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

United States Attorneys' Bulletin

Published by:
Executive Office for United States Attorneys, Washington, D.C.
Anthony C. Moscato, Director

Editor-in-Chief: *Judith A. Beeman* *(202) 501-6098*
Editor: *Audrey J. Williams* *(202) 501-6098*

VOLUME 41, NO. 2 **FORTIETH YEAR** **FEBRUARY 15, 1993**

TABLE OF CONTENTS **Page**

TABLE OF CONTENTS

Please send name or address changes to:
The Editor, United States Attorneys' Bulletin
Room 6021, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530
Telephone: (202) 501-6098 - Fax: (202) 219-1201

COMMENDATIONS

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

Sidney P. Alexander (Tennessee, Western District), was presented a plaque by Sean T. Morrissey, Resident Agent in Charge, and Charles Piper, Special Agent in Charge, Defense Criminal Investigative Service, Department of Defense (DOD), Memphis, for his excellent representation and successful prosecution of a complex kickback/bribes case involving DOD purchase orders. ***Debbie Sykes*** and ***Mamie Cox*** provided valuable assistance.

Joseph Allen and ***E. James King*** (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, FBI, Detroit, for their outstanding contributions to the success of a complicated drug conspiracy case in which the defendants diverted precursor chemicals to clandestine methamphetamine laboratories in Northern California.

Leland B. Altschuler (California, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for his successful efforts in resolving the second largest check-kiting scheme ever investigated by the FBI and prosecuted by the Justice Department.

Craig A. Benedict (New York, Northern District), by Thomas D. McCarthy, Special Agent in Charge, U.S. Secret Service, Syracuse, for his professional and legal skill in obtaining the conviction of an individual with a violent history who threatened the lives of President Bush and former President Reagan.

Linda M. Betzer and ***Stephen G. Sozio*** (Ohio, Northern District), by Jack Chivatero, District Director, Internal Revenue Service, Cleveland, for obtaining a guilty verdict on all counts in a complex drug case.

Susan Dein Bricklin (Pennsylvania, Eastern District), by Karl Kabeiseman, General Counsel, Defense Logistics Agency, Alexandria, Virginia, for her professional skill in successfully opposing many actions brought by a former Defense Personnel Support Center employee who was a ringleader in a corruption scandal.

Lance Caldwell (District of Oregon), by David C. Tatman, Chief of Enforcement Securities Section, Department of Insurance and Finance, Salem, for his outstanding success in prosecuting a multimillion dollar real estate fraud case involving mail fraud, interstate transportation of stolen goods, false and fictitious names, and money laundering.

Kenneth R. Chadwell (Michigan, Eastern District), by C. W. Wilson, Postal Inspector in Charge, U.S. Postal Service, Detroit, for successfully prosecuting two individuals involved in a series of mail thefts.

Kenneth A. Cusick (Texas, Southern District), and the ***Corpus Christi branch office,*** by George W. Proctor, Director, Office of International Affairs, Criminal Division, Department of Justice, for their valuable assistance in the successful resolution of an extradition case involving a British fugitive wanted by United Kingdom authorities.

Lew Davis (California, Northern District), by Corporal R. G. "Ron" Harrison, Royal Canadian Mountain Police (RCMP), Vancouver, for his outstanding professional assistance in a U.S./Canadian investigation of international drug trafficking and money laundering.

Larry Eastepp (Texas, Southern District), by Rodger M. Brisko, Supervising U.S. Probation Officer, U.S. District Court, Houston, for his excellent training presentation to the presentence section of the U.S. Probation Department on various types of fraud schemes and general banking terminology.

Robert "Bud" Ellis (Washington, Eastern District), by Neil W. Williamson, Supervisor, Animal and Plant Health Inspection Service, Regulatory Enforcement, Department of Agriculture, Sacramento, for his professional skill in the successful litigation of a case involving falsification of phytosanitary certificates used in exportation of hay to Japan, a program overseen by the Plant Protection and Quarantine Division of the Inspection Service.

Elizabeth Ann Farr (District of Arizona), by F. Braxton Mohler, Patrol Agent in Charge, U.S. Border Patrol, Immigration and Naturalization Service, Tucson, for her outstanding cooperative efforts in a number of difficult enforcement cases, and for forming a task force to provide guidance and counsel on a regular and routine basis.

Kay Gardiner (New York, Southern District), by Janet H. Brown, Executive Director, Commission on Presidential Debates, Washington, D.C., for her excellent representation and success in two cases brought by an independent presidential candidate who sought an order revoking the tax exempt status of presidential candidate debate sponsors.

William C. Hahesy (California, Eastern District), by Richard H. Ross, Special Agent in Charge, FBI, Sacramento, for his successful efforts in obtaining guilty verdicts on all sixteen counts in a complex bank fraud case.

Cynthia Hawkins (Florida, Middle District), by C. W. "Jake" Miller, Brevard County Sheriff, Titusville, for her valuable assistance and guidance in an investigation targeting a group of high level crack cocaine dealers in the Cocoa area.

Rick Jancha, Roberto Moreno, and ***Gregory Miller*** (Florida, Middle District), were presented plaques of appreciation by C. W. "Jake" Miller, Brevard County Sheriff, Titusville, for their outstanding assistance to the Sheriff's office and the Brevard County Drug Task Force in dismantling a marijuana smuggling organization. ***Yvonne Parker, Joellen Waldenmaier, Anna Roeser,*** and ***Beverly Williams*** provided valuable clerical and paralegal support.

Grant C. Johnson (Wisconsin, Western District), by William D. Lock, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for his success in obtaining a conviction of an individual for false statements to the Social Security Administration and theft from the SSI (Supplemental Security Income) program.

Terry Lehman (Ohio, Southern District), by Craig M. Ziegler, Resident Agent in Charge, U.S. Customs Service, Columbus, for his outstanding presentation on Sentencing Guidelines at a recent conference for U.S. Customs Service agents.

Stephen Lester (District of Kansas), by Lt. Col. Hervey A. Hotchkiss, Chief, Tort Claims and Litigation Division, Air Force Legal Services Agency, Department of the Air Force, Arlington, Virginia, for his excellent representation of Air Force providers resulting in a favorable judgment for the United States.

Daniel S. Linhardt (California, Eastern District), by Steven V. Giorgi, Chief, Criminal Investigation Division, Internal Revenue Service, Sacramento, for his participation in the annual Continuing Professional Education program, and his presentation on grand jury appearances and witness testimony.

Rory Little (California, Northern District), by Rimantas A. Rukstele, First Assistant United States Attorney, District of Nevada, Las Vegas, for organizing a Ninth Circuit Appellate and Sentencing Conference for criminal appellate specialists from all United States Attorney's offices in the Ninth Circuit and the Department of Justice.

Michael Littlefield (Oklahoma, Eastern District), by Anthony C. Moscato, Acting Director, Executive Office for United States Attorneys, for his outstanding efforts in the successful resolution of a complex bankruptcy fraud case in the Western District of Missouri.

Kenneth Magdison and ***Melissa Annis*** (Texas, Southern District), by Gary Olenkiewicz, Group Supervisor, Drug Enforcement Administration, Brownsville, for their valuable assistance and cooperative efforts in the successful prosecution of a complex organization which transported forty tons of cocaine from the Rio Grande Valley to Houston from August, 1988 to October, 1989.

Joseph E. Maloney (California, Eastern District), by Donald R. Jayne, Regional Counsel, General Services Administration, San Francisco, for his professional guidance in bringing two Title VII discrimination cases to a successful conclusion.

James Martin (Georgia, Northern District), by John H. Imhoff, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, Chicago, for his excellent representation in detention proceedings of two money laundering fugitives, which developed into extensive negotiations over the release of one of the cooperating fugitives to the custody of Chicago IRS agents.

Dorothy McMurtry (Missouri, Eastern District), by L. S. Crawford, Jr., Inspector in Charge, U.S. Postal Service, St. Louis, for her professionalism and legal skill in successfully prosecuting a postal case involving the fraudulent use of credit cards stolen from the mail.

Mark Matthews, Mark Stein, and ***Robert Khuzami*** (New York, Southern District), by Robert E. Van Etten, Special Agent in Charge, U.S. Customs Service, New York, for their outstanding success in prosecuting a complex money laundering case involving millions of dollars for the Colombian drug cartels.

Paul Newby (North Carolina, Eastern District), by Daniel K. Martin, Chief U.S. Probation Officer, U.S. District Court, Raleigh, for his excellent presentation on financial investigations and collections at the joint financial training program for probation and U.S. Attorney personnel.

Dan L. Newsom (Tennessee, Western District), was presented an Office of Inspector General agent's badge by Paul D. McGuire, Special Agent-in-Charge, Department of Transportation, Atlanta, for his successful prosecution of a conspiracy case involving the falsification of records to conceal unapproved repairs to aircraft fuel tanks, for overseeing two counterfeit/bogus aircraft parts cases, and pursuing a fraud case against a Memphis airport agency funded by the Department of Transportation.

Dana Peters (Ohio, Southern District), by Joseph M. Whittle, United States Attorney, Western District of Kentucky, for his outstanding contribution to the success of the Atlanta Fraud Conference attended by 175 federal and state attorneys and investigators and sponsored by the U.S. Attorneys' offices of the Western District of Kentucky and the Northern District of Georgia.

Reid Pixler (District of Arizona), by Martin C. Brnel, Jr., Deputy-in-Charge, Office of the District Attorney, Palm Springs, California, for his valuable assistance and cooperative efforts "far above and beyond the call of duty" in a superior court case.

Michael Price (Missouri, Eastern District), by James W. Nelson, Special Agent in Charge, FBI, St. Louis, for bringing a complex financial institution fraud case to a successful conclusion.

Benjamin Rosenberg (New York, Southern District), by James M. Fox, Assistant Director in Charge, FBI, New Rochelle, for his professionalism and legal skill in the successful prosecution of a financial institutions fraud case.

Richard Seeborg (California, Northern District), by Richard Speier, Jr., Chief, Criminal Investigation Division, Internal Revenue Service, San Jose, for his outstanding victory in an income tax evasion case following a two-week trial and less then five hours of jury deliberation.

Howard M. Shapiro and ***Julie O'Sullivan*** (New York, Southern District), by William S. Sessions, Director, FBI, Washington, D.C., for their successful prosecution of a corporate official on charges of defrauding Chase Manhattan Bank and a consortium of four other banks, resulting in a loss of approximately $200 million.

Sara Shudofsky (New York, Southern District), by Peter G. Powers, General Counsel, Smithsonian Institution, Washington, D.C., for her excellent representation and successful resolution of a personal injury action filed against the Cooper-Hewitt Museum in New York.

Lisa Margaret Smith (New York, Southern District), by George V. Doerrbecker, Supervising U.S. Probation Officer, U.S. District Court, Brooklyn, for her professional and legal skill in bringing a probation violation matter to a successful conclusion.

Susan Snook and ***Harry Brady*** (New York, Southern District), by Thomas A. Constantine Superintendent, New York State Police, Albany, for their significant contributions to the success of the recent 1992 Sex Offense Seminar.

Thomas Spina, Jr. (New York, Northern District), by John J. O'Connor, Special Agent in Charge, FBI, Albany, for successfully prosecuting a bank vice president charged with embezzling over $500,000.

Donette D. Wiethe (Ohio, Southern District), by Colonel Herbert F. Harback, Corps of Engineers, Department of the Army, Louisville, Kentucky, for her excellent representation in a case involving noncompliance of the terms of a Consent Decree, and for actively pursuing unresolved violations of the Clean Water Act and Rivers and Harbors Act.

William S. Wong (California, Eastern District), by Robert E. Bender, Special Agent in Charge, Drug Enforcement Administration, San Francisco, for his successful prosecutive efforts in the trial of a recent case, as well as his valuable contributions during the investigative stages of the case.

Larry J. Wszalek (Wisconsin, Western District), by William D. Lock, Assistant Regional Inspector General for Investigations, Department of Health and Human Services, Chicago, for obtaining a conviction in a case involving the forgery and negotiation of a Social Security check drawn to a deceased person.

Ruth Young (Georgia, Southern District), by Jeffrey Axelrad, Director, Torts Branch, Civil Division, Department of Justice, for her success in obtaining a court decision to apply the discretionary function exception to the Federal Tort Claims Act in the context of Section 106 of the bankruptcy code.

SPECIAL COMMENDATION FOR THE WESTERN DISTRICT OF MICHIGAN

John A. Smietanka, United States Attorney for the Western District of Michigan, announced that his office continued to be self-sufficient in FY 1992. Coordinated efforts of the criminal and civil litigation divisions resulted in judgment enforcement proceeds totalling $5.3 million; compared to operating expenditures of $3.5 million for the fiscal year ending September 30, 1992. The judgment enforcement and forfeiture efforts are not profit motivated, but the $1.8 million "profit" generated in FY 1992 is testimony to the Western District of Michigan's commitment to collect debts due the United States in a timely, aggressive, efficient and cost-effective manner. The United States Attorney's office directs its collection efforts through the Federal Debt Collection Procedures Act and beginning with the last quarter of FY 1992, the office has been implementing a Judgment Enforcement Team (JET) project with the U.S. Marshals Service, which acts as an investigatory and enforcement arm of the Financial Litigation Unit. The Financial Litigation Unit has refocused its resources and efforts upon large assets and more aggressive use of postjudgment execution and attachment. The seizure and forfeiture of vast criminal resources has primed the District for a "large asset first" emphasis in the civil debt collection arena.

The third anniversary of the Asset Forfeiture Unit was marked by the seizure of $2.7 million worth of criminal assets. In one instance, a Holland area building was put in service as a Post for the Holland Police Department. Other local, county and state law enforcement agencies benefited from the return of $874,000.00 from "shared" criminal and civil forfeiture cases. The FY 1992 totals are also buttressed by a $530,000.00 pre-complaint settlement in a defective pricing case; a $93,000.00 restitution payment to Whirlpool Corporation, from a mail fraud sentence; and, in order to discharge a blanket property lien filed by the United States, a $144,000.00 criminal fine payment by a defendant convicted on six counts of filing false income tax returns. The United States Attorney's office hopes their efforts will have a sobering effect upon those who take their obligations to the United States lightly.

* * * * *

SPECIAL COMMENDATION FOR THE NORTHERN DISTRICT OF OHIO

James V. Moroney, Assistant United States Attorney for the Northern District of Ohio, was commended by K. J. Hunter, Chief Postal Inspector, U.S. Postal Service, Washington, D.C., for his exceptional prosecutorial skill in a large telemarketing operation which sold fraudulent vacation and credit card protection packages. Twenty individuals were charged in this nationwide scam which victimized sixty thousand citizens and fourteen banking institutions across the country, with losses estimated at over $10 million dollars. This case represents the most significant telemarketing fraud case ever prosecuted in the Northern District of Ohio.

PERSONNEL

Acting Attorney General And Associate Attorney General

Pending the confirmation of the new Attorney General, ***Stuart M. Gerson*** has assumed the duties of Acting Attorney General and Associate Attorney General as of 12:00 noon, January 20, 1993.

Former ***Deputy Attorney General George J. Terwilliger III*** has joined the Washington, D.C. law firm of McGuire, Woods, Battle & Doothe. The Deputy Attorney General position remains vacant.

Executive Office For United States Attorneys

On January 15, 1993, ***Anthony C. Moscato*** was appointed Director of the Executive Office for United States Attorneys. Mr. Moscato formerly served as Deputy Assistant Attorney General for Administration, Justice Management Division.

United States Attorneys

On January 13, 1993, ***Patrick J. Foley*** was appointed United States Attorney for the Northern District of Ohio.

On January 15, 1993, ***Michael J. Rotko*** was appointed United States Attorney for the Eastern District of Pennsylvania.

On January 20, 1993, ***Richard H. Stephens*** was appointed United States Attorney for the Northern District of Texas.

On January 25, 1993, ***Barbara L. Beran*** was appointed United States Attorney for the Southern District of Ohio.

On February 2, 1993, ***Roger S. Hayes*** was appointed United States Attorney for the Southern District of New York.

* * * * *

HONORS AND AWARDS

Attorney General's Annual Awards

The Attorney General's Annual Awards were presented to approximately seventy Department of Justice employees on December 14, 1992 at a ceremony in the Great Hall of the Department of Justice. The names of those receiving various awards were featured in the December, 1992 and January, 1993 issues of the United States Attorneys' Bulletin. An important award was inadvertently omitted from the announcements following the ceremony.

John Marshall Award for Participation in Litigation

Richard J. Ritter, Special Litigation Counsel, Housing and Civil Enforcement Section, Civil Rights Division, was recognized for leading the team that developed the Nation's first lawsuit challenging the mortgage lending practices of a financial institution as racially discriminatory. ***Mr. Ritter, Gabriel W. Gorenstein,*** Chief of the Appellate Section, and ***Claude M. Millman, Assistant United States Attorney for the Southern District of New York,*** were recognized for resolving successfully the Department's lawsuit challenging the tenant selection and assignment policies of the New York City Housing Authority,

the largest housing authority in the country. Since 1988, statistics have demonstrated that lending institutions in many large cities make significantly more mortgage loans in white residential areas then in comparable minority residential areas. However, no person or organization had legally alleged that a mortgage lending institution has engaged in a pattern or practice of unlawful discrimination. The Attorney General asked the Civil Rights Division to give special priority in resolving this issue.

Under Mr. Ritter's leadership, the Division developed a statistical model for investigating lending institutions. The Division is currently in the final stages of pre-suit settlement negotiations, which should result in a monetary settlement of $1 million for 50 persons identified as victims. Mr. Ritter, Mr. Gorenstein and Mr. Millman served as co-investigators and co-counsel in the successful resolution of the Department's lawsuit challenging the tenant selection and assignment policies of the New York City Housing Authority as discriminatory against blacks and Hispanics. The overall monetary value of the settlement is estimated to exceed $20 million, with 1,990 future vacancies at the project set aside for black and Hispanic victims. These two lawsuits represent substantial achievements promoting rights to fair housing and fair lending that will have a significant impact throughout the country.

* * * * *

District Of Oregon

Charles H. Turner, United States Attorney for the District of Oregon, was presented an Award by the Regional Organized Crime Narcotics Agency in recognition of meritorious service and acts that have materially contributed to the attainment of the highest standards of cooperative law enforcement and the achievement of the goals of the Agency. This agency, consisting of state, local and federal officers and agents, was organized by Mr. Turner in 1986 and is designed to focus on the most significant drug traffickers in the region. As a measure of their success, in 1991 the Agency investigated, and Mr. Turner prosecuted, the largest heroin smuggling case in the history of the Northwest.

* * * * *

Northern District Of Georgia

Joe D. Whitley, United States Attorney for the Northern District of Georgia, was presented an award by the National Federal Bar Association at its 11th Annual Federal Practice Seminar for his outstanding contribution to federal litigation. Mr. Whitley also became an Honorary Lifetime Member of the Georgia Sheriffs Association and was presented a plaque for his dedication to attaining the highest standards of cooperation with state and local law enforcement. In particular, Mr. Whitley was honored for his leadership and support of the transfer of the Lake Careco property to the Georgia Sheriffs' Youth Homes, Inc., which will be used as a nature science center and drug education summer camp for children. Mr. Whitley is the first United States Attorney in Georgia to receive this award.

* * * * *

Eastern District Of Wisconsin

Melvin K. Washington, Assistant United States Attorney for the Eastern District of Wisconsin, was presented the Chief Postal Inspector Award by K.J. Hunter, Chief Postal Inspector, U.S. Postal Service, Washington, D.C., for his successful prosecution of an individual convicted of crimes uncovered during the investigation of a shooting of a postal supervisor in November, 1990. Through his efforts, the defendant was indicted, arrested, and has pleaded guilty to eleven charges which resulted from the 20-month investigation. The award was presented at a ceremony in the United States Attorney's office.

* * * * *

Northern District Of Georgia And The Southern District Of New York

Nina L. Hunt, United States Attorney for the Northern District of Georgia, and ***Steve Bennett, Assistant United States Attorney for the Southern District of New York,*** were presented a Special Act Cash Award by William L. Roper, M.D., M.P.H., Director, Centers for Disease Control (CDC), Department of Health and Human Services, Atlanta, in recognition of their exceptional service. Over the past several years, Ms. Hunt and Mr. Bennett have handled litigation that has followed attempts by various private parties to subpoena CDC employees to testify in litigation in which the government is not a party. Their skillful handling of sensitive litigation has resulted in very positive decisions which establish an even stronger legal precedent upholding the Department of Health and Human Services' testimony regulations. In addition to significant legal precedent, these decisions have greatly enhanced CDC's ability to focus on research priorities without unnecessary diversion of resources in non-governmental legal actions.

* * * * *

Southern District Of New York

William B. Pollard, Assistant United States Attorney for the Southern District of New York, was presented the Chief Postal Inspector's Award by K. J. Hunter, Chief Postal Inspector, U.S. Postal Service, Washington, D.C., for his outstanding efforts in the development and implementation of the Postal Money Laundering Program. Four years ago, the Postal Inspection Service became aware that a significant number of postal money orders were being purchased through structured transactions throughout the Metropolitan New York area. It was evident that these postal money orders were being used to launder drug money associated with the Colombian cartels. What followed was an extensive investigation into the street-level purchase of money orders, the mailing and transfer of these funds back to Colombia and other foreign countries, and the subsequent deposit of funds back into U.S. bank accounts. In "Operation Clean Hands," an Ecuadorian money exchange emerged as the primary focal point, along with a parallel investigation into the use of the International Express Mail System. As a result of this investigation, the two heads of the Ecuadorian money exchange (Cambiaria C&F) were arrested, indicted in the Southern District of New York, and have entered guilty pleas. Over $7 million in assets associated with their scheme have been forfeited. The parallel investigation into the International Express Mail System resulted in the forfeiture of an additional $3.5 million. Mr. Pollard was the focal point and key to the success of both operations.

* * * * *

Northern District Of California

Carl M. Faller and ***Patrick K. Hanly, Assistant United States Attorneys for the Northern District of California (Fresno),*** were presented Prosecutor-of-the-Year Awards at the annual dinner meeting of the Central Valley Arson Investigators Association, Porterville, California. Mr. Faller and Mr. Hanly were successful in prosecuting a former Glendale investigator who was convicted in July, 1992, and sentenced to thirty years in prison for a series of fires he set in the Central San Joaquin Valley during a statewide arson conference in Fresno in January, 1987.

* * * * *

OPERATION WEED AND SEED

Official Weed And Seed Sites

In the Operation Weed and Seed Newsletter, Issue No. 2, January, 1993, the Executive Office for Weed and Seed has reported that thus far the following cities/communities have become officially recognized Weed and Seed sites:

Benton Harbor, Michigan
Akron, Ohio
Milwaukee, Wisconsin
Euclid, Ohio
Wichita, Kansas
Mobile, Alabama
Indianapolis, Indiana
Springfield, Illinois
Shreveport, Louisiana
Las Vegas, Nevada

The significance of becoming an officially recognized Weed and Seed site is that the communities will have easier access to existing federal, state and local resources by virtue of the fact that they have in place a recognized, comprehensive, community-based strategy for revitalizing their neighborhoods.

As of November/December, 1992, the United States Attorneys for the following cities/ communities have advised the Executive Office for Weed and Seed that they are in the process of developing the Weed and Seed strategy:

Alabama
- Birmingham
- Jackson
- Selma

Alaska
- Anchorage

Arizona
- Phoenix

Arkansas
- Little Rock

California
- Sacramento
- Fresno
- San Jose
- E. Palo Alto
- N. Richmond
- Oakland

Connecticut
- Bridgeport
- Hartford
- New Haven
- Norwalk
- Waterbury
- West Haven

Florida
- Bradenton
- Brevard County
- Melbourne
- Seminole County
- St.Petersburg/ Clearwater/ Tarpon Springs
- Pensacola
- Tallahassee
- Miami

Georgia
- Macon
- Savannah

Indiana
- Fort Wayne
- Gary
- Hammond
- South Bend

Iowa
- Cedar Rapids
- Des Moines

Kansas
- Kansas City
- Topeka

Louisiana
- New Orleans
- Baton Rouge

Maine
- Portland

Michigan
- Grand Rapids
- Lansing
- Muskegon

Minnesota
- Minneapolis

Mississippi
- Greenville

Missouri
- St. Louis

North Carolina
- Durham

New Mexico
- Albuquerque

New York
- Brooklyn
- Syracuse

Ohio
- Cleveland
- Lima
- Columbus

Oklahoma
Tulsa
Oregon
Portland
Pennsylvania
Harrisburg
Scranton
Wilkes-Barre
York

Rhode Island
Providence
Tennessee
Chattanooga
Knoxville
Nashville
Memphis

Texas
Dallas
Houston
Utah
Salt Lake City
Virgin Islands
St. Thomas
West Virginia
Wheeling
Charleston

The following cities/communities have submitted proposals and are awaiting approval for official recognition:

Florida
Fort Myers
Hillsborough County
Jacksonville

Florida
Ocala
Orlando
Tampa

Florida
Volusia County
Polk County
Maryland
Baltimore

* * * * *

Edward J. Byrne Block Grants Awarded

As of January, 1993, the FY 1993 Edward J. Byrne Block Grants have been awarded to all fifty states. These grants, intended primarily for law enforcement purposes as directed by the states, have grown in the last twelve years. Since 1989, the funding level for the Bureau of Justice Assistance Formula Grant program has more than tripled, from $118 million in 1989 to $423 million in 1993.

* * * * *

HEALTH CARE FRAUD

Eastern District Of Louisiana

On January 20, 1993, Harry Rosenberg, United States Attorney for the Eastern District of Louisiana, announced that Kirk R. Wascom, Ralph L. Flood, Daniel J. Himel, Randall E. Heller, and John J. Coerver, Jr. were sentenced in U.S. District Court for their involvement in the theft of approximately $1.9 million from North Shore Regional Medical Center, Slidell, Louisiana. United States Attorney Rosenberg announced their indictments on June 30, 1992, and on October 6, 1982, each of the defendants entered pleas of guilty to various criminal offenses, (See, United States Attorneys' Bulletin, Vol. 40, No. 8, dated August 15, 1992, at p. 245.)

Sentences were handed down by the United States District Judge, as follows: Mr. Wascom, Chief Executive Officer, was sentenced to seven and a half years imprisonment, plus three years of supervised release after his jail sentence, and was ordered to pay restitution of $135,977.00. Mr. Flood, Chief Financial Officer, was sentenced to more than six years imprisonment, three years of supervised release, and ordered to pay restitution of $39,220.00. Mr. Heller, Director of Marketing, was sentenced to five years imprisonment, three years of supervised release, and ordered to pay restitution of $500,00.00. Mr. Himel, Associate Administrator of the hospital, was sentenced to forty months imprisonment, three years of supervised release, and ordered to pay restitution of $124,250.00. Mr. Coerver, Assistant Financial Officer, was sentenced to thirty three months imprisonment, three years of supervised release, and ordered to pay restitution of $30,000.00.

United States Attorney Rosenberg said, "It is this type of fraud that has caused health care costs to skyrocket through the stratosphere. The substantial periods of incarceration, coupled with an order of restitution of more than $800,000 as part of the sentence, hopefully will discourage anyone who is even thinking of bilking health care providers."

* * * * *

POINTS TO REMEMBER

Plea Bargain Alert From The Office Of International Affairs

Defendants and witnesses in U.S. criminal proceedings increasingly have foreign criminal involvement. Accordingly, a defendant or witness negotiating a plea agreement or immunity with U.S. prosecutors may want the United States to make his or her evidence unavailable to foreign law enforcement authorities.

Assistant United States Attorneys must be aware that the United States cannot bind any foreign government not to obtain or use trial testimony, trial exhibits, court pleadings, and other public record information. If a foreign government obtains and uses such information contrary to a U.S. prosecutor's agreement or promise, this breach may jeopardize the prosecutor's name.

In addition, the United States has treaties of mutual assistance in criminal matters with a number of foreign nations. These may obligate the United States to provide assistance to foreign law enforcement authorities. A prosecutor who promises, regardless of U.S. treaty obligations, that the United States will not provide publicly-available evidence to a foreign authority or that the foreign authority will not use it may seriously damage U.S. relations with law enforcement counterparts and treaty partners.

For these reasons, **it is essential that prosecutors contemplating such agreements or promises first consult the Office of International Affairs, Criminal Division, at (202) 514-0000.** Attorneys in the Office of International Affairs will advise whether a proposed agreement or promise is contrary to a U.S. treaty commitment or is otherwise likely to be unenforceable.

* * * * *

Employer Obligations Under the Immigration Reform And Control Act (IRCA)

On January 26, 1993, the Department of Justice reiterated the Immigration Reform and Control Act's (IRCA) prohibition on employment discrimination based on national origin or citizenship status and cautioned employers against asking workers for specific documents to prove employment authorization. This announcement from the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) comes in light of recent public interest concerning the hiring of immigrants. OSC said although IRCA prohibits employers from hiring undocumented workers, employers cannot request the production of a "green card" or any other specific document from an individual for purposes of verifying work authorization. Denying workers the right to present the documents of their choice in such circumstances is an unfair immigration-related employment practice under recent amendments to IRCA, and subjects the violator to a civil penalty of $100 to $1,000 per violation.

Workers can present any combination of legally acceptable documents to establish work authorization, such as a driver's license and a social security card. A list of such documents appears on the back of INS Employment Eligibility Verification Form I-9. As long as the documents reasonably appear to be genuine and relate to the individual presenting them, the employer must accept them as proof of work authorization.

Congress created OSC in 1987 to enforce the antidiscrimination provision of IRCA. Since that time, the Office has handled over 2,700 charges of discrimination. For more information about OSC and the antidiscrimination provision, please contact the Office of Special Counsel for Immigration Related Unfair Employment Practices, P.O. Box 27728, Washington, D.C. 20038-7728.

* * * * *

"Inside The Biggest Pentagon Scam"

One of the features in the January 11, 1993, issue of Fortune magazine is an article entitled "Inside the Biggest Pentagon Scam" by Irwin Ross. The article describes the Operation Illwind investigation, and reveals how secrets are sold, bids are rigged, and officials are bribed. ***Joseph J. Aronica, Assistant United States Attorney for the Eastern District of Virginia,*** as the lead prosecutor, not only helped shape the legal strategy during the investigation, but conducted seven trials (one more is pending) and also managed negotiations that led to numerous guilty pleas. Since the investigation began in September, 1986, Operation Illwind has led to the conviction of nine government officials, 43 Washington consultants and corporate executives, and seven companies, and monetary recoveries in excess of $230 million. In recognition of his outstanding accomplishments, Mr. Aronica received the Attorney General's Award for Distinguished Service in 1991. ***Assistant United States Attorney Jack Hanly*** was presented the Director's Award for Superior Performance for his role in the investigation. FBI Director William S. Sessions later held a ceremony in his office in honor of the attorneys who participated in the investigation,

If you would like a copy of the article, please contact the United States Attorney's Office for the Eastern District of Virginia at (703) 706-3700.

* * * * *

Federal Civil Postjudgment Interest Rates

Please note that the Cumulative List of Changing Federal Civil Postjudgment Interest Rates in the Appendix of this Bulletin, at p. 66, has been carefully reviewed and revised. In using the same list over a period of time while making regular adjustments on a frequent basis, some of the rates appearing in previous issues of the Bulletin are not accurate. Therefore, please disregard previous listings and refer to the Cumulative List in this Bulletin. If you have any questions or wish to verify a percentage, please call the Financial Litigation Staff, at (202) 501-7017.

* * * * *

Hurricane Andrew Relief Fund Update

On January 14, 1993, Attorney General William P. Barr issued a memorandum to all Department of Justice employees expressing his thanks to those who donated their time, energy and money to the Hurricane Andrew Relief Fund. The Attorney General advised that of a total of more than $40,000 collected, $30,000 was sent to the Local Committee for Hurricane Andrew Relief in Miami, chaired by Roberto Martinez, United States Attorney for the Southern District of Florida. The Local Committee in Miami received 115 applications from Department employees who suffered losses from the hurricane. A total of $29,000 was distributed by the Local Committee to 45 employees and their dependents. All Department employees who met the Fund's criteria were distributed cash, solely on the basis of need.

The Attorney General also advised that the Internal Revenue Service granted the Fund provisional approval for income tax-exempt status as a publicly supported, charitable organization. As a result, Department employees who made cash contributions to the Fund during 1992 may treat their gifts as donations to a qualified, tax-exempt charitable organization.

* * * * *

SENTENCING REFORM

Guideline Sentencing Update

A copy of the Guideline Sentencing Update, Volume 5, No. 7, dated January 11, 1993, is attached as Exhibit A at the Appendix of this Bulletin.

Federal Sentencing And Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit B is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 31 dated December 28, 1992, which is published and copyrighted by James Publishing Group, Santa Ana, California.

* * * * *

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, 1991 through December 31, 1992:

Description	Count	Description	Count
Defendants Charged	10,742	Prison Sentences	33,688 years
Defendants Convicted	6,184	Sentenced to prison	4,417
Defendants Acquitted	310	Sentenced w/o prison or suspended	381
Defendants Dismissed	741	Average Prison Sentence	92 months
Defendants Sentenced	4,798		

Defendants Charged Under 922(g) w/o enhanced penalty	2,323
Defendants Charged Under 922(g) with enhanced penalty under 924(e)	501
Defendants Charged Under 924(c)	3,835
Defendants Charged Under Both 922(g) and 924(c)	618
Defendants Charged Under 922(g) and 924(c) and (e)	91
Defendants Charged With Other Firearms Violations	3,374
Total Defendants Charged	10,742

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.]

* * * * *

FINANCIAL INSTITUTION FRAUD

Financial Institution Prosecution Updates

On January 12, 1993, the Department of Justice issued the following information describing activity in "major" bank fraud prosecutions, savings and loan prosecutions, and credit union fraud prosecutions from October 1, 1988 through December 31, 1992. "Major" is defined as (a) the amount of fraud or loss was $100,000 or more, or (b) the defendant was an officer, director, or owner (including shareholder), or (c) the schemes involved convictions of multiple borrowers in the same institution, or (d) involves other major factors. All numbers are approximate, and are based on reports from the 94 United States Attorneys' offices and from the Dallas Bank Fraud Task Force.

Bank Prosecution Update

Description	Count	Description	Count
Informations/Indictments	1,796	CEOs, Chairmen, and Presidents:	
Estimated Bank Loss	$4,288,802,892	Charged by indictment/ information	162
Defendants Charged	2,506	Convicted	142
Defendants Convicted	2,077	Acquitted	3
Defendants Acquitted	53	Conviction rate	97.9%
Prison Sentences	2,688 years		
Sentenced to prison	1,349		
Awaiting sentence	343	Directors and Other Officers:	
Sentenced w/o prison or suspended	403	Charged by indictment/ information	529
Fines Imposed	$8,162,736	Convicted	481
Restitution Ordered	$497,762,192	Acquitted	9
		Conviction rate	98.2%

Savings And Loan Prosecution Update

Informations/Indictments	866	CEOs, Chairmen, and Presidents:	
Estimated S&L Loss	$9,135,793,604	Charged by indictment/ information	161
Defendants Charged	1,397	Convicted	124
Defendants Convicted	1,096	Acquitted	10
Defendants Acquitted	83 *	Conviction rate	92.5%
Prison Sentences	2,086 years		
Sentenced to prison	704		
Awaiting sentence	187	Directors and Other Officers:	
Sentenced w/o prison or suspended	221	Charged by indictment/ information	238
Fines Imposed	$ 16,516,736	Convicted	212
Restitution Ordered	$570,735,149	Acquitted	8
		Conviction rate	96.4%

* Includes 21 borrowers in a single case.

Credit Union Prosecution Update

Description	Count	Description	Count
Informations/Indictments	112	CEOs, Chairmen, and Presidents:	
Estimated Credit Loss	$133,421,997	Charged by indictment/ information	12
Defendants Charged	145	Convicted	10
Defendants Convicted	124	Acquitted	7
Defendants Acquitted	1	Conviction rate	100%
Prison Sentences	153 years		
Sentenced to prison	91		
Awaiting sentence	13	Directors and Other Officers:	
Sentenced w/o prison or suspended	20	Charged by indictment/ information	71
Fines Imposed	$ 45,700	Convicted	66
Restitution Ordered	$14,602,490	Acquitted	0
		Conviction Rate	100%

* * * * *

LEGISLATION

Independent Counsel Reauthorization

The Independent Counsel Reauthorization bill was introduced on January 21, 1993, with bipartisan support. It would extend the now-expired independent counsel statute for five additional years. It would also add new administrative and fiscal controls on the operations of independent counsels and would clarify that the statute applies to members of Congress. Although hearings on this legislation have not been scheduled, early action is likely. Committee staff have advised that passage of the bill is probable during the first one hundred days of the Administration. The measure is currently being reviewed by the Department's components.

* * * * *

Unpaid Family and Medical Leave

The United States Senate passed th family and medical leave bill, 71-27, on February 4, 1993, and forwarded it to the President for signature. This legislation would require businesses with 50 or more employees to grant twelve weeks of unpaid leave to workers after the birth or adoption of a child or during the illness of an employee or his or her close family members. This measure was passed by the Congress in 1992, but it was vetoed by President Bush on the grounds that it was an unnecessary interference by the government in the workplace.

* * * * *

OFFICE OF LEGAL EDUCATION

COMMENDATIONS

Carol DiBattiste, Director, Office of Legal Education (OLE) and the members of the OLE staff, thank the following Assistant United States Attorneys, Department of Justice and Agency officials, and Department of Justice employees for their outstanding teaching assistance and support during courses conducted from January 1-15, 1993. All of those individuals listed below are Assistant United States Attorneys unless otherwise identified.

Civil Trial Advocacy Course (Washington, D.C.)

Monte Clausen, District of Arizona; ***Ed Robbins, Tomson Ong,*** and ***Jan Luymes***, Central District of California; ***Beth Levine***, Southern District of California; ***Cynthia Everett***, Southern District of Florida; ***Amy Kaminshine*** and ***Sharon Stokes***, Northern District of Georgia; ***Tom Watson*** and ***Jill Ondrejko***, Eastern District of Louisiana; ***Mary Beth Carmody***, District of Massachusetts; ***Peter Caplan***, Eastern District of Michigan; ***Irene Dowdy***, District of New Jersey; ***Brian McCarthy***, Western District of New York; ***James Woods***, Northern District of New York; ***Warren "Tom" Majors***, Western District of Oklahoma; ***Fred Martin***, Middle District of Pennsylvania; ***Sid Alexander***, Western District of Tennessee.; ***Nancy Koenig*** and ***Paula Billingsley***, Northern District of Texas; ***Steve Mason***, Eastern District of Texas; ***Bill Ryan***, District of Utah; ***Debra Prillaman***, Eastern District of Virginia; ***Jim Shively***, Eastern District of Washington; and ***Jeff Senger***, Attorney, Civil Rights Division.

Civil FIRREA Representatives Seminar (Philadelphia)

Virginia Gibson-Mason, Eastern District of Pennsylvania

Criminal Federal Practice Seminar (Clearwater, Florida)

Thomas Hannis, District of Arizona; ***Steve Zipperstein***, Central District of California; ***Roger Haines***, Southern District of California; ***Joseph Ruddy, Gary Montilla, John Newcomer***, and ***Eduardo Toro-Font***, Middle District of Florida; ***Susan Tarbe***, Southern District of Florida; ***Richard Deane***, Northern District of Georgia; ***Ronald Seivert***, Western District of Texas; ***John Lenior***, Southern District of Texas; and ***Rhonda Fields***, District of Columbia.

Criminal Federal Practice Manual

Roger Haines, Southern District of California, ***George Newhouse, Jr.***, Central District of California; ***Steve Chaykin, Lynne Lamprecht***, and ***Dawn Bowen***, Southern District of Florida; ***Richard Deane***, Northern District of Georgia; ***Robert Boltman***, Eastern District of Louisiana; ***Linda Sybrant***, Western District of Missouri; ***Douglas Cannon***, Middle District of North Carolina; ***Lance Caldwell***, District of Oregon; ***James DeAtley, Greg Anderson, Ronald Seivert, Chris Gober, Michael Hardy, Michael McCrum***, and ***Philip Police***, Western District of Texas; ***Richard Stevens***. Eastern District of Texas, ***Lawrence Finder*** and ***Bernard Hobson***, Southern District of Texas; ***Stewart Walz***, District of Utah; ***Paul Billups*** and ***Nancy Hill***, Southern District of West Virginia, and ***Nathan Fishbach***, Eastern District of Wisconsin.

Basic Financial Litigation for Support Staff (New Orleans)

Honorable Tim Murphy, Deputy Associate Attorney General and ***Honorable Harry A. Rosenberg, United States Attorney, Eastern District of Louisiana***. Assistant United States Attorneys ***S. Mark Gallinghouse***, Eastern District of Louisiana, and ***James A. Gibbons***, Middle District of Pennsylvania. Regional Financial Litigation Specialists: ***Barbara Brouner***, Western District of Washington; ***Kathleen M. Connors***, District of New Jersey; ***Paul Condon;*** Northern District of New York; ***Patricia A. Gober***, Northern District of Ohio; and ***Patsy Ybarra***, Western District of Texas. ***Dale Trott***, Acting Deputy Director, Accounting Operations Group, Justice Management Division; ***Jack Collins***, Special Assistant to the Acting Director, Office for Victims of Crime; ***Judy Diaz***, Financial Programs Specialist, Financial Management Service, Department of the Treasury; ***Kim Whatley***, Probation Program Specialist, Probation Division, Administrative Office of the U.S. Courts. Financial Litigation Staff, Executive Office of United States Attorneys: ***Kathleen Haggerty***, Assistant Director, ***Judith Benderson***, Assistant Director, ***Frank Shippen***, Paralegal Specialist, ***Leslie C. Bournes***, Management Analyst,and ***Darrell R. Curtis***, Management Analyst. ***Sharon Hopson*** and ***Patty Ostrowski***, Management Analysts, Case Management Staff, Executive Office of United States Attorneys.

Basic Paralegal Skills Course (Washington, D.C.)

Jim Miles, Paralegal Specialist, Executive Office for Weed and Seed. ***Heather Jacobs,*** Program Manager, Priority Programs Team, and ***Curtis Wolf,*** Attorney Advisor, Office of Legal Counsel, Executive Office of United States Attorneys.

Asset Forfeiture Four-Part Training Video Tapes

Art Leach, Assistant United States Attorney, Northern District of Georgia, ***Karen Tandy,*** Chief, Litigation Section, Asset Forfeiture Office, Criminal Division; and ***Larry Fann,*** formerly Acting Director of the Asset Forfeiture Office, Criminal Division (now in private practice).

* * * * *

TRAINING MANUAL FOR CRIMINAL PROSECUTORS
Central District Of California

The United States Attorney's office for the Central District of California has compiled a two-volume "training manual" which contains an overview of federal criminal law and practices. Topics include: pre-trial matters, preparing for trial, organizing the case, trial, release/detention hearings, bail, removal, revocation of probation and supervised release, motion practice/suppression hearings, sentencing guidelines, and habeas corpus petitions/section 2255 motions. Although the manual is geared toward new federal prosecutors, the detailed description of pre-trial proceedings, trial strategy considerations, and post-trial litigation may prove helpful to more seasoned prosecutors.

To obtain a copy of the manual, please contact Miriam Krinsky, Assistant United States Attorney, at (213) 894-2433, or Carol DiBattiste, Director, Office of Legal Education at (202) 208-7574.

* * * * *

COURSE OFFERINGS

AUSA Carol DiBattiste, the Director of the Office of Legal Education (OLE), is pleased to announce OLE's projected course offerings for the months of April through July 1993, for both the **Attorney General's Advocacy Institute (AGAI)** and the **Legal Education Institute (LEI)**.

AGAI provides legal education programs to Assistant United States Attorneys (AUSAs) and attorneys assigned to Department of Justice divisions. LEI provides legal education programs to all Executive Branch attorneys, paralegals, and support personnel and to paralegal and support personnel in United States Attorneys' offices.

AGAI Courses

The courses listed below are tentative only. OLE will send a teletype approximately eight weeks prior to the commencement of each course to all United States Attorneys' offices and DOJ Divisions officially announcing each course and requesting nominations. Once a nominee is selected, OLE funds costs for Assistant United States Attorneys only.

April 1993

Dates	Course	Participants
7-8	Alternative Dispute Resolution-Civil	AUSAs, DOJ Attorneys
7-9	Criminal Chiefs, USAOs	Chiefs (Large USAOs)
12-15	Health Care Fraud	AUSAs, DOJ Attorneys
19-30	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
20-22	Civil Chiefs, USAOs	Chiefs (Large USAOs)
20-22	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, System Managers
26-28	USAO Attorney Management	Supervisory AUSAs
27-30	Basic Civil FIRREA	AUSAs, DOJ Attorneys

May 1993

3-7	Appellate Advocacy	AUSAs, DOJ Attorneys
4	Executive Session (Debt Collection)	U.S. Attorneys
11-13	Civil Chiefs, USAOs	Chiefs (Small and Medium USAOs)
11-13	Asset Forfeiture	8th Circuit (AUSAs, Support Staff, LECC Coordinators)
12-13	Ethics Seminar (USAOs)	Ethics Advisors (AUSAs, Support Staff)
17-21	Federal Practice Seminar-Criminal	AUSAs, DOJ Attorneys
17-28	Basic Civil Trial Advocacy	AUSAs, DOJ Attorneys

June, 1993

2-4	USAO Attorney Management	Supervisory AUSAs
2-4	Bankruptcy Fraud	AUSAs, DOJ Attorneys
8-10	Prison Litigation	AUSAs, DOJ Attorneys
8-11	Advanced Financial Institution Fraud	AUSAs, DOJ Attorneys

June, 1993 (Cont'd.)

8-11	Child Sex Abuse	AUSAs, DOJ Attorneys
15-17	Automating Financial Litigation	Financial Litigation AUSAs and DOJ Attorneys, Support Staff, System Managers
15-18	Violent Crimes	AUSAs, DOJ Attorneys
21-23	Money Laundering	AUSAs, DOJ Attorneys
21-25	Financial Crimes	AUSAs, DOJ Attorneys
21-25	Basic Narcotics	AUSAs, DOJ Attorneys
21-25	Appellate Advocacy	AUSAs, DOJ Attorneys
22-25	Advanced Evidence	AUSAs, DOJ Attorneys
28-30	Constitutional Torts	AUSAs, DOJ Attorneys
28-July 1	Public Corruption	AUSAs, DOJ Attorneys

July, 1993

12-23	Basic Criminal Trial Advocacy	AUSAs, DOJ Attorneys
13-15	Medical Malpractice	AUSAs, DOJ Attorneys
20-23	Basic Attorney Asset Forfeiture	AUSAs, DOJ Attorneys
26-30	Appellate Advocacy	AUSAs, DOJ Attorneys
26-30	Financial Litigation For AUSAs	AUSAs
27-29	Environmental Crimes	AUSAs, DOJ Attorneys

LEI Courses

LEI offers courses designed specifically for paralegal and support personnel from United States Attorneys' offices **(indicated by an * below)**. Approximately eight weeks prior to the commencement of each course OLE will send a teletype to all United States Attorneys' offices officially announcing the course and requesting nominations. The nominations are sent to OLE via Fax. Once a nominee is selected, OLE funds all costs for paralegal and support staff from United States Attorneys' offices.

Other LEI courses offered for all Executive Branch attorneys (except AUSAs), paralegals, and support personnel are officially announced via mailings, sent every four months to Federal departments, agencies, and USAOs. Nomination forms must be received by OLE at least 30 days prior to the commencement of each course. A nomination form for LEI courses listed below (except those marked by an *) can be found at Exhibit C. Local reproduction is authorized and encouraged. Notice of acceptance or non-selection will be mailed approximately three weeks before the course begins to the address typed in the address box on the nomination form. **Please note: OLE does not fund travel or per diem costs for students attending LEI courses (except for paralegals and support staff from USAOs for courses marked by an *).**

April, 1993

Dates	***Courses***	***Participants***
2	Legal Writing	Attorneys
13	Introduction to FOIA	Attorneys, Paralegals, Support Staff
15	Alternative Dispute Resolution	Attorneys
20-22	Environmental Law	Attorneys
21-22	Federal Acquisition Regulations	Attorneys
26-30*	USAO Support Staff Training (Civil and Criminal)	GS 4-7; 4th Circuit Region
27	Ethics & Professional Conduct	Attorneys, Ethics Officers
28-29	Evidence	Attorneys

May, 1993

4-6	Law of Federal Employment	Attorneys
11-13	Basic Negotiations	Attorneys
18-19	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
18-20	Discovery	Attorneys
19-21	Attorney Management	Supervisory Attorneys
20	Privacy Act	Attorneys, Paralegals, Support Staff
26	Statutes and Legislative Histories	Attorneys, Paralegals
27	Computer Acquisition	Attorneys

June, 1993

2-3	FOIA for Attorneys and Access Professionals	Attorneys, Information Officers, Paralegals
2-4*	Civil Paralegal	Paralegals (2-4 yrs. experience), USAOs and DOJ Divisions
4	Privacy Act	Attorneys, Paralegals, Support Staff
8	Advanced FOIA	Attorneys, Paralegals
8-11	Examination Techniques	Attorneys
11	Ethical Considerations in Federal Prosecutions	Attorneys (Note: Course meets Pennsylvania mandatory CLE requirements)
14-18*	USAO Support Staff Training (Civil & Criminal)	GS 4-7; 11th Circuit Region
15	Ethics & Professional Conduct	Attorneys
22-23	Federal Acquisition Regulations	Attorneys
24	Fraud, Debarment and Suspension	Attorneys
29	Computer Law	Attorneys

July, 1993

7	Computer Assisted Legal Research	Attorneys, Paralegals
7-8	Federal Administrative Process	Attorneys
13-15	Environmental Law	Attorneys
16	Legal Writing	Attorneys
19-22*	Basic Criminal Paralegal	Paralegals; USAOs

Office Of Legal Education Contact Information

Address: Room 10332, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530

Telephone: (202) 208-7574
Fax (AGAI): (202) 208-7235
Fax (LEI): (202) 208-501-7334

* * * * *

SUPREME COURT WATCH

An Update of Supreme Court Cases From The Office of the Solicitor General

Selected Cases Recently Decided

Civil Cases:

Bray v. Alexandria Women's Health Clinic, No. 90-985 (decided January 13)

In this case abortion clinics and supporting organizations sued under 42 U.S.C. 1985(3) to halt blockades by Operation Rescue that were designed to hinder abortion-related activities. The government argued that Section 1985(3) provided no cause of action because the blockading activities are aimed at all persons involved in abortions and are not based on animus toward women generally, and because no showing of purposeful interference with the right of interstate travel had been made. The Supreme Court has now agreed. The Court declined to consider whether the plaintiffs might also have a cause of action against Operation Rescue for hindering States from securing equal protection to all persons because that issue was not properly raised. The majority hinted that such a claim would not succeed.

Criminal Cases:

Crosby v. United States, No. 91-6194 (decided January 13)

In this case the government argued that, notwithstanding Rule 43 of the Federal Rules of Criminal Procedure, a defendant who flees before trial may be tried in absentia if the costs of delay are great. The Supreme Court has held, however, that under the plain language of Rule 43, trials in absentia are permitted only for defendants who are present at the beginning of trial and later fall into one of the categories listed in the Rule. The Court did not reach Crosby's claim that his trial was also unconstitutional.

Herrera v. Collins, No. 91-7328 (decided January 25)

This case raised the question when federal habeas is available to prisoners who have been convicted but claim that newly discovered evidence demonstrates their actual innocence. The Supreme Court has agreed with the government that federal habeas remedies are appropriate only to redress violations of the Constitution, not errors of fact. Moreover, it held that the Eighth Amendment does not apply to claims of actual innocence because the challenge is to the conviction, not the punishment. It has also agreed that the Due Process Clause permits States to limit the time in which convicted defendants may raise challenges based on newly discovered evidence. At least where executive clemency remains available, no habeas remedy is required for actual innocence claims. The Court left open the possibility that federal habeas relief might be available to a remediless prisoner who has made an extraordinary showing of innocence, but found that not to be so in Herrera's case.

Lockhart v. Fretwell, No. 91-1393 (decided January 25)

This case involved an unusual claim that defense counsel had rendered ineffective assistance by failing to raise an argument that seemed valid under the law at the time, even though a later Supreme Court case overruled the lower court precedents that suggested that the argument was valid. The Supreme Court has agreed with the government that Fretwell (the habeas petitioner) had not shown sufficient prejudice because he had not shown that the earlier proceeding was unreliable or unfair. Even though the outcome might have been different at the time, the defendant is not entitled today to the windfall of an incorrect ruling.

Zafiro v. United States, No. 91-6824 (decided January 25)

The Supreme Court has agreed with the government and held that Rule 14 of the Federal Rules of Criminal Procedure does not require district courts to grant defendants' motions to sever their trials from the trials of co-defendants simply because the defendants plan to present antagonistic defenses. The Court expressed a strong preference for joint trials, although it cautioned that severances under Rule 14 may be appropriate if a joint trial might compromise a specific trial right of one defendant or would prevent the jury from making a reliable judgment about guilt. Even in cases where prejudice is possible, however, the Court noted that appropriate jury instructions may be a sufficient cure.

Selected Cases Recently Argued

Civil Cases:

Barr v. Catholic Social Services, Inc., No. 91-1826 (argued January 11)

This case involves lawsuits brought by aliens seeking to acquire legal residency under the amnesty provisions of Immigration Reform and Control Act of 1986 (IRCA). The district court agreed that two INS regulations implementing the Act were inconsistent with the Act and, as a remedy, extended the statutory period of time for filing for amnesty. The government has challenged the district court's jurisdiction and, independently, the court's remedial authority to extend the statutory deadline.

Criminal Cases:

Alexander v. United States, No. 91-1526 (argued January 12)

The defendant Alexander controlled a large adult entertainment empire and was convicted on various federal tax evasion, obscenity, and RICO charges. Relying on the post-trial forfeiture provisions of RICO, 18 U.S.C. 1963(a), the district court ordered that Alexander forfeit his entire wholesale and retail businesses and almost $9 million in cash. Alexander argued that the forfeiture of non-obscene expressive material under RICO violates the First Amendment and that the forfeiture in this case also violated the Eighth Amendment. The government contended that the forfeiture was not a prior restraint on future speech but a penalty for past racketeering offenses. It also argued that the forfeiture was not overbroad and was not disproportionate to the offenses.

Helling v. McKinney, No. 91-1958 (argued January 13)

In this case the government argued, as amicus curiae, that mere exposure to environmental tobacco smoke cannot constitute a violation of a prisoner's Eighth Amendment rights. Rather, the prisoner must establish the authorities' deliberate indifference to the adverse effects of his or her exposure to secondary cigarette smoke.

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

Civil Cases:

St. Mary's Honor Center v. Hicks, No. 92-602 (granted January 8) (to be argued in April)

In an action alleging unlawful discrimination under Title VII and Section 1983, whether a judgment for the employee is compelled, as a matter of law, by a finding that the employer's legitimate, nondiscriminatory reasons for an adverse employment action are pretextual.

McNeil v. United States, No. 92-6033 (granted January 15) (to be argued in April)

Whether a district court may entertain an action under the Federal Tort Claims Act that was filed before the plaintiff seeks relief from the defendant agency (as required by 28 U.S.C. 2675(a)), if the plaintiff subsequently seeks relief.

Criminal Cases:

Austin v. United States, No. 92-6073 (granted January 15) (to be argued in April)

Whether the civil forfeiture of property that was used by the owner for drug trafficking violated the Cruel and Unusual Punishment or Excessive Fines Clauses of the Eighth Amendment.

* * * * *

CASE NOTES

NORTHERN DISTRICT OF CALIFORNIA

Attorneys' Fees Under The Equal Access To Justice Act (EAJA)

After prevailing in a jury trial in a Bivens action the plaintiff moved for attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(l)(A). The government argued that because plaintiff prevailed in her suit against the federal defendants in their individual capacities, not their official capacities, EAJA does not apply. The District Court, the Honorable Stanley A. Weigel, found the defendants' point well-taken. EAJA is a limited waiver of sovereign immunity which must be strictly construed. The Court also found that because the United States was not a party to plaintiff's Bivens suit (although plaintiff did bring -- and lose -- in a related FTCA action) and could not be found liable on the merits of the claims asserted in the Bivens suit, plaintiff is not entitled to collect attorneys' fees from the United States for legal work performed on the Bivens action. See Kentucky v. Graham, 473 U.S. 159, 165, 168 (1985).

Kreines v. United States and McMenimen, No. C-87-1401-SAW, (N.D.Ca. 1992)

Attorney: Stephen L. Schirle, Chief, Civil Division, N.D. Calif.
(415) 556-6977

* * * * *

Favorable Ruling In Section 504 Case Where Plaintiff Fails To Provide Sufficient Information About Handicapping Condition

One district court judge in the Northern District of California ruled in the government's favor in a Section 504 case because the plaintiff failed to provide sufficient information about his handicapping condition. Doe v. Attorney General, No. C-88-3820-CAL. Plaintiff Doe was a medical doctor employed by a health care facility which contracted with the FBI to perform physical examinations on all persons who are applicants for employment by the FBI and in other circumstances (annual and other promotional physical examinations). Virtually all of the examinations were conducted by plaintiff. In August, 1988, an

unknown person advised the FBI that the plaintiff had Kaposi's Sarcoma, a contagious AIDS-related illness. However, when the FBI attempted to confirm this information from plaintiff and the health care facility, the FBI was given only a conclusory statement that there was no risk. Neither the doctor nor the health care facility confirmed that the plaintiff had this contagious disease.

Initially, the district court determined that plaintiff did not have a private right of action against the federal defendants under Section 504. In addition, the district court rejected plaintiff's claim under the Fifth Amendment finding that the defendants did not violate the doctor's right to privacy. The district court's decisions were vacated in part, reversed in part, affirmed in part, and remanded by the Ninth Circuit Court of Appeals, Doe v. Attorney General, 941 F.2d 780 (9th Cir. 1991). The Ninth Circuit remanded the case to the district court to make findings on the merits of Dr. Doe's Section 504 claim.

The district court, in findings of fact and conclusions of law, filed on December 28, 1992, found for the federal defendants. The district court found that the risk of transmission of AIDS in a routine physical examination, using the procedures followed by plaintiff, is not significant. The court also found that contemporary medical judgment is that a doctor who is infected with AIDS should inform his patient of the infection and that physicians who are asked whether they have AIDS should answer the question directly and truthfully. The court also found that contemporary medical judgment is that the hospital should verify that their physicians are complying with the contagious disease guidelines of the Centers for Disease Control. The district court concluded:

> [d]efendants did not act solely because of plaintiff's illness. Rather, defendants acted because plaintiff, the facility and the hospital did not answer the FBI's concerns about whether plaintiff had Kaposi's Sarcoma and about the risk in prevention, but provided only conclusory statements. As a result of the minimal information provided by plaintiff, the facility and the hospital, defendants were also unable to determine whether plaintiff was "otherwise qualified" to perform physical examinations for FBI agents and applicants.

Judge Legge entered judgment in favor of the federal defendants. His opinion should prove very helpful in addressing Section 504 claims where the plaintiff has provided only minimal information about his condition.

Doe v. Attorney General, No. C-88-3820, N.D. Calif.

Attorney: Stephen L. Schirle, Chief, Civil Division, N.D. Calif.
(415) 556-6977

* * * * *

CIVIL DIVISION

D.C. Circuit Holds That Presidential Task Force On Regulatory Relief Is Not An "Agency" Subject to the Freedom of Information Act

The Presidential Task Force on Regulatory Relief was created by President Reagan in 1981 to further the Administration's regulatory reform efforts. The Task Force was chaired by then-Vice President Bush and operated through his office, with the assistance of the Office of Management and Budget (OMB). (The functions of the now-defunct Task Force were then performed by the Council on Competitiveness chaired by then-Vice President Quayle). In plaintiff's FOIA suit for disclosure of Task Force records, the district court held that the Task Force is an "agency" subject to the FOIA, and ordered further discovery regarding whether any Task Force records were among the Vice President's records. The district court and court of appeals subsequently granted our request for interlocutory appeal under 28 U.S.C. 1292(b).

The D.C. Circuit (Silberman, Sentelle; Wald, dissenting), has now held that the Presidential Task Force is not an agency under the FOIA, adopting our argument that the Task Force's "sole function" was to advise and assist the President. Because the Task Force operated in close proximity to the President, received its delegation of authority directly from the President, and had no formal structure, the Court held that it did not exercise authority independent from assisting the President. While the Task Force provided "guidance" and "direction" to federal officers, the Court held, its members acted as the functional equivalents of assistants to the President.

Meyer v. George Bush, et al., No. 92-5029 (January 8, 1993).
DJ # 145-1-2048.

Attorneys: Douglas Letter - (202) 514-3602
Matthew Collette - (202) 514-4214

* * * * *

Second Circuit, Upholding Postal Service Regulation, Finds That Interior Postal Sidewalk Is Nonpublic Forum For First Amendment Analysis

Plaintiff, a candidate for the United States Senate, set up a table on the off-street access walkway leading to the entrance of a post office to solicit signatures in support of his candidacy. Plaintiff's activity violated a postal regulation which prohibits "campaigning for election to any public office" on postal premises. Plaintiff challenged the regulation on First Amendment grounds. The district court found the postal walkway at issue to be a nonpublic forum, but also found that the regulation was not reasonable and held it to be unconstitutional. On appeal, the Second Circuit reversed. The court declined to determine the walkway's status as a forum for First Amendment purposes, finding instead that the regulation was a reasonable time, place, or manner restriction that was content-neutral and served a significant state interest and, therefore, could survive scrutiny in any forum.

Shortly thereafter, the United States Supreme Court decided Burson v. Freeman, 112 S. Ct. 1846 (1992), finding a Tennessee statute which prohibited solicitation of votes within 100 feet of the entrance to a polling place to be "content-based" because free speech rights depended entirely on whether the speech related to a political campaign. The Court upheld the statute in Burson only because it served compelling state interests. Subsequently, the Supreme Court granted certiorari in Longo, vacated the judgment of the Second Circuit, and remanded the case for further consideration in light of Burson.

On remand, the Second Circuit found that, in light of Burson, the regulation at issue here could no longer be considered "content-neutral." The court, however, accepted our argument that it should follow the plurality opinion in United States v. Kokinda, 497 U.S. 720 (1990), that an interior postal walkway is a nonpublic forum subject only to a "reasonableness" test. The Second Circuit then found that the regulation passed the "reasonableness" test because, among other things, it was not an effort to suppress a particular viewpoint and it protected postal workers from political entanglement.

Longo v. United States Postal Service, No. 91-6141 (December 28, 1992).
DJ # 145-5-7297.

Attorneys: Douglas N. Letter - (202) 514-3602
Steve Frank - (202) 514-4820

* * * * *

Ninth Circuit Reverses District Court Order Requiring The CIA To Confirm Or Deny The Existence Of Records Regarding A Foreign National

Plaintiff Joe Hunt was charged by the State of California with the murder of Hedayat Eslaminia, an Iranian national. He filed suits under the Freedom of Information Act ("FOIA") against several government agencies for all records pertaining to Mr. Eslaminia's activities. In this action, plaintiff sought all records regarding Mr. Eslaminia's activities in the possession of the Central Intelligence Agency.

Invoking Exemptions 1 and 3 of the FOIA, the CIA explained that it could not confirm or deny the existence of records on Mr. Eslaminia. In three public declarations, the agency explained that it would have records on Mr. Eslaminia only if he were the source or target of intelligence-gathering. To reveal that Mr. Eslaminia was, or was not, an intelligence source or target would inform observers of the scope and nature of the CIA's intelligence-gathering activities and could potentially endanger CIA sources. The CIA also submitted in camera declarations in support of its position.

The district court rejected the CIA's position, concluding that, in its view, confirming or denying Mr. Eslaminia's status as a source or target would not compromise intelligence sources and methods. The court further ordered the CIA to prepare a public Vaughn index of any responsive documents that might exist.

We obtained an emergency stay pending appeal followed by highly expedited briefing and argument. The Ninth Circuit (Goodwin, Dorothy Nelson, Reinhardt) has now reversed. The court concluded that an order requiring the CIA to confirm or deny the existence of responsive records could compromise intelligence sources or methods. The panel rejected the district court's holding that the agency's affidavits lacked specificity, reasoning that further particularity might reveal whether Mr. Eslaminia was a source or target of intelligence gathering. The panel noted that the CIA had, in its view, achieved a near-blanket exemption from the FOIA, but concluded that this outcome was dictated by the statute and controlling precedent.

Hunt v. CIA, No. 92-16548 (December 30, 1992). DJ # 145-1-1307.

Attorneys: Leonard Schaitman - (202) 514-3441
Mark B. Stern - (202) 514-5089
Malcolm L. Stewart - (202) 514-1633

* * * * *

False Claims

Middle District Of Florida Holds That Relator Is Not Entitled To Review In Camera Submissions Made By Government Prior to Intervention Declination

Following the Government's decision to decline intervention in a qui tam case, relator 1) sought to review the in camera submissions made by the Government in support of requests for extensions of the seal, and 2) moved to compel production by the Government of all documents relating to its review prior to declination. Pursuant to 31 U.S.C. § 3730(b)(3), the court held that even though the Government had declined intervention, the relator was not entitled to see the Government's in camera submissions. The court also rejected relator's motion to compel, holding that relator must first seek to obtain such materials through the normal discovery process.

United States ex rel. Rehman v. ECC Int'l Corp., Civ No. 90-939-CIV-ORL (M.D. Fla. Jan 13, 1993)

Attorney: Glenn Kaplan - (202) 514-6846

* * * * *

Northern District Of Illinois Holds that USDA Civil Penalty Imposed After Criminal Conviction Violates Double Jeopardy Clause

Individual was convicted of food stamp program violations involving $590 in fraud against the Government and $1,380 in total Government expenditures. Pursuant to 7 C.F.R. § 278.6(f)(2), the USDA imposed a civil penalty of $80,000. Holding that the civil penalty bore no relation to the seriousness of the offense or to the costs incurred by the Government, the court ruled that the civil penalty was not remedial and therefore violated the Double Jeopardy Clause.

Patel v. United States, Civ. No. 91 C 4407 (N.D. Ill. Jan. 8, 1993).

Attorney: Sharon Jackson Coleman
Assistant United States Attorney
(312) 353-1414

* * * * *

TAX DIVISION

Supreme Court Rules That Home Office Expenses May Not Be Deducted When The Taxpayer's Principal Place Of Business Is Not The Taxpayer's Home

On January 12, 1993, the Supreme Court reversed the adverse decision of the Fourth Circuit in Nader E. Soliman v. Commissioner, which presented the question whether the taxpayer was entitled to a home-office deduction. Dr. Soliman spent most of his working hours performing anesthesiology services at three hospitals. The bulk of these services were performed at Suburban Hospital in Bethesda where he worked approximately five hours per day. He also spent approximately two hours per day working at Shady Grove Hospital in Rockville, Maryland, and Loudon Memorial Hospital in Leesburg, Virginia. Dr. Soliman performed some incidental tasks related to his practice in an office located in his home, where he spent two to three hours per day. Dr. Soliman claimed a deduction related to his use of his home office.

Under Section 280A of the Internal Revenue Code (which was adopted in 1976 to restrict home-office deductions), expenses incurred in maintaining a home office are deductible only if the home office constitutes the taxpayer's "principal" place of business. The Supreme Court held that a home office could qualify for deduction only if it was "the most important or significant place for the business." In the case at hand, analyzing the "relative importance of the functions [Dr. Soliman] performed at each business location and the time spent at each place," the Court found that his home office -- while "important, even essential, to his professional activity" -- was not his "principal" place of business. Justice Stevens dissented. (The Washington Post has reported that 35 million American taxpayers maintain home offices.)

* * * * *

Third Circuit Reverses Adverse Judgment On The Government's $1 Million Claim Against A Surety Under A Payment Bond

On December 29, 1992, the Third Circuit reversed and remanded the unfavorable judgment of the District Court in United States v. American Insurance Company. This case was an action to enforce a bond issued by American Insurance Company to secure payment of delinquent federal income tax liabilities of Wheeling-Pittsburgh Steel Corporation. At issue was the question whether the defendant surety bond company, under the terms of its surety contract, was obligated to pay the secured taxes of Wheeling-Pitt after it filed a petition in bankruptcy. A collateral agreement expressly incorporated into the bond provided that the Internal Revenue Service was entitled to demand payment on the bond if Wheeling-Pitt filed for bankruptcy. The District Court ignored this requirement, finding that, because no payments were due when Wheeling-Pitt filed for bankruptcy, the surety was entitled to cancel the bond. The Third Circuit rejected this reasoning, explaining that the surety "agreed that the IRS could make demand on the bond when [the taxpayer] petitioned in bankruptcy and that is exactly what happened." The case was remanded for a determination of the exact liability (totalling approximately $1.1 million).

* * * * *

Fifth Circuit Sustains Multi-Million Dollar Damage Award Against The United States Under The Federal Tort Claims Act

On December 29, 1992, a divided panel of the Fifth Circuit affirmed, in part, the adverse decision of the District Court in Elvis E. Johnson v. Robert Sawyer and United States, which awarded Johnson damages under the Federal Tort Claims Act (FTCA) for the wrongful disclosure of tax return information. The court of appeals upheld the District Court's award of over $5 million in damages to Johnson for his economic losses, but remanded the case with respect to the remaining $5 million award for emotional distress and mental anguish for further explanation as to how the District Court determined that amount.

Johnson sought damages from various Internal Revenue Service employees, officials in the office of U.S. Attorney, and the United States, for injuries he claimed resulted from disclosures contained in an IRS press release. The press release reported that Johnson had pled guilty to an information charging him with evasion of tax for two years (only one year was actually covered by the information) and set forth personal information about him which was not contained in the information. The District Court found that the United States had agreed in the plea bargain that it would issue no press release and that the press release contained information that was not in the public record. It went on to hold that the discretionary function exception to the FTCA did not shield the United States from liability. On appeal, the Fifth Circuit agreed refusing to adopt the position of the Ninth Circuit that once tax return information is disclosed in a judicial proceeding the IRS may release that information to the press. Judge Garwood filed a vigorous dissent.

* * * * *

Eighth Circuit, Sitting En Banc, Goes Into Conflict With the Eleventh Circuit In $23 Million Gift Tax Case

On December 28, 1992, the Eighth Circuit, sitting en banc, affirmed the order of the District Court by a 7-4 vote, in Irvine v. United States, and held that a taxpayer's disclaimer of an interest in a trust was not a taxable gift. In Ordway v. United States, 908 F.2d 890 (11th Cir. 1990), cert. denied, 111 S.Ct. 2916 (1991), the Eleventh Circuit reached the opposite result, ruling that a related taxpayer's disclaimer of an interest in the same trust was a taxable gift.

Each of these cases involved a beneficiary of a trust created in 1917 by Lucius Ordway, one of the principal founders of the 3M Company. The taxpayer in each case filed a disclaimer with respect to his interest in the trust's corpus when the trust terminated in 1979, and not upon learning of his interest in the trust (1931 and 1941, respectively). The district court in each case held that the disclaimer was not a transfer subject to the federal gift tax because the trust interest was created prior to the imposition of the gift tax in 1932 and thus a disclaimer of that interest could not be a transfer subject to the gift tax.

In Irvine, the Eight Circuit affirmed the decision of the district court with the majority opinion finding it anomalous that a disclaimer could turn a gift that was not subject to the gift tax into one that was. Four dissenting judges would have followed the Eleventh Circuit's decision in Ordway, where the court of appeals concluded that the disclaimer was itself a taxable transfer regardless of when the trust was created and that the partial disclaimer was taxable because it was not made within a reasonable time after taxpayer learned of the interest as required by Jewett v. Commissioner, 455 U.S. 305 (1982).

* * * * *

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	Effective Date	Annual Rate
10-21-88	8.15%	02-14-90	7.97%	05-31-91	6.09%	09-18-92	3.13%
11-18-88	8.55%	03-09-90	8.36%	06-28-91	6.39%	10-16-92	3.24%
12-16-88	9.20%	04-06-90	8.32%	07-26-91	6.26%	11-18-92	3.76%
01-13-89	9.16%	05-04-90	8.70%	08-23-91	5.68%	12-11-92	3.72%
02-15-89	9.32%	06-01-90	8.24%	09-20-91	5.57%	01-08-93	3.67%
03-10-89	9.43%	06-29-90	8.09%	10-18-91	5.42%	02-05-93	3.45%
04-07-89	9.51%	07-27-90	7.88%	11-15-91	4.98%		
05-05-89	9.15%	08-24-90	7.95%	12-13-91	4.41%		
06-02-89	8.85%	09-21-90	7.78%	01-10-92	4.02%		
06-30-89	8.16%	10-27-90	7.51%	02-07-92	4.21%		
07-28-89	7.75%	11-16-90	7.28%	03-06-92	4.58%		
08-25-89	8.27%	12-14-90	7.02%	04-03-92	4.55%		
09-22-89	8.19%	01-11-91	6.62%	05-01-92	4.40%		
10-20-89	7.90%	02-13-91	6.21%	05-29-92	4.26%		
11-17-89	7.69%	03-08-91	6.46%	06-26-92	4.11%		
12-15-89	7.66%	04-05-91	6.26%	07-24-92	3.51%		
01-12-90	7.74%	05-03-91	6.07%	08-21-92	3.41%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Jack W. Selden
Alabama, M	James Eldon Wilson
Alabama, S	J. B. Sessions, III
Alaska	Wevley William Shea
Arizona	Linda A. Akers
Arkansas, E	Charles A. Banks
Arkansas, W	J. Michael Fitzhugh
California, N	John A. Mendez
California, E	George L. O'Connell
California, C	Terree Bowers
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Roberto Martinez
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Jay D. Gardner
Guam	Frederick Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
Kentucky, E	Karen K. Caldwell
Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Richard D. Bennett
Massachusetts	A. John Pappalardo
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Thomas B. Heffelfinger
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

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

* * * * *

Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

EXHIBIT A

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 7 • JANUARY 11, 1993

Departures

CRIMINAL HISTORY

Fourth Circuit holds that court may depart by analogy to career offender guideline for defendant who would have been sentenced as career offender but for invalid prior conviction. The presentence report put defendant in criminal history category VI and concluded he had several prior violent felonies that qualified him as a career offender. Defendant challenged the validity of the prior convictions, but the district court ruled that at least two were valid and sentenced him as a career offender under § 4B1.1. As an alternative, the court held that even if one of the required felony convictions were invalid, the same sentence would be imposed because the underlying facts were not disputed and could be used to depart under § 4A1.3, p.s., with the career offender provision as a guide.

The appellate court affirmed, holding that it did not have to decide whether the disputed convictions were valid because the departure to the career offender range was proper. "Once the district court determines that a departure under U.S.S.G. § 4A1.3, p.s. is warranted and that the defendant's prior criminal conduct is of sufficient seriousness to conclude that he should be treated as a career offender, the district court may depart directly to the guideline range applicable to career offenders similar to the defendant.... Thus, if a district court, based on reliable information, determines that a defendant's underlying past criminal conduct demonstrates that the defendant would be sentenced as a career offender but for the fact that one or both of the prior predicate convictions may not be counted [because they are constitutionally invalid], the court may depart directly to the career offender guideline range." *Cf. U.S. v. Hines*, 943 F.2d 348, 354–45 (4th Cir.) (departure to career offender level proper where defendant missed that status only because prior violent felonies were consolidated), *cert. denied*, 112 S. Ct. 613 (1991); *U.S. v. Dorsey*, 888 F.2d 79, 80–81 (11th Cir. 1989) (same), *cert. denied*, 110 S. Ct. 756 (1990).

The court added, as a general matter, that "[a]dditional Criminal History Categories above Category VI may be formulated in order to craft a departure that corresponds to the existing structure of the guidelines." *Accord U.S. v. Streit*, 962 F.2d 894, 905–06 (9th Cir. 1992) [4 *GSU* #24]; *U.S. v. Glas*, 957 F.2d 497, 498–99 (7th Cir. 1992) [4 *GSU* #20]; *U.S. v. Jackson*, 921 F.2d 985, 993 (10th Cir. 1991) (en banc). A so-called "vertical departure"—moving to higher offense levels within category VI—may also be used and is recommended in the November 1992 revision of § 4A1.3, p.s.

U.S. v. Cash, No. 91-5869 (4th Cir. Dec. 14, 1992) (Wilkins, J.).

See *Outline* at VI.A.1.c, 3, and 4.

MITIGATING CIRCUMSTANCES

U.S. v. Aslakson, No. 92-1891 (8th Cir. Dec. 18, 1992) (per curiam) (Affirmed: An offer, which was refused by the government, to testify against a codefendant in exchange for a substantial assistance motion under § 5K1.1, p.s., cannot warrant departure under § 5K2.0, p.s. on the theory that such conduct is not adequately covered by the acceptance of responsibility reduction in § 3E1.1. Assistance in the prosecution of others is covered under § 5K1.1, not § 3E1.1, and departure cannot be made without motion of the government except in very limited circumstances not present here.).

See *Outline* at VI.C.4.c.

U.S. v. Frazier, No. 91-3585 (7th Cir. Nov. 16, 1992) (Coffey, J.) (Remanded: General finding that defendant suffers from a mental disorder is not sufficient for downward departure under § 5K2.13, p.s. The district court must make specific findings that "defendant's mental condition resulted in a significantly reduced mental capacity at the time of the offense [and] contributed to the commission of her offense.... [S]uch a link cannot be assumed." District court also erred in basing the departure on its opinion that there was "nothing to be gained" by imprisoning defendant, in terms of either punishment or general deterrence: "Departures must 'be based on policies found in the Guidelines themselves rather than in the personal penal philosophy of the sentencing judge.'").

See *Outline* at VI.C.1.b and 4.b.

AGGRAVATING CIRCUMSTANCES

U.S. v. Medina-Gutierrez, No. 92-2094 (5th Cir. Dec. 23, 1992) (Duhé, J.) (Remanded: Plain error to use § 5K2.6, p.s., as a basis for departure in offense of transportation of firearms in interstate commerce. That offense "is, technically, a crime in which weapons are used, and therefore seems to warrant a § 5K2.6 upward departure. Practically speaking, however, this section must refer to crimes that may be committed with or without the use of a weapon, otherwise, every firearms sentence would require upward departure." It was not error, however, to depart upward because of defendant's frequent purchases of weapons: "a criminal defendant who has repeatedly engaged in a criminal activity evidences a dangerousness not apparent in a defendant who has acted illegally only once.").

See *Outline* at VI.B.1 and 2.

SUBSTANTIAL ASSISTANCE

U.S. v. Easter, No. 91-6103 (10th Cir. Dec. 10, 1992) (Baldock, J.) (Seymour, J., dissenting) (Affirmed: Defendant claimed for the first time on appeal that the government refused to make a § 5K1.1, p.s. motion because he was the only conspirator to request a jury trial. The appellate court rejected his request for a remand and hearing on the government's motives: "Defendant's exercise of his constitutional right to a jury trial would be an improper basis for the government to withhold a motion. Nevertheless, defendant did not raise this argument in the district court," so it could only be reviewed for plain error. But the court, characterizing this as a factual dispute to which "plain error review does not apply," dismissed the appeal: "Defendant's suggestion regarding the government's motive for failing to bring a motion raises the factual issue of, not only the government's motive, but whether the Defendant in fact provided substantial assistance.").

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

Criminal History

Armed Career Criminal

U.S. v. Medina-Gutierrez, No. 92-2094 (5th Cir. Dec. 23, 1992) (Duhé, J.) (Affirmed: Whether prior violent felony convictions were "related" under §4A1.2 is irrelevant to sentencing as armed career criminal under §4B1.4. Defendant argued that three burglary convictions should be treated as one violent felony because they were committed within weeks of one another as part of a common plan and were consolidated for sentencing. However, §4B1.4 applies to defendants subject to enhanced sentence under 18 U.S.C. §924(e), and the appellate court stated that "what matters under §924(e) is whether three violent felonies were committed on different occasions; whether they are . . . 'related cases' under §4A1.2 is irrelevant."). *See also* §4B1.4, comment. (n.1) ("the definition[] of 'violent felony' . . . in 18 U.S.C. §924(e) [is] not identical to the definition[] of 'crime of violence' . . . used in §4B1.1").
[To be placed in new section IV.D in next edition of *Outline*.]

Calculation

U.S. v. Tabaka, No. 91-3882 (3d Cir. Dec. 28, 1992) (Weis, J.) (Remanded: If a prior sentence is suspended, only the portion that was served should be considered in the criminal history calculation. Defendant had received a sentence of a minimum 48 hours and maximum 15 months that was suspended after two days. The appellate court held it was error to consider the maximum sentence (for three criminal history points) rather than the two days actually served (one point). Normally the "sentence of imprisonment" used to calculate criminal history points is the maximum sentence imposed, rather than time actually served. *See* §4A1.2(b)(1) and comment. (n.2). However, §4A1.2(b)(2) specifically states: "If part of a sentence of imprisonment was suspended, 'sentence of imprisonment' refers only to the portion that was not suspended.").
See *Outline* at IV.A.2.

Determining the Sentence

Consecutive or Concurrent Sentences

U.S. v. Gullickson, No. 92-1398 (8th Cir. Dec. 8, 1992) (Magill, J.) (Remanded: District courts retain discretion under 18 U.S.C. §3584(a) to impose concurrent or consecutive sentences, but they must also follow §5G1.3 unless departure is warranted. Here, §5G1.3(c) (Nov. 1991) called for concurrent sentences, but the district court improperly made the federal sentence consecutive to defendant's unexpired state sentences without "follow[ing] the usual guidelines procedures" to determine whether departure was warranted.).

U.S. v. Parkinson, No. 91-2233 (1st Cir. Dec. 4, 1992) (per curiam) (Affirmed: In determining under §5G1.3(c) the extent to impose sentence consecutively to prior unexpired state sentence, look at "the actual total prison term likely to be served [on state sentence], not the putative terms of imprisonment imposed." Defendant was serving a 10–20 year state term, and for the instant federal offense he received a 240-month sentence, to run consecutively. Defendant argued that this was actually a departure because it would result in a total sentence of 30–40 years, which exceeded the maximum 327 months that "approximate[d] the total punishment that would have been imposed . . . had all of the offenses been federal offenses for which sentences were being imposed at the same time," §5G1.3, comment. (n.3) (1991). However, the appellate court held that good-conduct credit and parole "could potentially result in defendant serving less than seven years of [the state] sentence," for a total sentence of less than 327 months.).

Note that effective Nov. 1, 1992, §5G1.3(c) was designated a policy statement, but the substance of the guideline is essentially the same.
See *Outline* at V.A.3.

Fines

U.S. v. Fair, No. 92-2098 (5th Cir. Dec. 9, 1992) (Duhé, J.) (Remanded: PSR indicated defendant could not pay fine, and court improperly imposed fine without articulating reasons: "specific findings are necessary if the court adopts a PSR's findings, but then decides to depart from the PSR's recommendation on fines or cost of incarceration." Defendant may rely on PSR's conclusion that he cannot pay fine; burden then shifts to government to prove ability to pay. District court also erred in imposing cost of incarceration fine under §5E1.2(i) without first imposing punitive fine under §5E1.2(a).).
See *Outline* at V.E.1 and 2.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Davis, No. 92-3143 (6th Cir. Dec. 16, 1992) (Gilmore, Sr. Dist. J.) (Affirmed: Where defendant was convicted of conspiracy to distribute cocaine, but the unusual circumstances of the case prevented the district court from reaching any reasonable estimate of the quantity of cocaine attributable to defendant, it was proper for the court to use the lowest offense level applicable to cocaine under the Drug Quantity Table.).
See *Outline* at II.B.3.

U.S. v. Reyes, No. 91-6398 (10th Cir. Nov. 17, 1992) (Baldock, J.) (Remanded: District court clearly erred in finding that defendant negotiated to sell additional pound of cocaine, *see* §2D1.1, comment. (n.12) ("the weight under negotiation in an uncompleted distribution shall be used"). The undercover agent testified that he believed that defendant agreed to sell him another pound, but "[n]othing in the recorded conversation indicates an affirmative response by Defendant to supply an additional pound of cocaine. . . . and nothing in the record, other than [the agent's] subjective belief, indicates that Defendant agreed to it."
See *Outline* at II.B.3.

Adjustments

Role in Offense

U.S. v. Katora, No. 91-3505 (3d Cir. Dec. 7, 1992) (Mansmann, J.) (Becker, J., dissenting) (Remanded: Adjustment under §3B1.1(c) could not be applied to equally culpable codefendants who organized only non-culpable persons, not each other or other culpable participants. The fact that defendants "shared responsibility for creating and carrying out the fraud do[es] not indicate that either [defendant] organized the other. Rather, . . . [defendants] were 'organizers' only in the sense that they were 'planners' of the offense. Just as section 3B1.1 cannot enhance the sentence of a solo offender, . . . neither can it enhance the sentences of a duo when they bear equal responsibility for 'organizing' their own commission of a crime." Defendants did organize innocent third parties, but under §3B1.1 "use of non-culpable 'outsiders' [may only be used] to calculate 'extensiveness,' not 'role.' . . . [W]e conclude that the application of sections 3B1.1 and 3B1.2 has two prerequisites: multiple participants and some differentiation in their relative culpabilities.").
See *Outline* at III.B.2, 6, and 7.

EXHIBIT B

Federal Sentencing and Forfeiture Guide

NEWSLETTER

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

Vol. 3, No. 31 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | December 28, 1992

IN THIS ISSUE:

Guidelines Sentencing, Generally

5th Circuit says referral of case for federal prosecution did not violate due process. (110) The 5th Circuit affirmed that the decision to refer defendant's case for federal prosecution did not violate his due process rights even though it adversely affected his sentence and was made without any reviewable guideline. The ultimate decision of whether or not to charge a defendant presumably rests with the federal prosecutor, who has complete discretion in deciding whether or not to prosecute or what charge to file. Moreover, a defendant may be prosecuted and convicted under a federal statute even after having been convicted in a state prosecution based upon the same conduct. *U.S. v. Satterwhite*, __ F.2d __ (5th Cir. Dec. 17, 1992) No. 92-8002.

1st Circuit finds no improper triple counting in sentencing for felon in possession and carrying a firearm during drug crime. (125)(330)(500) Defendant was convicted of being a felon in possession of a firearm, 18 U.S.C. section 922(g)(1), and carrying a firearm in relation to a drug trafficking crime, 18 U.S.C. section 924(c)(1). The 1st Circuit rejected defendant's argument that it was improper to count the conduct underlying the section 924(c)(1) charge three times in computing his sentence. His guilty plea to section 924(c)(1) had three effects on his sentence: First, it required five years to be added to his felon in possession sentence. Second, under guideline section 4B1.4(b)(3)(A), it raised the base offense level from 33 to 34 for the felon in possession charge. Third, under section 4B1.4(c)(2), it raised the criminal history category from IV to VI for the felon in possession charge. Effects number two and three were plainly mandated by guideline section 4B1.4 and did not constitute impermissible double

counting. The additional consecutive five year sentence was not prohibited by application note 2 to section 2K2.4, since defendant was not sentenced for the drug offense underlying the section 924(c)(1) charge. *U.S. v. Sanders*, __ F.2d __ (1st Cir. Dec. 18, 1992) No. 92-1940.

6th Circuit reverses enhancement for express threat of death where defendant received separate firearm sentence. (125)(224)(330) Defendant pled guilty to assaulting a postmaster and robbery of a post office, and carrying a firearm in relation to a crime of violence. He received an enhancement under section 2B3.1(b)(2)(D) (later designated 2B3.1(b)(2)(F)) based on his co-defendant's express threat of death to the postmaster. The 6th Circuit reversed, holding the enhancement improper where defendant had already received a separate mandatory sentence under 18 U.S.C. section 924(c) for the firearm charge. The commentary to guideline section 2K2.4 provides that when a sentence under section 924(c) is imposed in conjunction with a sentence for an underlying offense, the specific offense characteristic for the firearm should not be applied with respect to the underlying offense. As application note 2 to section 2K2.4 makes clear, the express threat of death enhancement was related to the possession or use of the firearm. *U.S. v. Smith*, __ F.2d __ (6th Cir. Dec. 11, 1992) No. 92-3162.

3rd Circuit disapproves of "one book rule" where it would violate ex post facto clause. (131) Defendants pled guilty to various counts of consumer fraud, bribery, conspiracy and tax evasion. The 3rd Circuit remanded for resentencing because the district court applied the post-1989 guidelines without considering whether the offenses had been committed before or after November 1, 1989. When retroactive application of the current version of the guidelines results in more severe penalties than those in effect at the time of the offense, the earlier guidelines control. The court expressly disapproved of the so-called "one book rule" -- that only one set of the guidelines should be used in calculating the applicable sentence "as a cohesive and integrated whole." Such a rule is inconsistent with Circuit caselaw prohibiting the application of more stringent penalties than were authorized at the time of the offense. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

3rd Circuit says applying post-*Hughey* amendments to VWPA would violate ex post facto clause. (131)(610) In *Hughey v. U.S.*, 495 U.S. 411 (1990), the Supreme Court held that a restitution order under the VWPA must be based only on the loss caused by the conduct that formed the basis of the conviction. After *Hughey*, Congress amended the VWPA to provide that (a) when an offense involves a pattern of criminal activity, "victim" means a person who is directly harmed by that pattern, and (b) the court is authorized to order restitution to the extent that the parties have agreed to it in a plea agreement. These amendments became effective after defendants committed their offense but before they entered plea agreements. The 3rd Circuit held that because these amendments worked to the detriment of defendants by enlarging a court's power to order restitution, application of the amendments to defendants was prohibited by the ex post facto clause. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

10th Circuit rules defendants did not withdraw from conspiracy before guidelines' effective date. (132) The 10th Circuit rejected three defendants' claim that they withdrew from their drug conspiracy prior to November 1, 1987, the effective date of the guidelines. Although the partnership of two of the defendants may have ended prior to November 1, 1987, the conspiracy continued in

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

Annual Subscription price: $295
Main volume only (3rd Ed. 1991): $80.

Editors:
- Roger W. Haines, Jr.
- Kevin Cole, Professor of Law, University of San Diego
- Jennifer C. Woll
- Judy Clarke

Publisher:
- Kathy McCoy

spite of the partnership breakup. The district court found that the conspiracy continued into early 1991, and there was considerable evidence of one defendant's drug activity until his arrest in 1989. Although the second defendant contended that he stopped distributing marijuana for the conspiracy in October 1987, at trial he testified that he was not sure of the date, and other witnesses testified that he was involved at least through 1988. There was overwhelming evidence that the third defendant was involved in drug distribution activities through 1991. *U.S. v. Powell*, __ F.2d __ (10th Cir. Dec. 9, 1992) No. 91-5171.

10th Circuit says defendant's disproportionate sentence did not violate 8th Amendment. (140)(716) The 10th Circuit rejected defendant's argument that the disproportionality of his 235-month sentence as compared to the 5-year sentences received by his co-conspirators constituted cruel and unusual punishment. First, defendant did not allege that his sentence was grossly disproportionate to his crimes, which is a critical factor in assessing whether a sentence is so disproportionate so as to constitute cruel and unusual punishment. Moreover, even if stated properly, the claim would fail. Inasmuch as the Supreme Court has held that a life sentence for possession of 650 grams of cocaine base did not violate the 8th Amendment, then a 235-month sentence for possessing with intent to distribute a kilogram of cocaine base does not violate the 8th Amendment. *U.S. v. Easter*, __ F.2d __ (10th Cir. Dec. 10, 1992) No. 91-6103.

Application Principles, Generally (Chapter 1)

2nd Circuit remands after amendment states that felon in possession is not a crime of violence. (150)(520) Defendant was convicted of two counts of being a felon in possession of a firearm. He was sentenced as an Armed Career Criminal under the 1991 version of guideline 4B1.4. The district court rejected defendant's ex post facto challenge to his 264-month sentence, finding that under the version of the guidelines in effect when the offense was committed, he would have been classified as a career offender, and thus would have been subject to an even harsher sentence. The career offender finding was based on the conclusion that defendant's felon in possession conviction was a crime of violence. However, on the day of oral argument, guideline section 1B1.10(d) was amended to provide retroactively that a "felon in possession" conviction is never a crime of violence for career offender purposes. In light of this amendment, the 2nd Circuit remanded the case for resentencing. *U.S. v. Carter*, __ F.2d __ (2nd Cir. Dec. 10, 1992) No. 92-1089.

8th Circuit agrees that false social security number offense involved more than minimal planning. (160) The 8th Circuit affirmed that defendant's offense of using a false social security number involved more than minimal planning. Defendant had detailed written instructions about how to conceal his identity at the various banks, how to structure transactions so as to avoid detection, and what answer to give if a teller asked for his social security card. *U.S. v. Lublin*, __ F.2d __ (8th Cir. Dec. 11, 1992) No. 92-2453.

5th Circuit affirms loss based on face value of fraudulently-deposited checks. (180)(220)(300) Defendant used stolen blank checks to commit bank fraud. He would forge a stolen check drawn on one account, use a stolen deposit slip to deposit the check into another account, and request cash back. The face value of the fraudulently-deposited checks was $100,944 and the actual loss to the banks was $14,731, the amount of cash defendant received. The 5th Circuit affirmed the use of the face value of the fraudulently deposited checks as the amount of loss under both the fraud guideline, section 2F1.1, and the theft guideline, section 2B1.2. The court rejected defendant's contention that the 1991 amendment to note 7 to section 2F1.1 authorized the court only to consider the intended loss, and not the probable loss. Although courts must consider the commentary, they are not bound by it as they are by the guidelines. Moreover, defendant put the victims at risk for the full amount of the checks. *U.S. v. Wimbish*, __ F.2d __ (5th Cir. Dec. 17, 1992) No. 92-1060.

Offense Conduct, Generally (Chapter 2)

10th Circuit affirms that loss of a partially-sighted eye was permanent or life-threatening injury. (210) Defendant was convicted of assault resulting in serious bodily injury. He received an enhancement under section 2A2.2(b)(3)(C) because the victim sustained permanent or life-threatening injury. The 10th Circuit affirmed the enhancement, despite defendant's claim that the removal of the victim's right eye did not constitute permanent or life-threatening bodily injury because the victim was blind in his right eye prior to the assault. The

district court found that the victim had some sight in that eye; he could see figures and light, and could distinguish colors. Defendant offered no support for his argument that the jury did not find the assault resulted in permanent or life-threatening bodily injury. *U.S. v. Talamante*, __ F.2d __ (10th Cir. Dec. 16, 1992) No. 92-2010.

10th Circuit finds no plain error in valuing truck when stolen rather than when VIN was altered. **(226)** Defendant was convicted of altering motor vehicle identification numbers. Guideline section 2B6.1 provides for an enhanced offense level if the retail value of the vehicle exceeded $2,000. Defendant argued for the first time on appeal that it was error to base the enhancement on the value of the truck at the time it was stolen rather than four years later when he altered the VIN, since he was not convicted of stealing the truck. The 10th Circuit rejected the argument, finding no plain error. However, the court did not preclude the possibility that in future cases, where the issue was properly raised, it would refuse to reverse where the valuation was computed at some time other than when the VIN was tampered with. *U.S. v. Herndon*, __ F.2d __ (10th Cir. Dec. 8, 1992) No. 91-7077.

10th Circuit finds guideline and statute are not vague despite failure to define "cocaine base." **(242)** The 10th Circuit held that 21 U.S.C. section 841(b)(1) and guideline section 2D1.1 are not unconstitutionally void for vagueness for failing to define the term "cocaine base." The statute and guidelines make it clear that trafficking in cocaine, no matter what the form, will result in punishment. Section 841(b)(1) is merely a penalty provision and does not change the elements of cocaine trafficking offenses. "Cocaine base" is sufficiently defined and distinguishable from other forms of cocaine to prevent arbitrary and discriminatory enforcement. As a result of their different chemical compositions, cocaine base and cocaine hydrochloride have distinct physical properties, including different melting points, solubility levels, and molecular weights. *U.S. v. Easter*, __ F.2d __ (10th Cir. Dec. 10, 1992) No. 91-6103.

10th Circuit finds harsher penalties for cocaine base do not violate equal protection. **(242)** The 10th Circuit rejected defendant's claim that the enhanced penalty scheme for offenses involving cocaine base, rather than cocaine, violates equal protection by disproportionately affecting blacks. There was no evidence that Congress or the sentencing commission adopted the more severe cocaine base penalties to further a racially discriminatory purpose. Therefore, the scheme was subject only to rational basis review, and met that standard. *U.S. v. Easter*, __ F.2d __ (10th Cir. Dec. 10, 1992) No. 91-6103.

11th Circuit upholds mandatory minimum sentence despite indictment's failure to allege drug quantity. **(245)** Defendant claimed that the statutory minimum sentence of 60 months under 21 U.S.C. section 841(b)(1)(B)(ii) for a drug offense involving over 500 grams of cocaine did not apply to her because the indictment did not allege that she was carrying 500 grams of cocaine. The 11th Circuit, relying upon *U.S. v. Cross*, 916 F.2d 622 (11th Cir. 1991), rejected this argument. The government need not allege in the indictment or prove at trial the specific amount of drugs involved in an offense in order to use that information to determine the relevant sentence under section 841(b)(1)(B). *U.S. v. Milton*, __ F.2d __ (11th Cir. Dec. 21, 1992) No. 91-5481, *withdrawing and superseding U.S. v. Milton*, 965 F.2d 1037 (11th Cir. 1992).

6th Circuit affirms use of lowest base offense where judge could not estimate quantity of drugs. **(254)** A jury convicted defendant of conspiring to distribute cocaine. After a second sentencing hearing, the district judge concluded that there was insufficient evidence presented to fairly estimate the specific quantity of cocaine attributable to defendant. Accordingly, the district court applied the lowest base offense level applicable to cocaine under the drug quantity table, a level 12. The 6th Circuit affirmed. The court was following the mandate in *U.S. v. Walton*, 908 F.2d 1289 (6th Cir. 1990) to err on the side of caution in estimating drug quantity. The district court's finding was "not only wise, it clearly did not offend any of [defendant's] rights." The government did not cross-appeal the district court's determination, and the determination was clearly reasonable in light of all of the facts before the district court. *U.S. v. Davis*, __ F.2d __ (6th Cir. Dec. 16, 1992) No. 92-3143.

8th Circuit remands for more specific determination of drug quantity. **(254)** The 8th Circuit remanded for the district court to make specific findings and to reconsider the issue of the quantity of drugs involved in a marijuana conspiracy. Contrary to defendants' assertions, drug quantity is relevant only to the sentence and is not part of the offense, and thus need not be decided by the jury. A district court's decision as to drug quantity is a finding of fact that must be ac-

cepted by the court of appeals unless clearly erroneous. Here, the district court did not provide a description of how it reached the quantity of 22,000 pounds of marijuana. Thus, the appellate court was unable to review whether the determination was clearly erroneous. *U.S. v. Alexander*, __ F.2d __ (8th Cir. Dec. 9, 1992) No. 92-1261.

2nd Circuit remands for explicit findings of ability to import amount under negotiation. (265)(765) Defendant was convicted of conspiring to import and importing heroin. He argued that he should only have been sentenced on the amount he actually imported, since the poor quality of heroin he had previously imported precluded him from importing the additional quantities under negotiation. The 2nd Circuit remanded because the district court failed to make explicit findings of fact. The court appeared to have implicitly accepted the factual findings in the PSR, but this needed to be made explicit. In light of the conflicting evidence, the court was required to make specific affirmative factual findings. *U.S. v. Maturo*, __ F.2d __ (2nd Cir. Dec. 16, 1992) No. 92-1265.

8th Circuit says attributing 210 pounds of marijuana to defendant was clearly erroneous. (265) The 8th Circuit held it was clear error to find defendant responsible for 210 pounds of marijuana. A co-defendant told an undercover agent that he knew two people who would take 250 pounds of marijuana. He then said that he and another person would take 250 pounds. At the meeting, defendant's associate purchased approximately 37 to 40 pounds of marijuana. Defendant arrived later and was arrested. The district court presumed that the remaining 210 pounds was attributable to defendant. However, another man arrived with defendant that day, and that man was also convicted of conspiracy to distribute marijuana. That man had the ability and intent to purchase hundreds of pounds of marijuana. It was apparently a "cash and carry" deal, yet defendant only had sufficient money to purchase about 10 pounds of marijuana. *U.S. v. Kook*, __ F.2d __ (8th Cir. Dec. 16, 1992) No. 92-1290.

8th Circuit finds defendant accountable for 3,000 pounds of marijuana. (265) The 8th Circuit affirmed the district court's determination that defendant was accountable for 3,000 pounds of marijuana. The evidence showed that a government agent working undercover as a marijuana supplier advised defendant that he had 3,000 pounds of marijuana to supply. Defendant responded affirmatively to the suggestion of 3,000 pounds. The agent tendered 3,000 pounds of marijuana to defendant, and defendant was arrested that same day. *U.S. v. Kook*, __ F.2d __ (8th Cir. Dec. 16, 1992) No. 92-1290.

8th Circuit affirms that two defendants could foresee large quantity of marijuana distributed. (275) The 8th Circuit affirmed that two defendants could reasonably foresee the entire quantity of drugs distributed by their marijuana conspiracy. One defendant was present when one marijuana shipment was delivered, accompanied the conspiracy's leader several times to collect payments or deliver marijuana, and received money from the purchasers. The second defendant transported large sums of money from the buyer to the conspiracy's leader, and thus could have reasonably foreseen that large quantities were delivered prior to his entry into the conspiracy. Further, he was the first defendant's step-father, and shared a residence with him. However, because the district court failed to explain its basis for holding a third defendant accountable for 5,000 pounds of marijuana, the case was remanded. *U.S. v. Alexander*, __ F.2d __ (8th Cir. Dec. 9, 1992) No. 92-1261.

1st Circuit affirms firearm enhancement based on weapon found in locked closet with heroin. (284) Police found in a locked closet outside defendant's apartment a quantity of heroin, a balance scale, a bag containing two guns and a small box of ammunition. The 1st Circuit affirmed an enhancement for possession of a firearm during a drug trafficking crime. The district court's finding that defendant was aware that the guns were in the closet was supported by evidence that the only person observed at the closet was defendant, the only key to the closet was recovered from defendant, and defendant's fingerprints were found on the scale in the closet. The weapon was readily accessible to defendant. While a nexus must be shown between the weapon and the criminal act, the defendant need not have the weapon on his person or in the immediate vicinity. Defendant's acquittal on the charge of using and carrying a firearm in relation to a drug trafficking crime was not determinative in the sentencing decision. *U.S. v. Pineda*, __ F.2d __ (1st Cir. Dec. 9, 1992) No. 92-1011.

3rd Circuit affirms loss equal to face value of cancelled checks to be used in counterfeiting scheme. (300) Defendant obtained cancelled checks of corporations and used them to order blank checks from a check printing company. He

then issued checks in fictitious names and deposited the checks into bank accounts opened under those fictitious names. He negotiated to sell cancelled checks to an undercover agent which the agent could put to the same use. At his arrest, defendant had two cancelled checks with a combined face value in excess of $1.5 million. The 3rd Circuit affirmed the use of $1.5 million as the amount of the loss under section 2F1.1. The court rejected defendant's claim that there was no "loss" because the checks had already been credited to the payees and were about to be debited to the accounts of the drawers. The purpose of the cancelled checks was not to draw on them but to use them in a counterfeiting scheme which could easily have led to a loss in the neighborhood of the amount of the cancelled checks themselves. *U.S. v. Holloman*, __ F.2d __ (3rd Cir. Dec. 8, 1992) No. 92-1429.

5th Circuit relies on auto dealer's guide to determine value of cars sold. (300((348) Defendant was convicted of odometer tampering. Section 2N3.1(b)(1) refers sentencing courts to the fraud guideline when the offense involves more than one car. Note 7 to section 2F1.1 provides that in cases involving misrepresentation of the quality of a consumer product, loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received. The National Automobile Dealers Association (NADA) guide stated that the reduction of value for high mileage should not exceed 40 percent of a car's value. The 5th Circuit affirmed the district court's use of the 40 percent loss of value figure from the NADA guide to determine loss. The court determined that the average purchase price of a car sold by defendant was $10,000, and arrived at a loss of $4,000 per car. *U.S. v. Whitlow*, __ F.2d __ (5th Cir. Nov. 17, 1992) No. 92-2144.

Supreme Court will decide whether multiple enhancements apply to multiple gun convictions in single indictment. (330) Title 18 U.S.C. section 924(c) provides for a five-year enhancement for use of a firearm in a crime of violence, and adds "in the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years." The Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh circuits have held that a "second or subsequent conviction" can result from the same indictment as the first conviction under section 924(c). *See* cases collected in *U.S. v. Deal*, 954 F.2d 262 (5th Cir. 1992) and *U.S. v. Neal*, 976 F.2d 601 (9th Cir. 1992). Only the Tenth Circuit has reached a contrary conclusion. *See U.S. v. Abreu*, 962 F.2d 1447 (10th Cir. 1992) (en banc). On October 5, 1992, the Supreme Court granted certiorari in the 5th Circuit's *Deal* case, to resolve the conflict. *U.S. v. Deal*, __ U.S. __, 113 S.Ct. 53 (1992) (*granting certiorari*).

3rd Circuit includes tax loss from defendants' employees in loss caused by tax fraud. (370) Defendants argued that the court erred in computing their sentences based upon the tax loss attributable to the employees of their companies rather than using losses attributable to the defendants individually. The 3rd Circuit affirmed, concluding that the tax fraud conspiracy alleged in the indictment was clearly intended to encompass the tax losses attributable to the employees of the defendants' companies as well as the losses from the defendants' own personal tax evasion. Defendants' cash skimming scheme defrauded the IRS out of the taxes owned by those employees receiving cash, as well as taxes owed by the defendants. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

Adjustments (Chapter 3)

3rd Circuit agrees that elderly homeowners were vulnerable victims of roof repair scam. (410) Defendants pled guilty to various counts of consumer fraud, bribery, conspiracy and tax evasion resulting from their operation of a roofing business. The 3rd Circuit affirmed a vulnerable victim enhancement under section 3A1.1 based on the age of the homeowners defrauded. The consumer fraud scheme depended in many instances on the inability of elderly homeowners to verify the need to repair or replace roofs. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

5th Circuit says unsworn assertion that there was no leader did not constitute objection. (431)(855) The 5th Circuit affirmed a leadership enhancement based upon defendant's role in an odometer-tampering scheme. First, he objected to the enhancement only at the sentencing hearing, based solely upon his attorney's assertion that there was no leader and that everyone voluntarily participated in the scheme. The court would not consider objections in the form of unsworn assertions. Moreover, the record supported the enhancement. Defendant's contention that the court should have limited itself to consideration of the falsification of car titles charges was unavailing. All of defendant's conduct was part of one

odometer-tampering scheme. Defendant directed the activities of at least nine other individuals, including buyers, "spinners," and secretaries. *U.S. v. Whitlow*, __ F.2d __ (5th Cir. Nov. 17, 1992) No. 92-2144.

8th Circuit affirms that defendant was a leader in marijuana conspiracy. (431) The 8th Circuit affirmed that defendant held a leadership role in a marijuana distribution conspiracy. More than five individuals were involved in the conspiracy, and they served as subordinates to defendants. Two participants identified defendant as their boss. Four others worked as drivers for defendants. Defendant's wife and another man both collected payments for defendant. That man also lived in a house purchased by defendant to serve as a transfer point for shipments. Defendant established the price his buyer paid for marijuana. *U.S. v. Alexander*, __ F.2d __ (8th Cir. Dec. 9, 1992) No. 92-1261.

8th Circuit holds that teller supervisor abused a private position of trust. (450) Defendant, a teller supervisor, used her key to a reserve drawer not assigned to a permanent employee to take $11,821. The 8th Circuit affirmed an enhancement for abuse of a position of private trust under section 3B1.3. Defendant was more than an ordinary teller; she was employed to monitor other tellers. The bank trusted her to review the daily reports, to conduct regular audits, to assign the teller drawers, and to safeguard the keys to the idle teller drawers. She used her position to facilitate and conceal the offense. She falsified her reports by omitting the shortages in the drawer and ensured that the drawer was not assigned to a teller who might discover that funds were missing. *U.S. v. Brelsford*, __ F.2d __ (8th Cir. Dec. 10, 1992) No. 92-2330.

1st Circuit upholds obstruction enhancement based on failure to acknowledge prior arrest. (461) After conviction, when asked by the probation officer, defendant denied that he had ever been arrested in this or any other country. Later, a fingerprint match established that defendant had been arrested a few months earlier in New York on a firearms charge. The 1st Circuit affirmed an enhancement for obstruction of justice. Section 3C1.1 includes attempts to obstruct justice as well as actual obstruction. The probation officer was only successful in discovering the prior arrest because he chose to run a fingerprint check on the defendant. Defendant's denial of his prior arrest was material under the guidelines. He was awaiting trial in New York at the time he committed the instant offense, and this could have been grounds for an upward departure under section 4A1.3(d). *U.S. v. Pineda*, __ F.2d __ (1st Cir. Dec. 9, 1992) No. 92-1011.

5th Circuit says findings were adequate to support obstruction enhancement. (461)(765) The 5th Circuit held that the district court made adequate factual and legal findings supporting an enhancement for obstruction of justice. Defendant contended that he was not involved in a shooting incident against a witness, and also contended, in an unsworn assertion, that he never threatened another witness. After hearing counsel's assertions regarding the shooting incident, the district court specifically found that a preponderance of the evidence showed that defendant was involved in the incident. The court also implicitly found that defendant threatened the second witness. Even if the court made no findings regarding the threats, defendant's objection, based upon bare assertions that he did not threaten the witness, need not have been considered. *U.S. v. Whitlow*, __ F.2d __ (5th Cir. Nov. 17, 1992) No. 92-2144.

6th Circuit reverses obstruction enhancement for failure to find defendant's testimony untruthful. (462) Defendant's testimony at trial contradicted prosecution witnesses, and defendant received an enhancement for obstruction of justice. The 6th Circuit held that the district court erred in enhancing the sentence without expressly finding that defendant testified untruthfully. A defendant may not be found to have obstructed justice merely because he or she testifies at trial and the jury returns a guilty verdict. However, appellate courts have upheld obstruction enhancements where the district court makes a specific finding that a defendant lied. This specific finding need not be as detailed as "reasoned statements" justifying departures from the guidelines. But it must be a clear finding that a defendant has lied with respect to testimony given under oath. *U.S. v. Burnette*, __ F.2d __ (6th Cir. Dec. 10, 1992) No. 91-6484.

3rd Circuit affirms separate grouping for mail fraud, bribery and tax evasion charges. (470) Defendants pled guilty to various counts of consumer fraud, bribery, conspiracy and tax evasion resulting from their operation of a roofing business. The 3rd Circuit affirmed the district court's decision to group the counts according to three principal offenses: mail fraud, bribery and tax evasion. The three groups involved different victims (the mail fraud involved homeowners, the bribery involved the union, and the tax evasion involved the

government), so that grouping under either subsection (a) or (b) of section 3D1.2 would have been improper. Although all of the counts were listed in subsection (d) as appropriate for grouping, that did not mean the counts must be grouped. Counts must be of the same general type before grouping is appropriate. Here, each of the groups differed in nature and were not an essential part of or related to the other groups. *U.S. v. Seligsohn,* __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

1st Circuit denies acceptance of responsibility reduction to defendant who went to trial. (490) The 1st Circuit affirmed the district court's denial of a reduction for acceptance of responsibility to a defendant who went to trial. This was not one of the "rare" instances where the defendant may assert his right to trial and also claim acceptance of responsibility. Although defendant acknowledged the presence of heroin in a locked closet, he did so only after being informed that a warrant would soon issue to search the closet. He did not inform the officers of the money secreted in his apartment. *U.S. v. Pineda,* __ F.2d __ (1st Cir. Dec. 9, 1992) No. 92-1011.

8th Circuit denies acceptance of responsibility reduction to defendant who pled guilty. (490) The 8th Circuit affirmed a denial of an acceptance of responsibility reduction despite defendant's guilty plea. Neither the 1991 nor the November 1992 version of section 3E1.1 requires a reduction whenever a defendant admits the elements of the offense. Under both versions, a defendant who enters a guilty plea is not entitled to an adjustment as a matter of right. Here, the district court stated that defendant was not sincere in accepting responsibility for his crime. His attitude was that of having been caught on a technicality and not that he "did wrong." The probation officer noted that defendant did not give any believable indication that he had accepted responsibility for his offense. *U.S. v. Lublin,* __ F.2d __ (8th Cir. Dec. 11, 1992) No. 92-2453.

Criminal History (§4A)

8th Circuit says stolen auto and firearms offenses were not part of common scheme. (504) Defendant had a prior conviction in federal court for unlawfully transporting 14 handguns which he purchased in southeastern states and transported to New York. He also had a prior New York state conviction for possession of a stolen automobile. He argued that because he stole the automobile to transport the handguns, the crimes were related under section 4A1.2(a)(2) for criminal history purposes. The 8th Circuit rejected the argument, ruling that the two convictions were not part of a common scheme, even if defendant stole the auto to transport the handguns. In addition to stealing the car, defendant changed the vehicle identification number and registration transfer stub, and then sold the car. The state and federal offenses occurred on different dates, were factually distinct, and the guns and car were sold to different people. *U.S. v. Lublin,* __ F.2d __ (8th Cir. Dec. 11, 1992) No. 92-2453.

4th Circuit upholds use of invalid conviction to depart to career offender level. (508)(520) The 4th Circuit outlined three approaches to take if the defendant's criminal history score of VI is inadequate, or if he would be sentenced as a career offender but for the constitutional invalidity of a predicate offense. First, a court may exercise its discretion not to depart. Second, a court may determine the extent of a departure by extrapolating from the existing sentencing table. Third, if the defendant's criminal conduct is sufficiently serious to conclude that he should be treated as a career offender, the court may depart directly to the career offender guideline. When this last approach is used, there is an implicit finding that each successive criminal history category inadequately represents the seriousness of defendant's conduct. Here, defendant had 39 criminal history points, triple the minimum necessary for category VI. He did not dispute that he committed the criminal conduct underlying the constitutionally invalid conviction. The departure to career offender level was proper. *U.S. v. Cash,* __ F.2d __ (4th Cir. Dec. 14, 1992) No. 91-5869.

5th Circuit affirms criminal history departure in addition to 924(e) gun enhancement. (510) Defendant was convicted of being a felon in possession of a firearm, and was subject to a minimum 15-year sentence for three prior violent felony convictions. The district court departed upward by 10 years and sentenced him to 25 years based on his criminal history. The 5th Circuit agreed that criminal history category VI did not adequately reflect the seriousness of defendant's past conduct. Defendant received no criminal history points for three prior felony convictions because the sentences were consolidated. Moreover, defendant's 24 criminal history points were almost double the 13 points necessary to place him in category VI. The extent of the departure, while large, was significantly less than many other

departures affirmed by the appellate courts and the 25-year sentence fell well within section 924(e)'s maximum penalty of life imprisonment. *U.S. v. Doucette*, __ F.2d __ (5th Cir. Dec. 9, 1992) No. 91-4994.

1st Circuit rules that commercial burglary was a crime of violence. (520) The 1st Circuit affirmed that defendant's prior conviction for conspiracy to break and enter a commercial structure qualified as a crime of violence for career offender purposes. Notes 1 and 2 to the November 1991 version of section 4B1.2 indicate that conspiracy to commit a predicate offense is itself a predicate offense. There was no cogent reason to reject the Commission's view. Even though commercial burglaries are not expressly listed in section 4B1.2(1)(ii), it still constitutes a crime of violence. A crime of violence includes any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Burglary of a commercial dwelling "poses a potential for episodic violence so substantial as to bring such burglaries within the violent felony/crime of violence ambit." *U.S. v. Flore*, __ F.2d __ (1st Cir. Dec. 9, 1992) No. 92-1601.

Determining the Sentence (Chapter 5)

5th Circuit affirms prohibition against employment in used-car industry for odometer tamperer. (580) Defendant was convicted of odometer tampering. The 5th Circuit affirmed a prohibition against employment in the used-car industry as a condition of defendant's supervised release. *U.S. v. Whitlow*, __ F.2d __ (5th Cir. Nov. 17, 1992) No. 92-2144.

3rd Circuit remands for restitution to be recalculated based on loss from counts of conviction. (610) Defendants pled guilty to various counts of consumer fraud, bribery, conspiracy and tax evasion resulting from their operation of a roofing business. The 3rd Circuit remanded for re-calculation of restitution based upon *Hughey v. U.S.*, 495 U.S. 411 (1990). The court must make findings as to (1) the amount of loss actually sustained by the victim, (2), how the loss is connected to the offense of conviction, and (3) the defendant's financial needs and resources. Although it was proper to weigh the loss caused by the entire scheme when calculating defendants' terms of imprisonment, *Hughey* does not allow a court to use that sum as a basis for restitution. The court must designate recipients of the restitution. Although a court may properly direct that payments be made to the U.S. Attorney, unguided discretion to determine who are "victims" may not be entrusted to either the U.S. Attorney or the Probation Office. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

10th Circuit reverses restitution order as contrary to *Hughey*. (610) Defendant was convicted of altering and removing motor vehicle identification numbers. The district court ordered defendant to pay restitution based on the loss suffered by the victims as a result of the theft of the truck. The 10th Circuit reversed, ruling that the restitution order violated *Hughey v. U.S.*, 495 U.S. 411 (1990). *Hughey* requires a restitution order under the VWPA to be based only on the loss caused by the conduct that formed the basis of the conviction, in this case the alteration of the stolen truck's VIN. The government bears the burden of demonstrating that a defendant's conduct resulted in a loss that would not have otherwise occurred. Here, the government offered no evidence that the alteration of the VINs caused the loss of the full value of the truck. The damage suffered by the victims here could have occurred regardless of whether defendant altered the truck's VIN. *U.S. v. Herndon*, __ F.2d __ (10th Cir. Dec. 8, 1992) No. 91-7077.

9th Circuit upholds restitution order based on conduct constituting the offense of conviction. (620) Defendant pled guilty to one count of making false claims for tax refunds and one count of mail fraud based on his submission of tax returns for dead people and receipt of money at fictitious mail box addresses. In ordering restitution on the mail fraud count, the district court calculated the sum of all fraudulent tax returns sent to defendant via the mailbox that was the subject of that count, even though 5 of the 17 checks were the subject of other substantive counts. The restitution order was proper. The plea agreement made defendant aware of the potential for restitution, the IRS was a victim of the offense within the meaning of the Victim Witness Protection Act and all 17 checks were within the conduct constituting the court of conviction. In the Ninth Circuit, inability of a defendant to pay a restitution award is not a bar to imposing restitution because the defendant's future financial status could change. *U. S. v. Jackson*, __ F.2d __ (9th Cir. Dec. 14, 1992), No. 91-50822.

1st Circuit vacates costs of supervised release fine for indigent defendant. (630) The trial court

did not declare defendant indigent, but declined to impose a punitive fine on defendant due to his inability to pay. However, the court did impose a fine to pay for the costs of supervised release. The 1st Circuit vacated the fine in light of the trial court's determination that defendant could not afford to pay a punitive fine. The costs of supervised release constitute an additional fine under section 5E1.2(a) which cannot be imposed where defendant has been found exempt from a punitive fine because of an inability to pay it. *U.S. v. Pineda*, __ F.2d __ (1st Cir. Dec. 9, 1992) No. 92-1011.

5th Circuit holds that defendant may rely on PSR to show inability to pay fine. (630) The district court adopted the facts in defendant's PSR, which concluded that defendant did not have any realistic ability to pay a fine. Nonetheless, the court imposed a $20,000 fine to cover the cost of incarceration. The 5th Circuit held that if a court adopts a PSR's findings, but then decides to depart, specific findings are necessary. A defendant may rely on his PSR to establish his inability to pay a fine or the cost of incarceration. Moreover, it was a misapplication of the guideline to impose a cost of incarceration fine absent the imposition of a section 5E1.2(a) punitive fine. *U.S. v. Fair*, __ F.2d __ (5th Cir. Dec. 9, 1992) No. 92-2098.

5th Circuit holds that sentences should have been concurrent. (650)(855) Defendant committed two crimes in Texas and then travelled to Chicago to commit another crime. He was sentenced in Chicago federal court to a 110-month term for the Chicago crime. He then pled guilty in Texas federal court to the Texas crimes and his sentences were ordered to run consecutively. The 5th Circuit held that under the November 1991 version of guideline section 5G1.3, the Texas federal court should have sentenced defendant so that his sentence would "result in a combined sentence equal to the total punishment that would have been imposed under section 5G1.2 had all the sentences been imposed at the same time." Defendant was erroneously sentenced under the prior version of section 5G1.3, which gave a court discretion to order consecutive sentences. Although defendant did not raise this issue below, the district court's incorrect application of the guidelines amounted to plain error. *U.S. v. Gross*, __ F.2d __ (5th Cir. Dec. 9, 1992) No. 91-7364.

8th Circuit holds that federal sentence should have been concurrent to state sentence. (650) Defendant was sentenced in state court to 120 months, of which he would actually serve 78 months. He was then sentenced in federal court for sexual abuse to 121 months, consecutive to his state sentence. The 8th Circuit held that under sections 5G1.3(c) and 5G1.2(c), a concurrent federal sentence should have been ordered. Application note 4 to section 5G1.3 requires that the combined sentence approximate the total punishment that would have been imposed if all the offenses had been prosecuted federally at the same time. Defendant's sentencing range if all the offenses had been prosecuted together would have been 121 to 151 months. His combined state and federal sentences was 199 months. In remanding for resentencing, the court noted that a court may depart under section 3584(a) from the range in section 5G1.3(c) when sufficient justification exists. *U.S. v. Gullickson*, __ F.2d __ (8th Cir. Dec. 8, 1992) No. 92-1398.

3rd Circuit remands to reconsider departure based on disparity and age of 62-year old defendant. (670)(716)(736) Defendant was 62-years old, but was not alleged to be in poor physical health. The district court departed downward from 168 months to a sentence of 150 months because of defendant's age, and to reduce disparity with co-defendants' sentences. The 3rd Circuit remanded for reconsideration of the departure. Departures based on age are permitted when the defendants are elderly and infirm and home confinement is equally efficient and less costly. But appropriate findings to support a downward departure on this ground alone were not made. Under *U.S. v. Higgins*, 967 F.2d 841 (3rd Cir. 1992), sentence disparity among co-defendants is not a sufficient basis for departure. However, because it was unclear from the record whether there were unusual circumstances that would constitute an exception to the *Higgins* rule, the case was remanded for reconsideration. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

Departures (§5K)

8th Circuit affirms lack of discretion to make substantial assistance departure under section 5K2.0. (712)(715) Defendant argued that the government refused his offer to cooperate in exchange for a motion for a substantial assistance departure under section 5K1.1. At sentencing, he moved under section 5K2.0 for a departure on the ground that his willingness to cooperate was not adequately rewarded by a section 3E1.1 reduction for acceptance of responsibility. The 8th Circuit

affirmed that the district court lacked authority to depart downward without a government 5K1.1 motion. Although a district court has authority to depart under section 5K2.0 for extraordinary restitution not addressed by section 3E1.1, this does not apply to a claim of substantial assistance or cooperation. Cooperation with the prosecutors simply cannot be sufficiently extraordinary to warrant a departure under section 5K2.0 absent a government motion under section 5K1.1. *U.S. v. Aslakson*, __ F.2d __ (8th Cir. Dec. 18, 1992) No. 92-1891.

10th Circuit upholds government motion requirement for substantial assistance departure. (712)(855) The 10th Circuit rejected defendant's claim that the district court should have been permitted to consider his assistance to the government notwithstanding the government's failure to move for a downward departure under section 5K1.1. Defendant waived his claim that the government improperly denied the motion based on defendant's exercise of his constitutional right to a jury trial. This fact-dependent issue should have been raised below. Judge Seymour dissented. *U.S. v. Easter*, __ F.2d __ (10th Cir. Dec. 10, 1992) No. 91-6103.

D.C. Circuit rejects disparity among co-defendants as basis for downward departure. (716) The D.C. Circuit affirmed the district court's determination that it lacked authority to depart downward based upon significant disparity between defendant's sentence and others arrested with him. The very purpose of the guidelines was to eliminate disparity in the sentences of similarly situated defendant. The guidelines attempt to achieve uniform sentences across the nation, not within a particular criminal transaction. *U.S. v. Williams*, __ F.2d __ (D.C. Cir. Dec. 15, 1992) No. 91-3164.

1st Circuit affirms upward departure where gun used to shoot victim was "relevant conduct." (718)(721) Defendant's girlfriend was shot in the head. A search of defendant's apartment uncovered three firearms. He was convicted of being a felon in possession of a firearm. There was no evidence that any of those firearms were used in the shooting. Nonetheless, there was significant evidence that defendant committed the shooting and the district court departed upward under section 5K2.2 based upon the significant physical injury to the victim. The 1st Circuit affirmed the upward departure based on the uncharged relevant conduct. Even if the weapon which wounded defendant's girlfriend was not one of those listed in the indictment, defendant's possession of it was relevant conduct. The illegal possession of four separate firearms could easily be viewed as part of the same course of conduct under section 1B1.3. The 38-month departure, in view of the victim's permanent vegetative state, was not unreasonable. *U.S. v. Sanders*, __ F.2d __ (1st Cir. Dec. 18, 1992) No. 92-1940.

Sentencing Hearing (86A)

7th Circuit finds judge did not come to sentencing hearing with closed mind as to disputed factors. (750) Defendant argued that the district judge came to the sentencing hearing with an inflexible attitude as to disputed factors, in violation of defendant's due process right to challenge the disputed factors at sentencing. The 7th Circuit affirmed, finding that although the judge expressed some strong feelings at the beginning of the sentencing hearing, the record as a whole reflected only his opinion that the evidence of defendant's guilt presented at trial was overwhelming. The judge heard arguments from counsel and testimony from defendant, and gave satisfactory reasons for his rulings. *U.S. v. Pless*, __ F.2d __ (7th Cir. Dec. 18, 1992) No. 91-3419.

7th Circuit confirms that judge is not required to make tentative findings. (750) The 7th Circuit rejected defendant's claim that guideline section 6A1.3 and Local Order P9 required the district judge to provide him with tentative findings as to disputed factors before the sentencing hearing took place. Section 6A1.3 requires only that the court present a defendant with the opportunity to address factual issues before the court decides on and pronounces the sentence. *U.S. v. Pless*, __ F.2d __ (7th Cir. Dec. 18, 1992) No. 91-3419.

7th Circuit upholds denial of four writs of habeas corpus ad testificandum. (750) The 7th Circuit held that the denial of four writs of habeas corpus ad testificandum presented on the eve of sentencing did not violate due process or Fed. R. Crim. P. 32(c)(3)(A). Two of the witnesses were expected to deny that defendant had made threats in an elevator of the jail. However, the judge said the threats would not be considered at sentencing. A third witness was to testify as to defendant's role in the offense. But the judge properly ruled that the evidence at trial was sufficient to determine defendant's role. As for the fourth witness, it was reasonable to reject him as a witness about defendant's solicitation of the murder of a witness.

Defendant gave no indication as to the manner in which the witness would counter the overwhelming evidence that defendant had obstructed justice by soliciting the murder of witnesses. *U.S. v. Pless*, __ F.2d __ (7th Cir. Dec. 18, 1992) No. 91-3419.

3rd Circuit rejects challenge to standard of proof where defendants destroyed pertinent data. (755) Defendants argued that because of the large increase in sentence triggered by the large amount of loss, the clear and convincing standard of *U.S. v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990) should have been applied rather than the preponderance of the evidence standard. The 3rd Circuit rejected the argument. Much of the difficulty in determining the loss in the fraud and tax counts was caused by defendants' mass destruction of company records. It was "poor grace" for the defendants to assert a lack of convincing evidence. The government submitted extremely detailed affidavits from Department of Labor and IRS agents describing information from many witnesses and an analysis of the remaining records of the company. Defense counsel chose not to cross-examine the agents, preferring instead to submit counter-affidavits. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

1st Circuit finds defendant and counsel were familiar with presentence report. (760) The 1st Circuit rejected defendant's argument that Fed. R. Crim. P. 32(a)(1)(A) required the district court to inquire at sentencing whether defendant had read the PSR and discussed it with counsel. Under Circuit precedent, a new sentencing hearing will not be required as long as it is clear from the record that the defendant and defense counsel were familiar with the report. In the addendum to the report, the probation officer certified that the report had been disclosed to defense counsel. Defense counsel's statements at sentencing related to the drug quantity calculations in the report. Prior to sentencing, defense counsel filed written opposition to the report. Since the record well established that defense counsel was intimately familiar with the PSR, the appellate court would not assume that counsel did not discuss "so critically important a document" with his client. *U.S. v. Cruz*, __ F.2d __ (1st Cir. Dec. 18, 1992) No. 92-1047.

1st Circuit holds that late receipt of presentence report was harmless. (760) Defendant received his presentence report less than three weeks prior to sentencing, even though Local Order P3 required the report to be disclosed to the defendant at least 30 days prior to sentencing. The 1st Circuit held that the late receipt of the presentence report was harmless error. Defendant failed to show that he was prejudiced in any way by the 11-day deficit. He submitted his objections to the presentence report to the prosecution and the court, and the district judge addressed all of defendant's objections at the sentencing hearing. Defendant made no proffer of any evidence that he could have procured or developed in the extra time that might have arguably made a difference in sentencing. *U.S. v. Pless*, __ F.2d __ (7th Cir. Dec. 18, 1992) No. 91-3419.

1st Circuit finds court resolved drug quantity dispute but failed to attach findings to PSR. (765) The 1st Circuit ruled that the district court resolved defendant's contention that he was not responsible for certain quantities of heroin seized from a co-conspirator's residence. The court implicitly adopted the total adjusted offense level proposed in the PSR, except for the two level adjustment for obstruction of justice. The court's 63-month sentence constituted a rejection of defendant's contention that he should not be held responsible for more than 26.4 grams of heroin, and a rejection of the government's argument that defendant was responsible for 100 or more grams of heroin. However, although the district court implicitly resolved the drug quantity dispute, it did not attach a written record of its findings to the presentence report as required by Rule 32(c)(3)(D). The case was remanded with instructions to attach to the presentence report a written record of the court's findings as to heroin quantity. *U.S. v. Cruz*, __ F.2d __ (1st Cir. Dec. 18, 1992) No. 92-1047.

7th Circuit remands for limited purpose of attaching written findings as to contested factors. (765) The 7th Circuit rejected defendant's claim that the district court failed to make a finding on his entrapment defense to the obstruction enhancement, as required by Fed. R. Crim. P. 32(c)(3)(D). The judge allowed defendant to testify on that precise issue at the sentencing hearing, and found that defendant had perjured himself in that testimony, thus indicating he did not believe defendant's entrapment defense. However, merely attaching an addendum to the presentence report with the defendant's objections did not satisfy Rule 32. A limited remand was necessary only to permit the attachment of the judge's written determination of the disputed factors to the presentence report. *U.S. v. Pless*, __ F.2d __ (7th Cir. Dec. 18, 1992) No. 91-3419.

8th Circuit affirms where late written findings complied with Rule 32. (765) The district court did not make the required finding as to the quantity of marijuana as required by Fed. R. Crim. P. 32(c)(3)(D). The court stated that a specific finding was unnecessary, but indicated that final findings would be written and attached to the p
resentence report. The court then filed written findings of fact, concluding that defendant was responsible for 3,000 pounds of marijuana. The 8th Circuit affirmed, finding that although the initial oral statements were not sufficient to satisfy Rule 32, the subsequent written findings of fact with regard to quantity did comply with the rule. Although the judgment was entered five days before the written findings of fact were filed, returning the case to the district court for the entry of fact-findings already made "would be a needless triumph of form over substance." *U.S. v. Kook*, __ F.2d __ (8th Cir. Dec. 16, 1992) No. 92-1290.

8th Circuit concludes that court did not rely on hearsay to determine drug quantity. (770) The 8th Circuit rejected defendant's argument that the district court erroneously relied on hearsay in determining the quantity of marijuana. The district court based its quantity determinations on testimony from the specific recollection of witnesses who were subject to cross-examination. The witnesses testified on the basis of first-hand observation, personal recollection and in one case from written records. One witness testified that he was present when loads had been weighed, and another testified that he was paid based on the weight he transported. *U.S. v. Alexander*, __ F.2d __ (8th Cir. Dec. 9, 1992) No. 92-1261.

1st Circuit says findings met requirements of 18 U.S.C. section 3553(c). (775) The 1st Circuit affirmed that the district court's findings met the minimum requirements of 18 U.S.C. section 3553(c) "by the narrowest margin." Since the sentencing transcript clearly reflected that the court and the parties focused primary attention on the presentence report, the appellate court was able to determine that the minimum requirements of section 3553(c) were met. *U.S. v. Cruz*, __ F.2d __ (1st Cir. Dec. 18, 1992) No. 92-1047.

Plea Agreements, Generally (86B)

3rd Circuit rules that defendant's continued criminality relieved government of obligation to move for downward departure. (790) The 3rd Circuit rejected defendant's claim that the government's failure to move for a downward departure was a breach of his plea agreement. Defendant concealed his criminal conduct that occurred after he signed the plea agreement and affirmatively lied to the government. Contrary to defendant's assertions, the plea agreement obligated defendant to disclose "any crime about which he [had] knowledge," not simply those of his co-defendants. His promise to cooperate with the government was inconsistent with his continuing involvement in criminal conduct. His conduct relieved the government of its obligation under the plea agreement to move for a downward departure. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

3rd Circuit reverses failure to use loss amount stipulated by parties in plea agreement. (795) The district court adopted the presentence report's conclusion that the losses caused by defendant's consumer fraud scheme exceeded $20 million. The 3rd Circuit held that it was error for the district court to overlook the parties' stipulation, which the court accepted, that the amount of consumer fraud was between $10 million and $20 million. *U.S. v. Seligsohn*, __ F.2d __ (3rd Cir. Dec. 9, 1992) No. 91-2083.

10th Circuit holds that acceptance of forfeiture stipulation did not violate Fed. R. Crim. P. 11. (795)(900) At the district court's suggestion, defendant agreed to stipulate to forfeiture of certain items if the jury returned guilty verdicts on certain counts. On appeal, defendant argued for the first time that the court violated Fed. R. Crim. P. 11 by failing to address him directly before accepting the stipulation to ensure that he understood the nature of the accusation, that the stipulation was entered into voluntarily, and that there was a factual basis for the forfeiture. The 10th Circuit found no plain error or violation of due process. The stipulation was not a guilty plea. This was a case where both parties gambled on the outcome of the trial and defendant lost. Moreover, the district court took great care to ensure that defendant, through his trial counsel, understood the nature of the stipulation. Defendant was present in court and represented by counsel during all of the discussions surrounding the stipulation. *U.S. v. Herndon*, __ F.2d __ (10th Cir. Dec. 8, 1992) No. 91-7077.

Violations of Probation and Supervised Release (Chapter 7)

2nd Circuit says "standard conditions" required defendant to regularly meet with probation officer. (800) The magistrate imposed, as a condition of defendant's supervised release, "the standard conditions that have been adopted by this court." The 2nd Circuit affirmed that this included the requirement that defendant meet regularly with his probation officer. This condition was on the list prepared for probation purposes. The Sentencing Reform Act did eliminate standard conditions, replacing them with mandatory and discretionary conditions. Regular meetings with a probation officer are not mandatory but are discretionary. The court rejected defendant's contention that a discretionary condition could not be imposed without an explicit determination that such condition met the requirements of 18 U.S.C. section 3583(d). Here, the magistrate stressed his sense that defendant was not functioning well without supervision. *U.S. v. Smith*, __ F.2d __ (2nd Cir. Dec. 11, 1992) No. 92-1223.

2nd Circuit says no indictment is required before revoking supervised release. (800) Defendant was convicted of a misdemeanor and sentenced to one year in jail and one year of supervised release. Later, his supervised release was revoked and he was sentenced to six months. He argued that the district court had no jurisdiction to impose a jail sentence since he was never indicted for the misdemeanor, yet would serve a total of 18 months in jail. He argued that this violated the indictment clause of the 5th Amendment and Fed. R. Crim. P. 7(a). The 2nd Circuit rejected the argument. Defendant was not sentenced to more than a year's imprisonment for the misdemeanor. The six month sentence for violating the court's order enforcing the conditions of supervised release was a punishment separate from the original sentence, and neither punishment required indictment under the 5th Amendment or Rule 7(a). *U.S. v. Smith*, __ F.2d __ (2nd Cir. Dec. 11, 1992) No. 92-1223.

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

8th Circuit refuses to consider in habeas action challenge not brought on direct appeal. (880) The 8th Circuit affirmed the district court dismissal of defendant's 28 U.S.C. section 2255 motion to vacate his sentence. The claim that he was entitled to a decrease in offense level under section 2K2.1(b)(1) could have been raised on direct appeal and was not. *Schneider v. U.S.*, __ F.2d __ (8th Cir. Dec. 17, 1992) No. 92-2577.

Forfeiture Cases

Supreme Court holds that depositing *res* into U.S. treasury did not defeat appellate jurisdiction. (905) Rejecting the bank's innocent owner defense, the district court ordered the proceeds from the sale of the residence to be forfeited to the United States. *U.S. v. One Single Family Residence*, 731 F.Supp. 1563 (S.D. Fla. 1990). The bank filed a timely notice of appeal, but did not deposit a supersedeas bond or seek to stay execution of the judgment, so the U.S. Marshal transferred the proceeds of the sale into the Asset Forfeiture Fund of the U.S. Treasury. The government then moved to dismiss the appeal for lack of jurisdiction over the *res*. The Supreme Court rejected the government's argument, holding that the rule on which the government relied -- that jurisdiction depends upon continued control of the *res* -- "does not exist." A majority of the Court also found it unnecessary to decide whether the "appropriations clause" made recovery of the *res* dependent on an act of Congress, ruling that 31 U.S.C. section 1304 and 28 U.S.C. section 2465 would authorize the return of funds in this case in any event. *Republic National Bank of Miami v. U.S.*, __ U.S. __, 113 S.Ct. __ (Dec. 14, 1992) No. 91-767.

8th Circuit upholds default judgment where claimant failed to satisfy Supplemental Rule C(6). (920) Claimant filed a timely claim but did not file an answer until well after the deadline established in Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims. The 8th Circuit affirmed the district court's refusal to consider the claim as sufficient, by itself, to satisfy Rule C(6). Strict compliance with the Rule requires both a claim and an answer. There was no error in denying leave to file a late answer, since claimant did not show excusable neglect. Claimant was a licensed attorney and was not ignorant of the procedural requirements. Moreover, at least three documents outlined the requirements of Rule C(6). Claimant also offered no good reason why the district court should have granted him additional time to respond to the government's motion to strike the claim. The fact that the motion was inadvertently filed directly with the judge rather than through the clerk's office made no practical difference to claimant. *U.S. v. Ford 250 Pickup*

1990, VIN #1FTHX26M1LKA69552, __ F.2d __ (8th Cir. Dec. 8, 1992) No. 92-2228.

Opinion Withdrawn

(245)(865) *U.S. v. Milton*, 965 F.2d 1037 (11th Cir. 1992) *withdrawn and superseded*, __ F.2d __ (11th Cir. Dec. 21, 1992) No. 91-5481.

Amended Opinion

(712) *U.S. v. Delgado-Cardenas*, __ F.2d __ (9th Cir. September 3, 1992), *amended*, __ F.2d __, (9th Cir. Dec. 14, 1992), No. 91-50253.

Topic Numbers In This Issue

110, 125, 131, 132, 140, 150, 160, 180,
210, 220, 224, 226, 242, 245, 254, 265, 275, 284,
300, 330, 348, 370,
410, 431, 431, 450, 461, 461, 462, 470, 490,
500, 504, 508, 520, 510, 520, 580,
610, 620, 630, 630, 650, 670,
716, 712, 715, 716, 718, 721, 736,
750, 755, 760, 765, 770, 775, 790, 795,
800, 880, 855, 900, 905, 920

TABLE OF CASES

U.S. Department of Justice
Executive Office for U.S. Attorneys
Office of Legal Education

Nomination Form

EXHIBIT C

Legal Education Institute
601 D Street, N.W.
Room 10332
Washington, D.C. 20530

(202) 501-7467
FTS 241-7467
FAX (202) 501-7334
FTS FAX 241-7334

(Please Type)

COURSE

Course Name	Course Date(s)	Course Location

NOMINATOR

Name	Title	
Phone Number	**Number of Nominees Submitted:**	**Order of Preference of this Nominee:**

NOMINEE

Name	Title	
Office, Agency or Department Name		**Phone Number**

QUESTIONNAIRE

1. Has the nominee applied for this course in the past and not been selected?

   Yes No (please circle) If yes, how many times?

2. What percentage of nominee's work involves the subject(s) of the course?

3. Indicate the level of skill or knowledge nominee has in this area:

   Novice Intermediate Advanced (please circle)

4. How many years has the nominee worked in this area?

5. What training has the nominee had in this area?

6. If necessary, please indicate any special considerations:

ADDRESS

Return mailing Address: Must be Typed and fit into box

LEI USE ONLY	
ACCEPTED	**NOT SELECTED**