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COMMENDATIONS

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

Mark E. Aspey (District of Arizona), by Derle Rudd, Regional Inspector, Internal Revenue Service, Dallas, for his valuable assistance and cooperation in the successful prosecution of an IRS Special Agent for fraud and false statements.

Lee B. Altschuler and ***Anna Matheson*** (California, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for their outstanding success in the criminal prosecution of nine defendants involved in a large automobile theft ring.

Peter Barrett (Mississippi, Southern District), by Amy M. Lecocq, Assistant Director, Attorney General's Advocacy Institute, Department of Justice, Washington, D.C., for serving as an instructor and for preparing and presenting an excellent lecture and demonstration on expert witnesses at the Criminal Trial Advocacy Course.

Steven M. Biskupic (Wisconsin, Eastern District), by Robert M. Guttman, Assistant Secretary for Labor-Management Standards, Department of Labor, for his success in obtaining a conviction in a case involving the criminal enforcement of the Labor-Management Reporting and Disclosure Act.

Robert Bradford and ***Warren D. Majors*** (Oklahoma, Western District), by Gerard F. Scannell, Assistant Secretary for Occupational Safety and Health, Department of Labor, Washington, D.C., for their outstanding legal representation in a constitutional challenge to their scheduling system, resulting in case dismissal.

Barbara Z. Brook and ***Joan Kouros*** (Indiana, Northern District), by Robert J. Gofus, Chief, Criminal Investigation Division, Internal Revenue Service, Indianapolis, for their professional efforts in the successful prosecution of a drug conspiracy and money laundering case.

Lance Caldwell (District of Oregon), by Anthony E. Daniels, Assistant Director, FBI, Quantico, Virginia, for his excellent presentation on discovery, investigation and prosecution of major financial institution fraud at a Bank Failure Seminar recently held at the FBI Academy in Quantico.

Larry H. Colleton (Florida, Middle District), by Norman S. Ward, District Director, Office of Labor-Management Standards, Department of Labor, Tampa, for his successful resolution of an embezzlement case involving a labor union official.

Virginia M. Covington (Florida, Middle District), by William H. Gentry, Section Chief, Property, Procurement and Management Section, Administrative Services Division, FBI, Washington, D.C., for her excellent presentation on judicial forfeiture at a recent training seminar for FBI agents in Tampa.

Michael C. Daniel (Georgia, Middle District), by William A. Campbell, Jr., Chief Field Counsel/General Law, U.S. Postal Service, Atlanta, for his excellent representation and legal skill in obtaining a verdict in favor of the Postal Service.

Frederick E. Dashiell (District of Massachusetts), by Kenneth J. Claunch, Chief, Criminal Investigation Division, Internal Revenue Service, Boston, for his exceptional efforts in a criminal asset forfeiture matter, resulting in forfeitures of over $6 million.

Jeff Downing (Florida, Middle District), by Tony Perez, Chief, Enforcement Division, U.S. Marshals Service, Arlington, Virginia, for his valuable assistance and dedicated efforts in securing a provisional arrest warrant for an Italian fugitive featured in a recent "America's Most Wanted" television program.

Miriam Duke and ***Michael Solis*** (Georgia, Middle District), by Joseph R. Davis, Assistant Director-Legal Counsel, FBI, Washington, D.C., for their participation in a New Agents' moot Court at the FBI Academy in Quantico, Virginia.

Phil Espinosa (District of Arizona), by Joel H. Knowles, Warden, Federal Bureau of Prisons, Tucson, for his professional legal skill and valuable assistance in the management of an inmate requiring hospital care outside the confines of the Federal Correctional Institution.

Bruce Hinshelwood (Florida, Middle District), by Lawson Lamar, State Attorney, Ninth Judicial Circuit of Florida, Orlando, for his participation as lead counsel during the initial phase of an evidentiary hearing and his significant contribution to the prospect of a favorable outcome in a capital collateral proceeding.

Steve Holtshouser (Missouri, Eastern District), by John P. Sutton, Special Agent in Charge, DEA, St. Louis, for his outstanding prosecutive skills in a major cocaine case, resulting in the immobilization of a cocaine trafficking organization operating in the St. Louis area.

Ralph E. Hopkins (Florida, Middle District), by Gerald A. Thornton, Special Assistant United States Attorney, Office of the Solicitor, Department of the Interior, Knoxville, for the valuable assistance and hospitality extended by him and other staff members, particularly ***Pat Nadiak,*** during lengthy depositions in the United States Attorney's office in Orlando.

Rick L. Jancha (Florida, Middle District), by Peter J. Rieff, Resident Agent in Charge, DEA, Altamonte Springs, for his valuable assistance and special prosecutive efforts resulting in the destruction of three high-level smuggling organizations operating on the East Coast.

Jane H. Jolly (North Carolina, Eastern District), by Paul Lyon, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Charlotte, for her successful prosecution of a drug trafficker for violations of the firearms and drug laws, complicated by a previous acquittal for drug conspiracy in the Middle District of North Carolina.

Mark Jones (Michigan, Eastern District), by Lt. Clifford DeFeyter, Michigan State Police, Lansing, for his demonstration of professionalism and legal skill in securing a conviction in an interstate transportation of stolen property case.

Dennis P. Kissane (Pennsylvania, Western District) was presented the Chief Inspector's Award for Excellence in the Administration of Justice by Charles R. Clauson, Chief Postal Inspector, U.S. Postal Service, for his successful prosecution of over sixty postal cases as coordinator of "Fast Track," a program designed to expedite certain federal crimes through the legal system.

Ronald D. Lahners, United States Attorney for the District of Nebraska, was presented a plaque from Cleveland Vaughn, Special Agent in Charge, U.S. Fish and Wildlife Service, Department of the Interior, Omaha, in appreciation for his dedication and special interest in the field of conservation, and his ongoing efforts in the preservation and enforcement of fish and wildlife laws.

Ralph J. Lee (Florida, Middle District), by Paul M. Levin, Supervisory Attorney, Claims Division, U.S. Postal Service, Washington, D.C., for his excellent representation and expert legal skills in the successful settlement of two Postal Service cases.

Allan B. Levenberg (Ohio, Northern District), by Paul E. Coffey, Chief, Organized Crime and Racketeering Section, Criminal Division, Department of Justice, Washington, D.C., for his outstanding presentations at trial resulting in the Sixth Circuit affirming the conviction of a labor union official, and for his valuable contribution to the important area of federal criminal law enforcement.

Stephen J. Licclone (Wisconsin, Eastern District), by Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, Department of Labor, for his excellent presentation on criminal prosecutions relating to employee benefit plans at a training program sponsored by the Pension and Welfare Benefits Administration.

Daniel E. Lynn (Mississippi, Southern District), by Mark R. Simpson, Senior Attorney, Office of General Counsel, Department of Agriculture, Atlanta, for successfully resolving a complex boundary line case for the Forest Service involving adverse possession, estoppel, and the statute of limitations.

Kent McDaniel and ***James Tucker*** (Mississippi, Southern District), and other staff members of the Criminal Division, by Wayne R. Taylor, Special Agent in Charge, FBI, Jackson, for their special efforts and valuable contributions to the outstanding success of a moot court training program held recently for FBI agents.

Reginald McGlory (Pennsylvania, Western District), by Fred T. Goldberg, Jr., Commissioner, Internal Revenue Service, Washington, D.C., for his successful prosecution of a complex drug trafficking organization case.

Paul J. Moriarty (Florida, Middle District), by William M. Blackshear, Jr., M.D., Associate Professor of Surgery, University of South Florida, Tampa, for his professionalism and legal skill in a fraud trial in which the physician testified as an expert witness. Also, ***Mr. Moriarty*** was presented the Inspector General's Integrity Award for his valuable contributions to the mission of the Office of Inspector General of the Department of Health and Human Services.

Kathleen O'Malley and ***Sandra S. Bower*** (Florida, Middle District), by M.D. Purcell, Postal Inspector in Charge, U.S. Postal Service, Tampa, for their excellent representation and successful prosecution of a workers' compensation fraud case.

Melanie K. Pierson (California, Southern District), by Steven J. D'Onofrio, Director and Special Counsel, Anti-Piracy Unit, Recording Industry Assn., Washington, D.C., for her legal skill and professionalism in obtaining a guilty verdict in an audio cassette counterfeiting case involving duplication of cassettes in excess of $225,000.

Steven M. Reynolds (Alabama, Middle District), by Robert Lee Vinson, Chief of Police, Lanett Police Department, Lanett, for his outstanding success in the prosecution of one of the largest crack cocaine distributors in Chambers County, Alabama.

Kenneth P. Snoke (Oklahoma, Northern District) was presented an Integrity Award by Richard P. Kusserow, Inspector General, Department of Health and Human Services, Washington, D.C., for his successful prosecution of forty social security program fraud cases with restitution ordered of over $533,000 over the past four years. This is the only award to a United States Attorney or Assistant United States Attorney in the 5-state Dallas Region, and the first ever to a prosecuting attorney in the State of Oklahoma.

Tom Swaim, Steve West and ***Dan Boyce*** (North Carolina, Eastern District), by John D. Watson III, Governor's Crime Commission, Raleigh, for their valuable assistance and special contributions to the success of the Second Annual Governor's Crime Commission Drug Task Force Conference.

Mary Beth Uitti (California, Northern District), by F.S. Miceli, District Director, Internal Revenue Service, San Francisco, for her successful efforts in the litigation of an employment discrimination case through the District Court and the Ninth Circuit Court of Appeals.

Mark Yancey (Oklahoma, Western District), by Bob A. Ricks, Special Agent in Charge, FBI, Oklahoma City, for his valuable contribution as a lecturer at a recent Police Training Program.

SPECIAL COMMENDATION FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Joe Hollomon, Assistant United States Attorney for the Southern District of Mississippi, was commended by William O. Nichols, Superintendent, Vicksburg National Military Park, for his demonstration of legal skill and professionalism in one of the first prosecutions in the Southeast under the Archeological Resource Protection Act. Two Louisiana men were indicted on felony charges of unauthorized excavation of archeological resources and receipt and destruction of government property, and misdemeanor charges of possession of a metal detector in a national park. The pair agreed to plead guilty to misdemeanor charges of unauthorized digging, and felony charges will not be pursued. They also forfeited a 1988 Ford Bronco and metal detectors, agreed to stay out of all state and federal parks on the sites of Civil War battlefields for two years, and face a maximum prison sentence of one year, a $5,000 fine and 200 hours of community service work.

The Civil War artifacts that park officials found at the site of the dig included artillery ammunition and numerous Minie balls. The .58 caliber rifle Minie balls were the most common bullets used in the Civil War. Superintendent Nicholson said, "The very real benefit from this successful prosecution, and the widespread publicity it received throughout the country, will be a heightened public awareness of the significance of this aspect of our nation's heritage and of the penalties associated with violations of this law."

* * * * *

Life Sentences Without Parole Imposed In Mail Bomb Case

On August 20, 1991, Acting Attorney General William P. Barr issued the following statement:

> The life sentences without parole imposed on Walter Leroy Moody, Jr., represent a just, successful conclusion to the investigation and prosecution of heinous crimes that shocked the nation. Two murders committed by Moody during attacks on the federal courts and the civil rights movement led to one of the century's most intensive investigations. This country should be proud of the professional job done by federal agents, investigators and the prosecution team in this immensely complicated case. The life sentences will protect the public and help deter others who might consider such terrorism against our society.

[NOTE: Walter Moody was sentenced to seven life terms plus 400 years in prison with no possibility of parole. The Justice Department team was led by Assistant United States Attorneys ***Louis J. Freeh*** and ***Howard M. Shapiro*** (New York, Southern District), and ***John Malcolm*** (Georgia, Northern District). For background information concerning this case, please refer to Volume 39, No. 1, dated February 15, 1991, and Volume 39, No. 4, dated April 15, 1991, of the United States Attorneys' Bulletin.]

* * * * *

Attorney General Dick Thornburgh Leaves The Department Of Justice

On August 9, 1991, Attorney General Dick Thornburgh submitted his resignation to the President, effective as of the close of business on August 15, 1991. A copy of his letter is attached at the Appendix of this Bulletin as Exhibit A, together with a copy of the President's response.

In a letter to all Department of Justice employees, the Attorney General said,

> "As you know, I have announced my resignation as Attorney General to return to my home state of Pennsylvania as a candidate for the United States Senate. Before leaving office, I want to express my pride in your accomplishments over the past three years. In my daily contacts here and during my travels across the country, I have seen firsthand how aggressively you have met the manifest challenges to the law presented by increasingly complex criminal enterprises and civil cases. Please accept my gratitude for faithfully carrying out the priorities of the Department of Justice during my tenure as Attorney General."

* * * * *

Acting Attorney General William P. Barr Takes Charge

On August 15, 1991, ***William P. Barr*** became Acting Attorney General for the Department of Justice. ***Mr. Barr*** has served as Deputy Attorney General since July, 1990, and prior to that he was the Assistant Attorney General for the Office of Legal Counsel.

* * * * *

FINANCIAL INSTITUTION FRAUD

Senior Interagency Group

On July 31, 1991, Ira Raphaelson, Special Counsel for Financial Institutions Fraud, announced the establishment of the Senior Interagency Group, a 12-member panel representing federal law enforcement and regulatory agencies charged with fighting financial institution fraud. A copy of the Protocol on the Formation of the Senior Interagency Group is attached at the Appendix of this Bulletin as Exhibit B. As part of the national strategy to combat financial institutions fraud, the Senior Interagency Group recommended the following:

1. That United States Attorneys continue or convene local and, where appropriate, regional Bank Fraud Working Groups, comprised of federal prosecutors, law enforcement officials, and regulatory agency representatives.

2. That these local and regional working groups help serve as a mechanism for helping U.S. Attorneys prioritize and investigate appropriate cases of financial institution fraud.

3. That these local and regional working groups seek the involvement of state enforcement and regulatory officials where appropriate to address the broadest range of problems in as coordinated a fashion as possible.

4. That these local and regional working groups forward information regarding recurring issues and/or innovative approaches to the National Interagency Bank Fraud Enforcement Working Group for national distribution and consideration.

5. That the National Interagency Bank Fraud Enforcement Working Group refer those issues it deems appropriate to the Senior Interagency Group for its consideration and potential resolution.

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ASSET FORFEITURE

Executive Office For Asset Forfeiture

Reorganization

On July 31, 1991, the Congress approved the reorganization of the Executive Office for Asset Forfeiture (EOAF). This office was created on October 30, 1989, by then Attorney General Dick Thornburgh. The EOAF, as originally established, consisted of the Director and three support positions. Three attorneys on detail from the Executive Office for United States Attorneys, the Federal Bureau of Investigation, and the Justice Management Division made up the balance of the professional staff.

Under the reorganization plan, the EOAF will expand to thirteen permanent positions. The EOAF's responsibilities include policy and operational management oversight, strategic planning for all aspects of the domestic and international forfeiture program, and development of the consolidated asset tracking system. In addition, the EOAF will be assuming greater responsibilities for the Assets Forfeiture Fund.

Cary Copeland is Director and Chief Counsel, and Katherine Deoudes will serve as the Deputy Director. Mike Perez continues as the Assistant Director for Financial Management. The Assistant Director for Policy and Operations will be named shortly.

In 1989, General Thornburgh recognized the tremendous potential of forfeiture as a weapon to combat drug trafficking and organized crime. Since 1985, the number of asset seizures had grown at an annual rate of 59 per cent. Receipts to the Assets Forfeiture Fund had increased dramatically -- from $27 million in FY 1985 to $460 million in FY 1990. While each participating component had its own separate forfeiture program, the Department did see much success in forfeiture. However, the explosive growth in the number and value of asset forfeitures made it an extremely high profile program with new and difficult management challenges. The EOAF was created to meet those challenges and to facilitate coordination of forfeiture activities at the highest levels of the Department.

* * * * *

Increasing The Use Of Criminal Forfeiture Laws

The Executive Office for Asset Forfeiture (EOAF), Office of the Deputy Attorney General, recently solicited information from all United States Attorneys concerning steps they have taken to increase the use of criminal forfeitures. Based on incoming reports in response to this request, EOAF has prepared a Summary containing management tips that could be useful for all criminal and forfeiture attorneys. A copy is attached at the Appendix of this Bulletin as Exhibit C.

If you have any questions or comments, please call the Executive Office for Asset Forfeiture at (FTS) 368-0473 or (202) 514-0473.

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DRUG ISSUES

24-Nation Chemical Action Task Force Proposes Action

On July 18, 1991, the Department of Justice announced that a 24-nation task force has recommended adoption of a world-wide program to reduce the illicit supply of chemicals used by drug traffickers to manufacture cocaine, heroin, and synthetic drugs. The proposals were made by the Chemical Action Task Force (CATF) in a report following a year-long study of how to curtail both the quantity and types of chemicals now obtained by traffickers to produce large amounts of illegal drugs.

The CATF was created at the 1990 Economic Summit in Houston by the seven major industrialized nations and the Commission of the European Communities as part of "their continuing grave concern with the devastating effects of international drug trafficking on all societies...." As the Summit's host country, the United States organized the CATF, under the auspices of the Department of Justice. Acting Attorney General William P. Barr is the CATF Chairman. Several international organizations also are part of the CATF and support the proposals.

The CATF report was endorsed in London at the conclusion of the 1991 Economic Summit of Canada, France, Italy, Germany, Japan, the United Kingdom, the United States, and the Commission of the European Communities. The 1988 United Nations "Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" is the foundation for international cooperation in this area, the CATF said. In addition to the Economic Summit partners, other CATF members are: Argentina, Australia, Belgium, Bolivia, Brazil, China, Colombia, Ecuador, Hungary, India, The Netherlands, Pakistan, Peru, Spain, Sweden, Switzerland, Thailand, Organization of American States, and the International Narcotics Control Board. In accordance with its mandate, the CATF included industry representatives.

Twelve chemicals used to produce illegal drugs already are listed by the Convention for regulation. The CATF report recommended that ten more chemicals be added to the Convention list and thereby identified as major enforcement targets worldwide. The report also contains a wide-ranging series of recommendations that would apply to import, export, transshipment, and domestic distribution of various chemicals. The CATF recommended that all countries "establish appropriate and effective administrative, civil and/or criminal sanctions," which could include holding

companies as well as their employees liable for actions relating to chemical diversion; revoking or suspending licenses; and suspending, seizing, or confiscating suspect chemical shipments. The CATF concluded that an international program to combat diversion must be directed at manufacturers, end-users, and intermediaries. Since chemicals may be diverted to illicit uses at any point in the chain, "responsibility must be shared among producer, transit, and consumer countries."

The Report's proposed follow-up action includes a meeting in Asia to more fully address the control of chemicals used in the production of heroin and a Task Force meeting in 1992 to review overall progress.

Attorney General Dick Thornburgh said, "This action allows nations from around the world to cooperate with multi-national businesses to ensure that legitimate commerce in chemicals remains unimpeded, while diversions of the chemicals needed to manufacture illegal narcotics are brought to a standstill."

* * * * *

"OPERATION WEED AND SEED"

New Inner City Drug Initiative

On August 7, 1991, Attorney General Dick Thornburgh announced that the Department of Justice will join with New York University, The Ford Foundation and The Pew Charitable Trusts to launch an $8 million, three-year program to test a new strategy to control and prevent illegal drug use and trafficking among high risk youth in drug and crime-ridden neighborhoods. This program is part of the Justice Department's broader "weed and seed" initiative, and is a cooperative venture between the Bureau of Justice Assistance (BJA), Office of Justice Programs, Department of Justice, and the Substance Abuse Strategy Initiative Program of New York University.

The key to "weed and seed" is the coordination and concentration of resources to address the problem of drug-related crime with a comprehensive program -- one that brings together law enforcement at the federal, state and local levels and integrates it with the private sector and community, church and school leaders. The prevention and intervention component of the Substance Abuse Strategy Initiative Program will include family services; educational assistance; after-school activities involving recreation, tutoring, and group participation; summer activities involving community service, education, and recreation; incentives for successful program participation and mentoring to foster attachments to positive role models. The control and enforcement component will include community-based policing; criminal justice activities to make the neighborhood safe from drugs and violent crime; and efforts to mobilize the community to become involved in drug and crime prevention and control. The cities where the program will be tested have not been selected.

BJA will provide a maximum of $4 million to the program, with initial grants of $850,000 the first year. The Ford Foundation will provide $3 million in funding and The Pew Charitable Trusts will provide $1 million to the Substance Abuse Strategy Initiative Program. The Attorney General said, "Through such public/private partnerships we can 'weed' by ridding neighborhoods of violent criminals, gangs, drug traffickers and other thugs by implementing programs such as Operation Triggerlock. Then we can 'seed' by implementing economic development, education and public housing initiatives through coordinated efforts involving all sectors of the community, including the criminal justice system."

[NOTE: The Pew Charitable Trusts is a national philanthropy based in Philadelphia. The Trusts are a cluster of seven individual charitable funds established between 1948 and 1979 by the sons and daughters of Joseph N. Pew, founder of the Sun Oil Company.]

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"Operation Weed And Seed" Program For Trenton, New Jersey

On August 7, 1991, Attorney General Dick Thornburgh announced that Trenton, New Jersey will receive a total of $2 million in federal and state funds to serve as a pilot program for "Operation Weed and Seed." The Bureau of Justice Assistance (BJA), Office of Justice Programs, Department of Justice, plans to award Trenton an initial grant of $240,000 to start the program which would be administered through the New Jersey Attorney General's office. It is anticipated that additional federal and state funding for the 15-month project will bring the total to $2 million. Trenton's comprehensive plan to implement the program is as follows:

The Violent Offenders Removal Program will establish a Violent Crime Task Force to target, apprehend and incapacitate selected violent criminals and members of violent street gangs. The Task Force will focus on high-ranking members of designated violent street gangs operating in Trenton; violent offenders who could be prosecuted under Operation Triggerlock, and "drug kingpins" who could be subject to life imprisonment under federal law. The Task Force will include the Trenton Police Department, the Mercer County Narcotics Task Force and Mercer County Prosecutor's Office, the New Jersey State Police, the Statewide Narcotics Task Force, the United States Attorney for the District of New Jersey, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms and the Federal Bureau of Investigation.

The Community Oriented Policing Program will utilize community-oriented policing techniques to patrol neighborhoods with a high incidence of illegal drug activity and violent crime. The foot patrols will be supported by mobile units working closely with the community.

Project Safe Haven will designate three school facilities as Safe Haven sites for youth. These sites will provide community access to recreation, athletics, training, employment, health and social service resources.

The Neighborhood Reclamation and Revitalization Initiative will serve as an adjunct to the Community Oriented Policing Program and Project Safe Haven by recruiting and including community organizations, citizen and tenant groups and housing authority officials to actively participate in the project.

* * * * *

"Operation Weed And Seed" Program For Kansas City, Missouri

On August 7, 1991, Attorney General Dick Thornburgh announced that Kansas City will receive a $200,000 federal grant to fund a pilot program called "Operation Weed and Seed." The one-year Kansas City project will feature a comprehensive and coordinated law enforcement and neighborhood rehabilitation effort in the Central Patrol Division, a high crime, economically depressed area. In 1990, the area was responsible for 40 percent of all arrests for drug offenses in Kansas City, 60 percent of all murders, 50 percent of all rape arrests, 41 percent of all armed robbery arrests and 54 percent of all sex offenses.

Under the grant, the Kansas City Police Department, the United States Attorney's Office in Kansas City, and the Jackson County Prosecutor's Office will work with community and neighborhood organizations to target, apprehend and incapacitate drug traffickers, gangs and violent criminals. Those criminals who qualify will be prosecuted under Operation Triggerlock. Other agencies and organizations, such as the Small Business Administration, the Department of Housing and Urban Development, the Ad Hoc Group Against Crime, the Minority Contractors Association, and City Codes Enforcement Authorities will be involved in neighborhood reclamation efforts. Education and counselling, the creation of businesses and jobs and community renovation will be emphasized.

The Attorney General said, "These efforts will enhance the quality of life and give these neighborhoods back to law-abiding citizens."

* * * * *

CRIME ISSUES

New Federal Guidelines For Victim And Witness Assistance

On August 6, 1991, Attorney General Dick Thornburgh announced new federal guidelines that establish procedures for the federal criminal justice system in responding to the needs of crime victims and witnesses. The Attorney General formally signed the new guidelines in a ceremony in his office. In attendance were Deputy Attorney General William Barr, Assistant Attorney General for the Office of Justice Programs Jimmy Gurule, Assistant Attorney General for Civil Rights John Dunne, Drug Enforcement Administration Administrator Robert Bonner, and other Department officials, as well as representatives from victims and criminal justice organizations.

The 1991 Attorney General Guidelines for Victim and Witness Assistance implement new protections for federal victims of crime, including a Federal Crime Victims Bill of Rights, in accordance with provisions of the Crime Control Act of 1990, which directs the Department of Justice and other federal agencies with law enforcement responsibilities to "make their best efforts" to ensure that victims of crime are accorded the rights to which they are legally entitled. The Guidelines include: mandatory annual reporting to the Attorney General of each appropriate Department component's efforts regarding victims and witnesses; a recommendation by the Attorney General that the performance appraisal of each federal investigator, prosecutor, and corrections official include an assessment of the official's implementation of victims' rights protections; a recommendation that a brochure on victims' rights be carried by each investigating agent and be given to each victim as routinely as Miranda rights are given to offenders; and mandatory training for all federal investigators and prosecutors regarding multi-disciplinary methods of handling child abuse and child sexual abuse cases.

Two provisions of the Crime Control Act expand victims protections enacted by the Victim and Witness Protection Act of 1982, upon which earlier guidelines were based. Title V of the Act --the Victims' Rights and Restitution Act of 1990--creates a Federal Crime Victims Bill of Rights and codifies services that should be available to victims of federal crime. Title II of the Act--the Victims of Child Abuse Act of 1990--contains extensive amendments to the criminal code affecting the treatment of child victims and witnesses by the federal criminal justice system. In addition, it requires certain professionals working on federal land, or in a federally-operated or contracted facility, to report suspected child abuse and child sexual abuse.

The Office for Victims of Crime (OVC), a component of the Department's Office of Justice Programs, led the effort to draft the new guidelines, which involved at least 15 Department agencies engaged in the investigation and prosecution of federal crimes. The Guidelines are being prepared for distribution by OVC to all United States Attorneys' offices.

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Michigan And Kentucky Awarded Funds To Improve Criminal Records

The Department of Justice awarded the Michigan State Police Records Division $230,970 and the State of Kentucky $499,800 to improve the quality of criminal history records throughout the state. The projects, supported by the Bureau of Justice Statistics in the Office of Justice Programs, is part of a three-year, $27 million program designed to assist states in upgrading current systems used to maintain records of arrests, prosecutions, convictions and sentences.

Michigan is the 29th state to participate in the program. It will use the funds to not only improve record accuracy but also to add a special indicator to those offenders with felony convictions. Currently, state criminal history records are deficient in clearly identifying whether or not a felony conviction record is present. This program will help states and localities stem violent crime by improving the information needed to prevent firearm purchases by ineligible convicted felons.

Kentucky is the 30th state to participate in the program. It will use the funds to install computer links between twenty-eight of the fifty-six state circuit courts and the state's Administrative Office of the Courts for the immediate reporting of felony case dispositions. Additional courts will be added to the system later as funds become available.

John Smietanka, Principal Associate Deputy Attorney General, said, "The major objective of this cooperative agreement is to improve the overall quality of the state's criminal history record information by improving disposition reporting. It is critical that law enforcement officers, prosecutors, judges and corrections officials have access to complete and accurate information on each individual within the purview of the criminal justice system."

* * * * *

Project Triggerlock
Summary Report

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

Description	*Count*	*Description*	*Count*
Indictments/Informations	999	Sentenced to prison	22
Defendants Charged	1,285	Sentenced w/o prison or suspended	3
Defendants Convicted	213	Restitution Ordered	$ 645
Defendants Acquitted	6	Fines Ordered	$5,350
Prison Sentences	47 years 9 months		

"Significant Activity" is defined as an indictment/information, conviction, acquittal or sentencing which occurs during the time period. 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. [NOTE: All numbers are approximate.]

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CRIMINAL DIVISION ISSUES

Court-Ordered Monitoring By FBI Agents Of Defendants On Pretrial Release

A number of federal courts have recently issued orders providing for FBI involvement in monitoring the pretrial release of certain organized crime defendants. Pursuant to 18 U.S.C. §3142(c), which permits judicial officers to release defendants prior to trial subject to conditions designed to assure their appearance and the safety of the community, courts have recently included in their release orders provisions for 1) random inspection of a defendant's home by the FBI, 2) FBI involvement in installing pen registers and telephone monitoring systems in the defendant's home and 3) court-authorized interceptions by the FBI of all wire communications to and from the defendant's home.

Attached at the Appendix of this Bulletin as Exhibit D is a copy of an article prepared by Mary C. Spearing, Chief of the General Litigation and Legal Advice Section of the Criminal Division, which recommends that any future efforts by courts to impose similar obligations on the FBI with respect to the monitoring of pretrial releasees be discouraged, and that responsibility for installing electronic surveillance equipment and monitoring telephone conversations be left to the Pretrial Services components of the districts.

If a district court disagrees and orders the FBI to perform Pretrial Service's tasks, please notify Lisa Kahn of the General Litigation and Legal Advice Section at (FTS) 368-1061 or (202) 514-1061.

* * * * *

Guides For Drafting Indictments

In the United States Attorneys' Bulletin (Vol. 39, No. 7, dated July 15, 1991, at page 189), a revision of the form indictment for 8 U.S.C. §1326 to exclude reference to the defendant's prior felony conviction was included as an attachment for insertion in the Guides For Drafting Indictments in place of the older version.

This revised form indictment inadvertently omitted direct reference to the defendant having previously been deported as well. Therefore, a new form indictment for 8 U.S.C. §1326 is attached at the Appendix of this Bulletin as Exhibit E to replace the earlier versions.

* * * * *

Mutual Legal Assistance Treaty With Mexico

On May 3, 1991, the United States and the United Mexican States exchanged instruments of ratification for the "Treaty on Cooperation Between the United Mexican States and the United States of America for Mutual Legal Assistance." The Treaty provides for assistance in the investigation of transborder crimes, especially drug trafficking, but also crimes of violence and property crimes. The Treaty also provides for "ancillary proceedings" related to criminal acts. This allows for assistance in both civil and administrative proceedings that are related to the criminal offenses. The Treaty is to be interpreted as broadly as possible allowing the Treaty to provide assistance in a wide range of criminal cases, such as narcotics investigations and money laundering cases.

The Criminal Division's Office of International Affairs has been designated as the Coordinating Authority for the United States. Prosecutors interested in making a Treaty request should send a letter to the Office of International Affairs, Department of Justice, P.O. Box 27330, Washington, D.C. 20038. Upon receipt of the letter, a copy of the Treaty, a sample request and other instructions will be forwarded to you to assist in the preparation of your documents.

If you have any questions, please contact the Office of International Affairs at (FTS) 368-0005 or (202) 514-0005.

* * * * *

Additional Support For United States Attorneys In Wiretap Matters

To support more fully the United States Attorneys' offices' use of electronic surveillance through Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended ("Title III"), the Electronic Surveillance Branch ("ESB") of the Criminal Division's Office of Enforcement Operations is now responsible for additional functions beyond its traditional review of Title III applications and requests for closed-circuit television and consensual monitoring.

These new functions include: (1) reviewing and commenting upon, when requested by a United States Attorney's office, appellate briefs addressing Title III issues, especially in areas where wiretaps have seldom been used or litigated previously (e.g., roving taps) and in areas involving advanced technology (e.g., interception of computer data and other non-pager electronic communications); (2) assisting, upon request, in the preparation of motions and trial briefs involving important Title III matters; (3) maintaining a library of briefs and motions filed by the United States Attorneys' offices on Title III issues, to serve as a legal-research tool for the United States Attorneys' offices; and (4) making available on-site training for Assistant United States Attorneys and investigative agents in the legal and policy matters relating to Title III interception, post-interception practice, and the use of such information in resulting litigation.

In order for the ESB to provide appropriate assistance involving the above functions, the full cooperation of the United States Attorneys' offices is essential, particularly in maintaining a current brief/motions library. Copies of the government's briefs and motions on electronic surveillance issues should be sent routinely to the ESB for inclusion in this resource. Requests for information from the library, as well as requests for litigation assistance and training, should be directed to the Electronic Surveillance Branch, Carla H. Raney, Chief, Office of Enforcement Operations, Criminal Division, P.O. Box 7600, Washington, D.C. 20044 -- (FTS) 368-2869 or (202) 514-2869.

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TAX DIVISION

Criminal Tax Prosecutions In Light Of United States v. Powell

In a communication dated June 25, 1991, Shirley D. Peterson, Assistant Attorney General of the Tax Division, addressed United States v. Roy G. Powell and Dixie Lee Powell, 1991 WL 99653 (WESTLAW), No. 90-10060 (9th Cir. June 13, 1991), wherein the Ninth Circuit reversed the failure to file tax return convictions of two tax protesters. A petition for rehearing en banc has been filed. Until the Ninth Circuit acts on that petition, Assistant Attorney General Peterson has prepared a detailed memorandum advising all United States Attorneys of a number of points to be considered when conducting criminal tax prosecutions. A copy of that memorandum, dated August 8, 1991, is attached at the Appendix of this Bulletin as Exhibit F.

If you have any questions or require further information, please contact Robert E. Lindsay, Chief, Criminal Appeals and Tax Enforcement Policy Section, (FTS) 368-3011 or (202) 514-3011, or Alan Hechtkopf, Assistant Chief, at (FTS) 368-5396 or (202) 514-5396.

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POINTS TO REMEMBER

Special Assistant United States Attorney Appointments

On July 22, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys (EOUSA), advised all United States Attorneys as follows:

> By Attorney General Order dated June 25, 1991, 28 C.F.R. §0.15(e)(2) was amended to provide for the redelegation of authority to appoint Special Assistant United States Attorneys (SAUSAs) to the Director of the Executive Office for United States Attorneys (EOUSA). Such redelegation streamlines the personnel process, maximizes Department resources, and implements the Attorney General's goal of delegating as much responsibility as possible to cognizant organizations.
>
> Prior to the amendment, the Deputy Attorney General could redelegate such appointment authority only to "the official responsible for attorney personnel management." 28 C.F.R. §0.15(c). The Department considered such official to be the Director, Office of Attorney Personnel Management (OAPM), which previously executed such appointment authority.
>
> Pursuant to the foregoing, the Director, OAPM, redelegated to the Director, EOUSA, the SAUSA appointment authority on July 8, 1991. Effective immediately, I am exercising this authority and appointing all SAUSAs. By memorandum dated April 26, 1991, to the Director, OAPM, the Deputy Attorney General approved the then proposed redelegation and directed that such authority, once received by the Director, EOUSA, could be redelegated further to the Deputy Director and the Associate Director, EOUSA. Consequently, I am considering redelegating SAUSA appointment authority and will provide further advice when redelegations have been accomplished.

If you have any questions concerning SAUSA appointment authority, please contact Deborah Westbrook, Legal Counsel, at (FTS) 368-4024 or (202) 514-4024.

Memorandum Of Agreement Between The Department Of Justice And The Federal Trade Commission

On August 2, 1991, the Department of Justice and the Federal Trade Commission announced a Memorandum of Agreement with respect to the handling of civil penalty suits enforcing the premerger notification provisions of the Hart-Scott-Rodino Act. A copy of the memorandum, signed by Attorney General Dick Thornburgh, Chairman Janet D. Steiger of the Federal Trade Commission, and James F. Rill, Assistant Attorney General for the Antitrust Division, is attached at the Appendix of this Bulletin as Exhibit G.

Under the agreement, the Commission will submit civil penalty recommendations to the Department. The Department will advise the Commission that 1) it will file the recommended action, 2) it disapproves the recommended action, or 3) it requires further information. If none of the determinations described above has been communicated to the Commission within 45 days, the Commission may designate Commission attorneys for appointment by the Attorney General to file the case in federal court on behalf of the United States. The Attorney General will retain full discretion to make, decline to make, or revoke such appointments and will also retain control over the ensuing litigation, including approval of any proposed settlement agreements with defendants.

Under the Hart-Scott-Rodino amendments to the Clayton Act, persons planning to acquire significant voting securities or assets must notify the Department and the Commission in advance, so that transactions can be screened for anticompetitive effects. Companies that fail to comply with the notification requirements are subject to suits for injunctive relief that can be brought by either the Department or the Commission, or to actions for monetary penalties that can be brought only by the Attorney General or his designees. The agreement does not affect the ability of either agency to bring suits seeking injunctions. In cases where the Department designates Commission attorneys to prosecute civil penalty actions, the Commission attorneys will be appointed by the Attorney General as Special Attorneys or Special Assistant United States Attorneys.

Attorney General Dick Thornburgh said, "This is a positive step forward. It fully preserves the Attorney General's authority to prosecute cases in the name of the United States but enables the Department to conserve resources by efficiently utilizing the Commission's expertise. In short, it enhances the government's ability to enforce the antitrust laws."

* * * * *

Wichita Abortion Clinic Litigation

The following is a statement by Lee Thompson, United States Attorney for the District of Kansas, dated August 6, 1991, concerning the Wichita Abortion Clinic litigation:

> On August 5, 1991, U.S. District Judge Patrick Kelly in Wichita, Kansas, issued a preliminary injunction against a range of activities conducted by Operation Rescue anti-abortion protesters in that city. Neither the United States nor any governmental agency is a party to the litigation. However, by specific detailed instructions from the court, the United States Marshals Service has been ordered to enforce the injunction.

Under our legal system, it is imperative that court orders be obeyed until there is a modification or reversal of them. This is particularly true when the objection to the order is founded on legal principles that have not been explicitly resolved by the Nation's highest court. Therefore, the U.S. Marshals Service will enforce the order until such time as a court instructs it otherwise.

However, the United States believes the federal court does not have jurisdiction to enter this order. This is the same position the Department of Justice has taken in a case now pending before the United States Supreme Court, Bray v. Alexandria Women's Health Clinic. The Department of Justice also believes that the detailed instructions to the Marshal's office on how to implement the order improperly intrude on the authority of the Marshals to determine the best method of enforcing the court's order.

Consequently, the United States has today filed a brief in the district court pointing out what it believes to be the erroneous nature of the order. That brief incorporates the brief previously filed in the Supreme Court. The filing with the district court asks that the court's injunction be stayed until appellate review occurs.

The filing by the United States takes no position on the activities of the litigants, but reiterates the government's view that the matters in litigation should be addressed in state court.

* * * * *

SENTENCING REFORM

1991 Sentencing Guidelines Manual

The United States Sentencing Commission will distribute the 1991 Sentencing Guidelines Manual in November, 1991. To receive an adequate number of Manuals for your staff (including the projected FY-1992 staffing level), please call Legal Counsel, Executive Office for United States Attorneys, at (FTS) 368-4024 or (202) 514-4024.

* * * * *

Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 4, No. 6, dated July 31, 1991, is attached as Exhibit H at the Appendix of this Bulletin.

* * * * *

Federal Sentencing and Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit I is a copy of the Federal Sentencing and Forfeiture Guide, Volume 2, No. 28, dated July 15, 1991, Volume 2, No. 29, dated July 29, 1991, and Volume 2, No. 30, dated August 12, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

* * * * *

SAVINGS AND LOAN ISSUES

Savings And Loan Prosecution Update

On June 12, 1991, the Department of Justice issued the following information describing activity in "major" savings and loan prosecutions from October 1, 1988 through May 31, 1991. "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.

Informations/Indictments	489
Estimated S&L Losses	$7.770 billion
Defendants Charged	803
Defendants Convicted	597 (93%)
Defendants Acquitted	48 *
Prison Sentences	1,153 years
Sentenced to prison	345 (79%)
Awaiting sentence	168
Sentenced w/o prison or suspended	94
Fines Imposed	$ 8.208 million
Restitution Ordered	$273.044 million

CEOs, Board Chairmen, and Presidents:	
Charged by indictment/ information	99
Convicted	72
Acquitted	7
Directors and Other Officers:	
Charged by indictment/ information	145
Convicted	116
Acquitted	5

All numbers are approximate, and are based on reports from the 94 offices of the United States Attorneys and from the Dallas Bank Fraud Task Force.

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

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CASE NOTES

EASTERN DISTRICT OF PENNSYLVANIA

Philadelphia Dentist Ordered To Pay Almost $19 Million For Medicare Fraud

The largest civil judgment ever rendered in a Medicare fraud case in the United States, totaling almost $19 million, was ordered by the United States District Court for the Eastern District of Pennsylvania against a dentist found guilty of illegally billing Medicare for oral cancer screening tests. A copy of the Court's decision in United States v. John A. Lorenzo, D.D.S. is attached at the Appendix of this Bulletin as Exhibit J.

This case concerned a mobile dental operation that performed routine dental examinations at nursing homes. During the billing process the routine examinations were then reclassified as limited consultations for cancer. Once reclassified, bills were submitted to Medicare in the amount of $50.00 per exam. (Medicare does not pay for dental care, but will pay for limited consultations at a physician's request.) The Court held that these consultations were not ordered by patients' physicians and that the defendant had actual knowledge or reckless disregard as to the truth or falsity of these claims. The total number of false claims found by the court numbered 3,683.

David H. Ward, Assistant United States Attorney for the Eastern District of Pennsylvania, investigated and prosecuted the case, with the cooperation of the Office of Inspector General of the Department of Health and Human Services, and the FBI.

* * * * *

NORTHERN DISTRICT OF OHIO

Restitution Order May Be Based Upon Extrapolation From A Partial Audit Of Fraudulent Claims

In a recent decision, the Sixth Circuit held that a restitution order in a Medicare fraud case could be based upon an extrapolation of a partial audit of fraudulent claims. The court recognized that a comprehensive audit of all claims submitted during the three-year period covered by the indictment "would have been unduly time-consuming and was not required in order to satisfy the government's burden of proof."

The court also held that the restitution order need not be reduced by the amount Medicaid might have paid had the claims been submitted for reimbursement for the ambulette service actually provided stating, "[W]e are aware of no authority for reducing the restitution due to one victim merely because another party could lawfully have been charged a portion of the fraudulently procured amount."

United States v. Malloch, et al., 6th Cir., No. 90-3458, June 27, 1991.

Attorney: Ann C. Rowland
Assistant United States Attorney
(FTS) 942-3765

* * * * *

CIVIL DIVISION

Third Circuit Upholds Constitutionality Of Provisions Of Price-Anderson Act Amendments Granting District Courts Jurisdiction Over Actions Arising Out Of Nuclear Incidents

This case involves personal injury claims and claims of business loss arising out of alleged radiation leaks from the Three Mile Island nuclear plant. Under the Price-Anderson Amendments Act of 1988, a defendant in any suit asserting liability arising out of a nuclear incident may petition for the removal of the action to federal district court. The district court held that the removal provisions of the Act were unconstitutional and granted plaintiffs' motion to remand the actions to the state courts in which they had been filed. The government intervened to defend the constitutionality of the statute.

The Third Circuit upheld the constitutionality of the Amendments. First, it found appellate jurisdiction to review the order notwithstanding 28 U.S.C. §1447(d), which bars appellate review of an order remanding a case to the state court from which it was removed. It reasoned that Congress did not intend the bar to review remand orders under 28 U.S.C. §1447(d) to apply where Congress had expressly vested jurisdiction in a federal court, and the order of remand rested upon a district court's determination that the statute itself was unconstitutional. The Court then found that the Amendments did not exceed Congress' Article III authority because the Amendments require the application of federal law in several key respects. It rejected the district court's principal rationale, that because Congress incorporated state law as the rule of decision in determining liability in most instances under the statute, cases under the statute did not arise under federal law.

TMI Coordinated Proceedings, No. 90-8048 (July 26, 1991)
DJ # 145-0-2944

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Peter Maier - (202) 514-3585 or (FTS) 368-3585

* * * * *

Fourth Circuit Holds That Commander In Chief Of The U.S. Atlantic Fleet Acted Outside The Scope Of His Employment When He Confronted Base Law Enforcement Officer

Admiral Carter was Commander in Chief of the U.S. Atlantic Fleet. Plaintiff, a civilian law enforcement officer at the naval base, stopped the Admiral's daughter for speeding. Admiral Carter requested two of plaintiff's superiors to bring plaintiff to the Admiral's residence that afternoon to discuss the problem of discourteous patrolmen. Based on the ensuing conversation, plaintiff filed suit against Admiral Carter in state court, seeking damages for defamation, insulting words, intentional infliction of emotional distress, and tortious interference with business relations. The U.S. Attorney removed the case to federal court, certified that the Admiral was acting within the scope of his employment with regard to the incident, and sought to substitute the United States for Admiral Carter under the Westfall Act, 28 U.S.C. 2679. Alternatively, dismissal was sought on grounds of Feres intramilitary immunity. The district court denied both motions.

The Fourth Circuit affirmed the district court, holding that the district court's factual findings that Admiral Carter was acting outside scope should not be disturbed. Noting that if the allegedly tortious conduct had occurred in a meeting in the Admiral's office during the work week, the Admiral would clearly have been acting within scope. The majority found sufficient indicia in the circumstances here that the incident had been motivated primarily by concern for the Admiral's family, rather than concern for the overall problem. The majority then rejected our Feres argument, on the ground that this case does not implicate concern for maintenance of military discipline. Finally, the majority rejected our argument that the Civil Service Reform Act (CSRA) bars this action, holding that the CSRA preempts only actions relating to one of the prohibited personnel practices enumerated in 5 U.S.C. 2302(a)(2)(A).

Johnson v. Carter. No. 90-3077 (July 8, 1991) DJ # 157-79-2860

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Michael E. Robinson - (202) 514-4259 or (FTS) 368-4259

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Ninth Circuit Reverses District Court Decision Enjoining INS To Answer Freedom Of Information Act (FOIA) Requests Within 10 Days

James Mayock, an immigration lawyer, sought an injunction requiring INS's San Francisco office to comply with the FOIA's 10-day time-limit provision. The district court granted Mayock's summary judgment motion, and issued a permanent injunction requiring INS's San Francisco office to answer FOIA requests within 10 days and also to give priority in processing to requests filed on behalf of aliens in deportation or exclusion proceedings. A unanimous panel of the court of appeals reversed and remanded.

The panel held that the district court failed to consider pertinent record evidence that arguably entitled INS to invoke the "exceptional circumstances" exception to the FOIA's 10-day baseline. The court also indicated that the injunction's category-wide preference for aliens based on their asserted need for information was wrong as a matter of law, reiterating that one's supposed need for and intended use of the requested information generally does not affect one's FOIA rights.

James R. Mayock v. Alan C. Nelson, et al., No. 89-15977 (July 10, 1991)
DJ # 145-12-7044

Attorneys: Leonard Schaitman - (202) 514-3441 or (FTS) 368-3441
Thomas M. Bondy - (202) 514-2397 or (FTS) 368-2397

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TAX DIVISION

Second Circuit Upholds Adverse Decision In "Subpart F" Case

On July 22, 1991, the Second Circuit affirmed the District Court's decision in favor of the taxpayer in R.E. Dietz Corporation v. United States. This case involved the application of the "controlled foreign corporation" provisions of Subpart F of the Internal Revenue Code. It presented the issue whether the taxpayer, a manufacturing company based in upstate New York, was required to include in its income interest earned by its wholly-owned Hong Kong subsidiary. Under Hong Kong law, that interest was treated as "offshore" and therefore not subject to Hong Kong tax. We maintained that, under Section 954(b)(4) of the Internal Revenue Code, the taxpayer was required to include the locally untaxed interest in its Subpart F income because it had not established to the Commissioner's satisfaction that the use of the offshore accounts did not have "as one of its significant purposes a substantial reduction" of United States income tax. The Second Circuit, however, held that the Internal Revenue Service had abused its discretion in this case in determining that a significant purpose of the offshore accounts was to avoid U.S. tax. It stressed that the use of the offshore accounts was of critical importance in keeping the company going during an "economically tumultuous" period, and that even though the taxpayer knew the accounts were generating tax-free interest, there was "no evidence even suggesting that tax exemption was a purpose, let alone a significant one, in establishing the accounts."

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Ninth Circuit Strikes Down Rule 11 Sanctions Imposed Against The United States And Its Attorney

On July 29, 1991, the Ninth Circuit reversed an adverse decision of the District Court which had imposed Rule 11 sanctions against the Government and the Government's attorney in Darlene Mattingly v. United States. In this case, taxpayer sought to recover a partial payment she made with respect to a "responsible person" assessment. The question presented on appeal was whether the District Court erred in finding that a counterclaim filed by the Government against the taxpayer for the unpaid balance of the assessment was frivolous and warranted the imposition of a $1,000 fine against the United States and a public reprimand of the Government's trial attorney.

The Ninth Circuit concluded that the trial attorney acted reasonably in filing the counterclaim. The Court determined that our attorney was entitled to rely upon the investigative file compiled by the Internal Revenue Service when he filed the counterclaim. That file, in turn, supported our claim that taxpayer was a "responsible person." She had been acting comptroller of the company whose tax liability remained unpaid and she was responsible for signing all corporate checks. In overturning the sanctions, the Court noted that the trial attorney had later orchestrated a concession of our case on grounds that did not go to the merits. The Court concluded that his actions in working out this concession were "commendable" and that "[p]ublic censure was inappropriate."

Although it ruled in the Government's favor on the merits, the Ninth Circuit did reject the argument that the District Court lacked jurisdiction to impose Rule 11 monetary sanctions against the United States. We contended that Congress had not waived its immunity as sovereign from such awards. The Ninth Circuit stated, however, that the United States must conduct its litigation with the same degree of integrity as that expected of other litigants and that there is no justification for exempting the Government from Rule 11 on the ground of sovereign immunity.

* * * * *

Ninth Circuit Reverses Denial Of Immunity From Bivens Suit As To IRS Attorneys And Agents

On July 29, 1991, the Ninth Circuit unanimously reversed the unfavorable District Court determination in Fry v. Melaragno and held that the appellants in that case -- three IRS attorneys and an IRS revenue agent -- were entitled to immunity from a Bivens suit brought for alleged violations of plaintiff's First Amendment rights. Plaintiff's complaint alleged that the IRS attorneys violated his First Amendment rights by their repeated, irrelevant references to his authorship of such books as Our Lady of Perpetual Deductions and Pay No Taxes at Harvest Time during the course of a Tax Court case in which his liability for taxes was at issue. The complaint further alleged that the IRS agent violated the plaintiff's constitutional rights by conspiring with others to bring false criminal charges against him and by inserting into the presentence report details about his First Amendment activities which allegedly encouraged Parole Commission employees to keep the plaintiff in prison for a longer period than the prosecutor had promised.

Since the plaintiff's allegations against the IRS attorneys were based entirely upon their official conduct as attorneys for the IRS, the Ninth Circuit held that these defendants were absolutely immune from suit. The Court further held that the IRS agent was entitled to qualified immunity from suit because he did not have the authority to cause criminal charges to be brought and because communicating details of his investigation to those involved in sentencing did not infringe upon the plaintiff's First Amendment rights.

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Ninth Circuit Holds Unconstitutional Nevada Ad Valorem Tax On Property Maintained And Operated By Federal Government Contractor

On July 15, 1991, the Ninth Circuit, in a split decision, affirmed the judgment of the district court in United States v. Nye County Nevada, et al., holding that a Nevada tax on property maintained and operated by a Federal Government contractor was an unconstitutional ad valorem tax on property owned by the United States.

In this case, the Air Force contracted with Arcata Associates, Inc. to maintain and operate government-owned electronic equipment used by the Air Force to train pilots at its combat ranges in Nye County, Nevada. Pursuant to its contract with Arcata, the Air Force agreed to reimburse Arcata for all its costs, including any taxes that might be incurred in maintaining and operating the equipment. Nye County contended that Arcata had a taxable interest in the equipment and assessed a personal property tax. The court determined that Arcata had no property interest in the equipment and that the statute effectively imposed an unconstitutional tax on Government property.

* * * * *

Eleventh Circuit Holds That District Courts Lack Jurisdiction To Review The Commissioner's Refusal To Abate Interest On Tax Deficiencies

On July 23, 1991, the Eleventh Circuit held, in Horton Homes, Inc. v. United States, that the district courts do not have jurisdiction to review the IRS' refusal to abate interest under the recently enacted provisions of Section 6404 of the Internal Revenue Code. The Court held that under the Administrative Procedures Act the decision whether to abate interest is a matter within the unfettered discretion of the IRS. A contrary decision could have led to a flood of litigation as over 12,000 abatement claims have been denied by the IRS since the enactment of the statute.

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Federal Circuit Affirms Favorable Claims Court Decision Regarding Oil Production Payment Loans

On July 23, 1991, the Federal Circuit, in a split decision, affirmed the Claims Court's favorable grant of summary judgment in European American Bank v. United States. This multi-million dollar case presented the question whether the taxpayer is required to report, as income, interest due on loans. Repayment of the loans here was dependent upon petroleum production. The wells associated with these loans were producing revenues that, while substantial, were unlikely to satisfy both the interest and the principal due on the loans. The majority held that, as a matter of law, the taxpayer had a reasonable expectation of receiving the interest and that the interest must, therefore, be accrued and reported as income.

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ADMINISTRATIVE ISSUES

Attorney General's Advocacy Institute (AGAI) Relocated To The Patrick Henry Building

The Office of Legal Education's Attorney General's Advocacy Institute (AGAI), Executive Office for United States Attorneys, has moved to the Patrick Henry Building where sophisticated facilities have been installed on the first and tenth floors to better serve the students and faculty. The Patrick Henry Building is located three blocks from the main Department of Justice building, and is within easy walking distance of the EOUSA Director's office, where receptions and other activities will continue to be conducted as well.

AGAI built five new courtrooms/classrooms which are wired for voice-activated video taping, five video playback rooms, plus a separate lecture room which may also be used as a large courtroom. The video equipment installed at the AGAI permits taping and editing of lectures. In addition, AGAI offers an Interactive Evidence Lab with video computerized equipment to test evidence skills.

The Office of Legal Education (OLE) has also relocated its administrative offices to the tenth floor of the Patrick Henry Building. Amy M. Lecocq, Director, invites you to stop by whenever you are in the Washington, D.C. area.

The addresses, telephone and telefax numbers are as follows:

Office of Legal Education (OLE)

Office of Legal Education	Telephone:	(FTS) 268-7574
Room 10332, Patrick Henry Building		(202) 208-7574
601 D Street, N.W.	Telefax:	(FTS) 268-7235
Washington, D.C. 20530		(202) 208-7235

Attorney General's Advocacy Institute (AGAI)

Attorney General's Advocacy Institute	Telephone:	(FTS) 268-7574
Room 10332, Patrick Henry Building		(202) 208-7574
	Telefax:	(FTS) 268-7235
		(202) 208-7235

For students and faculty members attending courses sponsored by AGAI:

AGAI Courtrooms	Telephone:	(FTS) 268-7200
Room 1000, Patrick Henry Building		(202) 208-7200
	Telefax:	(FTS) 268-7235
		(202) 208-7235

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Psychiatric Examinations Of Defendants

The Special Authorizations Unit (SAU) of the Justice Management Division advises that many requests for psychiatric examinations of defendants are being received with incomplete and/or erroneous information, or the purpose of the examination is not clearly stated. The Fees and Expenses of Witnesses Appropriation is responsible for the payment of the following types of psychiatric examinations: a) competency to stand trial; b) sanity at time of event, when requested by a Department of Justice attorney; and c) examination of convicted, incarcerated persons contesting transfer or non-release when performed by a private psychiatrist at the request of a Department of Justice attorney.

All requests for psychiatric examinations of defendants must be carefully reviewed to ensure that the purpose of the examination is clear, and must be accompanied by a copy of the court order for the examination. Please note that requests without court orders, or for services payable by the Administrative Office for U.S. Courts, must be returned for correction--or appeal of the order if the order is incorrect.

SAU is also receiving requests for examinations to determine eligibility for bail, (payable by the Pretrial Services of the Administrative Office for U. S. Courts), and examinations for insanity defense requested by CJA-appointed attorneys and federal public defendants, (payable by the Federal Defenders Service of the Administrative Office for U.S. Courts). The cost of dual purpose examinations--at time of event, and competency to stand trial--requested by the defense are split between the Department of Justice and the defense.

If you have any questions, please call the Special Authorizations Unit at (FTS) 241-8429 or (202) 501-8429).

* * * * *

Change In Privately Owned Vehicle Reimbursement Rate

The General Services Administration has increased the mileage reimbursement rate from 24 cents to 25 cents per mile for use of privately owned automobiles when authorized as advantageous to the Government. (See, Federal Register, Volume 56, No. 122, dated June 25, 1991). This rate applies to fact and expert witnesses as well as all government employees, and is effective June 30, 1991 for travel performed on or after that date.

The rates now in effect for motorcycles (20 cents per mile) and airplanes (45 cents per mile) are at the statutory maximum levels.

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CAREER OPPORTUNITIES

General Litigation And Legal Advice Section, Criminal Division

The General Litigation and Legal Advice Section has several positions available for which experienced Assistant United States Attorneys are invited to apply. The positions include Principal Deputy Chief, Deputy Chief for Litigation, and litigators with an interest in and knowlege of computers and emerging technologies to handle complex computer crime cases and matters. The Section has broad jurisdiction which encompasses approximately two-thirds of all federal criminal statutes. Additionally, it has a variety of civil responsibilities.

Interested applicants should submit a resume or SF-171 (Application for Federal Employment) to Mary C. Spearing, Chief, General Litigation and Legal Advice Section, P.O. Box 887, Ben Franklin Station, Washington, D.C. 20044-0887.

* * * * *

Office Of The U.S. Trustee, San Diego

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney for the U.S. Trustee's Office in San Diego. Responsibilities include assisting with the administration of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; drafting motions, pleadings, and briefs; and litigating cases in the Bankruptcy Court and the U.S. District Court.

Applicants must possess a J.D. degree for at least one year and be an active member of the bar in good standing (any jurisdiction). Outstanding academic credentials are essential and familiarity with bankruptcy law and the principles of accounting is helpful. Applicants should submit a resume and law school transcript to: Office of the U.S. Trustee, Department of Justice, 101 West Broadway, Suite 440, San Diego, California 92191 Attn: Peggy LeCompte. Current salary and years of experience will determine the appropriate grade and salary levels. The possible range is GS-11 ($31,116 - $40,449) to GS-14 ($52,406 - $68,129). This advertisement is open until filled. No telephone calls, please.

* * * * *

APPENDIX

CUMULATIVE LIST OF CHANGING FEDERAL CIVIL POSTJUDGMENT INTEREST RATES

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

Effective Date	Annual Rate	Effective Date	Annual Rate	Effective Date	Annual Rate
10-21-88	8.15%	01-12-90	7.74%	04-05-91	6.26%
11-18-88	8.55%	02-14-90	7.97%	05-03-91	6.07%
12-16-88	9.20%	03-09-90	8.36%	05-31-91	6.09%
01-13-89	9.16%	04-06-90	8.32%	06-28-91	6.39%
02-15-89	9.32%	05-04-90	8.70%	07-26-91	6.26%
03-10-89	9.43%	06-01-90	8.24%		
04-07-89	9.51%	06-29-90	8.09%		
05-05-89	9.15%	07-27-90	7.88%		
06-02-89	8.85%	08-24-90	7.95%		
06-30-89	8.16%	09-21-90	7.78%		
07-28-89	7.75%	10-27-90	7.51%		
08-25-89	8.27%	11-16-90	7.28%		
09-22-89	8.19%	12-14-90	7.02%		
10-20-89	7.90%	01-11-91	6.62%		
11-16-89	7.69%	02-13-91	6.21%		
12-14-89	7.66%	03-08-91	6.46%		

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

* * * * *

UNITED STATES ATTORNEYS

DISTRICT	U.S. ATTORNEY
Alabama, N	Frank W. Donaldson
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	William T. McGivern
California, E	Richard Jenkins
California, C	Lourdes G. Baird
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Richard Palmer
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Dexter W. Lehtinen
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	D. Paul Vernier
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	Louis G. DeFalaise
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	Wayne A. Budd
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Jerome G. Arnold
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	Leland E. Lutfy
New Hampshire	Jeffrey R. Howard
New Jersey	Michael Chertoff
New Mexico	William L. Lutz
New York, N	Frederick J. Scullin, Jr.
New York, S	Otto G. Obermaier
New York, E	Andrew J. Maloney
New York, W	Dennis C. Vacco
North Carolina, E	Margaret P. Currin
North Carolina, M	Robert H. Edmunds, Jr.
North Carolina, W	Thomas J. Ashcraft
North Dakota	Stephen D. Easton
Ohio, N	Joyce J. George
Ohio, S	D. Michael Crites
Oklahoma, N	Tony Michael Graham
Oklahoma, E	John W. Raley, Jr.
Oklahoma, W	Timothy D. Leonard
Oregon	Charles H. Turner
Pennsylvania, E	Michael Baylson
Pennsylvania, M	James J. West
Pennsylvania, W	Thomas W. Corbett, Jr.
Puerto Rico	Daniel F. Lopez-Romo
Rhode Island	Lincoln C. Almond
South Carolina	E. Bart Daniel
South Dakota	Philip N. Hogen
Tennessee, E	John W. Gill, Jr.
Tennessee, M	Joe B. Brown
Tennessee, W	Edward G. Bryant
Texas, N	Marvin Collins
Texas, S	Ronald G. Woods
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	Dee V. Benson
Vermont	George J. Terwilliger III
Virgin Islands	Terry M. Halpern
Virginia, E	Kenneth E. Melson
Virginia, W	E. Montgomery Tucker
Washington, E	John E. Lamp
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Grant C. Johnson
Wyoming	Richard A. Stacy
North Mariana Islands	D. Paul Vernier

* * * * *

EXHIBIT
A

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

August 9, 1991

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

As you know, I earlier expressed to you my intention to seek the Republican nomination for the United States Senate seat from Pennsylvania left vacant by the tragic death of our mutual friend, Senator John Heinz.

As you also know, there was a very real question about whether the election to fill that seat would be held this year or at any time before 1994. That question appears to have been resolved this week by a federal court in Pennsylvania.

Accordingly, I am tendering to you my resignation as Attorney General effective as of the close of business on Thursday, August 15, 1991.

I cannot begin to express to you how fulfilling and rewarding my service as a member of your Cabinet has been. With your strong support, the Department of Justice has led a stepped-up law enforcement effort against international drug traffickers and money launderers, organized crime, white collar criminals, environmental polluters, and those who would deprive our citizens of their civil rights and the advantages of free market competition. Much of our success in these endeavors has been due to the day-in, day-out efforts of the many dedicated employees of this Department, but your leadership and strong support have been crucial and invaluable.

Ginny and I are both also most appreciative of your efforts in securing passage of the Americans with Disabilities Act, which I believe to be the most important civil rights legislation signed into law in the last 25 years.

On a more personal note, we will always treasure the warm friendship which you and Barbara have shown toward our family. The many personal kindnesses extended to us during the past three years have added immeasurably to the pride we feel in having served your Administration and our nation during these challenging and exciting times.

I hope to continue to have the opportunity to work with you during the months and years ahead in the service of our country. Until then, I extend my best wishes for further success to you and to my Cabinet colleagues.

Sincerely,

Dick Thornburgh
Attorney General

THE WHITE HOUSE

WASHINGTON

August 9, 1991
(Kennebunkport)

Dear Dick:

It is with mixed emotions that I accept your resignation as Attorney General effective as of the close of business on Thursday, August 15, 1991.

Your departure from the Cabinet will be a great loss. As America's chief law enforcement officer, you have been relentless and unwavering in your pursuit of all those who would prey upon our society, from the violent offender, to the international drug trafficker; from the organized crime boss, to the environmental polluter; from the savings and loan thief, to the corrupt public official. At the same time, you have provided crucial and courageous leadership on a host of difficult issues, from efforts to enact our civil rights and crime bills, to protecting the Executive Branch against incursions on our constitutional authority.

Most important, during the last three years, when I had a tough call to make, I knew I could rely on your sound judgment and advice. That is, after all, the most important tribute that a client can pay to his lawyer. So, as you leave the Cabinet, know that you carry with you the utmost thanks of your client for a job well done.

In returning to your home state of Pennsylvania, however, you provide our Party with the strongest possible candidate in the special election to fill the seat left vacant by the tragic death of Senator John Heinz. And come next year, I will be looking forward to working with "Senator Dick Thornburgh" on the many important issues that our Nation faces.

Barbara joins me in extending to you and Ginny and your family all our best wishes.

Sincerely,

George Bush

The Honorable Dick Thornburgh
The Attorney General
Washington, D.C. 20530

EXHIBIT B

July 31, 1991

PROTOCOL ON THE FORMATION OF
SENIOR INTERAGENCY GROUP

Pursuant to Section 2539(c) of the Crime Control Act of 1990, we senior officials have gathered at the invitation of the Attorney General, Dick Thornburgh, to assist in the collective effort to prosecute crimes against financial institutions under that Act and the Financial Institutions Reform, Recovery and Enforcement Act, and to collect the proceeds of those crimes through all available means.

In establishing this group, we reaffirm our commitment to use the best efforts of our respective agencies and components to carry out our statutory responsibility to "enhance interagency coordination and assist in accelerating the investigations and prosecution of financial institution fraud."

Moreover, in carrying out these responsibilities, we believe that the Senior Interagency Group comprised of senior officials will serve best as a policy making body for the existing National Interagency Bank Fraud Enforcement Working Group and advisory body to the Attorney General through his Special Counsel.

We hereby establish that Senior Interagency Group.

Dick Thornburgh
Attorney General

Nicholas F. Brady, Secretary
Department of the Treasury

L. William Seidman
Chairman, Federal Deposit
Insurance Corp.
Resolution Trust Corp.

John P. LaWare
Governor, Federal Reserve
System

Timothy Ryan
Director, Office of Thrift
Supervision

Robert L. Clarke
Comptroller of the Currency
Department of the Treasury

Roger W. Jepsen
Chairman, National Credit
Union Association

Joseph M. Whittle
Chairman, Attorney General's
Advisory Committee

William S. Sessions, Director
Federal Bureau of Investigation

John R. Simpson, Director
U.S. Secret Service

Fred T. Goldberg, Jr.
Commissioner
Internal Revenue Service

Charles R. Clauson
Chief Postal Inspector
U.S. Postal Service

EXHIBIT C

A SUMMARY OF REPORTS BY THE UNITED STATES ATTORNEYS ON INCREASING CRIMINAL FORFEITURES

-- The following steps have been taken in United States Attorneys' offices to increase forfeiture generally and criminal forfeitures in particular.

Location of Asset Forfeiture Unit

-- A number of districts have made the Asset Forfeiture Unit a part of the Criminal Division (specifically with the Narcotics Unit or OCDETF) or have co-located it with the Criminal Division or the OCDETF unit. This has improved both formal and informal communication and has sent the message that forfeiture is an integral part of every criminal prosecution.

-- Where the Asset Forfeiture Unit is a part of the criminal division, districts report that the forfeiture attorneys, credibility is enhanced.

-- In a few districts, the Asset Forfeiture Unit reports directly to the First Assistant. Because forfeiture cuts across civil and criminal lines, these districts believe that coordination is enhanced by placing it at this level. In addition, this placement raises visibility and priority of the work.

Rating Assistants on Forfeiture Work

-- One district has made supervision of investigation and prosecution of forfeiture a critical element for all chiefs and deputy chiefs.

-- One district is developing a critical job element for all Assistants pertaining to the investigation and prosecution of criminal and civil forfeiture claims.

-- While not a critical element, in one district forfeiture efforts were noted as an enhancement to overall ratings in the performance evaluation process.

Identifying Forfeiture Potential

-- One district has modified the case intake form such that failure to address forfeiture will result in an inability to enter the case information.

-- Asset forfeiture attorneys are given printouts to review all new cases to identify those where forfeiture potential is likely.

-- Some forfeiture attorneys get the OCDETF proposal forms to review.

-- In some districts, the Office policy states that there is a presumption of forfeiture potential in every drug, money laundering, RICO and FIRREA case.

-- In districts that use prosecution memos, there is a requirement that forfeiture be addressed. If there is no forfeiture potential, the AUSA must explain why.

-- In one district, the Chief, Major Narcotics Section has written to all federal agencies advising them of the emphasis on forfeiture and requesting that all agents be specifically instructed on how to prepare the asset forfeiture aspects of their basis from the inception.

-- In several districts, the federal agents are under instruction by the criminal prosecutors to contact the forfeiture attorney as soon as asset forfeiture potrntial is found.

-- In one district, prosecutors have urged the DEA Asset Forfeiture Team to provide forfeiture investigative assistance to the other Special Agent Groups investigating substantive criminal law violations. This has resulted in enhanced oriminal forfeiture claims in at least five major criminal cases.

-- In some districts, federal agents are required to give copies of investigative reports to the forfeiture Attorney.

<u>Involving the Asset Forfeiture Attorney Early</u>

-- Regardless of the location of the Forfeiture Unit, getting the forfeiture attorney involved early in the investigation is important.

-- Many districts report that asset forfeiture attorneys attend the criminal division and OCDETF weekly meetings. This is particularly important when indictments are discussed.

-- At indictment meetings in many districts, every case is looked at for forfeiture potential.

-- Asset forfeiture attorneys in some districts are frequently assigned as co-counsel on any case in which there are potential assets to be forfeited. They work with the prosecutor at pre-trial, trial and grand jury stages as appropriate.

-- Having a forfeiture attorney consult on every case results in greater uniformity of case handling in some districts.

-- In some districts, forfeiture attorneys are routinely assigned to work with criminal prosecutors in all OCDETF and other major drug cases.

-- In many districts, forfeiture attorneys are included in any meeting involving investigative strategy on cases with forfeiture potential.

Standard Language and Forms

-- Sample indictments and jury instructions for criminal forfeiture have been developed by many districts.

-- A form book for criminal forfeiture is available from the Asset Forfeiture Office, Criminal Division.

-- Drafting the forfeiture count is often the responsibility of the criminal Assistant, although in a number of districts the forfeiture attorney is responsible for either drafting or reviewing the count.

-- One district developed lists of substantial offenses which support forfeiture under 18 U.S.C. 981 and 982 as well as lists of offenses which constitute specified unlawful activity under 18 U.S.C. 1956 and 1957. All criminal prosecutors have these lists.

-- This district also developed a 30-page summary of the procedures relating to all types of forfeiture proceedings (including money laundering and criminal forfeiture) which is used to train agents and attorneys.

-- Many districts have standard plea agreement language.

-- One district requires all Assistants in the Major Crimes section to include in indictments all currency seized from cocaine swallowers and body carriers. Instead of declining small dollar amounts, criminal prosecutors are learning how to do criminal forfeitures.

Coordination of Plea Agreements

-- In some districts the forfeiture attorney must approve any pleas which involve forfeiture of assets. In many districts the forfeiture attorney participates in the drafting of the plea.

Training

-- In-house training on forfeiture is critical and is ongoing in the majority of districts.

-- In one district, all criminal sections will receive training on asset forfeiture from the forfeiture attorney. In addition, the forfeiture attorney is personally meeting with all federal agencies to discuss forfeiture. Increased quality and quantity of referrals has already resulted from these efforts.

-- It is important that developments in forfeiture law and policy are communicated frequently to criminal attorneys in all districts.

-- Training of federal, State and local agencies on what is needed to put together a good forfeiture case should be ongoing.

-- All criminal prosecutors should seek training in asset forfeiture, money laundering, etc. through the AGAI training program.

-- Many districts are using EOUSA's "forfeiture flying squad" thereby one or two nationally recognized forfeiture attorneys provide in-house training to requesting districts.

-- One district includes asset forfeiture problems in its in-district two-week trial advocacy course for new Assistants.

-- One district requires all new Assistants to spend several weeks in the forfeiture unit prior to assuming criminal prosecution responsibility.

EXHIBIT
D

Court-Ordered Monitoring by F.B.I. Agents

of Defendants on Pretrial Release

A number of federal courts have recently issued orders providing for F.B.I. involvement in monitoring the pretrial release of certain organized crime defendants. Pursuant to 18 U.S.C. § 3142(c), which permits judicial officers to release defendants prior to trial subject to conditions designed to assure their appearance and the safety of the community, courts have recently included in their release orders provisions for (1) random inspection of a defendant's home by the F.B.I., (2) F.B.I. involvement in installing pen registers and telephone monitoring systems in the defendant's home and (3) court-authorized interceptions by the F.B.I. of all wire communications to and from the defendant's home. For the reasons discussed below, it is recommended that any future efforts by courts to impose similar obligations on the F.B.I. with respect to the monitoring of pretrial releasees be discouraged, and that responsibility for installing electronic surveillance equipment and monitoring telephone conversations be left to the Pretrial Services components of the district courts.

Specific conditions of pretrial release authorized by statute are set forth in 18 U.S.C. § 3142(c)(1)(B). Subsection (xiv) of Section 3142(c)(1)(B) authorizes a court to require the criminal defendant to "satisfy any other condition that is reasonably necessary to assure the appearance of the [defendant] and to assure the [public safety]." The statute does not specifically authorize or prohibit recruitment of any Executive Branch agencies or personnel to assist in ensuring compliance with the court-ordered conditions of release. While a court arguably has the authority under the All Writs Act (28 U.S.C. § 1651) to issue orders designed to enforce release conditions imposed pursuant to Section 3142(c)(1)(B)(xiv), such authority would not permit a court to order a government agency to perform a function outside the scope of its regular official responsibilities. The functions of the Federal Bureau of Investigation do not normally include court-ordered preventive investigation or monitoring of defendants on pretrial release, unless such activity were part of a pre-existing Executive Branch criminal investigation or search for evidence. See 28 C.F.R. § 0.85. Accordingly, the use of F.B.I. personnel and equipment to ensure compliance with court-ordered conditions of a defendant's pretrial release is inconsistent with their primary responsibilities, and this is inappropriate.[1]

---

[1] The F.B.I. also notes that court orders requiring the FBI to assist in monitoring pretrial releasees should be opposed because of the drain they place on investigative manpower and scarce

In the event a court in your district indicates an interest in ordering the installation of pen registers or other electronic surveillance devices in the home of a defendant as a condition of such defendant's order of release, please encourage the court to place responsibility for effectuating such a condition with the court's Pretrial Services office and any experts they may need to retain, rather than with the F.B.I. Established under 18 U.S.C. § 3152, Pretrial Services is the only governmental body which has an express statutory mandate to supervise pretrial releasees. Although Pretrial Services may not have the technical expertise and equipment to itself carry out the court's order, it is authorized under 18 U.S.C. § 3154(11) to contract for the carrying out of any pretrial services function, and therefore should be able to secure the necessary assistance from private companies.[2]

If a district court disagrees and orders the F.B.I. to perform Pretrial Service's tasks, please notify Lisa Kahn (FTS 368-1061) of the Criminal Division's General Litigation and Legal Advice Section.

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electronic surveillance equipment, and because additional personnel and technical equipment have not been budgeted for since F.B.I. assistance to Pretrial Services was never contemplated by Congress.

[2] Pretrial Services offices which have questions about procedures for implementing court orders requiring the installation of pen registers and other telephone monitoring systems should be directed to contact Dan Ryan of the Administrative Office of the United States Courts (FTS 786-6540).

EXHIBIT
E

REENTRY OF DEPORTED ALIEN

(8 U.S.C. 1326)

On or about the _____ day of _____, 19_____, in the District of _____, the defendant, _____, an alien who had previously been deported, knowingly and unlawfully entered [attempted to enter] [was found in] the United States at _____, _____, the said defendant having not obtained the consent of the Attorney General of the United States for reapplication by the defendant for admission into the United States, in violation of Title 8, United States Code, Section 1326.

(Revised 8/91)

U.S. Department of Justice

Tax Division

EXHIBIT F

Washington, D.C. 20530

August 8, 1991

MEMORANDUM

TO: All United States Attorneys

FROM: Shirley D. Peterson
Assistant Attorney General
Tax Division

SUBJECT: CRIMINAL TAX PROSECUTIONS IN LIGHT OF UNITED STATES V. POWELL, NO. 90-10060 (9TH CIR. JUNE 13, 1991)

In an earlier communication, dated June 25, 1991, we informed you of United States v. Roy G. Powell and Dixie Lee Powell, 1991 WL 99653 (WESTLAW), No. 90-10060 (9th Cir. June 13, 1991), wherein the Ninth Circuit reversed the failure to file tax return convictions of two tax protesters. A petition for rehearing en banc has been filed. Nevertheless, until the Ninth Circuit acts on that petition, we advise you to consider the following in light of Powell when conducting criminal tax prosecutions:

1. The Powell opinion states that the Government may prove willful conduct by demonstrating either that the defendant acted with bad purpose or evil motive, or that he voluntarily and intentionally violated a known legal duty. Slip op. at 7348-7349. This is incorrect. Willful conduct means conduct in voluntary, intentional violation of a known legal duty, and that is all it means. See Cheek v. United States, 111 S.Ct. 604, 610 (1991). The Government should not agree to jury instructions, whether in the Ninth Circuit or elsewhere, that do not require proof of a voluntary, intentional violation of a known legal duty.

All of us fought long and hard against the proposition that a good motive excuses a failure to comply with the internal revenue laws. See United States v. Pomponio, 429 U.S. 10 (1976). We do not want to fight that battle again.

2. After Cheek, 111 S.Ct. at 610-612, it is clear that willfulness is to be judged subjectively. The Powell opinion

(slip op. at 7349-7351) held that the following instruction misled the jury as to the subjective nature of willfulness:

> If a person believes, in good faith, that he or she has done all that the law requires, that person cannot be guilty of criminal intent to willfully fail to file a tax return. But if a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for you to decide whether the defendants acted in good faith, or whether they willfully intended to fail to file an income tax return.

We believe that this instruction correctly sets forth the subjective standard of willfulness. Accord United States v. Whiteside, 810 F.2d 1306, 1310-1311 (5th Cir. 1987); United States v. Payne, 800 F.2d 227, 229 (10th Cir. 1986); United States v. Aitken, 755 F. 2d 188, 192 (1st Cir. 1985). In order to avoid any future problems, however, we suggest that the following good faith instruction be used both inside and outside the Ninth Circuit (with appropriate modification for the particular crimes charged):

> To prove that the defendant acted willfully, the Government must prove that she [he] voluntarily and intentionally violated a known legal duty. If the Government proves that the defendant knew of her [his] legal duty to file returns and to pay taxes, and that she [he] voluntarily and intentionally violated that duty, then you may find that the defendant acted willfully.
>
> The defendant's conduct is not willful if she [he] acted through negligence, inadvertence, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law. Thus, if you find that the defendant had a good faith misunderstanding of the law or believed in good faith that she [he] had done all that the law required, you may not find that the defendant acted willfully and you must acquit the defendant.
>
> A good faith belief is one which is honestly and genuinely held. It is for you to decide whether the defendant acted in good faith or whether she [he] willfully attempted to evade taxes. In making this determination, you are entitled to consider all of the

> evidence received in this case which bears on the defendant's state of mind. You may also consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held.
>
> However, the defendant's beliefs need not be reasonable and you may not simply substitute your judgment as to the reasonableness of the defendant's beliefs in place of an honest belief held in good faith. If you find that the defendant's beliefs were held in good faith, you may not find the defendant guilty simply because you find that the beliefs were unreasonable.

This instruction unquestionably sets forth a subjective standard of willfulness. At the same time, it alerts the jury to the fact that it may consider the reasonableness of a defendant's asserted beliefs in determining whether they were genuinely held. See Cheek, 111 S.Ct. at 611-612; Powell, slip op. at 7351.

3. The Powell panel also held that the trial court erred in responding to a jury question by telling the jurors that the ability of the IRS to file a substitute return does not supplant a taxpayer's obligation to file. The panel acknowledged that this instruction correctly stated the law, but held that it served "no purpose" and was tantamount to telling the jury to disregard the defendants' claim that they acted in good faith. The panel added that the jury should have been told that "the actual law was irrelevant for purposes of the case" because "all that mattered was the Powells' good faith understanding of the law." Slip op. at 7346, 7353-7354 & n.2.

Notwithstanding the language in Powell about the irrelevance of the actual law, juries in criminal tax cases, both inside and outside the Ninth Circuit, must be instructed on the law so that they can determine what the defendant was legally required to do. See, e.g., Cheek, 111 S.Ct. at 610 (Government must prove that defendant had a legal duty). And, the trial court must be able to clarify the applicable law for the jurors in response to a jury question.

Powell should not be read as precluding such necessary and appropriate instructions in the Ninth Circuit. Instead, Powell should be read as holding only that instructions as to what the law required can be prejudicial to the defendant on the issue of willfulness -- not that they invariably are prejudicial, regardless of how careful the trial court is to instruct the jurors that willfulness is determined solely by what the defendant

believed. 1/ Thus, district courts in the Ninth Circuit and elsewhere may still clarify the applicable law so long as they also clearly advise the jury that willfulness is to be determined solely by what the defendant actually believed, and not by whether he correctly interpreted the law. See United States v. Eargle, 921 F.2d 56, 57-58 (5th Cir. 1991), petition for cert. pending, No. 90-1641; United States v. Dack, 747 F. 2d 1172, 1175 (7th Cir. 1984); United States v. Karsky, 610 F. 2d 548, 551 (8th Cir. 1979), cert. denied, 444 U.S. 1092 (1980).

4. The Powell court also held that the defendants were improperly prevented from reading to the jury a statute on which they assertedly had relied. The court held that Cheek implicitly overruled Ninth Circuit precedent on this issue and required the admission of legal materials upon which a defendant claims to have relied. Slip op. at 7345, 7354-7356 & n.3.

Prior to Cheek, many cases had upheld the exclusion of such evidence on the ground that it had little or no probative value but great potential to confuse the jury. See, e.g., United States v. Mann, 884 F.2d 532, 538 (10th Cir. 1989); United States v. Flitcraft, 803 F.2d 184, 185-186 (5th Cir. 1986); United States v. Kraeger, 711 F.2d 6, 7-8 (2d Cir. 1983); United States v. Bernhardt, 642 F.2d 251, 253 (8th Cir. 1981); Cooley v. United States, 501 F.2d 1249, 1253-1254 (9th Cir.), cert. denied, 419 U.S. 1123 (1975). In our view, Cheek did not affect prior law, and trial courts retain their discretion to exclude this type of evidence under Fed. R. Evid. 403. See United States v. Fingado, 1991 WL 90952 (WESTLAW), No. 89-2318, slip op. at 3 n.1 (10th Cir. June 4, 1991) ("Cheek did not require the admission of any and all evidence showing a basis for the defendant's beliefs"; court retains discretion concerning admissibility of legal documents or testimony regarding their contents). Cf. United States v. Lussier, 929 F.2d 25, 31 (1st Cir. 1991). 2/

1/ Although the trial court in Powell did reinstruct the jury on willfulness and good-faith belief, slip op. at 7346, the opinion inexplicably fails to mention these instructions in its discussion of this issue, see slip op. at 7353-7354. We decline to infer from the court's failure to discuss these instructions any holding that instruction on the law is inherently prejudicial regardless of how carefully and accurately the jury is instructed on willfulness and good faith.

2/ The Powell holding is based on a single sentence in Cheek which states that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Cheek, 111 S.Ct. at 611. However, Powell lifts this sentence out of its context, which concerns instructions that required the jury to disregard a defendant's genuinely held beliefs about the tax laws. Read in

Thus, prosecutors outside the Ninth Circuit may still seek the exclusion of legal materials upon which a defendant claims to have relied when such exclusion is warranted under Rule 403. When appropriate, however, restraint should be exercised so that a conviction which could have been obtained even if some legal material had been admitted is not jeopardized on appeal because no such material was admitted. Within the Ninth Circuit, prosecutors should generally not oppose the admission of such materials. However, even though Powell treated the exclusion of this type of evidence as a matter of law, see slip op. at 7354 (standard of review is de novo); slip op. at 7356 (upon retrial, trial court "should allow proffered evidence of the statutes, case law and legal materials the Powells relied upon"), we believe that trial courts in the Ninth Circuit do retain some discretion. Powell could not have intended, for example, to give a defendant the right to read hundreds of cases upon which he assertedly relied to the jury. Thus, even after Powell, we believe that a rule of reason would still apply to the admission of such evidence in the Ninth Circuit and prosecutors in that circuit should take the position that the court still can control the amount of such material which is presented to the jury.

We will, of course, advise you when the Ninth Circuit acts on the petition for rehearing en banc in Powell. In the meantime, any attorney with questions or seeking further information concerning this memorandum may contact Robert E. Lindsay, Chief, (FTS 368-3011 or 202-514-3011) or Alan Hechtkopf, Assistant Chief, (FTS 368-5396 or 202-514-5396), Criminal Appeals & Tax Enforcement Policy Section, Tax Division.

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context, this sentence in Cheek does not affect a trial court's discretion to exclude legal materials from evidence pursuant to Rule 403.

EXHIBIT G

MEMORANDUM OF AGREEMENT
BETWEEN
THE DEPARTMENT OF JUSTICE
AND
THE FEDERAL TRADE COMMISSION

WHEREAS, the Federal Trade Commission ("Commission") conducts investigations into potential violations of Section 7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("H-S-R Act"), and the regulations promulgated thereunder, 16 C.F.R. Parts 801, 802 and 803 ("Rules");

WHEREAS, the Department of Justice, ("Department"), acting at the request of the Commission or upon its own initiative, may commence actions pursuant to Section 7A (g) (1) of the Clayton Act for violations of the H-S-R Act and/or Rules;

WHEREAS, the conduct of that litigation requires a close and cooperative relationship between the attorneys of the Department and of the Commission in order to achieve the most effective deployment of the Government's resources and assure consistent approaches to enforcement of the provisions of the H-S-R Act and Rules; and

WHEREAS, the Department may appoint the Commission's attorneys as Special Attorneys or Special Assistant United States Attorneys and thereby authorize them to commence a particular action on behalf of the United States pursuant to 28 U.S.C. §§ 515, 543;

NOW, THEREFORE, the following Memorandum of Agreement is entered into by the Department, represented by the Attorney General of the United States ("Attorney General") and the Assistant Attorney General in charge of the Antitrust Division of the Department ("Assistant Attorney General"), and the Commission, represented by the Chairman of the Commission ("Chairman"), for the purpose of promoting the efficient and effective handling of actions for violations of the H-S-R Act and/or Rules:

1. The Attorney General will have control over all actions brought pursuant to Section 7A(g) (1) of the H-S-R Act.

2. In cases where the Commission deems an action to be appropriate, it will request that the Department initiate such action by transmitting a case proposal to the Attorney General in the following manner:

(a) all such requests by the Commission to the Department will be transmitted by the Commission to the Attorney General, and a copy will be concurrently delivered to the Assistant Attorney General;

(b) all such requests will be accompanied by a memorandum that contains such information as may be necessary to assist in evaluating and/or prosecuting the requested action and that describes the relief proposed by the Commission to be sought in the action;

(c) at the request of the Assistant Attorney General, the Commission will make available any files relevant to the case that is the subject of the requested action.

3. The Assistant Attorney General will, within 45 days after receipt of a request and supporting papers as described in 2 (b) above from the Commission, evaluate the case proposal for purposes of determining whether the Department will initiate an action for the violations alleged; during such time, the Commission's attorneys will be available to consult with the Assistant Attorney General with respect to such action, and will provide such additional information and support as may be necessary to assist the Assistant Attorney General in such deliberations.

4. Prior to the expiration of this 45-day period, the Assistant Attorney General will inform the Chairman by letter that:

(a) no action is authorized, providing the reasons supporting said conclusion;

(b) additional information is required before a determination can be made, describing the nature of the information needed; or

(c) the Assistant Attorney General will initiate an action by filing a complaint within a time certain.

5. If none of the determinations described in Paragraph 4 has been communicated to the Chairman by the end of the 45-day period, the Chairman or the Chairman's delegate may designate specific Commission attorney(s) and forward the name(s) of such attorney(s) in writing to the Attorney General for purposes of their prompt appointment as Special Attorneys or Special Assistant United States Attorneys ("Commission Special Attorneys") to prosecute the action; PROVIDED, however, that the Attorney General will retain full discretion to make, decline to make, or revoke any such appointment at any time.

6. Commission attorneys appointed as Commission Special Attorneys for purposes of prosecuting such actions will be subject to the supervision and control of the Attorney General, and will take the required oath prior to conducting any kind of court proceedings.

7. In all actions prosecuted by the Commission Special Attorneys pursuant to this Agreement, the Commission shall be responsible for any costs and attorneys fees incurred.

8. It is understood that, pursuant to this Agreement, Commission Special Attorneys in the course of prosecuting actions may appear in court, conduct discovery and trials, present oral argument, prepare briefs, memoranda and pleadings, participate in discussions with opposing counsel, including settlement negotiations, and undertake all other aspects of case preparation and trial normally associated with the

responsibilities of an attorney in the conduct of litigation; PROVIDED, however, that the Attorney General will retain control over the conduct of all such litigation.

9. It is understood that the settlement of any action subject to this Agreement and the negotiation of any such settlement to be filed in court will require the authorization of the Attorney General or the appropriate delegate within the Department in a manner that conforms to the Department's regulations governing the settlement of actions as set forth in 28 C.F.R. §0.160 et seq.

10. Nothing in this Agreement will affect any authority of the Solicitor General to authorize or decline to authorize appeals by the Government from any district court to any appellate court or petitions to such courts for the issuance of extraordinary writs, such as the authority conferred by 28 C.F.R. §0.20, or to carry out the traditional functions of the Solicitor General with regard to appeals to or petitions for review by the Supreme Court.

11. Nothing in this Agreement will affect any authority of the Commission to commence any action pursuant to Section 7A(g) (2) of the Clayton Act.

12. In order to implement the terms of this Agreement effectively, the Attorney General, the Assistant Attorney General and the Chairman will transmit copies of this

Agreement to all personnel affected by its provisions. This Agreement will not preclude the Department and the Commission from entering into mutually satisfactory arrangements concerning the handling of a particular case.

13. This Agreement will apply to all cases for which requests are submitted after the date of approval of this Agreement. The Department and the Commission will endeavor to resolve all matters relating to cases arising before the effective date of this Agreement in a manner consistent with the spirit of this Agreement. This Agreement may be terminated at any time by written notice from the Attorney General to the Chairman or from the Chairman to the Attorney General but, in the event of such termination, the Agreement will remain in force with respect to litigation commenced under the Agreement prior to its termination.

Dick Thornburgh
Attorney General

Date: May 29, 1991

James F. Rill
Assistant Attorney General
Antitrust Division
Department of Justice
Date:

Janet D. Steiger
Chairman
Federal Trade Commission
Date: July 31, 91

By Direction of the Commission

Guideline Sentencing Update

FEDERAL

EXHIBIT H

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 4 • NUMBER 6 • JULY 31, 1991

General Application Principles

Sixth Circuit holds that sentencing steps prescribed in U.S.S.G. § 1B1.1 are inconsistent with 18 U.S.C. § 3553; directs courts to follow statute, not Guidelines, if there are aggravating or mitigating circumstances not taken into account by Sentencing Commission. An undercover agent agreed to sell defendant 500 grams of cocaine, but instead gave defendant 85 grams in a plastic bag that was inside another bag containing 985 grams of plaster of paris. Defendant was charged with and pled guilty only to possession with intent to distribute an unspecified quantity of cocaine. On appeal defendant argued that he should have been sentenced only on the basis of the 85 grams he actually possessed, not the 500 grams he attempted to buy or the total weight of the cocaine and plaster package (note: the guideline range is the same for 500 or 1,070 grams of cocaine).

The majority of the court first held that the "sequence of nine sentencing steps prescribed" in § 1B1.1 is "inconsistent with the enabling statute governing guideline sentencing," 18 U.S.C. § 3553. The court determined that "the statute itself establishes the sentencing sequence and the way a district court shall go about applying the Sentencing Guidelines. The Commission does not follow the congressional scheme." The court held that "instead of waiting until the very end of the nine-step sentencing process to determine if a 'departure' is permissible, as the Sentencing Commission directs in § 1B1.1.... the [district] court should determine at the outset of the sentencing process whether the case presents circumstances 'not adequately taken into consideration' by the Commission in proposing its offense level for the crime.... If the District Court determines at the outset that the facts and circumstances of the case should render the Guidelines inapplicable, the Court 'shall impose an appropriate sentence having . . . due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses.' [18 U.S.C. § 3553(b).] The Court should compare the Commission's proposed offense level for the crime to the first principles outlined by Congress [in § 3553(a)] and determine at the outset whether the Commission's proposed level for the crime adequately takes into account the circumstances of the case in light of the need for a 'just punishment not greater than necessary.'"

"The legal effect of the more flexible approach to the guidelines outlined here is to transform mandatory rules into the more 'modest name "guidelines"' in those cases in which the Commission's proposed guideline sentence is 'greater than necessary' or in which the parties present a legitimate 'aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration.' When such a circumstance is presented, the guidelines become inapplicable as mandatory rules to be followed by the District Court without regard to its own judgment. Instead, the guidelines become more general principles of sentencing to be used in light of the principles of sentencing outlined in § 3553(a)."

Using this approach, the issue in the instant case is "whether the guidelines specify an applicable offense guideline section or range that takes into account either of the two aggravating circumstances which the government asserts should raise the offense level," namely the weight of the plaster or the negotiation for 500 grams. As to the first, "[t]here is no evidence that the Commission considered a case in which the cocaine is separately wrapped in a plastic bag inside a mixture of plaster and not adulterated or alloyed with the plaster." It was error to conclude "that the sentencing sequence under the statute and the sentencing guidelines mechanically requires an offense level of 26 for this reason."

With respect to the 500 grams, the issue was "whether the Commission has stated with clarity how it proposes to deal with a defendant who is charged with and convicted only of possession of a small quantity of drugs but who also may have committed other conspiracy or attempt crimes." The court concluded that "[i]t is not clear to us that the Commission intended . . . to raise the punishment by including as a mandatory aggravating circumstance uncharged conduct that amounts to a conceptually different offense from the offense of conviction. Attempts or conspiracies are inchoate crimes not of the same character as the substantive offense of possession, and they are not covered by the same guideline section. . . . It is true, as our dissenting colleague maintains, that the relevant conduct provisions in Application Note 12 to § 2D1.1 say that the 'quantities of drugs not specified in the count of conviction may be considered in determining the base offense level,' but it does not say that they 'may' be considered if the additional amounts involve a conceptually distinct drug offense, let alone that they 'must' be considered."

On remand, the district court should "follow the sentencing process established by Congress in § 3553(a) and (b), as outlined above. This process provides for a mandatory guidelines sentence at a particular level if, but only if, in specifying the offense level to be applied the Commission took into account all of the aggravating and mitigating circumstances in the case. If there is such a circumstance not taken into account, . . . the District Court 'shall impose an appropriate sentence having due regard' for the Guidelines.... The District Court should resentence the defendant under the more flexible procedure and the qualitative standards set out in the last two sentences of 18 U.S.C. § 3553(b)."

U.S. v. Davern, No. 90-3681 (6th Cir. June 20, 1991) (Merritt, C.J.).

Departures

Extent of Departure

Ninth Circuit en banc holds that extent of departure for atypical circumstances must be determined by reference to "the structure, standards and policies" of the Sentencing Reform Act and Guidelines. Defendant pled guilty to illegal transportation of aliens. His guideline range was 0–6 months, but the district court departed to a 36-month sentence because defendant attempted to evade arrest in a dangerous high-speed chase. The appellate court affirmed the departure and set forth a five-step procedure for review of departures. *See U.S. v. Lira-Barraza*, 897 F.2d 981 (9th Cir. 1990). The Ninth Circuit granted rehearing en banc.

The en banc court first determined that the five-step review process could be combined into three steps, essentially following the procedure set forth in *U.S. v. Villafane*, 874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989), and followed by several circuits. In this case the first two steps were satisfied: the district court had "legal authority to depart" because it identified an aggravating circumstance not adequately considered by the Sentencing Commission, and its factual finding that the circumstance existed was not clearly erroneous.

The third step is "whether the extent of departure from the applicable Guideline range was 'unreasonable' within the meaning of 18 U.S.C. § 3742(e)(3) and (f)(2)." The court held that it could not review the departure for reasonableness because the district court had not explained the extent of the departure. The court determined that the provisions of the Sentencing Reform Act and the Guidelines "support the conclusion that departure sentences are limited by the sentencing structure established by the Act." In particular, the directive in 18 U.S.C. § 3553(a)(6), that courts shall consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," applies to departures "and requires, at a minimum, that departure sentences be consistent with other sentences fixed by the Guidelines or suggested by Commission standards and policies."

"The essential factor is that the extent of departure be based upon objective criteria drawn from the Sentencing Reform Act and the Guidelines. Possible criteria include comparison of the seriousness of the atypical circumstances to offenses or enhancements in the Guidelines, . . . treatment of the circumstance as a separate offense covered by the Guidelines, . . . and consideration of the structure of the sentencing table, in particular, the increments between guideline ranges."

The court stated that "a reasonableness standard assumes a range of permissible sentences. We give weight to the district court's choice within a permissible range. Reversal is required only if the choice is 'unreasonable' in light of the standards and policies incorporated in the Act and the Guidelines." To facilitate appellate review, sentencing courts "should include a reasoned explanation of the extent of the departure founded on the structure, standards and policies of the Act and Guidelines." *Cf. U.S. v. Roth*, 934 F.2d 248 (10th Cir. 1991) (indicating that departure by analogy to guidelines may be necessary to enable review for reasonableness). The case was remanded for an explanation of the district court's reasons for choosing 36 months.

Among the other circuits, only the Seventh Circuit appears to require departure by analogy for atypical circumstances. *See U.S. v. Ferra*, 900 F.2d 1057, 1062–63 (7th Cir. 1990). The Second, Third, and Tenth Circuits have strongly recommended use of analogies when appropriate, but do not require it. *See U.S. v. Jackson*, 921 F.2d 985, 990–91 (10th Cir. 1990) (en banc); *U.S. v. Kikumura*, 918 F.2d 1084, 1113 (3d Cir. 1990); *U.S. v. Kim*, 896 F.2d 678, 683–85 (2d Cir. 1990). Other circuits have indicated approval of departure by analogy. *See U.S. v. Hummer*, 916 F.2d 186, 194 n.7 (4th Cir. 1990); *U.S. v. Landry*, 903 F.2d 334, 340–41 (5th Cir. 1990); *U.S. v. Shuman*, 902 F.2d 873, 877 (11th Cir. 1990).

U.S. v. Lira-Barraza, No. 88-5161 (9th Cir. July 22, 1991) (Browning, J.) (en banc).

Mitigating Circumstances

U.S. v. Wogan, No. 91-1214 (1st Cir. July 18, 1991) (Selya, J.) (improper to depart downward to equalize sentence with that of codefendant, who had received shorter sentence because government failed to produce sufficient evidence of total amount of heroin involved in offense, which evidence was produced at defendant's later sentencing and resulted in longer term—"a perceived need to equalize sentencing outcomes for similarly situated codefendants, without more, will not permit a departure from a properly calculated guideline sentencing range"). *Accord U.S. v. Joyner*, 924 F.2d 454, 459–61 (2d Cir. 1991).

Criminal History

Career Offender Provision

U.S. v. Rivers, 929 F.2d 136 (4th Cir. 1991) (Reversing 733 F. Supp. 1003 (D. Md. 1990) [3 *GSU* #7], which held that defendant was not a career offender because two prior felonies that occurred within twelve days and in adjacent jurisdictions were sentenced separately only because of "accident of geography" or, alternatively, that they were "committed pursuant to a single plan" (i.e., robbing gas stations to get money for drugs), and for either reason should not be counted as separate offenses. Appellate court held there was "no factual or legal support for the district court's findings and conclusions." The prior offenses were "unrelated" within the meaning of § 4A1.2, and to consider them "part of a single common scheme or plan" pursuant to § 4A1.2, comment. (n.3), "would have the effect of making related offenses of almost all crimes committed by one individual. The fact that both offenses were committed to support one drug habit does not make the offenses related under § 4A1.2." And the fact that the second judge made the second sentence concurrent to first does not matter.). *But cf. U.S. v. Houser*, 929 F.2d 1369, 1374 (9th Cir. 1990) (reversing finding that two prior drug convictions were not related under § 4A1.2 and defendant was thus career offender—convictions resulted from single investigation, both drug sales were to same undercover agent, and defendant was charged with separate offenses only because sales occurred in different counties: "[Defendant] was charged and convicted of two offenses merely because of geography and not because of the nature of the offenses. . . . There was significant evidence . . . that these two drug sales were part of a 'single common scheme or plan.' There was no evidence before the court to contradict this finding.").

EXHIBIT I

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 2, No. 30 | Federal Sentencing Guidelines and Forfeiture Cases from All Circuits. | August 12, 1991

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- 5th Circuit remands for failure to find that amount of drugs in conspiracy was foreseeable. Pg. 6
- 9th Circuit holds that felons are entitled to reduction for sport weapon possession. Pg. 7
- 9th Circuit applies aggravating role adjustment only when offense is committed by more than one criminally responsible person. Pg. 7
- 1st Circuit affirms abuse of trust enhancement for policeman who sold drugs. Pg. 8
- 7th Circuit rejects denial of guilt to investigators as ground for obstruction enhancement but affirms on other grounds. Pg. 10
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- 3rd Circuit remands for court to consider defendant's ability to pay fine. Pg. 12
- 9th Circuit limits restitution in wire fraud scheme to the amount in the count of conviction. Pg. 13
- 4th Circuit rules court's adoption of presentence report did not resolve disputed facts. Pg. 14

Cruel and Unusual Punishment

6th Circuit upholds 10-month sentence for illegal sale of machine gun against 8th Amendment challenge. (105) The 6th Circuit rejected defendant's claim that his 10-month sentence for selling a machine gun without a license violated the 8th Amendment's guarantee against cruel and unusual punishment. A plurality of the Supreme Court recently supported a "narrow proportionality" test in *Harmelin v. Michigan*, __ U.S. __ (June 27, 1991) No. 89-7272. Under this approach, there is no requirement of strict proportionality. The 8th Amendment is offended only by an extreme disparity between crime and sentence. Defendant's 10-month sentence easily survived this test. The unauthorized distribution or use of dangerous weapons constituted a sufficiently grave threat to society that a sentence of 10 months is more than justified. *U.S. v. Hopper*, __ F.2d __ (6th Cir. August 2, 1991) No. 90-6230.

Guideline Sentences, Generally

10th Circuit upholds state prosecutor's decision to drop charges and refer defendant to federal prosecutor. (110) Defendant was arrested on state drug charges by a strike force funded by and comprised of personnel from state, local and federal governments. Since there was an ongoing investigation of defendant on more extensive charges, the county attorney's office dismissed the state charges and released defendant. Several months later defendant was arrested by the strike force on federal drug charges and was convicted. Defendant argued that due process was violated when members of the strike force referred his case for federal prosecution without any "articulated policy or written guidelines." The 10th Circuit ruled that although such guidelines might be desirable, they were not constitutionally mandated. Defendant's argument misconceived the role of the strike force. Although the strike force officers have some influence in charging decisions, the ultimate charging decision rests solely with state and federal prosecutors. The court refused to assume that the prosecutors acted as

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"rubber stamps" for the strike force. *U.S. v. Andersen*, __ F.2d __ (10th Cir. July 29, 1991) No. 90-4044.

1st Circuit applies guidelines to defendants who failed to withdraw from conspiracy prior to guidelines' effective date. **(125)(380)** The 1st Circuit affirmed the application of the guidelines to defendants involved in a conspiracy that began prior to and continued beyond November 1, 1987, the effective date of the guidelines. Although defendants contended that their involvement in the conspiracy ended no later than the summer of 1987, there was no evidence that defendants took affirmative actions to withdraw from the conspiracy. Mere cessation of activity, in and of itself, is insufficient to constitute withdrawal from a conspiracy. Moreover, there was evidence that defendants attempted to resume more active participation in the conspiracy by reestablishing their supply relationship with a co-conspirator. The court rejected defendants' contention that, for purposes of factoring guideline calculations, only activity occurring subsequent to November 1, 1987 should have been considered. The guidelines take into account the entirety of the defendant's behavior in furtherance of the conspiracy. *U.S. v. David*, __ F.2d __ (1st Cir. July 29, 1991) No. 89-1807.

5th Circuit finds no ex post facto violation in application of guidelines to conspiracy that began prior to guidelines' effective date. **(125)(380)** The 5th Circuit found no ex post facto violation in the application of the guidelines to a conspiracy which began prior to the enactment of the guidelines. Although defendant contended that his participation in the conspiracy was not shown to have continued past the effective date, he did not argue that he withdrew from the conspiracy by taking affirmative acts inconsistent with the conspiracy and communicated this to his conspirators. *U.S. v. Puma*, __ F.2d __ (5th Cir. July 22, 1991) No. 90-1420.

7th Circuit affirms involvement in prior drug conspiracies as grounds for upward criminal history departure. **(130)(733)** Defendant was convicted of two drug charges. Although defendant fell with criminal history category I, the district court determined that defendant had been involved in five separate conspiracies, and departed upward to criminal history category III. The 7th Circuit rejected defendant's claim this departure violated the ex post facto clause, even though the evidence presented at his sentencing hearing predated the effective date of the guidelines. Defendant was not being punished for his past conspiracies, but rather for the two counts for which he was convicted. Although defendant received a stiffer penalty for his current crimes, his 450-month sentence was within the statutory maximum for both of the offenses. *U.S. v. Mettler*, __ F.2d __ (7th Cir. July 29, 1991) No. 90-2136.

5th Circuit rules disparate sentence does not violate "spirit" of guidelines. **(140)** Defendant claimed that the disparity between his sentence and the sentence of one of his co-conspirators rendered his sentence defective under the "spirit" of the guidelines. The 5th Circuit rejected this contention, since defendant's sentence fell within the range recommended by the guidelines. The fact that another party received a sentence lower than defendant did not render defendant's otherwise legal sentence a violation of the guidelines. *U.S. v. Puma*, __ F.2d __ (5th Cir. July 22, 1991) No. 90-1420.

General Application Principles (Chapter 1)

10th Circuit affirms upward departure based upon more than minimal planning and obstruction of justice. **(160)(340)(460)(745)** Defendant pled guilty to making a false statement in a passport application. The court increased the offense level by two for "more than minimal planning," and by two additional points because the offense had been committed to escape detection for other crimes, and thus was an attempt to obstruct justice. The 10th Circuit affirmed, although it found that the sentence in fact was a departure from the guidelines. Although several guidelines contain a two-point enhancement for more than minimal planning, guideline section 2L2.4 does not. Similarly, the court did not adjust defendant's sentence based upon obstruction of justice under guideline section 3C1.1, since this concerns attempts to obstruct the investigation of the instant offense. However,

both were proper grounds for an upward departure. Guideline section 2L2.4 was intended to be used for illegal aliens convicted of fraudulently acquiring passports to enter or remain in the country. The sentencing commission did not contemplate its use in sentencing citizens who engage in a more serious offense by fraudulently acquiring a passport to avoid prosecution. *U.S. v. Strickland*, __ F.2d __ (10th Cir. July 31, 1991) No. 91-6026.

10th Circuit holds that defendant's oral agreement in open court constituted stipulation to more serious offense. (165) Pursuant to a plea agreement, defendant pled guilty to bank larceny and the government dropped bank robbery charges. However, as permitted by the plea agreement, the government presented the actual facts in open court. Defendant agreed with these facts. The district court found that defendant had stipulated, under guideline section 1B1.2(a), to the more serious offense of bank robbery, and thus sentenced him under the robbery guideline. The 10th Circuit affirmed, finding that a stipulation under section 1B1.2 need not be written. The provision "turns on whether there was a knowing agreement by the defendant, as part of a plea bargain, that facts supporting a more serious offense occurred and could be presented to the court for application of guidelines relating to the more serious offense." Defendant not only agreed in open court to the bank robbery facts, but refused the district court's offer to let him withdraw his plea and go to trial if he disputed the existence of the agreement with respect to the more serious offense. *U.S. v. Gardner*, __ F.2d __ (10th Cir. July 24, 1991) No. 90-2244.

9th Circuit, en banc, holds that commentary is less than guideline, but more than legislature history. (180) In a lengthy, *en banc* opinion, the 9th Circuit held that the commentary to the guidelines cannot be treated as equivalent to the guidelines themselves. It is an interpretive aid for the courts and must be treated as something less than the guidelines. At the same time however, it must be treated as "something more than ordinary legislative history, which normally can be ignored if the statute is clear." Guideline section 1B1.7 and its commentary assume that guidelines often will need further explanation. "If the guidelines were clear the courts were expected simply to follow their plain meaning, the commission would have no reason to state that failure to follow the commentary constitute an incorrect application of the guidelines." Nevertheless, if it is not possible to construe the guideline and commentary consistently, the text of the guideline should be applied. *U.S. v. Anderson*, __ F.2d __ (9th Cir. August 6, 1991) (*en banc*) No. 89-10059.

Offense Conduct, Generally (Chapter 2)

New York District Court rules that lack of definition for "cocaine base" bars higher sentence. (240) Neither 21 U.S.C. 841, nor guideline section 2D1.1 defines cocaine base, the substance generally known as "crack." District Judge Lasker noted that the Ninth Circuit in *U.S. v. Shaw*, __ F.2d __ (9th Cir. June 11, 1991) No. 90-50242, concluded that cocaine base means "cocaine that can be smoked, unlike cocaine hydrochloride." The court added that "neither Congress nor the Commission intended the term 'cocaine base' to be defined by the presence of a hydroxylion or by its testing basis rather than acidic." Approximately a year earlier, a different panel of the Ninth Circuit said in *U.S. v. Hawkins*, 899 F.2d 852, 854 n. 2 (9th Cir. 1990), that "[t]he term 'cocaine base' is cocaine that contains an active hydroxylion." The *Van Hawkins* definition had been earlier adopted by the D.C. Circuit in *U.S. v. Brown*, 859 F.2d 974 (1988). However, in *U.S. v. Turner*, 928 F.2d 956 (10th Cir. 1991), an expert rejected *Van Hawkins'* definition of cocaine base as any form of cocaine with a hydroxylion. Based on this disagreement in the scientific community, the District Court found it would be "irresponsible" to rely on the Van Hawkins definition. The court found the cocaine base provisions unconstitutionally vague and sentenced defendant on the assumption that the substance was cocaine rather than cocaine base. *U.S. v. Jackson*, __ F.Supp. __ (S.D.N.Y. July 12, 1991) No. 89 CR 488 (MEL).

10th Circuit rules stipulation did not bar consideration of additional drugs. (245)(270)(795) Defendant was originally charged with possession 1.5 liters of P2P with intent to manufacture methamphetamine. In order to avoid the mandatory minimum sentence, the parties stipulated that the amount of P2P possessed by defendant was "not readily provable." The 10th Circuit ruled that the district court erred in finding that the stipulation barred it from considering additional drugs found in defendant's home. Under guideline section 6B1.4(d), a court is not bound by a stipulation of facts. Section 1B1.3(a)(2) requires aggregation of quantities from drug offenses that were "part of the same course of conduct or common scheme or plan as the offense of conviction," regardless of whether defendant was convicted of underlying offenses pertaining to the additional amounts. Moreover, the mandatory minimum sentence cannot be eliminated simply because a specific amount of drugs was not alleged in the indictment. However, since defendant was not fully aware of the consequences of his plea, the plea was involuntary, and he was entitled to plea anew. *U.S. v. McCann*, __ F.2d __ (10th Cir. July 26, 1991) No. 90-4109.

6th Circuit upholds equating one gram of crack to 100 grams of cocaine. (250) Defendant contended that by equating one gram of crack to 100 grams of cocaine, the guidelines violated substantive due process and the 8th Amendment prohibition against cruel and unusual punishment. The 6th Circuit rejected both of these challenges. The ratio tracked a similar ratio passed by Congress. The ratio was rationally based upon (a) evidence in the scientific community which suggested that crack is more likely to

cause addiction than cocaine, and (b) the fact that the cheap price and small size of crack made it more accessible to children. Circuit precedent already rejected defendant's argument concerning the 8th Amendment, and nothing in the Supreme Court's recent decision in *Harmelin v. Michigan*, __ U.S. __ (June 27, 1991) altered the analysis. *U.S. v. Pickett*, __ F.2d __ (6th Cir. August 1, 1991) No. 90-3594.

6th Circuit affirms failure to depart downward based upon alleged irrationality of drug table. (250)(722) Defendant contended that 18 U.S.C. section 3553(b) requires a district court to depart downward whenever there exists an aggravating or mitigating circumstance not taken into consideration by the guidelines. He then argued that the Sentencing Commission did not properly take into account the true properties of crack and cocaine when it formulated the ratio equating 1 gram of crack to 100 grams of cocaine. Therefore, the district court was required to depart downward in his case and sentence him as if he were convicted of a cocaine offense rather than crack. The 6th Circuit rejected this contention for three reasons. First, a court is never required to depart downward by section 3553(b). Second, a district court's refusal to depart downward is not appealable. Finally, the 100:1 ratio is not sufficiently unusual to justify a downward departure. *U.S. v. Pickett*, __ F.2d __ (6th Cir. August 1, 1991) No. 90-3594.

8th Circuit holds that marijuana cutting which has developed root hairs is a marijuana plant. (250) Defendant was arrested growing 43 mature marijuana plants and 188 marijuana cuttings. The district court determined that 18 of the cuttings had roots and therefore were "plants." Thus, defendant was sentenced on the basis of 61 marijuana plants. The 8th Circuit affirmed, holding that a cutting which has developed root hairs is a plant under the guidelines. The fact that such roots were rudimentary and that the cutting might not yet be viable did not affect the analysis. As in earlier cases, the court declined to develop a viability test to determine when a cutting becomes a plant. *U.S. v. Bechtol*, __ F.2d __ (8th Cir. July 24, 1991) No. 90-2799.

8th Circuit affirms consideration of precursor chemicals in determining base offense level. (250) The 8th Circuit found no error in the district court's consideration of precursor chemicals found with defendant's drug laboratory equipment. If the amount of drugs seized does not reflect the scale of the manufacturing offense, a sentencing court can consider evidence concerning the amount of drugs a defendant was capable of producing from precursor chemicals. Here, the district court heard expert testimony estimating the amount of methamphetamine that could be produced from the precursor chemicals, as well as testimony about the amount of drugs made in previous "cooks." The district court arrived at a correct calculation of base offense level after hearing this evidence. *U.S. v. Rogers*, __ F.2d __ (8th Cir. July 23, 1991) No. 90-1237.

9th Circuit upholds drug sentence based upon quantity of final product even if it could not have been produced during the conspiracy. (250(275) Guideline section 2D1.4(a) requires the district court to apply an offense level "as if the object of the conspiracy . . . had been competed." Defendant argued that the 200 kilograms of phenylacetic acid could not have been used to produce the claimed quantity of methamphetamine within the time frame of the conspiracy alleged in the indictment. The 9th Circuit rejected this argument, holding that "a conspiracy to achieve a result is distinct from the result itself." The fact that the conspiracy took place within a certain time period "does not mean that the result must fall within the same time period." "The district court properly considered the quantity of drugs as though the object of the conspiracy, distinct from the conspiracy itself, was completed. It is irrelevant *when* that completion might have occurred." *U.S. v. Aichele*, __ F.2d __ (9th Cir. July 30, 1991) No. 90-10364.

10th Circuit upholds use of precursor drugs purchased by defendant to calculate actual amount of drug defendant produced. (250) The 10th Circuit upheld the district court's use of precursor chemicals to calculate the quantity of methamphetamine defendant produced. The 29-kilogram figure was supported by evidence that defendant purchased 37 kilograms of the precursor chemical L-ephedrine, and a DEA chemist's testimony that defendant could have produced approximately 29 kilograms of methamphetamine from that quantity of the precursor chemical. *U.S. v. Andersen*, __ F.2d __ (10th Cir. July 29, 1991) No. 90- 4044.

7th Circuit affirms consideration of related conduct based on testimony of government witnesses. (270)(755) Defendant argued that the district court erred in including in the calculation of his offense level cocaine from transactions which the court found to be "related" to the offense of conviction based on the testimony of two "biased" witnesses. The 7th Circuit rejected this contention, since it is the district court's prerogative to assess the credibility of the witnesses and credit their testimony over defendant's testimony. The district court was aware that the witnesses had entered into agreements with the government which required their testimony at defendant's trial. The 7th Circuit also rejected defendant's argument that the burden of proof for determining relevant conduct should be higher, finding no merit in the contention that the guidelines are ambiguous as to what constitutes relevant conduct. *U.S. v. Caicedo*, __ F.2d __ (7th Cir. July 23, 1991) No. 89-2813.

11th Circuit affirms consideration of cocaine involved in charge on which defendant was acquitted. (270) The 11th Circuit affirmed the district court's consideration in sentencing of cocaine involved in a conspiracy charge of which defendant was acquitted. The only evidence linking defendant with the conspiracy was the testimony of a single wit-

ness. Defendant maintained that the jury found the testimony unreliable as evidenced by the acquittal. However, the jury may have acquitted the defendant only because it felt that the distribution count on which he was convicted was not associated with the conspiracy. Thus, it would be inappropriate to assume that the jury's acquittal meant that it found that defendant did not receive the drugs in question. Moreover, an acquittal based upon a reasonable doubt standard does not preclude a contrary finding using the preponderance of the evidence standard. *U.S. v. Manor*, __ F.2d __ (11th Cir. July 30, 1991) No. 90-8247.

1st Circuit affirms that defendant could reasonably foresee drug shipment. (275) Defendant was involved in a drug conspiracy. He contended that the district court improperly attributed to him a 10 kilogram shipment of cocaine which a co-conspirator brought, since he was unaware of the shipment. The 1st Circuit rejected this argument. In a drug conspiracy, there is no requirement that a defendant actually know that a particular shipment was made, so long as the shipment was "a foreseeable fruit of the conspiracy." Whether or not defendant actually knew of the shipment, given the size and scope of the conspiracy, there was no doubt that the shipment was reasonably foreseeable. Moreover, defendant introduced the co-conspirator to the leader of the conspiracy as a possible courier, and was aware that the leader was awaiting cocaine from Colombia. At a minimum, defendant played some role in effectuating the shipment, which by itself was sufficient to bring the shipment into the calculation. *U.S. v. David*, __ F.2d __ (1st Cir. July 29, 1991) No. 89-1807.

5th Circuit remands for failure to find that amount of drugs in conspiracy was foreseeable. (275) The 5th Circuit vacated defendant's sentence and remanded for resentencing because, in holding defendant accountable for all of the drugs involved in the conspiracy, the district court failed to find that the quantity was reasonably foreseeable to defendant. In order to attribute to a particular defendant amounts of a controlled substance involved in a conspiracy, the sentencing court must determine the quantity of the substance that the defendant knew or should have reasonably foreseen. The "reasonable forseeability" requirement requires a finding separate from the finding that defendant was a co-conspirator. *U.S. v. Puma*, __ F.2d __ (5th Cir. July 22, 1991) No. 90-1420.

8th Circuit affirms consideration of drugs found in defendant's girlfriend's rented car. (275) The 8th Circuit upheld including in the calculation of defendant's base offense level nine kilograms of cocaine which were seized during an inventory search of his girlfriend's rented car. "[D]rugs handled by a co-conspirator confederate having a close association or working relationship with a defendant may be included when calculating the offense level attributable to that defendant." Defendant and his girlfriend were partners in the drug business, living together and sharing joint bank accounts. He knew she was a courier, and visited her in jail in Iowa where the nine kilograms were found during the inventory search of the rented car. He relied upon her advice in transactions with other drug dealers. *U.S. v. Beal*, __ F.2d __ (8th Cir. July 30, 1991) No. 90-5419.

1st Circuit affirms firearm enhancement based upon gun held to drug courier's head. (284) Defendant ran a continuing criminal enterprise involving vast amounts of drugs. When one of his couriers faked a robbery in order to steal a drug shipment, defendant and others took the courier to an apartment where the courier was beaten and a gun held to his head in order to make him confess to faking the robbery. The 1st Circuit affirmed an enhancement under guideline section 2D1.1(b) for use of a firearm during a drug trafficking offense. Defendant was responsible for the gun's use, whether or not he actually held the gun himself. It was perfectly reasonable for the district court to conclude that, in brandishing, or causing the firearm to be brandished, while trying to retrieve a stolen shipment of cocaine, defendant was furthering the substantive offense related to that shipment. *U.S. v. David*, __ F.2d __ (1st Cir. July 29, 1991) No. 89-1807.

3rd Circuit upholds firearm enhancement based upon "arsenal" found in defendant's house. (284) Defendant was arrested after selling cocaine from his residence to an undercover agent. A search of the residence disclosed numerous firearms. The 3rd Circuit upheld an enhancement under guideline section 2D1.1(b)(1) based upon defendant's possession of a dangerous weapon during the commission of a drug crime. Although the weapons were not used during the crime, they were clearly present during it. The district court could properly determine that the size and composition of defendant's "arsenal" created a strong inference that he possessed the weapons in order to further the drug transaction. *U.S. v. Demes*, __ F.2d __ (3rd Cir. August 1, 1991) No. 91-3090.

4th Circuit affirms firearm enhancement based upon co-conspirator's possession of weapon. (284) Defendant contended that he should not have received a two-level enhancement for possession of a firearm during the commission of his offense under guideline section 2D1.1(b)(1) because (a) he was acquitted of being involved in the only incident in which a weapon was used, and (b) his co-conspirator's weapon cannot be charged to him. The 4th Circuit rejected both of these arguments. First, the jury's acquittal of defendant signified that the jurors found that the evidence against defendant failed to convince them of his guilt beyond a reasonable doubt. However, the standard of proof at sentencing is less demanding. Second, defendant did not dispute that he knew that his co-conspirator possessed the weapon during events which furthered the conspiracy. The section 2D1.1(b)(1) enhancement properly applies when a

defendant has knowledge of his co-conspirator's possession of a firearm during acts furthering the conspiracy. *U.S. v. Morgan*, __ F.2d __ (4th Cir. Aug 1, 1991) No. 90-5701.

7th Circuit affirms that "loss" included money defendant received through administrative error. (300) Defendant obtained benefits from the Social Security Administration and HUD by failing to disclose his true employment. After being confronted by a government investigator, defendant advised them that he was employed full time. Due to an administrative error defendant continued to receive the Social Security benefits through direct deposit. The 7th Circuit held that in calculating the loss caused by defendant's fraud under guideline section 2F1.1(b)(b)(1), the district court properly included approximately $2,000 he received after he notified the Social Security Administration of his employment. Even though defendant knew that the money was being deposited into his account due to an administrative error, he did nothing to alert the agency and continued to convert the funds to his own use for five months. Defendant could not claim that thought he was entitled to the funds, given the information he received from the government investigator. *U.S. v. Hintzman*, __ F.2d __ (7th Cir. July 9, 1991) No. 90-2229.

6th Circuit affirms difference in offense level under guideline section 2K2.3. (330) Defendant pled guilty to violating 26 U.S.C. section 5861(a), selling certain specified firearms without registering or paying a special tax. Under guideline section 2K2.3 in effect at the time defendant was sentenced, this offense carried a base offense level of 12. Defendant contended that his offense was "identical" to the conduct prohibited by 18 U.S.C. section 922(a)(1), i.e., selling firearms without being a registered dealer. This offense carried a base offense level of 6 under section 2K2.3. The 6th Circuit rejected defendant's claim that the difference in offense levels violated the Sentencing Commission's mandate to avoid unwarranted disparities in sentencing. Here the disparities were desirable. The weapons listed in section 5861 are particularly dangerous. "It is quite in accord with the guidelines to punish one who sells a machine gun or sawed-off shotgun illegally more severely than one who sells an ordinary hunting rifle." *U.S. v. Hopper*, __ F.2d __ (6th Cir. August 2, 1991) No. 90-6230.

9th Circuit holds that felons are entitled to reduction for sport weapon possession. (330) Guideline section 2K2.1(b)(1) provides that if the defendant possessed the firearm for lawful sporting purposes, the offense level should be decreased by six levels. The 9th Circuit held that this reduction is available to a defendant who is convicted of knowingly receiving a firearm after having been convicted of a felony, in violation of 18 U.S.C. section 922(g)(1). The court followed an earlier 5th Circuit case, *Buss v. U.S.* 928 F.2d 150 (5th Cir. 1991), which had interpreted this guideline as it was worded prior to the 1989 amendment, to apply to persons convicted of being felons in possession of a firearm. The defendant's sentence was reversed and the case was remanded for a new sentencing hearing. *U.S. v. Prator*, __ F.2d __ (9th Cir. July 29, 1991) No. 90-50463.

Adjustments (Chapter 3)

9th Circuit, en banc, holds that aggravating role adjustment only applies when the offense is committed by more than one criminally responsible person. (430) Reversing the panel opinion in *U.S. Anderson*, 895 F.2d 641 (9th Cir. 1990), the *en banc* 9th Circuit joined the 6th, 7th and 11th Circuits in holding that the aggravating role adjustment in guideline section 3B1.1 "only apples when the offense is committed by more than one criminally responsible person." Thus, the district court erred in finding that defendant was an organizer, leader, supervisor or manager of the bank robbery, where the only other participant was the getaway driver who did not know that defendant was robbing the bank until after they had arrived back at the house. *U.S. v. Anderson*, __ F.2d __ (9th Cir. August 6, 1991) (*en banc*) No. 89-10059.

9th Circuit reverses "organizer" enhancement that was based on defendant's ownership of the property. (430) The district court assumed that because defendant owned the used car dealership, and knowingly permitted drug distribution to take place there, he was necessarily a leader subject to enhancement under section 3B1.1(c). In fact, defendant was found not guilty of any part in an ongoing conspiracy, and the crime of which he was convicted indicated that he was not a significant player, let alone an organizer or leader. Thus the 3B1.1(c) enhancement was not proper. *U.S. v. Tamez*, __ F.2d __, 91 D.A.R. 9229 (9th Cir. July 30, 1991).

6th Circuit refuses minimal participant reduction to defendant who drove car in which cocaine and weapons were found. (440) Defendant contended that she was entitled to four-level reduction for being a minimal participant, rather than the two-level reduction she received for being a minor participant. The 6th Circuit found no clear error in the district court's determination. Defendant was driving the car where a weapon and cocaine were found, and had a key to and stayed in the motel room where more cocaine was found. *U.S. v. Anderson*, __ F.2d __ (6th Cir. July 29, 1991) No. 90-3239.

7th Circuit finds sufficient evidence that defendant was full participant in interstate theft scheme. (440) The 7th Circuit rejected defendant's contention that he was a minor or minimal participant in a conspiracy to steal a trailer and its interstate shipment. Although defendant was acquitted of conspiracy charges, there was ample evidence from which the district court could conclude that defendant was a full participant in the offense. Defendant was present during the discussion and planning of the theft of the trailer. He travelled with a co-defendant to the truck lot to steal the trailer.

Defendant helped unload the trailer's cargo, boxes of dishwashing detergent, into a co-defendant's basement. In addition, defendant participated in the distribution by loading the stolen detergent from the basement into a van so that a co-defendant could sell it and participated in selling the detergent. *U.S. v. Davis*, __ F.2d __ (7th Cir. July 26, 1991) No. 90-2754.

7th Circuit rules defendant waived minor participation issue by failing to raise it in district court. (440)(800) Defendant contended that he was entitled to a reduction based upon his minimal role in a drug conspiracy. In sentencing defendant, the district court noted that defendant was the "least culpable" of the three participants. The 7th Circuit ruled that defendant had waived this issue by failing to present it to the district court. *U.S. v. Martinez*, __ F.2d __ (7th Cir. August 1, 1991) No. 89-3733.

8th Circuit rejects minor status for defendant involved in all aspects of drug manufacturing and distribution. (440) The 8th Circuit affirmed the district court's decision to deny defendant a reduction for being a minor or minimal participant in the methamphetamine lab defendant and her husband operated in of their home. The district court found that defendant was involved in all aspects of the drug manufacturing and distribution process and that her primary responsibility was packaging and addressing the drugs for shipment. Although one witness testified that defendant had no specific responsibilities and was not a "main player," the district court's decision not to grant the downward adjustment was not clearly erroneous. *U.S. v. Rogers*, __ F.2d __ (8th Cir. July 23, 1991) No. 90-1237.

9th Circuit reaffirms that minimal participant analysis applies only to the count of conviction. (440) In *U.S. v. Zweber*, 913 F.2d 705, 708 (9th Cir. 1990), the 9th Circuit rejected the argument that a defendant may receive a minimal participation reduction for playing a minor role in uncharged or unconvicted counts. Here the defendant was convicted of making available a building for the purpose of narcotics trafficking in violation of 21 U.S.C. section 856(a)(2), "which contemplates violation by an individual." Accordingly the district court's denial of the section 3B1.2 reduction was not clear error. *U.S. v. Tamez*, __ F.2d __ (9th Cir. July 30, 1991).

9th Circuit holds that court need not accept defendant's "self serving claim that he was merely a "courier." (440) Defendant argued that he should have received a reduction for being a minimal or minor participant under section 3B1.2 because he was a "one time drug courier." The 9th Circuit held that he failed to demonstrate that his role was purely that of a courier, noting that in *U.S. v. Rigby*, 896 F.2d 392, 395 (9th Cir. 1990) the court denied the reduction "since there was no evidence other than defendant's self serving statement, to support such a finding." In addition, the court noted that "a defendant may be a courier without being either a minimal or a minor participant." Finally the court noted that "possession of a substantial amount of narcotics is grounds for refusing to grant a sentence reduction." Here the defendant possessed nearly 28 pounds of high quality heroin. *U.S. v. Lui*, __ F.2d __ (9th Cir. August 5, 1991) No. 89-50557.

10th Circuit rejects minor status for only defendant charged in the offense. (440) Defendant pled guilty to possessing counterfeit money and certain drug charges. He contended he was entitled to a minor or minimal role reduction under guideline section 3B1.2 because his role in the counterfeiting offense was merely that of a courier, he did not know how to print counterfeit notes, he was not a major distributor, and he derived no cognizable profit from the illicit activity. The 10th Circuit found that the district court's refusal to adjust downward was not clearly erroneous. A defendant's status as a courier does not necessarily mean that he was a minor participant. Moreover, because defendant was the only individual charged in the matter, no downward adjustment should be given for his role in the offense. *U.S. v. McCann*, __ F.2d __ (10th Cir. July 26, 1991) No. 90-4109.

1st Circuit affirms abuse of trust enhancement for policeman who sold drugs. (450) Defendant, a police officer, was convicted of three drug-related offenses. The 1st Circuit upheld a two-level enhancement under guideline section 3B1.3 based upon abuse of trust. A police officer occupies a position of public trust, and the commission of a crime by a police officer constitutes an abuse of that trust. Although this by itself is insufficient to apply section 3B1.3, the district court also concluded that defendant used his intelligence and knowledge as a police officer to conceal his illegal activities. The sentencing court reasonably concluded that defendant used his familiarity with investigative techniques used in narcotics investigations to conceal his own activities and avoid detection. *U.S. v. Rehal*, __ F.2d __ (1st Cir. July 23, 1991) No. 90-1932.

7th Circuit holds pilot used special skill in drug offenses. (450) Defendant participated in various drug conspiracies by piloting the airplanes that transported the drugs to their ultimate destination. The 7th Circuit affirmed that defendant's piloting skill was a "special skill" justifying an enhancement under guideline section 3B1.3. *U.S. v. Mettler*, __ F.2d __ (7th Cir. July 29, 1991) No. 90-2136.

1st Circuit refuses to adopt higher standard to determine whether defendant committed perjury at trial. (460)(755) The 1st Circuit affirmed the district court's decision to enhance defendant's offense level for obstruction of justice based upon a finding that defendant had testified untruthfully at trial and suggested to potential witnesses that they change their stories and refuse to cooperate with law en-

forcement. The court rejected defendant's argument the "beyond a reasonable doubt" standard of proof applicable to perjury cases should be employed by the sentencing court. Notwithstanding defendant's acquittal on some charges, the trial court was not obligated to specify those portions of defendant's testimony that it believed were falsified, since the finding of untruthfulness was supported by the record. Here, defendant repeatedly testified that he never "used," "sold," or "shared" cocaine and denied each of the events for which the jury found him guilty. The enhancement did not violate section 3C1.1's prohibition against punishing a defendant for exercising a constitutional right. A defendant has no constitutional right to commit perjury. *U.S. v. Rehal*, __ F.2d __ (1st Cir. July 23, 1991) No. 90-1932.

4th Circuit affirms obstruction enhancement in perjury case. (460) Defendant claimed that an enhancement for interference with the administration of justice is never appropriate when the underlying offense is perjury, since perjury is per se a "substantial interference with the administration of justice." The 4th Circuit rejected this contention, holding that such an enhancement can be proper in a perjury case. The district court found that defendant's perjury before a grand jury constituted a "substantial interference with the administration of justice" in that the perjurious statement resulted in the unnecessary expenditure of substantial governmental resources. *U.S. v. Dudley*, __ F.2d __ (4th Cir. July 25, 1991) No. 90-5211.

6th Circuit affirms obstruction enhancement for defendant who concealed age and identity from officials. (460) The 6th Circuit affirmed the district court's enhancement of defendant's offense level for obstruction of justice. Defendant lied about her age and identity upon arrest, and lied to a juvenile court judge during a hearing to determine her identity. In addition, defendant convinced her mother to lie about defendant's age and identity to the juvenile court judge. *U.S. v. Anderson*, __ F.2d __ (6th Cir. July 29, 1991) No. 90-3239.

7th Circuit affirms perjury as basis for obstruction enhancement. (460) The 7th Circuit affirmed an enhancement for obstruction of justice under guideline section 3C1.1 based upon defendant's perjury at trial. Despite a government tape of defendant negotiating a drug deal with a government agent, defendant denied that he was the person on the tape, denied ever dealing drugs and denied ever meeting the government agent. Defendant's testimony was more than a denial of wrongdoing, it was "a batch of lies." Section 3C1.1 does not have an unconstitutionally chilling effect on a defendant's right to testify, since a defendant has no right to commit perjury. The section is not unconstitutional even though its two-level enhancement in offense level results in a greater sentence increase for a defendant with a high base offense level than for a defendant with a low base offense level. In proportionality analysis, the focus is not on punishment across cases but on whether the quantum of punishment in a specific case is proportionate to the crime. Here, defendant's sentence bore a rational relationship to his offense. *U.S. v. Contreras*, __ F.2d __ (7th Cir. July 19, 1991) No. 90-1221.

7th Circuit affirms obstruction enhancement based upon defendant's attempt to "con" the jury. (460) Defendant was convicted of concealing his true employment activity from the Social Security Administration and HUD. The 7th Circuit affirmed an enhancement for obstruction of justice based upon the district court's determination that defendant attempted to "con" the jury. When initially contacted by government investigators, defendant gave at least three different reasons for his failure to disclose his employment. At trial, defendant first stated that he truthfully disclosed his employment in spite of overwhelming evidence to the contrary. Later, he contended that he believed he was not required to report this work until he had been working for a year, despite evidence that in the past he had reported a job which he had held for only one week. *U.S. v. Hintzman*, __ F.2d __ (7th Cir. July 9, 1991) No. 90-2229.

7th Circuit refuses to consider argument that probation officer violated internal directive. (460) Defendant argued that the probation officer's conclusion as to whether defendant's sentence should be enhanced for obstruction of justice under guideline section 3C1.1 was in violation of a probation office directive. The 7th Circuit refused to consider this argument because it was simply a reformulation of defendant's rejected claim that the district court erred in enhancing his sentence for obstruction of justice. *U.S. v. Caicedo*, __ F.2d __ (7th Cir. July 23, 1991) No. 89-2813.

7th Circuit affirms that guidelines permit obstruction enhancement for lying to a magistrate. (460) The district court imposed a two-point enhancement for obstruction of justice based on defendant's false testimony before a magistrate during a hearing on his motion to suppress certain evidence. The 7th Circuit rejected defendant's contention that the enhancement was improper because the district judge did not personally observe the alleged perjury. The fact that the perjured testimony occurred during a proceeding which was conducted by a magistrate did not affect the validity of the enhancement. The November 1990 version of Application Note 3(f) to guideline section 3C1.1 specifies that lying in a proceeding before a magistrate is a ground for an obstruction enhancement. Since this amendment was merely a clarification of existing law, the enhancement was proper. *U.S. v. Caicedo*, __ F.2d __ (7th Cir. July 23, 1991) No. 89-2813.

7th Circuit upholds obstruction enhancement based upon defendant's testimony that he did not know goods were stolen. (460) Defendant was found guilty of possession of a stolen interstate shipment in connection with his involvement in a conspiracy to steal a trailer and its shipment. The 7th Circuit affirmed an enhancement for obstruction of justice,

finding the district court made sufficiently specific findings by stating that defendant "attempted to mislead the jury as to his knowledge and participation . . . in the theft. . . ." In his trial testimony, defendant made numerous representations that he did not know that either the trailer or its contents were stolen. Even when defendant admitted on cross-examination that he knew something was not quite right because the shipment was being unloaded into a co-defendant's basement late at night, he still continued to maintain that he did not know that the shipment was stolen. *U.S. v. Davis*, __ F.2d __ (7th Cir. July 26, 1991) No. 90-2754.

7th Circuit upholds obstruction enhancement based upon defendant's denial of material fact. (460) Defendant was convicted of several counts of sexual abuse. Defendant contended that an enhancement for obstruction of justice was improper because the only portion of his testimony that was not consistent with a material finding of fact by the court was his refusal to admit any penetration. He contended that the act was so brief that he was unaware he had penetrated his victim. The 7th Circuit rejected this argument. Defendant was aware by the time he testified that the court's determination of his guilt depended significantly on whether the court found that penetration had occurred. Defendant did not express uncertainty about whether penetration had occurred. Rather, he repeatedly denied such penetration. Thus, the district court could determine that defendant had testified falsely on this material issue. *U.S. v. Cherry*, __ F.2d __ (7th Cir. July 26, 1991) No. 90-2427.

7th Circuit rejects denial of guilt to investigators as ground for obstruction enhancement but affirms on other grounds. (460) When initially confronted by postal inspectors concerning a fraudulent investment scheme, defendant claimed that she had properly invested the funds entrusted to her. When confronted with contrary information during the interview, defendant admitted that she lied, and signed a written confession. Before trial, she moved to suppress the confession, and testified falsely at the suppression hearing. The district court imposed a two-point enhancement for obstruction of justice based on defendant's lies. The 7th Circuit held that defendant's initial statement to investigators was no more than a denial of guilt, and thus was not a ground for enhancement under application note 3 to section 3C1.1. However, it was proper to enhance the sentence based on defendant's lies at the suppression hearing. The court refused to adopt the 2nd Circuit's requirement that the trial judge find that a defendant had a conscious purpose of obstructing justice. Nonetheless, in the future, district judges should use the specific language of section 3C1.1 to avoid recurrence of this issue. *U.S. v. Barnett*, __ F.2d __ (7th Cir. July 31, 1991) No. 90-2869.

8th Circuit affirms obstruction enhancement based upon defendant's threatening phone call. (460) Defendant was involved in a drug distribution ring. After one of the ring's street dealers was arrested and pled guilty, defendant called the dealer and suggested that an informant had informed on the dealer. Defendant then suggested that informants would be less of problem if they were killed. The district court found that defendant's conversation with the dealer was an implicit threat to the dealer concerning what would happen to the dealer if he should inform upon the drug ring. Thus, defendant received a two-level enhancement for obstruction of justice. The 8th Circuit affirmed, agreeing that defendant's conversation with the dealer constituted a threat, and that such a threat justified an obstruction of justice enhancement. *U.S. v. Nunn*, __ F.2d __ (8th Cir. July 23, 1991) No. 90-5230.

8th Circuit upholds obstruction enhancement for defendant who threw drugs out car window while being followed. (460) Defendant threw a package of cocaine out a car window while the car was being closely followed by police officers in an unmarked vehicle that was flashing its headlights. Defendant had just purchased cocaine from his supplier for resale to the car's driver, an undercover police officer. Although defendant claimed he threw the cocaine out the window because he was afraid, the 8th Circuit upheld the district court's enhancement for obstruction of justice. The new commentary to the guidelines states that attempting to destroy or conceal evidence during arrest alone does not constitute obstruction of justice. However, this did not help defendant, since the guideline in effect when defendant was sentenced had been interpreted to permit an enhancement for a defendant who throws drugs out the window of a vehicle while being approached by police. *U.S. v. Watts*, __ F.2d __ (8th Cir. July 31, 1991) No. 90-2899.

8th Circuit affirms obstruction enhancement based upon false testimony. (460)(485) The 8th Circuit affirmed the district court's decision to enhance defendant's offense level for obstruction of justice based upon his false trial testimony. The district court did not rely upon the jury's disbelief of defendant's testimony, but expressly found that the testimony was, at least in part, false. Moreover, the district court properly denied defendant a reduction for acceptance of responsibility, for this was not an extraordinary case in which adjustments for both obstruction of justice and acceptance of responsibility were proper. *U.S. v. Willis*, __ F.2d __ (8th Cir. July 23, 1991) No. 90-5232.

10th Circuit upholds threatening letters as grounds for obstruction enhancement. (460) The government presented letters which defendant had written to an informant and potential witness against defendant. One letter noted that the government had done a good job of protecting the informant and that defendant had been "every day" trying "to get at" the informant for what he did to defendant. The other letter stated that defendant had "sent out copies of this paper to people I [know] here & with any luck maybe someone out there hates rats and will punish [the informant] and his fam-

iv for me." The 10th Circuit upheld the district court's decision to enhance defendant's offense level for obstruction of justice. Threatening, intimidating or attempting to unlawfully influence a co-defendant, witness or juror is grounds for the adjustment. *U.S. v. McCann*, __ F.2d __ (10th Cir. July 26, 1991) No. 90-4109.

1st Circuit affirms grouping continuing criminal enterprise charge with substantive counts. (470) Defendant was convicted of conducting a continuing criminal enterprise and numerous substantive drug counts. Under guideline section 3D1.2(d), the district court grouped all of the counts together. The substantive drug offenses all had the same base offense level of 36 under guideline section 2D1.1, while the CCE charge carried a base offense level of 32 under guideline section 2D1.5. Defendant complained that, by operation of the grouping principles, the CCE offense took on the higher offense level of the surrounding substantive offenses. Were the CCE offense level calculated separately, the base offense level would be 32, with no upward adjustment for his role in the offense. The 1st Circuit found no merit in this argument, since the guidelines expressly mandate such grouping. Moreover, there is nothing surprising, or unfair, about this result. The CCE base offense level is a minimum, and when a defendant is also convicted of substantive counts involving vast amounts of drugs, it makes sense for the offense level to increase. *U.S. v. David*, __ F.2d __ (1st Cir. July 29, 1991) No. 89-1807.

9th Circuit denies credit for acceptance of responsibility despite a strong dissent. (480) The defendant exercised his right to remain silent at trial and refused to discuss his case with the probation officer. He did not make a statement at his sentencing hearing. Accordingly, Judges Rymer and Alarcon upheld the district court's denial of credit for acceptance of responsibility. Judge Kozinski dissented, pointing out that the acceptance of responsibility provision puts a defendant "to a brutal choice between obtaining a shorter sentence and giving up his right to appeal, and preserving intact his right to appeal but giving up the opportunity to plead for a more lenient sentence." He suggested that to avoid constitutional questions raised by the provision, the could should require a new sentencing hearing after affirming the defendant's conviction on appeal. At the new hearing the defendant would have an opportunity to qualify for the two level reduction for acceptance of responsibility. *U.S. v. Aichele*, __ F.2d __, 91 D.A.R. 9211 (9th Cir. July 30, 1991) No. 90-10364.

D.C. Circuit denies acceptance of responsibility reduction to defendant who claimed drugs were for his personal use. (485) Defendant was convicted of possession of cocaine with intent to distribute. The D.C. Circuit upheld the district court's denial of a reduction for acceptance of responsibility. Defendant disputed throughout trial that he intended to distribute the drugs, contending that the drugs were for his personal use, denied that the ziplock bags were his, and claimed that the cash found with the drugs was savings to repay a student loan. *U.S. v. Bruce*, __ F.2d __ (D.C. Cir. August 2, 1991) No. 90-3134.

3rd Circuit denies acceptance of responsibility reduction to defendant who raised entrapment defense at trial. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because he cooperated with government agents, explained where he obtained his cocaine, and was fully debriefed by the government. He did go to trial and raise an entrapment defense, but pointed to *U.S. v. Fleener*, 900 F.2d 914 (6th Cir. 1990), in which the 6th Circuit held that assertion of an entrapment defense was not necessarily inconsistent with acceptance of responsibility. The 3rd Circuit rejected defendant's claim, finding it difficult to reconcile defendant's claim of entrapment with his claim that he accepted responsibility. Ordinarily, a claim of entrapment would seem to be the antithesis of acceptance of responsibility, since the defendant, rather than accepting personal responsibility, urges that the government bears responsibility for the offense. Although it was possible to hypothesize a case in which a plea of entrapment was not inconsistent with acceptance of responsibility, this was not such a case. *U.S. v. Demes*, __ F.2d __ (3rd Cir. August 1, 1991) No. 91-3090.

6th Circuit reverses acceptance of responsibility reduction which was based upon post-conviction letter sent to district court. (485) The 6th Circuit reversed the district court's decision to reduce defendant's offense level for acceptance of responsibility based on a letter which defendant sent to the district court after conviction. Defendant did not exhibit any of the factors listed in guideline section 3E1.1 which a court may consider in determining whether a defendant is entitled to such a reduction. In fact, one of the factors, timeliness of the defendant's conduct, weighed against defendant. Moreover, nothing in the letter could be characterized as an affirmative acceptance of personal responsibility. In the letter, defendant painted herself as a victim and denied any knowledge of the crime. Her letter was not an affirmative acceptance of responsibility but a renouncement of culpability. Moreover, defendant received an enhancement for obstruction of justice, and she did not present an extraordinary case in which both adjustments were justified. *U.S. v. Anderson*, __ F.2d __ (6th Cir. July 29, 1991) No. 90-3239.

Criminal History (§ 4A)

9th Circuit holds expungement of record is a narrow power used only in extreme circumstances. (500) To enable defendant to reenlist in the U.S. Army Reserves during the Persian Gulf War, the district court expunged all records of his felony convictions. The government appealed, and the 9th Circuit reversed, ruling that the equitable power to expunge "is a narrow power, appropriately used only in extreme cir-

cumstances." It has been used in civil rights case involving unconstitutional state convictions. But in this case, there was no suggestion that the defendant's arrest or conviction was in any way unlawful or invalid, or that the government engaged in any sort of misconduct. "Nor are we presented with any other fact which could outweigh the government's interest in maintaining criminal records." The expungement order was vacated. *U.S. v. Smith*, __ F.2d __ (9th Cir. August 2, 1991) No. 90-50496.

4th Circuit upholds career offender finding even though defendant's prior convictions were not separated in time. (520) Defendant argued that he should not be classified as a career offender on the basis of two prior convictions because he had not been convicted of any of them before he was caught and convicted of all of them. Thus, he contended that he did not have two prior convictions under the guidelines. According to defendant, a defendant would have to commit a crime, be caught, convicted, sentenced and released, then commit a second crime and again be caught, convicted, sentenced and released, before he could commit the third crime which would make him a career criminal. The 4th Circuit rejected this argument, finding it contradicted by the clear language of guideline section 4B1.1. The "two prior felony convictions" are only required to be sustained prior to the instant offense. Nothing states that these convictions must be separated by an intervening period of incarceration and release. *U.S. v. Hines*, __ F.2d __ (4th Cir. July 31, 1991) No. 90-5514.

Determining the Sentence (Chapter 5)

6th Circuit upholds adding mandatory term of supervised release to sentence after initial sentencing order. (580)(750) The district court, sua sponte, added a three-year term of supervised release to defendant's sentence one week after the initial sentencing order was filed. Following the 4th Circuit's decision in *U.S. v. Cook*, 890 F.2d 672 (4th Cir. 1989), the 6th Circuit found that a district court has the authority to amend a sentence sua sponte (a) within the time for appeal and (b) to conform the sentence to the mandatory provisions of the guidelines. In this case the amended judgment was entered one week after the initial judgment, within the 10-day time limit for appeals. Guideline section 5D1.1(a) provides for a mandatory term of supervised release when "a sentence of imprisonment" of more than one year is imposed. Defendant's "split sentence" of seven months imprisonment and seven months community confinement was sufficient to require come within the guideline. However, the court's authority to amend the sentence only allowed it to conform defendant's sentence to the mandatory requirements of the guidelines, in this case two years of supervised release. *U.S. v. Strozier*, __ F.2d __ (6th Cir. July 29, 1991) No. 90-4057.

9th Circuit holds that supervised release provision applies to offenses committed after November 1, 1987. (580) Petitioner argued that since 21 U.S.C. section 846 did not provide for a term of supervised release in addition to his prison sentence, the supervised release term was improper. The 9th Circuit rejected the argument, agreeing with the 2nd, 5th, 7th and 11th Circuits that because the petitioner was sentenced for a class B felony for a violation occurring after November 1, 1987, "the district court had discretion to sentence him up to a 60 month term of supervised release. See 18 U.S.C. sections 3583(a) and (b)." *U.S. v. Schanning*, __ F.2d __6 (9th Cir. August 1, 1991) No. 91-15111.

9th Circuit holds that supervised release may be revoked even where it exceeds the maximum sentence permissible under the statute. (580) Defendant was convicted of simple possession of a controlled substance under 21 U.S.C. section 844(a) and was sentenced to the maximum one year imprisonment plus a year of supervised release. He served 360 days in custody and was placed on supervised release. When the government sought to revoke his supervised release term, he argued that since he had already served the maximum sentence, neither 18 U.S.C. section 3583, governing supervised release, nor the indictment clause of the constitution permitted the district court to revoke his supervised release and sentence him to an additional period of incarceration. The 9th Circuit rejected the argument holding that section 3583 "authorizes the revocation of supervised release even where the resulting incarceration, when combined with the period of time the defendant has already served for his substantive offense, will exceed the maximum incarceration permissible under the substantive statute. The court held that the indictment clause did not apply. *U.S. v. Purvis*, __ F.2d __ 9th Cir. August 2, 1991) No. 90-50183.

9th Circuit upholds condition of supervised release barring defendant from participation in motorcycle clubs. (580) As a special condition of defendant's supervised release, the district court directed that he "not participate in the activities, or be a member of any motorcycle clubs, including but not limited to the Dirty Dozen." Defendant argued that this condition impermissibly restricted his freedom of association. The 9th Circuit rejected the argument, ruling that the sentencing judge, in his broad discretion, could properly have concluded that the defendant "was more likely to relapse into crime if he returned to his prior associations." *U.S. v. Bolinger*, __ F.2d __ (9th Cir. July 30, 1991) No. 90-10305.

3rd Circuit remands because district court failed to state that it considered defendant's ability to pay fine. (630) Defendant contended that the district court erred in imposing a $58,000 fine because it failed to consider his ability to pay a fine. The 3rd Circuit found that the district court made no finding as to defendant's ability to pay a fine, and thus, remanded the case for resentencing on the fine. In cases

where it is clear that a defendant has the ability to pay a fine, such an omission might be harmless. Here, however, the presentence report concluded that defendant did not have the ability to pay a fine. Although defendant had $60,000 worth of equity in real property, the mortgage was in arrears and the property was being foreclosed. Thus, the record did not clearly establish that defendant had the ability to pay a fine. *U.S. v. Demes*, __ F.2d __ (3rd Cir. August 1, 1991) No. 91-3090.

9th Circuit limits restitution in a wire fraud scheme to the amount in the count of conviction. (610) The 9th Circuit held that the Supreme Court's decision in *Hughey v. U.S.*, 110 S.Ct. 1979 (1990) overruled *U.S. v. Pomazi*, 851 F.2d 244 (9th Cir. 1988), thus limiting restitution in a wire fraud scheme to the amount specific in the count to which the guilty plea was made. The court acknowledged that both *Pomazi's* mail fraud and this defendant's wire fraud convictions required the presence of a scheme while *Huey's* fraudulent use of unauthorized credit cards did not. But the courts said that "this is too fine a point on which to distinguish *Huey*, particularly since the indictment in *Huey* also alleged a scheme." The court therefore held that *Huey* overruled *Pomazi* with regard to restitution under the Victim and Witness Protection Act 18 U.S.C. sections 3579, 3580. "Even when the offense of conviction involves a conspiracy or scheme, restitution must be limited to the loss attributable to the specific conduct underlying the conviction." The court rejected the government's argument that the count pled included an admission to the entire scheme because a preamble incorporated by reference allegations of the entire scheme into each count. The entire sentence was vacated. *U.S. v. Sharp*, __ F.2d __ (9th Cir. August 5, 1991) No. 88-5122.

Departures Generally (§ 5K)

4th Circuit remands because district court did not give defendant proper notice before upward departure. (700) The 4th Circuit remanded for resentencing because the district court failed to give defendant any notice of its intent to depart upward. The presentence report did not identify any grounds for departure, nor did the government request such a departure. Under the Supreme Court's recent decision in *Burns v. United States*, 111 S.Ct. 2182 (1991), such notice is required. *U.S. v. Maxton*, __ F.2d __ (4th Cir. July 31, 1991) No. 89-5701.

5th Circuit remands because district court failed to give notice of intent to depart on grounds not previously identified. (700) The 5th Circuit remanded defendant's case for resentencing, since without prior notice, the district court departed upward on a ground not identified in the presentence report or in a prehearing submission by the government, as required by *Burns v. United States*, 111 S.Ct. 2182 (1991). *U.S. v. Williams*, __ F.2d __ (5th Cir. July 24, 1991) No. 91-3138.

9th Circuit reverses upward departure for failure to state reasons for extent of departure. (700) In departing upward by 85 months, the district court explained simply that "discretion lies in the district court." Relying on it recent *en banc* decision in *U.S. v. Lira-Barraza*, No. 88-5161 (9th Cir. July 22, 1991), the 9th Circuit stated that 18 U.S.C. section 3553(a)(6) "requires at a minimal that departure sentences be consistent with other sentences fixed by the guidelines or suggested by commission standards and policies." In order to "facilitate appellate review, the district court's statements should include a reasoned explanation of the extent of the departure founded on the structure, standards, and policies of the act and guidelines." The sentence was vacated. *U.S. v. Durham (Richard)*, __ F.2d __ (9th Cir. August 6, 1991) No. 89-30349.

9th Circuit reverses downward departure for cooperation in absence of government motion. (700)(710)(790) Reaffirming its ruling in *U.S. v. Mena*, 925 F.2d 354, 355 (9th Cir. 1991) the 9th Circuit stated that the requirement for a government motion in 5K1.1 "might not apply if the prosecution has acted with 'bad faith or arbitrariness that might conceivably present a due process issue.'" But simply because the government determined defendant had not been truthful in his dealings with it, despite the defendant's acquittal on the perjury charge, "does not, without more, render the government's decision arbitrary or demonstrate that it was made in bad faith." Moreover the court ruled that departure under 5K2.0 for cooperation with the government was inappropriate because this would "render meaningless section 5K1.1's requirement that any downward departure based on substantial cooperation be premised on a motion for such departure by the government." Finally the court found nothing in the plea agreement requiring the government to move for a downward departure. Accordingly the sentencing was vacated. *U.S. v. Goroza*, __ F.2d __ (9th Cir. August 8, 1991) No. 90-10142.

9th Circuit upholds upward departure based on facilitating or concealing the commission of another offense. (700) Guideline section 5K2.9 provides that if the defendant "committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct. Here the district court properly found that defendant attempted to conceal the illegal laboratory by dismantling it and moving its contents. He and his wife went to the farmhouse after the bodies were discovered, disassembled and removed the lab, loaded the equipment into a truck and drove the truck until it broke down. *U.S. v. Durham (Richard)*, __ F.2d __ (9th Cir. August 6, 1991) No. 89-30349.

9th Circuit permits departure based on death, only if the death relates to the crime of which defendant was convicted. (700) Guidelines section 5K2.1 provides that "if death resulted, the court may increase the sentence above the authorized guideline range." The 9th Circuit held that that departure is proper "only if the death in question relates to the crime of which the defendant was convicted." In this case, it was unclear whether the district court relied on the deaths in departing from the guidelines. The 9th Circuit reminded the court that on remand a departure would be proper only if the court found that the defendant "intended" or "knowingly risked" the deaths. *U.S. v. Durham (Richard)*, __ F.2d __ (9th Cir. August 6, 1991) No. 89-30349.

9th Circuit upholds past violent conduct, misdemeanors and likelihood of recidivism as bases for upward departure. (730) Since section 4B1.1 refers only to previous felony convictions, the district court could properly consider defendant's prior violent *misdemeanor* offenses as evidence that his criminal history score did not adequately represent the seriousness of his past conduct. Likewise since only four criminal history points can be accumulated for prior misdemeanors under guidelines section 4A1.1(c), it was proper for the court to consider the additional misdemeanor convictions. Finally, the district court properly concluded that defendant's record was significantly more serious than other defendant's in the same criminal history category in concluding that there was a greater likelihood of recidivism. *U.S. v. Durham (Richard)*, __ F.2d __ (9th Cir. August 6, 1991) No. 89-30349.

4th Circuit affirms upward departure where two unrelated felony-murders were counted as single offense under guidelines. (733) The district court departed upward from criminal history category III to sentence defendant as a career offender, based upon defendant's two prior felony-murders which the state had consolidated for sentencing. The 4th Circuit affirmed. Defendant received a criminal history category III because the guidelines treated as a single offense the two felony-murder convictions. However, the convictions arose from separate armed robberies occurring on different days and resulted in the unrelated murders of two different victims. Had the sentencing of these offenses occurred independently of one another, defendant would have been classified as a career offender. *U.S. v. Hines*, __ F.2d __ (4th Cir. July 31, 1991) No. 90-5514.

5th Circuit finds district court did not improperly depart based upon political considerations. (740) In sentencing defendant, the district court noted that defendant's father ran for Governor of Texas and this was a reason for defendant to "follow the straight and narrow, even more reason for [defendant] not to disappoint" his parents. The district court then departed upward and sentenced defendant to a "boot camp" style prison. The 5th Circuit found that the district court did not improperly depart upward based upon politics and defendant's socioeconomic background. These statements were "merely observations" made by the district court. "The 'coincidence' of [defendant's] father's political rhetoric and the trial court's recommendation of 'boot camp' [might] be troubling, but [did] not rise to the level of reversible error." *U.S. v. Williams*, __ F.2d __ (5th Cir. July 24, 1991) No. 91- 8138.

5th Circuit affirms that involvement of juvenile in drug possession offense justifies upward departure. (745) The district court departed upward because defendant (a) had a history of drug abuse, (b) did not take advantage of drug treatment programs, and (c) had involved a juvenile in the offense. The 5th Circuit found that the first two grounds were improper justifications for departure, but upheld the involvement of the juvenile as supporting a departure. The court rejected defendant's contention that guideline section 2D1.2 provides an offense level for drug offenses involving a juvenile, and that therefore the Sentencing Commission decided not to allow an adjustment or departure for involving a juvenile in a first offense of simple possession. Under guideline section 5K2.0, a specific offense characteristic under one guideline may be relevant for sentencing under a different guideline. *U.S. v. Williams*, __ F.2d __ (5th Cir. July 24, 1991) No. 91-8138.

Sentencing Hearing (§ 6A)

11th Circuit remands because court failed invite allocution from defendant at sentencing. (750) The 11th Circuit found that the district court violated Fed. R. Crim. P. 32(a)(1)(C) by not addressing defendant personally to ask whether he had any statement prior to sentencing. The Rule explicitly requires the court to "address" the defendant personally" to ascertain if the defendant has any statement regarding his sentence. The fact that the defendant presented objections to the presentence report and presented evidence in mitigation of his sentence did not relieve the court of this obligation. The case was remanded so that defendant could exercise his right to allocution. *U.S. v. Phillips*, __ F.2d __ (11th Cir. July 30, 1991) No. 90-8271.

4th Circuit rules court's adoption of presentence report did not resolve disputed facts. (760) Defendant objected to two findings in his presentence report: his use of a firearm and the quantity of drugs on which he should be sentenced. The district court expressly resolved the firearm question against defendant, but did not make a finding with respect to drug quantity. The court did, however, state that he accepted the presentence report "in toto." The 4th Circuit remanded for resentencing after finding that the district court failed to adequately resolve defendant's objection concerning drug quantity as required by Fed. R. Crim P. 32. The general adoption of the presentence report was insufficient to satisfy Rule 32. "While such an adoption of the presentence report

may constitute a sufficient finding under Rule 32(c)(3)(D) when the context of the ruling makes clear that the district court intended to rule on each of the alleged factual inaccuracies. on this record we cannot determine whether the district court intended its ruling to apply to both of [defendant's] objections or only to the possession of the firearm issue." *U.S. v. Morgan*, __ F.2d __ (4th Cir. Aug 1, 1991) No. 90-5701.

5th Circuit affirms that judge may orally reject defendant's challenges to presentence report. (760) Defendant contended that the district court violated Fed. R. Crim. P. 32(c)(3)(D) by failing to make written findings rejecting defendant's challenges to his presentence report. The 5th Circuit rejected this claim, finding that the district court's oral rejection of defendant's challenge satisfied the rule's requirement that the trial court make a finding as to the allegations raised by defendant. *U.S. v. Puma*, __ F.2d __ (5th Cir. July 22, 1991) No. 90-1420.

5th Circuit affirms reliance upon acts committed before charged conduct. (770) The 5th Circuit rejected defendant's claim that the district court erroneously relied upon the presentence report, which referred to acts committed before the charged conduct. A sentencing court may consider for sentencing purposes facts that were not alleged in the indictment. *U.S. v. Puma*, __ F.2d __ (5th Cir. July 22, 1991) No. 90-1420.

7th Circuit rules judge provided adequate statement of reasons for sentence. (775) Defendant argued that the district court violated 18 U.S.C. section 3553(c)(1) by failing to state the reasons for the sentence imposed and the reasons for choosing a sentence at a particular point in the range. The 7th Circuit found defendant was not entitled to a remand. First, defendant had waived this issue by not raising it at sentencing. Second, the district court satisfied the statute by incorporating its 26 page sentencing opinion, which was filed prior to the imposition of sentence. The opinion addressed the factors which are to be considered at sentencing, such as the nature and circumstances of the offense, and it provided the court's reasons for setting defendant's sentence above the minimum 121-month sentence. *U.S. v. Caicedo*, __ F.2d __ (7th Cir. July 23, 1991) No. 89-2813.

9th Circuit finds no breach of plea agreement despite sentence in excess of government recommendation. (790) Petitioner argued that the district court was bound to follow the government's ten year recommendation in the plea agreement and breached the agreement by sentencing him to a total of fifteen years. However the plea agreement specifically stated that the recommendation "shall not be binding upon the court." "A defendant receives the benefit of a plea agreement when the government makes its recommendation to the court even if the district court sentences the defendant in excess of that recommendation." Nor did the plea agreement require the government to advise the court that the petitioner was less culpable than the other codefendants. *U.S. v. Sharp*, __ F.2d __ (9th Cir. August 5, 1991) No. 88-5122.

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

6th Circuit affirms defendant's right to appeal under 18 U.S.C. section 3742. (800) The government contended that defendant had no right to appeal his sentence under 18 U.S.C. section 3742(c)(1), which provides that a plea agreement that contains a specific sentence may not be appealed "under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement." Defendant received the sentence he agreed to in his plea agreement. The 6th Circuit rejected this argument. None of defendant's challenges fell under paragraphs (3) or (4) of subsection (a). Two of defendant's challenges involved the constitutionality of a guideline provision, which constitutes an appeal under paragraph (1), a sentence imposed in violation of law. The other argument was that the guidelines were misapplied, which is clearly an issue arising under paragraph (2), a sentence imposed as a result of an incorrect application of the guidelines. *U.S. v. Pickett*, __ F.2d __ (6th Cir. August 1, 1991) No. 90-3594.

9th Circuit declines to remand to a different judge for resentencing. (800) Defendant argued that, on remand, the case should be assigned to a different judge for resentencing. The 9th Circuit rejected the request, noting that "absent unusual circumstances, resentencing is to be done by the original sentencing judge." The court found no basis for remanding to a different judge in this case. *U.S. v. Sharp*, __ F.2d __ (9th Cir. August 5, 1991) No. 88-5122.

9th Circuit upholds waiver of right to appeal sentence departure. (800) As part of his plea agreement, defendant waived his right to appeal his sentence, agreeing that the court could depart upward as long as the sentence did not exceed thirty-six months. Even though he was sentenced to thirty-six months, he appealed, arguing that the guideline range and upward departure misapplied the guidelines, rendering the sentence outside the negotiated agreement. Judges Farris and Tang rejected the argument, ruling that if his argument were excepted, his express waiver of the right to appeal the sentence "would be a nullity." The fact that the plea agreement called for a sentence under the guidelines did not permit him to appeal on the ground that the sentence was not in conformance with the plea agreement. Judge D. Nelson dissented, arguing that it undermines the guidelines to permit district courts to incorrectly apply the sentencing guidelines in plea agreements as long as they sentence under an agreed cap. *U.S. v. Bolinger*, __ F.2d __ (9th Cir. July 30, 1991) No. 90-10305.

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

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Guideline Sentences, Generally

8th Circuit rules guidelines are consistent with Sentencing Reform Act. (120)(560) Defendant contended that the sentencing guidelines applicable to his case were inconsistent with the Sentencing Reform Act of 1984, which requires a sentencing court to consider the "history and characteristics of the defendant" and alternatives to imprisonment. The 8th Circuit rejected this claim. The district court had the benefit of the pre-sentence report on defendant, which detailed his history and characteristics. This was sufficient to fulfill the mandate in the Sentencing Reform Act. While Congress authorized the Sentencing Commission and the courts to make probation available for some crimes, it did not require probation to be made available. *U.S. v. Barrett*, __ F.2d __ (8th Cir. July 3, 1991) No. 90-5537.

10th Circuit affirms pre-guidelines sentence because defendant pled guilty to scheme ending October 1987. (125) Defendant pled guilty to two counts of mail fraud and two counts of failing to file an income tax return. Defendant contended that he should have been sentenced under the guidelines, because he continued to engage in criminal conduct after the guidelines' effective date. The 10th Circuit rejected this argument. "By pleading guilty, defendant admitted that he committed the offense charged, namely, a mail fraud scheme ending in October 1987. He cannot now challenge the factual basis of the charge to which he pleaded guilty." *U.S. v. Morrison*, __ F.2d __ (10th Cir. July 2, 1991) No. 90-1364.

3rd Circuit remands for application of earlier version of guidelines because government agreed to their use. (130) Defendant objected to the district court's use of the sentencing guidelines loss table in effect at the time of sentencing rather than the table in effect at the time of the offense. The newer guidelines resulted in a guideline range of 27 to 33 months, instead of 21 to 27 months. The 3rd Circuit found it unnecessary to address defendant's arguments in favor of resentencing because the government advised the court that it had no objection to the use of the earlier

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guidelines. On remand, the district court was instructed to apply the earlier version of the guidelines. *U.S. v. Barei*, __ F.2d __ (3rd Cir. July 17, 1991) No. 90-5457.

9th Circuit holds that statute may not be applied retroactively to increase defendants' sentence. (130) In footnote 1 the 9th Circuit noted that effective February 27, 1991, Congress had added steroids to the list of controlled substances. However, citing *Miller v. Florida*, 482 U.S. 423 (1987), the court ruled that it could not apply this statute retroactively to increase the defendants' sentence. "Therefore the change in the statute does not affect this appeal." *U.S. v. Shields*, __ F.2d __ (9th Cir. July 24, 1991) No. 89-50603.

10th Circuit applies prior version of section 2D1.1(b)(1) to avoid ex post facto problem. (130)(280) Guideline section 2D1.1(b)(1) enhances a defendant's sentence if the defendant possessed or used a firearm during the course of a drug trafficking crime. The 10th Circuit found it was necessary to apply the 1988 version of guideline section 2D1.1(b)(1) in effect at the time defendant committed his drug crimes in order to avoid an ex post facto problem. It agreed with other circuit courts that the 1988 version of the guideline required a finding of scienter in order to enhance a defendant's sentence, while the amended guideline, effective in November of 1989, deleted this requirement. "Given the decreased burden of the government, we have little trouble concluding that retroactive application of the changed guideline would disadvantage defendant in this case." *U.S. v. Underwood*, __ F.2d __ (10th Cir. July 8, 1991) No. 90- 3220.

11th Circuit finds no ex post facto violation in application of amended relevant conduct provision. (130)(170) Defendant pled guilty to a single sale of crack cocaine but her base offense level was calculated on the basis of all the drugs distributed by the conspiracy in which she was involved. Defendant contended that application of the version of guideline section 1B1.3 in effect at the time she was sentenced violated the ex post facto clause. Under the 1989 version of the guideline in effect at the time defendant was sentenced, a defendant could be held accountable for the quantities of cocaine sold by codefendants whether or not the defendant had pled guilty to a conspiracy charge. Defendant contended the prior version of section 1B1.3 in effect at the time she committed the offense did not permit this. The 11th Circuit found no ex post facto violation. The prior version of the guidelines intended for relevant conduct to include all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. The 1989 amendment merely clarified this intent and was not a substantive change. *U.S. v. Robinson*, __ F.2d __ (11th Cir. July 5, 1991) No. 90-3302.

1st Circuit reverses downward departure intended to bring parity to co-defendants' sentence. (140)(722) Defendant and his co-defendant were equal partners in a drug distribution scheme. The co-defendant was sentenced first, and due to the government's "slipshod" effort to build a record, the judge was only able to find the co-defendant accountable for 10.19 grams of heroin. Accordingly, the co-defendant received a 27-month sentence, which was at the top of his applicable guideline range. At defendant's sentencing hearing, the government was able to build an adequate record, and the sentencing judge found that 755.75 grams were involved in the scheme. This resulted in a guideline range of 87 to 108 months. However, in order to avoid disparity between co-defendants who had essentially the same role in the offense, the district court departed downward and sentenced defendant to 27 months. The 1st Circuit reversed, since under Circuit precedent, "the perceived need to equalize sentencing outcomes for similarly situated co-defendants, without more, will not permit a departure from a properly calculated guideline sentencing range." *U.S. v. Wogan*, __ F.2d __ (1st Cir. July 18, 1991) No. 91-1214.

4th Circuit affirms refusal to depart downward despite government motion. (140)(710)(810) Defendant was originally sentenced within his guideline range. Thereafter, a co-conspirator was arrested and defendant agreed to testify against him. After defendant testified, the co-conspirator pled guilty. The government then filed a motion to reduce defendant's sentence under Fed. R. Crim. P. 35(b), and the district court reduced it by 35 months. Defendant claimed that the

district court erred in failing to make a downward departure at the time of his original sentence, particularly in light of the government's motion under section 5K1.1 for a downward departure of 10 to 15 percent from the lowest guideline sentence and the district court's granting of a reduction to a less deserving co-defendant. The 4th Circuit found no error in the district court's refusal to grant a downward adjustment at the time of the initial sentence or the refusal to grant a reduction greater than 35 months. The fact that the government made a motion did not remove the decision to depart from the court's discretion. The granting of a similar motion to a co-defendant was not sufficient to show abuse of discretion. *U.S. v. Richardson*, __ F.2d __ (4th Cir. July 1, 1991) No. 89-5263.

Offense Conduct, Generally (Chapter 2)

9th Circuit upholds departure in steroids case based on quantity and scope but reverses for improper reliance on role. (200)(420)(740) The steroid guideline, section 2N2.1, contained no distinctions based on quantity. Accordingly the 9th Circuit held that it was proper for the district court to consider the large quantity of steroids distributed in departing upward. Similarly it was proper for the court to depart on the basis of the "scope" of the offense, since the distribution schemes spanned at least 14 months. However, the sentence was reversed because the judge also relied on the defendant's "role" in the offense. Since role in the offense is governed by section 3B1.1, the case was remanded for resentencing. Judge Rymer dissented, arguing that the departure was based the scope of the operation, not on role in the offense. *U.S. v. Shields*, __ F.2d __ (9th Cir. July 24, 1991) No. 89-50603.

10th Circuit affirms firearm adjustment based upon toy cap gun carried by co-defendant. (220) Defendants and a juvenile attempted to rob a bank by having the juvenile walk into the bank and present a note that said "Shut up fill the bag I have a gun." When the teller asked the juvenile if she was serious, the juvenile responded by pulling back her jacket and pointing to her chest as if she had a gun. After the teller told the juvenile she had no money, the three then went to another bank where the juvenile walked in and presented a note which stated "Shut the fuck up fill this bag with money and I won't shoot you." The three were apprehended a short time later, and a toy cap gun was found in the juvenile's jacket. The 10th Circuit affirmed a three level enhancement under section 2B3.1(b)(2)(C) because "a dangerous weapon (including a firearm) was brandished, displayed, or possessed" in the offense. The robbery notes threatened violence from a firearm. One of the defendants had written at least one of the notes, and both defendants' fingerprints were on both of the notes. The evidence was sufficient that the juvenile possessed a "dangerous weapon" within the meaning of the guidelines and that both defendants were aware that she possessed it. *U.S. v. Pool*, __ F.2d __ (10th Cir. July 5, 1991) No. 90- 7039.

1st Circuit reverses sentence below statutory minimum. (245)(660) Defendant was convicted of 11 drug charges carrying a mandatory minimum prison term of five years. Her guideline range was 63 to 78 months, but the district court departed below both the guideline range and the minimum sentence and sentenced defendant to 57 months. The 1st Circuit reversed and remanded for resentencing. Guideline section 5G1.1(c)(2) provides that the guidelines do not supercede a minimum sentence mandated by statute. The 57-month sentence violated this guideline and 21 U.S.C. section 841(b)(1)(B)(ii), which set the mandatory minimum sentence. *U.S. v. Rodriguez*, __ F.2d __ (1st Cir. July 11, 1991) No. 90-1533.

7th Circuit reverses career offender sentence that exceeded the statutory maximum. (245)(520) Defendant was convicted of possessing with intent to distribute 9.15 kilograms of marijuana in violation of 21 U.S.C. section 841(b)(1)(D). Since he had a prior drug felony conviction, he was subject to a maximum 10-year sentence. He was found to be a career offender under the guidelines, with a guideline range of 262 to 327 months. He was sentenced to 300 months because the probation officer, government and district court mistakenly believed the statutory maximum for defendant's crime was 30 years. On appeal, the 1st Circuit reversed, holding that defendant could be sentenced to no more than the statutory maximum, ten years. *U.S. v. Belanger*, __ F.2d __ (7th Cir. July 3, 1991) No. 90-2812.

9th Circuit holds that guidelines did not repeal mandatory minimum sentences. (245)(660) Defendant argued that he was entitled to be sentenced under the guidelines, which impose a lesser sentence than the mandatory minimum 10 year sentence for repeat narcotics offenders under 21 U.S.C. section 841(b)(1)(B). The 9th Circuit rejected the argument, noting that guideline section 5G1.1(b) expressly provides that where the statutorily required minimum sentence is greater than the maximum of the applicable guideline range, "the statutorily required minimum sentence shall be the guideline sentence." The court rejected the defendant's argument that 18 U.S.C. section 3553(b) implicitly repealed the mandatory minimum sentence. The court noted that "repeals by implication are disfavored," and followed the holding of other circuits that the mandatory minimum sentence does not constitute a departure from the guidelines. *U.S. v. Williams*, __ F.2d __ (9th Cir. July 18, 1991) No. 89-50241.

9th Circuit upholds aggregating amounts of methamphetamine distributed before effective date of mandatory minimum statute. (245)(380) The minimum ten year sentence required under 21 U.S.C. section 841(b)(1) became effective November 18, 1988. The conspiracy for which the

defendant received the mandatory minimum sentence began before that date, and he argued that the ex post facto clause prevented aggregating amounts of methamphetamine distributed prior to November 18, 1988. The 9th Circuit rejected the argument, noting that conspiracy is a continuing offense for which the sentencing guidelines contemplate the aggregation of all amounts of contraband involved in the conspiracy. See section 2D1.4, commentary note 1. *U.S. v. Inafuku*, __ F.2d __ (9th Cir. July 10, 1991) No. 90-10188.

11th Circuit vacates because court failed to advise of mandatory minimum five-year term. (245)(780) The 11th Circuit found that the district court violated Fed.R.Crim.P. 11(c)(1) by failing to advise defendant during the plea colloquy of the mandatory minimum five-year sentence. The district court did not satisfy Rule 11 by telling defendant that she faced a five to 40 year sentence, since the court clearly referred to the range as a maximum sentence. The court also did not satisfy the rule by advising defendant of the 63 to 78 month guideline range, since that was the applicable range without reductions for acceptance of responsibility, minimal participation and cooperation that the government agreed to recommend in the plea agreement. Although the indictment carried the notation "5 to 40 years and/or $2,000,000 and at least 4 years supervised release," a reasonable person could interpret this as indicating either a sentence of incarceration or a fine plus supervised release. The case was remanded to give defendant the opportunity to enter a new plea. *U.S. v. Hourihan*, __ F.2d __ (11th Cir. July 1, 1991) No. 90-3781.

5th Circuit affirms that weight of blotter paper containing LSD determines weight of drug. (250) Following the Supreme Court's decision in *Chapman v. U.S.*, 111 S.Ct. 1919 (1991), the 5th Circuit found no error in the district court's inclusion of the weight of the blotter paper containing LSD in the total weight of the LSD involved. *U.S. v. McCusker*, __ F.2d __ (5th Cir. July 12, 1991) No. 90-8512.

11th Circuit affirms drug quantity based upon defendant's testimony. (250) The 11th Circuit affirmed the district court's determination that defendant was involved with more than 500 grams of cocaine base. Defendant testified at trial that she sold $20 worth or more of crack cocaine to each customer, sometimes selling more than five grams to a customer, three or four days a week, six or seven hours a day, for approximately a year and a half. She also admitted that she knew at the time that everyone at the junkyard was selling crack cocaine. *U.S. v. Robinson*, __ F.2d __ (11th Cir. July 5, 1991) No. 90-3302.

1st Circuit affirms upward departure based upon quantity of drugs in conduct underlying telephone count convictions. (255)(745) Although initially charged with various drug charges, defendants pled guilty to the unlawful use of a communications facility. At the time defendants were sentenced, this offense carried a base offense level of 12, under section 2D1.6, regardless of the quantity of drugs in the underlying crime. The district court departed upward based upon the quantity of drugs involved in the underlying conduct. The 1st Circuit affirmed, finding the quantity of drugs involved in drug transactions underlying a telephone count to be a proper ground for departure. Guideline section 2D1.6 was amended effective November 1990 to provide that the base offense level for the telephone count is the offense level applicable to the underlying offense. The commentary notes that under the previous guideline, departure was often warranted to take into account the scale of the underlying offense. Moreover, other circuits have also upheld this as a ground for departure. *U.S. v. Citro*, __ F.2d __ (1st Cir. July 16, 1991) No. 90-1203.

4th Circuit reverses determination that defendant who had no money was capable of producing 10 kilograms of cocaine. (265) An undercover agent attempted to purchase 10 kilograms of cocaine from defendant. No sale was ever consummated, although the agent did wire $1300 in expense money to defendant. Defendant was not able to produce the cocaine and claimed that he planned to "rip off" the agent. The district court held defendant accountable for the 10 kilograms, finding that if defendant had the money he could have gotten the cocaine. The 4th Circuit reversed, finding nothing in the record to show that defendant could have raised the $150,000 necessary to purchase the cocaine. Without such money defendant was not "reasonably capable" of producing any cocaine. *U.S. v. Richardson*, __ F.2d __ (4th Cir. July 1, 1991) No. 89-5263.

4th Circuit holds defendant accountable for additional sales made by partner for one year after defendant was out of conspiracy. (275) Defendant was in partnership with a co-defendant in a cocaine distribution ring until the partner refused to work with him because of his drug abuse. The two renewed their business relationship a short time later after defendant advised the partner that he had some contacts in North and South Carolina. The two made one trip to South Carolina during which they sold one kilogram of cocaine and defendant introduced his partner to his contacts. They also made one trip to North Carolina and delivered cocaine to another of defendant's contacts. Shortly thereafter, they made a second trip to South Carolina, which resulted in defendant being forced out of the business after he deserted the partner and stole his car and a large amount of cocaine. The district court held defendant accountable for the sales the partner made in the Carolinas for almost a year after defendant was out of the conspiracy. The 4th Circuit affirmed, although it noted that the facts presented the outer limits of what could be "reasonably foreseeable." It would be "both unreasonable and unfair to hold [defendant] accountable for all sales by [the partner] to these contacts for an indefinite period of time." *U.S. v. Richardson*, __ F.2d __ (4th Cir. July 1, 1991) No. 89-5263.

10th Circuit remands because district court failed to provide adequate statement of reasons. (280)(775) The district court adopted the presentence report without making any specific findings. The 10th Circuit remanded for resentencing and an adequate statement of reasons as required by 18 U.S.C. section 3553(c). The presentence report included a two level enhancement under section 2D1.1(b)(1) for possession of a firearm during a drug trafficking crime. However, the enhancement may be based on either the defendant's own possession or the reasonable foreseeability of a co-defendant's possession. Although a district court need not make particularized findings for guidelines adjustments, the court must at a minimum make a finding that the requirements for the adjustment have been satisfied. Here, the appellate court could not determine whether the firearms enhancement resulted from the weapons found in defendant's truck or found on the farms or both, or whether the district court applied the correct legal standard. *U.S. v. Underwood*, __ F.2d __ (10th Cir. July 8, 1991) No. 90-3220.

5th Circuit affirms firearms enhancement despite acquittal of substantive firearm offense. (284) The 5th Circuit found no error in the two-level increase in defendant's offense level for possession of a firearm during a drug crime, even though defendant was acquitted of the firearm charge. *U.S. v. McCusker*, __ F.2d __ (5th Cir. July 12, 1991) No. 90-8512.

D.C. Circuit rules defendant need not know weapon is stolen to receive enhancement under guideline section 2K2.1. (330) Guideline section 2K2.1, Unlawful Receipt, Possession or Transportation of Firearms or Ammunition directs the district court to increase the offense level by two levels if the firearm was stolen or had an altered or obliterated serial number. The D.C. Circuit upheld the enhancement of defendant's offense level under this section despite his contention that there was no evidence that he was aware that the gun he possessed was stolen. It held that the current version of section 2K2.1 unambiguously requires no finding of scienter before the two-level enhancement applies. Because section 2K2.1 is unambiguous in its imposition of strict liability for possession of a stolen firearm, the presumption against strict liability did not apply. *U.S. v. Taylor*, __ F.2d __ (D.C. Cir. July 9, 1991) No. 90-3124.

Adjustments (Chapter 3)

11th Circuit reverses refusal to apply vulnerable victim enhancement to cross-burning crimes. (410) Defendants burned a cross in the front yard of a black family's home. The 11th Circuit reversed the district court's finding that a vulnerable victim enhancement under guideline section 3A1.1 was not appropriate. However, the court refused to adopt a presumption that the vulnerable victim enhancement should apply whenever the victim of a cross-burning is a black American. Such a presumption inadequately considers the defendant's motives in selecting the victim. Moreover, the court refused to accept the government's claim that the victim's testimony alone was sufficient to satisfy the requirements of guideline section 3A1.1. The applicability of section 3A1.1 turns on the defendant's decision to target the victim, not the victim's suffering. However, the facts of the case did require the application of the adjustment. Defendants knew (a) the race of the victims, (b) that the victims were the first black family to move into the area, (c) the rural, isolated location of their home, and (d) the time (middle of the night) that they chose to act. *U.S. v. Long*, __ F.2d __ (11th Cir. July 17, 1991) No. 89- 3942.

4th Circuit upholds leadership role of defendant who participated in conspiracy until his drug abuse forced him out. (430) The 4th Circuit affirmed that defendant was an organizer of a drug ring involving five or more participants. Defendant was the instigator of the drug ring, and with his partner, organized the conspiracy. Defendant had the contacts who were used in the distribution of the cocaine and necessary to the success of their business. He enjoyed a leadership position in the conspiracy until his personal use of cocaine ended his participation. *U.S. v. Richardson*, __ F.2d __ (4th Cir. July 1, 1991) No. 89-5263.

4th Circuit affirms leadership role for defendant who assumed control of drug business when partner became unreliable. (430) The 4th Circuit affirmed that defendant was a leader of a drug business that involved five or more participants. Defendant's partner had the initial contacts that were used to distribute cocaine, but defendant was the real leader and without him there would have been nothing to distribute. Although initially defendant was only to provide money and his partner was to acquire and distribute the cocaine, when the partner proved unreliable by using the cocaine instead of selling it, defendant handled purchasing and distribution. After defendant split with the partner, defendant was able to continue to sell an additional 11 kilograms of cocaine, thereby increasing his share of the profits. *U.S. v. Richardson*, __ F.2d __ (4th Cir. July 1, 1991) No. 89-5263.

1st Circuit agrees that defendant who accompanied supplier on drug sale and vouched for cocaine was not minor participant. (440) The 1st Circuit summarily affirmed the district court's determination that defendant was not a minor participant. Defendant was arrested with four others in connection with an attempted sale of one kilogram of cocaine to an undercover agent. Defendant was to have been paid $600 for his involvement. Defendant worked for the supplier of the cocaine, and accompanied the supplier on the drug sale to the agent. At the supplier's direction, defendant directed the agent into the supplier's car to complete the sale. As the agent was shown the cocaine, defendant vouched for its quality and pledged that the agent could exchange it if not

satisfied. *U.S. v. Rosado-Sierra*, __ F.2d __ (1st Cir. July 3, 1991) No. 90-2020.

2nd Circuit affirms despite judge's overstatement concerning risk of obstruction enhancement if defendant testified. (460) Defendant contended that his right to testify was impermissibly chilled by the district judge's warning that if he testified and was convicted, he would receive a sentence enhancement for obstruction of justice. The 2nd Circuit found this to be an overbroad statement of the risks of testifying, since it suggested that the obstruction enhancement would be automatic if defendant testified and was convicted. Nonetheless, there were no grounds for relief. First, since defendant did not testify, it was unclear whether his complaint was cognizable on appeal. Second, defendant could not now complain of imprecision in the judge's warning in the absence of any objection when the caution was given. Finally, since defendant would have inevitably been questioned about the essential elements of the offense, the risk was very real that the jury would convict, and that the judge would find defendant's testimony false and enhance his sentence for obstruction. *U.S. v. Padron*, __ F.2d __ (2nd Cir. July 5, 1991) No. 90-1456.

7th Circuit affirms obstruction enhancement based upon defendant's misrepresentation of criminal record. (460) During defendant's presentence interview, defendant denied that he had been convicted of a weapons offense years earlier under an alias. Defendant made this denial even though he was an absconder from a court-imposed probation on this conviction. The 7th Circuit found that this lie was sufficient to justify an enhancement for obstruction of justice under guideline section 3C1.1. "It is difficult to conceive of a more material falsehood than a defendant lying to a probation officer concerning the extent of his criminal record during the presentence investigation." Although this ground, by itself, justified the enhancement, the enhancement was further supported by defendant's denial of drug use while released on bail prior to entry of his guilty plea. *U.S. v. Delgado*, __ F.2d __ (7th Cir. July 3, 1991) No. 90-1545.

11th Circuit defers to district court decision not to enhance sentence for obstruction of justice. (460) The government argued that the district court should have made a two-level upward adjustment for obstruction of justice under guideline section 3C1.1 on the ground that defendant perjured himself in making out his entrapment defense. The 11th Circuit deferred to the district court's judgment, and affirmed. "The district court is uniquely suited to make such a determination because it heard all the evidence and was able to observe a particular witness' demeanor and behavior on the witness stand. Although the district court found that portions of [defendant's] testimony was severely compromised by the testimony of more credible witnesses, it found that these inconsistencies did not rise to such a level as to require an upward adjustment in the sentence." *U.S. v. McDonald*, __ F.2d __ (11th Cir. July 17, 1991) No. 89-5269.

D.C. Circuit remands to determine whether defendant attempted to mislead authorities about offense of conviction. (460) Defendant, the mayor of the District of Columbia, was convicted of one count of possession of cocaine on November 10, 1989. The district court enhanced his offense level by two under guideline section 3C1.1 for obstruction of justice based upon his false grand jury testimony in January 1989. The D.C. Circuit remanded for resentencing, finding it unclear from the record whether the district court thought defendant's perjury was an attempt to obstruct justice with respect to the offense of conviction or whether the district court erroneously thought guideline section 3C1.1 does not require such a finding. Agreeing with the 2nd, 5th and 8th Circuits, the court held that the term "instant offense" as used in section 3C1.1 refers solely to the offense of conviction. However, the court rejected defendant's contention that his perjury could not, as a matter of law, support the section 3C1.1 enhancement. The court could conceive of a situation where a defendant's lies, although not specifically concerning the offense of conviction, were a willful attempt to mislead authorities about the offense of conviction. *U.S. v. Barry*, __ F.2d __ (D.C. Cir. July 12, 1991) No. 90-3251.

11th Circuit rules acceptance of responsibility provision does not infringe right to appeal. (480) Defendant contended that the sentencing guidelines infringed his right to appeal because he was unable to express acceptance of responsibility at the sentencing hearing while he anticipated bringing this appeal. The 11th Circuit rejected this contention, finding that guideline section 3E1.1 does not unconstitutionally prejudice or penalize defendant for exercising his right to appeal from a conviction. *U.S. v. McDonald*, __ F.2d __ (11th Cir. July 17, 1991) No. 89- 5269.

7th Circuit denies acceptance of responsibility reduction to defendant who obstructed justice. (485) The 7th Circuit upheld the district court's decision to deny defendant a reduction for acceptance of responsibility. Defendant had obstructed justice by misrepresenting his criminal history to a probation officer conducting a presentence interview, and by denying he used drugs while released on bail prior to entry of his guilty plea. Under these circumstances, defendant did not present an exceptional situation justifying both an obstruction enhancement and an acceptance of responsibility reduction. *U.S. v. Delgado*, __ F.2d __ (7th Cir. July 3, 1991) No. 90-1545.

11th Circuit finds no double counting in denial of acceptance of responsibility and upward departure based upon same conduct. (485)(745) Defendant committed another offense while released on bond on the instant offense. The 11th Circuit held that the district court's denial of a reduction for acceptance of responsibility and its upward departure

based on the commission of this offense did not constitute impermissible double counting. The guidelines recognized the potential for double counting in certain cases involving both guideline section 3E1.1 and section 5K2.0. For example, guideline section 3E1.1 permits the denial of an acceptance of responsibility reduction if the defendant obstructed justice. Moreover, such double counting is permitted because each section "concerns conceptually separate notions relating to sentencing." Section 3E1.1 decreases the sentence of a defendant who has shown sincere remorse for his crimes, while an upward departure under section 5K2.0 enhances an otherwise inadequate sentence. *U.S. v. Aimufua*, __ F.2d __ (11th Cir. July 12, 1991) No. 90-8594.

D.C. Circuit denies acceptance of responsibility reduction where defendants lied about circumstances of crime. (485) Defendants were arrested driving a car with loaded firearms and wearing bullet-proof vests. They were convicted of being felons in possession of a firearm. Although defendants admitted possessing the weapons, they claimed that two of them were purchasing the weapons and vests from the third defendant, and that they were on their way to test them. The district court found this story incredible and denied them a reduction for acceptance of responsibility. The D.C. Circuit agreed, rejecting the argument that this violated their 5th Amendment rights by coercing an explanation of their "related conduct." "The district court properly interpreted the guideline to require a truthful and complete explanation of, and a genuine acceptance of responsibility for, all of the circumstances surrounding the defendants' firearm possession offense. It was not error for the district court to require an acceptance of responsibility that extended beyond the narrow elements of the offense." *U.S. v. Taylor*, __ F.2d __ (D.C. Cir. July 9, 1991) No. 90-3124.

Criminal History (§ 4A)

10th Circuit affirms that defendant committed crime while under criminal justice sentence. (500) In 1985, defendant was sentenced to six months jail for a bad check offense and ordered to pay attorneys' fees and court costs. Defendant was paroled after six days in jail, and ordered to pay the fees and costs within three months. When he failed to pay and failed to appear for a parole revocation hearing, the court issued a warrant for his arrest. The warrant was served and defendant posted a recognizance bond. When defendant still had not paid his fees several months later, the court issued another warrant which was never served. The 10th Circuit affirmed the district court's decision to add two points to defendant's criminal history score for committing the instant offense while under a criminal justice sentence. He argued that his two-year parole had expired when he was arrested for the instant offense even though there was an outstanding warrant for his failure to appear at a parole revocation hearing. Under Kansas law, when a warrant issued for violation of a condition of probation cannot be served, the defendant is a fugitive from justice, and time spent as a fugitive cannot count as time served on parole unless the court decides to credit defendant with this time. *U.S. v. Pettit*, __ F.2d __ (10th Cir. July 3, 1991) No. 90-3261.

9th Circuit holds that government bears the burden of proof in establishing criminal history category. (500)(755) When the government seeks to adjust an offense level upward, it bears the burden of proof to support that upward adjustment. The 9th Circuit ruled that the adjustment of the criminal history category is closely analogous. Under the guidelines a higher criminal history category produces a heavier sentence just as a high offense level does. Therefore on remand the government would bear the burden of proof to establish that the state convictions warranted an increase in defendant's criminal history category. *U.S. v. Kemp*, __ F.2d __ (9th Cir. July 11, 1991) No. 90-10213.

9th Circuit holds that "generic" prior conviction requires court to look at actual conduct. (500) The district court assessed two criminal history points for two misdemeanor "domestic violence" convictions under Arizona law. Under guideline section 4A1.2(c)(1) certain misdemeanor convictions are not counted unless (1) they are similar to the offense of conviction, and (2) resulted in more than one year probation or 30 days imprisonment. Since neither of the convictions here satisfied the second condition, the court was required to determine whether they were similar to the offense of conviction. Since the generic definition "domestic violence" contained both included and excluded offenses under the guidelines, the 9th Circuit held that the district court should examine the information and any other relevant charging papers to determine whether the actual conduct constituting the crime was similar to one of the excluded crimes under the guidelines. The case was remanded for this purpose. *U.S. v. Kemp*, __ F.2d __ (9th Cir. July 11, 1991) No. 90-10213.

10th Circuit affirms inclusion in criminal history score of bad check misdemeanor conviction. (500) The 10th Circuit found that the district court properly added two points to his criminal history score for his prior bad check misdemeanor conviction. Defendant received a six-month sentence, and actually served six days in prison. Six months' imprisonment is clearly not probation, and clearly exceeds 30 days. Therefore, it did not qualify under guideline section 4A1.2(c) as an exception to the general rule that counts misdemeanors in the criminal history computation. *U.S. v. Pettit*, __ F.2d __ (10th Cir. July 3, 1991) No. 90-3261.

2nd Circuit rules notice of enhancement under section 851 is not required to sentence defendant as career offender. (520) The district court refused the government's request to sentence defendant as a career offender because the government failed to file an information stating in writing the

revious convictions to be relied upon, pursuant to 21 U.S.C. section 851(a)(1). The 2nd Circuit reversed, holding that a section 851(a)(1) notice is required only where the statutory minimum or maximum penalty is sought to be enhanced, not where a defendant, by reason of his criminal history, receives an increased sentence under the guidelines within the statutory range. Under the career offender guidelines defendant had an applicable guideline range of 360 months to life, within the statutory range of 10 years to life. Section 851 was thus inapplicable. *U.S. v. Whitaker*, __ F.2d __ (2nd Cir. July 16, 1991) No. 91-1021.

4th Circuit affirms that state misdemeanor is a felony for career offender purposes. (520) Defendant argued that he should not have been classified as a career offender because one of his prior offenses was not a felony. South Carolina law classified one of his two prior drug offenses as a misdemeanor. Although defendant agreed that the guidelines defined both of his prior offenses as felonies, he argued that the definition of felony given in the guidelines was not authorized by Congress because the Sentencing Reform Act is silent on a definition. The ambiguity therefore should be resolved in his favor under the rule of lenity. The 4th Circuit rejected this argument. Although the definition of a felony conviction for states offenses is not derived from the underlying statute, it is consistent with the statutory definition of felony used in classifying federal criminal offenses. This allows for consistent application of the law. Thus, the Sentencing Commission acted properly within the authorization given to it to adopt guidelines consistent with Title 18 of the United States Code. *U.S. v. Pinckney*, __ F.2d __ (4th Cir. July 11, 1991) No. 90-5776.

4th Circuit permits downward departure from career offender guidelines where criminal history is overstated. (520)(730) The 4th Circuit held that where the seriousness of a defendant's criminal history has been overstated, a district court may depart downward from the career offender guidelines. Guideline section 4B1.1 is not an exception to the general rules governing criminal history departures under guideline section 4A1.3. Because the district court concluded that it lacked the discretion to depart downward from the criminal history guidelines, the case was remanded for resentencing. *U.S. v. Pinckney*, __ F.2d __ (4th Cir. July 11, 1991) No. 90-5776.

4th Circuit finds breaking and entering of unoccupied house was crime of violence for career offender purposes. (520) Defendant contended that his prior state conviction for breaking and entering a residence was not a crime of violence for career offender purposes because at the time of the crime the owner of the property lived in a rest home and the property was unoccupied. The 4th Circuit rejected this reasoning. The building which defendant broke into was a residence and was used for no other purpose. There was no evidence to suggest that it was not occupied at the time of the break-in. Even though the owner was in a rest home, there was no evidence of when she or someone else might return. Her grandson was looking after the house, and the grandson actually came upon defendant while defendant was hauling away furniture. From defendant's perspective, the risk to person or property was no different than had the owner been away momentarily at the store. *U.S. v. Raynor*, __ F.2d __ (4th Cir. July 11, 1991) No. 90-5008.

4th Circuit reaffirms that federal definition of felony governs for career offender purposes. (520) Following its decision in *U.S. v. Pinckney*, __ F.2d __ (4th Cir. July 11, 1991) No. 90- 5776, the 4th Circuit rejected defendant's contention that his prior conviction in North Carolina for assaulting a law enforcement officer should be treated as a misdemeanor. Even though the state characterized it as a misdemeanor, the statute specifies a penalty of up to two years imprisonment. Thus, it is a felony under federal law, and defendant was properly classified as a career offender. *U.S. v. Raynor*, __ F.2d __ (4th Cir. July 11, 1991) No. 90-5008.

7th Circuit rules that prior drug offense for which defendant received a fine was felony for career offender purposes. (520) Defendant contended that one of his prior drug offenses should not have been treated as a felony for career offender purposes because of the minor nature of the sentence he received, i.e., a fine of $500 plus costs. Moreover, in the presentence report the probation officer suggested that there might be reasons for a downward departure based upon an overrepresentation of defendant's criminal history. The 7th Circuit found no merit in defendant's argument. Application Note 3 to the career offender guideline provides that a conviction for a drug offense shall be considered a prior felony conviction if the offense was punishable by imprisonment in excess of one year, regardless of the actual sentence imposed. Defendant could have received a prison term of up to five years for his prior drug offense. *U.S. v. Belanger*, __ F.2d __ (7th Cir. July 3, 1991) No. 90-2812.

7th Circuit holds that prior drug felony was not constitutionally infirm. (520) Defendant claimed that one of his two prior drug convictions was constitutionally infirm because his waiver of counsel was not knowing and intelligent. The 7th Circuit found the waiver was knowing, and upheld the use of the conviction. Defendant was initially represented by the public defender and then private counsel, but he discharged the private counsel when he ran out of money. He did not again request the services of a public defender. Before accepting defendant's plea, the trial judge informed defendant of his possible sentencing exposure and explained the benefits of legal representation. Defendant responded that he understood those benefits but nonetheless chose to waive his right to counsel. The judge explained the particulars of the charge and ascertained that defendant had read and understood the criminal complaint and did not quarrel with its recitation of facts. Finally, the court inquired whether de-

fendant read and understood the "Plea Questionnaire and Waiver of Rights" form which he had earlier signed, which detailed the constitutional rights that defendant waived by pleading no contest. *U.S. v. Belanger*, __ F.2d __ (7th Cir. July 3, 1991) No. 90-2812.

8th Circuit reaffirms that section 851 notice requirements need not be satisfied to sentence career offender. (520) Defendant contended that the government improperly failed to notify him that it would seek to have him sentenced as a career offender under guideline section 4B1.1. Prior to trial, the government served and filed an information pursuant to 21 U.S.C. section 851 notifying defendant that he would be subject to a term of 10 years to life as a result of his prior felonies. Defendant was sentenced as a career offender to a 400-month term of imprisonment followed by eight years of supervised release. The 8th Circuit rejected defendant's claim that the district court was required by section 851 to notify him that he could be sentenced as a career offender. Prior circuit caselaw established that the requirements of section 851 do not apply to sentences imposed under the career offender provisions of the guidelines. Notwithstanding a 6th Circuit case to the contrary, the court refused to reconsider its prior holdings. Moreover, the presentence report clearly set forth defendant's prior convictions and stated that defendant should be sentenced as a career offender. *U.S. v. Adams*, __ F.2d __ (8th Cir. July 1, 1991) No. 90-5266.

11th Circuit refuses to apply career offender provisions where it would result in lower guideline sentence. (520) Defendant had an offense level of 36 and a criminal history category of VI, which resulted in a guideline range of 262 to 327 months. Defendant contended that he should have been sentenced as a career offender, which would have resulted in a lower offense level and a guideline range of 210 to 262 months. The 11th Circuit upheld defendant's sentence, finding that guideline section 4B1.1 suggests that application of the career offender provision is not appropriate where it would result in a lower sentence than would otherwise be applicable. Moreover, section 4B1.1 is a sentence enhancement provision rather than one of reduction. Logic dictates that defendant be sentenced under the otherwise applicable sentencing range, which more closely approximates the statutory maximum. *U.S. v. Robinson*, __ F.2d __ (11th Cir. July 5, 1991) No. 90-3302.

10th Circuit finds district court properly considered defendant's ability to pay pre-guidelines restitution. (620) In this pre-guidelines case, defendant appealed the court's order requiring him to pay $613,765 in restitution under the Victim and Witness Protection Act, contending that the court failed to consider his ability to pay. The 10th Circuit rejected this argument. Defendant's financial situation and employment prospects were discussed at the sentencing hearing as required by 18 U.S.C. section 3664(a). The defendant has the burden of proving an inability to pay restitution, and defendant did not meet this burden. Although he currently had a negative monthly cash flow and his assets were seized, defendant had a college degree in petroleum engineering and had successfully operated numerous supermarkets and convenience stores. His mail fraud scheme showed "imagination and skills of persuasion" that could be applied to legal endeavors. Finally, the restitution order was limited to five years after his release from prison. If, after good faith efforts, defendant was still unable to complete payment, the order would terminate. *U.S. v. Morrison*, __ F.2d __ (10th Cir. July 2, 1991) No. 90-1364.

5th Circuit rules court need not make explicit findings concerning defendant's ability to pay fine. (630)(800) Defendant was assessed a $10,000 fine. He argued that the district court failed to consider the guideline factors when assessing his fine, particularly his ability to pay. The 5th Circuit upheld the fine, finding the district court had adequately considered defendant's ability to pay, and that it was not required to make explicit findings. The court adopted the presentence report, which revealed that defendant's only assets were valued at less than $1000, and that he was currently unemployed, had no dependents and lived with his mother, who supported him. "Where the presentence report makes no recommendation concerning the fine, and the defendant neither presents evidence on nor objects to the amount of the fine assessed within the guideline range, the defendant may not raise new objections absent plain error." Defendant had an extensive education and lived at home with minimal financial obligations. Thus, the record supported the fine imposed. *U.S. v. Matovsky*, __ F.2d __ (5th Cir. July 17, 1991) No. 91-4081.

9th Circuit upholds finding that defendant had ability to pay $17,500 fine. (630) The district court explained the imposition of the fine based upon defendant's income tax information and his co-defendant's statements suggesting that he had large sums of money to spend. The 9th Circuit found no plain error in relying on this information. *U.S. v. Inafuku*, __ F.2d __ (9th Cir. July 10, 1991) No. 90-10188.

7th Circuit affirms consecutive sentences on pre-guidelines and guidelines counts. (660) Defendant was convicted of 18 counts of mail fraud and two counts of making false statements to the Social Security Administration. All but two of the counts involved conduct that occurred prior to the effective date of the guidelines. The district court sentenced defendant to concurrent terms of 24 months on each of the pre-guidelines counts, to be served consecutively to the 37 months defendant received for the two guidelines counts. The 7th Circuit upheld the consecutive sentences, holding that the district court had the discretion to make the defendant's guidelines and pre-guidelines sentences consecutive. The court could have sentenced defendant to five years on each of the 18 pre-guidelines counts for which he was convicted. "Given the wide scope of the court's discretion to

sentence the defendant on the pre-guidelines counts, it is immaterial whether the court made the defendant's sentences on these counts consecutive to his sentence on the two guidelines counts." *U.S. v. Ewings*, __ F.2d __ (7th Cir. July 2, 1991) No. 90-2306.

6th Circuit finds no double jeopardy violation in prosecution for conduct used to enhance prior sentence. (680) Defendant was originally indicted on drug charges, and failed to appear for a sentencing hearing. When he was eventually apprehended, defendant gave a false name and required restraint by three police officers. Defendant's sentence was enhanced for obstruction of justice. Defendant was subsequently indicted for knowing failure to appear. Defendant moved for the indictment to be dismissed on double jeopardy grounds. The 6th Circuit affirmed the district court's denial of the motion. Following the 5th, 7th and 8th Circuits, the court held that the prohibition against double jeopardy is not implicated when a defendant is indicted for conduct previously used to increase the length of his sentence for a separate offense. *U.S. v. Mack*, __ F.2d __ (6th Cir. July 16, 1991) No. 91-3010.

Determining the Sentence (Chapter 5)

9th Circuit holds that post-arrest drug rehabilitation efforts do not justify downward departure. (690)(722) After his arrest and before sentencing, defendant participated in a drug rehabilitation program. The district court refused to depart downward to allow him to serve his sentence in the rehabilitation facility instead of prison, stating that it lacked power to do so. On appeal, the 9th Circuit affirmed, holding that a defendant's post-arrest drug rehabilitation efforts "afford no basis for downward departure from the guidelines' sentencing range, or for commitment to a drug treatment program in lieu of the sentence required by the guidelines." The court thus agreed with the decisions in *U.S. v. Sklar*, 920 F.2d 107 (1st Cir. 1990), *U.S. v. Pharr*, 916 F.2d 129 (3rd Cir. 1990), and *U.S. v. Van Dyke*, 895 F.2d 984 (4th Cir. 1990), that section 5H1.4 forbids downward departure on the basis of drug dependance or drug "independence." The court disagreed with the 6th Circuit's opinion in *U.S. v. Maddalena*, 893 F.2d 815 (6th Cir. 1989), and two district court opinions which have recognized some discretion to depart downward on the basis of drug rehabilitation. *U.S. v Martin*, __ F.2d __ (9th Cir. July 9, 1991), No. 90-10446.

Departures Generally (§ 5K)

2nd Circuit permits court, on remand, to depart upward on grounds previously rejected. (700) When defendant's mail fraud scheme began to unravel, he kidnapped and assaulted one of his co-conspirators to coerce him to continue to participate in the scheme. The district court initially rejected this as a ground for upward departure under section 5K2.4, concluding that this guideline applies only to the abduction of victims of the underlying offense. However, the court did depart upward on other grounds. The 2nd Circuit remanded to allow the district court to make factual findings required by two recent circuit decisions. On remand, the district court decided to ground its upward departure on the kidnapping and assault. The 2nd Circuit found no impropriety in basing the departure on a ground previously rejected. The law-of-the-case doctrine did not bar this result, since the appellate court never ruled on this question. Therefore, the district court was free to change its prior ruling on that matter. In addition, the law-of-the-case doctrine is not an inviolate rule. Defendant was not prejudiced because he had adequate notice of the district court's action. *U.S. v. Uccio*, __ F.2d __ (2nd Cir. July 15, 1991) No. 91-1057.

9th Circuit holds that departures must be guided by structure, standards and policies of guidelines. (700) The *en banc* 9th Circuit held that all departures from the sentencing guidelines are to be determined "in light of the structure, standards, and policies of the Act and guidelines." The court rejected the government's argument based on the guideline manual, Chapter 1, Part A, Introductory comment (n. 4(b)) that some departures "will remain unguided." The court ruled that to facilitate appellate review, the district court's statement of reasons "should include a reasoned explanation of the extent of the departure founded on the structure, standards and policies of the Act and Guidelines." Chief Judge Wallace and Judge Hall concurred separately. *U.S. v. Lira-Barraza*, __ F.2d __ (9th Cir. July 22, 1991) No. 88-5161 (*en banc*).

9th Circuit adopts three-step standard of review of departures. (700)(820) The panel opinion in this case adopted a five-step process for reviewing departures. On rehearing *en banc*, the court held that the five steps may be combined into three, thus bringing the 9th Circuit into line with most other federal circuits. The court must first determine whether the district court had legal authority to depart, and this in reviewed *de novo*. Second, the court reviews for clear error the factual findings supporting the existence of the identifying circumstance. Thirdly the court determines whether the extent of departure was "unreasonable" within the meaning of 18 U.S.C. section 3742, which defines the standard of appellate review. Since the court here gave no explanation for sentencing outside the guideline range, the sentence was vacated and the case was remanded for further proceedings. Chief Judge Wallace and Judge Hall concurred separately. *U.S. v. Lira-Barraza*, __ F.2d __ (9th Cir. July 22, 1991) No. 88-5161 (*en banc*).

10th Circuit rules defendant was not improperly denied notice of upward departure. (700) The 10th Circuit rejected defendant's claim that he did not receive proper notice of the

district court's intent to depart upward from the guidelines. The presentence report stated that there were no factors that might warrant departure. At the presentence hearing, the district court stated only that departures were seldom made with any success and that he would decide whether to depart. However, at the sentencing hearing, the judge advised defendant that he intended to depart upward by 60 months based upon a juvenile's involvement in the crime. The judge then offered defense counsel some time to discuss this with defendant. Neither defendant's counsel nor counsel for a co-defendant made any request for additional time or a continuance of the sentencing hearing. Therefore, there was no error. However, because the case was to be remanded for the district court to explain its reasons for the extent of the departure, the district court was ordered to give notice in advance of resentencing of any departure contemplated and give defendant the opportunity to address the issue. *U.S. v. Pool*, __ F.2d __ (10th Cir. July 5, 1991) No. 90-7039.

4th Circuit refuses to inquire into government's reasons for failing to bring motion for substantial assistance departure. (710) Defendant contended that the government abused its discretion in refusing to file a motion for a downward departure under guideline section 5K1.1 based upon his substantial assistance. The 4th Circuit refused to consider his claim, noting that under Circuit precedent, when a defendant is able to negotiate a plea agreement that includes the government's agreement to file a motion for a downward departure under section 5K1.1, the defendant obtains a right to require the government to fulfill that promise. Absent such an agreement, the government alone has the right to decide, in its discretion, whether to file such a motion. Here, defendant's agreement only required the government to bring any facts concerning defendant's cooperation to the attention of the court at sentencing. *U.S. v. Raynor*, __ F.2d __ (4th Cir. July 11, 1991) No. 90-5008.

8th Circuit holds district court may not depart downward for substantial assistance without government motion. (710) The 8th Circuit reaffirmed that in the absence of a government motion, a court lacks authority to depart downward based upon a defendant's substantial assistance. Prior caselaw did leave open the possibility that in an appropriate situation, a defendant might obtain a downward departure in the absence of a government motion if the defendant could prove his substantial assistance to the court. However, such an "appropriate situation" would have to involve "a question of prosecutorial bad faith or arbitrariness that might conceivably present a due process issue." No due process concerns were raised in defendant's case. Judge Beam concurred specially to express his "continuing view that section 5K1.1 of the [g]uidelines does not strip a district court of its authority to depart downward for substantial assistance by a defendant in appropriate circumstances" under the general departure authority in the guidelines. *U.S. v. Hubers*, __ F.2d __ (8th Cir. July 1, 1991) No. 90-5491.

9th Circuit remands where plea agreement contemplated a finding on defendant's cooperation. (710)(780) The plea agreement stated that defendant would be sentenced to 60 months if he cooperated and 78 months if he did not. It provided that the "FBI has the sole discretion and judgment to determine whether the defendant provided substantial cooperation." The district court sentenced the defendant to 78 months, with no mention of whether or not defendant cooperated. On appeal, the government conceded that the case should be remanded to determine whether defendant cooperated. *U.S. v. Serrano*, __ F.2d __ (9th Cir. July 24, 1991) No. 89-10583.

1st Circuit affirms denial of downward departure based upon defendant's drug addiction. (722) Defendant argued that the district court mistakenly believed it lacked authority to depart downward based upon her cocaine addiction. The 1st Circuit upheld the district court's ruling. Section 5K2.0 presents two avenues to a valid departure: (a) a departure may be based upon a qualitative "kind" of circumstance not considered by the Commission, or (b) a departure may be based upon circumstances which, though considered by the Commission, are present "to a degree" not envisioned nor frequently seen in connection with the offense. Section 5H1.4 states that drug addiction is not a reason for imposing a sentence below the guidelines. Thus, drug dependency was taken into account in the guidelines. Moreover, defendant's addiction was not atypical for a drug offense so as to justify an exception to the general rule in section 5H1.4. *U.S. v. Citro*, __ F.2d __ (1st Cir. July 16, 1991) No. 90-1203.

1st Circuit affirms denial of downward departure based upon diminished capacity. (722) Defendant argued that the district court incorrectly believed that it lacked authority to depart downward under guideline section 5K2.13 based upon defendant's diminished mental capacity. The 1st Circuit rejected this argument, finding the judge's comments reflected that the judge did not depart downward because there was no evidence that defendant's mental condition played a causative role in the offense, as required by the guideline. The fact that defendant might be victimized in prison due to his diminished capacity was not an independent ground for departure. Defendant's mental condition also did not provide a ground for departure under guideline section 5K2.0. A person with borderline intelligence or mild retardation who is easily persuaded to follow others does not present a mitigating circumstance not adequately considered by the sentencing commission in formulating the guidelines. "Borderline intelligence is not so extraordinary as to overcome the clear mandate of section 5H1.3 that mental conditions 'are not ordinarily relevant.'" *U.S. v. Lauzon*, __ F.2d __ (1st Cir. July 16, 1991) No. 90-1661.

10th Circuit affirms prior lenient sentences and threat to public safety as grounds for upward departure. (733)(745)

The district court departed upward from a guideline range of 15 to 21 months and sentenced defendant to 38 months imprisonment. The departure was based on many factors, including the fact that defendant had received lenient treatment for two prior felonies and his threat to public safety. The 10th Circuit affirmed these two reasons as grounds for the departure. Guideline section 5K2.14 states that a defendant's criminal history may be underrepresented when the defendant had previously received an extremely lenient sentence for a serious offense. Defendant, age 23, was already on probation for two previous felony convictions. He was a threat to public safety because he collected and sold "anti-personnel" weapons and was building highly volatile bombs in a residential area. Defendant believed he was selling weapons to an illegal paramilitary organization. However, the court was unable to determine whether the degree of departure was reasonable since the district court failed to follow the procedure previously outlined in U.S. v. Jackson, 921 F.2d 985 (10th Cir. 1990). *U.S. v. Stumpf*, __ F.2d __ (10th Cir. July 3, 1991) No. 90-8043.

D.C. Circuit affirms upward departure where defendant had two prior offenses for carrying illegal weapon. (733) Defendant contended that the district court decided to depart upward one criminal history level by improperly considering his conduct in the instant case. The D.C. Circuit found no merit to this claim. Defendant had prior convictions which were excluded from the calculation of his criminal history score. Defendant also had two prior convictions for illegal possession of a firearm, the same crime as the offense of conviction. "The nature of present conduct is relevant both in order to give context to the past behavior in question and in order to assess a tendency toward recidivism." *U.S. v. Taylor*, __ F.2d __ (D.C. Cir. July 9, 1991) No. 90-3124.

D.C. Circuit remands because district court failed to explain why a one-level departure was inadequate. (734) Defendant fell within criminal history category III, but the district court departed upward and sentenced him as if he were in criminal history category VI. The D.C. Circuit remanded for resentencing. Before departing by two levels, the district court should have explained why a one-level criminal history departure was inadequate. Moreover, the court's two level departure may have been inadvertent. The presentence report initially recommended criminal history level IV for defendant, but it was amended to place defendant in level III. The district court may have believed that defendant remained in category IV and that it was only departing upward by one level. *U.S. v. Taylor*, __ F.2d __ (D.C. Cir. July 9, 1991) No. 90-3124.

D.C. Circuit rules defendant had adequate notice of upward departure. (740) The D.C. Circuit ruled that defendant had adequate notice of the possibility the district court would depart upward. The presentence report recommended a departure and the district court gave the defendant the opportunity to address the grounds for the proposed upward departure at the sentencing hearing. *U.S. v. Taylor*, __ F.2d __ (D.C. Cir. July 9, 1991) No. 90-3124.

2nd Circuit upholds upward departure based on violence against co-conspirator. (745) Defendant kidnapped and assaulted one of his co-conspirators to coerce him to continue to participate in the mail fraud scheme. The district departed upward under section 5K2.4, which authorizes an upward departure where a person is abducted to facilitate the commission of the offense of conviction. The 2nd Circuit affirmed, rejecting defendant's argument that since his act could not have been prosecuted as a federal offense, it was not an appropriate ground for departure. Where violent misconduct, although not itself violating federal law, is undertaken in furtherance of the federal offense, the district court is permitted to depart on the basis of that misconduct. Moreover, guideline section 5K2.4 is not limited to acts of violence against victims of the underlying crime. There is no language indicating that the person abducted cannot be a co-conspirator. *U.S. v. Uccio*, __ F.2d __ (2nd Cir. July 15, 1991) No. 91-1057.

10th Circuit affirms involvement of juvenile as grounds for upward departure. (745) Defendants and a juvenile attempted to rob two banks. While defendants waited in the car, the juvenile entered each bank and presented a note threatening to shoot the teller unless she filled the juvenile's bag with money. The 10th Circuit affirmed the district court's upward departure based on involvement of the juvenile in the offense. Even if defendants did not send the juvenile in to the bank, they allowed her to go in where she was the only robber in serious danger of being killed by a bank guard. The district court's characterization of the 16-year-old girl as a juvenile was not erroneous, even though under certain circumstances a 16-year-old can be prosecuted as an adult. However, the district court failed to explain why a 60-month departure was appropriate. The case was remanded for the district court to properly explain its reasons for the degree of the departure. *U.S. v. Pool*, __ F.2d __ (10th Cir. July 5, 1991) No. 90-7039.

Sentencing Hearing (§ 6A)

7th Circuit rules defendant waived challenge to sufficiency of the evidence by admitting accuracy of facts. (760) Defendant argued that the district court erred in considering relevant conduct because there was insufficient evidence to support the facts upon which the district court relied. The 7th Circuit ruled that defendant had waived this argument by failing to challenge the district court's findings below. Defendant specifically admitted to the court that she did not disagree with the facts in the presentence report. Her statements constituted at least a waiver regarding, if not an admission of, the factual accuracy of the evidence considered

by the district court at sentencing. Defendant did not receive ineffective assistance of counsel. Counsel's arguments at sentencing indicated a tactical decision to avoid any additional fact-finding which would have occurred had he objected to the presentence report or requested an evidentiary hearing. *U.S. v. Livingston*, __ F.2d __ (7th Cir. July 10, 1991) No. 90-1552.

D.C. Circuit refuses to remand despite failure to provide defendant with 10-day notice of presentence report. (760) Defendant contended that his sentence should be reversed because the court did not delay sentencing until he and his counsel had 10 days to review the presentence report as required by Fed. R. Crim. P. 32(c). The D.C. Circuit refused to remand, holding that the trial court's failure to provide the full 10-day notice does not provide a basis for vacating a sentence and remanding for resentencing unless the defendant was prejudiced. Defendant failed to demonstrate such prejudice. Before the sentencing hearing, defendant's counsel filed detailed responses to the presentence report and the government's sentencing memoranda, fully addressing every issue that defendant raised on appeal. *U.S. v. Barry*, __ F.2d __ (D.C. Cir. July 12, 1991) No. 90-3251.

9th Circuit says that defendant must show that court actually relied on false information in sentencing. (770) Defendant argued that the district court "may have relied" on the inaccurate information in imposing the maximum sentence within the guideline range. However, relying on *U.S. v. Columbus*, 881 F.2d 785, 787 (9th Cir. 1989), the 9th Circuit held that this was insufficient. The defendant must show that the court "*did* rely on the challenged information in imposing his sentence." Since he failed to object in the district court, he could not rely on Fed. R. Crim. P. 32 which requires the sentencing court to make factual findings concerning disputed statements in the presentence report or to make clear on the record that the disputed facts were not taken into account in the sentencing. *U.S. v. Caperell*, __ F.2d __ (9th Cir. July 10, 1991) No. 90-10073.

D.C. Circuit affirms sentencing D.C. mayor, who "let down" community, at top of guideline range. (775) Defendant, the mayor of the District of Columbia, was convicted of possession of cocaine. He claimed that his sentence should have been vacated because, in sentencing within the guideline range, the district court relied on unfounded assumptions that defendant "let down" the community and gave "aid, comfort and encouragement to the drug culture at large." The D.C. Circuit rejected this claim. The district court relied on facts that defendant and his counsel admitted: defendant failed as a role model to the citizens of Washington, D.C., and contributed to "the anguish that illegal drugs have inflicted" on the city. The statement that his conduct gave "aid, comfort and encouragement" to the drug culture was not a finding that defendant's conduct had an adverse effect on the community, such as increasing drug use. Rather, the statement was simply part of the court's finding that defendant failed as a leader and role model by sending a signal condoning the use of illegal drugs. *U.S. v. Barry*, __ F.2d __ (D.C. Cir. July 12, 1991) No. 90-3251.

9th Circuit holds that supervised release term and fine were proper despite language of plea agreement. (780) Defendant argued that the district court sentenced beyond the plea agreement by imposing supervised release and a fine. The 9th Circuit rejected the argument, ruling that although the government is to be held to the literal terms of the plea agreement, defendant was on notice from another provision of the agreement that he was subject to mandatory supervised release and a mandatory fine. *U.S. v. Serrano*, __ F.2d __ (9th Cir. July 24, 1991) No. 89-10583.

9th Circuit finds no violation of plea bargain, despite reliance on relevant conduct outside the indictment. (780) Defendant argued that the government breached the plea agreement by arguing for an increase in his sentence based on the January 1989 conspiracy, because the government had stipulated that the continuing criminal enterprise terminated on November 17, 1988. He argued that the district court abused its discretion in considering this evidence as relevant conduct under section 1B1.3 because it had approved the plea agreement and stipulation. The 9th Circuit rejected the argument, noting that the plea agreement did not say that the government would not argue that other acts were part of the same course of criminal conduct. Moreover, the agreement provided that each party could argue the facts deemed relevant to the issue of departure. *U.S. v. Caperell*, __ F.2d __ (9th Cir. July 10, 1991) No. 90-10073.

Plea Agreements, Generally (§ 6B)

8th Circuit finds no breach of plea agreement in government's failure to move for downward departure. (790) The government gave defendant an unsigned plea agreement stating that he was cooperating, and that he could present these efforts to the court at sentencing. The government later informed defendant that it would *not* move for a downward departure. Defendant's attempt to plead guilty based on the unsigned agreement was rejected by the district court. Several months later defendant signed a plea agreement identical to the first except that it did not require the government to make a section 5K1.1 motion. On appeal, defendant contended that the first agreement induced him to cooperate, and should have been specifically enforced. The 8th Circuit rejected this contention, even assuming the first agreement was binding. When defendant pled guilty under the second plea agreement, he was aware that the government was not going to make the section 5K1.1 motion. Hence, his plea was not involuntary or induced by any misrepresentation. Moreover, the first plea agreement did not induce defendant to cooperate, since defendant began coop-

erating shortly after his arrest. *U.S. v. Hubers*, __ F.2d __ (8th Cir. July 1, 1991) No. 90-5491.

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

1st Circuit holds that government's failure to immediately object to illegal sentence did not constitute a waiver. (800) The government failed to object to the district court's sentence below the mandatory minimum required by 21 U.S.C. section 841(b)(1). Nevertheless, the 1st Circuit held that the government's failure to object to this illegal sentence did not constitute a waiver. Since the error affected substantial rights, the sentence was subject to plain error review under Fed. R. Crim. P. 52(b). *U.S. v. Rodriguez*, __ F.2d __ (1st Cir. July 11, 1991) No. 90-1533.

4th Circuit declines to consider appeal filed two and one-half months after entry of judgment. (800) Defendant was sentenced and judgment was entered January 24, 1988. On April 16, he wrote a letter to the district judge captioned "Notice of Appeal" in which he advised the judge that on January 26 he had requested his attorney to start appeal proceedings, and the attorney refused. The court clerk advised defendant that his time for appeal had expired and that he needed to obtain an extension of time. He advised defendant to make the request in writing and to indicate why he was making the request. On April 27 defendant filed a paper entitled "Motion to File an Out of Time Appeal," but in the motion he gave no reason for the motion. The 4th Circuit ruled that the district court properly denied this motion. The April 27 motion was not only beyond the time that could have been allowed by the granting of an extension, but contained no showing of excusable neglect. *U.S. v. Raynor*, __ F.2d __ (4th Cir. July 11, 1991) No. 90-5008.

9th Circuit holds waiver of appeal inapplicable where defendant claims sentence violated plea agreement. (800) As part of his plea agreement, defendant signed a written waiver of the right to appeal his sentence. Nevertheless, the 9th circuit refused to dismiss his appeal "because a wavier does not apply when a party contends . . . that a sentence was not in accordance with the plea agreement." *U.S. v. Serrano*, __ F.2d __ (9th Cir. July 24, 1991) No. 89-10583.

9th Circuit finds that appeal is not moot where defendant is serving a term of supervised release. (800) By the time this appeal was decided, defendant had completed serving his custodial sentence and was serving a two year term of supervised release. The *en banc* 9th Circuit held that the appeal was not moot because its outcome might have a direct effect on his term of supervised release. If, as a result of the appeal, he were resentenced to a term of imprisonment of less than one year, imposition of supervised release would be discretionary. Since the decision on appeal might affect defendant's sentence, the court found it unnecessary to consider whether collateral consequences alone would be sufficient to create a live controversy. *U.S. v. Lira-Barraza*, __ F.2d __ (9th Cir. July 22, 1991) No. 88-5161, (*en banc*).

10th Circuit upholds its jurisdiction on second appeal to consider issue not raised on first appeal. (800) In the first appeal, the 10th Circuit ruled that it was improper to find that defendant was a leader or organizer based on his role in conduct for which he was not convicted. After resentencing, defendant appealed the calculation of his criminal history level. The 10th Circuit upheld its jurisdiction to consider this claim, even though it was not raised in defendant's prior appeal. Since defendant was challenging the district court's application of the guidelines, the 10th Circuit had jurisdiction under 18 U.S.C. section 3742. The court rejected the government's argument that Fed. R. Crim. P. 35 should have limited the district court's reconsideration to the major participant enhancement. The court noted that it remanded the case for resentencing. It did not instruct the district court to reconsider only the major participant issue. Therefore, the court did not err in ordering another presentence report and reconsidering defendant's criminal history. *U.S. v. Pettit*, __ F.2d __ (10th Cir. July 3, 1991) No. 90-3261.

5th Circuit affirms sentence at top of guideline range. (810) Defendant, a university student writing his doctoral dissertation, pled guilty to interstate transportation of stolen goods in connection with his theft of over 400 library books. His applicable guideline range was two to eight months, and the district court sentenced him at the top of the guideline range to eight months. Defendant contended that the district court should have sentenced him at the lower end of the range, or granted a downward departure, based on aspects of his character, background and mental/emotional condition. The 5th Circuit affirmed the sentence, finding that the district court's decision to sentence at the top of the guideline range, as well as the decision not to depart downward, were both within that court's discretion. Defendant's argument concerning the weight to be given to his character, background and emotional condition were not grounds for error. *U.S. v. Matovsky*, __ F.2d __ (5th Cir. July 17, 1991) No. 91-4081.

Forfeiture Cases

1st Circuit affirms forfeiture despite failure to instruct jury that "substantial connection" must exist between residence and drug crime. (900) Defendant argued that the district court erroneously refused to instruct the jury that in order to sustain its criminal forfeiture claim, the government was required to establish a "substantial connection" between defendant's residence and his drug offenses. The 1st Circuit rejected this, finding any error to be harmless. It noted that it has yet to determine the degree of interrelatedness required to support a criminal forfeiture under 21 U.S.C. section 853(a)(2). However, the "substantial connection" test is the

burden required under the civil statute, 21 U.S.C. section 881(a)(7). Even assuming this was the burden, any error was harmless. The evidence linking defendant's conduct to his residence was (a) an express mail package containing marijuana, addressed to and received at the residence, and (b) the controlled substance and related paraphernalia were discovered in the basement of the residence. Either of these was sufficient to establish a substantial connection between the residence and the drug crimes. *U.S. v. Desmarais*, __ F.2d __ (1st Cir. July 17, 1991) No. 90- 2178.

1st Circuit affirms bifurcated trial for criminal charges and criminal forfeiture claims. (920) Over defendant's objection, substantive criminal charges against defendant were tried separately from the criminal forfeiture claims against his residence. The 1st Circuit affirmed the bifurcation order. No court has determined that a criminal defendant is entitled to a unitary trial under these circumstances. Defendant's claim that bifurcation prevented him from urging the jury to invoke its power of nullification was mistaken. Even in a unitary trial, it would have been improper to urge the jury to nullify applicable law. *U.S. v. Desmarais*, __ F.2d __ (1st Cir. July 17, 1991) No. 90-2178.

1st Circuit affirms default judgment in forfeiture case. (920) On February 28, 1990, the government filed a motion for summary judgment in a forfeiture action involving currency found in claimant's home. The motion was unopposed. On April 6, 1990, claimant's counsel withdrew. The district court granted summary judgment for the government on May 22, 1990 and judgment was entered the next day. Defendant filed a pro se motion for relief from judgment, which was denied. On appeal, defendant attacked the summary judgment on the ground that the failure to oppose it was the result of excusable neglect and misrepresentations by his attorney. The 1st Circuit rejected this contention, since a client is bound by the acts and omissions of his attorney. Claimant's incarceration did not prevent his attorney from filing a timely opposition to the government's motion for summary judgment. *U.S. v. One Lot of $25,721.00 in Currency*, __ F.2d __ (1st Cir. July 16, 1991) No. 90-1688.

1st Circuit holds transfer of funds to Asset Forfeiture Fund does not defeat jurisdiction. (920) Following the 2nd and 4th Circuits, and disagreeing with the 5th, 7th, 9th and 11th Circuits, the 1st Circuit held that in a currency forfeiture case the government subjects itself to the court's in personam jurisdiction. Therefore, transfer of the funds to the government's Asset Forfeiture Fund does not deprive the court of jurisdiction if a timely appeal has been filed. It is unnecessary for jurisdictional purposes to request a stay or to post a supersedeas bond. "There is no good reason why the government should be allowed to insulate itself from the appellate process by wrapping itself in the mantle of an admiralty fiction designed at an earlier time to meet a problem totally unrelated to present day civil forfeiture proceedings. Jurisdiction based upon the location of the res is particularly inapposite to a currency forfeiture case. The government has possession and control of the currency from the time it seizes it. The execution of the judgment merely transfers it from one government pocket to the other. Basing jurisdiction on what pocket contains the currency is nothing more than a shell game." *U.S. v. One Lot of $25,721.00 in Currency*, __ F.2d __ (1st Cir. July 16, 1991) No. 90-1688.

3rd Circuit upholds its jurisdiction over money transferred from Seized Deposit Fund to Asset Forfeiture Fund. (920) After the forfeiture order was entered, the money was transferred from the Justice Department's Seized Deposit Fund to its Asset Forfeiture Fund. The government argued that this removed the res from the court's jurisdiction. The 3rd Circuit rejected this argument, ruling that the rules concerning physical location could not be applied to an incorporeal res such as this. The res at issue was "merely an entry in a Justice Department account with the United States Treasury." It would be "a complete fiction" to deem the obligation to be located at any particular place within the United States. Moreover, the government agreed that the res was in the district when it was initially seized and deposited in the first account. If this account existed in the district, there was no reason not to conclude that the second account also existed in the district. *U.S. v. One Million Three Hundred Twenty Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents ($1,322,242.58)*, __ F.2d __ (3rd Cir. July 12, 1991) No. 90-3368.

3rd Circuit affirms dismissal of claim as sanction for failure to comply with discovery orders. (920) In a forfeiture action, the 3rd Circuit affirmed the dismissal of claimants' claims as a sanction for failing to provide discovery. The noncompliance arose from one claimant's decision to assert a 5th Amendment privilege. However, if they wished to assert a privilege, they were required to submit timely responses, rather than simply ignoring the requests. Second, the government was significantly hampered in the prosecution of its forfeiture action. Third, claimant had a history of dilatoriness, consistently violating discovery deadlines. Fourth, the refusal to comply was willful, and by failing to respond at all to the requests, in bad faith. Fifth, it seemed doubtful that alternative sanctions would be effective, since in the past, claimants merely paid a fine and then continued to ignore the discovery requests. Finally, claimants did not assert a meritorious claim, contending only that the forfeiture action violated one of the claimant's plea agreements. *U.S. v. One Million Three Hundred Twenty Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents ($1,322,242.58)*, __ F.2d __ (3rd Cir. July 12, 1991) No. 90-3368.

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

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Guideline Sentences, Generally

11th Circuit upholds consideration at sentencing of illegally seized handguns. (110)(770) The 11th Circuit affirmed the district court's consideration at sentencing of handguns which had been illegally seized in violation of the 4th Amendment. It found that the potential costs to sentencing proceedings outweighed the benefits to Fourth Amendment principles. Excluding such reliable information from sentencing would frustrate federal policy that judges consider all relevant and reliable facts in order to assure that each defendant receives an individualized sentence. In contrast, the benefit of excluding such evidence was slight: "[i]t is unrealistic to assume that the threat that a future sentence might be less severe would significantly deter . . . lawlessness." *U.S. v. Lynch*, __ F.2d __ (11th Cir. July 1, 1991) No. 89-3920.

6th Circuit rules that Guidelines are inconsistent with enabling legislation. (120)(150) The 6th Circuit ruled that the sequence of steps prescribed in guideline section 1B1.1 is inconsistent with the enabling statute. That section, through a nine-step process, directs a court to determine a defendant's offense level, criminal history and applicable guideline range and then determine whether there are any aggravating or mitigating circumstances that would justify a departure. The 6th Circuit found that 18 U.S.C. section 3553(a) mandates a different approach. A district court must first consider the facts and fix a sentence "not greater than necessary" to comply with the purposes of sentencing, including "just punishment." The statute creates "a rebuttable presumption" that the guidelines provide such just punishment. But the court is not bound by the guidelines if there is an aggravating or mitigating circumstance not adequately considered by the Commission. Thus, according to the 6th Circuit, a district court must determine at the outset whether the case presents circumstances not adequately considered by the Sentencing Commission. If it does, the court must impose an appropriate sentence having "due regard for the relationship of the sentence imposed to sentences prescribed by guidelines" for similar offenses. "The legal effect of the more flexible approach to the guidelines outlined here is to transform

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mandatory rules into the more modest name 'guidelines." When a legitimate aggravating or mitigating circumstance is presented, the guidelines become inapplicable as mandatory rules, and instead become "more general principles of sentencing to be used in light of the principles of sentencing outlined in section 3553(a)." Judge Kennedy dissented. *U.S. v. Davern*, __ F.2d __ (6th Cir. June 20, 1991) No. 90-3681.

5th Circuit determines defendants were involved in a single conspiracy that continued past effective date of guidelines. (125)(380) Several co-conspirators were involved in a drug lab that produced large quantities of methamphetamine using a new method of production. When authorities learned of the lab, the conspirators quickly disbanded it. Several months later some of the conspirators involved in the first lab began a new lab at a different location several hundred miles away. The new lab used conventional methods of production and produced only a fraction of the methamphetamine produced by the first lab. The first lab was disbanded prior to the effective date of the guidelines, while the second lab continued production until after the effective date of the guidelines. The district court found that a single conspiracy was involved, and sentenced defendants under the guidelines. The 5th Circuit affirmed, finding the district court's determination that there was one conspiracy involving both labs was not clearly erroneous. The actions of the conspirators at the second lab were reasonably foreseeable. The huge quantity of methamphetamine produced at the first lab, the number of conspirators and the size of the distribution network involved made it likely that the conspiracy would find some means of continuing its operation. *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

5th Circuit affirms refusal to permit jury to determine termination date of conspiracy. (125)(380)(750) Defendants contended that the trial court erred in refusing to submit a special interrogatory to the jury concerning the termination date of the conspiracy in order to determine whether the conspiracy continued after the effective date of the guidelines. The 5th Circuit found no error. The trial court properly did not view this issue within the purview of the jury and rendered its own factual findings supporting application of the guidelines. Moreover, because all of the defendants were charged and convicted of conspiring to manufacture and possess methamphetamine from 1982 to 1988, there was least an implicit finding from the jury that the conspiracy did continue beyond the effective date of the guidelines. *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

10th Circuit applies guidelines to conspiracy beginning before effective date. (125)(380) Relying on past circuit precedent, the 10th Circuit rejected defendant's claim that the ex post facto clause was violated by applying the guidelines to a conspiracy that began before their effective date but continued after that time. *U.S. v. Shewmaker*, __ F.2d __ (10th Cir. June 24, 1991) No. 90-3207.

9th Circuit holds amendment permitting acceptance of responsibility for career offenders is not retroactive. (130)(480)(520) At the time defendant was sentenced, a career offender under section 4B1.1 could not obtain a two-point reduction for acceptance of responsibility under section 3E1.1. After he was sentenced, effective November 1, 1989, section 4B1.1 was amended to permit career offenders to be given credit for acceptance of responsibility. On appeal, defendant argued that this amendment should apply to him. The 9th Circuit rejected the argument, ruling that the language of the amendment indicated it was not intended to have retroactive effect and noting that it was not included in the list of amendments that are to be given retroactive effect in guideline section 1B1.10(d). The court observed that applying the version of the guidelines in effect at the time of the appeal rather than at sentencing, "would create an incentive for defendants to delay appeals or take unnecessary appeals in order to preserve the possibility that a future amendment, not listed in section 1B1.10, would nevertheless apply to them." *U.S. v. Mooneyham*, __ F.2d __ (9th Cir. July 3, 1991) No. 89-50573.

2nd Circuit finds least culpable co-conspirator not entitled to minor role reduction. (140)(440) The presentence report concluded that one co-conspirator was the most culpable and that defendant was the least culpable of the co-conspirators. Nonetheless, the district court gave them both the same sentence. The 2nd Circuit rejected defendant's claim that he

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should have received an offense level reduction based upon his minor role. "The intent of the Guidelines is not to 'reward' a guilty defendant with an adjustment merely because his co-conspirators were even more culpable." A defendant's role in the offense is determined not just by comparing the acts of each participant, but also by measuring each participant's individuals acts and relative culpability against the elements of the offense of conviction. The fact that the district court mistakenly stated that defendant's role was "not minimal" did not mean that the judge failed to recognize the distinction between minor and minimal roles. *U.S. v. Lopez*, __ F.2d __ (2nd Cir. June 17, 1991) No. 90-1210.

2nd Circuit refuses to require district court to explain sentence disparity between co-defendants. (140)(720) The 2nd Circuit rejected defendant's request to vacate his sentence and remand his case so that the district judge could explain the disparity between defendant's sentence and the lesser sentences of his co-defendants. Since the guidelines were properly applied, a remand would serve no purpose. Circuit precedent foreclosed the possibility of a departure on the basis of disparity among co-defendants' sentences. Moreover, a defendant may generally not appeal a district court's refusal to depart downward. *U.S. v. Lanese*, slip copy (2nd Cir. June 21, 1991) No. 90-1525.

4th Circuit affirms size of fraud as ground for upward departure even though court refused to depart upward for other defendants. (140)(745) Defendant challenged the district court's decision to depart upward based in part upon the size of the fraud. Although Application Note 10 to section 2F1.1 permits an upward departure for losses substantially in excess of $5 million, defendant argued that the court cannot use the amount of the loss to depart upward where the court has refused to depart upward on this ground for other defendants. The 4th Circuit, reviewing the matter *de novo*, disagreed with defendant. Departing only as to defendant did not violate the goal of uniformity. Defendant's conduct was much more egregious than that of his co-defendants. Defendant founded the corporation used to commit the fraud, was the corporation's president and CEO, had the final word on the corporation's activities, and realized extravagant financial rewards from the scheme. There was no error in the district court's failure to determine the extent of the departure through analogy to the scale set forth in guideline section 2F1.1(b)(1). There were other permissible factors relied upon by the district court as grounds for the departure, and the extent of the departure was reasonable. *U.S. v. Palinkas*, __ F.2d __ (4th Cir. June 26, 1991) No. 90-5086.

5th Circuit finds no disparity in co-defendants' sentences. (140)(780) Defendants complained that their sentences were grossly disproportionate to the sentences received by co-defendants who pled guilty. Defendants were sentenced under the harsher guidelines, while they contended that those who pled guilty did so to pre-guidelines offenses, and thus not only received lesser sentences, but also benefitted from old law provisions such as of parole. The 5th Circuit found no merit to this claim, even assuming that the application of the guidelines to only those defendants who exercise their right to trial violates the Constitution. Nine of the 13 co-defendants agreed to cooperate with the government, and their sentences were "obviously the result of leniency and [were] not relevant to the present constitutional inquiry." The remaining four co-defendants received sentences comparable to defendants' sentences. *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

General Application Principles (Chapter 1)

4th Circuit affirms ongoing nature of fraud as ground for upward departure. (160)(300)(430)(745) Defendant, the CEO of a corporation, organized a sophisticated fraud against the corporation's lender. The 4th Circuit held that the ongoing nature of the fraud and the sophistication involved were proper grounds for an upward departure. It rejected defendant's contention that these factors were adequately considered by the adjustment in guideline section 3B1.1(a) for a leadership role in an "otherwise extensive" criminal enterprise and in guideline section 2F1.1(b)(2)(A) for more than minimal planning. Defendant's scheme not only involved the creation of dummy supplier and buyer corporations, but it also involved the development of a highly complex computer program that made random assignments of payments toward and increases in accounts receivable, used counterfeit checks and check stubs to create the illusion of payment of invoices, created false merchandise labels to inflate inventory, created mail drops for legitimate customers at false locations so that the customers would not see the bank confirmations of amounts owed, intercepted auditors' confirmations from the U.S. mail, fabricated false confirmations of auditing inquiries and had one member pose as president of one of the dummy corporations at a meeting with bank auditors. *U.S. v. Palinkas*, __ F.2d __ (4th Cir. June 26, 1991) No. 90-5086.

2nd Circuit finds no inconsistency between use of relevant conduct and dismissal of counts in plea bargain. (170)(270)(780) The 2nd Circuit found no error in the district court's consideration ofquantities of drugs involved in transactions that were the subject of counts dismissed as result of plea bargaining. Even if this result were to diminish the number of plea agreements, that is no reason to disregard the guidelines. This is a matter for the Sentencing Commission to consider in its periodic modification of the guidelines. Moreover, there is no conflict between the relevant conduct guideline and the policy statement on plea bargaining. The policy statement provides that a court may accept a plea agreement which contemplates dismissal of

charges only if the remaining charges adequately reflect the seriousness of defendant's behavior. However, a judge's assessment of the adequacy of the remaining counts is to be determined in light of the sentence authorized for those counts by all of the guidelines, including the relevant conduct guideline. *U.S. v. Quintero*, slip copy (2nd Cir. June 28, 1991) No. 90-1658.

2nd Circuit affirms enhancement for firearm possession during transaction that took place one month after offense of conviction. (170)(284) Defendant contended it was error to enhance his offense level under guideline section 2D1.1(b)(1) for possession of a firearm during a drug transaction which took place on June 14, since the offense of conviction occurred May 16. The 2nd Circuit affirmed the sentence, holding that the gun possessed on June 14 could result in a weapons adjustment for the May 16 drug crime if the the gun was possessed in connection with drug activity and the drug activity on June 14 was part of the same course of conduct or common scheme as the May 16 sale. Both conditions were met here. Both transactions were one of a series of meetings in which defendant either arranged to sell or actually sold crack to undercover detectives following introductions by the same informant, and the weapon was possessed as a security measure. However, the district judge did erroneously state that the gun possession had to be linked to a transaction specified in one of the dismissed counts. *U.S. v. Quintero*, slip copy (2nd Cir. June 28, 1991) No. 90-1658.

Supreme Court grants certiorari to decide whether sentencing guidelines for adults limit sentence for juvenile delinquents. (190) The Federal Juvenile Delinquency Act, 18 U.S.C. 5037(c)(1)(B) limits a juvenile's sentence to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The 8th Circuit held that this limited a juvenile's sentence to the maximum provided under the federal sentencing guidelines for similarly situated adults rather than the maximum statutory penalty. The court held that although the guidelines do not apply to individuals sentenced as juveniles, it was proper to utilized the guidelines in this way. On June 24, 1991, the Supreme Court granted certiorari to review this ruling. *U.S. v. R.L.C.*, 915 F.2d 320 (8th Cir. 1990) *cert. granted*, 111 S.Ct. __ (June 24, 1991) No. 90-1577.

Offense Conduct, Generally (Chapter 2)

9th Circuit holds that since drug guidelines includes manufacturing, there is no need for analogies. (240) Guideline section 2D1.1 has the heading "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession With Intent to Commit These Offenses)." The 9th Circuit ruled that in other words, the guidelines "include possession with intent to commit manufacturing" under unlawful manufacture. Thus there was no need for the court to invoke the principle of analogy in guideline section 2X5.1. Section 2D1.1 applied to defendant's attempt to manufacture methamphetamine from ephedrine. *U.S. v. Cook*, __ F.2d __ (9th Cir. July 8, 1991) No. 90-10358.

1st Circuit includes suitcase bonded with cocaine in total weight of cocaine. (250) Defendant was arrested carrying suitcases made of cocaine. The 2.5 kilograms of cocaine had been chemically bonded with the acrylic suitcase material. The 1st Circuit affirmed the district court's decision to include the total weight of the suitcase, less all metal parts (about 12 kilograms), instead of the weight of the cocaine. It found that the reasoning of the Supreme Court in *Chapman v. U.S.*, 59 U.S.L.W. 4530 (May 30, 1991) was applicable in all but one respect. *Chapman* held that the weight of blotter paper carrying LSD should be included in the calculation of the weight of the LSD. The difference in this case is that unlike blotter paper, the suitcase material cannot be consumed, and the cocaine must be separated from the suitcase material prior to ingestion. However, this fact alone did change the outcome, "for 'ingestion' would not seem to play a critical role in the definition of 'mixture' or 'substance.'" Moreover, the effort required to create a chemically bonded cocaine/acrylic suitcase suggested a serious drug smuggling effort of a sort that might warrant increased punishment. *U.S. v. Mehecha-Anofre*, __ F.2d __ (1st Cir. June 20, 1991) No. 90-1405.

6th Circuit refuses to include weight of plaster of Paris surrounding cocaine in weight of cocaine. (250)(270) An undercover FBI agent agreed to transfer to defendant 500 grams of cocaine, but the agent transferred only 3 ounces of cocaine in a small plastic bag placed inside a mixture of 985 grams of powdered plaster of Paris. The 6th Circuit found there was no evidence that the Sentencing Commission considered a case in which the cocaine is separately wrapped in a plastic bag inside a mixture of plaster and not adulterated or alloyed with the plaster. If the grams of cocaine were mixed with the grams of cocaine, then the result might be different. The court also found that it was not clear whether the court could consider for sentencing purposes the additional 500 grams of cocaine that defendant intended to purchase. Attempt is a conceptually different offense than simple possession, the offense with which defendant was charged. Since the Sentencing Commission did not consider these situations, the 6th Circuit, in accordance with its new approach to guideline sentencing, remanded the case to the district court for resentencing the defendant under a more flexible approach following the qualitative standards set forth in 18 U.S.C. section 3553(b). Judge Kennedy dissented. *U.S. v. Davern*, __ F.2d __ (6th Cir. June 20, 1991) No. 90-3681.

8th Circuit affirms drug estimation based upon kilogram wrappers containing trace amounts of cocaine. (250) Defendant disputed the district court's finding that he dis-

tributed three more kilograms of cocaine than the one kilogram he admitted distributing. The district court relied upon three "kilogram cocaine wrappers" found in his home and business. The wrappers contained trace amounts of cocaine residue. The 8th Circuit affirmed the district court's calculation, finding it "not mere conjecture to assume a kilogram wrapper with trace amounts of cocaine on it at one time actually contained a kilogram of cocaine." The wrappers are the kind of evidence that the guidelines permit a sentencing court to use to estimate drug quantities. *U.S. v. Eberspacher*, __ F.2d __ (8th Cir. June 25, 1991) No. 90-5237.

10th Circuit permits drug quantity estimate based on variety of methods. (250) The district court accepted the government's estimate of defendant's marijuana crop at 74,000 plants, giving him a base offense level of 34. The 10th Circuit upheld the finding. While quantification by physical seizure is desirable, it is not required. The government's methods of estimation were permissible. For part of defendant's crop, the government counted the number of plants in a row of corn, then multiplied by the total number of rows in the field; for another part, it sampled the density of plants in a given area and extrapolated to a larger area; and for another part, used an aerial surveillance photograph because all the plants in that part had already been harvested. Though it would have been "better" for the government to employ a single method of estimation, the determination was upheld given the difficulties the government encountered in estimating the crop. *U.S. v. Shewmaker*, __ F.2d __ (10th Cir. June 24, 1991) No. 90-3207.

10th Circuit affirms estimation of drugs defendant was capable of producing despite missing ingredients. (250) Because other ingredients were necessary before a final product could be produced, defendant argued that it was improper for the district court to determine for sentencing purposes that he could have produced 41.7 pounds of methamphetamine. The 10th Circuit found no merit in this contention, finding this issue controlled by *U.S. v. Havens*, 910 F.2d 703 (10th Cir. 1990). Defendant's argument that the guidelines limit a court's ability to estimate producible quantities to those instances where a "laboratory" is seized was also without merit. *U.S. v. Leopard*, __ F.2d __ (10th Cir. June 26, 1991) No. 90-7079.

8th Circuit affirms consideration of types and quantities of drugs not specified in offense of conviction. (270) Defendants argued that their sentences were unconstitutionally imposed because their indictments failed to specify that cocaine base (crack) would be included in determining the amount of drugs used to calculate their base offense level. Defendants were only charged and convicted of cocaine offenses. The 8th Circuit upheld the sentences, following circuit precedent which established that the guidelines require consideration of types and quantities of drugs not specified in the offense of conviction, if they were part of a common scheme or plan as the offense of conviction. Senior Circuit Judge Heaney dissented, finding the district court improperly enhanced defendants' sentences based upon amounts of crack that were not charged in the indictment and were not proven at trial. The government's failure to charge crack offenses allowed the government to use the sentencing proceeding, with its lower burden of proof, to dramatically enhance defendants' sentence. The fact that the sentences were less than the statutory maximum had little meaning since the statutory maximums were set at a time when parole was available. *U.S. v. Payne*, __ F.2d __ (8th Cir. June 28, 1991) No. 90-1262.

2nd Circuit affirms that defendant was capable of producing 50 kilograms of cocaine. (275) Defendant contended that it was error to determine that he was involved in a conspiracy to sell 50 or more kilograms of cocaine, since he was incapable of producing 50 kilograms. The 2nd Circuit rejected this contention. There was testimony at trial that a few weeks before the attempted transaction defendant said he possessed in excess of 100 kilograms, and made a statement to DEA agents that he was involved in a conspiracy to distribute 50 kilograms of cocaine. Moreover, the fact that the kilogram of cocaine found in his hotel room was 93% pure suggested that defendant was a well-connected dealer, capable of obtaining a large quantity of cocaine. *U.S. v. Lopez*, __ F.2d __ (2nd Cir. June 17, 1991) No. 90-1210.

5th Circuit holds distributors accountable for all drugs produced by large-scale methamphetamine conspiracy. (275) Defendants contended that it was improper to sentence them on the basis of the total amount of methamphetamine produced and distributed during the course of a large-scale drug conspiracy because they were unaware of the full extent of the operation. The 5th Circuit affirmed. Defendants were distributors who sold proportionately small, but nonetheless sizeable amounts of the methamphetamine produced at the drug lab. Notwithstanding defendants' contention that their roles were limited, both defendants had a long-term relationship with the leader of the conspiracy and wore a gold arrowhead necklace that indicated that they were part of the conspiracy's "inner circle." *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

8th Circuit affirms sentence based upon total amount of drugs in conspiracy that was foreseeable to each defendant. (275) Defendants claimed that the district court unfairly increased their sentences by considering the conduct of co-conspirators. The 8th Circuit affirmed, concluding that the district court correctly calculated defendants' base offense level on the basis of the total amount of cocaine and crack implicated in the conspiracy that was foreseeable to each defendant. Each defendant was aware of the conspiracy and of the amount of drugs being bought and sold at their direction. The district court considered each defendant individu-

ally, gauging each defendant's relative involvement and his or her knowledge of the quantities of drugs distributed through the drug ring. *U.S. v. Payne*, __ F.2d __ (8th Cir. June 28, 1991) No. 90-1262.

5th Circuit affirms firearm enhancement based upon photographs of defendant displaying weapon to co-conspirators. (284) A shotgun was seized from a co-conspirator involved in a methamphetamine laboratory. The district court found that defendant sold or gave the shotgun to the co-conspirator, and increased defendant's offense level under guideline section 2D1.1(b)(1). The 5th Circuit rejected defendant's claim that there was insufficient evidence to prove that defendant had possession of the weapon during the conspiracy. In addition to testimony by another co-conspirator that he thought the weapon belonged to defendant, several photographs seized from defendant's residence showed him proudly displaying the weapon in the presence of other co-conspirators. *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

8th Circuit affirms firearm enhancement despite acquittal for using a firearm in connection with a drug trafficking crime. (284)(770) The 8th Circuit rejected defendant's contention that his acquittal for using a firearm in connection with a drug trafficking crime under 18 U.S.C. section 924(c) precluded a two-level enhancement under guideline section 2D1.1(b)(1) for possession of a firearm during a drug trafficking crime. The government's burden on the weapons charge is to prove guilt beyond a reasonable doubt, while the guidelines enhancement applies "if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." *U.S. v. Eberspacher*, __ F.2d __ (8th Cir. June 25, 1991) No. 90-5237.

2nd Circuit determines that extortionate collection of debt is "otherwise extensive" based upon its connection to gambling activity. (430) Defendant was convicted of using extortionate means to collect a debt. The 2nd Circuit affirmed a three-level enhancement under guideline section 3B1.1(b) based upon defendant's managerial role of a criminal activity that involved five or more participants or was otherwise extensive. Recent circuit precedent established that a defendant's role in an offense can be determined on the basis of uncharged relevant conduct. Here, defendant ran an extensive gambling operation which was relevant to the offense of conviction. The gambling operation furthered defendant's extortion since it created the debt that defendant unlawfully sought to collect. *U.S. v. Lanese*, slip copy (2nd Cir. June 21, 1991) No. 90-1525.

5th Circuit finds self-serving statement insufficient to show defendant withdrew from conspiracy. (380) Defendant contended that he withdrew from a drug conspiracy prior to the guidelines' effective date, and therefore it was improper to sentence him under the guidelines. In a taped conversation in late 1986 or early 1987, defendant told a co-conspirator "I am not involved in that anymore, my partner has fled, he has left the state." The 5th Circuit found that this "self-serving statement" alone was insufficient to demonstrate that defendant had withdrawn from the conspiracy. *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

Adjustments (Chapter 3)

10th Circuit affirms leadership role of defendant who recruited juveniles to commit crime. (430) The 10th Circuit affirmed the district court's decision to enhance defendant's offense level based upon his leadership role in an armed robbery. The district court found that defendant was "calling the shots and making the decisions and telling them how to go about it." The court also found that defendant had "recruited a bunch of juveniles, young juveniles" and was "merely using these minors as his minions and had influenced them to assist in carrying out the robbery." *U.S. v. Morgan*, __ F.2d __ (10th Cir. June 28, 1991) No. 90-5031.

2nd Circuit rejects minimal role for defendant who travelled from Miami to New York to assist with drug transaction. (440) The 2nd Circuit rejected defendant's claim that because his role in the conspiracy could not be discerned from the record, he was entitled to a reduction based upon his minimal role. First, a defendant bears the burden of proving his entitlement to a reduction based upon his role in the offense. Second, there was evidence that defendant knew of the plan to sell 50 kilograms of cocaine, travelled from Miami to New York to help with the transaction, and he expected a large payment for his services. This participation was more than the minimal role contemplated by the guidelines. *U.S. v. Lopez*, __ F.2d __ (2nd Cir. June 17, 1991) No. 90-1210.

4th Circuit rejects minor role reduction for less culpable defendant who materially assisted fraud. (440) The district court denied a minor role reduction to a defendant involved in a scheme to defraud a lender by creating false accounts receivable. The 4th Circuit affirmed, even though defendant appeared to have been less culpable than his co-defendants. "The critical inquiry is . . . not just whether the defendant has done fewer "bad acts" than his co-defendants, but whether the defendant's conduct is material or essential to committing the offense." Defendant's actions in furtherance of the conspiracy were "substantial and important." Defendant accepted and returned counterfeit invoices with out-of-state postmarks travelled to various locations in the U.S. to set up mail boxes for fictitious customers, hired attorneys to set up four sham corporations, and set up bank accounts for those corporations. Defendant also created mail drops for legitimate corporate customers at false locations so that the customers would not receive and see the bank confirmations containing exaggerated sums said to be owed to the debtor

corporation. Defendant once intercepted confirmations mailed by auditors by retrieving them from the United States mail. *U.S. v. Palinkas*, __ F.2d __ (4th Cir. June 26, 1991) No. 90-5086.

5th Circuit rejects minor role of defendants who wore necklaces indicating membership in "inner circle" of conspiracy. (440) Defendants contended they were only minor or minimal participants in a conspiracy to distribute methamphetamine. One defendant argued that the only evidence implicating him in the conspiracy was a co-conspirator's testimony that he and defendant were partners distributing between 12 and 20 pounds of methamphetamine between 1983 until 1986. In contrast, the conspiracy produced between 700 to 1200 pounds of methamphetamine. Moreover, defendant was only charged in one count of the 39-count indictment. The other defendant contended he was a musician with no money and little possessions who played a peripheral role in the conspiracy. The 5th Circuit upheld the district court's refusal to accord them minor or minimal status. The evidence showed that the first defendant trafficked in large quantities of drugs with his partner for seven to nine years. Moreover, defendant wore a gold arrowhead necklace signifying his membership in the inner circle of the conspiracy. The other defendant sold drugs for the conspiracy's leader as far back as 1982 and during this time distributed pound quantities of the drug. A search of his residence uncovered drug ledgers reflecting thousands of dollars in narcotics sales. Finally, this defendant also wore the arrowhead necklace. *U.S. v. Devine*, __ F.2d __ (5th Cir. June 20, 1991) No. 90-8156.

7th Circuit denies further role reduction despite judge's comment that defendant's role was "minimal." (440) Defendant argued that the sentencing judge should have treated defendant as a minimal participant rather than a minor participant. The judge called defendant's role "minimal" when sentencing another defendant. The 7th Circuit rejected defendant's argument that this statement was dispositive. "Extemporaneous speech by a judge who may not have been paying attention to nuance does not preclude a more considered decision later." *U.S. v. Dumont*, __ F.2d __ (7th Cir. June 25, 1991) No. 90-2149.

9th Circuit denies minor participant adjustment where defendant admitted being well paid for his services to participate in narcotics delivery. (440) The 9th Circuit stated that a "simple statement by the district court that the defendant was not a minor participant is typically sufficient to settle this question." Here the defendant admitted to being well paid for his services and to flying across the country simply to participate in this particular narcotics delivery. The district court was entitled to disbelieve his self-serving description of his own involvement. *U.S. v. Ocampo*, __ F.2d __ (9th Cir. July 1, 1991) No. 89-50332.

2nd Circuit rules prior version of guidelines authorized obstruction enhancement for flight from judicial proceedings. (460) The 2nd Circuit held that the 1987 version of guideline section 3C1.1 authorized an enhancement for obstruction of justice when a defendant flees, or attempts to flee, a judicial proceeding. The district court's determination that defendant attempted to flee prior to his trial was not clearly erroneous. Less than a month before his scheduled trial date, a moving van filled with defendant's possessions was parked outside his home. In executing a search warrant at defendant's home, the FBI found an Israeli visa application, an El Al timetable with notations regarding a flight leaving the next day, and a computer printout reserving seats for "Mr. and Mrs. Kats" on a flight the next day. Defendant's false statements to the Probation Department concerning his attempted flight was an alternative basis for the enhancement. *U.S. v. Keats*, slip copy (2nd Cir. June 21, 1991) No. 90-1643.

10th Circuit upholds obstruction enhancement based upon false testimony. (460) The 10th Circuit upheld the district court's decision to enhance defendant's sentence based upon his false testimony. The district court had found that defendant engaged in "material conduct" by giving a "fabricated version of what took place and his lack of involvement." Defendant "maintained all the way along that he wasn't involved in this bank robbery," although the court found that he clearly was involved. *U.S. v. Morgan*, __ F.2d __ (10th Cir. June 28, 1991) No. 90-5031.

1st Circuit denies acceptance of responsibility reduction based on flight despite defendant's cooperation. (485) Defendant contended that he was entitled to a reduction for acceptance of responsibility because upon his arrest he immediately admitted his full involvement, turned over cocaine to authorities and risked his life to help the government apprehend more important members of the drug ring. However, he did not appear in court for sentencing, and was apprehended by authorities several months later, at which time he gave a false name. The 1st Circuit affirmed the denial of the reduction, finding that the determination of whether this was an "extraordinary case" justifying both an acceptance of responsibility reduction and an obstruction of justice enhancement was for the district court. *U.S. v. Yeo*, __ F.2d __ (1st Cir. June 21, 1991) No. 91-1074.

2nd Circuit denies acceptance of responsibility reduction to defendant who denied involvement in larger transaction. (485)(755) Prior to sentencing, defendant acknowledged that he travelled to New York to assist in a transaction involving one kilogram of cocaine. However, he denied involvement in the 50-kilogram transaction. He argued that since proof of his involvement in the larger transaction was "not overwhelming," his refusal to acknowledge his participation in the larger transaction should not be used to deny him a reduction for acceptance of responsibility. The 2nd Circuit found the argument frivolous, since the standard of proof at sen-

tencing is a preponderance of the evidence, not "overwhelming." *U.S. v. Lopez*, __ F.2d __ (2nd Cir. June 17, 1991) No. 90-1210.

8th Circuit affirms denial of acceptance of responsibility reduction to defendant who failed to name source. (485) Defendant contended that the district court erred in denying him a reduction for acceptance of responsibility because he refused to name his source. He claimed that he could not reveal his source out of fear for his family, but that other factors demonstrated his acceptance. The 8th Circuit affirmed the district court's action. Defendant not only failed to name his source, he "bordered on perjuring himself" at the plea hearing. Moreover, while awaiting sentencing, defendant tested positive for cocaine use in violation of his bond. *U.S. v. Eberspacher*, __ F.2d __ (8th Cir. June 25, 1991) No. 90-5237.

10th Circuit rejects reduction to defendant who waited until sentencing to accept responsibility. (485) The 10th Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Defendant did not accept responsibility for the crime charged before or during trial or in his presentence report. His first acknowledgement of responsibility came at the sentencing hearing, which the district court found to be untimely. *U.S. v. Dennison*, __ F.2d __ (10th Cir. July 1, 1991) No. 89-2203.

11th Circuit finds acceptance of responsibility was not denied solely because of defendant's decision to stand trial. (485) The 11th Circuit rejected defendants' contention that the district court improperly based its refusal to grant them a reduction for acceptance of responsibility upon their decision to stand trial. Defendants ceased their criminal activity only after being arrested. From that time onward, they maintained that they were innocent; at trial, they challenged the credibility of the government witnesses and urged the jury to find them not guilty. After being found guilty they subsequently admitted to a probation officer that they "sold drugs" but expressed no remorse for their actions. Although a court may not refuse to grant a reduction under section 3E1.1 solely because a defendant proceeds to trial, such a choice may be considered by the court as one factor among many in determining whether the defendant has actually accepted responsibility. *U.S. v. Jones*, __ F.2d __ (11th Cir. June 28, 1991) No. 90-8628.

Criminal History (§ 4A)

1st Circuit determines that similar crimes involving different victims at different places were not related. (500) Defendant contended that his five prior convictions were part of a common scheme or plan and therefore the district court should have counted them as one prior sentence, rather than as two. The 1st Circuit found no error. The district court could properly find none of the crimes were not part of a common scheme or plan. Although each involved theft of rented property and took place within a six-week period, each crime involved a different victim and took place at a different location on a different date. The only reason that the court created two separate groups rather than counting each offense separately was that they were consolidated for sentencing. *U.S. v. Yeo*, __ F.2d __ (1st Cir. June 21, 1991) No. 91-1074.

10th Circuit concludes failure to appear is not "related" to underlying offense. (500) In computing a defendant's criminal history score, a court is required by guideline section 4A1.2(a)(2) to treat multiple sentences as a single sentence if the cases are "related." Defendant argued that his sentence for failing to appear to serve his sentence for a drug offense should have been treated as a sentence "related" to the underlying drug sentence because both offenses were part of a common scheme or plan. The 10th Circuit disagreed, concluding that the offenses lacked "factual commonality," assessed by examining "temporal and geographical proximity as well as common victims and a common criminal investigation." The "fact-intensive inquiry" was not clearly erroneous. *U.S. v. Shewmaker*, __ F.2d __ (10th Cir. June 24, 1991) No. 90-3207.

4th Circuit holds a court may depart downward where career offender status overstates seriousness of criminal history. (520)(720) Following the 8th and 9th Circuits, the 4th Circuit held that a district court may, in an atypical case, downwardly depart from the guidelines where career offender status overstates the seriousness of a defendant's past conduct. Such departures are reserved for "truly unusual" cases, and in deciding to depart a district court should follow the procedures outlined in the court's prior cases. Because it was unclear from the record whether the district court thought it had the authority to depart downward, the case was remanded for resentencing. District Judge Ellis dissented, concluding that sentencing judges have no authority to depart downward from the career offender guidelines on the ground that they overstate the seriousness of the defendant's past conduct. *U.S. v. Adkins*, __ F.2d __ (4th Cir. June 20, 1991) No. 90-5047.

Determining the Sentence (Chapter 5)

2nd Circuit reverses failure to apply guidelines to term of supervised release. (580) Defendant was sentenced at the top of his applicable guideline range to a term of 12 months imprisonment, which the district court termed "a gift." The court then noted that the guidelines did not restrict him as to supervised release, and accordingly sentenced defendant to 20 years supervised release. The 2nd Circuit reversed so that the district court could determine the appropriate term of

supervised release within the three to five year term mandated by guideline section 5D1.2(a). The court also rejected defendant's contention that an upward departure from the guidelines as to supervised release is not permitted if the district court does not also depart as to term of imprisonment. There may be circumstances where the specified term of imprisonment is adequate but the specified term of supervised release is not. *U.S. v. Marquez*, slip copy (2nd Cir. June 24, 1991) No. 90-1480.

5th Circuit, en banc, holds failure to discuss supervised release during plea colloquy did not mandate reversal. (580)(750) In *U.S. v. Bachynsky*, 924 F.2d 561 (5th Cir. 1991), a panel of the 5th Circuit vacated defendant's conviction because the district court failed entirely to inform him of the term of supervised release. On rehearing *en banc*, the 5th Circuit held that when a district court complies with Rule 11(c)(1) to the extent of informing the defendant of the maximum penalty under the statute, but fails entirely to mention or explain the effect of supervised release, and the defendant's subsequent sentence includes a term of supervised release, the error does not automatically mandate reversing the conviction and vacating the sentence. In defendant's case, the error was harmless. Defendant was sophisticated and highly educated and represented by very competent counsel. Defendant was in close contact with his counsel during plea negotiations and acknowledged that he had read the plea agreement and reviewed it with his attorney. *U.S. v. Bachynsky*, __ F.2d __ (5th Cir. June 25, 1991) No. 89-2742 (*en banc*), *reversing* 924 F.2d 561 (5th Cir. 1991).

2nd Circuit rules defendant has burden of establishing inability to pay a fine. (630) Defendant challenged a $100,000 fine on the grounds that the district court failed to explain its reasons for imposing the fine and failed to consider defendant's ability to pay such a fine. The 2nd Circuit found that since the fine was within the guideline range, the district court had no obligation to explain its reasons for the amount of the fine. The provision requiring an explanation of reasons for imposing a sentence at a particular point within a guideline range, if that range exceeded 24 months, 18 U.S.C. section 3553(c)(1), was not applicable here. The court also held that the 1990 version of guideline section 5E1.2 places upon a defendant the burden of proving an inability to pay a fine. Since the case was to be remanded on other grounds, the district court could, in its discretion, allow defendant to present additional evidence regarding his ability to pay the $100,000 fine. *U.S. v. Marquez*, slip copy (2nd Cir. June 24, 1991) No. 90-1480.

3rd Circuit rules it has no jurisdiction to consider denial of request for substitute detention. (650)(810) Defendant received a four-month term of imprisonment, at the bottom of his guideline range. He contended that the district court abused its discretion by denying his request to substitute confinement of home, community or halfway house detention. The 3rd Circuit found that it did not have jurisdiction to review a sentencing court's discretionary refusal to impose a substitute detention under guidelines section 5C1.1(c)(2). The rationale of cases holding that a court has no jurisdiction to review a failure to depart downward applied here as well. *U.S. v. Perakis*, __ F.2d __ (3rd Cir. June 25, 1991) No. 90-3583.

10th Circuit upholds guideline requiring consecutive sentence for defendant who committed crime on escape status. (660) Guideline section 5G1.3 requires a district court to impose a consecutive sentence for a crime committed while a defendant is on escape status from a prior sentence. Though this provision was held invalid in *U.S. v. Wills*, 881 F.2d 823 (9th Cir. 1989), as inconsistent with 18 U.S.C. section 3584(a), the 10th Circuit joined four other circuits in reconciling the provisions. Section 3584(a) provides, "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively." The court found the guideline consistent with this statutory language because a sentencing court remains free to consider departing to impose a concurrent sentence. Because the district court did not purport to depart from the guidelines sentence on one count, the sentence was improper. However, the district court acted within its discretion in deciding that the sentence should run concurrently with a prior sentence for failure to appear, because that sentence was imposed after defendant committed the instant offense. *U.S. v Shewmaker*, __ F.2d __ (10th Cir. June 24, 1991) No. 90-3207.

Departures Generally (§ 5K)

9th Circuit reverses sentence where district court did not realize it had discretion to depart. (700)(810) The general rule is that district court's discretionary decision not to depart downward is not subject to review on appeal. But the 9th Circuit ruled that "it is crucial that the district court exercise its discretion." If the court believes it has no discretion, "there is an error of law which we are able to review." In this case it was evident from the statements of the court that it believed it had no discretion and so exercised none. The court noted that the guidelines "are not a straight jacket for district judges. They do give discretion to depart." This case was remanded for resentencing. *U.S. v. Cook*, __ F.2d __ 91 D.A.R. 8158 (9th Cir. July 8, 1991) No. 90-10358.

1st Circuit upholds jurisdiction to consider ability to make substantial assistance departure without government motion. (710)(800) The 1st Circuit ruled that it had appellate jurisdiction to consider whether a district court has authority to depart downward for substantial assistance under guideline section 5K1.1 in the absence of a government motion. Although there is no unanimity among the circuit courts as to whether such jurisdiction is conferred by 18 U.S.C. section

3742(a)(1) (granting appellate jurisdiction over sentences imposed in violation of law) or 18 U.S.C. section 3742(a)(2) (granting appellate jurisdiction over sentences resulting from incorrect applications of the guidelines), the court found it sufficient merely to find it had jurisdiction without particularizing the source. *U.S. v. Romolo*, __ F.2d __ (1st Cir. June 28, 1991) No. 90-2187.

1st Circuit reaffirms that court may not depart downward for substantial assistance in the absence of government motion. (710) The 1st Circuit rejected defendant's contention that the district court had the ability in the absence of a government motion to depart downward under guideline section 5K1.1 based upon his substantial assistance to authorities. The court termed "dictum" the language in *U.S. v. La Guardia*, 902 F.2d 1010 (1st Cir. 1990) which left open the possibility that in "egregious cases" the government's arbitrary and capricious failure to move for such a departure might be an aggravating circumstance justifying a downward departure under guideline section 5K2.0. Other courts have determined that section 5K2.0 cannot provide authority for a downward departure based on a defendant's substantial assistance because that circumstance was adequately considered by the commission in guideline section 5K1.1. Nonetheless, it was "theoretically possible, albeit unlikely" that the circumstances surrounding a prosecutor's failure to file such a motion might justify a departure. Defendant's situation was nowhere close to the level of egregiousness necessary to seriously consider a departure. The government explained its reasons for the denial which the district court found to be "facially reasonable." The district court was not obligated to order an evidentiary hearing on the matter. *U.S. v. Romolo*, __ F.2d __ (1st Cir. June 28, 1991) No. 90-2187.

D.C. Circuit rules exposure to domestic violence is not a component of socio-economic class for which departure is prohibited. (720) Defendant had what the district court described as a "tragic" background: he was moved around from relative to relative, and his stepfather threatened him and eventually murdered his mother. The district court refused to depart based on defendant's background because it found that guideline section 5H1.10 prohibited departures based upon a defendant's "socio-economic class." The D.C. Circuit held that exposure to domestic violence and its "attendant dislocations" was not part of a defendant's socio-economic class. Socioeconomic class refers to an individual's status in society as determined by objective criteria such as education, income and employment. Domestic violence does not "follow class lines." The court did not reach the question of whether exposure to domestic violence might be considered a basis for departure other than as it relates to a defendant's mental and emotional condition. The case was remanded for the district court to reconsider whether a downward departure might otherwise be justified. *U.S. v. Lopez*, __ F.2d __ (D.C. Cir. June 28, 1991) No. 90-3020.

D.C. Circuit upholds failure to depart downward based upon defendant's young age. (722) The D.C. Circuit affirmed the district court's refusal to depart downward based upon defendant's age. The district court understood the scope of its authority on the question of age, but concluded that defendant did not present sufficiently unusual circumstances to justify the departure. The fact that the same judge granted a departure in a similar case did not give defendant a basis to attack the court's exercise of discretion in his case. The appellate court also rejected defendant's claim that guideline section 5H1.1, which states that a defendant's age is not ordinarily relevant, was invalid because the Sentencing Commission failed to give reasons for adopting it. *U.S. v. Lopez*, __ F.2d __ (D.C. Cir. June 28, 1991) No. 90-3020.

2nd Circuit affirms upward criminal history departure based upon pending state charges for crimes committed after instant offense. (733) The 2nd Circuit affirmed the district court's decision to depart upward by one criminal history category based upon pending state charges. The fact that the state crimes for which defendant was awaiting sentencing were committed 20 months after the instant offense did not make this an improper ground for departure. The "critical question under guideline section 4A1.3 is whether the criminal history category adequately reflects the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." *U.S. v. Keats*, slip copy (2nd Cir. June 21, 1991) No. 90-1643.

11th Circuit remands because district court incorrectly increased defendant's offense level rather than criminal history category. (730) Defendant robbed a bank and a credit union, but pursuant to a plea agreement, pled guilty only to the robbery of the credit union. Defendant's resulting offense level was 17, which when combined with his criminal history category III, resulted in a guideline range of 30 to 37 months. The district court determined that defendant's criminal history did not adequately reflect the seriousness of his past criminal conduct, as evidenced by the bank robbery for which the government did not prosecute defendant. However, in departing, the court sentenced defendant as if he had been convicted of a level 21 offense, but did not adjust his criminal history category. The 11th Circuit remanded for resentencing, finding that in departing upward on criminal history grounds, the district court should have looked to the next higher criminal history category and determined whether that category was more appropriate, rather than increasing defendant's offense level. *U.S. v. Johnson*, __ F.2d __ (11th Cir. July 1, 1991) No. 89-4048.

2nd Circuit rules judge adequately explained reasons for sentence. (775) The 2nd Circuit found that the district court adequately explained the reasons for the sentence he imposed upon defendant. Defendant received a sentence that was slightly above the middle of his guideline range. The government had requested an adjustment for obstruction of

justice because defendant had submitted misleading information to the probation department. The district judge rejected this request, but explicitly stated that in selecting a sentence within defendant's guideline range, he would take into account defendant's attempt to mislead the court. The judge also stated that defendant worked closely with a co-conspirator, and that defendant was close to the source of supply of the cocaine. These statements satisfied the requirements of 18 U.S.C. section 3553(c)(1). *U.S. v. Lopez*, __ F.2d __ (2nd Cir. June 17, 1991) No. 90-1210.

2nd Circuit holds judge properly stated reasons for 216-month sentence. (775) The 2nd Circuit rejected defendant's claim that the district judge failed to offer sufficient reasons for sentencing him as required by 18 U.S.C. section 3553(c). The judge's statement about generalized deterrence was made in the context of rejecting defendant's request for the statutory minimum sentence, not as the sole rationale for the sentence. The record revealed that the judge explicitly stated the specific reasons for determining defendant's offense level, that he explained the factors that led him to impose a 216-month sentence, rejected the probation department's recommendation that defendant be given a two-point adjustment for his managerial role and obstruction of justice, and carefully considered defendant's psychological history. Although to avoid any possible dispute the judge might have emphasized that the reasons he gave reflected both his consideration of the imposition of the particular sentence as required by section 3553(c), and the relationship of that particular sentence to the applicable guideline range, as required by section 3553(c)(1), his statements here were sufficient. *U.S. v. Lopez*, __ F.2d __ (2nd Cir. June 17, 1991) No. 90-1210.

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

10th Circuit reviews imposition of concurrent sentence de novo. (820) Because the decision to impose a concurrent sentence presents a pure question of law, the 10th Circuit concluded that the decision was subject to *de novo* review on appeal. *U.S. v Shewmaker*, __ F.2d __ (10th Cir. June 24, 1991) No. 90-3207.

Forfeiture Cases

1st Circuit holds claimant who quitclaimed property one month prior to seizure has no standing to contest forfeiture. (900) The 1st Circuit found that claimant had no standing to contest the forfeiture of property which claimant had quitclaimed to his brother one month prior to the government's seizure of the property. Claimant contended that the use of the property to grow marijuana, which gave rise to the forfeiture, invalidated the pre-forfeiture transfer of the property. However, if that was so, then the government, and not claimant, was entitled to the property. *U.S. v. One Parcel of Real Property with Buildings, Appurtenances and Improvements Known as 190 Colebrook Road*, __ F.2d __ (1st Cir. June 21, 1991) No. 91-1196.

CERTIORARI GRANTED

(190) *U.S. v. R.L.C.*, 915 F.2d 320 (8th Cir. 1990), *cert. granted*, 111 S.Ct. __ (June 24, 1991) No. 90-1577.

AMENDED OPINIONS

(110)(520)(680) *U.S. v. O'Neal*, 910 F.2d 663 (9th Cir. 1990) *amended*, __ F.2d __ (9th Cir. July 2, 1991) No. 89-10051.

EXHIBIT J

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

UNITED STATES OF AMERICA : CIVIL ACTION

v.

JOHN LORENZO : NO. 89-6933

ENTERED: 1/13/90

CLERK OF COURT

MEMORANDUM OF DECISION

McGLYNN, J. JANUARY 11, 1991

This suit by the government asserts claims under the False Claims Act, 31 U.S.C. §3729, as well as related common law causes of action including fraud, breach of contract, unjust enrichment and payment under mistake of fact. The threshold issue is whether the defendant dentist, John Lorenzo, and his associated companies were entitled to bill Medicare for oral cancer examinations of nursing home residents. Subsidiary issues include the personal liability of Diana Lorenzo and whether the corporate entities operated as the alter ego of John and Diana Lorenzo.

Jurisdiction is premised on 28 U.S.C. §1345.

After an examination of the evidence presented at the bench trial and after consideration of the briefs and arguments of counsel, the court makes the following

FINDINGS OF FACT

1. Plaintiff is the United States of America acting through the Department of Health and Human Services (HHS) which administers

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the Health Insurance for the Aged Act established by Subchapter XVIII of the Social Security Act, 42 U.S.C. §1395, et seq. (Medicare)

2. In Pennsylvania the Medicare program is administered through a private contractor, Pennsylvania Blue Shield (PBS). In New Jersey the program is administered through the Prudential Insurance Company. These private contractors process the Medicare claims submitted by health care providers.

3. The defendant, John Lorenzo, is a Doctor of Dental Surgery licensed to practice in Pennsylvania and New Jersey. He practiced dentistry under the style of John Lorenzo, D.D.S., P.C., a Pennsylvania corporation with its principal place of business at 207 N. Broad Street, Suite 601, Philadelphia, Pennsylvania.

4. Defendant, U.S. Mobile Dental Care Systems, Inc., is a Pennsylvania corporation formed for the purpose of supplying dental services to nursing home residents and residents of other facilities such as prisons, who do not have access to dental care. U.S. Mobile had its principal place of business at 207 N. Broad Street, Suite 601, Philadelphia, Pennsylvania.

5. Defendant, Diana Lorenzo, is the wife of John A. Lorenzo and held the office of president of U.S. Mobile until 1988.

6. Defendants, Prime Medica Associates and J.D. Investments are partnerships consisting of John and Diana Lorenzo with a place of business at 207 N. Broad Street, Suite 601, Philadelphia, Pennsylvania.

7. U.S. Mobile entered into contracts with the operators of nursing homes to supply dental services.

8. U.S. Mobile employed a number of dentists, most of whom were recent dental school graduates and were paid on a commission or salary basis for full-time or part-time work.

9. During the years 1983 through 1988, John Lorenzo and dentists employed by U.S. Mobile performed routine dental examinations at nursing homes in Pennsylvania and New Jersey. These examinations included an oral cancer screening. An examination of the oral cavity head and neck for cancer is an integral part of a standard dental examination.

10. As a result of information learned at a seminar in late 1985, John Lorenzo decided that Medicare would be billed for certain dental procedures, including an oral cancer examination. A health care professional employed by him advised him that a cancer examination of the oral cavity head and neck could be billed as a "limited consultation" Code 90600.

11. Accordingly, the dentists at U.S. Mobile were instructed to do a dental examination and an oral cancer examination and to document the results on the record.

12. In 1986 U.S. Mobile, on behalf of its dentists, began to submit bills for oral cancer examinations to Pennsylvania Blue Shield and Prudential Insurance Co. for processing.

13. In almost every case, however, the "examinations" were nothing more than the oral cancer screening that previously had been done as part of a routine dental examination. None of these

examinations had been conducted at the request of an attending physician or because of a specifically identified medical concern.

14. Prudential Insurance Company rejected the claims submitted on behalf of New Jersey residents, but PBS authorized payment on behalf of Pennsylvania residents.

15. Sometime prior to February 1987 several of the dentists working for U.S. Mobile as well as the Medical Director of a group of nursing homes challenged U.S. Mobile's right to bill Medicare for the oral cancer procedures.

16. As a result, U.S. Mobile sought guidance from a representative of PBS who advised that the payment forms were being properly prepared. In giving this advice, the representative was not told that the "limited consultations" had not been requested by attending physicians nor was the representative informed that the examinations were routine screenings unrelated to particular medical problems.

17. U.S. Mobile submitted 3683 claims to Medicare through Pennsylvania Blue Shield and received $130,719.10 in return.

18. U.S. Mobile billed Medicare $50.00 per examination while billing private patients $25.00 per examination and Medicaid $6.00 to $8.00 per examination.

19. Defendants also billed for 190 Pennsylvania and New Jersey Medicaid patients for routine dental examinations at the rates of $6.00 to $8.00 while at the same time they were billing PBS and Prudential for the oral cancer screenings on the basis of a

"limited consultation."

DISCUSSION

It is the government's position that Medicare cannot be billed for oral cancer examinations by a dentist unless they are specifically requested by the patient's treating physician to evaluate or relieve existing symptoms. The government does not contend that the procedures were not performed, but that the examinations were not "consultations."

Both the statute and the regulations issued thereunder would seem to provide ample support for the government's position.

Section 1862 of the Health Insurance for the Aged Act (The Act), 42 U.S.C. §1395y, provides in pertinent part:

> (a) Notwithstanding any other provision of this title, no payment may be made under part A or part B for any expenses incurred for items or services --
>
> . . .
>
> (7) where such expenses are for routine physical checkups,
>
> . . .
>
> (12) where such expenses are for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth, except that payment may be made under part A in the case of inpatient hospital services in connection with the provision of such dental services if the individual, because of his underlying medical condition and clinical status or because of the severity of the dental procedure, requires hospitalization in connection with the provision of such services;

These proscriptions are echoed in the Medicare regulations. Routine physical checkups, other than for the diagnosis of a specific illness, are not covered, 42 C.F.R. §405.310(a)(1) and dental services in connection with the treatment of teeth or structures directly supporting the teeth are not covered, 42 C.F.R. §405.

The defendants, on the other hand, argue that they obtained blanket approval to conduct the cancer screening programs by the explicit terms of the contracts between U.S. Mobile and the nursing home operators or by the oral approval of the medical directors of the several homes. Defendants rely on PBS's Procedure Terminology and Manual (PT&M) which arguably allows nursing homes to make referrals for consultation ("referring physician or other source") and the New Jersey Department of Health, Division of Health Facilities Evaluation, Licensing Standards for Long Term Care Facilities that define a dental examination and an oral cancer examination as separate procedures.

This argument begs the question. The issue is not whether U.S. Mobile was authorized to conduct the examination but whether Medicare can be billed for such an examination. Authorizing a dentist to conduct an examination is not the same as requesting a consultation with respect to a specific medical problem. New Jersey's Nursing Home standards do not aid defendants' cause, but simply identify two components of the same examination. Most of the dentists who testified in this case

were emphatic in stating that an oral cancer examination is an integral part of a standard dental examination. Defendants have conceded as much, at least, in an academic setting. (See proposed Findings of Fact and Conclusions of Law of Lorenzo and U.S. Mobile, No. 26).

The defendants performed routine dental examinations, classified a component of those examinations as a "limited consultation" and billed Medicare accordingly. Whether such procedures are characterized as a "screening" or an "examination", it is clear that under the Act and the regulations defendants are not entitled to be paid by Medicare for those services.

With respect to the Pennsylvania and New Jersey Medicaid claims under the Pennsylvania Department of Public Welfare regulations and guidelines for the provision of dental services the initial dental exam is to include a cancer exam of the oral cavity head and neck. Commonwealth of Pennsylvania, Department of Public Welfare, Bureau of Utilization Review - Dental Program Protocol for Dental Consultants Recipient Field Evaluation, Recipient Record Review. The Department of Public Welfare Regulation 55 PA Code Section 1101.63 provides:

> Providers shall consider the Department's fees or rates to be payment in full. A provider who seeks or accepts supplementary payment of any kind from the Department, the recipient or any other person for a compensable service or item shall be required to return the supplementary payment.

Defendants billed Medicaid covered patients in Pennsylvania for the initial exam which included the cancer

examination. Medicare was then billed for those same patients for the performance of the same cancer examination billed under Medicaid.

Under New Jersey Medicaid Codes for Dental Services, an initial oral examination requires a thorough observation of all conditions present in the oral cavity and contiguous structures.

Defendants billed New Jersey Medicaid patients for this initial exam which included the oral cancer exam. Defendants then billed plaintiff for the same oral cancer exam billed to New Jersey.

It is a violation of Title 10, Chapter 49 - 1.17(d) under New Jersey Medical Assistance for a provider to "submit false information for the purpose of obtaining greater compensation than to which the person is legally entitled."

The False Claim Act (FCA), 31 U.S.C. §3729 as amended on October 27, 1986, provides for treble damages and civil penalties against anyone who knowingly presents or causes to be presented to an officer or employee of the United States a false or fraudulent claim for payment or approval or who knowingly makes uses or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government. 31 U.S.C. §3729(a)(1) and (2).

I have no difficulty in concluding that the claims submitted by U.S. Mobile constituted false claims. The health insurance claim forms were prepared in such a way as to disguise

a routine dental check-up as a limited consultation consisting of "a cancer examination of the oral cavity head and neck."

Under the FCA, "the terms 'knowing and knowingly' mean that a person, with respect to information - (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required". 31 U.S.C. §3729(b).

The evidence is clear that John Lorenzo knew that, except in very limited circumstances, dental services are not covered by Medicare and he was also aware that routine checkups are not covered. Indeed, Dr. Lorenzo advised his patients to write their Congressmen to urge Medicare coverage for dental services and further, up until 1986, Lorenzo and U.S. Mobile had not billed Medicare for the oral cancer examinations. In addition, Prudential Insurance Company, the Medicare claims agent for New Jersey, rejected such claims. Nevertheless, Lorenzo and U.S. Mobile continued to submit claims, including claims for New Jersey residents, to PBS, in spite of direct instructions to the contrary from the Medical Director of a group of Nursing Homes who threatened to cancel U.S. Mobile's contract. Dentists employed by U.S. Mobile recognized that they were performing screenings, not consultations, and that it was a misrepresentation to bill their services as a consultation. They expressed their concerns to Dr. Lorenzo, who told them not to

worry about the billings. Nevertheless, the billings to PBS continued. The record is replete with evidence that attending physicians never knew that "consultations" had taken place. There were a number of instances where Medicare was billed for a cancer examination of the oral cavity neck and head when the patient was unavailable for an examination for physical or other reasons. Defendants' reliance on the advice given by U.S. Mobile's health care consultant and the PBS representative is not persuasive. It is apparent that such advice, if given at all, was based on the assumption that the procedures were legitimate consultations and not routine checkups.

I have no difficulty in concluding that John Lorenzo and U.S. Mobile, vicariously, knew that the information contained on the claim forms was misleading, and deliberately so, in order to receive Medicare payments they were not otherwise entitled to receive. At the very least, they acted in reckless disregard of the truth or the falsity of the information they inserted on the form.

The next issue concerns the personal liability of Diana Lorenzo. She was the nominal president of U.S. Mobile. She signed contracts and checks, drove the company automobile, and received compensation by having personal bills paid by the company. But after considering the evidence in its totality, I am not persuaded that she was conscious of, or aware of the falsity of the claims being submitted to Medicare. All decisions were made by John Lorenzo, and Diana Lorenzo was merely a

figurehead and not a knowing participant in her husband's ongoing efforts to manipulate the Medicare system.

Having concluded that John Lorenzo and U.S. Mobile are liable under the FCA, I turn now to the government's efforts to pierce the corporate veil on the theory that all the other business enterprises were merely the alter ego of John A. Lorenzo.

The monies obtained by Defendant U.S. Mobile under the Medicare Provider Number of Defendant John A Lorenzo and other dentists were placed in U.S. Mobile's checking account and Defendant John A. Lorenzo's Private practice account - Defendant John A. Lorenzo, D.D.S.

The funds of U.S. Mobile were used in undocumented transactions between U.S. Mobile and the other Defendant entities. For example:

a. Defendant U.S. Mobile entered into two ten year leases with Prime Medica Associates in 1984 and 1985 using the 1985 lease to cancel the first 1984 ten year lease and nearly double the rent.

b. Defendants canceled U.S. Mobile's 1984 ten year lease on 1100 square feet, and in 1985 had U.S. Mobile enter into a new lease for 1200 square feet at double the rental price.

c. Defendants John and Diana Lorenzo were the signatories to these leases representing either U.S. Mobile (lessee) or Prime Medica (lessor).

d. Loans were made between Defendants J.D. Investments, Prime Medica and U.S. Mobile that are undocumented as to terms.

e. Loans were made between John A. and Diana Lorenzo and U.S. Mobile.

None of the other enterprises of Defendants John and Diana Lorenzo who used space at 207 N. Broad Street were ever documented as paying rent to Defendant Prime Medica or known to Defendants' accountants and bookkeeper.

Defendant John Lorenzo also caused U.S. Mobile to enter into multiple contracts for services and space from the other defendants. For example:

a. In 1983 and 1984 Defendant Lorenzo Corporation provided U.S. Mobile with space at 207 N. Broad Street, Philadelphia, Pennsylvania (where U.S. Mobile was purportedly renting from Prime Medica), and services, which resulted in U.S. Mobile owing Lorenzo Corporation in excess of $40,000 in 1984, $80,000 in 1985, and in excess of $100,000 in 1986.

b. In 1984 and 1985 Defendant John A. Lorenzo had U.S. Mobile sign Contracts with Defendant John A. Lorenzo, D.D.S. (the private dental practice) to provide services, staff, and use of a computer.

c. In 1986 Defendant John Lorenzo had U.S. Mobile contract to buy a photocopier for his private office at 191 Presidential Boulevard.

Defendants' accountant was not aware of the existence of the obligations created between U.S. Mobile and Defendants' other entities. Defendants John and Diana Lorenzo submitted invoices relating to equipment that had nothing to do with U.S. Mobile, as representing their initial contribution to U.S. mobile in 1983.

John Lorenzo transferred the services of Mark Strong, D.M.D., from U.S. Mobile to his (Lorenzo's) private practice but continued to pay him from U.S. Mobile funds.

There can be no question that corporate formalities were not observed; that significant inter-entity transactions were not documented; and that the corporations and partnerships were treated as a single unit and the alter ego of John Lorenzo.

Finally, it is clear that U.S. Mobile was undercapitalized and that revenues were siphoned off from other ventures. Accordingly, I conclude that the "corporate veil" should be pierced and that the individual John Lorenzo and the business entities should be held liable jointly and severally. U.S. v. Pisani, 646 F.2d 83 (3d Cir. 1981).

Having found for the plaintiff under the FCA, it is not necessary to discuss plaintiff's other theories of liability.

To the extent that facts have been recited in this discussion that are not specifically enumerated under the heading Findings of Fact, they shall be deemed to have been so enumerated.

In view of the foregoing, the Court arrives at the following

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. The plaintiff is entitled to judgment under the False Claims Act, 31 U.S.C. §3729 against John Lorenzo, John Lorenzo, D.D.S., P.C., U.S. Mobile Dental Care Systems, Inc. Prime Medica Associates and J.D. Investments, jointly and severally.

3. Diana Lorenzo, individually, is entitled to judgment in her favor.

4. Plaintiff is entitled to recover three times the amount of damages ($130,719.10 x 3) $392,157.30.

5. Plaintiff is also entitled to receive as a civil penalty a sum of not less than $5,000 nor more than $10,000, for each false claim. See United States v. Bornstein, 423 U.S. 303 (1976). There were 3,683 false claims filed in this case and at a minimum, the total penalty would be $18,415,000. It would appear that before the recent amendments to the False Claim Act, the Court had discretion to reduce the penalty where it was excessive and out of proportion to the damages sustained. Peterson v. Blue Cross/Blue Shield of Texas, 508 F.2d 55 5th Cir. (1975). However, the False Claims Act as it now stands limits that discretion to a range between $5,000 and $10,000 per false claim. Accordingly, the plaintiff is entitled to judgment for the additional sum of $18,415,000.

6. Plaintiff is entitled to recover the costs of this action.

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	
JOHN LORENZO	:	NO. 89-6933

O R D E R

AND NOW, this 11th day of JANUARY, 1991, pursuant to the Findings of Fact and Conclusions of Law filed herewith, it is hereby

ORDERED that JUDGMENT is entered in favor of the United States of America and against John Lorenzo, John Lorenzo, D.D.S., P.C., U.S. Mobile Dental Care Systems, Inc., Prima Medica Associates and J.D. Investments, jointly and severally, in the amount of $18,807,157.30.

BY THE COURT:

JOSEPH L. McGLYNN, JR. J.

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

UNITED STATES OF AMERICA	:	CIVIL ACTION
v.	:	
JOHN LORENZO	:	NO. 89-6933

O R D E R

AND NOW, this 11th day of JANUARY, 1991, pursuant to the Findings of Fact and Conclusions of Law filed herewith, it is hereby

ORDERED that JUDGMENT is entered in favor of Diana Lorenzo and against the United States of America.

BY THE COURT:

JOSEPH L. McGLYNN, JR. J.