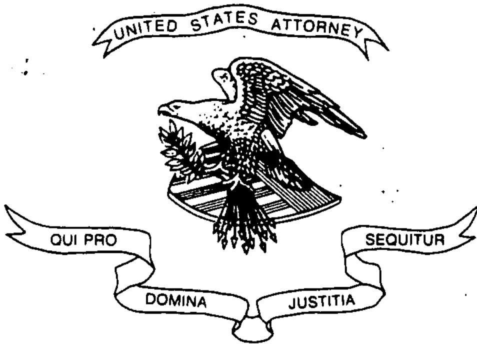
U.S. Department of Justice
Executive Office for United States Attorneys



United States Attorneys' Bulletin

Published by:
Executive Office for United States Attorneys, Washington, D.C.
Laurence S. McWhorter, Director

Editor-in-Chief: *Judith A. Beeman* *FTS/241-6098*
Editor: *Audrey J. Williams* *FTS/241-6098*

VOLUME 40, NO. 1 **THIRTY-NINTH YEAR** **JANUARY 15, 1992**

TABLE OF CONTENTS **Page**

COMMENDATIONS 1
Special Commendation For The District Of Arizona 4

ENVIRONMENT AND NATURAL RESOURCES DIVISION PRESENTS SPECIAL COMMENDATION AWARDS 5

ATTORNEY GENERAL HIGHLIGHTS
Attorney General's Advisory Committee Of United States Attorneys and Subcommittees 5
Attorney General Attends Meetings In Europe 7

DEPARTMENT OF JUSTICE HIGHLIGHTS
BCCI 7
President Bush Addresses The Pornography Issue 8
$2.3 Million Awarded To Boys/Girls Clubs In Public Housing Developments 8
$200,000 Awarded To Florida In Aid To Investigate Church Fires 9
Civil Fraud Settlements And Judgments In 1991 9

ASSET FORFEITURE
Department Of Justice Presents Funds To Canada 10

CRIMINAL DIVISION ISSUES
"Global" Plea Agreements 11
Child Victim-Witness Provisions Of The Crime Control Act Of 1990 11
Computer Crime 12
Project Triggerlock - Summary Report 12

TABLE OF CONTENTS

Page

FINANCIAL INSTITUTION FRAUD
- Video Training In Financial Institution Fraud 13
- Financial Institution Prosecution Updates 14
  - Bank Prosecution Update
  - Savings And Loan Prosecution Update
  - Credit Union Prosecution Update

POINTS TO REMEMBER
- Allegations Of Misconduct Against Assistant United States Attorneys 15
- Witness Fees And Allowances 16

SENTENCING REFORM
- Guideline Sentencing Updates 18
- Federal Sentencing And Forfeiture Guide 18

CASE NOTES
- Civil Division 18
- Environment And Natural Resources Division 20
- Tax Division 21

ADMINISTRATIVE ISSUES
- New Address Changes In The Criminal Division 23
- Career Opportunities 24
  - Office Of The U.S. Trustee
    - Pittsburgh; Los Angeles; San Diego; Rockville, Maryland

APPENDIX
- Cumulative List Of Changing Federal Civil Postjudgment Interest Rates 25
- List Of United States Attorneys 26

Exhibit A: Subcommittees Of The Attorney General's Advisory Committee
Exhibit B: BCCI Fact Sheet And Press Statement
Exhibit C: Child Victim-Witness Provisions Of The Crime Control Act Of 1990
Exhibit D: Guideline Sentencing Updates
Exhibit E: Federal Sentencing And Forfeiture Guides

Please send name or address changes to:
The Editor, United States Attorneys' Bulletin
Room 6419, Patrick Henry Building
601 D Street, N.W., Washington, D.C. 20530
Telephone: (FTS) 241-6098 - (202) 501-6098
Fax: (FTS) 241-7682 - (202) 501-7682

COMMENDATIONS

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

G. Norman Acker, III (North Carolina, Eastern District), by Bruce Joel Jacobsohn, Special Counsel, U.S. Postal Service, Charlotte, for his representation and ultimate success in a Postal Service case, and for valuable services rendered by the Civil Section in a variety of other postal matters.

Joseph Allen and ***E. James King*** (Michigan, Eastern District), by William R. Coonce, Special Agent in Charge, Drug Enforcement Administration, Detroit, for their outstanding presentation and successful prosecution of a case involving the manufacture and distribution of amphetamines.

Daniel P. Bach and ***Timothy M. O'Shea*** (Wisconsin, Western District), by John W. Frazer, Jr., Supervisory Senior Resident Agent, FBI, Madison, for their exceptional legal skill and dedicated efforts in obtaining the conviction of three defendants for the murder of an inmate at the Federal Correctional Institution in Oxford, Wisconsin.

Walter F. Becker, Jr. and ***Linda G. Bizzarro*** (Louisiana, Eastern District), were presented Certificates of Appreciation by Johnny F. Phelps, Special Agent in Charge, Drug Enforcement Administration, New Orleans, for their outstanding contribution to the success of a complex investigation of two MDMA (methylenedioxy methamphetamine) or (Ecstasy) trafficking organizations, resulting in 143 indictments of MDMA traffickers thus far.

Richard J. Bender and ***Glyndell E. Williams*** (California, Eastern District), by Gary N. Overby, Special Agent in Charge, Office of the Inspector General, San Francisco, for their successful prosecution of a bribery case and other related charges.

Carolyn J. Bloch (Pennsylvania, Western District), by Karen E. Evancho, Narcotics Agent II and Louis W. Gentile, Western Zone Commander, Office of Attorney General, Commonwealth of Pennsylvania, Greensburg, for her professional and legal skill in the prosecution of a drug kingpin for multiple federal charges, including illegal use and possession of dangerous firearms.

Nelson Boxer (New York, Southern District), by Drew C. Arena, Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his prompt response to a request for judicial assistance from the United Kingdom, and for bolstering the excellent working relationship between the Office of International Affairs and the British Government.

R. Daniel Boyce (North Carolina, Eastern District), by Ralph Harrison, Vice President and Regional Operations Manager, First Union National Bank, Raleigh, for his successful prosecutive efforts in a $554,000 embezzlement case.

George W. Breitsameter (District of Idaho), by Donald G. Farmer, Regional Inspector General for Investigations, Department of Energy, Richland, Washington, for his valuable assistance and support in obtaining a conviction on four counts in a complicated contract fraud case.

Frank L. Butler, III (Georgia, Middle District), by John P. Byrnes, Attorney, Small Business Administration, Atlanta, for his assistance and cooperative efforts provided to the agency in resolving a debt collection matter in a timely manner.

Pat Chesley and ***Byron Cudmore*** (Illinois, Central District), by John R. Fleder, Director, Office of Consumer Litigation, Department of Justice, Washington, D.C., for their valuable contributions to the nationwide investigation of illegal importation and receipt and distribution of unapproved drugs intended for use in food-producing animals, resulting in over 50 convictions on various charges to date.

Monte Clausen (District of Arizona), by Joel H. Knowles, Warden, Federal Correctional Institution, Tucson, for his excellent presentation on legal issues and correctional case law at the fifth monthly correctional forum attended by approximately 100 corrections, probation, and parole professionals, and congressional staff.

D. Michael Crites, United States Attorney, and ***Staff*** (Ohio, Southern District) were presented a Certificate of Appreciation from Michael J. Astrue, General Counsel, Department of Health and Human Services, Washington, D.C., in recognition of the extraordinary support and assistance they have provided to the General Counsel's office.

Richard Delonis (Michigan, Eastern District), by Thomas M. Robertson, Assistant Executive Director, Prosecuting Attorneys Coordinating Council, Department of Attorney General, State of Michigan, Lansing, for his valuable service as a faculty member at the Investigation and Prosecution of Obscenity Seminar recently conducted for Michigan prosecuting attorneys.

Thomas A. Devlin, Jr. (Georgia, Northern District), by William Gill, Acting Regional Inspector, Internal Revenue Service (IRS), Chamblee, for his outstanding legal and management skills in the prosecution of several misconduct cases of IRS employees.

Salvador A. Dominquez (Ohio, Southern District), by Don B. Heard, Black Achievers Director, YMCA, Columbus, for his excellent presentation before a troubled youth group on the consequences of crime.

Scott Godshall (Pennsylvania, Eastern District), by Craig H. Wolf, Lancaster County Drug Enforcement Task Force, Lancaster, for his professional and cooperative efforts in carrying out the joint goals of quality convictions of drug traffickers.

Wendy Hildreth Goggin (Tennessee, Middle District), was presented the Chief Inspector's Award by K. W. Newman, Postal Inspector in Charge, U.S. Postal Inspection Service, Nashville, for her outstanding efforts in combatting political corruption, white collar crime, and child pornography.

Jennifer Granholm and ***Charles Holman*** (Michigan, Eastern District), by George M. Krappmann, Special Agent, Bureau of Alcohol, Tobacco and Firearms, Detroit, for their valuable assistance and guidance in successfully prosecuting two drug traffickers operating near a public school.

Christine Gray (New York, Southern District), by Richard D. Bennett, United States Attorney for the District of Maryland, for her cooperative efforts in providing testimony and obtaining evidence and documents in a criminal case involving both jurisdictions.

Thomas J. Hopkins (California, Eastern District), received a Certificate of Appreciation from Richard C. Smith, Special Agent in Charge, Air Force Office of Special Investigations, Northwest Procurement Fraud Region, Travis Air Force Base, for his outstanding success in the prosecution of a former president of an electronics company in a mail and tax fraud case which involved a $3.6 million Air Force radar contract, and for obtaining a perjury conviction against the former president's wife.

Richard D. Humphrey (Wisconsin, Western District), by Ralph E. Anfang, District Counsel, Department of Veterans Affairs, Milwaukee, for his outstanding success in obtaining a favorable decision in a complex tort case.

William A. Kolibash, United States Attorney, (West Virginia, Northern District), by David B. Cross, Brooke County Prosecuting Attorney, for his outstanding assistance provided to the Prosecuting Attorney's Office and the Sheriff's Department of Brooke County, resulting in the most successful joint investigation ever undertaken into drug trafficking, corruption and organized crime in the northern panhandle of West Virginia.

Edward Kumiega (Oklahoma, Western District), by Theodore B. Royster, Special Agent in Charge, Bureau of Alcohol, Tobacco and Firearms, Oklahoma City, for his professionalism and dedication in the coordination of Project Triggerlock, which has resulted in the Western District of Oklahoma ranking ninth out of 94 judicial districts in convictions.

James T. Lacey (District of Arizona), by David S. Wood, Special Agent in Charge, Drug Enforcement Administration, Phoenix, for his outstanding success in the prosecution of the leader of a methamphetamine organization who was found guilty by a jury and sentenced to a term of 165 months in a federal penitentiary.

John J. McCann and ***Henry M. Greenberg*** (New York, Northern District), by William S. Sessions, Director, FBI, Washington, D.C., for their significant role in obtaining the conviction and 60-year sentence of a drug dealer and 23 co-conspirators on cocaine distribution charges.

Patricia McGarry (Missouri, Eastern District), by Bernadette Nenninger, Missouri Juvenile Justice Association, Jefferson City, for her excellent presentation on child pornography at the Fall Educational Conference held recently in Columbia.

Melissa Mundell (Georgia, Southern District), by Clinton I. Newman, Assistant General Counsel, Claims Division, U.S. Postal Service, Washington, D.C., for her prosecutive skill in a slip and fall case, resulting in a considerable savings to the Postal Service in potential damages.

Tony Nyktas, Terry Lehman, and ***Robert Behlen*** (Ohio, Southern District), by Michael J. Keane, Attorney, Antitrust Division, Department of Justice, Cleveland, for their valuable assistance and guidance throughout a grand jury investigation and trial in which all corporate defendants were found guilty.

Richard Parker (Virginia, Eastern District), by Gerald M. Auerbach, Chief, Legal Counsel, U.S. Marshals Service, Arlington, for his outstanding professional efforts in successfully representing the Marshals Service in a lawsuit filed against a Deputy U.S. Marshal.

James E. Rattan (Ohio, Southern District), by Thomas M. Hillin, Regional Counsel, Defense Construction Supply Center, Defense Logistics Agency, Department of Defense, Columbia, for his excellent represention at hearings in opposition to a temporary restraining order and preliminary injunction filed against the government, and for his ultimate successful efforts.

Christa A. Reisterer (Wisconsin, Western District), by Charles E. Wallen, Chief, Farmer Programs, Farmers Home Administration (FmHA), Department of Agriculture, Stevens Point, for her excellent representation and cooperative efforts in various FmHA bankruptcy proceedings.

Rudolf A. Renfer, Jr. (North Carolina, Eastern District), by Paul A. Hammond, Special Assistant for Automation, and Leonard F. Grusk, Coordinator, U.S. Courts Fine Center, Administrative Office of the United States Courts, Washington, D.C., for participating in the U.S. Courts Fine Center User Group meeting and for his assistance in advancing the Fine Center project.

Ann C. Rowland (Ohio, Northern District), by Paul E. Coffey, Chief, Organized Crime and Racketeering Section, Criminal Division, Department of Justice, Washington, D.C., for her outstanding service during her tenure as Chief of the Organized Crime Strike Force in Cleveland.

Gideon A. Schor (New York, Southern District), by Robert A. Bryden, Special Agent in Charge, Drug Enforcement Administration, New York City, for his excellent representation in a Bivens action and for obtaining a favorable decision for the government.

Gary L. Spartis (Ohio, Southern District), by Detective Robert D. Meeker, Narcotics Bureau, Public Safety Department, Police Division, Columbus, for his professionalism and outstanding success in the prosecution of a number of narcotics traffickers.

Darryl Stewart (Tennessee, Middle District), by C. E. Campbell, Special Agent in Charge, Internal Revenue Service, Nashville, for his outstanding legal skill and professionalism in the successful prosecution of a complex tax case.

Susan Tarbe (Florida, Southern District), by John L. Martin, Chief, Internal Security Section, Criminal Division, Department of Justice, Washington, D.C., for her successful prosecution of a conspiracy case involving violations of the Arms Export Control Act, and false statements concerning the export of military helicopters and rocket launchers to Iraq in 1983.

Pamela J. Thompson and ***the United States Attorney's staff*** (Michigan, Eastern District), were presented the General Counsel's Certificate of Appreciation by Michael J. Astrue, General Counsel, Department of Health and Human Services, Washington, D.C., for their proficiency, professionalism, and extraordinary efforts in handling the Social Security disability caseload in the Eastern District of Michigan.

James Eldon Wilson, United States Attorney, and ***Staff*** (Alabama, Middle District), by James C. Barksdale, District Director, Small Business Administration, Birmingham, for their outstanding spirit of cooperation and teamwork in various matters of mutual interest, particularly the field of debt collection, and for acting as a mediator and clearinghouse among the various agencies in the Middle District of Alabama.

Mark Zanides (California, Northern District), received a Certificate of Appreciation from Reginald Boyd, United States Marshal, San Francisco, for his successful prosecution of two individuals involved in a kidnapping and escape by helicopter from the Pleasanton Federal Correctional Institution, both of whom are presently serving lengthy prison sentences.

SPECIAL COMMENDATION FOR THE DISTRICT OF ARIZONA

John R. Mayfield, Assistant United States Attorney for the District of Arizona, was commended by Colonel Robert G. Douglass, Chief, Claims and Tort Litigation Division, Air Force Legal Services Agency, U.S. Air Force, Washington, D.C., for his outstanding efforts in the investigation and presentation of a case involving severe injuries to two independent contractors who fell inside a water tank they were painting on Williams Air Force Base in March, 1987. The plaintiffs alleged negligent design and construction of the tank and an internal rotating ladder. Accident reconstruction to determine what caused the ladder to derail was a very complex matter, made even more difficult because of problems encountered in locating documents and photographs. Assistant United States Attorney Mayfield was very tenacious and thorough in searching for old design instructions and "missing" photos, and eventually found the items he needed. He and an expert accident reconstructionist used computer modeling and freeze-frame videotape to convince the court to make the critical finding that the plaintiffs had removed lock nuts from the ladder's wheel system, allowing it to derail. As a result of this finding the court concluded there was no design defect or dangerous condition of the premises. Colonel Douglass stated that the skill with which Mr. Mayfield orchestrated this pivotal expert analysis and presentation was exceptional.

* * * * *

ENVIRONMENT AND NATURAL RESOURCES DIVISION PRESENTS SPECIAL COMMENDATION AWARDS

On December 10, 1991, Barry M. Hartman, Acting Assistant Attorney General, and Myles Flint, Deputy Assistant Attorney General, Environment and Natural Resources Division, conducted a Special Commendation Awards ceremony in the Great Hall of the Department of Justice, Washington, D.C. Two Assistant United States Attorneys were included among those receiving honors for their valuable contributions to the Division's Environmental Enforcement Section. They were:

Patrick M. Flatley, Assistant United States Attorney for the Northern District of West Virginia, for his significant leadership role as settlement negotiator in United States v. Rayle Coal Co., et al, and for his active participation in several other cases within the Division. Rayle Coal involves violations of the Clean Water Act arising from the discharge of pollutants from an inactive coal mining site into two streams in West Virginia, as well as other highly contentious issues, such as veil piercing and in-stream treatment. The case, filed in 1987, is currently pending and is expected to proceed to trial in the spring of 1992. The United States is seeking civil penalties and injunctive relief to bring the defendants into compliance with the Clean Water Act.

Rick Willis, Assistant United States Attorney for the Western District of Louisiana, for his outstanding cooperative efforts and strong commitment to the successful conclusion of a preliminary injunction hearing in United States v. Marine Shale Processors, a major EPA "sham recycling" case. Marine Shale began incinerating non-hazardous oil field waste in 1985. In 1986, claiming to be a recycler rather than an incinerator, and thus exempt from Resource Conservation and Recovery Act regulations, they began incinerating hazardous wastes. Marine Shale claims that the end result of their process is a glass-like "aggregate" suitable for paving, roadbeds, and other possible uses. Samples of the "aggregate", however, have shown high levels of some toxic metals, including lead, cadmium and chromium. In March, 1991, Marine Shale violated an oral agreement not to sell, give away or transport their "aggregate" pending resolution of the civil suit filed in June of 1990. They began trucking large quantities from their facility to a leased lot across the road approximately a quarter of a mile away. With the assistance of Mr. Willis, a Temporary Restraining Order was immediately obtained, and Mr. Willis also conducted a major portion of the presentation of the hearing on preliminary injunction. An order granting the central elements of the U.S. demands was set by District Judge Richard T. Hale on the fifth day of the hearing.

* * * * *

ATTORNEY GENERAL HIGHLIGHTS

Attorney General's Advisory Committee Of United States Attorneys

On December 31, 1991, Attorney General William P. Barr announced the appointment of four new members of the Attorney General's Advisory Committee of United States Attorneys. The new members are: Jean Paul Bradshaw, Western District of Missouri; Michael Chertoff, District of New Jersey; Gene W. Shepard, Southern District of Iowa; and Robert Q. Whitwell, Northern District of Mississippi.

The Attorney General also announced that J. William Roberts, United States Attorney for the Central District of Illinois, will assume the position as Chairman. The Committee elected Thomas W. Corbett, Jr., Western District of Pennsylvania, Chairman-elect for the new year. Lourdes G. Baird, Central District of California, and Mike McKay, Western District of Washington, were elected to serve as Vice Chairpersons.

Joseph M. Whittle, Western District of Kentucky, was commended for his outstanding service as Chairman of the Committee from December, 1990 to December, 1991. Mr. Whittle will continue to serve on the Committee as ex officio.

The following is a complete list of members:

Chairman:
J. William Roberts, Central District of Illinois

Chairman-Elect:
Thomas W. Corbett, Jr., Western District of Pennsylvania

Vice-Chairpersons:
Lourdes G. Baird, Central District of California
Mike McKay, Western District of Washington

Members:
Linda Akers, District of Arizona
Jean Paul Bradshaw, Western District of Missouri
Wayne A. Budd, District of Massachusetts
Michael Chertoff, District of New Jersey
Marvin Collins, Northern District of Texas
E. Bart Daniel, District of South Carolina
Jeffrey R. Howard, District of New Hampshire
Timothy D. Leonard, Western District of Oklahoma
Otto G. Obermaier, Southern District of New York
Gene W. Shepard, Southern District of Iowa
Robert Q. Whitwell, Northern District of Mississippi
Jay B. Stephens, District of Columbia, ex officio
Joseph M. Whittle, Western District of Kentucky, ex officio

* * * * *

Subcommittees

Attached at the Appendix of this Bulletin as Exhibit A is a Subcommittee listing of the Attorney General's Advisory Committee of United States Attorneys.

* * * * *

Attorney General Attends Meetings In Europe

During the week of December 4, 1991, Attorney General William P. Barr met with European officials on joint law enforcement concerns that included Pan Am 103, terrorism, drug trafficking, and the investigation of the Bank of Credit and Commerce International (BCCI). The following was the Attorney General's agenda:

-- Met in Edinburgh with Lord Fraser of Carmyllie, Scotland's chief prosecutor, to discuss the continuing investigation into the bombing of Pan Am Flight 103 in 1988. Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, accompanied General Barr.

-- Attended the TREVI Conference in Amsterdam where he participated in in-depth talks regarding programs to combat terrorism, drug trafficking and fraud. The TREVI Conference is made up of top-level law enforcement officials of twelve European community nations and seven observer nations, including the United States. The Attorney General was joined by Mr. Mueller, William S. Sessions, Director, FBI, and Robert C. Bonner, Administrator, DEA.

-- Held separate talks with Philippe Marchand, the French Interior Minister, and Vincenzo Scotti, the Italian Interior Minister. The United States has worked closely with these countries on a range of important law enforcement matters, including terrorism and organized crime.

-- Met in London with Kenneth Baker, the British Home Secretary, to discuss a variety of mutual law enforcement concerns.

-- Met with Barbara Mills, chief of the British Serious Fraud Office, on cooperative efforts in the BCCI case.

-- Presented a check for $2.4 million to New Scotland Yard as its share of forfeited assets from a major, jointly-investigated drug case.

-- Met in Bonn with law enforcement officials of Germany, with which the United States has worked closely on anti-terrorism and other enforcement programs.

* * * * *

DEPARTMENT OF JUSTICE HIGHLIGHTS

BCCI

On December 19, 1991, Attorney General William P. Barr announced the filing of major racketeering charges against the Bank of Credit and Commerce International and its agreement to plead guilty to those charges and all other pending federal and state charges. The Attorney General stated that this action successfully resolves all U.S. charges against BCCI as an institution; forfeits all of BCCI's assets in the United States; and, by requiring full cooperation by BCCI in the ongoing investigation, substantially expedites the pursuit and prosecution of all of the individuals involved in BCCI's wrongdoing around the world.

Attached at the Appendix of this Bulletin as Exhibit B is a copy of the Attorney General's press statement, together with a Fact Sheet on the BCCI Plea Agreement.

* * * * *

President Bush Addresses The Pornography Issue

On October 10, 1991, President George Bush addressed the national conference of the Religious Alliance Against Pornography in which he stated that the Administration is committed to the fullest prosecution of obscenity and child pornography crimes, and that this issue will remain a priority. The following is an excerpt of the President's statement:

> We have made tremendous progress at the Federal level, through such Federal initiatives as Project Postporn, in which we have virtually eliminated that horrible mail order obscenity business. . . In the last six months alone, the Department of Justice has obtained major indictments and convictions against some of the largest hardcore pornography producers and distributors in this country. These successes would not have been possible without the leadership of the Department of Justice, and the United States Attorneys in cities like Dallas and Birmingham and Tallahassee and Concord, New Hampshire, and over here in Alexandria, Virginia, and the continued efforts of the Postal Inspection Service, the FBI, and the U.S. Customs Service.

[Note: The President is referring to the Northern District of Texas - Marvin Colllins, United States Attorney; the Northern District of Alabama - Frank W. Donaldson, United States Attorney; the Northern District of Florida - Kenneth W. Sukhia, United States Attorney; the District of New Hampshire - Jeffrey R. Howard, United States Attorney; and the Eastern District of Virginia - Richard Cullen, United States Attorney.]

* * * * *

$2.3 Million Awarded To Boys/Girls Clubs In Public Housing Developments

On December 11, 1991, Attorney General William P. Barr announced that the Department of Justice will award $2.3 million to the Boys and Girls Clubs of America. The funds come from the Department's Bureau of Justice Assistance in the Office of Justice Programs. The goals of the program are to expand the number of Boys and Girls Clubs in public housing developments, to institute strong drug and delinquency prevention programs within these clubs and to develop other services for club members, such as tutoring, job skills training and help in receiving comprehensive child services.

Attorney General Barr said, "Efforts at social rehabilitation cannot even get started without strong law enforcement and social order in place. It is this essential relationship between law enforcement and social programs that has led to the development of what we at the Department of Justice call 'Weed and Seed.' This program is more than just another spending proposal; it is a new method of operating. It involves the integration of federal, state and local law enforcement activities on a community basis -- and then the integration of those law enforcement efforts with a broader program of community revitalization. I can think of no better 'Seed' effort than the Boys and Girls Clubs."

* * * * *

$200,000 Awarded To Florida In Aid To Investigate Church Fires

On December 11, 1991, Attorney General William P. Barr announced the award of $200,000 to the Florida Church Arson Task Force, which is investigating a rash of fifty fires apparently started by acts of arson at churches in central Florida in the last nineteen months. The funds come from a special Emergency Federal Law Enforcement Assistance Fund administered by the Department of Justice's Bureau of Justice Assistance in the Office of Justice Programs. The money will help pay the expenses of state and local personnel assigned to the Task Force, which is comprised of representatives of more than sixty federal, state, and local law enforcement officials, including the Florida Fire Marshal's office, the Florida Department of Law Enforcement, the Bureau of Alcohol, Tobacco and Firearms, and the Gainesville, Ocala, and Winter Haven police and fire departments. The award will be administered by the City of Gainesville, through its police department. Eight of the suspicious fires occurred in Gainesville.

In 1990, funds from the Emergency Federal Law Enforcement Assistance program were awarded to Florida to assist a special task force investigating the murders of five college students in the Gainesville area. The investigation led to the identification of a suspect, who has been indicted. Attorney General Barr said these funds will ensure that state and local law enforcement and fire personnel have adequate resources to investigate and find the perpetrator or perpetrators of these vicious acts of violence.

* * * * *

Civil Fraud Settlements And Judgments In 1991

On December 19, 1991, the Department of Justice announced that the Civil Division obtained more than $340 million in judgments and settlements in cases involving fraud against the government during FY 1991, an increase of $83 million from the $257 million obtained in FY 1990. The total has steadily increased during the last several years. It was $27 million in FY 1985, $54 million in FY 1986, $83 million in FY 1987, $176 million in FY 1988, and $225 million in FY 1989. Stuart M. Gerson, Assistant Attorney General for the Civil Division, said the figures demonstrated, in a concrete fashion, the Administration's continued dedication in the fight against fraud, waste and abuse, and involved all areas of government activity. Some of the highlights are as follows:

-- A record $185 million civil settlement with Unisys Corporation included $18 million deposited into the Asset Forfeiture Fund. The Unisys settlement was the sixth corporate settlement and the fifty-first guilty plea in the ongoing Ill Wind investigation, which uncovered an extensive manipulation of the contract award process by contractors.

-- Qui Tam litigation produced recoveries of $25.6 million during FY 1991, with $4.5 million designed for the individuals who initiated the suits.

-- Civil Division attorneys collected $34 million from NEC Information Technologies, a wholly owned subsidiary of the Japanese electronics giant NEC Corporation, for bidrigging and defective pricing on telecommunications contracts let for bid by the U.S. Armed Forces in Japan. This agreement followed the successful investigation and resolution of claims against 132 Japanese construction companies during the prior fiscal year for bidrigging on construction contracts let for bid by the U.S. Navy in Japan.

-- $4.5 million and $6.3 million were recovered because of bid manipulations in contracts for spare parts awarded by the Air Force.

-- McDonnell Douglas paid $7.5 million because it defectively priced material costs on contracts for the M242 automatic chain gun.

-- General Electric paid $6.3 million in connection with the voluntary disclosure of its mischarging of accounts on government contracts.

-- The Civil Division concluded a number of substantial settlements involving fraud against the General Services Administration.

-- Recoveries in the area of health care fraud included more than $14 million obtained by the Civil Division and United States Attorneys' offices from individuals and companies who defrauded the Medicare program administered by the Department of Health and Human Services.

* * * * *

ASSET FORFEITURE

Department Of Justice Presents Funds To Canada

In a ceremony on December 11, 1991 at the Canadian Embassy in Washington, D.C., Robert S. Mueller, III, Assistant Attorney General for the Criminal Division, and Kenneth H. Sukhia, United States Attorney for the Northern District of Florida, presented a check for $807,109 to the Deputy Chief of Mission, Marc Brault, as its share of forfeited assets from a drug trafficking ring that was successfully prosecuted following a joint investigation by the two countries. This check represents part of $2.4 million traced to a Swiss bank account and later forfeited to the United States by two Canadian defendants in the case. The ring distributed more than 10,000 pounds of cocaine and 100,000 pounds of marijuana in the United States and Canada. Some fifty members of the drug ring are now serving prison terms following trials in the Northern District of Florida.

The Royal Canadian Mounted Police discovered the Canadian end of the ring and a money-laundering trail leading overseas. Other agencies with major roles in the case included the Drug Enforcement Administration, Internal Revenue Service, and the Okaloosa County Sheriff's Office. An important contribution was made by David McGee, Assistant United States Attorney for the Northern District of Florida, and chief prosecutor of the Florida cases.

This is the fourth time the Department has given forfeited funds to other nations under an international drug asset sharing program approved by Congress in 1988. Two years ago, Canada and Switzerland each received $1 million for their investigative work against a money-laundering ring in Operation Polar Cap. Earlier this month, $2.4 million was given to the United Kingdom after the successful joint investigation of a large drug ring.

* * * * *

CRIMINAL DIVISION ISSUES

"Global" Plea Agreements

On December 26, 1991, J. William Roberts, Chairman, Attorney General's Advisory Committee of United States Attorneys, issued a teletype to all United States Attorneys restating the Department's policy on "global" plea agreements. The policy on "global" plea agreements was discussed in the summer of 1990 by the Attorney General's Advisory Committee (AGAC). As a result of the efforts of the Law Enforcement Coordination Subcommittee and the Criminal Division, the Executive Office for United States Attorneys and the AGAC authorized the issuance of a bluesheet on October 1, 1990. Multi-District (Global) Agreement Requests appears in Title 9 of the United States Attorneys' Manual, at 9-27.641, and reads as follows:

> No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the U.S. Attorney(s) in each affected district(s) and/or the Assistant Attorney General of the Criminal Division.
>
> (REQUESTING DISTRICT/DIVISION SHALL MAKE KNOWN TO ANY OTHER AFFECTED DISTRICT(S)/DIVISION):
>
> (1) The specific crimes allegedly committed in affected district(s) as disclosed by the defendant. (No prosecution agreement should be made to any crime not disclosed by the defendant.)
>
> (2) Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.
>
> (3) The proposed agreement to be made to the defendant and the applicable sentencing guideline range.

* * * * *

Child Victim-Witness Provisions Of The Crime Control Act Of 1990

Attached at the Appendix of this Bulletin as Exhibit C is a copy of a memorandum dated December 4, 1991, to all United States Attorneys from Robert S. Mueller, III, Assistant Attorney General, Criminal Division, concerning the child victim-witness provisions of the Crime Control Act of 1990. Many of the most relevant provisions are found in new section 3509 of Title 18, United States Code, enacted as section 225 of P.L. 101-647. This legislation introduces a number of new practices to the federal system with which federal prosecutors must become familiar. For instance, the statute authorizes the court, in specified circumstances, to order the use of two-way closed circuit television to take a child witness' testimony. It also permits the court to order that a videotaped deposition of the child witness be taken. To assist you in dealing with issues that arise in litigation involving these new provisions, the Child Exploitation and Obscenity Section of the Criminal Division, in conjunction with the Office for Victims of Crime, will be preparing training materials.

Please forward copies of any pleadings, memoranda or briefs which might be of assistance to other prosecutors to: Patrick A. Trueman, Chief, Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, 3131 Washington Center, 1001 G Street, N.W., Washington, D.C. 20530. The telephone number is: (FTS) 368-5780 or (202) 514-5780.

* * * * *

Computer Crime

On October 21, 1991, Robert S. Mueller, III, Assistant Attorney General, Criminal Division, advised all United States Attorneys that coordination of all computer crime investigations is absolutely necessary. In less than an hour, a hacker outside the United States can penetrate over a dozen government and private computers, each in a different judicial district. Often the hacker is searching for sensitive military information, thus raising national security concerns.

To ensure that these investigations are coordinated, all computer crime investigations must be reported to the Computer Crime Unit, General Litigation and Legal Advice Section, Criminal Division. The Computer Crime Unit will coordinate Justice Department investigations and, to the extent possible, inform Assistant United States Attorneys when other related investigations are being conducted. The Computer Crime Unit must be notified as soon as a suspect is arrested for a computer crime violation or within three days of opening a computer crime investigation. Also, the Unit must be notified at least twenty-four hours in advance of obtaining a search warrant, since the execution of search warrants in one district may unintentionally terminate a covert investigation being conducted by another district. Finally, consultation is required with the Computer Crime Unit before an indictment is presented or before plea negotiations are finalized.

For purposes of these requirements, computer crime shall mean any offense involving or potentially involving 1) violations of 18 U.S.C. §1030; 2) violations of 18 U.S.C. §2701 et. seq., 3) computer "bulletin boards"; or 4) schemes in which a computer was the target of the offense (even if charged as a violation of 18 U.S.C. §1343, §2314, or §2319), e.g., computer viruses or where the defendant's goals were to obtain information or property from a computer or to attack a telecommunications system or data network.

All notifications and consultations should be directed to: Scott Charney, Unit Chief, Computer Crime Unit, General Litigation and Legal Advice Section, P.O. Box 887, Ben Franklin Station, Washington, D. C. 20044 - (FTS) 368-1026 or (202) 514-1026.

* * * * *

Project Triggerlock
Summary Report

April 10, 1991 through November 30, 1991

Description	Count	Description	Count
Indictments/Informations.........	2,965	Prison Sentences..................	2,348.25 years
Defendants Charged...............	3,836	Sentenced to prison...............	434
Defendants Convicted............	1,194	Sentenced w/o prison or suspended......................	36
Defendants Acquitted.............	35		

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

* * * * *

FINANCIAL INSTITUTION FRAUD

Video Training In Financial Institution Fraud

The Office of Legal Education, Executive Office for United States Attorneys, has produced new video training tapes on the prosecution of financial institution fraud. The tapes were filmed at the Financial Institution Fraud Seminar held in Boston, Massachusetts August 27-30, 1991. If you are interested in borrowing any of the following titles, please contact Jim Miles at (FTS) 268-7574 or (202) 208-7574.

1. *Introduction to the Operation of Lending Institutions* (60 minutes)

2. *Insider Transaction: Hypotheticals or Prototypes* (60 minutes)

3. *Fundamentals of Commercial Lending: Hypotheticals or Prototypes* (60 minutes)

   Understanding Appraisals in the Commercial Lending Process (60 minutes)

4. *Commercial Lending Panel* (75 minutes)

5. *Regulatory Framework, Banks, and Thrifts* (90 minutes)

6. *The Examination Function* (75 minutes)

7. *Overview of Bank Fraud Statutes*
   - *Traditional Statutes* (75 minutes)
   - *Money Laundering Statutes* (60 minutes)

8. *Charging Decisions: Hypotheticals or Prototypes* (90 minutes)

9. *Developing and Following the Paper Trail* (120 minutes)

10. *Document Control and Management from Investigation Through Trial* (30 minutes)

11. *Practical Tips on Obtaining Documents from Regulators* (45 minutes)

12. *Disclosure Issues* (75 minutes)

13. *Demonstration - Trial Exhibits* (30 minutes)

14. *Financial Statements* (90 minutes)

15. *The Use of Ethical Rules to Inhibit Investigations: The Prosecutor at Risk* (90 minutes)

16. *Civil Penalties* (60 minutes)

17. *Asset Forfeiture Options* (60 minutes)

* * * * *

Financial Institution Prosecution Updates

On December 6, 1991, the Department of Justice issued the following information describing activity in "major" bank fraud prosecutions, savings and loan prosecutions, and credit union fraud prosecutions from October 1, 1988 through November 30, 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, or (d) involves other major factors. All numbers are approximate, and are based on reports from the 94 United States Attorneys' offices and from the Dallas Bank Fraud Task Force.

Bank Prosecution Update

Description	Count	Description	Count
Informations/Indictments........	1,095	Sentenced to prison................	734
Estimated Bank Loss............	$2,670,238,311	Awaiting sentence..................	230
Defendants Charged.............	1,522	Sentenced w/o prison or suspended......................	241
Defendants Convicted..........	1,193	Fines Imposed........................	$ 4,817,581
Defendants Acquitted...........	15	Restitution Ordered.................	$305,592,326
Prison Sentences................	1,491 years		

Savings And Loan Prosecution Update

Description	Count	Description	Count
Informations/Indictments........	565	Sentenced to prison.................	444
Estimated S&L Loss.............	$7,848,627,286	Awaiting sentence.....................	163
Defendants Charged.............	950	Sentenced w/o prison or suspended.........................	116
Defendants Convicted..........	712	Fines Imposed..........................	$ 13,649,436
Defendants Acquitted...........	55 *	Restitution Ordered..................	$ 398,057,193
Prison Sentences..................	1,437 years		

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

Credit Union Prosecution Update

Description	*Count*	*Description*	*Count*
Informations/Indictments.......	65	Sentenced to prison...............	47
Estimated Credit Loss..........	$82,393,151	Awaiting sentence..................	13
Defendants Charged.............	84	Sentenced w/o prison or suspended......................	7
Defendants Convicted..........	67	Fines Imposed........................	$ 3,550
Defendants Acquitted...........	1	Restitution Ordered................	$ 7,623,436
Prison Sentences..................	81 years		

* * * * *

POINTS TO REMEMBER

Allegations Of Misconduct Against Assistant United States Attorneys

On December 12, 1991, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, reminded all United States Attorneys of the requirement to report all allegations of misconduct concerning Assistant United States Attorneys, other Department attorneys and those in criminal investigative or law enforcement positions to the Office of Professional Responsibility (OPR) pursuant to the provisions of 28 C.F.R. §0.39a, and the United States Attorneys' Manual 1-4.100 and 3-2.735B. This requirement extends to all complaints of misconduct, regardless of whether they appear to be without merit, are the subject of a state bar proceeding, or are part of an opinion or order issued by a judicial forum. Additionally, allegations of misconduct involving any other employees or allegations of waste, fraud, and abuse should be reported to the Office of Inspector General (OIG). Reporting allegations of misconduct against federal employees who are not employed in your offices where such allegations are brought to your attention is also required. The requirement would encompass allegations regarding, for example, Special Agents, Border Patrol Agents, etc.

In reporting allegations of misconduct, please send a written report which states the source of the allegations, the name and position of the federal employee involved and a summary of the circumstances surrounding the incident, to either of the following:

Michael E. Shaheen, Jr., Counsel
Office of Professional Responsibility
Department of Justice, Room 4304
10th and Constitution Avenue, N.W.,
Washington, D.C. 20530
Telephone: (FTS) 368-3365 or
(202) 514-3365

or

Richard J. Hankinson, Inspector General
Office of Inspector General
Department of Justice, Room 4706
10th and Constitution Avenue, N.W.,
Washington, D.C. 20530
Telephone: (FTS) 368-3435 or
(202) 524-3435
Hotline for reporting waste, fraud and abuse:
1-800-869-4499

A copy of the report should be forwarded at the same time to Deborah C. Westbrook, Legal Counsel, Executive Office for United States Attorneys, as the Deputy Designated Agency Ethics official, with an appropriate notation that the allegation has been reported to OPR/OIG. Her address and telephone number is: Department of Justice, Room 1629, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530 - (FTS) 368-4024 or (202) 514-4024.

* * * * *

Witness Fees And Allowances

The Special Authorizations Unit of the Justice Management Division has advised all United States Attorneys' offices via teletype as follows:

Prisoners Not Eligible To Receive Fact Witness Fees And Allowances. The Department of Justice's (DOJ) FY 1992 Appropriations Act (P.L. 102-140, Oct. 28, 1991) has extended the prohibition against the expenditure of appropriated funds for the payment of witness fees to incarcerated persons. This prohibition covers incarcerated illegal aliens, material witnesses, convicted prisoners and persons being held on charges. Please continue maintaining records on these appearances. Depending on the permanent law enacted in this matter, retroactive payments may have to be made to some individuals. If you are litigating this issue, please call Linda Donaghy, Office of General Counsel, Justice Management Division, at (FTS) 368-3452 or (202) 514-3452.

Habeas Corpus Expenses. When prisoners (local, state or federal) are permitted to proceed in forma pauperis in habeas corpus appeals, the expenses of witnesses subpoenaed by the prisoners to attend discovery depositions may be charged to the Fees and Expenses of Witnesses (FEW) appropriation. Additionally, the cost of transcripts of the witness' deposition may be charged to the FEW appropriations. The Subobject Classification Code for transcripts is: 2508.

Discovery Depositions. Discovery depositions conducted by DOJ attorneys are generally chargeable as a litigative expense of the office conducting the deposition. The only depositions chargeable to the FEW appropriation (other than habeas corpus depositions) are fact witness depositions in lieu of testimony (to preserve testimony) and expert witness discovery depositions where each side provides their own expert witnesses to the other side at no cost. Discovery depositions with fact witnesses are considered to be part of the investigative stage of the case, not chargeable to the FEW appropriation.

Expert Witnesses

Use Of GTS Accounts For Expert Witnesses. 1) The General Services Administration (GSA) Transportation Contracts allow expert witnesses, as well as fact witnesses, to travel at contract rates, providing that DOJ makes the reservations and pays the carriers directly; 2) Offices wishing to obtain and use a separate GTS account for expert witnesses should contact Diane Kelly, Financial Operations Service, (FTS) 241-7868 or (202) 501-7868; 3) Do not use your office GTS account or fact witness GTS account for expert witness expenses; 4) Please note that expert witness GTS accounts can be used for airfare and Amtrak tickets only. Other forms of transportation and lodging must not be charged to the expert witness GTS accounts. 5) An office using a GTS account to pay for the transportation of an expert witness is responsible for ensuring that the transportation is not claimed on the expert witness's voucher.

Hiring Expert Witnesses without Formal Competition. Congress, in P.L. 102-140, authorized the DOJ procedure of hiring expert witnesses without formal competitive procurement procedures, including advertising in the Commerce Business Daily. However, DOJ attorneys should still contact at least three prospective expert witnesses prior to selection. While cost must be a factor, selection may be based primarily on expertise and courtroom demeanor. Expert witness files should contain rationale used for selection of all expert witnesses. Repetitive use of the same expert witnesses is discouraged.

Travel Of Plaintiff To Be Examined By DOJ Expert Witness. The travel expenses of the plaintiff to be examined by the DOJ expert witness should be requested on a Form OBD-47 (Request, Authorization and Agreement for Fees and Expenses of Witnesses). The travel requests must be accompanied by a copy of the approved expert witness request. The Special Authorizations Unit (SAU) is receiving requests for the travel of plaintiffs prior to the preparation/approval of the requests for expert witnesses. SAU will approve the plaintiff's expenses only (no fee) via teletype to the U.S. Marshal of the trial district.

Invoices For Expert Witness Services. Invoices for expert witness services should be mailed to: U.S. Department of Justice, Fiscal and Data Services Section, P.O. Box 50814, Washington, D.C. 20004-0814. A copy of the approved Form OBD-47 must accompany all invoices. [Note: Expert witness invoices should not be sent to SAU.]

Fact Witnesses

Fact Witness Relocation Expenses. Concerning the relocation of witnesses who are not enrolled in the U.S. Marshals' Witness Protection Program, the only authority for payment of relocation expenses of witnesses within the FEW appropriations is vested in the Witness Protection Program. Requests for relocation, both temporary and permanent, for witnesses not enrolled in the Witness Protection Program cannot be paid from the FEW appropriation.

Use Of GTS Accounts For Fact Witnesses. When a GTS account is used to pay for the transportation and/or lodging of fact witnesses, the person making the reservations must ensure that the use of the GTS account is noted on the Form OBD-3, Fact Witness Voucher. If use of the GTS account is not noted on the OBD-3, the U.S. Marshals Service may make duplicate payments to fact witnesses for items charged to the GTS account.

Military Members As Fact Witnesses. Military members (both civilian and uniformed personnel) called as fact witnesses must have military travel orders to enable them to attend court. A subpoena is not sufficient to allow military members to travel. If the Base is located within the trial district, please contact the Base Office of the Staff Judge Advocate. If the Base is located outside the trial district, or if DOJ must pay per diem for the attendance of the witness, please fax a completed form OBD-16 (Request for Armed Forces or Government Employee Witness) to SAU at least two (2) weeks prior to the appearance of the witness. The fax number is: (FTS) 241-8090 or (202) 501-8090.

Payment Procedure for Military Members. If the case involves the activities of the Service, the Service must bear the expense. If the case does not involve the activities of the Service, DOJ must ultimately bear the expense. If DOJ is responsible for the expense and no per diem is involved, the U.S. Marshal may pay local transportation expenses. If DOJ is responsible for the expense and per diem is involved, the Service member must be requested through SAU, using

Form OBD-16. (Please be sure to include a telephone number for all witnesses on Form OBD-16.) The Service must initially pay the expenses and request reimbursement from the Department of Justice in Washington. The instructions for requesting reimbursement are on the SAU approval form (JMD-426, Request for Personnel to Testify as Government Witness). These payment instructions conform to the requirements of 5 U.S.C. §5751 and 28 CFR Part 21. Please note that witness GTS accounts should not be used to pay for the expenses of government or military employee/witnesses.

Outdated Forms OBD-3, Fact Witness Voucher. Form OBD-3 is a 4-part carbon pack designed to pay fact witnesses. The current edition is dated March, 1991. Offices which have a supply of older forms should obtain a supply of current forms and dispose of the outdated forms. Current forms may be obtained by faxing a request to the DOJ Stocked Forms Warehouse. The commercial number is: (301) 763-2411.

* * * * *

SENTENCING REFORM

Guideline Sentencing Updates

A copy of the Guideline Sentencing Update, Volume 4, No. 12, dated December 5, 1991, and Volume 4, No. 13, dated December 27, 1991, is attached as Exhibit D at the Appendix of this Bulletin.

* * * * *

Federal Sentencing and Forfeiture Guide

Attached at the Appendix of this Bulletin as Exhibit E is a copy of the Federal Sentencing and Forfeiture Guide, Volume 3, No. 3, dated December 2, 1991, and Volume 3, No. 4, dated December 16, 1991, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

* * * * *

CASE NOTES

CIVIL DIVISION

Third Circuit Holds Assistant United States Attorney (AUSA) Is Entitled To Immunity For Participation In Drug Forfeiture Action

Following the seizure of his business as proceeds of a drug transaction, Catterson brought a Bivens suit against the AUSA who sought the seizure. The district court denied the AUSA's motion to dismiss on grounds of absolute prosecutorial immunity. The Third Circuit reversed in part, holding that the AUSA was entitled to absolute immunity for drafting and filing the complaint, applying for the seizure warrant and participating in the warrant hearing since these acts represented core prosecutorial functions. However, the court found that the post-seizure management of the property was not a prosecutorial function and remanded for a determination of whether qualified immunity shields the AUSA from liability. This decision clarifies the reach of absolute immunity and will help to protect AUSAs charged with implementing the drug forfeiture laws.

Schrob v. Catterson, No. 90-6051 (Nov. 15, 1991). DJ # 157-48-2798.

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Jennifer H. Zacks - (202) 514-4826 or (FTS) 368-4826

* * * * *

Fifth Circuit Vacates District Court Order Rescinding Prior Seizure Order For Medical Devices Determined By FDA To Be Adulterated And Misbranded

In this action brought by the Food and Drug Administration (FDA) to seize certain surgical implant devices determined by FDA to be adulterated and misbranded, the district court granted the defendants' motion to quash the seizure order (which had been signed by another judge). We sought and obtained an emergency stay from the court of appeals. Now, the court has vacated the district court's order quashing the seizure order.

The court of appeals held that "[w]hen a complaint which complies on its face with the provisions of the admiralty rules [which are applicable to forfeiture proceedings] seeks forfeiture of articles of property alleged to be in violation of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 334(b), the United States is entitled to secure a warrant for seizure and to maintain its seizure of the property described until a seizing court hears the matter on the merits of the conflicting claims."

United States v. Undetermined Article of Various Quantities, etc., et al., No. 91-2263 (Nov. 7, 1991). DJ # 22B-74-61-2.

Attorneys: Douglas N. Letter - (202) 514-3602 or (FTS) 368-3602
John S. Koppel - (202) 514-5459 or (FTS) 368-5459

* * * * *

Seventh Circuit Upholds Federal Crop Insurance Corporation's Authority To Collect Overpayments Made To Insurers Under Crop Reinsurance Program

The Federal Crop Insurance Corporation (FCIC) administratively offset $337,558.00 in payments made to Old Republic Insurance Company under the FCIC's crop reinsurance program, on the ground that Old Republic had negligently paid out this money to farmers insured under the program. Old Republic brought this action challenging both the agency's authority to recoup the overpayments and the constitutional adequacy of the agency's recoupment procedures. The district court determined that FCIC possessed authority under the contract and the Debt Collection Act of 1982, 31 U.S.C. 3711(a)(1) (1988), to recoup the overpayments, and further held that the agency's informal hearing procedure complied with the requirements of due process. The court of appeals has now affirmed.

Old Republic Ins. Co. et al. v. Federal Crop Ins. Corp., No. 90-2933 (Nov. 4, 1991). DJ # 145-8-2257.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
John S. Koppel - (202) 514-5459 or (FTS) 368-5459

* * * * *

Eleventh Circuit Sustains Asset Freeze Order In Major Office Of Supervision (OTS) Proceeding

In October, 1990, the Office of Thrift Supervision issued a "Temporary Order," freezing Paul's assets in connection with pending administrative proceedings on Paul's alleged mismanagement of CenTrust Bank of Miami. After the district court denied Paul's motion for a preliminary injunction, Paul asked the 11th Circuit to invalidate the Temporary Order on constitutional and statutory authority grounds. In a terse, per curiam, unpublished order, the court of appeals affirmed the district court's decision. Because of the notoriety of the plaintiff, and the wide publicity given to this case, this victory is important to OTS's enforcement efforts.

David L. Paul v. Office of Thrift Supervision, No. 90-6016. (Nov. 6, 1991). DJ # 145-3-3219.

Attorneys: William Kanter - (202) 514-4575 or (FTS) 368-4575
Bruce G. Forrest - (202) 514-4549 or (FTS) 368-4549

* * * * *

ENVIRONMENT AND NATURAL RESOURCES DIVISION

Department Of Interior Entitled To Obtain Lease Records, Even If Suit To Obtain Royalties Might Be Barred By Six-Year Statute Of Limitations, 28 U.S.C. 2415(a)

Phillips holds various federal and Indian oil and gas leases. The Mineral Management Service (MMS), Department of the Interior, issued an order to Phillips directing Phillips to produce for an MMS audit certain lease records concerning royalty payments. These lease records were more than six years old at the time that the order was issued. Phillips then commenced this litigation and maintained that the order was arbitrary and capricious because any suit which might be subsequently filed by MMS to collect any royalty payment deficiencies which might be disclosed by the audit would be barred by the 6-year statute of limitation set out in 28 U.S.C. 2415(a). The district court agreed with this contention and set aside the agency's order. The Government appealed.

The court of appeals reversed. The court stated that while Section 2415(a) might ultimately bar a suit by the government to recover royalty payment deficiencies, that provision was not applicable to government requests to produce records and, hence, was not relevant here. The court noted that the leases in question granted MMS the right to inspect the lease records, without limitation as to time, that the Federal Oil and Gas Royalty Management Act authorized MMS to compel lessees to produce records for audit purposes, and that federal agencies vested with investigatory powers, such as the MMS, have traditionally been given broad discretion to require the disclosure of information concerning matters within their jurisdiction. Accordingly, Phillips was required to produce the subject lease records for MMS audit, notwithstanding that those records related to royalty payments due more than six years ago.

Phillips Petroleum Company v. Lujan, lOth Cir. No. 90-5122 (December 2, 1991) (McWilliams, Baldock, Dumbauld)

Attorneys: Robert L. Klarquist - (FTS) 368-2731 or (202) 2731
Edward J. Shawaker - (FTS) 368-4010 or (202) 514-4010

* * * * *

Cheyenne River Sioux Not Barred From Regulating Hunting Or Fishing By Non-Indians On Part Of Tribe's Reservation Taken In 1954 By United States For Flood Control Project

The State of South Dakota sued officials of the Cheyenne River Sioux Tribe to enjoin them from regulating hunting or fishing by non-Indians on a 105,000-acre parcel of their Reservation which had been taken by the United States in 1954 for a flood control project. The district court granted the requested injunction. The tribal officials appealed, and at the request of the Interior Department we filed an amicus brief on their behalf.

The Court of Appeals reversed. It pointed out that the Fort Laramie treaty had vested the Tribe with hunting and fishing jurisdiction over the entire Reservation. While the Tribe may have lost that jurisdiction with respect to land granted to non-Indians under Allotment Acts, the flood control statutes at issue here did not have the same effect, since they were not designed to end tribal self government. Instead, they specifically provided for tribal hunting, fishing and other rights in the taken area, and were simply silent on the issue of regulatory jurisdiction. The Court found that the proper inference from congressional silence was that the Tribe retained its regulatory power reserved under the Treaty. The Court noted that the taken area included some 18,000 acres of land which had previously been owned by non-Indians. With respect to these parcels, the Court held that the Tribe would not have jurisdiction unless it could show that the conduct of non-Indians on those lands "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe," citing Montana v. United States, 450 U.S. 544 (1981). The Court remanded for such a determination, but urged the parties to try for a negotiated settlement.

State of South Dakota v. Bourland, 8th Cir. No. 90-5486 (November 21, 1991) (Bowman, Heaney, Bright)

Attorneys: David C. Shilton - (FTS) 368-5580 or (202) 514-5580
Edward J. Shawaker - (FTS) 368-4010 or (202) 514-4010

* * * * *

TAX DIVISION

Supreme Court Grants Certiorari In Case Presenting The Question Whether Its Decision In Davis v. Michigan Applies To Military As Well As Civilian Retirees

On November 27, 1991, the United States Supreme Court granted the plaintiff's petition for certiorari in Barker v. State of Kansas, No. 91-611. This case presents the issue whether Kansas' failure to exempt the retirement benefits of military retirees from state income tax to the same extent that an exemption is provided for benefits paid to retired state employees is contrary to the Supreme Court's decision in Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989). In Davis, the Supreme Court held that Michigan's taxation scheme which taxed retirement benefits paid to state retirees more favorably than those paid to federal retirees violated 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental immunity.

Despite the Supreme Court's decision in Davis, the Supreme Court of Kansas ruled that Kansas could tax the retirement benefits paid to federal military retirees even though it does not tax the retirement benefits paid to state retirees. In distinguishing this case from Davis, the Kansas court reasoned that military retirees were different from civilian retirees in that their "pensions" represented payment for remaining on call for further active duty.

The Government filed an amicus brief in support of the petition for certiorari, taking the position that the difference in status between federal military retirees and federal civilian retirees is not a sufficient basis for discriminatory tax treatment. The Solicitor General has now asked the Tax Division to prepare a draft amicus brief in support of the petitioners.

* * * * *

Residence Seized From Tax Protestors After Two and One-Half Year Battle

After two and one-half years, the Government succeeded in gaining possession of a house the Internal Revenue Service had seized from some tax protestors in Colrain, Massachusetts. The former owners of the house, Gordon Kehler and his wife Betsy Corner, refused to pay income taxes they reported because they were opposed to United States military policies. The Internal Revenue Service levied upon the house and, in an auction held in 1989, ended up purchasing the house for the minimum bid price of $5,100.

The taxpayers, supported by several hundred members of the Pioneer Valley War Tax Refusers Support Committee, refused to vacate the house. Fearing a confrontation if the Service were to attempt eviction on its own, the Tax Division obtained a court order requiring the taxpayers to vacate the property by November 22, 1991. When they refused to comply with that order, we obtained an ex parte order permitting the Marshal to disconnect utilities and to bring the taxpayers before the court to show cause why they should not be held in contempt. The Marshal was given discretion as to the timing, with a view to minimizing potential conflicts and was specifically directed to wait until after Thanksgiving to serve the show cause order.

On December 3, 1991, the United States Marshal took Mr. Kehler into custody and, at the same time, began removing the taxpayers' possessions from the house. Because of the inclement weather, few war protestors were present and events proceeded smoothly.

* * * * *

Guilty Plea In Money Laundering Case

On November 25, 1991, Robert Reese pled guilty in the United States District Court for the Eastern District of California to filing a false personal return for 1985. Reese participated in a so-called "double trust" scheme pursuant to which he treated his receipt of taxable income laundered through foreign trusts as tax-free gifts. Participants in the scheme signed personal service contracts with the foreign trust and had their payroll checks sent directly to that entity. The trust returned 95 percent of the check to the participant, who then characterized the sum received from the trust as a gift. Reese, who owns his own company, also permitted several of his employees to participate in this scheme.

* * * * *

Indictment Returned In Electronic Filing Case

On December 4, 1991, a grand jury in the United States District Court for the Southern District of Texas returned a 53-count indictment against 24 defendants for over $1.7 million in false and fraudulent refund claims. The indictment alleges that from June 1, 1990 through October 18, 1991, 18 Nigerian nationals and six United States citizens conspired to file false 1990 federal income tax returns. The conspirators filed or aided in filing approximately 750 returns, primarily using the Internal Revenue Service's electronic filing capabilities.

The grand jury investigation focused upon two Houston-based return preparation and filing businesses. The indictment charges that John Berry and Ceola Haynes, the joint owners of one of the return preparation businesses, and Azubuike Azouga, the owner of the other return preparation business, recruited unemployed individuals living in low income housing projects, college students, or Nigerian nationals to file false returns.

This case represents the largest electronic filing indictment returned to date.

* * * * *

ADMINISTRATIVE ISSUES

New Address Changes In The Criminal Division

Organized Crime and Racketeering Section
Criminal Division, Department of Justice
Suite 300, 1001 G Street, N.W.
Washington, D.C. 20530

Paul Coffey, Chief	FTS 368-3595
Alexander White, Deputy Chief, Headquarters	FTS 368-3505
Frank Marine, Deputy Chief, Litigation Unit	FTS 368-1569
Cynthia Young, Assistant Chief, RICO	FTS 368-1214
Gerald Toner, Assistant Chief, Labor Unit	FTS 368-3666
Susan Henry, Lead Secretary	FTS 368-3594

The fax numbers are:

Headquarters -	FTS 368-3596
RICO/Labor Unit -	FTS 368-9837
Litigation Unit -	FTS 368-0878

[Note: If calling commercial, the area code is 202; the prefix is 514, then the last four digits.]

* * * * *

Child Exploitation and Obscenity Section
Criminal Division, Department of Justice
3131 Washington Center
1001 G Street, N.W.
Washington, D.C. 20530

Phone: (FTS) 368-5780
(202) 514-5780

Fax: (FTS) 368-1793
(202) 514-1793

* * * * *

Electronic Surveillance Branch
Office of Enforcement Operations
Criminal Division, Department of Justice
Universal South Building
1825 Connecticut Avenue N.W., 10th Floor
Washington, D.C. 20009

Phone: (FTS) 266-4715
(202) 606-4715
Fax: (FTS) 266-4735
(202) 606-4735

Regular mail should be mailed to P.O. Box 7600, Washington, D.C.

* * * * *

CAREER OPPORTUNITIES

Office Of The U.S. Trustee
Pittsburgh, Los Angeles, San Diego, and Rockville, Maryland

The Office of Attorney Personnel Management, Department of Justice, is seeking an experienced attorney to manage the legal activities of the U.S. Trustee's Office in Pittsburgh, Los Angeles, San Diego, and Rockville, Maryland. Responsibilities include assisting with the administration and trying of cases filed under Chapters 7, 11, 12, or 13 of the Bankruptcy Code; maintaining and supervising a panel of private trustees; supervising the conduct of debtors in possession and other trustees; and ensuring that violations of civil and criminal law are detected and referred to the United States Attorney's office for possible prosecution, as well as participating in the administrative aspects of the office.

Applicants must possess a J.D. degree and be an active member of the bar in good standing (any jurisdiction), extensive management experience and at least five years of bankruptcy law experience. Applicants must submit a resume, salary history and SF-171 (Application for Federal Employment), to:

Office of the U.S. Trustee
Department of Justice
1000 Liberty Avenue, Rm. 319
Pittsburgh, Pennsylvania 15222
Attn: Stephen I. Goldring

Office of U.S. Trustee
Department of Justice
300 North Los Angeles Street
Suite 3101
Los Angeles, California 90012
Attn: Anna Covington

Office of U.S. Trustee
Department of Justice
One Metro Square
51 Monroe Street, Plaza Level Two
Rockville, Maryland 20750

Office of U.S. Trustee
Department of Justice
101 W. Broadway, Suite 440
San Diego, California 92101
Attn: Larry G. Ramey

Current salary and years of experience will determine the appropriate grade and salary levels. The possible grade/salary range in Pittsburgh, Pennsylvania and Rockville, Maryland GS-11 (31,116-$40,449) to GS-14 ($52,406-$68,129). The possible grade/salary range in Los Angeles is GS-12 ($40,278-$52,359) to GS-15 ($66,574-$86,549). In San Diego, the possible grade/salary range for this Assistant United States Trustee position could go up to $72,500, depending on experience. These positions are 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%	08-23-91	5.68%
04-07-89	9.51%	06-29-90	8.09%	09-20-91	5.57%
05-05-89	9.15%	07-27-90	7.88%	10-18-91	5.42%
06-02-89	8.85%	08-24-90	7.95%	11-15-91	4.98%
06-30-89	8.16%	09-21-90	7.78%	12-12-91	4.41%
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	George L. O'Connell
California, C	Lourdes G. Baird
California, S	William Braniff
Colorado	Michael J. Norton
Connecticut	Albert S. Dabrowski
Delaware	William C. Carpenter, Jr.
District of Columbia	Jay B. Stephens
Florida, N	Kenneth W. Sukhia
Florida, M	Robert W. Genzman
Florida, S	Dexter W. Lehtinen
Georgia, N	Joe D. Whitley
Georgia, M	Edgar Wm. Ennis, Jr.
Georgia, S	Hinton R. Pierce
Guam	Frederick Black
Hawaii	Daniel A. Bent
Idaho	Maurice O. Ellsworth
Illinois, N	Fred L. Foreman
Illinois, S	Frederick J. Hess
Illinois, C	J. William Roberts
Indiana, N	John F. Hoehner
Indiana, S	Deborah J. Daniels
Iowa, N	Charles W. Larson
Iowa, S	Gene W. Shepard
Kansas	Lee Thompson
Kentucky, E	Karen K. Caldwell
Kentucky, W	Joseph M. Whittle
Louisiana, E	Harry A. Rosenberg
Louisiana, M	P. Raymond Lamonica
Louisiana, W	Joseph S. Cage, Jr.
Maine	Richard S. Cohen
Maryland	Richard D. Bennett
Massachusetts	Wayne A. Budd
Michigan, E	Stephen J. Markman
Michigan, W	John A. Smietanka
Minnesota	Thomas B. Heffelfinger
Mississippi, N	Robert Q. Whitwell
Mississippi, S	George L. Phillips
Missouri, E	Stephen B. Higgins
Missouri, W	Jean Paul Bradshaw

DISTRICT	U.S. ATTORNEY
Montana	Doris Swords Poppler
Nebraska	Ronald D. Lahners
Nevada	Leland E. Lutfy
New Hampshire	Jeffrey R. Howard
New Jersey	Michael Chertoff
New Mexico	Don J. Svet
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	Kevin V. Schieffer
Tennessee, E	Jerry G. Cunningham
Tennessee, M	Ernest W. Williams
Tennessee, W	Edward G. Bryant
Texas, N	Marvin Collins
Texas, S	Ronald G. Woods
Texas, E	Robert J. Wortham
Texas, W	Ronald F. Ederer
Utah	David J. Jordan
Vermont	Charles A. Caruso
Virgin Islands	Terry M. Halpern
Virginia, E	Richard Cullen
Virginia, W	E. Montgomery Tucker
Washington, E	William D. Hyslop
Washington, W	Michael D. McKay
West Virginia, N	William A. Kolibash
West Virginia, S	Michael W. Carey
Wisconsin, E	John E. Fryatt
Wisconsin, W	Kevin C. Potter
Wyoming	Richard A. Stacy
North Mariana Islands	Frederick Black

* * * * *

1/06/92

EXHIBIT A

ATTORNEY GENERAL'S ADVISORY COMMITTEE OF UNITED STATES ATTORNEYS

SUBCOMMITTEES

Civil Issues Subcommittee
Lee Thompson, District of Kansas, Chairman
Karen Caldwell, Eastern District of Kentucky
Richard Cullen, Eastern District of Virginia
J. Michael Fitzhugh, Western District of Arkansas
Tony M. Graham, Northern District of Oklahoma
Jeffrey R. Howard, District of New Hampshire
William D. Hyslop, Eastern District of Washington
E. Montgomery Tucker, Western District of Virginia
James Eldon Wilson, Middle District of Alabama
Robert Q. Whitwell, Northern District of Mississippi (Liaison)

Controlled Substance Subcommittee
J. B. Sessions, III, Southern District of Alabama, Chairman
Michael D. Crites, Southern District of Ohio
William A. Kolibash, Northern District of West Virginia
Michael W. Norton, District of Colorado
Hinton R. Pierce, Southern District of Georgia
Harry Rosenberg, Eastern District of Louisiana
Kenneth W. Sukhia, Northern District of Florida
Ronald G. Woods, Southern District of Texas
Wayne A. Budd, District of Massachusetts (Liaison)

Drug Abuse Prevention & Education Subcommittee
Ronald D. Lahners, Chairman, District of Nebraska
Daniel A. Bent, District of Hawaii
Joseph S. Cage, Jr., Western District of Louisiana
William C. Carpenter, Jr., District of Delaware
Robert W. Genzman, Middle District of Florida
Frederick J. Scullin, Jr., Northern District of New York
Charles H. Turner, District of Oregon
Gene Shepard, Southern District of Iowa (Liaison)

Environmental Crimes Subcommittee
Dennis C. Vacco, Western District of New York, Chairman
Richard D. Bennett, District of Maryland
John E. Fryatt, Eastern District of Wisconsin
Frederick J. Hess, Southern District of Illinois
Robert J. Wortham, Eastern District of Texas
Michael Chertoff, District of New Jersey (Liaison)

Financial Litigation Subcommittee

Charles W. Larson, Northern District of Iowa, Chairman
Lourdes G. Baird, Central District of California
Michael M. Baylson, Eastern District of Pennsylvania
Edgar W. Ennis, Middle District of Georgia
Joyce J. George, Northern District of Ohio
Lee Thompson, District of Kansas
James J. West, Middle District of Pennsylvania
Marvin Collins, Northern District of Texas (Liaison)

Indian Affairs Subcommittee

Linda A. Akers, District of Arizona, Chairman/Liaison
Thomas J. Ashcraft, Western District of North Carolina
John E. Fryatt, Eastern District of Wisconsin
Thomas B. Heffelfinger, District of Minnesota
Doris M. Poppler, District of Montana
Kevin Potter, Western District of Wisconsin
John W. Raley, Jr., Eastern District of Oklahoma
Frederick J. Scullin, Jr., Northern District of New York
Don Svet, District of New Mexico

International Relations Subcommittee

Lourdes G. Baird, Chairman/Liaison
Charles W. Larson, Northern District of Iowa
Otto G. Obermaier, Southern District of New York
J. B. Sessions III, Southern District of Alabama
J. William Roberts, Central District of Illinois

Investigative Agency Subcommittee

Deborah J. Daniels, Southern District of Indiana, Chairman
E. Bart Daniel, District of South Carolina
Ron Ederer, Western District of Texas
J. William Roberts, Central District of Illinois
Joe D. Whitley, Northern District of Georgia
Thomas W. Corbett, Jr., Western District of Pennsylvania (Liaison)

Law Enforcement Coordinating Committee/Victim Witness Subcommittee

George L. Phillips, Southern District of Mississippi, Chairman
Linda Akers, District of Arizona
Charles A. Banks, Eastern District of Arkansas
Michael W. Carey, Southern District of West Virginia
Richard S. Cohen, District of Maine
Deborah J. Daniels, Southern District of Indiana
Frank W. Donaldson, Northern District of Alabama
Ronald F. Ederer, Western District of Texas
Richard A. Stacy, District of Wyoming
Gene Shepard, Southern District of Iowa, (Liaison)

National Environmental Enforcement Council

Dennis C. Vacco, Western District of New York
James J. West, Middle District of Pennsylvania

Obscenity and Child Exploitation Subcommittee
Margaret P. Currin, Eastern District of North Carolina, Chairman
Edward G. Bryant, Western District of Tennessee
Michael J. Norton, District of Colorado
John W. Raley, Jr., Eastern District of Oklahoma
Kenneth W. Sukhia, Northern District of Florida
Robert Q. Whitwell, Northern District of Mississippi
Jeffrey R. Howard, District of New Hampshire (Liaison)

Office Management & Budget Subcommittee
Timothy D. Leonard, Western District of Oklahoma, Chairman
Jean Paul Bradshaw, II, Western District of Missouri
William C. Carpenter, Jr., District of Delaware
Deborah J. Daniels, Southern District of Indiana
Charles W. Larson, Northern District of Iowa
Mike McKay, Western District of Washington
Jay B. Stephens, District of Columbia
J. William Roberts, Central District of Illinois
Joseph M. Whittle, Western District of Kentucky
Thomas W. Corbett, Jr., Western District of Pennsylvania (Liaison)

Organized Crime & Violent Crime Subcommittee
Joe D. Whitley, Northern District of Georgia, Chairman
Lourdes G. Baird, Central District of California
Wayne A. Budd, District of Massachusetts
Michael Chertoff, District of New Jersey
Joyce J. George, Northern District of Ohio
Thomas Heffelfinger, District of Minnesota
Andrew J. Maloney, Eastern District of New York
Stephen J. Markman, Eastern District of Michigan
Dennis C. Vacco, Western District of New York
Otto G. Obermaier, Southern District of New York, (Liaison)

Public Corruption Subcommittee
Michael W. Carey, Southern District of West Virginia, Chairman
Richard D. Bennett, District of Maryland
Fred L. Foreman, Northern District of Illinois
Raymond P. Lamonica, Middle District of Louisiana
Daniel F. Lopez-Romo, District of Puerto Rico
Harry A. Rosenberg, Eastern District of Louisiana
Jay B. Stephens, District of Columbia
E. Bart Daniel, District of South Carolina, (Liaison)

Sentencing Guidelines Subcommittee
Robert H. Edmunds, Middle District of North Carolina, Chairman
Michael M. Baylson, Eastern District of Pennsylvania
Margaret P. Currin, Eastern District of North Carolina
Deborah J. Daniels, Southern District of Indiana
Stephen D. Easton, District of North Dakota
Charles H. Turner, District of Oregon
Ronald G. Woods, Southern District of Texas
Jean Paul Bradshaw, Western District of Missouri, (Liaison)

Southwest Regional Task Force Coordination
Ronald F. Ederer, Western District of Texas, Chairman
William Braniff, Southern District of California
Ronald G. Woods, Southern District of Texas
Linda A. Akers, District of Arizona, (Liaison)

White Collar Crime Subcommittee
William C. Carpenter, District of Delaware, Chairman
Edward G. Bryant, Western District of Tennessee
Maurice O. Ellsworth, District of Idaho
Stephen B. Higgins, Eastern District of Missouri
Leland E. Lutfy, District of Nevada
Joe D. Whitley, Northern District of Georgia
Wayne A. Budd, District of Massachusetts
Marvin Collins, Northern District of Texas, (Liaison)

Bank Fraud Working Group
Richard Bennett, District of Maryland

Computer Office Applications Working Group
William Braniff, Southern District of California, Chairman
Daniel A. Bent, District of Hawaii
William C. Carpenter, District of Delaware
Robert J. Wortham, Eastern District of Texas

Criminal Fines Working Group
Michael M. Baylson, Eastern District of Pennsylvania

Criminal Rules Working Group
Robert H. Edmunds, Middle District of North Carolina
Richard D. Bennett, District of Maryland
Stephen J. Markman, Eastern District of Michigan
William T. McGivern, Northern District of California

Executive Working Group (Federal, State and Local Prosecutors)
Gene W. Shepard, Southern District of Iowa
J. William Roberts, Central District of Illinois
Thomas W. Corbett, Western District of Pennsylvania
Fred Foreman, Northern District of Illinois

Executive Review Board (OCDETF)
Michael J. Norton, District of Colorado
J. William Roberts, Central District of Illinois
J. B. Sessions, III, Southern District of Alabama

Media Relations Working Group
Stephen B. Higgins, Eastern District of Missouri (Chairman)
Mike Baylson, Eastern District of Pennsylvania
Mike McKay, Western District of Washington
Fred Foreman, Northern District of Illinois

Operation Alliance Working Group
Ronald F. Ederer, Western District of Texas, Liaison

Operation Weed and Seed Working Group
Michael Baylson, Eastern District of Pennsylvania, Chairman
Jean Paul Bradshaw, II, Western District of Missouri
Ed Bryant, Western District of Tennessee
Wayne A. Budd, District of Massachusetts
Michael Chertoff, District of New Jersey
Fred Foreman, Northern District of Illinois
John Hoehner, Northern District of Indiana
Thomas W. Corbett, Jr., Western District of Pennsylvania (Liaison)

Securities and Commodities Fraud Working Group
Otto G. Obermaier, Southern District of New York
Fred L. Foreman, Northern District of Illinois

Veterans Re-employment Working Group
Charles W. Larson, Northern District of Iowa

U.S. Attorney Representative to BOP Issues
Frederick J. Hess, Southern District of Illinois

U.S. Attorney Case Management Working Group
Thomas W. Corbett, Jr., Western District of Pennsylvania, Chairman
Jean Paul Bradshaw, II, Western District of Missouri
William C. Carpenter, Jr., District of Delaware
Deborah J. Daniels, Southern District of Indiana
Michael J. Norton, District of Colorado

* * * * *

Department of Justice

EXHIBIT B

FOR IMMEDIATE RELEASE
THURSDAY, DECEMBER 19, 1991

AG
202-514-2007
(TDD) 202-514-1888

Fact Sheet On BCCI Plea Agreement

This Fact Sheet contains a summary of the new charges brought against the Bank of Credit and Commerce International and the plea agreement with BCCI that were announced today by Attorney General William P. Barr.

PART I: What The Plea Accomplishes

o Guilty plea to charges filed in the Supreme Court of New York County on July 29, 1991, and to comprehensive federal racketeering charges filed in Washington, D.C., today which supersede the charges the Justice Department brought on November 15, 1991.

o Dismantling of BCCI as a corporate presence in U.S. and around the world.

o Cooperation by the court-appointed liquidators of BCCI with enforcement authorities in investigating and prosecuting individuals.

o Orderly distribution of BCCI's assets in the U.S.

PART II: Superseding Charges

o Federal superseding criminal information filed in Washington is a comprehensive RICO conspiracy. It includes:

o Acquisition fraud allegations in connection with Independence Bank, Encino, California.

o Acquisition fraud allegations in connection with First American Bank, Washington, D.C.

o Acquisition fraud allegations in connection with National Bank of Georgia.

o Securities fraud in connection with Centrust (Miami) stock parking.

o International money laundering.

o Tax conspiracy.

PART III: Outline of Plea Agreement

o Agreement provides for guilty plea by BCCI to existing and newly filed federal criminal charges in the U.S. District Court in Washington, D.C., and to charges in the Supreme Court of New York County.

o Forfeiture of all BCCI assets in the United States, estimated at about $550 million.

o Cooperation by the Liquidators worldwide to facilitate access by American law enforcement and regulatory agencies to records and witnesses necessary to bring to justice individual wrongdoers related to BCCI's criminal actions.

o Use of part of forfeited funds to support U.S. financial institutions by providing a contingency fund which can be drawn upon to recapitalize viable U.S. institutions secretly acquired by BCCI and serve as a source of partial restitution for possible losses to insurance fund.

o Use of part of the forfeited funds for international court-supervised liquidation of BCCI to compensate innocent victims world-wide.

o An international screening mechanism to insure that only bona-fide victims and creditors receive restitution through the forfeiture mechanism.

o Federal and New York State penalties.

PART IV: Structure of the Plea Agreement

Opening Section

o First six pages list operating rationale.

o Paragraphs 1-3, BCCI agrees to plead to new federal charges.

o Paragraphs 4-7, BCCI agrees to plead to New York charges.

o Paragraph 8a provides for infusion by court-appointed Liquidators of $5 million, with approval of foreign courts, into Independence Bank as part of the forfeiture mechanism.

o Under forfeiture mechanism in paragraphs 9-13, BCCI assets

within the U.S. are forfeited as part of the criminal process in federal court and distributed into a U.S. and Worldwide Fund.

State Liquidation Process

o The forfeiture does not initially reach funds that are part of the New York and California state liquidation processes to ensure full compensation of U.S. claimants but does provide for a forfeiture of the remainder of those liquidation estates. The forfeiture reaches proceeds from the required sale of BCCI stock in American institutions, not the stock itself.

o The U.S. Fund serves as a protective mechanism for U.S. financial institutions and a means of reimbursing various prosecutive agencies for investigative costs.

o The Worldwide Fund is contingent both on cooperation and paragraph 14, which mandates an international screening mechanism for disbursements to creditors and depositors ensuring that only innocent persons receive compensation.

o Under paragraph 15, in the unlikely event that the worldwide liquidation process fully compensates innocent victims, residual money is forfeited to the U.S.

o The Court Appointed Liquidators cooperate with federal prosecutors and the District Attorney of New York under paragraph 17, and with federal and state regulatory officials under paragraph 21. Also under paragraph 21, regulators reserve the right to file compensatory claims in the international liquidation proceedings. The cooperation of the liquidators includes waiver of all privileges in BCCI's documents.

Ban Against BCCI

o Paragraph 18 bans BCCI from doing business in the U.S.

o In paragraph 20, Court-Appointed Fiduciaries (CAF) consent to the $200 million civil monetary penalty by the Federal Reserve.

o Paragraphs 21, 22, and 34 include disposition of existing cases. In paragraph 29, CAFs waive the statute of limitations.

o Paragraphs 24-28 contain details on construction of the agreement. Paragraphs 30-33 contain a recitation of the waiver of corporate trial rights.

#####

STATEMENT BY ATTORNEY GENERAL WILLIAM P. BARR
ON THE BCCI PLEA AGREEMENT

TODAY WE ARE ANNOUNCING THE FILING OF MAJOR RACKETEERING CHARGES AGAINST THE BANK OF CREDIT AND COMMERCE INTERNATIONAL (BCCI). WE ARE ALSO ANNOUNCING BCCI'S AGREEMENT TO PLEAD GUILTY TO THOSE CHARGES AND ALL OTHER PENDING FEDERAL AND STATE CHARGES. THIS ACTION SUCCESSFULLY RESOLVES ALL UNITED STATES CHARGES AGAINST BCCI AS AN INSTITUTION; FORFEITS ALL OF BCCI ASSETS IN THE UNITED STATES; AND, BY REQUIRING FULL BCCI COOPERATION IN ON-GOING INVESTIGATIONS, ALLOWS US TO EXPEDITE THE PURSUIT AND PROSECUTION OF THE INDIVIDUALS INVOLVED IN THE BANK'S WRONGDOING AROUND THE WORLD. THIS AGREEMENT IS THE RESULT OF AN INTENSE AND UNPRECEDENTED COOPERATIVE EFFORT INVOLVING FEDERAL, STATE AND INTERNATIONAL LAW ENFORCEMENT AND REGULATORY AGENCIES.

THERE ARE FOUR KEY ELEMENTS TO THIS PLEA AGREEMENT:

1. BCCI PLEADS GUILTY TO NEWLY FILED FEDERAL CRIMINAL CHARGES IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. THESE CHARGES ACCUSE BCCI OF VIOLATING THE RICO STATUTE THROUGH CONSPIRING TO COMMIT RACKETEERING ACTS INVOLVING FRAUD, MONEY LAUNDERING, TAX EVASION AND CONSPIRACY. SPECIFICALLY, BCCI IS CHARGED WITH SECRETLY ACQUIRING CONTROL AND INFLUENCE OVER FIRST AMERICAN BANK OF WASHINGTON, D.C.; THE INDEPENDENCE BANK OF ENCINO, CALIFORNIA; AND THE NATIONAL BANK OF GEORGIA. THE

RACKETEERING CONSPIRACY ALSO INCLUDES ALLEGATIONS OF FRAUD IN THE SALE OF SECURITIES OF CENTRUST SAVINGS BANK OF MIAMI. THESE CHARGES SUBSUME THE EARLIER FEDERAL CHARGES FILED IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ON NOVEMBER 15.

2. BCCI FURTHER PLEADS GUILTY TO CHARGES FILED BY DISTRICT ATTORNEY ROBERT MORGENTHAU IN THE SUPREME COURT OF NEW YORK COUNTY, INCLUDING GRAND LARCENY IN THE FIRST DEGREE AND A SCHEME TO DEFRAUD IN THE FIRST DEGREE. AS PART OF THIS, BCCI AGREES TO PAY A $10 MILLION FINE TO NEW YORK STATE.

3. THE PLEA AGREEMENT REQUIRES BCCI TO FORFEIT ALL OF ITS ASSETS IN THE UNITED STATES TO THE FEDERAL GOVERNMENT. THESE ASSETS ARE CURRENTLY VALUED AT $550 MILLION. THIS REPRESENTS THE LARGEST SINGLE CRIMINAL FORFEITURE IN HISTORY. ANY OTHER BCCI ASSETS IN THE UNITED STATES THAT MIGHT BE FOUND IN THE FUTURE ALSO WILL BE FORFEITED TO THE FEDERAL GOVERNMENT.

ABOUT HALF OF THE FORFEITED ASSETS WILL BE PLACED IN A SPECIAL FEDERAL FUND. THE MONEY IN THIS FUND IS TO BE USED AS A CONTINGENCY FUND THAT WILL MINIMIZE THE RISK TO U.S. TAXPAYERS BY SERVING AS A SOURCE FOR ADDITIONAL CAPITAL TO U.S. FINANCIAL INSTITUTIONS SECRETLY ACQUIRED BY BCCI OR TO OFFSET LOSSES TO THE U.S. DEPOSIT INSURANCE FUND.

THE OTHER HALF OF THE $550 MILLION WILL BE PUT IN A SECOND FUND TO BE USED IN OTHER COUNTRIES AS PART OF THE INTERNATIONAL COURT-SUPERVISED LIQUIDATION OF BCCI TO COMPENSATE INNOCENT VICTIMS WHO LOST MONEY WHEN THE BANK COLLAPSED. A SIGNIFICANT PROVISION WHICH WE REQUIRED AS PART OF THIS PLEA AGREEMENT MANDATES ESTABLISHMENT OF A SCREENING MECHANISM TO ENSURE THAT THESE FUNDS WILL ONLY BE DISTRIBUTED TO INNOCENT DEPOSITORS, CREDITORS AND OTHER VICTIMS OF BCCI WHOSE CLAIMS ARE NOT DERIVED IN ANY WAY FROM ILLEGAL ACTIVITY.

4. THE FOURTH ELEMENT OF THIS PLEA AGREEMENT RELATES TO COOPERATION BY THE BANK IN OUR ONGOING INVESTIGATIONS. A SIGNIFICANT OBSTACLE TO FEDERAL AND STATE INVESTIGATIVE EFFORTS HAS BEEN THE DIFFICULTY IN OBTAINING EVIDENCE -- DOCUMENTS AND WITNESSES FROM AROUND THE WORLD. BCCI WAS OPERATED TO EVADE REVIEW, AND MUCH OVERSEAS INFORMATION IS SHIELDED BY BANK SECRECY LAWS, PRIVILEGES, AND OTHER HURDLES INHERENT IN OBTAINING EVIDENCE LOCATED IN OTHER COUNTRIES. THE PLEA AGREEMENT REQUIRES BCCI LIQUIDATORS TO PROVIDE FULL COOPERATION TO AMERICAN ENFORCEMENT AGENCIES IN OUR CONTINUING EFFORTS TO BRING TO JUSTICE THE INDIVIDUALS RESPONSIBLE FOR BCCI'S WRONGDOING, AS WELL AS THOSE WHO WERE USING BCCI TO FURTHER THEIR OWN ILLEGAL ACTIVITIES -- INCLUDING DRUG AND ARMS TRAFFICKERS AND MONEY LAUNDERERS. THIS COOPERATION SPECIFICALLY INCLUDES ACCESS TO DOCUMENTS AND WITNESSES AND THE WAIVING OF APPLICABLE PRIVILEGES. THIS COULD TAKE YEARS OFF THE TIME IT WOULD OTHERWISE TAKE TO

INVESTIGATE AND PROSECUTE INDIVIDUAL WRONGDOERS. WE ALSO BELIEVE IT MAY WELL PERMIT US TO MAKE CASES WE OTHERWISE MIGHT NOT BE ABLE TO MAKE IN THE ABSENCE OF COOPERATION.

I WANT TO TAKE A MOMENT TO DESCRIBE HOW THIS AGREEMENT CAME ABOUT.

IN AUGUST I ASKED ASSISTANT ATTORNEY GENERAL BOB MUELLER, IN CHARGE OF THE CRIMINAL DIVISION, TO ESTABLISH A TASK FORCE TO COORDINATE THE INVESTIGATIVE WORK BEING DONE IN VARIOUS U.S. ATTORNEYS OFFICES AROUND THE COUNTRY. I ASKED THAT THE TASK FORCE PURSUE THE POSSIBILITY OF BROAD RICO CHARGES AGAINST BCCI. SUCH CHARGES MIGHT ALLOW THE USE OF FEDERAL FORFEITURE AGAINST BCCI ASSETS. THIS REQUIRED CONSOLIDATION OF CERTAIN ASPECTS OF THE INVESTIGATION WITHIN THE TASK FORCE. THE TASK FORCE -- COMPRISED OF ATTORNEYS FROM THE CRIMINAL DIVISION AND JAY STEPHENS OFFICE HERE IN D.C. -- WORKED AROUND THE CLOCK AND AROUND THE WORLD IN DEVELOPING THE RICO AND FORFEITURE CHARGES TO WHICH BCCI IS PLEADING GUILTY TODAY. THIS AGREEMENT WOULD NOT HAVE BEEN POSSIBLE WITHOUT DEVELOPMENT OF THESE CHARGES.

I WOULD LIKE TO COMMEND BOB MUELLER FOR THE WORK THAT HE AND HIS TEAM ACCOMPLISHED. I WANT TO NOTE PARTICULARLY THE SUPERB WORK DONE BY IRA RAPHAELSON, OUR SPECIAL COUNSEL FOR FINANCIAL INSTITUTION FRAUD; BY LARRY URGENSON AND ALLEN CARVER OF THE

FRAUD SECTION; BY JAY STEPHENS AND HIS LAWYERS, PARTICULARLY MARK DUBESTER, MERRICK GARLAND AND DAVID EISENBURG; AND BY THE FBI INVESTIGATORS, PARTICULARLY, SPECIAL AGENT RICHARDSON.

AS THE TASK FORCE'S WORK PROCEEDED, A MONTH AGO I ASKED THE ACTING DEPUTY ATTORNEY GENERAL, GEORGE TERWILLIGER, TO SPEARHEAD AN EFFORT TO COORDINATE AND RECONCILE WHAT WE WERE DOING WITH THE OTHER PARALLEL CRIMINAL INVESTIGATIONS AND REGULATORY ACTIVITIES UNDERWAY IN THE UNITED STATES, AND ALSO WITH THE INTERNATIONAL ENFORCEMENT AND REGULATORY ACTIONS GOING ON WORLDWIDE.

IT WAS APPARENT THAT WE ALL SHARED THE SAME GOALS: (1) ORDERLY AND COMPLETE DISMANTLING OF BCCI'S OPERATIONS; (2) EFFECTIVE PROSECUTION OF THE INDIVIDUALS INVOLVED IN BCCI'S WRONGDOING; AND (3) DOING JUSTICE FOR THE VICTIMS OF BCCI'S CRIMES.

ALL OUR EFFORTS WERE COMPLICATED BY THE FACT THAT BCCI AS A CORPORATE ENTITY WAS ESSENTIALLY DEFUNCT. ITS LIABILITIES FAR EXCEEDED ITS ASSETS AND COURTS IN THREE COUNTRIES HAD APPOINTED PROVISIONAL LIQUIDATORS TO WIND DOWN ITS AFFAIRS AND SAFEGUARD THE INTERESTS OF INNOCENT DEPOSITORS AND CREDITORS.

FROM OUR STANDPOINT, THE KEY THINGS OF VALUE STILL HELD BY BCCI WERE ITS ASSETS IN THE UNITED STATES AND POTENTIAL EVIDENCE OF WRONGDOING BY INDIVIDUALS.

IN OUR EFFORTS TO FORGE A COORDINATED APPROACH, WE FOUND A WILLING ALLY IN THE DISTRICT ATTORNEY OF NEW YORK, ROBERT MORGENTHAU. HE AND HIS STAFF WERE AN INTEGRAL AND INVALUABLE PART OF THE NEGOTIATION TEAM THAT HAS BROUGHT THIS AGREEMENT ABOUT. THE COOPERATION AND TEAMWORK BETWEEN THE DEPARTMENT OF JUSTICE AND BOB MORGENTHAU'S OFFICE HAS BEEN SUPERB.

I WANT TO PAY TRIBUTE TO GEORGE TERWILLIGER AND THE TEAM THAT SUCCESSFULLY NEGOTIATED THIS INTERNATIONAL AGREEMENT, PARTICULARLY IRA RAPHAELSON, LARRY URGENSON, BETH KASWAN OF THE SOUTHERN DISTRICT OF NEW YORK; AND, FROM BOB MORGENTHAU'S OFFICE, JOHN MOSCOW, MARK SHOELL AND MIKE CHERKASKY, WHO IS HERE TODAY WITH US.

BEGINNING ABOUT FOUR WEEKS AGO, THIS GROUP HAS BEEN ENGAGED IN INTENSIVE AND SOMETIMES AROUND-THE-CLOCK NEGOTIATIONS IN WASHINGTON, NEW YORK AND LONDON. THESE NEGOTIATIONS INCLUDED DISCUSSIONS WITH FIVE U.S. BANKING REGULATORY AGENCIES, THE S.E.C.; STATE REGULATORS IN CALIFORNIA AND NEW YORK; AND ENFORCEMENT, REGULATORY, AND LIQUIDATING AUTHORITIES IN THE UNITED KINGDOM, THE CAYMAN ISLANDS, AND LUXEMBOURG. THE AGREEMENT ALSO REQUIRED COURT APPROVAL IN THOSE THREE COUNTRIES.

THESE EFFORTS HAVE PRODUCED AN HISTORIC EXAMPLE OF DOMESTIC AND INTERNATIONAL COOPERATION IN DEALING WITH A VEXING

ENFORCEMENT AND REGULATORY PROBLEM. THIS IS HOW LAW ENFORCEMENT SHOULD WORK.

IN SUM, THIS IS AN EXTREMELY IMPORTANT STEP FORWARD IN THE BCCI INVESTIGATION. WE WILL CONTINUE TO PURSUE THIS INVESTIGATION AGAINST INDIVIDUAL WRONGDOERS AS AGRESSIVELY AS POSSIBLE, AND WITH THE SAME OUTSTANDING COOPERATION THAT HAS MADE TODAY'S ANNOUNCEMENT POSSIBLE.

I WILL NOW ASK GEORGE TERWILLIGER WITH THE HELP OF BOB MUELLER AND MIKE CHERKASKY TO PROVIDE YOU FURTHER DETAILS AND ANSWER ANY QUESTIONS YOU HAVE.

U.S. Department of Justice

Criminal Division

EXHIBIT C

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 04 1991

MEMORANDUM

TO: All United States Attorneys

FROM: Robert S. Mueller, III
Assistant Attorney General RSM/RLH

SUBJECT: **Child Victim-Witness Provisions of the Crime Control Act of 1990**

The Crime Control Act of 1990, P.L. 101-647, November 29, 1990, contains several titles which set forth provisions addressing the special difficulties encountered by child victims and witnesses in dealing with the judicial process. The relevant statutory provisions were forwarded to you by the Office of Justice Programs on January 30, 1991, and are discussed in the outline attached to this memorandum. Many of the most relevant provisions are found in new section 3509 of Title 18, United States Code, enacted as section 225 of P.L. 101-647. This legislation introduces a number of new practices to the federal system with which federal prosecutors must become familiar. For instance, the statute authorizes the court, in specified circumstances, to order the use of two-way closed circuit television to take a child witness' testimony. It also permits the court to order that a videotaped deposition of the child witness be taken. This Division, in conjunction with the Office for Victims of Crime, will be preparing training materials to assist federal prosecutors in becoming conversant with these new provisions.

The Child Exploitation and Obscenity Section of this Division has been tasked to develop expertise with respect to the new legislation so that appropriate legal advice and practical guidance can be provided to United States Attorneys' Offices. That Section will also develop a brief and pleadings bank to assist your attorneys in dealing with issues that arise in litigation involving these new provisions. I would appreciate your forwarding copies of any pleadings, memoranda or briefs which might be of assistance to other prosecutors to the Child Exploitation and Obscenity Section.

Most of the questions that have arisen concerning this legislation have involved subsection (d) of section 3509. That subsection requires all persons connected with the prosecution or with the defense, as well as court personnel and jurors, to keep all documents disclosing the name of or any other information concerning a child in a secure place. The provision permits the disclosure of such information only to persons who, by reason of their participation in the proceeding, have reason to know the information. Subsection (d) also requires that any document disclosing such information be filed under seal and a redacted version be placed in the public record. The court may issue appropriate orders to protect the identity of the child (including an order closing the courtroom when it is anticipated that such information may be revealed) if the court concludes that "there is a significant possibility that such disclosure would be detrimental to the child." Finally, the subsection states that it does not prohibit disclosure of the name of or other information concerning a child to "the defendant, the attorney for the defendant, a multidisciplinary child abuse team, a guardian ad litem, or an adult attendant, or to anyone to whom, in the opinion of the court, disclosure is necessary to the welfare and well-being of the child." The term "child" is defined in subsection (a) of section 3509 as a person under the age of 18 who is or is alleged to be (a) a victim of a crime of physical abuse, sexual abuse, or exploitation, or (b) a witness to a crime committed against another person. Other definitions in subsection (a) define some of the terms used in the definition of "child." Finally, pursuant to new 18 U.S.C. § 403, a knowing or intentional violation of section 3509 (d) is a criminal contempt punishable by a fine and up to one year's imprisonment.

This memorandum addresses the most common inquiries that have arisen concerning subsection (d).

1) As stated above, the date of enactment of this legislation is November 29, 1990. Any document filed in a case after that date which discloses the name of or other information concerning a child victim or witness should be sealed and a redacted version of the document should be placed in the public record. Further, in any case continuing after November 29, 1990, documents filed prior to that date which contain such child-identifying information should be sealed and redacted versions substituted for the copies in the public record. To achieve this end, the prosecutor should seek an appropriate order from the court pursuant to 18 U.S.C. § 3509(d). Removal of these pre-November 29 documents from the public record is necessary to ensure that the prosecutor is acting in accordance with the intent of legislation. The statute presumes that public exposure of a child victim or witness is harmful to the child. Although the existence of the document on the public record may have already subjected the child to some exposure, further harm to the child by continued public availability of the identifying information can be prevented by redacting it now. While it is not

practically feasible to do anything about child-identifying information in the records of cases which were closed prior to November 29, 1990, every effort should be made to adhere to the provisions of the statute in cases which were open on that date and in cases which have been opened since.

2) In our view, the privacy provisions of subsection (d) should be adhered to in papers filed on appeal in cases that were concluded at the trial level prior to November 29, 1990, even if the child's identity is revealed in the public record of the trial, at least until we get judicial interpretations to the contrary.

3) The privacy provision applies to the defendant, his attorney and others assisting him, as well as to the prosecution. The question has arisen as to what responsibility the prosecutor has with respect to public record documents filed by the defendant that contain child-identifying information. Any pleading filed by the prosecution which sets forth the requirements of the statute will alert the defense to its responsibilities. In addition, the prosecutor may wish to notify defense counsel of the statutory provisions by letter, pointing out the sanctions provided under 18 U.S.C. § 403.

4) As stated above, a "child" to whom the statute pertains must be either a victim of physical or sexual abuse or exploitation, or a witness to a crime committed against another person. We do not believe the statute would apply to a child witness in a drug case or a prostitution case (unless the child is also a victim of physical or sexual abuse or exploitation). Under current caselaw, drug and prostitution offenses are "victimless" crimes and, therefore, are not "committed against another person" as required by section 3509. For the same reason, we do not believe the statute would apply to a child witness in an alien smuggling case. Further, since a child must be a "person," we do not believe the statute protects the identity of a dead child victim. We do believe, however, that the prosecutor should protect the identity of a child victim of prior uncharged acts of abuse in a case where an individual is charged with abusing another child.

5) Where child victims are suing the United States or a federal official in connection with matters arising out of a related criminal case (e.g., a school teacher on an Indian reservation has been prosecuted for child abuse and the children sue the United States because federal officials failed to discover the abuse) the following question has arisen: Does subsection (d) prohibit the Assistant U.S. Attorney who is defending the civil suit from examining the files of the Assistant U.S. Attorney who is prosecuting the criminal case? We believe an argument can be made that the children, by filing suit, have waived any objection to access to the criminal files by the civil Assistant U.S. Attorney. Further, where the criminal case was concluded prior to November 29, 1990, the argument should be made that the statute

does not apply. We would argue that it is not reasonable to deny the government the opportunity to properly defend itself in a civil case or to require the government to expend resources to duplicate work that has already been done in connection with the prosecution. We suggest, however, that in such a situation the civil Assistant U.S. Attorney seek an appropriate order from the court.

6) Although subsection (d) does not prohibit disclosure to the defendant, neither does it mandate such disclosure. The normal rule that defendants are not entitled to government witnesses' names in advance of trial except in capital cases is applicable. Furthermore, cases have arisen in the past in which the prosecutor has concluded that disclosure to the defendant would be hazardous to a child and has sought an appropriate order from the court. Nothing in subsection (d) prohibits the prosecutor from taking such action in the future. Although the defendant in perhaps the majority of cases will be provided access to identifying information, the prosecutor should not fail to seek the assistance of the court if he or she has concluded that disclosure of this information to the defendant would be inappropriate. Further, even in those cases in which there do not appear to be particular circumstances militating against disclosure to the defendant, the prosecutor may wish to seek the court's concurrence with disclosure by filing an appropriate motion to disclose or requiring the defendant to file such a motion. Although subsection (d) expressly states that it does not bar disclosure to the defendant, the court's concurrence will provide additional protection against allegations that the prosecutor improperly disclosed identifying information which would expose him to criminal sanctions.

7) Finally, the privacy provision is based upon a "need to know" concept. Disclosure of identifying information concerning a child victim or witness to United States Attorney's Office personnel or investigative personnel who are not involved with the case and thus have no reason to possess the information is highly inappropriate and may subject the individual who makes the disclosure to criminal sanctions under 18 U.S.C. § 403.

The provisions of subsection (d) are currently the subject of litigation in the District of Oregon, in United States v. Broussard, No. CR 91-39-MA, which is being handled jointly by the United States Attorney's Office and the Civil Rights Division. In opinions dated April 26, 1991, and May 23, 1991, the district court denied motions filed by the defendants and by "The Oregonian" newspaper challenging the applicability of subsection (d) and sustained the provisions against a wide-ranging constitutional attack. Defense counsel have indicated that they plan to attack such other provisions of 18 U.S.C. § 3509 as become relevant. This case may be the vehicle to provide some judicial guidance as to the meaning and proper application of many of the new provisions.

In closing, I wish to call your attention to another important provision of the Act. Section 226 requires certain listed professionals to report suspected child abuse on federal land or in a federally operated or contracted facility and makes it a Class B misdemeanor to fail to report. The reporting requirements are codified at 42 U.S.C. § 13031 and the criminal penalty at 18 U.S.C. § 2258. You should also be aware that a separate reporting requirement for child abuse in Indian country was enacted as part of Title IV of P.L. 101-630, November 28, 1990, and is codified at 18 U.S.C. § 1169. This statute imposes criminal penalties of a fine up to $5,000 or six months' imprisonment or both for failure to report. Related provisions, including definitions used in section 1169 and certain aspects of the reporting procedure, are codified at 25 U.S.C. §§ 3201-3207. Both 42 U.S.C. § 13031 and 18 U.S.C. § 1169 include federal prosecutors among those upon whom a duty to report is imposed.

I cannot overemphasize the importance of these new child victim and witness provisions and the necessity for federal prosecutors to become familiar with them. The Criminal Division is committed to doing all that it can to assist you in this difficult and sensitive area of criminal practice.

Attachment

CHILDREN AS VICTIMS AND/OR WITNESSES

I. INTRODUCTION TO THE STATUTE

A. The Statute

Title II through Title V of the "Crime Control Act of 1990," PL 101-647, effective November 29, 1990, impose new procedures in the investigation and prosecution of cases where children are victims or witnesses. The new procedures are particularly applicable in jurisdictions where Federal cases involving child abuse are common.

The purpose of the new legislation is to protect the rights of victims of crime who are children and to improve the response of the criminal justice system to incidents of child abuse. Officials and employees of the Justice Department have new responsibilities to ensure that children who are crime victims are afforded additional assistance and protections in the prosecution of child abuse offenses.

B. Training Requirements

Training will be required for Justice Department investigative and prosecutorial personnel with respect to the treatment of children in the Federal criminal justice system. Among other reasons, training is important in this area because of the new criminal penalties which may be imposed upon law enforcement personnel for their knowing failure to abide by the statute's procedures to protect the privacy of child victims and child witnesses.

II. RIGHTS AND PROTECTIONS OF CHILD VICTIMS AND CHILD WITNESSES

Title II of the "Crime Control Act of 1990" is also known as the "Victims of Child Abuse Act of 1990" (VCAA). The VCAA provides child victims and child witnesses with a wide range of rights and protections in the investigation and prosecution stages of the Federal criminal justice process.

A. Investigation Phase

The VCAA calls upon all Federal investigators to utilize so-called "multidisciplinary methods" of investigating offenses involving children as victims. A multidisciplinary approach to the investigation of offenses involving children as victims might include the following components:

1) a written agreement between law enforcement, social service, health, and other related agencies to coordinate child abuse investigations;

2) the establishment of an "appropriate site" for interviewing, treating, and counseling child victims;

3) where various agencies are involved, joint as opposed to individual interviews of the child victim;

4) an effort to reduce the number of interviews of the child victim; and

5) to the extent possible, the same agency representative who conducts the initial interview should conduct all subsequent interviews.

B. Prosecution Phase

The VCAA also created new procedures for Federal prosecutors. Entitled "Child Victims' and Child Witnesses' Rights," the new procedures are set forth at Title 18, United States Code, Section 3509. The procedures apply in cases involving a "child." A "child" is defined in the VCAA as a person under the age of 18 who is alleged to be the victim of physical abuse, sexual abuse, exploitation, or a witness to a crime committed against another person. The new procedures are described below.

1) Multidisciplinary Child Abuse Teams

Federal prosecutors shall work with and consult state and local (including tribal) government multidisciplinary child abuse teams whenever possible. Multidisciplinary child abuse teams are professional units composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the handling of child abuse cases.

2) Alternatives to Child's Live In-Court Testimony Where a Case Involves an Alleged Offense Against a Child

a) Closed Circuit 2-Way TV

The court may order that the child's testimony be taken by closed circuit television in a room outside the courtroom. The order may be sought at least 5 days before trial by the Federal prosecutor, the child's attorney, or the child's guardian ad litem. Only the Federal prosecutor, the attorney for the defendant, the child's attorney or guardian ad litem, a judicial officer, a TV equipment operator, and an adult attendant for the child may be present in the room during the child's testimony. The child's testimony must be transmitted into the courtroom and the defendant must be provided a means to communicate with his or her attorney during the child's testimony. Furthermore, the defendant's image and the voice of the judge must be transmitted from the courtroom to the room where the child is testifying.

The court may issue the order upon a finding:

1) that the child is unable to testify in open court in the presence of the defendant because of fear;

2) of a likelihood, established by expert testimony, that the child will suffer emotional trauma if he or she testifies in open court;

3) that the child suffers from a mental or other infirmity; or

4) that the conduct of the defendant or defense counsel causes the child to be unable to testify.

In June 1990 the United States Supreme Court found no violation of the Confrontation Clause of the Sixth Amendment where a child abuse victim's trial testimony was taken by one-way closed-circuit television. In Maryland v. Craig, ___U.S.___, 110 S.Ct. 3157 (1990), the Supreme Court approved the use of such a procedure where the trial court had determined that serious emotional distress would be inflicted upon the child if the child were required to testify in the presence of the defendant.

b) Videotaped Deposition

As an alternative to closed circuit TV, the court may order that a videotaped recording of the child's deposition be taken prior to trial in lieu of live in-court testimony. Application for such an order may be made by the Federal prosecutor, the child's attorney, or the child's parent or guardian. The court's findings in support of an order for a videotaped deposition are the same as the findings required to obtain an order for closed-circuit TV.

The trial judge must preside at a videotaped deposition as if at trial. The defendant is entitled to be present unless he or she is excluded because of conduct which might cause the child to be unable to testify. Where the defendant is excluded from the deposition room, the court must order a 2-way closed-circuit television to relay the defendant's image into the room in which the child is testifying and the child's testimony into the defendant's room. The defendant must be provided a means to communicate with his or her attorney during the deposition. During videotaped deposition, the defendant is specifically afforded the same rights he or she would have at trial, namely, the right to an attorney, the right of witness confrontation, and the right to cross-examine the child through his attorney.

The child's videotaped deposition may be admitted into evidence at trial if at the time of trial the child is unable to testify because of fear, likelihood of emotional trauma, mental or other infirmity, or conduct by the defendant or defense counsel. Additional videotape depositions may be ordered where new evidence is discovered prior to trial. The court may also issue a protective order to protect the privacy of the child. The videotape of the deposition must be destroyed 5 years after the trial court's judgment is entered, but not before a final judgment is entered on appeal, including Supreme Court review.

3) Competency of Child Witnesses

A child is presumed competent to testify at trial. This is consistent with Rule 601 of the Federal Rules of Evidence which provides that every person is competent to testify.

A competency examination regarding a child witness may be conducted only upon:

a) written motion by a party; and

b) a showing on the record, that "compelling reasons" (other than the child's age) exist to conduct such an examination.

Once ordered, a competency examination may not be conducted in the presence of the jury. The examination of the child is generally conducted by the court on the basis of questions submitted by the Federal prosecutor and the attorney for the defendant. The questions must be:

a) appropriate to the age and developmental level of the child;

b) unrelated to the issues at trial; and

c) focused on whether the child can understand and answer simple questions.

In addition to the court, either the Federal prosecutor or the attorney for the defense may examine the child if the court finds that such an examination would not cause the child to suffer emotional trauma. Under no circumstances may a party acting as attorney pro se conduct a competency examination of a child.

The only persons permitted to attend a child's competency examination are the judge, the Federal prosecutor, the attorney for the defendant, a court reporter and persons, such as a guardian ad litem or adult attendant, whose presence is deemed necessary for the welfare and well-being of the child.

4) Protection of the Privacy of Child Victims and Witnesses

All persons connected with a case which involves child victims or witnesses, including Federal prosecutors and investigators, are subject to the following stringent requirements concerning the confidentiality of information:

a) documents which disclose information concerning a child must be kept in a secure place;

b) such documents may be disclosed only to persons who have a need to know because of their participation in the proceedings;

c) all documents filed in court that disclose information concerning a child must be filed under seal; and

d) a copy of documents filed under seal shall also be placed in the public record, with the proviso that all information concerning the child is redacted from the documents.

The court may issue a protective order upon its determination that disclosure of information concerning the child would be detrimental to the child.

NOTE: A knowing or intentional violation of the privacy protection provisions is punishable by a maximum penalty of one year's imprisonment and/or a fine. (See, 18 U.S.C. 403.)

5) Closing the Courtroom

The court may issue an order to close the courtroom during the child's testimony if the court determines that requiring the child to testify in open court would cause:

a) substantial psychological harm to the child; or

b) the child to be unable to communicate effectively.

Such an order would exclude all persons, including the press, who do not have a direct interest in the case.

6) Guardian Ad Litem

To protect the best interests of the child, the court may appoint a guardian ad litem who would:

a) have access to all case records except the

attorneys' work product;

b) have the same access to grand jury materials as the child victim; and

c) be immune from civil or criminal liability while complying with the guardian's lawful duties.

7) Adult Attendant

During a child's testimony at a proceeding the child has the right to be accompanied by an adult attendant. The function of the attendant is to provide the child with emotional support. The attendant is precluded from prompting or providing the child with an answer during the child's testimony.

8) Victim Impact Statement

The probation officer shall prepare a victim impact statement for inclusion in the presentence report and shall consult all appropriate sources, including the multidisciplinary team and the child victim's guardian ad litem, to determine the impact of the offense on the child victim.

9) Miscellaneous

a) Speedy Trial- in a case where a child is a witness the court may designate the case as being of "special public importance." After such a designation, the proceeding is expedited and takes precedence over all others. In deciding whether to grant a continuance in such a proceeding, the court must take into consideration the age of the child and the potential adverse impact any delay might have on the child's well-being. The court must make written findings of fact and conclusions of law.

b) Statute of Limitations- the statute of limitations for offenses involving abuse of a child under the age of 18 years is extended until the child reaches the age of 25.

c) Testimonial Aids- the court may permit the use of appropriate demonstrative aids to assist a child in testifying.

C. Reporting Child Abuse

Federal prosecutors and investigators, among other "covered professionals," who learn of facts that give reason to suspect the occurrence of child abuse on Federal land or in a Federally

operated or contracted facility must report the suspected abuse to a designated agency. Persons making good faith reports are protected from civil and criminal liability.

NOTE: The failure to report suspected incidents of child abuse is a Class B misdemeanor. (See 18 U.S.C. 2258.)

D. Child Care Worker Background Checks

Persons employed by Federal agencies or facilities operated by Federal agencies (including by private contract) who are involved in providing "child care services" shall undergo a criminal history background check within 6 months following the enactment of the "Crime Control Act of 1990." This requirement extends to all Federal personnel who are involved in the investigation of reports of child abuse and neglect. Any conviction for a sex crime, drug felony, or offense involving a child victim may be a ground for denial of employment or dismissal of an employee. Conviction of other crimes may be considered if it bears on the individual's fitness to have responsibility for the safety and well-being of children.

III. ENHANCEMENT OF PENALTIES

Title III of the "Crime Control Act of 1990" is also known as the "Child Protection Restoration and Penalties Enhancement Act of 1990." That title provides or requires the following:

A. The recordkeeping requirements, set forth in 18 U.S.C. 2257, for persons involved in the production of sexually explicit materials are amended.

1) Information in such records may not be used as evidence with respect to violations of law. There is an exception for violations involving furnishing false information in the records.

2) New offenses are created. It is unlawful to:

a) fail to create and maintain the required records;

b) knowingly make a false entry in or fail to make an appropriate entry in records required to be kept; and

c) sell or transfer material containing visual depictions covered by the statute and produced using material mailed or shipped in interstate or foreign commerce, or intended

> for such mail or shipment, without indicating thereon the location of the records required to be kept in connection with the production of the materials.

NOTE: Violation of these provisions is punishable by up to 2 years' imprisonment and/or a fine. Repeat offenders may be punished by up to 5 years' imprisonment. (See, 18 U.S.C. 2257.)

B. Increased penalties (from 5 to 15 years) for the sexual abuse of a minor. (See, 18 U.S.C. 2243(a);)

C. The U.S. Sentencing Commission to amend the sentencing guidelines applicable to sexual crimes against children to permit the imposition of more substantial penalties in such cases, if the Sentencing Commission determines that current penalties are inadequate.

D. Transfers the provisions regarding selling and possession with intent to sell on Federal property, in the special maritime and territorial jurisdiction, and in Indian country of visual depictions of minors engaged in sexually explicit conduct from 18 U.S.C. 1460 to 18 U.S.C. 2252; further amends Section 2252 to criminalize the possession on Federal property, in the special maritime and territorial jurisdiction, and in Indian country of three or more visual depictions of minors engaged in sexually explicit conduct; further amends Section 2252 by broadening subsection (a)(2) to include covered visual depictions which merely contain material which has been mailed or has moved in interstate or foreign commerce.

IV. SPECIAL RULE FOR OFFENSES INVOLVING CHILDREN

Title IV of the "Crime Control Act of 1990" provides a special rule to be applied where violations of 18 U.S.C. 1201 (kidnaping) involve a child as the victim and the offender is at least 18 years of age and is not the victim's close relative or legal custodian. In such cases the United States Sentencing Commission is directed to amend the sentencing guidelines to enhance the penalties which the sentencing court may impose, according to the level of violence or mistreatment of the victim.

V. MISSING CHILD REPORTS

Title XXXVII of the "Crime Control Act of 1990" requires each federal, state and local law enforcement agency to report each known case of a missing child under age 18 to the National Crime Information Center of the Department of Justice. The Attorney General will publish an annual statistical summary of such reports.

VI. ADDITIONAL PROTECTIONS FOR ALL CRIME VICTIMS

Title V of the "Crime Control Act of 1990" is also known as the "Victims' Rights and Restitution Act of 1990." This portion of the new statute applies to all victims of crime, including children.

A. Federal investigators and prosecutors are required under this title to make their "best efforts" to see that victims are accorded the following rights:

1) to be treated with fairness and with respect for the victim's dignity and privacy;

2) to be reasonably protected from the accused offender;

3) to be notified of court proceedings;

4) to be present at all public court proceedings;

5) to confer with the attorney for the government;

6) to restitution; and

7) to information about the conviction, sentencing, imprisonment, and release of the offender.

With respect to restitution, it should be noted that restitution is only available in cases arising under Title 18, United States Code, and certain other statutory provisions. (See 18 U.S.C. 3663.)

B. Title V of the new statute entitles crime victims to various services which must be performed by responsible Justice Department officials who are to be so designated by the Attorney General. In effect, the designated officials are responsible for identifying victims of crime and ensuring that the victims are afforded the rights set forth above. It should be noted that many of these services are already being provided under guidelines promulgated by the Attorney General pursuant to the Victim and Witness Protection Act of 1982, P.L. 97-291 (October 12, 1982).

Guideline Sentencing Update

EXHIBIT D

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 13 • DECEMBER 27, 1991

Departures

MITIGATING CIRCUMSTANCES

Eleventh Circuit holds downward departure for diminished capacity properly precluded for violent offense. Defendant pled guilty to bank robbery and a related weapon charge. He argued for a downward departure, claiming that he committed the offense while suffering from severe depression and diminished capacity as a result of serious financial problems. The district court indicated that "diminished capacity . . . would apply to this case," but ruled that it had no discretion to grant a departure because § 5K2.13, p.s., prohibits departure for diminished capacity in violent offenses. The appellate court affirmed.

Defendant claimed on appeal that his mental state could be considered under 18 U.S.C. § 3661, which states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant when imposing sentence. Under 28 U.S.C. § 994(d), however, the Sentencing Commission was required to place limits on the consideration at sentencing of certain information, including "mental and emotional condition." Any conflict or inconsistency between the two sections is resolved, the appellate court held, by 18 U.S.C. § 3553(b), which directs courts to impose sentence within the guideline range barring circumstances not adequately considered by the Commission: "By reading § 3661 together with § 3553(b) it becomes clear that § 3661 is designed to make sure that no limitation is placed on information available to the district court, as long as the information was not already considered by the Sentencing Commission in formulating the guidelines. . . . Hence, § 3661 is a safety net. . . . [T]he Sentencing Commission determined that mental and emotional conditions could not be considered as a mitigating factor if the defendant committed a violent crime. Since Fairman committed armed bank robbery, a crime of violence, his mental and emotional condition could not be considered" for departure.

U.S. v. Fairman, 947 F.2d 1479 (11th Cir. 1991).

EXTENT OF DEPARTURE

U.S. v. Rosado-Ubiera, 947 F.2d 644 (2d Cir. 1991) (per curiam) (vacating sentence and remanding: even though sentencing court intended to depart downward, it failed to determine whether defendant should receive downward adjustment under § 3B1.2(a) for minimal role in offense—applicable guideline range is starting point for departure, and here the downward departure resulted in longer sentence than lower end of guideline range that would have applied if role in offense dispute was resolved in defendant's favor). *See U.S. v. McCall*, 915 F.2d 811, 813 (2d Cir. 1990) (guideline range is point of reference for any departure and should be correctly calculated); *U.S. v. Talbott*, 902 F.2d 1129, 1134 (4th Cir. 1990) (same); *U.S. v. Roberson*, 872 F.2d 597, 608 (5th Cir.) (same), *cert. denied*, 110 S. Ct. 175 (1989).

SUBSTANTIAL ASSISTANCE DEPARTURE

U.S. v. Robinson, No. 89-3262 (11th Cir. Dec. 9, 1991) (per curiam) (vacated and remanded because district court granted downward departure without ruling on government's § 5K1.1, p.s., motion or otherwise articulating reasons for departure as required by 18 U.S.C. § 3553(b): "[T]he sentencing judge, when faced with a section 5K1.1 motion, must rule on it before imposing sentence. . . . On remand, therefore, the court shall, after finding the relevant sentencing facts and the appropriate guideline range, rule on the Government's motion. If the court denies the motion, it shall then give the defendant an opportunity to articulate grounds, if any he has, for a downward departure . . . .").

Offense Conduct

DRUG QUANTITY

U.S. v. Tabares, No. 91-1273 (1st Cir. Nov. 14, 1991) (Breyer, C.J.) (court properly included in base offense level quantities of drugs evidenced by entries in notebook found in conspiracy defendant's apartment at time of arrest, where evidence indicated those amounts were part of conduct related to offense of conviction, *see* § 2D1.4, comment. (n.2) ("judge may consider . . . financial or other records")). *Accord U.S. v. Cagle*, 922 F.2d 404, 407 (7th Cir. 1991); *U.S. v. Ross*, 920 F.2d 1530, 1538 (10th Cir. 1990). *See also U.S. v. Straughter*, No. 91-3002 (6th Cir. Nov. 14, 1991) (Brown, Sr. J.) (records of drug payments found in co-conspirator's purse provided support for finding of larger amount of cocaine than that seized during arrests).

U.S. v. Hicks, No. 90-5627 (4th Cir. Oct. 23, 1991, amended Nov. 21, 1991) (Houck, Dist. J.) (sentencing court properly converted cash seized from defendant, which had come from drug sales related to offense of conviction, into estimated cocaine quantity to calculate base offense level under §§ 2D1.1(a)(3), 2D1.4, comment. (n.2)). *Accord U.S. v. Gerante*, 891 F.2d 364, 368-69 (1st Cir. 1989). *See also U.S. v. Duarte*, No. 91-1203 (7th Cir. Dec. 10, 1991) (Flaum, J.) (dividing cash amount by price per kilogram to estimate quantity of cocaine "is perfectly acceptable under the Guidelines").

Relevant Conduct

U.S. v. Duarte, No. 91-1203 (7th Cir. Dec. 10, 1991) (Flaum, J.) (vacating sentence and remanding: district court found defendant accountable for 5 kilograms of cocaine, not just 1.177 kilograms actually seized, but did not explicitly find additional cocaine was "part of the same course of conduct or common scheme or plan" as conspiracy and possession offenses of conviction, § 1B1.3(a)(2)—"court should explicitly state and support, either at the sentencing hearing or (preferably) in a written statement of reasons, its finding that the unconvicted activities bore the necessary relation to the convicted offense").

Adjustments

Acceptance of Responsibility

U.S. v. Reed, No. 90-6502 (6th Cir. Dec. 4, 1991) (Milburn, J.) (§ 3E1.1 reduction properly denied defendant who continued credit card fraud while in jail awaiting sentencing: "continued criminal conduct is incompatible with the idea of acceptance of responsibility"; willingness to acknowledge offense and accept punishment insufficient absent contrition, which "has been recognized by this court as a component of a defendant's acceptance of responsibility. Contrition may be the best predictor of a successful rehabilitation, and those who . . . continue their crimes in jail and do not voluntarily withdraw from their criminal conduct demonstrate the opposite").

Role in Offense

U.S. v. Rotolo, No. 91-1436 (1st Cir. Dec. 3, 1991) (Breyer, C.J.) (Affirming enhancement for aggravating role under § 3B1.1(c) and holding that sentencing court may, but is not required to, compare defendant's role to "average" participant in that type of offense. Court distinguished *U.S. v. Daughtrey*, 874 F.2d 213, 216 (4th Cir. 1989), which concerned adjustment under § 3B1.2 for mitigating role and stated that "each participant's individual acts and relative culpability [should be measured] against the elements of the offense of conviction." The court here noted that language in the commentary to § 3B1.2, which indicates a defendant's mitigating role is to be compared to "the average participant," is absent from the guideline and commentary for aggravating roles in § 3B1.1. The court concluded: "We do not read the 'aggravating role' guideline as absolutely forbidding a court from making comparisons to the 'average' participant. . . . But, the Guideline does not legally require it to do so."). *See also U.S. v. Palinkas*, 938 F.2d 456, 460 (4th Cir. 1991) (applying *Daughtrey*, adding: "The critical inquiry is thus not just whether the defendant has done fewer 'bad acts' than his codefendants, but whether the defendant's conduct is material or essential to committing the offense."); *U.S. v. Caruth*, 930 F.2d 811, 815 (10th Cir. 1991) (in "minimal participant" case, holding "Guidelines permit courts . . . to compare a defendant's conduct . . . with the conduct of an average participant in that type of crime").

Obstruction of Justice

U.S. v. De Felippis, No. 90-3603 (7th Cir. Dec. 6, 1991) (Moran, Chief Dist. J., by desig.) (reversed: false statements to probation officer about employment history were not "material" because "the factual inaccuracies in his representations could not have influenced his sentence, even if believed," *see* § 3C1.1, comment. (nn.3(h) & 4(c); note, however, that even if not "material," "false information does . . . have a bearing on the trial court's rejection of a . . . reduction for acceptance of responsibility"). *See also U.S. v. Tabares*, No. 91-1273 (1st Cir. Nov. 14, 1991) (Breyer, C.J.) (reversed: obstruction under § 3C1.1 must be both willful and material—here defendant had provided false social security number to probation officer, but there was no evidence he did so "willfully" or materially impeded presentence investigation).

U.S. v. Hicks, No. 90-5627 (4th Cir. Oct. 23, 1991, amended Nov. 21, 1991) (Houck, Dist. J.) (proper to apply § 3C1.1 enhancement to defendant who threw cocaine out of car during high-speed chase, even though he later helped recover the drugs, and it was not inconsistent to apply § 3C1.1 and then grant § 3E1.1 reduction for cooperation, *see* § 3E1.1, comment. (n.4); enhancement under § 3C1.1 also warranted for false financial information, which would have affected imposition of fine, even though information was later corrected).

Sentencing Procedure

Presentence Interview

U.S. v. Hicks, No. 90-5627 (4th Cir. Oct. 23, 1991, amended Nov. 21, 1991) (Houck, Dist. J.) ("*Miranda* warnings are not required prior to routine presentence interviews." *Accord U.S. v. Cortes*, 922 F.2d 123, 126–27 (2d Cir. 1990); *U.S. v. Rogers*, 921 F.2d 975, 979–80 (10th Cir.), *cert. denied*, 111 S. Ct. 113 (1990); *U.S. v. Davis*, 919 F.2d 1181, 1186–87 (6th Cir. 1990); *U.S. v. Jackson*, 886 F.2d 838, 841–42 n.4 (7th Cir. 1989) (per curiam). Similarly, "there is no [Sixth Amendment] right at a routine presentence interview because [it] is not a critical stage of the criminal proceedings." *Accord U.S. v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 792 (1991); *Jackson*, 886 F.2d at 845. *Contra U.S. v. Herrera-Figueroa*, 918 F.2d 1430, 1433 (9th Cir. 1990) (must allow attorney if requested by defendant). In any event, defendant had no right to make false statement to probation officer: "At best, Hicks could have refused to answer the question or requested the presence of his attorney. Under no circumstances was he free to give a false answer.").

Criminal History

Career Offender Provision

U.S. v. Wilson, No. 90-5203 (4th Cir. Dec. 3, 1991) (Wilkinson, J.) (Guidelines mandate "categorical approach" to whether predicate offense constitutes "crime of violence" under § 4B1.1 "rather than a particularized inquiry into the facts underlying the conviction," and district court properly refused to look into actual circumstances of defendant's 1976 robbery conviction because robbery is listed as violent crime in § 4B1.2, comment. (n.2) (1991): "Under the plain language of the Guidelines, we conclude that Wilson's robbery offense constitutes a 'crime of violence' and that we need not—indeed, must not—look to the specific facts and circumstances underlying it."). *Accord U.S. v. McAllister*, 927 F.2d 136, 138–39 (3d Cir. 1991); *U.S. v. Selfa*, 918 F.2d 749, 751 (9th Cir.), *cert. denied*, 111 S. Ct. 521 (1990); *U.S. v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2056 (1991); *U.S. v. Carter*, 910 F.2d 1524, 1532–33 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1628 (1991).

Remanded for Rehearing En Banc, Vacated:

U.S. v. Davern, 937 F.2d 1041 (6th Cir. 1991) (sentencing steps prescribed in § 1B1.1 are inconsistent with 18 U.S.C. § 3553, courts directed to follow statute rather than guideline for departures) (vacated Sept. 26, 1991). *See* 4 *GSU* #6.

U.S. v. Silverman, 945 F.2d 1337 (6th Cir. 1991) (courts should conduct evidentiary hearing in accordance with Confrontation Clause when disputed evidence could increase sentence) (vacated Dec. 4, 1991). *See* 4 *GSU* #9.

Certiorari Granted:

U.S. v. Wade, 936 F.2d 169 (4th Cir. 1991) (absent commitment in plea agreement to move for substantial assistance departure, government need not explain refusal to make motion) (cert. granted Dec. 9, 1991). *See* 4 *GSU* #5.

Guideline Sentencing Update

Federal Judicial Center

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

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

Volume 4 • Number 12 • December 5, 1991

Offense Conduct

Drug Quantity

Seventh Circuit emphasizes that quantity of drugs attributed to co-conspirators must be calculated for each individual based on what was "reasonably foreseeable" within the scope of that defendant's agreement. Defendants were part of a large-scale heroin distribution scheme that operated over a three-year period. Some were in the conspiracy from the start while others joined at various stages. All appealed their sentences, claiming that the district court improperly used the entire amount of heroin distributed during the course of the conspiracy to calculate their base offense levels under U.S.S.G. § 1B1.3(a). The appellate court affirmed some sentences, but remanded others for individualized consideration of those defendants' scope of involvement in the conspiracy and the amount of heroin for which they could be held responsible.

Under the relevant conduct guideline, a co-conspirator is held accountable for "conduct of others in furtherance of the [conspiracy] that was reasonably foreseeable by the defendant." § 1B1.3(a), comment. (n.1). The commentary further states that "the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline."

Based on the Guidelines and parallel case law on conspiracy, the appellate court concluded that "there are two limiting factors on the use of conduct in calculating the sentence of a conspiracy defendant. The conduct must be 1) in furtherance of the conspiracy and 2) reasonably foreseeable to the defendant." In a drug conspiracy, a defendant "will not be held accountable for prior or subsequent conduct that was not a reasonably foreseeable element of the criminal activity agreed to by the defendant, even if the conduct involved the distribution of the same controlled substance by other defendants. . . . [T]he most relevant factor in determining the reasonable forseeability of conduct engaged in by co-conspirators in an intricate and longstanding conspiracy is the scope of the defendant's agreement with the other conspirators."

Accordingly, the court held that a defendant who was a member of the conspiracy for less than two months but allegedly "knew of" the scope of the conspiracy prior to joining (he had been a heroin user and lived across the street from the leader of the conspiracy) should not have had his offense level based on all of the drugs distributed: "Reasonable foreseeability refers to the scope of the agreement that the defendant entered into when he joined the conspiracy, not to the drugs defendant may have known about as a function of his individual consumption. . . . To sentence a defendant based on the entire amount of drugs distributed requires that this amount be reasonably foreseeable with respect to the agreement that the defendant entered into. He may not be held responsible for the total quantity of drugs simply because he might have been aware that [the leader of the conspiracy] operated a large-scale drug organization."

Remanding, the court instructed the sentencing court "to scrutinize the agreement that [each] individual defendant entered into to determine whether he actually agreed to become involved in a conspiracy to distribute a given quantity of drugs—here more than 10 kilograms of heroin. . . . In order to sentence a defendant based on the entire quantity of drugs distributed in a conspiracy, when the defendant has joined the conspiracy in its late stages, it must be shown that those earlier transactions were reasonably foreseeable to him. The Government must show that the defendant agreed to a conspiracy whose scope included so large a distribution of heroin. The judge may sentence a late entrant on the basis of all the drugs distributed only if the earlier distributions occurred as part of the conspiracy to which the defendant agreed. . . . Furthermore, he may not be sentenced according to all of the heroin distributed after he agreed to join the conspiracy if in agreeing to conspire, he reasonably foresaw a lesser amount."

The court added that the sentencing court must "set[] forth the reasons why [a] particular amount of drugs was reasonably foreseeable" to each defendant for sentencing purposes.

U.S. v. Edwards, 945 F.2d 1387 (7th Cir. 1991).

U.S. v. Restrepo-Contreras, 942 F.2d 96, 99 (1st Cir. 1991) (following *Chapman v. U.S.*, 111 S. Ct. 1919 (1991) (weight of LSD "mixture" includes carrier), and *U.S. v. Mahecha-Onofre*, 936 F.2d 623, 626 (1st Cir. 1991) (suitcase made from cocaine chemically bonded with acrylic was "mixture"), holding that total weight of statues made of twenty-one kilograms of beeswax and five kilograms of cocaine should be counted under § 2D1.1 as "mixture or substance" containing cocaine). *But see U.S. v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991) (unusable, poisonous by-products should not be included in weight of methamphetamine mixture); *U.S. v. Rolande-Gabriel*, 938 F.2d 1231, 1238 (11th Cir. 1991) (weight of "unusable" part of cocaine mixture should not be included).

Relevant Conduct

Incriminating Statements During Cooperation

Fourth Circuit holds that sentencing court may not use information protected under U.S.S.G. § 1B1.8(a) as basis for denying substantial assistance departure. Defendant pled guilty to possession of cocaine with intent to distribute. The plea agreement stated that defendant would assist the government in the investigation of others, and, pursuant to

U.S.S.G. § 1B1.8(a), any self-incriminating evidence revealed as part of his cooperation would not be used against him in any further criminal proceedings. In return the government would recommend a departure for substantial assistance, a sentence at the low end of the guideline range, and a reduction for acceptance of responsibility. The defendant and government fulfilled their respective parts of the bargain. However, during defendant's cooperation he admitted to selling sizable quantities of marijuana over several years, and the district court took this into account in denying the substantial assistance motion and sentencing defendant at the top of the guideline range. Defendant appealed, arguing that § 1B1.8(a) precluded the use of this information.

The appellate court agreed and reversed. Application Note 1 to § 1B1.8(a) states in part that "the policy of the Commission is that where a defendant as a result of [such] a cooperation agreement . . . reveals information that implicates him in unlawful conduct not already known to the government, such defendant should not be subject to an increased sentence by virtue of that cooperation where the government agreed that the information revealed would not be used for such purpose." The court found that "there is no question that, contrary to the guidelines' expressed policy, Malvito has been 'subjected to an increased sentence by virtue of [his] cooperation where the government agreed that the information revealed would not be used for such purpose.' Were we to allow Malvito's sentence to stand, not only would this policy be frustrated, but an important and common investigative tool would lose some potency."

The court concluded: "The district court is not bound by the government's recommendation that it make a substantial assistance departure. On the other hand, U.S.S.G. § 1B1.8 requires it to honor the government's promise that self-incriminating information volunteered by the defendant under a cooperation agreement will not subject the defendant to a harsher sentence. In short, the district court could have denied Malvito the downward departure for almost any reason, but not for the reason it gave." The court noted the general rule that refusals to depart "are ordinarily not appealable," but held that this sentence "was imposed as a result of an incorrect application" of the guidelines, and as such was appealable under 18 U.S.C. § 3742(a)(2). Because resentencing was required on this ground, the court did not decide the issue of sentencing at the top of the guideline range.

U.S. v. Malvito, 946 F.2d 1066 (4th Cir. 1991) (Wilkins, J., dissenting).

Departures

Mitigating Circumstances

U.S. v. Harrington, No. 90-3176 (D.C. Cir. Oct. 25, 1991) (Ginsburg, J.) (Silberman, J., dissenting; Edwards, J., concurring) (reversing 741 F. Supp. 968 (D.D.C. 1990)—"post-offense [drug] rehabilitation is the type of conduct properly considered in determining whether [defendant] is eligible for a reduction in sentence under U.S.S.G. § 3E1.1" for acceptance of responsibility and therefore not a proper ground for downward departure, *accord U.S. v. Van Dyke*, 895 F.2d 984, 986–87 (4th Cir.), *cert. denied*, 111 S. Ct. 112 (1990); but agreeing with *U.S. v. Sklar*, 920 F.2d 107, 115–17 (1st Cir. 1990), that an "extraordinary" case of rehabilitation could warrant departure). *See also U.S. v. Martin*, 938 F.2d 162, 163–64 (9th Cir. 1991) (departure for drug rehabilitation precluded by § 5H1.4, p.s.); *U.S. v. Pharr*, 916 F.2d 129, 133 (3d Cir. 1990) (same), *cert. denied*, 111 S. Ct. 2274 (1991). *Contra U.S. v. Maddalena*, 893 F.2d 815, 818 (6th Cir. 1989).

U.S. v. White, 945 F.2d 100, 102 (5th Cir. 1991) (reversing downward departure based on defendant's youth: "The guidelines have adequately taken into consideration the defendant's age in § 5H1.1, specifying extremely limited circumstances under which a sentencing court may use age in departing from the applicable range. The circumstance of being young is not a permissible consideration under the guidelines."). *Accord U.S. v. Diagi*, 892 F.2d 31, 34 (4th Cir. 1990).

Aggravating Circumstances

U.S. v. Klotz, 943 F.2d 707, 710 (7th Cir. 1991) (U.S.S.G. § 5K1.2, p.s.—"A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor"—precludes upward departure for failure to assist authorities but "does not forbid a judge to consider the extent of assistance when selecting a sentence within the guideline range").

Adjustments

Obstruction of Justice

U.S. v. Austin, No. 91-1245 (1st Cir. Oct. 8, 1991) (Hill, J.) (reversed—district court improperly refused to impose enhancement despite finding that defendant committed perjury during hearing on his motion to withdraw guilty plea: "[W]e hold that, upon finding Appellant had perjured himself during the Fed. R. Crim. Pro. 32(d) hearing, the district court was, without discretion, mandated to enhance the Appellant's base offense level by two levels as prescribed by . . . § 3C1.1. The offense level enhancement applies to unsuccessful and foolish attempts as well as the more savvy attempts at perjury. The enhancement applies regardless of whether the perjury was attempted before a judge or jury."). *Accord U.S. v. Avila*, 905 F.2d 295, 297 (9th Cir. 1990) (enhancement mandatory once court finds facts sufficient to constitute obstruction); *U.S. v. Roberson*, 872 F.2d 597, 602 (5th Cir.), *cert. denied*, 110 S. Ct. 175 (1989).

Appellate Review

U.S. v. Jones, No. 90-3266 (D.C. Cir. Oct. 25, 1991) (Wald, J.) (adopting three-part test set forth in *U.S. v. Diaz-Bastardo*, 929 F.2d 798, 800 (1st Cir. 1991) (*see* 4 *GSU* #3), for reviewing departure based on both proper and improper grounds). *Accord U.S. v. Glick*, 946 F.2d 335 (4th Cir. 1991). For other circuits' positions see 4 *GSU* #11.

Note: *U.S. v. Galloway*, 943 F.2d 897 (8th Cir. 1991), which narrowed the scope of the relevant conduct provision, § 1B1.3(a), was vacated Nov. 20, 1991, and rehearing en banc granted with argument set for Jan. 6, 1992.

EXHIBIT
E

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

Vol. 3, No. 4 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | December 16, 1991

IN THIS ISSUE:

- 8th Circuit finds role enhancement improperly based on collateral conduct. Pg. 3
- 11th Circuit rules guidelines do not conflict with statute prohibiting limitations on sentencing information. Pg. 3
- 4th Circuit affirms firearm enhancement despite acquittal on gun charge. Pg. 4
- 1st Circuit rules aggravating role does not require conduct more culpable than average. Pg. 7
- 7th Circuit rules misrepresentation of employment status did not justify obstruction enhancement. Pg. 8
- 8th Circuit holds court may depart downward for extraordinary restitution. Pg. 9
- 1st Circuit rules defendant waived objection to presentence report by failing to object to probation officer's response. Pg. 10
- 9th Circuit rules interest cannot be assessed on older restitution orders. Pg. 11
- 11th Circuit holds court may depart downward for severe mental illness. Pg. 13
- 1st Circuit finds defendant was denied right to counsel at sentencing. Pg. 13
- 2nd Circuit prohibits claimant from contesting forfeiture while fighting extradition. Pg. 14

Note: The new amendments to the Sentencing Guidelines became effective on November 1, 1991. This newsletter summarizes the most significant amendments, by topic. The amendment summaries may be found under the index numbers that apply to them.

Guideline Sentencing, Generally

Dissenter says Supreme Court should decide whether guideline amendments apply retroactively. (131) Dissenting from the denial of a writ of certiorari in these cases, Justice White noted that most courts of appeals apply guidelines amendments retroactively if they clarify, but do not substantively change, the operation of an existing guideline. See *U.S. v. Caballero*, 936 F.2d 1292, 1299 n. 8 (D.C. Circuit 1991); *U.S. v. Urbanek*, 930 F.2d 1512, 1514-1515 (10th Cir. 1991); *U.S. v. Lillard*, 929 F.2d 500, 502-503 (9th Cir. 1991); *U.S. v. Fiala*, 929 F.2d 285, 290 (7th Cir. 1991); *U.S. v. Nissen*, 928 F.2d 690, 694-695 (5th Cir. 1991); *U.S. v. Perdomo*, 927 F.2d 111, 116-117 (2nd Cir. 1991); *U.S. v. Fells*, 920 F.2d 1179, 1184 (4th Cir. 1990). In contrast, the 8th Circuit has held that an amendment may not be applied before its effective date. See *U.S. v. Watts*, 940 F.2d 332, 333 (8th Cir. 1991); *U.S. v. Dortch*, 923 F.2d 629, 632 n. 2 (8th Cir. 1991). In the present cases, the 6th Circuit did not apply an amendment that took effect after the petitioners had been sentenced in district court, even though an earlier 6th Circuit case, *U.S. v. Sanchez*, 928 F.2d 1450, 1458-1459 (6th Cir. 1991) had done so. Citing *Braxton v. U.S.*, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), Justice White noted that the Sentencing Commission "has not addressed this recurring issue," and accordingly he would grant certiorari. *Early v. U.S.*, No. 90-8126, and *Coleman v. U.S.*, No. 90-8184, 112 S.Ct. __ (Oct. 15, 1991) (Justice White dissenting).

© 1991, Del Mar Legal Publications, Inc., 2670 Del Mar Heights Rd., Suite 247, Del Mar, CA 92014. Tel: (619) 755-8538

SECTION

100 Pre-Guidelines Sentencing, Generally

110 Guidelines Sentencing, Generally
115 Rule 35 Motion to Correct Sentence
120 Constitutional Issues, Generally
125 Double Counting/Double Jeopardy
130 Ex Post Facto/Retroactivity, Generally
131 Amendments To Guidelines
132 Continuing Offenses/Conspiracy
135 Due Process
140 Cruel and Unusual Punishment
145 Statutory Challenges To Guidelines

150 Application Principles, Gen. (Chap. 1)
160 Definitions (More Than Minimal Planning, Etc.) (§1B1.1)
165 Stipulation to More Serious Offense *(See also 795)* (§1B1.2)
170 Relevant Conduct, Generally (§1B1.3) *(For Drug Relevant Conduct, see 260*
175 Acquitted, Dismissed, Uncharged Conduct *(for use in Departures see 718)*
180 Use of Commentary/Policy (§1B1.7)
185 Information Obtained During Cooperation Agreement (§1B1.8)
190 Application to Indians, Assimilated Crimes, Juveniles, Misd. (§1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault (§2A1 -2)
215 Sexual Abuse, Kidnapping, Air Piracy, Threatening Comm. (§2A3 -6)
220 Theft, Embezzlement, Burglary (§2B1 -2)
224 Robbery, Extortion (§2B3)
226 Commercial Bribery, Counterfeiting, Forgery, VIN Nos. (§2B4 -6)
230 Public Officials, Offenses (§2C)
240 Drug Offenses, Generally (§2D)
242 Constitutional Issues
245 Mandatory Minimum Sentences
246 Telephone Counts (21 U.S.C. 843(b))
250 Calculating Weight or Equivalency
251 "Mixtures"/Purity
252 Laboratory Capacity/Precursors
253 Marijuana/Plants
254 Estimating Drug Quantity
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§2E)
300 Fraud (§2F)
310 Sexual Exploitation of Minors (§2G)
315 Civil Rights, Political Offenses (§2H)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§2J)
330 Firearms, Explosives, Arson (§2K)
340 Immigration Offenses (§2L)
345 Espionage, Export Controls (§2M)
348 Food, Drugs, Odometers (§2N)
350 Escape, Prison Offenses (§2P)

SECTION

355 Environmental Offenses (§2Q)
360 Money Laundering (§2S)
370 Tax, Customs Offenses (§2T)
380 Conspiracy/Aiding/Attempt (§2X)
390 "Analogies" Where No Guideline Exists (§2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§3A)
420 Role in Offense, Generally (§3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§3B1.1)
431 Cases Finding Aggravating Role
432 Cases Rejecting Aggravating Role
440 Mitigating Role: Minimal or Minor Participant (§3B1.2)
443 Cases Finding Mitigating Role
445 Cases Rejecting Mitigating Role
450 Abuse of Trust/Special Skill (§3B1.3)
460 Obstruction of Justice (§3C)
461 Cases Finding Obstruction
462 Cases Rejecting Obstruction
470 Multiple Counts (§3D)
480 Acceptance of Responsibility, Gen. (§3E)
482 As to "Related" Conduct
484 Constitutional Issues
486 Probation Interview/Cooperation
488 Timeliness, Sincerity, Minimizing Role
490 Effect of Guilty Plea
492 Effect of Perjury/Obstruction
494 Other Post-Arrest Misconduct

500 Criminal History, Generally (§4A1.1)
504 Prior Convictions (§4A1.2)
508 Departures for Criminal History (§4A1.3)
510 Cases Upholding
514 Cases Rejecting
520 Career Offenders (§4B1.1)
530 Criminal Livelihood (§4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§5B) *(for Revocation, see 800)*
570 Pre-Guidelines Probation Cases
580 Supervised Release (§5D) *(Rev. see 800)*
590 Parole
600 Custody Credits
610 Restitution (§5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§5E4.2)
640 Community Confinement, Etc. (§5F)
650 Consecutive Sentences (§5G)
660 Specific Offender Characteristics (§5H)
670 Age, Education, Skills (§5H1.1 -.2)
680 Physical and Mental Conditions, Drug and Alcohol Abuse (§5H1.3 -.4)
690 Employment, Family Ties (§5H1.5 -.6)

SECTION

700 Departures, Generally (§5K) *(for Criminal History Departures, see 508, for Refusal to Depart, see 860)*
710 Substantial Assistance Departures §5K1)
712 Necessity for Government Motion
715 Specific Grounds for Departure (§5K2)
716 Disparity Between Co-Defendants
718 Acquitted, Dismissed, Uncharged Conduct *(for consideration as "Relevant Conduct," see 175, 270)*
719 "Aberrant" Behavior, Rehabilitation
721 Physical or Psychological Injury, Abduction, Restraint (§5K2.1 -.4)
725 Property Damage, Weapons, Disruption of Gov't. Function, Extreme Conduct, Facilitating Other Offense (§5K2.5 -.9)
730 Self Defense, Necessity, Duress, Diminished Capacity (§5K2.10 -.13)
734 National Security, Public Health and Safety, Terrorism (§5K2.14 -.15)
736 Specific Offender Characteristics (§5H)
738 Drug Cases

750 Sentencing Hearing, Generally (§6A) *(for Waiver by Failure to Object, see 855)*
755 Burden of Proof
758 Discovery at Sentencing
760 Rule 32, Presentence Report (§6A1.2)
761 Notice/Disclosure of Information
765 Resolution of Disputes (§6A1.3)
770 Information Relied On/Hearsay *(for Dismissed, Uncharged Conduct, see 175, 718)*
772 Pre-Guidelines Cases
775 Statement of Reasons For Sentence Within Range (18 U.S.C. §3553)

780 Plea Agreements, Generally (§6B)
790 Advice/Breach/Withdrawal (§6B)
795 Stipulations (§6B1.4) *(see also 165)*

800 Violations of Probation and Supervised Release (Chapter 7)

840 Sentencing of Organizations (Chapter 8)

850 Appeal of Sentence (18 U.S.C. §3742)
855 Waiver by Failure to Object
860 Refusal to Depart Not Appealable
865 Overlapping Ranges, Appealability of
870 Standard of Review, Generally *(See also substantive topics)*

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

900 Forfeitures, Generally
905 Jurisdictional Issues
910 Constitutional Issues
920 Procedural Issues, Generally
930 Delay In Filing/Waiver
940 Return of Seized Property/ Equitable Relief
950 Probable Cause
960 Innocent Owner Defense
970 Property Forfeited

8th Circuit finds that role enhancement was improperly based on role in collateral conduct. (131) (430) The 8th Circuit ruled that the district court improperly based an aggravating role adjustment on defendant's role in conduct outside the offense of conviction. At the time defendant was sentenced, circuit law interpreted section 3B1.1 to permit an enhancement only for a defendant's role in the offense of conviction, not his role in collateral offenses. Although section 1B1.3(a)(2) was amended effective November 1, 1990 to provide that aggravating role enhancements may be based on a defendant's role in all relevant conduct, this amendment was not in effect at the time defendant was sentenced. Judge Gibson dissented because he believed that the conduct in question was part of the offense of conviction. *U.S. v. Furlow*, __ F.2d __ (8th Cir. Dec. 6, 1991) No. 90-2392.

11th Circuit rules guidelines do not conflict with statute prohibiting limitations on sentencing information. (145)(730) Defendant, who committed armed bank robbery, requested a downward departure based on his mental condition, even though guideline section 5K2.13 authorizes a downward departure for diminished capacity only for non-violent offenses. Defendant contended that the guidelines' limitation conflicted with 18 U.S.C. section 3661, which prohibits any limitation on the information which a sentencing court may consider. The 11th Circuit interpreted section 3661 as only prohibiting limitations on information that had not already been considered by the Commission in formulating the guidelines. Limitations can be placed on the district court's consideration of information which has already been considered by the Commission, because technically the district court considers this information by applying the guidelines. *U.S. v. Fairman*, __ F.2d __ (11th Cir. Dec. 4, 1991) No. 90-8909.

General Application Principles (Chapter 1)

8th Circuit judge advocates adoption of *Davern's* flexible approach. (150) Defendant was acquitted of aiding and abetting the possession of crack cocaine but convicted of *conspiracy* to possess the same crack. The 8th Circuit upheld defendant's convictions and sentence. Senior Judge Bright, concurring and dissenting, felt that given the jury's inconsistent findings, the district court should not be bound by the sentencing guidelines' mechanical approach to sentencing. Judge Bright advocated the analysis articulated by the 6th Circuit in *U.S. v. Davern*, 937 F.2d 1041 (6th Cir. 1991), *vacated on granting of rehearing en banc*, (6th Cir. Sept. 26, 1991), No. 90-3681. Under this approach, a sentencing court must first analyze whether the guidelines reflect the pertinent aggravating or mitigating circumstances surrounding a defendant's crime. If they do not, then the judge should sentence defendant to a just punishment which is not greater than necessary to comply with Congress' sentencing objections. Here, the guidelines did not instruct a judge how to deal with a situation in which a jury has acquitted a defendant of aiding and abetting a substantive offense, but convicted him of conspiring to commit the same offense. *U.S. v. Quarles*, __ F.2d __ (8th Cir. Nov. 27, 1991) No. 90-5536.

7th Circuit affirms that attempt to obtain fraudulent loans involved more than minimal planning. (160) The 7th Circuit affirmed the district court's finding that defendant's bank fraud scheme involved more than minimal planning. Defendant committed repeated acts over several weeks, including obtaining credit for an automobile by a falsified application, subsequently tendering a no-funds check in an effort to secure release of the automobile, seeking a $250,000 loan by another falsified application, lowering the amount sought in order to expedite the loan, and writing $4,400 in checks on a $100 ac-

The **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, bimonthly supplements and biweekly newsletters. The main volume, (3rd Ed., hardcover, 1100 pp.), covers ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month the newsletters are merged into a supplement with full citations and subsequent history.*

Annual Subscription price: **$250** (includes main volume, 6 supplements and 26 newsletters a year.) Main volume (3rd Ed. 1991): **$80**.

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

Publication Manager:
Beverly Boothroyd

Copyright © 1991, Del Mar Legal Publications, Inc., 2670 Del Mar Heights Road, Suite 247, Del Mar, CA 92014. Telephone: (619) 755-8538. All rights reserved.

count. *U.S. v. De Felippis*, __ F.2d __ (7th Cir. Dec. 6, 1991) No. 90-3603.

Commission amends definition of "stipulation." **(165)** As anticipated by Supreme Court in *Braxton v. U.S.*, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), the Sentencing Commission amended application note 1 to section 1B1.2, effective November 1, 1991 to clarify the meaning of the term "stipulation." The Commission stated that "[w]here a stipulation that is set forth in a written plea agreement or made between the parties on the record during a plea proceeding specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established."

Commission emphasizes that relevant conduct section applies to possession of a dangerous weapon in a drug offense. **(170)(280)** The November 1, 1991, amendment to section 2D1.1(b)(1) makes explicit that the provisions of subsection (a)(2) of section 1B1.3 (relevant conduct) apply to the enhancement for possession of a dangerous weapon during a drug trafficking offense, and that the weapon need not have been possessed during the act constituting the count of conviction.

4th Circuit affirms firearm enhancement despite acquittal on firearms charge. **(175)(284)** Defendant was convicted of possession of crack cocaine and acquitted of carrying a firearm in relation to a drug trafficking crime. Nonetheless, the district court found as a factual matter that defendant possessed the weapon and enhanced defendant's base offense level by two under guideline section 2D1.1(b)(1) for possessing a dangerous weapon during a drug crime. The 4th Circuit upheld the enhancement against double jeopardy and due process challenges, ruling that acquitted conduct can properly be used to enhance a sentence once the requisite finding has been made. *U.S. v. Romulus*, __ F.2d __ (4th Cir. Nov. 25, 1991) No. 91-5390.

Commission expressly states that guidelines apply to Assimilative Crimes Act and Indian Offenses. **(190)(390)** The background commentary to section 2X5.1 was amended on November 1, 1991, to reflect that Congress amended the Crime Control Act of 1990 to expressly state that the Sentencing Guidelines apply to convictions under 18 U.S.C. section 13 (the Assimilative Crimes Act) and 18 U.S.C. section 1153 (the Indian Major Crimes Act).

Offense Conduct, Generally (Chapter 2)

11th Circuit finds no evidence that defendant engaged in conduct evidencing intent to carry out threats. **(215)** Defendant received a six-level increase under guideline section 2A6.1(a), which applies where a defendant is convicted of communicating a threat in interstate commerce, and then engages in any conduct evidencing an intent to carry out that threat. The 11th Circuit reversed. Although defendant had purchased numerous firearms and ammunition several months prior to making a threatening phone call to his former supervisor, there was no evidence connecting the two actions. Defendant had made a similarly threatening phone call the year before "because he felt like it." The reasonable conclusion from the record was that defendant made this phone call for the same reason, and had no intent of carrying out the threat. *U.S. v. Philibert*, __ F.2d __ (11th Cir. Nov. 29, 1991) No. 90-8728.

Commission increases enhancements for firearm in robbery and extortion involving threats. **(224)** The Commission raised the enhancement for involvement of a firearm in a robbery under section 2B3.1 by two levels to more closely accommodate Congress's view of the seriousness of committing a felony while possessing a firearm and to lessen the disparity from different prosecution practices with respect to pursuing violations of 18 U.S.C. section 924(c). The Commission also added a two level enhancement to the extortion guideline 2B3.2 where the offense involves an express or implied threat of death, bodily injury or kidnapping.

Commission adds new guideline for fraud involving deprivation of the intangible right to the honest services of public officials. **(226)** The November 1, 1991 amendment creates a new guideline 2C1.7 with a base offense level of ten to cover certain broad offenses that involve public corruption. An eight level enhancement is provided if the offense involved an elected official or any official holding a high level decision making or sensitive position. Application note 5 authorizes an upward departure where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government.

Commission adds steroids to the Drug Quantity Table. **(240)** In response to the Crime Control Act of 1990, the Commission amended the Drug Quantity Table of section 2D1.1 effective November 1, 1991 to

treat steroids as equivalent in seriousness to other schedule III controlled substances. "Ice" was also added to the Drug Quantity Table and was defined as a mixture or substance containing D-methamphetamine hydrochloride of at least 80% purity.

Commission changes terms "pure PCP" and "Pure Methamphetamine" to "PCP (actual)" and "Methamphetamine (actual)." (251) The November 1, 1991 amendment to section 2D1.1 substitutes the term "actual" for the term "pure" when referring to the weight of the controlled substance itself contained in the mixture or substance. Further, the Drug Equivalency Table in Application Note 10 was amended by deleting all conversions to heroin, cocaine, or PCP and inserting in lieu thereof the appropriate conversion to marihuana.

Commission creates new guideline for precursor chemicals. (252) Effective November 1, 1991, the Commission amended the guidelines to create a new guideline to address violations of the Chemical Diversion and Trafficking Act involving listed precursor and essential chemicals used in the manufacture of controlled substances. The new section, 2D1.11, bases the offense level on a Chemical Quantity Table which starts at level 12 and is capped at level 28. Another new section, 2D1.12 provides guidelines for offenses involving prohibited flasks or equipment. Violations of record keeping are addressed in new guidelines sections 2D1.13 and 2D3.5.

Commission explains marihuana plant equivalency. (253) The background commentary to section 2D1.1 was amended November 1, 1991, to explain the reasons the Commission adopted the policy that, in the case of fewer than 50 marihuana plants, each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana (the average yield of a mature marihuana plant), except where the actual weight of the usable marihuana is greater.

7th Circuit rejects contention that informant's testimony was too vague to determine drug quantity. (254)(775) Although defendant contended that he was involved with less than 50 kilograms of cocaine, the district court adopted the presentence report's determination, based on the testimony of an informant, that defendant was responsible for 77 kilograms of cocaine. The 7th Circuit rejected defendant's contention that the informant's testimony was too vague and speculative. The informant testified that from June 1988 to February 1989, he received up to 10 kilograms of cocaine from defendant every two weeks, although the normal quantity delivered was only one kilogram. After February 1989, cocaine deliveries ranged between five and 15 kilograms per trip, including one 27 kilogram delivery. These deliveries occurred biweekly until May 27, 1990, except for a month and a half in April 1989. The district court had ample opportunity to observe the informant during his testimony. The court did not improperly base its finding on evidence presented during a co-defendant's sentencing hearing. *U.S. v. Herrera*, __ F.2d __ (7th Cir. 1991) No. 90-2091.

1st Circuit affirms that defendant expected to purchase marijuana under negotiation. (265) Defendant challenged his sentence which was based on his attempted purchase of one ton, rather than half a ton, of marijuana, claiming he could not afford to purchase the full ton and did not actually intend to purchase that amount. The 1st Circuit affirmed the sentence, ruling that defendant expected to be able to purchase the full ton of marijuana. Defendant stated at the start of negotiations that he wished to purchase a full ton. Although he subsequently indicated that he could only afford to pay for the first half ton, defendant later renewed negotiations for the second half. He called the seller and spoke specifically about taking delivery of the second half ton several days after his receipt of the first half ton. The district court could reasonably believe that defendant expected he would be able to pay for the second half ton with money realized from the resale of the first half ton or other resources. *U.S. v. Rotolo*, __ F.2d __ (1st Cir. Dec. 3, 1991) No. 91-1436.

1st Circuit rules defendant waived right to appeal loss calculation. (300)(855) Defendant submitted a written objection to the presentence report's calculation of the loss caused by his fraud. The district court rejected defendant's objection and upheld the methodology used in the presentence report. Defendant failed to renew his objection in his appellate brief. Therefore, the 1st Circuit ruled that defendant had waived the objection. He also could not challenge the calculation on different grounds for the first time on appeal. *U.S. v. Dietz*, __ F.2d __ (1st Cir. Nov. 27, 1991) No. 91-1321.

2nd Circuit affirms application of environmental guideline to mail fraud defendants. (300)(355) (715) Defendants were convicted of RICO and mail fraud charges in connection with their operation of an environmentally hazardous landfill. The district court sentenced them under the environmental guideline, section 2Q1.2, relying on application note 15 to the 1988 version of section 2F1.1, which provided that where the mail fraud statute is used primarily as a jurisdictional basis to prosecute other offenses, the most analogous guideline should be ap-

plied. The 2nd Circuit affirmed, but held that the application note was in conflict with the requirement in section 1B1.2(a) that the offense level be based on the offense of conviction. This conflict was resolved by a 1989 amendment (now numbered application note 13) directing the court to apply a section other than section 2F1.1 only if the other offense was "established" in the information or the indictment. The 2nd Circuit found it unnecessary to resolve the conflict because the district court stated that even if section 2F1.1 applied, it would depart upward to 26 based on the environmental harm. Since there was no indication that the mail fraud guidelines took into account the massive environmental damage proven here, a departure would not be an abuse of discretion. *U.S. v. Paccione*, __ F.2d __ (2nd Cir. Nov. 15, 1991) No. 90-1587.

7th Circuit affirms loss calculation based on total attempted fraud. (300) Defendant submitted a false financial statement as part of his loan application to purchase a $26,319.29 car. When defendant brought the car back to the dealer for service, at the bank's request the dealer refused to release the car to defendant. Defendant subsequently applied for a $250,000 loan at another bank, again submitting a false financial statement. The 7th Circuit affirmed the district court's addition of nine points to defendant's offense level because the total value of the attempted loss was $276,319.29. The court rejected defendant's argument that there was no possibility of his obtaining the $250,000 loan. Section 2X1.1(b)(1) provides that a decrease for an unsuccessful attempt does not apply when a defendant completes all of the acts he believed necessary to successfully complete the substantive offense. *U.S. v. De Felippis*, __ F.2d __ (7th Cir. Dec. 6, 1991) No. 90-3603.

Commission adopts new guidelines for child pornography. (310) Effective November 1, 1991, the Commission adopted section 2G2.4, creating a new guideline in response to the Crime Control Act of 1990, which creates a new offense of possession of more than three items of child pornography, and increases the penalties for sale or possession with intent to sell child pornography. In addition, pursuant to a directive from Congress, the Commission promulgated amendments that supersede these changes, effective November 27, 1991. The November 27, 1991, amendment to section 2G2.4 covers possession of materials depicting a minor engaged in sexually explicit conduct. The base offense level was increased to level 13 and a specific offense characteristic was added to provide a two level increase if the offense involved possessing ten or more books, magazines, periodicals, films, video-tapes or other items containing a visual depiction involving the sexual exploitation of a minor. A similar amendment to new section 2G3.1, covering importing, mailing, or transporting obscene matter also took effect on November 27, 1991.

1st Circuit rules defendant did not transport woman who drove her own car across state lines. (310) Defendant drove Prostitute A across state lines to engage in prostitution. Prostitutes B and C travelled across state lines in B's car pursuant to defendant's instructions. Defendant received a three level enhancement under section 2G1.1(c) for transporting three people in interstate commerce. The 1st Circuit ruled that defendant should only have received a two-level enhancement, because he did not "transport" Prostitute B, who drove her own car over the border. Application note 5 authorizes a court to consider relevant conduct. However, "transportation" does not include cases in which the person travels "under her own steam." Defendant was accountable for the transportation of Prostitute C because he induced both B and C to travel and it was reasonably foreseeable that this would result in the transportation of C by B in furtherance of the jointly undertaken activity. *U.S. v. Camuti*, __ F.2d __ (1st Cir. Dec. 4, 1991) No. 91-1540.

Commission clarifies that sentence for failure to appear is to be imposed consecutively. (320) Effective November 1, 1991, the Commission amended Application Note 3 to section 3J1.6 to clarify that in the case of a failure to appear to serve a sentence, any term of imprisonment imposed on the failure to appear is to be imposed consecutively. In addition, Application Note 4 was added to instruct the criminal history points for the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the offense constituted a failure to report for service of sentence.

7th Circuit affirms that defendant who suborned perjury substantially interfered with administration of justice. (320) Defendant caused three men to perjure themselves before a grand jury. At their subsequent perjury trials, defendant repeated the same lie. Defendant was convicted of subornation of perjury and received a three level increase under guideline section 2J1.3(b)(2) for substantial interference with the administration of justice. Defendant claimed the enhancement was improper because the government never believed the false testimony and therefore never expended additional resources because of the lies. The 7th Circuit affirmed the enhancement because defendant's conduct not only impaired grand jury proceedings, but necessitated four perjury-re-

lated trials within three years. *U.S. v. Bradach*, __ F.2d __ (7th Cir. Dec. 3, 1991) No. 91-1207.

Commission rewrites some firearms guidelines. (330) The November, 1991 amendments substantially rewrote section 2K1.3, involving explosive materials, to include offenses previously covered under section 2K1.6. In addition, section 2K2.1 was amended to combine three existing firearms guidelines into one new guideline. Eight alternative base offense levels are provided to account for the varying offense conduct. A firearms table provides enhancements if the offense involved three or more firearms.

Commission amends immigration guidelines effective November 1, 1991. (340) The alien smuggling guideline, 2L1.1 was amended to provide an alternative base offense level of 20 if the defendant was convicted under 8 U.S.C. section 1327 of a violation involving an alien who was previously deported after sustaining a conviction for an aggravated felony. In addition, section 2L1.2 was amended to provide a 16-level enhancement if the defendant was previously deported after a conviction for an aggravated felony.

Commission adds new guideline for failure to file currency report. (360) The November 1, 1991 amendments created a new guideline section 2S1.4 with a base offense level of 9 for offenses involving Currency and Monetary Instrument Reports, previously covered by section 2S1.3 (Failure to Report Monetary Transactions; Structuring Transactions to Evade Report Requirements).

Adjustments (Chapter 3)

1st Circuit considers unwitting participants in determining that activity is otherwise extensive. (430) Defendant received a four-level enhancement under section 3B1.1(a) for leading a criminal activity that involved five or more participants or was otherwise extensive. The 1st Circuit held that in determining defendant's role, it was proper to consider individuals who were innocently involved in the fraud. There is no requirement that a defendant control four other criminally responsible individuals to qualify for enhancement under section 3B1.1(a). Such an interpretation would nullify the "otherwise extensive" language. Once the minimum of two participants is met, "the extensiveness of a criminal activity is not necessarily a function of the precise number of persons, criminally culpable or otherwise, engaged in the activity. Rather, an inquiring court must examine the totality of the circumstances, including not only the number of participants, but also the width, breadth, scope, complexity, and duration of the scheme." *U.S. v. Dietz*, __ F.2d __ (1st Cir. Nov. 27, 1991) No. 91-1321.

1st Circuit rules aggravating role does not require conduct more culpable than average. (431) Defendant contended that an aggravating role adjustment would only be proper if his conduct was more egregious than the average purchaser of marijuana. The 1st Circuit rejected this argument. The language relied on by defendant in *U.S. v. Daughtrey*, 874 F.2d 213 (4th Cir. 1989) dealt with a downward adjustment for a mitigating role under section 3B1.2. Although the aggravating role adjustment does not absolutely forbid a court from making comparisons to the "average" participant, it does not require such a comparison. *U.S. v. Rotolo*, __ F.2d __ (1st Cir. Dec. 3, 1991) No. 91-1436.

1st Circuit affirms that defendant's scheme to defraud various government agencies was otherwise extensive. (431) Defendant and his family fraudulently received benefits from the social security administration and seven state unemployment agencies. The 1st Circuit affirmed that defendant's criminal activity was "otherwise extensive" under section 3B1.1(a). The offense of conviction involved defendant, three other criminally culpable family members, and countless employees of the government offices that processed the bogus claims. Moreover, the course of the criminal activity spanned 12 years, crossed seven states, used many fictitious identities, infiltrated two different sets of programs and involved eight different government agencies. *U.S. v. Dietz*, __ F.2d __ (1st Cir. Nov. 27, 1991) No. 91-1321.

4th Circuit denies rehearing en banc in case rejecting obstruction enhancement based on defendant's trial perjury. (460) In *U.S. v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), the 4th Circuit held that a sentencing enhancement for obstruction of justice under section 3C1.1 based on a defendant's perjury at trial was an unconstitutional burden on the defendant's right to testify. An evenly-divided court denied the petition for rehearing *en banc*. Judge Wilkins, joined by Judges Wilkinson, Niemeyer and Luttig, filed a dissenting opinion, believing that the original panel decision "improperly disregards Supreme Court precedent, exhibits fallacious reasoning, and creates a gratuitous split among the circuit courts of appeals." *U.S. v. Dunnigan*, __ F.2d __ (4th Cir. Nov. 27, 1991) No. 90-5668.

8th Circuit rules defendant's denial of government's position did not preclude obstruction enhancement. (460) Application note 2 to section

3C1.1 provides that "suspect testimony" should be viewed in a light most favorable to the defendant. The 8th Circuit found that this note does not mean that a mere denial by a defendant precludes a finding contrary to the defendant's position. It adopted the 5th Circuit's view that the note "instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction." Thus, the district court was free to reject defendant's characterization of his conversation about killing the "snitch." Any doubt by the district court about the seriousness of defendant's intent to obstruct the investigation would have been dispelled by defendant giving a co-defendant money to hire an assassin. *U.S. v. Tallman*, __ F.2d __ (8th Cir. Dec. 6, 1991) No. 90-2131.

4th Circuit upholds obstruction enhancement for defendant who lied about age and identity to obtain release. (461) After defendant's arrest, defendant lied to the magistrate about his age and true identity in order to conceal the fact that he was a juvenile. He claimed he gave the false information because he knew that if authorities were aware he was a juvenile, he would be detained pending trial, but if he was considered an adult, he would likely be released on bond. Defendant contended that an enhancement for obstruction of justice under section 3C1.1 was improper because he did not act willfully. The 4th Circuit affirmed the enhancement, ruling that defendant's admitted intent to prevent authorities from determining his true identity and age in order to gain an unwarranted release from custody constituted a willful obstruction of justice. *U.S. v. Romulus*, __ F.2d __ (4th Cir. Nov. 25, 1991) No. 91-5390.

8th Circuit affirms obstruction enhancement for warning co-conspirators of arrival of police. (461) When police pulled up to the house which defendant and a co-conspirator were approaching on foot, defendant threw down a clear plastic bag and yelled words to the effect of "Run! Police!" Defendant and his co-conspirator were arrested, and the bag contained cocaine base. Defendant contended that an enhancement for obstruction of justice was improper because his throwing down the cocaine base and warning of the arrival of the police did not materially hinder the investigation of the case. The 8th Circuit affirmed the enhancement. Defendant was sentenced on October 19, 1990. The sentencing guidelines in effect on that date did not require that a defendant's conduct result in a "material hindrance" in order for an obstruction increase to apply. *U.S. v. Sparks*, __ F.2d __ (8th Cir. Nov. 26, 1991) No. 90-4854.

8th Circuit affirms obstruction enhancement based on defendant's perjury at trial. (461) The 8th Circuit affirmed a two-level enhancement under section 3C1.1 based on the trial judge's determination that defendant had perjured himself at trial. The court rejected the 4th Circuit's decision in *U.S. v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), which would have disallowed an enhancement based on a defendant's perjury at trial. Senior Judge Heaney, concurring, believed that *Dunnigan* expressed the better view and said the case should be reconsidered *en banc* to determine the extent to which an obstruction enhancement is proper when a defendant testifies at trial and is found to be untruthful. *U.S. v. Ogbeifun*, __ F.2d __ (8th Cir. Nov. 25, 1991) No. 91-1775.

7th Circuit rules misrepresentation of employment status did not justify obstruction enhancement. (462)(488) Defendant told his probation officer and the court that he was employed at a particular brokerage firm as a broker-trainee for various times ranging from a few days to a few months prior to his arrest. In fact, defendant was never employed there. He had begun a training program at the firm which, if completed successfully, could lead to his employment as a sales representative on a commission basis. The 7th Circuit rejected defendant's misrepresentation as a ground for an obstruction of justice enhancement because the misrepresentations were not material. However, the false information did support the district court's decision to deny defendant a reduction for acceptance of responsibility. *U.S. v. De Felippis*, __ F.2d __ (7th Cir. Dec. 6, 1991) No. 90-3603.

2nd Circuit affirms possible incorrect grouping because court also justified sentence on proper departure grounds. (470)(850) Defendants were convicted of RICO and mail fraud charges, but they were sentenced under the environmental guideline, section 2Q1.2. The district court found that because the fraud offenses and the environmental offenses could not be grouped together, guideline section 3D1.4 required a two level adjustment. The 2nd Circuit found this problematic, because the underlying premise of grouping under section 3D is that there have been multiple counts and multiple convictions. Here no counts of the indictment charged defendants with violation of federal environmental laws, and accordingly, the only offenses subject to multiple count rules were the RICO and mail fraud offenses. However, resentencing was not necessary, because the district court ruled in the alternative that it would depart upward by two levels because the environmental guideline did not take into account the fact that defendants had defrauded various agencies and indi-

viduals. *U.S. v. Paccione*, __ F.2d __ (2nd Cir. Nov. 15, 1991) No. 90-1587.

7th Circuit affirms grouping where counts involved same victim and were part of common scheme. (470) Defendant caused three men to perjure themselves before a grand jury. He was convicted of subornation of perjury, conspiracy to commit subornation of perjury and making a false statement under oath. The 7th Circuit affirmed the district court's decision to group the counts together, since the government conceded that all counts involved the same victim and were part of a common scheme or plan. This satisfied all of the conditions for grouping under section 3D1.2(b). *U.S. v. Bradach*, __ F.2d __ (7th Cir. Dec. 3, 1991) No. 91-1207.

8th Circuit holds court may depart downward for extraordinary restitution. (480)(715) Before learning of the FBI's investigation into his fraudulent activities, defendant discussed a settlement under which he would give the banks which he defrauded all of his assets, totalling $1.4 million. The loss attributable to defendant's scheme was $253,000. Before he was indicted, defendant entered into the settlement with both banks. The district court denied defendant's request for a downward departure. The 8th Circuit remanded for resentencing because it was not clear that the district court knew it could depart downward based on defendant's extraordinary restitution. On the other hand, the district court correctly determined that it lacked discretion to depart downward based on defendant's guilty plea, employment record, community ties and family responsibilities. Defendant's actions took place over a one-year period, and thus did not constitute an act of aberrant behavior. *U.S. v. Garlich*, __ F.2d __ (8th Cir. Nov. 27, 1991) No. 91-2476.

8th Circuit applies clearly erroneous standard in reviewing acceptance of responsibility. (480) In the past, the 8th Circuit held that "the determination of a sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation." The Sentencing Commission deleted the "without foundation" language in the commentary to guideline section 3E1.1. The 8th Circuit found that this change reflected the Commission's view that the clearly erroneous standard of review applies to the district court's factual determination of acceptance of responsibility. *U.S. v. Miller*, __ F.2d __ (8th Cir. Nov. 27, 1991) No. 91-2035.

8th Circuit denies credit for acceptance of responsibility where defendant refused to discuss her involvement. (486) The 8th Circuit upheld the district court's denial of a reduction for acceptance of responsibility, where the district court relied on the presentence report, which indicated that defendant withheld a credit bureau report from the probation officer, refused to discuss her involvement in the offense, and stated that she signed the plea agreement under duress. *U.S. v. Miller*, __ F.2d __ (8th Cir. Nov. 27, 1991) No. 91-2035.

8th Circuit rules mere guilty plea may justify acceptance of responsibility reduction. (490) At defendant's sentencing hearing, the district court stated that under the law, merely pleading guilty was not sufficient to indicate acceptance of responsibility. The 8th Circuit remanded, noting that case law clearly holds to the contrary. The guidelines do not prohibit a district court from granting an acceptance of responsibility reduction even if the defendant does nothing more than plead guilty. Judge Gibson dissented, believing that the reduction was denied because the district court did not believe defendant had accepted responsibility. *U.S. v. Tallman*, __ F.2d __ (8th Cir. Dec. 6, 1991) No. 90-2131.

6th Circuit denies acceptance of responsibility reduction to defendant who continued fraud in jail. (494) Defendant was denied a reduction for acceptance of responsibility because he continued his credit card fraud while in jail awaiting sentencing. The 6th Circuit affirmed, noting that such continued criminal conduct was incompatible with an acceptance of responsibility. The court rejected defendant's claim that section 3E1.1 only requires a defendant to indicate a willingness to be held accountable for his crime. Such a reading would permit a defendant not to express remorse, not to apologize to any victim, and not to promise not to commit criminal acts in the future. *U.S. v. Reed*, __ F.2d __ (6th Cir. Dec. 4, 1991) No. 90-6502.

Criminal History (§4A)

Commission amends application note to state that "crime of violence" does not include unlawful possession of a firearm by a felon. (504)(520) Application Note 2 to section 4B1.2 was amended on November 1, 1991 to state that the term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Since this was an amendment to the commentary, rather than the guidelines themselves, the Commission did not submit this amendment to Congress six months before it became effective, as required for guidelines amendments under 28 U.S.C. section 994(p).

1st Circuit rules defendant waived objection to presentence report by failing to object to probation officer's response. (504)(760)(855) Defendant submitted a written objection to the presentence report's inclusion of a prior misdemeanor conviction, claiming he was not represented by counsel and the plea was made under duress. In response, the presentence report was amended to state that defendant waived his right to counsel and represented himself during the prior proceeding. At sentencing, defendant neither denied that he had waived his right to counsel nor challenged the voluntariness of his prior plea. The 1st Circuit found that by failing to object to the amended presentence report, defendant had waived his right to challenge his waiver of counsel or the voluntariness of his prior plea. The amended statement met a threshold burden requiring defendant, at the least, to put the waiver of counsel question in issue. By failing to do so, he waived the issue. *U.S. v. Dietz*, __ F.2d __ (1st Cir. Nov. 27, 1991) No. 91-1321.

7th Circuit affirms upward departure even though it should have been a criminal history departure. (508)(700)(865) Defendant was convicted of bank fraud after submitting two fraudulent loan applications to two different lenders. The 7th Circuit affirmed the district court's two level upward departure in offense level based on defendant's extensive history of similar fraudulent conduct. Defendant had escaped the consequences of much of this fraud by persuading his parents and friends to pay his debts. Defendant had a pattern of seeking to acquire expensive goods and services by fraudulent means and without any means to pay for them. Although the court should have more properly increased defendant's criminal history rather than offense level, the appellate court did not remand for resentencing because the sentence imposed was within the range that would have applied had defendant's criminal history been properly increased. *U.S. v. De Felippis*, __ F.2d __ (7th Cir. Dec. 6, 1991) No. 90-3603.

4th Circuit prohibits inquiry into facts underlying predicate offenses for career offender enhancement. (520) Defendant contended that his prior robbery conviction could not be a crime of violence for career offender purposes because the actual conduct for which he was convicted consisted of simple pickpocketing. The 4th Circuit held defendant's robbery conviction was a crime of violence, ruling that the guidelines "mandate a categorical approach to the offense rather than a particularized inquiry into the facts underlying the conviction." The career offender provision is triggered by a defendant's prior felony convictions, not his prior criminal conduct. The guidelines' definition mandates a categorical approach by focusing the inquiry on the elements of the offense rather than the particular conduct involved. Moreover, the categorical approach is supported by the application notes, which enumerate a number of crimes that are crimes of violence. *U.S. v. Wilson*, __ F.2d __ (4th Cir. Dec. 3, 1991) No. 90-5203.

6th Circuit affirms criminal livelihood enhancement. (530) Defendant used an unauthorized credit card to fraudulently obtain $17,000 worth of merchandise. The 6th Circuit affirmed the district court's ruling that defendant engaged in a pattern of criminal conduct as a livelihood under section 4B1.3. A pattern of criminal conduct" is defined to include independent offenses occurring over a substantial period of time. This implies that a pattern may contain gaps or lull periods. Defendant's conduct began in August, 1989, and continued until his arrest in December, 1989. He then continued it again in March 1990. The seven-month period from August 1989 to March 1990 was long enough to constitute "a substantial period of time." The court also found that defendant engaged in his fraud as a livelihood: during the seven-month period, he realized over $17,000 worth of merchandise, while his legitimate income was only $350. *U.S. v. Reed*, __ F.2d __ (6th Cir. Dec. 4, 1991) No. 90-6502.

Determining the Sentence (Chapter 5)

2nd Circuit affirms supervised release even though conspiracy statute did not authorize it. (580) Defendant pled guilty to conspiring to distribute cocaine in violation of 21 U.S.C. section 846. At the time of his offense, November 14, 1988, there was no supervised release provision in section 846. Nevertheless, the 2nd Circuit held that authority for supervised release came from the sentencing guidelines. Section 2D1.4(a) provides that the offense level for conspiracy shall be the same as for the underlying controlled substance offense. Thus, defendant had an offense level of 26, which required a minimum 63 months imprisonment, and under section 5D1.1(a), a term of supervised release. The fact that Congress later amended section 846 to expressly provide for supervised release did not alter this analysis. Additional support for defendant's term of supervised release was found in 18 U.S.C. section 3583(a), which authorizes the imposition of supervised release for all federal felonies and misdemeanors. *Rodriguez v. U.S.*, __ F.2d __ (2nd Cir. Dec. 5, 1991) No. 91-2105.

Commission requires restitution for more cases. (610) On November 1, 1991, the Commission amended section 5E1.1 to expand the restitution guideline to cover convictions *beyond* Title 18 and 49 U.S.C. section 1472. The amendment requires that restitution be ordered as a condition of probation or supervised release for such offenses unless the court determines that the complication and prolongation of the sentencing process outweighs the need to provide restitution to any victims.

9th Circuit upholds joint and several liability for restitution. (610) Defendant contended that the district court erred in ordering joint and several liability in resentencing him because at his original sentencing, the court had foreclosed such liability. The 9th Circuit upheld the joint and several liability order, finding defendant's interpretation of the district judge's original comments to be exaggerated. The judge's suggestion that its order requiring defendant to make full restitution might be reduced to a sum that "fairly represent[ed] everyone's involvement and a balance of contribution" may have led defendant to believe that his restitution liability would eventually be reduced. However, the district court ultimately ordered defendant to make restitution of the entire amount of his victims' losses, with credit given for restitution amounts other defendants made. The court did not foreclose joint and several liability. *U.S. v. Angelica*, __ F.2d __, 91 D.A.R. 14899 (9th Cir. Dec. 6, 1991) No. 90-50696.

9th Circuit remands for resentencing in light of *Hughey v. United States*. (610) In *U.S. v. Angelica*, 859 F.2d 1390 (9th Cir. 1988) the 9th Circuit remanded defendant's case for resentencing after holding that restitution could be based on losses by all victims of defendant's fraudulent scheme, rather than merely on losses by victims named in the indictment. Thereafter, in *Hughey v. United States*, 110 S.Ct. 1979 (1990), the Supreme Court held that a court cannot order restitution under the Victim and Witness Protection Act for acts other than those underlying the offense of conviction. Accordingly, on defendant's second appeal, the 9th Circuit ordered that defendant's restitution order be modified to conform with *Hughey*, and that on remand, the district court should include in its restitution order only the losses sustained by the eight victims named in the indictment. The court also directed the district court to consider on remand whether a payment period, rather than immediate restitution, would be appropriate. *U.S. v. Angelica*, __ F.2d __, 91 D.A.R. 14899 (9th Cir. Dec. 6, 1991) No. 90-50696.

9th Circuit affirms restitution order based on retail value of converted diamonds. (610) Defendant participated in a fraudulent trading business which persuaded customers to send their diamonds in for resale, and then misappropriated the proceeds. Defendant contended that the victims of his scheme were "investors" who would purchase diamonds not at retail but at wholesale prices substantially lower than the prices stated by the government expert. The 9th Circuit found no abuse of discretion in the district court's adoption of the government expert's contrary valuation. *U.S. v. Angelica*, __ F.2d __, 91 D.A.R. 14899 (9th Cir. Dec. 6, 1991) No. 90-50696.

9th Circuit rules interest cannot be assessed on older restitution orders. (620) The district court held that under the Victim and Witness Protection Act, defendant could be required to pay interest and penalties on restitution payments past due. The 9th Circuit reversed, because defendant's offenses took place from June 1982 to July 1983, before the effective date of the statute which provided for the imposition of interest and penalties. *U.S. v. Angelica*, __ F.2d __, 91 D.A.R. 14899 (9th Cir. Dec. 6, 1991) No. 90-50696.

Commission simplifies fine guideline. (630) The November 1, 1991, amendments simplified section 5E1.2 by eliminating the termination of loss and gain in the calculation of the fine guideline range. As reflected in new Application Note 4, the Commission envisions that for most defendants, the maximum from the fine table in subsection C will be at least twice the amount of gain or loss resulting from the offense. The note also discusses upward departures.

7th Circuit rejects claim that fine should have been offset by $18,000 seized from defendant's residence. (630) The 7th Circuit rejected defendant's contention that his $10,000 fine was based on clearly erroneous information and that he should have been credited with the $18,000 seized by police at the time of his arrest. The district court determined that defendant not only had assets, but that he had the ability to earn excellent income from legitimate sources. Although defendant challenged the presentence report's determination of his net worth, he did nothing to contest the conclusion that he had the ability to earn sufficient money to satisfy his obligations following his release. If defendant did have a claim to the $18,000, he would have adequate opportunity to pursue this claim in a separate proceeding. *U.S. v. Blackman*, __ F.2d __ (7th Cir. Dec. 6, 1991) No. 89-3582.

7th Circuit affirms $50,000 fine even though judge considered defendant's ability to pay $40,000 fine. (630) The 7th Circuit rejected defendant's claim that the district court failed to weigh all the factors set forth in 18 U.S.C. section 3572(a) in determining his ability to pay a $50,000 fine. Although the statutory factors were considered with respect to defendant's ability to pay a $40,000 fine, defendant did not argue that his ability to pay a $50,000 fine was substantially less than his ability to pay $40,000. Defendant failed to object to the increased fine at sentencing, even though he had the opportunity to do so. The trial judge's determination that a $50,000 fine would not pose undue hardship on the defendant was permissible. *U.S. v. Bradach*, __ F.2d __ (7th Cir. Dec. 3, 1991) No. 91-1207.

Commission permits court to recommend "shock incarceration program." (640) On November 1, 1991, section 5F1.1 was amended to add a policy statement that allows the court pursuant to 18 U.S.C. sections 3582(a) and 3621(b)(4), to recommend that a defendant participate in a shock incarceration program if he meets the criteria set forth in 18 U.S.C. section 4046. The program involves a highly regimented schedule that provides elements of military basic training, job training and educational programs, and drug, alcohol and other counseling programs. In return for the successful completion of this shock incarceration program, the defendant is eligible to serve the remainder of his term of imprisonment in a graduated release program comprised of Community Corrections Center and home confinement phases.

Commission clarifies consecutive sentence guidelines. (650) Section 5G1.3 was substantially amended on November 1, 1991 to ensure that incremental punishment is imposed for multiple offenses, and that the sentence imposed is not dependant upon whether acts were prosecuted in one or several proceedings. Under the new amendment, the requirement for a consecutive sentence is expanded to cover a defendant who committed the instant offense after sentencing for, but before commencing service of, an undischarged term of imprisonment.

Commission disapproves of departures based on appearance or physique. (680)(736) The policy statement under section 5H1.4 was amended on November 1, 1991 to express the Commission's position that a defendant's appearance or physique is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

New York District Court departs downward to permit drug addict to continue methadone treatment. (680)(736) Defendant pled guilty to distributing and possessing heroin. The District Court for the Southern District of New York departed downward and sentenced her to four years' probation because she was a first-time offender who had been raised in an abusive and alcoholic environment. She had been addicted to heroin for over 14 years, and since her arrest, she had been participating in a methadone program and was making progress. The court found that if incarcerated, defendant would be unable to continue her methadone treatment in an effective manner. Policy statement 5H1.4, stating that drug dependency is not a reason for a downward departure, was not applicable. The court found that the Sentencing Commission had ignored Congress's mandate to consider the purposes of sentencing in promulgating the guidelines. The guidelines do not take into account research which concludes that comprehensive drug treatment programs can be effective in reducing both drug use and criminal behavior. *U.S. v. Maier*, __ F.Supp. __ (S.D.N.Y. Nov. 6, 1991) No. 90 CR. 0170(RWS).

Commission disapproves of departures based on military, civic, charitable or public service. (690)(736) A new policy statement to section 5H, effective November 1, 1991 sets forth the Commission's position that military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Departures Generally (§5K)

2nd Circuit rules section 5K1.1 permits departure below statutory minimum sentence. (710) The government made a motion to depart downward under section 5K1.1 based on defendant's substantial assistance. The district court ruled that because the government's motion was not specifically made under 18 U.S.C. section 3553(e), it lacked authority to depart below the statutory minimum sentence. The 2nd Circuit reversed, ruling that section 5K1.1 authorizes a departure below the statutory minimum. Section 5K1.1 does not create a ground for a downward departure separate from section 3553. Rather, section 5K1.1 implements the directive of section 3553 and 28 U.S.C. section 994(n). *U.S. v. Cheng Ah-Kai*, __ F.2d __ (2nd Cir. Dec. 6, 1991) No. 91-1192.

11th Circuit holds judge must rule on government's substantial assistance motion prior to im-

posing sentence. (710) Prior to the imposition of defendant's sentence, the government moved for a downward departure based on defendant's substantial assistance under section 5K1.1. The district court did not rule on the motion, but granted defendant a downward departure. The 11th Circuit vacated the sentence, ruling that a judge must rule on the government's section 5K1.1 motion prior to imposing sentence. *U.S. v. Robinson*, __ F.2d __ (11th Cir. Dec. 9, 1991) No. 89-3262.

2nd Circuit affirms upward departure for failure to perform forfeiture agreement. (715)(900) Defendants entered into an agreement with the government which provided that if they were found guilty of various RICO and fraud charges, they would pay the government $22 million in lieu of forfeiture or fines. Defendants were convicted but failed to make any of the installment payments required by the agreement. The district court departed upward by two levels based on defendants' default. It specifically found that defendants had committed a fraud on the court because they were aware at the time they executed the agreement that they would be unable make their installment payments within the specified time period. The 2nd Circuit affirmed. There was no evidence that the district court improperly placed on defendants the burden of proving their intent to perform the forfeiture agreement. The fact that the government could enforce the forfeiture agreement by filing confessions of judgment did not make it unfair for the court to consider their fraud as a ground for departure. *U.S. v. Paccione*, __ F.2d __ (2nd Cir. Nov. 15, 1991) No. 90-1587.

11th Circuit holds district court may depart downward for severe mental illness. (730) Defendant was convicted of making a threatening phone call to his former supervisor. The 11th Circuit ruled that the district court incorrectly determined that it lacked authority to depart downward based on defendant's diminished capacity under guideline section 5K2.13. Government physicians concluded that defendant was suffering from severe mental illness, including paranoid delusions, at the time of the offense. Although a departure is only available if the defendant committed a non-violent crime, defendant's telephone call was a non-violent crime. *U.S. v. Philibert*, __ F.2d __ (11th Cir. Nov. 29, 1991) No. 90-8728.

Sentencing Hearing (§6A)

1st Circuit finds defendant was denied right to counsel at sentencing. (760) At the first sentencing hearing, the district court appointed replacement counsel to represent defendant and to ascertain his position regarding the search warrant. At the second hearing, his newly-appointed counsel told the court that he had discussed the search warrant with defendant and advised him a challenge was unlikely to succeed. Defendant stated that he no longer wanted the attorney to represent him, and the attorney requested permission to withdraw. The court failed to act on the request. The 1st Circuit held that this denied defendant his 6th Amendment right to be sentenced with the assistance of counsel. Defendant repeatedly complained during the second sentencing hearing that he was being sentenced without an attorney. Although the attorney was in the courtroom throughout the hearing, he did not represent defendant in any meaningful sense. The attorney's advice was neither offered nor requested. *U.S. v. Mateo*, __ F.2d __ (1st Cir. Nov. 27, 1991) No. 91-1592.

8th Circuit affirms sufficiency of notice of upward departure in presentence report. (761) In *U.S. v. Hill*, 911 F.2d 129 (8th Cir. 1990), the 8th Circuit rejected defendant's claim that he did not receive sufficient notice of a possible upward departure. The case was vacated and remanded by the Supreme Court for reconsideration in light of *Burns v. U.S.*, 111 S.Ct. 2182 (1991), which held that before a court can depart upward on a ground not previously identified, the court must give the parties reasonable notice. On remand, the 8th Circuit reaffirmed that defendant received adequate notice of the upward departure. The presentence report specified various grounds on which a departure might be based. A hearing was held during which defendant had the opportunity to address the possibility of a departure. The court rejected defendant's suggestion that *Burns* be expanded to require that notice of the upward departure come from the district court itself. *U.S. v. Hill*, __ F.2d __ (8th Cir. Dec. 5, 1991) No. 89-2833.

7th Circuit upholds requiring defendant to present rebuttal evidence to probation department. (765) Prior to sentencing, the district court advised defendant to submit all written objections to the presentence report to the probation department. Although he did provide certain generalized objections, he did not include any substantive evidence. At sentencing, defendant attempted to present corroborating evidence. The district court continued the hearing, directing defendant to provide all of his information to the probation department. At the continued sentencing hearing, defendant presented only his own testimony. The 7th Circuit rejected his claim that he was denied a fair sentencing hearing by being required to present his evidence to the probation de-

partment prior to the continued hearing. A district judge has discretion to determine the precise form of the defendant's opportunity to contest prejudicial or inaccurate information contained in the presentence report. The court specifically addressed each factual inaccuracy alleged by defendant, and determined his testimony was not sufficiently credible to support his objections. *U.S. v. Herrera*, __ F.2d __ (7th Cir. 1991) No. 90-2091.

8th Circuit affirms that district court did not rely on disputed information. (765) Defendant contended that the district court violated Fed. R. Crim. P. 32 by failing to resolve a factual dispute contained in the presentence report or make clear that it would not take the disputed matter into consideration at sentencing. The 8th Circuit rejected this contention, ruling that the district court complied with Rule 32 by making clear that defendant's sentence would not be based on the disputed portion of the presentence report. After defendant agreed at her sentencing hearing that the factual dispute would not affect the sentencing determination in any way, the court stated that defendant's objection to statements contained in the presentence report could be disregarded. *U.S. v. Miller*, __ F.2d __ (8th Cir. Nov. 27, 1991) No. 91-2035.

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

8th Circuit refuses to address drug quantity issue which would not change base offense level. (865) Defendant contended that it was improper to include in his base offense level 7.5 grams of cocaine base seized from people located in the basement of a house which defendant was entering when he was arrested. The 8th Circuit refused to address this argument, since it would not change his base offense level. Defendant received an offense level of 32, for possessing between 50 and 150 grams of cocaine base. The government proved that defendant had 54.63 grams of cocaine base in his possession at the time of his arrest. *U.S. v. Sparks*, __ F.2d __ (8th Cir. Nov. 26, 1991) No. 90-4854.

Forfeiture Cases

2nd Circuit prohibits claimant from contesting forfeiture while fighting extradition. (900) The doctrine of disentitlement holds that a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action. Claimant was arrested in Hong Kong, and fought attempts to extradite him to the U.S. to face narcotics charges. The U.S. government subsequently brought a civil forfeiture action against real property which it alleged had been purchased with the proceeds of claimant's illegal activities. The 2nd Circuit held that under the doctrine of disentitlement, claimant was barred from contesting the civil forfeiture proceeding as long as he continued to fight extradition. A defendant with notice of criminal charges who actively resists returning from abroad to face those charges is a fugitive from justice, even when he has no control over his movements because he is imprisoned in a foreign country. *U.S. v. Eng*, __ F.2d __ (2nd Cir. Dec. 3, 1991) No. 91-6013.

2nd Circuit denies standing to claimant who filed motion for order to show cause rather than verified claim. (920) Admiralty Rule 6(c) requires a claimant asserting a right to seized property to file a verified claim within 10 days after process has been executed. Claimant never filed a verified claim, instead filing a motion for an order to show cause why the properties should not be released. The motion stated that claimant was a potential claimant to the properties but did not state what interest he had. The 2nd Circuit affirmed the district court's determination that claimant lacked standing to challenge the forfeiture. The court rejected claimant's argument that he did not receive adequate notice of the forfeiture action, since he filed his motion on the same date which he contended the time to file a verified claim expired. Filing a verified claim would not have waived his right to bring a motion for an order to show cause. *U.S. v. Eng*, __ F.2d __ (2nd Cir. Dec. 3, 1991) No. 91-6013.

Federal Sentencing and Forfeiture Guide
NEWSLETTER

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

Vol. 3, No. 3 | FEDERAL SENTENCING GUIDELINES AND FORFEITURE CASES FROM ALL CIRCUITS. | December 2, 1991

IN THIS ISSUE:

2nd Circuit says that disproportionately large civil forfeiture may violate double jeopardy. Pg. 1.

10th Circuit rules clarifying amendment changed the law of the circuit and raised ex post facto problems. Pg. 3.

6th Circuit vacates panel decision in *Davern* and grants rehearing en banc. Pg. 3.

4th Circuit holds that guideline range need not be disclosed to defendant prior to accepting plea. Pg. 4.

8th Circuit rules drugs involved in 1983 state conviction were *not* part of same course of conduct as 1989 federal conviction. Pg. 5.

10th Circuit holds "loss" caused by fraudulent loans must be reduced by value given to lender. Pg. 6.

1st Circuit reverses obstruction enhancement based on false social security number. Pg. 8.

5th Circuit examines underlying conduct to determine that felon in possession of a firearm is a crime of violence. Pg. 8.

9th Circuit notes that Parole Commission has been extended to November 1, 1997. Pg. 9.

D.C. District Court departs downward for diminished capacity. Pg. 10.

3rd Circuit determines extent of prosecutor's immunity for actions in civil forfeiture case. Pg. 11.

Guideline Sentencing, Generally

2nd Circuit says that disproportionately large civil forfeiture may violate double jeopardy. (125)(140)(910) Defendant's $68,000 equity interest in his condominium was forfeited after he sold $250 worth of cocaine from the condominium. He argued that the forfeiture constituted criminal punishment and violated the double jeopardy clause and was cruel and unusual punishment. Relying on *U.S. v. Halper*, 490 U.S. 435 (1989), the 2nd Circuit held that a civil forfeiture will not be presumed punitive if the property was an instrumentality of crime. However, where the property is not an instrumentality and its value is overwhelmingly disproportionate to the value of the drugs, there is a rebuttable presumption that the forfeiture is punitive in nature. Here, the government conceded that the condominium was not an instrumentality of crime, and the court found that the forfeiture was overwhelmingly disproportionate. Nevertheless, the court found that since the drug offense had been prosecuted by the state rather than the federal government, the double jeopardy clause did not apply. As for cruel and unusual punishment, the equivalent of a $68,000 fine, while large, did not violate the 8th Amendment. *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive*, Babylon, New York, __ F.2d __ (2nd Cir. Nov. 13, 1991) No. 90-6268.

7th Circuit finds no evidence that district court mistakenly calculated loss based on pre-guidelines conduct. (125)(855) Defendant was found guilty of 48 counts relating to a fraudulent check cashing scheme. Nineteen of the counts were subject to the sentencing guidelines, while 29 counts were pre-guidelines counts. Defendant contended that the amount of the loss caused by his conduct under the guidelines incorrectly included amounts involved in

© 1991, Del Mar Legal Publications, Inc., 2670 Del Mar Heights Rd., Suite 247, Del Mar, CA 92014. Tel: (619) 755-8538

SECTION

100 Pre-Guidelines Sentencing, Generally

110 Guidelines Sentencing, Generally
115 Rule 35 Motion to Correct Sentence
120 Constitutional Issues, Generally
125 Double Counting/Double Jeopardy
130 Ex Post Facto/Retroactivity, Generally
131 Amendments To Guidelines
132 Continuing Offenses/Conspiracy
135 Due Process
140 Cruel and Unusual Punishment
145 Statutory Challenges To Guidelines

150 Application Principles, Gen. (Chap. 1)
160 Definitions (More Than Minimal Planning, Etc.) (§1B1.1)
165 Stipulation to More Serious Offense *(See also 795)* (§1B1.2)
170 Relevant Conduct, Generally (§1B1.3) *(For Drug Relevant Conduct, see 260*
175 Acquitted, Dismissed, Uncharged Conduct *(for use in Departures see 718)*
180 Use of Commentary/Policy (§1B1.7)
185 Information Obtained During Cooperation Agreement (§1B1.8)
190 Application to Indians, Assimilated Crimes, Juveniles, Misd. (§1B1.9)

200 Offense Conduct, Generally (Chapter 2)
210 Homicide, Assault (§2A1-2)
215 Sexual Abuse, Kidnapping, Air Piracy, Threatening Comm. (§2A3-6)
220 Theft, Embezzlement, Burglary (§2B1-2)
224 Robbery, Extortion (§2B3)
226 Commercial Bribery, Counterfeiting, Forgery, VIN Nos. (§2B4-6)
230 Public Officials, Offenses (§2C)
240 Drug Offenses, Generally (§2D)
242 Constitutional Issues
245 Mandatory Minimum Sentences
246 Telephone Counts (21 U.S.C. 843(b))
250 Calculating Weight or Equivalency
251 "Mixtures"/Purity
252 Laboratory Capacity/Precursors
253 Marijuana/Plants
254 Estimating Drug Quantity
260 Drug Relevant Conduct, Generally
265 Amounts Under Negotiation
270 Dismissed/Uncharged Conduct
275 Conspiracy/"Foreseeability"
280 Possession of Weapon During Drug Offense, Generally (§2D1.1(b))
284 Cases Upholding Enhancement
286 Cases Rejecting Enhancement
290 RICO, Loan Sharking, Gambling (§2E)
300 Fraud (§2F)
310 Sexual Exploitation of Minors (§2G)
315 Civil Rights, Political Offenses (§2H)
320 Contempt, Obstruction, Perjury, Impersonation, Bail Jumping (§2J)
330 Firearms, Explosives, Arson (§2K)
340 Immigration Offenses (§2L)
345 Espionage, Export Controls (§2M)
348 Food, Drugs, Odometers (§2N)
350 Escape, Prison Offenses (§2P)

SECTION

355 Environmental Offenses (§2Q)
360 Money Laundering (§2S)
370 Tax, Customs Offenses (§2T)
380 Conspiracy/Aiding/Attempt (§2X)
390 "Analogies" Where No Guideline Exists (§2X5.1)

400 Adjustments, Generally (Chapter 3)
410 Victim-Related Adjustments (§3A)
420 Role in Offense, Generally (§3B)
430 Aggravating Role: Organizer, Leader, Manager or Supervisor (§3B1.1)
431 Cases Finding Aggravating Role
432 Cases Rejecting Aggravating Role
440 Mitigating Role: Minimal or Minor Participant (§3B1.2)
443 Cases Finding Mitigating Role
445 Cases Rejecting Mitigating Role
450 Abuse of Trust/Special Skill (§3B1.3)
460 Obstruction of Justice (§3C)
461 Cases Finding Obstruction
462 Cases Rejecting Obstruction
470 Multiple Counts (§3D)
480 Acceptance of Responsibility, Gen. (§3E)
482 As to "Related" Conduct
484 Constitutional Issues
486 Probation Interview/Cooperation
488 Timeliness, Sincerity, Minimizing Role
490 Effect of Guilty Plea
492 Effect of Perjury/Obstruction
494 Other Post-Arrest Misconduct

500 Criminal History, Generally (§4A1.1)
504 Prior Convictions (§4A1.2)
508 Departures for Criminal History (§4A1.3)
510 Cases Upholding
514 Cases Rejecting
520 Career Offenders (§4B1.1)
530 Criminal Livelihood (§4B1.3)

550 Determining the Sentence (Chapter 5)
560 Probation (§5B) *(for Revocation, see 800)*
570 Pre-Guidelines Probation Cases
580 Supervised Release (§5D) *(Rev. see 800)*
590 Parole
600 Custody Credits
610 Restitution (§5E4.1)
620 Pre-Guidelines Restitution Cases
630 Fines and Assessments (§5E4.2)
640 Community Confinement, Etc. (§5F)
650 Consecutive Sentences (§5G)
660 Specific Offender Characteristics (§5H)
670 Age, Education, Skills (§5H1.1-.2)
680 Physical and Mental Conditions, Drug and Alcohol Abuse (§5H1.3-.4)
690 Employment, Family Ties (§5H1.5-.6)

SECTION

700 Departures, Generally (§5K) *(for Criminal History Departures, see 508, for Refusal to Depart, see 860)*
710 Substantial Assistance Departures §5K1)
712 Necessity for Government Motion
715 Specific Grounds for Departure (§5K2)
716 Disparity Between Co-Defendants
718 Acquitted, Dismissed, Uncharged Conduct *(for consideration as "Relevant Conduct," see 175, 270)*
719 "Aberrant" Behavior, Rehabilitation
721 Physical or Psychological Injury, Abduction, Restraint (§5K2.1-.4)
725 Property Damage, Weapons, Disruption of Gov't. Function, Extreme Conduct, Facilitating Other Offense (§5K2.5-.9)
730 Self Defense, Necessity, Duress, Diminished Capacity (§5K2.10-.13)
734 National Security, Public Health and Safety, Terrorism (§5K2.14-.15)
736 Specific Offender Characteristics (§5H)
738 Drug Cases

750 Sentencing Hearing, Generally (§6A) *(for Waiver by Failure to Object, see 855)*
755 Burden of Proof
758 Discovery at Sentencing
760 Rule 32, Presentence Report (§6A1.2)
761 Notice/Disclosure of Information
765 Resolution of Disputes (§6A1.3)
770 Information Relied On/Hearsay *(for Dismissed, Uncharged Conduct, see 175, 718)*
772 Pre-Guidelines Cases
775 Statement of Reasons For Sentence Within Range (18 U.S.C. §3553)

780 Plea Agreements, Generally (§6B)
790 Advice/Breach/Withdrawal (§6B)
795 Stipulations (§6B1.4) *(see also 165)*

800 Violations of Probation and Supervised Release (Chapter 7)

840 Sentencing of Organizations (Chapter 8)

850 Appeal of Sentence (18 U.S.C. §3742)
855 Waiver by Failure to Object
860 Refusal to Depart Not Appealable
865 Overlapping Ranges, Appealability of
870 Standard of Review, Generally *(See also substantive topics)*

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

900 Forfeitures, Generally
905 Jurisdictional Issues
910 Constitutional Issues
920 Procedural Issues, Generally
930 Delay In Filing/Waiver
940 Return of Seized Property/ Equitable Relief
950 Probable Cause
960 Innocent Owner Defense
970 Property Forfeited

non-guidelines counts. Because his guideline and pre-guideline sentences were ordered to run consecutively, he contended he was subjected to double punishment in violation of the double jeopardy clause. The 7th Circuit rejected this argument, since defendant failed to state how the district court erred in determining the loss for guidelines offenses. Moreover, at the sentencing hearing the defendant made no objection to the figure used by the district court. Accordingly he failed to preserve this issue for appeal. *U.S. v. Randall*, __ F.2d __ (7th Cir. Nov. 14, 1991).

10th Circuit holds defendant should be sentenced under the guidelines in effect on the date he was resentenced. (130) On June 20, 1989, defendant was sentenced to 130 months' imprisonment. On August 2, 1990, defendant filed a motion under 28 U.S.C. section 2255 to vacate his sentence. The district court found that defense counsel failed to advise defendant of his right to appeal, and defendant was unaware of it until the time for filing the notice of appeal had passed. Thus, on March 19, 1991, the district court simultaneously vacated defendant's June 20, 1989 sentence, reimposed it exactly as previously entered, and informed the defendant of his right to appeal. Defendant then appealed his March 19, 1991 sentence. The 10th Circuit ruled that the date defendant was sentenced was March, 1991. Although the March 1991 sentencing court merely reimposed the sentence exactly as it had been imposed in June 1989, the court's appellate jurisdiction resulted from the March, 1991 sentencing. Thus, defendant should have been sentenced under the guidelines in effect in March 1991. *U.S. v. Saucedo*, __ F.2d __ (10th Cir. Nov. 12, 1991) No. 91-6126.

10th Circuit rules clarifying amendment changed the law of the circuit and raised ex post facto problems. (131)(420) In *U.S. v. Pettit*, 903 F.2d 1336 (10th Cir. 1990), the 10th Circuit held that an aggravating role adjustment under section 3B1.1 was limited to the offense of conviction rather than other relevant conduct. Thereafter, effective November 1, 1990, the Introductory Commentary to Chapter 3, Part B, was amended to state that a defendant's role in the offense is to be based on all relevant conduct. The Commission stated that the purpose of the amendment was to clarify, rather than to change section 3B1.1. However, because the court was required to overrule circuit precedent in order to interpret the guideline consistent with the amended commentary, the 10th Circuit held that the application of the amended commentary to defendant would violate the ex post facto clause. The Sentencing Commission's "post hoc clarification" of its intent did not invalidate the court's pre-amendment interpretation of the guidelines. *U.S. v. Saucedo*, __ F.2d __ (10th Cir. Nov. 12, 1991) No. 91-6126.

6th Circuit upholds 360-month sentence for drug trafficker against cruel and unusual punishment claim. (140) Defendant was convicted of various drug-related offenses and received three concurrent terms of 360 months and one 41 month concurrent term. The 6th Circuit rejected as "patently meritless" defendant's claim that the 360-month sentence constituted cruel and unusual punishment under the facts of his case. *U.S. v. Straughter*, __ F.2d __ (6th Cir. Nov. 14, 1991) No. 91-3002.

6th Circuit vacates panel decision in *Davern* and grants rehearing en banc. (145)(150)(251)(270) In *U.S. v. Davern*, 937 F.2d 1041 (6th Cir. 1991), the 6th Circuit ruled that the sequence of steps prescribed in guideline section 1B1.1 for determining a defendant's sentence was inconsistent with the enabling legislation. It found that a more flexible approach was mandated by 18 U.S.C. section 3553(a). On September 26, 1991, the 6th Circuit granted rehearing en banc and vacated the panel decision. *U.S. v. Davern*, 937 F.2d 1041 (6th Cir. 1991), *vacated upon granting of rehearing en banc*, (6th Cir. Sept.

The **Federal Sentencing and Forfeiture Guide Newsletter** *is part of a comprehensive service that includes a main volume, bimonthly supplements and biweekly newsletters. The main volume, (3rd Ed., hardcover, 1100 pp.), covers ALL Sentencing Guidelines and Forfeiture cases published since 1987. Every other month the newsletters are merged into a supplement with full citations and subsequent history.*

Annual Subscription price: **$250** (includes main volume, 6 supplements and 26 newsletters a year.) Main volume (3rd Ed. 1991): **$80**.

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

Publication Manager:
Beverly Boothroyd

Copyright © 1991, Del Mar Legal Publications, Inc., 2670 Del Mar Heights Road, Suite 247, Del Mar, CA 92014. Telephone: (619) 755-8538. All rights reserved.

26, 1991), No. 90-3681.

General Application Principles (Chapter 1)

8th Circuit affirms that theft by armored car employee involved more than minimal planning. (160)(220) Defendant worked for an armored car company as a messenger responsible for accepting and distributing the car's currency or cargo. One day after receiving a bag containing $25,000 without having to sign for it, he stole the money. The 8th Circuit affirmed a two-level increase under guideline section 2B1.1(b)(5) for more than minimal planning. The district court found that defendant had stolen money from the armored car's cargo on several earlier occasions and had taken substantial steps to conceal his thefts, including the final theft of $25,000. *U.S. v. Coney*, __ F.2d __ (8th Cir. Nov. 20, 1991) No. 91-1980.

10th Circuit rules pre-November 1990 guidelines required role adjustments to be based on offense of conviction. (170)(420) In *U.S. v. Pettit*, 903 F.2d 1336 (10th Cir. 1990), the 10th Circuit held that role adjustments must be based only on defendant's role in the offense of conviction rather than other relevant conduct. In *U.S. v. Riles*, 928 F.2d 339 (10th Cir. 1991), it interpreted the same version of the guidelines as requiring the court to consider all relevant conduct in determining whether to grant a downward adjustment for a defendant's mitigating role under section 3B1.2. The 10th Circuit noted that *Pettit* and *Riles* were "fundamentally at odds and lack[ed] any principled distinction." Since *Pettit* was decided first, and *Riles* could not have overruled it, a district court prior to November, 1990 would have been required to follow *Pettit's* analysis. However, effective November 1, 1990, the Introductory Commentary to Chapter 3, Part B was amended to state that role in the offense is to be based on all relevant conduct. *U.S. v. Saucedo*, __ F.2d __ (10th Cir. Nov. 12, 1991) No. 91- 6126.

Offense Conduct, Generally (Chapter 2)

4th Circuit holds that guideline range need not be disclosed to defendant prior to accepting plea. (245)(780) The 4th Circuit rejected defendant's claim that the district court violated Fed. R. Crim. P. 11(c)(1) by failing to notify him of any mandatory minimum penalty prior to accepting his guilty plea. Neither statute under which defendant was convicted contained a mandatory minimum sentence. The sentencing range dictated by the sentencing guidelines did not set a mandatory minimum penalty for the offense within the meaning of Rule 11(c)(1), since the guidelines provide for departures. Normally, at the time of a plea hearing, there has been no presentence report prepared, and the court cannot inform the defendant of the sentencing range under the guidelines. Thus, a guideline range need not be disclosed before a plea is accepted. *U.S. v. DeFusco*, __ F.2d __ (4th Cir. Nov. 12, 1991) No. 90-5319.

8th Circuit affirms that a court may collaterally examine validity of prior convictions for section 924(e) purposes. (245)(504) Defendant was convicted of being a felon in possession of a firearm and received an enhanced sentence under 18 U.S.C. section 924(e) for four prior convictions. He claimed that the prior convictions were invalid. The 8th Circuit upheld defendant's ability to collaterally attack the validity of the prior convictions, even though at the time defendant was sentenced, the commentary to guideline section 4A1.2 forbade collateral attacks on prior convictions used to compute a defendant's criminal history score. The court stated that while sentences greater than section 924(e)'s minimum sentence are governed by the guidelines, the minimum sentence itself is governed by section 924, an independent statutory authority. Circuit courts have consistently interpreted section 924(e) to permit collateral challenges to prior convictions. *U.S. v. Day*, __ F.2d __ (8th Cir. Nov. 21, 1991) No. 91-1499.

1st Circuit affirms approximation based upon drug quantities listed in ledger. (254) Police discovered in defendants' apartment 730 grams of cocaine, $14,000 in cash and a spiral notebook with notations of various cocaine transactions. The district court computed defendants' base offense level by adding to the 730 grams the 3,555 grams that the spiral notebook indicated that defendants had sold during the preceding few months. The 1st Circuit affirmed the calculation. A DEA agent testified that the notebook was a ledger of drug sales, that it referred to prices current during the prior two months, and that the sales added up to at least 3,555 grams of cocaine. Defendants occupied the apartment alone, the ledger was readily available in the kitchen, and the apartment contained over $14,000 in cash; likely proceeds from fairly recent drug transactions. *U.S. v. Tabares*, __ F.2d __ (1st Cir. Nov. 14, 1991) No. 91-1273.

6th Circuit affirms defendant's involvement with 15 kilograms of cocaine. (254) Defendant argued that the government failed to prove his responsibility

for the 15 kilograms of cocaine which were attributed to him at sentencing. The 6th Circuit found sufficient evidence to support the determination. One witness testified that defendant transported four kilograms of cocaine from a deal she arranged. Another witness testified about defendant's involvement in approximately 12 transactions, each involving quantities of cocaine ranging from four to eight kilograms. Yet another witness testified that he sent defendant on three to four trips to transport cocaine and that on these trips the average amount of cocaine carried was six kilograms. *U.S. v. West*, __ F.2d __ (6th Cir. Nov. 15, 1991) No. 91-5097.

6th Circuit upholds approximation of cocaine quantity based upon cooperating co-conspirator's testimony. **(254) (770)** The district court included in the calculation of defendant's base offense level 30 to 40 kilograms which a co-conspirator testified he had purchased from defendant during the previous years. Defendant contended that it was improper to punish him for the additional kilogram amounts based solely on the testimony of a co-conspirator, particularly one who had traded testimony to the government in exchange for a plea agreement. The 6th Circuit found no error in the district court's reliance upon such testimony. The testimony was corroborated by the records found in another conspirator's purse, which noted collection of payments of $330,000. *U.S. v. Straughter*, __ F.2d __ (6th Cir. Nov. 14, 1991) No. 91-3002.

7th Circuit remands because district court never specified drug quantity on which sentence was based. **(254)(775)** Defendant was convicted of conspiring to distribute less than 500 grams of cocaine. He was sentenced to 97 months, which would have been a lawful sentence for at least 3.5 but less than five kilograms of cocaine. The 7th Circuit remanded for resentencing because the quantity of cocaine was never discussed during sentencing. There was a "bald" statement in defendant's presentence report that the government believed defendant was responsible for at least four kilograms of cocaine. However, this would be a poor source for estimating the quantity of cocaine since there was no basis given for the government's conclusion. Even if the presentence report had been expressly adopted by the district court, it would not have sufficiently explained the sentence. In imposing sentence a court must give reasons explaining, at the very least, how it computed the base offense level and applicable guideline range. *U.S. v. Leichtnam*, __ F.2d __ (7th Cir. Nov. 21, 1991) No. 90- 2534.

7th Circuit affirms drug quantity based on testimony that defendant paid burglar 200 times in eight months. **(254)** Defendant was a fence who paid for stolen goods with cocaine. The 7th Circuit affirmed that defendant's offense involved in excess of 500 grams. Police found 174 grams on his premises, together with $50,000 in cash and stolen property. Defendant paid two burglars 21 and 28 ounces of cocaine, respectively, for their goods. Another burglar testified that he sold stolen items to defendant approximately 200 times over an eight-month period. If defendant paid this burglar cash plus one-sixteenth of an ounce of cocaine as he did with the others, then he distributed 354 grams of cocaine to one burglar alone. This put him well over 500 grams. Alternatively, the district judge would have been entitled to determine that defendant doled out a substantial quantity of cocaine for the cash and merchandise on hand. Judge Cudahy, dissenting in part, found the burglar's story improbable, and that the majority too lightly regarded the requirement that aggravating factors must be found by a preponderance of the evidence. *U.S. v. Ferra*, __ F.2d __ (7th Cir. Nov. 19, 1991) No. 91-1584.

10th Circuit holds defendant waived right to challenge determination of drug relevant conduct. **(260)(855)** Defendant contended for the first time on appeal that the district court erred by including certain quantities of drugs in his base offense level calculation without any evidence that they were part of a common plan or scheme. The 10th Circuit held that defendant waived his right to challenge this issue by failing to raise it below. Whether the transactions involved in the dismissed counts were part of the same course of conduct or common scheme or plan as the count to which defendant pled guilty is a "fact-intensive inquiry" that must be raised at sentencing to preserve the issue for appeal. Because defendant's dispute was entirely factual, he waived the issue by failing to object at sentencing, and it did not constitute plain error. *U.S. v. Saucedo*, __ F.2d __ (10th Cir. Nov. 12, 1991) No. 91-6126.

8th Circuit rules drugs involved in 1983 state conviction were *not* part of same course of conduct as 1989 federal conviction. **(270)** The district court calculated defendant's base offense level by adding the drugs involved in his offense of conviction, which took place in 1989, with the amount of drugs involved in a state conviction in 1983. The 8th Circuit reversed the district court's determination that the drugs involved in the 1983 conviction were part of the same course of conduct as the offense of conviction. Under no circumstances could defendant now be criminally liable or "accountable" in 1989 for

the conduct that resulted in his conviction in 1983. The district court's approach was at variance with the guidelines' basic approach of separating the nature and circumstances of the offense from the history and characteristics of the offender. The 1983 conviction should have been included in defendant's criminal history, not his offense level. *U.S. v. Barton*, __ F.2d __ (8th Cir. Nov. 21, 1991) No. 90-2670.

7th Circuit affirms inclusion of drugs involved in larger conspiracy. (275) Although defendant was convicted of conspiracy to distribute two kilograms of cocaine, he was sentenced on the basis of 11 kilograms after the district court determined he was part of a larger conspiracy involving his two brothers and others. The 7th Circuit rejected defendant's claim that the government failed to prove the larger conspiracy by a preponderance of the evidence. Defendant's claim that his brothers were competitors rather than co-conspirators was unsupported by the record. There was also no merit to defendant's claim that the government should have charged him with the larger conspiracy if it wanted to sentence him on this basis. The court found that the larger conspiracy was part of the same course of conduct as the offense of conviction under section 1B1.3(a) because the cocaine involved in the larger conspiracy would have been grouped with the two kilogram conspiracy if the larger conspiracy had been charged. *U.S. v. Blas*, __ F.2d __ (7th Cir. Nov. 14, 1991) No. 90-2071.

6th Circuit upholds firearm enhancement for weapons found in bedroom of residence. (284) The 6th Circuit upheld an enhancement under guideline section 2D1.1(b)(1) based on handguns found in the bedroom of defendant's residence. Defendant failed to show any clear error in the district court's determination that these weapons were used in the furtherance of his drug conspiracy. *U.S. v. Straughter*, __ F.2d __ (6th Cir. Nov. 14, 1991) No. 91-3002.

10th Circuit holds defendant waived question of scienter for weapon possession by failing to raise it below. (284)(855) Defendant asserted for the first time on appeal that his enhancement under section 2D1.1(b)(1) for possessing a weapon during a drug trafficking crime was improper because he lacked the requisite scienter. Under the pre-November 1989 guidelines in effect when defendant committed his offense, a finding of scienter was required to support an adjustment under section 2D1.1(b)(1). Under the present guidelines scienter is not required. The 10th Circuit ruled that defendant's failure to raise the scienter issue below constituted a waiver of his right to challenge it on appeal. Defendant's knowledge is a factual issue which would be reviewed under the clearly erroneous standard had defendant raised it below. A factual dispute concerning the applicability of a particular guideline, not brought to the attention of the district court, does not rise to the level of plain error. *U.S. v. Saucedo*, __ F.2d __ (10th Cir. Nov. 12, 1991) No. 91-6126.

10th Circuit holds "loss" caused by fraudulent loans must be reduced by value given to lender. (300) On six different occasions, defendant, who constructed and sold single family homes, represented to federally-insured lenders that his buyers had made specified down payments when they had either made substantially smaller down payments or none at all. The cumulative value of these loans was $440,896. At the time of sentencing, not a single loan was in default. The district court imposed a nine-level enhancement under section 2F1.1 for a loss of $440,896, ruling that even though there was no actual loss, this was the amount of the intended loss. The 10th Circuit reversed, finding no factual basis for the $440,896 figure. Although defendant did receive all of the loan proceeds, he delivered to the lenders something in return: the security interest in the houses and the promises of the borrowers to repay the loans. There was no factual basis for concluding that the $440,896 was the intended or probable loss. The court did not believe "the possibility that some loss might occur on one or more of the six loans in the future amount[ed] to the 'probable' loss contemplated by section 2F1.1. *U.S. v. Smith*, __ F.2d __ (10th Cir. Nov. 15, 1991) No. 91-6096.

5th Circuit holds that enhancement under section 2K2.1(b)(2) does not require knowledge that gun is stolen. (330) Following its recent decision in *U.S. v. Singleton*, __ F.2d __ (5th Cir. Oct. 16, 1991) No. 90-1962, the 5th Circuit held that an enhancement under guideline section 2K2.1(b)(2) does not require knowledge that the firearm was stolen. *U.S. v. Dancy*, __ F.2d __ (5th Cir.) No. 91-2023.

Adjustments (Chapter 3)

1st Circuit articulates two step analysis for applying aggravating role enhancement. (430) The 1st Circuit stated that in order to increase a base offense level for managerial role under section 3B1.1(c), the court must apply a two-part analysis. First, it must make a factual finding that there were at least two participants in the criminal enterprise. Second, the evidence must show that the defendant exercise control over, or was otherwise responsible for organizing the activities of, at least one other individual

committing the crime. *U.S. v. Veilleux*, __ F.2d __ (1st Cir. Nov. 20, 1991) No. 91-1215.

10th Circuit reviews enhancement for organizer role de novo. (430)(755) Defendant challenged a four-level enhancement for his organizer role in the offense under section 3B1.1(a). The 10th Circuit held that since the applicability of the guideline was an issue of law, its review would be *de novo*. *U.S. v. Smith*, __ F.2d __ (10th Cir. Nov. 15, 1991) No. 91-6096.

10th Circuit rules it was plain error to consider relevant conduct in determining defendant's aggravating role. (430) Defendant claimed for the first time on appeal that the district court improperly based its an aggravating role adjustment on conduct outside the offense of conviction. Under circuit precedent, an adjustment under section 3B1.1 could only be based on defendant's role in the offense of conviction. The 10th Circuit held that the district court's erroneous consideration of defendant's relevant conduct in making the aggravating role adjustment constituted "plain error," which was reversible on appeal despite defendant's failure to raise the issue below. *U.S. v. Saucedo*, __ F.2d __ (10th Cir. Nov. 12, 1991) No. 91-6126.

1st Circuit affirms managerial enhancement based on testimony of defendant's drug customer. (431)(870) The 1st Circuit affirmed a two-level enhancement under guideline section 3B1.1(c) based on defendant's managerial role in the offense. The district court relied heavily upon the testimony of one prosecution witness, who stated that defendant took over defendant's father's drug operation. Defendant assumed his father's accounts receivable by demanding and receiving payment from the witness for a cocaine debt owed to the father. Defendant also stated to the witness that he had a personal drug runner. Moreover, the district court found that defendant supplied drugs to an organization and controlled the details of the transactions. Setting the details of drug transactions, where the offender also directs at least one accomplice, is sufficient to uphold an enhancement. While the appellate court might have given less credence to the witness's testimony, a factfinder's choice between two permissible views cannot be clearly erroneous. *U.S. v. Veilleux*, __ F.2d __ (1st Cir. Nov. 20, 1991) No. 91-1215.

7th Circuit affirms managerial enhancement for fence who requested specific merchandise from thieves. (431) Defendant was a fence who paid for stolen goods with cocaine. The 7th Circuit affirmed a managerial enhancement under section 3B1.1(c), ruling the district court could have found that defendant managed a "stable of thieves" by requesting them to supply him with specific merchandise. Although the district court could have found that the burglars were "independent entrepreneurs" rather that defendant's "minions," the appellate court would not disturb a determination that could have gone either way. The court rejected that the prosecutor's contention that the section 3B1.1(c) enhancement is proper for a fence just because the fence, by offering to buy goods, makes burglary more profitable. *U.S. v. Ferra*, __ F.2d __ (7th Cir. Nov. 19, 1991) No. 91-1584.

7th Circuit affirms managerial role of defendant who had authority to permit others to join conspiracy. (431) The 7th Circuit affirmed defendant's managerial role in a drug conspiracy begun by his brother. The defendant did not recruit the conspirator who joined the conspiracy later, but he did exercise the authority to let the conspirator join the conspiracy. Defendant testified that he had the authority to let others into "the chain" without having to consult with his brother or anyone else. Defendant trained the conspirator to take his place, and directed his activities in Indiana. The court found defendant's claim that he was merely an intermediary who communicated orders was unpersuasive. Defendant was in a position of trust as his brother's contact in Indiana. When the conspirator arrived in Indiana with the marijuana from the brother, defendant doled it out to the distributors. Defendant also handled large amounts of "buy" money. The fact that defendant was supervised by his brother did not disprove his supervisory role over others. *U.S. v. Lawson*, __ F.2d __ (7th Cir. Nov. 14, 1991) No. 90-3479.

10th Circuit rejects leadership role of seller who fraudulently obtained loans for his buyers. (432) On six different occasions, defendant, who constructed and sold single family homes, misrepresented to federally-insured lenders that his buyers had made specified down payments. The 10th Circuit reversed a four level enhancement under guideline section 3B1.1 based upon defendant's leadership role in the offense because there was no connection among the various borrowers. To support enhancement, the government must show that each member of the organization is answerable to defendant and is under his continuing control. Defendant's clients were not continually dependent on him. Also, defendant's criminal activity did not involve five or more participants. *U.S. v. Smith*, __ F.2d __ (10th Cir. Nov. 15, 1991) No. 91-6096.

1st Circuit affirms that defendant was minor rather than minimal participant in drug conspiracy. **(445)** The 1st Circuit affirmed the district court's determination that defendant was a minor, rather than a minimal, participant in a drug conspiracy. Defendant was not a supplier nor was he directly involved in the distribution of the cocaine. However, his role was supportive in nature. Based upon the amount of money he was to collect, the purity of the cocaine and the amount of the cocaine, the district court concluded defendant was a minor participant. Defendant's claim that he was a mere traveling companion for his more culpable co-conspirator was not supported by the jury's verdict. The jury clearly believed that defendant attempted to collect the first installment payment on a 26 kilogram delivery of cocaine. *U.S. v. Cortes*, __ F.2d __ (1st Cir. Nov. 21, 1991) No. 90-1921.

1st Circuit rejects minimal role based on drugs in plain sight and readily available cash in defendant's apartment. **(445)** Defendant was arrested after police discovered cocaine and large amounts of cash in the apartment she shared with her boyfriend. Although defendant was found to be less culpable than her boyfriend, the district court refused to classify her as a minimal participant based upon the drugs in plain sight and the readily accessible cash found in the apartment. The district court therefore classified defendant's role as minor. The 1st Circuit affirmed, finding no clear error. *U.S. v. Tabares*, __ F.2d __ (1st Cir. Nov. 14, 1991) No. 91-1273.

8th Circuit rules defendant who was aware of drug distribution scheme and handled certain transactions was at least a minor participant. **(445)** The 8th Circuit rejected defendant's contention that she should have received a three level, rather than a two level, reduction under guideline section 3B1.2 based upon her mitigating role in her boyfriend's drug operation. Defendant argued she was entitled to a larger reduction because there was no evidence that she ever bought or sold drugs, arranged drug sales or possessed drugs. Her only role was handling legitimate purchases or transactions for which identification was required. Defendant rented the apartment used for drug trafficking and paid the utility bills. The car which the boyfriend used was registered to her. The court found that defendant's participation in the financial side of the boyfriend's drug activities and her knowledge of the scope and structure of the enterprise amply supported the district court's conclusion that she was at least a minor participant in the operation. Defendant admitted that she handled the "drug money" for the boyfriend. *U.S. v. Hall*, __ F.2d __ (8th Cir. Nov. 12, 1991) No. 90-3064.

1st Circuit upholds obstruction enhancement despite conflicting testimony about defendant's threats to witness. **(461)** The 1st Circuit upheld an enhancement for obstruction of justice based on defendant's threats to a government witness. The witness testified that when he saw defendant at a bar, defendant said that if the witness testified against him, either he or his father would kill the witness. This testimony was corroborated by a man who was with the witness at the bar. Defendant produced a witness who testified that he was with defendant at the bar, and that the conversation was much different. The district court was entitled to find the government witness's version of the conversation more credible. Therefore the enhancement was not clear error. *U.S. v. Veilleux*, __ F.2d __ (1st Cir. Nov. 20, 1991) No. 91-1215.

5th Circuit upholds obstruction enhancement for defendant convicted of perjury and kidnapping. **(461)(470)** Defendant was convicted of kidnapping and perjury. He contended that a two-level enhancement for obstruction of justice under section 3C1.1 was improper because his grouped base offense level of 30 already included his perjury offense. The 5th Circuit affirmed the enhancement, relying upon note 4 to section 3C1.1. It provides that where a defendant is convicted of both an obstruction offense and the underlying offense, the two counts are to be grouped under section 3D1.2(d). The offense level for that group is the offense level for the underlying offense increased by two for obstruction of justice, or the offense level of obstruction offense, whichever is greater. In this case, the offense level for the kidnapping was greater than the offense level for the perjury count, and therefore it was proper for the district court to add two points to the offense level for the kidnapping offense. *U.S. v. Winn*, __ F.2d __ (5th Cir. Nov. 20, 1991) No. 90-1110.

1st Circuit reverses obstruction enhancement based on false social security number. **(462)** Defendant received a two-level enhancement for obstruction of justice because he provided the probation officer with a false social security number. The 1st Circuit reversed, finding that since defendant had been using the false number for some time, it was not material to the investigation. The false number was the same number that defendant used on his tax returns. The number was likely to have helped, rather than impeded, the investigators as they looked for defendant's prior work history and assets. *U.S. v. Tabares*, __ F.2d __ (1st Cir. Nov. 14, 1991) No. 91-1273.

1st Circuit rejects reduction where defendant did not accept responsibility until trial was almost over. (488) The 1st Circuit affirmed the district court's decision to deny defendant a reduction for acceptance of responsibility. Although defense counsel conceded during trial that defendant committed the firearms offenses, he did not do this until the trial was virtually over. Moreover, defendant did not accept responsibility for the drug charges for which he was convicted. *U.S. v. Tabares*, __ F.2d __ (1st Cir. Nov. 14, 1991) No. 91-1273.

7th Circuit rejects reduction based on attempt to accept responsibility at end of sentencing hearing. (488) At the very end of the sentencing hearing, immediately prior to imposition of sentence, the defendant made a "feeble attempt" to accept responsibility. The 7th Circuit affirmed the denial of a reduction for acceptance of responsibility. "Waiting until the district judge has resolved the disputed facts at the critical moment of sentencing [was] inconsistent" with acceptance of responsibility. *U.S. v. Blas*, __ F.2d __ (7th Cir. Nov. 14, 1991) No. 90-2071.

Criminal History (§4A)

1st Circuit upholds departure where defendant admitted prior criminal acts which led to charges but not convictions. (510) The 1st Circuit affirmed the district court's decision to depart upward from criminal history category IV to V based upon three prior instances of criminal behavior that had led to criminal charges but not convictions. Defendant did not deny the facts upon which the charges rested. The charges were dismissed, but not because of any finding on the merits. For example, two of the charges were dismissed because defendant was deported. A departure is authorized by section 4A1.3(e) in such a situation. *U.S. v. Tabares*, __ F.2d __ (1st Cir. Nov. 14, 1991) No. 91-1273.

5th Circuit examines underlying conduct to determine that felon in possession of a firearm is a crime of violence. (520) Defendant was arrested after entering a motel late at night carrying a shotgun. He eventually pled guilty to being a felon in possession of a firearm, although the weapon involved in the offense was not the weapon which defendant carried into the motel. Nonetheless, the 5th Circuit looked into the facts underlying the offense of conviction and determined that it was a crime of violence for career offender purposes. Defendant purchased three weapons, including two handguns, within two days. Six days later, he purchased yet another shotgun, bringing his known arsenal to four firearms. One night later, while in the possession of firearms, he caused a disturbance at one motel that was serious enough to require the police. He was arrested later that same night after entering another motel, brandishing a shotgun, while under the influence of drugs and alcohol. Given defendant's history of violence and irresponsibility associated with his possession of guns, the district court was justified in determining that defendant's mere possession of the weapon presented a "serious potential risk of physical injury to another." *U.S. v. Shano*, __ F.2d __ (5th Cir. Nov. 18, 1991) No. 91-4102. [Editor's note: Effective November 1, 1991, the Sentencing Commission amended Application Note 2 to section 4B1.2 to state that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."]

7th Circuit reviews criminal livelihood determination under clearly erroneous standard. (530)(870) The 7th Circuit found that whether defendant engaged in illegal gambling as a criminal livelihood is a finding of fact. Therefore, it would accept a district court's finding on appeal unless it was clearly erroneous. *U.S. v. Rosengard*, __ F.2d __ (7th Cir. Nov. 15, 1991) No. 90-1511.

7th Circuit affirms that defendant engaged in illegal gambling as a criminal livelihood. (530) Defendant admitted to his probation officer that he had been involved in organized gambling periodically throughout his life. During his best year, he earned $40,000, and in some years he lost money. His tax returns for 1984 through 1988 reflected an adjusted gross income in excess of $24,000 for each year. He held a nongambling job prior to 1984, but eventually quit, and because "really didn't know anything else [he] could do," he went back into organized gambling in 1985. The 7th Circuit affirmed a determination under guideline section 4B1.3 that defendant engaged in criminal conduct as a livelihood. Given defendant's income tax returns and job history from the years 1984 to 1988, the district judge could have reasonably found that defendant derived a substantial portion of his income from illegal gambling or that his income from gambling exceeded $6,700 in any 12-month period. In addition, defendant admitted that he hoped to be successful enough to retire. *U.S. v. Rosengard*, __ F.2d __ (7th Cir. Nov. 15, 1991) No. 90-1511.

9th Circuit notes that Parole Commission has been extended to November 1, 1997. (590) On December 1, 1990, Congress amended section 235(b) of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2032 (1984), to extend the life of the

Parole Commission and the parole provisions, 18 U.S.C. section 4201 *et seq.*, for an additional five years. *See* Pub. L. No. 101-650, Title III, section 316 (December 1, 1990). Thus, 18 U.S.C. section 4205(a), which requires pre-guidelines prisoners to serve one-third of their sentence before being eligible for parole "will continue to be in effect until November 1, 1997." *Fassler v. U.S. Parole Commission*, __ F.2d __ (9th Cir. November 14, 1991) No. 90-16110.

9th Circuit holds that pre-guidelines prisoner must serve one-third of his sentence before parole. (590) Defendant was sentenced to 25 years before the sentencing guidelines became effective. Under the guidelines, his range would have been 12-16 months. He argued that section 235(b)(3) of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2032 (1984), repealed or pre-empted 18 U.S.C. section 4205(a), which requires a prisoner to serve one-third of his sentence before being eligible for parole. The 9th Circuit rejected the argument, ruling that section 235(b)(3), as amended on December 7, 1987, *see* Pub. L. No. 100-182, 101 Stat. 1266 (1987), simply requires the Parole Commission to set a release date "pursuant to section 4206" before the Commission goes out of existence in 1997. Nothing in section 235(b)(3) suggests that pre-guidelines prisoners are free from section 4205(a)'s requirements. The court noted that its conclusion was in accord with *Skowronek v. Brennan*, 896 F.2d 264, 269 (7th Cir. 1990); *Valladares v. Keohane*, 871 F.2d 1560, 1563 (11th Cir. 1989); and *Lightsey v. Kastner*, 846 F.2d 329, 330-31 (5th Cir. 1988). *Fassler v. U.S. Parole Commission*, __ F.2d __ (9th Cir. November 14, 1991) No. 90-16110.

Departures Generally (§5K)

2nd Circuit discusses grounds for challenging requirement of government motion. (712) Defendant challenged the government motion requirement in guideline section 5K1.1. The 2nd Circuit found that it was bound by Circuit precedent to hold that no departure was available for defendant based on his cooperation in the absence of a government motion. He made no claim that the government acted in bad faith. However, the court outlined various arguments that existed for challenging the government motion requirement. Although the opinion did not state that the court found these arguments persuasive, it presented a very detailed discussion of them. *U.S. v. Agu*, __ F.2d __ (2nd Cir. Nov. 14, 1991) No. 91-1193.

11th Circuit rejects claim for the first time on appeal that government acted in bad faith. (712) Defendant claimed for the first time on appeal that the government acted in bad faith in refusing to move for a downward departure under section 5K1.1 based upon defendant's substantial assistance. The 11th Circuit rejected this claim. Defendant raised no challenge to the government's good faith at sentencing, and did not seek a downward departure for his substantial assistance. Defendant signed a written plea agreement acknowledging that the determination of whether he had provided substantial assistance rested solely with the government, and that defendant could not challenge that determination on appeal or by collateral attack. The district court properly sentenced defendant within the guideline range. The district court lacked discretion to depart downward based upon his assistance in the absence of a government motion. *U.S. v. Brumlik*, __ F.2d __ (11th Cir. Nov. 22, 1991) No. 90-3419.

10th Circuit rejects claim based upon co-defendant's disparate sentence. (716) Defendant contended that his sentence was impermissibly disparate when compared to his co-defendants. Following Circuit precedent, the 10th Circuit rejected his claim since it was based solely upon the lesser sentence imposed on a co-defendant and because his sentence fell within the applicable guideline range. *U.S. v. Jackson*, __ F.2d __ (10th Cir. Nov. 18, 1991) No. 90-2288.

2nd Circuit finds record ambiguous as to whether judge was aware of his ability to depart. (719)(736)(860) Defendant requested a downward departure based on several grounds, including extraordinary family ties, lack of sophistication in completing the crime, potential for victimization in jail, and the fact the crime was an aberration from defendant's normal behavior. The district court denied defendant's request. The 2nd Circuit agreed that the grounds discussed gave the district court legal authority to depart downward, and remanded because it was unclear from the record whether the court was aware of its ability to depart. The judge stated: "I have the authority, but I really don't think that if I did so--I believe I would be violating the law. . . . The Court's got the authority to depart from the guidelines whenever it feels it can do so justifiably and within the meaning of the interpretation of the guidelines through the courts and the statutes itself. I don't think I have a case where I can." *U.S. v. Ritchey*, __ F.2d __ (2nd Cir. Nov. 14, 1991) No. 91-1333.

6th Circuit rules defendant's gambling disorder did not cause diminished mental capacity. (730)(850) Defendant, a doctor of osteopathy, became a compulsive gambler and incurred excessive debts to his bookmaker. After defendant received threats to himself and his family, he sold Tylenol with codeine to raise the money to pay his gambling debts. The 6th Circuit affirmed the district court's conclusion that defendant did not qualify for a downward reduction under guideline section 5K2.13 based on diminished capacity or under section 5K2.12 for duress. The district court's legal conclusion that the type of mental state and coercion claimed by the defendant did not fit within guidelines sections 5K2.13 and 5K2.12 was reviewable on appeal under 18 U.S.C. section 3742(a)(1). Defendant's gambling disorder did not cause him to suffer a "significantly reduced mental capacity." He was able to absorb information in the usual way and to exercise the power of reason. He began to sell drugs not because of an inability to understand his situation, but because he needed the money. Coercion to pay gambling debts does not represent the type of coercion that would warrant a downward departure. *U.S. v. Hamilton,* __ F.2d __ (6th Cir. Sept. 24, 1991) No. 91-1086.

D.C. District Court departs downward for diminished capacity. (730) Although defendant had an offense level of 22, the D.C. District Court departed downward to level 20 because defendant suffered from a diminished mental capacity. In his presentence report, a clinical social worker reported that defendant had been suffering from depression, self-destructive behavior and possible suicidal ideation. The social worker also concluded that defendant used drugs as a response to his existing emotional problems. *U.S. v. Wilkerson,* __ F.Supp. __ (D.D.C. Sept. 26, 1991) No. 90-369.

6th Circuit rejects downward departure based on suicidal tendencies and ability to make restitution. (736) The district court departed downward and sentenced defendant to probation, because it found that defendant's mental and emotional condition was "far beyond the limits [it] ordinarily encounter[ed] in criminal sentencing," and it feared that incarceration might end in defendant's suicide. The court also found that a prison sentence would frustrate any meaningful hope of restitution. The 6th Circuit reversed, finding that none of these reasons were an appropriate ground for a downward departure. A rule permitting a downward departure where restitution is at issue and is a meaningful possibility would generally apply only in white collar crimes and cause disparate sentences based upon socioeconomic status. Permitting departures based upon self-professed suicidal tendencies would result in such claims becoming "virtual boilerplate" in defendant's arguments before sentencing judges. *U.S. v. Harpst,* __ F.2d __ (6th Cir. Nov. 21, 1991) No. 91-3078.

Sentencing Hearing (§6A)

10th Circuit finds that court adequately explained why it was not bound by amount of drugs specified in plea agreement. (765) The plea agreement stated that defendant possessed 11.2 grams of cocaine at the time of his arrest. The presentence report stated that the offense involved 109.3 grams of cocaine. Over defendant's objection, he was sentenced for the greater amount. The 10th Circuit found that the district court complied with Fed. R. Crim. P. 32(c)(3)(D) by adequately explaining why it was not bound by the amount specified in the plea agreement. The district court considered all of the facts and the course of conduct, defendant's own statements and the drugs that were recovered from both of the rooms used to commit the offense. However, because the district court failed to attach a written copy of its factual findings to the presentence report as required by Rule 32(c)(3)(D), the case was remanded for the district court to tend to this ministerial matter. *U.S. v. Jackson,* __ F.2d __ (10th Cir. Nov. 18, 1991) No. 90-2288.

8th Circuit affirms that court adequately stated reasons for sentence at top of guideline range. (775) The 7th Circuit rejected defendant's claim that the district court failed to state adequate reasons for sentencing him at the top of his guideline range as required by 18 U.S.C. section 3553(c)(1). The district court's written judgment listed only "career offender" as the reason for the maximum sentence. However, the court's orally-imposed sentence controlled the appellate court's review of the reasons for the sentence. At defendant's sentencing hearing, the court gave specific reasons for the maximum sentence, noting that defendant had previously appeared before the court and defendant's probation officer had warned him he would face life in prison if convicted again. This was a sufficient reason for the maximum sentence. The appellate court noted its concern with the rising number of appeals involving section 3553(c)(1) and urged sentencing courts to refer to the facts of each case and explain why they choose a particular point in the sentencing range. *U.S. v. Dumorney,* __ F.2d __ (8th Cir. Nov. 21, 1991) No. 91-1719.

Plea Agreements, Generally (§6B)

4th Circuit holds defendant need not be informed he cannot withdraw his guilty plea. (790) Defendant argued that his sentence should be vacated because the court failed to advise him that once he pled guilty he could not withdraw his plea. The 4th Circuit ruled that the court was not required to inform the defendant that he could not withdraw his guilty plea. Defendant's argument was based on the incorrect premise that Fed. R. Crim. P. 11(e)(2) applied to him. The rule provides that for plea agreements of the type specified in subdivision (e)(1)(B), the court must advise the defendant that if the court does not accept the sentencing recommendation or request, the defendant has no right to withdraw his plea. Rule 11(e)(1)(B) plea agreements contain an agreement by the government to make a sentencing recommendation or not to oppose a sentencing request of the defendant. Since there was no such agreement by the government in this case, there was no requirement that the district court inform defendant that he had no right to withdraw his guilty plea. *U.S. v. Lambey*, __ F.2d __ (4th Cir. Nov. 18, 1991) No. 90-5619.

4th Circuit refuses to permit withdrawal of plea even though defense counsel underestimated guideline range. (790) Defense counsel advised defendant that although he could not predict defendant's guideline range, he "felt" that it would be 78 to 108 months. Defendant received a 360-month sentence. The 4th Circuit found no abuse of discretion in the district court's denial of defendant's motion to withdraw his guilty plea. At defendant's plea hearing, the court advised defendant that he faced a maximum life sentence. Defendant testified that he was aware that any predictions as to his sentence were not binding on the court. The appellate court did not rule out the possibility that erroneous advice to a defendant might constitute grounds for withdrawing a guilty plea where the information given by the court conflicts with the earlier information given by the defendant's attorney. However, the court said that the criminal justice system must be able to rely upon the dialogue between the court and defendant. Judge Widener dissented, believing that defendant had established a fair and just reason for withdrawing his plea in that his counsel's "very incorrect reading of the Sentencing Guidelines [fell] short of an objective standard of reasonableness." *U.S. v. Lambey*, __ F.2d __ (4th Cir. Nov. 18, 1991) No. 90-5619.

4th Circuit denies rehearing en banc in case holding that defendant's waiver of appeal barred government appeal. (790)(850) In *U.S. v. Guevara*, 941 F.2d 1299 (4th Cir. 1991), the 4th Circuit held that a defendant's explicit waiver of appeal in a plea agreement must be construed as an implicit waiver of the government's right to appeal. Judge Wilkins, joined by Judges Wilkinson, Niemeyer and Luttig, dissented from the denial of the petition for rehearing *en banc*. Judge Wilkins felt that in the absence of an express waiver, the right to appeal should be recognized and respected. The record contained no evidence that the defendant entered the plea agreement involuntarily or without full knowledge and understanding of its provisions. Moreover, there was no indication that the government intended to waive its statutory right to appeal. Defendant did not even raise this issue on appeal. *U.S. v. Guevara*, __ F.2d __ (4th Cir. Nov. 14, 1991) No. 90-5840 (Wilkins, J., dissenting from the denial of rehearing *en banc*).

10th Circuit rules that statement of drug quantity in plea agreement was not sentencing recommendation. (790) Under Fed. R. Crim. P. 11(e)(1)(B), the government may make a sentencing recommendation or agree not to oppose defendant's request for a particular sentence. Defendant's plea agreement specified that he possessed 11.2 grams of cocaine, but it did not contain a sentencing recommendation by the government or an agreement by the government not to oppose defendant's request for a particular sentence. The 10th Circuit ruled that defendant's agreement was not a Rule 11(e)(1)(B) agreement. Therefore, the district court was not required, pursuant to guideline section 6B1.1(b), to advise defendant prior to accepting his guilty plea that the court was not bound to accept the government's sentencing recommendation. *U.S. v. Jackson*, __ F.2d __ (10th Cir. Nov. 18, 1991) No. 90-2288.

Forfeiture Cases

2nd Circuit finds sufficient nexus between sales of small amounts of cocaine and condominium in which sales took place. (900) Claimant's condominium was seized after he made two small sales of cocaine to a government informant inside the condominium. No drugs, weapons, large amounts of cash, drug paraphernalia or drug records were discovered in the condominium. The 2nd Circuit affirmed that the drug activity was sufficiently connected with the property to bring the property within the purview of 21 U.S.C. section 881(a)(7). The court rejected defendant's claim that the statute requires a "substantial connection" between the property and the crime. Instead, the statute only requires a "nexus" between the drug activity and the property. As a site

for the sales, the property "facilitated" them by permitting them to be conducted in an atmosphere of relative privacy. Moreover, the statute permits forfeiture to be predicated upon only a small quantity of drugs. *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, __ F.2d __ (2nd Cir. Nov. 13, 1991) No. 90-6268.

3rd Circuit determines extent of prosecutor's immunity for actions in civil forfeiture case. **(900)** Plaintiffs filed a claim against an Assistant U.S. Attorney and several DEA agents claiming that the seizure of plaintiffs' corporation violated plaintiffs' constitutional rights. The 3rd Circuit held that the prosecutor was subject to absolute immunity for initiating the complaint, applying for the seizure warrant, and for his actions and statement before the judge in support of the complaint and seizure warrant. However, the prosecutor's management of and negotiations concerning the return of the seized property, including his demand for a release from personal liability, were not directly related to the judicial process. Here, the prosecutor was acting in an administrative capacity, and thus was only entitled to qualified immunity. With respect to the allegedly false statements the prosecutor made to the press and public, talking to the press is at best an administrative function and therefore the prosecutor was only entitled to qualified immunity. The appellate court found that supplementation of the record was necessary for the district court to resolve the qualified immunity of the prosecutor and the DEA agents. *Schrob v. Catterson*, __ F.2d __ (3rd Cir. Nov. 15, 1991) No. 90-6051.

2nd Circuit rejects substantive due process challenge to forfeiture even though informant suggested drug sales take place at claimant's condominium. **(910)** Claimant's condominium was seized after he made two small sales of cocaine to a government informant inside of the condominium. No drugs, weapons, large amounts of cash, drug paraphernalia or drug records were discovered in the condominium. The confidential informant had requested that the first sale take place in the condominium, and it was unclear who specified the location of the second sale. The 2nd Circuit rejected a substantive due process challenge to the forfeiture. A forfeiture of property may be unduly oppressive only when the owner of the forfeited property is innocent of the wrongful activity and has done all that reasonably could be expected to prevent the proscribed conduct. Here, defendant committed a crime inside the condominium. Even if the informant was responsible for suggesting the condo as the site of the drug transaction, defendant could hardly be said to have done everything possible to prevent the property's use for illegal purposes. *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, __ F.2d __ (2nd Cir. Nov. 13, 1991) No. 90-6268.

10th Circuit holds innocent lienholder is entitled to recover attorneys' fees if provided for in pre-existing deed of trust. **(960)** The 10th Circuit held that where a pre-existing deed of trust gives a lienholder the right to recover attorneys' fees, the innocent lienholder is entitled to recover such fees even though the fees are incurred after the acts giving rise to the forfeiture and after the government's seizure of the property. In such a situation, a lienholder's right to recover attorneys' fees is secured by the property, and its right to recover such fees is an interest in the property. This is true even if the fees are incurred after the acts giving rise to the forfeiture. The lienholder's right to reimbursement of attorneys' fees were created at the time the deed of trust was formed. This right predated the commission of the bad acts that gave rise to the forfeiture. *U.S. v. Real Property Located at 2471 Venus Drive, Los Angeles, California*, __ F.2d __ (10th Cir. Nov. 19, 1991) No. 90-6212.

Opinion Affirmed on Appeal

(910) *U.S. v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York*, 747 F.Supp. 173 (E.D.N.Y. 1990), *aff'd*, __ F.2d __ (2nd Cir. Nov. 13, 1991) No. 90-6268.

* U.S. G.P.O.:1991-312-344:60028