boric acid and cocaine were not mixed in the package: each had distinct colors and could be distinguished with the naked eye. Although they were in close proximity, they remained separate layers in the package. Second, boric acid is not a traditional carrier medium for cocaine. Finally, the boric acid did not facilitate the distribution of the cocaine, it functioned more like packaging material. The court agreed with the usable/unusable distinction adopted by the 2nd, 6th, 9th and 11th Circuits. *U.S. v. Rodriguez,* __ F.2d __ (3rd Cir. Sept. 18, 1992) No. 91-5455.

5th Circuit affirms estimate of drug purchases six months prior to defendant's arrest. (254)(270) Defendant was involved in the sale of five ounces of cocaine to an undercover agent. The 5th Circuit affirmed that defendant distributed a minimum of 30 ounces of cocaine in the previous six months, and that this was relevant conduct for sentencing purposes. A co-conspirator testified that she sold cocaine to defendant five or six times a month for six months, in quantities ranging from one to three ounces. A DEA agent testified that this amount was not consistent with personal consumption. Although there was evidence that defendant was indigent, this did not mean that defendant could not be a cocaine distributor. The prior drug purchases qualified as relevant conduct, because they passed the test of similarity, regularity, and temporal proximity. The distribution activities took place within six months of each other, they were of a continuous nature, the quantities involved were similar, and the source and type of the drug were the same. *U.S. v. Bethley,* __ F.2d __ (5th Cir. Sept. 14, 1992) No. 91-3639.

1st Circuit says conspirator not accountable for drugs distributed prior to joining conspiracy. (275) Investigators conducted three separate drug transactions with two drug conspirators. Defendant was only involved in the last transaction, because he was in prison during the first two transactions. Nevertheless, his offense level was based on the drugs involved in all three transactions. The 1st Circuit reversed, holding that the transactions which occurred prior to defendant's entry in the conspiracy could not be considered relevant conduct for sentencing purposes. The base offense level of a co-conspirator should reflect only the quantity of drugs he reasonably foresees as the object of the conspiracy after he joins the conspiracy. In deciding what is reasonably foreseeable, the earlier transactions of which he is aware will be useful evidence. However, a new entrant cannot have his offense level enhanced for prior drug distributions just because he knew they took place. *U.S. v. O'Campo,* __ F.2d __ (1st Cir. Sept. 3, 1992) No. 91-1089.

4th Circuit affirms that defendant need not be convicted of conspiracy to be accountable. (275) The 4th Circuit affirmed that defendant could be held accountable for drug quantities involved in a conspiracy, even though conspiracy charges against him were dropped when he pled guilty to possession charges. A sentencing court can consider quantities of cocaine involved in a conspiracy even when the defendant pleads guilty only to possession with intent to distribute and even though the quantity expressed in the count to which he pled guilty was smaller. There was sufficient evidence to support the district court's determination that 1.6 kilograms were involved in the conspiracy. A co-conspirator admitted sales of $2,500 per day (with one gram selling for $100), seven days a week, during a five month period. Such sales figures would support a determination of 3.5 kilograms. *U.S. v. Ellis,* __ F.2d __ (4th Cir. Sept. 17, 1992) No. 91-5620.

10th Circuit rejects loss estimate that included amounts caused by defendant's civil fraud. (300) Defendant, a doctor, committed numerous acts of fraud involving Medicare and Medicaid. His plea agreement stipulated that he would pay $100,000 to the government in satisfaction of all civil claims, and that the loss to the government for the criminal offenses was less than $2,000. Based on the probation officer's estimate of loss as $188,036, and the stipulation, the district court calculated defendant's sentence under section 2F1.1(b)(1)(G) based on a loss of $100,000. The 10th Circuit reversed, finding that this improperly included amounts caused by defendant's civil fraud. A loss under the guideline cannot be the result of civil

fraud for which a person cannot be imprisoned. Any calculation of loss must involve a determination that defendant's billing error rose to the level of criminal activity. The only evidence of loss directly attributable to defendant's criminal conduct was the stipulated amount of $2,000. *U.S. v. Abud-Sanchez*, __ F.2d __ (10th Cir. Aug. 17, 1992) No. 91-2221.

9th Circuit applies aggravated assault guideline to civil rights case. (315) Defendant fired his rifle into the home of a black family, shooting one person in the stomach. U.S.S.G. section 2H1.3 provides for a base offense level of 15 if injury occurred, or two plus the offense level applicable to any underlying offense. The 9th Circuit held that this language did not require the defendant to be charged or convicted of the underlying offense. In this case, the offense most comparable to the defendant's conduct was assault resulting in serious bodily injury under 18 U.S.C. section 1.13(f). Under U.S.S.G. section 2A2.2(a), the offense level for that crime is fifteen, plus four because the victim suffered serious bodily injury. This offense level of nineteen, should then have been increased by two under section 2H1.3, for a total of twenty-one. Since twenty-one is greater than fifteen, the higher offense level of twenty-one should have been applied. *U.S. v. McInnis*, __ F.2d __ (9th Cir. September 28, 1992) No. 90-50693.

5th Circuit clarifies that felons are eligible for reduction if firearm is possessed for legal collection purposes. (330) In *U.S. v. Pope*, 871 F.2d 506 (5th Cir. 1989), a felon who claimed to own a gun and silencer solely for collection purposes was denied a reduction under section 2K2.1. Language in the opinion suggested that the reduction was denied because as a felon, the defendant could not legally possess a gun collection. In this case, the 5th Circuit labelled this language as dicta, stating that the reduction was denied in *Pope* because the collection itself was illegal (it included an unregistered silencer, which even a citizen free of all legal disabilities cannot possess). Because dicta in *U.S. v. Buss*, 928 F.2d 150 (5th Cir. 1991), confused this matter further, the court clarified the issue: the availability of the reduction in section 2K2.1 turns on the purpose or use for which the firearm is acquired or possessed and the lawfulness of this use. If it would be legal for a non-felon to possess such a collection, a felon may receive the reduction if he possessed the weapon solely for collection purposes. *U.S. v. Shell*, __ F.2d __ (5th Cir. Sept. 2, 1992) No. 91-7109.

5th Circuit affirms that loaded firearms in urban apartment were not for sporting purposes. (330) Defendant, a felon, purchased a .30 caliber rifle and a 9mm. pistol by misrepresenting that he had never been convicted of a crime. He requested a "sporting purpose" reduction under the 1989 version of guideline section 2K2.1(B)(1), based on testimony that he owned the pistol for target practice and the long gun for deer and bird hunting. The 5th Circuit affirmed the district court's denial of the reduction. The guns were found loaded in defendant's urban apartment. None but the most negligent of target shooters would keep legitimate sporting firearms loaded in the home. It is not sufficient that one among several intended uses might be lawful recreation; it must be the sole intended use. In light of defendant's criminal history, the district court's finding that defendant did not possess the weapons for purely recreation purposes was not clearly erroneous. *U.S. v. Shell*, __ F.2d __ (5th Cir. Sept. 2, 1992) No. 91-7109.

7th Circuit upholds consideration of felon's actual or intended use of firearm. (330) Defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. section 922(g). Under section 2K2.1, defendant's offense level was increased because defendant committed a forcible rape in connection with his firearm possession. He argued that this was improper, because in enacting section 922(g), Congress intended solely to proscribe the possession of a firearm by a felon and that a court may not consider criminal behavior beyond the mere possession in sentencing such a defendant. Since defendant failed to raise this argument below, the 7th Circuit reviewed the lower court's decision only for plain error, and found none. The background commentary to section 2K2.1 notes that the guideline for the felon-in-possession charge provides that in addition to the defendant's criminal history, the actual or intended use of the firearm is probably the most important factor in determining the sentence. *U.S. v. Mason*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3419.

7th Circuit affirms offense level for forcible rape committed by felon in possession of a firearm. (330) Defendant was convicted of being a felon in possession of a firearm. Guideline section 2K2.1(c)(1) provides that if the firearm was possessed in connection with another offense, apply section 2X1.1. Section 2X1.1 provides for a base offense level from the guideline for the substantive offense. Defendant used the firearm to commit a forcible rape, so the district court applied the base offense level from section 2A3.1, Criminal Sexual Abuse. This increased defendant's base offense level from 12 to level 27. The 7th Circuit rejected defen-

dant's argument that his sentence could be enhanced only if he had been convicted of violating a state criminal statute. The background commentary to section 2K2.1 indicates that the firearm statute is often used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. Although this "piggy-back" philosophy may be controversial, the "controversy turns on congressional judgments that are not subject to amendment by the judiciary." *U.S. v. Mason*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3419.

9th Circuit finds aiding and abetting illegal entry is a prior related offense in 2L1.1(b)(2). (340) The substantive offense of aiding and abetting illegal entry is a "similar offense" to smuggling, transporting or harboring illegal aliens sufficient to justify a two-level increase under section 2L1.1(b)(2). Here, the defendant was convicted of transporting illegal aliens and argued that his prior conviction for aiding and abetting illegal entry was not a "related offense" within the meaning of application note 2 to section 2L1.1. Relying on language in the background commentary, the court rejected the argument, finding that aiding and abetting was a similar offense. Aiding and abetting illegal entry is also related to smuggling, if not as a "brother" at least as "a first cousin." Helping aliens enter the United States illegally fits "hand in glove" with actually bringing them in or hiding them. *U.S. v. Cruz-Ventura*, __ F.2d __ (9th Cir. Sept. 22, 1992), No. 91-50720.

9th Circuit holds prior felony conviction is element of immigration offense, not a mere sentencing factor. (340)(770) Relying on *U.S. v. Arias-Granados*, 941 F.2d 996 (9th Cir. 1991), the 9th Circuit held that subsections (b)(1) and (b)(2) of 8 U.S.C. section 1326 constitute separate crimes and not merely sentence enhancement provisions for the underlying crime of illegal reentry following deportation. Subsection (1) increases the maximum sentence from two to five years if the alien had been deported after a felony conviction, and subsection (2) increases the maximum sentence to fifteen years if the prior conviction was for an aggravated felony. The court held that the three subsections of section 1326 "identify different crimes, the elements of which must be proven at trial and not simply at sentencing." Since the jury was not instructed on all of the elements of the crimes here, the defendants could not be sentenced to more than 24 months. Their sentences were vacated. *U.S. v. Gonzalez-Medina*, __ F.2d __ (9th Cir. Oct. 1, 1992) No. 91-30437.

9th Circuit finds departure was properly based on dangerous treatment of aliens. (340)(734) Defendant was convicted of alien smuggling after evading Border Patrol agents in a 12-mile chase involving speeds of 100 mph and a collision resulting in minor damage to a car. Four aliens were found locked in the trunk of the car driven by the defendant. The district court had the authority to depart upward under note 8 to §2L1.1 because of dangerous treatment of the aliens. However, because there was no reasoned explanation of the extent of the departure, the case was remanded for the district court to explain the degree of departure by analogy to the guidelines. *U.S. v. Cruz-Ventura*, __ F.2d __ (9th Cir. Sept. 22, 1992), No. 91-50720.

8th Circuit finds that conspiracy was "completed." (380) Defendant assisted two conspirators who burned down a house so that the homeowner could collect fire insurance proceeds. He pled guilty to conspiracy to commit mail fraud. The conspiracy guideline, section 2X1.1(b)(2), provides for a three-level reduction, unless the defendant or a co-conspirator completed all the acts necessary to successfully complete the offense. Defendant argued that in denying him this reduction, the district court erroneously focused on the arson rather than the mail fraud as the "offense." The 8th Circuit agreed, but found the error harmless. Defendant was not entitled to the reduction because once the homeowner sent in the claim for the proceeds under her fire insurance policy, she had completed all of the acts the conspirators believed necessary for successful completion of the mail fraud. *U.S. v. Westerman*, __ F.2d __ (8th Cir. Sept. 8, 1992) No. 91-2715.

Adjustments (Chapter 3)

4th Circuit upholds leadership enhancement despite inappropriate comments. (431) Defendant contended that in imposing a leadership enhancement, the judge was improperly influenced by defendant's alien status and his personal view that the sentencing guidelines were too lenient. The 4th Circuit affirmed. Although the judge made some inappropriate remarks at sentencing about defendant's alien status and the lenient sentencing range available under the guidelines, these factors did not influence the sentence. The enhancement was fully supported by the record: defendant secured the location for the counterfeiting enterprise, he obtained money for the printing equipment and accessories, he retained the keys to

the house where the operation took place, and five persons were involved in the operation. The judge's selection of a sentence at the middle of the guideline range, and his lenient sentence of another alien, supported the conclusion that the enhancement was not improperly motivated. *U.S. v. Salama*, __ F.2d __ (4th Cir. Sept. 3, 1992) No. 91-5200.

11th Circuit affirms that defendants were leaders of drug conspiracy involving more than five participants. (431) The 11th Circuit affirmed that defendants were leaders or organizers of a drug conspiracy involving more than five participants. In order to be considered an organizer or leader within the meaning of the guidelines, the defendant need not be the sole leader or a kingpin of the conspiracy. Evidence at trial indicated that both defendants exercised decision-making authority and control over the operation, and travelled either by themselves or with other individuals to southern Florida to meet their drug sources. The district court found that the drug organization was somewhat extensive and involved more than five individuals. *U.S. v. Revel*, __ F.2d __ (11th Cir. Sept. 3, 1992) No. 90-3967.

8th Circuit reverses district court's refusal to find defendant was a "minimal" participant. (443) A woman falsely reported a burglary in order to receive insurance proceeds. She then hired her brother to set her house on fire so that she could collect on her fire insurance policy. After two unsuccessful attempts, she arranged for a third attempt by her brother and her cousin. They recruited defendant to drive the truck so that they both could enter the house and spread gasoline. Defendant pled guilty to one count of mail fraud. The district court refused to find that defendant was a minimal participant, instead granting him only a two-level minor role reduction. The 8th Circuit reversed, finding that defendant was only a minimal participant in the mail fraud. For purpose of determining defendant's role in the offense under section 3B1.2, the district court was obligated to measure defendant's relative culpability in the context of the overall mail fraud conspiracy to which he pled, not just the arson conspiracy in which he took an active role. Judge Hansen dissented. *U.S. v. Westerman*, __ F.2d __ (8th Cir. Sept. 8, 1992) No. 91-2715.

1st Circuit affirms that defendant who checked on whereabouts of arrested co-conspirator was not a minor participant. (445) One defendant sold drugs to an undercover agent on three occasions. After the third sale, the defendant was arrested. About 90 minutes after the sale, a second defendant called the undercover agent to check on the first defendant's whereabouts, since she had not returned home with the drugs or the money. The 1st Circuit affirmed that neither defendant was a minor participant. Each played a critical role in the conspiracy. For the first defendant, it was as the telephone point of contact and the actual transfer agent for the drugs and money. For the second defendant, it was his "attentive follow up for a significant transaction the conspirators had undertaken." *U.S. v. O'Campo*, __ F.2d __ (1st Cir. Sept. 3, 1992) No. 91-1089.

5th Circuit affirms consideration of relevant conduct in rejecting mitigating role. (445) The 5th Circuit affirmed that defendant did not have a mitigating role in a drug distribution based in part upon his role in relevant conduct. Defendant's activities were not limited to a single delivery of drugs. He regularly purchased cocaine and sold it during the six months prior to his arrest. *U.S. v. Bethley*, __ F.2d __ (5th Cir. Sept. 14, 1992) No. 91-3639.

8th Circuit affirms that middleman was not minor participant. (445) Defendant, a drug conspirator, contended that he was entitled to a minor role reduction, since he was only a middleman in the drug distribution chain. The 8th Circuit affirmed the district court's determination that defendant was not a minor participant. Defendant personally dealt with an undercover narcotics agent in arranging each of eight separate distributions. He also negotiated the price to be paid by the detective, placed phone calls to inform him that he had obtained the cocaine and was ready to proceed with the transactions, guided the detective to the source's apartment, handled cash for some of the transactions, and delivered the cocaine to the detective. *U.S. v. Harris*, __ F.2d __ (8th Cir. Sept. 4, 1992) No. 92-1100.

5th Circuit says criminal defense attorney who traded legal services for drugs used a special skill. (450) Defendant, a criminal defense attorney who specialized in drug cases, was convicted of drug charges for accepting drugs as payment for legal services. He also assisted one client by introducing him to another client who was interested in purchasing cocaine. The 5th Circuit upheld a special skill enhancement under section 3B1.3 based on defendant's status as a well-respected lawyer who was able to use his reputation to conceal his drug-related activity. The skills possessed by lawyers are clearly "special skills" under the

guidelines. The finding that defendant used his skills as a lawyer to significantly facilitate the commission of the crime was not clearly erroneous. Defendant used knowledge he had acquired as a prosecutor and defense lawyer to avoid surveillance and to avoid detection and apprehension. *U.S. v. White*, __ F.2d __ (5th Cir. Sept. 4, 1992) No. 91-1472.

5th Circuit upholds obstruction enhancement for handing cocaine to co-defendant and urging another co-defendant to sign a false affidavit. (461) Defendant was involved in delivering cocaine to an undercover agent. When he realized he was about to be arrested, he ran from the officer, removed the drugs from his jacket and put the drugs in the hands of an accomplice. The district court also found that after his arrest, defendant contacted another co-defendant on at least five occasions attempting to persuade her to sign an affidavit swearing he was not involved in the offense. The 5th Circuit affirmed an enhancement for obstruction of justice, based on the combination of defendant's placing the bag of cocaine into the hands of an accomplice and his attempts to get a co-defendant to sign a false affidavit. The court declined to determine whether defendant's actions at his arrest, standing alone, were sufficient to constitute obstruction of justice. *U.S. v. Bethley*, __ F.2d __ (5th Cir. Sept. 14, 1992) No. 91-3639.

5th Circuit affirms that obstruction enhancement may be based upon perjury at trial. (461) The 5th Circuit rejected defendant's claim that an enhancement for obstruction of justice based on his perjury at trial placed an impermissible burden on his right to testify. The guideline section is tailored to protect a defendant's right to testify, while still permitting sentencing courts to take into account the fact that the defendant perjured himself. There is no protected right to commit perjury. *U.S. v. Collins*, __ F.2d __ (5th Cir. Sept. 10, 1992) No. 91-3778.

7th Circuit upholds obstruction enhancement for perjury at trial. (461) Defendant, a licensed firearms dealer, was convicted of various charges relating to his sale of firearms to a convicted felon. He received an enhancement for obstruction of justice based on his testimony at trial that the government agent to which he sold firearms never told him he was a convicted felon. In contrast, both the agent and an ATF agent testified that on two occasions the agent told defendant he was a felon, and another ATF agent testified that defendant told him he knew it was wrong to have sold a firearm to a felon. The 7th Circuit affirmed the obstruction enhancement, rejecting defendant's claim that basing it a mere denial of other witnesses' testimony would have a chilling effect on a defendant's right to testify on his own behalf. There is no right to commit perjury. *U.S. v. Casanova*, __ F.2d __ (7th Cir. Aug. 7, 1992) No. 91-3233.

8th Circuit affirms obstruction enhancement based upon perjury at trial. (461) Defendant was convicted of structuring financial transactions to avoid the reporting requirement. Despite evidence to the contrary, he testified at trial that the money involved in the transaction was his own money and money he borrowed from a friend, and was not drug proceeds. The 8th Circuit affirmed an enhancement for obstruction of justice based upon defendant's false testimony at trial. The court rejected defendant's claim that the enhancement was improper because a reasonable jury could have believed his trial testimony. The enhancement may be applied when "there is a strong finding of perjury based on the trial judge's independent evaluation of the defendant's testimony." Here, noting the jury clearly believed contrary testimony concerning the source of the funds, the district court expressly found that defendant willfully attempted to obstruct justice by giving false testimony at the trial. *U.S. v. Patino-Rojas*, __ F.2d __ (8th Cir. Sept. 8, 1992) No. 92-1074.

11th Circuit upholds obstruction enhancement for defendant who ripped recording device off informant and fled with it. (461) As police approached, defendant ripped a tape recording device off an informant, fled the scene, and eventually turned himself in to authorities two weeks later. The 11th Circuit upheld an enhancement for obstruction of justice based upon defendant's actions. At the time defendant was sentenced, guideline section 3C1.1 applied without qualification to defendants who attempted to destroy or conceal material evidence. The district court found that defendant understood that the informant was taping the conversation and thought that by taking the tape recording device, he was destroying evidence that would be material at trial. The fact that defendant took a transmitter, and not the tape itself, was irrelevant. Furthermore, defendant fled the scene and remained in hiding for two weeks before turning himself in to authorities. *U.S. v. Revel*, __ F.2d __ (11th Cir. Sept. 3, 1992) No. 90-3967.

8th Circuit remands because judge mistakenly believed that defendant was subject to separate

sentence for each drug count. (470) Defendant was convicted of two counts of distributing heroin. Based on the 37 grams of heroin involved in the two sales, defendant had a base offense level of 18 and a guideline range of 27 to 33 months. The court sentenced defendant to 33 months on each count to be served concurrently. The 8th Circuit remanded for resentencing, because the district court mistakenly believed that defendant was subject to a sentence of 27 to 33 months on each count, when in fact, the two counts had been grouped together and the sentencing range was based on the aggregate amount of heroin involved in both sales. The appellate court did not believe the district court would have imposed the same sentence had it not mistakenly believed that defendant was subject to a sentence of 27 to 33 months on each count. *U.S. v. Gordon*, __ F.2d __ (8th Cir. Sept. 8, 1992) No. 91-3642EM.

11th Circuit affirms that drug trafficking and money laundering are not closely related. (470) Defendant transported marijuana from Texas to Florida, where he sold it. He gave his uncle and another person cash from the proceeds to purchase vehicles titled in the uncle and other person's names. Defendant also used the proceeds to purchase a house. The 11th Circuit rejected defendant's claim that his convictions for drug trafficking and money laundering should have been grouped as closely related counts under section 3D1.2(b) or (d). Because counts involving different victims (or societal harms in the case of victimless crimes) are grouped together only as provided in subsection (c) or (d), grouping under section 3D1.2(b) was rejected. Subsection (d) provides for grouping of counts involving the same harm when the offense level is determined largely on the basis of the total amount of harm or loss. Although both drug trafficking and money laundering are these types of offenses, grouping is not automatic.. The court rejected grouping because drug trafficking and money laundering are not crimes of the same general type, nor were the offenses, under these facts, closely related. *U.S. v. Harper*, __ F.2d __ (11th Cir. Sept. 11, 1992) No. 91-3430.

7th Circuit holds that judge need not give notice of intent to reject a recommended reduction. (480) The 7th Circuit held that defendant was not entitled, under *Burns v. United States*, 111 S.Ct. 2182 (1991), to prior notice of the judge's intent to reject the presentence report's recommendation of a reduction for acceptance of responsibility. The inclusion of the recommendation in the report, by definition, gave defendant notice that it is an open question at the sentencing hearing. The district court makes the final sentencing determination, and *Burns* does not dictate advance warning of the sentencing judge's intent to reject a recommended reduction. *U.S. v. Saunders*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-3841.

7th Circuit affirms that acceptance of responsibility provisions do not violate 5th Amendment. (484) Defendant argued that the acceptance of responsibility provision in section 3E1.1 violates the 5th Amendment because the reduction is only available to those defendants who plead guilty. The 7th Circuit rejected the argument, holding that section 3E1.1 does not contain a per se policy of punishing those who elect to stand trial, despite the fact that leniency is more often granted to defendants who plead guilty. Plea bargain cases teach that not every burden on the exercise of a constitutional right and not every encouragement to waive such a right is invalid. Courts have traditionally been allowed to show leniency based on an expression of remorse, and section 3E1.1 merely formalizes this. As long as the leniency decision is an individualized one, not based merely on the defendant's decision to go to trial, a defendant's constitutional rights are not impaired. *U.S. v. Saunders*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-3841.

7th Circuit affirms that defendant's remorse was "too little, too late." (488) The probation officer recommended a reduction for acceptance of responsibility, based on defendant's full confession to him after conviction. The 7th Circuit affirmed the denial of the reduction based on the district court's determination that defendant did not show true remorse. Defendant did not turn himself in or voluntarily withdraw from criminal activity, and in fact told lies at the time of his arrest. Despite a clear opportunity to "come clean," he chose to perpetuate the conspiracy. Defendant's non-cooperation after his arrest, combined with his attempts to downplay his role in the conspiracy, led the district court to reasonably conclude that defendant's remorse was "too little, too late." *U.S. v. Saunders*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-3841.

3rd Circuit remands acceptance of responsibility ruling to consider why defendants went to trial. (490) In denying defendants a reduction for acceptance of responsibility, the district court considered the fact that defendants refused to plead guilty to the entire indictment. The 3rd Circuit remanded for reconsideration of this issue, since the court failed

to consider the apparently valid reasons why both defendants refused to plead guilty to the entire indictment. One defendant refused in order to contest his guilt on a gun possession charge and was vindicated by his acquittal on that charge. The second defendant went to trial to determine the amount of drugs involved in the conspiracy, an issue which the appellate court decided in his favor. A defendant's decision to go to trial does not prohibit his receipt of a two-level reduction for acceptance of responsibility. *U.S. v. Rodriguez*, __ F.2d __ (3rd Cir. Sept. 18, 1992) No. 91-5455.

Criminal History (§4A)

9th Circuit finds criminal history departure proper but extent of departure not adequately explained. (510) The defendant was convicted of alien smuggling and the district court departed upward by 12 months, based in part on the finding that the defendant's criminal history category was inadequately represented. All of the factors considered by the district court -- three unresolved state court bench warrants, two convictions not factored into the criminal history calculation and the past use of ten aliases, nine dates of birth and four social security numbers -- were permissible grounds for upward departure under §4A1.3. However, the district court did not provide adequate reasons for the degree of the departure and the case was remanded. Any departure based on underrepresentation of the defendant's criminal history should be analogized to the guideline range for defendants with higher criminal histories. *U.S. v. Cruz-Ventura*, __ F.2d __ (9th Cir. Sept. 22, 1992), No. 91-50720.

Determining the Sentence (Chapter 5)

11th Circuit upholds non-parolable sentence for drug conspiracies committed between 10/27/86 and 11/1/87. (590) Defendant argued that the district court abused its discretion in sentencing him to two non-parolable 12-year terms of imprisonment because the non-parolable terms of imprisonment contained in 21 U.S.C. sections 841 and 960 did not become effective until November 1, 1987, the effective date of the sentencing guidelines. The 11th Circuit disagreed, holding that non-parolable sentences may be imposed for drug conspiracies committed between October 27, 1986 and November 1, 1987. Section 841 and 960 were amended by sections 1001 and 1302 of the Anti-Drug Abuse Act of 1986 and signed into law October 27, 1986. Neither section 1002 nor section 1302 contained an express effective date. The Supreme Court held in *Gozlon-Peretz v. United States*, 111 S.Ct. 840 (1991) that absent a clear direction from Congress to the contrary, a law takes effect on the date of its enactment. Since neither section 1002 nor 1302 contained an effective date, and since there was nothing in the Act to rebut the presumption that it became effective upon the ADAA's enactment, the supervised release provisions contained within sections 1002 and 1302 apply to all specified drug offenses that were committed after October 26, 1986. *U.S. v. Giltner*, __ F.2d __ (11th Cir. Sept. 18, 1992) No. 90-3990.

4th Circuit affirms that difficulty in reaching assets does not prohibit fine. (630) Although the presentence report showed that defendant had no assets, the district court imposed an $25,000 fine based on evidence that defendant had assets in Saudi Arabia and Ecuador. The court doubted whether the fine would be collectable. The 4th Circuit affirmed the fine, since defendant did not dispute that he had access to overseas assets, and questions regarding the difficulty in collecting a fine do not affect the validity of the fine. *U.S. v. Salama*, __ F.2d __ (4th Cir. Sept. 3, 1992) No. 91-5200.

4th Circuit affirms concurrent statutory maximum sentences for robbery and assault. (650) Defendant was convicted of first-degree murder, robbery and assault. The 4th Circuit affirmed that district court did not err in sentencing him to the statutory maximum penalties for robbery and assault. Defendant had an adjusted offense level of 43 for these three counts, which resulted in a total punishment of life imprisonment. Under section 5G1.2(b), the sentence on the robbery and assault counts would be life imprisonment. Section 5G1.1(a) provides that if this results in a sentence above the maximum authorized by statute for the offense of conviction, the statutory maximum shall be the guideline sentence. Because life imprisonment exceeded the statutory maximum for both robbery and assault, the district court was correct in sentencing defendant to the statutory maximum for these two counts. Because the maximum allowable sentence for the murder count is adequate to achieve the total punishment of life imprisonment, section 5G1.2(c) provides that the sentences run concurrently. *U.S. v. Analla*, __ F.2d __ (4th Cir. Sept. 11, 1992) No. 91-5552.

11th Circuit upholds consecutive sentences where highest statutory maximum was less than

total guidelines punishment. (650) Defendant was convicted of two counts of unlawful possession of a firearm and one count of obstruction of justice. He argued that his three consecutive 10-year terms violated the guidelines. The 11th Circuit disagreed, finding the consecutive sentences authorized by section 5G1.2(d). That section provides that if the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. Here, defendant's total punishment level was 45, which carried a guideline range of life imprisonment. Each count of conviction carried a statutory maximum of 10 years' imprisonment. Therefore, because the highest statutory maximum on any count was ten years, and because the total punishment level under the guidelines was life imprisonment, the district court properly ran defendant's sentences consecutively. *U.S. v. Fortenberry*, __ F.2d __ (11th Cir. Sept. 10, 1992) No. 91-7209.

D.C. Circuit holds that defendant must be present when court says sentences are consecutive. (650)(750) The district court imposed the statutory maximum sentence on defendant, but found that there was a question about whether the sentence could run concurrently with her current sentence or whether it had to run consecutively. It then informed the parties, without objection, that it would research the question and give them an answer at the end of the day. Later that day, the court signed the judgment and commitment order imposing a consecutive sentence. The D.C. Circuit held that the district court violated defendant's right under the 6th Amendment and Fed. R. Crim. P. 43(a) to be present at sentencing. The district court did not perform a purely ministerial act when it decided to impose the sentence consecutively. The earlier sentencing proceeding, at which defendant was present, was not "final." *U.S. v. Lastra*, __ F.2d __ (D.C. Cir. Sept. 8, 1992) No. 90-3132.

9th Circuit upholds downward departure for abusive childhood. (680)(715)(736) Defendant pled guilty to bank robbery and received a sentence of 145 months. She appealed, arguing that the district court erred in refusing to depart downward based on her history of childhood abuse. As a youth, the defendant lived with her drug-addicted mother and her mother's narcotics dealer boyfriend. The defendant was often beaten, routinely raped and sodomized and the mother's boyfriend urinated in her mouth. Several medical experts agreed that the defendant's history of abuse was exceptional. The district court erred in holding that the tragic circumstances of the abusive upbringing were not extraordinary and the case was remanded to determine whether a departure was warranted. In addition, the court suggested the district court may also wish to consider a "youthful lack of guidance" departure. *U.S. v. West*, __ F.2d __ (9th Cir. Sept. 18, 1992), No. 91-30085.

4th Circuit reverses downward departure based on family responsibilities. (690)(736) Defendant pled guilty to sexual exploitation of children. Although he had a guideline range of 87 to 108 months, the district court departed downward and sentenced him to 12 months, based upon the detrimental effect a lengthy incarceration would have on his family. Defendant had been a member of a "stable family unit" for 18 years, and his wife had recently been laid off from her job. Defendant's children needed him for "guidance, family life and financial support." Thus, the district court concluded that an extended period of incarceration would lead to the destruction of the family. The 4th Circuit reversed, holding that defendant's situation was not sufficiently extraordinary to justify a downward departure based upon his family circumstances. The imposition of prison sentences normally disrupts spousal and parental relationships. Judge Stamp dissented, believing that the district court's conclusion that defendant's situation was extraordinary was not clearly erroneous. *U.S. v. Bell*, __ F.2d __ (4th Cir. Sept. 4, 1992) No. 91-5370.

Departures (§5K)

Article urges amendments to equalize sentences of co-defendants who possess different quantities of useful information. (710) In "*Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*," Antoinette Marie Tease examines the situation in which co-defendants receive different sentences because only one of these was able to provide sufficient information to prosecutors to receive a departure for substantial assistance. The author's primary focus is on cases in which this scenario results in the more culpable co-defendant receiving a lesser sentence than a less culpable co-defendant who lacked information. After reviewing cases in which courts have upheld both the government motion requirement and substantial assistance departures generally and have generally rejected downward departures aimed at equalizing disparities

among co-defendants' sentences, the author advocates amending the guidelines either to authorize downward departures to equalize sentences or to limit the extent of downward departures based on substantial assistance so that the resulting sentence cannot be less than that for a less culpable co-defendant. 53 MONTANA L. REV. 75-90 (1992).

Article examines government motion requirement for substantial assistance departures. (712) In *"Who's the Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure,"* a student author examines the government motion requirement both from the perspective of Eighth Circuit law and constitutional constraints. The author concludes that the Eighth Circuit will not permit a substantial assistance departure in the absence of a government motion without allegations of bad faith or arbitrariness, but may permit such departures when these allegations are established. More generally, the author argues that the government motion requirement violates notions of procedural due process, substantive due process, and separation of powers. 18 WILLIAM MITCHELL L. REV. 731-56 (1992).

8th Circuit rejects alleged racial disparity as basis for downward departure. (715) Defendant was convicted of a drug offense involving crack cocaine. In departing downward on other grounds, the district court also noted the disparate impact the guidelines' treatment of crack offense had on minorities. The 8th Circuit ruled that the alleged racial disparity in sentencing was not a basis for a downward departure. In five prior opinions, the 8th Circuit rejected the argument that harsher penalties for crack violate the equal protection clause. Congress had rational motives for the distinction, including the potency of crack, the ease with which drug dealers can carry and conceal it, the highly addictive nature of the drug, and the violence which often accompanies trade in it. Although the guidelines have a racially discriminatory impact, there is no evidence that Congress or the Sentencing Commission had a racially discriminatory motive when they promulgated the harsher penalties for crack. Judge Bright dissented, believing that even if the disparities do not violate the constitution, they constitute a mitigating factor which would justify a downward departure. *U.S. v. Lattimore*, __ F.2d __ (8th Cir. Sept. 3, 1992) No. 91-3454MN.

4th Circuit rejects downward departure to rectify charging decisions that created disparate sentences among co-conspirators. (716) The ringleader of a drug conspiracy cooperated with the government by providing evidence against his co-conspirators. As a result of his pre-indictment deal, he pled guilty to only two charges, and received a 108-month sentence. A less culpable co-conspirator did not cooperate and thus was charged with more serious drug offenses carrying a much higher sentencing range. The district court departed downward under section 5K2.0 based on the prosecutorial charging decision, which produced extremely disparate sentences with respect to the culpability of the co-conspirators. The 4th Circuit reversed, holding that absent proof of actual prosecutorial misconduct, a district court may not depart downward based on the disparity of sentences among co-defendants. *U.S. v. Ellis*, __ F.2d __ (4th Cir. Sept. 17, 1992) No. 91-5620.

8th Circuit affirms consideration of co-defendant's probable sentence in choosing sentence within guideline range. (716)(775) The 8th Circuit held that in choosing a sentence within a defendant's guideline range under 18 U.S.C. section 3553(c)(1), a district court may consider a co-defendant's probable sentence. Section 3553(a)(6) states that among factors to be considered during sentencing, the court should consider the need to avoid unwarranted sentence disparities among defendants who have been found guilty of similar conduct. Here, the district court compared the involvement of defendant and his co-defendant in the same drug transaction. Moreover, the court considered defendant's background, involvement in the offense, and age. The court adequately stated its reasons for defendant's sentence. *U.S. v. Stanton*, __ F.2d __ (8th Cir. Sept. 11, 1992) No. 91-3862.

9th Circuit says aberrant behavior departure is not limited to probationary sentences. (719) The district court departed downward from a guideline range of 51-63 months to a sentence of 30 months based on a convergence of factors which demonstrated aberrant behavior. The defendant's armed bank robbery conduct fell within the "spectrum of aberrant behavior" discussed in *U.S. v. Takai*, 941 F.2d 738, 743 (9th Cir. 1991). It was not an abuse of discretion to determine, based on the totality of the circumstances, that the robbery was a single act of aberrant behavior. The robbery was the defendant's first criminal offense, he suffered from manic depression, was under extreme pressure from a combination of circumstances including a recent job loss. The court received numerous letters from the defendant's family and friends stating that the robbery was out of character. There is no requirement that an aberrant behavior departure

must result in a sentence of probation. Nor must each factor be considered separately. *U.S. v. Fairless*, __ F.2d __, (9th Cir. Sept. 21, 1992), No. 91-30344.

9th Circuit finds court stated adequate reasons for departure. (730)(775) The defendant argued the district court improperly failed to state its reasons under 18 U.S.C. section 3553(c)(1), which requires the district court to state its reasons for choosing a sentence within the applicable guideline range if that range exceeds 24 months. Here, subsection (c)(1) did not apply because the defendant received a sentence below the applicable guideline range. In addition, the court provided an adequate statement of reasons for imposing a sentence different from the guideline range as required by section 3553(c)(2). The court clearly stated that it was granting a downward departure for coercion and duress under section 5K2.12 and that because the defendant's conduct was not entirely reasonable, she was only entitled to a two-level downward departure. The explanation satisfied the statute. *U.S. v. West*, __ F.2d __ (9th Cir. Sept. 18, 1992), No. 91-30085.

7th Circuit rejects poor quality of marijuana as grounds for downward departure. (738) Defendant picked a type of marijuana commonly referred to as "Indian ditch weed," a low-grade marijuana typically used as filler with higher grade marijuana. The 7th Circuit affirmed that a downward departure based on the low quality of the drug would be improper. The Sentencing Commission made an explicit decision to focus on the weight and not the purity of the drugs in determining the offense level. Although application note 9 of section 2D1.1 states that an upward departure might be warranted in cases involving an unusually pure form of the drug, there is no corresponding provision suggesting a downward departure for low quality drugs. If the district courts could depart from the Drug Quantity Table anytime they were faced with drugs of less than "average" purity, the Sentencing Commission's decision to focus on the weight of the drugs in sentencing would be eviscerated. *U.S. v. Upthegrove*, __ F.2d __ (7th Cir. Sept. 3, 1992) No. 91-2991.

Sentencing Hearing (§6A)

11th Circuit reverses where defense counsel was denied opportunity to address enhancement. (750) The 11th Circuit held that the district court abused its discretion in precluding defense counsel from addressing the probation officer's recommendation that defendant receive a managerial role enhancement. At the beginning of the hearing, the sentencing judge indicated that he had reviewed counsel's objections, and that he was going to overrule all of them except one. After an extended discussion on this one issue, when defense counsel attempted to discuss defendant's role in the offense, the court indicated that it would not hear any arguments from the defense. This action was in violation of Fed. R., Crim. P. 32(a)(1), which states that at the sentencing hearing, the court shall afford defendant's counsel an opportunity to comment upon the probation officer's sentencing determinations. *U.S. v. Mylor*, __ F.2d __ (11th Cir. Sept. 10, 1992) No. 90-5763.

4th Circuit affirms even though defendant did not receive government's objections to presentence report as required by local rule. (760) The 4th Circuit refused to vacate defendant's sentence even though he failed to receive a copy of the government's objections to his presentence report as required by a local rule of the district court. Defense counsel received subsequent correspondence prior to trial which should have alerted him to the government's objections. Moreover, defense counsel received a detailed accounting of the government's objections, contained in the final sentence report, more than two weeks prior to sentencing. Thus, the rule was either substantially complied with or the failure to comply with it was harmless error. *U.S. v. Ellis*, __ F.2d __ (4th Cir. Sept. 17, 1992) No. 91-5620.

7th Circuit finds no prejudice in similarity between PSR and government's sentencing memo. (760) The 7th Circuit rejected defendant's claim that he was unduly prejudiced by the similarity between the version of facts of the presentence report and the government's sentencing memorandum. The record made it clear that the district court considered defendant's version of the facts even though he submitted them 18 days after the deadline. *U.S. v. Mason*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3419.

8th Circuit, en banc, finds no due process violation where defendant cross examined probation officer about presentence report. (765) Shortly before the sentencing hearing, defendant presented the judge with 17 pages of objections to the presentence report. The judge then announced that he would assume that the factual statements in the presentence report were true, and that it was defendant's burden to prove that they were not. The court put the probation officer under oath and conducted an abbreviated interrogation as to the

truth of the statements contained in the report. Defense counsel was then permitted to challenge the evidentiary basis for the officer's statements. The 8th Circuit, en banc, found that this procedure did not violate due process. It was error under Fed. R. Crim. P. 32(c)(3)(D) for the judge to announce that he would assume the report was correct and place the burden on defendant to prove it was not. But there was no functional difference between the procedure that was followed and the result that would have been reached had the government been required to question the officer in the first instance. *U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070 (*en banc*).

6th Circuit, en banc, holds that Confrontation Clause does not apply at sentencing hearing. (770) In *U.S. v. Silverman*, 945 F.2d 1337 (6th Cir. 1991), *rehearing granted and decision vacated* (6th Cir. Dec. 4, 1991), a 6th Circuit panel held that the reliability of hearsay evidence used at sentencing must be tested under the Confrontation Clause. On rehearing en banc, the 6th Circuit rejected this approach, holding that the Confrontation Clause does not apply to sentencing hearings. It is a long-established principle that the constitutional protection afforded a criminal defendant at trial, including confrontation rights, are not available at sentencing to limit the court's consideration of the background, character and conduct of the defendant. The court rejected the theory that the sentencing guidelines have so changed sentencing procedures as to entitle a defendant to trial-like procedural protection at sentencing. Fed. R. Crim. P. 32 affords the defendant adequate due process protection. Hearsay evidence may be considered, so long as the defendant has the opportunity to refute it, and the evidence bears some minimal indicia of reliability. Judge Nelson concurred. Chief Judge Merritt and Judge Martin dissented. *U.S. v. Silverman*, __ F.2d __ (6th Cir. Sept. 22, 1992) No. 90-3205 (en banc).

6th Circuit, en banc, denies defendant the opportunity to review probation officer's interview notes from which he gave hearsay testimony. (770) The 6th Circuit, en banc, found no error in the district court's denial of defendant's request to inspect the probation officer's interview notes from which he gave hearsay testimony against defendant. The extent of a defendant's constitutional right is not to be sentenced on the basis of invalid information, and a defendant must be given an opportunity to rebut any challenged information. Since defendant was given an opportunity to explain or rebut any challenged information, his request failed. *U.S. v. Silverman*, __ F.2d __ (6th Cir. Sept. 22, 1992) No. 90-3205 (*en banc*).

7th Circuit refuses to consider defendant's Confrontation Clause claim. (770)(855) Defendant alleged that he was denied his 6th Amendment right to confront witnesses because his accuser did not testify at the sentencing hearing. The 7th Circuit refused to address this constitutional claim. When the deposition of the accuser was admitted at sentencing, defendant's counsel objected only on the issue of reliability. Thus, the 6th Amendment claim was waived. Moreover, on appeal, defendant cited no case law in support of his argument and failed to support his contention with facts from the record. Without a factual or legal basis before the appellate court, it was unnecessary to consider defendant's bare allegation of a 6th Amendment violation. *U.S. v. Mason*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3419.

7th Circuit upholds reliance on probation officer's testimony which contradicted testimony by defendant. (770) Defendant committed a forcible rape while in illegal possession of a firearm. He contended the district court improperly relied upon the testimony of his probation officer, who testified that defendant told her during an interview that he did not have sexual intercourse with the victim on the night of his arrest. In contrast, at sentencing, defendant claimed that he had consensual intercourse with the victim. The 7th Circuit rejected the argument, since it was essentially an argument that the district court made an incorrect credibility determination. Defendant offered nothing on appeal, aside from his own uncorroborated version of the facts, to demonstrate that the sentencing court's credibility determinations were clearly erroneous. *U.S. v. Mason*, __ F.2d __ (7th Cir. Sept. 9, 1992) No. 91-3419.

8th Circuit, en banc, overrules *Fortier* and holds that Confrontation Clause does not apply to sentencing hearing. (770) In *U.S. v. Wise*, 923 F.2d 86 (8th Cir. 1991), an 8th Circuit panel reversed defendant's sentence on the ground that the district court had improperly relied upon a probation officer's hearsay testimony without undertaking the confrontation clause analysis required by *U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990). In this case, the 8th Circuit, en banc, overruled *Fortier* and a similar holding in *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990) and held that the right to confront witnesses does not attach at a sentencing hearing. It is only where the sentencing phase constitutes "a separate criminal proceeding" that due process

requires that a defendant have the opportunity to confront and cross-examine witnesses. The guidelines have not so changed the sentencing phase that it constitutes a separate criminal proceeding. The use of relevant conduct at sentencing does not transform sentencing into a new guilt phase. The guidelines' provision that only information containing "sufficient indicia of reliability to support its probable accuracy" satisfies hearsay concerns. Judge Beam concurred specially and Chief Judge Arnold and Judges Lay and McMillian concurred in part and dissented in part. *U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070 (*en banc*).

8th Circuit, en banc, upholds reliance upon probation officer's hearsay statements. (770) Defendant's probation officer testified at his sentencing hearing that based on admissions of two persons who were placed on pretrial diversion and admissions by two others in connection with state court proceedings, he believed that defendant had given these four people counterfeit money. The 8th Circuit, en banc, affirmed that the probation officer's hearsay testimony was sufficiently reliable to support a leadership enhancement. It was fair to assume that a condition of the pretrial diversion of the first two participants was their agreement to give truthful information. Any self-incriminating statements made by them was a statement against penal interest. The information obtained as a result of the state court proceedings against the last two participants was reliable because their admissions of guilt were made in open court. Although the probation officer never spoke with one of the men, the source of the probation officer's information (the Secret Service and the prosecutor's office) rendered it reliable. *U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070 (*en banc*).

11th Circuit affirms drug quantity based on defendant's admissions at plea hearing. (770) The 11th Circuit affirmed the district court's finding that defendant's offense involved two kilograms of cocaine based on defendant's admissions during his plea hearing. *U.S. v. Mylor*, __ F.2d __ (11th Cir. Sept. 10, 1992) No. 90-5763.

Appeal of Sentence (18 U.S.C. §3742)

8th Circuit holds that government waived objection to district court's downward departure. (855) Defendant was convicted of firearm charges which carried an offense level of 16 and resulted in a guideline range of 33 to 41 months. The district court departed downward and assigned defendant a base offense level of 12, which resulted in a guideline range of 15 to 21 months. Defendant received an 18-month sentence. The 8th Circuit ruled that the government waived its objection to the departure by failing to raise it below. Defendant would serve 15 months in prison less than the minimum sentence he would have served under his original guideline range. This was not a gross miscarriage of justice. Judge Fagg dissented. *U.S. v. Filker*, __ F.2d __ (8th Cir. Aug. 10, 1992) No. 91-2889.

Forfeiture Cases

11th Circuit, en banc, holds that preponderance of evidence standard applies to criminal forfeitures. (900) Reversing the panel opinion in *U.S. v. Elgersma*, 929 F.2d 1538 (11th Cir. 1991) the en banc 11th Circuit held that the preponderance of the evidence standard applies to criminal forfeiture proceedings. The language in section 853(a) indicates congressional intent to characterize criminal forfeiture as part of the sentencing process, rather than part of the substantive offense. Because it is not an element of the crime itself, Congress had the authority to apply a less strenuous standard of proof. Section 853(d) provides that certain property is forfeitable if the government establishes by a preponderance of the evidence that the property was acquired during the period of certain crimes and there was no likely source for such property other than the crime. The defendant may rebut this presumption, but the presumption would have no significance if the government were still required to prove forfeiture beyond a reasonable doubt. Judge Kravitch concurred specially to urge the circuit to require bifurcation of in personam forfeiture proceedings from the guilt phase of a criminal trial. *U.S. v. Elgersma*, __ F.2d __ (11th Cir. Sept. 8, 1992) No. 89-3926 (*en banc*).

5th Circuit affirms that there was probable cause as to crime and forfeitability of property. (940)950) Defendant moved before trial for the return of approximately $75,000 in cash seized from him after he was arrested for attempting to purchase cocaine in a "reverse sting" operation. The district court referred the matter to a magistrate to conduct a hearing to determine probable cause as to both the commission of a narcotics offense and the forfeitability of the money. The 5th Circuit affirmed the magistrate's determination that there was probable cause. Defendant had thousands of dollars in cash stored and packaged in exactly the same way,

$20,000 of which he used to pay for the cocaine in the instant offense. He had no legitimate employment and admitted that he sold cocaine for years. The $42,000 seized from a warehouse was just over the amount defendant needed to complete the next phase of the drug deal he had discussed with the undercover agent. *U.S. v. Ivy*, __ F.2d __ (5th Cir. Sept. 17, 1992) No. 91-8434.

Opinion Withdrawn and New Opinion Published

(100) *U.S. v. Kimball*, 961 F.2d 1482 (9th Cir. 1992), *withdrawn and new opinion published, U.S. v. Kimball*, __ F.2d __ (9th Cir. Sept. 17, 1992) No. 91-10207.

Opinion Withdrawn

(430)(755)(760)(765)(870) *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. July 2, 1992), No 89-30212, *opinion withdrawn*, __ F.2d __ (9th Cir. Sept. 23, 1992), No. 89-30212.

Reversed on Rehearing En Banc

(770) *U.S. v. Wise*, 923 F.2d 86 (8th Cir. 1991), *vacated on rehearing en banc, U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-170 (*en banc*).

(145)(170)(220) *U.S. v. Galloway*, 943 F.2d 897 (8th Cir. 1991), *vacated on rehearing en banc, U.S. v. Galloway*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-3034 (*en banc*).

(900) *U.S. v. Elgersma*, 929 F.2d 1538 (11th Cir. 1991), *vacated*, 938 F.2d 179 (11th Cir 1991), *opinion on rehearing en banc, U.S. v. Elgersma*, __ F.2d __ (11th Cir. Sept. 8, 1992) No. 89-3926 (*en banc*).

(770)(790) *U.S. v. Silverman*, 945 F.2d 1337 (6th Cir. 1991), *vacated, opinion on rehearing en banc, U.S. v. Silverman*, __ F.2d __ (6th Cir. Sept. 22, 1992) No. 90-3205 (*en banc*).

Overruled Opinions

(770) *U.S. v. Fortier*, 911 F.2d 100 (8th Cir. 1990), *overruled by U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070 (*en banc*).

(770) *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990), *overruled by U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070 (*en banc*) (only overruling holding that confrontation clause applies at Fed. R. Crim. P. Rule 32(c)(3)(D) hearings).

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Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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Guidelines Sentencing, Generally

D.C. Circuit upholds increase in sentence for defendant who went to trial. (120)(480)(775) Defendant had a guideline range of 121 to 151 months, and received a 127-month sentence. The district judge stated that if defendant had pled guilty, he would have imposed the minimum guideline sentence, but because the case went to trial, he was adding an additional six months. The D.C. Circuit held that the Constitution permits the court to increase defendant's sentence based on his failure to plead guilty. Certain Supreme Court cases do suggest that all practices tending to deter the exercise of the right to trial or appeal are unconstitutional. However, such a broad reading would be inconsistent with other Supreme Court cases, such as those upholding plea bargaining, which establish that the government may impose sentencing differentials that favor defendants who plead guilty. Judge Mikva strenuously dissented, believing the decision contrary to Supreme Court precedent and the rule in every circuit. *U.S. v. Jones*, __ F.2d __ (D.C. Cir. Aug. 14, 1992) No. 91-3025.

2nd Circuit rejects enhancement where weapon was not inherently dangerous. (125)(210) Defendant assaulted a U.S. Marshal by trying to run him down with his car. The court sentenced him under section 2A2.2 (Aggravated Assault) rather than section 2A2.4 (Obstructing or Impeding Officers While Possessing a Dangerous Weapon) because he had used a dangerous weapon. This raised his offense level from 6 to 15. He also received a four level enhancement under section 2A2.2(b)(2) for "otherwise using" a dangerous weapon in committing his offense. Disagreeing with *U.S. v. Williams*, 954 F.2d 204 (4th Cir. 1992), the 2nd Circuit held that the enhancement was impermis-

sible double counting, because the use of an ordinary object as a dangerous weapon already transformed the minor assault into an aggravated one. Therefore, the adjustment for use of a dangerous weapon is appropriate only for situations involving inherently dangerous weapons, such as firearms. *U.S. v. Hudson*, __ F.2d __ (2nd Cir. Aug. 14, 1992) No. 92-1057.

8th Circuit affirms that enhancement for physical contact during assault was not double counting. (125)(210) Defendant was convicted of assaulting an IRS agent. He argued that the enhancement he received under section 2A2.4(b)(1) for an assault involving physical contact was impermissible double counting, because the conduct proscribed by 18 U.S.C. section 111 involved forcible assault. The 8th Circuit rejected the argument, ruling that physical contact is not an element of forcible assault under section 111. *U.S. v. Wollenzien*, __ F.2d __ (8th Cir. Aug. 12, 1992) No. 91-1951.

11th Circuit rules that enhancement based upon alien's prior felony was not impermissible double counting. (125)(340) Defendant was an alien who was convicted of illegally reentering the United States after having been deported. He received an enhancement under section 2L1.2(b)(1), which applies if the defendant previously was deported after a conviction for a felony other than an immigration felony. The 11th Circuit found no equal protection or "double counting" problem. The policy of strongly deterring aliens with prior convictions from reentering the United States justifies the distinction between aliens with prior convictions and citizens with prior convictions. The prior conviction was properly counted twice, once in defendant's criminal history and once for the enhancement. Double counting a factor during sentencing is permissible if the Sentencing Commission intended the result, and if the result is permissible because each section concerns conceptually separate notions relating to sentencing. *U.S. v. Adeleke*, __ F.2d __ (11th Cir. Aug. 14, 1992) No. 91-8520.

11th Circuit says felon's possession of firearm is crime of violence under both "old" and amended guidelines. (131)(520) Defendant was convicted of being a felon in possession of a firearm. When he committed his crime in July 1989, the words "crime of violence" were defined under section 4B1.2(1) to include felonies that, by their nature, involve a "substantial risk" that physical force will be used. This provision was amended November 1, 1989 to substitute the phrase "serious potential risk." of physical injury to another. Applying the amended version of section 4B1.2(1), the district court determined that a felon's possession of a firearm was a crime of violence. The 11th Circuit rejected defendant's claim that applying the amended guideline violated the ex post facto clause, because there is no significant difference between the words "substantial risk" and "serious potential risk." The district court properly refused to examine the circumstances underlying the felon in possession charge to determine whether the offense was violent. *U.S. v. Wright*, __ F.2d __ (11th Cir. Aug. 17, 1992) No. 90-3564.

11th Circuit says prior conviction need not have caused deportation for enhancement to apply. (131)(340) Defendant was an alien who was convicted of illegally reentering the United States after having been deported. He received an enhancement under section 2L1.2(b)(1), which applies if the defendant previously was deported after a conviction for a felony other than an immigration felony. The 11th Circuit rejected the argument that the enhancement only applies if the prior felony conviction was the cause of the deportation. "After" is a word of chronology, not a word of causation. Application note 6, effective November 1, 1991.

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after defendant was sentenced, states that "deported after a conviction" means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. There was no ex post facto violation in applying the amended note to defendant since it merely clarified an existing guideline, and did not change the law. *U.S. v. Adeleke*, __ F.2d __ (11th Cir. Aug. 14, 1992) No. 91-8520.

2nd Circuit affirms that RICO conspiracy extended beyond effective date of guidelines. (132)(290) Based on a fraudulent mailing on March 29, 1988, the 2nd Circuit affirmed that the RICO conspiracy extended beyond November 1, 1987, the effective date of the guidelines. The determination that the conspiracy "straddled" the effective date of the guidelines was a sentencing factor to be determined by the judge, not the jury. One defendant's claim that he held a minimal role in the conspiracy was irrelevant to this issue. The court rejected a second defendant's claim that he should not be sentenced under the guidelines because he did nothing after November 1, 1987. It was reasonably foreseeable to him that the conspiracy would continue. The court also rejected claims that two defendants affirmatively withdrew from the conspiracy. Although one left the firm in 1984, he continued for work on an ad hoc basis. The other resigned his position to practice with an independent firm, but continued to be entitled to a percentage of the recovery in cases in which he had been involved. *U.S. v. Eisen*, __ F.2d __ (2nd Cir. Aug. 17, 1992) No. 91-1549(L).

6th Circuit rejects 8th Amendment challenge to 15-year sentence for Armed Career Criminal. (140) Defendant was convicted of various firearms-related offenses, and received a mandatory minimum 15-year sentence under the Armed Career Criminal Act, 18 U.S.C section 924(e). The 6th Circuit rejected defendant's claim that the 15-year sentence was so disproportionate to his crime as to constitute cruel and unusual punishment. Under *Harmelin v. Michigan*, 111 S.Ct. 2680, a plurality of the Supreme Court held that the 8th Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are grossly disproportionate to the crime. Defendant's 15-year sentence was not an extreme sentence, nor was it grossly disproportionate to his series of crimes. *U.S. v. Warren*, __ F.2d __ (6th Cir. Sept. 2, 1992) 91-6070.

Application Principles, Generally (Chapter 1)

8th Circuit upholds mandatory nature of guidelines. (145)(150) Defendant argued that instead of automatically applying the sentencing guidelines, as 18 U.S.C. section 3553(b) requires, the sentencing court must first apply section 3553(a), which counsels the sentencing court to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in this section. Thus, defendant contended that the district court was not bound by the guidelines, but instead should have treated them as one factor to consider in determining the appropriate sentence. The 8th Circuit upheld the mandatory nature of the guidelines, noting that this line of argument was rejected in earlier Circuit cases. *U.S. v. Johnston*, __ F.2d __ (8th Cir. Aug. 19, 1992) No. 91-3860.

9th Circuit, en banc, rehears *Fine* case, and holds that fraud losses underlying dismissed counts are relevant conduct. (175)(270)(718)(780) The panel opinion in this case, *U.S. v. Fine*, 946 F.2d 650 (9th Cir. 1991) held that mail fraud losses underlying counts dismissed in a plea agreement could not be considered as "relevant conduct" under Section 1B1.3 of the Sentencing Guidelines. The Ninth Circuit granted rehearing *en banc*, and unanimously reversed the panel. The *en banc* court followed the earlier decision in *U.S. v. Turner*, 898 F.2d 705, 711 (9th Cir. 1990), which held that quantities of drugs in dismissed counts were properly aggregated with the counts of conviction as relevant conduct. The court distinguished *U.S. v. Castro-Cervantes*, 927 F.2d 1079 (9th Cir. 1990) and *U.S. v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991), on the ground that the dismissed (or uncharged) conduct there was used to *depart*. The *en banc* court left the remainder of the panel opinion intact. *U.S. v. Fine*, __ F.2d __, 92 D.A.R. 12670 (9th Cir. Sept. 14, 1992) No. 90-50280 (*en banc*).

Offense Conduct, Generally (Chapter 2)

8th Circuit affirms enhancement for striking IRS agent. (210) Defendant was convicted of assaulting an IRS agent during the performance of his official duties. The 8th Circuit upheld an enhancement under section 2A2.4(b)(1) for an offense involving physical contact, because defendant struck the agent and subjected him to a

considerable degree of violence. Defendant testified that he had grabbed the agent's clothes and treated him somewhat roughly. However, the court credited the agent's testimony that defendant had made a "cowardly attack" on the officer from behind, and had struck a severe blow at the back of the agent's neck. *U.S. v. Wollenzien*, __ F.2d __ (8th Cir. Aug. 12, 1992) No. 91-1951.

7th Circuit affirms that defendant had intent and ability to sell five kilos of cocaine. (265) Defendant negotiated with an undercover agent to obtain five kilograms of cocaine from defendant's supplier. The agent agreed to pay for all five, but would only receive three. Defendant would take the other two kilograms and sell them, and repay the agent the purchase price for two kilograms from his sale proceeds. The 7th Circuit affirmed that defendant had the intent and ability to produce five kilograms of cocaine. Defendant's contention that he lacked the funds to complete the five kilogram deal was unpersuasive, since the undercover agent had promised to finance the entire deal. Defendant did not have to provide any money to complete the deal, he just needed his supplier to get the drugs. The court rejected defendant's claim that there never was a solid agreement to buy and sell five kilograms. The buyer/agent expressed a clear and definite desire to purchase five kilograms, and defendant stated that he was "positive" his supplier could provide that quantity. *U.S. v. Mahoney*, __ F.2d __ (7th Cir. July 22, 1992) No. 91-1090.

10th Circuit upholds consideration of drugs found in unrelated traffic stop. (270) Defendant was convicted of being a source of LSD for two drug distributors in Wyoming. He was also convicted of simple possession based on drugs which police found in his van after an unrelated traffic stop in Wyoming. The 10th Circuit affirmed that the district court could properly add the drug quantities found during the traffic stop to the total weight of drugs involved in the drug distribution charges. The commentary to section 1B1.3(2) provides that a defendant need not be convicted of multiple counts for the additional drug quantities to be added to the total weight of drugs used to determine the sentence. If the failure to obtain a conviction permits aggregation, then conviction of a lesser-included offense should also permit such an aggregation. The sole limiting factor to such aggregating of amounts is that the district court must find, as it did here, that the drug quantities were part of a same course of conduct or common scheme or plan. *U.S. v. Barela*, __ F.2d __ (10th Cir. Aug. 24, 1992) 91-8050.

4th Circuit rules that potential consequences of default determines loss in fraudulent loan case. (300) Defendants made fraudulent misrepresentations to obtain a $168,700 mortgage on their home. The 4th Circuit reversed the determination that the loss under section 2F1.1 should be based on the amount of the fraudulently obtained loan; instead, it should be based on the potential consequences of default. Thus, because defendants conveyed a security interest in the real estate to the bank when they obtained the loan, the value of the security interest should be deducted from the amount of the loan in determining loss. Payments made by defendants should also be considered. The court found that *U.S. v. Rothberg*, 954 F.2d 217 (4th Cir. 1992) was indistinguishable. *U.S. v. Baum*, __ F.2d __ (4th Cir. Sept. 1, 1992) 91-5684.

8th Circuit upholds distribution enhancement for intent to resell pornography to friend. (310) Defendant was arrested after receiving two child pornography magazines in the mail. Defendant advised the postal inspector that he intended to resell the magazines to a friend for a $10 profit after photographing the pictures he liked. The 8th Circuit affirmed an increase in offense level under section 2G2.2(b)(2) for an offense involving distribution, even though defendant did not regularly sell child pornography. Note 1 to section 2G2.2 defines distribution as "any act related to distribution for pecuniary gain," including possession with intent to distribute. By its terms the guidelines do not require multiple acts or a regular course of conduct. Defendant's possession and intent to sell the magazines met the definition of "distribution." *U.S. v. Stanton*, __ F.2d __ (8th Cir. Aug. 19, 1992) No. 92-1894WM.

11th Circuit remands to consider intent to use weapon for lawful sporting purposes. (330) Defendant's truck was stopped by police because it had an expired tag and a burned-out rear light. He was found to be intoxicated and was arrested. Police found a shotgun in the cab of the truck, so he was charged with being a felon in possession of a firearm. The gun was of a type normally used to hunt deer, and it was deer hunting season. The gun was loaded with two buckshot shells. The district court refused to grant defendant a reduction under section 2K2.1(b)(1) for a weapon possessed purely for lawful sporting purposes. The 11th Circuit remanded for reconsideration of the reduction, because it was possible the district court mistakenly believed that the reduction was only available to defendants who were actually lawfully

hunting at the time they were caught with the gun. Defendant did not need to prove he was engaged in lawful sporting purposes at the time of his arrest. *U.S. v. Skinner*, __ F.2d __ (11th Cir. Aug. 14, 1992) No. 91-7775.

9th Circuit permits departure under 2L1.1 plus obstruction enhancement for high-speed chase in immigration case. (340)(460) While transporting five aliens in the back of his car, defendant led Border Patrol agents on a three hour high speed chase. The district court added two levels for obstruction of justice under 3C1.2, and also departed upward under Commentary Note 8 to Section 2L1.1 which authorizes an upward departure for offenses involving "dangerous or inhumane treatment" of the aliens. The 9th Circuit affirmed, holding that the obstruction enhancement did not prevent the court from departing upward under 2L1.1. The court indicated that an upward departure would also be authorized under Section 3C1.2 if defendant's conduct was more than reckless, but the government failed to make such a showing here. The court rejected the government's argument that because 3C1.2 is written in the singular, an upward departure is warranted when the defendant's actions endanger more than one person. "We decline to adopt a construction of section 3C1.2 that would mandate departure in almost every case." The court noted in a footnote however, that an amendment to section 3C1.2 effective November 1, 1992, may change this result. *U.S. v. Hernandez-Rodriguez*, __ F.2d __ (9th Cir. Sept. 15, 1992) No. 91-50572.

9th Circuit reverses for failure to explain the extent of departure in immigration case. (340)(734) Under *U.S. v. Lira-Barraza*, 941 F.2d 745, 751 (9th Cir. 1991)(*en banc*), a district court must include a "reasoned explanation of the extent of the departure founded on the structure, standard and policies of the Act and Guidelines." In this alien smuggling case, the district court increased the defendant's sentence by eight levels without explaining the amount of its departure nor analogizing to other portions of the guidelines. The 9th Circuit rejected the government's argument that the departure could be justified by analogy to the guideline on "interference with a flight crew." Defendant's conduct in leading the officers on a high speed chase "bore no resemblance to interference with a flight crew," and at any rate the district court did not purport to make that analogy. The sentence was reversed. *U.S. v. Hernandez-Rodriguez*, __ F.2d __ (9th Cir. Sept. 15, 1992) No. 91-50572.

9th Circuit reviews under limited "plain error" standard where defendant failed to object at sentencing. (340)(855) Defendant claimed that he did not smuggle the aliens for profit and thus his base offense level should have been six rather than nine under section 2L1.1(b)(1). However, he did not object to the calculation of the base offense level in the district court; indeed, he expressly agreed with it. This constitutes a waiver of the right to appeal. In the 9th Circuit, such alleged sentencing errors will be reviewed for plain error. There was no plain error here because two passengers indicated that defendant charged them a fee, and the government stated that defendant had been previously arrested for alien smuggling and had made the same sort of claim at that time. *U.S. v. Hernandez-Rodriguez*, __ F.2d __ (9th Cir. Sept. 15, 1992) No. 91-50572.

11th Circuit affirms that defendant *committed* offense while escaped, despite no *conviction*. (350) The escape guideline, section 2P1.1(b)(3), provides for a four-level reduction if the escape was from a non-secure community corrections center or similar facility. However, the reduction does not apply if the defendant, while away from the facility, committed an offense punishable by imprisonment for a year or more. The 11th Circuit rejected defendant's claim that the reduction was barred only if the defendant had been *convicted* of such an offense. The Sentencing Commission used the word "committed," not "convicted." A court can deny the reduction if it finds, by a preponderance of the evidence, that the defendant committed the disqualifying offense. Here, the evidence was sufficient: defendant was indicted on drug charges which took place during the appropriate period, and he admitted his participation to two law enforcement officers. *U.S. v. Strachan*, __ F.2d __ (11th Cir. Aug. 14, 1992) No. 91-3772.

Adjustments (Chapter 3)

9th Circuit upholds vulnerable victim adjustment for involuntary manslaughter of two-year-old child. (410) The defendant was convicted of involuntary manslaughter involving the death of his two-year-old stepchild and argued that the vulnerable victim adjustment should not have applied because involuntary manslaughter is not an intentional crime. In upholding the application of the adjustment, the court relied on *U.S. v. Boise*, 916 F.2d 497, 506 (9th Cir. 1990) which held that crimes against children trigger §3A1.1 regardless of whether the defendant intentionally selects them

due to their vulnerabilities. In addition, the court disagreed with *U.S. v. Cree*, 915 F.2d 352 (8th Cir. 1990), finding that whether a crime is intentional or not does not mean that the defendant did not know the victim was unusually vulnerable due to age. The defendant should have known the child was a vulnerable victim regardless of whether his crime involved the same degree of intent. *U.S. v. White*, __ F.2d __, 92 D.A.R. 12464 (9th Cir. Sept. 8, 1992), No. 91-10213.

5th Circuit upholds organizer enhancement for defendant who used chain of command. (431) The 5th Circuit upheld a two level increase for defendant's role as an organizer or leader. The district court adopted the findings of the presentence report, which stated that defendant was the organizer of a conspiracy to distribute cocaine, and used a chain of command in his distribution scheme, with one conspirator as a middleman and another as a cocaine distributor. *U.S. v. Singer*, __ F.2d __ (5th Cir. Aug. 21, 1992) 91-7367.

10th Circuit upholds leadership enhancement for "hub" of fraud conspiracy. (431) Defendant used credit card information from innocent third parties to purchase airline tickets, which he would then sell for cash. The 10th Circuit affirmed that defendant was the leader of the scheme. Defendant recruited a rental car employee and unidentified others to obtain credit card information. He used other people as sales representatives to obtain ticket orders, which defendant would then fill. Defendant was the "hub on this particular wheel." *U.S. v. Powell*, __ F.2d __ (10th Cir. Aug. 28, 1992) 91-1114.

8th Circuit affirms departure for serious nature of defendants' obstructive conduct. (460)(715) Defendants were convicted of drug charges and of threatening a witness. The latter conviction arose from defendants' threats to a co-defendant to kill him, his wife, family and anybody he cared about if he cooperated. The district court departed upward four points based on the serious nature of the threats. The court reasoned that the eight-level increase authorized by the obstruction guideline, section 2J1.2(b)(1), for threats to cause physical injury, would have no effect because the offense level for the drug charges exceeded the adjusted offense level for obstruction. The 8th Circuit agreed. Application note 6 to section 3C1.1 directly addresses this situation and mandates that the offense level equal the offense level for the underlying offense plus a two level enhancement for obstruction of justice. The two level enhancement, however, did not adequately account for the nature of defendants' conduct, so the equivalent of a four level departure was proper. Judge Bright concurred. *U.S. v. Wint*, __ F.2d __ (8th Cir. Aug. 28, 1992) 91-3831.

8th Circuit rejects upward departure based upon extent of defendant's perjury. (460)(715) Defendant received an enhancement for obstruction of justice for committing perjury before a grand jury. The district court also departed upward for the same perjury before the grand jury, plus defendant's perjury at trial and his subornation of perjury by his wife. The 8th Circuit rejected defendant's perjury as grounds for an upward departure, finding that his conduct was not significantly in excess of the acts of obstruction contemplated by section 3C1.1. Although the presentence report did not list defendant's perjury at trial and subornation of perjury as reasons for the obstruction enhancement, committing, suborning or attempting to suborn perjury are examples of the very type of conduct to which the obstruction enhancement applies. Defendant's perjury was not extensive, since all instances related to the same subject matter. Moreover, the conduct did not involve any significant collateral consequences. *U.S. v. Griess*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 91-1893.

6th Circuit reaffirms that perjury is grounds for obstruction enhancement. (461) The 6th Circuit rejected defendant's challenge to a two-level enhancement for obstruction of justice based upon his perjury at trial. First, the argument was moot because defendant received the mandatory sentence required by the Armed Career Criminal Act, and thus his sentence was not affected by his offense level. Second, even if the issue were not moot, the court refused to abandon its decision in *U.S. v. Acosta-Cazares*, 878 F.2d 945 (6th Cir. 1989), which held that perjury at trial is grounds for an obstruction enhancement. The 4th Circuit, in *U.S. v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), *cert. granted* 112 S.Ct. 2272 (1992), held that such an enhancement would place an intolerable burden on a defendant's right to testify on his own behalf. But this decision is in conflict with six other circuits. *U.S. v. Warren*, __ F.2d __ (6th Cir. Sept. 2, 1992) 91-6070.

5th Circuit says court could reject defendant's testimony and impose obstruction enhancement. (461) Defendant received an enhancement for obstruction of justice based upon the pre-

sentence report's statement that defendant made several threats against his accomplices to keep them from testifying against him. Defendant denied making such threats, stressing that under the application note to section 3C1.1, a defendant's testimony should be evaluated in a light most favorable to him. The 5th Circuit affirmed that the district court's reliance on the presentence report rather than defendant's version of the facts was not clearly erroneous. Note 1 does not direct a court to accept the defendant's account in instances of disagreement, but simply instructs the judge to resolve in favor of the defendant those conflicts about which the sentencing judge, after weighing the evidence, has no firm conviction. *U.S. v. Singer*, __ F.2d __ (5th Cir. Aug. 21, 1992) 91-7367.

8th Circuit declines to consider whether obstructive conduct must be connected to instant offense. **(461)(855)** Defendant was indicted on firearm and drug charges. Two weeks after the indictment, a DEA agent was in defendant's neighborhood looking for vehicles that defendant owned that might be subject to forfeiture in connection with the drug charges. During a conversation with the agent, defendant allegedly threatened the agent's family and girlfriend. Thereafter the drug charges were severed. Defendant was convicted of the firearm offense, and received an enhancement for obstruction of justice for threatening the agent. He argued for the first time on appeal that the obstructive conduct did not occur "during the investigation, prosecution or sentencing of the instant (firearms) offense" as required by section 3C1.1. The 8th Circuit rejected this argument. The prosecution of the firearm charge was pending at the time of the threats, so as a purely temporal matter, the threat *did* occur during the prosecution of the instant offense. The court refused to consider whether the term "during" connotes some logical relationship between the obstructive conduct and the instant offense. *U.S. v. Allmon*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 91-2927EA.

9th Circuit finds assault before indictment was calculated to influence witness. **(461)** Two months before being indicted for the death of his stepchild, the defendant violated a court order barring him from seeing his wife. He kicked his way into his former residence, assaulted his wife and told her he was not responsible for his step-daughter's death. He also spoke to his wife about her cooperation with law enforcement officials during their investigation of the death. The District Court did not clearly err in determining that the episode was calculated to influence the wife's opinion of the cause of the child's death and her cooperation with law enforcement. *U.S. v. White*, __ F.2d __, 92 D.A.R. 12464 (9th Cir. Sept. 8, 1992), No. 91-10213.

1st Circuit reverses where obstruction did not occur during investigation of instant offense. **(462)** At his arrest, defendant gave police a false name and social security number. He was originally charged with using a false social security number but the charges were dropped. He was then charged with the unauthorized use of a credit card. The 1st Circuit reversed an enhancement for obstruction of justice based on defendant's use of a false name at arrest, since at the time he gave the false name, authorities were not investigating the instant offense. Although defendant's false representations to the arresting officers may have actually and significantly hindered the investigation of the charge involving the false social security number, that charge was dropped. It was only later that the instant offense involving the unauthorized use of the credit cards was investigated and charged. All evidence indicated that the false name did not actually hinder the investigation of the credit card offense. *U.S. v. Yates*, __ F.2d __ (1st Cir. Aug. 17, 1992) No. 91-1778.

2nd Circuit permits career offender to receive departure for exceptional acceptance of responsibility. **(480)(520)(715)** Defendant robbed a bank while in a drug-induced state. One day later, after the effects of the crack wore off, he voluntarily surrendered to police, confessed his crime, and explained that he needed drug rehabilitation, which he hoped to receive in prison. The 2nd Circuit found that such voluntary surrender and confession one day after the robbery might constitute an extraordinary acceptance of responsibility that would justify a downward departure. The court rejected the government's argument that the Sentencing Commission implicitly rejected the availability of such departures for career offenders such as defendant. Because it was not clear whether the district court was aware of its authority to depart in this situation, the case was remanded. *U.S. v. Rogers*, __ F.2d __ (2nd Cir. Aug. 12, 1992) No. 92-1066.

9th Circuit finds no acceptance of responsibility where defendant showed no remorse. **(482)** Defendant argued that he showed no remorse because he could not discuss criminal behavior of which he was yet to be convicted. The 9th Circuit rejected the argument, ruling that the reduction

was not denied because defendant refused to discuss uncharged behavior but because he did not exhibit remorse for the conduct for which he was convicted. *U.S. v. Daly*, __ F.2d __ (9th Cir. Sept. 11, 1992) No. 91-50242.

5th Circuit rejects 5th Amendment challenge to acceptance of responsibility provisions. (484) Defendant argued that the acceptance of responsibility provisions violate the 5th Amendment by requiring individuals to admit guilt in order to receive a sentencing reduction. The 5th Circuit rejected this argument. The cases cited by defendant held that the government may not require a defendant to accept responsibility for offenses of which he has not been convicted. However, a defendant must accept responsibility for all facets of the crime of conviction. Thus, even if the 5th Circuit were to follow those decisions, defendant would not prevail. *U.S. v. Singer*, __ F.2d __ (5th Cir. Aug. 21, 1992) 91-7367.

8th Circuit denies acceptance of responsibility for refusal to admit violence in assault. (488) Defendant was convicted of assaulting an IRS agent. He challenged an enhancement under section 2A2.4(b)(1) for assaults involving physical contact, contending that although he had grabbed the agent's clothes, he never struck the agent. The court, however, credited the agent's testimony that defendant had struck the agent from behind. The 8th Circuit affirmed that defendant's refusal to admit the degree of violence in his assault was grounds for denying him a reduction for acceptance of responsibility. Moreover, the trial judge stated that he would have imposed the same sentence even if defendant had received the acceptance of responsibility reduction. *U.S. v. Wollenzien*, __ F.2d __ (8th Cir. Aug. 12, 1992) No. 91-1951.

11th Circuit defers to lower court's determination that defendant did not accept responsibility. (488) Defendant challenged the district court's refusal to grant him a reduction for acceptance of responsibility. Although acknowledging it was a "close question," the 11th Circuit deferred to the district court's decision. Defendant pled guilty and cooperated with authorities. However, his probation officer testified that defendant did not seem at all remorseful. In addition, the lower court found that although defendant expressed regret, this expression was late in coming. *U.S. v. Paslay*, __ F.2d __ (11th Cir. Sept. 3, 1992) 90-8832.

Criminal History (§4A)

1st Circuit finds prior burglary unrelated based on the number of burglaries not included in criminal history. (500) During a 10-day period, defendant burglarized numerous residences in New Hampshire. All but one burglary occurred in the same county. Although the sentence for all the burglaries was imposed on the same day, the district court concluded that the burglary which occurred in a different county involved different conduct and was not a related case under section 4A1.1. The 1st Circuit upheld the district court's determination, apparently based on the sheer number of burglaries which were not included in defendant's criminal history. Defendant received only three criminal history points for 18 different burglary convictions. Under these circumstances, the district court's determination to add another three points based on this other burglary was justified. *U.S. v. Yates*, __ F.2d __ (1st Cir. Aug. 17, 1992) No. 91-1778.

6th Circuit says consolidated cases were separate for Armed Career Criminal purposes. (500) Defendant argued that he did not have the requisite three prior violent felonies for purposes of the Armed Career Criminal Act because his three prior state felony offenses were consolidated for sentencing, and therefore should be counted as one under section 4A1.2. The 6th Circuit rejected this argument, since defendant's sentence was not calculated under the guidelines, but under the Armed Career Criminal Act. Under 18 U.S.C. section 924(e)(1), the test for separate offenses is whether they were committed on occasions different from one another. It is immaterial that the offenses were consolidated for sentencing. All of defendant's prior convictions were committed on separate occasions. *U.S. v. Warren*, __ F.2d __ (6th Cir. Sept. 2, 1992) 91-6070.

10th Circuit upholds inclusion in criminal history of conviction for driving with ability impaired. (504) The 10th Circuit affirmed that defendant's Colorado conviction for driving with ability impaired (DWAI) was properly included in his criminal history. Although minor traffic infractions are excluded from a defendant's criminal history under section 4A1.2(c), application note 5 states that convictions for driving while intoxicated and similar offenses are to be counted. The reference in application note 5 to "similar offenses" means offenses involving driving and alcohol impairment. In Colorado, DWAI is an offense

involving driving and alcohol impairment. *U.S. v. Walling*, __ F.2d __ (10th Cir. Aug. 31, 1992) 91-2189.

8th Circuit upholds upward departure for "incorrigible recidivist." (510)(715) Defendant pled guilty to illegally re-entering the United States after deportation. He had been in the United States almost continually since 1980, had been arrested 15 times and deported eight times. He fell within criminal history category V and had a guideline range of 21-27 months. The district court first departed to criminal history category VI based on the seriousness of his past criminal conduct and high risk of recidivism. Finding that the additional three months incarceration provided by such a departure was inadequate, the court then departed under 5K2.0, and imposed a 48-month sentence. The reasons were (1) defendant's proclivity for recidivism, (2) defendant's need to be deterred from future criminal conduct, (3) the inadequacy of defendant's criminal history, and (4) the serious danger defendant represented to the community. The 8th Circuit upheld the departure. *U.S. v. Lara-Banda*, __ F.2d __ (8th Cir. Aug. 14, 1992) No. 91-3607.

8th Circuit upholds departure for outdated juvenile convictions despite other improper reasons. (510)(715) The district court departed upward in part because defendant's juvenile offenses were not counted in his criminal history score. Defendant contended that the departure was improper because his juvenile offenses were not evidence of misconduct similar to the instant offense. The 8th Circuit held that, whether or nor the offenses were evidence of similar misconduct, the district court has discretion to consider outdated juvenile offenses as a ground for departure under section 5K2.0. The extent of the departure, from a range of 15 to 21 months, to a sentence of 42 months, was reasonable, even though three of the other reasons stated by the district court as grounds for the departure were improper. Judge Beam dissented, believing that the single permissible ground for departure, the outdated juvenile offenses, did not justify a departure of such magnitude. *U.S. v. Griess*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 91-1893.

11th Circuit reverses upward departure because defendant received inadequate notice. (514) The district court sentenced defendant as a career offender, based upon its determination that a prior offense was a crime of violence. The court noted however, that even if the prior offense was non-violent, it still would have departed under section 4A1.3 and imposed the same sentence. After determining that the prior offense was not a crime of violence, the 11th Circuit also rejected the upward departure, since defendant had received inadequate notice of the court's intent to depart, as required by *Burns v. United States*, 111 S.Ct. 2182 (1991). After the judge announced that even if defendant were not a career offender, she would depart upward, defendant was given the opportunity to object. However, *Burns* makes it clear that this is not enough: a defendant must receive both an opportunity to comment upon the departure and reasonable notice of the contemplated decision. *U.S. v. Wright*, __ F.2d __ (11th Cir. Aug. 17, 1992) No. 90-3564.

9th Circuit reaffirms that "crime of violence" does not include being a felon in possession of a firearm. (520) Relying on *U.S. v. Sahakian*, __ F.2d __ (9th Cir. May 26, 1992) No. 91-10199, slip op. 5975, 5980 (9th Cir. May 26, 1992), the Ninth Circuit reaffirmed that the crime of being a felon in possession of a firearm is not a crime of violence for the purposes of the career offender adjustment because it "does not have as an element the actual, attempted or threatened use of violence, nor does the actual conduct it charges involve a serious potential risk of physical injury to another." *U.S. v. Daly*, __ F.2d __ (9th Cir. Sept. 11, 1992) No. 91-50242.

11th Circuit reverses consideration of underlying circumstances to determine that grand theft was crime of violence. (520) After looking at the particular facts surrounding defendant's prior conviction for grand theft, the district court held that it was a crime of violence under section 4B1.1. Accordingly, he was sentenced as a career offender. The 11th Circuit reversed. Under *U.S. v. Gonzalez-Lopez*, 911 F.2d 542 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2056 (1991), a sentencing court is not permitted to examine the underlying facts of each predicate offense for career offender purposes. *U.S. v. Wright*, __ F.2d __ (11th Cir. Aug. 17, 1992) No. 90-3564.

Determining the Sentence (Chapter 5)

8th Circuit remands for district court to explicitly consider probation option. (560) The presentence report set defendant's offense level at 11, with a guideline range of 8 to 14 months. In this range, imprisonment would be required, and

therefore the presentence report did not discuss probation. The district court did not impose one of the enhancements, resulting in an offense level of nine, and a guideline range of four to eight months. In this lower range, probation with community confinement and without incarceration was available. The district court imposed a sentence of four months, two to be served in confinement and the other two in a community treatment center. The 8th Circuit remanded to consider whether probation was appropriate. While the trial court was not required explicitly to reject probation, the appellate court thought remand was desirable in light of presentence report, which clearly excluded the probation option. *U.S. v. Wollenzien*, __ F.2d __ (8th Cir. Aug. 12, 1992) No. 91-1951.

Article endorses downward departures for drug rehabilitation (680)(736) In "*Downward Departures from the Federal Sentencing Guidelines Based on the Defendant's Drug Rehabilitative Efforts*," a student author assesses the four primary arguments that have been employed against departures based on a defendant's post-arrest drug rehabilitation: that the factor is adequately considered by the acceptance of responsibility provision, that such departures are precluded by section 5H1.4, that such departures are contrary to the statutory command about the proper role of rehabilitation in sentencing, and that such departures are unfair to defendants who were not addicted and therefore do not have an opportunity to earn the departure. Rejecting these arguments, the author nevertheless finds wanting the rationales of courts that have permitted such departures and suggests an alternative. The author notes that a proposed 1992 amendment is "designed to foreclose departure" by explicitly permitting consideration of drug rehabilitation under the acceptance of responsibility guideline. 59 U. CHICAGO L. REV., 837-64 (1992).

Departures (§5K)

Article assesses disparity under the guidelines. (700) In "*Departures Visible and Invisible: Perpetuating Variation in Federal Sentences*," Daniel J. Freed and Marc Miller review figures from the Commission's 1991 annual report that reveal a wide disparity of departure rates among the circuits and an even wider range among districts. They also note the wide variety among the districts in the frequency with which prosecutors initiate "substantial assistance" departures, and a seeming reduction in judicially-initiated downward departures in districts where substantial assistance departures are more frequent. Finally, the authors caution against viewing departure rates as adequate to reveal whether disparity persists under the system, noting the possibility of "low-visibility departures," including nonuniform application of the guidelines themselves. 5 FEDERAL SENTENCING REPORTER, 3-5 (1992).

Article advocates departures to remedy excessively high guidelines sentences. (700) In "*A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*," Judge Jack B. Weinstein maintains that guidelines sentences for at least some offenses are too harsh. For example, he claims that the increased punishment for drug mules has not led to any reduction in drug trafficking; in fact, the failure of drug "mules" to carry drugs in quantities just below the amounts that trigger higher penalties under the guidelines, the author argues, demonstrates that the guidelines' increased severity is not having a deterrent effect. At the same time, however, the guidelines have increased the costs of the sentencing process. Judge Weinstein advocates departures as a means to avoid one of those costs -- sentences that are too harsh in light of the personal circumstances of the offender. He states that he has always been able to depart when he thought it desirable. Prosecutors can play an important role in ameliorating the guidelines by making substantial assistance motions and by declining to appeal other downward departure cases. But recent Commission action suggests that the departure power may be limited. 5 FEDERAL SENTENCING REPORTER, 6-9 (1992).

11th Circuit says failure to give notice of intent to depart is subject to harmless error review. (700) At sentencing, the prosecutor suggested for the first time that the court depart upward for use of a dangerous weapon during defendant's fraud scheme. The court agreed, and departed upward. The 11th Circuit held that this violated the requirement in *Burns v. United States*, 111 S.Ct. 2182 (1991), that a sentencing court must give notice of its intention to depart upward on a ground not previously identified. The appellate court also held that a failure to provide *Burns* notice is not necessarily grounds for reversal, but is subject to harmless error review. However, because the right to prior notice implicates the due process clause, the "harmless beyond a reasonable doubt" standard applies. In this case, remand was necessary because one of the grounds for departure was invalid. Therefore the court declined to determine

whether the failure to provide notice was harmless. The court also warned that if a defendant fails to object below, the notice requirement will be subject to waiver and limited review under the plain error doctrine. *U.S. v. Paslay*, __ F.2d __ (11th Cir. Sept. 3, 1992) 90-8832.

8th Circuit holds that departure may not be based on refusal to identify other drug distributors. (710) The district court departed upward in part because of defendant's unwillingness to report the names and activities of other people who used and distributed drugs. The 8th Circuit held that section 5K1.2 prohibited the district court from departing based on defendant's refusal to assist authorities. The policy statement provides that a defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor. *U.S. v. Griess*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 91-1893.

11th Circuit forbids substantial assistance departure under section 5K2.0. (712)(715) The district court originally made a substantial assistance departure, over the government's objection. On the first appeal, the 11th Circuit reversed, finding such an departure improper absent a government motion under section 5K1.1. At resentencing, the district court departed downward under section 5K2.0, finding (1) defendant was substantially less responsible than his co-defendant, (2) defendant posed a lesser danger to society, (3) defendant provided testimony that was of substantial assistance to the government in its prosecution of the co-defendant, (4) absent a downward departure, there would be an insufficient disparity between the co-defendant's 78 month sentence and defendant's 41 month sentence, (5) defendant's testimony demonstrated his attempt to rehabilitate himself, (6) his testimony exposed him to danger, and (7) his testimony provided a benefit to government. The 11th Circuit vacated and remanded for resentencing, finding the departure an effort to circumvent the government motion requirement in section 5K1.1. *U.S. v. Chotas*, __ F.2d __ (11th Cir. Aug. 18, 1992) No. 91-8206.

1st Circuit upholds departure based on possession of loaded gun. (715) Defendant stole a firearm, ammunition, credit cards and other goods from a residence. He was arrested in possession of the credit cards and the loaded weapon. He eventually pled guilty to the unauthorized use of credit cards. The 1st Circuit upheld an upward departure based on defendant's possession of the loaded handgun in close conjunction with events surrounding the offense of conviction. The fraud guideline does not list or mention as a relevant factor the possession or use of a firearm as a characteristic of that offense. There was sufficient evidence of a "significant association" between the loaded weapon and the misuse of the stolen cards. Defendant used one of the cards to rent a car which was involved in a high-speed chase with police, and admitted that his possession of the gun at the time of the chase was the reason why he fled. When arrested several weeks later he still possessed both the cards and the weapon. *U.S. v. Yates*, __ F.2d __ (1st Cir. Aug. 17, 1992) No. 91-1778.

8th Circuit rejects finding that defendant was "incorrigible." (715) The district court departed upward in part based upon defendant's likelihood of future criminal activity, and the fact that he was "incorrigible." The 8th Circuit found that although the likelihood that a defendant will continue criminal activity is a proper ground for an upward departure, there was insufficient evidence to support that determination here. Defendant had only one adult conviction and several juvenile convictions before his present offense. Based on those offenses (driving under the influence of alcohol, possession of alcohol as a minor, possession of a controlled substance, and burglary), all of which occurred seven to 15 years before the instant offense, it could not be said that defendant was so incorrigible as to warrant a departure from the guidelines. *U.S. v. Griess*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 91-1893.

11th Circuit rejects upward departure based upon victimization of accomplices. (715)(725) Defendant defrauded hundreds of people by selling them franchises in a nonexistent legal expense insurance company. The court departed upward four levels based upon (1) defendant's use of a baseball bat and a pistol to threaten others, and (2) his "victimization" of his accomplices. The 11th Circuit found that defendant's use of a dangerous weapon in a fraud case was proper grounds for departure under section 5K2.6, but found insufficient evidence of defendant's "victimization" of his accomplices. The district court found that some of the accomplices would not have become felons had defendant not recruited them. However, section 3B1.1(a) provides for an enhancement for a leader or organizer. The recruitment of accomplices is one factor tending to show a leadership role. In addition, the exploitation of vulnerable victims is taken into account in guideline section 3A1.1. Because it was unclear to what extent the four level

departure was based on the improper ground, the case was remanded. *U.S. v. Paslay*, __ F.2d __ (11th Cir. Sept. 3, 1992) 90-8832.

Sentencing Hearing (86A)

Article advocates jury factfinding of offense-related sentencing factors. (750) In "*Jury Factfinding of Offense-Related Sentencing Factors*," Colleen P. Murphy surveys the cases that have generally held that a sentencing court is not bound by facts found by a jury and that the judge need not put special questions to the jury designed to determine its view on factual issues relevant to sentencing. The author argues that the jury could be involved in the process without changing the burden of proof at sentencing. Instead, juries could be asked, after returning a verdict based on the reasonable doubt standard applicable at sentencing, to determine whether particular facts on which proof was introduced at trial had been shown by a preponderance of the evidence. 5 FEDERAL SENTENCING REPORTER, 41-44 (1992).

8th Circuit upholds reliance on ringleader's trial testimony as to drug quantity. (765)(770) The 8th Circuit rejected defendant's claim that the district court improperly relied upon his co-conspirator's trial testimony as to the quantity of drugs involved in their drug conspiracy. The co-conspirator testified under oath and was vigorously cross-examined, so there was no hearsay or confrontation clause issue. The co-conspirator as ringleader was in the best position to quantify the conspiracy's activities. Witness credibility is an issue for the sentencing judge that is virtually unreviewable on appeal. However, the case was remanded because the court did not explain how it reached its quantity determination. On remand, the district court was to specifically explain whether it found the co-conspirator's testimony credible (a decision which would be virtually unreviewable), or whether because there was no other evidence, it felt bound to accept that evidence (which would be an error of law). Like any other factfinder, the sentencing judge is free to believe all, some, or none of a witness's testimony. *U.S. v. Candle*, __ F.2d __ (8th Cir. Aug. 26, 1992) 91-2576.

8th Circuit declines to consider propriety of hearsay under law-of-the-case doctrine. (770) Defendant received disability benefits on behalf of her infant granddaughter, and made false statements to the Social Security Administration in order to continue receiving those benefits after the granddaughter moved elsewhere. The 8th Circuit remanded for resentencing because the district court had imposed an incorrect enhancement. At resentencing, the district court sentenced defendant at the top of her newly calculated guideline range, based on hearsay statements of defendant's daughter that defendant had misused the granddaughter's benefits. On defendant's second appeal, she challenged the district court's reliance upon the hearsay to determine that she had misused the child's benefits. The 8th Circuit refused to consider this argument under the law-of-the-case doctrine, because it had implicitly rejected it in the first appeal. *U.S. v. Callaway*, __ F.2d __ (8th Cir. Aug. 12, 1992) No. 91-3546.

8th Circuit affirms consideration of defendant's criminal record in rejecting his testimony. (770) Defendant received an enhancement for obstruction of justice based on a government agent's testimony that during his investigation defendant threatened the agent's family and girlfriend. Defendant denied making such a threat, but the district court credited the agent's testimony over defendant's in part because of defendant's criminal record. Defendant contended that it was not proper to impeach his credibility with his prior convictions because they were too old to be considered for impeachment under Fed. R. Evid. 609(b). The 8th Circuit rejected the argument, noting that the Rules of Evidence do not apply at sentencing. Moreover, the allegedly stale convictions were not the only reason the court credited the agent's testimony over defendant's. At a previous hearing to revoke defendant's bail, the court also credited the agent's testimony over defendant's, noting that it had always found the agent to be a truthful witness. *U.S. v. Allmon*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 91-2927EA.

10th Circuit upholds reliance on hearsay statements of postal inspectors. (770) The enhancement for obstruction of justice was based on the testimony of two postal inspectors who described defendant's attempt to influence the testimony of trial witnesses. One inspector testified that he had been contacted by two different witnesses, who related that defendant had called them from prison to threaten them. One of the witnesses also reported that defendant had called his sister. Another inspector testified that he had spoken with the sister and she told him that defendant had called and blamed her brother for defendant's inability to spend Christmas with his son. The 10th Circuit rejected defendant's contention that it was improper to rely on this hearsay information with-

out any indication as to why the declarants were unavailable. The right to confront witnesses does not extend to sentencing. Moreover, the testimony was consistent with tapes of the conversations made by the prison. *U.S. v. Powell*, __ F.2d __ (10th Cir. Aug. 28, 1992) 91-1114.

Appeal of Sentence (18 U.S.C. §3742)

4th Circuit, en banc, says attorney's incorrect estimate of range is not grounds to withdraw plea. (790) Defense counsel advised defendant that he "felt" that defendant's guideline range would be 78 to 108 months. Defendant received a 360-month sentence. The 4th Circuit, en banc, found no abuse of discretion in the district court's denial of defendant's motion to withdraw his guilty plea. An appropriately conducted Rule 11 plea hearing raises "a strong presumption that the plea is final and binding." Here, defendant made no challenge to the plea hearing. The district judge advised him that he faced a maximum sentence of life imprisonment, and that under guideline sentencing, no one could accurately predict a sentence until the presentence report has been prepared. The appellate court did not rule out the possibility that a defendant's misapprehension of a likely sentence, based on a clear error in the advice given him, can be a fair and just reason for withdrawal of a guilty plea if it is not corrected by the court at the Rule 11 hearing. Judge Widener (joined by Judge Sprouse), Judge Hall and Judge Phillips (joined by Chief Judge Ervin) each dissented. *U.S. v. Lambey*, __ F.2d __ (4th Cir. Sept. 2, 1992) 90-5619 (en banc).

4th Circuit finds no error in failure to advise defendant that he could not withdraw plea. (790) Defendant argued that his sentence should be vacated because at his Rule 11 plea hearing, the judge failed, pursuant to Fed. R. Crim. P. 11(e)(2) to advise him that once he pled guilty he could not withdraw his plea. The 4th Circuit found no error, since Rule 11(e)(2) was not applicable to defendant. Rule 11(e)(2) provides that if the plea agreement requires the government to make a sentencing recommendation or not to oppose a request by the defendant, the court must advise the defendant that he has no right to withdraw his plea even if the court does not accept the recommendation or request. Since there was no agreement by the government in this case, Rule 11(e)(2) did not apply and the court was not required to advise defendant that once he pled guilty he could not withdraw the plea. *U.S. v. Lambey*, __ F.2d __ (4th Cir. Sept. 2, 1992) 90-5619 (en banc).

8th Circuit says misunderstanding career offender status did not entitle defendant to withdraw plea. (790) After defendant signed his plea agreement, an Assistant U.S. Attorney faxed to defendant's counsel her calculations of defendant's likely sentence under the guidelines. It showed a range of 120-150 months for criminal history category V and a range of 130-162 months for category VI. Defendant's counsel had independently calculated the likely sentencing range and reached similar results. Nevertheless, the presentence report classified defendant as a career offender, with a range of 210 to 262 months. Defendant moved to withdraw his plea, arguing that the government's representation induced him to plead guilty. The 8th Circuit affirmed the district court's denial of defendant's motion. The written plea agreement was specific in its terms and promised no certain sentencing range. Even if defendant misunderstood the application of the guidelines, this would not entitle him to withdraw his plea, as he was apprised of the possible range of punishment and told that the guidelines would apply. *U.S. v. Ludwig*, __ F.2d __ (8th Cir. Aug. 14, 1992) No. 91-3683.

10th Circuit rules that enhancement of defendant's sentence did not violate plea agreement. (790) Defendant's plea agreement provided that in return for his plea to being a felon in possession of a firearm, the government would dismiss another firearm charge, and would not recommend a departure. The plea petition represented that the maximum sentence would be 10 years, but made clear that a probation officer would conduct a presentence investigation. After reviewing the presentence report, the government realized that defendant's three prior violent felonies triggered the penalty enhancement in section 924(e)(1) and brought the statute to the probation officer's attention. The district court then informed defendant of the minimum 15-year term and allowed him to withdraw his plea. Defendant chose to stand by his plea and argued that the enhancement violated the plea agreement. The 10th Circuit rejected this claim. The government did not bargain away the enhancement or agree not to inform the district court of its applicability. *U.S. v. Johnson*, __ F.2d __ (10th Cir. Aug. 25, 1992) 91-3277.

Violations of Probation and Supervised Release (Chapter 7)

2nd Circuit reaffirms that court may not reimpose supervised release after revoking original term and imposing imprisonment. (800) Defendant was sentenced under pre-guidelines law to a term of supervised release. After defendant violated the terms of her supervised release, the district court sentenced her to a one year term of imprisonment and extended her supervised release for one year. The 2nd Circuit, following *U.S. v. Koehler*, __ F.2d __ (2nd Cir. Aug. 21, 1992) 91-1585, reversed, since 18 U.S.C. section 3583(e) does not authorize a further term of supervised release after revocation of an initial term of supervised release and imposition of a term of imprisonment. Although defendant's original offense was committed prior to the effective date of the guidelines, her violation of supervised release occurred after their effective date. Therefore, upon remand, the district court should also reconsider defendant's sentence in accordance with the Chapter 7 policy statements in the sentencing guidelines. *U.S. v. Bermudez*, __ F.2d __ (2nd Cir. Sept. 1, 1992) 92-1236.

2nd Circuit says court cannot reimpose supervised release after revoking original term. (800) Defendant originally was sentenced to three years probation. She violated probation and was sentenced to imprisonment followed by supervised release. This was authorized by 18 U.S.C. section 3565(a)(2), which allows a court to revoke probation and impose any other sentence that was available at the time of the initial sentencing. Defendant then violated her supervised release, and the court sentenced her to one year in prison, to be followed by a new three-year term of supervised release. The 2nd Circuit reversed. Sentencing upon revocation of supervised release is controlled by section 3583(e), which permits a court to terminate or extend a term of supervised release, or to revoke it. It does not permit a court to reimpose a term of supervised release after revoking the original term and imposing a term of imprisonment. *U.S. v. Koehler*, __ F.2d __ (2nd Cir. Aug. 21, 1992) 91-1585.

8th Circuit affirms that court need not give detailed reasons for imposing sentence above Chapter 7 sentencing range. (800) The district court revoked defendant's supervised release after he was discovered possessing and selling drugs. Although the sentencing range recommended in Chapter 7 was 12 to 18 months, the district court sentenced defendant to two years' imprisonment. The 8th Circuit rejected defendant's claim that the district court was required to give detailed reasons for its "upward departure" from the Chapter 7 recommended sentencing range. The Chapter 7 policy statements are merely advisory, not binding, and therefore a court is not required to make the explicit, detailed findings required when it departs upward from a binding guideline. *U.S. v. Jones*, __ F.2d __ (8th Cir. Aug. 11, 1992) No. 92-1021MN.

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

2nd Circuit reviews argument not raised below because it was a novel issue that should be reviewed on its merits. (855) For the first time on appeal, defendant raised a particular objection to his sentence. The question was a difficult one that had only been addressed by one case in the 4th Circuit. Consequently, the 2nd Circuit decided to review the issue, finding it to be a "novel issue" that should be addressed on its merits. *U.S. v. Hudson*, __ F.2d __ (2nd Cir. Aug. 14, 1992) No. 92-1057.

Forfeiture Cases

2nd Circuit says state ruling that U.S. had no jurisdiction did not bar new forfeiture action. (905) Local police initially impounded claimant's Jeep after he was arrested on drug charges. Claimant filed a motion in state court under Vermont Rule 41(e) for return of the Jeep. Before the motion was decided, the federal government commenced an administrative forfeiture proceeding. The state court then granted claimant's motion for the return of the Jeep, concluding that neither the state nor the federal government had an interest in the vehicle. Although the Jeep was returned to claimant, several days later DEA agents seized it again. The 2nd Circuit rejected claimant's argument that the Vermont state court's determination that the federal government had not established jurisdiction over the Jeep barred this second forfeiture action. The state court merely adjudicated claimant's rights in the vehicle as they were implicated by the state criminal proceeding. The state court did not, and could not, adjudicate the federal government's interest in the Jeep as that interest arose under the federal forfeiture statutes. *U.S. v. In Re One 1987 Jeep Wrangler Automobile*

VIN # 2BCCL8132HBS12835, __ F.2d __ (2nd Cir. Aug. 6, 1992) 92-6025.

2nd Circuit rules that failure to publish notice of seizure did not violate due process where claimant had actual notice. (910) The 2nd Circuit rejected defendant's claim that the DEA's failure to publish a notice of seizure denied him of notice of the seizure of his Jeep. Claimant admitted that he had received actual notice of the seizure. Constructive notice is not further required. *U.S. v. In Re One 1987 Jeep Wrangler Automobile VIN # 2BCCL8132HBS12835*, __ F.2d __ (2nd Cir. Aug. 6, 1992) 92-6025.

2nd Circuit rules that treating Notice of Claim as relating to prior forfeiture proceeding violated due process. (910) In April, local police impounded claimant's Jeep. Claimant filed a motion in state court for its return. In May, after claimant filed this motion but before it was decided, the federal government commenced an administrative forfeiture proceeding. The DEA served a Notice of Seizure on claimant in late May. On June 16, the state court granted claimant's motion, and the Jeep was returned to claimant. On July 9, DEA agents seized the Jeep and allegedly advised claimant that a Notice of Seizure would issue within 30 days. Sometime in August, claimant filed a Notice of Claim. The DEA treated this Notice of Claim as in response to the first seizure notice served in May, and rejected it as untimely. Claimant then filed a motion for return of property under Fed. R. Crim. P. 41(e). On October 17, during the pendency of this motion, a new Notice of Seizure was served. Claimant never filed a new Notice of Claim, and the DEA deemed the Jeep summarily forfeited. The 2nd Circuit held that the DEA's determination that the Notice of Claim filed in August related to the first Notice of Seizure denied claimant the procedural safeguards of the forfeiture statutes. The case was remanded for further administrative proceedings. *U.S. v. In Re One 1987 Jeep Wrangler Automobile VIN # 2BCCL8132HBS12835*, __ F.2d __ (2nd Cir. Aug. 6, 1992) 92-6025.

2nd Circuit affirms dismissal of Rule 41(e) motion because administrative forfeiture had begun. (940) The 2nd Circuit affirmed the district court's dismissal of claimant's motion under Fed. R. Crim. P. 41(e) for the return of his seized property, since the federal government had begun administrative forfeiture proceedings. Once the federal government properly commences a civil forfeiture proceeding, it is the prerogative of the claimant to chose the forum of adjudication. A judicial action may be commenced by filing a claim and cost bond within a certain time period, or an administrative forfeiture occurs by default. Under all of these scenarios, the claimant is afforded the opportunity to test the legality of the seizure in the forfeiture proceeding. Consequently, once the administrative process has begun, the district court loses subject matter jurisdiction to adjudicate the matter in a Rule 41(e) motion. Here, the administrative forum afforded claimant the opportunity to raise all objections to the seizure. *U.S. v. In Re One 1987 Jeep Wrangler Automobile VIN # 2BCCL8132HBS12835*, __ F.2d __ (2nd Cir. Aug. 6, 1992) 92-6025.

Opinions vacated upon grant of Rehearing En Banc

(275)(284)(431)(855) *U.S. v. Montanye*, 962 F.2d 1332 (8th Cir. 1992), *rehearing en banc granted and opinion partially vacated* (8th Cir. July 30, 1992) No. 91-1703.

(790) *U.S. v. Lambey*, 949 F.2d 133 (4th Cir. 1991), *vacated, opinion on rehearing en banc*, __ F.2d __ (4th Cir. Sept. 2, 1992) 90-5619 (*en banc*).

Amended Opinions

(504)(855) *U.S. v. French*, __ F.2d __ (6th Cir. May 28, 1992), *amended* __ F.2d __ (6th Cir. Aug. 20, 1992) No. 90-6222.

(910)(930) *U.S. v. James Daniel Property*, __ F.2d __ (9th Cir. April 24, 1992), No. 90-16636, *amended*, __ F.2d __ (9th Cir. Sept. 10, 1992), No. 90-16636.

Opinion Clarified

(251) *U.S. v. Jennings*, 945 F.2d 129 (6th Cir. 1991), *opinion clarified by U.S. v. Jennings*, 966 F.2d 184 (6th Cir. 1992).

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NEW FORFEITURE STATUTES ENACTED BY CONGRESS

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Immediately before it adjourned on October 9, 1992, Congress approved a series of bills amending the forfeiture statutes in 18 U.S.C. §§ 981-82 and the related substantive money laundering offenses in 18 U.S.C. §§ 1956-57 and 31 U.S.C. § 5324. The legislation also included several entirely new procedural provisions that will be codified in Titles 18 and 28. Each of the amendments and new provisions took effect as soon as the President signed the respective bills into law. Therefore, all federal agents and prosecutors handling criminal and civil forfeiture cases should be apprised of the statutory changes as soon as possible.

The following is a summary of the most important changes affecting forfeiture. Parenthetical references are given to the relevant legislative history which is explained at the end of this article. The text of the statutes as amended and the legislative analysis is set forth in the Appendix.

I. The Annunzio-Wylie Anti-Money Laundering Act

The most important new provisions were enacted as part of the Annunzio-Wylie Anti-Money Laundering Act ("the Act") which appears as Title XV of the Housing and Community Development Act of 1992 ("HCDA"), Pub. L. 102-___ (eff. October 28, 1992). Most of the Act deals with regulatory changes affecting financial institutions convicted of money laundering. Subtitle C, however, comprises a series of money laundering and forfeiture provisions drafted by the Criminal Division of the Department of Justice. Those provisions include the following.

A. Relaxation of the Tracing Requirement in Civil Cases

Title 18, Section 984 is a new statute entitled "Civil forfeiture of fungible property." It is intended to relax the burden on the government of tracing forfeitable funds through a bank account in money laundering cases.

Civil forfeiture is an in rem action to which the "substitute assets" provisions of the criminal forfeiture statutes do not apply. Therefore, in a civil forfeiture action, the government is limited to the forfeiture of the actual property involved in the underlying offense. This means that electronic funds can be forfeited only when a financial analyst can directly trace the funds on deposit at the time of the seizure to the earlier illegal activity. For this reason, tainted funds deposited into highly active accounts often cannot be forfeited. See United States v. $488,342.85, 969 F.2d 474 (7th Cir. 1992).

For example, if a money launderer puts $1 million in "dirty" money into his account on Monday, removes it on Tuesday, and deposits $1 million in funds from an unknown source on Wednesday, none of the funds can be forfeited if the contents of the account are not seized until Friday. Section 984 remedies this by relaxing the tracing requirement in the case of electronic funds and other fungible property involved in money laundering offenses. It provides that if a forfeiture action is commenced within one year of the commission of the act giving rise to the forfeiture,[1] "it shall not be necessary for the Government to identify the specific property involved in the offense." Rather, "any identical property found in the same place or account as the property involved in the offense" may be forfeited.

(**Leg. History:** HCDA § 1522; S.2733 § 1042, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 102, Cong. Record (daily ed.) Aug. 2, 1991 at S12238; H.R.26 § 30, H.Rep. 28, 102d Cong., 1st Sess. (1991) at 45.)

B. Subpoenas for Bank Records

Title 18, Section 986,[2] is another new statute entitled "Subpoenas for bank records." It simplifies the procedure for gathering bank records once a complaint is filed in a civil forfeiture case based on a money laundering or drug violation by providing for the issuance of a subpoena duces tecum by the Clerk of the Court in the district where the forfeiture action is pending. Any party to the action may request the issuance of such a subpoena and is required to give notice to all other parties.

The legislation was intended to eliminate the burden on the government of gathering records under the Rules of Civil Procedure which previously required the service of a deposition subpoena on the custodian of records in the district where the records are located. The new statute makes clear, however, that it is intended to complement the discovery rules and does not preclude any party from pursuing discovery under those rules. Therefore § 986 does not preclude the government for using the amended Rules of Civil Procedure that took effect while this legislation was pending.

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[1] The Senate version of this provision contained a two-year rule, but a last minute change made at the behest of the House Judiciary Committee limited the application of the statute to one year.

[2] The numbering of the new provisions as sections 984 and 986 reflects the omission of other proposals that were not enacted. For example, the Justice Department had proposed a section 985 permitting prosecutors to issue administrative subpoenas to gather evidence in civil forfeiture cases before the filing of a complaint. This provision passed both the House and Senate yet was dropped from the final bill at the request of the House Judiciary Committee. Section 986 in fact contains a now meaningless cross-reference to the non-existent § 985.

(**Leg. History:** HCDA § 1523; S.2733 § 1044, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 104, Cong. Record (daily ed.) Aug. 2, 1991 at S12239; H.R.26 § 32, H.Rep. 28, 102d Cong., 1st Sess. (1991) at 49.)

C. In Rem Jurisdiction Over the Property

The Act also amends an existing statute to clarify when a court has in rem jurisdiction over defendant property in a civil forfeiture action.

Title 28, Section 1355, gives the district courts subject matter jurisdiction over civil forfeiture cases. The venue statutes for forfeiture actions provide for venue in the district in which the subject property is located, 28 U.S.C. § 1395, or in the district where a related criminal action is pending, 18 U.S.C. § 981(h), 21 U.S.C. § 881(j). But until now, no statute has defined when a court has jurisdiction over the property that is the subject of the suit.

Although there have been exceptions created in certain situations, the usual rule has been that the government must file a civil forfeiture action in the district in which the subject property is located. This has resulted in the filing of multiple forfeiture actions in different districts in the same case in order to satisfy jurisdictional requirements. It also has made it difficult to file a forfeiture action against property that has been placed overseas. The Act eliminates these problems for all civil forfeiture actions by adding several new subsections to § 1355.

Subsection 1355(b)(1)(A) sets forth the general rule that jurisdiction for an in rem action lies in the district in which the acts giving rise to the forfeiture were committed. Subsection 1355(b)(1)(B) also gives a district court in rem jurisdiction over the property if venue for the forfeiture action would lie in the district under any venue-for-forfeiture statutes that Congress has previously enacted or may enact in the future. Thus, a civil forfeiture action may now be brought in the district where the underlying crime occurred, the district where the property is located, or the district where a related criminal indictment is pending, if §§ 981(h) or 881(j) apply.

To aid the court in obtaining physical control over the property in order to exercise its in rem jurisdiction, subsection 1355(d) gives the district court authority to issue nationwide service of process. This is intended to eliminate the problem identified in United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill Lynch, ___ F.2d ____, No. 91-5470 (3rd Cir. Jul. 22, 1992) which held that the venue provisions of § 981(h) did not automatically confer in rem jurisdiction on the district court.

Subsection (b)(2) addresses the problem involving property located overseas by providing for jurisdiction over such property in the United States District Court for the District of Columbia, in the district court for the district in which any of the acts giving rise to the forfeiture occurred, or in any other district where venue would be appropriate under a venue-for-forfeiture statute. Because the nationwide service of process provision would not apply on foreign soil, however, the government must continue to rely on mutual legal assistance treaties and other international agreements to bring the property to the United States before a forfeiture order issued pursuant to this section could be enforced.

Finally, subsection 1355(c) addresses two recurring problems involving appeals in civil forfeiture actions: 1) whether the removal of the property from the jurisdiction of the court following the entry of the district court order deprives the appellate court of jurisdiction over the appeal; and 2) whether the appellate court should take steps to ensure that the property is not diminished in value, taken out of the country, or otherwise made unavailable to the appellant in the event the appeal results in the reversal of the district court's judgment. See United States v. $12,390, 956 F.2d 801 (8th Cir. 1992) (noting a split in the circuits on the first issue).

Subsection (c) resolves the first issue by providing that an appellate court is not deprived of jurisdiction over an otherwise proper appeal simply because the res has been removed from the jurisdiction. The statute also provides that the appellate court is obliged to take whatever steps it deems necessary, including ordering the stay of the district court order or requiring the appellant to post an appeal bond, to ensure that while the appeal is pending, the party exercising control over the property does not take any action that would deprive the appellant of the full value of the property should the district court's judgment be reversed. The types of actions that the appellant court must seek to protect against are those listed in 21 U.S.C. §853(p).

(**Leg. History:** HCDA § 1521; S.2733 § 1041, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 101, Cong. Record (daily ed.) Aug. 2, 1991 at S12238.)

D. Forfeiture of Proceeds of Foreign Crimes

Inspired by the government's experience in the BCCI case and in certain terrorism cases, Congress has expanded the scope of the money laundering statutes to permit prosecution for laundering the proceeds of foreign bank fraud, kidnaping, robbery and extortion offenses, if the laundering offenses occur in the United States or involve a U.S. citizen.[3] Under §§ 981 and 982, the proceeds of

[3] The definition of "specified unlawful activity" in 18 U.S.C. § 1956(c)(7)(B), as amended, is set forth in the Appendix.

these foreign offenses are subject to forfeiture to the extent they are involved in a money laundering violation. Previously, only the proceeds of foreign drug crimes were forfeitable under §§ 981 and 982.

As is the case for the existing provision relating to foreign drug crimes, the forfeiture provisions in §§ 981 and 982 would only apply where the foreign offense was punishable by at least one year in prison in the foreign country, and would be recognized as a felony under federal law if committed within the jurisdiction of the United States.

(**Leg. History:** HCDA § 1536; S.2733 § 1055, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 213, Cong. Record (daily ed.) Aug. 2, 1991 at S12241.)

E. Substantive Money Laundering Amendments

The Act makes a number of changes to the substantive money laundering statutes that will have an impact on money laundering forfeitures.

1. Forfeiture of Property Involved in Conspiracy Offenses

The Act amends § 1956 by adding a new subsection (g)[4] to provide for the prosecution of money laundering conspiracies under §§ 1956 and 1957 instead of 18 U.S.C. § 371. The primary purpose of this change was to raise the maximum penalty for money laundering conspiracy from 5 years to whatever the maximum would be for the substantive § 1956 or 1957 offense. An additional effect of the amendment, however, is to allow the forfeiture of property involved in money laundering conspiracies under §§ 981 and 982. Previously, forfeiture of such property was not possible because the forfeiture statutes do not apply to § 371 violations.

(**Leg. History:** HCDA § 1530; S.2733 § 1051, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 209, Cong. Record (daily ed.) Aug. 2, 1991 at S12241; H.R.26 § 34, H.Rep. 28, 102d Cong., 1st Sess. (1991) at 49.)

2. Additions to Specified Unlawful Activity

In addition to the foreign offenses discussed above, the Act adds several new domestic offenses to the definition of "specified unlawful activity" in § 1956(c)(7)(D). These include 18 U.S.C. § 1708 (theft from the mail), food stamp fraud under the Food Stamp Act, and violations of the Foreign Corrupt Practices Act. Proceeds of these crimes are now subject to forfeiture under §§ 981 and 982 if the proceeds are laundered in violation of § 1956 or 1957.

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[4] Note that Congress also inadvertently added another subsection (g) to 1956 dealing with notification to bank regulatory agencies following conviction of a financial institution for money laundering.

(**Leg. History:** HCDA § 1534; S.2733 § 1057, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 215, Cong. Record (daily ed.) Aug. 2, 1991 at S12241.)

The Act also removes an ambiguity in the definition of "specified unlawful activity" created by the Crime Control Act of 1990. The 1990 amendment added mail and wire fraud offenses "affecting a financial institution" to the definition of specified unlawful activity. Because mail and wire fraud are RICO predicates, and because all RICO predicates are included in the definition of "specified unlawful activity" under §1956(c)(7)(A), this amendment was unnecessary, and has created the impression that Congress meant to limit money laundering to cases involving only certain kinds of mail and wire fraud offenses.

By striking the redundant references to mail and wire fraud in § 1956(c)(7)(D), the Act makes clear that the laundering of the proceeds of any mail or wire fraud offense is prosecutable under §§ 1956 and 1957, and that the proceeds of all mail and wire fraud offenses are forfeitable if they are involved in a money laundering offense.

(**Leg. History:** HCDA § 1524; S.2733 § 1045, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 201, Cong. Record (daily ed.) Aug. 2, 1991 at S12240; H.R.26 § 25, H.Rep. 28, 102d Cong., 1st Sess. (1991) at 44.)

3. CMIR Structuring

The Act creates a new offense in Title 31 to make it illegal to structure the importation or exportation of monetary instruments with the intent to evade the CMIR reporting requirement. The new statute is codified as 31 U.S.C. § 5324(b) which is set forth in the Appendix. The Act provides that civil forfeitures for CTR structuring offenses will continue to be covered by §981 of Title 18, while civil forfeitures for CMIR offenses, including the new structuring offense, will continue to be covered by §5317 of Title 31. Criminal forfeiture for both types of structuring violations will be covered by § 982.

(**Leg. History:** HCDA § 1525; S.2733 § 1046, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 203, Cong. Record (daily ed.) Aug. 2, 1991 at S12240; H.R.26 § 26, H.Rep. 28, 102d Cong., 1st Sess. (1991) at 45.)

4. Definition of "Financial Transaction"

The Act expands the scope of the substantive money laundering statutes by amending the definition of "financial transaction" in § 1956(c)(4) to include two types of transactions not previously covered by §§ 1956 and 1957. These include transactions where title to real property, a vehicle, a vessel or an airplane changes hands without the payment of money, and transactions where funds are placed in a safe deposit box.

Property involved in such transactions will now be subject to forfeiture if the other elements of § 1956 or 1957 are satisfied.

(**Leg. History:** HCDA § 1527; S.2733 § 1048, Cong. Record (daily ed.) June 23, 1992 at S8625; S.1665 § 206, Cong. Record (daily ed.) Aug. 2, 1991 at S12240.)

F. Prohibition of Illegal Money Transmitting Businesses

Finally, Subtitle B of the Act creates a new substantive money laundering offense, codified at 18 U.S.C. § 1960, entitled "Prohibition of illegal money transmitting businesses." The new statute makes it a federal offense to operate a money transmitting business without the appropriate state license. The Act also amends § 982 (but not § 981) to provide for the forfeiture of any property involved in the new offense.

(**Leg. History:** HCDA § 1512; S.2733 § 1022, Cong. Record (daily ed.) June 23, 1992 at S8624; H.R.26 § 11, H.Rep. 28, 102d Cong., 1st Sess. (1991) at 38.)

II. Anti-Car Theft Act: Forfeiture for Crimes Relating to Carjacking

In separate legislation, Congress also enacted a set of new criminal statutes and amendments relating to automobile theft and "carjacking." (The "Anti-Car Theft Act," Pub. L. 102-___, eff. Oct. 25, 1992.) Included in this bill were parallel civil and criminal forfeiture provisions codified as subsections 981(a)(1)(F) and 982(a)(5), respectively. As set forth in the Appendix, these subsections permit the forfeiture of the "gross proceeds" of any violation of 18 U.S.C. §§ 511, 553, 2119 (the new statute relating to armed robbery of automobiles), 2312 and 2313. The term "gross proceeds" is not defined, and it is not clear how its meaning differs from the terms "property involved in," "proceeds," and "gross receipts" that are used in other parts of §§ 981 and 982.

III. Forfeiture for Fraud, Counterfeiting, Smuggling and Explosives Offenses

In still another bill, H.R. 5488, Pub. L. 102-393 (eff. October 6, 1992), Congress made parallel amendments to §§ 981(a)(1)(C) and 982(a)(2) to add to the list of fraud statutes for which civil and criminal forfeiture were authorized in the FIRREA Act of 1989. As set forth in the Appendix, the revised statute permits the forfeiture of "proceeds" of any violation of, or any conspiracy to violate, 18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1341 or 1343, affecting a financial institution, and §§ 471-74, 476-81, 485-88, 501-02, 510 542, 545, 842, 844 and 1029-30, whether the violation affects a financial institution or not.

LEGISLATIVE HISTORY

All of the provisions of Subtitle C of the Annunzio-Wylie Act were taken virtually without change from the "Money Laundering Improvements Act of 1991," a bill drafted by the Criminal Division of the Department of Justice and introduced by Sen. Alphonse D'Amato (R-NY) on August 2, 1991, as S.1665. The analysis of S.1665 submitted by Sen. D'Amato at the time it was introduced is thus part of the legislative history of these provisions. That analysis appears at pages S12235-43 of the Congressional Record of August 2, 1991. The new § 1960, which appears in Subtitle B of the Act, came from another D'Amato bill that was later combined with the provisions of S.1665.

S.1665, however, was never enacted into law. Instead, the provisions of that bill were combined with other money laundering and regulatory provisions sponsored by Reps. Frank Annunzio (D-IL) and Chalmers Wylie (R-OH) that had passed the House of Representatives earlier in 1991 as H.R. 26. The provisions of that bill are explained in H.Rep. 28, 102d Cong., 1st Sess. (1991).

The combined bill was guided through the Senate by Sen. Donald Riegle (D-MI), Chairman of the Senate Banking Committee and passed the Senate on July 1, 1992 as Title X of S.2733, a bill relating to government sponsored enterprises. The provisions of that bill are set out in the Congressional Record of July 1, 1992 at pp. S9382-90, and are explained by Sen. Riegle at pp. S8624-25 of the Congressional Record of June 23, 1992. Rather than act on S.2733, however, the House of Representatives included its money laundering and forfeiture provisions in what ultimately became the Annunzio-Wylie Act as Title XV of H.R.5334 which is the bill that was finally passed on October 8, 1992 and was signed by the President on October 28. The text of the Act appears in the Congressional Record of October 5, 1992 at H12042-50. A brief analysis was printed in the Record on October 8, 1992 at S17918.

The amendments to 18 U.S.C. §§ 981(a)(1)(C) and 982(a)(2) were drafted by the Treasury Department and were inserted into the Treasury appropriations bill, H.R. 5488, on September 28, 1992 and signed by the President on October 6, 1992. See Cong. Record, daily ed., Sept. 28, 1992 at H9576-78.

The Anti-Car Theft Act, H.R.4542, was passed on October 8, 1992 and was signed by the President on October 25. The analysis of the Act that appears in the Congressional Record at S17960-62 appears not to contain an explanation of the forfeiture provisions.

* * * * *

18 USC § 981(a)(1). Civil forfeiture

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324**(a)** of title 31, or of section 1956 or 1957 of this title, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(B) Any property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act), within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of section 215, **471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545,** 656, 657, **842, 844,** 1005, 1006, 1007, 1014, **1028, 1029, 1030,** 1032, or 1344 of this title or a violation of section 1341 or 1343 of such title affecting a financial institution.

(D) Any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of --

(i) section 666(a)(1) (relating to Federal program fraud);
(ii) section 1001 (relating to fraud and false statements);
(iii) section 1031 (relating to major fraud against the United States);
(iv) section 1032 (relating to concealment of assets from conservator or receiver of insured financial institution);
(v) section 1341 (relating to mail fraud); or
(vi) section 1343 (relating to wire fraud),

if such violation relates to the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision or the National Credit Union Administration, as conservator or liquidating agent for a financial institution.

(E) With respect to an offense listed in subsection (a)(1)(D) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations or promises, the gross receipts of such an offense shall include all property, real or personal, tangible or intangible, which thereby is obtained, directly or indirectly.

(F) Any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, from a violation of --

(i) section 511 (altering or removing motor vehicle identification numbers);

(ii) section 553 (importing or exporting stolen motor vehicles);

(iii) section 2119 (armed robbery of automobiles);

(iv) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(v) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce).

18 USC § 982(a). Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957, **or 1960** of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate --

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, **or**

(B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under --

(A) section 666(a)(1) (relating to Federal program fraud);
(B) section 1001 (relating to fraud and false statements);
(C) section 1031 (relating to major fraud against the United States);
(D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);
(E) section 1341 (relating to mail fraud); or
(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate --

(A) section 511 (altering or removing motor vehicle identification numbers);
(B) section 553 (importing or exporting stolen motor vehicles);
(C) section 2119 (armed robbery of automobiles);
(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or
(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

18 USC § 984. Civil forfeiture of fungible property

(a) This section shall apply to any action for forfeiture brought by the Government in connection with any offense under section 1956, 1957 or 1960 of this title or section 5322 of title 31, United States Code.

(b)(1) In any forfeiture action in rem in which the subject property is cash, monetary instruments in bearer form, funds deposited in an account in a financial institution (as defined in section 20 of this title), or other fungible property --

(A) it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture; and

(B) it shall not be a defense that the property involved in such offense has been removed and replaced by identical property.

(2) Except as provided in subsection (c), any identical property found in the same place or account as the property involved in the offense that is the basis for the forfeiture shall be subject to forfeiture under this section.

(c) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be commenced more than one year from the date of the offense.

(d)(1) No action pursuant to this section to forfeit property not traceable directly to the offense that is the basis for the forfeiture may be taken against funds held by a financial institution in an interbank account unless the financial institution holding the account knowingly engaged in the offense.

(2) As used in this section, the term "interbank account" means an account held by one financial institution at another financial institution primarily for the purpose of facilitating customer transactions.

18 USC § 986. Subpoenas for bank records.

(a) At any time after the commencement of any action for forfeiture in rem brought by the United States under section 1956, 1957, or 1960 of this title, section 5322 of title 31, United States Code, or the Controlled Substances Act, any party may request the Clerk of the Court in the district in which the proceeding is pending to issue a subpoena duces tecum to any financial institution, as defined in 31 U.S.C. 5312(a), to produce books, records and any other documents at any place designated by the requesting party. All parties to the proceeding shall be notified of the issuance of any such subpoena. The procedures and limitations set forth in section 985 of this title shall apply to subpoenas issued under this section.

(b) Service of a subpoena issued pursuant to this section shall be by certified mail. Records produced in response to such a subpoena may be produced in person or by mail, common carrier, or such other method as may be agreed upon by the party requesting the subpoena and the custodian of records. The party requesting the subpoena may require the custodian of records to submit an affidavit certifying the authenticity and completeness of the records and explaining the omission of any record called for in the subpoena.

(c) Nothing in this section shall preclude any party from pursuing any form of discovery pursuant to the Federal Rules of Civil Procedure.

18 USC § 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part -- (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States --

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, **transmission, or transfer** represent the proceeds of some form of unlawful activity and knowing that such transportation, **transmission, or transfer** is designed in whole or in part --

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the transportation, **transmission, or transfer** whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent --

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term ''represented'' means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1), or a transportation, **transmission, or transfer** described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of --

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section --

(1) the term ''knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity'' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term ''conducts'' includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term ''transaction'' includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, **use of a safe deposit box,** or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term ''financial transaction'' means

(A) a transaction **which in any way or degree affects interstate or foreign commerce** (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, **or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft,** or
(B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term ''monetary instruments'' means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term ''financial institution'' has the definition given that term in section 5312(a)(2) of title 31, United States Code, **or** the regulations promulgated thereunder;

(7) the term ''specified unlawful activity'' means --

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving **(i)** the manufacture importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act); **(ii) kidnaping, robbery, or extortion; or (iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978;**

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), **section 1708 (theft from the mail),** section 2113 or 2114 (relating to bank and postal robbery and theft), or section 2319 (relating to copyright infringement) of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), **section 422 of the Controlled Substances Act (21 U.S.C. § 863),** section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, **any violation of section 9(c) of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act.;**

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S. C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term ''State'' includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if --

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(g)[1] NOTICE OF CONVICTION OF FINANCIAL INSTITUTIONS.-- If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

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[1] So in the original.

18 USC § 1957.

Engaging in monetary transactions in property derived from specified unlawful activity.

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are --

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section --

(1) the term ''monetary transaction'' means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or

to a financial institution (**as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title,** but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term ''criminally derived property'' means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term ''specified unlawful activity'' has the meaning given that term in section 1956 of this title.

18 USC § 1960.

PROHIBITION OF ILLEGAL MONEY TRANSMITTING BUSINESSES

(a) Whoever conducts, controls, manages, supervises, directs, or owns all or part of a business, knowing the business is an illegal money transmitting business shall be fined in accordance with this title, or imprisoned not more than 5 years, or both.

(b) As used in this section-

(1) the term 'illegal money transmitting business' means a money transmitting business that affects interstate or foreign commerce in any manner or degree and which is knowingly operated in a State-

(A) without the appropriate money transmitting State license; and

(B) where such operation is punishable as a misdemeanor or a felony under State law;

(2) the term 'money transmitting' includes but is not limited to transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier; and

(3) the term 'State' means any State of the United States, the District of Columbia, the Northern Mariana Islands, and any commonwealth, territory, or possession of the United States.

28 USC § 1355. Fine, penalty or forfeiture

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

(b)(1) A forfeiture action or proceeding may be brought in-

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

(c) In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

31 USC 5317. Search and forfeiture of monetary instruments

(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material omission or misstatement. The Secretary shall include a statement of information in support of the warrant. On a showing of probable cause, the court may issue a search warrant for a designated person or a designated or described place or physical object. This subsection does not affect the authority of the Secretary under another law.

(b) Searches at Border. -- For purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.

(c) If a report required under section 5316 with respect to any monetary instrument is not filed (or if filed, contains a material omission or misstatement of fact), the instrument and any interest in property, including a deposit in a financial institution, traceable to such instrument may be seized and forfeited to the United States Government. **Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5324(b), or any property traceable to such property, may be seized and forfeited to the United States Government.** A monetary instrument transported by mail or a common carrier, messenger, or bailee is being transported under this subsection from the time the instrument is delivered to the United States Postal Service, common carrier, messenger, or bailee through the time it is delivered to the addressee, intended recipient, or agent of the addressee or intended recipient without being transported further in, or taken out of, the United States.

31 USC 5324.

Structuring transactions to evade reporting requirement prohibited

(a) No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction --

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

(b) No person shall, for the purpose of evading the reporting requirements of section 5316 --

(1) fail to file a report required under section 5316, or cause or attempt to cause a person to fail to file such a report;

(2) file or cause or attempt to cause a person to file a report required under section 5316 that contains a material omission or misstatement of fact; or

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any importation or exportation of monetary instruments.

* U.S. G.P.O.:1992-342-499:60338