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COMMENDATIONS

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

John Appelquist (Missouri, Western District), by Thomas E. Den Ouden, Supervisory Senior Resident Agent, FBI, Springfield, for his professional and legal skill in the successful prosecution of a bank officer in an embezzlement case.

Terrence Berg (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for his valuable assistance to the Clandestine Laboratory Enforcement Team in conducting laboratory recertification training.

Bryan Best (Texas, Southern District), by Jack R. Stern, District Attorney, Fort Bend County, Texas, for his excellent representation of the State of Texas, and for his extraordinary efforts in prosecuting a difficult and complex case.

Robert J. Boitmann (Louisiana, Eastern District), by Anthony E. Daniels, Assistant Director, FBI, Quantico, Virginia, for his participation in an Insurance Fraud Seminar at the FBI Academy, and for his excellent presentation on insurance fraud prosecutions.

Robert E. Bulford (Ohio, Northern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for serving as a guest instructor at an Advanced Informant/Conspiracy School hosted by Kent State University in Kent, Ohio.

Timothy Burgess (District of Alaska), by Wallace D. Loh, Dean, University of Washington School of Law, Seattle, for his participation and excellent presentation at the 10th Annual National Fishery Law Symposium.

Charles Calhoun, Michael Solis and ***John Lynch*** (Georgia, Middle District), by Thomas W. Stokes, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Atlanta, for their outstanding legal support in a number of significant cases involving drug trafficking organizations, and for their commitment to the aggressive prosecution of all violations of federal law.

Robert DeSousa (Pennsylvania, Middle District), by William H. Ryzewic, Executive Director for Industrial and Facility Management, Naval Sea Systems Command, Department of the Navy, Washington, D.C., for his participation and excellent presentation on the affirmative civil enforcement program at the recent NAVSEA Federal Employees' Compensation Act (FECA) Conference in Washington, D.C.

Andrew Dunne (District of Minnesota), by Mark Shields, Superintendent, Bureau of Criminal Apprehension, St. Paul, for his professional and legal assistance in uncovering the most sophisticated hydroponic indoor marijuana grow in Minnesota history, and for his successful prosecution of four co-conspirators in the ensuing drug and money laundering case.

Robert A. "Bud" Ellis (Washington, Eastern District), by Earl M. Gurney, Manager, and L. Pete Peterson, Special Investigator, Department of Social and Health Services, Yakima, for his excellent representation and cooperative efforts in successfully prosecuting two complex welfare fraud cases.

Patrick Flachs (Missouri, Eastern District), by James S. Triner, Deputy Director, Midwest Environmental Enforcement Association, Elgin, Illinois, for his excellent presentation on U.S. v. Goodner at the 37th Periodic Conference held recently in St. Louis.

Jennifer Granholm (Michigan, Eastern District), by State Senator Lana Pollack, 18th District, Lansing, for her excellent presentation at a workshop sponsored by a newly formed coalition of women entitled "Enough is Enough--Women Against Gun Violence."

John R. Halliburton (Louisiana, Western District), by Nancy Kreitzer, Acting Director, Appeals and Litigation Division, Federal Crop Insurance Corporation (FCIC), Department of Agriculture, Washington, D.C., for his excellent presentation on witness preparation, and for his successful prosecution of a recent FCIC case.

Patrice M. Harris (Louisiana, Eastern District), by Charles R. Sekerak, Assistant Inspector General for Investigations, Railroad Retirement Board, Chicago, for her professionalism and legal skill in the successful resolution of a complicated case involving railroad retirement benefits totalling $100,000 that continued to be accepted by a family long after the death of the retiree and his widow.

Amy Hay and ***Albert Schollaert*** (Pennsylvania, Western District), by Loretta E. Alkalay, Assistant Chief Counsel, Federal Aviation Administration, Jamaica, New York, for providing legal assistance during a USAir mechanics strike, and for standing ready to be of service in the event of an emergency.

Suzanne Hayden and ***Elizabeth O'Leary*** (District of Alaska), by Burdena G. Pasenelli, Special Agent in Charge, FBI, Anchorage, for their invaluable legal assistance to task force members concerning the arrest of members of a narcotics organization, and also responding to questions concerning forfeiture issues.

Steven Holtshouser (Missouri, Eastern District), by John P. Sutton, Special Agent in Charge, Drug Enforcement Administration, St. Louis, for his expert legal and professional skill in obtaining a guilty plea to conspiracy to manufacture methamphetamine after only three days of an anticipated two-week trial.

Brad C. Lewis and ***Eugene Illovsky*** (California, Eastern District), by David F. Dickson, Regional Inspector General for Investigations, Department of Agriculture, San Francisco, for their outstanding successful efforts in prosecuting a case involving nine defendants who fraudulently issued crop-subsidy and crop-loan checks to their friends for a total of approximately $120,000.

Charles Lewis (Texas, Southern District), by Robert W. Koppe, Jr., Assistant Director, Office of Strategic Analysis, Financial Crimes Enforcement Network, Arlington, Virginia, for his participation in the Mexican bank draft conference in Scottsdale, Arizona, and for sharing his vast experience in this field.

Tom Luedke (District of Kansas), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for his professional and legal skill in obtaining the guilty verdict of an individual for child molesting at Fort Riley, Kansas.

Janice Kittel Mann (Michigan, Western District), by Martin J. Suuberg, Deputy Solicitor, Department of the Interior, Washington, D.C. for her success in obtaining an excellent settlement of two difficult and complex lands cases.

Larry C. Marcy (Texas, Southern District), by Martin R. Steinmetz, Attorney, Office of the Solicitor, Department of the Interior, Tulsa, Oklahoma, for his professionalism and legal skill in obtaining the dismissal of a suit against the government involving 844 acres of land acquired for the Lower Rio Grande Valley National Wildlife Refuge valued at $1.8 million.

Mark Miller (Missouri, Western District), received a Certificate of Appreciation from Cynthia A. Hillman, Chairperson, The Greater Kansas City Federal Executive Board, in recognition of his valuable support and assistance in Operation Andrew-Airlift to Homestead, Florida.

Jose Angel Moreno (Texas, Southern District), by Roberto Serna, District Attorney, 293rd Judicial District, Eagle Pass, for his valuable assistance and legal guidance in obtaining a guilty plea in the capital murder case of a Dimmit County Sheriff.

James V. Moroney and ***John D. Sammon*** (Ohio, Northern District), by F. J. Marion, Postal Inspector, U.S. Postal Service, Cleveland, for their successful prosecution of the most significant telemarketing fraud case in the Northern District of Ohio, involving 60,000 citizens, 14 banking institutions across the country, and losses estimated at over $10 million.

David J. Novak (Texas, Southern District), by Alejandro Diaz de Leon, Regional Attache, Attorney General's Office of Mexico, San Antonio, for his valuable assistance and cooperative efforts in "Operation Choza Rica," a money laundering case before a Mexican court.

Peter M. Ossorio (Missouri, Western District), by James C. Esposito, Special Agent in Charge, FBI, Kansas City, for his successful prosecution of an intricate and complex narcotics trafficking case in which nineteen defendants in four jurisdictions have either pled guilty or were convicted.

Kent W. Penhallurick (Ohio, Northern District), by K. C. Weaver, Regional Chief Postal Inspector, U.S. Postal Service, Bala-Cynwyd, Pennsylvania, for his successful efforts in resolving a case involving the issuance of administrative subpoenas for financial records of an individual suspected of fraud and abuse in filing workers' compensation benefit claims.

Stephen C. Peters and ***Linda S. Kaufman*** (District of Colorado), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding professional and legal skill in the successful prosecution of a criminal case in which a consulting firm was responsible for losses in excess of $35 million to more than 600 individuals. ***Virginia Browne*** provided valuable paralegal services.

Andrew S. Quinn (Pennsylvania, Middle District), by D. Michael Crites, United States Attorney, and Jeffery P. Hopkins, Assistant United States Attorney, Southern District of Ohio, for his excellent presentation on health care fraud, and for his valuable assistance and guidance in the ACE program.

Steve Reynolds (Alabama, Middle District), by J. W. Holland, Jr., Inspector in Charge, U.S. Postal Service, Birmingham, for his successful prosecution of a Project Triggerlock case in which a rural carrier was assaulted and a shooting incident occurred.

Joan G. Ruffenach (District of Arizona), by David C. Jones, Senior U.S. Probation Officer, U.S. District Court, Mesa, for her valuable insight and legal advice in the development of a search and seizure policy for the U.S. Probation Office, one of the few districts that has court-authorized search policy and procedures in place.

Stephen L. Schirle (California, Northern District), by Loren A. N. Buddress, Chief U.S. Probation Officer, U.S. District Court, San Francisco, for his valuable assistance and guidance in responding to a variety of questions concerning firearms policy.

Gregory Schuetz (Michigan, Eastern District), by Randy Toledo, Trial Attorney, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his valuable assistance rendered to Danish authorities in bringing a homicide case to a successful conclusion.

Jimmy Sledge (Texas, Southern District), by Louis G. Brewster, Chief U.S. Probation Officer, U.S. District Court, Houston, for his valuable assistance and cooperative efforts above and beyond the call of duty in a recent revocation proceeding.

Bernard Smith, Craig Morford and ***Ann Rowland*** (Ohio, Northern District), by Jack Chivatero, District Director, Internal Revenue Service (IRS), Cleveland, for their outstanding team effort in assisting IRS in collecting funds on deposit with the District Court for bond as well as interest on a criminal fine.

Christian H. Stickan (Ohio, Northern District), by Harold T. Duryee, Director, Department of Insurance, Columbus, for attending the National Association of Insurance Commissioners' meeting in Cincinnati, and for his excellent presentations before the Special Committee on Anti-Fraud and the State Insurance Department attorneys.

Thomas P. Swaim (North Carolina, Eastern District), by J.M. Davenport, Provost Marshal, Marine Corps Air Station, Cherry Point, for his excellent presentation on asset forfeiture at a seminar for the Security Department of the Marine Corps Air Station, and other regional law enforcement personnel. Also, by David M. Cheesman, Jr., Investigator, Dare County Sheriff's Office, Manteo, for his participation in a training program for local and regional law enforcement personnel.

James H. Swain (Pennsylvania, Eastern District), by Stephen N. Marica, Assistant Inspector General for Investigations, Small Business Administration, Washington, D.C., for his excellent presentation on asset forfeiture at the annual training conference held recently in Baltimore, Maryland.

Allan N. Taffet (New York, Southern District), by Colonel Charles W. Beardall, Chief, Litigation Division, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for his successful efforts in obtaining a motion to quash after persuasively addressing sovereign immunity and federal regulatory reasons for not permitting state courts to compel federal employees to testify in private litigation.

Sandra L. Teters and ***Jeffrey L. Bornstein*** (California, Northern District), by John W. Magaw, Director, U.S. Secret Service, Washington, D.C., for their valuable assistance and cooperative efforts in successfully prosecuting a complex credit card fraud case that recorded losses in excess of $1 million.

Stephen A. West (North Carolina, Eastern District), by David R. Chambers, Attorney-in-Charge, Office of General Counsel, Department of Agriculture, Raleigh, for his excellent representation and successful resolution of the first of a series of cases on Farmers Home Administration regulations.

James W. Winchester (District of Colorado), by Tom L. Thompson, Deputy Regional Forester, Rocky Mountain Region, Department of Agriculture, Lakewood, for his outstanding efforts in bringing two cases to a successful conclusion.

Ewald Zittlau (Pennsylvania, Middle District), by Judge Stewart Dalzell, U.S. District Court, Philadelphia, for his demonstration of professional and legal skill during the trial of two separate drug cases, and for the successful outcome of both cases before the court.

SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF LOUISIANA

John Halliburton, Assistant United States Attorney for the Western District of Louisiana, was commended by James A. Endicott, Jr., General Counsel, Department of Veterans Affairs (VA), Washington, D.C., for his outstanding professional and legal services, and for obtaining a favorable decision from the United States Court of Appeals for the Fifth Circuit in Rapides Regional Medical Center v. Secretary, Department of Veterans Affairs, No. 91-5097 (5th Cir. Sept. 24, 1992).

In August, 1991, Rapides Regional Medical Center filed suit against the VA alleging that they violated the Competition in Contracting Act by entering into an arrangement with another private hospital to share the use of cancer radiation therapy equipment. The District Court agreed with Rapides and enjoined VA and the private hospital from implementing the sharing arrangement. The Court of Appeals, however, reversed the District Court's decision and vacated the permanent injunction. This decision will permit the VA Medical Center in Alexandria, Louisiana and the private hospital to proceed with their plans to share the use of $1.5 million equipment. As a result, VA will be able to provide better care to veterans in the area at less cost. This decision has important ramifications beyond validating the sharing arrangement in Alexandria. In 1991, VA shared $59.6 million in specialized medical resources with community health-care facilities under sharing contracts. This decision acknowledges the validity of the policies and procedures by which VA carries out this valuable program.

The Department of Veterans Affairs received outstanding legal assistance from the United States Attorney's office, and especially from ***John R. Halliburton.*** After the District Court's decision, Mr. Halliburton assisted ***Jonathan R. Siegel*** of the Appellate Staff in preparing two legal memoranda setting forth the Government's legal arguments and responding to Rapides' arguments. His work directly resulted in the Government's success.

* * * * *

Operation Hercules In The Southern District Of New York

Paul Gardephe and ***Elizabeth Glazer, Assistant United States Attorneys for the Southern District of New York,*** were commended by Captain Robert Martin, Special Investigations Division of the New York Police Department, for their professionalism and outstanding cooperation in the successful prosecution of Operation Hercules.

Operation Hercules, a task force consisting of homicide detectives from the New York Police Department, and a number of federal, state and local law enforcement officials, was created to solve a series of murders that occurred in the Bronx during 1990 and 1991. As a result of this task force, ten people were indicted in September, 1992 on racketeering and numerous other charges. The indictment alleges that the group, which became known as the "Cowboys," planned the kidnapping of at least six successful narcotics traffickers. Posing as police officers, the Cowboys would "arrest" their victims and hold them for ransom. Typically, they tortured their victims. On one occasion they murdered a victim when his family failed to pay the ransom; on another occasion they attempted to murder a victim. In addition to the murder of the kidnap victim, the indictment also charges the group with three other murders. Captain Martin stated that this case could serve as a textbook on how the police and prosecutors can work together to see that justice is served.

* * * * *

"Unsolved Mysteries" Case Resolved In The Western District Of Oklahoma

On October 23, 1992, ***H. Lee Schmidt*** and ***Nicholas Lillard, Assistant United States Attorneys for the Western District of Oklahoma,*** announced the conviction of two individuals for conspiracy, mail and wire fraud, and money laundering. The defendants were identified and located following an "Unsolved Mysteries" television broadcast. Another man is still being sought. The defendants devised an elaborate scheme involving the sale of phony medical supply distributorships to investors nationwide. The scam was accomplished through national advertising and a fake warehouse purportedly filled with medical supplies, but actually was stocked with empty boxes. The FBI estimated that at least 140 people were victimized by the scam, and losses were estimated at $1.3 million. Records show that both defendants were involved in a similar scheme in Alabama approximately twelve years ago.

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HONORS AND AWARDS

ATTORNEY GENERAL'S ANNUAL AWARDS

The Attorney General's 41st Annual Awards Ceremony is scheduled to be held in Washington, D.C. on December 14, 1992. The following is a list of the United States Attorneys and Assistant United States Attorneys who are award recipients:

Distinguished Service Awards

United States Attorneys

Douglas N. Frazier
Former United States Attorney
District of Nevada

Andrew J. Maloney
United States Attorney
Eastern District of New York

Assistant United States Attorneys

Florida, Southern District
Myles Malman
Guy Lewis
James G. McAdams, III
Michael P. Sullivan

New York, Northern District
Michael Olmsted

West Virginia, Southern District
Nancy C. Hill

New York, Southern District
John Gleeson
Laura A. Ward
Patrick J. Cotter
James Orenstein

California, Central District
James R. Asperger

John Marshall Awards

Participation In Litigation:
Pennsylvania, Eastern District
Joseph T. Labrum, III
Kristin R. Hayes
Robert A. Zauzmer
Jeffrey M. Lindy

Handling Of Appeals:
Florida, Southern District
Linda Collins Hertz

Equal Employment Opportunity:
Eastern District of Louisiana
Brian A. Jackson

Asset Forfeiture:
Northern District of Iowa
Robert L. Teig
Martin J. McLaughlin

Excellence In Legal Support
Central District of California
Anastasia Clubb, Paralegal

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SOUTHERN DISTRICT OF FLORIDA

Roberto Martinez, United States Attorney for the Southern District of Florida, and several members of his staff, received Department of Justice awards for their role in protecting the civil rights of the victims of Hurricane Andrew in Southern Florida. The awards acknowledged that Mr. Martinez placed a high priority on the protection of civil rights in a time of severe crisis. He remained personally involved in directing the programs, and providing whatever resources were necessary to get the job done. The staff members who received awards are: ***Daniel Gelber; Marcos Jimenez; Karen Rochlin; Daryl Trawick;*** and ***Patrick White.***

Immediately after President Bush declared the State of Florida a disaster area on August 24, 1992, Mr. Martinez requested that a special program be undertaken to protect the civil rights of the storm victims. He established a Task Force to address the enforcement of fair housing laws and installed special phone lines so that Department of Housing and Urban Development officials could receive complaints of housing discrimination. The telephone numbers were publicized in local papers and on September 4, 1992, the Department filed a fair housing lawsuit alleging a pattern or practice of discrimination.

After a state court postponed an election in the impacted areas for one week, Mr. Martinez asked the Department to establish special voting procedures to ensure that minority voters would have a fair opportunity for effective participation in the storm areas. A broad-based and extended absentee voting period was established in Dade County, with the federal government providing vehicles and telephones to assist in the absentee voting.

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EASTERN DISTRICT OF NORTH CAROLINA

Margaret Person Currin, United States Attorney for the Eastern District of North Carolina, was presented the James Iredell Award on October 20, 1992, at a banquet held in her honor. The award is presented annually by Phi Alpha Delta to an individual who has made significant contributions to the legal profession and the Campbell University School of Law, Buies Creek, North Carolina.

The award was inspired by the life and writings of James Iredell who fought for North Carolina's ratification of the Constitution. His efforts gained him national prominence and led to his appointment to the United States Supreme Court. Mrs. Currin is the second woman and the first Campbell law graduate to receive this prestigious award.

Mrs. Currin served as Assistant Dean for Placement and Alumni Relations at the University in 1981 prior to her appointment as United States Attorney for the Eastern District of North Carolina. She is one of only four women out of the 93 United States Attorneys in the nation to serve in that position.

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INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC.

On November 16, 1992, the International Drug Conference, sponsored by the International Narcotic Enforcement Officers Association, Inc., Albany, New York, was held in West Palm Beach, Florida. Special honors and awards were presented to the following Assistant United States Attorneys for their outstanding service and dedication to duty in the area of law enforcement:

Florida, Southern District
Edward Ryan
Theresa Van Vliet

Georgia, Northern District
James T. Martin

Illinois, Southern District
James Porter

New York, Northern District
Grant Jacquith

Pennsylvania, Eastern District
Seth Weber

Texas, Southern District
Bertram Isaacs
Nancy Herrera

District of Utah
David J. Schwendiman

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DEPARTMENT OF JUSTICE HIGHLIGHTS

Transition

On November 9, 1992, Attorney General William P. Barr advised all Department of Justice Component Heads that President Bush is committed to a smooth and organized transition process while we maintain the ongoing operations and responsibilities of government. He wants us to help President-elect Clinton and his new team to the fullest extent possible.

Dan Levin has been designated to serve as the Department's Transition Officer. Mr. Levin will coordinate all contacts with the President-elect's transition staff, and will provide additional guidance when it becomes available. His telephone number is: (202) 514-3892.

Anthony C. Moscato will serve as the Transition Officer for the Executive Office for United States Attorneys and the Offices of the United States Attorneys. His telephone number is: (202) 514-2121.

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Ethics Laws And Regulations

A package containing important ethics materials, including the Executive Order on Conduct and Standards of Conduct for government officers and employees, has been distributed to all United States Attorneys and Department of Justice employees. You are requested to read and retain them for future reference.

For additional copies, please call the Ethics Program Office at (202) 514-3452. If you have any questions or need advice concerning conduct matters, please call Donna Henneman, Office of Legal Counsel, at (202) 514-4024.

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Proposed Rules On Communications With Represented Persons

On November 20, 1992, the Department of Justice announced the publication in the Federal Register of a proposed set of rules regarding the circumstances under which government attorneys may engage in communications with persons who are represented by counsel. The proposal is intended to provide bright-line guidance to federal prosecutors and law enforcement officials in performance of their obligations to enforce federal laws. The proposal is also intended to resolve a long-standing problem involving the uneven application of sometimes conflicting state and local attorney ethical rules addressing such communications to government attorneys involved in criminal and civil law enforcement. State and local rules, which were originally designed for private attorneys conducting civil litigation, have provided little practical guidance to federal prosecutors and have been subject to widely differing interpretations. The proposed rules outline for the first time a clear, comprehensive, and uniform set of guidelines for Department of Justice attorneys, including amendments to the United States Attorneys' Manual and the publication of a detailed commentary explaining and interpreting the rules. The publication of the proposed rules in the Federal Register will be followed by a 30-day period for public comment.

The proposal is the culmination of more than a year and a half of study and analysis within the Department, under the auspices of a subcommittee of the Attorney General's Advisory Committee of United States Attorneys headed by Deborah J. Daniels, Director, Executive Office for Weed and Seed, and United States Attorney for the Southern District of Indiana, and F. Dennis Saylor, Special Counsel to the Assistant Attorney General for the Criminal Division. Dozens of career law enforcement attorneys contributed to the development of the proposal, including representatives from the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and the Tax Division, as well as the FBI, the DEA, and more than two dozen United States Attorneys' offices.

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Death Penalty For Federal Crimes

Attached at the Appendix of this Bulletin as Exhibit A is a copy of a proposed rule published in the Federal Register on November 30, 1992, establishing the procedures the government will follow in administering the death penalty for federal crimes. The procedures would be followed by government attorneys, the United States Marshals Service, and the Bureau of Prisons in obtaining and executing death sentences. Public comments on the proposed rule must be submitted within thirty days of its publication. The Department expects publication of a final rule shortly thereafter.

The rule was necessitated by Congress' 1984 repeal of 18 U.S.C. §3566, which had provided that federal executions would be carried out in the manner prescribed by the state in which the sentence was imposed. The Department said the need for the rule has become imperative with the growing number of cases under 21 U.S.C. §848, which provides the death penalty for certain drug-related offenses, and with recent Supreme Court decisions indicating the vitality of the capital sentencing procedures under 18 U.S.C. §1111. Under the proposed rule, federal executions would be conducted by the Bureau of Prisons and the United States Marshals Service. The rule establishes lethal injection as the method of execution. The proposal also establishes rules for access to prisoners under sentence of death and accommodates the interest of the media and the public in reports of the execution.

For further information, please contact Thomas R. Kane, Assistant Director, Information Policy and Public Affairs, Federal Bureau of Prisons, 320 First Street, N.W., Room 641, Washington, D.C. 20534.

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Fiscal Year 1993 Program Plans For Four Bureaus Of The Office Of Justice Programs

On November 10, 1992, Acting Assistant Attorney General Steven D. Dillingham announced that four of the Bureaus within the Office of Justice Programs (OJP) of the Department of Justice recently published their Fiscal Year 1993 Program Plans in the Federal Register for public comment. The plans describe the program areas each Bureau is considering for support and funding during the fiscal year.

The Bureau of Justice Assistance (BJA) Fiscal Year 1993 Program Plan was published on November 9, 1992. BJA is supporting various innovative demonstration and training and technical assistance programs to enhance state and local law enforcement efforts. Highlights of its plan include a new Regional Drug Prosecution Unit Program, a Financial Investigations and Money Laundering Prosecution Demonstration Program, a Corrections Options Grant Program, a Comprehensive Gang Initiative, and a Statewide Intelligence System Program.

The Bureau of Justice Statistics (BJS) published its plan on November 4, 1992. In FY 1993, BJS will continue its more than two dozen statistical series, with special efforts being dedicated to the collection and analysis of data on violent crime and criminal victimization. in particular, BJS will assess and analyze data from national and local incident-based reporting systems and document its benefits to law enforcement agencies.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) proposed plan, published for comment on November 9, 1992, has a new emphasis on a program strategy that is designed to reduce serious, violent, and chronic juvenile crime through a range of prevention, intervention, and treatment services, including a range of graduated options.

The Office for Victims of Crime (OVC) plan was published on November 4, 1992. It describes OVC's planned training and technical assistance for criminal justice system professionals and victim service providers, including new and advanced techniques in the crime victims field, as well as continuing efforts by OVC to establish and improve assistance programs for Native American crime victims.

The National Institute of Justice (NIJ), another OJP component, is completing its plan and expects to publish it soon.

If you have any questions, please call the Office of Congressional and Public Affairs, Office of Justice Programs, at (202) 307-0703.

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OPERATION WEED AND SEED

Weed And Seed Implementation Manual

On October 29, 1992, Deborah J. Daniels, Director, Executive Office for Weed and Seed, issued a Weed and Seed Implementation Manual to all United States Attorneys, together with various other material to assist in starting an Operation Weed and Seed program.

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

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Weed And Seed Handbook

On November 6, 1992, Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, issued a handbook to all United States Attorneys with Weed and Seed demonstration sites in their district, as well as all United States Attorneys who are currently developing Weed and Seed strategies. The handbook, entitled "The Three R's for Adults: Rights-Responsibilities-Remedies," was prepared by several law students working in Philadelphia law firms and the United States Attorney's office this past summer, and was designed to promote neighborhood revitalization -- a key goal of Operation Weed and Seed. Some of the topics of discussion are: duties of property owners; rights of tenants; remedies under the Philadelphia Municipal Code; falsifications and misrepresentations in license applications; liability of business owners; equitable relief; quo warranto; federal statutory remedies; victims witness services; and the Crime Victims' Compensation Board.

This handbook can serve as a model for other districts in compiling their own listings of laws that aid citizens in Weed and Seed neighborhoods. If you have any questions or would like a copy of the handbook, please call Andrea Diehl, Public Affairs Specialist, at (215) 597-2556.

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DRUG ISSUES

Random Drug Testing In The United States Attorneys' Offices

On November 6, 1992, Harry H. Flickinger, Assistant Attorney General for Administration, and Anthony C. Moscato, Acting Director, Executive Office for United States Attorneys, issued a memorandum to all United States Attorneys and Administrative Officers concerning the status of random testing in the United States Attorneys' offices.

As a result of implementation visits conducted by the Executive Office for United States Attorneys and the Drug-Free Workplace Office, and subsequent employee challenges to their designation for random testing, it was discovered that the requisite approval for testing a category of employee referred to as "drug prosecutor" had not been obtained from the District of Columbia District Court as required by the Court of Appeals' decision in Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989). To remedy this situation, the Department's OBD Order 1792.1A has been amended to include a definition and category of "drug prosecutor," and has been sent to the District Court for review. It is impossible to predict when the District Court will take up this matter and resolve it.

In the interim, upon the advice of the Office of General Counsel, Justice Management Division, and the Civil Division, random testing for individuals who have been designated as drug prosecutors is being suspended. Random testing for presidential appointees and employees with top secret clearances will continue in the nineteen United States Attorneys' offices visited in 1991. This temporary suspension of random testing has no impact on applicant testing; therefore, implementation of pre-employment testing should continue uninterrupted as discussed with the Administrative Officers at the national conference in St. Louis, Missouri.

Additional information and guidance will be furnished as soon as the District Court has decided whether the plan to randomly test drug prosecutors is constitutional. If you have any questions, please call the Drug-Free Workplace Program Office at (202) 514-6716, or the Legal Counsel's office, Executive Office for United States Attorneys, at (202) 514-4024.

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CRIME ISSUES AND STATISTICS

Four Percent More Prisoners In First Half Of 1992

The Bureau of Justice Statistics, Office of Justice Programs, has announced that the nation's state and federal prison population grew by 31,449 inmates -- just under four percent -- during the first half of the year to reach a record 855,958 men and women as of June 30, 1992. The six-month increase was well below the record 47,000 increase in prisoners recorded during the first half of 1989. Other statistics were reported as follows:

• This year's increase was the equivalent of about 1,209 more inmates every week, compared to 1,160 per week during the first half of 1991 and more than 1,800 additional prisoners per week during the first half of 1989.

• The 12-month growth from June, 1991 to June, 1992, was 6.4 percent -- an increase of more than 51,000 inmates. Although this is the lowest rate of growth since 1984, the total increase in prisoners represents the third largest annual increase on record.

• During the first half of the year, the federal prison population grew by 8.1 percent, compared to an increase of 3.4 percent among the fifty states and the District of Columbia.

• Prisoners in the Western states increased by 3.2 percent during the first half of the year, compared to 3.6 percent increase in the Northeast. Southern and Midwestern prisoner counts grew by 3.4 and 3.6 percent, respectively.

• One state recorded double-digit half-year increases -- West Virginia by 14.3 percent. Twelve states had prisoner growth of at least ten percent for the twelve months ending June 30. Three states recorded declines during this one-year period.

• During the first half of this year the number of female inmates in state and federal prisons grew 3.8 percent, the same increase among men. As of June 30, women prisoners accounted for 5.8 percent of all prisoners nationwide.

• The number of prisoners per capita on June 30, 1991, also reached a record 319 sentenced offenders (inmates sentenced to a year or more in prison) held in state and federal prisons per 100,000 residents. There were 35 sentenced female offenders in prison for every 100,000 females in the population -- for males the incarceration rate was almost eighteen times higher, 618 sentenced male prisoners for every 100,000 males.

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Almost 2,500 Prisoners Await Execution

On October 23, 1992, the Bureau of Justice Statistics, Office of Justice Programs, reported that eight states executed fourteen prisoners last year, increasing to 157 the total number of executions in the United States between 1976, when the Supreme Court reaffirmed the death penalty's constitutionality, and December 31, 1991. Those executed during 1991 had spent an average of nine and eight months awaiting execution, about one year and nine months longer on the average than the twenty three people executed during 1990. Other statistics are included in the report as follows:

• Since 1977, 4,101 prisoners have been under a death sentence for varying lengths of time. Of these men and women, the 157 who have been executed account for 3.8 percent of the total. Whites, blacks and Hispanics had almost identical probabilities of being executed -- 4 percent for white prisoners and 3.8 percent for both black and Hispanic inmates.

• As of last December 31, 34 states and the federal system had 2,482 prisoners awaiting execution -- a 5.8 percent increase over the number held at the end of 1990. The most were in Texas (340), Florida (311), California (301), Pennsylvania (137), Illinois (132), Oklahoma (125), Alabama (119), Ohio (111) and Georgia (101).

- About 70 percent of the offenders on death row for whom criminal history information was available had a prior felony conviction, and about one in twelve had a prior homicide conviction.

- About 40 percent of those sentenced to death were involved with the criminal justice system at the time they committed their new capital offense. Half of these were on parole. The rest were in prison, had escaped from prison, were on probation or had other charges pending against them.

- Almost 15 percent of those sentenced to death from 1988 through 1991 had received two or more death sentences.

- The death row inmates were 59 percent white, 39.6 percent black, 0.9 percent American Indian, and 0.5 percent Asian. Hispanic prisoners accounted for 7.4 percent of those sentenced to capital punishment. Thirty-four of the people awaiting execution (1.4 percent) were women.

- Half of all death row prisoners were 34 years old or older. About 58 percent were held by Southern states. Western states held 21 percent, Midwestern states, 15 percent, and the Northeastern states almost 6 percent. One prisoner was in federal custody.

- During 1991, five prisoners were executed in Texas; two in Florida and Virginia; and one in Georgia, Louisiana, Missouri, North Carolina, and South Carolina.

- Of the 157 executions in sixteen states form 1977 through 1991, 59.9 percent were white (including one white female), and 40.1 percent were black. There were ten Hispanic male prisoners executed, of whom nine were white and one black.

- Of those executed since 1977, 61 were by lethal injection, 90 were electrocuted, five received lethal gas and one execution was by a firing squad.

- The jurisdictions without a death penalty as of the end of last year were Alaska, the District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

The Bureau of Justice Statistics Bulletin entitled, "Capital Punishment 1991" and other information and publications may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850. The telephone number is: 1-301-251-5500. The toll-free number is: 1-800-732-3277.

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Most Felony Defendants Released Before Trial

According to the Bureau of Justice Statistics, Office of Justice Programs, an estimated 65 percent of the men and women arrested on felony charges in the nation's 75 largest counties during May, 1990 were released from custody before their trial or final case disposition. The remainder were detained in jail until their case disposition. Director Steven D. Dillingham stated that perhaps the most significant study findings were that among felony defendants granted pretrial release, 24 percent failed to appear for a scheduled court hearing, and 18 percent were rearrested while on release. Almost two-thirds of the rearrests were for new felony offenses and about one-half of those rearrested for a felony were again released from custody.

The Bureau's National Pretrial Reporting Program collected the data from a sample of state court felony case filings. Each case was tracked for at least one year following the filing of charges or through disposition and sentencing if final judgment occurred in less than one year. Other significant findings were:

- About 6 percent of all felony defendants were held in custody without bail. About a third of those charged with murder were denied bail.

- Approximately 60 percent of the pretrial releases did not require the defendant to post bond. The most frequent type of discharge from custody after arrest, granted to 26 percent of felony defendants, was released on recognizance in which the defendant signs an agreement to appear in court as scheduled.

- For defendants for whom bail was set, the more serious the felony charge, the higher the bond. Nearly two-thirds of murder defendants and nearly half of rape defendants had bonds set at $20,000 or more.

- Among the defendants who were not released before trial (35 percent), five out of six could not post bail, and one in six was held without bail.

- Among the defendants with a set bail, the likelihood of pretrial release decreased as the amount of bail increased. Two-thirds of those with a bail of less than $2,500 were released, compared to a third of defendants with bail set at $10,000 or more.

- Among defendants with bail set at $10,000 or more, those facing drug-related charges were the most likely to secure release.

- Defendants with an active criminal justice status or an extensive criminal record were less likely to be released before trial. While about half of those with two or more prior convictions were released, about four-fifths of those with no prior convictions were released.

- Of those released after being charged with a violent offense, 19 percent failed to appear in court.

- Among released defendants, the likelihood of rearrest was highest among those charged with property and drug offenses and among males, blacks, younger defendants, and those with the longest and most serious prior criminal histories. Thirty-two percent of the defendants with five or more prior convictions were rearrested while on pretrial release, compared to 13 percent of those with no prior convictions.

- A bench warrant to arrest a released defendant for failure to appear in court occurred most frequently for the following categories of released defendants: those charged with property or drug offenses, those who were released on unsecured bond or as the result of an emergency measure to reduce jail crowding, and those with prior records of failure to appear.

- In processing felony defendants, a clear priority was given to those detained in jail. Among defendants who were not released, half spent 37 days or less in jail pending the disposition of their cases, compared to a median of 125 days for released defendants.

• Within one year of case filing, 81 percent of released defendants and 96 percent of detained defendants had been adjudicated on their original felony arrest charge. Detained defendants were about three times as likely as were released defendants to be convicted and sentenced to a state prison.

• There is some evidence of a decline in the granting of pretrial releases to felony drug defendants. During 1988, the 75 largest counties released about 72 percent of such defendants, compared to 65 percent during 1990. Compared to 1988, defendants charged with violent or property offenses in 1990 were slightly more likely to secure release before trial.

• In 1990, the 75 largest counties held 37 percent of the national population and had almost 50 percent of the crimes reported to police.

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PROJECT TRIGGERLOCK
Summary Report

Project Triggerlock focuses law enforcement attention at local, state and federal levels on those serious offenders who violate the nation's gun laws. The following is a summary report of significant activity from April 10, 191 through October 31, 1992:

Description	*Count*	*Description*	*Count*
Defendants Charged	9,779	Prison Sentences	28,207 years
Defendants Convicted	5,537	Sentenced to prison	3,736
Defendants Acquitted	255	Sentenced w/o prison or suspended	338
Defendants Dismissed	601	Average Prison Sentence	91 months
Defendants Sentenced	4,074		

Charge Information

Defendants Charged Under 922(g) w/o enhanced penalty	2,238
Defendants Charged Under 922(g) with enhanced penalty under 924(e)	448
Defendants Charged Under 924(c)	3,537
Defendants Charged Under Both 922(g) and 924(c)	590
Defendants Charged Under 922(g) and 924(c) and (e)	6,890
Defendants Charged With Other Firearms Violations	2,889
Total Defendants Charged	9,779

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

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ENVIRONMENTAL ISSUES

Record $2 Billion Year For Environmental Enforcement

The Department of Justice announced that in FY 1992 it achieved a series of record successes in enforcing the nation's environmental laws, including the recovery of more than $2 billion in monetary payments. The Department's $2 billion recovery, a new annual record, comes from criminal penalties, including fines and restitution; civil penalties; Superfund cost recoveries and court-ordered hazardous waste cleanups; and natural resource damages. Combined with the three preceding "billion-dollar years," the 1992 results brought the Department's environmental enforcement record to over $5 billion won during the past four years. Several other records were set in both criminal and civil enforcement.

With respect to criminal enforcement, Acting Assistant Attorney General Vicki A. O'Meara of the Environment and Natural Resources Division, said that over half of all the indictments and convictions in the entire history of the program -- and 94 percent of the fines and penalties, and 69 percent of the actual prison time to be served for environmental crimes -- have come during the last four years. She stated, "By any measure, the Department's commitment to tough enforcement of our environmental laws has been demonstrated by our record. These extraordinary results are a tribute to the hard work by our staff attorneys and the United States Attorneys, as well as the Environmental Protection Agency and the FBI, which are largely responsible for investigating and referring these cases to us."

With respect to civil enforcement, Ms. O'Meara said, "The development of strategic enforcement efforts has helped us achieve these results. Among the areas we focused on last year were recalcitrant environmental violators, illegal transportation of hazardous wastes to and from Mexico, enforcement under the Clean Air Act regarding the chemical benzene, disposal of primary metals and industrial chemicals, and industrial waste pretreatment plants."

Some of the enforcement accomplishments for FY 1992 include:

- A record 191 criminal indictments.
- A record $163,064,344 in criminal penalties.
- A record $65.6 million recovered in civil penalties for environmental violations.
- A record $923 million recovered for natural resource damages.
- The largest environmental criminal penalty ever imposed -- $125 million -- and the largest single civil monetary settlement in history -- $900 million, both arising out of the Exxon Valdez oil spill. Exxon will reimburse the United States and the State of Alaska for all of their cleanup and damage assessment costs, and will restore, replace, or acquire the equivalent of the natural resources affected by the spill.

A complete summary of the recent accomplishments of the Environment and Natural Resources Division of the Department of Justice is attached at the Appendix of this Bulletin as Exhibit B.

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United States And Alaska Reach $32 Million Settlement With Alyeska

On November 25, 1992, the Department of Justice announced that the United States and the State of Alaska filed a settlement, valued at more than $32 million, in U.S. District Court in Anchorage, Alaska, to settle legal actions against Alyeska Pipeline Service Company, the company responsible for initial containment and cleanup of oil spills caused by vessels loaded at the Valdez Terminal. Alyeska is a Delaware corporation whose owners are Amerada Hess Pipeline Corporation, and the pipeline line companies of ARCO, Exxon, Mobil Alaska, Phillips Alaska, BP Alaska, and Unocal Alaska. The federal and state actions against Alyeska stem from the March, 1989 grounding of the T/V Exxon Valdez, owned by Exxon Shipping, on Bligh Reef in Alaska's Prince William Sound. Several of the vessel's cargo tanks ruptured as a result of the grounding and approximately eleven million gallons of Exxon's crude oil spilled into Prince William Sound.

Stuart M. Gerson, Assistant Attorney General for the Civil Division, said "The settlement that we and the State of Alaska have negotiated resolves the governments' claims that Alyeska had failed to maintain sufficient oil spill response capability on Prince William Sound. This failure became manifest in the wake of the Exxon Valdez oil spill. Added to our previous resolution of litigation with Exxon, the federal and state governments believe that this settlement properly redresses damages caused to the people of Alaska by making appropriate investments in the Alaska environment and assures that such a tragedy will not recur both in terms of prevention of and response to potential future spills." Mr. Gerson pointed out that the settlement provides for a restoration project through the purchase of forestry land for the State Park system, and also requires Alyeska to finance a number of projects that can be used to combat any future oil spill. Under the terms of the settlement agreement, valued in cash payments at approximately $32 million, Alyeska will provide:

- $14.5 million to construct storage facilities and boat response docks in Chenenga and Tatitlek in Prince William Sound;
- $7.5 million to purchase forestry land and place it in the Kachemak Bay State Park;
- $6 million to construct Shepherd Point Deepwater Port Access road project in Cordova, which includes rehabilitating two miles and building four miles for access to a deep water port which will serve as a response staging area in the event of future spills in southern Prince William Sound.
- $1.6 million to reimburse the United States for Coast Guard cleanup expenses;
- $1.5 million for Alaska Fisheries Tax payments to the affected municipalities;
- $200,000 to equip the government sections of the response command post in the Valdez Emergency Operations Center (VEOC) to be set up by Alyeska to respond to future oil spills in Prince William Sound. Alyeska firmly commits in the agreement to build the VEOC in the City of Valdez at an estimated cost of $14 million.

Federal and state claims, civil and criminal, against Exxon were resolved in a settlement of more than $1 billion and approved by the district court in October, 1991. (See, United States Attorneys' Bulletin, Vol. 39, No. 10, dated October 15, 1991, at p. 277.) Assistant Attorney General Gerson stated, however, that in negotiating that settlement, both the federal government and the state took care to reserve their rights to continue their actions to obtain civil damages against Alyeska for any violations of the law with regard to the grounding of the Exxon Valdez, the resulting oil spill, the containment or cleanup of that spill, or Alyeska's preparedness in responding to an oil spill.

Largest Natural Resource Damage Settlement Ever In The Central District Of California

On November 5, 1992, the Department of Justice, in conjunction with the National Oceanic and Atmospheric Administration, the Department of the Interior, the United States Attorney's office in Los Angeles, and the Environmental Protection Agency, announced that the United States and the State of California filed a proposed consent decree to settle for $45.7 million a dispute involving the liability of over 150 local government agencies in the Los Angeles area of claims for natural resource damages and Superfund cleanup costs resulting from DDT and PCB contamination. The proposed agreement, filed in U.S. District Court in Los Angeles, requires $42.2 million to be paid over a period of four years to federal and state trustee agencies for restoration of injured natural resources. In addition, a payment of $3.5 million will go to the Environmental Protection Agency for response costs associated with cleanup at the Montrose Chemical Corporation Superfund. At the discretion of the natural resource trustees, up to $8 million of the natural resource damage settlement may be paid in the form of cleanup services provided by the Los Angeles County Sanitation Districts, the major settling defendant in the case. Los Angeles County Sanitation Districts consists of a group of sewer districts throughout Los Angeles County that discharge wastewater through an ocean outfall into the San Pedro Channel near Los Angeles.

The settlement seeks damages for injury done to natural resources resulting from releases of DDT from the former Montrose Chemical Plant in Torrance, mainly through sewer discharge and dumping into the San Pedro Channel near Los Angeles. In addition, PCBs were released into those waters through sewer discharge from plants operated by Westinghouse Electric, the Potlatch Corporation, and the Simpson Paper Company. The complaint, filed in June, 1990, on behalf of the above offices and agencies, alleged that the DDT and PCB releases, which began in the 1940s, injured marine sediments, fish, marine mammals and birds, including endangered species, such as the bald eagle and peregrine falcon. Restoration of the natural resources could include removal or treatment of contaminated underwater sediments, restocking fish or installation of artificial reefs.

Vicki A. O'Meara, Acting Assistant Attorney General for the Environment and Natural Resources Division, said, "This agreement represents the largest settlement ever obtained by the United States for a non-oil spill natural resource damage claim. It shows that polluters, whether they are individuals, corporations, or government agencies, must take responsibility for their actions." Terree A. Bowers, United States Attorney for the Central District of California, added, "Whether the interest is in clean air, clean water or a clean, safe community for Southern California, we are committed to enforcing the federal environmental laws."

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Operation Whiteout In The District Of Alaska

On October 30, 1992, the Department of Justice, in conjunction with the Department of the Interior, and the United States Attorney's office in the District of Alaska, Anchorage, said that five defendants have been sentenced, four of them to terms of imprisonment ranging from two to ten months, for "headhunting," which is the illegal hunting and killing of Pacific walrus for their ivory. The defendants were arrested as part of an ongoing investigation called "Operation Whiteout," an undercover operation that exposed the widespread poaching of walrus ivory which was then often traded for illegal drugs. The defendants were charged with conspiracy and illegally killing walrus during a hunting trip filmed by an undercover agent. The videotape showed the defendants shooting into several herds of walrus, killing ten animals and taking only the head and oosik (the walrus penis bone) of each animal. The defendants were charged with twenty four others in January, 1992.

Operation Whiteout, initiated in April, 1990, by undercover agents of the Fish and Wildlife Service, established a wholesale marine mammal product business to uncover the network of Alaskan natives who engaged in "headhunting" for walrus ivory. Over a 20-month period, the agents engaged in hundreds of wildlife transactions with natives and non-natives across western Alaska. Drugs, especially marijuana, were sought by hunters in exchange for the ivory tusks and carvings they wished to sell. By late 1991, the agents had identified over 70 natives and non-natives who were potential subjects for prosecution on both drug and wildlife charges.

The Pacific walrus has been protected by the provisions of the Marine Mammal Protection Act since the Act's inception in 1972. The Act allows Alaskan natives, like the five defendants, to hunt the animals for subsistence or handicraft purposes if the hunters take all the usable parts of each walrus they kill -- not just the commercially saleable ivory tusks. Alaskan natives have hunted the walrus for many years and currently take about 10,000 animals each year.

Wevley William Shea, United States Attorney for the District of Alaska, said, "The United States recognizes that most Native Alaskan hunters take walrus legally. However, we will aggressively investigate and prosecute any hunters engaged in illegal hunting, or in trading ivory for drugs." Vicki A. O'Meara, Acting Assistant Attorney General, Environment and Natural Resources Division, said, "Operation Whiteout is a double-barrelled success. We've convicted ivory dealers and drug dealers at the same time."

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POINTS TO REMEMBER

Operation Garbage Out

On November 9, 1992, Anthony C. Moscato, Acting Director, Executive Office for United States Attorneys, issued a memorandum to all United States Attorneys concerning Operation Garbage Out and the current status of the local and central case management systems. A copy is attached at the Appendix of this Bulletin as Exhibit C.

In December, 1991, the implementation of Phase 3 of Operation Garbage Out was announced. (See, United States Attorneys' Bulletin, Vol. 39, No. 12, dated December 15, 1991.) Since that time, a team of Executive Office personnel has reviewed reports of data from twenty one districts in order to determine their completeness and accuracy. During these reviews, a number of common errors have been identified, and the attached memorandum includes a number of recommendations to alleviate the problems. The Executive Office personnel will continue their review efforts this fiscal year at the rate of four districts per month. Mr. Moscato also advised that accurate and timely case management information reporting continues to be one of the highest priorities of the Executive Office.

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Reimbursing State And Local Entities For Production Of Documents

On November 17, 1992, Anthony C. Moscato, Acting Director, Executive Office for United States Attorneys, issued a memorandum to all United States Attorneys and Administrative Officers concerning reimbursement to state and local agencies for production of records. A copy is attached at the Appendix of this Bulletin as Exhibit D.

This matter arose in part from the Florida Department of State, Division of Corporations' refusal to produce incorporation records without prepayment. At the request of several United States Attorneys' offices, this issue was examined by Deborah C. Westbrook, Legal Counsel, and the policy articulated in the attached memorandum should be followed when requesting records from state or local agencies. If you have any questions, please contact Robert X. Marcovici, Attorney-Advisor, Office of Legal Counsel, at (202) 514-4024.

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Office Of Special Counsel For Immigration Related Unfair Employment Practices

On November 6, 1992, the Department of Justice announced that the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) can now communicate with victims of discrimination in more than 140 languages. With the assistance of AT&T Language Line Services, OSC has gained access to languages as varied as Haitian Creole, Laotian, or Slovak, for example. Because OSC handles cases involving discrimination based on national origin or citizenship status, many seeking OSC's assistance speak languages other than English. As a result, becoming multi-lingual will make OSC more accessible to the public. OSC said that when a person who does not speak English calls, he or she will be transferred to an interpreter who will take information on the complaint. Interpreters are available twenty four hours a day, seven days a week.

OSC was created by Congress in 1987 to enforce the anti-discrimination provision of the Immigration Reform and Control Act of 1986. Since its inception, OSC has received over 2,500 charges. Special Counsel William Ho-Gonzalez said, "Removal of the language barrier is a significant development that will enhance OSC's enforcement efforts. We expect that many people who were deterred from contacting OSC because they did not speak English will now feel free to inform us when they have been subjected to discriminatory employment practices."

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DEBT COLLECTION SUCCESS STORIES

District Of North Dakota

Stephen D. Easton, United States Attorney for the District of North Dakota, announced that his office, consisting of eleven attorneys and 24 support personnel, collected almost $5.6 million in FY 1992 of debts due the federal government. Collections in FY 1992 increased over $1.3 million from those of FY 1991.

During FY 1992, which ended September 30, 1992, the United States Attorney's office collected approximately $5.2 from civil cases and $352,000 from criminal cases. The amount collected in civil cases represents both cash collected and property recovered either through voluntary conveyance, foreclosure, or forfeiture of property in connection with a criminal case. The civil cases consisted mainly of student loans, foreclosures, or other defaulted government loans. The United States Attorney's office is responsible for collecting fines, restitution, and special assessments from criminal cases. United States Attorney Easton said, "The taxpayers of North Dakota can be extremely pleased with the aggressive debt collection efforts that are being made by this office. The Financial Litigation Unit employees of this office have done a commendable job in collecting monies owing to the government."

* * * * *

District Of Kansas

Lee Thompson, United States Attorney for the District of Kansas, announced that collections for FY 1992 totaled $9.7 million, more than two and a half times its annual budget of $3.8 million. The District of Kansas consistently ranks in the top ten districts for total collections, and United States Attorney Thompson praised his Financial Litigation Unit, led by Assistant United States Attorney Tanya S. Wilson, and the Civil Division for this outstanding record. The District of Kansas collected $16.8 million in FY 1991, receiving $6.5 million on behalf of the United States in a single case. Mr. Thompson anticipates increased collections in FY 1993 based n Kansas' participation in the Judgment Enforcement Pilot Project and added emphasis on the collection of criminal fines and restitution.

* * * * *

Eastern District Of North Carolina

Margaret Person Currin, United States Attorney for the Eastern District of North Carolina, announced that her office collected $8.86 million for FY 1992, an increase of 27 percent. Civil collections were $6.86 million (13 percent increase), and criminal collections were $2 million (115 percent increase). Significantly, the cost of collection was only 3.59 percent. The collections exceeded the United States Attorney's office budget by $4 million.

Ms. Currin noted that these achievements were particularly impressive given the fact that the district is the first pilot district for the U.S. Courts Fine Center which began on September 1, 1992. The project required a great deal of time to reconcile the debts and to work on procedural aspects.

* * * * *

SENTENCING GUIDELINES

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 4, dated October 21, 1992, and Volume 5, No. 5, dated November 19, 1992 is attached as Exhibit E at the Appendix of this Bulletin. This publication is distributed periodically by the Federal Judicial Center, Washington, D.C. 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.

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Federal Sentencing And Forfeiture Guide Newsletters

Attached at the Appendix of this Bulletin as Exhibit F is a copy of the Federal Sentencing and Forfeiture Guide Newsletter, Volume 3, No. 27, dated November 2, 1992, and Volume 3, No. 28, dated November 16, 1992, which is published and copyrighted by the James Publishing Group, Santa Ana, California.

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FINANCIAL INSTITUTION FRAUD

Financial Institution Prosecution Update

On November 23, 1992, the Department of Justice issued the following information describing activity in "major" frauds against financial institutions covered by FIRREA and the Crime Control Act of 1990 from October 1, 1988 through October 31, 1992. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution, or (d) 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. (* $ are in millions)

Savings And Loan Prosecutions

Description	Count	Description	Count
Informations/Indictments	817	CEOs, Board Chairmen, and Presidents:	
Estimated S&L Losses	$ 9,017 *	Charged by indictment/ information	153
Defendants Charged	1,331	Convicted	118
Defendants Convicted	1,028	Acquitted	10
Defendants Acquitted	82 *	Conviction Rate	92.2%
Conviction rate	92.2%		
Sentenced to prison	672		
Sentenced w/o prison or suspended	198	Directors and Other Officers:	
% Sentenced to prison	77.2%	Charged by indictment/ information	227
Fines Imposed	$ 16,169 *	Convicted	195
Restitution Ordered	$ 561,832 *	Acquitted	8
		Conviction Rate	96.1%

* Includes 21 borrowers in a single case.

Bank Prosecutions

Informations/Indictments	1,693	CEO's, Chairmen, and Presidents:	
Estimated Bank Loss	$ 4,129 *	Charged by Indictments/ Informations	152
Defendants Charged	2,384	Convicted	132
Defendants Convicted	1,923	Acquitted	2
Defendants Acquitted	46	Conviction rate	98.5%
Conviction Rate	97.7%		
Sentenced to prison	1,260		
Sentenced w/o prison or suspended	377	Directors and Other Officers:	
% Sentenced to prison	77.0%	Charged by Indictments/ Informations	498
Fines Imposed	$ 6,995 *	Convicted	445
Restitution Ordered	$ 457,992 *	Acquitted	7
		Conviction rate	98.5%

Credit Union Prosecutions

Informations/Indictments	104
Estimated Credit Loss	$ 130.4 *
Defendants Charged	137
Defendants Convicted	112
Defendants Acquitted	1
Conviction Rate	99.1%
Sentenced to prison	82
Sentenced w/o prison or suspended	17
% Sentenced to prison	82.8%
Fines Imposed	$ 23,200
Restitution Ordered	$ 13,715 *

CEOs, Chairmen, and Presidents:	
Charged by Indictments/ Informations	12
Convicted	10
Acquitted	0
Conviction rate	100%
Directors and Other Officers:	
Charged by Indictments/ Informations	69
Convicted	61
Acquitted	0
Conviction rate	100%

OFFICE OF LEGAL EDUCATION

Course Offerings

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 February through May, 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 officially announcing each course and requesting nominations approximately eight weeks prior to the commencement of the course. Once a nominee is selected, OLE funds all costs for personnel from United States Attorneys' offices only.

February, 1993

Date	*Course*	*Participants*
1-12	Basic Criminal Trial Advocacy	Attorneys
2-4	Advanced Asset Forfeiture	Asset Forfeiture Attorneys
2-5	Basic Criminal Paralegal	Paralegals
16-18	Automating Financial Litigation	Financial Litigation Attorneys and Support, System Managers
16-19	Federal Practice Seminar (Civil)	Attorneys
17-19	Money Laundering	Attorneys
22-25	Advanced Financial Institution Fraud	Attorneys

March, 1993

Date	***Course***	***Participants***
1-5	Support Staff Training (Criminal & Civil)	GS 4-7; 5th Circuit Region
1-5	Appellate Advocacy	Attorneys
2-5	Complex Litigation	Attorneys
8-11	Advanced Evidence	Attorneys
8-19	Basic Asset Forfeiture Advocacy	Attorneys
9-11	First Assistants Seminar	FAUSAs (Large USAOs)
10-12	Attorney Management	DOJ and Agency Attorney Supervisors
15-18	Advanced Narcotics	Attorneys
17-19	Developments in Torts Law	Attorneys
22 - Apr 2	Basic Civil Trial Advocacy	Attorneys
23-26	Basic Paralegal Skills (Criminal and Civil)	Legal Technicians and Paralegals
31 - Apr 2	Criminal Chiefs	Chiefs (Small and Medium USAOs)

April, 1993

7-8	Alternative Dispute Resolution-Civil	Attorneys
7-9	Criminal Chiefs	Chiefs (Large USAOs)
12-14	Health Care Fraud	Attorneys
20-22	Civil Chiefs	Chiefs (Large USAOs)
19-30	Basic Criminal Trial Advocacy	Attorneys
20-22	Automating Financial Litigation Attorneys	Financial Litigation Attorneys and Support, System Managers
26-28	Attorney Management	AUSA Supervisors

April, 1993 (Cont'd.)

Date	Course	Participants
26-30	Support Staff Training (Civil and Criminal)	GS 4-7; 4th Circuit Region
27-30	Basic Civil FIRREA	Attorneys
	May, 1993	
3-7	Appellate Advocacy	Attorneys
4	Executive Session (Debt Collection)	U.S. Attorneys
11-13	Civil Chiefs	Chiefs (Small and Medium USAOs)
11-13	Asset Forfeiture	8th Circuit (Attorneys, Support Staff, LECC Coordinators)
12-13	Ethics Seminar	Ethics Advisors (Attorneys, Support Staff)
17-21	Federal Practice Seminar-Criminal	Attorneys
17-28	Basic Civil Trial Advocacy	Attorneys
19-21	Attorney Management	DOJ and Agency Attorney Supervisors

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New Asset Forfeiture Training Videotape

"Federal Civil and Criminal Asset Forfeiture" consists of a series of four videotapes and written materials and provides an excellent overview and comparison of civil and criminal asset forfeiture. The program was produced in October, 1992, by Assistant United States Attorney Suzanne Warner, Office of Legal Education, Attorney General's Advocacy Institute, who is on detail to OLE from the Western District of Kentucky. The video lecturers are attorneys with extensive practical experience in the field of asset forfeiture litigation. They are: Larry Fann, former Acting Director of the Asset Forfeiture Office, Criminal Division, and former Director of Training for the FBI; Art Leach, who just completed a one-year detail as Assistant Director of the Executive Office for Asset Forfeiture, now an Assistant United States Attorney for the Northern District of Georgia; and Karen Tandy, a former Assistant United States Attorney, and presently Chief of the Litigation Unit of the Asset Forfeiture Office of the Criminal Division.

"Federal Civil and Criminal Asset Forfeiture" is available to all United States Attorneys' offices. Local reproduction of the videotapes and accompanying materials is authorized for training purposes. Anyone interested in receiving these tapes should contact Suzanne Warner or Hilda Hudson, Office of Legal Education, Attorney General's Advocacy Institute. The telephone number is: (202) 208-7574.

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Guides For Drafting Indictments

During the month of December, the Office of Legal Education (OLE) will distribute to the Criminal Chiefs of all United States Attorneys' offices a 5-1/4" diskette containing the DOJ Guides for Drafting Indictments prepared by the General Litigation and Legal Advice Section of the Criminal Division. OLE encourages local reproduction and distribution of the diskette to all interested Assistant United States Attorneys handling criminal matters.

The Guides for Drafting Indictments is currently being revised by the General Litigation and Legal Advice Section for general distribution in the future.

* * * * *

Your OLE Staff

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LEGISLATION

Anti-Car Theft Act Of 1992

On November 5, 1992, Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, advised all Federal Prosecutors, that on October 25, 1992, the President signed into law H.R. 4542, the "Anti-Car Theft Act of 1992." A copy is attached as Exhibit G at the Appendix of this Bulletin.

Effective the day it was signed, the new legislation, to be codified at 18 U.S.C. § 2119, makes carjacking a federal offense and provides a new weapon in the arsenal against violent crime.

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Child Support

On November 3, 1992, Anthony C. Moscato, Acting Director, Executive Office for United States Attorneys, distributed a copy of S. 1002 to all United States Attorneys. S. 1002, signed by the President on October 25, 1992, imposes a criminal penalty for flight to avoid payment of arrearages to child support. The Executive Office for United States Attorneys will follow this legislation closely, and will provide further information as developments occur.

* * * * *

Incarcerated Witness Fees Act Of 1992

On October 14, 1992, H.R. 2324, the Incarcerated Witness Fees Act of 1992, was signed into law. This Act states that any witness who is incarcerated at the time testimony is given may not receive fees or allowances. Further details and information will be forthcoming in the near future.

* * * * *

Copyright Infringement

On October 28, 1992, the President signed S. 893, a bill to amend Title 18, United States Code, with respect to the criminal penalties for copyright infringement. This bill raises certain copyright infringements, including computer software, from a misdemeanor to a felony and sets new penalty levels.

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SUPREME COURT WATCH

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

Selected Cases Recently Decided

Parke v. Raley, No. 91-719 (decided December 1)

This case involved a Kentucky recidivist statute that permitted sentence enhancements based on prior criminal convictions. Raley argued that his prior convictions were invalid under Boykin v. Alabama because the state could not show that an on-the-record colloquy had taken place to ensure that he knowingly and voluntarily pleaded guilty. No transcripts of the guilty plea hearings were available, but the Kentucky statute provided that the defendant has the burden of proving that a prior guilty plea was not knowing and voluntary, and the Kentucky courts held that Raley had not met his burden. On a habeas corpus challenge, however, the Sixth Circuit held that the Due Process Clause requires the government to bear the burden of proving the validity of a guilty plea when no transcript exists, and Kentucky had not met that burden.

The Supreme Court has now unanimously reversed. Justice O'Connor, writing for eight Justices, recognized that Boykin had held that on a direct appeal from a guilty plea, the conviction must be reversed unless a transcript of the hearing, with a required colloquy, appeared in the record. But the Court refused to import that presumption to the context of collateral attacks on convictions. Instead, it held that the Due Process Clause permits the government to require a defendant to prove the invalidity of a prior guilty plea, even when no transcript of the proceeding exists, and that Raley had not met his burden here. The Court declined to address the broader argument of the United States, as amicus curiae, that the Due Process Clause does not require courts to entertain any collateral challenges to prior convictions used to enhance sentences, other than arguments that the court lacked jurisdiction or that the defendant lacked counsel.

Church of Scientology v. United States, No. 91-946 (decided November 16)

In this case, the IRS requested that a California state court provide tapes that had been filed in a private case and contained conversations between church officials and their lawyers. The district court ordered the California court to comply, which it did. The church appealed, but the Ninth Circuit agreed with the government that the appeal was moot because the government already has the tapes. The Supreme Court has unanimously reversed, however, reasoning that the case was not moot because the court could effectuate a partial remedy by ordering the government to destroy or return any copies of the tapes. (For further details, please refer to the Tax Division Case Notes, at p. 409.)

Hadley v. United States, No. 91-6646 (decided November 16)

This case was expected to clarify the standards for admitting evidence of prior bad acts under Federal Rules of Evidence 404(b) and 403, particularly where the defendant has offered to stipulate that if he committed the charged act he possessed the requisite intent. The Court has dismissed the writ of certiorari as improperly granted, however.

Selected Cases Argued In November

CIVIL CASES

Growe v. Emison, No. 91-1420 (argued November 2)

This case involves a challenge to Minnesota's legislative redistricting under Section 2 of the Voting Rights Act. In Thornburg v. Gingles, the Supreme Court established a three-part test to determine whether multimember districts impermissibly dilute minority votes, examining whether the minority voting group is large enough and compact enough to comprise a majority in a district, whether the minority group exhibits political cohesiveness, and whether the majority population votes as a block to defeat minority-preferred candidates. In this case, the government argued as amicus curiae that the district court erred in not applying the Gingles factors to challenges to single-member districting, particularly by failing to examine whether voting was racially polarized.

CRIMINAL CASES

Zafiro v. United States, No. 91-6824 (argued November 2)

This case presents the question whether criminal co-defendants are automatically entitled to separate trials simply because they present antagonistic defenses. The traditional approach has been that they are, but the government argues that joint trials should be the norm because the jury is more likely to determine the truth when all the conflicting stories are before it.

Withrow v. Williams, No. 91-1030 (argued November 3)

In this case, the government, as amicus curiae, maintains that federal courts should not hear Miranda claims on petitions for habeas corpus, so long as the state courts afforded the prisoner a full and fair opportunity to present the claim.

Crosby v. United States, No. 91-6194 (argued November 9)

Petitioner Crosby, one of numerous co-defendants in a complex case, disappeared before trial began and was tried and convicted in absentia. He now claims that convicting him in absentia violated Federal Rule of Criminal Procedure 43 because that Rule permits trials in absentia only when the defendant was initially present and then either disappeared or was so disruptive that he had to be removed. The government argued that, by failing to appear after full notice, Crosby had waived his constitutional right to be present at his trial, that Rule 43 is silent about trials in absentia in these circumstances, and that, given the severe prejudice to witnesses, the court, and the prosecution that delay would have caused, the district court properly decided to try Crosby despite his absence.

Questions Presented In Selected Cases In Which The Court Has Recently Granted Cert.

CIVIL CASES

Sullivan v. Schaefer, No. 92-311 (granted November 30)

In an action for judicial review of the denial of a claim for Social Security disability benefits, the district court reversed the Secretary's decision and remanded for further proceedings under the fourth sentence of 42 U.S.C. 405(g). The question presented is whether the remand order was a "final judgment" that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

TXO Production Corp. v. Alliance Resources Corp., No. 92-479 (granted November 30)

Whether an award of ten million dollars in punitive damages violated the defendant's procedural and substantive due process rights.

Darby v. Kemp, No. 91-2045 (granted November 2)

Whether the petitioners were required to exhaust administrative remedies before seeking judicial review of sanctions recommended by a hearing officer of the Department of Housing and Urban Development.

Kemp v. Alpine Ridge Group, No. 92-551 (granted November 16)

Whether Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057, which prescribes retroactive and prospective procedures for calculating rent adjustments under the housing assistance program, violates the Due Process Clause by abrogating vested contract rights.

Hatcher v. Valcarcel, No. 92-531 (granted November 16)

Whether a misdemeanor conviction for willful failure to file an income tax return must be admitted under Federal Rule of Evidence 609(a)(2) for the purpose of impeaching a witness.

CRIMINAL CASES

United States v. Padilla, No. 92-207 (granted November 2)

Whether other members of a drug transportation conspiracy have standing to challenge the investigatory stop of one of the members and the subsequent search of the vehicle he was driving.

Stinson v. United States, No. 91-8686 (granted November 9)

Whether a court's failure to follow the Sentencing Commission's commentary in USSG 4B1.2 comment. n.2., which specifically states that the offense of unlawful possession of a firearm by a felon is not a "crime of violence" for purposes of USSG 4B1.1, constitutes an "incorrect application of the sentencing guidelines" requiring vacatur of the sentence under 18 U.S.C. 3742(f)(1).

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CASE NOTES

SOUTHERN DISTRICT OF TEXAS

The Fifth Circuit Court of Appeals recently held, in a case of nationwide first impression, that the debt collection surcharge authorized by the Federal Debt Collection Procedures Act (28 U.S.C. §§3001-3630) applies to guarantors of government-guaranteed loans. A copy of the opinion is attached at the Appendix of this Bulletin as Exhibit H.

The Small Business Administration (SBA) guaranteed a loan made by a commercial bank to a printing concern. The franchisor of the printing concern guaranteed repayment of the loan. After the borrower defaulted and was discharged in bankruptcy, SBA sued the franchisor for the amount due on its guaranty, and also sought the 10 percent surcharge authorized by 28 U.S.C. §3011. The guarantor opposed the surcharge. The Fifth Circuit held that the term "debt" in the statute included amounts owed to the government under a guaranty agreement.

U.S. v. Alphagraphics Franchising, Inc., September 29, 1992.

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CIVIL DIVISION

Ninth Circuit Holds That United States Is Immune From Tort Actions Arising Out Of Combatant Activities Of The Military

This case arises out of the U.S.S. Vincennes' destruction of an Iranian civilian airliner during the tanker war between Iraq and Iran. All 290 persons aboard the airliner were killed, Heirs of the decedents brought a wrongful death action against the United States and several defense contractors responsible for the design and manufacture of the weapons systems aboard the Vincennes. The district court dismissed the case, holding that it entailed a non-justiciable political question and that it could not be litigated without exposing information protected by a validly established state secrets privilege.

The Ninth Circuit affirmed on other grounds. It held that the case did not present a political question and was in fact justiciable, principally because a damages action could be decided under judicially manageable standards without intruding into decision-making processes constitutionally committed to another branch of government. It also held, however, that explicit provisions of the Federal Tort Claims Act retained the government's sovereign immunity from damages actions arising out of combatant activities during a time of war. The court construed "time of war" broadly to include not only declared wars but "periods of significant armed conflict." The court further reasoned that a similar exception must be implied into the Public Vessels Act because Congress intended to shield the government from liability for the assertedly negligent conduct of our armed forces in times of combat.

Koohi v. United States, Nos. 90-16159, 90-16107 (October 8, 1992) [9th Cir.; N.D. Cal.]. DJ # 61-11-4008.

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* * * * *

Fourth Circuit Upholds Administrative Subpoena Against Fifth Amendment Challenge

The Department of Energy issued administrative subpoenas to two corporate officers as part of an investigation to determine whether agency employees were engaging in fraudulent practices. When the corporate officers refused to comply with the subpoenas, the agency petitioned for enforcement. The district court ruled for the government, holding that defendants did not satisfy their burden of proving that their documents were corporate documents protected by the Fifth Amendment's "act-of-production" privilege.

In a per curiam opinion which should prove very helpful to the government in future actions of this type, the Fourth Circuit (Widener, Sprouse, and Wilkinson, JJ.) has now affirmed. The Fourth Circuit held that the affidavits in this case were insufficient to prove that the diaries and day planners in question here were personal rather than corporate because the affidavits failed to identify and describe the allegedly personal entries in the diaries. In another important ruling, the Fourth Circuit held that the Fifth Amendment's act-of-production privilege does not apply to the sole officer and employee of a one-man corporation, thus answering in our favor a question left open in Braswell v. United States, 487 U.S. 99 (1988).

United States v. Stone, (October 6, 1992) [4th Cir.; E.D. Va.]. DJ # 46-35-1546.

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* * * * *

Seventh Circuit Affirms Most Of Postal Service's Ruling That School's Carriage Of Union Mail Without Postage Is Unlawful, But Finds That Some Items Require Further Consideration

The Fort Wayne Education Association is the exclusive bargaining representative of teachers employed by the Fort Wayne Community Schools. The collective bargaining agreement between the Association and the Schools provides that the Schools shall, without charge, carry letters between the Association and teachers via the Schools' in-house mail system. The Postal Service informed the Schools that such carriage violated the Private Express Statutes (which protect the federal postal monopoly) and did not fall within the statutory exception for letters "related to the current business of

the carrier." The Postal Service cited its regulation interpreting the exception, which requires that the letters be "sent by or addressed to" their carrier. The Schools brought a declaratory judgment action against the Association and the Postal Service, seeking a declaration of what mail it might lawfully carry. The district court held for the Postal Service.

On appeal, the Seventh Circuit agreed with us that the "vast majority" of the communications at issue could not lawfully be carried by the Schools without the payment of postage. The court agreed that the statutory exception was limited in a manner similar to that specified in our regulation. But, relying on a 1915 Supreme Court opinion and an 1896 opinion of the Attorney General, the court held that a letter falls within the statutory exception if it is sent by or addressed to its carrier, or on its behalf. The court agreed that most Association mail was not sent "on behalf of" the Schools. But, rejecting the Postal Service's contention that a letter satisfies the statute and regulation only if it is a letter that the carrier can control, open, or refuse, the court held that letters from certain "joint committees" created by the collective bargaining agreement, respecting the administration of the agreement rather than bargaining over it, might fall within the statutory exception. The court remanded the case for further factual development related to this question.

Fort Wayne Community Schools v. Fort Wayne Education Association, Inc. and United States Postal Service, No. 90-3316 (October 13, 1992). [7th Cir.; N.D. Ind.]. DJ # 145-5-7359

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* * * * *

Tenth Circuit Tells District Judge That He Cannot Award Witness Fees In Excess Of Those Allowed By 28 U.S.C. §1821

Following an $8 million judgment against the government in a medical malpractice case, the district judge (Ellison, C.J.) added insult to injury by awarding over $63,000 to pay the costs of plaintiffs' witnesses. We appealed from both decisions. Several months ago, the Tenth Circuit vacated the district court's decision in the malpractice action and remanded the case for further proceedings. Now, the Court of Appeals has vacated the award of costs as well. When the district court awarded costs to plaintiff for witness expenses, it recognized that Section 1821 called for witness compensation of only $30 per day (subsequently raised by statute to $40). Applied to this case, however, that provision allowed plaintiffs to obtain less than $2500 to cover their far greater costs of providing expert medical witnesses. The district court, noting that it had found the plaintiffs' witnesses particularly helpful, decided to enhance that statutory fee with an additional $60,000. The Tenth Circuit has now stated quite forcefully that the district court had no authority to make this additional fee award. The plaintiffs had argued that authority for the lower court's award of additional fees could be found in 28 U.S.C. §2412(a). Relying heavily on the Supreme Court's 1987 decision in Crawford Fitting Co. v. J.T. Gibbons, the Court of Appeals ruled that neither §2412(a) nor Rule 54(d) allows a district court to award fees to pay a party's witnesses beyond the limits set by section 1821.

Phillip Lee Hull v. United States, No. 92-5095 (October 26, 1992) [10th Cir.; N.D. Okla.]. DJ # 157-59N-180.

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False Claims

District Of Delaware Denies Motions To Quash Writs of Attachment, Garnishment And Sequestration

The District Court for the District of Delaware denied motions to quash writs of attachment, garnishment and sequestration that the government had obtained ex parte under the Federal Debt Collection Procedures Act on approximately $20 million in property located in three states. The underlying claim under the False Claims Act is against the two owners of a truck driving correspondence school for obtaining about $350 million in federally guaranteed student loans and Pell grants for an ineligible program, then falsifying records and deliberately delaying or failing to pay refunds for the 80 percent of enrolled students who dropped out of the program, so that the government's default liability for the huge numbers of students who defaulted on their loans was greater than it should have been. The two brothers had taken approximately $46 million out of the school in subchapter S distributions. The 90 percent owner of the school had placed all of his assets in the names of himself and his wife as tenants by the entireties, in order to preclude our collecting on any judgment against the husband alone. We therefore included the families of both brothers in the lawsuit.

The court found that we had established probable validity of the claims against the school owners under the False Claims Act on three theories: that the school would not have been accredited and therefore would have been ineligible had the brothers not caused the school to make false statements to the accrediting body; that the length of the school's program was too short to be eligible to participate in student aid programs and that the brothers had submitted or caused false statements to be submitted concerning course length to the government; and that the brothers had caused false default claims to be submitted to the government by deliberately delaying or failing to pay refunds. The court also found that we had established the probable validity of our unjust enrichment claim against the brothers' families.

United States v. Teeven, Civ. No. 92-418 LON (D.Del. October 26, 1992).

Attorney: Joan Hartman - (202) 307-6697

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TAX DIVISION

Supreme Court Holds That Compliance With An IRS Summons Does Not Render An Appeal From An Enforcement Order Moot

In a unanimous opinion entered on November 16, 1992, the Supreme Court reversed the favorable decision of the Ninth Circuit in Church of Scientology of California v. United States and Frank Zolin. The question presented in this case was whether an appeal from an order enforcing an Internal Revenue Service summons becomes moot once the materials sought by the Internal Revenue Service are turned over to it. Every court of appeals that has considered this question, except the Third Circuit, has held that compliance with an IRS summons moots an appeal of the enforceability of the summons. However, another line of cases involving Federal Trade Commission discovery requests holds that compliance with a court order enforcing an FTC subpoena does not moot an appeal from such an order.

Adopting the reasoning in the FTC line of cases, the Supreme Court held that compliance with the summons enforcement order does not moot the appeal. Although the court recognized that it was too late to provide a fully satisfactory remedy for the invasion of privacy which occurs when the IRS improperly obtains summoned information, it ruled that the court of appeals has the power to effectuate a partial remedy by ordering the Government to return or destroy any copies of the documents that it may possess. Accordingly, the controversy was not moot.

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Second Circuit Sustains Favorable Decision In $9.5 Million Investment Credit Recapture Case

On October 6, 1992, the Second Circuit affirmed the favorable decision of the District Court in Salomon Inc. v. United States. This case, which involved approximately $9.5 million, presented the question whether the taxpayer, which entered into a series of pre-arranged transactions leading to its disposition of certain assets, was required to "recapture" a portion of an investment tax credit that it had previously claimed with respect to those assets. Section 47 of the Internal Revenue Code, as in effect for the year at issue, provided that a taxpayer must generally recapture a portion of any investment tax credit taken with respect to an asset if the taxpayer disposes of the asset prior to the end of its useful life. Treasury regulations applicable to corporations filing consolidated income tax returns provide an exception to this general rule, stating that no recapture is required if the property is transferred to another member of the consolidated group, or if the corporation holding such property leaves the consolidated group.

In this case, the taxpayer transferred certain investment credit assets to a newly-formed subsidiary and then immediately transferred the stock of the subsidiary, as part of a pre-arranged transaction, outside the consolidated group. While acknowledging that a literal reading of the consolidated return regulations would exempt this transaction from the recapture rules, the District Court held that those rules should not be read to apply to pre-arranged transactions such as this. The Second Circuit has now endorsed the District Court's reasoning. The Government has appealed this identical issue from an adverse decision of the Tax Court in Walt Disney Incorporated v. Commissioner, which is now pending before the Ninth Circuit.

* * * * *

Seventh Circuit Rules That Post-Bar Date Amendment To Bankruptcy Claim Is Not Timely

On October 23, 1992, the Seventh Circuit affirmed the adverse decision of the District Court in In re Emil and Judith Stavriotis. In this bankruptcy case, the Internal Revenue Service originally filed a timely proof of claim for $11,000 in income taxes owed by the debtors. Subsequent to the bar date (and following the completion of an ongoing tax audit), the Internal Revenue Service sought to amend that claim to assert over $2 million in additional claims. The question presented here was whether a post-bar date amendment to the claim should be permitted, where the amended claim involved the same kind of tax and the same taxable year as the original claim, and the debtor did not introduce any specific evidence of prejudice. The Seventh Circuit ruled that the Bankruptcy Court did not abuse its discretion in refusing to allow the Internal Revenue Service to amend its claim. It found that the dramatic increase in the amount of the claim came as an "unfair surprise" and, if allowed, would prejudice other creditors.

* * * * *

Ninth Circuit Renders Two Adverse Rulings In Captive Insurance Cases

On November 5, 1992, the Ninth Circuit, in two unrelated cases -- The Harper Group v. Commissioner and AMERCO v. Commissioner -- held that payments made by members of an affiliated group of corporations to a wholly-owned captive insurance company were "insurance premiums," and therefore deductible under Section 162 of the Internal Revenue Code. In both cases, the Government unsuccessfully contended that the payments constituted "reserves" against future losses and that they were not deductible. In AMERCO, the court decided that it was possible to have a true insurance transaction between a corporation and its wholly-owned insurance company, provided that the captive has "substantial" unrelated insurance business. The Ninth Circuit held that this "unrelated business" standard was met by the captive in AMERCO, which conducted between fifty-two and seventy-four percent of its insurance business with unrelated entities. In The Harper Group, the Ninth Circuit followed its decision in AMERCO and similarly concluded that payments made by related corporations to a captive which conducted between twenty-nine and thirty-three percent of its total business with unrelated entities qualified as deductible insurance premiums.

Adjustments in captive insurance cases that are currently pending at the administrative level exceed $1 billion.

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Suit Filed In The Claims Court Seeking Personal Exemption Deduction For "Unborn Fetus"

A tax refund suit was recently filed in the United States Claims Court challenging the Internal Revenue Service's disallowance of a dependency exemption deduction claimed for an "unborn fetus." The taxpayers, Andrea and Michael Cassman, argue that "Baby Cassman was a child," and that they should thus be entitled to the deduction.

This case, in which the taxpayers apparently intend to argue that their son's or daughter's life begins with conception and that, by virtue of the sustenance the fetus derives from Ms. Cassman, he or she receives "support" from them, has already attracted media attention.

* * * * *

Judge Recuses Himself From Case Involving Participants In Electronic Filing Scheme After Death Threat

On October 26, 1992, the date that trial was scheduled to commence in the United States District Court for the Southern District of Texas against Uchechukwuy Ezumah, Francis Okogwu, Emmanuel Onyemem, Azubuike Azuogu and Kamoru Atandabeg, Judge Samuel Kent continued the trial and recused himself from any further participation in the case, stating that he had received a written warning that his life wold be in danger if he continued to participate in the case. This would have been the fourth and last in a series of trials involving participants in an electronic filing scheme headed by John Berry and Ceola Haynes. Berry and Haynes, the joint-owners of a return preparation business, recruited unemployed individuals living in low-income housing projects, college students and Nigerian nationals to file false returns. They were indicted in December of 1991, along with twenty other individuals who participated in this scheme. The scheme involved approximately 750 electronically filed returns that fraudulently claimed an aggregate of $1.7 million in refunds.

Judge Kent presided over each of the previous trials, which resulted in the conviction of Berry, Haynes and nine other participants in the scheme. New trial and sentencing dates will be set following the selection of a new trial judge.

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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%	11-18-92	3.76%
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.

* * * * *

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Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

EXHIBIT A

DEPARTMENT OF JUSTICE

28 CFR Part 26

[AG Order No. 1634-92]

Implementation of Death Sentences in Federal Cases

AGENCY: Department of Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes procedures for government attorneys, the United States Marshals Service, and the Federal Bureau of Prisons to follow in obtaining and executing death orders for violations of the Federal criminal law. The rule is necessary to ensure orderly implementation of death sentences.

DATES: Written comments must be submitted on or before December 30, 1992.

ADDRESSES: Please submit written comments to the Assistant Director, Information Policy and Public Affairs, Federal Bureau of Prisons, 320 First Street NW., room 641, Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Thomas R. Kane, Assistant Director, Information Policy and Public Affairs, Federal Bureau of Prisons, 320 First Street NW., room 641, Washington, DC 20534.

SUPPLEMENTARY INFORMATION: The United States Code currently provides the death penalty for a number of civilian offenses. See, for example, 18 U.S.C. 1111 and 21 U.S.C. 848. In 1984 Congress repealed 18 U.S.C. 3566, which since 1937 had provided that executions in Federal cases were to be conducted in the manner prescribed in the state in which the sentence was imposed. Congress's repeal of section 3566, and Federal prosecutors' negligible experience with capital cases in recent years, has left a need for procedures for obtaining and executing death orders. This need has become imperative with the growing number of cases under 21 U.S.C. 848, providing the death penalty for certain drug-related offenses, and with recent Supreme Court decisions indicating the vitality of the capital sentencing procedures under 18 U.S.C. 1111.

Section by Section Analysis

Section 1

This section provides guidance once a death sentence has been recommended in Federal civilian cases. The U.S. Attorneys' Manual governs the conduct of such cases in earlier stages. This rule is not meant to govern cases under military law.

Section 2

The prosecutor should file the proposed Judgment and Order promptly upon recommendation of the death sentence, since Federal judges themselves have little recent experience with capital cases and may expect the government's guidance.

The proposed Judgment and Order prescribed in this section sets forth the procedures for execution that are established in later sections of this rule. In cases where the court adopts in full the proposed Judgment and Order, the execution will be carried out according to the procedures dictated by both judicial and executive mandates, operating in tandem. The rule contemplates, however, that establishment by the Executive Branch of procedures for execution is entirely adequate for execution of a duly-ordered sentence of death.

The "Return," which is a common feature of death orders dating back to at least last century, notifies the sentencing court of the execution.

Section 3

This section establishes procedures for execution in Federal criminal cases except to the extent a court orders otherwise. Lethal injection will be the method of execution. This method increasingly is the method of execution in the states. The execution is to be conducted in a Federal Bureau of Prisons facility selected by the Director of the Bureau of Prisons. It is to be conducted by a United States Marshal selected by the Director of the U.S. Marshals Service, who will be assisted by a team selected by the Marshal and Warden of the facility.

The date, time, and place of execution are to be determined by the Director of the Federal Bureau of Prisons, the institution normally charged with determining the place and manner of custody of prisoners. See 18 U.S.C. 3621. Resting determination of the execution date with the Director will obviate the practice, which is a pointless source of delay in state cases, of seeking a new execution date from the sentencing court each time a higher court lifts a stay of execution that caused an earlier execution date to pass. This procedure will not, of course, limit any right of the prisoner under sentence of death to seek collateral relief from his sentence.

Section 4

This section establishes rules for access to the prisoner under sentence of death at the time of the execution and in the days immediately preceding. These rules are meant to enable the prisoner and his immediate family to prepare themselves for the execution, while ensuring that the prison facility and the execution itself are not disrupted. These rules also accommodate the media's and public's interest in reports of the execution. They are similar to rules in place in many states and to rules previously followed by the Marshals Service in implementing the Federal death penalty. The rules are not meant to curtail necessary contacts initiated by Justice Department personnel, including the U.S. Marshals Service.

Section 5

This section gives all Justice Department personnel the right to decline to participate in executions for religious or moral reasons. This right is granted Bureau of Prisons personnel by 21 U.S.C. 848(r).

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. This rule is not considered to be a major rule within the meaning of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federalism Assessment in accordance with Section 6 of E.O. 12612.

List of Subjects in 28 CFR part 26

Law enforcement officers, prisoners.

For the reasons set out in the preamble, chapter I of title 28 of the Code of Federal Regulations is proposed to be amended by adding a new part 26 to read as follows:

PART 26—IMPLEMENTATION OF DEATH SENTENCES IN FEDERAL CASES

Sec.

Authority: 5 U.S.C. 301; 18 U.S.C. 4001(b), 4002; 28 U.S.C. 509, 510.

§ 26.1 Applicability.

The regulations of this part apply whenever a sentencing hearing conducted in a United States District Court has resulted in a recommendation or determination that a criminal defendant be sentenced to death for commission of an offense described in any Federal statute.

§ 26.2 Proposed judgment and order.

(a) Whenever this part becomes applicable, the attorney for the government shall promptly file with the sentencing court a proposed Judgment and Order. The proposed Judgment and Order shall state, in addition to any other matters required by law or otherwise appropriate, that:

(1) The sentence of death shall be executed by a United States Marshal designated by the Director of the United States Marshals Service;

(2) The sentence shall be executed by intravenous injection of a lethal substance or substances in a quantity sufficient to cause death;

(3) The sentence shall be executed on a date and at a place designated by the Director of the Federal Bureau of Prisons; and

(4) The prisoner under sentence of death shall be committed to the custody of the Attorney General or his authorized representative for appropriate detention pending execution of the sentence.

(b) The attorney for the government shall append to the proposed Judgment and Order a Return by which the designated United States Marshall may inform the court that the sentence of death has been executed.

§ 26.3 Time, place, and method of execution.

(a) Except to the extent a court orders otherwise, a sentence of death shall be executed:

(1) On a date and at a time designated by the Director of the Federal Bureau of Prisons, which date shall be no sooner than 60 days from the entry of the judgment of death. If the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted;

(2) At a Federal penal or correctional institution designated by the Director of the Federal Bureau of Prisons;

(3) By a United States Marshal designated by the Director of the United States Marshals Service, assisted by additional personnel selected by the Marshal and the Warden of the designated institution and acting at the direction of the Marshal; and

(4) By intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director of the Federal Bureau of Prisons and to be administered by qualified personnel selected by the Warden and acting at the direction of the Marshal.

(b) Unless the President interposes, the United States Marshal shall not stay execution of the sentence on the basis that the prisoner has filed a petition for executive clemency.

§ 26.4 Other execution procedures.

Except to the extent a court orders otherwise:

(a) The Warden of the designated institution shall notify the prisoner under sentence of death of the date designated for execution at least 20 days in advance, except when the date follows a postponement of fewer than 20 days of a previously scheduled and noticed date of execution, in which case the Warden shall notify the prisoner as soon as possible.

(b) Beginning seven days before the designated date of execution, the prisoner shall have access only to his spiritual advisers (not to exceed two), his defense attorneys, members of his family, and the officers and employees of the institution. Upon approval of the Director of the Federal Bureau of Prisons, the Warden may grant access to such other proper persons as the prisoner may request.

(c) In addition to the Marshal and Warden, the following persons shall be present at the execution:

(1) Necessary personnel selected by the Marshal and Warden, including at least one physician selected by the Warden;

(2) Those attorneys of the Department of Justice whom the Deputy Attorney General determines are necessary;

(3) Not more than the following numbers of persons selected by the prisoner:

(i) One spiritual adviser;

(ii) Two defense attorneys; and

(iii) Three adult friends or relatives; and

(4) Not more than the following numbers of persons selected by the Warden:

(i) Eight citizens; and

(ii) Ten representatives of the press.

(d) No other person shall be present at the execution, unless leave for such person's presence is granted by the Director of the Federal Bureau of Prisons. No person younger than 18 years of age shall witness the execution.

(e) The Warden should notify those individuals described in paragraph (c) of this section as soon as practicable before the designated time of execution.

(f) No photographic or other visual or audio recording of the execution shall be permitted.

(g) After the execution has been carried out, the physician or other qualified personnel selected by the Warden shall conduct an examination of the body of the prisoner to determine that death has occurred and shall inform the Marshal and Warden of his determination. Upon notification of prisoner's death, the Marshal shall complete and sign the Return described in § 26.2(b) or any similar document and shall file such document with the sentencing court.

(h) The remains of the prisoner shall be disposed of in a manner determined by the Warden.

§ 26.5 Attendance at or participation in executions by Department of Justice personnel.

No officer or employee of the Department of Justice shall be required to be in attendance at or to participate in any execution if such attendance or participation is contrary to the moral or religious convictions of the officer or employee. For purposes of this section, the term "participation" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

Dated: November 19, 1992.

William P. Barr,

Attorney General.

[FR Doc. 92-28869 Filed 11-27-92; 8:45 am]
BILLING CODE 4410-01-M

EXHIBIT
B

RECENT ACCOMPLISHMENTS OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION

I. Environmental Enforcement

Tough, consistent civil and criminal enforcement of the nation's environmental laws have been top Justice Department priorities during the Bush Administration.

*Between 1989 and 1992, we set records in every category of enforcement:

- indictments (191 in 1992)
- convictions (107 in 1989)
- fines, restitution, and forfeitures ($163 million in 1992, including $125 million from the Exxon Valdez plea)
- jail time served (48 years in 1990)
- civil cases filed (340 in 1991)
- civil recoveries ($1.9 billion in 1992, including $900 million from the Exxon Valdez settlement)
- civil penalties ($65.6 million in FY 92, doubling the previous record of $32.5 million in 1991).

*We have had four straight "billion dollar years" (over $1 billion in civil and criminal penalties, restitution, cleanup orders and other requirements). No one ever reached this level before.

1989 - $1,020,000,000
1990 - $1,240,782,234
1991 - $1,220,752,954
1992 - $2,116,956,271

*In the past four years, over five and one-half billion dollars has been garnered by federal environmental enforcement.

*In 1992, each of our civil environmental enforcement lawyers brought in, on the average, a record of $12,600,000 in civil penalties, natural resource damages, CERCLA cost recovery and commitments to site cleanup work by defendants.

*We obtained the largest wetlands victories in history -- over $2,000,000 in fines and restitution against Paul Tudor Jones in Maryland, and over $1,000,000 in penalties and restitution against the Sumitomo Corporation in Guam.

*We obtained the largest Clean Water Act settlement in history -- $1.025 billion from Exxon.

*We obtained the largest hazardous waste criminal fine in history -- in July 1992 the Rockwell Corporation pled guilty to RCRA and CWA felonies and an $18.5 million fine for its management of the DOE facility at Rocky Flats, Colorado.

*Other prosecutions were mounted against large companies: Chevron recently pled guilty to 65 Clean Water Act crimes, and agreed to pay $8 million in civil and criminal fines ($6.5 criminal). This is the third largest criminal penalty assessed under any environmental statute. Other penalties include Wheeling Pitt's record $6,000,000 civil penalty under the Clean Water Act, and Shell Oil's $23 million payments for natural resource damages caused by violations of the Clean Water Act.

*Other "firsts" were achieved during this period:

- Cases were filed to enforce prohibitions against ozone-depleting chloroflourocarbons ("CFCs").

- The first criminal conviction was obtained for illegal export of hazardous waste to a foreign country.

*Environmental criminals spent over twice as much time in jail since 1989 as was spent by such criminals in the history of environmental enforcement (142 years actually being served 1989-92 vs. 64 years 1983-88).

- In both 1991 and 1992, 91% of jail time imposed was actually served. From 1983 to 1988, that figure was 30%.

- The average jail term served in both 1991 and 1992 was a record one full year.

*In the past four years, 94% of all criminal fines imposed in the history of the environmental criminal enforcement program were levied -- $224,300,914. Similarly, 69% of all jail time actually served was handed out in the last four years -- 142 years.

*In the last four years, we have indicted 551 defendants -- 190 corporations and 361 individuals.

*Major environmental hazards were brought under control with agreements such as:

- The civil settlements with Texas Eastern and Transwestern, which required $500 million in pipeline cleanups and a $15 million civil penalty from Texas Eastern, under the Toxic Substances Control Act;

- The civil settlement with Syntex, requiring it to clean up the Times Beach, Missouri, Superfund site, at an estimated cost of $100 million;

- The civil settlements, at a total value of $109 million, for the cleanup of New Bedford Harbor, Massachusetts; and

- The civil settlement with the State of Florida to enforce state water quality standards necessary to protect the Everglades from nutrient-laden agricultural runoff.

*Key initiatives were taken, in which the Department brought multiple enforcement actions which focused upon particular violations. The focus of these initiatives were:

- the lead initiative, a national effort to reduce the exposure to lead in the environment;

- the CFC initiative, a series of lawsuits filed to enforce EPA's rule restricting the importation of ozone-depleting chloroflourocarbons ("CFCs");

- the pretreatment initiative, a national effort against industrial facilities and POTWs to properly control, through pretreatment, industrial discharges of toxic wastewaters into sewage treatment systems, which has resulted in over 670 penalty actions totalling more than $54 million;

- the land ban initiative, a nationwide crackdown to enforce restrictions on hazardous waste disposal;

- the benzene initiative, a series of civil judicial and administrative enforcement actions designed to protect human health from this known carcinogen; and

- the industrial sectors initiative, the simultaneous filing of 22 enforcement actions and settlements for violations of five environmental statutes against facilities involved in the three industrial sectors, with the worst recurrent violations: pulp and paper manufacturing, metal manufacturing and smelting, and organic chemical manufacturing.

*Federal facilities and federal employees have been held to the same standards as private parties. We have indicted and convicted 10 federal employees for illegal polluting activities. The record-breaking plea agreement with Rockwell Corporation was for the mismanagement of a federal facility by a federal contractor. General Dynamics was held liable under the Clean Air Act for emissions from its airplane painting operations in Fort Worth.

II. Protection of Wildlife and Marine Resources

The Division, in conjunction with U.S. Attorneys' offices throughout the country, continued its aggressive prosecutorial program for fish and wildlife violations. Among the most noteworthy results from litigation were:

- More than 29 individuals in Alaska (25 have thus far pled guilty) have been charged with illegally killing walrus, trafficking in walrus ivory, and drug dealing, following the banning of the import of African elephant ivory. A two-year sting operation revealed a significant black-market trade in walrus ivory, including the trading of ivory for drugs.

- Two corporations paid $590,000 in fines and restitution under the Migratory Bird Treaty Act for birds killed in uncovered cyanide tailing ponds associated with the companies' mining activities.

- More than 93 shrimp trawlers have been criminally charged under the Endangered Species Act for failure to protect endangered and threatened sea turtles which are caught and drowned in the trawlers' nets.

- Convictions for money laundering were upheld on appeal against foreign participants in a scheme to purchase 500 metric tons of salmon illegally taken in Northern Pacific waters and then smuggle the salmon into the U.S. for repackaging as a legal U.S. product. Two participants were arrested after they received a down payment of $330,000 at a local bank. They were sentenced to 60 months and 24 months imprisonment respectively.

- A preliminary injunction was issued against treasure hunters in the Florida Keys whose salvage activities were destroying marine sanctuary resources.

- the successful forfeiture of $3 million from foreign and domestic fishing vessels arising from fishing violations.

- one of the first civil injunction lawsuits under the Endangered Species Act, to force an irrigation district with defective fish protection devices to reduce its waterflow so as not to kill fish in the irrigation system.

- Twenty defendants were convicted or pled guilty in prosecutions relating to theft and interstate transportation of saguaro cactus from federal and private lands in Arizona. Sentences totaled in excess of $30,000 in fines and restitution, and three years jail time.

III. Ensuring a Balanced Regulatory Program

*We successfully defended EPA's regulations governing discharges from the organic chemicals, plastics, and synthetic fibers industries, resulting in the annual removal of over 130 million tons of pollutants from the nation's waters. Chemical Mfrs. Ass'n. v. EPA. Other successful defenses of EPA's regulatory programs include the particulate matter standards under the Clean Air Act, which affirmed the Agency's broad discretion in setting such standards, NRDC v. EPA, and EPA's restrictions on the land disposal of hazardous wastes under RCRA. Chemical Waste Management v. EPA. These challenges to the Administration's balanced regulatory approach were mounted by special interest groups on both sides of the regulatory issue.

*We successfully defended the space program from efforts to halt the Galileo mission stemming from frivolous environmental claims.

*The pro-private property position we argued for as amicus curiae in the Supreme Court's most important takings case of the 1991-92 term prevailed. Lucas v. South Carolina Coastal Council. The Court held that a loss of all economic use of property was a per se taking, subject only to a limited exception for common-law nuisances.

*In two recent Supreme Court cases, we have won decisions limiting standing to persons who are actually injured by the actions complained of (Lujan v. National Wildlife Federation; Lujan v. Defenders of Wildlife). This ensures that environmental priorities will be set by elected representatives, not special interest groups or judges.

*We successfully defended the ability of the President to conduct foreign affairs and international negotiations against efforts to impose unwarranted environmental priorities and requirements. FOET v. Watkins (global warming); Public Citizen v. U.S. Trade Representative (NAFTA negotiations); Greenpeace v. Stone (transport of chemical weapons). We also participated in international negotiations and meetings to ensure that the President's foreign policy objectives and powers would be maintained and international environmental protection goals would be achieved.

*We successfully represented the U.S. as trustee for Indian tribes in:

- water rights adjudications, which
  - o ended disputes over water in southwestern Colorado and northern New Mexico which have been ongoing for over 100 years;
  - o finally settled the Indian water claims in southern Idaho, thereby saving tens of millions of dollars in what would most certainly have been a bitter and protracted litigation; and
  - o successfully enforced a federal decree against non-Indian farmers who had deprived certain tribes of their water rights for over 50 years.
- trespass actions by a railroad which brought payments to the reservation for a future right of way;
- ousting an unauthorized gambling operation on the reservation, collecting almost $2 million for the Winnebago Tribe; and
- establishing a prescriptive easement across private land so that the Zunis could make their quadrennial religious pilgrimage.

Executive Office for United States Attorneys
Office of the Director

EXHIBIT C

Main Justice Building, Room 1619
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

NOV 9 1992

MEMORANDUM FOR: All United States Attorneys

FROM: Anthony C. Moscato
Acting Director

SUBJECT: Status of Operation Garbage Out and Case Management in the United States Attorneys' Offices

Accurate and timely case management information reporting continues to be one of this organization's highest priorities. We are pleased to report that over the past year, we have continued to see improvements in the quality of information contained in our local and central case management systems. We would like to review the current status of our efforts and to advise you of plans for the coming fiscal year.

I. Phase 3 of Operation Garbage Out

In December 1991, the implementation of Phase 3 of Operation Garbage Out was announced. Since that time, a team of Executive Office personnel has reviewed reports of data from 21 districts in order to determine their completeness and accuracy. They will continue their review efforts this fiscal year at the rate of four districts per month.

During these reviews, a number of common errors have been identified: (1) FIRREA and other criminal fraud cases which did not indicate which agency had been defrauded; (2) civil cases brought to recover money that did not indicate the amount of relief that was requested; (3) cases that did not indicate the file number of the client (for civil) or investigating (for criminal) agency; (4) forfeiture cases which did not properly identify the asset that was being forfeited; (5) collections that did not list the debtor's social security number; (6) foreclosure cases with an incorrect agency; and (7) collections which had a zero balance but were not yet closed.

As United States Attorney, you can help reduce the frequency of these and other errors by taking the following steps.

1. **Use** the information in your local case management system to manage your office. Your leadership is the key to ensuring that information is entered in a timely and accurate manner.

2. **Emphasize** the importance of incorporating all new policy and procedure releases in the manuals kept by the system users. In addition, new policies should be reviewed within each office to develop practical ways of incorporating them into the office's current procedures.

3. **Encourage** adequate training of all potential system users in both the attorney and the support staffs. Your system manager, experienced docket clerks and financial litigation technicians are good sources of expertise. The Case Management and Financial Litigation Staffs are planning a series of training conferences this fiscal year for docket personnel, financial litigation agents, attorney supervisors, system managers, and administrative officers. The Case Management and Financial Litigation Staff personnel can also arrange for on-site training sessions of docket technicians, financial litigation technicians, and system managers.

4. **Institute a data quality** control program within your district. As a first step, encourage your system manager to review and eliminate errors that appear on the monthly error lists received from the Executive Office. Second, ask your system manager to develop and run reports that will test for the same errors that Information Management checks for in Phase 3 of Garbage Out. (A package of reports (DOGS), which was initially developed by Stacy Joannes of the Western District of Wisconsin and Patricia Mahoney of the Northern District of Iowa, is being distributed to the TALON districts.) Correct errors before they reach the Executive Office. Third, look at your office procedures. If changing a procedure can ensure that good information is entered in the first place, the time spent identifying and correcting errors can be reduced.

5. **Call** the Case Management (202-501-6598) or the Financial Litigation Staff (202-501-7017) if you have questions about the procedures that should be used in your case management system. The Executive Office has dedicated personnel to support all levels of the case management systems. System managers and individual

case management system users are encouraged to contact these program managers.

II. Improved Central System Data Quality Procedures

During the past six months, the Case Management Staff has been analyzing the information contained in its central systems to ensure that information contained in the central systems accurately reflects the information contained in the local systems. As a result of this analysis, a number of changes have been made to the way information submitted by your district is incorporated in the central system. The Case Management Staff will continue to monitor the quality of data in the central system, but they need your help. Please contact Eileen Menton, the Assistant Director for the Case Management Staff, on (202) 501-6598 if you identify any discrepancies between reports generated by the Executive Office and the information in your local system.

III. Local Case Management Systems

A number of initiatives are underway, which will result in new caseload and collections systems for the United States Attorneys' offices.

The Financial Litigation and Case Management Staffs are working with the Administrative Office of the United States Courts to implement the National Fine Payment Center, which is now running in the Eastern District of North Carolina. It will soon be expanded to the remaining pilot sites - the Western District of Missouri, the Eastern District of Pennsylvania, the Western District of Texas, and the Southern District of Texas. The remaining districts will be converted over the next two to three years.

The Financial Litigation and Case Management Staffs are also working with the Justice Management Division on the expanded Nationwide Central Intake Facility. Proposals from vendors to operate the facility, which will ultimately be responsible for support of the Financial Litigation Units in all of the districts are now being solicited. The Department plans to award a contract in the spring of 1993. Those districts which have participated in the Private Counsel Pilot project will be converted initially. The remaining districts will be converted over the next two to three years.

Finally, the Case Management Staff is continuing its work on the development of a new case management system for the United States Attorneys' offices, which will replace PROMIS, USACTS-II, and TALON. The requirements document is now being completed.

During the coming year, the system will be designed and programming started.

IV. Departmental Case Management System

Tom Corbett is to be commended for this role as Chairman of the Standards Committee for the Departmental Case Management System. Working with representatives of the litigating divisions, he has developed a framework for the development of a system which will provide accurate Department-wide caseload statistics to the Attorney General. The work of that Committee is being turned over to a Technical Implementation Sub-Committee chaired by Sue Cavanaugh of the Civil Division.

U.S. Department of Justice

Executive Office for United Sta

EXHIBIT D

Office of the Dir or

Washington, D.C. 20530

NOV 17 1992

MEMORANDUM FOR: All United States Attorneys
All Administrative Officers

FROM: Anthony C. Moscato
Acting Director

BY: Deborah C. Westbrook
Legal Counsel

SUBJECT: Reimbursing State and Local Entities for Production of Documents

Upon request from several United States Attorneys' offices, we have examined the issue of reimbursing state and local agencies for production of records. This matter arose in part from the Florida Department of State, Division of Corporations' refusal to produce incorporation records without prepayment. The policy articulated below should be followed when requesting records from state or local agencies:

If you invoke the federal legal process when requesting records or documents from state or local agencies, you should not reimburse those agencies for production. If you do not invoke the federal legal process, you should reimburse the state or local agencies according to their prescribed rates. States or localities that do not have legislatively imposed rates should be reimbursed at a reasonable rate. There are few instances when the federal legal process cannot be invoked for production of records. In most instances, a grand jury or trial subpoena can be issued to obtain records or documents. Whenever possible subpoenas should be utilized to acquire records.

The understanding reached with the Florida Department of State, Division of Corporations, regarding reimbursement for document production was predicated upon this policy. By way of background, the Florida Department of State recently began requiring the United States Attorneys' offices to reimburse it for the production of documents requested pursuant to subpoenas or oral and written requests. After several United States Attorneys' offices sought our guidance in this matter, we surveyed all districts for information on current practices. Subsequently, we entered into discussions with the Florida Department of State asserting that the federal government had no

authority to reimburse a state government entity for services provided pursuant to judicial process. The Florida Department of State has accepted our position that if United States Attorneys' offices request documents by invoking the federal legal process, no fees will be charged.

Inasmuch as the same issue has arisen with respect to other state agencies, this memorandum memorializes oral and written advice previously rendered by this office. No reimbursement of state agencies for production of documents is necessary if the federal legal process is invoked. This applies to all state agencies and all types of records acquired from such agencies. Unless there is a specific federal statutory exception, no entity is entitled to reimbursement for complying with the federal legal process. This principle was first enunciated in Blair v. United States, 250 U.S. 273 (1919) and reiterated in Hurtado v. United States, 410 U.S. 578 (1973):

> [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for the performance of which he is entitled to no further compensation than that which the statutes provide.

Hurtado at 589. The Government is not required to pay for the performance of a public duty it is already owed. Hurtado at 588. Therefore, unless specific statutory authority exists, the federal government will not pay or reimburse entities for fulfilling their public duties.

If you have any questions, please contact Robert X. Marcovici, Attorney-Advisor, Office of Legal Counsel, at (202) 514-4024.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT E

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

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

VOLUME 5 • NUMBER 4 • OCTOBER 21, 1992

Departures

MITIGATING CIRCUMSTANCES

Ninth Circuit holds district court erred in finding defendant's childhood abuse was not "extraordinary." Defendant pled guilty to bank robbery. The district court determined that the Guidelines covered the effects of childhood abuse in § 5H1.3, p.s., and that defendant's history of abuse, although "shocking," was not so extraordinary as to warrant downward departure.

The appellate court agreed that § 5H1.3 covers "the psychological effects of childhood abuse" and thus departure was warranted only in extraordinary circumstances. *Accord U.S. v. Vela*, 927 F.2d 197, 199 (5th Cir.), *cert. denied*, 112 S. Ct. 214 (1991). However, the court reversed because it was clear error to hold that defendant's circumstances were not extraordinary. The court found that defendant was severely abused in childhood and after, over a period of fifteen years. Several medical experts examined defendant and "[e]ach agreed that her history of abuse was exceptional.... [One] reported that West's abuse was so severe she had become 'virtually a mindless puppet.'" The court remanded and also suggested that, because defendant's history indicated the lack of any "meaningful guidance" during her childhood, the district court consider whether departure was warranted under *U.S. v. Floyd*, 942 F.2d 1096, 1099–1102 (9th Cir. 1991) (affirmed departure based on defendant's "youthful lack of guidance") [4 *GSU* #10]. *Cf. U.S. v. Lopez*, 938 F.2d 1293, 1298 (D.C. Cir. 1991) (§ 5H1.10, p.s., does not preclude consideration of defendant's tragic personal history) [4 *GSU* #5]; *U.S. v. Diegert*, 916 F.2d 916, 918–19 (4th Cir. 1990) (district court has discretion to determine whether defendant's "tragic personal background and family history" is "extraordinary" and warrants departure). **Note:** A new policy statement at § 5H1.12, effective Nov. 1, 1992, states that "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds" for departure.

U.S. v. West, No. 91-30085 (9th Cir. Sept. 18, 1992) (Thompson, J.).

See *Outline* at VI.C.1.b and h.

In two cases, Second Circuit holds that drug rehabilitation efforts or "extraordinary acceptance of responsibility" may warrant downward departure. In one case, defendant pled guilty to heroin distribution. Sentencing was postponed over a year to allow her to pursue drug rehabilitation. The guideline range was 51–63 months, but the district court concluded that defendant's rehabilitation efforts, and her need for further treatment, warranted departure to a four-year term of probation that included mandatory drug treatment.

The appellate court affirmed. Noting that the circuits are split as to whether drug rehabilitation efforts may warrant downward departure (see *Outline* at VI.C.2.a and b), the court concluded "that the position opposed to rehabilitation-based departures is not persuasive. In the first place, this position rests in large part on the view ... that 'rehabilitation is no longer a direct goal of sentencing.' ... That view is simply mistaken.... 28 U.S.C. 994(k) stands for the significantly different proposition that rehabilitation is not an appropriate ground for imprisonment.... Since rehabilitation may not be a basis for incarceration but must be considered as a basis for a sentence [under 18 U.S.C. § 3553(a)(2)(D)], Congress must have anticipated that sentencing judges would use their authority, in appropriate cases, to place a defendant on probation in order to enable him to obtain 'needed ... medical care, or other correctional treatment in the most effective manner.'"

The court disagreed that the Sentencing Commission "adequately considered" drug rehabilitation. "The Commission concluded that drug dependence is not a reason for a downward departure. U.S.S.G. 5H1.4. Whether or not that flat assertion is 'adequate' consideration of the factor it 'considers'—drug dependence, it is surely not any consideration ... of ... defendant's efforts to end her drug dependence through rehabilitation." The court also rejected the argument that § 3E1.1 adequately covers drug rehabilitation. "[T]he conduct that indicates acceptance of responsibility 'for [a defendant's] criminal conduct' must relate directly to the offense. To permit section 3E1.1 to serve as the Commission's adequate consideration of all mitigating 'post-offense conduct,' ... thereby precluding departures regardless of anything constructive that the defendant might do after his arrest that benefits himself, his family, or his community, undermines the statutory standard for departure, 18 U.S.C. § 3553(b), as well as the statutory requirement to consider the 'characteristics of the defendant,' *id.* §3553(a)(1)." **Note:** An amendment to the commentary for § 3E1.1, effective Nov. 1, 1992, adds "post-rehabilitative efforts (e.g., counseling or drug treatment)" as a factor demonstrating acceptance of responsibility.

The court cautioned that rehabilitation programs, "easily entered but difficult to sustain, cannot be permitted to become an automatic ground for obtaining a downward departure." In this case, however, the district court "conscientiously examined all of the pertinent circumstances" and appropriately concluded departure was warranted.

U.S. v. Maier, No. 92-1143 (2d Cir. Sept. 23, 1992) (Newman, J.).

In the other case, defendant robbed a bank while under the influence of crack. The next day he voluntarily surrendered and confessed, explaining that his previous attempts at drug rehabilitation had failed and he hoped to get help in prison. The district court held it had no authority to depart downward for these actions.

The appellate court remanded, holding "extraordinary acceptance of responsibility" may be grounds for departure. "We find nothing in the Guidelines which contemplates a defendant like Rogers, who, emerging from a drug-induced state and realizing his wrongdoing, turns himself over to the police and confesses.... [C]onduct such as this raises a colorable basis for a downward departure." See *Outline* at VI.C.2.a and 4.

The appellate court also held that defendant's career offender status did not bar departure. "[T]here is nothing unique to career offender status which would strip a sentencing court of its 'sensible flexibility' in considering departures. . . . If a career offender is eligible for departure based on past conduct, which is the basis for his status as a career offender, we can see no reason why he should not be similarly eligible for a departure based on present conduct, which is the basis for his conviction and sentence." Some circuits have held that departure for career offenders is permissible when the criminal history category overrepresents the seriousness of past conduct. See *Outline* at VI.A.2.

U.S. v. Rogers, 972 F.2d 489 (2d Cir. 1992).

U.S. v. Slater, 971 F.2d 626, 634–35 (10th Cir. 1992) (per curiam) (Remanded: District court erred in holding that departure under § 5H1.4, p.s., is limited to physical impairments so severe as to warrant a non-custodial sentence. An impairment may be "extraordinary" yet warrant only a reduction in, not elimination of, the term of imprisonment.). *Accord U.S. v. Hilton*, 946 F.2d 955, 958 (1st Cir. 1991); *U.S. v Ghannam*, 899 F.2d 327, 329 (4th Cir. 1990).
See generally *Outline* at VI.C.1.

Aggravating Circumstances

U.S. v. Wint, No. 91-3831 (8th Cir. Aug. 28, 1992) (Wollman, J.) (Affirmed four-level upward departure for defendants—convicted of drug offenses and threatening a witness—for making death threats against a codefendant and his family to influence his testimony. Although the obstruction enhancement in § 3C1.1 covers threats against witnesses, it does not adequately address "the nature of [defendants'] conduct. Here, the threats were of death, not simply physical injury. The threats were ongoing and apparently sincere. . . . The targets of the threats included not only [the codefendant], but also innocent third parties. . . . Finally, the threats occurred while [the codefendant] was incarcerated, unable to protect his family or even free to flee himself."). *See also U.S. v. Baez*, 944 F.2d 88, 90 (2d Cir. 1991) (affirmed departure for abducting and threatening to kill informant); *U.S. v. Wade*, 931 F.2d 300, 306 (5th Cir.) (affirmed departure made partly on basis that defendant had coconspirator threaten and shoot at person), *cert. denied*, 112 S. Ct. 247 (1991); *U.S. v. Drew*, 894 F.2d 965, 974 (8th Cir.) (affirmed departure for attempt to murder witness), *cert. denied*, 110 S. Ct. 1830 (1990) [3 *GSU* #2].
See *Outline* at VI.B.1.

Sentencing Procedure

Hearsay

En banc Sixth Circuit affirms that Confrontation Clause does not apply at sentencing. In three cases consolidated for appeal, defendants' sentences were increased for drug amounts in relevant conduct that were proved by hearsay testimony. The en banc court affirmed and rejected defendants' claims that the Confrontation Clause precluded the use of hearsay testimony at sentencing: "[C]onfrontation rights do not apply in sentencing hearings. . . . When defendants have pleaded guilty . . . sentencing does not mandate confrontation and cross-examination on information submitted to the court through the presentence reports and law enforcement sources. Following the mandates of Fed. R. Crim. P. 32 is constitutionally sufficient because they are fundamentally fair and afford the defendant adequate due process protections." *Accord U.S. v. Wise*, — F.2d — (8th Cir. Sept. 17, 1992) (en banc) [5 *GSU* #3]. See *Outline* at IX.D.1.

The court also noted that "[i]t is the law that even illegally obtained or other inadmissible evidence may be considered by the sentencing judge unlike at a trial involving guilt or innocence." Other circuits agree. See *Outline* at IX.D.4.

U.S. v. Silverman, No. 90-3205 (6th Cir. Sept. 22, 1992) (en banc) (Wellford, Sr. J.) (Merritt, C.J., Keith, Jones, and Martin, JJ., dissenting).

Offense Conduct

Calculating Weight of Drugs

U.S. v. Rodriguez, No. 91-5455 (3d Cir. Sept. 18, 1992) (Roth, J.) (Remanded: Court joined four other circuits in holding unusable ingredients should not be included as part of drug "mixture" under Note * in § 2D1.1(c). Defendants conspired to sell three one-kilogram packages of cocaine, which actually consisted of compressed boric acid with a small amount of cocaine (65.1 grams total) carefully wrapped around the boric acid to fool buyers. Distinguishing *Chapman v. U.S.*, 111 S. Ct. 1919 (1991) [4 *GSU* #4], the court held that defendants should not have been sentenced on the total weight: "*Chapman* concerned a true mixture," whereas "the cocaine here was not mixed in among the particles of boric acid." Furthermore, "the compressed boric acid was not used either as a cutting agent or routine transport medium for the cocaine such that its proximity to the cocaine here would constitute a 'mixture' as *Chapman* elucidates that term."

The court also rejected the government's argument that "the object of the conspiracy was three kilograms of cocaine," finding "that the government produced no evidence of availability to the defendants of three kilograms of cocaine and that the district court made no finding that a higher guideline range was justified by any ability of defendants to deliver in fact three kilograms of cocaine to the proposed purchasers" as is required under § 2D1.4, comment. (n.1).).
See *Outline* at II.B.1 and 3.

Violation of Supervised Release

Revocation of Supervised Release

U.S. v. Koehler, No. 91-1585 (2d Cir. Aug. 21, 1992) (Mahoney, J.) (Remanded: Error to reimpose supervised release term after it was revoked and a sentence of imprisonment was imposed. Once a term of supervised release has been revoked under 18 U.S.C. § 3583(e)(3), "there is nothing left to extend, modify, reduce, or enlarge under § 3583(e)(2).").

U.S. v. Bermudez, No. 92-1236 (2d Cir. Sept. 1, 1992) (per curiam) (Remanded: After revocation of supervised release for defendant who was originally sentenced before the Guidelines became effective but after supervised release went into effect, district court should still consider Guidelines Chapter 7 when resentencing. "It seems clear that a violation of supervised release is, for this purpose, a separate 'offense' from the crime that led to the initial imprisonment. . . . Revocation or modification of supervised release is authorized by 18 U.S.C. § 3583(e), which requires the court to consider certain factors set forth in § 3553(a), including '. . . the guidelines that are in effect on the date the defendant is sentenced' and 'any pertinent policy statement. . . .' Thus, on remand, the current Guidelines should be consulted in resentencing Bermudez." The court noted that, although courts should "take the [Chapter 7] policy statements into account when sentencing for a violation of supervised release," the statements "'are advisory rather than mandatory.'"
See *Outline* at VII.B.1.

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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

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

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General Application Principles

AMENDMENTS

Third Circuit holds that clarifying commentary that was added after defendant's sentencing may be considered on appeal even if it conflicts with circuit precedent, unless it is inconsistent with the guideline. Defendant, convicted of armed bank robbery and possession of a firearm by a convicted felon, received a longer sentence because the sentencing court determined that the unlawful possession offense was a "crime of violence" under § 4B1.2(1)(ii). At the time, the Third Circuit held that unlawful possession could be a crime of violence and courts could look beyond the indictment to the underlying circumstances of the offense to make that determination. *See U.S. v. John*, 936 F.2d 764, 767–68 (3d Cir. 1991); *U.S. v. Williams*, 892 F.2d 296, 304 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 3221 (1990). Between defendant's sentence and appeal, however, an amendment to § 4B1.2, comment. (n.2) "clarifie[d] that the application of § 4B1.2 is determined by the offense of conviction (i.e., the conduct charged in the count of which the defendant was convicted); [and] that the offense of unlawful possession of a weapon is not a crime of violence." *See* U.S.S.G. App. C, Amendment 433 (1991). Defendant argued that because the amendment merely clarified the guideline, he should be resentenced.

The appellate court remanded, holding that "we may consider a new commentary regarding an ambiguous guideline in determining how that guideline should be applied. We further hold that a panel may consider new commentary text where another panel of this court has already resolved the ambiguity and that a second panel is entitled to defer to the new commentary even when it mandates a result different from that of the prior panel." Finding § 4B1.2(1)(ii) was ambiguous as to whether underlying or only charged conduct could be considered, the court concluded that "the reading of § 4B1.2 reflected in the new commentary is a permissible reading of that guideline and ... a sentencing court should look solely to the conduct alleged in the count of the indictment charging the offense of conviction in order to determine whether that offense is a crime of violence."

The court also held, however, that if "the Commission adopts an interpretive commentary amendment that the text of the guideline cannot reasonably support, ... we should decline to follow its lead. ... Therefore, to the extent the amendment in question purports to make possession of a firearm by a felon never a crime of violence, we conclude that the text of the guideline will not support this interpretation. Thus, we decline to give it any effect."

Other circuits have followed the amendment, but the Eleventh Circuit concluded that the amendment did not nullify circuit precedent that held unlawful possession by a felon is "by its nature" a crime of violence. *See U.S. v. Stinson*, 957 F.2d 813, 814–15 (11th Cir. 1992) (per curiam). *Cf. U.S. v. Saucedo*, 950 F.2d 1508, 1512–17 (10th Cir. 1991) (do not retrospectively apply clarifying amendment to commentary that conflicts with circuit precedent and would disadvantage defendant in violation of ex post facto clause).

U.S. v. Joshua, No. 91-3286 (3d Cir. Oct. 5, 1992) (Stapleton, J.).

See *Outline* at I.E and IV.B.1.b.

INCRIMINATING STATEMENTS AS PART OF COOPERATION AGREEMENT

U.S. v. Fant, 974 F.2d 559, 562–65 (4th Cir. 1992) (Remanded: It was "plain error" to base obstruction of justice enhancement on statements made to probation officers where plea agreement, pursuant to § 1B1.8(a), stated self-incriminating information provided to government would not be used to determine the guideline range. Application Note 5 (Nov. 1, 1991), added after defendant was sentenced but "intended merely to clarify ... the proper operation of § 1B1.8," indicates that the restriction in § 1B1.8(a) "applies to statements made to probation officers which are later incorporated into presentencing reports."). *Accord U.S. v. Marsh*, 963 F.2d 72, 73–74 (5th Cir. 1992) (per curiam) [4 *GSU* #24]. *But cf. U.S. v. Miller*, 910 F.2d 1321, 1325–26 (6th Cir. 1990) (holding, prior to addition of Note 5, that statements to probation officer are not covered by § 1B1.8).

See *Outline* at I.D.

Sentencing Procedure

EVIDENTIARY ISSUES

Sixth Circuit holds that illegally seized evidence may not be considered in sentencing under the Guidelines unless it is unrelated to the offense of conviction. Defendant pled guilty to a 1990 drug conspiracy charge. In determining where to sentence within the guideline range, the district court considered evidence that was illegally seized during a 1988 arrest on state drug charges. Defendant appealed.

Although the appellate court affirmed on the facts of the case, it disagreed with four other circuits by holding that "the exclusionary rule bars a sentencing court's reliance on evidence illegally seized during the investigation or arrest of a defendant for the crime of conviction in determining the defendant's sentence under the Sentencing Guidelines."

"This conclusion follows in part from the momentous changes in sentencing wrought by the federal Sentencing Guidelines ... [which] have dramatically changed the calculus of costs and benefits underlying the exclusionary rule. ... [S]entencing has to a significant extent replaced trial as the principal forum for establishing the existence of certain criminal conduct. It therefore follows that excluding illegally seized evidence from trial but permitting its use at sentencing will result in a corresponding decrease in the deterrent effect of the exclusionary rule on unconstitutional law-enforcement practices."

However, because defendant's 1988 state drug charges "involved conduct unrelated to that for which Nichols was convicted in this case ... excluding the evidence from sentencing on the subsequent conviction would not sufficiently fur-

ther the purposes of the exclusionary rule to justify barring its use at sentencing." The court held that, "where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the Sentencing Guidelines, and the district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range."

One judge agreed with the result but "prefer[red] not to join in some of the dicta that accompany the court's announcement of this conclusion. Our disposition of this appeal makes it unnecessary to say, for example, whether we agree or disagree with the 'broad rule' that other Courts of Appeals have adopted with respect to the use at sentencing of evidence inadmissible at trial."

U.S. v. Nichols, No. 91-5581 (6th Cir. Nov. 6, 1992) (Jones, J.) (Nelson, J., concurring in part).
See *Outline* at IX.D.4.

Adjustments

Obstruction of Justice

U.S. v. Colletti, No. 91-5405 (3d Cir. Oct. 7, 1992) (Fullam, Sr. Dist. J.) (Remanded: Committing perjury at trial may warrant § 3C1.1 enhancement, but "the perjury of the defendant must not only be clearly established, and supported by evidence other than the jury's having disbelieved him, but also must be sufficiently far-reaching as to impose some incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury."). *See also U.S. v. Lawrence*, 972 F.2d 1580, 1581–83 (11th Cir. 1992) (per curiam) (court must make independent finding that defendant willfully lied at trial).
See *Outline* at III.C.5.

Acceptance of Responsibility

U.S. v. Hicks, No. 91-3195 (D.C. Cir. Nov. 3, 1992) (Randolph, J.) (Remanded: Defendant was convicted on one count; the jury could not reach a verdict on a second. At trial, defendant admitted the first offense but denied the second. The district court refused to grant a § 3E1.1 reduction, holding that defendant had to accept responsibility for the second offense—as relevant conduct—as well as the offense of conviction. The appellate court, noting the split in the circuits on this issue, stated that the Nov. 1, 1992 amendment to § 3E1.1 "seems to resolve the confusion" by indicating that "the Guideline requires the showing of contrition only with respect to the offense of conviction." Note, however, that Application Note 1(a) states that "a defendant who falsely denies . . . relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."

The court also noted: "Under U.S.S.G. § 1B1.11, also effective November 1, 1992, the resentencing will occur under the new version of the Guidelines unless such application would violate the Ex Post Facto Clause." The court cautioned that "our disposition of this case does not mean that a defendant is entitled to resentencing anytime a relevant Guideline is amended during the pendency of an appeal. The result here is dictated by unique circumstances—an amendment that appears to render a substantial constitutional issue without future importance and a record that does not reveal the precise basis for the district court's ruling. We doubt that many similar cases will arise in the future.").
See *Outline* at I.E and III.E.3.

U.S. v. Rodriguez, 975 F.2d 999, 1009 (3d Cir. 1992) (Remanded: In denying acceptance of responsibility reduction, district court erred by not considering reasons why defendants refused to plead guilty to entire indictment and went to trial. The decision to go to trial does not prohibit the reduction, § 3E1.1(b) and comment. (n.2), and here the defendants appear to have had specific, valid reasons for refusing to plead—one was acquitted on the count he refused to plead guilty to, the other disagreed with the amount of drugs claimed by the government and won a lower amount on appeal.).
See *Outline* at III.E.4.

Role in Offense

U.S. v. Colletti, No. 91-5405 (3d Cir. Oct. 7, 1992) (Fullam, Sr. Dist. J.) (Remanded: Robbery defendant was not leader of criminal activity involving five or more persons, § 3B1.1(a), because the fifth person "was neither 'criminally responsible for the commission of the offense' . . . nor was he used to facilitate the criminal offense—which was already completed" when he became involved. The fifth person was charged with receiving the stolen goods from the robbery, but was not and could not properly have been charged with robbery. He did not know the robbery was to occur, assisted only *after* the offense by briefly hiding the stolen goods, and did not profit from the crime.).
See *Outline* at III.B.2.

Criminal History

Calculation

U.S. v. Woods, No. 92-1016 (7th Cir. Oct. 6, 1992) (Cummings, J.) (Affirmed: District court should have followed Application Note 3 of § 4A1.2 and treated prior sentences as "related" under § 4A1.2(a)(2) solely because they were consolidated for sentencing. Although *U.S. v. Elmendorf*, 945 F.2d 989, 997–98 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 990 (1992), held that this note need not be strictly followed, and "we still believe that treating crimes as 'related' simply because they were consolidated for trial or sentencing is misguided," the Nov. 1991 additions of § 4A1.1(f) and Application Note 6 "show that cases that are consolidated for sentencing are meant to be considered related." Thus, "[l]anguage in *Elmendorf* to the contrary should be limited to cases arising under prior versions of the Sentencing Guidelines." Here, however, "this error was harmless"—although points were subtracted by treating some prior sentences as related, enough points were added under § 4A1.1(f) to result in the same criminal history category and sentencing range.).
See *Outline* at IV.A.1.c and X.D.

Offense Conduct

Calculation of Loss

U.S. v. Bailey, 975 F.2d 1028, 1030–31 (4th Cir. 1992) (Remanded: For loss computation in completed fraud, it was improper to include projected profits defrauded investors would have earned on their investments—only the "out-of-pocket funds actually taken" by defendant are included. Use of "probable or intended loss" under § 2F1.1, comment. (n.7), is limited to attempt crimes.).
See *Outline* at II.D.2.

Vacated Pending Rehearing En Banc:

U.S. v. Lambert, 963 F.2d 711 (5th Cir. 1992). Please delete the reference to *Lambert* in the *Outline* at VI.A.3.

EXHIBIT F

Federal Sentencing and Forfeiture Guide

NEWSLETTER

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

Vol. 3, No. 28 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | November 16, 1992

IN THIS ISSUE:

Amendments effective November 1, 1992

On November 1, 1992, the new amendments to the Federal Sentencing Guidelines became effective. The amendments were summarized in the *Federal Sentencing and Forfeiture Guide Newsletter* when they were sent to Congress on May 1, 1992. These summaries are included, by topic, in the softbound Volume II of the *Federal Sentencing and Forfeiture Guide*. On September 16, 1992, the Sentencing Commission adopted additional amendments to policy statements and commentary for the following guideline sections: 1B1.10, 1B1.11, 2D1.1, 2F1.1, 2K1.13, 2K2.1, 3C1.1, 3C1.2, 4A1.2 and 7B1.1. The most important of these September 16, 1992 amendments are summarized, by topic, in this newsletter.

Also enclosed with this Newsletter is the Sentencing Commission's Table IV, titled "Factors Found by Appellate Court to Not Warrant an Upward Departure."

Guidelines Sentencing, Generally

2nd Circuit remands despite sentence within proper range because of judge's pretrial remarks. (110)(775) Prior to trial, the district judge threatened to impose the maximum sentence if he concluded that defendant went to trial without "a good defense." Defendant had a guideline range of 262 to 327 months, and received a 320-month sentence. The government moved to remand the case, and the 2nd Circuit wrote an opinion only to make clear the inappropriateness of the judge's threat. The judge's pretrial remarks created an unacceptable risk that the sentence was impermissibly enhanced above an otherwise

appropriate sentencing norm to penalize the defendant for exercising his constitutional right to stand trial. *U.S. v. Cruz,* __ F.2d __ (2nd Cir. Oct. 21, 1992) No. 92-1172.

8th Circuit finds no sentencing entrapment where government did not purchase drugs to increase sentence. (110)(242) Defendant argued that the government engaged in sentencing entrapment in violation of his due process rights. Since the government indicted him on the basis of one two-ounce sale, he claimed that the remaining 8-1/8 ounces he sold to the government informant resulted from sales instigated by the government merely to increase his sentence. The 8th Circuit rejected this argument, since defendant presented no evidence that the government continued the purchases merely to enhance his eventual sentence. The government continued purchases of narcotics from defendant for a reasonable period of time in order to probe the extent of the distribution ring, identify forfeitable assets, and snare defendant's supplier. The government was successful in this endeavor, locating considerable forfeitable assets, snaring defendant's cocaine supplier, and arresting a co-conspirator. *U.S. v. Calva,* __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-3739EA.

Article suggests Supreme Court has underestimated impact of guidelines. (110) In "*The Law of Federal Sentencing in the Supreme Court's 1991-92 Term,*" Ronald F. Wright summarizes the four guidelines cases decided by the Court during that period. He predicts that the cases will have a limited but positive impact on guidelines administration. The opinions themselves, however, demonstrate that the Court does not view the guidelines as having significantly changed federal sentencing. In light of this apparent lack of sophistication, Wright concludes that it may be best that the Court thus far has chosen only to review relatively unimportant guidelines cases. 5 FED. SENT. RPTR. 108-11 (1992).

2nd Circuit affirms district court's ability to reallocate fine after sentencing. (115)(630) The district court initially imposed a fine of $78,859 to cover the costs of imprisonment and waived all other fines. However, the calculation was based on an incorrect term of imprisonment, and the correct calculation should have been $41,130. The district court denied defendant's motion under Fed. R. Crim. P. 35(c) to reduce the fine, and the 2nd Circuit affirmed. The court's written order rejecting defendant's motion supported the interpretation that the court simply meant that the financial penalty ought not to exceed $78,859. In rejecting defendant's motion, the judge stated that he accepted defendant's determination that the cost of incarceration was $41,130, and that the remaining amount of $37,729 was within the appropriate guideline range for a fine, and thus the total fine of $78,859 was reaffirmed. The order was not a change of sentence, but a change of allocation. *U.S. v. Carter,* __ F.2d __ (2nd Cir. Nov. 4, 1992) No. 92-1117.

9th Circuit upholds converting imprisonment to special parole under former Rule 35(e). (115)(590) Pursuant to former Fed. R. Crim. P. 35(b), as it existed before the Sentencing Guidelines became effective on November 1, 1987, the district court modified defendant's sentence from five years imprisonment and five years special parole to two years imprisonment and eight years special parole. Four years later, the defendant argued that the increase in his special parole term was illegal because he was not personally present when the modification was
the argument, concluding that conversion of three years of defendant's sentence from imprisonment to special parole did not constitute an increase in sentence. Accordingly, there was no requirement under Fed. R. Crim. P. 43(c)(4) for the defendant to be present. *U.S. v. Thompson,* __ F.2d __ (9th Cir.

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Nov. 9, 1992) No. 92-10205.

8th Circuit finds no double counting in enhancement for knowledge that laundered money was drug proceeds. (125)(360) Defendant, convicted of money laundering, received an enhancement under section 2S1.1(b)(1) based on his knowledge that the laundered funds were drug proceeds. He argued that because he was charged with laundering drug money, an essential element of his crime was his knowledge that the laundered funds were drug proceeds, and therefore the enhancement constituted improper double counting. The 8th Circuit rejected this challenge. Defendant was convicted under 18 U.S.C. section 1956(a)(1)(B)(i), which prohibits the laundering of proceeds from a myriad of illegal activities, many of which have nothing to do with drugs. Thus, section 2S1.1(b)(1) distinguishes between classes of money launderers, punishing more severely those who knowingly launder drug proceeds. *U.S. v. Long*, __ F.2d __ (8th Cir. Oct. 20, 1992) No. 91-3434.

Supreme Court agrees to review 11th Circuit's rejection of commentary that felon in possession is not a "violent felony." (130)(180)(520) The 11th Circuit held that possession of a firearm by a convicted felon was categorically a crime of violence under the career offender guideline. The court refused to be bound by the Sentencing Commission's change in the commentary to section 4B1.2 unless Congress amended that language to specifically exclude possession of a firearm by a felon as a crime of violence. "We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of circuit courts." On November 9, 1992, the Supreme Court granted certiorari to review this ruling. *U.S. v. Stinson*, 943 F.2d 1268 (11th Cir. 1991), *on rehearing*, 957 F.2d 813 (11th Cir. 1992), *cert. granted*, __ U.S. __, 113 S.Ct. __ (Nov. 9, 1992) No. 91-8685.

Commission adopts ex post facto policy statement. (131) In policy statement 1B1.11, adopted September 16, 1992, effective November 1, 1992, the Sentencing Commission stated that "[i]f the court determines that use of the guidelines manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed. In the commentary, the Commission states that Congress did not expect the ex post facto clause to apply to amended sentencing guidelines. Nevertheless, it notes that the courts generally have held that the ex post facto clause *does* apply to guideline amendments that subject the defendant to increased punishment. 57 Federal Register 42804-42806 (September 16, 1992).

10th Circuit upholds harsher penalties for cocaine base than for cocaine powder. (135)(242) The 10th Circuit rejected constitutional challenges to the guideline section providing for harsher penalties for offenses involving crack cocaine than for cocaine powder. Even if such a provision has a discriminatory impact upon African-Americans, there is a rational relationship between the classification and a legitimate end. The guideline is not unconstitutionally vague. The mandatory nature of the guidelines is not an impermissible exercise of judicial power by the legislative branch. *U.S. v. Robinson*, __ F.2d __ (10th Cir. Nov. 2, 1992) No. 91-2090.

7th Circuit affirms that RICO guideline complies with guidelines' enabling legislation. (140)(290) The 7th Circuit rejected the argument that the RICO guideline, section 2E1.1, conflicts with the guidelines' enabling legislation by unfairly providing a high minimum base offense level and then failing to set forth specific aggravating or mitigating factors. Congress intended to make RICO a "weighty offense." The very structure of the statute demonstrates that Congress has decided that a RICO conspiracy is a specific, identifiable crime apart from any underlying predicates. *U.S. v. Ashman*, __ F.2d __ (7th Cir. Oct. 30, 1992) No. 91-2390.

8th Circuit reaffirms constitutionality of consideration of uncharged drug quantities at sentencing. (140)(242) The 8th Circuit, relying on its recent en banc decisions in *U.S. v. Galloway*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-3034 and *U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070, rejected defendant's claim that the inclusion of uncharged drug quantities in the computation of his sentence violated his constitutional rights to indictment, jury trial, and confrontation. *Galloway* held that a sentencing enhancement based on uncharged relevant conduct that is proven by a preponderance of the evidence does not violate the right to indictment, jury trial and proof beyond a reasonable doubt. *Wise* held that the right to confront witnesses does not attach at the sentencing phase. Relying on *Galloway*, the court also rejected defendant's claim that the Commission exceeded its statutory authority in promulgating section 1B1.3(a)(2), the relevant conduct provision. Senior Judge Heaney concurred.

U.S. v. Calva, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-3739EA.

8th Circuit says Failure to Appear guideline complies with statutory directive. (145)(320) The November, 1988, version of guideline section 2J1.6 (Failure to Appear) provided for the base offense level of six to be increased according to the maximum statutory penalty for the underlying offense. In *U.S. v. Lee*, 887 F.2d 888 (8th Cir. 1989), the 8th Circuit concluded that this guideline did not comply with Congress' statutory directive because it failed to differentiate between defendants who fail to appear to serve a sentence already imposed and defendants who fail to appear for trial, appeal, or sentencing. The 8th Circuit held that the November, 1990, amendment adequately addressed the issues raised in *Lee*. Section 2J1.6 now differentiates between failure to report cases on the basis of the amount of time the defendant is delinquent in reporting and on the type of facility to which the sentenced defendant is to report. *U.S. v. Marlon*, __ F.2d __ (8th Cir. Oct. 22, 1992) No. 91-3215.

Application Principles, Generally (Chapter 1)

Article advocates "structural" interpretation, assesses "crime of violence" requirement. (150)(520) In "*The Importance of Structural Analysis in Guideline Application*," Mary E. McDowell urges courts to view the guidelines in the same way they would view a complex statute, interpreting parts in a way that accords with the "internal structure of the text" and that makes the scheme as a whole appear "rational." Failure to follow this approach, she argues, had led to a diversity of viewpoints as to whether the crime of being a felon illegally in possession of a firearm constitutes a "crime of violence" within the meaning of the Career Offender guideline, section 4B1.1. Though the Commission sought to clarify this point by adding Commentary in November 1991, courts have not yet achieved uniformity. McDowell argues that reading 4B1.1 in conjunction with 2K2.1 and 4B1.4 would lead courts to conclude that being a felon in possession constitutes a crime of violence only when the indictment charges facts indicating that the crime was in fact violent. 5 FED. SENT. RPTR. 112-14 (1992).

1st Circuit says plan to sell forged instruments involved more than minimal planning. (160)(300) Defendant was arrested in possession of forged cashier's checks and demand drafts with a total face value of more than $18 million. Defendant testified that he hoped to get 80 percent of the face amount of the checks, but that he might accept as little as 40 percent of face value. The 1st Circuit affirmed an enhancement for more than minimal planning, since the offense "obviously involved a complex plan." *U.S. v. Resurreccion*, __ F.2d __ (1st Cir. Oct. 30, 1992) No. 91-2015.

Offense Conduct, Generally (Chapter 2)

1st Circuit reviews de novo whether predisposition toward fencing justified enhancement. (220)(870) Guideline section 2B1.2(b)(4)(A) provides a four-level enhancement for a defendant who is in the business of receiving and selling stolen property. The 1st Circuit reviewed *de novo* the district court's determination that defendant's predisposition toward fencing activities brought him within the ambit of section 2B1.2(b)(4)(A). *U.S. v. St. Cyr*, __ F.2d __ (1st Cir. Oct. 15, 1992) No. 92-1639.

1st Circuit rejects enhancement for being in the business of receiving and selling stolen property. (220) Defendant pled guilty to two counts of possessing stolen property in connection with his possession of 22 sweaters. The district court imposed an enhancement under section 2B1.2(b)(4)(A) for being in the business of receiving and selling stolen property, inferring from defendant's willingness to come into the scheme that he was predisposed toward buying and selling stolen property. The 5th Circuit found defendant's casual trafficking in sweaters insufficient to justify the enhancement. A court should consider evidence of the amount of income generated through fencing, the defendant's past activities, his demonstrated interest in continuing or expanding the operation, and the value of the property handled. Even in the absence of regularity, the sophistication of the defendant's operation may indicate business conduct. Here, there was no evidence of either regularity or sophistication. *U.S. v. St. Cyr*, __ F.2d __ (1st Cir. Oct. 15, 1992) No. 92-1639.

1st Circuit affirms $10 million loss from forged bank documents despite no actual loss. (226)(300) Defendant was arrested in possession of forged cashier's checks and demand drafts with a face value of more than $18 million. He testified that he hoped to get 80 percent of the face amount, but might accept as little as 40 percent. The 1st

Circuit affirmed an enhancement under section 2B5.2 and 2F1.1 for a loss of $10 to $20 million even though there was no actual loss and no known victim. The fraud guideline includes intended loss, which need not be precise. Defendant intended to use the forged instruments to obtain between $10 and $20 million from someone. This was an intended loss to someone, since defendant knew the bank would never have honored the checks. Finally, the provision in note 4 to section 1B1.3 excluding harm that is merely risked refers to risks of harm other than "intended harm," since the fraud guideline clearly indicates that intended harm is to be considered. *U.S. v. Resurreccion*, __ F.2d __ (1st Cir. Oct. 30, 1992) No. 91-2015.

8th Circuit rules court used wrong standard in finding that defendant carried crack cocaine. **(240)(755)** At sentencing, the district court determined that defendant possessed crack cocaine, rather than powder cocaine. The 8th Circuit remanded for reconsideration of this issue because the district court applied a standard of proof less than a preponderance, and the evidence supporting the harsher crack sentence was "equivocal." The preponderance of the evidence standard applies to sentencing decisions. Under this standard, it was unclear whether the type of cocaine which defendant possessed was more likely than not crack and not cocaine powder. The government's forensic chemist stated alternatively that the substance was "most likely cocaine," "cocaine base with some procaine base," and "procaine or cocaine base with some procaine base mixed in." *U.S. v. Monroe*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 92-1979.

10th Circuit requires lower sentence where amphetamine verdict was ambiguous. **(240)** Defendants were charged with a conspiracy to distribute "methamphetamine/amphetamine." One defendant was also charged with possession of a listed chemical. The sentences were based on the offense level for methamphetamine, which is higher than amphetamine. Defendants argued that the use of the term "methamphetamine/amphetamine" in the indictment and the use of a general verdict form made the convictions ambiguous and required the sentence to be based on the lower base offense level for amphetamine. The 10th Circuit agreed as to some of the counts. Since there was sufficient evidence to support conspiracy convictions for either substance, the jury might have convicted defendants of an amphetamine conspiracy, and the sentences should have been based on the lower amphetamine offense level. Similarly, with respect to one defendant's charge of possessing a listed chemical, there was sufficient evidence to support a conviction based on either substance. *U.S. v. Pace*, __ F.2d __ (10th Cir. Oct. 28, 1992) No. 91-7059.

2nd Circuit upholds treating one marijuana plant as equivalent to 1000 grams. **(242)(253)** Under 21 U.S.C section 841(b)(1)(B)(vii) and guideline section 2D1.1(c), for offenses involving more than 100 marijuana plants, one plant is treated as equivalent to 1000 grams of marijuana. For offenses involving a lesser number of plants, one plant is treated as equivalent to 100 grams of marijuana. The district court held that both the statute and the guideline were unconstitutional because there was no rational basis for equating one unharvested marijuana plant with one kilogram of dried marijuana. The 2nd Circuit reversed, agreeing with *U.S. v. Osburn*, 955 F.2d 1500 (11th Cir. 1992), that there was a rational basis for penalizing large scale growers more harshly than small time offenders. The 60-month mandatory minimum sentence in section 841(b)(1)(B)(vii) was rationally related to Congress's objective of imposing severe punishment on large scale drug offenders. *U.S. v. Murphy*, __ F.2d __ (2nd Cir. Nov. 5, 1992) No. 92-1208.

3rd Circuit upholds harsher penalties for cocaine base than for cocaine. **(242)** The 3rd Circuit rejected the argument that because the guidelines do not define "cocaine base," higher penalties for cocaine base than for cocaine are unconstitutional. Cocaine salt and cocaine base or crack are different substances with a different molecular structure and definition in organic chemistry. Simply because Congress has not provided a definition for the term cocaine base does not mean it has failed to establish minimal guidelines to govern law enforcement. There is a rational basis for distinguishing between cocaine base and cocaine salt. Cocaine base is far more addictive than cocaine in its salt form, and is more accessible due to its relatively low cost. Finally, defendant had no basis for arguing that the guidelines were vague as to him, since he never suggested that he misunderstood the difference between crack and cocaine. *U.S. v. Jones*, __ F.2d __ (3rd Cir. Nov. 5, 1992) No. 92-3190.

10th Circuit holds that related convictions at single trial constituted multiple prior convictions. **(245)** Defendant was convicted in 1978 of one count of conspiring to manufacture, possess and distribute marijuana, based on numerous alleged overt acts. He was also convicted of the listed overt acts as substantive offenses. He

argued that because the prior offenses were related and based on a single indictment and trial, they constituted only one prior felony drug conviction for purposes of the mandatory life imprisonment under 21 U.S.C. section 841(b)(1)(A) (viii). The 10th Circuit rejected this argument, holding that the test for section 841 enhancement purposes is whether the prior offenses constituted separate criminal episodes or a single act of criminality. In defendant's case, although prosecuted in one case, his prior substantive offenses constituted separate criminal episodes that occurred at distinct times. *U.S. v. Pace*, __ F.2d __ (10th Cir. Oct. 28, 1992) No. 91-7059.

3rd Circuit remands where sentencing court erred in amount of cocaine specified in indictment. (250) The government conceded that the district court erred in concluding that the offense of conviction was possession of more than 500 grams of cocaine, since the offense to which defendant pled guilty was possession of less than 500 grams of cocaine. The 3rd Circuit remanded for resentencing, since the sentence was erroneous as a matter of law. *U.S. v. Delvlscovo*, __ F.2d __ (3rd Cir. Nov. 2, 1992) No. 91-5772.

S.Ct. dissenters would grant certiorari to determine whether to consider weight of waste in sentencing. (251) Justices White and Blackmun dissented from the denial of a petition for writ of certiorari, noting a split in the circuits over whether the weight of waste products from drug manufacturing that contain a detectable amount of a controlled substance should be used in calculating the sentence under section 2D1.1 of the guidelines. At issue in this case was a toxic liquid substance consisting of phenylacetone and a small percentage of methamphetamine. A chemist testified that the liquid was probably a waste product left over from the manufacturing process but the sentences were based on the total weight of the liquid. The two Justices found it was "high time" to resolve this conflict that makes a defendant's sentence depend upon the circuit in which the case is tried. *Walker v. U.S.*, __ U.S. __, 113 S.Ct. __ (1992) No. 92-5184.

11th Circuit upholds equating one marijuana plant to 100 grams of marijuana if less than 50 plants. (253) Relying on *U.S. v. Streeter*, 907 F.2d 781 (8th Cir. 1990), *overruled on other grounds, U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992), defendant argued that the district court erred in assigning a weight of 100 grams per marijuana plant because 21 U.S.C. section 841(b)(1)(D) indicates that the actual weight of the plants should be used unless 50 or more plants are involved. The 11th Circuit rejected this argument, finding that recent amendments to the commentary to section 2D1.1 rendered *Streeter* unpersuasive. The amended commentary states that the decision to treat each plant as equal to 100 grams was premised on the fact that the average yield from a mature marijuana plant equals 100 grams of marijuana. This states a rational basis for the commission's treatment of offenses involving fewer than 50 plants. *U.S. v. Thompson*, __ F.2d __ (11th Cir. Nov. 4, 1992) No. 91-8703.

2nd Circuit affirms sufficiency of evidence supporting drug quantity determination. (254) The 2nd Circuit affirmed that there was sufficient evidence supporting the district court's determination that defendant conspired to sell 14.7 kilograms of cocaine and .336 kilograms of heroin. The conclusions were based on a government-submitted report analyzing wiretap conversations concerning drug quantities and on the judge's personal review of the 39 tapes containing these conversations. The judge stated that the government's interpretation of the wiretaps was credible and convincing, and one witness's trial testimony regarding drug quantity corroborated the government's report. *U.S. v. Lasanta*, __ F.2d __ (2nd Cir. Oct. 21, 1992) No. 91-1724.

5th Circuit holds that collateral estoppel did not bar re-evaluation of drug quantity. (260) After pleading guilty, defendant's co-conspirator was sentenced on the basis of 200 pounds of marijuana. Defendant, however, withdrew his guilty plea and was convicted of the same conspiracy charge after a jury trial. At sentencing he was held accountable for 320 pounds of marijuana. The 5th Circuit rejected defendant's claim that the doctrine of collateral estoppel prevented the government from relitigating the amount of marijuana involved in the conspiracy. Defendant could not rely on the factual findings for his co-conspirator because defendant was not a party to that judgment. The doctrine of non-mutual collateral estoppel has no application in criminal cases. Moreover, the district court's findings were not inconsistent because of the differences in evidence available at the two sentencings. Defendant was sentenced after a two-day trial at which the court had an opportunity to hear more evidence. *U.S. v. Montes*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-8370.

5th Circuit affirms sentencing defendant on the basis of two separate transactions. (270) The 5th Circuit affirmed sentencing defendant based on his involvement in two transactions, one for 200

pounds of marijuana on October 9 and the other for 120 pounds of marijuana on October 19. Although defendant claimed he did not have the ability to purchase 200 pounds of marijuana on October 9, the undercover agent's testimony showed that the deal did not go through only because the buyers would not release their money until they were given a sample of the marijuana. In addition, defendant was present when the agent called defendant's co-conspirator and discussed both deals. The co-conspirator acknowledged to the agent that he and defendant had just discussed doing both deals. *U.S. v. Montes*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-8370.

10th Circuit includes cocaine defendant gave to a friend for personal use. (270) Defendant was convicted of conspiring to distribute marijuana. In calculating defendant's offense level, the district court included 365 ounces of cocaine that defendant gave to a friend over the course of a year for the friend's personal use. Defendant admitted that his friend had a drug habit of about an ounce of cocaine a day, and that for about a year, defendant supplied the friend with cocaine. The 10th Circuit rejected defendant's suggestion that his delivery of cocaine to his friend was not part of his overall drug activity. *U.S. v. Guest*, __ F.2d __ (10th Cir. Oct. 27, 1992) No. 91-6324.

1st Circuit upholds enhancement for defendant who sold cocaine and firearm to undercover agent. (284) Defendant sold cocaine and an unloaded .22 revolver and six bullets to an undercover agent. The firearms charge was severed from the drug charges. In sentencing for the drug charges, the 1st Circuit found no plain error in an enhancement under section 2D1.1(b) for possessing a firearm during a drug trafficking crime. The fact that defendant was selling the firearm to the agent, and not using it in the drug offense, was not important. There is no requirement that the weapon be intended for use in perpetrating the drug offense. Defendant arrived at the scene of the drug transaction in possession of a firearm, which was enough to trigger the enhancement. The presence of the weapon and ammunition likely instilled confidence in defendant, if not fear in those with whom he was dealing. *U.S. v. Castillo*, __ F.2d __ (1st Cir. Nov. 4, 1992) No. 91-1274.

10th Circuit affirms firearm enhancement rulings. (286) Three defendants were convicted of drug charges. Two received an enhancement under section 2D1.1(b) for possession of a firearm during a drug crime and the third did not. The 10th Circuit affirmed both rulings. The trial court found there was a difference between the first two defendants and the third defendant with respect to the weapon in the apartment: the first two defendants were in the apartment regularly and there was reason to believe they had knowledge of the weapon. For the limited time the third defendant was there, there was insufficient evidence that he had knowledge of the presence of the weapon. The enhancement was proper for the first two defendants even though they were acquitted by the jury of related firearms charges. Judge Seth dissented. *U.S. v. Robinson*, __ F.2d __ (10th Cir. Nov. 2, 1992) No. 91-2090.

Commission amends commentary in fraudulent loan and contract procurement cases. (300) On September 16, 1992, effective November 1, 1992, the Sentencing Commission amended the commentary to section 2F1.1 to state that in fraudulent loan application and contract procurement cases, the loss is the "actual loss to the victim (or if the loss has not yet come about, the expected loss)." "For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." 57 Federal Register 42804-42806 (September 16, 1992).

5th Circuit rejects departure where defendant was arrested for additional offense while on release. (320) While on release for this immigration offense, defendant was arrested, pled guilty and was sentenced for a second immigration offense. At sentencing for the instant offense, the government requested an enhancement under 18 U.S.C. section 3147 for committing an offense while on release. The the district court refused to impose the enhancement, even though section 2J1.7 directs a sentencing court to add three offense levels if section 3147 applies. Instead, the court departed upward, applying section 2J1.7 by analogy, apparently on the grounds that the government had failed to seek the section 3147 enhancement for the second offense. The 5th Circuit reversed the departure. Under sections 3147 and 2J1.7, an enhancement for post-conduct conviction should be applied to the sentence for the new crime committed while on release, not the original crime for which the defendant is on release. The fact that the government chose not to seek the enhancement for the second offense did not change the analysis.

U.S. v. Lara, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-2733.

9th Circuit holds that felon in possession of a firearm is not a "violent felony." (330) Defendant was convicted of being an ex-felon in possession of a firearm. He was sentenced under the Armed Career Criminal Act (ACCA) to a term of 200 months. The district court relied on two prior convictions for assault with a deadly weapon and one conviction for being a felon in possession of a concealable firearm as the predicate convictions justifying the enhanced sentencing. Judges Farris, Leavy and Trott vacated the sentence, finding that the defendant's prior conviction for being a felon in possession of a concealable firearm under the California Penal Code was not a predicate "violent felony" within the meaning of the ACCA. In so holding, the court concurred with the First Circuit's decision in *U.S. v. Doe*, 960 F.2d 221 (1st Cir. 1992) which had applied the same ruling to a prior federal conviction for being a felon in possession of a firearm. *U.S. V. Garcia-Cruz*, __ F.2d __ (9th Cir. Oct. 30, 1992), No. 91-50758.

Commission authorizes departure where defendant uses firearm to facilitate another firearms offense. (330)((725) On September 16, 1992, effective November 1, 1992, the Sentencing Commission added application note 11 to section 2K1.3, and note 18 to section 2K2.1 to state that as used in various subsections, "another felony offense" refers to offenses other than explosives or firearms possession or trafficking offenses. "However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosive offense (e.g. the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives) an upward departure under section 5K2.6 (weapons or dangerous instrumentalities) may be warranted." 57 Federal Register 42804-42806 (September 16, 1992).

5th Circuit affirms upward departure for extortionate immigration offense and use of firearm. (340)(730) Defendant and her co-defendant threatened a smuggled alien with a revolver, insisting that she either pay the $400 fee or suffer forcible repatriation. They also attempted to force a 15-year old girl to work as a prostitute until she could pay her fee. When the girl ran away, they tracked her down and threatened her. At one point the co-defendant discharged the revolver in the air. Defendant's conduct clearly fell outside the "heartland" described by section 2L1.1. The nine level departure, calculated by analogy to the extortion guideline, section 2B3.2, was reasonable. An additional five level departure based upon the use of the firearm was also reasonable. Section 5K2.0 expressly provides that if a weapon is a relevant factor in sentencing for an immigration violation, the court may depart. Section 5K2.6 notes that the discharge of a firearm might warrant a substantial sentence increase. *U.S. v. Lara*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-2733.

8th Circuit affirms that defendant used "sophisticated means" to impede discovery of tax fraud. (370) Defendant was convicted of charges relating to his involvement in a fraudulent tax shelter scheme. The 8th Circuit affirmed an enhancement under section 2T1.4(b)(2) (Nov. 1990) for using "sophisticated means . . . to impede discovery of the nature or extent of the offense." For such an enhancement to be appropriate, the scheme must be shown to be more elaborate or carefully planned "than a routine tax-evasion case." The scheme here was extensively planned with careful attention to detail. First the tax shelter scheme was conceived and initiated; then the original conspirators brought other participants into the deal and false tax returns were prepared for and signed by many of them. *U.S. v. Jagim*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-2583.

Adjustments (Chapter 3)

7th Circuit affirms that criminal activity was "otherwise extensive." (431) The 7th Circuit upheld a four-level leadership enhancement under section 3B1.1(a), affirming defendant's cocaine distribution ring was "otherwise extensive." Defendant's venture included the help of: Hendrix, who managed the Wisconsin operations; Lee, who regularly distributed the Wisconsin shipments; Sylvia, who attempted to coordinate one of defendant's deals in Miami; and Ruiz, who was present during the delivery of a kilogram of cocaine to undercover agents. Also involved were two other participants in New Jersey, and a number of individuals arrested in Bermuda. *U.S. v. Cojab*, __ F.2d __ (7th Cir. Oct. 27, 1992) No. 91-3903.

8th Circuit says objection to managerial enhancement was waived by not raising it at first appeal. (431)(855) At defendant's first appeal, the 8th Circuit found that a drug transaction was improperly considered relevant conduct, and remanded for resentencing. After resentencing, defendant appealed the imposition of a managerial

enhancement under section 3B1.1(b), contending that in his first appeal the circuit court had held that fewer than five participants were involved in his offense, and thus the district court failed to follow the law of the case. The 8th Circuit rejected this argument, finding defendant waived his challenge to the managerial enhancement by failing to object to it during his first appeal. The appellate court never held that the offense involved fewer than five participants. Moreover, even if defendant had not waived the issue, the appellate court would have affirmed the enhancement. Defendant conceded that including himself, there were five participants. *U.S. v. Montoya*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 92-1830NE.

8th Circuit upholds organizer enhancement for defendant who recruited accomplice for robbery. (431) The 8th Circuit affirmed an organizer enhancement under section 3B1.1(c) based upon defendant's role in a bank robbery. His accomplice testified that defendant recruited him to commit the crime, provided him with the baseball cap, sunglasses and demand note, and organized the bank robbery. *U.S. v. Pedroli*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-3191EM.

8th Circuit upholds leadership enhancement for defendant who initiated tax fraud scheme. (431) The 8th Circuit affirmed that defendant was leader of a criminal activity involving five or more participants. The initial idea for the scheme was defendant's and he willingly participated with his co-conspirator in the recruitment of participants (more than five), several of whom were defendant's relatives. There was evidence that defendant received the bulk of the ill-gotten gains from the scam, and that he was slated to receive a larger share of the profits than the others who participated later in the conspiracy. *U.S. v. Jagim*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-2583.

10th Circuit affirms managerial enhancement for defendant who recruited teens to bomb a clinic. (431) Defendant recruited several teenagers to bomb a neighboring clinic with which he was having a dispute. The 10th Circuit affirmed a managerial enhancement under section 3B1.1(a). The district court chose to disbelieve defendant's testimony that he was only responsible for engaging in exaggerated inappropriate comments in front of the teens. After listening to the defendant, the trial evidence and the additional testimony from both sides at the sentencing hearing, the court chose to disbelieve defendant and find he was a manager of a criminal activity involving less than five persons. *U.S. v. Guadalupe*, __ F.2d __ (10th Cir. Nov. 6, 1992) No. 91-6320.

10th Circuit upholds leadership enhancement based on government agent's hearsay testimony. (431)(770) Defendant received a four level enhancement for being the leader of criminal activity involving five or more participants. The district court properly relied on a government agent's hearsay testimony concerning the role of one of the alleged participants in the scheme. The agent testified that one witness told him that he was acting under defendant's direction when he drove a vehicle with defendant and a co-conspirator to a rival's house. The agent testified that the witness told him that defendant had said they intended to throw pipe bombs at the rival's house and car. The information was corroborated by defendant's guilty plea. There was also sufficient evidence that defendant led another co-conspirator. *U.S. v. Roach*, __ F.2d __ (10th Cir. Oct. 26, 1992) No. 92-6010.

1st Circuit affirms that by carrying forged instruments, defendant was not a minor participant. (445) Defendant was arrested at the airport in possession of forged cashier's checks and demand drafts with a total face value of more than $18 million. Defendant testified that he hoped to get 80 percent of the face amount of the checks, but that he might accept as little as 40 percent of face value. The 1st Circuit affirmed that defendant was not a minor participant under section 3B1.2(b). Given the letters found in defendant's briefcase and the above evidence, the district court could have found that defendant was "no mere mule," but a "critical player in a wide-ranging fraud scheme." *U.S. v. Resurreccion*, __ F.2d __ (1st Cir. Oct. 30, 1992) No. 91-2015.

7th Circuit says ability to trade at Chicago Board of Trade is a special skill. (450) The 7th Circuit affirmed that defendants' ability to trade at the Chicago Board of Trade (CBOT) was a special skill under guideline section 3B1.3. As CBOT traders, defendant were subject to both training and testing, including a three-day set of seminars complete with examination and registration by the National Futures Association. *U.S. v. Ashman*, __ F.2d __ (7th Cir. Oct. 30, 1992) No. 91-2390.

8th Circuit upholds abuse of trust enhancement for officer who raped teenager in his patrol car. (450) Defendant, a tribal police officer, was convicted of sexually abusing a minor in the back seat of a patrol car while on duty, after he had

picked up the victim for a curfew violation. The 8th Circuit upheld an enhancement under section 3B1.3 for abuse of trust, rejecting defendant's argument that because no one in the community trusted police, police cannot abuse their position. Defendant used his position as a police officer to detain the victim, and then he abused that position by raping her in the patrol car. *U.S. v. Claymore*, __ F.2d __ (8th Cir. Oct. 28, 1992) No. 91-3197.

Commission amends obstruction commentary to include aiding and abetting. (460) On September 16, 1992, effective November 1, 1992, the Sentencing Commission amended the commentary to sections 3C1.1 and 3C1.2 to state that "[u]nder this section, the defendant is accountable for his own conduct and for conduct he aided or abetted, counseled, commanded, induced, procured, or willfully caused." The Commission also added to section 3C1.2: "[i]f death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted." 57 Federal Register 42804-42806 (September 16, 1992).

8th Circuit affirms upward departure based on extent of defendant's obstruction of justice. (460)(715) Because of the extent of defendant's obstruction of justice, the district court chose not to enhance defendant sentence under section 3C1.1, instead departing upward under section 5K2.0. The 8th Circuit upheld the departure, finding the circumstances justified a departure and defendant's 58-month sentence was reasonable. Defendant's behavior included perjury, suborning perjury, an extensive and long term participation in the instant tax fraud offense, and flooding the court with frivolous motions, including some challenging the court's Article III status. *U.S. v. Jagim*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-2583.

1st Circuit upholds enhancement for misrepresenting criminal history to probation officer. (461) The 1st Circuit upheld an enhancement for obstruction of justice based upon defendant's failure to disclose to his probation officer several previous convictions. Although the omissions were eventually rectified, they resulted in a substantial delay in completing the presentence report. The fact that the misrepresentations resulted in no actual prejudice was immaterial. A defendant's concealment of important information about his criminal record is a material omission for purposes of section 3C1.1. The court affirmed the determination that the omissions were willful. The probation officer provided a markedly different account than defendant of their interview together and of defendant's reaction to the officer's independent discovery of the unmentioned convictions. *U.S. v. St. Cyr*, __ F.2d __ (1st Cir. Oct. 15, 1992) No. 92-1639.

8th Circuit upholds obstruction enhancement for perjury at trial. (461) The 8th Circuit affirmed an enhancement for obstruction of justice based on defendant's perjury at trial. A defendant has the right to testify at trial, but not to commit perjury. The record contained ample evidence that defendant committed perjury. At trial, defendant denied he had sexual contact with the victim. However, the victim and a fellow police officer testified that defendant had raped the victim, and genetic evidence indicated that defendant was the father of the victim's child. *U.S. v. Claymore*, __ F.2d __ (8th Cir. Oct. 28, 1992) No. 91-3197.

8th Circuit affirms obstruction enhancement based on letter requesting friend to get others to commit perjury. (461) Shortly after his arrest, defendant wrote a letter to a friend from jail asking the friend to get in touch with certain people and request that they tell police the same story he told them. The 8th Circuit affirmed an enhancement for obstruction of justice based on the letter. The district court did not believe defendant's testimony that he was attempting to determine whether the people would tell the truth so that he could use them as defense witnesses. It was irrelevant that the letter contained no threats or intimidation and that the solicitation was not made directly to its targets. *U.S. v. Larson*, __ F.2d __ (8th Cir. Oct. 21, 1992) No. 92-2263NI.

10th Circuit upholds obstruction enhancement for threatening witness. (461) The 10th Circuit upheld an enhancement for obstruction of justice for threatening a witness while in custody before trial. Although the witness did not testify at sentencing, his statement was contained in the presentence report. The witness stated that defendant told him that he and his family would "never live." Defendant simply testified, without further elaboration, that he did not make the statement. The appellate court assumed the sentencing court found defendant's denial incredible. *U.S. v. Guadalupe*, __ F.2d __ (10th Cir. Nov. 6, 1992) No. 91-6320.

5th Circuit rejects obstruction enhancement for denial of involvement in escape attempt. (462) Defendant and two other inmates made an aborted effort to escape from prison. When prison officials

questioned defendant about the damaged window near his bunk, defendant stated that he had nothing to do with the escape attempt. However, he admitted his guilt after blisters and cuts were found on his hands and other inmates told jail officials that they had witnessed defendant's attempts to remove the window. The 5th Circuit reversed an enhancement for obstruction of justice based on defendant's initial statement to officials that he had nothing to do with the escape attempt. Defendant's statement was fairly described as a mere "denial of guilt" within the meaning of section 3C1.1. Moreover, a false statement made by a defendant to law enforcement officers cannot constitute obstruction of justice unless the statement obstructs or impedes the investigation significantly. *U.S. v. Surasky*, __ F.2d __ (5th Cir. Oct. 19, 1992) No. 91-8553.

10th Circuit remands to clarify whether obstruction enhancement was correctly applied. (462) Defendants each received an enhancement for obstruction of justice for providing a false name, date of birth and place of birth. The 10th Circuit remanded for reconsideration, because it was unclear whether defendants' conduct was an "actual, significant hindrance" to the investigation, as required by *U.S. v. Urbanek*, 930 F.2d 1512 (10th Cir. 1991). Here, although all defendants used their aliases throughout trial, their true names were known by that time and were used by various witnesses. Although fingerprinting, checking and cross-referencing may have been required, the investigation was not significantly hindered. The case was remanded to determine whether the enhancement was appropriate under the principles of *Urbanek*. *U.S. v. Robinson*, __ F.2d __ (10th Cir. Nov. 2, 1992) No. 91-2090.

D.C. Circuit declines to decide whether prior guideline required acceptance of responsibility for related conduct. (482) Defendant argued that he was denied an acceptance of responsibility reduction because of his refusal to accept responsibility for conduct outside the offense of conviction. At the time of defendant's sentencing in July 1991, the guideline required a defendant to accept responsibility for "his criminal conduct." A majority of other circuits have interpreted this to require acceptance of responsibility for all related conduct. However, amendments to section 3E1.1 and its commentary, effective November 1, 1992, indicate that it applies only to the offense of conviction. Since this revision would render any interpretative ruling of little future effect, and given the ambiguity in the trial court's ruling, the court remanded for resentencing (which would occur under the new guidelines). *U.S. v. Hicks*, __ F.2d __ (D.C. Cir. Nov. 3, 1992) No. 91-3195.

1st Circuit denies acceptance of responsibility reduction to defendant who claimed innocence. (488) The 1st Circuit denied defendant a reduction for acceptance of responsibility in light of defendant's claims of innocence and testimony that the district court found "essentially perjurious." *U.S. v. Resurreccion*, __ F.2d __ (1st Cir. Oct. 30, 1992) No. 91-2015.

5th Circuit denies acceptance of responsibility reduction to defendant who minimized conduct. (488) The 5th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Both the district court and the presentence report stated that although defendant cooperated with the INS after her arrest, she tended to minimize her behavior and continued to deny that a firearm was involved. *U.S. v. Lara*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-2733.

8th Circuit affirms that defendant did not accept responsibility for lying during gun purchase. (488) Defendant was convicted of making a false statement in connection with the purchase of a firearm. At his plea hearing, he testified that while intoxicated, he and a friend entered a pawnshop so that his friend could purchase a gun, but that because his friend did not have a driver's license, defendant purchased the gun for him. He said on the form that he was not a convicted felon, but he did not think that this lie would get him into trouble. He said that when his friend talked about shooting himself and others, defendant realized he had made a mistake and threw the gun in a trash can. He then called his friend's mother and told her to come and get her son. The mother called the police, who retrieved the gun from the trash can. At sentencing, defendant testified to the same basic story, but was contradicted by the pawnshop owner. The 8th Circuit affirmed that defendant's actions did not show acceptance of responsibility. *U.S. v. Lewis*, __ F.2d __ (8th Cir. Oct. 30, 1992) No. 92-2268.

5th Circuit denies reduction to defendant who withdrew guilty plea to contest drug quantity. (490) Defendant withdrew his guilty plea in order to contest the amount of drugs attributable to him. The district court found defendant responsible for the full contested quantity, and the 5th Circuit affirmed. Defendant conceded that he was not entitled to an acceptance of responsibility reduction

unless the appellate court also found for him on the drug quantity issue. However, the 5th Circuit found that even if it had, the district court was not obliged to find that defendant accepted responsibility. Defendant's plea of not guilty put the government to its burden of proof on the factual issues relating to his guilt. His plea agreement did not force him to go to trial to contest the amount of marijuana involved in the conspiracy. The information to which he pled did not allege an amount of marijuana, and the district court was not obligated to accept the presentence report. Defendant could have argued the issue without withdrawing his plea. *U.S. v. Montes*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-8370.

7th Circuit affirms denial of reduction to defendant who pled guilty to protect wife. (490) Defendant entered his guilty plea in an attempt to have the charges against his wife dismissed, and failed to provide financial information to the probation officer. The 7th Circuit affirmed that the denial of a reduction for acceptance of responsibility did not penalize defendant for exercising his 5th Amendment privilege against self-incrimination. The record amply supported the district court's determination. Apart from the plea, there was no evidence of defendant's affirmative recognition of his guilt. Had he provided the probation officer with the requested financial information, he may well have given the district court a factual basis for the adjustment. *U.S. v. Cojab*, __ F.2d __ (7th Cir. Oct. 27, 1992) No. 91-3903.

8th Circuit, en banc, affirms denial of acceptance of responsibility reduction despite guilty plea. (490) In *U.S. v. Furlow*, 952 F.2d 171 (8th Cir. 1991) an 8th Circuit panel held it was improper for the district court to deny a reduction for acceptance of responsibility in the erroneous belief that merely pleading guilty was not sufficient to justify the reduction. On rehearing, the en banc 8th Circuit upheld the denial of the reduction, finding that the district court had denied the reduction after considering all of the circumstances of the case. The court explicitly accepted the government's argument that although acceptance of responsibility might be proper for a guilty plea alone, the defendant here had not accepted responsibility for his conduct. *U.S. v. Furlow*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 90-2392 (en banc).

8th Circuit denies reduction to defendant who pled guilty and testified for government. (490) Defendant argued he was entitled to a reduction for acceptance of responsibility because he pled guilty and testified for the government. The 8th Circuit affirmed the denial of the reduction because defendant suborned perjury and perjured himself before the grand jury, and raised a transparently frivolous claim in an attempt to withdraw his guilty plea. *U.S. v. Jagim*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-2583.

11th Circuit denies acceptance of responsibility after defendant tested positive for marijuana. (494) Defendant argued that he was entitled to a reduction for acceptance of responsibility because he pled guilty and agreed to testify against his co-defendants at trial if necessary. Moreover, the government recommended a reduction. The 11th Circuit upheld the denial of the reduction, in light of evidence that defendant had tested positive for marijuana while on probation in a related state case. A defendant's continued drug use is a proper basis for denying an acceptance of responsibility reduction. *U.S. v. Thompson*, __ F.2d __ (11th Cir. Nov. 4, 1992) No. 91-8703.

Criminal History (§4A)

5th Circuit includes offense committed after instant offense in criminal history. (504) While on release for the instant immigration offense, defendant was arrested on a second such offense. She pled guilty and was sentenced for the subsequent offense prior to sentencing on the instant offense. The 5th Circuit upheld including the sentence for the subsequent offense in defendant's criminal history for the instant offense. Conduct and convictions occurring after the conduct that is the subject of the current sentence can be used to increase the criminal history score. Section 4A1.2(a)(1) provides that a prior sentence is "any sentence previously imposed upon adjudication of guilt." Application note 1 further includes as a prior sentence "one imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense." *U.S. v. Lara*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-2733.

7th Circuit affirms that sentence of "conditional discharge" is the same as probation. (504)(855) The 7th Circuit affirmed the inclusion in defendant's criminal history of a one year sentence of "conditional discharge" for resisting a peace officer. Although section 4A1.2(c)(1) excludes "hindering or failing to obey a police officer" from a defendant's criminal history, there is an exception

for a term of probation of at least one year. For purposes of this guideline exception, a term of probation is the same as a term of conditional discharge. Probation means that the convicted defendant is not incarcerated but must comply with various conditions set by the sentencing court and monitored by a probation officer. Conditional discharge is the same except that there is no probation officer. *U.S. v. Caputo*, __ F.2d __ (7th Cir. Oct. 28, 1992) No. 91-3315.

7th Circuit includes use of a false driver's license in defendant's criminal history. (504) The 7th Circuit held that the district court properly included in defendant's criminal history a prior sentence for use of a false driver's license. An offense is excludable under section 4A1.2(c)(1) if it is "similar to" certain listed offenses, including driving without a license or with a revoked or suspended license, and giving false information to a police officer. While there is a resemblance, using a false driver's license is more serious and should not be ignored in computing a defendant's criminal history. One who drives without a license or a revoked license will be apprehended the first time he is stopped by police. A person driving with a false license will not be apprehended if the name on the license corresponds to the information in the state's records. *U.S. v. Caputo*, __ F.2d __ (7th Cir. Oct. 28, 1992) No. 91-3315.

8th Circuit upholds consideration of driving under the influence conviction. (504) Defendant argued that his Illinois conviction for driving under the influence should not have been included in his criminal history because he was charged only with careless and reckless driving. The 8th Circuit rejected this, since defendant offered no evidence to support his position, and Illinois court documents indicated that defendant was charged with a DUI violation. *U.S. v. Pedroll*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-3191EM.

8th Circuit affirms that indeterminate sentence under Youth Corrections Act is a prior sentence. (504) Defendant argued that his indeterminate sentence under the Youth Corrections Act was not a "prior sentence" under the guidelines because an indeterminate sentence is not a sentence of imprisonment exceeding one year and one month. The 8th Circuit affirmed that the indeterminate Youth Corrections Sentence qualified as a prior sentence. Note 2 to section 4A1.2 states that in determining the length of the sentence for purposes of section 4A1.1(a), the length of imprisonment is the stated maximum, not the length of time actually served. When the length of time is indeterminate, a court looks to the maximum possible length of time that could have been served. By operation of law, the maximum sentence defendant faced was six years imprisonment. *U.S. v. Pedroll*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-3191EM.

8th Circuit affirms criminal history category II based on ten prior tribal convictions. (504) The district court placed defendant in criminal history category II after learning that he had ten previous convictions in tribal court. The 8th Circuit affirmed that this determination was not clearly erroneous. *U.S. v. Claymore*, __ F.2d __ (8th Cir. Oct. 28, 1992) No. 91-3197.

Commission clarifies instructions for computing criminal history. (504) On September 16, 1992, effective November 1, 1992, the Sentencing Commission added commentary note 8 to section 4A1.2 stating that the term "commencement of the instant offense" includes any relevant conduct. "If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar conduct, the court may consider this information in determining whether an upward departure is warranted under section 4A1.3 (adequacy of criminal history category)." 57 Federal Register 42804-42806 (September 16, 1992).

1st Circuit upholds criminal history departure based on bench warrant for failure to appear. (510) The district court departed upward from criminal history category I to II because at the time defendant committed the instant offenses, there was an outstanding bench warrant for his arrest for failure to appear in state court on then-pending drug charges. The 1st Circuit affirmed, since guideline section 4A1.3 states that an upward departure may be proper if the defendant was pending trial, sentencing or appeal on another charge at the time of the instant offense. *U.S. v. Garcia*, __ F.2d __ (1st Cir. Oct. 22, 1992) No. 92-1490.

9th Circuit says supervised release guidelines are consistent with Sentencing Reform Act. (580) After receiving a sentence of 15 months and a two year term of supervised release, defendant challenged the *mandatory* nature of the supervised release guidelines on the basis that the Sentencing Reform Act permits an *optional* term of supervised release. The 9th Circuit rejected the challenge, finding that section 5D1.1 and section 5D1.2 can be read consistently with 18 U.S.C. section 3583, the statute authorizing terms of supervised release.

The trial judge is permitted to depart from the mandatory supervised release term set forth in the guidelines. Here, the trial judge simply declined to exercise his discretion to depart. The mandatory terms of supervised release are not contrary to congressional intent because even assuming that the length of supervision should depend on the defendant's need for supervision and not the length of the original prison term, the trial judge does have authority to depart. *U.S. v. Chinske*, __ F.2d __ (9th Cir. Nov. 3, 1992), No. 91-30378.

9th Circuit finds supervised release conditions were reasonably related to offense. (580) As a condition of supervised release, the district court ordered the defendant not to possess any firearms, to participate in a substance abuse treatment program, to submit to a search upon request by the probation officer and to pay a fine on a schedule to be determined by the probation office. The court imposed these conditions after finding that the defendant had supported himself by growing and selling marijuana for profit for at least five years. Both the special and standard conditions were valid and reasonably related to the nature and circumstances of the offense and the need to deter future criminal conduct. *U.S. v. Chinske*, __ F.2d __ (9th Cir. Nov. 3, 1992) No. 91-30378.

9th Circuit says change in law regarding parole eligibility did not render guilty plea involuntary. (590) Petitioner argued that his 1986 guilty plea to bank robbery was involuntary because he relied on parole provisions in section 235(b)(3) that required the Parole Commission to set a release date within the applicable parole guideline range. Although the provision was enacted before the 1986 sentencing, it took effect November 1, 1987 and was amended shortly after that date to require parole decisions to be made under 18 U.S.C. section 4206. Petitioner was not disadvantaged by the amendment because section 235(b)(3) was a transition provision which controls the timing of the Parole Commission but does not change the parole eligibility of prisoners. Reliance on the previous version did not render the guilty plea involuntary because petitioner could not have relied on it. *Evenstad v. U.S.*, __ F.2d __ (9th Cir. Nov. 4, 1992) No. 90-16202.

Departures (§5K)

4th Circuit reinstates panel opinion because it was in compliance with *U.S. v. Williams*. (700) In *U.S. v. Kochekian*, 938 F.2d 456 (4th Cir. 1991), a 4th Circuit panel found that the district court relied on one improper and two proper reasons for imposing an upward departure. The court did not invalidate the departure because the sentence imposed was reasonable and the district court was justified in imposing the sentence based upon the two valid reasons standing alone. The case was vacated by the Supreme Court in light of *U.S. v. Williams*, 112 S.Ct. 1112 (1992) and remanded for reconsideration. After reviewing the original opinion, the 4th Circuit reinstated the original judgment, concluding that it was in compliance with the requirements of *Williams*. *U.S. v. Kochekian*, __ F.2d __ (4th Cir. Oct. 19, 1992) No. 90-5090, *reinstating* 938 F.2d 456 (4th Cir. 1991).

8th Circuit affirms departure for suborning perjury and bringing family members into conspiracy. (715) The district court departed upward, finding that defendant obstructed justice by suborning perjury, even though he was never charged with the offense, and that defendant's nephew, although not a "vulnerable victim," was "dragged" into the conspiracy by his uncle because of their relationship. Moreover, defendant was involved in an extensive and long-term criminal activity. The 8th Circuit agreed that the "totality of circumstances" supported the departure. *U.S. v. Jagim*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-2583.

8th Circuit affirms upward departure based on police officer's use of force in raping minor. (715) Defendant was convicted of a single count of sexually abusing a minor. The 8th Circuit affirmed an upward departure based upon the pervasiveness of defendant's conduct and his use of force. Although defendant was only convicted of a single count of abuse, the district court found that defendant raped the victim several times during the months of July through September. Moreover, the court believed that force was used. There was sufficient evidence that the circumstances justifying the departure actually existed. The court's findings were supported by the testimony of a fellow police officer and the testimony of the victim. Moreover, there was scientific evidence that defendant was the father of the victim's child. *U.S. v. Claymore*, __ F.2d __ (8th Cir. Oct. 28, 1992) No. 91-3197.

9th Circuit says agent's perjury before grand jury is not a basis for downward departure. (715) One of the arresting agents perjured himself before the grand jury by omitting certain facts when directly questioned by a grand juror. Concurring with the First Circuit's decision in *U.S. v. Valencia-Lucena*, 925 F.2d 506, 515 (1st Cir. 1991), the

court found that the perjury before the grand jury was not a basis for a downward departure because it did not relate to the offense or offender. The only purpose of the departure would be to deter government misconduct, a purpose that has no relation to the goals of the Sentencing Reform Act. *U.S. v. Williams*, __ F.2d __ (9th Cir Nov. 3, 1992) No. 91-50434.

5th Circuit finds insufficient evidence of extreme psychological injury to victim. (721) The district court departed upward due to psychological harm inflicted on one of the aliens smuggled by the defendants. The defendants attempted to force a 15-year old girl to work as a prostitute until she could pay her fee. When she objected, the co-defendant threatened to cut off her hands and take her back to Mexico, and brandished a revolver. When the girl ran away, they tracked her down and threatened her again. The 5th Circuit rejected this ground for departure, concluding that this did not rise to the level of "substantial impairment of the intellectual, psychological, emotional or behavioral functioning" required by section 5K2.3. The court stated only that defendant's conduct "resulted in psychological harm to the alien" and that she was placed on tranquilizers "due to a possible nervous breakdown." There was no evidence of alleged substantial impairment or its duration. *U.S. v. Lara*, __ F.2d __ (5th Cir. Oct. 14, 1992) No. 91-2733.

8th Circuit affirms downward departure for extreme vulnerability in prison. (736) The 8th Circuit affirmed the district court's determination that an extraordinary physical impairment that results in a defendant's extreme vulnerability to victimization in prison is a proper ground for a downward departure. The court rejected the government's claim that the Bureau of Prisons could adequately protect defendant, since it never presented the district court with any evidence of the facilities available to defendant in prison. Defendant met his burden of justifying the departure by presenting the report of four doctors and the testimony of one of them; all of them stated that in prison defendant would be exceedingly vulnerable to victimization and potentially fatal injuries. Although these doctors may not have been familiar with the facilities available to defendant in prison, it was not clear error to rely upon these statements. *U.S. v. Long*, __ F.2d __ (8th Cir. Oct. 20, 1992) No. 91-3434.

Sentencing Hearing (86A)

8th Circuit holds that failure to continue sentencing did not prevent assistance of counsel. (750) Defendant's sentencing was continued several times, and then he fired his retained counsel. The court advised defendant of his right to counsel, and gave him until the end of the week to make a decision. At this hearing, sentencing was reset for one month later, with a warning that if defendant continued to procrastinate, he would have waived his right to counsel. At sentencing, the court granted defendant's motion for appointment of counsel. The hearing was continued until later that afternoon, when defendant was sentenced. A month earlier, the court had taken the precaution of advising appointed counsel about the potential appointment, and had provided him with a copy of the presentence report. Thus, he was familiar with the case, and defendant was not prejudiced. *U.S. v. Jagim*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-2583.

8th Circuit upholds consideration of hearsay to impose leadership enhancement. (770) The district court imposed a two-level leadership enhancement based on hearsay testimony in the presentence report concerning defendant's role in a bank robbery. Relying on *U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 92-1070 (*en banc*), the 8th Circuit rejected defendant's claim that the district court's reliance on the hearsay violated his constitutional rights. Due process was not implicated because the two level increase in offense level resulted in less than a two-fold increase in sentence. The hearsay was reliable since it was corroborated by the declarant's testimony at defendant's aborted trial. The declarant was subjected to vigorous cross-examination and the trial judge was able to assess his testimony. *U.S. v. Pedroli*, __ F.2d __ (8th Cir. Oct. 29, 1992) No. 91-3191EM.

Article questions inapplicability of evidentiary rules at sentencing. (770) In "*Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*," Margaret A. Berger notes with skepticism the inapplicability of the rules of evidence at sentencing. She takes issue with the conventional wisdom that judges are capable of accurately assessing evidence that juries would be precluded from hearing by the rules of evidence. She proposes a number of possible reforms: that

prosecutors not be allowed to prove as "relevant conduct" any fact that could have been charged at trial as a separate count, that prosecutors be precluded from relying on facts rejected by jury verdicts, and that certain categories of hearsay -- like hearsay of a declarant while involved in plea discussions -- be inadmissible even at sentencing. 5 FED. SENT. RPTR. 96-101 (1992).

Article doubts Commission's authority to issue evidentiary rules. (770) In "*Raising the Quality of Evidence at Sentencing*," Mark David Harris notes that 6A1.3 arguably imposes a more stringent test for admissibility of evidence at sentencing than would have been imposed under due process doctrine applicable to discretionary sentencing. Courts have varied in their recognition of this point. However, Harris questions whether the Commission's enabling legislation authorizes the Commission to promulgate such rules. He suggests, however, that due process and Confrontation Clause notions provide a means that courts should employ to demand reliable evidence at sentencing. He also encourages the Supreme Court to repeal Federal Rule of Evidence 1101(d)(3), which makes the rules inapplicable at sentencing. 5 FED. SENT. RPTR. 102-05 (1992).

3rd Circuit affirms denial of withdrawal of plea based on fear of a substantial sentence. (790) The 3rd Circuit affirmed the district court's denial of defendant's motion to withdraw his guilty plea. Defendant claimed that he wanted to withdraw his plea because he owed someone a substantial sum of money and had been "set up." The district court, however, found that the reason defendant sought to withdraw the plea was his fear of a substantial sentence, and that the reasons offered by defendant were merely a "post hoc" attempt to justify his motion. At the hearing to withdraw the plea, defendant acknowledged he did all that the government alleged, and did not mention coercion or that he was forced in any manner to sell drugs. He did not meet his burden of proving an entitlement to withdraw his plea. *U.S. v. Jones*, __ F.2d __ (3rd Cir. Nov. 5, 1992) No. 92-3190.

8th Circuit affirms denial of motion to withdraw guilty plea despite excessive sentence. (790) The 8th Circuit affirmed the denial of defendant's motion to withdraw his guilty plea. Defendant's claims of ineffective assistance and ignorance of his options were contradicted by his written plea agreement and the record from the Rule 11 hearing. Although his 235-month sentence for being a $1,000 drug "mule" seemed excessive, it was required by law. Senior Judge Heaney dissented, believing the district judge should have considered whether defendant was a minimal participant. *U.S. v. Johnson*, __ F.2d __ (8th Cir. Oct. 26, 1992) No. 92-1140.

9th Circuit holds that neither party is bound by plea agreement until approved by court. (790) Shortly before the court proceedings where the defendant was to sign a plea agreement negotiated on his behalf, he assaulted a deputy marshal and ran from the courtroom. After the defendant was apprehended and returned to the courtroom, the government withdrew the plea agreement. The district court did not err in refusing to compel the government to perform the plea agreement. Neither the defendant nor the government is bound by a plea agreement until it is approved by the court. The detrimental reliance exception to this rule did not apply in this case because the defendant did not plead guilty based on the agreement and did not provide any information or other benefit to the government based on the agreement. *U.S. v. Savage*, __ F.2d __ (9th Cir. Nov. 3, 1992) No. 91-50490.

Violations of Probation and Supervised Release (Chapter 7)

11th Circuit affirms that policy statements on revocation of supervised release are advisory. (800) The 11th Circuit, following the 3rd, 5th and 6th Circuits, ruled that the policy statements relating to the revocation of supervised release are advisory. Thus it approved a 24-month sentence imposed on defendant after he tested positive for cocaine use while on supervised release, even though the guidelines called for a maximum 13-month sentence. *U.S. v. Thompson*, __ F.2d __ (11th Cir. Nov. 5, 1992) No. 91-1012.

Appeal of Sentence (18 U.S.C. §3742)

9th Circuit holds refusal to depart based on public service was discretionary. (860) At sentencing, defendant argued that the Sentencing Commission did not adequately consider public service as a mitigating factor and had several witnesses testify to his good character, his service as a city council member and his involvement in conservation groups. However, because the district court recognized its authority to depart but found that "service to the public . . . cannot justify disobedience of the law", the 9th Circuit held that it

lacked jurisdiction to review the decision. *U.S. v. Chinske*, __ F.2d __ (9th Cir. Nov. 3, 1992) No. 91-30378.

5th Circuit remands even though same sentence might be imposed. (865) Defendant originally had a guideline range of 30 to 37 months, and received a 30-month sentence. On appeal, the 5th Circuit reversed an enhancement for obstruction of justice, which reduced defendant's guideline range to 24 to 30 months. The government contended that no remand was necessary because the district court would have imposed the same sentence even without the improper enhancement. The 5th Circuit remanded because it was not convinced the district court would have imposed the same sentence. Although the district court asked to be reminded what sentence it gave to a co-defendant, and all three conspirators received 30-month sentences, this was not sufficient to conclude that defendant's sentence would have been the same without the improper enhancement. *U.S. v. Surasky*, __ F.2d __ (5th Cir. Oct. 19, 1992) No. 91-8553.

9th Circuit remands to determine whether collateral challenge was waived. (880) Four years after receiving a 12-year federal sentence for bank robbery, petitioner filed a motion under 28 U.S.C. section 2255 seeking to vacate his sentence on the ground that the district court had considered a prior state conviction that was tainted by ineffective counsel. The 9th Circuit determined that the procedures developed for challenging uncounseled priors should apply equally to priors challenged on ineffective assistance grounds. Waiver principles also apply. If the district court determines that the federal sentence was not affected by the challenged prior, it may dismiss the petition. If the sentence would be more lenient without the challenged prior, the court must determine whether petitioner has shown "cause and prejudice." If so, the district court must resentence without the prior conviction or determine that it did not result from ineffective assistance. *Evenstad v. U.S.*, __ F.2d __ (9th Cir. Nov. 4, 1992) No. 90-16202.

Forfeiture Cases

2nd Circuit affirms that warrant is required to seize vehicle. (910) Defendant was arrested pursuant to an arrest warrant. Police also seized his vehicle under the purported authority of the civil forfeiture statute, 21 U.S.C. section 881(a), although they had made no attempt to obtain a warrant for that purpose. The 2nd Circuit held that the government's seizure of the car, without a warrant, was not authorized under section 881. Congress is not authorized to create a new exception to the 4th Amendment's warrant requirement. Nothing in the language of the 4th Amendment suggests an exception for civil forfeiture seizures in drug cases. None of the traditional exceptions to the 4th Amendment's warrant requirements was present. *U.S. v. Lasanta*, __ F.2d __ (2nd Cir. Oct. 21, 1992) No. 91-1724.

11th Circuit rules 40-day delay between seizure and hearing was not unreasonable in light of plaintiff's inaction. (910) The U.S. Customs Service seized plaintiff's car in her presence. Following the seizure, the government initiated administrative forfeiture proceedings and mailed a notice to plaintiff explaining how to challenge the administrative forfeiture. Due to an incorrect address, the notice never reached plaintiff. Forty days after the seizure, plaintiff filed a complaint in district court for return of the vehicle. The court district court ruled the seizure violated due process. The 11th Circuit reversed, ruling that the 40-day delay. The court balanced the four factors listed in *U.S. v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983). The delay was relatively short. Plaintiff did not diligently assert her rights to a prompt post-seizure hearing, and showed no prejudice. Although she never received the written notice of the forfeiture, she and her lawyer were aware of it and chose to initiate this action rather than file a claim through the correct channel. *Nnadi v. Richter*, __ F.2d __ (11th Cir. Nov. 4, 1992) No. 92-8225.

11th Circuit rules there was sufficient probable cause to support seizure of car. (950) In a forfeiture action brought under the customs law, 19 U.S.C. section 1595a, the 11th Circuit reversed the district court's determination that there was no probable cause to seize claimant's vehicle. The United States bears the same burden of proving probable cause in actions under the customs laws as it does in actions under 21 U.S.C. section 881. A car is considered directly involved in a drug transaction when it is used to transport an individual to the place where a drug transaction takes place even though it is not used to transport money or drugs. Here, there was evidence that plaintiff used the car to transport a co-conspirator and cash to the airport to catch a flight to the Philippines, where the co-conspirator would use the cash to obtain heroin and then smuggle it back into the United States. This alone was sufficient to find

probable cause. *Nnadi v. Richter*, __ F.2d __ (11th Cir. Nov. 4, 1992) No. 92-8225.

Certiorari Granted

(130)(180)(520) *U.S. v. Stinson*, 943 F.2d 1268 (11th Cir. 1991), *on rehearing*, 957 F.2d 813 (11th Cir. 1992), *cert. granted*, __ U.S. __, 113 S.Ct. __ (Nov. 9, 1992) No. 91-8685.

Opinion Vacated and New Opinion Filed

(131)(430)(490) *U.S. v. Furlow*, 952 F.2d 171 (8th Cir. 1991), *vacated and new en banc opinion filed, U.S. v. Furlow*, __ F.2d __ (8th Cir. Nov. 6, 1992) No. 90-2392 (*en banc*).

(242)(253) *U.S. v. DeLeon*, 955 F.2d 1346 (9th Cir. 1992), *withdrawn, and new opinion published dismissing the sentencing issues as moot*, __ F.2d __ (Nov. 10, 1992) No. 89-30230.

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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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IN THIS ISSUE:

Guidelines Sentencing, Generally

9th Circuit finds no ex post facto violation in denying parole to California prisoner. (130)(590) Petitioner was sentenced to life imprisonment under California's Indeterminate Sentencing Law (ISL). Following his sentencing, California repealed the ISL and enacted the current Determinate Sentencing Law (DSL). The new law required the DSL guidelines to be used in deciding whether to grant parole. The 9th Circuit rejected the argument that this violated the ex post facto clause, noting that the DSL guidelines require consideration of the same criteria as did the ISL. Since petitioner was not disadvantaged by the DSL guidelines, the court found it unnecessary to determine whether the DSL guidelines were "laws" for ex post facto purposes. See *Smith v. U.S. Parole Commission*, 875 F.2d 1361, 1367 (9th Cir. 1989) (holding that U.S. Parole Commission guidelines are *not* laws for ex post facto purposes. *Connor v. Estelle*, __ F.2d __ (9th Cir. Oct. 26, 1992) No. 91-55889.

11th Circuit upholds basing offense level on pre-guidelines offense. (130)(320)(380) In 1990, defendant committed perjury with regard to his involvement in a 1986 marijuana conspiracy. Guideline section 2J1.3(c)(1) provides that if the offense involved perjury in respect to another criminal offense, section 2X3.1 should be applied. Section 2X3.1(a) calls for sentencing the defendant based upon the underlying offense, which in this case was the 1986 marijuana conspiracy. The 11th Circuit rejected defendant's argument that the application of section 2X3.1 violated the ex post facto clause, even though the underlying conspiracy occurred before the effective date of the guidelines. Defendant was sentenced under guidelines which were in effect at the time he committed his perjury offense. It was proper to use the underlying offense

as a measure of the severity of the perjury offense. *U.S. v. Roderick*, __ F.2d __ (11th Cir. Oct. 9, 1992) No. 91-3558.

3rd Circuit reverses role adjustment based on relevant conduct, despite later amendment. (131)(432) For the first time on appeal, defendant argued that the court erred in considering relevant conduct in making a four level leadership enhancement under section 3B1.1(a). The 3rd Circuit agreed, ruling that under its decision in *U.S. v. Murillo*, 933 F.2d 195 (3rd Cir. 1991), consideration of relevant conduct was plain error. The error was not harmless because the district court might not have departed upward to impose the same sentence without the enhancement. The court noted that the guidelines were amended effective November 1, 1990, a few months after defendant was sentenced, to specify that relevant conduct should be considered in making role adjustments. But the court ruled that if the guideline in effect at the time of the offense is more favorable to a defendant, it must be applied. *U.S. v. Pollen*, __ F.2d __ (3rd Cir. Oct. 13, 1992) No. 91-5703.

9th Circuit says court has discretion in applying retroactive currency guideline. (131)(360) Defendant was convicted of making a false customs declaration regarding currency he was bringing into the United States. He was sentenced under section 2S1.3 before the effective date of Amendment 379 which modified section 2S1.3 and created a new section for offenses involving the failure to file currency reports. The case was remanded to the district court to determine whether or not to adjust the sentence in light of the amendment. Section 1B1.10(a) does not mandate the use of the lesser enhancement but permits discretion to use the amended guideline. The court concurred with the discretionary approach to this issue adopted in *U.S. v. Connell*, 960 F.2d 191, 197 (1st Cir. 1992) (rejecting the mandatory resentencing required under *U.S. v. Park*, 951 F.2d 634 (5th Cir. 1992)). *U.S. v. Wales*, __ F.2d __ (9th Cir. Oct. 20, 1992), No. 91-10500.

7th Circuit finds no withdrawal from conspiracy before effective date of guidelines. (132) Defendant was originally sentenced under pre-guidelines law. In his first appeal, he adopted all of the arguments of his co-conspirator, who claimed he should have been sentenced under the guidelines because the conspiracy continued past the effective date of the guidelines. At resentencing, defendant saw his co-conspirator receive a much harsher sentence under the guidelines, and attempted to withdraw his request for resentencing. The 7th Circuit affirmed resentencing defendant under the guidelines. Defendant's request not to be resentenced came too late. He should have asked the first panel to rescind the portion of the judgment remanding his case. Defendant was properly sentenced under the guidelines because he conceded that the criminal enterprise continued past the effective date of the guidelines, and there was no evidence that he withdrew from the conspiracy. *U.S. v. Masters*, __ F.2d __ (7th Cir. Oct. 14, 1992) No. 91-2985.

7th Circuit remands to determine whether conduct continued beyond effective date of guidelines. (132) As a result of defendant's involvement in a conspiracy, he was convicted of possessing with intent to distribute 10 kilograms of cocaine. Although it was undisputed that the conspiracy continued beyond the effective date of the guidelines, the district court sentenced defendant under the guidelines without expressly determining whether defendant's conduct charged in the indictment occurred after such effective date. The 7th Circuit remanded for the limited purpose of making such a determination. *U.S. v. Centracchio*, __ F.2d __ (7th Cir. Oct. 2, 1992) No. 91-1742.

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Application Principles, Generally (Chapter 1)

4th Circuit says there is no right to information about relevant conduct prior to trial. (170)(260) The district court attributed 67 grams of cocaine base to defendant as relevant conduct. The 4th Circuit rejected defendant's claim that he was deprived of effective assistance of counsel when the district court denied his pretrial motion to compel the government to disclose the quantity of cocaine it intended to attribute to him at sentencing. Defendant was informed of the maximum sentence available for each of the two counts for which he was convicted. He was entitled to no more information. A defendant has no right under the guidelines or the federal rules of criminal procedure to receive information about the guideline range prior to trial. *U.S. v. Williams*, __ F.2d __ (4th Cir. Oct. 7, 1992) No. 91-5167.

9th Circuit includes uncharged loans as relevant conduct in fraud case. (175)(300) Defendant was convicted of fraudulently obtaining two automobile loans and a home mortgage loan. The 9th Circuit held that the district court did not err by including in its calculation of loss under section 2F1.1(b)(1) losses attributable to counts the government agreed not to prosecute. There was no dispute that these losses arose out of a common scheme, and therefore they were "relevant conduct" under 1B1.3. The court found it unnecessary to decide whether it was proper to include losses attributable to dismissed counts because these losses did not change the offense level. The district court properly considered the entire fraudulent scheme, whether charged or not, in concluding that the defendant was involved in a scheme to defraud more than one victim. The two-level increase under section 2F1.1(b)(2)(B) (June 1988) was proper. *U.S. v. Galliano*, __ F.2d __ (9th Cir. Oct. 22, 1992), No. 91-10431.

3rd Circuit uses amended career offender commentary despite conflict with prior decisions. (180)(520) Defendant was found to be a career offender based in part on his conviction for being a felon in possession of a firearm. While his appeal was pending, the Sentencing Commission amended to the commentary to section 4B1.1, to "clarify" that a felon's possession of a firearm is not a crime of violence, and that a sentencing court may only look at the conduct alleged in the indictment in determining whether the crime was a crime of violence. The 3rd Circuit held that it was free to defer to the amended commentary clarifying the ambiguous guideline, even where a prior panel had resolved the ambiguity to the contrary. However, the court found that the guideline would not support the amended commentary's position that possession of a firearm by a felon is never a crime of violence. Nevertheless, the court found that the commentary properly directed the court to consider only the conduct alleged in the indictment. Since the indictment did not allege that defendant's conduct posed a serious potential risk of physical injury, his conviction was not a crime of violence. *U.S. v. Joshua*, __ F.2d __ (3rd Cir. Oct. 5, 1992) No. 91-3286.

10th Circuit reaffirms that Chapter 7 policy statements are advisory and not binding. (180)(800) Upon revocation of supervised release, defendant received a 24-month term of imprisonment, even though Chapter 7 of the guidelines provided for a sentence of 6 to 12 months. The 10th Circuit reaffirmed that the policy statements in Chapter 7 are advisory rather than mandatory in nature. The two-year sentence was proper here. The district court demonstrated its awareness of the policy statements and requested counsel to brief the law on an upward departure from the range contained in Chapter 7. After briefing, the court stated a proper reason for the sentence above the recommended range: defendant continued to violate the terms of his supervised release after the district court had previously given defendant the opportunity to alter his behavior by deferring revocation of supervised release. *U.S. v. Brooks*, __ F.2d __ (10th Cir. Oct. 8, 1992) No. 91-5144.

Offense Conduct, Generally (Chapter 2)

3rd Circuit upholds loss equal to retail value of stolen gems. (220) Defendants stole a shipment of diamonds from a courier for a jewelry store. They argued that the actual loss under section 2B1.1 was not the $626,000 retail value of the stolen gems, but the 25 percent discounted price which the jewelry store would have been willing to sell them for, or the even-lower wholesale replacement cost of the gems. The insurance company covering the loss settled the jewelry store's claim for $289,749.50. The 3rd Circuit upheld the use of the retail value of the diamonds, since there was adequate evidence in the record to support the finding that the stolen gems had an actual market

value of $626,000. *U.S. v. Colletti*, __ F.2d __ (3rd Cir. Oct. 7, 1992) No. 91-5405.

5th Circuit says court was not bound by improper classification of methamphetamine in indictment. (240) The indictment correctly cited 21 U.S.C. sections 846 and 841(a)(1) as the relevant criminal statutes, but incorrectly referred to methamphetamine as a schedule III, rather than a schedule II, controlled substance. At sentencing, the district court rejected the government's claim that defendants should be sentenced for possessing a schedule II controlled substance, stating that the government was "stuck with its indictment." The 5th Circuit reversed, finding that because the district court applied the wrong statute and ignored the guidelines' recommendation, the sentences it imposed were illegal. The reference to methamphetamine as a schedule III substance in the indictment did not bind the court, since the elements of the relevant statutory offense charged were adequately described in the indictment. *U.S. v. Greenwood*, __ F.2d __ (5th Cir. Oct. 2, 1992) No. 91-8212.

11th Circuit upholds 100 to 1 cocaine to cocaine base ratio. (242) The 11th Circuit rejected defendant's claim that section 2D1.1(c)(11), which equates for sentencing purposes one gram of cocaine base with 100 grams of cocaine, was arbitrary and capricious. The court also rejected defendant's claim that in 21 U.S.C. section 841, which equates five grams of cocaine base with 500 grams of cocaine, Congress manifested an intention not to apply the 100 to 1 ratio to amounts of cocaine base less than five grams. A more plausible reading is that Congress wished to set particular parameters to guide the sentencing of large-scale drug dealers, but left the smaller dealers to the discretion of the Sentencing Commission. *U.S. v. Lawrence*, __ F.2d __ (11th Cir. Sept. 28, 1992) No. 91-7491.

11th Circuit rejects equal protection challenge to harsher penalties for crack than for cocaine. (242) Defendant argued that the wide disparity in punishment for crimes involving crack cocaine and powder cocaine violates the Equal Protection Clause of the Constitution because it has a discriminatory impact on black persons. According to defendant, crack cocaine is used predominantly by blacks, while powder cocaine is used predominantly by whites. The 11th Circuit rejected this argument, since there was a rational basis for the disparate penalties. The fact that crack cocaine is more addictive, more dangerous, and can be sold in smaller quantities than powder cocaine was sufficient reason for Congress to provide harsher penalties for its possession. *U.S. v. King*, __ F.2d __ (11th Cir. Sept. 22, 1992) No. 91-7690.

7th Circuit affirms refusal to depart from mandatory minimum sentence despite unfairness of sentence. (245)(716) All of defendant's more culpable co-conspirators pled guilty and provided valuable assistance to prosecutors. Consequently they received sentences substantially less than the mandatory minimum 10 years. One co-conspirator was allowed to plead to a charge that did not carry a minimum term and received four years' probation. However, defendant, the least culpable co-conspirator, went to trial and was convicted of charges carrying a 10-year minimum. The 7th Circuit affirmed, but stated that cases such as this involving a "sentencing inversion" are "troubling." The district court was without authority under section 5K2.0 to depart downward from a minimum sentence prescribed by statute. Judge Bauer dissented, finding insufficient evidence of defendant's guilt. *U.S. v. Brigham*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 92-1236.

10th Circuit holds that 21 U.S.C. section 841(b)(1)(C) is applicable penalty provision for amphetamine. (245) Defendants were convicted of various amphetamine-related offenses. They contended that the district court erroneously sentenced them under subparagraph (A) of 21 U.S.C. section 841(b)(1), when it should have sentenced them pursuant to subparagraph (D), which carries a maximum sentence of 10 years. The 10th Circuit affirmed their sentences, holding that section 841(b)(1)(C), which carries a maximum penalty of 20 years, was the applicable penalty provision for amphetamine. Subparagraph (C) applies to any controlled substance in schedule I or II, except as otherwise provided. Amphetamine was a schedule II controlled substance at the time defendants committed their offenses. Defendants' sentences were within the 20 year maximum. *U.S. v. Johnson*, __ F.2d __ (10th Cir. Sept. 29, 1992) No. 91-7012.

7th Circuit affirms that defendant distributed between 3.5 and 5 kilograms of cocaine. (254) The 7th Circuit affirmed the district court's determination that defendant distributed between 3.5 and 5 kilograms of cocaine. First, on the day of his arrest, defendant had sold three ounces of cocaine and had four ounces in his possession. Second, police found $5,000 in defendant's possession although he admitted he had a cocaine habit and no steady source of income. Third, police

found drug notes, seven loaded firearms and other drug paraphernalia in defendant's bedroom. Fourth, the testimony of two witnesses bolstered the government's theory that defendant had supplied a dealer for at least four months prior to defendant's arrest. Finally, 71 telephone calls were made from defendant's residence to the same Chicago phone number within a two-month period. The dealer testified that his source was receiving his cocaine from a source in Chicago approximately every other day. *U.S. v. Villarreal*, __ F.2d __ (7th Cir. Oct. 13, 1992) No. 91-3698.

7th Circuit affirms that four to five kilograms were involved in drug transaction. (254) The 7th Circuit affirmed the district court's determination that four to five kilograms of cocaine were involved in a drug transaction. Although there was evidence that the transaction involved 10 kilograms, the judge believed one of the witnesses was exaggerating. Nonetheless the judge believed the transaction still involved a substantial amount of cocaine based on the significance of the operation, amounts of cocaine involved in other transactions in which defendants participated, and the repeated references to $40,000 in taped conversations among the co-conspirators. *U.S. v. Centracchio*, __ F.2d __ (7th Cir. Oct. 2, 1992) No. 91-1742.

8th Circuit affirms attribution of 15 kilograms of cocaine base to defendant. (254) The 8th Circuit found no plain error in attributing to defendant 15 kilograms of cocaine base. A co-conspirator testified at trial that defendant received between one to five kilograms of cocaine a week beginning in early 1988 and ending in the fall of 1989. In addition, the presentence report stated that while defendant did not always sell his cocaine in the form of cocaine base, he was fully aware that his co-conspirators were doing so. *U.S. v. Turner*, __ F.2d __ (8th Cir. Sept. 14, 1992) No. 91-1490WM.

1st Circuit affirms that two kilograms were under negotiation. (265) Defendants argued it was error to find that they attempted to purchase two kilograms of cocaine from a government informant, since $20,000 was the agreed kilogram price and one defendant brought only $29,850 to the sale meeting. The 1st Circuit affirmed that defendants were responsible for two kilograms. The record was clear that defendants would purchase two kilograms for $30,000 up front and $10,000 later. On the date of the sale, one defendant told the informant that he had $30,000 which his associate would deliver. When the other defendant went to pick up the cocaine, she told the informant that there was $30,000 in the bag. *U.S. v. Figueroa*, __ F.2d __ (1st Cir. Oct. 7, 1992) No. 91-1020.

4th Circuit affirms attribution to defendant of golf ball sized cocaine rock seen by informant. (270) At sentencing on cocaine charges, a detective testified that he had interviewed an informant, who claimed to have seen a golf ball sized piece of cocaine in defendant's possession on the day preceding defendant's arrest. The detective asked the informant to recreate a model of the cocaine mass with clay. The model was sent to a chemistry professor, who testified that the weight of a similarly sized piece of cocaine base would be approximately 67.5 grams. The 4th Circuit affirmed the attribution to defendant of 67 grams of cocaine base as relevant conduct. Although defendant contended the informant's testimony was not credible, the district court determined that he was a believable witness. *U.S. v. Williams*, __ F.2d __ (4th Cir. Oct. 7, 1992) No. 91-5167.

6th Circuit, en banc, upholds consideration of larger quantity of marijuana plants than specified in indictment. (270) Defendant was convicted of manufacturing 100 or more marijuana plants, but was sentenced on the basis of possessing the 883 plants recovered from the marijuana field. The 6th Circuit rejected defendant's claim that it was improper to sentence him on the basis of a larger quantity than specified in the indictment. The guidelines contemplate the consideration of drug quantities exceeding the amount listed in an indictment where the larger quantity is part of the criminal activity or transaction. Moreover, the indictment alleged 100 *or more* marijuana plants. The 883 plants on which defendant's sentence was based was therefore consistent with the quantity charged in the indictment. *U.S. v. Morrow*, __ F.2d __ (6th Cir. Oct. 7, 1992) No. 89-5418 (en banc).

D.C. Circuit upholds consideration of drugs involved in acquitted counts. (270)(755) Defendant was convicted of distributing .199 grams of cocaine and acquitted of possessing with intent to distribute 12.72 grams possessed by a co-defendant. Defendant argued that the court should not have considered the 12.72 grams of cocaine in the acquitted count in sentencing him. The D.C. Circuit joined 10 other circuits in holding the sentencing guidelines allow the use of conduct underlying acquitted counts. There was no double jeopardy violation: defendant did not receive a separate sentence for the possession count; the acquitted count merely affected the point within the

statutory range at which his sentence was imposed. There was no due process violation. A not guilty verdict is not equivalent to a finding of complete innocence. It merely indicates that guilt beyond a reasonable doubt was not proven. Due process is satisfied if matters considered at sentencing are established by a preponderance of the evidence. Judge Randolph concurred. *U.S. v. Boney*, __ F.2d __ (D.C. Cir. Oct. 13, 1992) No. 90-3270.

1st Circuit finds no gender discrimination in sentencing for five kilograms of cocaine. (275) Two male defendants contended that the district court discriminated against them on the basis of their gender, when it found that the two women in the conspiracy were responsible for only two kilograms, while defendants were responsible for five kilograms. The 1st Circuit affirmed, since there was sufficient evidence to conclude that defendants were responsible for five kilograms of cocaine. Defendants, as well as their female co-conspirators, were held responsible for the two kilograms they attempted to purchase from a government informant. In addition, relying on defendants' admissions that they sold $6,000 worth of cocaine per day through their record shop, the court calculated that defendants were also responsible for distributing an additional three kilograms during the course of the conspiracy. Although defendants' characterized their statements as mere "puffery," the sentencing judge who heard the trial testimony was entitled to credit the admissions. *U.S. v. Figueroa*, __ F.2d __ (1st Cir. Oct. 7, 1992) No. 91-1020.

1st Circuit affirms consideration of drugs in same conspiracy as offense of conviction. (275) Defendant was convicted of conspiring to distribute cocaine. He argued that the district court erred in including in the calculation of his base offense level quantities of cocaine he distributed in furtherance of a putatively separate conspiracy involving a different distributor. The 1st Circuit rejected this argument, since while analyzing the sufficiency of the indictment, it had previously rejected the "separate conspiracy" theory. *U.S. v. Bello-Perez*, __ F.2d __ (1st Cir. Sept. 29, 1992) No. 91-2232.

7th Circuit defers to lower court's credibility determination in affirming drug quantity involved in conspiracy. (275)(770) Defendant conceded that the 361.6 grams of cocaine seized the night of her arrest could be attributed to her conspiracy, but contended that the district court erred in finding a total of 576.6 grams of cocaine were involved in this conspiracy. The only evidence of this additional cocaine was the testimony of a co-conspirator, who defendant contended was not credible. The 7th Circuit upheld the district court's quantity determination, deferring to the district court's determination of the co-conspirator's credibility. "[I]t is the district court's job to assess the credibility of witnesses who testify on matters relating to sentencing. We are not 'left with the definite and firm conviction that a mistake has been committed by the district court.'" *U.S. v. Villasenor*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 91-1107.

7th Circuit affirms that 1989 purchases were part of same conspiracy. (275) Defendant conceded his accountability for cocaine sales made to a confidential informant, but claimed there was insufficient evidence that the purchases he made in 1989 were part of the same scheme. He also contended these purchases were for personal use and not resale. The 7th Circuit affirmed the inclusion of the 1989 purchases in defendant's offense level. At defendant's sentencing, his supplier testified that from April 1989 to June 1990 he regularly sold defendant one to four ounces of cocaine per week, and that he told defendant the identity of his own supplier. Defendant stated that he used some of the drugs personally but that he sold enough to raise the money to repay his supplier. Finally, the search of defendant's home revealed items that are normally associated with the distribution of drugs, including two digital gram scales. *U.S. v. Villasenor*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 91-1107.

7th Circuit holds late-comer responsible for entire amount of cocaine in transaction. (275) A drug dealer received a four to five kilogram shipment of cocaine from his suppliers in Florida. Defendant became involved in the distribution of this cocaine after the dealer had difficulty in collecting his debts. Defendant argued that he was brought into the operation "late in the day" and was not aware of how much cocaine was initially shipped to the dealer. The 7th Circuit rejected this argument. The evidence demonstrated that defendant was committed to the objective of distributing the cocaine from the transaction. Defendant advised the dealer's supplier that the dealer's operation was in shambles because the dealer had mismanaged money, but that defendant would try to raise money to save the operation. Moreover, defendant travelled to Florida in order to meet with the suppliers to persuade them to give him more cocaine to sell so that they could be repaid. *U.S. v. Centracchio*, __ F.2d __ (7th Cir. Oct. 2, 1992) No. 91-1742.

1st Circuit affirms firearm enhancement based on assistant's use of Uzi to collect drug debts. (284) Defendant was convicted of conspiring to distribute cocaine. The 1st Circuit affirmed an enhancement for use of a firearm during the offense based upon evidence that defendant's assistant carried an Uzi submachine gun in "strong-arming drug debt collections." *U.S. v. Bello-Perez*, __ F.2d __ (1st Cir. Sept. 29, 1992) No. 91-2232.

7th Circuit affirms use of murder guideline for RICO defendant. (290) Defendant was convicted of racketeering activities ranging from protecting bookies to soliciting the murder of his wife. Section 2E1.1(a)(2) calls for use of the offense level applicable to the underlying racketeering activity. The 7th Circuit affirmed the use of the murder guideline, section 2A1.1, rather than the conspiracy to commit murder guideline, section 2A2.1 (under the pre-November 1990 version of the guidelines). Since the murder of defendant's wife occurred during the racketeering conspiracy, section 2E1.1(a)(2) and the relevant conduct guideline directed the court to the murder guideline rather than the solicitation guideline. The base offense level for murder is 43, i.e., life imprisonment. To come as close as possible to life imprisonment, the court properly gave under section 5G1.2(d) consecutive maximum sentences on each count, for a total of 40 years. The consecutive terms for racketeering and racketeering conspiracy did not constitute double jeopardy. *U.S. v. Masters*, __ F.2d __ (7th Cir. Oct. 14, 1992) No. 91-2985.

7th Circuit upholds preponderance of evidence standard in racketeering case. (290)(755) Defendant was convicted of racketeering charges. Section 2E1.1(a)(2) calls for the use of the offense level applicable to the underlying racketeering activity. Defendant contended that in considering whether he committed some other offense, the court should use a standard more exacting than the preponderance of the evidence. The 7th Circuit held that the district court properly used the preponderance standard in concluding that defendant was responsible for his wife's murder. Conviction at trial supplies all of the justification the Constitution requires for depriving a defendant of liberty for any term up to the maximum prescribed by statute. The court appeared to reject the 3rd Circuit's conclusion in *U.S. v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990), that when findings at sentencing transform the offense of conviction into a far more serious offense with a much more severe penalty, the court should use an enhanced burden of persuasion. *U.S. v. Masters*, __ F.2d __ (7th Cir. Oct. 14, 1992) No. 91-2985.

9th Circuit considers gross amounts of fraudulent loans defendant did not intend to repay. (300) Defendant pled guilty to fraudulently obtaining two automobile loans and a home mortgage loan. The banks recovered the property and reduced the amount of their actual losses by selling the cars and the house. The 9th Circuit held that because the defendant did not intend to repay the loans, it was proper to look to the gross amount of the loans obtained by the fraud to determine the intended loss for sentencing purposes. In so holding, the court did not reach the question of whether a person who *does* intend to repay a loan obtained by fraud is accountable for sentencing purposes for the full amount of the loan. *U.S. v. Galliano*, __ F.2d __ (9th Cir. Oct. 22, 1992), No. 91-10431.

7th Circuit affirms sentencing under 2X3.1 for defendant who perjured himself to protect others. (320)(380) Defendant, a conspirator in a marijuana farm, was convicted of perjury for testifying before a grand jury that he had no knowledge that his co-conspirators were involved in a marijuana operation. Section 2J1.3(c)(1) directs that if the perjury was in respect to another criminal offense, apply section 2X3.1 (Accessory After the Fact) with respect to that offense. Relying on *U.S. v. Huppert*, 917 F.2d 507 (11th Cir. 1990), defendant argued that he was improperly sentenced as an accessory after the fact under sections 2J1.3(c)(1) and 2X3.1 because as a principal in the marijuana-growing conspiracy, he could not also be sentenced as an accessory. The 7th Circuit affirmed, distinguishing *Huppert*. Unlike *Huppert*, defendant was clearly trying to protect others, and not himself. Defendant was immunized for his testimony, and thus had no reason to protect himself. *U.S. v. Curry*, __ F.2d __ (7th Cir. Sept. 24, 1992) No. 91-2550.

8th Circuit affirms physical injury enhancement where victim went to hospital. (320) The 8th Circuit affirmed an eight-level upward adjustment under section 2J1.2(b)(1) based upon the physical injury defendant caused his victim. It was clear that the victim suffered bodily injury, inasmuch as he went to the hospital and spent time at the hospital to assess the nature and character and extent of injuries suffered. *U.S. v. Schnurstein*, __ F.2d __ (8th Cir. Oct. 14, 1992) No. 92-1207NI.

11th Circuit affirms enhancement for threatening harm even though threat was not directly communicated to victim. (320) Defendant was convicted of 13 counts of obstructing justice and other related offenses. The district court applied an enhancement under section 2J1.2(b)(1) for threatening harm based on defendant's statement to one witness that he had connections to the Miami Mafia and that if the Mafia were to find out that the witness's mother had "said anything to anybody," both he and the mother would be murdered. The 11th Circuit affirmed, despite the fact that the threats were not made directly to the mother. There was support for the factual finding that defendant intended the daughter to relay the threat to her mother. *U.S. v. Moody*, __ F.2d __ (11th Cir. Oct. 9, 1992) No. 91-8810.

3rd Circuit affirms that life imprisonment is the maximum sentence for 924(e) offense. (330) Defendant was convicted of several offenses, including possession of a firearm by a felon in violation of 18 U.S.C. section 922(g)(1) and section 924(e). Sections 922(g)(and 924(e) carry a mandatory minimum sentence of "not less than 15 years" and include no express statement of the maximum sentence. Defendant argued that statutory maximum penalty under 18 U.S.C. section 924(e) was not life imprisonment but some term of years in excess of 15 years. The 3rd Circuit affirmed that the maximum sentence authorized under section 924(e) was life imprisonment. *U.S. v. Joshua*, __ F.2d __ (3rd Cir. Oct. 5, 1992) No. 91-3286.

Article examines environmental guidelines. (355) In "*Sentencing Environmental Crimes*," Gary S. Lincenberg examines the context in which the environmental guidelines were promulgated, explains how they apply to individual offenders, and discusses possible amendments to the guidelines. He also discusses the sentencing of corporate defenders in light of the new organizational guidelines which became effective November 1, 1991, but which only partially apply to environmental crimes. 29 AM. CRIM. L. REV. 1235 (1992).

5th Circuit affirms enhancement based on money defendants were capable of laundering. (360) Defendants were convicted of conspiracy to launder money. They received an enhancement under section 2S1.1(a)(2) based on the district court's determination that $2,097,000 was the amount of money to be laundered under the scheme. The court noted the negotiations during which defendants discussed the ease with which $1 million a month could be laundered. The court also observed that placing the amount at $2,097,000 was conservative and the actual sum could have been as high as $25 million. The 5th Circuit affirmed, finding sufficient evidence that defendants were capable of laundering $2,097,000. One defendant had a perfect cover, a Brazilian land sale for $25 million, that would provide a shade of validity to launder the drug money. *U.S. v. Fuller*, __ F.2d __ (5th Cir. Oct. 6, 1992) No. 91-5799.

3rd Circuit upholds application of payments to total tax, penalties and interest owed. (370) Defendant was convicted of income tax evasion. The IRS recovered some of his hidden assets, which were applied by the receiver to reduce the taxes, penalties and interest that defendant owed to the IRS, rather than reducing just the actual tax liability. Defendant's offense level under section 2T1.1 was based on the actual amount of tax he owed, regardless of the interest and penalties also due to the IRS. Defendant argued that the court should have calculated the taxes as if the receiver's payments had been allocated solely to the taxes. The 3rd Circuit rejected this argument. Under section 2T1.1, the sentence is to be based on the tax that the defendant attempted to evade. Thus it would have been proper to sentence defendant based on the full tax debt he attempted to evade, without *any* credit for the receiver's payments. *U.S. v. Pollen*, __ F.2d __ (3rd Cir. Oct. 13, 1992) No. 91-5703.

Adjustments (Chapter 3)

10th Circuit affirms that defendant was participant in gun battle with law enforcement officers. (410) Defendant received an enhancement under section 3A1.2(b) for assaulting a law enforcement officer based upon his participation in a gun battle. The 10th Circuit affirmed the determination that defendant was a participant in the gun battle. Defendant was present in the house immediately before the battle. A federal marshal testified that in addition to two automatic weapons, he heard gunfire from a third semiautomatic weapon. There was additional evidence that three persons in or near the house fired a weapon at the federal officers. The federal marshal testified that a co-defendant told him that defendant held and fired a MAC-10 machine gun during the gun battle. This hearsay was corroborated by the co-defendant's grand jury testimony. *U.S. v. Johnson*, __ F.2d __ (10th Cir. Sept. 29, 1992) No. 91-7012.

1st Circuit affirms leadership role for supplying and "fronting" cocaine, and collecting drug debts. (431) The 1st Circuit affirmed a four level leadership enhancement under section 3B1.1(a) based on evidence that defendant supplied and "fronted" cocaine, and after his distributor's arrest, directly supervised the collection of drug debts from the distributor's customers. When the distributor's lieutenant took over the distribution network, defendant provided operational oversight on a regular basis. *U.S. v. Bello-Perez*, __ F.2d __ (1st Cir. Sept. 29, 1992) No. 91-2232.

8th Circuit affirms that four others were involved in offense of conviction, not collateral conduct. (431) Defendant claimed that the district court misapplied a leadership enhancement under section 3B1.1(a) by considering individuals involved in conduct collateral to the charged offense. The 8th Circuit upheld the enhancement, since there was evidence from which the district court could properly infer that the four other participants were involved in the offense of conviction, not merely in collateral conduct. *U.S. v. Hale*, __ F.2d __ (8th Cir. Oct. 15, 1992) No. 90-2722EM.

3rd Circuit rules that receiver of stolen gems was not participant for leadership role purposes. (432) Defendant was convicted of conspiracy to transport stolen diamonds. The 3rd Circuit reversed a four-level enhancement under section 3B1.1(a) based on defendant's leadership role in criminal activity involving five or more participants. The district court properly counted defendant as a participant in the offense. But the receiver of the stolen gems could not be considered a participant. "Criminal activity" is not synonymous with relevant conduct. The receiver was not involved in defendant's robbery; it was completed before the receiver became involved or even aware of the criminal enterprise. While in some cases receivers of stolen goods can be properly regarded as participants in the theft, this was not such a case. There was no evidence that the receiver was expecting arrival of the diamonds, participated in the planning and execution of the robbery, or received any of the proceeds of the offense. *U.S. v. Colletti*, __ F.2d __ (3rd Cir. Oct. 7, 1992) No. 91-5405.

1st Circuit affirms that defendant who showed cash to informant was not a minimal participant. (445) The 1st Circuit rejected defendant's request for a four-level reduction as a minimal participant. There was evidence that defendant was a passenger in the car used to deliver the money to purchase two kilograms of cocaine from a government informant, that she pulled the money bag from under the car seat, and showed the cash to the informant. Moreover, defendant told the informant that there was $30,000 in the bag, which was correct. *U.S. v. Figueroa*, __ F.2d __ (1st Cir. Oct. 7, 1992) No. 91-1020.

7th Circuit rejects minor role for defendant who acted as translator during drug transactions. (445) Defendant contended that she should have received a minor or minimal role reduction because the evidence at trial proved she was nothing more than a translator in a drug deal. The 7th Circuit affirmed the denial of the reduction in light of evidence that defendant possessed a pager, was involved in more than one transaction, travelled in order to facilitate the conspiracy, and actively participated in the discussions that initiated the conspiracy. Defendant was an integral and active member of the conspiracy whose duties happened to include translating. *U.S. v. Villasenor*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 91-1107.

3rd Circuit outlines parameters for obstruction enhancement for defendant's perjury at trial. (460) Defendant received an enhancement for obstruction based upon his perjury at trial. In light of the Supreme Court's pending decision in *U.S. v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), cert. granted, 112 S.Ct. 2272 (1992), the 3rd Circuit refused to express a "firm view" on whether such an obstruction enhancement violates constitutional rights. However, the court expressed its view that in order to warrant the enhancement, the perjury must not only be clearly established, but also must be sufficiently far-reaching as to impose some incremental burden upon the government. Here, the judge relied on the fact that virtually all of defendant's testimony was disputed by other witnesses, and defendant's demeanor while testifying made it "obvious" he was lying. The 3rd Circuit remanded for clarification, finding the stated reasons did not adequately support the enhancement. *U.S. v. Colletti*, __ F.2d __ (3rd Cir. Oct. 7, 1992) No. 91-5405.

7th Circuit upholds obstruction enhancement for threats to witness during presentence investigation. (461) Prior to sentencing, defendant's bond was revoked for threatening his girlfriend that he would retaliate against her for cooperating with the FBI. The 7th Circuit affirmed that the threats were a proper ground for an obstruction of justice enhancement. Although defendant contended that

his case was essentially over, the enhancement applies to obstruction of the sentencing process as well obstructive activities before and after trial. It was proper for the district court to conclude that the purpose of defendant's threats was to thwart the girlfriend's further cooperation with government officials. *U.S. v. Woods*, __ F.2d __ (7th Cir. Oct. 6, 1992) No. 92-1016.

7th Circuit upholds obstruction enhancement based on perjury at trial. (461) The 7th Circuit affirmed an enhancement for obstruction of justice based on defendant's perjury at trial. In order to justify such an enhancement, the district court must make a specific independent finding that a defendant was less than truthful when he testified. The district court clearly did that in this case. Defendant's testimony was contrary to a government agent's testimony at several critical junctures, in particular with regard to when the agent paid defendant money and his location during the drug transaction. The district judge, who was in the best position to evaluate defendant's truthfulness, determined that defendant had lied about these facts as well as about the agent's alleged efforts to entrap defendant. *U.S. v. Easley*, __ F.2d __ (7th Cir. Oct. 2, 1992) No. 89-3190.

8th Circuit upholds obstruction enhancement for defendant who threw cocaine out window. (461) Defendant challenged an enhancement for obstruction of justice, claiming he threw cocaine and money out the window to protect himself from what he thought was a robbery, and not to conceal evidence from the police. The 8th Circuit upheld the enhancement, since the police knocked on the door, announced themselves, and stated that they had a search warrant. *U.S. v. Hale*, __ F.2d __ (8th Cir. Oct. 15, 1992) No. 90-2722EM.

8th Circuit affirms that false statement to FBI agents significantly impeded investigation. (461) A resident of a halfway house discovered a duffel bag containing marijuana. Defendant, another resident of the halfway house, initially told FBI agents that the duffel bag was not his, but later admitted ownership. The 8th Circuit upheld an enhancement for obstruction of justice based upon the false statements to the FBI agents. The initial denial of ownership of the duffel bag significantly obstructed or impeded justice. Defendant did not admit that the duffel bag belonged to him until after an FBI polygrapher had been flown in to administer a polygraph. Thus, the false statement necessitated a second interview with additional special personnel. *U.S. v. Penn*, __ F.2d __ (8th Cir. Sept. 10, 1992) No. 91-3422.

9th Circuit finds obstruction based on refusal to testify at co-conspirator's trial. (461) After defendant pled guilty, the government obtained a grant of immunity and an order compelling the defendant to testify in the trial of his co-conspirators. The defendant refused to testify and the district court held him in contempt. At sentencing, the district court increased defendant's offense level for obstruction of justice based on his refusal to testify. In upholding the increase, the court relied on the 11th Circuit's decision in *U.S. v. Williams*, 922 F.2d 737, 739 (11th Cir.), *cert. denied*, 112 S.Ct. 258 (1991) which had held that a defendant's refusal to testify at a co-conspirator's trial after an immunity order constituted an obstruction of justice under section 3C1.1. The defendant's refusal to testify constituted a willful obstruction of, or at least an attempt to obstruct, the administration of justice during the prosecution of the co-conspirators. *U.S. v. Morales*, __ F.2d __ (9th Cir. Oct. 21, 1992), No. 91-50272.

11th Circuit vacates obstruction enhancement because judge failed to independently find perjury. (462) Defendant received an enhancement for obstruction of justice based upon his perjury at trial. The 11th Circuit remanded for resentencing, because the sentencing judge failed to make a finding, independent of the jury's verdict, that defendant willfully lied at trial. A jury's verdict is not conclusive on this issue. A sentencing court must make its own decision, informed but not dictated by the jury's verdict. *U.S. v. Lawrence*, __ F.2d __ (11th Cir. Sept. 28, 1992) No. 91-7491.

7th Circuit finds no denial of right to allocution in permitting defendant to speak after announcing acceptance of responsibility finding. (480)(750) Defendant complained that he was denied his right to allocution under Rule 32(a)(1)(C) because he was unable to address the court until after it made findings concerning acceptance of responsibility. He argued that by being denied the opportunity to allocute until after the court made its decision, he was unable to influence the decision, and that he might have made a different statement had the acceptance question still been open. The 7th Circuit rejected this argument. First, until the court actually imposed sentence, it was free to re-evaluate and change its factual findings. Moreover, defendant's statement that he might have made a different statement earlier was ironic for someone who claims he had accepted

responsibility. Finally, as a factual matter, defendant had two earlier opportunities to address the court. At neither time did he say anything that indicated an acceptance of responsibility. *U.S. v. Aquilla*, __ F.2d __ (7th Cir. Sept. 29, 1992) No. 91-1951.

7th Circuit rules that entrapment defense did not entitle defendant to acceptance of responsibility reduction. (486) Defendant argued that the district court should not have denied him a reduction for acceptance of responsibility because he presented an entrapment defense. According to defendant, the presentation of the entrapment defense could be viewed as his acknowledgment of his participation in illegal conduct. The 7th Circuit affirmed the denial of the reduction. The trial judge stated that he appreciated defendant's contentions regarding his acknowledgment on the stand of his participation in illegal conduct, but believed that defendant's position was also "one of total denial of his obligation in this matter." *U.S. v. Haddad*, __ F.2d __ (7th Cir. Oct. 2, 1992) No. 91-3194.

7th Circuit denies reduction to defendant who did not withdraw from criminal activities. (486) The 7th Circuit affirmed the denial of a reduction for acceptance of responsibility, in light of evidence that defendant did not voluntarily withdraw from his criminal activities in a timely fashion, did not provide voluntary assistance to officials, and stated that he felt "pressured." Moreover, defendant received an enhancement for obstruction of justice because of his attempt to "mold" a witness's testimony to conform with his own grand jury testimony. *U.S. v. Curry*, __ F.2d __ (7th Cir. Sept. 24, 1992) No. 91-2550.

7th Circuit refuses to consider ineffective assistance claim because record reflected lack of acceptance of responsibility. (488) Defendant argued that the district court's finding that he did not accept responsibility was tainted by the ineffective assistance he received from his counsel at sentencing. The 7th Circuit refused to review in detail defendant's claim because defendant did not show that but for his attorney's alleged mistakes the result would have been different. Almost the entire record supported the denial of the reduction. Defendant not only challenged his guilt at trial, but likely committed perjury in testifying that he never sold cocaine. After trial, defendant continued to deny his involvement until after the district court cited his denial as a reason for denying the acceptance of responsibility reduction. Although defendant admitted some involvement at sentencing, it was a grudging and incomplete admission, accompanied by an excuse to minimize his own culpability. *U.S. v. Aquilla*, __ F.2d __ (7th Cir. Sept. 29, 1992) No. 91-1951.

8th Circuit denies reduction to defendant who went to trial in part to test applicability of statute. (490) Defendant contended that he should have received an acceptance of responsibility reduction because prior to his trial he cooperated in gathering his assets for liquidation and because the purpose of his trial was to test the applicability of the statute to his conduct. The 8th Circuit affirmed the denial of the reduction. While one of defendant's defense theories rested on the applicability of the statute to his conduct, defendant also argued that he possessed a good faith belief that he was authorized to perform the acts for which he was convicted. Thus, the trial also focused on defendant's factual guilt. *U.S. v. Peery*, __ F.2d __ (8th Cir. Oct. 14, 1992) No. 92-1245.

7th Circuit affirms denial of reduction to defendant who threatened witness. (492) The 7th Circuit affirmed the denial of a reduction for acceptance of responsibility to a defendant who received an enhancement for obstruction of justice for threatening to retaliate against his girlfriend for cooperating with authorities. This was not an extraordinary case where an acceptance of responsibility reduction was appropriate despite the obstruction enhancement. Threatening a co-defendant because of her cooperation with the government is not consistent with a finding that a defendant has accepted personal responsibility for his crime. Moreover, despite having received a managerial role enhancement, defendant refused to acknowledge his leadership role in the criminal activity. *U.S. v. Woods*, __ F.2d __ (7th Cir. Oct. 6, 1992) No. 92-1016.

Criminal History (§4A)

4th Circuit affirms that concealed weapon offense was not part of the offense of conviction. (504) The 4th Circuit rejected defendant's argument that the activity underlying his concealed weapon conviction was part of the instant offense, rather than a prior conviction to be counted in his criminal history. Defendant carried the concealed weapon in January 1989. He did not undertake this activity in furtherance of the marijuana conspiracy, but instead began carrying the weapon after he withdrew from the conspiracy

and began cooperating with state authorities. *U.S. v. Hall*, __ F.2d __ (4th Cir. Sept. 29, 1992) No. 92-5124.

4th Circuit reverses district court's ruling that prior conviction was invalid. (504)(520) In *U.S. v. Jones*, 907 F.2d 456 (4th Cir. 1990) (Jones I) the 4th Circuit remanded for the district court to consider defendant's claim that a prior state conviction for career offender purposes was invalid. On remand, based only on defendant's uncorroborated testimony, the district court held the conviction unconstitutional. On the government's appeal, the 4th Circuit reversed, ruling that the proof offered by defendant was insufficient to support a discretionary refusal to count a prior conviction. In a collateral attack on a prior conviction, the defendant should be required to identify the constitutional challenge intended. Next, he should be required to identify the means by which proof of invalidity will be attempted. To the extent the challenge is dependent on proof of historical facts likely to be in dispute by witnesses not yet located or identified, a discretionary decision not to entertain the proposed challenge would be justified. *U.S. v. Jones*, __ F.2d __ (4th Cir. Sept. 24, 1992) No. 91-5826.

7th Circuit affirms that six robberies were not "related" as part of common scheme or plan. (504) Defendant had six robberies or attempted robberies in his criminal history. Four of the robberies were committed in May and June of 1983. In each of these, defendant and several accomplices (who were not always the same) used plastic pellet guns to rob different stores or restaurants while a confederate listened to a police scanner. In March of 1984, defendant and different accomplices robbed two food stores in a similar manner. The 7th Circuit affirmed the district court's determination that the robberies were not part of a common scheme or plan for purposes of section 4A1.2(a)(2). Defendant's written confession supported a finding that the robberies were "spur-of-the-moment decisions," based on a lack of funds. Even if defendant "planned" to rob as many food stores and restaurants as he could, this was not the type of common scheme or plan that supported a finding that the cases were related. *U.S. v. Woods*, __ F.2d __ (7th Cir. Oct. 6, 1992) No. 92-1016.

7th Circuit holds that under 1991 guidelines, cases consolidated for sentencing are related. (504) Application note 3 to section 4A1.2(a)(2) states that prior offenses are related if they resulted from offenses that occurred on the same occasion, were part of a single common scheme or plan, or were consolidated for trial or sentencing. In *U.S. v. Elmendorf*, 945 F.2d 989 (7th Cir. 1991), the 7th Circuit held that notwithstanding application note 3, the fact that certain prior convictions were consolidated for sentencing was not determinative. However, the November 1991 amendments to section 4A1.2 and its commentary clearly indicated that prior sentences that have been consolidated for trial or sentencing must be considered related under section 4A1.2. Thus, the 7th Circuit held that the contrary language in *Elmendorf* should be limited to pre-amendment cases. The error was harmless here, since defendant would have fallen into the same criminal history category. *U.S. v. Woods*, __ F.2d __ (7th Cir. Oct. 6, 1992) No. 92-1016.

3rd Circuit upholds departure based on five old convictions excluded from criminal history. (510)(865) The 3rd Circuit upheld a departure from criminal history category III to IV, based upon the fact that five of defendant's seven prior convictions were not sufficiently recent to be included in his criminal history. Moreover, the sentencing ranges overlapped, and the actual sentence imposed was within both guideline ranges. *U.S. v. Collettl*, __ F.2d __ (3rd Cir. Oct. 7, 1992) No. 91-5405.

7th Circuit affirms upward departure despite attempt to impeach witness's credibility. (510)(770) Defendant received an upward criminal history departure based on a co-conspirator's testimony that he had engaged in several drug transactions with defendant in 1987, several years before the instant drug conspiracy. The 7th Circuit affirmed that this information was sufficient to support the departure, despite the witness's alleged memory loss and prior inconsistent statement to law enforcement officials. A witness is not unreliable simply because he is impeachable. There was no clear error simply because the district court believed the witness in spite of defense attorneys' attempts to impeach him. The court also rejected defendant's claim that trial counsel was ineffective for failing to object to the factual basis for the departure. The district court was aware of the facts that undermined the witness's credibility, so defendant was not prejudiced by his attorney's failure to bring those facts to the court's attention. *U.S. v. Villasenor*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 91-1107.

7th Circuit finds that defendant committed five prior criminal acts, and affirms departure. (510) Defendant received an upward criminal history de-

parture based on five prior criminal acts for which he was never convicted. The 7th Circuit affirmed that the government proved by a preponderance that defendant committed the acts. The information relayed to the court was more in depth than mere arrest records. One police officer who personally investigated three of the crimes described defendant's involvement in them. The mother of defendant's child testified as to defendant's involvement in a shooting which she witnessed. Finally, the police officer who arrested defendant on a pending concealed weapons charge described that incident. The testimony of each of the witnesses was based on personal observation. Moreover, defendant never denied his involvement in any of these incidents, arguing instead that they should not be considered at all because the charges were either pending, dismissed, or had been resolved in his favor. *U.S. v. Torres*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 91-3839.

8th Circuit says departure based on threat to ex-wife and boyfriend would have been proper. (510) Defendant was convicted under 18 U.S.C. sections 842(i) and 844, which prohibits any person who has previously been committed to a mental institution from shipping or receiving any explosive material in interstate commerce. The district court departed upward because defendant was a threat to society, in particular his ex-wife and her boyfriend. The pipe bomb defendant possessed was capable of seriously injuring and killing other persons, and defendant wrote several threatening letters and harassed his ex-wife and her boyfriend. Although the 8th Circuit had to remand for other reasons, it found that the district court relied on appropriate factors to support the upward departure, and that the 41-month sentence was "patently reasonable and justified." *U.S. v. Van Horn*, __ F.2d __ (8th Cir. Oct. 9, 1992) No. 91-3854.

Determining the Sentence (Chapter 5)

3rd Circuit remands because record did not indicate consideration of ability to make restitution. (610) The 3rd Circuit found that resentencing was necessary because, without explanation and without an indication that the judge considered defendant's ability to pay, the judge ordered defendant to make restitution in the amount of $289,749. The statute, 18 U.S.C. section 3664(a) mandates that, in determining whether to order restitution, the court shall consider the financial resources of the defendant and the financial needs and earning ability of the defendant and his dependents. *U.S. v. Colletti*, __ F.2d __ (3rd Cir. Oct. 7, 1992) No. 91-5405.

7th Circuit affirms full restitution order despite defendant's negative net worth. (610) The 7th Circuit upheld an order requiring defendant to pay in excess of $100,000 in full restitution to his fraud victims. The district court properly considered all of the mandatory factors set forth in 18 U.S.C. section 3664(a). Although defendant had a current negative net worth of $21,000, he had the possibility of making restitution in the future. He was hard-working and told the court he hoped to become a productive member of society again. The court fully considered defendant's financial resources as well as his financial needs and earning ability. The amount of restitution was not improperly calculated. Although defendant claimed that the value of the stolen seed recovered from him equalled the value of the seed he fraudulently obtained, the court was permitted to rely on probation officer's figures, which were obtained from the victims. *U.S. v. Helton*, __ F.2d __ (7th Cir. Sept. 21, 1992) No. 91-3909.

3rd Circuit affirms that court properly considered defendant's ability to pay $3,000 fine. (630) The 3rd Circuit rejected defendant's claim that the district court improperly failed to consider his ability to pay a $3,000 fine. The government presented evidence that defendant was a judgment creditor of the Virgin Islands and was owed $3,000. The district court properly considered this in imposing the $3,000 fine. *U.S. v. Joshua*, __ F.2d __ (3rd Cir. Oct. 5, 1992) No. 91-3286.

3rd Circuit upholds consecutive sentences for pre-guidelines and guidelines counts. (650) Defendant was convicted of several pre-guidelines counts and one guidelines count of tax evasion. His guideline count had a sentencing range of 57 to 71 months and a statutory maximum of 60 months. He received a 60 month sentence on his guideline count, to be served consecutively to concurrent 60-month sentences on the pre-guidelines counts. He argued that, based on his guideline range of 57 to 71 months, a consecutive sentence of at most 11 months was permissible. The 3rd Circuit upheld the 60-month consecutive sentences. With regard to pre-guidelines counts, a district court has virtually unfettered discretion in imposing a sentence if it falls within the statutory limits. Defendant's one guideline count had no limiting effect on the district court's discretion to impose

consecutive sentences for his pre-guidelines counts. *U.S. v. Pollen*, __ F.2d __ (3rd Cir. Oct. 13, 1992) No. 91-5703.

9th Circuit upholds order for old law federal sentence to run consecutively to state sentence. (650) Resolving a conflict in prior case law, an *en banc* 9th Circuit upheld an order requiring defendant's federal sentence to be served consecutively to his state prison sentence. In so holding, the court overruled its decision in *U.S. v. Terrovona*, 785 F.2d 767, 769 (9th Cir. 1986), *cert. denied* 476 U.S. 1186 1986) in favor of its earlier decision in *U.S. v. Thornton*, 710 F.2d 513 (9th Cir. 1983). The *en banc* court noted that no appellate court had approved the *Terrovona* analysis and that eight other circuits agreed that federal district courts had the power to impose a sentence that commences after completion of an existing state sentence. Judge Pregerson dissented, finding that the grant of authority under old 18 U.S.C. section 3568 to the Attorney General to designate the place of confinement permitted the district court to make a recommendation but precluded it from ordering a consecutive sentence. *U.S. v. Hardesty*, __ F.2d __, (9th Cir. Oct. 22, 1992) (*en banc*), No. 90-30260.

9th Circuit finds section 3147 enhancement must be consecutive regardless of underlying offense. (650) Defendant pled guilty to various fraud offenses, all but one of which were committed while he was on pretrial release in two unrelated federal cases. The district court enhanced the sentence under 18 U.S.C. section 3147 and imposed a consecutive term of 14 months. Upholding the consecutive term, the court relied on the plain language of section 3147, finding that it requires the enhancement term to run consecutively to any other term of imprisonment regardless of when the underlying offense was committed. Because the statute was not vague or ambiguous, the court did not need to consult the legislative history or rely on the rule of lenity. *U.S. v. Galliano*, __ F.2d __ (9th Cir. Oct. 22, 1992), No. 91-10431.

Departures (§5K)

Article concludes that 7th Circuit has mistakenly determined mitigating personal circumstances may not be considered at sentencing. (700) In "*The Seventh Circuit and Departures From the Sentencing Guidelines: Sentencing by Numbers*," Terence F. MacCarthy and Nancy B. Murnighan argue that courts retain significant discretion to depart from the guidelines in all but a very limited number of circumstances. The authors believe that the Sentencing Commission's adoption of the "heartland approach" to departures gives the courts the necessary discretion to dispense individualized justice. After reviewing 7th Circuit guideline cases, they conclude the Circuit has appropriately applied the heartland approach to departures based on offense characteristics, but has abandoned the approach for departures based on mitigating offender characteristics. They argue that the Circuit has mistakenly concluded that sentencing courts are precluded from considering extraordinary personal circumstances. This conclusion, they believe, has unnecessarily removed the human element from sentencing and reduced the process to sentencing by numbers. 67 CHI-KENT L. REV. 51 (1991).

5th Circuit reverses substantial assistance departure made without government motion. (712) The district court departed downward because (a) the guidelines did not adequately consider the minimal nature of defendant's past offenses, (b) the guidelines did not adequately reflect defendant's lack of culpability, and (c) defendant had substantially cooperated with the government. The government had not made a motion under section 5K1.1 for a substantial assistance departure. The 5th Circuit vacated and remanded for resentencing in light of *Wade v. United States*, 112 S.Ct. 1840 (1992). *Wade* made it clear that absent a section 5K1.1 motion from the government, a downward departure for substantial assistance is not proper. Although reasons (a) and (b) were arguably within the district court's discretion, reason (c) was an invalid departure factor. *U.S. v. Sellers*, __ F.2d __ (5th Cir. Oct. 2, 1992) No. 91-9513.

2nd Circuit remands again for finding of whether defendant's circumstances supported departure. (715) The district court originally departed downward based on a note from the jury which asked the court to be lenient in sentencing. In *U.S. v. Mickens*, 926 F.2d 1323 (2nd Cir. 1991) (*Mickens I*), the 2nd Circuit held that although the jury's sympathy may reflect circumstances that the court could appropriately consider, it was inappropriate to base a departure solely on the jury's recommendation. The case was remanded for an independent determination. At resentencing, the judge sentenced defendant to the bottom of her guideline range, holding that he had no authority to depart downward. On defendant's second appeal, the 2nd Circuit held that the judge mistakenly

interpreted *Mickens I*. A departure might be appropriate depending on the facts. It was precisely because the district court did not conduct independent fact-finding that defendant's original sentence was vacated, and for that same reason the case was again remanded for resentencing. *U.S. v. Mickens*, __ F.2d __ (2nd Cir. Oct. 13, 1992) No. 92-1108.

4th Circuit rejects disparity among co-conspirators sentenced in federal and state court as grounds for departure. (716) The 4th Circuit affirmed the district court's determination that sentencing disparity among co-conspirators or co-defendants sentenced in either federal or state court is not a proper basis for a downward departure. Such a policy would undermine the nationwide uniformity that Congress sought in implementing the guidelines. Moreover, once a court has decided to depart on a ground independent from sentencing disparity, the court may not consider sentencing disparity in determining the extent of the departure. A sentencing court may not consider, in determining the extent of a departure, a factor that would not constitute a valid basis for departure. *U.S. v. Hall*, __ F.2d __ (4th Cir. Sept. 29, 1992) No. 92-5124.

8th Circuit affirms that court may not depart downward under 5K2.0 for diminished capacity. (730) Defendant pled guilty to a violent crime. At sentencing, he requested a downward departure under section 5K2.0 due to his paranoid schizophrenia. The 8th Circuit affirmed the district court's ruling that it lacked discretion to depart downward under section 5K2.0 for diminished mental capacity because section 5K2.13 covered diminished capacity departures. The Sentencing Commission adequately considered downward departures based on diminished mental capacity when it formulated section 5K2.13, thus foreclosing consideration of the same factor under section 5K2.0. Because defendant committed a violent offense, he was not eligible for a downward departure under section 5K2.13. *U.S. v. Dillard*, __ F.2d __ (8th Cir. Oct. 5, 1992) No. 92-1849MN.

Sentencing Hearing (86A)

9th Circuit holds that government has the burden of establishing quantity of drugs. (755) Relying on *U.S. v. Howard*, 894 F.2d 1085, 1090 (9th Cir. 1990), the 9th Circuit held that the government has the burden of presenting evidence sufficient to enable the district court to determine the base offense level. Under section 2D1.1(c) the base offense level for a drug-related offense depends entirely upon the quantity of drugs involved. *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. Oct. 28, 1992) No. 89-30212, *superseding* 971 F.2d 234 (9th Cir. July 2, 1992).

9th Circuit reaffirms that preponderance standard of proof applies at sentencing. (755) In *U.S. v. Restrepo*, 946 F.2d 654 (9th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 1654 (1992), the 9th Circuit held that the preponderance of the evidence standard of proof satisfies due process for uncharged facts under the "relevant conduct" section, 1B1.3(a)(2). *Restrepo* left open the possibility that in cases involving severe penalty enhancements, due process might require heightened procedural protections. In this case, defendant was convicted of conspiracy, and the extent of the conspiracy caused her sentence to be increased from a range of 41-51 months to a range of 292-365 months. Nevertheless, the majority found that this did not provide the legal basis for the due process concerns contemplated in *Restrepo*, because this case involved only a "quantity determination" for *convicted* conduct, not *uncharged* conduct. Judge Wiggins refused to join this part of the opinion, arguing that the seven-fold increase in sentence required a higher standard of proof. *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. Oct. 28, 1992) No. 89-30212, *superseding* 971 F.2d 234 (9th Cir. July 2, 1992).

9th Circuit remands to determine whether to hold an evidentiary hearing. (765) Since the district court did not make specific findings with respect to the defendant's allegations of factual inaccuracy in the presentence report, the case was remanded to the district court. However, the 9th Circuit rejected the defendant's argument that the district court must afford her an evidentiary hearing on remand. Rule 32(c)(3)(A) "expressly vests the district court with discretion to hold an evidentiary hearing." Absent specific findings, the appellate court could not determine whether the district court abused its discretion in denying the motion for an evidentiary hearing. *U.S. v. Harrison-Philpot*, __ F.2d __ (9th Cir. Oct. 28, 1992) No. 89-30212, *superseding* 971 F.2d 234 (9th Cir. July 2, 1992).

3rd Circuit holds that court's rejection of government's proposed upward departure was a factual dispute within Rule 32. (765) The district court rejected the government's proposed upward departure based on the use of a firearm during a

robbery, concluding that defendant was not responsible for the use of firearms by the actual robbers. Defendant complained that the court failed to reduce this ruling to writing or append it to the final version of the PSR, which becomes part of a defendant's file. The 3rd Circuit agreed that this did involve a factual dispute within Rule 32, and that the final outcome should have been reflected in writing in the presentence report. *U.S. v. Colletti*, __ F.2d __ (3rd Cir. Oct. 7, 1992) No. 91-5405.

7th Circuit affirms despite district court's failure to make written findings. (765) The 7th Circuit refused to remand the case for resentencing even though the district court failed to make written findings and attach them to the presentence report as required by Fed. R. Crim. P. 32(c)(3)(D). The rule serves two purposes: to protect a defendant's due process rights by insuring his sentence is based on accurate information and to provide a clear record of the disposition and resolution of controverted facts in the presentence report. Remand is required only if the first purpose of the rule has been infringed. Here, there was no due process violation. A review of transcript revealed the district court allowed defendant the opportunity to present witnesses and arguments addressing the disputed factual matters, and the judge made findings of fact as to the amount of drugs involved. The case was remanded for the limited purpose of affording the district court an opportunity to make and attach written findings to the presentence report. *U.S. v. Villasenor*, __ F.2d __ (7th Cir. Oct. 8, 1992) No. 91-1107.

8th Circuit rules it was improper to rely on presentence report after objections. (765) Defendant's presentence report named several persons over whom defendant exercised a leadership role. Defense counsel objected, and the district court then referred to various parts of the presentence report and listed five persons over whom the report found defendant had exercised a leadership role. The 8th Circuit found that the district court violated Fed. R. Crim. P. 32(c)(3)(D) by relying on the presentence report without resolving defendant's objections. A presentence report is not evidence and when parties object to it, the court must make findings with respect to the controverted issues. *U.S. v. Moore*, __ F.2d __ (8th Cir. Oct. 8, 1992) No. 91-3202.

7th Circuit upholds reliance upon civil depositions at sentencing. (770) Defendant argued that the district court erroneously considered at sentencing depositions obtained from a civil action. The depositions indicated that defendant had previously committed a crime similar to the offense of conviction. The 7th Circuit affirmed that the depositions had sufficient indicia of reliability to be considered by the sentencing court. They were statements taken under oath in an adversarial proceeding in district court. The admission of the deposition testimony did not violate defendant's 6th Amendment right to confront witnesses. Defendant had every opportunity to rebut the impact of the deposition testimony, but he never argued that the matters described in the depositions were false. *U.S. v. Helton*, __ F.2d __ (7th Cir. Sept. 21, 1992) No. 91-3909.

8th Circuit upholds consideration of hearsay statements of confidential informant. (770) Based on its recent decision in *U.S. v. Wise*, __ F.2d __ (8th Cir. Sept. 17, 1992) No. 90-1070 (en banc), the 8th Circuit rejected defendant's claim that the district court's consideration of a hearsay statement of a confidential informant violated his 6th Amendment confrontation clause rights. *U.S. v. Hale*, __ F.2d __ (8th Cir. Oct. 15, 1992) No. 90-2722EM.

Plea Agreements, Generally 86B

5th Circuit vacates guilty plea for inadequate advice about supervised release and departures. (790) Defendant argued that Fed. R. Crim. P. 11 was violated by the district court's failure to (a) provide an explanation of the effect of a violation of supervised release, and (b) advise defendant that under certain circumstances it could depart upward from the guideline range. The 5th Circuit found that both failures were partial failures to address the core concern of Rule 11 of making sure that a defendant understands the consequences of his plea. Although each by itself might not necessitate vacation of the sentence, the two together did *not* constitute harmless error. *U.S. v. Hekimain*, __ F.2d __ (5th Cir. Oct. 9, 1992) No. 91-1832.

5th Circuit says prosecutor's statements, with court's follow-up questions, satisfied Rule 11. (790) Defendant complained that the district court failed to advise him personally of the statutory maximum penalty for his offense, as required by Fed. R. Crim. P. 11(c)(1). The 5th Circuit held that the prosecutor's statements, along with the court's follow-up questions, satisfied the requirements of Rule 11(c) that the trial court advise a defendant of

the maximum penalty. At the plea hearing, the prosecutor read the indictment and stated the maximum term of imprisonment and supervised release faced by defendant. The court then asked defense counsel whether he had discussed the maximum penalties with his client. After receiving an affirmative response, the court asked defendant whether he understood the maximum penalties involved. Defendant replied that he did. *U.S. v. Heklmain*, __ F.2d __ (5th Cir. Oct. 9, 1992) No. 91-1832.

8th Circuit rules that government's recommendation of upward departure violated plea agreement. (790) Defendant's plea agreement provided that the government would not seek an upward departure from the offense level calculated "by the United States Probation Office." The presentence report included a 10-level enhancement, which resulted in a total offense level of 18. The district court sustained defendant's objection to the 10-level enhancement, but instead imposed a four-level enhancement, resulting in a total offense level of 12. The government then urged an upward departure, arguing that this did not violate the plea agreement since the court used a range significantly lower than the presentence report. The 8th Circuit found that the government's recommendation violated the plea agreement. "It is circuitous to suggest that because one of the recommendations in the PSR was rejected by the district court, the ultimate offense level was calculated in any way other than 'by the United States Probation Office.'" Judge Gibson dissented. *U.S. v. Van Horn*, __ F.2d __ (8th Cir. Oct. 9, 1992) No. 91-3854.

Appeal of Sentence (18 U.S.C. §3742)

5th Circuit upholds timeliness of cross-appeal filed 30 days after denial of motion to reconsider. (850) During the time for filing a notice of cross-appeal, the government instead filed a motion to reconsider defendant's sentence. Thirty days after the motion was denied, the government filed a notice of appeal. Although the literal requirements of Fed. R. App. Proc. 4(b) were violated, the 5th Circuit upheld its jurisdiction to consider the government's cross-appeal. A well-established common-law exception to Rule 4(b) provides that a motion for reconsideration tolls the period for filing a notice of appeal until the motion for reconsideration is denied by the district court. Defendants' notices of appeal did not divest the district court of jurisdiction to rule on the government's motion for reconsideration. Rule 4(b) was not activated with respect to the government's cross-appeal until the district court denied the government's motion to reconsider. *U.S. v. Greenwood*, __ F.2d __ (5th Cir. Oct. 2, 1992) No. 91-8212.

4th Circuit refuses to review failure to make downward criminal history departure. (860) Defendant claimed that the district court should have departed downward because his criminal history category overstated the seriousness of his past criminal conduct. The 4th Circuit refused to review this issue, since a refusal to depart downward based on overrepresentation of criminal history is not appealable. *U.S. v. Hall*, __ F.2d __ (4th Cir. Sept. 29, 1992) No. 92-5124.

7th Circuit refuses review where no evidence that court was unaware of its authority to depart. (860) The 7th Circuit refused to review the district court's refusal to depart downward based on defendant's alleged extraordinary physical impairment. There was no evidence to suggest that the district court was unaware of its authority to depart. Thus, the appellate court presumed that the failure to depart was a discretionary decision. This was supported by the extensive evidence describing defendant's physical condition which the district court considered. *U.S. v. Helton*, __ F.2d __ (7th Cir. Sept. 21, 1992) No. 91-3909.

Forfeiture Cases

4th Circuit refuses to set aside forfeiture after related party's conviction was vacated. (900) The government filed a RICO forfeiture claim against certain stock, arguing that the claimant held the stock only as nominee for Kovens, a convicted RICO violator. In 1984, the claimant and the government reached a settlement which allocated 60 percent of the disputed stock to the United States and 40 percent to claimant. In 1988, Kovens' conviction was vacated. The 4th Circuit found no abuse of discretion in denying the claimant's action to recover the stock based on the vacation of Kovens' conviction. He was not entitled to relief under Rule 60(b)(4) from a void judgment, nor was he entitled to relief under Rule 60(b) (5) and (6). The forfeiture judgment was not dependent on Kovens' conviction. Strategic decisions made during the course of litigation provide no basis for relief under Rule 60(b)(6). *Schwartz v. U.S.*, __ F.2d __ (4th Cir. Sept. 28, 1992) No. 90-6043.

5th Circuit upholds restraining order permitting operation of business but directing certain proceeds to be delivered to government until trial. **(910)** Defendant and others were indicted on racketeering charges. The government obtained an ex parte restraining order pursuant to 18 U.S.C. section 1963(d), which prohibited all the defendants and their unindicted corporations from transferring any assets owned by them. The order directed that weekly payments to defendant from the 1989 sale of four businesses be turned over to the government and held until forfeitable upon conviction. The order expressly permitted the remaining businesses to stay in operation. The 5th Circuit rejected several constitutional challenges to the validity of the restraining order. Since the order permitted the businesses to operate in a normal business manner, including the selling of obscene materials, the order did not constitute an impermissible prior restraint of 1st Amendment activity. Defendant was not denied procedural due process. Finally, the fact that the restraining order bound unindicted corporations did not render it impermissibly overbroad. *U.S. v. Jenkins*, __ F.2d __ (5th Cir. Oct. 5, 1992) No. 92-2002.

8th Circuit affirms granting government's untimely motion to strike claimant's pleadings. **(930)** Twenty-seven days after being served with forfeiture papers, claimant filed a verified claim and answer and motion for an extension of time to file the claim and answer. These pleadings were untimely filed. Thirty-six days later, the government filed a motion to strike claimant's claim as untimely. This motion was also untimely, since Fed. R. Civ. P. 12(f) requires a motion to strike to be filed within 20 days after service of the pleadings upon the party. The 8th Circuit affirmed the court's decision to grant the government's motion to strike, and to deny claimant's motion for an extension of time. Rule 12(f) authorizes the court to act "upon the court's initiative at any time," which has been interpreted to allow the court to consider untimely motions to strike if the motion has merit. With respect to claimant's request for an extension, he did not file his pleadings within the applicable time or offer any reason for his delay other than his other legal problems. *U.S. v. Lot 65 Pine Meadow, an Addition to Barling, Sebastian County, Arkansas*, __ F.2d __ (8th Cir. Oct. 2, 1992) No. 92-1443.

8th Circuit rules government did not prove corporation's willful blindness of employee's drug dealings. **(960)** The government sought forfeiture of a Jeep owned by claimant, a family-owned corporation, based on drug dealing by Mark, a minority shareholder who used the Jeep as his company car. In granting summary judgment, the district court rejected the corporation's innocent owner defense, finding that it could not prove the absence of willful blindness. The 8th Circuit ruled that the government did not prove willful blindness as a matter of law, and remanded for trial. "Willful blindness involves an owner who deliberately closes his eyes to what otherwise would have been obvious and whose acts or omission show a conscious purpose to avoid knowing the truth." Here, the record showed that Mark had difficulty with drugs over a period of time and had been treated several times. He was allowed to return to work because the family felt he was no longer using drugs. Family members were monitoring Mark's work and attendance. Moreover, Mark had a personal car in addition to the Jeep. *U.S. v. One 1989 Jeep Wagoneer*, __ F.2d __ (8th Cir. Oct. 9, 1992) No. 91-2764.

Opinion Vacated upon Grant of Rehearing En Banc

(270) *U.S. v. Morrow*, 923 F.2d 427 (6th Cir.), vacated upon grant of rehearing en banc, 932 F.2d 1146 (1991), en banc opinion, __ F.2d __ (6th Cir. Oct. 7, 1992) No. 89-5418.

Opinion Withdrawn and Republished as Amended

(430)(755)(760)(765)(870) *U.S. v. Harrison-Philpot*, 971 F.2d 234 (9th Cir. July 2, 1992), *withdrawn and new opinion published*, __ F.2d __ (9th Cir. Oct. 28, 1992) No. 89-30212. See July 13, 1992 newsletter.

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U. S. Department of Justice
Criminal Division

EXHIBIT G

Judith Beeman
PAT Bldg.
Room 6022

Washington, D.C. 20530

NOV 5 1992

MEMORANDUM

TO: Federal Prosecutors

FROM: Robert S. Mueller, III
Assistant Attorney General

SUBJECT: Carjacking Legislation, 18 U.S.C. § 2119

On October 25, 1992, the President signed into law H.R. 4542, the "Anti Car Theft Act of 1992." Effective the day it was signed, the new legislation, to be codified at 18 U.S.C. § 2119, makes carjacking a federal offense and provides a new weapon in our arsenal against violent crime.

The carjacking legislation prohibits armed taking, or attempted taking of, a motor vehicle from another person by force and violence or by intimidation. There are two features of this legislation that are important to note:

First, the statute applies only to carjackings in which the defendant is armed with a firearm. An unarmed carjacking or one in which the defendant is armed with any other type of weapon is not a federal offense under this provision. The statute adopts the definition of firearm contained in 18 U.S.C. § 921(a)(3). Thus, a "firearm" is

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

The courts have held that it is unnecessary that the firearm be loaded, United States v. Coburn, 876 F.2d 372, 375 (5th Cir. 1989), or even operable to fall within this definition. United States v. Harris, 792 F.2d 866, 869 (9th Cir. 1986); see, e.g., United States v. Moore, 919 F.2d 1471, 1476 (10th Cir. 1990) (defective machinegun), cert. denied, 111 S.Ct. 2812 (1991); United States v. York, 830 F.2d 885, 890 (8th Cir. 1987) (lack of firing pin and defective cylinder), cert. denied, 484 U.S. 1074 (1988).

Indeed, a conviction may be obtained even where the government is unable to produce the firearm at trial. All that is necessary is some evidence, such as the testimony of an observer, that would permit a reasonable jury to infer that the object carried by the defendant was a firearm. See, e.g., United States v. Jones, 907 F.2d 456, 460 (4th Cir. 1990) (five eyewitnesses), cert. denied, 111 S.Ct. 683 (1991); Parker v. United States, 801 F.2d 1382, 1384 (D.C. Cir. 1986) (testimony of bank tellers who observed weapon), cert. denied, 479 U.S. 1070 (1987). However, possession of a toy or replica gun will not sustain a conviction. United States v. Westerdahl, 945 F.2d 1083, 1088 (9th Cir. 1991); United States v. Martinez-Jimenez, 864 F.2d 664, 668 (9th Cir.), cert. denied, 489 U.S. 1099 (1989).

Second, the interstate commerce nexus is established by the movement of the vehicle (and not the firearm) in interstate or foreign commerce. Thus, to establish a nexus with interstate commerce, it should be necessary to prove only that the motor vehicle traveled at some time in interstate or foreign commerce, that is, that the vehicle was manufactured in another state or that it was ever transported across state lines. Courts should apply a minimal nexus standard, as the Supreme Court has in the context of firearms offenses. Scarborough v. United States, 431 U.S. 563, 575 n.11 (1977). See, e.g., United States v. Kelley, 929 F.2d 582 (10th Cir.) (in a money laundering case, the interstate commerce nexus was proved in part by evidence that an auto was manufactured in Michigan and sold to the defendant in Oklahoma by a local car agency), cert. denied, 112 S.Ct. 341 (1991).

The new legislation provides substantial federal penalties for carjacking. A defendant, possessing a firearm, who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation is subject to a term of imprisonment up to 15 years. If serious bodily injury results, the defendant may be sentenced to a term up to 25 years' imprisonment. If death results, the defendant may be sentenced to life in prison.

Where appropriate, you will want to seek sentences in these cases at the high end of the sentencing guideline range. Since there is not yet a sentencing guideline for carjacking offenses, courts will look to the offense guideline that is "most applicable to the offense of conviction." U.S.S.G. § 1B1.2. The most logical choice is § 2B3.1, the robbery guideline.

Under § 2B3.1, the base offense level is 20 (33-41 months in criminal history category I), but there are enhancements for: the use of firearms to commit the offense, § 2B3.1(b)(2); causing bodily injury to a victim, § 2B3.1(b)(3); abducting or restraining a victim to facilitate commission of the offense or to facilitate escape, § 2B3.1(b)(4); and losses exceeding $10,000, § 2B3.1(b)(6). Additionally, you should seek an upward departure if a death results in the course of a carjacking. § 5K2.1.

Charging additional offenses will further ensure that violent carjackers are subject to prolonged incarceration. For example, carjacking cases should include a charge of using or carrying a firearm during a federal crime of violence in violation of 18 U.S.C. § 924(c), which carries a mandatory consecutive sentence of five years. If the firearm involved is a sawed off shotgun, the mandatory consecutive sentence is ten years, and if the firearm is a machinegun or is equipped with a silencer, the mandatory consecutive sentence is thirty years.

If the defendant is a convicted felon, he should be charged as a felon in possession of a firearm under 18 U.S.C. § 922(g), which provides a maximum prison term of ten years. If he has three prior convictions of violent felonies or serious drug offenses, he is subject to a mandatory minimum sentence of fifteen years as an armed career criminal. 18 U.S.C. § 924(e). If the defendant has transported the stolen vehicle across state lines, he is subject to ten years' imprisonment under 18 U.S.C. § 2312. (The penalty was increased from five to ten years by Section 103 of H.R. 4542.)

The statute specifically urges federal prosecutors to work with state and local law enforcement officials in the investigation and prosecution of violent carjackings. In many of your districts, FBI task forces, operating as part of the bureau's Safe Streets initiative, have already begun to target carjackers as a nationwide priority. Since by definition these are all Triggerlock cases, you can use your Triggerlock task force to ensure effective cooperation among all federal, state, and local agencies. You may wish to discuss the need for coordination in these cases at your next LECC meeting.

Should you have any questions concerning the new carjacking provision, please contact the Terrorism and Violent Crime Section at (202) 514-0849.

EXHIBIT H

UNITED STATES of America, Plaintiff-Appellee,

v.

ALPHAGRAPHICS FRANCHISING, INC., Defendant-Appellant.

No. 92-2279
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Sept. 29, 1992.

Small Business Administration (SBA) brought action against guarantor of SBA loan. The United States District Court for the Southern District of Texas, Melinda Harmon, J., entered judgment in favor of SBA. Guarantor appealed. The Court of Appeals held that: (1) SBA's failure to maintain collateral pending delayed sale did not absolve guarantor of liability, and (2) statutory ten percent surcharge on SBA debts applied to guarantor.

Affirmed.

1. Guaranty ⇐72

Guarantor of Small Business Administration (SBA) loan was liable under guaranty, even if SBA failed to maintain collateral pending delayed sale, where under terms of guaranty guarantor waived right to hold SBA liable for deterioration of collateral unless deterioration was caused by SBA's willful failure to act and there was no evidence of such willful failure.

2. Guaranty ⇐72

The term "willful," applied in context of waiver of defense of deterioration of collateral unless deterioration is willful, refers to act done with intent to bring about deterioration of property.

See publication Words and Phrases for other judicial constructions and definitions.

3. Guaranty ⇐36(9)

Statute permitting assessment of ten percent surcharge on Small Business Administration (SBA) loan applied to guarantor of SBA loan. 28 U.S.C.A. § 3011.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, KING, and GARWOOD, Circuit Judges.

PER CURIAM:

"Words pay no debts"[1]

This case is about a failed loan, guaranteed by the Small Business Administration ("the SBA"). Appellant Alphagraphics Franchising, Inc. ("Alphagraphics"), another guarantor of the loan, claims that the SBA caused the deterioration of collateral securing the loan by willfully failing to maintain it. We affirm.

I.

When, in the summer of 1987, Kenneth Babbit defaulted on his loan from Southwestern Commercial Capital ("Southwestern"), the SBA, which had guaranteed the loan, purchased the note from Southwestern.[2] The SBA conducted an auction of some of the collateral securing the loan in August of 1988, but did not sell two significant assets (production copiers) until the following May, nearly two years after Babbit defaulted on the loan. The SBA made a demand on Alphagraphics Franchising, Inc. ("Alphagraphics"), another guarantor of the Southwestern-Babbit note, to recover the deficiency. Under the terms of the guaranty, Alphagraphics' liability for the debt (as guarantor) declined over time.[3] At the time of the demand, Alphagraphics' liability was limited to 50% of the principal, interest, and other sums payable under the note, up to a maximum of $125,000. Because Alphagraphics refused to make any payment, the SBA brought this lawsuit to recover on the guaranty.

Alphagraphics defended on the ground that the SBA failed to sell off collateral (specifically, the two photocopy machines) in a timely fashion and did not properly maintain the machines during the interim. Under the guaranty, the lender (originally Southwestern but later the SBA by virtue of its purchase of the note) was not responsible for any "deterioration, waste, or loss by fire, theft or otherwise of any of the collateral, unless such deterioration, waste, or loss be caused by *the willful act or willful failure to act* of [the SBA]." According to Alphagraphics, the SBA sold the machines for a lower price than the machines could have fetched had they been sold sooner or maintained in the interim. Such conduct, in Alphagraphics' view, amounted to "deterioration ... caused by the ... willful failure to act of [the SBA]."

The district court granted the SBA's motion for summary judgment, concluding that Alphagraphics had not tendered any evidence establishing that the SBA's delay in selling the machines, and failure to maintain them, was "willful" as required by the guaranty. It entered judgment for the SBA in the amount of $137,500: $125,000 under the guaranty plus a 10% surcharge ($12,500) under 28 U.S.C. § 3011. Alphagraphics appealed.

II.

[1] We must review the record to determine whether a material issue of fact was in genuine dispute regarding the SBA's failure to maintain the machines pending their delayed sale. *See International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265 (5th Cir.1991) (summary judgment appropriate only if there are no genuine disputes as to material facts). Cognizant that our review of the record is plenary, *id.*, Alphagraphics directs our attention to record evidence establishing that the SBA's failure to act (i.e., maintain the machines) necessarily caused a decline in the ultimate sale price of the collateral. (*See*

1. William Shakespeare, *Troilus and Cressida*, Act III, scene II, line 56 (1601-03).

2. Babbit filed for bankruptcy at about the same time the note went into default, triggering an automatic stay of all collection enforcement against Babbit and his property.

3. The guaranty provided that Alphagraphics' liability would be limited to:
100% of the principal, interest, and other sums payable under the note, up to a maximum of $250,000, for one year from the date of the note;
50% of the principal, interest, and other sums payable under the note, up to a maximum of $125,000, during the second year from the date of the note;
25% of the principal, interest, and other sums payable under the note, up to a maximum of $62,500, during the third year from the date of the note;
10% of the principal, interest, and other sums payable under the note, up to a maximum of $25,000, during the fourth year from the date of the note.

R. 144–46, 162, 163) Although that evidence does, in fact, establish causation—that the decline in price of the machines is attributable to the SBA's failure to maintain them—it falls short of establishing the requisite intent: that the "deterioration" of the machines was caused by the SBA's "*willful* failure to act."

[2] In construing an identical provision, this court suggested but did not decide "that the term 'willful' applied in the context of deterioration of the collateral refers to an act done with 'an intent to bring about the deterioration of the property.'" *United States v. Proctor*, 504 F.2d 954, 957 (5th Cir.1974) (quoting *United States v. Houff*, 202 F.Supp. 471, 479–80 (W.D. 1962)). The Tenth Circuit, construing the same provision, has adopted that view:

> This court has defined "willful" in a civil context as an "intentional misdeed or such gross neglect of a *known duty* as to be the equivalent thereof." Any legal *duty* on the part of the SBA to protect the collateral from "deterioration, waste, loss by fire, theft or otherwise," however, was expressly waived in the guaranty agreement. Therefore, in order to establish a "willful act or willful failure to act," by the SBA under the guaranty agreement, a guarantor must allege more than "gross neglect of a known duty." ... [It] must allege "a purpose by the SBA to diminish the value of the security in order to intentionally injure the defendants.

United States v. New Mexico Landscaping, Inc., 785 F.2d 843, 847–48 (10th Cir. 1986) (citations omitted).[4] We now do the same.

Under the terms of *this* guaranty, Alphagraphics waived its right to hold the lender (ultimately the SBA) liable for the deterioration of the collateral. *See New Mexico Landscaping*, 785 F.2d at 847. The SBA was not responsible for the deterioration of the machines unless it failed to maintain them with the intent to cause harm to the collateral. *See id.* at 847–48. There being no evidence in this record to that effect, we conclude that the district court correctly entered summary judgment on that ground.[5]

III.

[3] We also find no error in the district court's imposition of the 10% surcharge under 28 U.S.C. § 3011, which provides:

> **§ 3011. Assessment of surcharge on a debt**
>
> **(a) Surcharge authorized.**—In an action or proceeding under Subchapter B or C, and subject to subsection (b), the United States is entitled to recover a surcharge of 10% of the amount of the debt in connection with the recovery of the debt, to cover the cost of processing and handling the litigation and enforcement under this chapter of the claim for such debt.

4. *Cf. FDIC v. Coleman*, 795 S.W.2d 706, 708–09 (Tex.1990) (no duty under statutory or common law, state or federal, to foreclose a lien expeditiously); *Clay v. FDIC*, 934 F.2d 69 (5th Cir.1991) (same, citing *Coleman*); *see also FDIC v. Myers*, 955 F.2d 348, 350 (5th Cir.1992) (no duty of good faith and fair dealing under Texas law, citing *Coleman*).

5. We summarily reject Alphagraphics' effort to introduce parol evidence on the ground that the limitation is ambiguous or that the SBA's demand was somehow defective. Appellant's Opening Brief at 11–16.

Alphagraphics contends that the provision cannot apply to it because it was a guarantor, not a debtor.[6] However, the statute does not limit recovery by the SBA to debtors alone. It provides for a 10% surcharge "in connection with the recovery of the debt." The term "debt" is defined as "an amount that is owing to the United States on account of a direct loan, *or loan* insured or *guaranteed by the United States*." 28 U.S.C. § 3002(3)(A). The Southwestern-Babbit note was "guaranteed by the United States," *id.*, and, thus, the SBA could recover the 10% surcharge from Alphagraphics "to cover the cost of processing and handling the litigation and enforcement ... of the claim for such debt." 28 U.S.C. § 3011.

IV.

With these words, we affirm the district court's judgment in favor of the SBA.

6. Our research has disclosed not a single case interpreting § 3011. Perhaps that comes as no surprise since the statute did not take effect until 1991.

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