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Logo for Position

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COMMENDATIONS

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

James R. Allison (District of Colorado), by John Jay Douglass, Dean, National College of District Attorneys, University of Houston Law Center, for his selection as a contributing author for the seventh edition of Trial Techniques: A Compendium of Course Materials.

D. Brad Bailey (District of Kansas), by Sharla Cerra, Attorney, Claims Division, U.S. Postal Service, Washington, D.C., for his excellent representation and legal skill in the prosecution of a complicated civil case.

Richard Banks (Texas, Southern District), by Fred Foreman, United States Attorney, Northern District of Illinois, for his valuable assistance in the investigation of a major tax fraud scheme involving martial arts schools in Illinois, Texas, and other states.

Bryan Best and ***Nancy Cook*** (Texas, Southern District) by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for their successful prosecution of a complex criminal case.

Linda Betzer (Ohio, Northern District), by J. Dean Carro, Coordinator of Appellate Review, University of Akron, for her special assistance and guidance in resolving a habeas corpus case, thereby sparing the court and the government valuable time and expense.

Edmund A. Booth, Jr. (Georgia, Southern District), by William P. Nelson, M.D., Director of Cardiology, University of South Carolina, Columbia, and R. B. Dickerson, M.D., Lompoc, California (both of whom were formerly Army physicians), for his outstanding success in the trial of a complex medical malpractice case.

R. Daniel Boyce (North Carolina, Eastern District), by James L. Brown, Chief, Explosives Division, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., for his participation at an Arson-for-Profit seminar at the Federal Law Enforcement Training Center in Glynco, Georgia.

Michael E. Clark and ***Cynthia Thornton*** (Texas, Southern District), by Ruben Monzon, Special Agent in Charge, DEA, Houston, for obtaining excellent results in the trial of a physician and several co-conspirators for conspiracy, obstruction of justice, medicaid fraud, and drug trafficking charges.

Michael E. Clark, Joseph A. Porto, and ***Michael T. Shelby*** (Texas, Southern District), by Andrew J. Duffin, Special Agent in Charge, FBI, Houston, for their valuable contributions to the FBI Moot Court Program.

Robert D. Clark (District of Colorado), by Michael B. Gorham, Director, Colorado Real Estate Commission, Denver, for his excellent presentation on the Drug Forfeiture Enforcement Program at a recent meeting of the Interprofessional Committee.

Curtis L. Collier (Tennessee, Eastern District), by William S. Sessions, Director, FBI, Washington, D.C., for his outstanding achievement in a bid-rigging conspiracy case involving state election officials in Tennessee.

Connie DeArmond (District of Kansas), by John A. Bell, District Counsel, Department of Veterans Affairs, Wichita, for her excellent representation and special legal skill in the prosecution of a malpractice case.

Eric Evenson and ***Dan Boyce*** (North Carolina, Eastern District), by Daniel L. Schofield, Chief, Legal Instruction Unit, FBI, Quantico, Virginia, for their outstanding participation in a recent DEA Moot Court program.

Thomas L. Fink (District of Arizona), by Fred Collins, Chief of Police, Scottsdale, for his valuable assistance and guidance in the successful prosecution of a major narcotics trafficking case.

Holly Fitzsimmons and ***Joseph Martini*** (District of Connecticut), by Philip W. Spayd, Regional Commissioner, Northeast Region, and Stephen M. Harney, Acting Regional Director, Office of Internal Affairs, U.S. Customs Service, Boston, for their successful prosecution of two major cases resulting in a safer work environment in the longshoring community.

Patrick J. Hanley (Ohio, Southern District), by Robert J. Freer, Chief, Regional Training and Development Branch, IRS, Cincinnati, for his excellent presentation at a recent Tax Trial Summary Witness Training class on the subject of expert witnesses.

Paul Hobby and ***Abe Martinez*** (Texas, Southern District), by Allison T. Brown, Inspector in Charge, U.S. Postal Service, Houston, for their successful prosecution of a complex embezzlement case involving $51,000 of postal funds.

John Lancaster (Texas, Southern District), by James L. Brown, Chief, Explosives Division, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., for his valuable contribution to the Arson-for-Profit seminar recently held at the Federal Law Enforcement Training Center in Glynco, Georgia.

Daniel M. LaVille (Michigan, Western District), received a Certificate of Appreciation from Floyd J. Marita, Regional Forester, U.S. Forest Service, Department of Agriculture, for his successful resolution of a highly sensitive unauthorized occupancy on the Ottawa National Forest.

Art Leach (Georgia, Southern District), by Laurence E. Fann, Acting Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for his excellent presentation at the Advanced Asset Forfeiture Training Conference in Phoenix on advanced criminal forfeitures, and at the OCDETF/Strike Force Training Conference in Albuquerque on criminal v. civil forfeitures.

Leslie Ohta (District of Connecticut), by Laurence E. Fann, Acting Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for her excellent presentation at the Advanced Asset Forfeiture Training Conference in Phoenix on the use of polygraph in forfeiture.

Richard Palmer and ***Tom Murphy*** (District of Connecticut), by Milt Ahlerich, Special Agent in Charge, FBI, New Haven, for their outstanding assistance in the investigation and prosecution of a criminal fraud case.

Stephen Peifer (District of Oregon), by Thomas G. Snow, Associate Director, Office of International Affairs, Criminal Division, Department of Justice, Washington, D.C., for his valuable assistance to the Office of International Affairs and the Government of the Republic of Turkey in executing a Turkish mutual assistance request.

Kim Pignuolo (Texas, Southern District), by Ralph E. Avery, Litigation Attorney, Office of the Judge Advocate General, Department of the Army, Arlington, Virginia, for her excellent representation of the Army's interests during the settlement of a bankruptcy case.

Manuel Porro-Vizcarra (Texas, Southern District), by Laurence E. Fann, Acting Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for his excellent presentation at the Advanced Asset Forfeiture Training Conference in Phoenix on FIRREA forfeitures.

David E. Risley (Illinois, Central District), received a Certificate of Appreciation from the Illinois M.E.G. Directors and Task Force Commanders Association, Narcotics and Dangerous Drugs Enforcement, for his outstanding efforts and dedication to narcotics law enforcement in the State of Illinois.

Solomon E. Robinson (California, Eastern District), by Chief Judge Loren S. Dahl, U.S. Bankruptcy Court, Sacramento, for his excellent representation and the professional manner in which he obtained the dismissal of a lawsuit against him.

Jessie Rodriquez (Texas, Southern District), by Laurence E. Fann, Acting Director, Asset Forfeiture Office, Criminal Division, Department of Justice, Washington, D.C., for his excellent presentation at the OCDETF/Strike Force Training Conference in Albuquerque on Continuing Criminal Enterprise.

Rosa I. Rodriguez and ***Edwin O. Vazquez*** (District of Puerto Rico), were awarded a Certificate of Appreciation by James H. Walker, District Director, Immigration and Naturalization Service, San Juan, for their outstanding contributions in the field of immigration law enforcement, particularly the successful prosecution of two major organizations attempting to illegally prepare documents to qualify aliens under the Special Agricultural Workers Program.

J.B. Sessions, III, United States Attorney, and Staff (Alabama, Southern District), by Stephen F. Jeroutek, Area Administrator, Office of Labor-Management Standards, Department of Labor, Dallas, for their excellent representation and valuable assistance in enforcing the various Title 29 statutes on behalf of the Office of Labor-Management Standards and other law enforcement efforts over the years.

Ted Smith (Pennsylvania, Middle District), by James A. Wagner, Jr., Chief of Police, Lewistown Borough Police Department, for his outstanding success in the prosecution of a criminal case involving an offense under the Armed Career Criminal statute and tampering with a witness.

Monte Stiles and ***Anthony Hall*** (District of Idaho), by Glenn Ford, Chief, Idaho Bureau of Narcotics, Department of Law Enforcement, Boise, for their outstanding representation and special efforts in successfully prosecuting a major drug case on behalf of the State of Idaho.

Robert S. Streepy (District of Kansas), by Thomas A. Price, Supervisory Special Agent, FBI, Kansas City, Missouri, for his prosecutive skills and expertise in the successful prosecution of a major criminal case.

Charles F. Teschner (Missouri, Western District), by Frank J. Storey, Special Agent in Charge, FBI, Kansas City, for his success in obtaining pleas of nolo contendere on both counts of a longstanding bank fraud and embezzlement case.

Ruth Young (Georgia, Southern District), by Saul Schultz, Senior Attorney, Office of General Counsel, Department of Agriculture, Atlanta, for her excellent representation of the government's interests in settling a complex Farmers Home Administration malpractice claim case.

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SPECIAL COMMENDATION FOR THE DISTRICT OF ARIZONA

On October 4, 1990, ***Linda A. Akers, United States Attorney for the District of Arizona,*** and all of the attorneys and support personnel in the Tucson office, were commended by Assistant Attorney General James F. Rill, Antitrust Division, Department of Justice, Washington, D.C., for their outstanding professional support and the courtesies they extended to the Antitrust staff during a grand jury investigation and trial of several dentists and their professional corporations for price-fixing in Tucson.

Mr. Rill stated that, while everyone expressed much interest in the investigation and case, several individuals deserve special thanks. ***Dan Knauss***, who heads the Tucson office, was extremely cooperative and informative about local procedures, and did everything possible to make the staff feel at home. ***Rick Cooper*** also did an outstanding job guiding the staff through various phases of the grand jury and provided expert advice during jury selection. ***Randy Stevens, Janet Martin*** and ***Reese Bostwick*** were very helpful in answering the staff's questions and educating them about local customs and practice and ***Don Overall***, a former Antitrust Division veteran, provided much-appreciated encouragement.

On the administrative side, Mr. Rill commended ***Sally Coffin, Dori Arter, Agnes Adams*** and ***Carol McCarthy***. Each of these people provided invaluable support and assistance to the staff during the grand jury investigation and trial. The staff could not praise these fine people enough. Mr. Rill said, "You are truly fortunate to have such dedicated professionals in your office."

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PERSONNEL

On October 11, 1990, the Senate confirmed the following nominations:

Michael Luttig, Assistant Attorney General for the Office of Legal Counsel
W. Lee Rawls, Assistant Attorney General for the Office of Legislative Affairs
Robert Mueller, Assistant Attorney General for the Criminal Division
Charles DeWitt, Director, National Institute of Justice, Office of Justice Programs

On October 4, 1990, ***Dan Eramian,*** formerly Deputy Director of Public Affairs since April 1989, became the chief spokesman for the Department of Justice and the Attorney General.

On October 10, 1990, ***Doris Swords Poppler*** was Presidentially appointed as United States Attorney for the District of Montana.

On October 10, 1990, ***Stephen D. Easton*** was Presidentially appointed as United States Attorney for the District of North Dakota.

On October 10, 1990, ***Stephen B. Higgins*** was Presidentially appointed as United States Attorney for the Eastern District of Missouri.

On October 17, 1990, ***Marvin Collins*** was reappointed as United States Attorney for the Northern District of Texas.

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CRIME ISSUES

Omnibus Crime Bill

In assessing the impact of law enforcement legislation passed by the 101st Congress, Attorney General Dick Thornburgh issued the following statement:

> The work of the 101st Congress in the area of anti-crime legislation is a considerable disappointment. Beginning with the President's announcement of his anti-violent crime initiative on May 15, 1989, the Administration had high hopes that this was the Congress which would finally respond to the nation's need for a workable death penalty, and an end to continuous death row appeals and criminals going free on legal technicalities. These hopes were dashed with passage of the so-called "comprehensive crime bill."
>
> The best that can be said about this anti-crime package is in the area of white collar crime. Highlights include possible life sentences for savings and loan kingpins along with fines up to $10 million. The federal government will also be better able to protect assets from being transferred or lost through pre-judgment attachments procedures. Moreover, a permanent Office of Special Counsel for savings and loan prosecutions has been authorized at the Department of Justice. Wire tap regulations have also been extended to include bank fraud violations.
>
> Anti-trust fines and penalties have also been enhanced. Sherman Act maximum fines for corporations have been increased from $1 million to $10 million. The government will also now be able to collect triple damages for anti-trust violations. Treble damages will serve as an important deterrent to bid-rigging and price-fixing.
>
> Under new federal laws sought for years by United States Attorneys and passed by Congress, the Department will now have uniform procedures for collecting the estimated $90 billion owed to the taxpayers. Previously, our efforts were hampered by the requirement that we utilize often inconsistent state law to collect federal debts, allowing debtors to seek legal sanctuary in different states.

* * * * *

Death Penalty

On October 27, 1990, Attorney General Dick Thornburgh issued the following statement in response to the Congressional conference deletion of key provisions from the Comprehensive Crime Control Act of 1990:

> The conferees' decision to drop use of the death penalty for federal crimes is welcome news only to violent criminals. To deny use of the ultimate sanction for such crimes as mail bombings, terrorism and assassination of the President would thwart the will of the American people, state and local prosecutors and the overwhelming membership of the House and the Senate.

Striking the death penalty from this bill would be an enormous step backwards in the fight against violent crime and would leave the federal government without the authority to impose the death penalty which 36 states now have. Rejection of the death penalty along with the stripping of proposals which would control endless appeals by death row inmates and which would assist police in the gathering of evidence now takes the teeth out of this legislation.

It is hard to comprehend at a time when citizen concern about crime is so high why some on Capitol Hill have such difficulty in passing a crime bill which is pro-law enforcement instead of pro-criminal. I will repeat that the first civil right of all Americans is the right to be safe in our homes, on our streets and in our communities.

Please refer to page 276 of this Bulletin for a discussion of the crime legislation as passed by the 101st Congress.

* * * * *

Savings And Loan Fraud

As of October 2, 1990, the Department of Justice has convicted 131 chief executive officers, board chairmen, presidents and other top directors and officers of financial institutions on major fraud charges in the past two years. Attorney General Dick Thornburgh stated, "These newly-compiled figures are demonstrable proof that hard-working federal investigators and prosecutors are making progress against those individuals who have perpetrated fraud against their institutions at a cost of billions of dollars to the taxpayers of the United States. These 131 top executives are among more than 300 persons convicted of major financial institutions fraud, and 77 percent of those sentenced have gone to prison."

The Attorney General said that as of the end of August, among CEOs, chairmen of the board, and presidents, 55 were indicted, 45 convicted, and only three acquitted (one of whom was convicted in another case). Among directors and other bank officers, 97 were indicted, 86 convicted, and only three acquitted. He further stated that "much more will follow as we apply the skills of a recently-doubled force of investigators and prosecutors."

Please refer to page 277 of this Bulletin for a discussion of the savings and loan legislation as passed by the 101st Congress.

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United States Attorney For The District Of Oregon

Four former members of a cult headed by the late Bhagwan Shree Rajneesh have been arrested and charged with conspiracy to murder the United States Attorney for the District of Oregon, Charles H. Turner. In January, 1985, United States Attorney Turner began directing a federal grand jury investigation into alleged violations of U.S. immigration laws by the Bhagwan and those of his followers who had participated in fraudulent marriages in order to remain in the United States. The investigation uncovered evidence which exposed the Bhagwan and many cult members to potential criminal prosecution, imprisonment, and deportation. The Bhagwan pled guilty in November, 1985 to conspiracy to commit immigration fraud and was deported to India where he died last January.

Charged in the case are Catherine Jane Stubbs, also known as Ma Shanti Bhadra, reportedly an Australian citizen; Susan Lissanevitch, also known as Ma Anand Su, reportedly a British citizen; Ann Phyllis McCarthy, also known as Ma Yoga Vidya, reportedly a German citizen; and Richard Kevin Langford, also known as Swami Anugiten, reportedly an American citizen. Stubbs and Langford were arrested in West Germany while Lissanevitch was arrested in England and McCarthy in South Africa. In addition to the murder conspiracy charge, each was charged with the illegal interstate transportation of firearms. These arrests follow the guilty plea by another former member of the cult, Alma Peralta, also known as Ma Dhyan Yogini, of Tucson, Arizona. All five had been followers of Bhagwan Shree Rajneesh, who presided over the commune of as many as 4,000 followers between August, 1981 and November, 1985.

Attorney General Dick Thornburgh said, "The risks associated with the job of federal prosecutor have never been more apparent than in this particular case. I am especially pleased that the five-year investigation into the conspiracy plot to murder Charles Turner has resulted in the arrest of those responsible for this sinister plan and that they will be held accountable for their outrageous criminal behavior."

* * * * *

Motions To Transfer Repeat Juvenile Offenders

As a result of the increased participation by persons under eighteen years of age in serious criminal activity, particularly in drug violations, Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, has prepared a statement entitled "Motions To Transfer Repeat Juvenile Offenders," which is attached at the Appendix of this Bulletin as Exhibit A.

If you have any questions, please call Mr. Lippe at (FTS) 368-1027 or (202) 514-1027.

* * * * *

Memorandum Of Understanding On Mailed Bomb Jurisdiction

Attached at the Appendix of this Bulletin as Exhibit B is a Memorandum of Understanding entered into between the United States Postal Inspection Service and the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, on mailed bomb jurisdiction. This memorandum further implements the Investigative Guidelines, Title XI, Organized Crime Control Act of 1970, dated March 1, 1973, which allocated investigative jurisdiction over certain offenses involving unlawful use of explosives. (See, United States Attorneys' Bulletin, Vol. 21, No. 8, dated April 13, 1983, at p. 321.)

As provided in the Guidelines, the Bureau of Alcohol, Tobacco and Firearms (ATF) was given, among other things, primary investigative jurisdiction over violations of 18 U.S.C. §844(d) and (i) and other violations of Section 844 directed at Treasury Department property and functions. The United States Postal Inspection Service was accorded primary jurisdiction to investigate incidents involving explosives or incendiary devices sent through the mails or directed against Postal Service property or functions.

If you have any questions, please call Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, at (FTS) 368-1207 or (202) 514-1207.

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Money Laundering Case List

Michael Zeldin, Acting Director, Money Laundering Office, Criminal Division, has prepared a money laundering case list involving decisions on currency transactions reports. A copy is attached at the Appendix of this Bulletin as Exhibit C. If you have any questions, please call Mr. Zeldin at (FTS) 368-1758 or (202) 514-1758.

Please refer to page 280 of this Bulletin for a discussion of the money laundering legislation as passed by the 101st Congress.

* * * * *

RICO Manual For Federal Prosecutors

The Organized Crime and Racketeering Section of the Criminal Division has prepared a revised Manual entitled "Racketeer Influenced And Corrupt Organizations (RICO): A Manual for Federal Prosecutors." It consists of approximately 250 pages and provides discussions of legal and tactical considerations in the prosecution of RICO cases.

To obtain a copy, please call (FTS) 368-1214 or (202) 514-1214.

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Federal Judiciary Criminal Fines Task Force

The enforcement of criminal fines must be addressed by every component of the criminal justice system--prosecutors, judges, probation officers, case agents, civil collection attorneys and prison officials. To that end, the Department of Justice and the Administrative Office of the United States Courts created the Criminal Fines Task Force to examine the issues concerning the collection of fines and restitution. The task force first met in October 1989 and has met five times during the past year.

On October 4, 1990, the Federal Judiciary Criminal Fines Task Force submitted a report to the Chief Justice of the United States and the Attorney General for the year ending September 30, 1990. A copy of this report is attached as Exhibit D at the Appendix of this Bulletin.

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Arkansas And Iowa Awarded Funds To Improve Criminal Records

On October 1, 1990, Attorney General Dick Thornburgh announced grant awards of $497,320 to Arkansas and $415,922 to Iowa to improve the quality of criminal history records in those states. The grants are the first to be given from a three-year, $27 million program designed to assist states in upgrading current systems used to maintain records of arrests, prosecutions, convictions and sentences. The Attorney General stated that these two states represent the first steps toward accomplishing a major goal of this Administration to assure that the highest standards of completeness, accuracy and timeliness characterize criminal history record information across the country. He said, "It is critical that law enforcement officers, prosecutors, judges, and corrections officials have access to complete and accurate information on each individual within the purview of the criminal justice system. We hope all states in need of this assistance will participate."

Steven D. Dillingham, Director of the Bureau of Justice Statistics, which will administer the program, stated that these grants to the states will emphasize the recording of arrest, conviction and sentencing information in a form which will make felony history information more reliable and complete. This is a crucial component of the overall objective of insuring that state criminal history records are up-to-date, complete and available to all criminal justice agencies.

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Crimes Reported By Victims During 1989

On October 24, 1990, the Bureau of Justice Statistics, Office of Justice Programs, announced that National Crime Survey results for last year revealed an estimated 19.7 million crimes of violence and personal thefts among United States residents 12 years old or older. The Bureau said there were an additional estimated 16.1 million household crimes, that is, burglaries, larcenies and motor vehicle thefts. The National Crime Survey is a continuing program in which U.S. Bureau of the Census employees interview approximately 97,000 people 12 years old or older about crimes that they may have experienced during the previous six months. Homicides and commercial crimes are not counted. All reported numbers are statistical estimates.

Steven D. Dillingham, Bureau Director, said, "Although the total amount of such crimes during 1989 did not significantly change from the 1988 levels and, overall, remain significantly below levels experienced a decade ago, the estimated number of certain types of crimes did vary somewhat from last year. For example, the number of burglaries fell by 7.3 percent from the 1988 figure, whereas the number of household larcenies increased by 6.4 percent. And there is also some evidence that the number of motor vehicle thefts increased."

Although the overall 1988-1989 changes were minimal, a bureau bulletin noted that the number of violent crimes was 11 percent lower than the 1981 number, and there were 15 percent fewer household crimes last year than there were in 1981. The region with the highest crime rates was the West, where there were 120 personal crimes per 1,000 residents and 215 household crimes per 1,000 households. The Northeast had the lowest rates, 75 personal crimes per 1,000 residents and 126 household crimes per 1,000 households. Compared to 1973, the first year for which complete data was available, the rates of crime in 1989 per 1,000 persons or per 1,000 households declined in all major crime categories other than motor vehicle thefts. The percentage changes were as follows:

Personal Crimes	-20.9%	**Household Crimes**	-22.0%
Crimes of Violence	-10.6	Burglary	-38.5
Rape	-29.5	Household Larceny	-11.8
Robbery	-19.6	Motor Vehicle Theft	+ 0.5
Assault	- 7.5		
Crimes of Theft	-24.6		

The National Crime Survey Report entitled "Criminal Victimization 1989" may be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

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DRUG ISSUES

Government Of Columbia Presidential Decree

On September 5, 1990, the Government of Colombia issued a presidential decree aimed at further disrupting drug trafficking and terrorist organizations. The primary tenet of the decree is its provisions allowing for reductions of sentences for those persons who voluntarily confess their involvement in drug crimes and cooperate by providing information on others involved in drug trafficking. Under this decree, persons who confess and cooperate will be judged and sentenced in Colombia. Their sentences can be reduced by one-third and will not be subject to extradition. If those persons who confess are guilty of only illegal weapons possession and/or criminal conspiracy charges, they can receive suspended sentences. Those persons who provide information on other persons and assist in seizing assets can receive reductions of up to 50 percent. Those persons, however, who withhold information will remain subject to extradition for drug trafficking crimes. The decree also contains an important "insurance measure." Those persons who come forward but do not give full confession of their crime will not be eligible for a sentence reduction.

Attorney General Dick Thornburgh expressed support for the Colombian President's plan to fortify his judicial system and free it from the paralyzing intimidation of the narco-terrorists, and stated, "It has always been a goal of ours to seize these drug kingpins and bring them to justice. If the government and people of Colombia are now able to enforce their own laws against drug trafficking--prosecuting, convicting, and incarcerating these thugs--so much the better."

* * * * *

3,743 Fugitives Are Arrested In "Operation Southern Star"

At a news conference in Miami on October 24, 1990, Attorney General Dick Thornburgh, and Marshals Service Director K. Michael Moore announced the completion of "Operation Southern Star," a ten-week drug fugitive manhunt that resulted in the arrests of 3,743 criminals and the seizure of $5,522,172 in cash and property in five major metropolitan areas. Guns, drugs and other contraband valued at approximately $7,292,799 were also seized during the operation. Among those arrested were 11 individuals charged with murder and 355 drug fugitives who had been at large for a year or longer, including one who had been a fugitive for 27 years. Southern Star investigators arrested 337 federal fugitives and 3,406 were wanted on State drug charges.

The success of the operation was due to the coordinated work of 28 local and state law enforcement agencies, along with U.S. Marshals Service offices in Miami, Houston, San Antonio, San Diego, and Los Angeles. These five metropolitan areas were among those designated by President Bush as "High Intensity Drug Trafficking Areas" in the Administration's National Drug Control Strategy. The Attorney General congratulated all of the men and women of Operation Southern Star and expressed his special thanks to the Marshals Service and to each of the sheriffs, police chiefs, and state law enforcement agencies who cooperated in this operation.

* * * * *

New Department Of Justice Drug Control Program

On October 10, 1990, Assistant Attorney General Jimmy Gurule, Office of Justice Programs, (OJP) announced the start of a new federal drug control program that targets small cities. This program is the first federal drug control effort specifically designed for cities with populations of 50,000 or less. The Bureau of Justice Assistance, OJP, awarded $100,153 to Hastings, Nebraska, and $99,940 to Ocala, Florida, to develop and test the effectiveness of a coordinated program involving law enforcement, prosecutors, the courts, corrections, drug treatment services, and other sectors of the community to control drug abuse and related crime. In Ocala, the program will be coordinated by the police department, which will demonstrate how police and citizens can work together in a unified effort to combat drug use and crime. Hastings will take a slightly different approach, attacking the problem through the efforts of a multi-jurisdictional task force. The task force will work to improve undercover intelligence and analysis capabilities. It will also enlist community participation by forming a Community Action Group.

Mr. Gurule stated that drug trafficking and drug-related crime, which have increased at an alarming rate in recent years, have had a devastating impact on many small jurisdictions. These communities, which represent a large segment of the population, often lack the resources and expertise of larger cities to deal with the overwhelming expansion and growing sophistication of drug-related crime.

* * * * *

Offender Drug Testing Programs Throughout The Criminal Justice System

On October 2, 1990, Attorney General Dick Thornburgh announced that the Department of Justice will award grants totaling more than $1.7 million to establish offender drug testing programs throughout the criminal justice system. The Bureau of Justice Assistance (BJA), a component of the Office of Justice Programs, will award $1.1 million to the American Probation and Parole Association (APPA), in Lexington, Kentucky, to help state corrections departments and local jails develop and implement drug testing programs during probation and parole. Offender management tools, such as the threat of additional sanctions and assessment of user fees, will be emphasized. APPA will conduct regional training sessions and provide technical assistance for probation and parole staff. Training materials also will be developed. In addition, the program will include drug testing as part of any intermediate sanction, such as intensive supervision programs, "boot camps," and electronic monitoring.

APPA will assist the Department of Community Corrections in Portland, Oregon in its development of the Comprehensive Drug Testing Model Demonstration Program. BJA will award the Department of Community Corrections $684,461 to develop a model drug testing system encompassing all stages of the criminal justice process--from arrest through probation or parole. The model will include a system for testing and tracking offenders as they move through the criminal justice process, and for ensuring that the test results are taken into account as offenders move through the judicial and correctional systems. The model will require drug testing as a condition of pretrial release, as part of jail-based treatment or monitoring programs, and as a condition of probation or parole.

The Attorney General said, "Drug testing is an important 'early warning system' to alert criminal justice officials to the potential risk to the community of a drug-abusing offender. In addition, mandatory testing, coupled with certain penalties, provides a powerful incentive for offenders under correctional supervision to remain drug-free."

* * * * *

Ninth Circuit Upholds Random Testing Of Pipeline Workers

In International Brotherhood of Electrical Workers, Local 1245 v. Skinner, No. 89-70061 (September 12, 1990), the Ninth Circuit has published a unanimous and comprehensive opinion rejecting the Administrative Procedure Act and the Fourth Amendment challenges to the testing program (including random testing) adopted by the U.S. Department of Transportation (DOT) for over 100,000 private employees engaged in safety-related functions involving natural gas and hazardous liquid pipelines.

The court of appeals held that, because of the potential for catastrophic injuries due to workers who might be drug-impaired, the rules were reasonable and practicable even though DOT did not find a particular drug problem in the pipeline industry. The court specifically rejected a Fourth Amendment challenge to the random testing component of the program in reliance on the Ninth Circuit's recent decision upholding random testing in the airline industry.

If you have any questions, please call Robert V. Zener, Appellate Litigation Counsel, Civil Division, at (FTS) 368-3425 or (202) 514-3425.

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Boot Camps

On October 5, 1990, Assistant Attorney General Jimmy Gurule, Office of Justice Programs, announced that the Bureau of Justice Assistance (BJA) has awarded grants of $250,000 each to the Illinois and Oklahoma Departments of Corrections to establish two boot camp programs. Boot camps are a relatively new type of intermediate correctional sanction that provides a sentencing option for young, non-violent offenders that is more restrictive than probation but less severe than long term incarceration in a traditional prison. These camps generally provide a highly structured, military-style environment where offenders are required to participate in drills, physical conditioning, manual labor, educational, vocational, life-skills training, self-esteem enhancement, drug rehabilitation, and other related program components.

Under the one-year BJA grants, Oklahoma and Illinois will establish model boot camps for drug offenders. The programs will include drug and alcohol counseling, drug testing, remedial education, and life skills training. Upon graduation, offenders will be under intensive supervision, a type of strict probation, subject to extensive drug testing, and participation in community service. The aim of the boot camp programs is to provide an opportunity for offenders to become law-abiding and drug-free, while at the same time, holding them accountable for their crimes through incapacitation, thereby enhancing public safety.

* * * * *

ASSET FORFEITURE

Attorney General's Guidelines On Seized And Forfeited Property

On September 24, 1990, Attorney General Dick Thornburgh and President Richard P. Ieyoub, National District Attorneys Association (NDAA), forwarded a joint letter to NDAA members, together with a copy of The Attorney General's Guidelines on Seized and Forfeited Property (1990). This letter sets forth various ways in which state and local prosecutors' contributions can merit an equitable share of a federal forfeiture.

Under the new Guidelines, equitable sharing of federally forfeited assets with state and local prosecutors is expressly allowed. This new provision is the result of a series of meetings between the Department and representatives of NDAA and the National Association of Attorneys General, and reflects the fact that one of the primary goals of the Department's program is to foster law enforcement cooperation at all levels of government.

A copy of the letter is attached at the Appendix of this Bulletin as Exhibit E. If you would like a copy of the Guidelines, please call the Executive Office for Asset Forfeiture, at (FTS) 368-1149 or (202) 514-1149.

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Accounting For Federal Asset Forfeiture Funds: A Guide For State And Local Law Enforcement Agencies

The Executive Office for Asset Forfeiture and the International Association of Chiefs of Police have prepared a new publication entitled "Accounting for Federal Asset Forfeiture Funds: A Guide for State and Local Law Enforcement Agencies." The purpose of the Guide is to assist state and local law enforcement agencies in creating and maintaining an accurate recordkeeping system for monies equitably shared through the Department of Justice's asset forfeiture program.

If you would like a copy of this publication, please call the Executive Office for Asset Forfeiture at (FTS) 368-1149 or (202) 514-1149.

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Departmental Policy Regarding Seizure Of Occupied Real Property

On January 11, 1990 Cary H. Copeland, Director, Executive Office for Asset Forfeiture, issued a memorandum to all United States Attorneys, and other Department of Justice officials, entitled "Seizure of Forfeitable Property," which discussed the Department's policy that ex parte judicial approval is required prior to the seizure of all real property. (See, United States Attorneys' Bulletin, Vol. 38, No. 2, dated February 15, 1990, at p. 24).

On October 9, 1990, Mr. Copeland issued a follow-up memorandum entitled "Seizure of Occupied Real Property," which clarifies the Department's general policy, and discusses notice and opportunity for hearing prior to seizure, circumstances supportive of immediate removal of occupants, and the nature of adversary pre-seizure hearing. A copy of this memorandum is attached at the Appendix of this Bulletin as Exhibit F.

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Congressional Action

A number of asset forfeiture amendments were included in the crime package recently passed by the 101st Congress. Please refer to page 282 in this Bulletin for a discussion of the legislation.

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SENTENCING REFORM

Stronger Sentencing Guidelines

Attorney General Dick Thornburgh has recommended that the United States Sentencing Commission make amendments to the sentencing guidelines for both organizational and individual defendants to ensure that tougher sentences are imposed for white collar and other crimes. In letters dated September 14 and October 12, 1990, the Attorney General encouraged the Commission to adopt changes that would lead to longer and/or more appropriate sentences for defendants convicted of bank and savings and loan fraud, money laundering, public corruption, steroids trafficking, smuggling of aliens, anti-trust offenses, and environmental crimes. He also recommended changes in the sentencing guidelines to help evaluate a defendant's criminal history record and status as a career criminal. The letters, which are attached at the Appendix of this Bulletin as Exhibit G, encourage that the guidelines be amended in the following ways:

o In the area of bank and savings and loan fraud, the guidelines would be amended to allow for higher guideline ranges to reflect the change in the statutory maximum penalty from five to 20 years.

o In the determination of a defendant's criminal history, the guidelines would be amended to distinguish serious past offense from less serious ones, to separate offenses so that they are not artificially treated as one, and to create an additional category to increase guideline scores for the most serious repeat offenders.

o The career offender guidelines would be strengthened to allow all past offenses, including those committed more than 15 years prior, to be considered in the imposition of sentence.

o The Department urges the Commission to amend the guidelines to appropriately punish more serious smuggling offenses, especially those that increase in severity depending upon the number of aliens and those that involve physical injury and the use of a weapon.

The letters also address other important issues, such as the use of probation for organizations, and list aggravating and mitigating factors which the Department believes should cause fine levels either to be increased or decreased.

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Guidelines Sentencing Update

A copy of the Guideline Sentencing Update, Volume 3, No. 14, dated October 12, 1990, is attached as Exhibit H at the Appendix of this Bulletin.

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Federal Sentencing Guide

Attached at the Appendix of this Bulletin as Exhibit I is a copy of the Federal Sentencing Guide, Volume 2, No. 7, dated September 24, 1990, and Volume 2, No. 8, dated October 8, 1990, which is published and copyrighted by Del Mar Legal Publications, Inc., Del Mar, California.

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POINTS TO REMEMBER

Civil Service Due Process Reform Bill

On August 17, 1990, H.R. 3086, the Civil Service Due Process Reform Bill, was enacted and became effective the same day. This bill has significant impact on United States Attorneys' offices. H.R. 3086 gave excepted service employees (e.g., non-preference eligible Assistant United States Attorneys (AUSAs) who have completed a two-year probationary period) essentially the same procedural protections and appeal rights as competitive service employees and excepted service preference eligibles (certain veterans). An Administrative Law Judge of the Merit Systems Protection Board (MSPB) may now review certain adverse actions (e.g., removal, suspensions over 14 days, reduction in basic pay, furlough of less than 30 days) taken involving AUSAs. Basic procedural rights now available under the provisions of H.R. 3086 include:

1) At least 30 days advance written notice [see 5 USC §7513(b)(1)];

2) Specific reason(s) for the proposed action [5 USC §7513(b)(1)];

3) A right to review material relied on to support the reasons for the proposed action given in the notice [5 CFR 752.404];

4) A reasonable time to answer the proposal orally and in writing [5 USC §7513(b)(2)];

5) A right to representation [5 USC §7513(b)(3)];

6) A written decision [5 USC §7513(b)(4)]; and

7) Entitlement to appeal the decision to the MSPB [5 USC §7513(d)].

Certain provisions of Department of Justice Orders and the United States Attorneys' Manual have been superseded by passage of this bill. In order to have appeal rights to the MSPB employees must have served a probationary/trial period, the duration of which is as follows:

Category Of Employee	Length Of Probationary Period
Most excepted service preference eligibles (certain veterans) and most competitive service employees	One Year
Most excepted service non-preference eligible employees	Two Years

The Personnel Staff of the Executive Office for United States Attorneys, which remains responsible for the ministerial coding and keying of all attorney personnel actions submitted to and approved by the Department's Office of Attorney Personnel Management, is awaiting publication of the implementing Office of Personnel Management regulations in order to provide more specific procedural/administrative details to Districts.

Questions on H.R. 3086 should be addressed to your District Administrative Officer.

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Department Of Justice Appropriations

On October 24, 1990, an appropriations bill for the Departments of Commerce, Justice, State, and the federal judiciary system was cleared for the President. The appropriation will provide 450 new Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) positions (200 attorneys, 290 support and 50 financial auditors). This increase almost doubles the resources currently available to prosecute those responsible for the worst white collar crime scandal in this century. Additionally, the Department will be provided 297 new Organized Crime Drug Enforcement Task Force (OCDETF) reimbursable positions (151 attorneys, 101 support, and 45 paralegals).

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Office Of The Inspector General Overview

Steve Turchek, Deputy Assistant Inspector General for Investigations, Office of the Inspector General, Department of Justice, has prepared an Overview which sets out in detail the purpose and functions of the Office of the Inspector General (OIG), as well as the extent of law enforcement authority held by the Special Agents. A copy of the Overview, a list of contact persons in Inspector General offices throughout the country, an OIG Directory, and a map showing five Investigations Divisions (Regions), is attached at the Appendix of this Bulletin as Exhibit J.

If you have any questions, please call Steve Turchek, (FTS) 633-3510 or (202) 633-3510.

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Social Security Litigation

Over the years the Department of Health and Human Services and the Department of Justice have worked together in the interest of managing the Social Security litigation caseload as effectively and efficiently as possible. One important aspect of this coordination is the prompt notification to the Social Security Administration and the Office of the General Counsel of newly filed Social Security cases. A recent notification of suit study has indicated a considerable decline in the percentage of Social Security cases in which the General Counsel was notified of suit within the long-established three-day goal from date of service on the United States Attorney. A study conducted in March, 1990, showed that the General Counsel's Office received timely notification of suit in 77 percent of newly filed Social Security cases. However, a study conducted in September, 1990, showed timely notification of suit in only 55.4 percent of the cases they reviewed. Not since July, 1985, has the percentage of cases been so low where there has been timely notification of suit.

Please review USAM, 1-15.220, which provides detailed information with regard to teletyping notification of suit in Social Security cases. To ensure you are following the correct procedure, a copy is attached at the Appendix of this Bulletin as Exhibit K.

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New Facsimile Machine In The Office Of The General Counsel, Social Security Division

In order to improve the processing of litigation materials in Social Security and Supplemental Security Income court cases, the Social Security Division of the Office of the General Counsel in Baltimore, Maryland has had a facsimile machine installed in its Office. Previously, materials to the Division in Baltimore had to be sent to, and picked up from, the Social Security Administration's central facsimile center.

The dedicated facsimile machine located in the Social Security Division will allow more direct transmission to and from the Division. All telefax material for the Social Security Division in Baltimore now should be sent to FTS 625-3213. The Office telephone number of the person to whom the material is being sent should be used as the verification number.

All United States Attorneys' offices should begin using this new telefax number immediately. Materials to be sent to the Falls Church Answer Staff should continue to be sent to its facsimile machine at FTS 756-5012.

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Coordination Of Surveys

On October 30, 1990, Manuel A. Rodriguez, Legal Counsel, Executive Office for United States Attorneys, issued a teletype to all United States Attorneys concerning coordination of surveys, including those initiated by the General Accounting Office (GAO) on behalf of Congress.

On June 13, 1980, former Attorney General Benjamin R. Civiletti signed DOJ Order No. 2810.1 requesting that all surveys, questionnaires or requests for information sought from one or more United States Attorneys' Office (USAO) by Department of Justice Offices, Boards, Divisions, Field Offices, or Bureaus, or by other persons outside the Department, including the private sector, or the General Accounting Office should be submitted to the Executive Office for United States Attorneys (EOUSA). (See, USAM, 1-10.300, dated October 1, 1988.)

Due to the continuing burden on USAOs to respond to frequent and sometimes duplicative surveys, EOUSA has been designated as the unit for coordinating surveys of your offices. Please note that only EOUSA has the authority to grant access to USAO material or personnel. All requests should be submitted to EOUSA Legal Counsel. All arrangements for GAO visits to the United States Attorneys' offices should be made by EOUSA Legal Counsel. If you are contacted by GAO or another Department component regarding a GAO visit, you should contact Legal Counsel promptly. Legal Counsel will work with your office and GAO to develop an agenda for the visit. Once the visit begins, Legal Counsel should be consulted if GAO attempts to expand the agenda. Also, please advise Legal Counsel if GAO does not attend scheduled meetings or causes any inconvenience in any way.

If you have any questions, please contact Legal Counsel staff, EOUSA, at (FTS) 368-4024 or (202) 514-4024.

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Manual For Special Assistant United States Attorneys

On September 28, 1990, Laurence S. McWhorter, Director, Executive Office for United States Attorneys, provided to all United States Attorneys a recently published Two-Volume Manual for Special Assistant United States Attorneys assigned to criminal matters and cases. Since Office of Legal Education funds are limited for training Special Assistant United States Attorneys in their basic trial advocacy course, the Manual will provide them with many of the written materials they would have otherwise received at the Attorney General's Advocacy Institute. The goal is to update and reproduce the Manual annually.

Special Assistant United States Attorneys are performing an invaluable role in assisting United States Attorneys throughout the nation in addressing criminal misconduct that must be prosecuted within the federal system. Given the significant differences between the military justice system, agency practices, and the federal criminal justice system, there was a clear need to provide educational materials which would allow the newly assigned Special Assistant an overview of the federal criminal practice. This Manual is the result of the collaborative efforts of Wayne Rich, Acting Deputy Director of the Executive Office for United States Attorneys; James DeAtley, Assistant Director of the Attorney General's Advocacy Institute; Henry Hudson, United States Attorney for the Eastern District of Virginia, his First Assistant, Kenneth Melson, and Assistant United States Attorney, Connie Frogale; and Brigadier General Michael E. Rich and Lt. Colonel Michael J. Cummings, United States Marine Corps.

Many of the sections contained in the Manual set forth the practices of the Eastern District of Virginia. Obviously, anyone using these materials must consult with the United States Attorney or the appropriate supervisory Assistant United States Attorney in their district to ensure that practices unique to that district are complied with. Other source books that should be consulted are the United States Attorneys' Manual, the "local rules of court" for the district, and the Federal Rules of Criminal Procedure.

If you would like additional copies, or have any questions or suggestions concerning this Manual, please call Nancy C. Hill, AGAI Assistant Director for Criminal Courses at (FTS) 368-4104 or (202) 514-4104.

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LEGISLATION

Omnibus Crime Bill

A stripped-down version of the crime bill passed in the final hours of the 101st Congress. Major portions of the President's crime package, such as habeas corpus, death penalty, and exclusionary rule reform were dropped in conference. The following is the status of some of the issues in the crime bill of major importance to the Department of Justice:

Federal Debt Collection Procedures Act

The Congress has passed the Federal Debt Collection Procedures Act of 1990 as a part of the crime package. The United States Attorneys have sought enactment of this bill for several years. The bill was originally drafted by a committee of United States Attorneys and Assistant United States Attorneys. The Senate agreed with our bill (S. 84), but the House made substantial changes in the bill that may pose serious problems.

Currently, the government is hampered by the requirement that we utilize State law to collect federal debts. This bill will provide the Department with uniform federal procedures and remedies to collect debts owed the United States. The Attorney General previously told the House and Senate Appropriations and Judiciary Committees: "In its capacity as the Nation's law firm, the Department helps to offset the cost of litigation by collecting criminal fines and debts owed to the United States. In FY 1989, our front-line litigation activities costs totaled $734 million; while debt and fine collections totaled $733.4 million. For a non-profit organization, the return on investment was nearly dollar for dollar, an accomplishment worthy of note." This includes $100 million from Ivan Boesky.

The United States Attorneys and the Civil Division are currently pursuing over $13.7 Billion in debts. These provisions of the crime package increase our ability to collect debts owed the United States by simplifying our job and the courts' job. There are some problems with the new bill and we expect we can work out the technical difficulties during the next Congress.

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Financial Institution Fraud
Title XXV of S. 3266

I. **Bank Fraud and Embezzlement Penalties**

Creates new crimes for:

- o Concealing assets from a federal banking agency;
- o Obstructing an Examiner of a Financial Institution;
- o S&L Kingpin Statute: creates a crime of engaging in a continuing financial crimes enterprise = bank frauds that involve 3 or more persons and from which any one person has received $5 million or more during any 24 month period. Punishment: At least 10 years imprisonment (up to life) and a $10 million fine (for individuals); $20 million (corp.)

Increases penalties for existing crimes:

- o Increases from 20 to 30 years the penalties for 10 types of bank fraud crimes;
- o Stipulates that the U.S. Sentencing Commission shall promulgate guidelines such that offenders of certain bank fraud statutes shall be assigned an offense level not less than level 24 under chapter 2.

II. **Protecting Assets From Wrongful Disposition**

- Increases the ability of the banking agencies, the Department of Justice and the National Credit Union Administration (NCUA) to attach assets to fulfill an order for money damages (injunctive relief) or to prevent the assets of suspected S&L wrongdoers from being transferred, dissipated, etc. (prejudgment attachment);

- Makes certain S&L debts non-dischargeable in bankruptcy; Disallows the use of bankruptcy to evade commitments to maintain the capital of a federally insured depository institution or to evade civil or criminal liability;

- Creates a uniform federal debt collection procedure which preempts archaic state procedures currently used by the United States Attorneys. The exempt property laws of the states would continue in effect except for individuals convicted in savings and loan fraud cases; as to these individuals, a uniform federal standard would apply.

- Makes fraudulent transfers of a financial institution voidable if they occur within 5 years before the appointment of a conservator or receiver;

- Regulates the use of Golden Parachutes and other employee benefits that have been misused in the S&L industry;

- Significantly increases the list of crimes for which civil and criminal forfeiture is available;

- Prohibits certain convicted debtors from purchasing the assets of any insured depository institution, so that S&L convicts cannot try to defraud additional institutions.

III. **Improved Procedures For Handling Banking Related Cases**

- Authorizes wiretap authority for bank fraud and related offenses;

- Authorizes U.S. government entities to request assistance from and provide assistance to foreign banking authorities;

- Extends the statute of limitations for civil penalties under FIRREA to 10 years;

- Grants subpoena authority to the FDIC, RTC and NCUA to carry out any power, authority, or duty with respect to an insured depository institution.

IV. **Structural Reforms at the Department of Justice**

- Establishes an Office of Special Counsel for Financial Institutions Fraud within the office of the Deputy Attorney General;

- Establishes a Financial Institutions Fraud Unit (or FIFU) to be headed by the Special Counsel;

- Directs that the Special Counsel:

  (i) supervise and coordinate investigations and prosecutions within the Department of Justice of financial institution fraud;

  (ii) ensure that laws relating to financial institution fraud are used to the fullest extent possible;

  (iii) ensure that adequate resources are devoted to financial institution fraud;

- Directs the Attorney General to establish Financial Institution Fraud Task Forces to aid the investigation, prosecution and recovery of assets relating to financial institution fraud crimes;

- Directs the Attorney General to set up a Senior Interagency Group to assist in identifying the most significant financial institution fraud cases and in allocating adequate resources thereto.

- Promotes Interagency Coordination as a tool to fight financial institution fraud by allowing the Attorney General to accept and other agencies and departments to provide, on a non-reimbursable basis, the services of attorneys, law enforcement personnel and other employees, including the Secret Service, under the supervision of the Attorney General.

V. **Reporting Requirements**

- Requires the Financial Institutions Fraud Unit to compile and collect extensive data on the nature and number of financial institutions investigations, prosecutions, and enforcement proceedings. Requires semi-annually reporting to the House and Senate Banking Committees on such data;

- Requires the Federal courts to report on the impact of business caused by the S&L crisis;

VI. **National Commission on the Savings and Loan Industry**

- Establishes a National Commission to examine and identify the origin and causes of the S&L crisis;

- Membership: 8 members appointed as follows:

  (a) 2 by the President;

  (b) 3 by the Speaker of the House, 1 of whom shall be by the recommendation of the minority leader;

  (c) 3 by the Pres. pro tempore of the Senate, 2 based on the majority leader's recommendation, 1 based on the minority leader's recommendation.

  Powers: generally, to conduct hearings, receive evidence, and call witnesses with subpoena authority.

Limitations of Subpoena Authority:

This was a hotly contested area in the negotiations, primarily because Common Cause was insisting that the Commission would be worthless without subpoena power. The resulting compromise is as follows:

(a) Executive Branch Veto: The Commission shall not receive testimony or evidence if the Attorney General, Director of the OTS or RTC certifies to the Commission that such evidence or testimony will impair, impede or compromise an ongoing investigation, prosecution or adjudication.

(b) Commission Power to Override Veto: The Commission may override the veto by a MAJORITY (5/8) vote.

VIII. **Qui Tam -- Private Actions Against Persons Committing Bank Fraud**

- This title was negotiated by the Department with Senators Roth, Simon, and Dixon and represents a helpful compromise acceptable to all.

- The title creates a mechanism for private citizens to bring forward information that the Government is unaware of to help the Department of Justice put together civil and criminal cases against individuals and institutions involved in the savings and loan scandal.

- Private citizens may file "declarations" disclosing violations of federal criminal law relating to insured depository institutions that give rise to an action for civil penalties under FIRREA. These sworn declarations will contain specific factual allegations constituting a prima facie case of such a violation. Persons who participated in the underlying illegal activities, or who would otherwise profit from them, are not eligible to file declarations.

- There are substantial monetary incentives for "declarants" to come forward with their information.

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Money Laundering

In the 1990 crime legislation, Congress included the following provisions of the Senate Bill (Title 5 and 32) relating to money laundering:

- The Secretary of Treasury shall report to Congress on uses made of currency transaction reports (DOJ opposed);

- The Secretary of Treasury shall appoint a task force to study methods of electronic scanning of certain United States currency notes (DOJ opposed);

- Allows the Attorney General to transfer to a participating foreign nation an equitable share of forfeited property/proceeds.

- o Addition of conforming predicates to "insider" exemption from the Right to Financial Privacy Act.
- o Clarify the definition of monetary instruments.
- o Correction of erroneous predicate offense.
- o Knowledge requirement for international money laundering.
- o Criminal forfeiture in cases involving criminal violations.
- o Defines "Financial Transaction".
- o Adds environmental crimes as money laundering predicates.

These provisions clarify and/or expand the current money laundering statutes and strengthen the Federal Government's overall enforcement program.

Also included: a provision that would expand the list of "predicate crimes" supporting a money laundering conviction to include the bank fraud crimes involved in the S&L scandal and the more serious environmental crimes. Persons laundering the proceeds of such crimes would be subject to prosecution under the money laundering statutes.

Significant Provisions Omitted

Provision that would have subjected a person guilty of conspiracy to commit money laundering to the same penalties as a person found guilty of violating a money laundering statute.

Provision authorizing forfeiture of the instrumentalities of foreign drug offenses.

Provision clarifying innocent owner provisions to make clear that claimant must prove both lack of knowledge and lack of consent.

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Child Pornography

There are two provisions in the 1990 crime bill relating to child pornography. The first provision is a fix of the 1988 section pertaining to record-keeping requirements that was struck down by the Federal District Court. This language now will require the producers of materials which include depictions of actual sexual conduct to keep records of the names and ages of those appearing in such depictions. Unlike the 1988 language, the provision is only prospective in nature.

The second provision concerns the possession of child pornography. There is a maximum penalty of a ten year prison sentence for those who possess child pornography with the intent to sell, and there is a five year maximum penalty for anyone convicted of simply possessing child pornography. This latter amendment is similar to a state law that was recently declared by the Supreme Court to be constitutional (Ohio v. Osborne).

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Law Enforcement Funding and Grants

Congress accepted the Senate version for law enforcement funding and dropped the House proposal from the Crime Bill.

The Senate version would continue a 75/25 match requirement for state and local law enforcement agencies in 1991. After 1991, the 50/50 match would be required. It would also increase the authorization for the 1991 appropriation for the State and local Law Enforcement Assistance Programs to $900 million. Also provided was a separate grant program providing additional resources to State and local agencies for rural drug enforcement. The purpose of the assistance program is to promote innovative programs offering a high probability of improving state and local drug control and system improvement efforts - not to foster state and local dependence on ongoing infusions of federal cash. Constituting the program as an equal partnership of the Federal government with state and local governments promotes this important objective, and is particularly important in an era of fiscal restraint. The current Bureau of Justice Assistance program allocates grants to all states for such states to expend in accordance with their state-wide strategy and their unique law enforcement problems.

The Administration's Fiscal Year 1991 budget already requested an appropriation of $492 million for law enforcement assistance programs.

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Asset Forfeiture

A number of asset forfeiture amendments were included in the crime package recently passed by the 101st Congress. The conferees agreed to the House provisions (Title IV); they did not adopt Title XIX of the Senate bill. The amendments are as follows:

- Attorney General may issue warrants of clear title to forfeited property;
- Extends forfeiture authority to include dangerous, toxic and hazardous materials, firearms involved in criminal drug activities, and drug paraphernalia;
- Attorney General must file an annual report to Congress containing audited financial statements regarding the forfeiture fund; and
- Enlargement of the forfeiture award authority.

Unfortunately, several Senate provisions were not included that would be beneficial to the forfeiture program. For example, the ability to forfeit instrumentalities used in foreign drug violations was dropped, as well as the authority to forfeit the proceeds from the sale of conveyances by drug traffickers after such conveyance was used in a drug violation.

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Chemical Diversion And Trafficking And Sentencing For Methamphetamine Offenses

In the 1990 crime legislation, Congress dropped the Senate version and adopted a modified version of the House proposal. The House proposal would expand the statutory list of precursor chemicals by adding 12 new precursor chemicals. It also directs the Sentencing Commission to promulgate or amend guidelines to provide more substantial penalties in methamphetamine cases in which the substance is smokable crystal amphetamine.

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Other legislation enacted by the 101st Congress of major importance to the Department is:

H.R. 5316 - Judgeships

Last June, the Judicial Conference requested 20 new Court of Appeals judgeships and 76 new district court judgeships. The Administration fully supported the Judicial Conference's request and suggested that more judgeships would be needed in the Fifth, Ninth and Eleventh Circuits to try and review a multitude of drug, money laundering and savings and loan cases.

Congress created 11 of the requested court of appeals judgeships and 74 district judgeships. The district judgeships are not allocated in the same way as the Judicial Conference requested, but the total number of judgeships will help meet pressing needs of the courts. Some of the new judgeships will allow the Chief Justice to make temporary designations on the recommendations of the Judicial Conference's Committee on Intercircuit Assignments to respond to urgent needs. H.R. 5316 also provides new planning mechanisms for the federal judiciary (Civil Justice Reform), implements some of the recommendations of the Federal Courts Study Committee created by Congress in 1988, streamlines the judicial discipline process within the federal courts and contains a number of improvements in the area of copyright law.

The 85 new judgeships created by Congress will provide needed assistance to the federal district courts and courts of appeals in trying and reviewing the many drug, money laundering and savings and loan cases being brought by the Justice Department.

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Antitrust

On October 27, 1990, Congress passed the following antitrust bills:

S. 994, which lessens restrictions on corporate interlocking directorates. Although director interlocks between substantial competitors raise competitive concerns, the current broad and absolute prohibition by Section 8 of the Clayton Act of interlocks between corporations that are only incidental competitors makes little sense in the competitive environment of the 1990s. Firms covered by Section 8 are often widely diversified, producing or selling a wide variety of products and services, including many that are generally unrelated to their primary lines. De minimis overlaps involving sales that are miniscule in absolute dollar amount, or as compared to the firms' overall business, do not present a plausible competitive threat that would warrant an interlock prohibition. Moreover, the Department has been informed repeatedly that capable and willing director candidates all too often are being disqualified after counsel's discovery of a de minimis competitive overlap that would subject the proposed directorship to the prohibition of Section 8.

The Department endorsed improvements that would update Section 8's jurisdictional size-of-firm threshold to $10 million and index it to the Gross National Product, and require both interlocked firms to exceed the jurisdictional threshold, rather than just one, as is currently the law.

The Department also supported correction of the major problem in Section 8 of the Clayton Act -- the apparent prohibition of corporate director interlocks between firms that technically may be viewed as competitors, but that actually compete only to a de minimis extent.

S. 995, which increases corporate fines for a Sherman Act violation to a maximum of $10 million from the current $1 million. The current corporate maximum antitrust fine of $1 million, set in 1974, is inadequate. It is out of touch with the increased emphasis on white-collar crime prevention that has resulted in very substantial recent increases in the maximum penalties for other similar crimes. In many cases, this statutory limit will prevent courts from imposing all but a fraction of the fine the U.S. Sentencing Commission in its completed guideline for antitrust offenses (distinct from other organizational sanctions which are still in draft) has determined is necessary to punish and deter antitrust violations. The alternative maximum fine of twice the gain or loss resulting from a violation may be difficult or impossible to compute in many criminal antitrust cases. We have strongly endorsed increasing the maximum Sherman Act corporate fine to $10 million.

S. 996, which provides treble damages for the United States government when it is a victim of a Sherman Act violation. Although many antitrust violations that injure the United States also involve violations of the False Claims Act, for which treble damages are recoverable, that Act may not be as easy to use as the Clayton Act, and may not apply in some circumstances. The reason that led Congress originally to limit antitrust recoveries by the United States to actual damages -- that the government needed no litigation -- does not seem sufficient today. Moreover, treble damages serve as an important deterrent to bid rigging and price fixing, which appear to occur frequently in government procurement. In order to further deter bid rigging and price fixing against the government, the Department supported treble damages for the United States when it is injured by antitrust violations.

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Clean Air Act Amendments

For the first time in thirteen years, Congress passed the Clean Air Act Amendments of 1990, which contains a broad array of civil and criminal authorities that will make it much easier for the Department of Justice and the Environmental Protection Agency to enforce. The amendments will bring the Act's enforcement provisions in line with those in other environmental laws, in part, by adding felony violations, increasing civil penalties, and providing imprisonment for knowing and negligent releases of dangerous air toxics.

Although the bill as passed does not contain all the enforcement and citizen suit provisions sought by the President -- and contains others we would have preferred not to see included -- this legislation overall is a very significant improvement over current law. The Department of Justice anticipates working closely with EPA to enforce the Act's new requirements firmly and fairly, so that this legislation's promise of clean air becomes a reality for our nation's citizens.

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Expansion Of The Federal Tort Claims Act

On October 27, 1990, in the waning hours of the 101st Congress, the House and Senate passed a version of the Department of the Interior Appropriations bill, H.R. 5769, which contains a provision that would permanently expand the Federal Tort Claims Act (FTCA) to cover Indian tribes, tribal organizations and their contractors.

During the conference, the Department vigorously opposed this provision as an unwarranted expansion of public liability for the acts of private entities, which are neither supervised nor controlled by the federal government. A letter was sent to the conferees advising that the Department would recommend a veto if this language were adopted. We expect to carry out this recommendation if the final bill, which is not yet available, contains this language.

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Legal Immigration Reform

On October 28, 1990, the Legal Immigration Reform bill was passed by both the House and Senate. The core of the bill lies in the overall numbers of immigrant visas and their allocation:

From 1992-95:	465,000 family-based 140,000 employment-based 40,000 for transition
Total:	645,000 per year for three years 55,000 for relatives of noncitizen aliens
Total:	700,000 per year for three years
From 1995 on:	480,000 family-based 140,000 employment-based 55,000 on the point system -- "diversity"
Total:	675,000 per year from 1995 on.

From the outset, the Administration has sought a balanced immigration policy which blends our tradition of family reunification with the ability to allow skilled people to fill immediate needs and contribute to our economy. The Immigration Act of 1990 does this. It is both pro-growth and pro-family and will enhance America's singular advantage as an international magnet for eager and talented people.

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CASE NOTES

CIVIL DIVISION

Second Circuit Denies Rehearing And Rehearing En Banc, Leaving Intact A Panel Decision Holding That The Attorney General Lacks Discretion To Consider Political And Foreign Policy Interests Of The United States When Exercising His Statutory Discretion To Deny An Application For Political Asylum Under 8 U.S.C. §1158(a)

Joseph Patrick Doherty, a member of the Provisional Irish Republican Army who has been convicted of murder by a British court, sought asylum after extradition and deportation proceedings were filed against him. The Attorney General determined that, in the exercise of his statutory discretion, he would not grant Doherty asylum.

On petitions for review, a split panel of the Second Circuit (Judges Feinberg and Pratt, Judge Lumbard dissenting) held that the Attorney General could not consider political and foreign policy interests of the United States in exercising his statutory discretion under 8 U.S.C. §1158(a) to reject an application for political asylum. We filed a petition for rehearing with a suggestion of rehearing en banc, urging that the panel's ruling, which lacked any basis in the text of the statute and disregarded the legislative history demonstrating Congress' intent not to restrict the Attorney General's discretion in this sensitive area, was plainly wrong. On September 13, 1990, the panel denied the petition for rehearing, and no judge in regular active service requested that a vote be taken on the suggestion for rehearing en banc.

Doherty v. U.S. Department of Justice, Nos. 88-4084, 89-4092 (Sept. 13, 1990). DJ # 39-51-6326, DJ # 39-51-6415

Attorneys: Barbara L. Herwig - (202) 514-5425 or (FTS) 368-5425
Robert Delahunty - (202) 514-4173 or (FTS) 368-4173
(Office of Legal Counsel)

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Fourth Circuit Sustains Most, Though Not All, Of The Gun Control Act Regulations

The National Rifle Association and others filed suit to challenge the validity of several regulations promulgated by the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) to implement the Firearm Owners Protection Act of 1986, which amended the Gun Control Act of 1968. Plaintiffs claimed that the 1986 amendments severely curtail the Secretary's discretion so that little deference is owed by the courts and that the failure to conduct an oral hearing prior to issuance of the final rules was a fatal procedural error. More specifically, plaintiffs challenged certain regulations concerning the meaning of "business premises" and "manufacture," the holding of gun shows, and the recordkeeping requirements for personal firearms possessed by collectors and dealers. The district court upheld all of the regulations except for the one defining the term "manufacture."

The court of appeals (Wilkinson, Sprouse, JJ., and Garbis, D.J.), affirmed in part. First, the Court held that the usual Chevron deference was owed to the Secretary's interpretation of the governing statute. The Court went on to sustain in full the Secretary's definition of "business premises" as well as the gun show provisions, but it partially invalidated the recordkeeping requirements to the extent that they demanded information beyond that specified in the statute, in view of the express statutory proviso that "no other recordkeeping shall be required." 18 U.S.C. §923(c). Finally, the Court agreed with the Secretary that no oral hearing was required before issuing final rules.

National Rifle Association v. Brady, No. 89-3345 (Sept. 13, 1990). DJ # 80-67-52.

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* * * * *

Fourth Circuit, In Massive Title VII Case, Affirms District Court's Sanctions Order Against Civil Rights Plaintiffs And Their Lawyers

Plaintiffs brought a class action against the Army under Title VII, making sweeping allegations that all of the employment practices at the Army's installation at Fort Bragg, North Carolina, were racially discriminatory. After massive discovery, the case went to trial, but shortly after the trial began the plaintiffs began to drop out of the lawsuit. The government moved for sanctions against plaintiffs and their lawyers, asserting that the case was frivolous and had been frivolous since its inception, that the litigation was brought and pursued in bad faith in order to harass the Army, and that the reasons that plaintiffs and their lawyers gave for dropping claims were baseless. The district court allowed the plaintiffs to withdraw their claims, but conducted extensive hearings on the questions of sanctions.

In a lengthy opinion, the district court imposed substantial sanctions against two plaintiffs and two lawyers. The district court found that plaintiffs had engaged in repeated instances of perjury, that the lawyers had not looked at the voluminous materials that the Army had turned over in discovery, that the case was brought and maintained in subjective bad faith, that no reasonable attorney would have continued to pursue this case after discovery, and that the abandonment of claims on the eve of trial in this case itself constituted bad faith. A unanimous panel of the Fourth Circuit (Ervin, Phillips, Wilkinson, JJ.) has now affirmed in large part the sanctions order. Stressing the extraordinary litany of misconduct that the district court found to have taken place and the substantial deference that was due to the district court's elaborate and reasoned explanation for the sanctions, and noting that the record amply supported the district court's factual findings, the panel held that (for the most part) the sanctions did not amount to an abuse of discretion.

Sandra L. Blue v. Department of the Army, Nos. 88-1364/1376/1377/1378/1379/1380 (Sept. 18, 1990). DJ # 35-54-34

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Fifth Circuit Goes Into Conflict With The Eleventh Circuit, Holding That Defaulted Student Loans Delinquent For More Than Ten Years Cannot Be Collected By Tax Refund Offset

Plaintiffs brought this action against the Secretary of the Department of Education (DOED) to recover tax refunds offset to partially satisfy their defaulted student loans. Plaintiffs claimed that the statute of limitations barred the offsets because the defaults had occurred more than ten years prior to offset. The Secretary counterclaimed against one plaintiff for the remaining unpaid balance of his loan. The district court granted summary judgment for DOED, holding that the defaulted loans were not rendered legally unenforceable by treasury regulations establishing a ten-year period for offsetting tax refunds. The court reasoned that the ten-year period for a federal agency to refer a debt for offset did not begin until the defaulted loans had been assigned to DOED and the agency obtained the right to collect on the debt. The district court also held that the government's counterclaim was not time barred because the applicable limitations provision specifically exempts government counterclaims from the operation of any statute of limitations.

The Fifth Circuit has now reversed, holding that debts more than ten years old are ineligible for tax refund offset. The Court interpreted the regulations to prohibit the offset of a debt which had been in default for more than ten years. In so holding, the Fifth Circuit created a conflict with the Eleventh Circuit, which had previously held in Jones v. Cavazos that the ten-year period did not begin to run until the debt was assigned to the agency requesting the offset. The Fifth Circuit also reversed without analysis the district court's holding in favor of the Secretary on the counterclaim.

Grider v. Cavazos, No. 90-8166 (Sept. 20, 1990). DJ # 145-0-3230.

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Eighth Circuit Holds That False Claims Act Suit Is Exempt From The Bankruptcy Code's Automatic Stay Provision

The Eighth Circuit, reversing a bankruptcy court ruling which had been affirmed by the district court, has just held that a suit by the government under the False Claims Act is not subject to the automatic stay provision of the Bankruptcy Code. The court held that the FCA suit was exempted from the automatic stay because it was "an action *** to enforce [the government's] police or regulatory power" under 11 U.S.C. §362(b)(4). The court acknowledged that the "chief purpose" of the FCA was to provide restitution to the government. Nonetheless, it found that a suit under the FCA was an exercise of the government's "police or regulatory power" because the deterrent and punitive features of the FCA were significant. In holding that the FCA suit was exempt from the stay, the court stressed that the FCA suit was designed only to fix the debtors' liability, and that the government did not seek by the FCA suit to gain a pecuniary advantage over other creditors or otherwise interfere with the property of the estate. Finally, the court stated that the district court had the power under 11 U.S.C. §105(a) to issue an injunction against the FCA suit if the debtor could satisfy the usual standards for the award of injunctive relief.

In Re: Commonwealth Companies, No. 89-1797NE (Sept. 6, 1990). DJ # 77-45-329.

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Eighth Circuit Construes COBRA Of 1985 To Return Recipients Of State Supplemental Payments Who Had Lost Eligibility For Those Payments By Virtue Of Increases In Their Social Security Benefits To The Status They Had Before The Increase In Benefits

Section 12202 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) provides that disabled widows or widowers who lost Supplemental Security Income (SSI) or State Supplementary Payments (SSP) by reason of a 1984 increase of Social Security benefits would be deemed to be receiving either SSI or SSP for purposes of determining their entitlement to Medicaid. The district court held that Section 12202 intended individuals who lost SSP benefits because of the 1984 increases to be deemed to be receiving no more income than would qualify for SSI benefits--a more generous level than SSP recipients would have been in before the 1984 increases.

The Eighth Circuit has now made clear that, in enacting Section 12202, Congress simply intended to place SSP recipients in the same position they were in before the 1984 increases. Thus, individuals who lost SSP benefits as a result of the increases would be deemed to be receiving no more income than would qualify for SSP benefits.

Darling v. Sullivan, Nos. 88-2873 & 88-2874 (Sept. 11, 1990). DJ # 137-43-411.

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Eighth Circuit Holds That The Department of Agriculture's Decision Not To Waive The Three-year Ownership Requirement To Have Land Placed In The Conservation Reserve Program Is Committed To Agency Discretion

This case concerns North Dakota's attempts to have two tracts of land it owned placed into the Conservation Reserve Program (CRP), 16 U.S.C. § 3831 et seq. (Supp. III 1985). The Secretary determined that North Dakota's land was ineligible for placement in the CRP because the state had not owned the land for three years as required by the CRP, and because the state failed to qualify for a waiver of that requirement. The district court held that the Administrative Procedure Act precluded review of the Secretary's decision not to waive the three-year ownership requirement because the matter was committed to agency discretion by law. The district court nevertheless concluded that the standard relied on by the Secretary was invalid, and remanded the case to the Secretary with orders to promulgate regulations establishing waiver criteria.

On cross appeals, the Eighth Circuit adopted our position that the Secretary's waiver determination was not subject to judicial review. The court noted that the waiver provision gave the Secretary "extremely broad discretion" and failed to supply any "objective criteria." Thus, the court concluded that meaningful standards were lacking by which to review the agency's action. In addition, the court reversed the district court's order that the Secretary promulgate procedural and substantive regulations. The court held that the agency had already promulgated adequate procedural rules, and it was within the Secretary's discretion to develop standards for applying the waiver provision either through rulemaking or case-by-case adjudication.

North Dakota v. Yeutter, No. 89-5485ND (Sept. 12, 1990).
DJ # 106-56-134, DJ # 106-56-135.

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Ninth Circuit Holds That Restrictions On Demonstrators During Navy's Fleet Week Celebration Violate The First Amendment

Each year the Navy conducts a Fleet Week celebration which includes a parade of ships in San Francisco Bay. The event draws crowds of up to 500,000 persons. In recent years, antiwar groups have engaged in counterdemonstrations by sailing their small boats between the Navy ships and the reviewing stand on a pier on shore. In the interests of security and maritime safety, the Coast Guard prohibited any boat from sailing within 75 yards of the pier. The district court held that this action violated the First Amendment, and it enjoined the Coast Guard from enforcing any security zone greater than 25 yards.

On our appeal, a divided Ninth Circuit has now affirmed. The majority (Tang and Canby, JJ.) held that the government had not proved that the 75-yard zone was narrowly tailored to the security and safety interests or that it left open sufficient alternative channels of communication. The majority held, however, that the government's position was sufficiently justified so that the district court had erred in awarding attorney fees under the Equal Access to Justice Act. Judge Tang concurred, stating that the Coast Guard's purpose "may well" have been improper viewpoint discrimination, reminiscent of the forced relocation of Japanese-Americans in World War II. Judge O. Scannlain dissented, stating his view that the 75-yard zone was a valid time, place, and manner restriction in light of what he considered were legitimate security and safety concerns. He also noted that the difference between the Coast Guard's zone and the zone allowed by the majority was only 50 yards -- "less than the distance from home plate to second base on a baseball diamond's basepaths."

Bay Area Peace Navy v. United States, Nos. 88-2958 & 88-15286 (Sept. 14, 1990). DJ # 145-18-1605

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Ninth Circuit Holds That State Law Cannot Preclude VA From Recovering From Veterans Amounts Paid By The Government On VA-Guaranteed Home Loans

The VA guarantees home loans for veterans. VA regulations permit the VA to recover amounts paid on the loan after foreclosure from the veterans. In this California class action, plaintiffs argued that recovery was precluded by California's anti-deficiency act.

The Ninth Circuit has now rejected this challenge, holding that the VA regulations preempt contrary state law. The court distinguished its earlier decision in Whitehead v. Derwinski on the ground that in the state law scheme in that case, the VA could preserve its right to recovery from the veteran.

Jones v. Derwinski, No. 89-15053 (Sept. 24, 1990). DJ # 151-11-1551

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* * * * *

Tenth Circuit Upholds Constitutionality of Civil Monetary Penalties Award Against Chiropractor Who Was Previously Convicted Of Medicare Fraud For The Same Conduct

Dr. Bernstein, a chiropractor, filed scores of false claims for Medicare reimbursement. He later pled guilty to one count of fraud and was sentenced and fined. By operation of law, he was also suspended from participation in the Medicare and Medicaid programs for ten years. The Department of Health & Human Services (HHS) then instituted this administrative proceeding under the Civil Monetary Penalties Law (CMPL) for submission of false claims, many of which had been the subject of the earlier criminal prosecution. Moreover, many of the claims would have been time-barred except that Congress had recently extended the limitations period from five to six years. Bernstein was found liable on all claims, and penalties of $49,200.00 and an assessment of $2,722.40 were imposed. He then petitioned for review, challenging both (1) the application of the CMPL's statute of limitations to revive claims on due process grounds, and (2) the imposition of civil penalties and assessments for the same course of conduct on double jeopardy grounds.

The Tenth Circuit has now affirmed the administrative judgment in all respects. Following a line of Supreme Court decisions, the court of appeals determined that a malefactor has no due process right to avoid a legislative revival of otherwise time-barred claims. Noting that the CMPL penalty and assessment awards were far below the maximum permissible under the statute, the court also sustained the administrative award as remedial rather than punitive, the standard established in United States v. Halper, 109 S. Ct. 1892 (1989).

Bernstein v. Sullivan, No. 89-9528 (Sept. 18, 1990). DJ # 137-87.

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TAX DIVISION

Motor Fuel Excise Tax Violation Cases In The Eastern District Of New York

On October 1, 1990, trial commenced in the Eastern District of New York against Richard and Robert Kennon, and the brothers were subsequently convicted by a jury on charges of conspiring to defraud the United States, evading motor fuel excise tax and aiding in filing false excise tax return. Their conviction resulted from their participation in a $1.3 million motor fuel excise tax evasion scheme. The evidence established that the brothers purchased gasoline from a major supplier using their company, Jenny Oil Corporation, and caused the gasoline to be falsely and fraudulently invoiced through a "daisy chain" to make it appear that another one of their companies had purchased the gasoline with taxes fully paid. In fact, federal excise taxes were never remitted to the Internal Revenue Service.

* * * * *

In United States v. Zummo, et al., a criminal case involving federal motor fuel excise tax violations, Judge Leonard D. Wexler of the Eastern District of New York declared a mistrial after one day of trial. Judge Wexler granted the defense motion for mistrial out of an abundance of caution after Newsday printed an article summarizing the testimony of the key witness in the Kennon case, which was also tried by Judge Wexler.

The Judge simultaneously empaneled the juries for the Zummo case and the Kennon case, but the Kennon case was tried first. Prior to the jury reaching a verdict in Kennon on October 11, 1990, Judge Wexler began hearing testimony in the Zummo case. Both cases involve some of the same witnesses, including Lawrence Iorizzo, whose testimony in Kennon was summarized in the Newsday article printed on October 11, 1990. In granting the defense motion for a mistrial in Zummo, the Judge acknowledged that he may have been imprudent in allowing the two cases to overlap.

The Zummo trial has been scheduled to recommence in December with a new jury.

* * * * *

District Court Dismisses Important Bivens Action Against IRS Agents

On September 28, 1990, the United States District Court for the District of Colorado entered a decision in favor of the IRS agents in a significant Bivens suit. The defendants involved were three Criminal Investigation Division employees from the Denver IRS office. The defendants were sued by over 200 members of a well-known tax protester group, the National Commodity and Barter Association (NCBA), for alleged First and Fourth Amendment violations. The allegations arose from the use of an informant who, while working at the NCBA offices, provided trash and non-trash items, including a mailing list, to the defendants.

The court held that the informant was not an agent of the defendants and, alternatively, that no First or Fourth Amendment violation existed since the informant acted within the inherent scope of her authority at the NCBA offices and the defendants had an ongoing legitimate government investigation.

* * * * *

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
10-21-88	8.15%	01-12-90	7.74%
11-18-88	8.55%	02-14-90	7.97%
12-16-88	9.20%	03-09-90	8.36%
01-13-89	9.16%	04-06-90	8.32%
02-15-89	9.32%	05-04-90	8.70%
03-10-89	9.43%	06-01-90	8.24%
04-07-89	9.51%	06-29-90	8.09%
05-05-89	9.15%	07-27-90	7.88%
06-02-89	8.85%	08-24-90	7.95%
06-30-89	8.16%	09-21-90	7.78%
07-28-89	7.75%	10-27-90	7.51%
08-25-89	8.27%		
09-22-89	8.19%		
10-20-89	7.90%		
11-16-89	7.69%		
12-14-89	7.66%		

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

* * * * *

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* * * * *

EXHIBIT
A

Motions to Transfer Repeat Juvenile Offenders

The increased participation by persons under eighteen years of age in serious criminal activity, particularly in drug violations, has increased the numbers of juveniles who may be eligible for harsher adult treatment through the operation of 18 U.S.C. § 5032.

Under 18 U.S.C. § 5032, certain juveniles may, on motion, be transferred to adult prosecution providing their cases meet certain criteria spelled out in the statute. To assure consistent handling of these cases, the United States Attorneys' Manual requires prosecutors to forward a request for authority to move to transfer to the Department. See USAM 9-8.130. The statute also provides that juveniles who are sixteen years of age or older and charged with a serious crime involving violence against persons or a particularly dangerous crime involving destruction of property must be transferred to adult prosecution if they are repeat offenders. Since adult treatment is mandatory in these cases, a formal motion to transfer -- approved in advance by the General Litigation and Legal Advice Section as described in USAM 9-8.130 -- is arguably unnecessary.

In many cases, the fact that a juvenile is a repeat offender is going to be clear on the face of the record. For example, if the juvenile has a prior federal drug sale conviction or adjudication on his record, and he commits another drug sale or a bank robbery, he is obviously a repeat offender who must be treated as an adult. However, other cases will not be so clear. Where the factual details of a state felony conviction must be considered, the district court will be called upon to decide whether a prior offense qualifies a juvenile for adult treatment.

To maintain a degree of uniformity in the handling of these cases, the procedure set forth below should be followed:

(1) If the prior offense is one of the federal offenses listed in paragraph four of section 5032, the approval of the General Litigation and Legal Advice Section need not be sought, and the pleading filed in the district court may be styled as a Notice of Prior Conviction for Purposes of Mandatory Transfer to Adult Prosecution to emphasize that the court has no discretion in ruling on the transfer.

(2) If the prior offense is not one of the federal offenses listed in paragraph four of section 5032, the approval of the General Litigation and Legal Advice Section must be sought. This may be done in writing or by telephone. If the review discloses that the prior offense properly qualifies for automatic transfer, permission to file the Motion to Transfer may be granted by telephone. If it appears that the prior offense will probably not qualify for automatic transfer, the request must be reduced to writing and it will be reviewed in accordance with USAM 9-8.130.

EXHIBIT
B

MEMORANDUM OF UNDERSTANDING
BETWEEN THE UNITED STATES POSTAL INSPECTION SERVICE
AND THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEPARTMENT OF THE TREASURY

1. Purpose

The purpose of this memorandum is to further implement the Investigative Guidelines, Title XI, Organized Crime Control Act of 1970, March 1, 1973, which allocated investigative jurisdiction over certain offenses involving unlawful use of explosives. As provided in the Guidelines, the Bureau of Alcohol, Tobacco and Firearms (ATF) was given, among other things, primary investigative jurisdiction over violations of 18 U.S.C. Section 844 (d) and (i) and other violations of Section 844 directed at Treasury Department property and functions. The United States Postal Inspection Service (Inspection Service) was accorded primary jurisdiction to investigate incidents involving explosives or incendiary devices sent through the mails or directed against Postal Service property or functions.

2. Scope

This memorandum pertains only to those incidents involving explosives or explosive or incendiary devices unlawfully sent through the mail. The jurisdiction of the Federal Bureau of Investigation, as well as state and local law enforcement agencies, is acknowledged by the parties but is outside the scope of this agreement.

3. Notification

Each agency will immediately notify the other of any report received of an incident involving explosives or an explosive or incendiary device sent through the mail. If, in the course of an ATF investigation, evidence is found that any such explosive or incendiary device was sent through the mail, ATF will immediately notify the Inspection Service.

4. Investigations

a. Response and Crime Scene Whenever ATF receives a report of a mail bombing, it shall immediately notify the Inspection Service. Whenever ATF responds to any bombing, it shall take reasonable steps to determine whether the explosive device or incendiary device had been sent through the mail. If there is any indication that the device had been mailed, ATF shall immediately notify the Inspection Service. The local Special Agent in Charge (SAC) and Inspector in Charge (INC) will determine when to initiate processing of the scene. This determination will be based on the initial assessment of the crime scene, the anticipated time of arrival of Inspection Service personnel, and the concern for public safety. If initial indications are that the bomb was not delivered by mail, ATF will act in accordance with its normal procedures. However, if, at any time, ATF obtains information indicating that the bomb was delivered by mail, it shall notify the Inspection Service and a joint task force will conduct the investigation.

b. Post-Crime Scene Investigation The ensuing investigation after examination of the crime scene will be conducted jointly by the Inspection Service, ATF, and available federal, state and or local authorities in a task force type of approach. Investigative strategies employed will be determined jointly by Inspection Service, ATF, and other involved agencies. In addition, contacts with federal, state, or local prosecutorial offices will be made jointly by the Inspection Service and ATF unless otherwise agreed.

c. Coordination Inspection Service and ATF managers will coordinate investigative activities and maintain appropriate liaison. Related activities such as press releases, press conferences and other investigative approaches will also require joint coordination by ATF and the Inspection Service.

5. Examination of Evidence

a. All evidence recovered during a crime scene investigation shall immediately be turned over to the Inspection Service at the crime scene or other mutually agreed location for examination by the Inspection Service crime laboratory. ATF assistance will be provided to the Inspection Service examination of the evidence if requested. In those cases where it had not been determined through processing of the crime scene that the explosives or explosive or incendiary device had been mailed and subsequent laboratory examination revealed that the mails had been used, the Inspection Service will be immediately notified and the evidence will be examined jointly by Inspection Service and ATF crime laboratory personnel.

b. Regardless of which agency has custody of the evidence, the crime laboratories of each agency will be available to the other on request to provide any assistance, information or expertise.

6. Implementation and Resolution of Disputes

a. Primary responsibility for the implementation of this agreement is in the local Special Agent in Charge of ATF and the Inspector in Charge of the Inspection Service, or their designees. They shall make every reasonable effort to implement this memorandum.

b. In the event a dispute arises regarding this Memorandum of Understanding which they are unable to resolve, the matter shall be referred to the Chief, Explosives Division, ATF and the Manager, Fraud and Prohibited Mailings Branch, Postal Inspection Service.

c. In the event the parties are unable to resolve a dispute, they agree to ask the Assistant Attorney General, Criminal Division, to mediate the dispute.

d. The parties agree to advise their agents of the provisions of this agreement.

e. Nothing in this agreement is intended to augment or diminish the authority of ATF or the Inspection Service to investigate crimes against the United States nor does this agreement confer any rights on any third party in litigation with the United States.

Stephen E. Higgins,
Director
Bureau of Alcohol, Tobacco and Firearms

Date: August 24, 1990

Charles R. Clauson,
Chief Postal Inspector

Date: 8/24/90

EXHIBIT C

MONEY LAUNDERING CASE LIST

CTR Cases

August, 1990

U.S. Supreme Court

California Bankers Assn. v. Schultz, 416 U.S. 21 (1974)
(Title I of Bank Secrecy Act (1) does not violate due process by imposing unreasonable burdens on banks or by making banks "agents" of the government (2) does not violate 4th Amendment rights of banks or their customers because Title I records are not disclosed to government without separate process (3) does not violate 5th Amendment privilege against self-incrimination as to banks or bank customers; Title II's foreign transaction reporting requirements do not violate 4th Amendment and are within the plenary power of Congress over interstate and foreign commerce; Title II's domestic reporting requirments, as implemented, do not violate 4th Amendment rights of bank)

Court of Appeals

U.S. v. Scanio, 900 F.2d 485 (2nd Cir. 1990)
(defendant willfully structured a currency transaction for the purpose of evading the bank's CTR filing requirement; Government was not required to prove that defendant actually knew structuring was unlawful. Jury instruction on 5324(3) included in the opinion)

U.S. v. Blackman, 897 F.2d 309 (8th Cir. 1990)
(Court upheld District Court's denial of defendant's motion for acquittal on the money laundering counts in the indictment; found that transaction, carried out by defendant with an auto sales firm, fits within the purview of 18 U.S.C. §1956 and is of the type that Congress intended to criminalize. Testimony from an expert witness which explained to jury, drug dealers' practice of use of wire services to conduct business and their preference in using vehicles encumbered by liens to protect from seizure, deemed permissible)

U.S. v. Lora, 895 F.2d 878 (2nd Cir. 1990)
(During guilty plea colloquy defendant acknowledged in the trial court that he should have known the money involved in the financial transaction was derived from illegal activity and the transaction was designed to conceal the identity of the parties involved in the transaction. Defendant thereafter sought to set aside the plea on this basis. 2nd Circuit ruled that defendant should have understood his guilty plea; that he was fully informed by the trial court of all of his rights; knowing, voluntary waivers of these rights were obtained)

U.S. v. Mcaffe, No. 88-5145 (4th Cir. Feb. 9, 1990) (unpublished decision)

(defendant, an attorney, was charged in two counts with (1001) and (5313) for advising his clients to structure cash transactions by purchasing cashier's checks under $10,000 from different banks to avoid filing CTR's. Defendants argued these two counts merged. Fourth Circuit found no merit to appellant's claims)

U.S. v. Casamento, 887 F2d 1141 (2nd Cir. 1989)

(circumstantial evidence sufficient to prove defendants' participation in the money laundering operations of "Pizza Connection" narcotics operation. See opinion pages 1162, 63 and 1166, 67)

U.S. v. Lee, 866 F.2d 998 (8th Cir. Sept. 18, 1989)

(defining financial transaction as a transfer of cash. Unclear from opinion whether transfer was simply between two individuals or whether a financial institution was involved)

U.S. v. Corona, 885 F.2d 776 (11th Cir. Sept. 29, 1989)

(§1952 (ITAR) conviction of bank officer based on imputing knowledge of drug trafficking based on "objective factors" analysis. Defines facilitation for ITAR purposes as "to make easy or less difficult." (Note: 1956 is based on ITAR facilitation theories)

U.S. v. Alamo Bank of Texas, 880 F.2d 828 (5th Cir. Aug. 7, 1989)

(successor bank criminally liable for CTR offenses committed by predecessor bank)

U.S. v. Donahue, 885 F.2d 45 (3rd Cir. 1989)

(defendant could be convicted of conspiring to willfully and knowingly avoid filing Currency Transactions Reports on basis of his agreement with bank branch manager to willfully violate bank's duty to file those reports or by aiding and abetting that violation, even though he himself could not have been held liable for failure to file those reports, and (2) venue on count relating to transportation of currency to Grand Cayman Island without filing requisite Currency and Monetary Instrument Reports was proper in district where offense "began" -- i.e., where defendant with currency boarded first of successive flights which later left country)

U.S. v Restrepo, 884 F.2d 1381 (2nd Cir. 1989)

(in a three page order upholding defendant's conviction under 18 U.S.C. § 1956, the Second Circuit held that § 1956 is neither vague on its face nor as applied)

U.S. v. Ponce Federal Bank, F.S.B., 883 F.2d 1 (1st Cir. 1989)

(upholding authority of District Court to disregard prosecutor's recommendation for a lesser fine as part of a plea bargain; fine imposed exceeded recommended fine by 1 million dollars)

U.S. v. Alamo Bank of Texas, 880 F.2d 828 (5th Cir. 1989)
(successor bank criminally liable for CTR offenses committed by predecessor bank)

U.S. v. St. Michael's Credit Union, 880 F.2d 579 (1st Cir. 1989)
(appeal of conviction of credit union and one of its employees; aff'd in part and rev'd in part; opinion discusses: (1) willfull blindness jury instructions deemed appropriate; (2) pattern of transactions exceeding $100,000 proven by chronic and consistent non-filing by credit union; (3) improper introduction of irrelevant evidence tainted § 1001 conviction thereby requiring reversal; and (4) aggregation of multiple transactions conducted on a single day but at different times violates Fifth Amendment notice -(5313 charge - not 5324(3))

U.S. v. American Investors of Pittsburgh, 879 F.2d 1087 (3rd Cir. 1989)
(corporate defendant and three principle officers convicted of structuring violations under 31 U.S.C. 5313 and 18 U.S.C. 2; convictions upheld; aggregation rules discussed; criminal liability of bank officers and customers fully explained; Mastronardo distinguished)

U.S. v. Eaves, 877 F.2d 943 (11th Cir. 1989)
(movement of money in interstate commerce satisfied jurisdictional prerequisites of Hobbs Act; analogous to movement of money in interstate commerce clause of 18 U.S.C. § 1956)

U.S. v. Bucey, 876 F.2d 1297 (7th Cir. 1989)
(defendant did not violate CTR statutes; defendant did not qualify as "financial institution"; defendant did not unlawfully fail to disclose identity of true source of funds on Parts I and II of CTR form; but evidence supported convictions for mail fraud and conspiracy)

U.S. v. Kingston, 875 F.2d 1091 (5th Cir. 1989), reh'g denied, 878 F.2d 815 (5th Cir. 1989)
(CTR offenses by bank employees; elements of proof; sufficiency of evidence; evidence that CTR violations committed in connection with violation of other federal law)

U.S. Alverez-Morena, 874 F.2d 1402 (11th Cir. 1989)
(holding drug money laundering violations sufficient to support the "series of three violations" requirement for C.C.E conviction. Each separate money laundering transaction held to be a distinct violation)

U.S. v. Rigdon, 874 F.2d 774 (11th Cir. 1989)
(individual defendant's exchanging currency for cashier's checks for fee qualified him as "financial institution", but did not involve "trick, scheme or device" to conceal transaction)

U.S. v. Jerkins, 871 F.2d 598 (6th Cir. 1989)
(§ 371 conspiracy; overt acts in conspiracy to avoid CTR requirement need not themselves be illegal; defendant attorney's laundering scheme aimed in part at thwarting IRS identification of revenue and collection of taxes subject to criminal conspiracy conviction)

U.S. v. Meros, 866 F.2d 1304 (11th Cir. 1989)
(where customer makes multiple cash transactions under $10,000 at different branches of same bank on same day, he can be the proximate cause of a bank's failure to file a CTR, and thus liable under 18 U.S.C. §§ 1001 and 2)

U.S. v. Reitano, 862 F.2d 982 (2nd Cir. 1988)
(defining term "gross revenue" in 18 U.S.C. § 1955; analogous to "gross receipts" language of pre-amendment 18 U.S.C. § 981(a)(1)(A))

Pilla v. U.S., 861 F.2d 1078 (8th Cir. 1988)
(defendant had duty to report acting in capacity as advisor to bank officer)

U.S. v. Camarena, No. 88-1314 (5th Cir. Dec. 6, 1988) (unpublished decision)
(knowledge that "structuring" is illegal not required under § 5324; § 5324 is not vague; the word "structure" has no peculiar, exotic or legal meaning as used in this statute)

U.S. v. Zingaro, 858 F.2d 94 (2nd Cir. 1988)
(evidence was a constructive amendment of RICO conspiracy indictment in violation of grand jury clause of Fifth Amendment)

U.S. v. Ashley Transfer & Storage Co., 858 F.2d 221 (4th Cir. 1988), cert. denied, 109 S.Ct. 1932 (1989)
(counts charging defendants with conspiracy to fix prices and conspiracy to defraud U.S. were not multiplicitous)

U.S. v. Lizotte, 856 F.2d 341 (1st Cir. 1988)
(jury instruction on "willful blindness"; defendant attorney may not take refuge in willful blindness; drug money was willingly laundered)

U.S. v. Hawley, 855 F.2d 595 (8th Cir. 1988), cert. denied, 109 S.Ct. 1141 (1989), reh'g denied, 109 S.Ct. 1772 (1989)
(husband and wife team engaged in "warehouse banking" services constitutes "financial institution")

U.S. v. Pieper, 854 F.2d 1020 (7th Cir. 1988)
(kickbacks, false income tax returns and conducting affairs of employee benefit fund through pattern of racketeering activity resulted in conviction of RICO violation and counts were not multiplicitous)

U.S. v. Segal, 852 F.2d 1152 (9th Cir. 1988)
(liability of bank customer who conspired with bank officer to avoid filing CTRs; aiding and abetting a failure to file currency transaction reports; conspiracy to defraud)

U.S. v. Mastronardo, 849 F.2d 799 (3rd Cir. 1988)
(pre-1986 statutes and regulations did not afford "fair notice" to bank customer that "structuring" violates law; defendants engaged in a multimillion dollar bookmaking and money laundering operation were charged with structuring currency transactions to avoid having financial institutions file CTRs)

U.S. v. Cuevas, 847 F.2d 1417 (9th Cir. 1988), cert. denied, 109 S.Ct. 1122 (1989)
(money launderer conspired to aid and abet drug offense; extensive money laundering operation with several international offices constitutes a "financial institution"; transfers between branches and offices of operation subject to CTR requirement)

U.S. v. Risk, 843 F.2d 1059 (7th Cir. 1988)
(bank had no legal duty to report structured transactions since statute and regulations in existence at time did not require aggregation of multiple transactions)

U.S. v. Petit, 841 F.2d 1546 (11th Cir. 1988), cert. denied, 108 S.Ct. 2906 (1988)
("sting operation"; conspiracy to receive stolen goods; goods provided by FBI agent do not need to be stolen; crime of conspiracy is complete once the conspirators, having formed the intent to commit a crime, take any step in preparation)

U.S. v. Polychron, 841 F.2d 833 (8th Cir. 1988), cert. denied, 109 S.Ct. 135 (1988)
(indictment against bank president charged with intentionally structuring transactions in order to avoid filing CTRs alleged crime against U.S. under 18 U.S.C. § 371; 18 U.S.C. § 1001; and 31 U.S.C. § 5313 and 18 U.S.C. § 2)

U.S. v. Shannon, 836 F.2d 1125 (8th Cir. 1988), cert. denied, 108 S.Ct. 2830 (1988)
(bank officer guilty of avoiding CTR requirement by causing personal funds to be deposited into bank's account at correspondent bank; sustaining obstruction of justice conviction based upon defendant's advice to former bank teller, who was prospective grand jury witness, that it would be "in her best interest" to forget about any large currency transactions which she had processed)

U.S. v. Lafaurie, 833 F.2d 1468 (11th Cir. 1987), cert. denied, 108 S.Ct. 2015 (1988)
("structured" transactions exceeding total of $10,000 at same bank, or different branches of same bank, on same day; customers have duty to report cash transactions and could be held criminally liable for failure to file report)

U.S. v. Robinson, 832 F.2d 1165 (9th Cir. 1987)
(bank teller, who was acting as a private individual and was not charged with operating a currency exchange business, was not a financial institution within currency laws; no duty to file CTRs)

U.S. v. Gimbel III, 830 F.2d 621 (7th Cir. 1987)
(defendant, who was a lawyer, structured currency transactions, had no duty to file a CTR reflecting structured nature of transactions; regulation in effect at time did not require aggregation of multiple transactions; individual cannot be charged as a "financial institution")

U.S. v. Hayes, 827 F.2d 469 (9th Cir. 1987)
(bank customer conspired with bank officer to avoid CTR requirement; customer liable for conspiracy to fail to file CTRs on transactions exceeding $10,000 on showing of complicity with bank vice president)

U.S. v. Abner, 825 F.2d 835 (5th Cir. 1987)
(a transaction over $10,000, even if split between two or more branches of same bank, constitutes a transaction requiring a CTR)

U.S. v. Herron II, 825 F.2d 50 (5th Cir. 1987)
(defendants not guilty of wire fraud violation for conspiring and scheming to launder money by failing to file CTRs in absence of allegation that defendants conspired to deprive U.S. of income taxes; conspiracy to violate CMIR requirement upheld)

U.S. v. Richeson, 825 F.2d 17 (4th Cir. 1987)
(conviction under 18 U.S.C. §§ 1001 and 2; defendant structured daily bank deposits so as to cause bank not to file required CTRs; CTR form required aggregation of transactions)

U.S. v. Nersesian, 824 F.2d 1294 (2d Cir. 1987), cert. denied, 108 S.Ct. 355 (1989)
(bank customer structuring transactions may be convicted under 18 U.S.C. § 371 and 18 U.S.C. §§ 1001 and 2 even though customer had no legal duty to file a CTR himself)

U.S. v. Bank of New England, 821 F.2d 844 (1st Cir. 1987), cert. denied, 108 S.Ct. 328 (1987)
(bank criminally liable; simultaneous transfer of over $10,000, same teller window, multiple instruments; definition of "pattern of illegal activity")

U.S. v. Montalvo, 820 F.2d 686 (5th Cir. 1987)
(conviction under § 371; purpose of money laundering conspiracy through foreign corporation was to impede and obstruct the IRS in collection of revenue)

U.S. v. DiTommaso, 817 F.2d 201 (2d Cir. 1987)
(defendants were convicted of drug smuggling; some defendants participated in drug conspiracy by laundering money through multinational shoe business)

U.S. v. Herron, 816 F.2d 1036 (5th Cir. 1987), vacated, 825 F.2d 50 (1987)
(scheme designed to facilitate cash deposits in domestic banking system without triggering reporting requirements constituted violation of wire fraud statute)

U.S. v. Murphy, 809 F.2d 1427 (9th Cir. 1987)
(court held that the law did not clearly impose a duty on the defendant to disclose the source of the funds in Part II of CTR Form 4789)

U.S. v. Williams, 809 F.2d 1072 (5th Cir. 1987), cert. denied, 108 S.Ct. 228 (1987)
(RICO violations, conspiracy to evade currency transaction reporting requirements, conspiracy to file false tax returns)

U.S. v. Cure, 804 F.2d 625 (11th Cir. 1986)
(bank customer guilty under § 371 of conspiring with bank not to file CTRs; guilty under §§ 1001 and 2 of causing bank to fail to file CTRs; multiple subtransactions at same bank, or different branches of same bank, on same day)

U.S. v. Hernando Ospina, 798 F.2d 1570 (11th Cir. 1986)
(defendant providing money laundering service exchanged $1.3 of Colombian pesos into cashier's checks for commission deemed "financial institution"; fact that undercover government agents conducted transactions did not negate bank's duty to file CTRs where agents acted at direction of defendants; conviction of conspiracy to violate Travel Act to facilitate narcotics trafficking upheld on basis of cocaine residue on currency)

U.S. v. Larson, 796 F.2d 244 (8th Cir. 1986)
(the Act imposed no duty to defendant to disclose to bank that his multiple currency transactions aggregated over $10,000, thus defendant not guilty of concealing such information from government; statute and regulations failed to afford "fair notice" to defendants)

U.S. v. Heyman, 794 F.2d 788 (2d Cir. 1986), cert. denied, 479 U.S. 989 (1986)
(defendant employee of financial institution convicted of causing institution to fail to file CTRs, although defendant had no legal duty to file CTRs himself; liable under § 5313; conviction sustained)

U.S. v. Reinis, 794 F.2d 506 (9th Cir. 1986)
(bank customer had no duty to report, thus no concealment and could not aid or abet a bank's failure to report CTRs; no duty on banks to aggregate multiple transactions each under $10,000)

U.S. v. Nahoom, 791 F.2d 841 (11th Cir. 1986)
(conviction of former AUSA for conspiracy to import and possess marijuana affirmed; evidence of defendant's involvement in money laundering scheme admissible on issue of intent; acquitted on RICO count)

U.S. v. Sanchez, 790 F.2d 1561 (11th Cir. 1986)
(bank officer guilty of conspiracy to defraud the U.S. by impeding investigation of large currency transactions of circumventing currency reporting requirements by referring customers to investment firm for purpose of avoiding CTR requirement)

U.S. v. Mouzin, 785 F.2d 682 (9th Cir. 1986), cert. denied, 479 U.S. 985 (1986)
(court held defendant qualified as "financial institution" as both "currency exchange" and "transmitter of funds" by virtue of role in transferring currency across the country and overseas)

U.S. v. Giancola, 783 F.2d 1549 (11th Cir. 1986), cert. denied, 479 U.S. 1018 (1986)
(same day, different branches of same bank; customer can be proximate cause of a bank's failure to file a CTR, and thus liable)

U.S. v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986)
(multiple subtransactions, each under $10,000 and each at a different bank, do not trigger duty to file CTR; however, one defendant, a kingpin of an intricate money laundering operation who delivered cash in excess of $10,000 to his couriers, qualified as a "financial institution" (i.e. a "currency exchange") with a duty to file CTRs)

U.S. v. Varbel, 780 F.2d 758 (9th Cir. 1986)
(defendants engaged in money laundering had no duty to report currency transactions to or through the bank; customer not liable under § 1001 & § 371 where each subtransaction conducted at different bank)

U.S. v. Denemark, 779 F.2d 1559 (11th Cir. 1986)
(no duty to file where each subtransaction at different bank)

U.S. v. Eirin, 778 F.2d 722 (11th Cir. 1986)
(money laundering case in which more than $57,000,000 passed through one bank in a ten month period; no CTRs were filed; evidence of defendant's participation is similar money laundering scheme admissible)

U.S. v. Anzalone, 766 F.2d 676 (1st Cir. 1985)
(application of reporting requirements to financial institutions only, customer had no duty to disclose information and therefore not liable under § 5313 & § 1001; court treated case as involving multiple subtransactions each on different day)

U.S. v. Valdes-Guerra, 758 F.2d 1411 (11th Cir. 1985)
("Operation Greenback": conspiracy and money laundering scheme; each reporting violation is a separate felony and a separate unit of "pattern of illegal activity" over 12 months)

U.S. v. Goldberg, 756 F.2d 949 (2d Cir. 1985), cert. denied, 472 U.S. 1009 (1985)
(court held three defendants engaged in money laundering, including two bank officers, constituted a "financial institution", namely a partnership or joint venture engaged in business of dealing in currency)

U.S. v. So, 755 F.2d 1350 (9th Cir. 1985)
("sting operation; no evidence of entrapment or "outrageous government conduct"; individual currency misdemeanors aggregating to more than $100,000 amount to separate felonies each time violation in a pattern adds to total exceeding $100,000 over 12 month period)

U.S. v. Cook, 745 F.2d 1311 (10th Cir. 1984), cert. denied, 469 U.S. 1220 (1985)
(customer liable under the bank reporting law for giving false information on report rather than for failure to file a report)

U.S. v. Orozco-Prada, 732 F.2d 1076 (2d Cir. 1984)
(money laundering operation integral to success of drug scheme and money launderers may be prosecuted for aiding and abetting drug offense)

U.S. v. Eisenstein, 731 F.2d 1540 (11th Cir. 1984)
(ignorance of the reporting requirement constitutes a valid defense)

U.S. v. Sans, 731 F.2d 1521 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1984)
(bank officials; evidence of non-filing by other officials irrelevant; conspiracy to defraud; failure to file CTRs; falsifying facts in a matter under jurisdiction of IRS)

U.S. v. Puerto, 730 F.2d 627 (11th Cir. 1984), cert. denied, 469 U.S. 847 (1984)
(customer liable for failure to file and false filing of CTRs under § 5313, § 1001 & §371)

U.S. v. Browning, 723 F.2d 1544 (11th Cir. 1984)
(court affirmed conviction of participants in money laundering scheme of conspiring to defraud U.S. by impairing, obstructing, and defeating IRS in its lawful function of identifying revenue and collecting tax due and owing on such revenue)

U.S. v. Tobon-Builes, 706 F.2d 1092 (11th Cir. 1983)
(defendant and companion together bought two $9,000 cashier's checks at each of ten banks during a six-hour period; actions by a customer that cause a financial institution to abrogate its duty to file a CTR are criminal under 18 U.S.C. §§ 1001 and 2)

U.S. v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983)
(use of "violation" and "part of" in § 1059 makes clear that each reporting violation can be separately prosecuted as felony and as separate unit of "pattern of illegal activity" over 12 month period)

U.S. v. Enstam, 622 F.2d 857 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981)
(defendants, who participated in money laundering scheme to disguise drug proceeds, are guilty of conspiracy to obstruct the IRS' tax collecting function and can be prosecuted for criminal conspiracy)

U.S. v. Thompson, 603 F.2d 1200 (5th Cir. 1979)
(actions by a bank officer that cause a financial institution to abrogate its duty to file a CTR are criminal)

U.S. v. Beusch, 596 F.2d 871 (9th Cir. 1979)
(corporate currency exchange guilty of failing to file CTRs; each reporting violation may be separate unit in "pattern of illegal activity" over 12 months and therefore prosecuted as felony)

District Court

U.S. v. Hoyland, 903 F.2d 1288 (9th Cir. 1990)
(Defendant convicted of willfully structuring cash transactions to cause bank's failure to file CTR's; neither criminal bad purpose to violate nor knowledge of statute is required - general intent to evade reporting requirement is all that is required to be proven)

U.S. v. Awan, No. 88-330-Cr-T-BB (M.D. Fla. Dec. 5, 1989)
(Rejecting vagueness challenge to §1956; indictment not duplicitous because each financial transaction encompassing a deposit, withdrawal and transfer could have been charged in separate counts; conspiracy objectives to aid and abet § 846 violation and money laundering (§1956) not multiplicitous (although court implied that it would grant a Rule 29 Motion as to §846 charge if the only evidence presented was that defendants laundered drug money). Rejects charge of conspiracy to attempt; proceeds of an SUA did not cease being proceeds because they passed through the hands of undercover agents; and transportation as it originally appeared in §1956(a)(2) encompassed electronic funds transfers)

U.S. v. LaFrance, 729 F.Supp. 7 (D. Mass. 1989)
(Court rejected defendant's vagueness challenge to §5324 (1) "Structuring" has plain meaning and is easily understood and scienter requirements of statute limits reach of statute)

U.S. v. 316 Units of Municipal Securities, 725 F.Supp. 172 (S.D.N.Y. 1989)
(Defendant's acquittal of criminal money laundering charges does not serve to collaterally estop government from pursuing civil forfeiture; knowledge of anti structuring provisions (§5324) not required for criminal prosecution or civil forfeiture under §981; knowledge of reporting requirements may be proven by circumstantial evidence and; innocent owner defense requires proof of lack of knowledge of the illegal transactions not lack of knowledge of the transactions' illegality).

U.S. v. Thakkar, 721 F. Supp. 1030 (S.D. Ind. 1989)
(defendant moved to dismiss §5324 indictment on grounds it failed to state a punishable offense and for vagueness. Court held (1) statute makes it illegal to structure regardless of the underlying purpose of structuring. No purpose of concealing criminal activity is required and (2) §5324 not unconstitutionally vague)

U.S. v. McKinney, Cr. No. 89-60021-RE (D. Or. 1989) (unpublished decision)
(defendant charged with 5324(3) structuring violations moved to dismiss indictment; held: (1) reporting requirements do not violate Fifth Amendment self-incrimination rights; (2) terms "structure" and "transaction" are not vague)

U.S. v. Russell K. Baker, No. 89-83-Cr-T-15B (M.D. Fla. 1989) (unpublished decision)
(rejecting vagueness and overbreadth challenge to 18 U.S.C. § 1957)

U.S. v. Kimball, 711 F. Supp. 1031 (D. Nev. 1989)
(reporting requirements of §§ 5313 and 5324 do not violate Fifth Amendment privilege against self-incrimination; 18 U.S.C. § 1956 not void for vagueness)

U.S. v. Palma, Crim. No. H-88-201 (S.D. Tex. 1989) (unpublished decision)
(Part II of CTR form requires naming of the individual or organization for whom transaction is completed)

U.S. v. Paris, 706 F. Supp. 184 (E.D.N.Y. 1988)
(subtransactions at different branches of same bank on same day; bank customers can be charged with conspiracy to avoid CTR reporting requirements and causing banks to fail to file CTRs)

U.S. v. Scanio, 705 F. Supp. 768 (W.D.N.Y. 1988)
(word "structure" in statute did not render statute unconstitutionally vague nor does statute violate 5th amendment)

U.S. v. Bara, Crim. No. H-87-9 (S.D. Tex. 1988) (unpublished decision)
(conspiracy to defraud the IRS; intentionally causing a financial institution to file a false CTR and falsifying material facts)

U.S. v. Central National Bank, 705 F. Supp. 336 (S.D. Tex. 1988) aff'd sub. nom. U.S. v. Alamo Bank of Texas, No. 88-6112 (5th Cir. Aug. 7, 1988)
(successor bank liable for predecessor's CTR violations which occurred three years prior to merger)

U.S. v. Torres Lebron, et al, 704 F. Supp. 332 (D.P.R. 1989)
(bank customers were not required to file CTRs, but could be held criminally liable for conspiring with bank employees to avoid filing of CTRs in multi-step transaction involving cash)

U.S. v. Kraselnick, 702 F. Supp. 480 (D.N.J. 1988)
(regulations afforded "fair notice" to bank employees that they could not structure transactions so as to avoid reporting requirements; conspiracy to defraud; three accounts, three day period)

U.S. v. Mainieri, 691 F. Supp. 1394 (S.D. Fla. 1988)
(18 U.S.C. § 1956 not void for vagueness; language in indictment clearly tracked statute and counts were not multiplicious in violation of 5th amendment)

U.S. Maria Dolores Camarena, No. EP-87-Cr-133 (W.D. Tex. Apr. 7, 1988) (unpublished decision), aff'd, No. 88-1314 (5th Cir. Dec. 6, 1988) (unpublished opinion), cert. denied, 109 S.Ct. 3158 (1989)
(§ 5324 not void for vagueness; money involved in CTR violation need not be criminally derived)

U.S. v. Bucey, 691 F. Supp. 1077 (N.D. Ill. 1988), aff'd in part and rev'd in part, 876 F.2d 1297 (7th Cir. 1986)
(defendant's motion to strike various charges in indictment of money laundering and violation of currency reporting statutes was denied)

U.S. v. Tota, 672 F. Supp. 716 (S.D.N.Y. 1987), aff'd, 847 F.2d 836 (2nd Cir. 1988), cert. denied, 109 S.Ct. 218 (1988)
(employees of brokerage firm criminally liable; physical transfer of currency from brokerage firm customer to broker on single occasion and in amount exceeding $10,000 was in violation of the Currency and Foreign Transactions Reporting Act)

U.S. v. Risk, 672 F. Supp. 346 (S.D. Ind. 1987)
(pre-1986 amendments; bank customer had no duty to report multiple subtransactions at different branches of same bank on same day, no duty to aggregate at time, therefore customer not liable)

U.S. v. Riky, 669 F. Supp. 196 (N.D. Ill. 1987)
(court held because defendant not an "agency", "branch", or "office" of a person, he was not a "financial institution" under 31 C.F.R. § 103.11(e))

U.S. v. Perlmutter, 656 F. Supp. 782 (S.D.N.Y. 1987), aff'd mem., 835 F.2d 1430 (2nd Cir. 1988), cert. denied, 108 S.Ct. 1110 (1988)
(second superseding indictment: individual attorney guilty of knowingly and intentionally causing a bank, by the device of splitting up a $12,000 transaction into amounts less than $10,000, to fail to file a CTR)

U.S. v. Shearson Lehman Brothers, Inc., 650 F. Supp. 490 (E.D. Pa. 1986) But See U.S. v. Mastronardo, 849 F.2d 799 (3rd Cir. 1988) (reversing convictions of individual defendants)
(denying motion to dismiss indictment; structuring financial transactions less than $10,000 is not unlawful per se; scheme became criminal when used to intentionally cause financial institution to fail to fulfill duty to file CTR)

U.S. v. Bank of New England, 640 F. Supp. 36 (D. Mass. 1986)
(bank can be charged with failure to file "structured" transaction even where customer had no duty under Anzalone; bank also properly charged under § 1001)

U.S. v. Cogswell, 637 F. Supp. 295 (N.D. Cal. 1985)
(indictment dismissed which charged bank customer with causing failure to file CTR where each subtransaction at a different bank)

U.S. v. Perlmutter, 636 F. Supp. 219 (S.D.N.Y. 1986) But See U.S. v. Perlmutter, supra.

(defendant attorney did not have notice that her restructuring transactions to avoid banks' reporting requirements and failing to disclose were criminal; indictment dismissed)

U.S. v. Gimbel (I), 632 F. Supp. 748 (E.D. Wis. 1985), rev'd 830 F.2d 621 (7th Cir. 1987)

(indictment, which charged defendant (attorney) with money laundering scheme in attempt to conceal from IRS clients' true income, stated offenses under § 1001 and under mail and wire fraud statutes)

U.S. v. Gimbel (II), 632 F. Supp. 713 (E.D. Wis. 1984)

(district court held that the law did not require the defendant, an attorney engaged in money laundering, to disclose on Part II of CTR form the real parties in interest to transaction)

U.S. v. Richter, 610 F. Supp. 480 (N.D. Ill. 1985), aff'd, 785 F.2d 312 (7th Cir. 1985), cert. denied, 479 U.S. 855 (1986)

(individual defendant properly charged under § 371 and §§ 1001 and 2 based on "structuring" of currency deposits)

U.S. v. Konefal, 566 F. Supp. 698 (N.D.N.Y. 1983)

(individual defendant can be charged with causing failure to file CTR; single count of indictment charging defendant with numerous transactions in order to satisfy "pattern of unlawful activity" requirement not multiplicitous)

EXHIBIT D

DEPARTMENT OF JUSTICE
FEDERAL JUDICIARY CRIMINAL FINES TASK FORCE

Financial Litigation Staff
Executive Office for
United States Attorneys
United States Department of Justice
Washington, DC 20530

Office of Assistant Director
Program Management
Administrative Office of the
United States Courts
Washington, DC 20544

October 4, 1990

The Chief Justice
of the United States
The Supreme Court
of the United States
Washington, DC 20543

Honorable Dick Thornburgh
Attorney General
Washington, DC 20530

Gentlemen:

The Department of Justice/Federal Judiciary Criminal Fines Task Force respectfully submits this report for the year ending September 30, 1990.

During the last decade, Congress passed numerous laws pertaining to the imposition and collection of criminal fines and restitution.[1] These laws not only provided for the imposition of monetary penalties for more types of offenses, but also increased the maximum level of a criminal fine ten fold.[2] As a result, federal courts imposed fines and restitution in more criminal cases and in greater amounts than ever before.

The Criminal Fine Enforcement Act of 1984 provided that the amount of the fine imposed must be related to the defendant's ability to pay, and the Victim and Witness Protection Act of 1982 provided that the financial resources of the defendant and the

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[1] The Criminal Fine Enforcement Act of 1984; the Sentencing Reform Act of 1985 and the Criminal Fine Improvements Act of 1987.

[2] The maximum fine level for an individual has increased from $25,000 to $250,000. See 18 U.S.C. § 3571 and § 3623 (1984).

financial needs and earning ability of the defendant and the defendant's dependents are among the factors to be considered in determining the amount of restitution ordered.[3] Nevertheless, the defendant's ability to pay often has been disregarded or not accurately presented at sentencing. Additionally, criminal defendants remain the most difficult debtors from whom to collect. For these reasons, the criminal debt inventory has increased dramatically during recent years and now exceeds $1 billion.

When criminal fines and restitution are not paid, court orders are not enforced and convicted criminals escape punishment. This breeds disrespect for the law, particularly in those cases where the defendant has the means to pay the fine. Furthermore, since virtually all criminal fines are deposited into the Crime Victims Fund, failure to collect fines means that fewer resources are available to assist crime victims.

The enforcement of criminal fines must be addressed by every component of the criminal justice system--prosecutors, judges, probation officers, case agents, civil collection attorneys and prison officials. To that end, the Department of Justice and the Administrative Office of the United States Courts created the Criminal Fines Task Force to examine the issues concerning the collection of fines and restitution. The task force first met in October 1989 and has met five times during the past year.

The task force would like to extend particular thanks to the Honorable Edward R. Becker of the Third Circuit Court of Appeals who attended most task force meetings and stimulated task force discussions. Although Judge Becker's term as Chairman of the Committee on Criminal Law and Probation Administration has expired, it is hoped that his successor, Judge Vincent L. Broderick, will continue to play an active role in the ongoing work of the task force. The Honorable Stanley S. Harris of the United States District Court of the District of Columbia and the Honorable Michael M. Baylson, United States Attorney for the Eastern District of Pennsylvania, also served on the task force.

The task force divided its work among four working groups which dealt with the National Fine Center, training, management of the criminal fine inventory, and legislation. (A complete list of the task force members and the working groups is attached as Appendix A.)

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[3] See 18 U.S.C. §§ 3572 and 3664.

The accomplishments of the task force during its first year of existence, are as follows:

1. Judgment and Commitment Forms. The Administrative Office of the United States Courts presented its new judgment and commitment form to the task force for comment. Through the task force, the various concerns of prosecutors, collection attorneys, probation officers, clerks of court, and victims were addressed prior to finalization of the form. The form has been distributed to all United States district court judges. The new form seeks to provide guidance to the sentencing judge. It sets forth in greater detail all sentencing options, including imprisonment, criminal fines, forfeiture, compensation to victims, restitution and denial of federal benefits. By reviewing each page of the form, the sentencing judge will see all available sentencing options for an individual convicted of a crime.

2. National Fine Center. As authorized by the Criminal Fine Improvements Act of 1987, the Administrative Office of the United States Courts is developing a National Fine Center, which will be piloted in the Eastern District of North Carolina. Four feeder districts will send information on the imposition and collection of fines to the center. The National Fine Center will provide current information on the payment of all fines, restitution and assessments imposed by the federal courts nationwide. It will perform, in one location, the accounting and administrative support for fine collection and enforcement, i.e., accept payments, furnish current balances, compute interest, send monthly statements and notices to debtors, track delinquencies and defaults, provide information to probation officers, clerks, and United States Attorneys and generate national fine statistics.

The pilot program will be instituted over a two to three year period. The five pilot districts are the Eastern District of North Carolina, the Western District of Missouri, the Eastern District of Pennsylvania, and the Western and Southern Districts of Texas.

3. Criminal Debt Management Plan. The Attorney General's Advisory Committee of United States Attorneys adopted a six point Criminal Debt Management Plan to be implemented by every United States Attorney's office. The plan has been in operation since April 1, 1990. It focuses on the identification and active enforcement of collectible criminal debts. Under the plan, the United States Attorneys will aggressively pursue the enforcement of collectible criminal debts and will also determine which criminal debts are truly uncollectible. Through the task force, the clerks of court and probation officers were apprised of the plan and their cooperation and support were encouraged.

4. Prosecutor and Probation Officer Coordination. The task force determined that many prosecutors and probation officers (charged with preparing presentence reports) were not totally familiar with the statutory basis for the imposition of criminal fines or the avenues available for collection. To remedy this situation, the Probation Office and the United States Attorney's office in the Eastern District of Pennsylvania prepared a working document for better coordination between the two offices. The document covers such issues as better identification of assets available for satisfaction of a fine or restitution and better collection systems.

For example, when a fine is imposed simply as a condition of probation, the probation officer may allow the defendant to pay the fine at the defendant's own schedule without an enforceable timetable. In some instances, the probation period expires, very little, if any, of the fine has been paid, and the court has lost jurisdiction over the defendant. In order to deal with this situation, prosecutors and probation officers have been urged to request the sentencing judge to order a specific table for the payment of the criminal fine, or to specifically authorize the probation office to establish such a schedule and to report back to the sentencing judge, as a violation of probation, any failure to pay in accordance with the schedule.

This plan has been distributed to all districts as a model for effective coordination between the United States Attorney's office and the probation office to improve criminal debt collections.

5. Joint Training for Prosecutors and Probation Officers. In addition, under the auspices of the task force, the Eastern District of Pennsylvania organized and presented a half-day joint training program for prosecutors and probation officers. The program was directed toward improved criminal debt collection through more effective coordination between the United States Attorney's office and the probation office. Speakers addressed the development of background financial information on the defendant, recommendations to the court on the imposition of fines and restitution relative to the defendant's ability to pay, and collection techniques.

All United States Attorneys and Chiefs of Probation have been strongly urged to conduct similar joint training programs by the end of fiscal year 1991. The agenda, training materials, and a videotape of the Philadelphia program are now available for use by other districts in developing their programs.

CONCLUSION

We respectfully believe that the Criminal Fines Task Force has had a productive year; and, unless you advise us otherwise, we intend to continue our discussions into the following fiscal year, as we monitor the development of the National Fine Center, encourage the expansion of joint training programs for prosecutors and probation officers, develop a monograph for use by sentencing judges, make recommendations concerning Federal Rule of Criminal Procedure 35, Correction or Reduction of Sentence, and otherwise attempt to deal with the large inventory of unpaid criminal fines.

Respectfully submitted,

DEPARTMENT OF JUSTICE/
FEDERAL JUDICIARY CRIMINAL FINES
TASK FORCE

FEDERAL JUDICIARY/DEPARTMENT OF JUSTICE CRIMINAL FINES TASK FORCE

FEDERAL JUDICIARY AND AOUSC:

Honorable Edward R. Becker
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Chairman, Committee on
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EXHIBIT
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Office of the Attorney General

Washington, D.C. 20530

September 24, 1990

NDAA Members:

Since the Department of Justice equitable sharing program began in FY 1986, we have returned almost a half billion dollars to state and local law enforcement agencies. We are pleased to announce that prosecutors are now full partners in the program. We solicit your assistance in making the federal forfeiture program even more productive.

Enclosed for your information is a copy of The Attorney General's Guidelines on Seized and Forfeited Property (1990). Under the new Guidelines equitable sharing of federally forfeited assets with state and local prosecutors is expressly allowed. This new provision is the result of a series of meetings between the Department and representatives of the National District Attorneys Association and the National Association of Attorneys General. It reflects the fact that one of the primary goals of the Department's program is to foster law enforcement cooperation at all levels of government.

Ways in which local prosecutors can qualify for an equitable share of federally forfeited property include:

(1) Providing assistance in the preparation of search and seizure warrants and other documents relating to the forfeiture. (A small share of the net forfeiture proceeds would be merited.);

(2) Providing a key informant, or substantially assisting throughout the investigation that leads to a federal forfeiture. (A large share of the net forfeiture proceeds could be merited depending upon the circumstances of the specific case.);

(3) Cross-designating your attorneys to handle federal forfeiture or related criminal cases in federal court. (The Department will authorize sharing of a portion of what would otherwise be the federal equitable share with cooperating local prosecutors who cross-designate attorneys.); and

(4) Prosecuting cases under state law directly related to a federal forfeiture. (The equitable share in such cases should be determined by the United States Attorney in conjunction with his or her Law Enforcement Coordinating Committee.)

It is important for state and local prosecutors to participate early in the investigative process. Early and meritorious involvement will be recognized by the Justice equitable sharing program.

Welcome aboard as partners in the equitable sharing program.

Sincerely,

Dick Thornburgh
Attorney General

Richard P. Ieyoub
President, NDAA

Enclosure

U.S. Department of Justice

Office of the Deputy Attorney General

Executive Office for Asset Forfeiture

EXHIBIT F

Washington, D.C. 20530

October 9, 1990

MEMORANDUM

TO: All United States Attorneys
Assistant Attorney General, Criminal Division
Director, Federal Bureau of Investigation
Administrator, Drug Enforcement Administration
Commissioner, Immigration and Naturalization Service
Director, U.S. Marshals Service

FROM: Cary H. Copeland
Director

SUBJECT: Departmental Policy Regarding Seizure of Occupied Real Property

I. General Policy

As previously stated in this Office's memorandum styled "Seizure of Forfeitable Property", January 11, 1990, it is the Department's policy that ex parte **judicial approval is required prior to the seizure of all real property.**

However, **it is not required that the U.S. Marshal actually seize property and take dominion and control of it in order to establish the Court's jurisdiction over the res.** An alternative method of initiating the forfeiture of property is to "arrest" the property under the Admiralty Rules.

In certain circumstances it may be advisable to use this less intrusive means of bringing the property into the jurisdiction of the Court for purposes of commencing a civil in rem forfeiture action. Moreover, as "arresting" property through the service of process does not interfere significantly with an owner's possessory interests, advance ex parte judicial review is not required as a matter of law or policy.

The determination of whether to initiate real property forfeitures through a "seizure" or "arrest" of the property requires an exercise of discretion by the Attorney for the Government taking into account the circumstances of the case at hand.

A. Arresting Real Property without Taking Actual Possession

The Clerk of Court may issue a Warrant of Arrest pursuant to Rule C(3) of the Supplemental Rules for Admiralty and Maritime Claims which is then posted upon the real property by the U.S. Marshal. This process establishes the jurisdiction of the Court. The simultaneous filing of a complaint and a lis pendens should also occur to prevent the transfer or encumbrance of the real property subject to forfeiture.

B. Effecting the Seizure Where the U.S. Marshal Takes Dominion and Control

1. Permitting Continued Occupancy

As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture provided that:

a. The occupants agree to maintain the property, which shall include but is not limited to keeping the premises in a state of good repair or in the same condition as existed at the time of seizure, and continuing to make any monthly payments due to lienholders or to make timely rent payments to the U.S. Marshal or his designee if the occupants are tenants;

b. The occupants agree not to engage in continued illegal activity;

c. The continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;

d. The continued occupancy does not adversely affect the ability of the U.S. Marshal or his designee to manage the property; and,

e. The occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants.

2. Removal of Occupants Upon Seizure

Immediate removal of all occupants at the time of seizure should be sought if there is reason to

believe that failure to remove the occupants will result in one or more of the following:

a. Danger to law enforcement officials or the public health and safety;

b. The continuation of illegal activity on the premises; or

c. Interference with the Government's ability to manage and conserve the property.

If appropriate under 19 U.S.C. 1612(a), consideration should be given to effecting an interlocutory sale of the defendant property if it is in the best interest of the United States. See A Guide to Sales of Property Prior to Forfeiture: The Stipulated and Interlocutory Sale, Criminal Division, 1990.

II. Notice and Opportunity for Hearing Prior to Seizure

It is the Department's position that no advance notice or opportunity for an adversary hearing is statutorily or constitutionally required prior to the seizure of property, including real property.

This is the Department's national policy and practice, with the exception of districts within the Second Circuit that are currently subject to United States v. The Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258 (2nd Cir. 1989), reh'g denied, 897 F.2d 659 (1990). The Court in Livonia Road did note that under exigent circumstances there is no need for a pre-seizure hearing (supra at 1265). The Second Circuit recently stated in United States v. 141st Street Corporation, 911 F.2d 870 (2nd Cir. 1990) that an exigent or extraordinary circumstance exists if: "1) seizure was necessary to secure an important governmental or public interest, 2) very prompt action was necessary, and 3) a governmental official initiated the seizure by applying the standards of a narrowly drawn statute."

III. Circumstances Supportive of Immediate Removal of Occupants

A. Reason to believe that leaving occupants in possession will result in **danger to the health and safety of the public or to law enforcement** may be based upon the following:

1. The nature of the illegal activity;

2. Presence of weapons, "booby traps," or barriers on the property;

3. Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;

4. Presence of serious safety code violations; or

5. Contamination by or presence of dangerous chemicals.

B. Reason to believe that leaving occupants in possession will result in **continued use of the property for illegal activities** may be based upon:

1. The nature of the illegal activity (e.g., repetitive drug sales);

2. The history of the property's and/or occupant's involvement in illegal activities;

3. Evidence that all occupants have been involved in the illegal activity;

4. The inability of non-participating occupants to prevent continued illegal activity; or

5. The failure of other sanctions to stop illegal activity.

C. Reason to believe that leaving occupants in possession might undermine **the U.S. Marshal's or his designee's ability to manage the property** may be based upon all the factors set out above or information that the occupants intend to waste or destroy the property.

D. The above list of circumstances is not intended to be exclusive. Attorneys for the Government may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

IV. Nature of Adversary Pre-Seizure Hearing

Notwithstanding our legal position regarding pre-seizure adversary hearings, some courts have required such hearings prior to the seizure of occupied real property. It is the Department's position that any such adversary hearing should be carefully restricted.

In terms of its scope, such a hearing should be limited to a proffer by the Government of evidence supporting probable cause. Such evidence may be circumstantial or hearsay. Claimants may then be heard, and upon the Court's satisfaction that probable cause exists and that there is no mistake in the identification of the property to be seized, the warrants for arrest should issue.

In terms of timing, given the limited nature of such a hearing it may be scheduled within 24 hours of notice of intent to seize. The Supreme Court has repeatedly indicated that the simple opportunity for an individual to speak and be heard in court has inherent value for purposes of due process. (See e.g., Marshall v. Jericho, 446 U.S. 238, 242 (1980)). Following initiation of the forfeiture action, a full trial on the merits will follow, prior to a judgment of forfeiture.

This policy does not create or confer any rights, privileges or benefits on prospective or actual claimants, defendants or petitioners. Likewise, this policy is not intended to have the force of law. See, United States v. Caceres, 440 U.S. 471 (1979).

cc: George J. Terwilliger III
Associate Deputy Attorney General

Philip M. Renzulli
U.S. Postal Inspection Service

Glenn McAdams
Internal Revenue Service

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Bureau of Alcohol, Tobacco and Firearms

U.S. Department of Justice

Criminal Division

EXHIBIT G

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 14 1990

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Under the Sentencing Reform Act, the Criminal Division is required at least annually to submit to the United States Sentencing Commission a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. 994(o). We believe that on the whole the guidelines are working well and that the Commission has met its statutory responsibilities in an exemplary fashion. There are areas, however, in which the guidelines can be improved. We urge the Commission to consider the following recommendations, which we believe will enhance the functioning of the guidelines and serve the purposes of sentencing set forth in the Sentencing Reform Act of 1984.

1. Criminal History

We have several recommendations regarding criminal history. First, guideline §4A1.2, which contains definitions and instructions for computing criminal history, should be amended so that sentences for separate offenses are not artificially treated as one. Guideline §4A1.2(a)(2) states that prior sentences imposed in "related cases" are to be treated as one for purposes of criminal history. Application note 3 provides that related cases are those that: (1) occurred on a single occasion; (2) were part of a single common scheme or plan; or (3) "were consolidated for trial or sentencing." This last factor artificially counts sentences for unrelated offenses as a single prior sentence and needlessly encourages separate trials and sentencing proceedings. The mere fact that cases were consolidated for trial or sentencing for purposes of efficiency in the administration of justice should not dictate criminal history results. We suggest that this third category of related cases be limited to those that were consolidated for trial or sentencing if the counts would have been

treated as a single group of closely related counts under guideline §3D1.2. This limitation would at least require some relationship between the offenses which are the object of the sentencing or a similarity in the type of offense. The Commission has recognized the problem by including it as a basis for departure under guideline §4A1.3 on the adequacy of criminal history. See application note 3 to guideline §4A1.2. We believe that the problem needs to be corrected by a guideline, not a recommendation regarding the appropriateness of departure. The definition of prior sentence also applies with respect to career offenders, guideline §4B1.2(3), and produces results that are inconsistent with the career offender statute, 28 U.S.C. 994(h).

We also believe that the criminal history guidelines should be refined to distinguish more accurately serious past offenses from less serious ones. Under the current provisions all prior sentences exceeding one year and a month are treated alike. See guideline §4A1.1(a). A defendant with a past first degree murder conviction resulting in a 20-year sentence would have the same criminal history score as a burglar who was sentenced to just over one year and a month of imprisonment. Not only the frequency but the seriousness of past criminal conduct is relevant to the purposes of sentencing set forth in the Sentencing Reform Act, 18 U.S.C. 3553(a)(2). For example, protection of the public from further crimes of the defendant should be reflected in a sentence that properly takes into account the seriousness of past conduct. We recommend either that additional criminal history points, based on a sliding scale, be provided for past sentences of five years or more or that some other mechanism be added to distinguish especially serious offenses, particularly crimes of violence, from less serious ones.

Our next criminal history concern is that the guidelines should include an additional criminal history category. We have been advised by prosecutors that they have dealt with defendants whose criminal history scores were 20 or more and that equal treatment of all defendants with scores of 13 or more, as now provided, fails to distinguish properly among defendants. While the court may depart from the guidelines for such defendants, it is not bound to do so and may wish to avoid triggering an appeal. One additional category would at least provide some increase for the most serious recidivists.

We have also noted that whether to count a sentence imposed in a case that is on direct appeal for criminal history purposes should be clarified. An application note should be added that such convictions are to be used in computing the criminal history score. Commentary language to the effect that prior sentences not otherwise excluded count in the criminal history score is not sufficient to clear up questions in this regard. See commentary to guideline §4A1.2, effective November 1, 1990; currently in application note 6 to guideline §4A1.2.

2. Career Offender Guidelines

The career offender guidelines include an objectionable application note to the definition section. Specifically, application note 4 to guideline §4B1.2 provides that the definitions from guideline §4A1.2 on criminal history apply in determining which past convictions are covered by the career offender guideline, §4B1.1. These include, for example, the guideline on the applicable time period, foreign sentences, and expunged convictions. As a result, a sentence of more than one year and a month that was neither imposed nor served during the fifteen years prior to the commencement of the instant offense is not counted. Similarly, a sentence of less than one year and a month does not count unless it was imposed within ten years of the commencement of the instant offense. These limitations are inconsistent with the statutory mandate that the Commission "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for defendants who are convicted of felonies that are crimes of violence or certain drug offenses and who have two prior convictions for such crimes. 28 U.S.C. 994(h). In particular, it makes no sense to apply the time limitations otherwise applicable for criminal history purposes to the career offender provision, which is designed to look at the defendant's entire lifespan.

3. Fraud Involving Financial Institutions

Another area where we believe amendment of the guidelines is necessary concerns fraud involving financial institutions. In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Congress significantly raised the penalties for certain offenses and issued a specific direction to the Sentencing Commission. We believe the Commission should revise the guidelines relevant to the statutes amended in order to respond to the Congressional determination that bank fraud is an offense requiring significantly greater punishment than in the past.

FIRREA, section 961(a) through (k), increased the maximum term of imprisonment from five or fewer years to 20 years and the maximum fine from $250,000 to $1,000,000 (and from $500,000 to $1,000,000 for an organization) for a violation of the following provisions of title 18, United States Code:

section 215(a) -- receipt of commissions or gifts for procuring loans;

section 656 -- theft, embezzlement, or misapplication by bank officer or employee;

section 657 -- embezzlement involving lending, credit, and insurance institutions;

section 1005 -- bank entries, reports, and transactions;

section 1006 -- federal credit institution entries, reports, and transactions;

section 1007 -- Federal Deposit Insurance Corporation transactions;

section 1014 -- loan and credit applications generally; renewals and discounts; crop insurance;

section 1341 -- mail fraud affecting a financial institution;

section 1343 -- wire fraud affecting a financial institution; and

section 1344 -- bank fraud.

In addition, the amendments established a new offense of receiving property or benefits through a transaction of a Federal Reserve bank, national bank, or certain other financial institutions with the intent to defraud the United States or such financial institution, 18 U.S.C. 1005, and a new obstruction of justice provision, 18 U.S.C. 1510. FIRREA also broadened forfeiture provisions of federal law, 18 U.S.C. 981 and 982, to cover violations of the above-listed statutes.

We believe that these amendments send a strong message to the Commission that Congress considers fraud offenses involving financial institutions a more serious matter than it had in the past and that greater punishment is in order for such offenses than for most other frauds. Maximum terms of imprisonment were raised four-fold and in some cases ten-fold. In order to respond to the Congressional concerns addressed in the penalty increases in FIRREA, we urge the Commission, as we did last year, to revise the guidelines applicable to the amended statutes to provide appropriate enhancements relating to financial institutions.

The only response to FIRREA by the Commission in the last amendment cycle was to the specific statutory direction to establish guidelines ensuring a substantial period of incarceration for a violation of, or a conspiracy to violate, the above-listed statutes that "substantially jeopardizes the safety and soundness of a federally insured financial institution." FIRREA, section 961(m). We now regard it as very likely that the current Congress will increase many of the penalties for fraud involving financial institutions to 30 years and will create new offenses in this area. This is even more reason to revise the guidelines.

One technical point with regard to last year's amendment in this area is that the term "financial institution," added as an application note to the guideline sections cited above, needs some revision with regard to the statutory sections it cites. First, a definition of "financial institution" in 18 U.S.C. 20 (not included in the application note) has supplanted the definitions previously found in 18 U.S.C. 215 and 1344, both referred to in the application note. In addition, section 1008 of title 18, United States Code, referred to in the new application note, has been repealed.

4. Immigration Offenses

Alien Smuggling

Our next recommendation concerns the guidelines affecting alien smuggling, §2L1.1 and related guidelines concerning entry or citizenship documentation. These guidelines affect a large number of cases, primarily in border districts, and are seriously inadequate. We have taken the position before and continue to believe that smuggling offenses increase in severity depending upon the number of aliens smuggled. Other factors, such as physical injury and the use of weapons, are also relevant. We urge the Commission to consider these factors and to amend the guidelines in order to appropriately punish the more serious offenses.

Reentry of Deported Aliens

We strongly urge the Commission, as we did last year, to revise guideline §2L1.2 to reflect the substantial increase in the maximum penalties in the Anti-Drug Abuse Act of 1988 for unlawful reentry into the United States following deportation subsequent to a felony conviction. Previously, the maximum penalty was two years' imprisonment. However, under the amendment the maximum prison term is five years if the defendant was deported after conviction of a felony and 15 years if the defendant was deported after conviction of an "aggravated felony." 8 U.S.C. 1326(b). The term "aggravated felony" includes murder, drug trafficking, and illicit trafficking in firearms or destructive devices. 8 U.S.C. 1101(a)(43). An increased penalty of this magnitude -- two years to 15 years -- and limited to particularly defined offenses must, in our view, be reflected in the sentencing guidelines if the will of Congress is to be effectuated.

The current guideline for the reentry of deported aliens is keyed to the two-year maximum prison term previously applicable to all offenses under the reentry statute. An enhancement of only four offense levels is provided if the defendant was previously deported after sustaining a conviction for a felony, other than one involving the immigration laws. There is no guideline for aliens convicted of aggravated felonies. Rather, the commentary suggests the appropriateness of an upward departure if the defendant was

deported following conviction of an aggravated felony. This approach is inadequate. The four-level increase results in a guideline sentence of just three years for an offender with an extensive criminal history background; the guideline sentence would be substantially less for an offender with a limited criminal background. This enhancement meets neither the five-year maximum sentence applicable to defendants previously convicted of non-aggravated felonies nor the 15-year maximum sentence applicable to defendants previously convicted of aggravated felonies.

Therefore, we urge that Congress' 10 year increase in the maximum sentence be recognized by a concomitant increase in the guidelines, and specifically that a new specific offense characteristic designated as guideline §2L1.2(b)(2) be adopted which increases the applicable guideline by 20 levels for all prior "aggravated felony" violations. While this is a steep specific offense increase, doing nothing forces judges to depart upward to meet this legislatively mandated circumstance (in conformance with the current application note 3 to guideline §2L1.2) and thus leads to additional and unwarranted appellate delay and procedures. As a practical matter, we do not think this is too harsh. In the ordinary case, an alien drug dealer who illegally returns to the United States to practice his trade will continue this pattern of conduct until there is a substantial disincentive to do so. In the exceptional situation involving an illegal alien drug dealer who has some sympathetic reason to reside here illegally, the court may depart downward.

5. Antitrust Offenses

The Department recommends an increase in the base offense level from 9 to 13 for antitrust offenses set out in guideline §2R1.1(a), and a concomitant decrease in the fine range for individual defendants set out in guideline §2R1.1(c) from the current 4 to 10 percent of the affected volume of commerce to a new range of 1 to 5 percent of the affected volume of commerce. No change is recommended at this time to the fine range for organizational defendants.

Our purpose in requesting this adjustment is neither to increase or decrease the total intended punishment of antitrust offenses as set forth in guideline §2R1.1, but rather to shift the punishment mix provided therein to rely more on incarceration and less on fines. There are several reasons why we believe these changes are appropriate.

First, these changes would bring guideline §2R1.1 more in line with the other fraud guidelines established by the Sentencing Commission, most particularly guideline §2F1.1. As the guidelines are currently formulated, significant disparities in punishment for the same offense result depending upon whether an offense is charged as an antitrust violation sentenced under guideline §2R1.1,

or as a mail or wire fraud violation, or conspiracy to defraud the government violation, sentenced under guideline §2F1.1.[1]

The changes we propose would bring guideline §2R1.1 closer to guideline §2F1.1 than it is at present, although guideline §2R1.1 would still rely somewhat less on incarceration and more on fines than the fraud guideline. As a policy matter, we see no reason why antitrust crimes and other economically motivated, white-collar crimes should be treated with the disparity that currently exists in the guidelines.

Second, at a more practical level, our limited but increasing experience with sentences being imposed under guideline §2R1.1 leads us to believe that individual antitrust defendants will not receive the "short prison sentences coupled with large fines" that the Commission intended when it adopted guideline §2R1.1.

With respect to prison sentences, the current offense levels provided in guideline §2R1.1, when reduced (as they almost always are) by 2 levels for acceptance of responsibility pursuant to guideline §3E1.1, frequently result in adjusted offense levels for antitrust defendants of 8 (2-8 months) to 10 (6-12 months). As you know, at these offense levels guideline §5B1.1 permits the court to substitute probation with home detention or community confinement for incarceration. Although the Commission states in application note 5 to guideline §2R1.1 that it intends that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders, one court of appeals has held that this language is purely hortatory and has no power to restrict a judge's discretion to sentence antitrust defendants under guideline §5B1.1. United States v. Pippin, 903 F.2d 1478 (11th Cir. 1990). The Department anticipates that those judges who, before the adoption of the guidelines, were strongly inclined against sentencing antitrust offenders to prison will use guideline §5B1.1 to avoid imprisoning antitrust offenders sentenced under the guidelines.

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[1] As an example, a bid rigging violation involving $4 million worth of commerce would receive an offense level of 10 (base offense level of 9 plus 1 for the specific offense characteristic of bid rigging) and an individual fine range of $160,000 to $400,000. Assuming, as the Commission did, that the typical antitrust offense results in a 10 percent overcharge, the same offense charged as mail fraud would result in an offense level of 15 (base offense level of 6 plus 9 for the specific offense characteristic of loss exceeding $350,000) and a fine range under section 5E1.2 of either $4,000 to $40,000 using the fine table or $0 to $800,000 under subsections (c)(1) and (c)(2). Amending section 2R1.1 as we suggest would result in an offense level of 14 and a fine range of $40,000 to $200,000.

With respect to individual fines, application of the 4 to 10 percent of the volume of commerce standard in guideline §2R1.1 results in extremely high fines -- at or near the statutory $250,000 maximum -- for a significant percentage of antitrust offenders. Not only are judges unwilling to impose such high fines on our typical antitrust defendants; as a practical matter these defendants generally lack the ability to pay the guideline fine and are entitled to a substantially reduced fine under guideline §5E1.2(f).

As a result of these factors, the Department believes that antitrust offenders will often get neither the short but certain prison sentences nor the high fines that the Commission foresaw in adopting guideline §2R1.1. We believe that the best way to maintain the level of deterrence that the Commission intended for antitrust offenses is to amend guideline §2R1.1 to increase offense levels and the recommended terms of imprisonment while reducing fines to more realistic levels.

6. Consecutive or Concurrent Sentences

We note that the Commission has decided not to adopt a guideline relating to the imposition of consecutive versus concurrent sentences, but has instead left this determination to the discretion of the courts. Our experience indicates that giving judges such unbridled discretion to make such fundamental sentencing decisions leads to vastly disparate sentences for similar or identical offenses. In our view, this result is inconsistent with the Sentencing Reform Act, and undermines the goal of reducing unwarranted disparity in sentencing.

We urge the Commission to undertake as one of its major projects the development of a set of principles for the courts to follow in deciding when to impose consecutive or concurrent sentences.

7. Steroids Trafficking

Attached is a proposed new guideline §2N2.3 which covers violations of 21 U.S.C. 333(e) (offenses involving anabolic steroids). The proposed guideline is patterned after the approach in which other illegal substances are addressed in the guidelines. The first basic premise, and one essential to deterrence of these crimes, is that almost every individual who chooses to engage in steroids trafficking would face some period (although limited) of incarceration (the base offense level of 8 equals 2 to 8 months).

Second, the guideline adopts the modus operandi of the drug guideline in keying the base offense level to the amount of drugs being trafficked. In the drug guideline, §2D1.1, the amounts are addressed in terms of weight. Because the largest segment of the steroids market is in vials with cc's as the measure, we are

suggesting the most common vial size as the base, with a 10cc vial as the basic unit of measure. Abusers inject from such vials for their daily doses, or alternatively and less commonly use tablets, which must generally be taken in larger quantities. We have been conservative in the vials and tablet numbers that equate with increases in levels above 8.

Our experience in the investigation and prosecution of individuals involved in the black market in steroids points to two specific offender characteristics which warrant an increase in the offense level. First, some offenses are committed with the aggravating factor of the offender affirmatively defrauding others to obtain the product or raw materials needed for the product. Second, products clandestinely manufactured not only pose enhanced risks to young athletes and others who take these drugs but trafficking in such products sustains and encourages businesses illegitimate from inception. Participation in and encouragement of such operations goes well beyond the simple illegal diversion and use of otherwise legitimate drugs. Finally, in some circumstances, offenses are committed with utter disregard for the serious injury they may cause quite apart from the normal risks associated with taking steroids. Clandestine operations have been uncovered where kitchen sinks and bathtubs were being used to mix components ultimately labelled as and accepted by unknowing recipients as legitimate product. Moreover, combinations have been put together which have serious potential for harm quite apart from the normal deleterious side effects associated with legitimate steroids. We believe that the sentence should reflect the seriousness of this offender characteristic with an increase in the offense level to at least level 13.

We note that legislation is pending to make steroids a schedule II or III controlled substance. In the event such legislation is enacted, it would be necessary for the Commission to revise this guideline to reflect substantially increased penalties.

8. Environmental Offenses

The words "specially protected" should be deleted from guideline §2Q2.1(b)(3)(A) to make the guideline consistent with the applicable criminal statute. This would correct a problem that has arisen from the recent consolidation of two guidelines pertaining to wildlife offenses.

As you are aware, an amendment to guideline §2Q2.2 was submitted to Congress by the Commission in April 1989 and approved effective November 1, 1989. The amendment consolidated two virtually identical wildlife guidelines into one guideline (absorbing §2Q2.2 into §2Q2.1) in order to make the base offense levels consistent and eliminate a two-tiered base level offense applicable to a narrow category of wildlife offenses.

The problem with the current guideline arises from the fact that the specific offense characteristics in the earlier guidelines, while alike, were not identical. In its original version, guideline §2Q2.1 was in fact the guideline for federal statutes that "specially protected" fish, wildlife, or plants. The former guideline §2Q2.2(b)(3)(A), however, that applied to two statutes of broader and more general applicability, properly did not include the "specially protected" modifier. The consolidation of guideline §2Q2.2 into guideline §2Q2.1 has made the "specially protected" limitation inapplicable, as the commentary to the current guideline properly suggests.

The change we propose here is necessary to avoid challenges to the offense level computation when the guideline is applied to violations of the smuggling statute, 18 U.S.C. 545, a statute that cannot fairly be described as one that involves "specially protected" fish, wildlife, or plants.

9. Money Laundering Offenses

We recommend that guideline §2S1.1.(b)(1) be revised to apply the offense level increase to convictions resulting from government "sting" operations under 18 U.S.C. 1956(a)(3). This provision basically mirrors other money laundering offenses in terms of intent and conduct, but the proceeds involved are represented by the government to be derived from specified unlawful activity rather than actually being so derived. In our view, exclusion of the enhanced sentence in cases in which the proceeds involved in the crime were provided by law enforcement and not the result of unlawful activity is inconsistent with Congressional intent in passing the money laundering statute and with settled case law.

In our view, the knowledge requirement that the "funds were the proceeds of an unlawful activity involving [drugs]...." is fully satisfied in these "sting" cases. It is not actual knowledge of the derivation of the funds which is the key ingredient here. Rather, it is the defendant's state of mind and intent which are critical. Indeed, "federal courts have consistently read 'know' to mean 'believe' where the results comport with congressional purpose and common sense." U.S. v. Parramore, 720 F.Supp. 799, 802 (N.D. Cal. 1989). In addition, it is precisely for the type of crime defendants are convicted of under section 1956(a)(3), money laundering to facilitate drug trafficking, that Congress intended such enhanced sentence.

We also recommend that the language in guideline §2S1.1(b)(1) be revised to read as follows:

> "If the defendant knew or had reason to know that the funds were the proceeds of an unlawful activity involving...".

10. Establishment of Manufacturing Operations

In order to take into account the quantity of drugs found in the "crack" or drug houses of defendants sentenced under 21 U.S.C. 856, we recommend an amendment to the base offense level in guideline §2D1.8 from level 16 to a base offense level of "16 or the offense level applicable to the underlying offense, whichever is greater." As currently drafted, this guideline has posed a problem at sentencing for judges who decided that, because of the large quantities of drugs involved, they had to depart upward from the guideline range. An amendment to this provision would alleviate such departures.

In addition, the recommended change would make this guideline consistent with the recent amendment to guideline §2D1.6, telephone counts (21 U.S.C. 843(b)), in which the base offense level was changed from level 12 to "the offense level applicable to the underlying offense", i.e. the quantity of controlled substances. However, in revising guideline §2D1.8, it is important that the Commission retain the base offense level of 16 in addition to adding "the offense level applicable to the underlying offense, whichever is greater" in order to provide an appropriate sentence for any defendants who operated "crack houses" but in which no controlled substances were found or seized.

11. Public Corruption Offenses

Extortion Under Color of Official Right

We recommend that the guideline concerning bribery and extortion under color of official right, §2C1.1, be amended to provide a higher base offense level. The guideline establishes a base offense level of 10 and provides specific offense characteristics based on the amount of the bribe involved and whether the offense involved an elected or high-level official. An offense level of 10 allows a sentence of probation (with intermittent, community, or home confinement). In our view, a person convicted of a bribery offense should ordinarily be incarcerated, regardless of the amount of the bribe involved or the value of the benefit received in exchange for it. Sentences of incarceration should not be reserved for cases involving officials who accept large bribes or convey valuable benefits and for high-level officials. The amount of the bribe or benefit received is generally unimportant in determining the level of the defendant's culpability or the harm caused by the offense. We recommend that the base offense level for guideline §2C1.1 be raised to 13 or 14 to assure a sentence of imprisonment even for a defendant who accepts responsibility for his offense.

Fraud Involving Deprivation of Intangible Rights

We urge the Commission to adopt a separate guideline in Chapter 2, Part C, to cover conspiracies to defraud the United States by interfering with governmental functions, in violation of 18 U.S.C. 371, and mail or wire fraud schemes involving public officials or others acting with them depriving others of the intangible right of honest services, in violation of 18 U.S.C. 1341-1346. Existing guidelines are insufficient to cover such conspiracies and schemes that involve considerations of the public welfare separate from purely financial fraud. The current fraud guideline has a relatively low base offense level of 6, with a chart based on dollar loss as the driving force behind the ultimate sentence to be imposed. See U.S.S.G. §2F1.1. The general conspiracy guideline §2X1.1 discusses only the conspiracy to commit offenses section of section 371 (and this guideline refers back to the guideline for the underlying substantive offense), so that conspiracies to defraud the United States likely would be handled under guideline §2F1.1 as well.

While application note 9 to guideline §2F1.1 provides that an upward departure may be warranted where dollar loss "does not fully capture the harmfulness and seriousness of the conduct," such as where "the primary objective of the fraud was nonmonetary," we believe that reaching an appropriate sentence in these important cases should not depend upon convincing the sentencing judge to make an unguided departure. Moreover, the provision in application note 13 for applying the guidelines for underlying statutes where mail or wire fraud are charged as a jurisdictional basis do not cover cases where the charges do not establish "an offense more aptly covered by another guideline." Finally, the two-level adjustment for abuse of a position of public or private trust under guideline §3B1.3 does not adequately reflect the seriousness of many such schemes and might not cover private individuals who participate in such schemes.

Section 371 conspiracies to defraud the United States by impeding the Internal Revenue Service in the collection of taxes (commonly known as "Klein conspiracies") already are covered by a separate guideline, §2T1.9. This guideline provides for a base offense level of at least 10, with higher base offense levels possible for cases involving large tax losses. There are specific offense characteristics for planned or threatened use of violence, and for encouraging others in addition to coconspirators to engage in such behavior.

We recommend that this new guideline be similar to guideline §2T1.9 and have a base offense level of 13 or 14, which would parallel the recommended amendment to the guideline for the closely related crimes of bribery and extortion under color of official right, §2C1.1. Like guideline §2C1.1(b)(2)(A), the new guideline should provide a specific offense characteristic tied to the dollar

loss table in guideline §2F1.1 for schemes involving large amounts of money. Other specific offense characteristics involving the planned or threatened use of violence and the encouragement of others outside the scheme to engage in such behavior could be carried over from guideline §2T1.9(b). The new guideline should also cross-reference the guidelines applicable to any underlying conduct that forms the basis for such a scheme, as in guideline §2C1.1(c)(1). See also application note 13 to guideline §2F1.1.

A base offense level of 14 under the proposed new guideline, instead of a base offense level of 6 under guideline §2F1.1, will raise the sentencing range for defendants in criminal history category I from 0-6 months to 15-21 months, a significant increase that is consistent with the importance and impact on the public of these crimes (under the existing guidelines, a defendant who passes a single Treasury check may be subject to more imprisonment than a public official who schemes to defraud the public). Corrupt schemes involving large amounts of money would still be subject to incremental higher sentences, paralleling guideline §2F1.1.

The prompt response by Congress in enacting 18 U.S.C. 1346 to overturn the Supreme Court's decision in McNally v. United States, 483 U.S. 350 (1987), reflects the belief that it is important to properly punish behavior that is designed to defraud the government or otherwise impede its proper functioning. The new guideline we propose for fraud offenses involving intangible rights would reflect the reality, already recognized by Congress and the Sentencing Commission, that these crimes implicate substantively different interests from ordinary criminal schemes and that they deserve enhanced treatment within the federal sentencing system.

Conclusion

We appreciate your consideration of these important matters and would be pleased to offer our assistance to the Commission in its efforts to address our concerns. The Department is also considering proposals with respect to the home detention guideline (§5C1.1), and we hope to be able to share our thoughts with you on this issue at a later time.

Sincerely,

Paul L. Maloney
Deputy Assistant Attorney General
Criminal Division

Attachment

was in addition to the inherent risks from taking anabolic steroids, increase by 2 levels. If the resulting offense level is less than level 13, increase to 13.

COMMENTARY

Statutory Provision: 21 U.S.C. § 333(e)(1)

APPLICATION NOTES:

1. This subpart covers violations of the Federal Food, Drug, and Cosmetic Act that penalize conduct involving the illegal manufacture, import, export, trafficking or possession of anabolic steroids. The statute and guideline also apply to "counterfeit" anabolic steroids which are defined to mean doses containing any amount of active steroid ingredients and which are falsely labeled.

2. If the anabolic steroids did not have any active ingredient, apply the fraud guideline §2F1.1. In calculating the loss in such cases, calculate the total "street" or retail value of the counterfeit steroids trafficked and use that result as the amount of loss.

3. A defendant who used special skills in the commission of the offense may be subject to an enhancement under §3B1.3 (Abuse of position of Trust or Use of Special Skill). Certain professionals, including doctors and pharmaceutical officials, would be subject to such an enhancement if involved in a steroid trafficking scheme. Others such as coaches and teachers may significantly aid the commission of steroid offenses, and would be subject to this enhancement if they did so.

4. "Clandestinely manufactured" means manufactured in any place other than a manufacturing facility operated openly and subject to inspection by the U.S. Food and Drug Administration and other authorities.

§2N2.4. Anabolic Steroid Offenses Involving Underage Individuals

(a) Base Offense Level (Apply the Greater)

(1) 2 plus the offense level from §2N2.3
(2) 18

Statutory Provision: 21 U.S.C. § 333(e)(2)

Application Notes

This guideline applies to individuals who are over the age of 18 and distribute or possess anabolic steroids with the intent to distribute to one under the age of 18.

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

October 12, 1990

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W., Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

For the past several months the Department of Justice, at my direction, has been engaged in a systematic review and evaluation of the complex policy issues involved in the sentencing of organizational defendants. In order to make sure the full range of policy options and concerns received due consideration, our review and assessment included past formal and informal organizational sentencing proposals, the public comments submitted to the United States Sentencing Commission, comments submitted directly to the Department, and alternative concepts discussed in the press, as well as views expressed by various other scholars and commentators.

Since the Commission now has a full complement of members, we thought it most productive to share with you our thinking based upon having completed this thorough review. The continued lack of organizational sentencing guidelines may send an unfortunate message that crimes committed by organizations are not viewed as the serious violations of law they may be. Therefore, it is imperative that the Sentencing Commission approve strong guidelines in this area. The following discussion highlights some of our key conclusions based upon this review.

Fines

We support a system of imposing fines that captures the seriousness of the offense as measured by the Commission's existing ranking of offenses in Chapter Two of the sentencing guidelines. We believe that an offense-level approach, rather than an approach based on gain or loss, accomplishes this purpose and that Option II, published by the Commission last November, is fundamentally sound. The offense-level approach in Option II assures that the seriousness of an offense as measured by the factors the Commission has assigned to offenses in Chapter Two is reflected in the penalty. It also generally assures that the

same range of fines applies to a given offense level regardless of the amount of pecuniary loss or gain that can be proved. Of course, loss or gain is not irrelevant to this approach for all offenses. For monetary offenses (e.g., fraud and theft) the calculation of the guideline offense level is itself based on the loss caused by the offense. Also, loss or gain not subject to restitution or disgorgement should be included in any guideline promulgated to assure that the defendant does not benefit from the crimes committed.

A comparison of an offense-level approach and the approach reflected in principles recently adopted by the Commission for purposes of developing a new set of proposed guidelines shows that the latter focuses mainly on the gain or loss caused by the offense. Because this focus is primarily on gain or loss and not other indicators of the seriousness of an offense, nonmonetary factors that the Commission currently uses to measure the severity of an offense by an individual would not figure in the calculation of the organizational fine. That is, the Commission's ranking of offenses by seriousness, as indicated by the assignment of a particular offense level, would evaporate from the determination of an appropriate sanction for an organization under a loss or gain approach. Nonmonetary harms counted in the current individual guidelines in Chapter Two include, for example: a substantial likelihood of death or serious bodily injury from an environmental offense, evasion of national security or nuclear proliferation controls in the context of export control laws, frauds involving a conscious or reckless risk of serious bodily injury, and frauds misrepresenting that the defendant was acting on behalf of a charitable, educational, or religious organization or a government agency. These indicators of the seriousness of an offense will go unpunished in a loss-based system of calculating organizational fines, unless the alternative "loss" amounts in a table are set sufficiently high. In past drafts developed by the Commission, these amounts were strikingly inadequate for serious offenses. However, an offense-level method of calculating fines, as we advocate, assures that nonmonetary harms are reflected in the fine because the fine levels are determined by the offense level assigned to the offense.

The maximum and minimum dollar fines the Commission establishes should be developed to provide an adequate fine for an organization as though the offense were a fraud at each offense level under the existing guidelines in Chapter Two. The fine range would then apply to any offense (other than antitrust) under the existing guidelines for the particular offense level in question. We also favor a fairly broad range of fines for each offense level so that the court has adequate flexibility to consider a variety of issues, some required for consideration by statute, 18 U.S.C. §§3553(a) and 3572(a).

Our recent review of organizational sentencing issues has led us to reject one recommendation made by ex officio member Stephen A. Saltzburg in his letter of February 14, 1990. He had recommended an alternative maximum fine of the greater of twice the gross loss or twice the gross gain resulting from the offense, if this calculation produced a higher fine than otherwise provided by Option II. We no longer believe that this alternative maximum fine is appropriate since it is inconsistent with the approach of basing the fine on the seriousness of the offense as reflected in the offense level.

Aggravating Factors

Guidelines for sentencing organizational offenders should provide general aggravating factors resulting in an increased offense level for conduct that indicates increased seriousness of an offense or a greater need for deterrence. The use of aggravating factors is consistent with the individual guidelines, which provide a number of general aggravating factors. The aggravating factors for organizations should include the following, among others: (1) high-level organizational involvement, (2) prior criminal history or prior similar misconduct adjudicated civilly or administratively, (3) violation of a judicial order or injunction, (4) bribery, and (5) risk to national security.

The concept of establishing fine levels that reflect the presumption that frequently occurring aggravating factors (involvement of high-level management, lack of an adequate compliance program) are present in the case is very different from the treatment of aggravating factors in the individual guidelines. We are not sure how this approach would work, whether it would be fair to defendants, and whether appropriate fine levels could be established to reflect these factors. Moreover, many aggravating factors that occur infrequently are, nevertheless, important and should be treated in guidelines, rather than policy statements recommending upward departure.

Mitigating Factors

We believe that guidelines for organizations should establish a number of mitigating factors that reflect reduced culpability or a decreased need for punishment or deterrence. These should include: (1) reporting of the offense to government authorities promptly upon discovering it, (2) a reasonable lack of knowledge of the offense by high-level management, (3) an offense that represented an isolated incident of criminal activity committed despite organizational policies and programs aimed at preventing it, and (4) substantial cooperation of the organization in the investigation or substantial steps by it to prevent a recurrence of similar offenses. A significant reduction in the fine should result if all the mitigating factors

are present in a given case. However, we oppose a guideline reduction of the fine to zero, unless there is an inability to pay any fine, because such a guideline reduction thwarts the goal of deterring organizational crime. Of course, if a court found a case so unusual, it might depart from the guidelines to a zero fine, and the Government could then appeal such departure.

With respect to the aggravating and mitigating factors for involvement of "high-level management," our recent review of the issues has led us to conclude that a narrower definition of this term should be incorporated in organizational guidelines than reflected in the Commission's proposal published last November. Specifically, we favor a definition derived from the Model Penal Code and would limit "high-level management" to an officer, director, partner, or any other agent or employee having duties of such responsibility that such person's conduct may fairly be assumed to represent the policy of the organization. This definition, unlike that in the Commission's published draft, would ordinarily exclude from "high-level management" a supervisor of a large number of employees, such as a plant foreman, who does not have organization-wide policy authority. Another change in this area is also worth noting. The February 14, 1990, letter registered opposition to a mitigating factor relating to a reasonable lack of knowledge of the crime by high-level management. However, our review of the issues has led us to conclude that the adoption of the narrower definition of "high-level management" with its inclusion as an aggravating and mitigating factor addresses in large degree the concerns expressed in the comments on the Commission's published drafts.

Restitution

Guidelines should treat restitution separately from any fine imposed and require restitution to make the victim whole. The degree of culpability and level of other sanctions imposed should be irrelevant to restitution.

Probation

We recommend that the Commission's guidelines require organizational probation in certain circumstances -- e.g., to ensure payment of a monetary penalty, as a mechanism to impose restitution, if the organization or its upper management was recently convicted of similar misconduct, or where the court finds that probation is necessary to ensure that changes are made to reduce the likelihood of future criminal conduct. The Commission should also provide for appropriate conditions of probation that authorize, when appropriate, periodic submission of reports to the court or probation officer by the defendant, a reasonable number of regular or unannounced examinations of books and records by the probation officer or auditors engaged by the

court, and development of a compliance plan aimed at preventing a recurrence of criminal behavior.

As a result of our recent review of organizational sentencing issues, we now support further modifications of the provisions on probation published by the Commission in November 1989, beyond those we recommended in the letter last February. For example, while we continue to believe that probation should be required to assure payment of a monetary penalty, this probation requirement should only be triggered if payment is not to be completed within 30 days after sentence is imposed. The published proposal would have required probation if payment was not made in full at the time of sentencing. In addition, we now believe that some of the recommended conditions of probation the Commission proposed last November to assure payment of a penalty (e.g., requiring court approval for paying dividends or entering into a merger) are excessive and should not be included in future policy statements on this subject.

We believe strongly that the points summarized above are essential to an effective treatment of organizational crime and are prepared to work closely with you and the Commission to draft organizational sentencing guidelines which appropriately address these and other lesser concerns identified during the course of our review. We look forward to working with you to develop the best possible policy in this important area and hope to discuss these thoughts in greater detail with you in the near future.

Sincerely,

Dick Thornburgh
Attorney General

EXHIBIT H

Guideline Sentencing Update

FEDER

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

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

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Adjustments

ROLE IN THE OFFENSE

Fifth Circuit holds that relevant conduct that "directly brought about" offense of conviction may be considered for role in offense adjustment. Defendant pled guilty to one count of selling two ounces of amphetamine. Her offense level was increased under U.S.S.G. § 3B1.1(a), "organizer or leader of a criminal activity that involved five or more persons," based on her role in the related manufacturing and distribution scheme.

In affirming, the appellate court held that "the 'offense' for § 3B1.1(a) purposes includes 'criminal activity' greater in scope than the exact, or more limited, activity comprising the elements of the offense charged." Relevant conduct that "directly brought about the more limited sphere of the elements of the specific charged offense" may be considered.

In *U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990), the Fifth Circuit had held that "section 3B1.1(a) focuses upon the number of transactional participants, which can be inferentially counted provided that the court does not look beyond the offense of conviction to enlarge the class of participants," and that 'a section 3B1.1(a) adjustment is anchored to the transaction leading to the conviction." The court in this case stated that "[o]ur holding is an application of the *Barbontin* holding .... The § 3B1.1(a) adjustment in this case was 'anchored to the transaction leading to the conviction,' because the district court incorporated and considered the very activities and persons ('participants') that directly lead to the final distribution [by defendant] of the amphetamine produced as a result of those activities of those persons. . . . The offense of conviction involved the last link of a continuous chain of transaction in manufacturing, distributing, and retailing amphetamine."

Three other circuits have held that, when counting the number of participants, § 3B1.1 applies only to the offense of conviction. *See U.S. v. Pettit*, 903 F.2d 1336 (10th Cir. 1990); *U.S. v. Tetzlaff*, 896 F.2d 1071 (7th Cir. 1990); *U.S. v. Williams*, 891 F.2d 921 (D.C. Cir. 1989). *But see U.S. v. Haynes*, 881 F.2d 586 (8th Cir. 1989) (affirming § 3B1.1(a) increase based on relevant conduct).

U.S. v. Manthei, No. 89-1970 (5th Cir. Sept. 20, 1990) (Barksdale, J.).

U.S. v. Mares-Molina, No. 89-50706 (9th Cir. Sept. 10, 1990) (Leavy, J.) (reversing finding that defendant convicted of conspiracy to import cocaine was "organizer, leader, manager, or supervisor" pursuant to U.S.S.G. § 3B1.1(c)—defendant could be considered manager or organizer of trucking business warehouse where cocaine was stored, but there were "no facts to support the conclusion that [he] exercised control or was otherwise responsible for organizing, supervising, or managing others in the commission of the offense" of conviction).

OBSTRUCTION OF JUSTICE

U.S. v. Hagan, No. 90-1072 (7th Cir. Sept. 25, 1990) (Ripple, J.) (holding that "the instinctive flight of a criminal about to be caught by the law" does not constitute obstruction of justice, U.S.S.G. § 3C1.1). *Accord U.S. v. Garcia*, 909 F.2d 389 (9th Cir. 1990); *U.S. v. Stroud*, 893 F.2d 504 (2d Cir. 1990).

U.S. v. Rodriquez-Macias, No. 89-10442 (9th Cir. Sept. 13, 1990) (per curiam) (affirming U.S.S.G. § 3C1.1 obstruction of justice enhancement for giving false name at time of arrest). *Accord U.S. v. Saintil*, 910 F.2d 1231 (4th Cir. 1990) (using false name at time of arrest and until arraignment before magistrate had "material" effect on government investigation).

U.S. v. Edwards, 911 F.2d 1031 (5th Cir. 1990) (affirming U.S.S.G. § 3C1.1 obstruction enhancement for defendant who failed to inform authorities of whereabouts of co-conspirator after being instructed to do so).

VICTIM-RELATED ADJUSTMENTS

U.S. v. Cree, No. 89-5611 (8th Cir. Sept. 25, 1990) (Larson, Sr. Dist. J.) (reversing U.S.S.G. § 3A1.1 "vulnerable victim" finding—even if victim of involuntary manslaughter offense could be considered vulnerable because of intoxication, there was no evidence that defendant knew extent of victim's intoxication or that he intended to exploit that vulnerability). *But cf. U.S. v. Boise*, No. 89-30071 (9th Cir. Aug. 29, 1990) (Wright, J.) (affirming finding that six-week-old baby was "vulnerable victim" under § 3A1.1 and rejecting argument that § 3A1.1 requires defendant to intentionally select victim because of vulnerability).

U.S. v. Wilson, No. 89-5209 (4th Cir. Sept. 4, 1990) (Wilkinson, J.) (reversing finding that recipients of letters that fraudulently solicited funds for tornado victims were "vulnerable victims" under U.S.S.G. § 3A1.1—defendant sent letters at random, and fact that "persons targeted might be sympathetic to the causes for which funds were fraudulently solicited may have 'made the crime possible, but it did not confer upon the victim the degree of vulnerability for which § 3A1.1 permits an upward adjustment,'" *U.S. v. Creech*, 913 F.2d 780 (10th Cir. 1990)).

ACCEPTANCE OF RESPONSIBILITY

U.S. v. Mourning, No. 89-7005 (5th Cir. Oct. 1, 1990) (Clark, C.J.) (for acceptance of responsibility reduction under U.S.S.G. § 3E1.1, defendant "must first accept responsibility for all of his relevant criminal conduct," as relevant conduct is defined in U.S.S.G. § 1B1.3(a); reduction properly denied money laundering defendant who did not accept responsibility for drug activity underlying offense of conviction). *Accord U.S. v. Gordon*, 895 F.2d 932 (4th Cir. 1990); *U.S. v. Henry*, 883 F.2d 1010 (11th Cir. 1989). *Contra U.S. v. Oliveras*, 905 F.2d 623 (2d Cir. 1990); *U.S. v. Perez-Franco*, 873 F.2d 455 (1st Cir. 1989).

Probation and Supervised Release

Revocation of Probation

U.S. v. Von Washington, No. 90-1423 (8th Cir. Sept. 28, 1990) (per curiam) (agreeing with *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990), that when probation is revoked pursuant to 18 U.S.C. § 3565 defendant must be resentenced within guideline range applicable to original offense of conviction; in resentencing, the conduct that caused the revocation may be considered for three purposes: reconsidering the initial decision of whether to depart (but any departure must be supported by facts that were presented at sentencing for the original offense); deciding whether to continue or revoke probation; determining the appropriate sentence within the applicable guideline range).

Criminal History

Calculation

U.S. v. Crosby, No. 89-3932 (6th Cir. Sept. 11, 1990) (Martin, J.) (sentencing court properly included in criminal history score a prior state drug conviction that was also an element of defendant's continuing criminal enterprise offense—although U.S.S.G. § 4A1.2(a)(1) defines "prior sentence" as a sentence imposed "for conduct not part of the instant offense," the Guidelines make an exception for CCE offenses, which necessarily involve continuous criminal activity, in § 2D1.5, comment. (n.3): "A sentence resulting from a conviction sustained prior to the last overt act of the instant [CCE] offense is to be considered a prior sentence under § 4A1.2(a)(1) and not part of the instant offense").

Career Offender Provision

U.S. v. Goodman, No. 89-6170 (5th Cir. Oct. 1, 1990) (Duhe, J.) ("[w]hen the instant offense is not one of those enumerated" as a "crime of violence" in the commentary to U.S.S.G. § 4B1.2, court may "look beyond the face of the indictment and consider all facts disclosed by the record"; unlawful possession of weapon by convicted felon, who intended to use it to retrieve another weapon with which he had previously threatened a group of people, was "crime of violence"). *Cf. U.S. v. Alvarez*, No. 89-2670 (7th Cir. Sept. 27, 1990) (Bauer, C.J.) (unlawful possession of weapon by convicted felon properly considered "crime of violence" where defendant struggled with arresting officer while holding fully loaded gun); *U.S. v. McNeal*, 900 F.2d 119 (7th Cir. 1990) (unlawful possession of weapon by convicted felon is "crime of violence" where defendant fired weapon); *U.S. v. Williams*, 892 F.2d 296 (3d Cir.) (same), *cert. denied*, 110 S. Ct. 322 (1990).

U.S. v. Jones, 910 F.2d 760 (11th Cir. 1990) (per curiam) ("a prior state court case wherein the defendant enters a nolo plea and adjudication is withheld can be used as a 'conviction' to make the defendant eligible for career offender status under Section 4B1.1 of the Sentencing Guidelines," even though defendant was placed on probation for that offense).

Departures

Aggravating Circumstances

U.S. v. Baker, No. 89-1165 (10th Cir. Sept. 12, 1990) (Tacha, J.) (affirming upward departure of three offense levels, from 51–63 month range to 70-month term, because "use of explosives for intimidation during a bank robbery is an aggravating factor not considered by the Sentencing Commission in Guidelines section 2B3.1 . . . [and] abduction at gunpoint is an aggravating factor not considered by the Commission in Guidelines section 2K1.6" (illegal use or possession of explosives)).

U.S. v. Thomas, No. 89-2071 (8th Cir. Sept. 11, 1990) (Wollman, J.) (affirming departure, from 8–14 month range to 60 months, for defendant convicted of possession of firearms by convicted felon based on "dangerous nature of the firearms [AK47 assault rifle and 9 mm. pistol], the fact that they were fully loaded, and the assaultive nature of [defendant's] 1983 conviction for second degree robbery and second degree assault").

U.S. v. George, 911 F.2d 1028 (5th Cir. 1990) (per curiam) (affirming departure from 15–21 month range to 50-month sentence—defendant convicted of counterfeiting fled jurisdiction when released on bond after conviction and before sentencing, and escape charges were not brought against him).

Mitigating Circumstances

U.S. v. Deane, No. 90-1085 (1st Cir. Sept. 10, 1990) (Campbell, J.) (vacating downward departure for defendant convicted of mailing child pornography: Sentencing Commission adequately considered "the full range of conduct" covered by the relevant guideline, including defendant's "passive" conduct "at the very least serious end of this range"; fact that defendant was otherwise exemplary employee and father was not ground for departure; and concern that Bureau of Prisons does not offer meaningful counseling program "does not justify a downward departure, absent exceptional circumstances and 'a finding that the defendant has an exceptional need for, or ability to respond to, treatment,'" *U.S. v. Studley*, 907 F.2d 254 (1st Cir. 1990)).

Sentencing Procedure

Burden of Proof

U.S. v. Newman, 912 F.2d 1119 (9th Cir. 1990) (when defendant challenges constitutionality of prior conviction used in computing criminal history score, "the ultimate burden of proof . . . lies with the defendant"; "where the Government seeks the inclusion of the prior conviction in a criminal history score calculation, its proof of the fact of conviction would satisfy its initial burden. Then . . . the defendant would have the burden to establish the constitutional invalidity of the prior conviction for purposes of determining the criminal history category"—proof must be by preponderance of the evidence). *Accord U.S. v. Unger*, No. 90-1457 (1st Cir. Sept. 28, 1990) (Selya, J.); *U.S. v. Brown*, 899 F.2d 677 (7th Cir. 1990); *U.S. v. Davenport*, 884 F.2d 121 (4th Cir. 1989); *U.S. v. Dickens*, 879 F.2d 410 (8th Cir. 1989).

Decision to Apply Guidelines

U.S. v. R.L.C., No. 90-5048 (8th Cir. Sept. 12, 1990) (Heaney, Sr. J.) (when sentencing juvenile under 18 U.S.C. § 5037(c), "the phrase 'maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult' prohibits a court from sentencing a juvenile to a term of imprisonment greater than the juvenile could have received had he been sentenced as an adult under the sentencing guidelines"). *Contra U.S. v. Marco L.*, 868 F.2d 1121 (9th Cir.), *cert. denied*, 110 S. Ct. 369 (1989) ("maximum term of imprisonment" is "that term prescribed by the statute defining the offense").

EXHIBIT I

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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Pre-Guidelines Sentencing, Generally

9th Circuit rules that after Rule 35 reduction in sentence, court had no jurisdiction to reinstate original sentence. (100) Defendant was sentenced prior to the sentencing guidelines, and filed a Rule 35 motion to reduce his sentence under the pre-guidelines version of Rule 35, Fed. R. Crim. P. The government filed no opposition and the court reduced the sentence from 5 years to 2 years. Thereafter the government filed a motion to reconsider and the court reinstated its original 5 year sentence. On appeal, the 9th Circuit reversed, holding that the court lost jurisdiction to modify the sentence once the 120-day time limit of Rule 35 passed. Moreover the pre-guidelines version of Rule 35 authorized only reductions in sentence, and did not permit the court to reinstate its original sentence. *U.S. v. Stump*, __ F.2d __ (9th Cir. Sept. 10, 1990) No. 90-10075.

Guidelines Sentences, Generally

6th Circuit holds that district court had no jurisdiction to resentence under the guidelines sua sponte after Mistretta. (110)(115) Before the Supreme Court upheld the guidelines in *Mistretta*, defendant received a three-year sentence under the pre-guidelines law, and no alternative sentence. Neither defendant nor the government appealed the sentence. After the Supreme Court found the guidelines constitutional, and 134 days after the entry of judgment in defendant's case, the district court, sua sponte, entered a second judgment of conviction and sentence pursuant to the sentencing guidelines. The 6th Circuit held that the district court was divested of jurisdiction in the case when the time for appeal had expired. There was no legal authority for the district court to re-invoke its jurisdiction to enter a second judgment increasing the sentence defendant was already serving. Chief Judge Merritt dissented, finding that the pre-guideline sentence entered by the district court was nothing more than a conditional sentence. *U.S. v. Martin*, __ F.2d __ (6th Cir. Sept. 18, 1990) No. 89-5181.

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5th Circuit finds that guidelines do not violate presentment clause. (115) The 5th Circuit rejected defendant's argument that the guidelines violate the presentment clause, since the enabling legislation for the guidelines was presented to and signed by the president. *U.S. v. Zapata-Alvarez*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 89-4225.

5th Circuit finds that guidelines section 1B1.2 does not deprive a defendant of right to effective assistance of counsel. (115)(165) Defendant pled guilty to bank larceny, but the district court determined defendant's base offense level by applying the section for Burglary of Other Structure, which has a higher base offense level than the section for Larceny, Embezzlement and Other Theft. Defendant argued that guidelines section 1B1.2 violated his 6th Amendment right to effective assistance of counsel, because it prevented defense counsel from predicting which specific guidelines section a judge will apply. Therefore, section 1B1.2 rendered defense counsel's advice regarding possible sentences meaningless. The 5th Circuit rejected this argument, finding that the Constitution only requires that a defendant understand the maximum possible prison term and fine for the offense charged. The Constitution does not require that defense counsel be able to predict the sentence that a judge will impose. The 5th Circuit also rejected defendant's argument that the district court violated Rule 11, Fed. R. Crim. P., by failing to ascertain that he understood that he could be sentenced under the guidelines for a greater offense than the one to which he pled guilty. *U.S. v. White*, __ F.2d __ (5th Cir. Sept. 7, 1990) No. 89-8062.

7th Circuit, en banc, includes weight of carrier medium in calculating LSD sentence. (115)(245)(250) 21 U.S.C. section 841(b)(1) sets a mandatory minimum term of imprisonment of five years for selling more than one gram of a "mixture or substance containing a detectable amount" of LSD. One defendant was convicted of selling 10 sheets of paper containing LSD. Because the total weight of the paper and the LSD was 5.7 grams, defendant received the five year mandatory minimum sentence. The *en banc* 7th Circuit held that the weight referred to in section 841 was the gross weight of the drug plus the carrier medium, not just the net weight of the drug. Although conceding that this could cause "odd things" to happen, the court found the language of the statute unambiguous. The 7th Circuit also held that the drug quantity table set forth in the guidelines referred to the gross weight of the LSD and the carrier medium. The court rejected the argument that the sentences violated the 8th Amendment or due process. Judge Cummings dissented, joined by Chief Judge Bauer, and Judges Wood, Cudahy and Posner, finding that the inclusion of the weight of the medium violated the statute and due process. Judge Posner also wrote a separate dissent, joined by the other dissenters, finding that the majority's interpretation made the punishment scheme for LSD irrational and violative of due process. *U.S. v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (*en banc*).

2nd Circuit rejects downward departure based upon federal and state prosecution for related offenses. (125)(660)(722) Defendant engaged in a scheme to defraud several banks through check-kiting. Defendant pled guilty in state court to defrauding one bank. Upon defendant's release, he was transferred to federal authorities, where he pled guilty to fraudulently withdrawing funds from another bank. Defendant argued that under the version of guidelines' section 5G1.3 in effect when he committed his offenses, if he had been prosecuted concurrently by the state and federal government, this would have required concurrent sentences. Since the federal government delayed his prosecution, defendant reasoned that he was entitled to a downward departure to prevent him from being prejudiced by the independent prosecutions. The 4th Circuit rejected this argument, finding that section 5G1.3 was significantly amended prior to the sentencing of defendant. The version in effect on the date defendant was sentenced did not mandate that the district court depart downward, and the 4th Circuit found that it had no jurisdiction to review the district court's discretionary refusal to depart from the applicable guidelines range. *U.S. v. Adeniyi*, __ F.2d __ (2nd Cir. Sept. 4, 1990) No. 90-1055.

5th Circuit finds that guidelines apply to conspiracy that

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continued beyond effective date. (125)(380) The 5th Circuit rejected defendant's argument that the guidelines should not apply to offenses that originated before the effective date of the guidelines. Defendant's participation in the conspiracy continued until November 10, 1987, the date of his arrest, and therefore it was proper to apply the sentencing guidelines to his case. *U.S. v. Zapata-Alvarez*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 89-4225.

8th Circuit holds that prior version of section 2B1.2(b)(4) authorized increase in offense level for broad range of organized criminal activity. (125)(220) Defendants pled guilty to possession of stolen goods, and received a sentence enhancement under guidelines section 2B1.2(b)(4) since the offense involved "organized criminal activity," i.e. "operations such as car theft rings or chop shops, where the scope of the activity is clearly significant but difficult to ascertain." After defendant was sentenced, section 2B1.2(b)(4) was amended to provide for an increase in offense level only if "the offense involved an organized scheme to receive stolen vehicles or vehicle parts." The 8th Circuit found that it was proper to apply the version of the guidelines in effect when defendant was sentenced. The revision significantly limited the application of the section. Therefore, the increase in defendant's offense level under section 2B1.2(b)(4) was proper. Judge McMillian disagreed with this conclusion, arguing that the purpose of the amendment was to clarify that "organized criminal activity" under section 2B1.2(b)(4) was limited to schemes to receive stolen vehicles and vehicle parts. *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

1st Circuit cannot review whether defendants' sentences were imposed in retaliation for exercising right to trial where sentences were within applicable guideline range. (140)(810) Defendants were convicted by a jury of aiding and abetting each other in the distribution of more than 5,000 grams of cocaine. One was sentenced to 150 months and the other was sentenced to 84 months. A codefendant who pled guilty received a downward departure based upon substantial assistance to the government and received a sentence of 30 months. Defendants argued that their sentences were imposed in retaliation for exercising their right to a jury trial. Both sentences were within the applicable guidelines range, and the 1st Circuit held that it had no appellate jurisdiction to consider a sentence within the applicable guideline range. *U.S. v. Vega-Encarnacion*, __ F.2d __ (1st Cir. Sept. 12, 1990) No. 89-2137.

6th Circuit finds disparate sentences among codefendants insufficient to show that defendants were penalized for going to trial. (145) In a pre-guidelines case, four defendants were charged with various counts of bribery and conspiracy. Two of the defendants exercised their right to a jury trial and were convicted. Defendants argued that the district court abused its discretion by sentencing them to a longer term than their codefendants because defendants exercised their right to a jury trial. The 6th Circuit agreed that it is improper to penalize a defendant who exercises his or her right to plead not guilty and go to trial, but found that "[m]ere disparity in sentences is insufficient to show that the sentencing court penalized [defendants'] for going to trial. Since defendants' sentences were within the statutory limits, the sentence was upheld. *U.S. v. Frost*, __ F.2d __ (6th Cir. Sept. 13, 1990) No. 89-5144.

General Application Principles (Chapter 1)

4th Circuit holds that defendant suffering mental illness can be sentenced to treatment facility for period that exceeds guidelines range. (150) The district court, in lieu of sentencing defendant, directed that he be hospitalized, and that his commitment constitute "a provisional sentence of imprisonment to the maximum term authorized by law for the offense for which the defendant was found guilty." Defendant received a provisional sentence of five years, and argued that "maximum term authorized by law" meant the maximum period authorized by the sentencing guidelines, i.e., six to 12 months. Defendant contended that he was denied equal protection, since prisoners who need mental health care *during* their sentence are sent to a mental health facility until the earlier of their recovery or the expiration of their term of imprisonment. The 4th Circuit rejected this argument, finding that "maximum term authorized by law" meant the statutory maximum. Defendant's provisional sentence did not violate equal protection since a prisoner found to be mentally ill during the term of his sentence is not similarly situated. *U.S. v. Roberts*, __ F.2d __ (4th Cir. Sept. 12, 1990) No. 89-5224.

10th Circuit finds that use of stolen credit card on 15 separate occasions involved more than minimal planning. (160)(300)(440) Defendant's brother and his brother's girlfriend were U.S. Postal Service employees who took credit cards from the mails and gave them to family and friends. Defendant personally used "his" stolen card 15 times in 15 different locations during a one month period. Each purchase involved "several calculated falsehoods including a forged signature." The 10th Circuit concluded that the district court's determination that defendant's offense involved more than minimal planning was not clearly erroneous. The 10th Circuit also rejected defendant's argument that he was a minor participant. Defendant was not convicted of conspiracy, he pled guilty only to his own fraudulent use of the card. Therefore, he was solely responsible for his crime. Moreover, defendant clearly had knowledge of his brother's and his wife's activities with respect to the credit cards. He even recruited his wife to become involved in the scheme. *U.S. v. Sanchez*, __ F.2d __ (10th Cir. Sept. 11, 1990) No. 89-2118.

8th Circuit upholds accumulating the value of all stolen goods and transactions for which codefendants were indicted. (170)(220)(470) Defendant was a participant in a stolen goods ring involving several other people. Defendant argued that it was improper to accumulate the value of all stolen goods and transactions for which his codefendants were indicted. The 8th Circuit rejected this contention, finding that guidelines section 1B1.3(a)(2) authorized the district court to consider amounts beyond those to which defendant pled guilty. Defendant relied upon the commentary to 1B1.3, which provides that in a robbery case in which a defendant robbed two banks, money taken in one robbery cannot be considered in determining the guidelines range for the other robbery. The 8th Circuit found defendant's reliance to be misplaced, since robbery is not an offense to be grouped together under 3D1.2(a)(2). However, possession of stolen property is an offense grouped together. *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

Offense Conduct, Generally (Chapter 2)

10th Circuit upholds upward departure on the basis of dynamite used for intimidation during robbery. (220)(330)(745) Defendant abducted a supply store owner at gunpoint in order to compel him to supply defendant with dynamite. Defendant then robbed a credit union at gunpoint, threatening to blow up the credit union with the dynamite if the money was not provided. Defendant pled guilty to robbery and receipt of explosives. The district court departed upward on the basis of defendant's possession of the dynamite during the robbery because the dynamite was "potentially more dangerous than the brandishing of the firearms." The 10th Circuit upheld the departure on the ground that the Sentencing Commission did not contemplate the use of explosive devices when it devised the "dangerous weapon" aggravation provisions. Moreover, the "uncontrollable nature of many explosives, which can result in indiscriminate destruction and slaughter, is sufficient in itself to justify departure." The 10th Circuit also upheld as grounds for departure defendant's abduction of the supply store owner at gunpoint in order to obtain the dynamite. *U.S. v. Baker*, __ F.2d __ (10th Cir. Sept. 12, 1990) No. 89-1165.

11th Circuit holds that a court may not review facts underlying crime of violence for career offender purposes. (220)(520) Defendant had four prior convictions for robbery, armed robbery, residential burglary, and attempted burglary. The district court reviewed the facts underlying three of defendant's convictions and determined that they lacked the requisite elements of violence to qualify as crimes of violence for career offender purposes. The 11th Circuit reversed, finding that the definition of the term "crime of violence" precluded an examination of the facts underlying the conviction. An offense is a crime of violence if the statutory definition has as an element the requisite use of force or threat of force, or if the crime belongs to the "generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or the harm actually occurs." Under this definition, defendant's prior offenses of robbery and residential burglary both were crimes of violence. "[R]obbery by its very nature involves the threat of violence." Burglary, "by its nature, creates a substantial risk of physical force," since whenever an intruder enters a dwelling, a person may be present inside, in which case the alarm to both the intruder and the resident may result in the use of physical force." *U.S. v. Gonzalez-Lopez*, __ F.2d __ (11th Cir. Sept. 7, 1990) No. 89-8093.

7th Circuit upholds upward departure on the basis of similarity of motive between current crime and prior convictions. (220)(733) Defendant pled guilty to committing two robberies and admitted his involvement in three other robberies. The district court departed upward from criminal history category II to criminal history category IV. Defendant had several previous convictions for various fraudulent financial transactions, which were not included in the calculation of defendant's criminal history score. Defendant admitted at the sentencing hearing that he had committed the robberies because he needed the money to pay back a man who defendant had conned in an investment scheme. The 7th Circuit found that the similarity between the motive for the bank robberies and the motive for defendant's other crimes justified the upward departure. A greater sanction was necessary to deter similarly-motivated crimes in the future. The 7th Circuit also found that defendant's use of a gun and plastic explosives justified an upward departure. The version of guidelines section 2B3.1 applicable to the case did not provide for an increase in offense level based upon the possession of a dangerous weapon. Section 2B3.1's subsequent amendment to require a three level increase in offense level for use of a dangerous weapon in the robbery showed the inadequacy of the prior version. *U.S. v. Dzielinski*, __ F.2d __ (7th Cir. Sept. 13, 1990) No. 90-1021.

8th Circuit finds that defendant who ran stolen goods ring was in the business of selling stolen property. (220) The district court found that defendant was in the business of selling stolen property and added four points to his offense level under guidelines section 2B1.2(b)(3)(A). The 8th Circuit found that this was supported by defendant's statement to an informant that he could supply stolen checks, jewelry, and credit cards. *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

8th Circuit holds that retail value of stolen goods is proper measure of loss. (220) Defendant argued that the district court erred in applying the retail value of stolen goods as the measure of loss under guidelines section 2B1.1(b)(1). The 8th Circuit rejected this argument, finding that under 18

U.S.C. section 659, the statute under which defendant was convicted, property is to be valued as set forth in 18 U.S.C. section 641, which provides that value means "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." The court also rejected defendant's argument that the value used for purposes of conviction should not be used for purposes of sentencing. "Use of wholesale as opposed to retail valuation would only encourage disparate sentencing for essentially similar criminal acts, especially in cases involving stolen property with several tiers if distribution." Judge McMillian disagreed, arguing that since the victims were wholesale distributors the value of the stolen goods was the wholesale market value. *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

6th Circuit includes state conviction in furtherance of continuing criminal enterprise in defendant's criminal history. (240)(500) Defendant pled guilty to involvement in a continuing criminal enterprise. He contended that it was error for the district court to include a prior state conviction in his criminal history because he had committed that offense as part of his continuing federal criminal enterprise. Guidelines section 4A1.2(a)(1) provides that in calculating a defendant's criminal history, a court may include "any sentence previously imposed upon adjudication of guilt, . . . for conduct not part of the instant offense." The 6th Circuit agreed that this would generally prohibit a court from including in a defendant's criminal history an offense which itself is an element of the instant offense. However, Application Note 3 to guidelines section 2D1.5 expressly provides that a prior sentence based on conduct which is part of the instant offense to establish a continuing series of violations shall be considered a prior sentence under section 4A1.2(a)(1) if the conviction occurred prior to the last overt act of the instant offense. Since defendant's prior state conviction occurred before his last overt act in furtherance of the continuing criminal enterprise, the state conviction was properly included in defendant's criminal history. *U.S. v. Crosby*, __ F.2d __ (6th Cir. Sept. 11, 1990) No. 89-3932.

1st Circuit finds that 21 U.S.C. section 841(b)(1)(B) does not violate due process. (245) Defendant contended that 21 U.S.C. section 841(b)(1)(B) did not give due process notice of the criminal penalties for violating section 841(a)(1), since it imposed two "inconsistent penalty schemes, one allowing the court to impose merely a fine and the other requiring the imposition of a five-year minimum term of imprisonment." The 1st Circuit agreed that the provision was ambiguous, but that it did not violate due process. Under the most lenient reading, the district court had the option of the imposition of a suspended sentence or probation with a fine. In this case, the sentencing guidelines prescribed a 97 month minimum term of imprisonment, and the district court expressly refused to depart downward. Thus, "the district court implicitly determined that a sentence of imprisonment, rather than a fine or probation, was required in any event." Therefore, defendant was not harmed by the claimed notice deficiency. *U.S. v. Castiello*, __ F.2d __ (1st Cir. Sept. 12, 1990) No. 89-1927.

6th Circuit upholds sentence enhancement based upon presence of gun in drug trafficker's bedroom nightstand. (284) A search of defendant's apartment and automobile uncovered two handguns, cocaine, cash and drug-related books and records. Defendant argued that the mere presence of firearms in his bedroom nightstand did not justify sentence enhancement under guidelines section 2D1.1(b)(1). The 6th Circuit rejected this argument, finding that defendant kept weapons in his apartment "readily accessible, to facilitate his drug transaction." Actual physical possession of the weapon is not necessary. Guidelines section 2D1.1 should be "construed broadly to cover the gamut of situations where drug traffickers have ready access to weapons with which they secure or enforce their transactions." *U.S. v. Snyder*, __ F.2d __ (6th Cir. Sept. 6, 1990) No. 89-3929.

7th Circuit upholds enhancement for drug dealer's possession of a firearm. (284) Defendant argued that the sentence enhancement for possession of a dangerous weapon under sentencing guidelines section 2D1.1(b) was improper because the guns found in defendant's house were not easily accessible, one being in a closet and the other in a drawer. Moreover, no guns were displayed or mentioned during the negotiations which took place at a motel, and the actual sale was to occur at the motel, and not defendant's house. The 7th Circuit rejected this argument. Handguns are a common "tool of the trade." Defendant was involved in a large scale drug transaction and had $314,000 in cash in his house. It was reasonable to infer that the cash was to be used in the drug transaction, and that the guns were present to protect the money. Therefore, "[t]here was a sufficient nexus between the handguns and [defendant's] offense so that the district court could reasonably find that it was not 'clearly improbable' that the guns were connected to [defendant's] offense." *U.S. v. Valencia*, __ F.2d __ (7th Cir. Sept. 13, 1990) No. 89-1648.

8th Circuit finds that defendant possessed firearm found underneath his living room couch. (284) While in defendant's apartment searching for a man who sublet a room from defendant, police noticed the muzzle of a gun and some currency partially visible underneath the living room couch. The police looked under the couch and also found 38 bags of cocaine. Defendant was found guilty of possession of cocaine with intent to distribute. The 8th Circuit upheld the district court's two level increase in defendant's offense level based upon his possession of a firearm during the commission of a drug offense. The pistol was found in a common area of defendant's apartment partially exposed. Moreover, defendant did not object to being sentenced on the basis of the 38 bags of cocaine found with the gun. *U.S. v. Jackson*, __ F.2d __ (8th Cir. Sept. 17, 1990) No. 90-1039.

1st Circuit reverses downward departure of child pornographer. (310)(722) Defendant pled guilty to mailing three child pornography magazines. The district court departed downward, since defendant's conduct was the least serious in a wide range of conduct covered by guidelines section 2G2.2, involving "no acting out but rather private fantasies and an otherwise exemplary life." The 1st Circuit reversed, following its opinion in *U.S. v. Studley*, 907 F.2d 254 (1st Cir. 1990). The court rejected the notion that as a "passive" offender who did not engage in distribution for pecuniary gain and had never engaged in sexual activity with minors, defendant fell outside the "heartland" of offenses covered by section 2G2.2. This argument rested on the assumption that most defendants convicted of receiving child pornography are also child molesters and extroverted deviates. The 1st Circuit also found that the Sentencing Commission did consider the full range of conduct covered by section 2G2.2, as evidenced by the increase in offense level for offenses involving distribution. *U.S. v. Deane*, __ F.2d __ (1st Cir. Sept. 10, 1990) No. 90-1085.

Virginia District Court determines that downward departure cannot be based upon victim's conduct. (310)(722) Defendant was convicted of aggravated sexual assault, and moved for a downward departure based on the contention that "victim's wrongful conduct contributed significantly to provoking the offense behavior." Defendant alleged that he and the victim smoked crack cocaine together the night of the rape and that she was reputed to have, in the past, engaged in sexual relations in exchange for drugs. The Eastern District of Virginia found that none of these circumstances justified a downward departure and did not "significantly contribute[] to provoking" the rape. *U.S. v. Saunders*, __ F.Supp. __ (E.D. Va. July 27, 1990) No. 90-00074-A.

2nd Circuit reverses upward departure based upon defendant's status in the community. (320)(746) Defendant, a lawyer and part-time judge, was convicted of perjury and tax evasion in connection with his acceptance of secret payments from the operator of a dump site. The district court departed upwards based on the "totality" of the circumstances, including the duty defendant owed to his community as a local judge and lawyer, the fact that in spite of his status as a community leader he gave perjured testimony, and the delay such testimony caused the state's efforts to investigate and clean up the dump site. The 2nd Circuit found that none of these reasons were grounds for an upward departure. The Sentencing Commission expressly rejected consideration of a defendant's socioeconomic status as a factor at sentencing. A defendant's education is relevant only to the extent that the defendant misused special training in perpetrating his crime. Although disruption of a government function may be grounds for an upward departure, this is not true in cases such as perjury or obstruction of justice where "interference with a government function is inherent in the offense." Judge Feinberg concurred in part and dissented in part, disagreeing with the majority's conclusion that it is "impermissible per se to consider a defendant's status as a prominent holder of public office" as a ground for departure. *U.S. v. Barone*, __ F.2d __ (2nd Cir. August 31, 1990) No. 89-1516.

2nd Circuit upholds grouping perjury and tax evasion as separate offenses. (320)(370)(470) Defendant received secret cash payments which he did not report on his income tax return. Defendant then lied to a federal grand jury concerning his receipt of such funds. The 2nd Circuit held that the district court properly divided defendant's offense conduct into two groups, since the laws prohibiting perjury and tax evasion protect wholly disparate interests and involve distinct harms to society. *U.S. v. Barone*, __ F.2d __ (2nd Cir. August 31, 1990) No. 89-1516.

Adjustments (Chapter 3)

9th Circuit rules that black family was "vulnerable victim" of cross burning. (410) Defendant argued that black persons are the only victims of cross burnings and thus the vulnerability is built into the offense. The 9th Circuit rejected the argument, relying on the 6th Circuit's opinion in *U.S. v. Salyer*, 893 F.2d 113 (6th Cir. 1989) that the civil rights protected under 18 U.S.C. section 241 could be violated not only on account of "race," but also "color, religion, sex or national origin." The court found that race was not "built into" either the statute or the guidelines. *U.S. v. Skillman*, __ F.2d __ (9th Cir. Sept. 14, 1990) No. 89-50203.

11th Circuit finds codefendant not a leader where defendant's conviction was reversed. (430) Defendant and codefendant were convicted of attempted exportation of various firearms. Defendant's conviction was reversed because the warnings he had been given by government agents as to illegality of transaction had been given in English, and defendant did not speak English. Since defendant lacked the necessary intent to commit the offense, there was no other participant to "organize, lead, manage or supervise." Therefore, the 11th Circuit found that codefendant could not receive a two level increase for being a manager or leader. *U.S. v. Markovic*, __ F.2d __ (11th Cir. Sept. 10, 1990) No. 89-7561.

1st Circuit finds that defendant who bragged that drugs were his was leader of drug ring. (430) An undercover agent arranged to purchase cocaine from a drug dealer. Defendant was present at the purchase, and advised the agent that he was there "to do the business himself" because the other dealer "did not know how to do the deal." The agent asked defendant if the cocaine belonged to defendant and defendant responded affirmatively. Although defendant argued that his statements to the agent were "mere bragging, not factual assertions," the 1st Circuit found that this was suffi-

cient evidence for the district court to conclude that defendant was an organizer, leader or supervisor. *U.S. v. Vega-Encarnacion*, __ F.2d __ (1st Cir. Sept. 12, 1990) No. 89-2137.

5th Circuit finds that defendant who was known as the "big man" was manager or supervisor of drug conspiracy. (430) Evidence at trial established that defendant was known as the "big man," was treated with deference by his co-conspirators, made unilateral decisions material to the furtherance of the conspiracy, was the first person notified upon delivery of cocaine and contemplated the future plans of the conspiracy. The 5th Circuit found that this supported the district court's determination that defendant was a manager or supervisor of the drug conspiracy. *U.S. v. Zapata-Alvarez*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 89- 4225.

8th Circuit finds that defendant who initiated transactions and negotiated prices was a manager or supervisor of stolen goods ring. (430) Defendant was a participant in a stolen goods ring involving several other people. The 8th Circuit found that the district court's determination that defendant was a manager or supervisor of the criminal activity was supported by the evidence. Defendant initiated transactions, negotiated prices, recruited individuals and was characterized as a spokesperson for the group. Defendant did not need to be controlling other individuals to be considered a manager or supervisor. *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

9th Circuit reverses "organizer or manager" adjustment where defendant did not exercise control over others. (430) Defendant was the owner of the trucking business which leased the warehouse in which the cocaine was off-loaded. Judges Leavy and Reinhardt held that this was insufficient to conclude that he organized or controlled his coconspirators within the meaning of guideline section 3B1.1(c). In order to be an organizer, leader, manager or supervisor one must exercise "some control over others." Judge Rymer dissented, arguing that one may "manage" a *thing* such as a business or money or a warehouse as well as a *person*. *U.S. v. Mares-Molina*, __ F.2d __ (9th Cir. Sept. 10, 1990) No. 89-50706.

10th Circuit finds that defendant who participated in attempted prison escape was not a minor participant. (440) Defendant contended that he was a minor participant in an attempted prison escape. Defendant alleged that he had no prior knowledge of the escape attempt, did not participate in the planning, and was coerced into taking part after its initiation by other inmates. An institutional employee who witnessed the escape attempt testified that there was no indication that defendant was being coerced. The witness testified that he had been grabbed and restrained by three inmates, one of whom he thought was defendant. In addition, testimony showed that defendant used a welding torch to cut two metal bars that blocked a tunnel leading to an unguarded area, which the prisoners used to reach the outer perimeter of the prison. Based on this evidence, the 10th Circuit found that the district court's determination that defendant was not a minor participant was not clearly erroneous. *U.S. v. Alvarez*, __ F.2d __ (10th Cir. Sept. 13, 1990) No. 89-6221.

10th Circuit finds that drug distributor was not a minor participant. (440) Defendant sold cocaine to government agents on three separate occasions. It was stipulated that the surveillance revealed that "although [defendant] supplied the cocaine to the agent, he was not the source of the cocaine and was less culpable than other individuals involved." Defendant argued that this entitled him to a reduction based on his status as a minor participant. The district court found that no minor roles existed in the drug traffic trade, since it "takes everyone's participation to make it happen." The 10th Circuit found this conclusion erroneous, since the guidelines clearly envision that categories of minor and minimal participants will be applied to those involved in drug trafficking. However, the district court had alternatively determined that one who makes three sales was not entitled to a reduction as a minor participant. Since defendant presented no evidence other than the stipulation in support of his argument for a decrease, the 10th Circuit upheld the district court's determination. *U.S. v. Oliva-Gambini*, 909 F.2d 417 (10th Cir. 1990).

1st Circuit determines that defendant was a minor, rather than a minimal participant. (440) Defendant, acting on behalf of a drug dealer, met with an undercover agent attempting to buy cocaine and advised the agent that the dealer would be able to provide the cocaine as soon as the person who had the keys to the apartment where the cocaine was stored returned to town. When the purchase finally took place, defendant stayed with the agent while the dealer obtained the drugs. While they waited for the dealer to return with the drugs, defendant advised the agent that if a nearby individual who looked like a policeman approached them, defendant would shoot the individual. Based on these facts, the 1st Circuit upheld the district court's determination that defendant was a minor participant rather than a minor participant. The court noted that "[t]here is a thin line between a minor and a minor participant, and at times, it is difficult to determine just where to draw it." U.S. v. *Vega-Encarnacion*, __ F.2d __ (1st Cir. Sept. 12, 1990) No. 89- 2137.

5th Circuit finds reduction for acceptance of responsibility not warranted where defendant obstructed justice. (460)(485) Defendant received a two level increase for obstruction of justice and argued that it should not preclude her from receiving a sentence reduction for acceptance of responsibility. The 5th Circuit noted that contemporaneous adjustments for both obstruction of justice and acceptance of responsibility are permitted, but are rare, and can only occur in "extraordinary circumstances." Although defendant did offer to cooperate with authorities and to testify at her co-

conspirator's trial, her testimony was never used and she did obstruct justice by failing to notify the DEA of her co-conspirator's whereabouts. Therefore, this was not an extraordinary circumstance justifying a reduction for acceptance of responsibility. *U.S. v. Edwards*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 90-4305.

5th Circuit finds that defendant who failed to notify DEA of whereabouts of co-conspirator obstructed justice. (460) DEA agents found amphetamines in a car owned by defendant and her companion. No charges were brought against defendant, who agreed to cooperate in the investigation. Eleven months later, an arrest warrant issued against defendant's companion. Defendant was instructed to contact the DEA if she had any contact with her companion. Defendant was found the next day in a bedroom with the companion. Defendant contended that it was improper to enhance her sentence for obstruction of justice because she intended to contact the DEA, but could not do so safely because she was in defendant's presence most of the evening. The 5th Circuit found that the resolution of this issue was factual, and therefore there need only be sufficient evidence in the record to support the district court's determination. The 5th Circuit also rejected defendant's argument that the government's dismissal of the charge of harboring a fugitive from justice precluded the court from considering her failure to contact the DEA in assessing her offense level under the guidelines. *U.S. v. Edwards*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 90-4305.

9th Circuit holds that use of false name at time of arrest constituted obstruction of justice. (460) Noting its previously ruling that a defendant obstructs justice when he lies to a probation officer, the 9th Circuit held that the defendant here obstructed justice when he lied to the law enforcement officer who stopped and arrested him. Judge Tang dissented. *U.S. v. Rodriguez-Macias*, __ F.2d __ (9th Cir. Sept. 13, 1990) No. 89-10442.

9th Circuit rejects automatic credit for acceptance of responsibility where defendant exercises 5th Amendment right not to testify at trial. (480) The district court held that those whose exercise their 5th Amendment right to remain silent at trial "must automatically receive credit for accepting responsibility in order to preserve the guidelines' constitutionality." The 9th Circuit disagreed, noting that the defendant's exercise of his right to remain silent at trial did not disable him from accepting responsibility for his actions afterwards. "Yet even after the jury found him guilty [defendant] refused to discuss his case with his probation officer and insisted that he did not intimidate or harass anyone because of race." He declined to make any statement at his sentencing hearing. The 9th Circuit found the district court's ruling clearly erroneous and reversed the sentence. *U.S. v. Skillman*, __ F.2d __ (9th Cir. Sept. 14, 1990) No. 89-50203.

5th Circuit denies reduction for acceptance of responsibility to defendant who minimized his role in offense. (485) Defendant pled not guilty to the charged offense and at trial repeatedly characterized his role as the most minimal, contrary to the findings of the district court. Since the trial judge was in a unique position to evaluate defendant's credibility, the 5th Circuit upheld the district court's denial of a reduction for acceptance of responsibility. *U.S. v. Zapata-Alvarez*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 89-4225.

6th Circuit finds that defendant who conspired to obtain cocaine while incarcerated did not accept responsibility. (485) Reviewing the district court's decision under the clearly erroneous standard, the 6th Circuit found that defendant's attempts to obtain cocaine while incarcerated on drug charges supported the district court's determination that defendant was not entitled to a sentence reduction for acceptance of responsibility. The Commentary to guidelines section 3E1.1 states that "a voluntary termination or withdrawal from criminal conduct or associations" is a factor to consider for determining a defendant's acceptance of responsibility. *U.S. v. Snyder*, __ F.2d __ (6th Cir. Sept. 6, 1990) No. 89-3929.

6th Circuit finds that woman who violated murder-for-hire statute did not accept responsibility. (485) Defendant was convicted of violating the federal murder-for-hire statute. The 6th Circuit upheld the district court's determination that defendant did not accept responsibility for her crime. She maintained her innocence throughout her trial. Although she stated that she did not believe that what she did was a crime, she did state that she was sorry for wanting her husband dead. However, she did not assist the government in determining whether there was an accomplice who might put her husband's life in danger. *U.S. v. Ransbottom*, __ F.2d __ (6th Cir. Sept. 10, 1990) No. 89-6314.

4th Circuit finds that defendant who denied intent to distribute cocaine did not accept responsibility. (485) Defendant admitted possessing cocaine for his personal use, but denied an intent to distribute it, claiming a government informant had entrapped him. The district court concluded that because defendant had not provided a "voluntary and truthful admission to the authorities as to his overall involvement in the offense," he did not meet the criteria for an acceptance of responsibility reduction. The 4th Circuit agreed, after reviewing the issue under the clearly erroneous standard. *U.S. v. Stewart*, __ F.2d __ (4th Cir. Sept. 4, 1990) No. 89-5767.

8th Circuit finds that guilty pleas supported district court's determination that defendants accepted responsibility. (490) The government argued that the district court erred in granting defendants a two level reduction for acceptance of responsibility, since mere guilty pleas, without additional affirmative acts, are an insufficient basis for acceptance of re-

sponsibility. The 8th Circuit upheld the district court's determination, noting that the sentencing court was entitled to great deference. Although a guilty plea is generally not conclusive in determining whether or not a defendant has accepted responsibility, "[n]othing in the Guidelines requires the district court to find that a defendant exhibits any of the specific listed objective acts if it finds that he has accepted responsibility . . . . Therefore, if a defendant pleads guilty for the offense that he or she committed, the district court may find that the defendant's guilty plea justifies the two-level reduction pursuant to section 3E1.1." *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89- 2652.

Criminal History (§ 4A)

4th Circuit finds that government's position at sentencing did not unfairly surprise defendant. (500)(760) The government had originally filed an objection to the presentence report because it believed that defendant should be classed as a career offender. After discussing the matter with the probation department, the government realized that defendant fell short of career offender status and withdrew the objection. At the sentencing hearing the government argued that defendant should receive a two level increase in his offense level pursuant to guidelines section 4A1.1(d) because he had committed the instant offense while on probation. This objection was not included in the original objection to the presentence report because of the government's belief that defendant should be sentenced as a career offender. The 4th Circuit rejected defendant's argument that he was unfairly surprised and denied the opportunity to respond to the government's position. The presentence report stated that defendant was on parole at the time he committed the offense. *U.S. v. Jones*, __ F.2d __ (4th Cir. Sept. 8, 1990) No. 89-5901.

5th Circuit upholds use of uncounseled state conviction in calculating defendant's criminal history level. (500) While waiting for her plea hearing on drug conspiracy charges, defendant was taken by state authorities to a county misdemeanor court to face charges in an unrelated matter. The state told defendant that if she pled guilty, the state would recommend a sentence equal to her time already served in federal pretrial custody. Defendant waived counsel, pled guilty, and was sentenced to time served. Defendant was never advised that the guilty plea could affect the sentence she might receive in the pending federal trial. As a result of her conviction on the state charges, defendant was classified in criminal history category III rather than criminal history category II. The 5th Circuit found that the effect of the guilty plea on defendant's federal trial was merely a "collateral consequence," and therefore not one to which defendant needed to be advised prior to entering her guilty plea. Since the prior conviction was not constitutionally suspect, it was proper for the district court to consider it in calculating defendant's criminal history level. *U.S. v. Edwards*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 90- 4305.

8th Circuit rejects argument that assault and criminal damage to property should be treated as disorderly conduct for criminal history purposes. (500) Defendant argued that his prior 11 day term of imprisonment for convictions for assault and criminal damage to property was in the nature of a sentence for disorderly conduct or disturbing the peace and, pursuant to guidelines section 4A1.2(c)(1) should not have been counted to compute his criminal history. The 8th Circuit rejected this argument, noting that defendant submitted no authority for this proposition and that there was nothing in the record to show the facts underlying the convictions. *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

10th Circuit applies career offender provisions even though current offense was of a different character than prior offense. (520) Defendant was convicted of attempted escape from a federal correctional institution, which he conceded was a crime of violence. Defendant had prior felony convictions involving controlled substances. Defendant argued that Congress intended the career offender provisions to apply to career violent offenders and to career drug offenders, but not to offenders whose current offense is of a different character than the offender's prior offenses. The 10th Circuit, followed its decision in *U.S. v. Newsome*, 898 F.2d 119 (10th Cir. 1990), and rejected this argument. *U.S. v. Alvarez*, __ F.2d __ (10th Cir. Sept. 13, 1990) No. 89-6221.

11th Circuit holds downward departure cannot be based upon lack of actual violence in career offender's prior convictions. (520)(722) The district court determined that even if defendant should be classified as a career offender, it would depart downward since defendant's prior "crimes of violence" did not involve actual violence and no injury resulted. The 11th Circuit rejected this as a ground for a downward departure, finding that the Sentencing Commission considered the distinction between the use of force and the lesser threat of force when it formulated the career offender guidelines. The district court also departed on the grounds that sentencing defendant as a career offender would result in an excessive sentence. The 11th Circuit rejected this as a ground for departure, finding that a court cannot depart because it believes a sentence is excessive. *U.S. v. Gonzalez-Lopez*, __ F.2d __ (11th Cir. Sept. 7, 1990) No. 89-8093.

Virginia District Court holds that there can be no criminal history downward departures for career offenders. (520)(730) Defendant, a career offender, argued that his criminal history category overstated the seriousness of his past criminal conduct and that the district court should depart downward under guidelines section 4A1.3. The Eastern District of Virginia rejected this position, finding that the

language in the career offender section strongly suggested that the Sentencing Commission did not intend to permit downward criminal history departures for career offenders. Moreover, Congress intended that "career offenders . . . receive a sentence of imprisonment at or near the maximum term authorized." *U.S. v. Saunders*, __ F.Supp. __ (E.D. Va. July 27, 1990) No. 90-00074-A.

Determining the Sentence (Chapter 5)

6th Circuit remands pre-guidelines restitution case. (620) As a condition of probation, defendant was ordered to make restitution in the amount of $318,000 to the SBA. The 6th Circuit found that restitution to the SBA was not authorized by the tax fraud statute under which defendant was convicted. However, the district court had stated that if its sentence should be reversed because the probation and restitution had not been ordered in connection with the SBA count, then on remand the prison sentence would be switched to the tax offense and the probation and restitution would be switched to the SBA offense. The 6th Circuit found that this procedure was not an unconstitutional enhancement of defendant's sentence. However, the order of restitution to the SBA suffered from other defects. The district court had found that defendant was bankrupt when he lied to the SBA, and therefore the SBA could not have received from defendant an amount close to $318,000. Therefore, the case was remanded for the district court to properly determine the amount of the SBA's loss caused by the defendant's fraud. *U.S. v. Joseph*, __ F.2d __ (6th Cir. Sept. 19, 1990) No. 89-3301.

6th Circuit upholds $800,000 restitution order. (620) In a pre-guidelines case, defendants were convicted of various counts of conspiracy and bribery, and each was ordered to pay $800,000 in restitution. Defendants argued that their financial statements showed a negative net worth, and therefore the large restitution order was an abuse of the district court's discretion. One defendant's financial statement showed assets in excess of 1.9 million dollars, while part of the liabilities listed were liabilities that the defendant owed to the victimized bank. The other defendant's joint financial statement with his wife showed assets in excess of $700,000 and a net worth over $400,000, although his individual financial statement showed a negative net worth of 3.5 million dollars. The 6th Circuit found that the district court had properly considered the factors for restitution, and did not abuse its discretion in ordering the restitution. *U.S. v. Frost*, __ F.2d __ (6th Cir. Sept. 13, 1990) No. 89-5144.

10th Circuit upholds $32,291 fine imposed upon drug conspirator. (630) Defendant pled guilty to conspiring to possess cocaine, and received a sentence that included a fine of $32,291. Defendant contended that the fine was an abuse of discretion since he lacked the financial ability to pay it. Defendant had no substantial assets and a net income of $1000 per month, of which $605 was to be paid in child support. The 10th Circuit rejected defendant's argument, finding that guidelines sections 5E1.2(e) and 5E1.2(i) mandate a punitive fine that is at least sufficient to cover the costs of defendant's incarceration and supervision. Although a court must consider a defendant's ability to pay, "the Guidelines impose no obligation to tailor the fine to the defendant's ability to pay." The 10th Circuit also rejected defendant's argument that guidelines section 5E1.2(i), which requires a defendant to pay the costs of incarceration, violated equal protection principles. *U.S. v. Doyan*, 909 F.2d 412 (10th Cir. 1990).

9th Circuit finds no double punishment in adjustments for vulnerable victim and use of fire in committing a felony. (680) Defendant was convicted of cross burning. He argued that the adjustment for vulnerable victim under guideline section 3A1.1 constituted double counting because guideline section 2K1.4(b)(4) provided for an increase of 7 levels for aiding and abetting the use of fire in the commission of a felony under 18 U.S.C. section 844(h)(1). The 9th Circuit rejected the argument "because it is possible to receive the 7 level increase under section 2K1.4(b)(4) without incurring an increase under section 3A1.1." *U.S. v. Skillman*, __ F.2d __ (9th Cir. Sept. 14, 1990) No. 89-50203.

9th Circuit finds no jurisdiction to consider "double counting" argument where sentence was within guideline range. (680)(810) The defendant claimed that the district court "double counted" his role in the offense by considering it once when increasing the offense level pursuant to section 3B1.1(c) and a second time when deciding to sentence defendant at the upper end of the guideline range. The 9th Circuit held that its decision in *U.S. v. Morales*, 898 F.2d 99 (9th Cir. 1990) applied, and it had no jurisdiction to consider the district court's discretionary decision so long as the sentence was within the guideline range. *U.S. v. Reed*, __ F.2d __ (9th Cir. Sept. 18, 1990) No. 89-10284.

Departures Generally (§ 5K)

7th Circuit finds that section 5K1.1's requirement of a government motion does not violate due process. (710) Defendant argued that the requirement under guidelines section 5K1.1 for a government motion in order to receive a reduction for substantial assistance violated due process. The 7th Circuit found that defendant had failed to present this issue to the district court, but since the government did not argue the waiver issue, the court considered it. Defendant's argument failed because it presupposed a right to have the court consider his assistance to the government in sentencing. "Since Congress did not have to provide any substantial assistance reduction, Congress could reasonably condition any reduction it did provide." The requirement of a government

motion was reasonable. *U.S. v. Valencia*, __ F.2d __ (7th Cir. Sept. 13, 1990) No. 89-1648.

1st Circuit finds that district court knew it could depart downward. (720) Defendant argued that his sentence should be set aside because the district court was unaware that the sentencing guidelines permit downward departure. At the sentencing hearing, defense counsel requested "a downward departure, as the Court is entitled to do . . ." Defense counsel and the sentencing judge then proceeded to discuss the issue, after which the judge stated that he would determine the requirements of the sentencing guidelines "mechanics" before determining the level of discretion available. The 1st Circuit found this sufficient evidence to determine that the district court was aware of its ability to depart downward. *U.S. v. Castiello*, __ F.2d __ (1st Cir. Sept. 12, 1990) No. 89-1927.

D.C. District Court departs downward for diminished capacity and vulnerability to attack in prison. (721) Defendant pled guilty to conspiracy, and was originally sentenced to three years. The Court of Appeals reversed. On remand the D.C. District Court found that defendant committed a nonviolent offense, that the offense did not result from the voluntary use of drugs, that defendant's criminal history did not suggest a need for incarceration, and that defendant committed the offense while suffering from a significantly reduced mental capacity. Accordingly, the court departed downward pursuant to guidelines section 5K2.13 and sentenced defendant to two years. The court also found that defendant's "extreme vulnerability" to attack in prison was a further ground for departure. Defendant was mentally retarded, and while in prison, had been the subject of a savage attack which caused severe head trauma. As a consequence defendant was frightened and could no longer sleep at night. He suffered headaches and when he slept during the day he suffered nightmares. The court found these facts justified a departure under guidelines section 5H1.4, which provides that "an extraordinary physical impairment may be reason to impose a sentence other than imprisonment." *U.S. v. Adonis*, __ F.Supp. __ (D.D.C. August 2, 1990) No. 88-0358-01(HHG).

9th Circuit reverses upward departure where district court failed to explain its reasons for the extent of departure. (734) The district court departed upward based on defendant's prior criminal history and obstruction of justice. However the district judge "failed to articulate with sufficient particularly the extent to which he relied upon each factor in departing upward." The 9th Circuit remanded to the district court to enable it to "articulate the reasons for the departure and the extent to which it relies on each factor individually." With respect to criminal history the district court should reason by analogy to the guidelines. *U.S. v. Ward*, __ F.2d __, 90 D.A.R. 10527 (9th Cir. Sept. 19, 1990) No. 89-10157.

5th Circuit upholds upward departure for defendant who fled between conviction and sentencing. (745) Based upon defendant's flight before sentencing the district court departed upward from 21 months to 50 months. The 5th Circuit rejected defendant's argument that he had not been afforded sufficient notice under Fed. R. Crim. P. 32(a)(1) and 18 U.S.C. section 3553(d) of the conduct on which the upward departure was based. Although the presentence report did not recommend an upward departure, defense counsel was given the opportunity to address the court concerning this matter. The 5th Circuit also found that the departure was reasonable. Defendant's argument that he might receive even greater punishment because the government might file additional charges against him based upon his flight was speculative. Defendant's flight caused significant disruption in the sentencing process. Moreover, the 50 month sentence, although almost triple the applicable range, was well below the statutory maximum of 15 years. *U.S. v. George*, __ F.2d __ (5th Cir. Sept. 5, 1990) No. 89-7119.

8th Circuit upholds upward departure for "assaultive" prior conviction and possession of firearms. (745) Defendant was found with a loaded nine millimeter pistol and a loaded AK47 assault rifle. He was convicted of being a felon in possession of a firearm. The applicable guidelines range was eight to 14 months, but the district court departed upwards and sentenced defendant to 60 months imprisonment, citing as aggravating circumstances the dangerous nature of the firearms, the fact that they were fully loaded and the assaultive nature of defendant's previous conviction for second degree robbery and second degree assault. Although the district court did not state whether its departure was a criminal history departure under guidelines section 4A1.3 or a general departure under guidelines section 5K2.0, the 8th Circuit upheld the departure. It found that these factors were not adequately taken into consideration by the Sentencing Commission, and that the factors illustrated the danger that defendant repeatedly posed for others, and warranted a severe departure. *U.S. v. Thomas*, __ F.2d __ (8th Cir. Sept. 11, 1990) No. 89-2071.

Sentencing Hearing (§ 6A)

1st Circuit remands case for sentencing by different judge where original judge failed to comply with Rule 32. (760) Defendant's trial for various drug charges ended in a mistrial, and defendant subsequently pled guilty to using a communications facility to facilitate a felony. The presentence report found a total offense level of 12 with a guideline range of 10 to 16 months, and recommended an upward departure based on numerous factors. Defendant argued that there were numerous factual inaccuracies in the presentence report. The sentencing judge, who also had presided at the mistrial, made certain findings based upon the evidence presented at trial, and departed upwards substantially. How-

ever, he failed to make specific findings as to the disputed matters in the presentence report or otherwise state that the disputed matters would not be relied upon in sentencing, as required by Fed. R. Crim. P. 32(c)(3)(D). The 1st Circuit found that the fact that the judge had presided over the trial and was familiar with the evidence did not excuse the judge from complying with Rule 32(c)(3)(D). The case was remanded for new sentencing by a different judge who could review the trial transcript of the aborted trial. *U.S. v. Hanono-Surujun*, __ F.2d __ (1st Cir. Sept. 12, 1990) No. 90-1187.

8th Circuit finds that defendant with mistaken belief that stipulation would be consistent with presentence report cannot withdraw guilty plea. (760)(795) Defendant argued that the district court abused its discretion in failing to consider whether he was reasonably justified in his mistaken belief that the facts stated in the stipulation would be consistent with those in his presentence report. He argued that he would not have agreed to a stipulation which was consistent with the Probation Office's characterization of his offenses. The 8th Circuit rejected the possibility that defendant's mistaken belief was justified. Guidelines section 6B1.4(d) clearly provides that the district court "is not bound by the stipulation, but may, with the aid of the presentence report, determine the facts relevant to sentencing." *U.S. v. Russell*, __ F.2d __ (8th Cir. Sept. 10, 1990) No. 89-2652.

Plea Agreements, Generally (§ 6B)

10th Circuit holds that attorney's miscalculation of sentence did not make plea involuntary. (790) Defendant's counsel, based upon defendant's misrepresentation of his criminal history, incorrectly advised defendant that he would not receive a sentence in excess of five years. Defendant's motion to withdraw his plea was denied, and defendant was sentenced to 210 months of imprisonment. The 10th Circuit rejected defendant's argument that the attorney's miscalculation of his likely sentence, and the court's failure to apprise defendant of the anticipated guideline range, rendered his plea involuntary. Defendant was properly advised of the statutory minimum and maximum penalties for his offense. The court was not required to inform defendant of the applicable sentencing guideline range prior to accepting the guilty plea. The fact that the applicable guidelines range was so much higher than defendant's attorney estimated did not render defendant's plea involuntary. Defendant was unable to show a "fair and just reason" for withdrawal of his plea. *U.S. v. Rhodes*, __ F.2d __ (10th Cir. Sept. 6, 1990) No. 89-3241.

11th Circuit remands forfeiture case for district court to determine whether use of claimant's statements violated plea agreement. (790)(900) Defendant's plea agreement stated that defendant's statements would not be used against him, either directly or indirectly. Defendant testified as a government witness that he and his partner bought several properties with the proceeds of illegal transactions, including certain property which was already the subject of a forfeiture proceeding. Following the trial, defendant was deposed in the forfeiture proceeding and again admitted that the property was purchased with drug proceeds. Over defendant's objections, the deposition was admitted into evidence at the forfeiture trial. Defendant argued that the use of his deposition testimony violated the plea agreement. The 11th Circuit found that the plea agreement was ambiguous, and remanded the case to determine whether the plea agreement allowed defendant's statements to be used against him in the forfeiture action. *U.S. v. One Parcel of Real Estate at 136 Plantation Drive*, __ F.2d __ (11th Cir. Sept. 14, 1990) No. 89-5135.

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

9th Circuit reverses sentence where it was unclear whether the same sentence would have been imposed but for the error. (810) The district court erred in giving the defendant credit for acceptance of responsibility, but sentenced him at the top of the guideline range. The 9th Circuit reversed and remanded for a new sentencing hearing even though the same sentence could have been imposed if the judge had not given the defendant credit for acceptance of responsibility. The court found reversal appropriate because it was not clear that the district court would have given the same sentence absent the error. *U.S. v. Skillman*, __ F.2d __ (9th Cir. Sept. 14, 1990) No. 89-50203.

9th Circuit reviews obstruction of justice for clear error. (820) The 9th Circuit held that the sentencing court's findings of fact under the guidelines are reviewed for clear error. "It is a question of fact whether a defendant obstructed justice under the guidelines." *U.S. v. Rodriguez-Macias*, __ F.2d __ (9th Cir. Sept. 13, 1990) No. 89-10442.

Death Penalty

9th Circuit finds failure to appoint defense psychiatrist to assist in sentencing violated due process. (860) Relying on *Ake v. Oklahoma*, 470 U.S. 68 (1985), Judges Ferguson and Fletcher held that the failure to appoint a defense psychiatrist to assist defendant in preparing for his sentencing hearing denied him due process of law. The trial court had agreed that a psychiatric evaluation was appropriate, but rather than appointing an expert to assist the defendant in preparation for a resentencing hearing on the death penalty, the judge ordered an evaluation directly for the court. The majority here held that this narrow inquiry violated due process. Judge Fernandez dissented. *Smith v. McCormick*, __

F.2d __, 90 D.A.R. 10069 (9th Cir. Sept. 7, 1990) No. 88-4115.

9th Circuit holds unconstitutional Montana's "sufficiently substantial to call for leniency" standard for mitigating evidence. (865) The Montana death penalty statute states that the court "shall impose a sentence of death if it finds one or more of the aggravating circumstances and find that there are no mitigating circumstances sufficiently substantial to call for leniency." Judges Ferguson and Fletcher held that this "sufficiently substantial to call for leniency" standard as applied in Montana "has resulted in an unconstitutional failure to consider give effect to all relevant and mitigating evidence. Accordingly the court reversed petitioner's death sentence. Judge Fernandez dissented. *Smith v. McCormick*, __ F.2d __, 90 D.A.R. 10069 (9th Cir. Sept. 7, 1990) No. 88-4115.

Forfeiture Cases

2nd Circuit upholds forfeiture of entire building based on drug activity in 15 of building's 41 apartment units. (900) (910) Claimant's entire apartment building was seized based upon narcotics activity which took place in 15 of the building's 41 units. Defendant argued that 21 U.S.C. section 881(a)(7) allows only property actually connected to narcotics activity to be forfeited, and therefore only the 15 apartment units in which narcotics activity took place could be seized. The 2nd Circuit rejected this, holding that the statute permits an entire parcel of land to be forfeited even if only part of the parcel is directly connected to drug activity. The court also rejected the defendant's argument that forfeiture of the entire building violated the 8th Amendment. *U.S. v. 141st Street Corporation*, __ F.2d __ (2nd Cir. August 17, 1990) No. 89-6268.

8th Circuit, en banc, holds that real property used for gambling is subject to forfeiture. (900) Rejecting the ruling of an earlier panel, reported at 876 F.2d 1362 (8th Cir. 1989), the en banc 8th Circuit held that 18 U.S.C. section 1955(d), which authorizes forfeitures of "any property used in an illegal gambling operation," applies to real property as well as personal property. The district court's order dismissing the forfeiture action was reversed. Judge Heaney dissented, joined by Chief Judge Lay and Judge McMillian. *U.S. v. South Half of Lot 7 and Lot 8*, __ F.2d __ (8th Cir. August 3 1990) (*en banc*).

2nd Circuit upholds seizure of property pursuant to ex parte warrant. (910) Claimant's apartment building was seized without prior notice pursuant to a warrant obtained by an ex parte application to a magistrate. The 2nd Circuit found that this procedure did not violate due process. The court distinguished cases finding due process violations when a personal residence is seized without prior notice, noting that "the private interest involved here is ownership and possession of an apartment building solely for commercial purposes." This case presented "exigent circumstances warranting the postponement of notice and the opportunity for an adversarial hearing." First, the residents of the neighborhood had an interest in being free from the dangers presented by a large scale narcotics operation. Second, the government suspected the owner of the building was aware of the drug activity and possibly involved in it. Therefore, prior notice of the seizure might have hampered police efforts to enforce the narcotics laws and increase the risk to police and the community from the seizure. "The high level of ongoing narcotics trafficking in the building, coupled with [claimant's] opportunity to contest the forfeiture at trial lead us to conclude that issuance of the seizure warrant by a neutral and detached magistrate was all the process that was due." *U.S. v. 141st Street Corporation*, __ F.2d __ (2nd Cir. August 17, 1990) No. 89-6268.

4th Circuit holds that transfer of funds to Asset Forfeiture Fund does not deprive court of appellate jurisdiction. (920) The government argued that the appellate court had lost jurisdiction over the forfeited money, and thus the appeal, when the money was transferred to the Asset Forfeiture fund after the claimant had failed to obtain a stay of execution or file a supersedeas bond. The 4th Circuit rejected the argument, disagreeing with *U.S. v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (*en banc*), *cert. denied*, 487 U.S. 1204 (1988) and *U.S. v. $57,480.05 U.S. Currency and Other Coins*, 722 F.2d 1457 (9th Cir. 1984). Although acknowledging that in general removal of the res ends the jurisdiction of the court, the 4th Circuit found that "invocation of the in rem rule is particularly inapposite to defeat jurisdiction in a government initiated civil forfeiture action." Since the res was unlikely to disappear, the court saw no reason to require the claimant to file a stay of execution or a bond in order to appeal the case. The court also found that by initiating the forfeiture proceeding, the government had subjected itself to the court's personal jurisdiction, and therefore could not escape "through its subsequent jurisdictional exceptions' to the claimant's appeal." *U.S. v. $95,945.18 United States Currency*, __ F.2d __ (4th Cir. Sept. 13, 1990) No. 90-7003.

1st Circuit finds no probable cause that house was used to facilitate drug transactions. (950) Defendant was arrested for drug trafficking based on cocaine, marijuana cigarettes, and drug sale notes found in his truck. A search of defendant's house revealed only a small amount of a white powdery substance resembling cocaine, a plastic bag with "green vegetable matter," some marijuana cigarettes and numerous firearms. The 1st Circuit found that this was insufficient evidence to establish probable cause that defendant's house was subject to forfeiture, and remanded the case for trial. Most importantly, the government never introduced evidence that the substances found in defendant's house were illegal drugs. In addition, although a confidential informant had advised the police more than a year before the search that s/he had

seen cocaine and large amounts of cash in the house, the informant was of untested reliability, and many of the significant items that the informant claimed to have seen in the house, such as large amounts of cash, drugs and a .357 pistol, never were found. Although the police overheard one phone call to the house in which it sounded as if a drug deal were being set up, the deal never materialized. The "tools of the trade" found in the house, without solid evidence of the trade itself, were insufficient to establish probable cause. *U.S. v. Parcel of Land and Residence at 28 Emery Street, Merrimac, Massachusetts*, __ F.2d __ (1st Cir. Sept. 6, 1990) No. 90-1090.

4th Circuit upholds finding that money was to be used to finance a drug transaction. (950) The 4th Circuit found that government had met its burden to establish probable cause that the money seized from claimant was to be used to finance a drug transaction: an undercover agent arranged a sale of six kilograms of cocaine, claimant produced this large sum of cash in small bills, which was represented to be the consideration for the cocaine, and claimant's companion gave the cash to the undercover agent, a total stranger, in a bowling ball bag. Claimant had little income and no bank account, and gave no reason why he would be carrying such a large sum of cash in a bowling ball bag. Defendant did not give any facts to rebut the showing of probable cause, and therefore, the 4th Circuit found that the summary judgment order was proper. *U.S. v. $95,945.18 United States Currency*, __ F.2d __ (4th Cir. Sept. 13, 1990) No. 90-7003.

2nd Circuit holds that innocent owner must establish either lack of knowledge or lack of consent. (960) The 2nd Circuit held that a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity, or if he had knowledge, that he did not consent to it. To show lack of consent, a claimant must prove that upon learning of the illegal activity being conducted on the property, he or she did all that reasonably could be expected to prevent it. In this case, the jury's conclusion that the owner failed to meet this burden was supported by the evidence. Although the police called the president of the corporation several times and left messages regarding the drug activity in the corporation's apartment building, the president never returned any of the calls, and took no steps to curb the drug activity. Once the building was raided and the corporation admitted it knew of the drug activity, it instructed the building superintendent not to accept rent from the tenants who were arrested. A jury could reasonably conclude that the corporation either knew of the narcotics activity prior to the raid and took no steps to stop it, or that corporation's response after learning of the raid was inadequate. *U.S. v. 141st Street Corporation*, __ F.2d __ (2nd Cir. August 17, 1990) No. 89-6268.

2nd Circuit imputes superintendent's knowledge of drug activity in building to corporate owner. (960) Claimant was the corporate owner of an apartment building seized for drug trafficking. There was evidence that the building superintendent had accepted bribes from drug dealers to keep the elevators in the building running, and that he charged several thousand dollars per month to lease apartments specifically for drug dealing purposes. Claimant asserted the innocent owner defense, arguing that it was improper to impute the superintendent's knowledge of the drug trafficking to it because the superintendent was acting adversely to claimant when he accepted bribes and charged the exorbitant rents. The 2nd Circuit rejected this argument, since the superintendent's actions were adverse to the corporation "only in the sense that his actions contributed to the imputation of knowledge" to claimant. Claimant failed to present evidence that it did not share in the superintendent's profits. Moreover, there was evidence that the president of claimant was aware of the drug trafficking. *U.S. v. 141st Street Corporation*, __ F.2d __ (2nd Cir. August 17, 1990) No. 89-6268.

REHEARING EN BANC

(900)(910) *U.S. South Half of Lot 7 and Lot 8*, 876 F.2d 1362 (8th Cir. 1989), *vacated on rehearing en banc*, __ F.2d __ (8th Cir. August 3, 1990).

AMENDED OPINION

(580)(775) *U.S. v. Lockard*, __ F.2d __ (9th Cir. July 26, 1990) No. 89-50469, *amended*, __ F.2d __ (9th Cir. Sept. 10, 1990).

Federal Sentencing and Forfeiture Guide NEWSLETTER

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

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Cruel and Unusual Punishment

7th Circuit holds that 30-year sentence for career offender's possession of a firearm did not violate 8th Amendment. (105)(520) Defendant was convicted of being a felon in possession of a firearm. The district court found he was a career offender, and sentenced him to 30 years. The 7th Circuit ruled that the 30-year sentence did not constitute cruel and unusual punishment. Defendant failed to demonstrate that a 30-year sentence was disproportionate to his crime. The statute under which he was convicted authorized a sentence from 15 years to life, and he was sentenced within the statutory maximum. The 7th Circuit also rejected defendant's argument that the career offender provisions violated the double jeopardy clause. *U.S. v. Alvarez*, __ F.2d __ (7th Cir. Sept. 27, 1990) No. 89-2670.

9th Circuit holds that 10-year enhancement for prior felony drug conviction did not violate 8th Amendment. (105) Defendant argued that his 10 year sentence enhancement for his prior felony drug conviction under 21 U.S.C. 841(b)(1)(A) was disproportionate to his crime and therefore violated the 8th Amendment. Reiterating its earlier ruling in *U.S. v. Kinsey*, 843 F.2d 383, 392-93 (9th Cir. 1988), the 9th Circuit rejected his argument. *U.S. v. Brownlie*, __ F.2d __ (9th Cir. Oct. 1, 1990) No. 89-10492.

Guideline Sentences, Generally

7th Circuit reaffirms that guidelines do not violate due process. (115) The 7th Circuit, following previous Circuit precedent, reaffirmed that the sentencing guidelines do not violate due process. The guidelines do not eliminate individualized sentences, since even in defendant's case, factors such as acceptance of responsibility, past criminal history and conduct of the victim were taken into account. Even without such tailoring the guidelines would pass muster in a non-capital case, since "criminals aren't entitled to sentences devised by judges rather than the legislature." *U.S. v. Bigelow*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-2274.

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9th Circuit authorizes consideration of juvenile adjudications as criminal history. (120)(500) Defendant argued that 28 U.S.C. section 994(b)(10) did not authorize the Sentencing Commission to permit judges to consider juvenile adjudications in assessing the defendant's criminal history. The 9th Circuit rejected the argument, holding that Congress even authorized consideration of a defendant's prior criminal *conduct*, "notwithstanding the fact that the defendant may not have been adjudged guilty of the prior act." The Commission "declined to exercise" this authority, instead limiting the term "criminal history" to criminal acts that resulted in an adjudication of guilt. The 9th Circuit found that this includes juvenile adjudications, and accordingly the Sentencing Commission acted within its statutory authority in authorizing trial judges to consider "criminal acts committed by a defendant prior to age 18." The court also rejected the defendant's due process argument. *U.S. v. Booten*, __ F.2d __ (9th Cir. Sept. 20, 1990) No. 89-30282.

2nd Circuit holds that violent assaults committed in furtherance of racketeering activities constituted continuing crimes. (125)(210) Defendant committed four assaults, three of which occurred prior to the effective date of the guidelines. The assaults were committed on the instructions of the leader of a violent narcotics ring of which defendant was a member. The 2nd Circuit found that the guidelines were applicable. Defendant's string of assaults was a continuing offense committed to maintain and increase his position in an enterprise engaged in racketeering activity. Since one of the assaults occurred after the effective date of the guidelines, defendant's criminal conduct was a "straddle" crime to which the guidelines applied. *U.S. v. McCall*, __ F.2d __ (2nd Cir. Sept. 28, 1990) No. 90-1074.

7th Circuit holds that guidelines apply to conspiracy that continued beyond effective date. (125)(140)(380) The 7th Circuit held that the sentencing guidelines applied to defendant's conviction for conspiracy, which began prior to but continued beyond November 1, 1987. Defendant contended that this was unfair because his co-defendant was not sentenced under the guidelines and received a less severe sentence. The 7th Circuit found that since defendant failed to present any facts or legal authority for this position, he waived this argument. Moreover, the court had no appellate jurisdiction to review the sentence of a defendant properly sentenced on the ground that a co-defendant was improperly sentenced. *U.S. v. Fazio*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-3232.

7th Circuit finds co-defendant's lenient sentence not grounds for resentencing defendant. (140)(810) Defendant was sentenced to 109 months after a trial. His co-defendant, who had a relatively "inactive" role, pled guilty and received a sentence of 97 months. The co-defendant had forfeited considerable cash and property to the government, while defendant had no funds to forfeit. Defendant argued that he was being punished for lacking sufficient wealth to confiscate. The 7th Circuit rejected the argument, ruling that a sentence within the guidelines cannot be reviewed as being "draconian or too lenient." Moreover, even if the co-defendant received less than he deserved, defendant "gains no similar advantage by reason of [co-defendant's] good fortune." *U.S. v. Cea*, __ F.2d __ (7th Cir. Sept. 26, 1990) No. 89-1796.

8th Circuit holds defendant not entitled to same downward departure as his co-defendants. (140)(722)(810) Defendant argued that his sentence created an unwarranted disparity between his sentence and the sentences imposed upon his co-defendants. The 8th Circuit rejected this argument, noting that the primary reason for the difference in sentence was that the co-defendants received a downward departure for substantial assistance to the government. The district court's refusal to grant a downward departure was not reviewable. *U.S. v. Keene*, __ F.2d __ (8th Cir. Sept. 25, 1990) No. 89-5442.

General Application Principles

2nd Circuit holds that applicable guidelines section must be based upon offense of conviction. (150)(210) Defendant pled

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guilty to aggravated assault, but the district court determined that defendant had acted with a "depraved indifference to human life," and applied the guideline section for assault with intent to commit murder. The 2nd Circuit reversed, holding that the applicable guideline section must be determined with reference to the offense of conviction, not to defendant's other conduct. To sentence defendant on the basis of another guideline section, the parties should have sought a stipulation to the more serious offense pursuant to guideline section 1B1.2(a). Defendant's agreement to describe his assaults at the time of his plea did not constitute the necessary stipulation, but rather an agreement to make available to the court information concerning the assaults for the purpose of evaluating the specific offense characteristics and evidence of relevant conduct. *U.S. v. McCall*, __ F.2d __ (2nd Cir. Sept. 28, 1990) No. 90-1074.

2nd Circuit finds that misrepresentation that defendant was a government official involved more than minimal planning. (160)(300) Defendant had numerous contacts with a real estate broker over a period of several weeks during which defendant misrepresented that he was employed by the U.S. State Department. In his assumed identity, defendant provided false information concerning his security needs and the government's role in securing and financing an apartment he was attempting to purchase. Defendant was convicted of making a false statement, and his base offense level was increased under guideline section 2F1.1(b)(2)(A) because the offense involved more than minimal planning. The 2nd Circuit agreed with this, finding that defendant's repeated acts over a period of several weeks justified the enhancement. *U.S. v. Bakhtiari*, __ F.2d __ (2nd Cir. Sept. 17, 1990) No. 89-1644.

5th Circuit finds that concealment of funds from bankruptcy court involved more than minimal planning. (160) Defendant attempted to conceal his receipt of $175,000 from a bankruptcy court by negotiating the check, obtaining a certificate of deposit in his mother-in-law's name, and three cashier's checks made payable, respectively, to his mother-in-law, his sister-in-law, and himself. Defendant then opened a new checking account in an out-of-town bank and gave $30,000 to an unidentified man. The 5th Circuit found that defendant's actions went beyond merely opening an account to hold the money, but was "a systematic scheme involving multiple banks and many different parties." Therefore, it was proper to increase defendant's offense level because his offense involved more than minimal planning. *U.S. v. Beard*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-3720.

5th Circuit finds that cutting wire from Army communications line involved more than minimal planning. (160)(220) Defendant received information from telephone workers as to which cables on an Army missile range were not in service. He collected cutting tools, cut the wires, loaded the wires into his vehicle, sought a buyer, transported the wires to the buyer, and made the sale. Reviewing the district court's ruling under the clearly erroneous standard, the 5th Circuit agreed that defendant had committed a crime involving more than minimal planning, justifying a two level increase under guideline section 2B1.1(b)(4). *U.S. v. Barndt*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-8084.

5th Circuit applies fraud guideline to false statements in bankruptcy. (165)(300)(320) Defendant pled guilty to making a false declaration under penalty of perjury in a bankruptcy proceeding. Defendant contended that the district court erred in sentencing him under the fraud guideline, section 2F1.1, rather than the perjury guideline, section 2J1.3. The 5th Circuit rejected this argument, finding that the Statutory Index specified the fraud guideline. A court may not look beyond the guideline listed in the Index unless that guideline is inappropriate in light of the statute or offense of conviction. Although defendant made his statement under penalty of perjury, his conduct constituted fraud because he attempted to conceal funds from the bankruptcy court. The 5th Circuit also rejected defendant's argument that sentencing him under the fraud guideline violated due process because of his expectation that he would be sentenced under the perjury guideline. Since defendant stipulated to facts that established a factual basis for fraud, under guideline section 1B1.2(a), defendant could be sentenced to the higher offense. *U.S. v. Beard*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-3720.

5th Circuit looks beyond offense of conviction to find that defendant was leader of amphetamine ring. (170)(430) Defendant ran a large scale amphetamine distribution ring, and was responsible for the production of approximately 7,000 grams from her laboratory in Oklahoma. However, defendant pled guilty only to distributing two ounces of amphetamine, and argued that since she was the only participant in the offense charged, it was improper to treat her as a leader of a criminal activity involving five or more participants. The 5th Circuit agreed that the "offense" in guideline section 3B1.1(a) refers only to the offense charged. However, the court held that the court could consider "the underlying activities and participants that directly brought about the more limited sphere of the elements of the specific charged offense" as relevant conduct. In this case, defendant established an extensive manufacturing and distribution system. The sale to the agent was "but the final link in a chain of extensive drug activities." Therefore, it was proper to find that defendant was a leader under section 3B1.1(a). *U.S. v. Manthei*, __ F.2d __ (5th Cir. Sept. 20, 1990) No. 89-1970.

6th Circuit holds that co-defendant's possession of nunchucks was properly attributed to defendant. (170)(220) Defendant and a co-defendant broke into a bank at night and stole various personal possessions belonging to bank employees and damaged the bank vault in an attempt to

open it. Defendant and the co-defendant were apprehended in the building adjacent to the bank, lying on the floor with their eyes closed. Co-defendant had a set of nunchucks, a martial arts weapon, under his head. Defendant objected to the two level increase in his base offense level based upon his co-defendant's possession of the nunchucks. The 6th Circuit found the increase was proper under guideline section 2B2.2. Possession of a weapon in the commission of an entry into a federally insured bank was foreseeable and it was reasonable to infer that defendant had knowledge of the weapon. *U.S. v. King*, __ F.2d __ (6th Cir. Oct. 2, 1990) No. 90-5441.

9th Circuit upholds "official victim" adjustment, based on answer to "Questions Most Frequently Asked." (180)(210)(410)(680) Defendant was convicted of assault on a federal officer. He argued that his sentence should not have been adjusted upward for "official victim" under section 3A1.2 because the aggravated assault guideline, section 2A2.2, "already incorporates that factor." The 9th Circuit rejected the argument, relying on the Sentencing Commission's answer to "Questions Most Frequently Asked About the Sentencing Guidelines." Although "this informal statement of the Commission is not binding on this court," the answer "clearly indicated that the Sentencing Commission intended the official victim adjustment to apply when a defendant is convicted under section 111 and sentenced under guidelines section 2A2.2." *U.S. v. Sanchez*, __ F.2d __ (9th Cir. Sept. 20, 1990) No. 89-50082.

9th Circuit holds guidelines inapplicable to Indian offenses defined by state law. (190) Disagreeing with the 8th Circuit's decision in *U.S. v. Norquay*, 905 F.2d 1157 (8th Cir. 1990), the 9th Circuit held that the sentencing guidelines do not apply to Indian offenses defined by state law. Here the defendant was convicted of residential burglary, a crime not defined by federal law. The Major Crimes Act, 18 U.S.C. section 1153(b), required that the defendant's offense be "defined and punished in accordance with the law of the state in which such offense was committed." The 9th Circuit held that this required that the defendant be sentenced according to state law without reference to the guidelines. *U.S. v. Bear*, __ F.2d __ (9th Cir. Sept. 26, 1990) No. 89-30200.

Offense Conduct, Generally (Chapter 2)

7th Circuit finds that district court applied improper guideline in extortion case. (210)(220)(290) Defendant hired two burly men to assist him in collecting legitimate business debts. The two men used violent methods. The district court found that the two men should not be sentenced under guideline section 2E2.1 (Making, Financing or Collecting an Extortionate Extension of Credit) because there was no evidence of loan-sharking or organized crime activity. Accordingly he sentenced them under the lesser section 2B3.2 (Extortion). The 7th Circuit disagreed with the finding that there was no organized criminal activity. The two men were involved in a crudely organized ongoing pattern of violence in order to collect extensions of credit: they circulated business cards, threatened two customers, and made repeated phone calls. The fact that the debts were legitimate, and that the two men did not extend the credit themselves did not remove them from the scope of section 2E2.1. The 7th Circuit also found that the defendant who hired them was improperly sentenced under guideline section 2A6.1 (Threatening Communications). The defendant was not part of the violence, but he did participate in and benefit from the extortion. Therefore, he should have been sentenced under the more serious section 2B3.2 (Extortion). *U.S. v. Bigelow*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-2274.

9th Circuit applies assault guideline, rather than obstruction guideline, where appellant rammed agent's car. (210) Appellant was convicted of assault on a federal officer after he rammed a border patrol vehicle with his car. The district court applied the "aggravated assault" guideline, section 2A2.2. The appellant argued that the court should have applied section 2A2.4, "obstructing or impeding officers." The 9th Circuit characterized the appellant's attempt "to recharacterize his actions" as "disingenuous," because at trial defendant's counsel agreed to eliminate instructions defining resisting, opposing, or impeding arrest. The district court properly applied the aggravated assault guideline. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. Sept. 20, 1990) No. 89-50082.

9th Circuit finds that car was a dangerous weapon. (210) Defendant was convicted of assaulting a border patrol officer with his automobile. He claimed that his car was not a dangerous weapon under guideline section 2A2.2(b)(2)(B). The 9th Circuit rejected his argument as "frivolous" because the guidelines define a dangerous weapon as "an instrument *capable* of inflicting death or serious bodily injury." The court also found no merit to defendant's argument that he merely "brandished" his car. *U.S. v. Sanchez*, __ F.2d __, 90 D.A.R. 10583 (9th Cir. Sept. 20, 1990) No. 89-50082.

5th Circuit applies guideline for robbery rather than attempted robbery. (220)(390) Guideline section 2X1.1(b)(1) provides for a decrease in offense level if the conviction is for attempt, "unless the defendant completed all the acts the defendant believed necessary for successful completion of the offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control." In this case, defendant pistol whipped and injured his victims in an attempt to learn where they were hiding chemicals he intended to steal. He forced one of the victims to drive him around the city in an attempt to locate the chemicals. Defendant was attempting to locate the chemicals when he was arrested. Therefore, the district court properly applied the robbery guideline, rather than the

attempted robbery guideline. *U.S. v. Pologruto*, __ F.2d __ (5th Cir. Sept. 26, 1990) No. 90- 2019.

6th Circuit holds that loss includes cost of hiring security guards pending repair of damaged bank vault. (220) Defendants broke into a bank and damaged the vault in an attempt to open it. Defendant's offense level was increased under guideline section 2B2.2 because the amount of the loss exceeded $2,500. The 6th Circuit held that the district court properly included in the calculation of loss the bank's cost of hiring extra security guards to guard the vault while it was being repaired. "Although the guards obviously are not part of the broken door, it is wholly foreseeable that demolition to bank vaults or mechanical mishaps during an attempted burglary would result in increased security while the integrity of the bank vault is restored." *U.S. v. King*, __ F.2d __ (6th Cir. Oct. 2, 1990) No. 90-5441.

7th Circuit holds that defendant was not in the business of receiving and selling stolen goods. (220) Defendant burglarized at least 11 businesses, transported the stolen goods across state lines, and sold it to third parties. Defendant pled guilty to one count of interstate transportation of stolen property. Four points were added to defendant's offense level because the district court determined that defendant was in the business of receiving and selling stolen property, pursuant to guideline section 2B1.2(b)(3)(A). The 7th Circuit reversed, finding that section inapplicable to one who sells property that he himself has stolen. The intent of the section is to punish professional fences, who facilitate the commission of many thefts by creating a clearinghouse for stolen goods. *U.S. v. Braslawsky*, __ F.2d __ (7th Cir. Sept. 20, 1990) No. 89-3389.

9th Circuit upholds mandatory enhancement for previous felony drug conviction. (245) Defendant pleaded guilty to possessing 5 kilograms of cocaine with intent to distribute. The district court sentenced him to the mandatory 10 years plus an additional 10 years because he had been convicted in 1983 of felony drug offense involving marijuana. He argued that 21 U.S.C. section 841(b)(1)(A)'s mandatory enhancement for previous drug conviction deprived him of his due process right to receive an individualized sentence. The 9th Circuit rejected the argument, ruling that sentencing under the statute is individualized according to quantity and variety of the narcotic possessed. Moreover, the court has discretion to sentence beyond the mandatory minimum and to consider such factors as a defendant's culpability and circumstances. The court found that the district court had determined that the most appropriate sentence was the 20-year minimum. *U.S. v. Brownlie*, __ F.2d __ (9th Cir. Oct. 1, 1990) No. 89-10492.

10th Circuit upholds district court's calculation of weight of marijuana destroyed by government officers. (250) The government seized marijuana from an airplane which crashed. The marijuana was wet due to fire fighting efforts. Defendant moved to conduct an independent analysis and weighing of the marijuana, which motion was granted, but the marijuana was destroyed by government officers before it could be delivered. At sentencing, the government presented evidence that the marijuana had a wet weight of 1300 pounds and a dry weight of 1155 pounds. Defendant countered with evidence of the amount of water used to extinguish the fire, and an affidavit from a chemist stating that a weight of 1155 pounds was consistent with 800 pounds of marijuana being soaked and then stored. The district court agreed with the government's determination of the weight and sentenced defendant accordingly. The 10th Circuit upheld the district court's determination, finding that defendant had not met the burden of proving that the government had destroyed the marijuana in bad faith. The district court's decision was not clearly erroneous. *U.S. v. Donaldson*, __ F.2d __ (10th Cir. Oct. 3, 1990) No. 89-2017.

5th Circuit bases offense level on drugs outside the offense of conviction. (270)(770) Defendant was charged with and pled guilty to the sale of two grams of amphetamines to a government agent. However, the presentence report concluded that defendant was responsible for the production of approximately 7,000 grams of amphetamines at a laboratory owned by the defendant. The 5th Circuit upheld the district court's calculation of defendant's offense level using the 7,000 grams. The district court properly based its findings on the presentence report, which in turn relied upon DEA investigative records, as well as information received from the state prosecution of defendant. *U.S. v. Manthei*, __ F.2d __ (5th Cir. Sept. 20, 1990) No. 89-1970.

8th Circuit upholds plea despite defendant's belief that sentence would be based only on cocaine in offense of conviction. (270)(790) Defendant pled guilty to distributing 4.4 pounds of cocaine, and was sentenced on the basis of all the cocaine distributed by the conspiracy, placing him in the range of 5 to 14.9 kilograms. Defendant claimed that he misunderstood how the guidelines would be applied, and moved to withdraw his guilty plea. The 8th Circuit affirmed the denial of the motion. Defendant had been advised of the range of possible punishment and was told that the guidelines applied. The 8th Circuit also found that it was proper to base defendant's sentence on the total amount of cocaine that defendant distributed, not just the amount listed in the charged offense. *U.S. v. Hoelscher*, __ F.2d __ (8th Cir. Sept. 18, 1990) No. 89-2973.

4th Circuit finds reasons inadequate to enhance sentence based upon weapons found in drug trafficker's home. (280) Defendants' sentences were enhanced under guideline section 2D1.1(b)(1), based upon various weapons and drugs found in their New York apartment and their Maryland house. In one defendant's case, the district court justified the enhancement because the defendant was "well aware" that

the weapons were in the apartment, and in the other defendant's case, the enhancement seemed to based solely upon the fact that weapons were found in the defendant's residence. The 4th Circuit found that these reasons were inadequate for enhancement. Enhancement is proper only if a court determines that it is not "clearly improbable" that the guns were connected to the drug offenses. The case was remanded to the district court with instructions to make a specific finding as to the connection between the guns and the drug offenses. *U.S. v. Apple*, __ F.2d __ (4th Cir. Oct. 3, 1990) No. 89-5066.

1st Circuit remands child molestation case for resentencing. (310)(410)(746(780) Pursuant to a plea agreement, defendant pled guilty to one charge of sexual exploitation in return for dismissal of the remaining 10 counts. The district court enhanced the sentence due to the victim's age, and departed upward from 71 to 97 months, noting that defendant's guilty plea to one count did not take into account defendant's "constant and deep involvement in the exploitation of ten minors by means of photographs." The 1st Circuit remanded for resentencing, holding that it was improper to increase defendant's offense level by two under guideline section 3A1.1 based on the victim's age, since the guideline for sexual exploitation of a minor already incorporates the victim's age into the offense level. In addition, the district court appeared to rely on the presentence report's incorrect statement that if defendant had been convicted of any one of the remaining counts, his base offense level would have increased by five, netting a guideline range of 97 to 121 months. Finally, if the district court felt that the remaining charges did not reflect the seriousness of defendant's conduct, it should not have accepted the plea. *U.S. v. Plaza-Garcia*, __ F.2d __ (1st Cir. Sept. 20, 1990) No. 89-1763.

2nd Circuit holds that possession of a silencer and possession of a semi-automatic weapon should not be grouped together. (330)(470) The 2nd Circuit rejected defendant's argument that his conviction for possession of a silencer and his conviction for possession of a semi-automatic pistol should be grouped together. The court found that the two offenses did not involve substantially the same harm, since a silencer transforms an unmuffled gun into a far more threatening weapon. The 2nd Circuit also rejected defendant's argument that his two convictions for escape should be grouped together. Since the two offenses occurred on two separate occasions, separated by three months, they merited separate, cumulative punishment. *U.S. v. Bakhtiari*, __ F.2d __ (2nd Cir. Sept. 17, 1990) No. 89-1644.

2nd Circuit remands case for district court to determine whether defendant obliterated serial number on silencer. (330) Defendant was convicted of possession of a silencer, which he claimed to have designed himself. Defendant contended that his offense level was improperly increased by one under guideline section 2K2.2 for possessing a silencer with an "obliterated serial number." The 2nd Circuit agreed, since there was no evidence that the silencer ever had a serial number or that defendant had ever obliterated it. The case was remanded for the district court to determine whether the silencer ever had a serial number and whether defendant removed it. *U.S. v. Bakhtiari*, __ F.2d __ (2nd Cir. Sept. 17, 1990) No. 89-1644.

6th Circuit holds that sentence for firearm conviction may be enhanced if firearm is used to commit state crime. (330) Defendant was convicted of possession of a sawed-off rifle. Guideline section 2K2.2(c) provided at the time that if the defendant used the firearm in the commission of another offense, the court should apply the guideline for the other offense, provided that the resulting offense level is higher. The government contended that defendant used the weapon to commit an aggravated assault under state law. The district court refused to apply the guideline for aggravated assault because it found that the term "other offense" applied only to federal crimes, not a state crime. The 6th Circuit reversed, and remanded the case to the district court to determine whether defendant's conduct constituted aggravated assault. However, the district court was instructed to apply the federal definition of aggravated assault. *U.S. v. Smith*, __ F.2d __ (6th Cir. August 6, 1990) No. 89-2346.

7th Circuit determines that felon's possession of a firearm was a crime of violence for career offender purposes. (330) (520) Defendant was convicted of being a felon in possession of a firearm. His offense was classified as a crime of violence, and he was sentenced as a career offender. The 7th Circuit found that although mere possession alone of a firearm might not constitute a crime of violence for career offender purposes, it was proper to examine the facts underlying the conviction to determine whether defendant had committed a crime of violence. In this case, defendant and others were arrested for drinking in public. Defendant walked away and was stopped by an officer. When the officer attempted to search defendant, defendant distracted the officer and then pulled a loaded semi-automatic weapon from his pants pocket. The officer struggled with defendant for the gun, and the officer's finger was injured. The 7th Circuit found that this use of physical force was sufficient to constitute a crime of violence. *U.S. v. Alvarez*, __ F.2d __ (7th Cir. Sept. 27, 1990) No. 89-2670.

1st Circuit finds that defendant who aided a prisoner's escape from prison was not a minor participant. (350)(440) The 1st Circuit rejected defendant's argument that he was a minor participant in another prisoner's escape from a federal prison. On instructions from a corrupt prison guard who promised him money, defendant passed the prisoner off as someone else to enable him to gain access to a different work detail. Defendant acted as lookout once the attempt was underway, and had a hand in other essential elements of the prisoner's escape. On these facts, the court found that

defendant was not "substantially less culpable" than the "average" person who helped a prisoner escape. *U.S. v. Ocasio*, __ F.2d __ (1st Cir. Sept. 19, 1990) No. 90-1146.

5th Circuit upholds calculation of defendant's offense level where defendant failed to raise objection at sentencing. (360)(760) Defendant brought $55,000 in cash into the United States from Mexico for the purpose of purchasing marijuana. Defendant pled guilty to money laundering. The district court determined that defendant knew or should have known that the money he was laundering was criminally derived proceeds, and increased his offense level pursuant to guideline section 2S1.3(a)(1)(C). The PSI contained statements from the defendant that indicated that he was aware that the money was illegally derived. The 5th Circuit held that since defendant did not object to the PSI and failed, at the sentencing hearing, to argue that his offense level should not be increased under section 2S1.3(a)(1)(C), this issue could not be raised on appeal. The district court also increased defendant's offense level by another five levels pursuant to section 2S1.3(b)(1) based upon its belief that defendant actually knew or believed that the funds were criminally derived. *U.S. v. Mouming*, __ F.2d __ (5th Cir. Oct. 1, 1990) No. 89-7005.

5th Circuit holds defendant entitled to reduction where money laundering scheme was not completed. (360)(390) Defendant pled guilty to conspiring to launder money and was sentenced under guideline section 2X1.1(b)(2), which provides that for a decrease of by 3 levels, "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the offense." The district court refused to decrease defendant's offense level because it found that he had completed the offense of conspiracy to launder money. The 5th Circuit disagreed, finding that the "offense" referred to in section 2X1.1(b)(2) was the underlying offense of money laundering, and not the charged offense of conspiracy to launder money. The case was remanded to determine whether defendant had substantially completed the offense of money laundering. *U.S. v. Rothman*, __ F.2d __ (5th Cir. Oct. 2, 1990) No. 89-3896.

Adjustments (Chapter 3)

8th Circuit reverses vulnerable victim enhancement for defendant who committed involuntary manslaughter. (410) Defendant struck and killed a drunk associate with his car. Although the government presented evidence that defendant intentionally killed the victim, defendant was acquitted of murder and found guilty of involuntary manslaughter. The 8th Circuit found that it was improper to enhance defendant's sentence based on the unusual vulnerability of the victim. Since the jury found that the defendant did not intend to injure the victim, he did not "choose" the victim because the victim was drunk. Moreover, even if defendant did intend to kill the victim, there was no evidence that defendant chose to do so because of the victim's alcohol-related vulnerability. Defendant was a victim who simply "happened to be intoxicated." *U.S. v. Cree*, __ F.2d __ (8th Cir. Sept. 25, 1990) No. 89-5611.

4th Circuit determines that defendant who sold drugs was organizer. (430) Defendant argued that there was no evidence that his two companions did anything more than accompany him on a trip, and since he was the only participant in the crime, it was improper to find that defendant was an organizer of a conspiracy to distribute cocaine. The 4th Circuit rejected this argument, noting that defendant recruited his companions to travel with him, that defendant was transporting cocaine on the trip, that cocaine and cash were found in the purse of one of his companions, indicating that she was part of the conspiracy, that defendant claimed a larger portion of the money from the drug sales, and that defendant exercised control and authority over his companions while distributing drugs. *U.S. v. Smith*, __ F.2d __ (4th Cir. Sept. 19, 1990) No. 89-5544.

5th Circuit holds that defendant can only be leader of transaction for which he is convicted. (430) Defendant was involved in a conspiracy to purchase drugs pursuant to which he smuggled $55,000 in cash into the United States. Defendant pled guilty to a single count of money laundering. The 5th Circuit, relying upon its earlier decision in *U.S. v. Barbontin*, 907 F.2d 1494 (5th Cir. 1990), found that it was improper to determine that defendant was a leader because he was convicted only of his single act of money laundering. A defendant may only be a leader in the transaction on which his conviction is based. Since defendant was the only party to his money laundering activity, he could not be a leader. *U.S. v. Mouming*, __ F.2d __ (5th Cir. Oct. 1, 1990) No. 89-7005.

8th Circuit finds that defendant who set up lab in basement was leader. (430) The district court found that defendant was a leader because he brought the other participants together and set up the methamphetamine laboratory in his basement. Defendant also introduced one co-defendant to the drug for the first time and sought advice from the government informant on improving the manufacturing process. Based on these findings, the 11th Circuit held that the district court's determination that defendant was a leader was not clearly erroneous. *U.S. v. Keene*, __ F.2d __ (8th Cir. Sept. 25, 1990) No. 89-5442.

7th Circuit finds that defendant who pulled weeds around marijuana plants was not a minimal participant. (440) Defendant contended that the district court should have determined that he was a minimal, rather than a minor participant. The 7th Circuit disagreed. Evidence showed that for two days prior to his arrest, defendant lived on the farm

where 60,000 marijuana plants were growing and that he advanced the conspiracy by picking weeds around the plants. The district court did not abuse its discretion in refusing to find him a minimal participant. *U.S. v. Hagan*, __ F.2d __ (7th Cir. Sept. 25, 1990) No. 90-1072.

7th Circuit reverses finding that businessman who hired violent debt collectors was a minor participant. (440) Defendant businessman hired two burly men to assist him in collecting legitimate business debts. The two men used violence and threats to collect the money. The 7th Circuit reversed the district court's finding that defendant was a minor participant. Defendant made threats over the phone to one of his debtors, and shared information about these phone calls with the two men. He willingly profited from the threats and violence even after the debtors brought them to his attention. Therefore, defendant was not substantially less culpable than the two men who committed the violence. *U.S. v. Bigelow*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-2274.

10th Circuit finds defendant who refused to reveal amount of money he expected to receive was not a minor participant. (440) At the request of a government informant, defendant introduced the informant to his drug supplier. Defendant argued that he should have been given a downward adjustment because he was less culpable than the supplier of the crack. The 10th Circuit rejected this argument. Defendant admitted he participated in the transaction for the money, but refused to reveal the amount he was to receive, so a comparison with his codefendant was impossible. Moreover, since a mandatory minimum sentence of 20 years applied to defendant, the issue was moot, since 20 years was higher than the bottom of his guideline range whether or not he was a minor or minimal participant. *U.S. v. Adams*, __ F.2d __ (10th Cir. Sept. 18, 1990) No. 89-1195.

10th Circuit upholds determination that defendant was not a minor participant. (440) Defendant traveled from the United States to Mexico, and returned to the United States in a plane with over 1000 pounds of marijuana. Defendant also had a prior drug-related conviction. The 10th Circuit found that these facts justified the district court's determination that defendant was not a minor participant. Although the judge failed to specify his reasons for making this finding, there is no legal requirement that a judge state reasons for his findings of fact. *U.S. v. Donaldson*, __ F.2d __ (10th Cir. Oct. 3, 1990) No. 89- 2017.

2nd Circuit finds that defendant who instructed associate to remove material from his apartment obstructed justice. (460) Defendant was arrested in possession of numerous weapons and various dangerous chemicals. While in prison, defendant used a prison telephone to instruct an associate to remove various chemicals and electrical components from defendant's apartment. The 2nd Circuit rejected defendant's argument that he had not obstructed justice because there was no proof that the chemicals and electrical components were material to the government's investigation. The district court properly concluded that defendant's actions were intended to destroy or conceal material evidence and thus obstruct justice. *U.S. v. Bakhtiari*, __ F.2d __ (2nd Cir. Sept. 17, 1990) No. 89-1644.

5th Circuit finds that defendant who deliberately refused to provide financial information to probation officer obstructed justice. (460) The district court found that defendant deliberately refused to supply information to the probation officer that was readily available to defendant and necessary for the probation office to determine defendant's ability to pay a fine or restitution. The 5th Circuit upheld the district court's conclusion that this warranted a two point enhancement for obstruction of justice. *U.S. v. Beard*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-3720.

7th Circuit finds that defendant's flight from arresting officers did not constitute obstruction of justice. (460) Police officers drove up to a farmhouse to speak to the residents about the marijuana growing in the field. Defendant and others fled through a back door and ran toward a cornfield. After a short chase, defendant was caught by the officer pursuing him. No one was hurt, although the officers fired several warning shots during the chase. Defendant was unarmed. The 7th Circuit found that these circumstances did not justify a sentence enhancement for obstruction of justice. In all other cases in which a defendant's flight constituted obstruction, the flight was combined with other circumstances. Here, no such circumstances existed. The officers lives were never in danger, even though they did not know the defendant was unarmed they chased him. Defendant's flight was merely the "instinctive flight of a criminal about to be caught by the law." *U.S. v. Hagan*, __ F.2d __ (7th Cir. Sept. 25, 1990) No. 90-1072.

4th Circuit finds that defendant who objected to facts in the plea agreement did not accept responsibility. (485) Defendant did not plead guilty until after his wife was convicted of related charges and his own trial was fast approaching. Defendant objected to statements in the government's proposed statement of facts, which was incorporated into the plea agreement, changing the statements to indicate merely that a witness would testify to those facts. He also struck the statement that he agreed with the statement of facts. In addition, he failed to cooperate with the government. On these facts, the 4th Circuit found a sufficient basis for the district court's determination that defendant had failed to accept responsibility for his conduct. *U.S. v. Apple*, __ F.2d __ (4th Cir. Oct. 3, 1990) No. 89-5066.

5th Circuit finds that defendant who failed to admit beating robbery victims did not accept responsibility. (485) Defendant admitted that he possessed a firearm in order to rob the victims of certain chemicals. He argued that he was entitled

to a reduction for acceptance of responsibility because he "readily admitted he acted wrongfully" and "felt genuine remorse for his conduct." The 2nd Circuit found that he did not accept responsibility, since he did not admit that he beat the victims and denied that the chemicals were for manufacturing methamphetamine. *U.S. v. Pologruto*, __ F.2d __ (5th Cir. Sept. 26, 1990) No. 90-2019.

5th Circuit finds that defendant who withheld funds from bankruptcy court did not accept responsibility. (485) Defendant pled guilty to making a false statement in his bankruptcy proceeding. The district court agreed with the presentence report that defendant did not come forth and indicate that he had violated the law nor did he express regret for having done so. The 5th Circuit found no clear error. *U.S. v. Beard*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-3720.

5th Circuit holds that court may look outside offense of conviction to determine acceptance of responsibility. (485) Defendant was involved in a conspiracy to purchase drugs, but pled guilty to a single count of money laundering. The 5th Circuit rejected defendant's argument that the district court could only determine his acceptance of responsibility by examining his conduct with respect to the single money laundering count. The court found that in order to be entitled to a reduction, defendant must accept responsibility for all conduct in furtherance of the money laundering charge, including all conduct demonstrating the intent, motive and purpose underlying the money laundering. Moreover, the 5th Circuit found that requiring a defendant to accept responsibility for uncharged criminal conduct does not violate the 5th Amendment, since no increase in punishment occurs if the defendant fails to accept responsibility. Giving a defendant the possibility of a more lenient sentence does not compel self-incrimination. *U.S. v. Mourning*, __ F.2d __ (5th Cir. Oct. 1, 1990) No. 89-7005.

8th Circuit finds that defendant who admitted crime was a mistake did not accept responsibility. (485) Defendant struck and killed a pedestrian, and was convicted of involuntary manslaughter. The 8th Circuit upheld the district court's determination that defendant was not entitled to a sentence reduction based on acceptance of responsibility, since the district court found that defendant admitted only that his behavior was a "mistake." *U.S. v. Cree*, __ F.2d __ (8th Cir. Sept. 25, 1990) No. 89-5611.

8th Circuit finds that defendant who lied and made "lame excuses" did not accept responsibility. (485) The district court found that defendant testified in an untruthful manner and attempted to justify his criminal conduct with "lame excuses." Based on this record, the 8th Circuit upheld the district court's determination that defendant was not entitled to a reduction for acceptance of responsibility. *U.S. v. Keene*, __ F.2d __ (8th Cir. Sept. 25, 1990) No. 89-5442.

Criminal History (§ 4A)

9th Circuit declines to consider criminal history argument where it would not affect sentence. (500)(810) Defendant argued that the district court improperly added one criminal history point for a previous conviction. However, he failed to object in the district court, and the 9th Circuit declined to resolve the question because even if he were successful, "it would not affect the sentence." "If one point were subtracted from his criminal history score, [defendant] would still fall within criminal history category II." Therefore, even if the district court erred, there was no "plain error." *U.S. v. Lopez-Cavasos*, __ F.2d __ (9th Cir. Sept. 25, 1990) No. 89-30022.

9th Circuit makes no distinction for unsupervised probation under criminal history guideline. (500) Defendant received two criminal history points under section 4A1.1(D) for being on three years summary probation for driving under the influence of alcohol. He argued that while supervised probation merited criminal history points, unsupervised or summary probation did not. The 9th Circuit rejected the argument ruling that "the guidelines make no distinction between the two types of probation." *U.S. v. Sanchez*, __ F.2d __, 90 D.A.R. 10583 (9th Cir. Sept. 20, 1990) No. 89-50082.

11th Circuit includes, in criminal history, state crimes that defendant committed after instant offense. (500) Defendant committed a series of four robberies and was convicted in state court of the third and fourth robberies. Following the imposition of the state sentences, defendant was indicted and pled guilty in federal court to the first and second robberies. The 11th Circuit held that the district court properly added three points to defendant's criminal history based upon the prior state convictions, even though the crimes occurred after the federal offenses. The term "prior sentence" in guideline section 4A1.1 means any sentence previously imposed prior to the instant sentencing, regardless of the date that defendant actually committed the offenses. *U.S. v. Walker*, __ F.2d __ (11th Cir. Sept. 25, 1990) No. 89-6143.

4th Circuit determines that unarmed robbery is a crime of violence for career offender purposes. (520)(720)(810) Defendant contended that his unarmed robbery of a bank was not a crime of violence for career offender purposes. The 4th Circuit rejected this argument. Defendant had clearly threatened the use of force when he handed the bank teller a note that stated "Give me $500 or I will shoot you." Moreover, application note 1 to guideline section 4B1.2 makes its clear that robbery is a crime of violence regardless of the presence of a weapon. In addition, defendant was convicted of violating the unarmed bank robbery statute, which requires property to be taken "by force and violence" or "by intimidation." The 4th Circuit also refused to consider defen-

dant's argument that he was entitled to a downward departure because he was unarmed during the robbery, since a failure to depart downward is not appealable. *U.S. v. Davis*, __ F.2d __ (4th Cir. Oct. 3, 1990) No. 89-5755.

5th Circuit finds possession of a firearm by a felon is a crime of violence for career offender purposes. (520) While intoxicated, defendant became involved in an altercation at a party and was asked to leave. He returned with a .38 caliber pistol, which he pointed at the party-goers. Defendant subsequently dropped the pistol, which a bystander kicked into the bushes. Defendant left the party and returned again with a .22 caliber rifle. When he discovered the party was over, he set out in his truck in search of his friends and was arrested after his truck went into a ditch. Defendant pled guilty to being a felon in possession of a firearm. The 5th Circuit concluded that based on these facts, defendant had committed a crime of violence for career offender purposes. "Considering [defendant's] intent at the time of his apprehension, this court is unwilling to require [defendant's] potential victims to wait until the trigger is pulled before we consider his act a 'crime of violence.'" *U.S. v. Goodman*, __ F.2d __ (5th Cir. Oct. 1, 1990) No. 89-6170.

Determining the Sentence (Chapter 5)

8th Circuit holds that sentence imposed on probation revocation must be within original guideline range. (560) Defendant pled guilty to embezzlement, with a guideline range of zero to four months imprisonment. He was sentenced to three years probation. Defendant violated the terms of his probation by using cocaine. The district court revoked his probation and sentenced him to one year imprisonment. The 8th Circuit reversed, agreeing with the 11th Circuit's decision in *U.S. v. Smith*, 907 F.2d 133 (11th Cir. 1990), that upon revocation of probation a district court may only impose a sentence that was available at the time defendant was initially sentenced. Post-sentencing conduct is relevant only for the purpose of convincing a court to depart (provided the facts supporting departure were presented to the court at the initial sentencing), and for deciding whether to continue or revoke probation. *U.S. v. Von Washington*, __ F.2d __ (8th Cir. Sept. 28, 1990) No. 90-1423.

California District court expunges criminal record to allow re-enlistment in army reserves. (560) Defendant was convicted in 1982 of making false credit union entries while working as a credit union examiner. He had just passed the bar. He represented himself at trial and was convicted on all counts. The district court suspended sentence and placed him on probation for five years. He was also disbarred. Having successfully completed probation, he applied to the district court to expunge his record to permit him to re-enlist in the army reserves and to apply for reinstatement in the California State bar. The district court found that it had "inherent equitable power and discretion to expunge criminal records in a special case." The court found that this was such a case and accordingly ordered the defendant's record expunged. *U.S. v. Smith*, __ F.Supp. __ (C.D. Cal. Aug. 24, 1990) No. CR82-109-AAH.

5th Circuit holds that supervised release is authorized by 18 U.S.C. section 3583(a). (580) Defendant pled guilty to conspiracy to possess with intent to distribute more than 100 grams of heroin in violation of 21 U.S.C. sections 841(a)(1), 841(b)(1) and 846. Defendant contended that the district court erred in sentencing him to a term of supervised release because the 1981 version of section 846 in effect when defendant was sentenced allowed only the imposition of imprisonment, a fine, or both. The 5th Circuit rejected the argument, finding that 18 U.S.C. section 3583(a) provided an independent basis for imposing a term of supervised release on defendant. *U.S. v. Badillo*, __ F.2d __ (5th Cir. August 28, 1990) No. 89-2591.

8th Circuit upholds 18 month sentence imposed upon revocation of supervised release. (580) Defendant pled guilty to unlawfully possessing stolen mail and was sentenced to 15 months imprisonment, followed by two years supervised release. Defendant violated the terms of his supervised release by missing scheduled drug tests and was sentenced to 18 months in prison. The 8th Circuit rejected defendant's argument that the district court failed to consider the factors set forth in 18 U.S.C. section 3553(a). The district court specifically mentioned several factors, including the nature of the violation, general deterrence to criminal conduct, protection of the public from further crimes of defendant, and defendant's educational background and criminal history. In addition, since the imposition of the 18 month sentence fell within the permitted statutory limits, the 8th Circuit refused to consider defendant's argument that the district court improperly applied a statutory provision requiring a minimum sentence for defendants found in possession of a controlled substance. *U.S. v. Graves*, __ F.2d __ (8th Cir. Sept. 19, 1990) No. 90-1492.

9th Circuit holds that district court has jurisdiction to grant credit for time served. (600) Disagreeing with the 7th and 11th Circuits, the 9th Circuit held that under 18 U.S.C. section 3585(b), effective Nov. 1, 1987, the district court has concurrent authority, along with the Attorney General, to grant credit for time served. The court reached this conclusion because the new statute is silent on the question, whereas the predecessor statute explicitly gave responsibility to the Attorney General. *U.S. v. Chalker*, __ F.2d __ (9th Cir. Sept. 26, 1990) No. 89-10396.

5th Circuit limits restitution to offense of conviction in light of Hughey v. U.S. (610) Defendant stole copper wire from a communications line located on an Army missile range three

separate times, and sold the copper wire to a scrap metal dealer. Defendant pled guilty to unlawfully selling the wire on one occasion. The 5th Circuit found that in light of the Supreme Court's decision in *Hughey v. U.S.*, __ U.S. __, 110 S.Ct. 1979 (1990), it was error for the district court to calculate the amount of restitution based on the total amount of wire that defendant stole on all three occasions. The case was remanded for the district court to recalculate the restitution based on the amount that defendant sold in the offense of conviction. The 5th Circuit also suggested that since the government had recovered certain of the stolen wire, in calculating restitution, the district court should consider whether the Army could mitigate its damages by restringing the seized wire. It was improper to calculate the Army's damages by the cost of installing an upgraded communications system, even if the wire defendant stole was no longer available. *U.S. v. Barndt*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-8084.

5th Circuit remands for district court to recalculate defendant's fine. (630) Defendant concealed from the bankruptcy court his receipt of $175,000. When caught, defendant was able to return all but $68,500 of the funds. In calculating defendant's fine under guideline section 5E4.2, the district court included the $68,500 as the amount of defendant's pecuniary gain from the commission of the offense. The 5th Circuit noted that the bankruptcy court had not yet determined whether the original $175,000 was part of the bankruptcy estate. If the money was not part of the bankruptcy estate, then the funds belonged to defendant and defendant gained nothing by concealing his own money. The case was remanded to the district court for recalculation of the fine either from the fine table in effect at the time of defendant's sentencing or based on defendant's pecuniary gain once the bankruptcy court determined the ownership status of the funds. *U.S. v. Beard*, __ F.2d __ (5th Cir. Sept. 18, 1990) No. 89-3720.

10th Circuit reverses fine for reimbursement of costs of incarceration where court refused to impose a punitive fine. (630) Defendant's presentence report concluded that defendant had a limited ability to pay a fine on an installment basis at the lower end of the guideline range, but that defendant should be considered indigent for purposes of imposing an additional fine for reimbursement of the costs of incarceration under guideline section 5E1.2(i). The district court imposed a fine in excess of $110,000, which the court stated was for incarceration and supervision. The 10th Circuit found that the fine for reimbursement was improper because the district court, in not imposing a punitive fine, had implicitly determined that defendant was financially unable to pay a fine. *U.S. v. Labat*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-2274.

9th Circuit suggests that court may impose a fine greater than the maximum specified in the fine table. (630) Guideline section 5E1.2(c)(2) provides that the maximum fine is the greater of the maximum amount shown in the fine table, or twice the pecuniary loss, or three times the pecuniary gain. Therefore the statement in the presentence report that "the fine range for a level 11 offense is $2,000 to $20,000" was not completely accurate. The 9th Circuit said "it may be that the district court had discretion to impose more than a $20,000 fine." However, the court found no plain error in the court's refusal to do so. *U.S. v. Lopez-Cavasos*, __ F.2d __ (9th Cir. Sept. 25, 1990) No. 89-30022.

Departures Generally (§ 5K)

1st Circuit reaffirms that it has no jurisdiction to review failure to depart downward. (710)(810) The 1st Circuit refused to consider defendant's contention that the district court erred in declining to make a downward departure. Although defendant contended that he had been of substantial assistance to the government, the district court was without power to depart downward on this basis in the absence of a motion from the government. *U.S. v. Ocasio*, __ F.2d __ (1st Cir. Sept. 19, 1990) No. 90-1146.

10th Circuit finds that requirement of government motion for departure for substantial assistance does not violate due process. (710) Defendant argued that 18 U.S.C. section 3553(e) violates due process to the extent it only permits a court to sentence a defendant below the statutory minimum upon the filing of a motion by the government. The 8th Circuit rejected this argument. Defendant had no constitutional right to have his assistance to the government considered in setting his sentence, and Congress could have precluded the courts from considering this factor altogether. The 8th Circuit also rejected defendant's argument that due process required judicial review of a prosecutor's decision not to file a section 5K1.1 motion. Although the court conceded that in an "egregious case" such review was possible, defendant's case was not egregious. The fact that the government filed a motion in a co-defendant's case did not require a similar motion in defendant's case. *U.S. v. Sorensen*, __ F.2d __ (10th Cir. Sept. 22, 1990) No. 89-2253.

11th Circuit reverses downward departure for substantial assistance made without government motion. (710) Over the government's objections, the district court determined that defendant provided substantial assistance to the government and departed downward. The 11th Circuit reversed, holding that a district court may not make a downward departure for substantial assistance without a government motion. The district court must follow the procedures set forth in section 5K1.1. The 11th Circuit also rejected the defendant's argument that it lacked jurisdiction to consider this issue. Judge Clark, concurring in part and dissenting in part, argued that prior circuit precedent holding that a government motion is a prerequisite to a downward departure under section 5K1.1

was wrongly decided. *U.S. v. Chotas*, __ F.2d __ (11th Cir. Oct. 2, 1990) No. 89-8427.

2nd Circuit remands case where unclear whether judge knew he could depart. (720) Defendant urged a downward departure on the basis of duress and his extensive family responsibilities. It was beyond dispute that defendant had extensive family responsibilities, and the 2nd Circuit found that the record was unclear as to whether the district judge was aware that he had the ability to depart on this basis. At one point the judge suggested that he concluded that defendant's circumstances did not justify a departure, and at another point the judge suggested that he would have given defendant a sentence of probation, but that his "hands are tied by the new guidelines." The case was remanded for the district court to clarify whether it recognized that it had the discretion to depart downward under the guidelines. *U.S. v. Sharpsteen*, __ F.2d __ (2nd Cir. Sept. 18, 1990) No. 89-1418.

4th Circuit finds that district court's refusal to depart based on defendant's illness was not reviewable on appeal. (720)(810) While defendant was incarcerated, he was diagnosed with cancer. The district court refused to depart downward, finding defendant's condition an insufficient basis for a departure. The 4th Circuit rejected defendant's argument that the district court's refusal to depart was based on its mistaken assumption that it lacked authority to depart based upon defendant's illness. Rather, the district court had carefully considered the situation and found that based on all the facts, departure was not warranted. *U.S. v. Apple*, __ F.2d __ (4th Cir. Oct. 3, 1990) No. 89-5066.

10th Circuit refuses to review district court's failure to make downward departure. (722)(810) Defendant argued that it was an abuse of discretion for the trial court to deny a downward departure. The 10th Circuit stated that the issue was not appealable, and that it lacked jurisdiction to consider the issue. *U.S. v. Adams*, __ F.2d __ (10th Cir. Sept. 18, 1990) No. 89-1195.

7th Circuit reverses downward departure made on the basis of victim's conduct. (722) Defendants came to the door of the victim at 7:30 in the morning in an attempt to collect a legitimate business debt for their client. The victim had an unpleasant voice and demeanor, weighed 270 pounds and refused to let the defendants in his house. Defendants tried to push past the victim, who pushed back and was punched in the face by one of the defendants. The defendants then chased the victim's 13 year old son, shoved him into a couch and tore the phone from the wall. The 7th Circuit reversed the district court's determination that the defendants were entitled to a downward departure under guideline section 5K2.10, based upon the victim's conduct. Section 5K.10 contemplates a situation where the victim provokes the attack. Here, the victim's unpleasant manner and blocking of the door did not provoke or justify the attack. *U.S. v. Bigelow*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-2274.

1st Circuit finds extent of upward departure unreasonable. (746) Defendant pled guilty to assisting the escape of a prisoner from a federal penitentiary. The district court departed upward from 33 to 60 months on the ground that many of defendant's prior convictions involved sentences imposed concurrently for related cases, so that only four of defendant's 16 prior convictions counted for criminal history purposes. The district court failed, however, to state its reasons for the degree of departure. The 1st Circuit reversed, ruling that the extent of the departure was not in "reasonable balance" with the circumstances justifying the departure. The departure doubled the guideline range and set defendant's sentence at the statutory maximum. Defendant's crime had some mitigating features and no aggravating features. Once an investigation into the escape began, defendant promptly came forward and explained his role in the offense, and testified against a corrupt prison guard who coerced defendant into cooperating. *U.S. v. Ocasio*, __ F.2d __ (1st Cir. Sept. 19, 1990) No. 90-1146.

5th Circuit remands case where district court failed to state specific reasons for upward departure. (746) The applicable guideline range for defendant was 37 to 46 months, and the district court departed upward to the statutory maximum and imposed a sentence of 120 months. The reasons articulated by the district court were "the nature and circumstances of the offense, the criminal history and characteristics of the defendant, the need to reflect the seriousness of the offense, the need to promote respect for the law and afford adequate deterrence to similar criminal conduct and protect the public from further criminal offenses of this defendant." The 5th Circuit found that the district court's recitation failed to list specific reasons for the upward departure. The case was remanded for the district court to identify the specific reasons of the case justifying the large departure. *U.S. v. Mourning*, __ F.2d __ (5th Cir. Oct. 1, 1990) No. 89-7005.

7th Circuit determines that district court did not articulate a sufficiently reasoned basis for upward departure. (746) Defendant was a gang member convicted of being a felon in possession of a firearm. The district court departed upward from the 10 to 16 month guideline range and sentenced defendant to 5 years. The court based its departure on its determination that the sentencing commission did not adequately take into consideration the different circumstances under which felons can possess guns. The 7th Circuit found that the district court's departure was improperly based on its "generalized dissatisfaction" with the guidelines. The district court failed to explain how the guidelines failed to take into account defendant's particular offense. The district court also failed to employ the proper methodology in calculating the departure. The case was remanded for the dis-

trict court to more specifically state its reasons for departure. *U.S. v. Scott*, __ F.2d __ (7th Cir. Sept. 28, 1990) No. 89-3512.

Sentencing Hearing (§ 6A)

9th Circuit upholds local rule requiring parties to object to presentence report before sentencing. (760) The Idaho local rule requires the parties to lodge their objections to the presentence report prior to the sentencing hearing. Pursuant to the local rule, the district judge refused to entertain the government's objection, which was raised for the first time at sentencing. The 9th Circuit held that the local rule was consistent with Rule 32(a)(1) Fed.R.Crim.P. because that rule "does not unconditionally require the district court to entertain objections to the accuracy of the presentence report not previously raised by the parties." Since the district court properly refused to hear the government's objection, the court treated the objection as if it were not raised in the district court, and found no "plain error." *U.S. v. Lopez-Cavasos*, __ F.2d __ (9th Cir. Sept. 25, 1990) No. 89-30022.

11th Circuit upholds statement of reasons for imposing life sentence on drug dealer. (775)(810) Defendant was convicted of various drug related charges and sentenced to life imprisonment. Defendant claimed his sentence was imposed in violation of law because the district court failed to adequately explain its reasons for imposing a life sentence as required by 18 U.S.C. section 3553(c)(1). The 11th Circuit held that a court can satisfy section 3553(c)(1) by tailoring its comments "to show that the sentence imposed is appropriate, given the factors to be considered as set forth in section 3553(a)." In this case the district court met its obligation to give a statement of reasons by noting that defendant's prior offenses occurred while under direct supervision and while assisting the government. These statements indicated that the district court felt defendant would continue to break the law as long as he was not incarcerated, and adequately supported the district court's decision to impose a life sentence. *U.S. v. Parrado*, __ F.2d __ (11th Cir. Sept. 20, 1990) No. 89-5756.

Plea Agreements, Generally (§ 6B)

9th Circuit rules that defendant need not be advised that he may receive an enhanced sentence if convicted of another offense in the future. (780) Defendant argued that his prior drug conviction could not be used to enhance his present sentence because his guilty plea to the prior charge was involuntary in that he was not fully aware that his conviction might be used to enhance his sentence if he committed an offense in the future. The 9th Circuit rejected the argument holding that "the possibility that the defendant will be convicted of another offense in the future and will receive an enhanced sentence based on an instant conviction is not a direct consequence of a guilty plea." Thus his plea was voluntary. *U.S. v. Brownlie*, __ F.2d __ (9th Cir. Oct. 1, 1990) No. 89-10492.

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

2nd Circuit reviews claim of incorrect application of guidelines even though not raised in district court. (800) Defendant contended that the district court applied the wrong guideline section in sentencing him. Although defendant failed to raise this issue in the district court, the 2nd Circuit decided to review the issue, determining that basing a sentence on the wrong guideline section is a "fundamental error 'affect[ing] substantial rights.'" "[W]here claims of major errors in the application of the Guidelines are presented for the first time on appeal, we should, during the infancy of the Guidelines, reach the merits at least so long as the failure to raise an issue was not a calculated decision." *U.S. v. McCall*, __ F.2d __ (2nd Cir. Sept. 28, 1990) No. 90-1074.

6th Circuit permits government to provide proof of approval of appeal before government's brief is filed. (800) At oral argument, the record failed to show that the Attorney General or the Solicitor General had given personal approval to the government's appeal. The 6th Circuit found that proof of such personal approval was not jurisdictional, but the court announced a prospective rule requiring such written proof no later than the filing of the government's appellate brief. The personal approval must be dated no later than the day on which the notice of appeal was filed by the government. *U.S. v. Smith*, __ F.2d __ (6th Cir. August 6, 1990) No. 89-2346.

11th Circuit holds that a provisional sentence is not appealable. (800) The district court determined that it needed additional information on defendant's mental condition prior to sentencing and ordered that defendant be committed for a study under 18 U.S.C. section 3552(b). The court also imposed a provisional sentence of imprisonment of 120 months, the maximum sentence authorized for the offense committed. The 11th Circuit held that the provisional sentence was not a final order, and therefore was not appealable. Section 3552(b) provides that after the study has been completed, the court must then finally sentence the defendant, from which the defendant can then appeal. To permit the defendant to appeal the provisional sentence would foster a piecemeal approach to the appellate process. *U.S. v. Muther*, __ F.2d __ (11th Cir. Sept. 25, 1990) No. 89-8783.

4th Circuit finds that sentence enhancement may not be reviewable if resulting sentence is within guideline range. (810) The 168-month sentence imposed upon defendant was at the bottom of the sentencing range for level 34, and at the high end of the sentencing range for level 32, which would have applied had the district court not added two points to

defendant's offense level for being an organizer. The 4th Circuit noted that if the district court had stated that the sentence would have been the same regardless of which sentencing range applied, then the sentence enhancement would not be subject to appellate review. *U.S. v. Smith*, __ F.2d __ (4th Cir. Sept. 19, 1990) No. 89-5544.

8th Circuit dismisses appeal where error in criminal history calculation would not affect sentence. (810) Defendant contended that it was improper to include in the calculation of his criminal history misdemeanor convictions for assault and petty theft. The misdemeanor convictions raised his criminal history from category II, with a guideline range of 87 to 108 months, to category III, with a guideline range of 97 to 121 months. Since defendant's sentence of 100 months was within both guideline ranges, his claim was not appealable. *U.S. v. Hoelscher*, __ F.2d __ (8th Cir. Sept. 18, 1990) No. 89-2973.

9th Circuit finds that judge exercised discretion in refusing to depart downward. (810) Reaffirming its ruling that a district court's discretionary decision not to depart downward from the guidelines is not subject to review on appeal, the 9th Circuit held that the district judge's ruling here was discretionary and therefore there was no jurisdiction to review his failure to depart downward. *U.S. v. Sanchez*, __ F.2d __ (9th Cir. Sept. 20, 1990) No. 89-50082.

Death Penalty, Generally

California district court stays death sentence before habeas petition is filed. (860) Eight days before his scheduled execution, the petitioner filed a "request for appointment of counsel in death sentence case and for stay of execution of death sentence." Although no habeas petition was on file, the district court stayed the execution pending the appointment of counsel and the filing of such a petition. The district court rejected the state's argument that a court has jurisdiction to issue a stay of execution only after a habeas petition is filed. The court found no requirement that the initial pleading allege specific nonfrivolous Constitutional errors. The court ruled that the All Writs Act, 28 U.S.C. section 1651(a) furnished an adequate basis for granting both a 45-day stay and a 120-day stay in order to preserve the court's "potential habeas jurisdiction." *Brown v. Vasquez*, __ F.Supp. __ (C.D. Cal. Sept. 4, 1990) No. CD90-2815AWT.

Forfeiture Cases

6th Circuit vacates award of costs and attorneys' fees to claimant in forfeiture case. (900) Claimant's automobile was seized, and after a non-jury trial, the district court denied forfeiture and ordered that the automobile be returned to claimant. Claimant was awarded costs and attorneys' fees under the Equal Access to Justice Act, which permits a court to make such an award against the United States unless the government's position was "substantially justified." The 6th Circuit reversed, ruling that since the government had met its burden of probable cause for forfeiture of the vehicle, its position was substantially justified, and therefore the award of costs and fees was improper. *U.S. v. One 1985 Chevrolet Corvette*, __ F.2d __ (6th Cir. Sept. 20, 1990) No. 89-1920.

D.C. Circuit holds that criminal court has no jurisdiction to return property once civil forfeiture proceedings begin. (910) (940) Claimant was arrested and indicted on drug charges, and filed a motion under Rule 41(e), Fed. R. Crim. P. for the return of currency and jewelry found at the time of his arrest. During the pendency of the criminal proceeding and before any action had been taken on the Rule 41(e) motion, claimant received notice from the DEA that it intended to seek forfeiture of the currency and jewelry. Claimant pled guilty, and at his sentencing hearing the district court denied the Rule 41(e) motion, finding that since the DEA had initiated forfeiture proceedings, the district court was not the proper forum in which to seek the return of the property. The D.C. Circuit agreed, holding that the government's initiation of forfeiture proceedings preempted the district court's jurisdiction to hear claimant's post-conviction Rule 41(e) claim. The D.C. Circuit also rejected claimant's argument that the government violated the double jeopardy clause when it initiated a civil forfeiture action after the conclusion of his criminal proceeding, since forfeiture statutes are civil in nature, not punitive. *U.S. v. Price*, __ F.2d __ (D.C. Cir. Sept. 25, 1990) No. 88-3004.

4th Circuit finds probable cause established by circumstantial evidence of drug transactions. (950) Claimant had a criminal record involving various drug related offenses. During a nine-month period, claimant made large cash expenditures and possessed large amounts of cash well in excess of his verifiable legitimate income. Claimant made frequent one-way plane trips without luggage to Miami, a known drug source city, and returned by rental car. Undercover agents made drug buys from several of claimant's employees on or near his business, and the employees made statements suggesting his involvement in drugs. Based on this circumstantial evidence, the 4th Circuit reversed the district court's ruling that the government had not established probable cause that a cash bond and certain properties purchased by the claimant in cash were the proceeds of illegal drug activity. *U.S. v. Thomas*, __ F.2d __ (4th Cir. Sept. 17, 1990) No. 89-6317.

EXHIBIT
J

OVERVIEW
Office of the Inspector General
Department of Justice

In 1978, Congress passed the first act creating the Office of Inspector General for most of the major departments of the Executive Branch. In 1988, a statutory Inspector General was created for the Department of Justice. See, Pub. L. No. 100-504, 102 Stat. 2515 (1988) (codified at 5 U.S.C. app. §§ 1-12). The Inspector General is appointed by the President and confirmed by the Senate. Congress provided that the appointment be made "without regard to political affiliation and solely on the basis of the integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." An Inspector General may be removed by the President, who shall communicate his reasons to both houses of Congress.

The Office of the Inspector General for the Department of Justice came into being on April 14, 1989, pursuant to the terms of the 1988 legislation, as further implemented by directive of the Attorney General. Pursuant to the terms of the legislation, nine units from five Departmental components were transferred to the Office of the Inspector General. In all, some 331 positions located in 20 field offices have been brought within the new OIG.

Since then, the Office has been restructured into four operational components, each headed by an Assistant Inspector General. The components, with their staffing level in parentheses, are as follows: Investigations (117); Audit (120); Inspections (65); Management & Planning (24). Total FY 1990 funding for the OIG is $22,891,000 ($20,541,000 in appropriated funds and $2,350,000 in reimbursements).

The Act left other internal investigations units, those of the FBI and DEA, in their respective components. These units continue to conduct misconduct investigations of employees within their components, subject to a statutory instruction to ensure cooperation and coordination between their activities and those of the Inspector General and to avoid a duplication of effort.

The Inspector General is responsible for the conduct of investigations and audits relating to the economy and efficiency of the Department's programs and operations, and to detect and prevent fraud and abuse in programs and operations administered or financed by the Department. In carrying out these responsibilities, the Inspector General is entitled to access all Department records and documents, to request information or assistance from any governmental agency or unit (Federal or state), to administer oaths and take affidavits, and to subpoena

records from outside sources necessary to the performance of the functions of his office.

Pursuant to Attorney General Order No. 1393-90 (Jan. 29, 1990), the Department has granted to the Inspector General the authority to designate OIG special agents to exercise law enforcement authority--to carry firearms, make arrests, and executive search warrants and other legal writs. This blanket deputation extends to all OIG special agents and authorizes the exercise of these powers where necessary to fulfill the responsibilities assigned to the Inspector General under the IG Act.

The Inspector General is subject to a number of reporting requirements, principal among them being a Semiannual Report to Congress describing significant problems and abuses that have been uncovered, recommended corrective action and prosecutorial referrals that have resulted, and extensive information regarding audits that have been conducted. Audits of the Inspector General comply with the standards established by the Comptroller General. Two special restrictions apply to the Inspector General of the Department of Justice: First, cases involving the misconduct of departmental employees in an attorney, criminal investigator or law enforcement position relating to a violation of law, regulation, order or other applicable standard of conduct are to be referred by the Inspector General to the Counsel, Office of Professional Responsibility for investigation. Second, a specific statutory provision authorizes the Attorney General to prohibit the Inspector General from undertaking or continuing an investigation or audit that might disclose sensitive information regarding ongoing cases, undercover operations, informants, or intelligence and national security matters.

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RIG - Regional Inspector General
ARIG - Assistant Regional Inspector General
SA - Special Agent

Department of Justice
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