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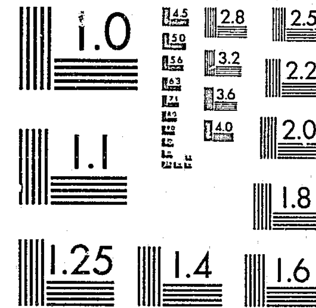

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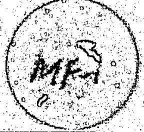
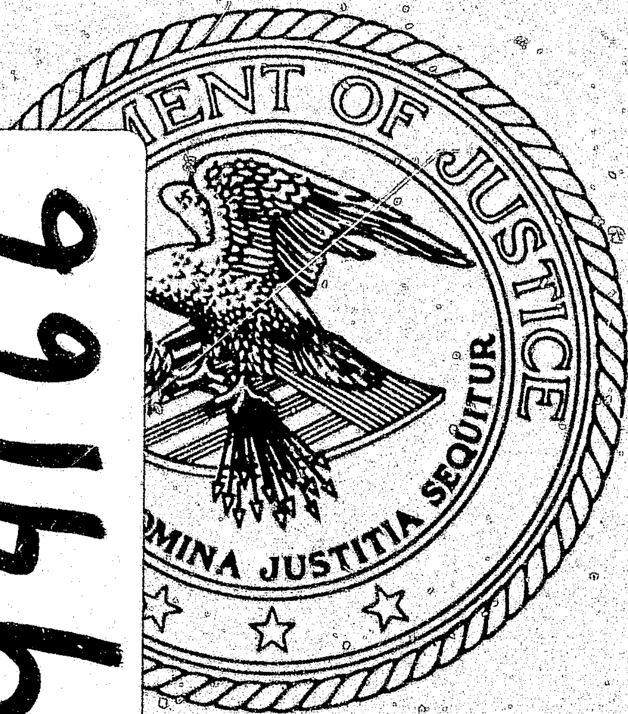


A Federal Prosecutor's Guide to Bond and Sentencing Issues

Narcotic and Dangerous Drug Section Monograph



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A FEDERAL PROSECUTOR'S GUIDE TO BOND AND SENTENCING ISSUES

Pretrial Detention, Sentence Enhancement, Parole Eligibility, and Penal Designation in Federal Prosecutions

NCJRS

MAY 9 1984

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February 3, 1984

FOREWORD

Bond and sentencing proceedings are the stages of the criminal justice process which have the greatest practical impact upon defendants because such proceedings can result in imprisonment in the form of either pretrial detention or post-trial incarceration. These stages should be understood by federal prosecutors because a variety of affirmative prosecutorial actions can influence the bond, parole, quantum of sentence imposed, and penal designation of defendants. The purpose of this Guide is to provide prosecutors with the knowledge necessary to the informed exercise of discretion in these and other related areas.

Although this Guide focuses almost exclusively upon drug prosecutions, the information contained should be of value to all members of the federal law enforcement community.

In addition to analyzing the current state of the law with respect to the issues discussed herein, this Guide provides practical advice supplemented by copies of appropriate pleadings utilized in litigation conducted by prosecutors from the Narcotic and Dangerous Drug Section.

We hope that this Guide will be useful in federal prosecutions in general, and in the prosecution of major drug traffickers in particular.

Charles W. Blau, Chief
Narcotic and Dangerous Drug Section
Criminal Division
United States Department of Justice

February 3, 1984

PREFACE

This monograph is intended for use by federal prosecutors. It reflects the views of the author rather than stating the policy of the Criminal Division or of the United States Department of Justice. As such, it is not intended to confer any rights, privileges, or benefits upon defendants, nor does it have the force of a United States Department of Justice directive. See United States v. Caceres, 440 U.S. 741 (1979).

As used herein, the terms "he," "him," and "his" should be construed as including persons of both genders.

Throughout this monograph, the common name for the Cannabis sativa L. plant is spelled "marihuana" rather than "marijuana." Although both forms are acceptable in common use, the former is used herein because "marihuana" is the spelling Congress employed in Title 21, United States Code, and a legal discussion should be careful to interpret the operative statutes precisely. Compare, Webster's New Collegiate Dictionary (1976) at 703 (either "marijuana" or "marihuana" is acceptable), with 21 U.S.C. § 802 (15) (Definitions: "The term 'marihuana' means all parts of the plant Cannabis sativa L."). See also 21 U.S.C. § 812(5)(c) at subsection (10)(listing "marihuana" as a Schedule I controlled substance).

The research for this monograph was completed on August 1, 1983, a date several months in advance of publication and distribution. More current case citations have been added, where possible, up until the date of publication.

I would like to express my gratitude to the following people who generously assisted in the preparation of this monograph:

1. Don Anderson, Chief of Administrative Systems, Bureau of Prisons, Washington, D.C., for his assistance with Section IV.

2. Linda Lancaster, Associate Warden, Metropolitan Correctional Center, New York City, for her assistance with Section V of this monograph.

3. First Assistant United States Attorney Cliff Proud, Southern District of Illinois; Group Supervisor Ed Irvin, Special Agent Ted Fergus, and Intelligence Analyst Dennis Moriarty, St. Louis DEA; and Special Agents Len Tracy and Jack Huff, St. Louis IRS, for their advice and assistance with regard to the enforcement aspects of this monograph, in general, and for their efforts in United States v. Mitchell, a case analyzed at length herein, in particular.

4. Criminal Division attorneys Gary Schneider, June Seraydar, and Bill Corcoran, Narcotic and Dangerous Drug Section; Merv Hamburg, Appellate Section; and Edgar Brown, Office of Enforcement Operations, for their editorial guidance.

5. Alice Ricks, Secretary, Narcotic and Dangerous Drug Section, for typing the manuscript.

6. Hope Breiding, Paralegal, and Mitchell Lerner, Law Clerk, Narcotic and Dangerous Drug Section, for their assistance in researching the legal issues discussed herein.

7. Helene Greenwald, former Law Clerk, Narcotic and Dangerous Drug Section, for her assistance with Section III(B).

I expect that this monograph will undergo periodic revision. Suggestions for corrections and improvements are encouraged.

Gregory Bruce English
February 3, 1984

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I

INTRODUCTION

> When a judge sentences a criminal offender to a term of imprisonment, one thing is nearly certain: the offender will not be imprisoned for the period specified in the sentence. The sentence imposed by the judge is a fiction. Needless to say, however, it is a fiction with real consequences. 1/

This observation in a Federal Judicial Center publication highlights the reason for this monograph -- to provide federal prosecutors with a thorough understanding of the pretrial detention, sentencing, and incarceration of drug offenders so that the prosecutors will know the consequences of this "fiction" even at the earliest stages of investigations. Although the imposition of sentence, setting of bond, granting of parole, and designation of penal facility are functions performed by independent agencies (i.e., the federal judiciary, U.S. Parole Commission, and Bureau of Prisons), prosecutorial actions can have a significant impact upon the ultimate decisions. The

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1/ A. Partridge, A. Chaset, and W. Eldridge, "The Sentencing Options of Federal District Judges" (Federal Judicial Center, rev. ed. May 1982), at page I-1. The purpose of "Sentencing Options" is to provide information on sentencing "principally for the benefit of newly appointed federal district judges." Id. However, all federal criminal practitioners should be familiar with the basic information contained in this publication. Copies can be obtained by contacting the Federal Judicial Center at 1520 H Street, N.W., Washington, D.C. 20005, (202) 633-6011. An earlier version of the Partridge-Chaset-Eldridge article was reprinted at 84 F.R.D. 175 (1980).

purpose of this monograph is to ensure that prosecutors are aware of the options in these areas so that they may assist judges and other officials more fully in the making of informed decisions.

As an integral member of the federal criminal justice system, it is unquestionably ethical and proper for a prosecutor to be concerned with sentencing and related issues. The American Bar Association's Standards Relating to the Administration of Criminal Justice [2/] define the prosecutor's role in sentencing:

> Standard 3-6.1 Role in Sentencing
>
> (a) The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.
>
> (b) Where sentence is fixed by the court without jury participation, the prosecutor should be afforded the opportunity to address the court at sentencing and to offer a sentencing recommendation. When requested by the court to furnish a sentencing recommendation, the prosecutor should have the obligation to do so.
>
> (c) Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing on sentence which will prejudice the jury's determination on the issue of guilt.
>
> Standard 3-6.2 Information Relevant to Sentencing
>
> (a) The prosecutor should assist the court in basing its sentence on complete and accurate information for use in the presentence report. The prosecutor should disclose to the court any information in the prosecutor's files relevant to the sentence.

2/ 2d Ed., Tentative Draft Approved Feb. 12, 1979, American Bar Association.

It is inherent in these ABA Standards that for a prosecutor to provide that "fair and informed judgment...on the sentence," with resulting impact upon parole eligibility and place of confinement, he must have an understanding of the federal criminal justice system. This is especially true in light of the prosecutor's dual role as an administrator of justice and as an advocate whose duty is to seek justice. [3/]

The Final Report of the Attorney General's Task Force on Violent Crime [4/] contains the following recommendation regarding the federal prosecutor's role during sentencing:

> The Attorney General should require, as a matter of sentencing advocacy, that federal prosecutors assure that all relevant information about the crime, the defendant, and, where appropriate, the victim, is brought to the court's attention before sentencing. This will help ensure that judges have a complete picture of the defendant's past conduct before imposing sentence.

The Commentary supporting this recommendation contains the

3/ Id. at Standards 3-1.1(b) and (c), "The Function of the Prosecutor," which provide as follows:

> (b) The prosecutor is both an administrator of justice and an advocate; the prosecutor must exercise sound discretion in the performance of his or her functions.
>
> (c) The duty of the prosecutor is to seek justice, not merely to convict.

4/ Attorney General's Task Force on Violent Crime, Final Report (Aug. 17, 1981) (hereinafter cited as "Violent Crime Report"), Recommendation 4 at 23.

following observation:

> Prosecutors, by virtue of their thorough knowledge of the case and access to the victim of the crime, witnesses, criminal information records, prison records, and investigative resources of the Federal Bureau of Investigation and other law enforcement agencies, are uniquely situated to obtain and provide this essential information to the judge, and they should actively and forcefully pursue this endeavor. [5]

The public interest may require that, to discharge this obligation, take a variety of affirmative steps. In the case of a particularly vicious offender, the options might include urging that bond be denied, supporting imposition of a lengthy penal sentence, requesting that the convicted defendant be imprisoned in a maximum security prison, and thereafter opposing a grant of parole. By contrast, if a defendant is to be a government witness, [6] it may be appropriate to advocate a release on bond, a light sentence, imprisonment at a minimum security camp, and expeditious parole. This monograph provides a practical analysis of how such disparate results can be properly influenced by the federal prosecutor even though the ultimate decisions are made by independent entities.

5/ Id.

6/ The ABA Standards, supra note 2, recognize that the prosecutor is entitled to consider "cooperation of the accused in the apprehension or conviction of others" in exercising his discretion. Standard 3-3.9(b)(vi), "Discretion in the Charging Decision."

II

BAIL

"Excessive Bail Shall Not Be Required" [7]

(A) Background

A historical combination of the Eighth Amendment, the Judiciary Act of 1789 (stating that, "Upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death"), [8] and Rule 46 of the Federal Rules of Criminal Procedure have created a statutory presumption favoring release on bond. [9]

The Bail Reform Act of 1966 [10] retained this presumption in favor of pretrial release, while deemphasizing financial constraints, in order to facilitate the release of defendants either on their own recognizance or subject to conditions less onerous than posting bond. [11] The Supreme Court has ruled that bail set

---

7/ U.S. Const. amend VIII.

8/ 1 Stat. 73, 91 (1789).

9/ The terms "bond" and "bail" are used interchangeably herein.

10/ 18 U.S.C. §§ 3041, 3141-3143, 3146-3152.

11/ 18 U.S.C. § 3146. The legislative history of this statute contains the following findings:

> SEC. 2(a). The Congress finds that --

(Footnote Continued)

before trial at a figure higher than an amount reasonably calculated to assure the presence of the defendant at trial is

---

(Footnote Continued)

(1) Present federal bail practices are repugnant to the spirit of the Constitution and dilute the basic tenets that a person is presumed innocent until proven guilty by a court of law and that justice should be equal and accessible to all;

(2) Persons reasonably expected to appear at future proceedings should not be deprived of their liberty solely because of their financial inability to post bail;

(3) Respect for law and order is diminished when the attainment of pretrial liberty depends solely upon the financial status of an accused;

(4) Bail practices which rely primarily on financial considerations inevitably disadvantage persons and families of limited means;

(5) The high cost of unnecessary detention imposes a severe financial burden on the taxpayers and depletes public funds which could be better used for other public purposes;

(6) Family and community ties, a job, residence in the community, and the absence of a substantial criminal record, are factors more likely to assure the appearance of a person than the posting of bail; and

(7) Accused persons should not be unnecessarily detained and subjected to the influence of persons convicted of crimes and the effects of jail life; nor should their families suffer needless public derision and loss of support.

SEC. 2(b). The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial stature, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.

S. Rep. No. 750, 89th Cong., 1st Sess. (these expanded findings were eventually condensed in the final version), quoted in United States v. James, 674 F.2d 886, 898 (11th Cir. 1982) (Circuit Judge Clark dissenting in part).

"excessive" under the Eighth Amendment. 12/ In addition to this standard regarding constitutional excessiveness, there are also statutory limitations governing bail contained in the Bail Reform Act and other statutes. For example, under the federal laws, pretrial bail cannot be denied on the basis of the danger the defendant poses to the community, except in the District of Columbia. 13/ This is a statutory limitation imposed by the Bail Reform Act rather than a constitutional one, and thus it does not necessarily apply to the states. 14/

The Attorney General's Task Force on Violent Crime has illustrated the difficulties with the current system by making detailed findings with respect to bail. 15/ Nonetheless, in

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12/ Stack v. Boyle, 342 U.S. 1 (1951).

13/ See United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969). But see 23 D.C. Code § 1322 (pretrial detention of dangerous persons authorized).

14/ Cf. Atkins v. Michigan, 644 F.2d 543, 549 (6th Cir.), cert. denied, 452 U.S. 964 (1981): "The states have the authority to determine that certain arrestees are so dangerous to the community -- because of either the nature of the crime with which they are charged or their propensity to flee before trial -- that they may be denied bail and incarcerated."

15/ These findings are reproduced as follows:

To provide an adequate means for dealing with dangerous defendants who are seeking release pending trial, the Bail Reform Act must be amended. It is obvious that there are defendants as to whom no conditions of release will reasonably assure the safety of particular persons or the community. With respect to such defendants, the courts must be given the authority to deny bail.

(Footnote Continued)

narcotics prosecutions the initial step in immobilizing a drug trafficker remains his pretrial detention following arrest. As used herein "pretrial detention" includes situations when a defendant is held without bond, when a defendant is in custody

(Footnote Continued)

The Act currently makes no provision for denial of bail on the ground of dangerousness. This does not mean, however, that there are no situations in which pretrial detention may be ordered. For example, it is recognized that a defendant who has threatened witnesses may be ordered detained and, in some circumstances, detention may be ordered for defendants who appear likely to flee regardless of what release conditions are imposed. Furthermore, there is a widespread practice of detaining particularly dangerous defendants by the setting of high money bonds to assure appearance.

Despite the fact that there is case law recognizing the authority to deny release based on a severe risk of flight, many judges continue to be reluctant to exercise this power in light of the absence of any such authority in controlling federal bail statutes. However, as has been the case with extremely dangerous defendants, a practice has developed of requiring extraordinarily high money bonds as a means of accomplishing the detention of defendants who pose a serious risk of flight. The courts should not be required to resort to this practice, but instead should have clear statutory authority to address the problem of flight to avoid prosecution honestly and order detention where it is the only means of assuring appearance. Furthermore, the practice of requiring high money bonds has proven to be an ineffective means of assuring the appearance of defendants who are engaged in highly lucrative criminal activity, are able to post huge sums of money to secure release, and are willing to forfeit these funds by fleeing the jurisdiction of the court. The recent case in which a narcotics trafficker was able to meet a $500,000 bond (bond was originally set at $21 million and reduced over the objection of the government) and quickly fled the country illustrates this problem. In such a case, the only means of assuring the defendant's appearance at trial is through detention. The law should make it clear that an order of detention in such circumstances is appropriate.

Violent Crime Report, Commentary to Recommendation 38, supra note 4 at 51-52 (footnotes deleted).

because he is unable to raise the required funds to post bond, and when a defendant is reluctant to be released on bond because release would require disclosure of the source of any proffered assets in a "Nebbia hearing." [16] These three possibilities, as well as the related issues of trial in absentia after a defendant has absconded and the setting of bail during the appellate process, are analyzed seriatim in the sections which follow. Wide-scale use of these procedures in seeking relief from the judiciary would constitute a partial solution to the limits placed upon the prosecution's ability to cope effectively with defendants who pose a danger to the community, or who will post bond and flee to avoid prosecution. The following information should facilitate the maximum utilization of pretrial detention permitted under the current state of the law.

(B) Denial of Bond

(1) Legal Authority

Although a recent amendment to the Bail Reform Act (effective October 14, 1982) changes Title 18, United States Code, Section 3146(a) to require, as a condition of release, that a defendant not coerce witnesses and other parties, Section 3146

16/ See United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966), in which the court authorized a hearing to determine the source of funds offered to post bail. For a detailed discussion, see infra Section II(D).

contains no provision authorizing the initial pretrial detention of a defendant without bail. However, the Courts of Appeals for the Fourth, Sixth, Eighth, Ninth, and District of Columbia Circuits have recognized "that courts have the inherent power to confine the defendant in order to protect witnesses at the pretrial stage as well as during trial." 17/

This inherent power to deny bail has been addressed in several important cases. The Sixth Circuit's ruling in United States v. Wind 18/ that the district court could deny bond was based upon the finding that the legislative history of the Bail

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17/ United States v. Wind, 527 F.2d 672, 675 (6th Cir. 1975). Accord, United States v. Graewe, 689 F.2d 54 (6th Cir. 1982); United States v. Phillips, No. 77-1731 (4th Cir. June 10, 1977) (unpublished opinion); United States v. Kirk, 534 F.2d 1262, 1280-1281 (8th Cir. 1976); United States v. Smith, 444 F.2d 61 (8th Cir. 1971), cert. denied sub nom. Haley v. United States, 405 U.S. 977 (1972); United States v. Cozzetti, 441 F.2d 344, 350-351 (9th Cir. 1971); United States v. Gilbert, 425 F.2d 490, 491-492 (D.C. Cir. 1969). Cf. United States v. Abrahams, 575 F.2d 3, 6-7 (1st Cir. 1978) (dicta citing Wind, 527 F.2d 672, and Gilbert, 425 F.2d 490, in decision upholding denial of bond because of defendant's proclivity to flee the jurisdiction); United States ex rel. Fink v. Heyd, 408 F.2d 7 (5th Cir. 1969) (no constitutional right to bond in denial of defendant's habeas corpus petition attacking Louisiana statute prohibiting appeal bond to prisoners receiving sentences in excess of five years); United States v. Meinster, 481 F. Supp. 1117, 1121 (S.D. Fla. 1979), aff'd on other grounds sub nom. United States v. Phillips, 664 F.2d 971 (11th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) (revocation of bond during trial because of plans to disrupt trial). See also Bitter v. United States, 389 U.S. 15, 16-17 (1967) (recognition of extrastatutory power in an opinion citing the Bail Reform Act); Leung v. Soscia, 649 F.2d 914, 920 (2d Cir.), cert. denied, 454 U.S. 971 (1981) (treaty requirements ordinarily require that a defendant pending extradition be denied bond). Cf. 23 D.C. Code § 1322 (authorizing the pretrial detention of persons who are dangerous to the community in one federal jurisdiction).

18/ 527 F.2d 672, 676 (6th Cir. 1975).

Reform Act established that this statute was not intended to address preventive detention. 19/ The Sixth Circuit analyzed the impact of this legislative history and concluded that courts have the inherent power to detain defendants who pose a threat to witnesses. 20/

19/ The court quoted this legislative history as follows:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pre-trial period, or because the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence.... A solution goes beyond the scope of the present proposal and involves many difficult and complex problems which require deep study and analysis. The present problem of reform of existing bail procedures demands an immediate solution. It should not be delayed by consideration of the question of preventive detention. Consequently, this legislation is limited to bail reform only.

Id. at 674.

20/ The court reasoned as follows:

> Since Congress did not intend to address the problem of pretrial detention without bond in the Bail Reform Act of 1966, the existence of an extrastatutory power to detain persons prior to trial may be considered.
>
> * * *
>
> In Carbo v. United States, 82 S.Ct. 662 (1962), Circuit Justice Douglas acknowledged that this inherent power may extend to custody in advance of trial when the court's own processes are jeopardized by threats against a government witness.

(Footnote Continued)

In a later case, United States v. Graewe, [21] the Sixth Circuit affirmed the trial court's decision to hold the defendant without bond because of the danger he posed to witnesses. [22]

(Footnote Continued)

* * *

> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial.
>
> * * *
>
> We hold that in a pretrial bail hearing on a non-capital offense a judicial officer may consider evidence that the defendant has threatened witnesses and is a danger to the community in determining whether the defendant should be released pursuant to 18 U.S.C. § 3146.

Id. at 674-675.

21/ 689 F.2d 54 (6th Cir. 1982).

22/ The court there stated:

> Competing principles are at stake whenever the possibility of the denial of bail is raised. The right to bail is recognized in the Eighth Amendment and in the Bail Reform Act of 1966, 18 U.S.C. § 3146. A person arrested for a non-capital offense shall be admitted to bail. Stack v. Boyle, 342 U.S. 1, 4 (1951). The traditional right to freedom before conviction permits the unhampered preparation of a defense, serves to prevent the infliction of punishment prior to conviction, and preserves the presumption of innocence. See Hudson v. Parker, 156 U.S. 277, 285 (1895). On the other hand, a trial court has an interest in protecting the administration of justice from "abuses, oppression and injustice." Bitter v. United States, 389 U.S. 15, 16 (1967); Wood v. Georgia, 370 U.S. 375, 383 (1962); Gumbel v. Pitkin, 124 U.S. 131, 144 (1888). The court's interest in efficient criminal prosecution and the gathering of witnesses demands precautions to ensure that the proceedings move expeditiously and

(Footnote Continued)

Graewe was based upon similar earlier holdings. In United States v. Gilbert, [23] the D.C. Circuit stated as follows:

> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial. Yet this power should be exercised with great care and only after a hearing which affords the defendant an ample opportunity to refute the charges that if released he might threaten or cause to be threatened a potential witness or otherwise unlawfully interfere with the criminal prosecution. [24]

In United States v. Kirk, [25] the Eighth Circuit found that the defendants were properly denied bond on the basis of "substantial evidence" of their involvement in the deaths of three witnesses. Kirk cited the Eighth Circuit's prior holding in United States v. Smith that "an accused by his actions can

(Footnote Continued)

> in accordance with due process. The extension of inherent powers to deny bail during trial to the pretrial period recognizes that unless the witnesses are protected before trial they and their testimony will not be available at trial. It also recognizes that the court's interests in the integrity of its own processes and the fair administration of justice are not confined to trial but to all proceedings. By protecting witnesses before trial through a defendant's detention, the court is encouraging those witnesses and other potential witnesses to come forward to provide information helpful to the implementation of justice.

Id. at 57.

23/ 425 F.2d 490 (D.C. Cir. 1969).

24/ Id. at 491-492.

25/ 534 F.2d 1262, 1280-1281 (8th Cir. 1976).

forfeit the right to bail and the court is under a duty to protect prospective witnesses." 26/ However, the Smith court noted that "[b]ail may be denied [only] in an exceptional case." 27/

The Ninth Circuit ruled in United States v. Cozzetti 28/ that the defendant's bail had properly been revoked during trial on the basis of his attempted tampering with witnesses prior to trial.

Thus, as Wind and these other holdings indicate, under certain circumstances pretrial detention has been permitted. However, these cases do have their critics. 29/ In addition to a punishment-before-conviction argument, the defense can be expected to emphasize the lack of specific statutory authority for

26/ 444 F.2d 61, 62 (8th Cir. 1971), cert. denied sub nom. United States v. Haley, 405 U.S. 977 (1972).

27/ Id.

28/ 441 F.2d 344, 350-351 (9th Cir. 1971).

29/ During the interlocutory appeal in United States v. Graewe, 689 F.2d 54, the defense brief set forth the following quotation from Alice Through the Looking Glass by Lewis Carroll on the first page of appellant's argument:

The Red Queen:

> "[T]here's the King's Messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all."
>
> "Suppose he never commits the crime?" said Alice.
>
> "That would be all the better, wouldn't it?" the Queen said.

pretrial detention. Despite these arguments, the authority to hold defendants without bond prior to trial when they have threatened prospective witnesses is clear. Moreover, in United States v. Abrahams, 30/ the First Circuit Court of Appeals held that this authority to deny bail could also be invoked because of the defendant's proclivities to flee the jurisdiction.

(2) Recommended Procedures

The district court hearing which resulted in the Graewe decision by the Sixth Circuit illustrates procedures prosecutors can follow to persuade the trial judge to hold a defendant without bond. Frederick Graewe was one of five defendants in United States v. Gallo. 31/ When the indictment in Gallo was returned the prosecution filed pleadings which resulted in the trial judge denying release on bail to all of the defendants. After the trial court issued its order, Frederick Graewe then

30/ 575 F.2d 3, 6-7 (1st Cir. 1978).

31/ Following a 12-week trial in United States v. Gallo, No. 82-119 (N.D. Ohio 1982), Angelo Lonardo, reputed underboss of the Cleveland Mafia family; Joseph Gallo, a capo in that family; and two murderers, Harmut Graewe and Kevin McTaggart, were all sentenced to life imprisonment without the possibility of parole as a result of their convictions for violating the continuing criminal enterprise statute, 21 U.S.C. § 848. These defendants also received the following concurrent sentences for related drug and travel offenses: McTaggart and Harmut Graewe -- 194 years; Gallo -- 138 years; Lonardo -- 103 years. The fifth defendant, Frederick Graewe, was sentenced to imprisonment for 42 years. See Department of Justice Narcotics Newsletter (April -- May, 1983) at 16-17 (hereinafter cited as "Narcotics Newsletter").

took an interlocutory appeal to the Sixth Circuit Court of Appeals where the government prevailed.

The procedures which were followed in the "no bond" hearing were not complicated. The prosecution initially filed a motion requesting that the court order all of the defendants to be held without bond, or, in the alternative, that bond for each defendant be set at $50 million (Appendix I). In support of this motion the government submitted the affidavit of the FBI case agent (Appendix II) to ensure that the record would support the trial judge's eventual decision. 32/ At the bail hearing the case agent briefly summarized the contents of his affidavit and was then subjected to defense cross-examination. 33/

32/ The agent's affidavit, which was similar to that used to support an application for electronic surveillance or a search warrant summarizing the pertinent results of the investigation, was proper since hearsay is admissible at a pretrial bail hearing. United States v. Wind, 527 F.2d 672 (6th Cir. 1975); United States v. Graewe, 689 F.2d 54, 55 n. 1 (6th Cir. 1982); 18 U.S.C. § 3146(f).

33/ This practice met the procedural due process requirements mandated by United States v. Gilbert, 425 F.2d at 491 (it is improper for the prosecution's position to be summarily adopted by the court). See also United States v. Wind, 527 F.2d at 674-675 (the defendant is entitled to cross-examine the government witnesses at a bail hearing); and United States v. Bigelow, 544 F.2d 904 (6th Cir. 1976) (a threatening letter to the President does not, in itself, justify a defendant being denied bond).

(C) Realistically High Bonds

(1) Legal Authority

The setting of "a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof" is specifically authorized by the Bail Reform Act of 1966. 34/ The factors which the court can consider include the nature and circumstances of the offense(s) charged, the defendant's financial resources, his record of convictions and of failures to appear at court proceedings, and the weight of the evidence against him. 35/ Because of the proclivity of defendants in drug cases to flee, these factors can justify multi-million-dollar bonds.

(a) General Propensity to Flee

The "no bond" motion in Graewe (Appendix I) alternatively sought a cash bond of $50 million by documenting the propensities of major drug traffickers to avoid prosecution by fleeing the jurisdiction and forfeiting bonds as a cost of doing business. To support the high bonds requested, the prosecution cited 13 separate cases in which district courts had set bail in amounts

34/ 18 U.S.C. § 3146(a)(4).

35/ 18 U.S.C. § 3146(b).

ranging from $2 million to $10 million in cash. [36/] The motion also recited a large number of cases in which traffickers had forfeited seemingly substantial bonds in their flight to avoid prosecution. [37/] This information, as well as the bail-related material contained in the Violent Crime Report, [38/] serves to illustrate the general pattern of escapist conduct engaged in by drug traffickers. In making its motion, however, the government must relate the Section 3146(b) factors set forth in the Bail Reform Act to the involved defendant(s) with particularity in order to justify a substantial bond.

Other sources of information can strengthen the prosecution's position. Appendix III consists of the testimony of the case agent in United States v. Mitchell [39/] and contains a discussion by an experienced DEA agent of the frequency with which drug traffickers post bond and flee. [40/] Also useful in this regard is the information provided by the defendant in completing Part II of Bail Reform Act Form No. 1. [41/] In

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36/ Appendix I at 5-6. Additionally, on December 15, 1983, in United States v. Rodriguez-Carvajah, No. 83-CR-554 (E.D.N.Y.), the court set bond at $20 million in cash for each of three alleged Colombian cocaine traffickers.

37/ Id. at 6-7.

38/ See supra note 4 and accompanying text.

39/ For additional information concerning this case, see infra note 65 and accompanying text.

40/ Appendix I at 12-13.

41/ See United States Attorneys' Manual § 9-6200, at 21.

documenting the common practice of drug dealers to abscond after posting bond, the government can ask the judge to take judicial notice of the district court records reflecting the forfeiture of bond in other drug cases. [42/] Reported cases also document this occurrence. For example, the Fourth Circuit has stated that "the fugitive rate...in the Fourth Circuit is the highest in the nation.... Large bonds are apparently often required of those accused of violating the narcotics laws." [43/]

(b) Arrestee's Expressed Intent to Flee

There is also legal authority indicating how particular factors can affect the eventual bond determination. For example, a trial court has given a defendant's prior statement expressing an intent not to appear great weight: "Perhaps more persuasive than any single other factor that could be brought to a court's attention would be the defendant's expressed intention to flee the particular proceedings then being conducted." [44/] Indeed, in

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42/ See e.g., United States v. DeMarchena, 330 F. Supp. 1223, 1226 (S.D. Cal. 1971).

43/ United States v. Wright, 483 F.2d 1068, 1070 n. 5 (4th Cir. 1973).

44/ United States v. Meinster, 481 F. Supp. 1117, 1125 (S.D. Fla. 1979), aff'd on other grounds sub nom. United States v. Phillips, 664 F.2d 971 (11th Cir. 1981), cert. denied, 457 U.S. 1136 (1982). See also 18 U.S.C. § 3143, (empowering a judge to require a defendant previously released on bond to give better surety if proof is received that the defendant is about to abscond); United States v. James, 674 F.2d 886, 889 (11th Cir. 1982).

United States v. Wind 45/ and United States v. Abrahams, 46/ the Sixth and First Circuits, respectively, have recognized a defendant's expressed intention to flee as being a basis for their being held without bond.

(c) Severity of the Charges

The severity of the offense charged is another important factor to be weighed. For example, a court has observed that a charge of operating a continuing criminal enterprise (CCE), in violation of Title 21, U.S. Code, Section 848, itself "suggest[s] [that] a very high bail is required." 47/

(d) Clear Evidence of Guilt

Similarly, the strength of the prosecution case, in and of itself, supports a high bond. 48/ In a CCE prosecution the court ordered the defendants held without bail, observing that "[t]here is a statutory presumption in pretrial bail proceedings that the likelihood of flight increases with the severity of the charges, the strength of the government's case, and the penalty which

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45/ 527 F.2d 672, 676 (6th Cir. 1975).

46/ 575 F.2d 3, 6-7 (1st Cir. 1978).

47/ United States v. Smith, 87 F.R.D. 693, 703 (E.D. Cal. 1980).

48/ United States v. Wright, 483 F.2d 1068, 1070 (4th Cir. 1973).

conviction would bring." 49/ Most of these factors are ordinarily applicable to individual defendants in drug trials. Additional information, such as prior convictions, lack of community ties, and a prior history of absconding will buttress the government position. 50/ With this type of evidence in a record, the First Circuit once affirmed a cash bond of $10 million. 51/

(2) Appellate Review

(a) No Appeal by Prosecution

The Bail Reform Act requires a judicial officer to set forth in writing the reasons for his bail decision. The Act also provides for expedited appellate review of this decision if the defendant is not satisfied with the conditions imposed for his release. However, the government has no statutory right to a similar appeal. 52/ Title 1 of S.1762, the "Comprehensive Crime Control Act of 1983," contains language authorizing such govern-

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49/ United States v. Meinster, 481 F. Supp. 1117, 1126 (S.D. Fla. 1979), aff'd on other grounds sub nom. United States v. Phillips, 664 F.2d 971 (11th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

50/ See, e.g., Appendix I at 7-9.

51/ United States v. Ariza-Ibarra, No. 78-8010 (1st Cir., decided March 2, 1978) [unreported opinion in pretrial bail appeal; subsequent conviction reversed on other grounds at 605 F.2d 1216 (1st Cir. 1979)].

52/ 18 U.S.C. §§ 3146(d) and 3147; Fed. R. App. Pro. 9(a).

ment appeals, and this bill has been favorably reported out of the Senate Judiciary Committee. Still, at this juncture the only avenue of redress now available to the government when it is dissatisfied with the bond which has been set is to persuade a federal district court judge who is presiding over the case to amend a prior determination by himself or other judicial officer previously assigned the case.

(b) Trial Court Can Raise Bond

(1) Previously Set by Magistrate

The district court is empowered to raise a bond previously set by a magistrate. This issue was the subject of an appeal in United States v. James. 53/ That case arose when, following James's indictment in the Northern District of Florida, he surrendered in the Southern District of Florida where he initially appeared before a magistrate. Although the warrant for James's arrest stated that bond was set at $20 million, the magistrate conducted a hearing and set a mixed property, corporate surety, and personal surety bond of $1 million. The government, during a later pretrial suppression hearing in the Northern District of Florida, orally requested reinstatement of the $20 million bond. The court responded by amending James's

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53/ 674 F.2d 886 (11th Cir. 1982).

bond to $2 million in cash and corporate surety.

James appealed this decision to the Eleventh Circuit, asserting that the "district court has no authority to increase a bond unless evidence is presented to show that the defendant has violated or is about to violate a condition of release." 54/ The court rejected this position noting that Title 18, U.S. Code, Section 3146(e), provides "by [its] express statutory language, the judicial officer who first sets the conditions of release may at any time amend his order to impose additional or different conditions of release." 55/ The court ruled that this language allowed the trial court to raise the bond initially set by a magistrate in another district. 56/ In reaching this decision,

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54/ Id. at 888.

55/ Id. at 889.

56/ The Court's decision was premised on the following reasoning:

> Here the judicial officer who ordered the release of James and Fernandez was not the district court for the Northern District of Florida, but a magistrate of the Southern District. Thus we are presented with the problem of whether the district court having original jurisdiction over the case may amend the conditions of a defendant's release on motion by the government even though that court is not the releasing officer under Section 3146(e).
>
> . . .
>
> Thus we hold that despite the fact that the district judge was not the releasing officer under Section 3146(e), he had authority as the court with original jurisdiction over the case to amend the conditions of appellants' release on motion by the prosecution.

(Footnote Continued)

the James court analogized the amendment of bonds provision of Section 3146(e) and the Section 3143 provision requiring better security when proof is made to a judicial officer that a defendant released on bond is about to abscond. 57/

In light of this authority it is evident that the trial court has virtually unfettered discretion to increase a prior magistrate's bond determination under the amendment provisions of Section 3146(e). Moreover, when the government can prove that a defendant who has been released on bond intends to abscond, the court must increase the amount of bond in accordance with Section 3143.

(2) During trial

The government can later seek an increase in surety even

(Footnote Continued)

Id. at 889-890 (footnotes deleted). Under the provisions of 28 U.S.C. § 636(b)(1)(A), a judge can also reconsider a pretrial matter first determined by a magistrate if "the magistrate's order is clearly erroneous or contrary to law." Id. at n. 8. Thus, the James ruling broadens this power.

57/ The court stated as follows:

> The "shall require" language of Section 3143 indicates that an increase in bail is mandatory upon the proper proof that the defendant is about to abscond. Section 3146, on the other hand, is permissive, and enables, but does not require, amendments to conditions of release at any time and for reasons other than the possibility the accused will abscond.

Id. at 889.

after the trial has commenced and bond has been set. In United States v. Zylstra, 58/ the Seventh Circuit Court of Appeals affirmed the trial judge's decision to reinstate a $1 million cash bond on the third day of trial. 59/ Zylstra delineated several factors which can justify a high bond, and recognized the authority of the trial court to increase bond during trial.

(c) Standard of Review

The standard of appellate review is abuse of discretion. 60/ Once the trial court has set bail, the appellate authorities will

58/ 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 403 (1983).

59/ The court's reasoning is reproduced as follows:

> It is a matter of common knowledge that the prosecution of big-time illegal drug trafficking is frequently hampered by threats to witnesses, prosecutors and even judges, which all too often are carried out. Traffic in illicit drugs is a matter of pressing national concern and the trial court was properly interested in seeing that at least one member of the "Company" hierarchy would be present in court during his entire trial. It was thus not unreasonable for the trial court to reinstate the original bond as it was evident that Zylstra would have more of a temptation to flee after having heard the wealth of evidence against him. After a review of the record, we hold that the trial court did not abuse its discretion in setting or reinstating Zylstra's $1,000,000 bond.

Id. at 1337-1338.

60/ United States v. Wright, 483 F.2d 1068, 1069 (4th Cir. 1973), citing United States v. Radford, 361 F.2d 777 (4th Cir.), cert. denied, 385 U.S. 877 (1966). See also Kaufman v. United States, 325 F.2d 305 (9th Cir. 1963).

not lightly disturb this decision. 61/ As Justice Powell has observed, "[d]ecisions of the District Court with respect to bail are entitled to 'great deference.'" 62/ Moreover, the Bail Reform Act provides that the trial court's order "shall be affirmed [on appeal] if it is supported by the proceedings below." 63/ Finally, a defendant's plea of guilty will waive a due process challenge to excessive bail. 64/

(3) Recommended Procedures

A possible solution to the bond problems prosecutors face is illustrated by the practices the government employed in United States v. Mitchell 65/ wherein the prosecution obtained the highest bonds ever set in the Seventh Circuit (viz., $5 million in cash). The Mitchell practices discussed below (with appended

61/ In affirming the $2 million cash bond in United States v. James, 674 F.2d at 891, the Eleventh Circuit ruled that the amount and type of bond "are within the sound discretion of the releasing authority, and we may review only for an abuse of that discretion."

62/ Mecom v. United States, 434 U.S. 1340, 1341 (1977) [as Circuit Justice], quoting Harris v. United States, 404 U.S. 1232 (1971).

63/ 18 U.S.C. § 3147(b).

64/ Lambert v. United States, 600 F.2d 476, 477-478 (5th Cir. 1979).

65/ No. 80-50032 (S.D. Ill.), aff'd sub nom. United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 403 (1983). Many of the appendices to this monograph are pleadings utilized in that prosecution.

pleadings) provide practical examples for prosecutorial actions concerning bond.

The prosecutors in Mitchell were concerned that difficulties with bond would be engendered due to the multi-state nature of the targeted criminal organization and the expectation that many defendants would be apprehended in federal jurisdictions other than than the Southern District of Illinois where the indictment was then returned. The prosecutors' concern was that if the defendants were apprehended in a distant state, the district court would conduct a removal hearing in accordance with Rule 40, Federal Rules of Criminal Procedure, federal prosecutors unfamiliar with the case would represent the government with the court then setting unrealistically low bonds, and the defendants would post the required bond and abscond. Therefore, the prosecutors took steps to ensure that bond would be determined when the indictment was returned. For that purpose they compiled an appropriate record justifying high bonds, thereby lessening the chances of an inadequate bond being set at the post-arrest removal hearing of the defendants.

On the day the Grand Jury returned the indictment the Mitchell prosecutors requested the Chief Judge of the Southern District of Illinois to fix bail as to all the defendants so that the amount could be endorsed on the arrest warrants under the provisions of Rule 9(b)(1) of the Federal Rules of Criminal

Procedure. [66] This was accomplished at an in camera, ex parte hearing wherein the government presented evidence in the form of testimony of the case agent and an exhibit consisting of the Grand Jury testimony of a cooperating witness which delineated the indicted defendants' proclivities for flight. [67]

Based upon this showing the Court determined that the bail amount for some defendants would be $5 million (the prosecution had recommended that bond for certain defendants be set at $20 million in cash). The government could have strengthened its position by having the Grand Jury recommend the amount of bail when it returned the indictment. [68] The transcript of this ex parte hearing before the court was prepared expeditiously before any arrests could be made and the indictment was unsealed so that it could be used in justifying the initial bond in accordance with Rule 40(f) of the Federal Rules of Criminal Procedure. [69] Although the magistrates presiding at the removal hearings in the other jurisdiction in Mitchell were not bound by the preliminary

66/ See, e.g., United States v. James, 674 F.2d 886, 888 and n. 4 (11th Cir. 1982) ($20 million bond endorsed on arrest warrant).

67/ A transcript of this pretrial hearing with exhibit is at Appendix III.

68/ See, e.g., United States v. DeMarchena, 330 F. Supp. 1223, 1224 (S.D. Cal. 1971). See generally, Carney, "Federal Grand Jury Practice Manual," Narcotic and Dangerous Drug Section Monograph (March, 1983) vol. I at 19-20, para. H. But see the concurring opinion of Justices Jackson and Frankfurter in Stack v. Boyle, 342 U.S. 1, 9-10 (1951) (it is improper for the Grand Jury to recommend the amount of bond).

69/ A transcript of this hearing is enclosed as Appendix III.

bail determination, no magistrate reduced the initial bail amount. Each defendant was later granted a bond hearing de novo when he appeared in the Southern District of Illinois under the provisions of Rule 46, but all of the initial bonds were retained. On appeal the $1 million cash bond of one defendant was upheld by the Seventh Circuit in United States v. Zylstra. [70] As a result, not a single Mitchell defendant (33 were eventually convicted) absconded after posting bond -- a satisfactory resolution which is conspicuously absent in most drug cases.

In addition to requesting that bond be set at the initial ex parte hearing, the government in Mitchell made two other motions relating to bond. The first was a "Nebbia motion" requesting a hearing to examine the source of any bond proffered by the defendants. [71] The second motion sought a restraining order to "freeze" certain assets which were subject to forfeiture under RICO [72] and CCE. [73] This restraining order contained, inter alia, a prohibition against allowing the enumerated assets to be used "to pay legal fees and bonds and court costs." [74]

70/ 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 403 (1983).

71/ This procedure is discussed infra Section II(D), and the motion is attached as Appendix IV.

72/ 18 U.S.C. § 1963(b).

73/ 21 U.S.C. § 848(d).

74/ P. 1, para. 1 of the restraining order at Appendix V (emphasis added). A discussion of such restraining orders is outside the scope of this monograph. For a good analysis of this (Footnote Continued)

There are also two civil actions that the prosecution can use to "freeze" a defendant's assets making this property unavailable for bond collateral. These devices are the Internal Revenue Service's special assessment procedures [75/] and civil forfeiture under the Controlled Substances Act. [76/] The IRS procedures can be employed quite expeditiously, [77/] and the government is normally entitled to a stay of discovery in a Section 881 civil forfeiture action when a concurrent criminal prosecution is pending. [78/]

(D) "Nebbia Motions"

After the amount of bond has been set, the government can seek a hearing to examine the source of any funds offered to

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(Footnote Continued)
issue, see Smith and Weiner, "Criminal Forfeitures under the RICO and Continuing Criminal Enterprise Statutes," (November, 1980), a Justice Department publication at 15-19. This motion for restraining order is reproduced at Appendix V.

75/ I.e., "jeopardy assessments," 26 U.S.C. § 6861, and "termination assessments," 26 U.S.C. § 6851. See generally, "Internal Revenue Service Termination and Jeopardy Assessments," Narcotics Newsletter (March, 1983) at 3-5. Cf., "Tax Levy Precludes Return of Money, District Court Rules," id. (Dec. 1982) at 5.

76/ 21 U.S.C. § 881.

77/ For example, in Bremson v. United States, 459 F. Supp. 121 (D. Mo. 1978), IRS agents who were notified by DEA of a pending drug charge were able to execute levies on seven bank accounts within five days of the defendant's arrest.

78/ See United States v. One 1967 Buick Hardtop Electra, 304 F. Supp. 1402 (W.D. Pa. 1969).

satisfy bond. The hearing helps ensure that the proceeds of illegal activity are not utilized by the defendant to purchase his freedom because the court is not required to accept tainted collateral. If the hearing establishes that the bond offered by the defendant is a proceed from illegal activity, the court can reject it. The government's request, which is supported by United States v. Nebbia [79/] and its progeny, is commonly referred to as a "Nebbia motion."

In Nebbia the defendant was indicted for conspiring to import large quantities of drugs into the United States, including what was then the largest quantity of heroin ever seized in America. [80/] When bond was set at $100,000, the defendant moved for reduction, stating that he did not have that much money. Several hours after his motion was denied his attorney presented a cashier's check for $100,000 to the court clerk. When the trial judge denied the government's request for a hearing to determine the source of the $100,000 on the grounds that he lacked authority to make such a ruling, an appeal was taken by the prosecution. The Second Circuit held that the district court had the power to make such an inquiry. In addressing this issue the Second Circuit stated:

> [T]he mere deposit of cash bail is not sufficient to deprive the court of the right to inquire into other factors which might bear

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79/ 357 F.2d 303 (2d Cir. 1966).

80/ Id. at 303-304.

on the question of the adequacy of the bail and stress the importance placed upon the ability of the surety to produce the defendant. 81/

The Nebbia doctrine was subsequently extended by another court when it required a surety company to disclose the source of proffered bond collateral. 82/ The court there concluded that "[n]othing in the Bail Reform Act of 1966 supports the contention

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81/ Id. at 304. The relief granted by the Second Circuit was as follows: "Mandamus may issue requiring Judge Sugarman to exercise his discretion whether to hold a hearing to determine the adequacy of the bail tendered on behalf of Nebbia, and whether it should be increased in amount or be accompanied by sureties." Id. at 305.

82/ In United States v. Melville, 309 F. Supp. 824 (S.D.N.Y. 1970), a surety company which proffered the $100,000 bond for an accused bomber of federal properties would not identify the "donors" who supplied two-thirds of its collateral for the bond. The District Court there stated:

> [W]here those sources [of bond] are questioned, the Court is entitled to have a moral as well as a financial assurance therefrom of the defendant's appearance in Court when required. [T]he function of bail is not to purchase freedom for for the defendant but to provide assurance of his reappearance after release on bail.
>
> * * *
>
> For this purpose it becomes appropriate to identify the sources of bail and ascertain their purpose and satisfy the Court that there is a nominal assurance for reappearance to be gained by acceptance of funds emanating from such sources.
>
> * * *

Id. at 826-827 (emphasis added).

that the court cannot inquire into the identity and purposes of bail." 83/ The court added that it would be appropriate for the "Nebbia hearing" to be conducted in camera with only the parties present if the defendant desires to preserve confidentiality. 84/

The "Nebbia motion" utilized in Mitchell (Appendix IV) illustrates how the authority cited above was adapted to a particular case. In Mitchell not a single defendant posted a cash bond after the government's "Nebbia motion" was granted.

(E) Trials In Absentia After the Defendant has Absconded

When a defendant flees and eludes apprehension for years, or even months, the prosecution's case frequently is weakened. Witnesses can become unavailable or forget details, prosecutors and law enforcement officers familiar with the case may leave

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83/ Id. at 828.

84/ See also United States v. DeMarchena, 330 F. Supp. 1223, 1225 (S.D. Cal. 1971), which demonstrates the applicability of the "Nebbia hearing" to drug cases. There a $50,000 bond for an accused marihuana smuggler was arranged through a bonding company by an unidentified woman who paid the company $55,000 in cash. The bondsman accepted the $55,000 in $10, $20, $50, and $100 bills contained in a "Hallmark" card box; extracted his premium of $5,000; and converted the remaining $50,000 into a cashier's check which was retained as surety. The court observed that it "knows nothing of the $55,000 in the Hallmark card box, except that it came from someone who cared enough to send the very best," and rejected the proffered bond. The court's ruling was "if the security comes from an illegitimate source, and is merely a 'business' expense for a dealer in contraband, there is a paucity of moral force compelling a defendant to reappear." Id. at 1226.

government service, and evidence, such as drug seizures and tape recordings, can be lost or physically deteriorate. Because a stale case can become a more difficult case, the public interest favors trial of the fugitive defendant in his absence. Although trials in absentia are probably limited to situations where one of multiple defendants absconds, their obvious advantage is that the government can proceed with its case against the remaining co-conspirators; little additional effort is required to prosecute the absent co-conspirator. Therefore, in multiple-defendant drug cases it would be appropriate for the prosecution to routinely request that, as a condition precedent to release on bail, the court require the defendants to execute a waiver of appearance form (Appendix VI) which is a consent to trial in absentia. The waiver is in a format suitable for local implementation and dissemination.

The authority for this condition of release is Title 18, United States Code, Section 3146(a)(5): "The judicial officer shall...impose any other condition deemed reasonably necessary to assure appearance as required" (emphasis supplied). To support the request for a waiver, the government can appropriately argue that this condition will destroy an important incentive for the defendants to abscond -- the disruption of the government's case--and thereby would help assure their presence at trial. Moreover, an equitable position favors this waiver: if the defendants do not intend to flee, they have no reason to object to executing this document and consenting to their trial in absentia.

(1) Trials Conducted in Absentia

Although a defendant has a constitutional right to be present at trial, he may waive this right by voluntarily and deliberately absenting himself from the trial without good cause. 85/ The Third Circuit Court of Appeals has found that a fugitive's voluntary absence was a waiver of both his constitutional and statutory rights to be present at the commencement of his trial. 86/ The court explained this waiver principle as

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85/ In United States v. Barton, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981), the defendant underwent elective surgery. His motion for postponement or severance was denied, and he was tried in absentia. The Second Circuit found that, under the circumstances, this was not an abuse of the trial court's discretion.

As the appellate court noted, the trial judge in Barton had looked to the surrounding circumstances to determine the voluntariness of the defendant's absence and then considered the fact that more than 100 witnesses were already scheduled, a panel of 250 veniremen had been arranged, and the judge was sitting by designation from another district. The trial court "[R]uled that Barton's interest in being present at his trial was outweighed by the burdens that a postponement or severance would impose on the court, the government, the witnesses, the codefendants, and the public." Id.

86/ Government of Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975). This holding represents the current state of federal law. See generally, 21 A.L.R. Fed. 906 (1974) (continuation of trial following voluntary absence of defendant); "In Absentia Trials Utilized in Florida," Narcotics Newsletter (August, 1981) at 7 (analysis of recent unreported cases in the Southern District of Florida). The Brown court found that, even though the language of Rule 43, Fed. R. Crim. Proc., seems to indicate that waiver of appearance is proper only after the trial has begun in the defendant's presence, the court found that:

(Footnote Continued)

follows:

> A defendant may waive his right to insist that his trial begin only in his presence. When a defendant has pleaded to the charges against him and knows that the trial of the charges is to begin on a day certain, the trial may start in his absence if he deliberately absents himself without some sound reason for remaining away. 87/

A finding of voluntary absence does not end the inquiry into the propriety, vel non, of a trial in absentia. The court must balance many factors in order to reach a decision to try a

(Footnote Continued)

> The commencement of a trial in the absence of a defendant might have special significance under Rule 43 if the defendant did not know when the trial was to begin.
>
> * * *
>
> [T]his is not the situation here. Brown was released on bail, one of the conditions of his release being that he appear at the start of his trial....Moreover, he was served with a subpoena notifying him of the date and precise time his trial was to commence.

507 F.2d at 189 (footnote omitted). See also, United States v. Tortora, 464 F.2d 1202 (2d Cir.), cert. denied sub nom. Santoro v. United States, 409 U.S. 1063 (1972).

87/ Government of Virgin Islands v. Brown, 507 F.2d at 189. See also United States v. Powell, 611 F.2d 41 (4th Cir. 1979), where the court determined that Rule 43 was drafted to reflect Illinois v. Allen, 397 U.S. 337 (1970) (remedies for unruly or disruptive defendants), and did not address the power of the court to proceed with a trial when the defendant had purposely absented himself before trial. Cf., United States v. Benavides, 596 F.2d 137 (5th Cir. 1979), where after the defendant absconded, the judge found him to be voluntarily absent and continued the trial in absentia. Two years later the defendant returned from Mexico and unsuccessfully appealed his conviction. The Fifth Circuit there noted that the Supreme Court's decision in Taylor v. United States, 414 U.S. 17 (1973), indicated that a defendant's voluntary absence could waive his right to be present at trial. The court went on to find that the circumstances there indicated a voluntary absence.

defendant in absentia. The Second Circuit in United States v. Tortora clearly stated how the trial court should do this: 88/

> Whether the trial will proceed will depend upon the trial judge's determination of a complex range of issues. He must weigh the likelihood that the trial could soon take place with the defendant present; the difficulty of rescheduling, particularly in multiple-defendant trials; the burden on the Government in having to undertake two trials, again particularly in multiple-defendant trials where the evidence against the defendants is often overlapping and more than one trial might keep the Government's witnesses in substantial jeopardy. 89/

The trial court must consider more than the defendant's voluntary absence in determining whether to authorize a trial in absentia. The Fifth Circuit, for example, has indicated that only a multiple-defendant case justifies a trial in absentia. 90/ That court has held that the permissible considerations include any hardships a continuance will cause to the jurors, witnesses, and the government. 91/ Thus, in seeking a trial in absentia, the prosecution should present evidence regarding hardships to jurors

88/ 464 F.2d 1201 (2d Cir.), cert. denied, 409 U.S. 1063 (1972) (footnote omitted).

89/ Id. at 1210. See also, United States v. Benavides, 596 F.2d at 139.

90/ United States v. Tortora, 464 F.2d at 1210 n. 7 ("It is difficult for us to conceive of any [appropriate] case...other than a multiple defendant case."); quoted with approval in United States v. Benavides, 596 F.2d at 139.

91/ Id. at 140.

and witnesses in order to show that the government's interests in proceeding with the trial outweigh the defendant's right to be present. 92/

(2) Effect of Absence Upon Appeal

The Supreme Court settled the issue of whether an appellate court should hear a fugitive's appeal in Molinaro v. New Jersey: 93/

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. 94/

92/ See also United States v. Reed, 639 F.2d 896, 903-904 (2d Cir. 1981); United States v. Pastor, 557 F.2d 930, 933-934 (2d Cir. 1977); United States v. Marotta, 518 F.2d 681, 683-684 (9th Cir. 1975). See also United States v. Ford, 632 F.2d 1354, 1378-1379 (9th Cir. 1980), cert. denied sub nom. Armstrong v. United States, 450 U.S. 934 (1981); United States v. Miller, 463 F.2d 600, 602-603 (1st Cir.), cert. denied, 409 U.S. 956 (1972).

93/ 396 U.S. 365 (1970). The Ninth Circuit has cited this holding with approval. United States v. Villegas-Codallos, 543 F.2d 1124 (9th Cir. 1976). Accord, United States v. Wood, 550 F.2d 435 (9th Cir. 1976); Johnson v. Laird, 432 F.2d 77 (9th Cir. 1970). See also, United States v. Estrada, 585 F.2d 742 (5th Cir. 1978) (There is no constitutional right to reinstatement of an appeal abandoned by escape).

94/ Id. at 366.

(3) Admissibility of Evidence of Flight

The courts have long recognized that when a defendant flees to avoid prosecution, evidence of his flight is admissible as tending to establish his guilt. In Allen v. United States, 95/ the Supreme Court held that flight evidence is admissible where instructions properly guide the jury. The Court there stated: "Indeed, the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." 96/

A leading opinion on this issue, United States v. Rowan, 97/ leaves no doubt that the admission of evidence of flight, and the giving of an approved jury instruction, is permissible. 98/ The court there approved an instruction patterned on the model found in Jury Instructions and Forms For Federal Criminal Cases. 99/

95/ 164 U.S. 492 (1896).

96/ Id. at 499 (citations omitted).

97/ 518 F.2d 685 (6th Cir. 1975), cert. denied, 423 U.S. 949 (1975).

98/ The jurors there were instructed that the evidence of flight was in itself not sufficient to establish guilt, but that they could take Jackson's departure into account and attach whatever significance they thought proper. The Sixth Circuit later endorsed this procedure. Id. at 691.

99/ 27 F.R.D. 39, 58-59 (1961). This provision reads as follows:

> The flight or concealment of a person immediately after the commission of a crime, or after

(Footnote Continued)

Accordingly, the proposed waiver of appearance authorizing

(Footnote Continued)
he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by the jury in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance if any to be attached to such a circumstance, are matters for determination by you, the jury.

Id. at 58-59 (Instruction 2.12, "Circumstantial Evidence -- Flight, Concealment").

This instruction is similar to the one found in Devitt & Blackmar, Federal Jury Practice and Instructions (3d Ed. 1977), Section 15.08, which provides:

> The intentional flight or concealment of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.
>
> In your consideration of the evidence of flight you should consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Let me suggest that a feeling of guilt does not necessarily reflect actual guilt.
>
> The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden of duty of calling any witnesses or producing any evidence.

See also, United States v. Craig, 522 F.2d 29, 32 (6th Cir.
(Footnote Continued)

trial in absentia, denial of appeal, and the admissibility of evidence of flight (Appendix VI) has a firm legal foundation.

Consideration of two contrasting scenarios illustrates the efficacy of this procedure. In both scenarios, the defendant absconds before trial, remains a fugitive for a decade, and returns after the witnesses against him have died and the original prosecutor has retired. In the first instance, the government has not tried the defendant in absentia, so the defendant is likely to elude justice. In the second instance, the defendant is tried in absentia, evidence of flight is introduced, the defendant is convicted, and his appeal is summarily dismissed. Under the latter set of circumstances, the eventual capture of the defendant generates only two minor questions: to which federal prison should the defendant be sent? 100/ and would the ends of justice be served by obtaining the requisite administrative approval 101/ to prosecute him for unlawful flight to avoid prosecution? Obviously, the second scenario better represents the public interest than the first and, to the extent that the defendant objects to this treatment, he is complaining of a uniquely self-inflicted wound.

(Footnote Continued)
1975); United States v. Hyson, 721 F.2d 856, 864 (1st Cir. 1983). Cf., United States v. Tortora, 464 F.2d at 1202 (the continued presence of the defendant's attorney at trial -- despite the absence of his client -- may negate any claim of prejudice arising from the trial in absentia).

100/ See infra Section V.

101/ See United States Attorney's Manual, §§ 9-2.112, 9-69.450.

(F) Bond during the Appellate Process

(1) Legal Authority

After conviction, the defendant bears the burden of establishing that if released he would neither flee nor be a danger to the community. Under this standard, the government can readily obtain denial of bond following conviction to ensure that the defendant does not flee during the pendency of his appeal. Regardless of the theory used to justify the incarceration of a defendant -- be it rehabilitation, deterrence, retribution, or incapacitation [102/] -- society's interests are advanced by the expeditious imprisonment of a convicted felon.

The provisions of the Bail Reform Act governing bond on appeal pose a stark contrast to their pretrial analogs. Rule 46c of the Federal Rules of Criminal Procedure provides:

> The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant. [103/]

102/ See generally A. Von Hirsh, Doing Justice: the Choice of Punishment, a Report of the Committee for the Study of Incarceration (1976).

103/ (Emphasis supplied). See also, 18 U.S.C. § 3148 which states:

> A person...who has been convicted of an offense and...has filed an appeal...shall be treated in accordance with the provisions of

(Footnote Continued)

A crucial factor which operates to limit the availability of bail on appeal is the likelihood of danger to the community. [104/] The court should assess the "danger to the community" factor "in terms of conduct that ca not be reasonably safeguarded against by an imposition of conditions upon the release." [105/] The court should deny bail only as a matter of last resort. [106/] Specifically, "the danger to the community posed by the defendant must be of such dimension that only his incarceration can protect against it." [107/] The burden of proof is placed upon the defendant in bail applications for bail pending appeal because, in the language of the Advisory Committee note to Rule 9(c), "the fact

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(Footnote Continued)

> Section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee, or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained.

104/ Id. Although it is also permissible for a court to deny bail on the grounds that the defendant's appeal is frivolous or dilatory, see 18 U.S.C. § 3148; United States v. Caron, 615 F.2d 920, 922 (1st Cir. 1980); In re July 1979 Term Special Grand Jury [sometimes cited as United States v. Donohoe], 656 F.2d 64 (4th Cir.), cert. denied, 454 U.S. 964 (1981), a discussion of that issue is outside the scope of this monograph.

105/ United States v. Jackson, 417 F.2d 1154, 1155 (D.C. Cir. 1969) (per curiam).

106/ 18 U.S.C. § 3148. See United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979). See generally, United States v. Seide, 492 F. Supp. 164 (C.D. Cal. 1980).

107/ United States v. Provenzano, 605 F.2d at 85. See also, Chambers v. Mississippi, 405 U.S. 1205, 1206 (1972).

of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal." These provisions have been applied in numerous drug and violent crime cases to justify denial of bail. 108/

This is typical of the results which have been achieved in numerous other cases. 109/

108/ For example in United States v. Maldonado, Cr. No. 82-196GG (D. P.R., June 22, 1983) the trial court denied appellate bond to two convicted extortionists, stating:

> In these circumstances, it would be a dereliction of duty for us to permit these defendants to remain at large and free to inflict further injury to the general community of Puerto Rico while their respective appeals are prosecuted. As stated by the court in United States v. Oliver, 683 F.2d 224, 236 (7th Cir. 1982), "We are simply not prepared to assume responsibility for the risk to the community that release would create."

The court then compiled a lengthy list of factors justifying its decision.

109/ See Mecom v. United States, 434 U.S. 1340 (1977) (denying application for reduction of bail because the offense involved a large-scale marihuana smuggling enterprise); Carbo v. United States, 82 S.Ct. 662 (1962) (denying bail pending appeal because of threats to prosecution witness); United States v. Oliver, 683 F.2d 224, 235 (7th Cir. 1982) (denying bail pending appeal by a felon convicted of the possession of firearms because "the nature of the offenses nevertheless encompasses a potential danger to human life"); United States v. Anderson, 670 F.2d 328, 330 (D.C. Cir. 1982) (per curiam) (denying bail pending appeal on grounds that defendant's prior record of drug offenses indicated that he was a danger to the community because "we find that society is endangered when courts release those individuals whose past conduct indicates that they are likely to possess, control, or distribute controlled substances," even though defendant always had appeared at trial, had strong family ties to the community, and suffered from diabetes); United States v. Hawkins, 617 F.2d (Footnote Continued)

(2) Evidentiary Requirements

The government has wide latitude in providing the factual

(Footnote Continued)
59 (5th Cir.), cert. denied, 449 U.S. 952 (1980) (denying bail pending appeal from a conviction for conspiracy to import drugs because defendant might continue trafficking activities); United States v. Warwar, 57 F.R.D. 645, aff'd on other grounds, 478 F.2d 1183 (1st Cir. 1973) (denying bail pending appeal from a conviction involving 1.1 pounds of cocaine because the offense reflected a large-scale operation); United States v. Baca, 444 F.2d 1291 (10th Cir.), cert. denied, 404 U.S. 979 (1971)(denying bond pending appeal because of defendant's threat against police officers); United States v. Blyther, 407 F.2d 1279 (D.C. Cir.), cert. denied, 394 U.S. 953 (1969)(affirming denial of bail pending appeal because defendant's record, and prior failure to comply with release requirements, indicated that he might pose a danger to the community if released); United States v. Alvarez, 548 F. Supp. 791 (S.D. Fla. 1982) (denying bail pending appeal because defendant would not stop his association with drug dealers, despite the fact that defendant had resided in that community for 14 years, had no record of prior criminal activity, and had never failed to appear during the trial); United States v. Rabena, 339 F. Supp. 1140 (E.D. Pa. 1972) (denying bail pending appeal by defendants who had "been associated with a vast network engaging in the illegal traffic of dangerous drugs" while adding that the effect on the community of the sale of dangerous drugs speaks for itself); United States v. Allen, 343 F. Supp. 549 (E.D. Pa. 1972)(denying bail pending sentencing for bank robbery); United States v. Bond, 329 F. Supp. 538 (E.D. Tenn. 1971) (denying bail pending appeal because defendant entered into periodic episodes of increasing mental tension and explosive antiauthority behavior); United States v. Sutton, 322 F. Supp. 1320 (S.D. Cal. 1971) (denying bail pending appeal because of threats to witness); United States v. Jackson, 297 F. Supp. 601 (D. Conn. 1969) (denying bail pending appeal from a kidnapping conviction); United States v. Tropiano, 296 F. Supp. 280 (D. Conn. 1969) (denial of bond pending sentencing for extortion because that crime involved the wrongful use of force, violence, or fear); United States v. Louie, 289 F. Supp. 850 (N.D. Cal. 1968) (denying bail pending appeal because the defendant had "consistently over a period of years operated as a confidence man"); United States v. Ursini, 276 F. Supp. 993, 998 (D. Conn. 1967) (denying bail pending appeal because a defendant had lunged at a witness, thereby displaying "at best an uncontrollable temper, at worst a depth of hostility and the venom to which other persons and the community should not be subjected").

predicate for a denial of appellate bond. In considering a "danger to the community" issue, the trial judge may take into account the nature and circumstances of the offense committed by the defendant; presentence report; any information regarding the defendant's prior criminal record; any pending criminal charges against the defendant; the defendant's demeanor at trial; and any other information indicative of the defendant's propensity to commit crime or otherwise endanger the community. 110/

110/ United States v. Provenzano, 605 F.2d 85, 94 (3d Cir. 1979); United States v. Erickson, 506 F. Supp. 83 (W.D. Okla. 1980); United States v. Rabena, 339 F. Supp. 1140 (E.D. Pa. 1972).

III

SENTENCE ENHANCEMENT

Because of the staggering profits made by traffickers in controlled substances, the disruption to our society fostered by the drug trade's indigenous climate of violence and corruption, and the inconsistent nature of federal narcotics penalties, enhancement of the putative maximum sentence which can be imposed in drug cases is often warranted. The purpose of this section is to set forth several alternative methods of escalating the maximum punishment in such prosecutions. 111/ This section will identify the unique penalty provisions of Title 21 112/ including

111/ The nature of basic sentences is discussed along with parole eligibility *infra* Section IV.

112/ The previously-discussed Controlled Substances Act and Controlled Substances Import and Export Act, which are codified in Title 21, are the basic federal statutes proscribing drug offenses. These two legislative enactments consolidated prior law:

> [T]hese different statutes were enacted because two different Committees in the House of Representatives had jurisdiction over the different Sub-chapters of the Act. The legislation was initially referred to the House Committee on Ways and Means and, following hearings, that Committee decided to consider only the portions relating to imports and exports of narcotic drugs, transferring the remaining provisions -- relating to domestic regulation and control -- to the Interstate and Foreign Commerce Committee.
>
> [T]he enacted legislation evidences a

(Footnote Continued)

the dangerous special drug offender escalation statute, the "double penalty" provisions for specified recidivists and

(Footnote Continued)
great deal of coordination between the two House Committees. For example, Subchapter II of the Act incorporates the basic standards of Subchapter I and makes numerous express references to the provisions of that Subchapter. The Subchapters also have parallel penalty structures imposing similar penalties on similar crimes, and these penalties represent a change from both the administration's proposal and prior law. Moreover, Congressman Boggs, the sponsor of the bill, stated when introducing a floor amendment to Title III [Subchapter II of the Act] that Section 1013 [now 21 U.S.C. § 963] -- relating to attempts and conspiracies -- will take effect at the same time as the comparable provisions of Title II [Subchapter I of the Act encompassing, inter alia, Section 846].

116 Cong. Rec. 33665 (1970); quoted in Albernaz v. United States, 450 U.S. 333, 341 n. 1 (1981). These two enactments are subchapters of the Comprehensive Drug Abuse Prevention and Control Act of 1970, a title frequently used to describe these two Title 21 criminal provisions. See., e.g., United States v. Gomberg, 715 F.2d 843 (3d Cir. 1983).

Because of this legislative history, these two statutes are commonly viewed as being parallel legislative enactments. However, there are significant inconsistencies between them. For example, 21 U.S.C. § 845(a) provides a sentence enchancement clause which applies when an adult distributes drugs to a minor, yet there is no analogous provision in the Controlled Substances Import and Export Act. In Albernaz v. United States, 450 U.S. 333, the Supreme Court discerned a sufficient distinction between these codal provisions to allow consecutive punishments for two conspiracy counts in violation of Title 21, Sections 846 (conspiracy to distribute) and 963 (conspiracy to import), based upon the same act. For a general discussion of the manner in which Congress escalated the punishment for distribution of over 1,000 pounds of marihuana to imprisonment for 15 years while leaving the penalty for importation of that amount at only five years, see Section III(B) which follows. Thus, it is an oversimplification to construe these enactments as being parallel.

defendants who distribute drugs to minors, the enhanced penalty for certain offenses involving over 1,000 pounds of marihuana, and the special parole term. This section also discusses the traditional enhancement mechanism of seeking consecutive sentences for multiple offenses.

Most of these sentence escalation devices have special pleading requirements which can be burdensome because their complexity is likely to create troublesome appellate issues. Still, the additional effort expended to ensure a greater maximum penalty can be a very cost-effective expenditure when the net result is increased incarceration for particularly deserving classes of offenders.

(A) Double Penalties

The sentence enhancement provisions of Title 21 allow the doubling of the maximum imposable penalties for distribution of controlled substances to minors and for certain offenses committed by recidivists. These two distinct types of penalty escalation clauses are addressed separately below.

(1) Distribution to Minors

An enhanced penalty for the distribution of drugs to minors by adults is specifically provided by Section 845(a) of Title 21, United States Code:

Distribution to persons under age twenty-one

> (a) Any person at least eighteen years of age who violates Section 841(a)(1) of this title by distributing a controlled substance to a person under twenty-one years of age is...punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by Section 841(b) of this title. 113/

As the age of the distributee is deemed to be an element of the offense, the prosecution must allege it in the indictment. 114/ Even though the age of the distributee is an element of the offense, mistake of fact as to the minor's age is not a defense. There is no case law addressing the mistake of fact defense as it pertains to Section 845(a), however, two general principles of law indicate that this defense does not apply in this situation.

First, as a matter of statutory construction, when a statute does not contain such phrases as "knowingly," "willfully," and "with intent to" indicating that fault is an element of the offense, strict liability is assumed. 115/ Under this standard Section 845(a) is a strict liability statute requiring no knowledge of the distributee's age. As no mental state exists

113/ This enhancement provision applies to wrongful distribution in violation of 21 U.S.C. § 841(a)(1) and to inchoate offenses denounced by 21 U.S.C. § 846.

114/ See United States v. Moore, 540 F.2d 1088, 1090 (D.C. Cir. 1976), wherein the omission of this element caused the court to vacate the affected count.

115/ W. La Fave and A. Scott, Criminal Law § 31, at 219 (1972).

which can be negated, defendant's mistake as to the minor's age is not a defense. 116/

Second, even assuming arguendo that Section 845 is not a strict liability statute, a defendant should be estopped from asserting a mistake of fact defense under the "lesser legal wrong" principle. Since a defendant who unknowingly sells drugs to a minor has intentionally committed the crime of wrongful distribution, which is illegal even if the distributee is an adult, the fact that the buyer is a minor is merely a factor in aggravation. The traditional legal view is that the defendant is not deserving of the usual ignorance defense because what he actually intended to do was a legal wrong. 117/

While mistake of fact is not a defense to a Section 845(a) proceeding, there may be cases where the prosecutor makes no objections to assertion of this defense for tactical reasons. The defendant may have to testify in his own defense in order to assert this defense. Prosecutors can exploit this because the defendant would probably be forced to admit that he is guilty of the crime of distribution in order to deny the aggravating element of knowledge of the minor distributee's age.

116/ Id., § 47, at 359.

117/ Id. at 360-361.

(2) Recidivists

Title 21 has numerous provisions which enhance the maximum sentence for defendants who have previously been convicted of federal drug offenses. The Controlled Substances Import and Export Act [118/] contains the following provision:

> Second or subsequent offenses
>
> (a) Any person convicted of any offense under this subchapter, is if the offense is a second or subsequent offense, punishable by a term of imprisonment twice that otherwise authorized, by twice the fine otherwise authorized, or by both.
>
> * * *
>
> (b) For purposes of this section, a person shall be considered convicted of a second or subsequent offense, if, prior to the commission of such offense, one or more convictions of him for a felony under any provision of this subchapter I of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant drugs, have become final. [119/]

The statute applies [120/] when drugs are distributed to minors as well as when inchoate offenses, such as conspiring to

118/ 21 U.S.C. § 962.

119/ This penalty clause applies to the unlawful importation offenses, offenses aboard vessels, and anticipatory offenses denounced by Sections 952, 955, and 963, respectively.

120/ The minor and recidivist enhancement provisions are jointly applicable to 21 U.S.C. § 841(a)(1) violations because 21 U.S.C. § 845(b) enhances the minors' clause by providing that the defendant with a prior conviction "for a second or subsequent offense involving the same controlled substance" (emphasis supplied) who distributes to a person under age 21 can receive triple the usual sentence.

distribute in violation of Title 21, United States Code, Section 846, are committed. However, it does not apply to the importation offenses.

The Controlled Substances Act contains analogous enhancement provisions for the following offenses:

[SEE CHART ON FOLLOWING PAGE]

RECIDIVIST PROVISIONS

	Section and Offense	Penalty Section
1.	§ 841 (a)(1): Possession with Intent Distribution Manufacturing § 841(a)(2): Counterfeit Substances	§§ 841(b)(1)(A) thru 841(b)(i)(B)(1)-(6)
2.	§ 842(a) & (b): Diversion	§ 842(c)(2)(B)
3.	§ 843(a): Diversion § 843(b): Communication Facility	§ 843(c)
4.	§ 846: Attempt Conspiracy	(same as substantive offense)
5.	§ 848: CCE	§ 848(a)(2)

These recidivist provisions are subject to precise procedural requirements. Section 851 of Title 21 mandates certain proceedings to establish prior convictions which apply with equal force to violations of the Controlled Substances Act 121/ and the Controlled Substances Import Act. 122/ Section 851(a)(1) requires the prosecution to file with the court (and provide the defense with a copy of) an information "stating in writing the previous convictions to be relied upon." This document must be filed before trial, a time which has been interpreted by one federal

121/ 21 U.S.C. § 851 (a).

122/ 21 U.S.C. § 962(c).

appellate court to be the day on which the trial court, during a bench trial, approved defendant's waiver of the jury. 123/ After conviction the trial court must ask the defendant if the information regarding prior convictions is incorrect, "and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." 124/ It is an error if the trial court fails to render this advice. 125/ The defendant can then either attack the accuracy of the information 126/ or the validity of the prior conviction. 127/ Following a hearing the court will make a determination and impose sentence.

There are two important limitations upon the use of prior convictions. First, the defendant is estopped from challenging the validity of a prior conviction "which occurred more than five years before the date of the information alleging such prior conviction." 128/ However, the filing of the prior conviction information tolls the running of this statute of

123/ United States v. Gill, 623 F.2d 540 (8th Cir. 1980), cert. denied, 449 U.S. 873 (1980).

124/ 21 U.S.C. § 851(b).

125/ United States v. Ramsey, 655 F.2d 398, 400 (D.C. Cir. 1981).

126/ 21 U.S.C. § 851(c)(1).

127/ Id. at § 851 (c)(2).

128/ Id. at § 851(e); United States v. Ramsey, 655 F.2d at 401.

limitations. [129] Thus, although this notice must be filed in a timely fashion before trial, the prosecution should be aware of the consequences of filing on a particular date.

Second, the prior conviction must have been a federal conviction -- state court convictions simply will not trigger this recidivist clause. [130] This prior federal conviction can be either a felony or a misdemeanor. [131] A conspiracy to violate the narcotics laws prosecuted under the general conspiracy statute, Section 371 of Title 18, which at one time was the only conspiracy offense available for drug offenders, can be used for enhancement. [132] Presumably, the prior conviction definition also includes a military court-martial proceeding. [133] Similarly, a prior conviction for RICO conspiracy in violation of Title 18, United States Code, Section 1962(d), based upon predicate acts involving a drug distribution operation or for interstate travel in aid of racketeering (ITAR), as denounced by Title 18, Section 1952(a), United States Code, when the defendant's trip between states was to transport illicit drugs, should suffice to invoke this provision. [134] However, a prior conviction under the Youth Corrections Act (Title 18, U.S. Code, Sections 5005 et seq.), which has been expunged from the defendant's records, cannot be used to escalate punishment pursuant to this provision. [135]

129/ United States v. Cevallos, 574 F.2d 854 (5th Cir. 1978).

130/ United States v. Johnson, 506 F.2d 305 (7th Cir. 1974), cert denied, 420 U.S. 1005 (1975).

131/ Cf., Rodriguez Salgado v. United States, 277 F.2d 653 (1st Cir. 1960).

132/ United States v. Buia, 236 F.2d 548 (2nd Cir. 1956).

133/ Cf., Rodriguez-Salgado v. United States, 277 F.2d 653 (1st Cir. 1960) (convictions before the statutory tribunals of Puerto Rico satisfy the prior federal offense requirement).

134/ Id.

135/ Cf., United States v. Fryer, 402 F. Supp. 831 (N.D. Ohio 1975), aff'd 545 F.2d 11 (6th Cir. 1976) (ruling that a YCA expunged conviction will not satisfy the prior conviction element of a firearms offense).

(B) Over 1,000 Pounds of Marihuana

(1) Background

With the enactment of the Title 21 drug offenses in 1970, the maximum penalty for offenses involving marihuana was set at imprisonment for five years, a fine of $15,000, and a minimum two year special parole term. 136/ Because this exposure of only five years of imprisonment was later perceived as being inadequate to deter major traffickers who derived multi-million dollar incomes for their illicit activities, Congress, in 1980, amended Title 21, United States Code, Section 841, to provide for an increased punishment of imprisonment for 15 years and a fine of $125,000 for distribution of over 1,000 pounds of marihuana. 137/

136/ The punishment for the distribution offenses in violation of 21 U.S.C. § 841(a)(1) is set forth at 21 U.S.C. § 841(b)(1)(B)(1) through (6), and for the importation offenses in violation of 21 U.S.C. §§ 952, 953, 955, 957, and 959 is set forth at 21 U.S.C. § 960(b)(2).

137/ This amendment, which has been codified as 21 U.S.C. § 841(b)(1)(B)(6), was originally enacted as a rider to the Infant Formula Act of 1980, Pub. L. 96-359, which became effective on September 26, 1980. See 94 Stat. 1194 and 1980 U.S. Code Cong. and Adm. News at 2858. The Department of Justice was never asked to comment upon this legislative proposal, and there is no other legislative history. This ad hoc approach to criminal legislation can generate inconsistent results such as those criticized by Senator John L. McClellan when he introduced the Organized Crime Control Act of 1970: "(L)ittle attention at all has been given to the penalty structure of most penal codes since the turn of the century. Penalties vary from one offense to the next without seeming rhyme or reason. Inconsistencies abound throughout." 115 Cong. Rec. 5882 (March 11, 1969).

(FOOTNOTE CONTINUED)

Although Congress apparently intended to deter marihuana smugglers with this enhanced sentence, the amendment addressed only the Section 841(a)(1) distribution offense provision while leaving the penalty structure for the importation offenses unchanged. Thus, although smuggling is arguably a more serious offense than ordinary dealing, the penalty for distributing over 1,000 pounds of marihuana is imprisonment for 15 years while the importing counterpart is only five years. Even though many instances of importing can also be charged as possession with intent to distribute, this disparate penalty structure can create inconsistencies in sentences for similarly situated criminals.

(2) The Enhanced Sentence Provision

With regard to this new marihuana penalty, two questions are immediately raised: 1) Is a special parole term 138/ included in this enhanced sentence? and 2) How is this enhanced sentence rendered operative? These matters, addressed separately below, were spawned by the following penalty provisions of Title 21, United States Code, Section 841(b), pertaining to marihuana:

(FOOTNOTE CONTINUED)
Because the penalty for conspiracy to distribute marihuana is the same fine or term of imprisonment as provided for the substantive offense, the sentence for a violation of 21 U.S.C. § 846 was also increased by this amendment.

138/ See infra Section III(D).

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

*　*　*

(1)(B) In the case of a controlled substance in Schedule I or II which is not a narcotic drug...such person shall, <u>except as provided in paragraphs</u> (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000 or both.

*　*　*

Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

*　*　*

(1)(B)(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000 (emphasis supplied).

Inartful drafting of this amended provision created these questions.

(a) <u>Special Parole Term</u>

The special parole term -- which is provided for by paragraph (b)(1)(B) for lesser quantities of marihuana -- may also be

available as a sentencing option for defendants receiving enhanced penalties under paragraph (b)(1)(B)(6). Prosecutors may argue that the paragraph(b)(1)(B) language requiring a special parole term to be imposed in conjunction with a prison term remains in effect even when paragraph (b)(1)(B)(6) modifies the penalty by escalating the fine and prison term for offenses involving over 1,000 pounds of marihuana. 139/

139/ The noted absence of a legislative history for the 1,000 pound escalation provision can be expected to generate an argument that a special parole term cannot be imposed in conjunction with this enhanced sentence. Defendants so situated might argue that a special parole term cannot be imposed unless it is specifically listed in the operative provision. They therefore could note that the other paragraphs of this Section -- except for subsection (4) which applies to small amounts of marihuana -- specifically enumerate the special parole term as a sentencing option.

This position can be buttressed by consideration of an earlier amendment to subsection (5) which increased the penalty for distribution of phencyclidine. This substance, commonly known as PCP, is defined in 21 U.S.C. § 830(c)(2). The current penalty of imprisonment for ten years and a fine of $25,000, as set forth at 21 U.S.C. § 841(b)(5), was added by the Psychotropic Substances Act of 1978 (Public Law 95-633), which made PCP a Schedule II substance. It increased the former penalty of imprisonment for five years and a fine of $15,000 effective November 10, 1978. PCP was originally classified as a Schedule II substance before this amendment. <u>See</u> 21 U.S.C. § 812(c) at Schedule III, para. (b)(7). The special parole term provided for PCP, which remained a minimum period of two years, was specified in both versions of the statute. Thus, it could be argued that Congress intentionally omitted any reference to a special parole term in the 1,000 pound amendment. One construction of <u>Bifulco v. United States</u> (see <u>infra</u> text accompanying note 211), to argue that the special parole term can be imposed only when it is specifically described in the penalty provision of the statute, would reinforce this contention. However, no appellate court has yet addressed this issue.

(b) Triggering this Sentence

In addressing the issue of how this sentence enhancement provision is rendered operative, several questions are presented. For example:

(1) Does the amount of marihuana (viz., over 1,000 pounds) become an element of the offense?

(2) Must the judge make special findings to invoke this sanction?

(3) Is a special verdict by the jury required?

These questions are troublesome because of the absence of cases construing the current version of this statute.

Because this enhancement factor is triggered by a determination that the offense involved over 1,000 pounds of marihuana, the trial court must know the quantity of this illicit substance involved. This factual finding would be automatically revealed by a general verdict of guilty when the amount alleged in the indictment exceeds 1,000 pounds. 140/ In any event, it has long been recognized that the quantity of marihuana is not an element

140/ A general verdict of guilty should ordinarily be construed as if it had used the words "guilty as charged in the indictment." See St. Clair v. United States, 154 U.S. 134 (1894); Williams v. United States, 238 F.2d 215 (5th Cir. 1956), cert. denied, 352 U.S. 1024 (1957). Indeed, under a sentencing provision which provided that a conspiracy to violate 50 U.S.C. § 32(a) would be enhanced if the offense took place during time of war, it was held that the greater sentence was triggered under the St. Clair ruling because the indictment charged that the conspiracy occurred during wartime. United States v. Sobell, 314 F.2d 314 (2d Cir.), cert. denied, 374 U.S. 857 (1963).

of the offense. 141/ However, a due process problem might arise if the indictment alleged over 1,000 pounds of marihuana and the jury found the defendant guilty even though the evidence at trial showing that amount were to be disputed. 142/ On the other hand, failure to allege the amount might create a notice problem.

141/ The quantity of marihuana in a 21 U.S.C. § 841(a) offense has been held not to be an element of the crime in a number of cases decided prior to the instant amendment. See, e.g., United States v. Woods, 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972 (1978); United States v. Sims, 529 F.2d 10 (8th Cir. 1976); United States v. Jeffers, 524 F.2d 253 (7th Cir. 1975), aff'd on other grounds, 432 U.S. 137, 151-152 (1977); United States v. Oates, 445 F. Supp. 351 (E.D.N.Y.), aff'd, 591 F.2d 1332 (2d Cir. 1978).

142/ A proponent of the opposite view could be expected to argue that, these cases notwithstanding, the traditional American rule is that facts justifying enhanced sentences become elements of the offense:

> The prosecution has the burden of proving the aggravated-punishment facts, which may be considered to be, in a sense, elements of a principal crime. Thus, when the prosecution seeks, in connection with defendant's conviction of the crime charged, to impose [an enhanced sentence] the prosecution must produce evidence of the facts..., and then persuade the fact finder of these matters beyond a resonable doubt.

W. La Fave and A. Scott, Criminal Law at 46 (1972) (footnotes omitted).

This argument would also note that, in construing the minors' clause (see supra Section III(A)(1)) another sentence enhancement feature of Title 21 which doubles the penal term of defendants who distribute drugs to children, the D.C. Circuit Court of Appeals held that the age of the distributee is an element of the offense which must be alleged in the indictment to trigger an escalated sentence. United States v. Moore, 540 F.2d 1088, 1090 (D.C. Cir. 1976). Moore's analysis of when enhancement features become elements of the offense supports the conclusion that the amount of marihuana becomes an element of the offense in excess of 1,000 pound prosecutions and, as such,

(FOOTNOTE CONTINUED)

In drafting the indictment, prosecutors can avoid this issue by simply alleging the amount as "2 tons of marihuana, an amount in excess of 1,000 pounds." Pleading the statutory provisions as "in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(6)" should be sufficient to notify the defendant of the enhanced sentence he faces if convicted. Although the Fifth Circuit has ruled that such precision is not required, it is desirable. 143/ In the only reported case construing the

(FOOTNOTE CONTINUED)
must be alleged in the indictment. However, even if the amount of marihuana is an element of the offense, a failure of the prosecution to prove the requisite facts in aggravation would not prevent a properly instructed jury from finding the defendant guilty of the lesser included offense of ordinary (unenhanced) distribution. See Jeffers v. United States, 432 U.S. 137 (1977), wherein the plurality concluded that a drug conspiracy in violation of 21 U.S.C. § 846 was a lesser included offense of CCE absent certain aggravating factors such as supervision of five subordinates. However, "[t]he Circuits differ about what determines the lesser included offense," so this concept is subject to many uncertainties. "Project: Criminal Procedure," 71 Georgetown L.J. 570 (Dec. 1982). Under this theory, the court in United States v. Moore, 540 F.2d 1088, applied too drastic a remedy in setting aside the conviction, because of the failure of the prosecution to plead the aggravating facts, when it could have simply affirmed the lesser (unenhanced) offense.

A critic could further argue that it is improper for the trial court to determine the amount of marihuana in question if the quantity is an element of the offense. In United States v. Ogull, 149 F. Supp. 272, 275 (S.D.N.Y. 1957), aff'd sub nom. United States v. Gernie, 252 F.2d 664 (2d Cir.), cert. denied, 356 U.S. 968 (1958), the court ruled that the trial judge could not determine if the conspiracy continued past a date which triggered a greater penal exposure because the duration of membership was deemed a question of fact so a judicial determination "would probably amount to a denial of the defendant's constitutional rights to be tried by jury and to due process of law." An analogous situation would arguably occur if the court were to find that over 1,000 pounds was involved if that amount were to be disputed.

143/ United States v. Vaglica, 720 F.2d 388, 391 (5th Cir. 1983) (failure to allege Section (B)(6) in indictment not grounds for reversal of conviction unless the defendant is prejudicially misled).

1,000 pound escalation provision, 144/ the Fifth Circuit relied upon Rule 7(c)(3) of the Federal Rules of Criminal Procedure to reject the defendant's argument on appeal that he had been improperly sentenced under this escalation provision. There, the indictment had charged the amount as "a quantity exceeding 1,000 pounds of marihuana," but merely cited the applicable statute as Title 21, United States Code, Section 841(a)(1), without referring to the 1,000 pound escalation clause of paragraph (b)(6). Despite this authority, the safer practice would be for prosecutors to describe the amount in terms of "over 1,000 pounds" and to cite the paragraph (b)(6) sentence escalation provision when drafting the charges, and to file a statement of intention to seek an enhanced sentence to irrefutably document the fact that the defendant has been given adequate notice.

Because of these possible defense arguments, the prosecution should be concerned with negating any appellate issues. A prophylactic measure whenever the amount of marihuana is in dispute would be for the prosecution to request that the jury return a special verdict stating the quantity. 145/ Although the use of special verdicts is usually not favored in criminal

144/ Id.

145/ Unlike the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure make no express provisions for the utilization of either special verdicts or interrogatories except for special findings by the judge in cases tried without a jury. Comp. Fed. R. Civ. Pro. 49(a) with Fed. R. Crim. Pro. 23(c). However, Fed. R. Crim. Pro. 57(b) authorizes the trial court to utilize any procedure not proscribed by law.

law, 146/ the Third Circuit Court of Appeals has endorsed their use where the offense requires the finding of an overt act, or in complex conspiracy cases where it would be helpful to specify each defendant's involvement, or in RICO prosecutions to determine which defendants committed each racketeering act. 147/ If employed in a similar manner in the sentence enhancement context a special verdict could reduce the chances of reversal by conclusively establishing the amount of marihuana in question. Another preventive measure may be special jury instructions.

(C) Consecutive Sentences

If the indictment alleges multiple violations of Title 21, it may be permissible for the trial court to impose consecutive

146/ United States v. Wilson, 629 F.2d 439, 442-444, and n. 7 (6th Cir. 1980). Accord, United States v. Griffin, 705 F.2d 434 (11th Cir. 1983); United States v. Desmond, 670 F.2d 414 (3d Cir. 1982); United States v. Frezzo Brothers, Inc., 602 F.2d 1123 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Shelton, 588 F.2d 1242 (9th Cir. 1978), cert. denied, 442 U.S. 909 (1979); United States v. Jackson, 542 F.2d 403 (7th Cir. 1976); United States v. Adcock, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971); United States v. James, 432 F.2d 303 (5th Cir. 1970), cert. denied, 403 U.S. 906 (1971); United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

147/ United States v. Boffa, 688 F.2d 919 (3d Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1272 (1983); United States v. Desmond, 670 F.2d 414; United States v. Uzzolino, 651 F.2d 207, 214 (3d Cir.), cert. denied, 454 U.S. 865 (1981); United States v. Palmeri, 630 F.2d 192, 202 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981); United States v. Frezzo Brothers, Inc., 602 F.2d at 1129-1130. See also United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Tarnopol, 561 F.2d 466, 473-474 (3d Cir. 1977).

sentences for each offense. The propriety of consecutive sentences depends upon whether the offenses are separate or multiplicious. Multiplicity is determined by assessing the elements of the offense and the legislative intent; the results vary with the particular combination of offenses in question.

The traditional test employed by the courts in determining multiplicity was set forth in Blockburger v. United States 148/ as follows:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. 149/

The Supreme Court recognized the continued viability of the Blockburger test in Brown v. Ohio, 150/ stating:

> [upon] proof [of a fact] that the other [offense] does not [require], the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. 151/

148/ 284 U.S. 299 (1932).

149/ Id. at 304.

150/ 432 U.S. 161 (1977).

151/ Id. at 166.

The Supreme Court later reaffirmed the Blockburger "rule of statutory construction" in Whalen v. United States 152/ by stating that it is to be used "to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively." 153/

The First Circuit Court of Appeals, in holding that consecutive sentences can properly be imposed for multiple individual drug offenses, has stated:

> Congress may treat different aspects of the same conduct as separate crimes when there is a meaningful distinction between the elements constituting each offense. 154/

Although this principle seems clear, it has resulted in disparate holdings when applied as a touchstone to assess the alleged multiplicity of various combinations of Title 21 and other offenses. The paragraphs which follow explain how the rule of multiplicity has affected various drug offenses.

152/ 445 U.S. 684 (1980).

153/ Id. at 691.

154/ United States v. Cruz Pagan, 537 F.2d 554, 559 (1st Cir. 1976). Accord, United States v. Rivera Diaz, 538 F.2d 461 (1st Cir. 1976).

(1) Conspiracy

(a) In General

Courts have generally determined Title 21 conspiracy offenses not to be multiplicious. In Albernaz v. United States, 155/ the Supreme Court ruled that conspiracy to import marihuana 156/ and conspiracy to distribute the same marihuana, 157/ although arising from one agreement, constitute two distinct offenses which thereby authorize cumulative punishments. The basis for the holding was the presence of separate conspiracy provisions in Title 21 coupled with the intent of Congress that the act be construed in favor of strong penalties. Thus, consecutive sentences can be imposed for both Title 21 conspiracy offenses even if the crimes are based upon the same misconduct. It must be remembered, however, that cumulative punishments must arise in the context of a single trial; if these charges were raised in successive prosecutions a double jeopardy defense would be present. 158/

Despite Albernaz, this dual statute principle is subject to

155/ 450 U.S. 333 (1981).

156/ 21 U.S.C. § 963.

157/ 21 U.S.C. § 846.

158/ United States v. Phillips, 664 F.2d 971 (11th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), at 1007 n. 52 and accompanying text.

the limitation that "the government may not split a single narcotics conspiracy to distribute different drugs for purposes of a separate conspiracy prosecution for each drug." 159/ In essence, the rule is that a single agreement can generate multiple charges when based upon violations of different conspiracy statutes, but that "a single continuing agreement, no matter how diverse its objects, may not give rise to multiple prosecutions where such an agreement violates but a single statute." 160/ In short, in indictments, an agreement to traffic in various controlled substances should be alleged as a single conspiracy count with multiple objectives because of this merger problem. 161/

(b) RICO/CCE and Their Predicate Offenses

The courts have given the two "enterprise" statutes contrasting treatment vis-a-vis their relationship with the Title 21 conspiracy offenses. The Supreme Court held in United States v. Jeffers 162/ that conspiracy to distribute marihuana in violation of Title 21, United States Code, Section 846, is a lesser

159/ Id. at 1007, citing, United States v. Marable, 578 F.2d 151 (5th Cir. 1978).

160/ Id. at 1007 n. 51.

161/ United States v. Gomberg, 715 F.2d 843 (3d Cir. 1983).

162/ 432 U.S. 137, 151-152 (1977)(plurality opinion). However, the plurality indicated that its ruling was not dispositive of this issue. Id. at 153 n. 20.

included offense of engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. 163/ In light of this ruling, one can readily infer that a Section 963 conspiracy to import offense is also encompassed by Section 848.

163/ The Third Circuit in United States v. Gomberg, 715 F.2d at 850 n. 3 (3d Cir. 1983), narrowly construed the Jeffers decision, stating:

> Because of the diverse views espoused by the justices, Jeffers holds only that a defendant found guilty of both a Section 846 conspiracy and a continuing criminal enterprise may not be fined in excess of the maximum authorized by Section 848.
>
> * * *
>
> Jeffers has often been cited inaccurately as holding that a conspiracy is a lesser included offense of a continuing criminal enterprise. See, e.g., United States v. Barnes, 604 F.2d 121, 156 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). Some cases have even construed this purported holding as requiring that a conviction and sentence under Section 846 must be set aside when the defendant is also found guilty at the same trial of violating Section 848. See United States v. Smith, 690 F.2d 748, 750 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3685 (U.S. March 21, 1983); United States v. Lurz, 666 F.2d 69 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); United States v. Johnson, 575 F.2d 1347, 1354 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). In these three cases, the government conceded that this interpretation of Jeffers was correct.

Despite this narrow construction, Jeffers is generally accepted as standing for the proposition stated in the text. However, because Jeffers was a plurality opinion it could be argued that Section 846 is not necessarily a lesser included offense of Section 848. However, the government appears to be reluctant to attack Jeffers on this basis.

Therefore, if the conspiracy offense and the CCE charge arise from the same agreement, the conspiracy is subsumed within the CCE conviction making consecutive sentences impermissible. 164/

Although the Title 21 conspiracy charges are thus lesser included offenses of Section 848, a RICO conspiracy 165/ is not. 166/ The judiciary has recognized that charging conspiracy to commit a substantive drug violation and a violation of RICO as separate counts does not constitute multiplicity. 167/ Indeed, conspiracy to commit any of the substantive offenses defined as

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164/ Under these circumstances a prior prosecution under either statute would create a double jeopardy defense to a subsequent prosecution for the other offense unless the government has evidence of a separate conspiracy. United States v. Phillips, 664 F.2d at 1008; United States v. Chagra, 653 F.2d 26, 27 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); United States v. Stricklin, 591 F.2d 1112, 1123 (5th Cir. 1979), cert. denied, 444 U.S. 963 (1979). The judiciary has usually addressed this issue in the context of the same agreement giving rise to both the Section 846 and Section 848 prosecutions. A related issue (which is outside the scope of this monograph) would be presented in a CCE prosecution for the distribution of numerous shipments of marihuana in conjunction with a Section 846 sterile conspiracy to distribute a single load of marihuana which aborted. In this situation is the Section 846 conspiracy a CCE predicate offense? According to United States v. Middleton, 673 F.2d 31 (1st Cir. 1982), the answer is yes. See generally, "Criminal Prosecution under the Continuing Criminal Enterprise Statute, 21 U.S.C. § 848," a Narcotics Section Monograph (October 1982) at 6-8. Jeffers did not resolve the question of whether concurrent sentences would be required in a Middleton prosecution. This situation illustrates the complexity of the CCE/conspiracy multiplicity issue.

165/ 18 U.S.C. § 1962(d).

166/ United States v. Phillips, 664 F.2d at 1010-1013. See also, United States v. Sinito, No. 82-3712, (6th Cir. decided Dec. 23, 1983).

167/ United States v. Solano, 605 F.2d 1141, 1145 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).

"racketeering activity" 168/ can be alleged as a RICO predicate act. 169/

(c) With Substantive Offenses

Conspiring to commit a particular offense and the subsequently consummated crime are normally separate violations which justify multiple punishments. 170/ Similarly, it is generally recognized that a RICO sentence can be imposed consecutively to punishments for its substantive predicate crimes. 171/

The courts have not completely resolved the question of whether a CCE sentence is multiplicious with the punishment imposed for substantive crimes alleged as its predicate offenses. The confusion surrounding this issue began when the circuit courts of appeal began to interpret the Supreme Court's plurality ruling in Jeffers to mean that conspiracy to distribute marihuana is a lesser included offense of CCE. Because the courts had characterized Title 21, United States Code, Section 848, as

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168/ 18 U.S.C. § 1961(d).

169/ United States v. Phillips, 664 F.2d at 1015; United States v. Weisman, 624 F.2d 1118, 1123-1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980).

170/ United States v. Ocanas, 628 F.2d 353, 361-362 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981), citing Ianelli v. United States, 420 U.S. 770, 777-778 (1975); United States v. Cardi, 519 F.2d 309, 315 (7th Cir. 1975).

171/ United States v. Phillips, 664 F.2d at 1009 n. 56 and accompanying text.

a hybrid statute which added various elements to a Section 846 conspiracy, conspiring to distribute was deemed to be a lesser included offense of CCE.

The courts initially construed Jeffers as requiring the merger of CCE with only the conspiracy offenses for sentencing purposes, allowing the imposition of cumulative punishments for Section 848 with substantive crimes. 172/ However, one commentator has construed the Jeffers holding as ruling "[t]hat Congress did not intend to permit cumulative punishments for Section 848 violations and the underlying offenses." 173/ Several appellate courts have adopted this construction of Jeffers beginning with the Fifth Circuit in United States v. Chagra. 174/

The recent decision of the Seventh Circuit in United States v. Jefferson 175/ explains the reason for the ruling that CCE and its predicate offenses merge for sentencing:

> In light of the development of Section 848 as the applicable sentencing structure for professional criminals, as well as express Congressional desire for a carefully structured penalty scheme, we conclude that Congress intended Section 848 to serve as a comprehensive and exclusive penalty structure for persons professionally involved in criminal drug enterprises. Given the absence of a maximum available prison sentence under Section 848, there is in fact no need for cumulative sentences to be imposed on the predicate offense. See United States v. Chagra, 669 F.2d 241, 262 (5th Cir.) cert denied, __ U.S. __, 103 S.Ct. 102 (1982). We therefore hold that cumulative sentences may not be imposed upon the predicate substantive offenses of a Section 848 conviction. In the instant case the imposition of cumulative sentences on Counts 3, 5, 7 and 10 violated defendant's rights under the Double Jeopardy Clause. Those sentences will be vacated. 176/

Dorothy Jefferson had received a ten year sentence on the CCE count, as well as a consecutive 20 year term for various substantive counts involving distribution of controlled substances 177/ and using a communication facility to facilitate distribution. 178/ The judge expressly stated that he intended for the defendant to receive a sentence total of 30 years, but noted that he imposed these consecutive penalties rather than a longer CCE sentence because he did not want the entire sentence to be without possibility of parole. 179/ In reaching its decision, the Seventh Circuit referred to the Supreme Court's prior construction of Section 848 in Jeffers v.

172/ For an analysis of the leading CCE cases discussing this issue, see "Project: Criminal Procedure," 71 Georgetown L.J. 572-573 n. 1597 (Dec. 1982). See also, United States v. Samuelson, 697 F.2d 255, 260 (8th Cir. 1983).

173/ "Project: Criminal Procedure," 71 Georgetown L.J. 572 (Dec. 1982).

174/ 669 F.2d 241, 262 (5th Cir.), cert. denied, __ U.S. __, 103 S.Ct. 102 (1982).

175/ 714 F.2d 689 (7th Cir. 1983).

176/ Id. at 703.

177/ 21 U.S.C. § 841(a)(1).

178/ 21 U.S.C. § 843(b).

179/ The penalty provision of 21 U.S.C. § 848 provides for imprisonment without parole for terms of between ten years and life.

United States 180/ stating that CCE, "reflects a comprehensive penalty structure that leaves little opportunity for pyramiding of penalties from other sections of the Comprehensive Drug Abuse Prevention and Control Act of 1970." 181/

The Third Circuit in United States v. Gomberg 182/ has interpreted Jeffers in the same manner as the Seventh Circuit did in Jefferson. The Fourth Circuit's recent decision in United States v. Raimundo 183/ to the same effect suggests a growing trend. Although the Supreme Court did appear to rule in Jeffers

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180/ 432 U.S. at 155.

181/ United States v. Jefferson, 714 F.2d at 701-702.

182/ 715 F.2d 843 (3d Cir. 1983). The court noted that the confusion in the appellate opinions considering this issue results from the failure to recognize that Jeffers was limited to the relationship between CCE and conspiracy wherein the Supreme Court did not specifically decide the lesser included offense issue. Id. at 850. It added that their cases did not "always respect the difference between successive prosecutions and multiple punishments." Id. The court also summarized the contrasting positions adopted in frequently cited CCE cases. Id. at 850 n. 5.

183/ No. 82-5163 (4th Cir. decided Nov. 23, 1983). The court there summarily disposed of this issue as follows:

> As the government properly concedes, the distribution and conspiracy charges in this case are lesser included offenses of the continuing criminal enterprise charge. Jeffers v. United States, 432 U.S. 137, 149-50 (1977). We therefore vacate James Bello's convictions for distributing and conspiring to distribute cocaine under 21 U.S.C. §§ 841(a)(1) and 846.

As the discussion which follows suggests, neither this prosecutorial concession nor this resulting judicial construction of Jeffers was warranted.

that a conspiracy to distribute marihuana was a lesser included offense of CCE, the various courts of appeals decisions that cumulative sentences for CCE and substantive Title 21 offenses cannot be imposed are subject to challenge for numerous reasons. First, the Jefferson ruling created a conflict between the circuits as it is not in accord with United States v. Phillips which held that a substantive charge which is a CCE predicate offense is not multiplicious with Section 848. 184/

Second, it appears that the holding in Jefferson is at odds with the Supreme Court's ruling in Albernaz v. United States. 185/ In addressing the legislative history of Title 21, the Supreme Court held that Congress intended for a single agreement to be charged as two separate drug conspiracy offenses, 186/ thereby allowing cumulative punishments. Since two conspiracy offenses based upon the same agreement can be cumulatively punished, it seems inconsistent for the court in Jefferson to hold that CCE (a hybrid conspiracy statute) merges with its

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184/ Although the Fifth Circuit in United States v. Chagra, 669 F.2d 241, 261-262 (5th Cir.), cert. denied, __ U.S. __, 103 S.Ct. 102 (1982), held the CCE merged with Section 841 distribution offenses for punishment purposes that ruling was limited to the context of fines. The court there affirmed a 30 year term of imprisonment for Section 848 and a consecutively imposed lifetime special parole term for Section 841. Even though Chagra was subject to challenge with respect to this merger issue, the government obviously had no incentive to appeal a decision affirming a sentence of 30 years without parole. Thus, the instant erroneous interpretation of the relationship of CCE to its predicate offenses was spawned.

185/ 450 U.S. 333 (1981).

186/ 21 U.S.C. §§ 846 and 963.

predicate substantive offenses. As previously noted, it has long been recognized that conspiracy to commit a particular offense and the subsequently committed substantive crimes can be consecutively punished. 187/

Third, the substantive offense of distribution contains a unique penalty feature, the special parole term. 188/ The legislative purpose of this parole provision was to provide a deterrent to future misconduct by the defendant. This punishment cannot be imposed for Section 848. Thus, an incidental effect of the ruling that CCE is multiplicious with its substantive predicate offenses is to negate this significant rehabilitative mechanism. Nevertheless, in United States v. Chagra, the trial court employed two different provisions of Title 21 to impose a sentence implementing the remedial intent of these statutes by requiring the service of a 30 year CCE prison term without parole, followed by a lifetime special parole term under the penalty for the substantive violation. This sentence thus provided for a long period of mandatory incarceration followed by the powerful rehabilitative incentive of a special parole term which was consistent with the precept that sentences should be individualized by being specifically tailored to fit the

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187/ However, the Jeffers plurality concluded that the ordinary policy supporting consecutive sentences for conspiracy and its underlying substantive offense does not apply to Sections 846 and 848. 432 U.S. at 157.

188/ See infra Section III (D). See e.g., 21 U.S.C. § 841(b)(1)(A).

defendant then before the court. 189/ However, if the holdings in Gomberg, Jefferson, Raimundo, and Chagra were correct in requiring this merger of sentences, the imposition of a special parole term for the subsumed predicate offense was improper. Under these circumstances, it is unlikely that Congress intended this result whereby a judge sentencing a defendant like Chagra would be empowered to impose a sentence of life imprisonment without parole, but would not be allowed to give a more lenient sentence of confinement for ten years under Section 848 followed by a lifetime special parole term for a distribution offense. Thus, the merger doctrine creates an inconsistent result in this context.

Fourth, these decisions prevent an organizer or manager from being fined more than the $100,000 maximum imposed by Section 848, whereas his subordinates who actually handle the drugs on the street--and whose illicit incomes are normally much less than that of their criminal superiors--could receive a fine at the rate of $25,000 per distribution offense. In Jefferson there

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189/ Cf. Gregg v. United States, 394 U.S. 489, 492 (1969) (presentence report enables judge to impose a sentence suited to defendant's particular character and potential for rehabilitation); Williams v. New York, 337 U.S. 241, 257 (1949) (judge's possession of fullest information possible concerning defendant's life and characteristics essential to selection of appropriate sentence); United States v. Burton, 631 F.2d 280, 282 (4th Cir. 1980) (purpose of probation report is to give sentencing judge fullest possible information concerning defendant's life and characteristics to enable him to impose appropriate sentence).

were over 20 substantive counts for which a cumulative fine of over $1 million could have been levied. This anomaly repudiates the Seventh Circuit's interpretation of the legislative intent regarding CCE.

Fifth, the Seventh Circuit in Jefferson appeared to err when it read the CCE legislative history as supporting an intent to ban cumulative punishment. In Jeffers, the plurality concluded that the same legislative history "is inconclusive on the question of cumulative punishment." 190/ Thus, the Jefferson decision is inconsistent with the Jeffers plurality's reading of the history of Section 848. Additionally, because Jeffers was not a majority opinion, the government can continue to argue that the policy favoring cumulative punishment of conspiracies and the underlying substantive offenses is fully applicable despite the Jeffers dicta.

Sixth, the Jefferson court's decision that Section 848 was intended "to serve as a comprehensive and exclusive penalty structure for persons professionally involved in criminal drug enterprises" 191/ ignores the Dangerous Special Drug Offender (DSDO) sentence enhancement provision of Title 21, United States Code, Section 849, which authorizes escalated prison sentences for all "professional" criminals who commit Title 21 crimes. The overlap of Section 848 with Section 849 regarding "professional"

190/ 432 U.S. at 156 n. 26.

191/ United States v. Jefferson, 714 F.2d at 703 (emphasis supplied).

criminals indicates that CCE is not an exclusive sentencing measure. This conclusion is reinforced by the fact that both Sections 848 and 849 were originally part of the same bill. 192/

In addition to a conflict between the circuits, Jefferson has created a split within the Seventh Circuit. In United States v. Zylstra, 193/ the Seventh Circuit upheld a sentence of imprisonment for 210 years. That sentence included a term of ten years of imprisonment for a CCE violation, with consecutive terms of incarceration totalling 200 years imposed for numerous substantive violations including distribution of marihuana in violation of Title 21, United States Code, Section 841(a)(1). In an opinion written by Judge Coffey (one of the members of the panel which had decided Jefferson 16 days before), the Seventh Circuit ruled that: "Once it is determined that a sentence is within limitations set forth in the statute under which it is imposed, appellate review is at an end...." 194/ This decision is in conflict with Jefferson.

Although this merger doctrine appears to be gaining increased acceptance, there are two considerations which reduce its practical impact. First, the prosecution can negate these

192/ This legislative history is discussed at note 275 and accompanying text.

193/ 713 F.2d 1332 (7th Cir.), cert. denied, __ U.S. __, 194 S.Ct. 403 (1983).

194/ Id. at 1340-1341. That court also disposed of the cruel and unusual punishment argument by noting that Zylstra was eligible for parole after serving ten years. Id. at 1341 n. 2.

effects by charging more Title 18 offenses, such as Racketeering (or RICO) conspiracy, Section 1962(d), and travel (or ITAR) violations, Section 1952(a), which will not merge with CCE, in the indictments of drug traffickers. Second, defendants who successfully assert this multiplicity argument at the appellate level may win a Pyrrhic victory. In United States v. Raimundo, for example, the Fourth Circuit remanded the case to the trial court for resentencing with the instruction that, "[t]he punishment imposed under Count Nine [for CCE] on remand cannot exceed the punishment initially imposed on all counts." 195/ Thus, the CCE sentence, which is without parole, could be increased substantially thereby greatly lengthening the defendant's period of actual incarceration.

(d) With Attempt

A single section of Title 21 makes it a crime when anyone "attempts or conspires to commit any offense" which the Controlled Substances Act denounces. 196/ The analogous provision of the Controlled Substances Import and Export Act 197/ employs identical language. One appellate court has ruled that these

195/ No. 82-5163 (4th Cir. decided Nov. 23, 1983), slip op. at 6.

196/ 21 U.S.C. § 846.

197/ 21 U.S.C. § 963.

statutes seem "to create only a single offense denominated attempt or conspiracy." 198/ Thus, an attempt and a conspiracy based upon the same factual episode in violation of this statutory provision would probably merge for sentencing. However, "a conspiracy to manufacture followed by a later, separate attempt to manufacture could constitute separately punishable offenses". 199/

(2) Distribution and Possession with Intent to Distribute

(a) In General

Although application of Blockburger and its progeny to the offenses of possession with intent to distribute and simultaneous distribution of the same controlled substance in violation of Title 21, United States Code, Section 841(a)(1), would seemingly justify consecutive sentences, that is not the state of the law. Although the Fifth Circuit Court of Appeals once held that such cumulative punishments could be imposed, it reversed this ruling in a later en banc decision. 200/ There is now uniformity among

198/ United States v. Taylor, 716 F.2d 701, 712 n. 6 (9th Cir. 1983). But see, United States v. Anderson, 651 F.2d 375, 378-379 (5th Cir. 1981), wherein the court ruled that a conspiracy to import and an attempt to import the same marihuana into the United States in violation of 21 U.S.C. § 963 constituted two separate crimes justifying consecutive sentences.

199/ United States v. Taylor, 716 F.2d at 712 n. 6 (emphasis in original).

200/ United States v. Hernandez, 580 F.2d 188 (5th Cir. 1978), rev'd, 591 F.2d 1019 (5th Cir. 1979) (en banc).

the federal circuits which hold that possession with intent to distribute, and simultaneous distribution of the same drugs, are but one offense requiring concurrent sentences. 201/ The rationale for this result is that when Congress proscribed both unlawful distribution and possession with intent to distribute in Title 21, United States Code, Section 841(a)(1), it intended that the culprit who would fall short of distribution could receive the same sentence as one who had actually distributed. Hence, the two offenses merge for sentencing purposes and, even though multiple charges can be made, only one sentence can be imposed. However, this rationale applies only when the same act supports both offenses, so charges based upon different episodes allow consecutive sentences.

Although the courts consider a single conspiracy to distribute multiple drugs to be a single offense, the simultaneous possession with intent to distribute of two different controlled substances constitutes multiple violations which the

201/ United States v. Phillips, 664 F.2d at 1022 ("When the intent to distribute was executed by a successful sale, the possession with intent to do so merged into the completed offense"). Accord, United States v. Henciar, 568 F.2d 489 (6th Cir. 1977), cert. denied, 435 U.S. 953 (1978); United States v. Olivas, 558 F.2d 1366 (10th Cir.), cert. denied, 434 U.S. 866 (1977), United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975), cert. denied, 429 U.S. 885 (1976); United States v. Curry, 512 F.2d 1299, 1305-1306 (4th Cir.), cert. denied, 423 U.S. 832 (1975); United States v. Stevens, 521 F.2d 334, 336-337 (6th Cir. 1975). Cf., United States v. Howard, 507 F.2d 559 (8th Cir. 1974) (simple possession in violation of 21 U.S.C. § 844(a) is a lesser included offense of distribution under 21 U.S.C. § 841(a)(1)).

courts can punish separately. 202/ The circumstances surrounding the offenses frequently determine whether they merge for sentencing. One court has held that even though heroin was found in four different bags in a safe when defendant's house was searched, defendant was improperly charged with four separate counts of possession with intent to distribute because his conduct constituted only one offense. 203/ However, that same court has held that individual sales of heroin to two separate people constituted separate offenses. 204/ In a decision by a different court incremental deliveries of 53,000 quaalude tablets on July 17th and 212,000 more on July 21st, both made pursuant to one transaction, were held to constitute separate "distributions" which the courts could separately punish. 205/ However, in a case where a sample was provided to an undercover operative immediately before a sale the court found the two distribution

202/ See, e.g., United States v. Pope, 561 F.2d 663, 669 (6th Cir., 1977) (simultaneous possession of heroin and methadone are separate offenses under Section 841(a)(1)).

203/ United States v. Williams, 480 F.2d 1204, 1205 (6th Cir. 1973).

204/ United States v. Noel, 490 F.2d 89, 90 (6th Cir. 1974). Cf. Blockburger v. United States, 284 U.S. 299 (1932) (holding that two sales of morphine hydrochloride to the same buyer with little time having elapsed between transactions constitute separate violations [of a predecessor statute to Section 841(a)(1)] which can be punished by imposition of consecutive sentences).

205/ United States v. McDonald, 531 F. Supp. 160, 162-163 (M.D. La. 1982).

offenses to have merged. [206]

(b) With Manufacturing Offenses

Manufacture of a controlled substance and the simultaneous possession with intent to distribute of that same substance constitute separate offenses even though these two crimes are derived from the same sentence in Section 841(a)(1). [207] Accordingly, consecutive sentences are permissible.

(c) With Importation Offenses

Because importation "is a 'continuous crime' that is not complete until the controlled substance reaches its final destination point, and...venue is proper in any district along the way," [208] the misconduct comprising this offense can also include what is usually regarded as the separate crime of possession with intent to distribute. This is significant because possession with intent to distribute in violation of Section 841(a)(1) can be cumulatively punished with illegal importation

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206/ United States v. Olivas, 558 F.2d at 1368.

207/ United States v. Lewis, 621 F.2d 1382, 1390 (5th Cir. 1980), cert. denied, 450 U.S. 935 (1981). Accord, United States v. Welebir, 498 F.2d 346, 352 (4th Cir. 1974).

208/ United States v. Gray, 626 F.2d 494, 498 (5th Cir.), cert. denied, 449 U.S. 1038 (1980).

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of the same drug in violation of Section 952. 209/ However, one court has ruled that the narrower offenses of importing and bringing the same heroin into customs territory while on board a vessel are multiplicious. 210/

(D) Special Parole Terms

(1) In General

Section 841(b)(1)(A) of Title 21 contains the following provision authorizing the imposition of a "special parole term" upon any person guilty of certain manufacturing, distributing, and possession with intent to distribute controlled and counterfeit substances offenses:

> Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

Other subparagraphs of this section contain special parole term

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209/ United States v. Dubrofsky, 581 F.2d 208, 213 (9th Cir. 1978).

210/ United States v. Tonarelli, 371 F. Supp. 891 (D. P.R. 1973).

provisions with the permissible term varying depending upon the nature of the controlled substance involved, and upon whether the defendant is a recidivist. Similar special parole term provisions pertaining to the unlawful importation offenses are set forth at Title 21, United States Code, Section 960(b). The following definition of "special parole term" is found at Section 841(c) (and duplicated in its sister provision of Section 960(c)):

> (C) Special Parole Term. A special parole term imposed under this section or Section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or Section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law (note that in Section 960 the phrase "Section 962" has been substituted for "Section 845").

Although the special parole is mandatory, courts occasionally forget to impose it as part of a sentence. The prosecutor must be aware of the mandatory nature of this unique parole provision, and must be certain that the sentencing judge employs it.

(2) Inchoate Offenses

The special parole term is not available when defendants are convicted of inchoate offenses. Sections 846 and 963 provide the following punishment for attempt and conspiracy:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The courts of appeal were once divided in determining whether the special parole provision applied to these offenses but the Supreme Court resolved the conflict in Bifulco v. United States. [211/] It ruled that a special parole term could not be imposed for inchoate offenses. The majority held that because Sections 846 and 963 defined the penalty only in terms of fines and penal terms, the special parole term was not available as a

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211/ Cp., Bifulco v. United States, 600 F.2d 407 (2nd Cir. 1979) (per curiam), rev'd, 447 U.S. 381 (1980); United States v. Sellers, 603 F.2d 53, 58 (8th Cir. 1979); Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1356 (4th Cir. 1978), cert. denied, 439 U.S. 1118 (1979); United States v. Dankert, 507 F.2d 190 (5th Cir. 1975); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978) (all holding that a special parole term is authorized); with United States v. Mearns, 599 F.2d 1296 (3d Cir.), cert. denied, 447 U.S. 934 (1979) (holding that a special parole term is not authorized).

sentencing option. 212/

(3) Features

The special parole term has been characterized as being "unique and novel," 213/ "a sanction previously unknown in the administration of criminal justice," 214/ and "a new program... there are no comparable laws now in force for narcotic drug law convictions." 215/ As such, it is designed to provide a powerful incentive for the rehabilitation of those convicted of the applicable Title 21 offenses.

Special parole terms can be imposed only for the designated offenses, but not for violations of Sections 843 and 844. 216/ Special parole is mandatory when the court imposes incarceration for violation of the designated offenses. 217/ The special parole

212/ This 6-3 ruling generated the following dissent: "Should the directors of a narcotics distribution business be punished less severely than their subordinates who merely peddle the poison? It is unlikely that Congress so intended." Bifulco v. United States, 447 U.S. at 402. Despite this dissenting view, the special parole term is available only to punish substantive violations of Sections 841, 952, 953, and 957 of Title 21, and not for the crimes of attempt and conspiracy.

213/ Id. at 390.

214/ Id. at 391.

215/ Id. at 396.

216/ United States v. Pigman, 546 F.2d 609, 613 (5th Cir. 1977).

217/ United States v. Scott, 502 F.2d 1102 (8th Cir. 1974); United States v. Jacobson, 578 F.2d 863, 868 (10th Cir.), cert. denied, 439 U.S. 932 (1978).

term is in addition to the prison sentence, so "it entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole." 218/ The parole violator must serve the entire special term even if he has already completed the basic sentence to confinement and ordinary parole. 219/ If the court fails to impose the required special parole term when sentencing the defendant, it may be added subsequently to correct the sentence without offending the double jeopardy clause. 220/ A violator does not receive any credit for the time already spent on parole. 221/ The duration of a special parole term is unlimited -- it can be for as much as a lifetime without constituting a cruel and unusual sentence. 222/ Considering these aspects of

218/ Moore v. United States, 592 F.2d 753, 755 (4th Cir. 1979); United States v. Mack, 509 F.2d 615, 616 (9th Cir. 1974), cert. denied, 421 U.S. 916 (1975).

219/ See Llerena v. United States, 508 F.2d 78, 82 (5th Cir. 1975).

220/ Id.; United States v. Bell, 521 F.2d 713 (4th Cir.), cert. denied, 424 U.S. 918 (1975); United States v. Scott, 502 F.2d at 1102.

221/ Bunker v. Wise, 550 F.2d 1155, 1159 (9th Cir. 1977).

222/ United States v. Salas, 602 F.2d 215 (9th Cir. 1979); United States v. Dayton, 592 F.2d 253 (5th Cir. 1979), reh. en banc, 604 F.2d 931, cert. denied, 445 U.S. 904 and 445 U.S. 971 (1979); United States v. Walden, 578 F.2d 966, 972 (3d Cir. 1978), cert. denied, 444 U.S. 849 (1979); United States v. Jones, 540 F.2d 465, 468-69 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977); United States v. Rivera-Marquez, 519 F.2d 1227 (9th Cir.), cert. denied, 423 U.S. 949 (1975); United States v. Rich, 518 F.2d 980, 986-987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976).

this sentence enhancement feature, its remedial capabilities for deterring narcotics recidivism are readily apparent.

This punishment is subject to several procedural limitations. It is improper to require the defendant to leave the United States as a condition of the special parole term. 223/ The court must inform the defendant of the consequences of violating the conditions imposed by the special parole term when accepting a guilty plea. 224/

(4) Uses

In addition to providing an effective deterrent to future misconduct by convicted drug offenders, the special parole term can be a valuable tool when used to enhance the credibility of cooperating defendants. It has long been recognized that during cross-examination of the prosecution's accomplice witnesses, the defense is entitled to explore "any understanding or agreement as to a future prosecution [because it] would be relevant to... [the witness'] credibility and the jury was entitled to know of it." 225/

Traditionally, the prosecution of major narcotics traf-

223/ United States v. Hernandez, 588 F.2d 346, 350-352 (2nd Cir. 1978).

224/ Cp., Moore v. United States, 592 F.2d at 753; with Michel v. United States, 507 F.2d 461 (2nd Cir. 1974). See also St. Etienne v. United States, 517 F.2d 695 (5th Cir. 1975).

225/ Giglio v. United States, 405 U.S. 151, 155 (1972).

fickers has depended upon the testimony of cooperating coconspirators. Thus, every governmental promise of leniency set forth in a Rule 11 plea agreement, or other understanding reached with the prosecution, can be expected to generate protracted defense cross-examination and argument with emphasis upon the quantum of incarceration the accomplice will receive. In an effort to negate the impact of this defense tactic, it is possible for plea bargains struck with coconspirator witnesses to provide for a lengthly special parole term in addition to the prison sentence--even if minimal--which normally is imposed upon cooperating defendants.

During redirect examination of the accomplice the prosecution can elicit testimony that his sentence included a special parole term which can be revoked upon commission of any additional crimes and thereby trigger further incarceration. Such a prosecutorial inquiry into the unique features of the special parole term could rebut the defense position that the accomplice's sentence was so lenient as to undermine his credibility.

(E) Dangerous Special Drug Offenders

(1) In General

Section 849 of Title 21 contains a special provision which can escalate the punishment for a drug offense to 25 years if certain procedural and substantive criteria are met. Section 849 is a clone of the Title 18 sentence enhancement clause commonly

known as the "Dangerous Special Offender" statute. [226] The statutory definitions of Dangerous Special Drug Offender [227] and Dangerous Special Offender [228] are reproduced as follows: [229]

[SPECIAL DEFENDANTS]

(e) A defendant is a special drug offender for purposes of this section if --

[RECIDIVIST PROVISION]

(1) The defendant has previously been convicted in courts of the United States, or a State or any political subdivision [a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof] for two or more offenses involving dealing in controlled substances, committed on occasions different from one another and different from such felonious violation [felony], and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felonious violation [felony], and less than five years have elapsed between the commission of such felonious violation [felony] and either the defendant's release, or parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense involving dealing in controlled substances and punishable by death or imprisonment in excess of one year under applicable laws of the United States or a State or any political subdivision [a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency of instrumentality] thereof; or

[PROFESSIONAL PROVISION]

(2) The defendant committed such felonious violation [felony] as part of a pattern of dealing in controlled substances [conduct] which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

[ORGANIZED CRIME PROVISION]

(3) Such felonious violation [felony] was, or the defendant committed such felonious violation [felony] in furtherance of, a conspiracy with three or more other persons to engage in a pattern of dealing in controlled substances which was [conduct] criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing [conduct], or give or receive a bribe or use force in connection with such dealing [as all or part of such conduct].

[DANGEROUS DEFENDANTS]

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felonious violation [felony] is required for the protection of the public from further criminal conduct, by the defendant.

As this comparison illustrates, and as the United States

226/ Hereinafter the "Dangerous Special Drug Offender," 21 U.S.C. § 849, and "Dangerous Special Offender," 18 U.S.C. § 3575, statutes will be referred to generically as "special offender" laws.

227/ 21 U.S.C. §§ 849(e) and (f).

228/ 18 U.S.C. §§ 3575(e) and (f).

229/ To facilitate comparison the underlined terms are present in DSDO but not in DSO, whereas the [bracketed] material is present in DSO but not in DSDO.

Supreme Court has noted, 230/ the dangerous special offender statute "has a twin" in the dangerous special drug offender statute as they are identical in almost all material respects. Therefore, the following analysis is applicable to both of these sentence enhancement statutes. 231/

The prosecution of most drug conspiracy cases will include Title 18 counts, which are not subject to enhancement under Section 849, so the use of the dangerous special offender statute may be warranted. The basis for this observation is that trafficking normally and necessarily requires the movement of money and controlled substances across either state lines or national borders. 232/ Section 3575 enables the prosecutor to

230/ United States v. Di Francesco, 449 U.S. 117, 121 n.2 (1980).

231/ Section 3575 was originally enacted as Title X of the Organized Crime Control Act (18 U.S.C. §§ 3575-3578), the author of which was Congressman Poff. 16 Cong. Rec. 35288. Title X was contained in the original version of S.30, 91st. Cong., 1st Sess., the Organized Crime Control Act, which was under consideration by Congress at the same time that the Drug Abuse Act was proposed. No dangerous special offender provision was included in the Drug Abuse Act at first. However, after Title X was reported out favorably by the House Judiciary Committee, Congressman Poff offered to amend the Drug Abuse Act to include a similar provision. His amendment was "essentially the same as Title X of the Organized Crime Control Act reported out by the Committee on the Judiciary yesterday." 116 Cong. Rec. 33670 (1970). The version contained in the Drug Abuse Act, 21 U.S.C. § 849, prompted little debate or review. In light of the close relationship between Sections 849 and 3575, the authority construing both have been interpreted herein as being interchangeable. For additional discussion of this legislative history, see infra Section III(E)(2)(C).

232/ This conduct constitutes interstate (or foreign) travel in aid of racketeering, the "ITAR" violation proscribed by 18 U.S.C. § 1952.

escalate the normal five year maximum prison sentence prescribed for travel violations. 233/

The only appreciable difference between these statutes is that one applies to drug offenses while the other pertains to virtually all felonies. This makes the dangerous special offender statute broader in two important respects. First, it--like its drug counterpart--can be filed for Title 21 offenses, as well as for Title 18 and other violations which the dangerous special drug offender statute cannot address. Section 3575 also can be used to escalate such other offenses as Title 26 tax violations and Title 31 currency crimes which often are used against drug traffickers. By its use of the term "alleged felony," Section 3575(a) is not limited to Title 18 offenses.

Second, the dangerous special offender statute has a broader recidivist's clause in that two prior felony violations are required to trigger the special offender provision of Section 3575(e), whereas the analogous requirement of Section 849(e) requires two prior drug violations. Thus, a defendant who has been recently imprisoned on two separate occasions for state larceny convictions can be subjected to an enhanced sentence when later charged with a federal drug violation only if the prosecution uses Section 3575 because the applicable provision of Section 849 is limited to earlier drug convictions. Either a

233/ Id.

state or federal prior conviction will suffice for the special offender recidivist provision, whereas the previously-noted "double penalty for prior convictions" provisions of certain Title 21 offenses 234/ are triggered only by earlier federal convictions.

A defendant qualifies for treatment as a special offender with resulting escalation of the maximum sentence to 25 years of imprisonment if he has met the definitions of both "special" and "dangerous." The "dangerous" element is satisfied simply by a finding that a longer period of confinement than ordinarily provided is required to protect the public from the defendant's criminal activities. The "special" element is met if only one of the features commonly known as the recidivist, professional, and organized crime offender provisions is satisfied.

The special offender statutes are an important prosecutorial tool for several reasons. Perhaps their most important usage is to correct the inequities in sentences which are inherent in Title 21. This point is illustrated by considering the following "Controlled Substances Penalty Chart" which summarizes the basic penalty structure for distribution of the twelve drugs most commonly involved in federal prosecutions. 235/

234/ See Section III(A)(2), supra.

235/ The statutory classifications with resulting penalty (FOOTNOTE CONTINUED)

DISTRIBUTION OFFENSE PENALTIES CHART

DRUGS		STATUTORY CLASSIFICATION		PENALTY		
Type	Name	Schedule	Type	Prison	SPT	Fine
Narcotics:	Opium	II	Narcotic	15	3	$25,000
	Morphine	II	Narcotic	15	3	$25,000
	Heroin	I	Narcotic	15	3	$25,000
	Methadone	II	Narcotic	15	3	$25,000
Depressants:	Methaqualone (Quaaludes)	II	Non-narcotic	5	2	$15,000
Stimulants:	Cocaine	II	Narcotic*	15	3	$25,000
Hallucinogens:	LSD (lysergic acid diethylamide)	I	Non-narcotic	5	2	$15,000
	Mescaline	I	Non-narcotic	5	2	$15,000
	PCP (phencyclidine)	II	Non-narcotic	10**	2	$25,000
Cannabis:***	Marihuana	I	Non-narcotic	5****	2	$15,000
	Hashish	I	Non-narcotic	5	2	$15,000
	Hashish oil	I	Non-narcotic	3	2	$15,000

* Although cocaine is medically classified as a stimulant, it is designated as a "narcotic" for penalty purposes by 21 U.S.C. § 802(16)(A).

** See supra note 139, for a discussion of the recent change in penalty for PCP.

*** "Marihuana" is defined by 21 U.S.C. § 802(15) as including hashish and hashish oil. In indictments, hashish is ordinarily described as "marihuana in the form of ___ pounds of hashish" in order to avoid confusion.

(FOOTNOTE CONTINUED)
provisions (i.e. maximum imposable fine, as well as the maximum term of imprisonment and the minimum special parole term as stated in years) have been extracted from the 21 U.S.C. § 841(b) penalty clauses for the distribution offenses.

**** Under the terms of 21 U.S.C. § 841(b)(1)(B)(6) "a violation of subsection (a) of this Section involving a quantity of marihuana exceeding 1,000 pounds..." is punishable by imprisonment for 15 years and a fine of $125,000. See supra Section III(B).

The inconsistencies in this penalty structure are readily apparent. For example, the maximum sentence for the distribution of over 1,000 pounds of marihuana, as indicated by this chart, is 15 years of imprisonment; yet the maximum sentence for importation of the same amount is only five years of imprisonment. As importation is arguably a more serious offense than distribution, it seems quite inconsistent to punish the former less severely than the latter.

The fact that the punishment for distribution of dangerous drugs such as LSD and Mescaline is only five years of imprisonment--the same as for less than 1,000 pounds of marihuana -- has also generated criticism. A General Accounting Office report has recommended that these punishments be escalated to 15 years. 236/

The government's right to appeal sentences provided by special offender statutes, was intended to redress the problem of overly lenient sentences which compromised the public interest in lengthy terms of imprisonment for certain classifications of

236/ "Stronger Crackdown Needed on Clandestine Laboratories Manufacturing Dangerous Drugs" (#GGD-82-6, November 6, 1981). This report stated that the dangerous drugs were as dangerous as heroin, so the penal exposure for traffickers in both should be the same. Id. at 16.

felons. 237/ These appeal provisions were, in part, a response to the recommendation of the President's Commission on Law Enforcement and Administration of Justice that, "[t]here must be some kind of supervision over those trial judges who...tend to mete out light sentences in cases involving organized crime management personnel." 238/

Despite this remedial intent, prosecutors have apparently not been able to employ these statutes effectively. As the Supreme Court observed in United States v. Di Francesco:

> This is the first case in which the United States specifically has sought review of a sentence under Section 3576. Inasmuch as the statute was enacted a decade ago, this fact might be said to indicate little use of the special offender statute by the United States. An attempt on the part of this Court to explain the non-use of the statute would be speculation, and we shall not indulge in it. 239/

However, the primary author of the Organized Crime Control Act of 1970 240/ has not been similarly reluctant to speculate: "Prosecutors have seldom sought...the long prison terms they

237/ Report of the President's Commission on Law Enforcement and the Administration of Justice: The Challenge of Crime in a Free Society 203 (1967).

238/ Id.

239/ 449 U.S. 117, 126 n. 9 (1980).

240/ Pub. L. No. 91-452, 84 Stat. 948 (which includes 18 U.S.C. § 3575).

may ask for under the companion Dangerous Special Offenders Act. 'Ultimately this record is a failure of imagination and will,' says [Professor] G. Robert Blakey of the Notre Dame Law School." 241/

(2) Procedural Features

(a) Government Appeal

Section 3575 of Title 18 and Section 849(h) of Title 21, United States Code, authorize the government to appeal a defendant's sentence. The Supreme Court has upheld the constitutionality of these provisions in the face of claims that they violate the double jeopardy clause of the Fifth Amendment. 242/ These statutes authorize a "review of the sentence on the record of the sentencing court...taken by the defendant or the United States to a court of appeals". 243/ The appellate court is empowered to "affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing." 244/ The "[R]eview of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused." 245/

241/ "How the Mob Really Works," Newsweek (January 5, 1981) at 34.

242/ United States v. Di Francesco, 604 F.2d 769, 781 (2nd Cir. 1979)[hereinafter cited as "Di Francesco I"], rev'd, 449 U.S. 117 (1980), on remand, 658 F.2d 33 (2nd Cir. 1981) [hereinafter cited as "Di Francesco II"].

243/ 18 U.S.C. § 3576 and 21 U.S.C. § 849(h).

(b) Minimum Mandatory Prison Terms

On remand from the Supreme Court, the Second Circuit, in Di Francesco II, 246/ held that after the trial court has found that the defendant is a special dangerous offender it must impose a prison term greater than the maximum ordinarily provided for that offense. The defendant in the case had received two concurrent ten year sentences to be served concurrently with a prior nine year sentence. Thus, although he had been found to be a dangerous special offender, Di Francesco received a net increase in his sentence of one year when he could have received 20 additional years of imprisonment. The court set aside this sentence with the following observation:

> Once a court has determined that a defendant is dangerous, that court has concluded that the maximum confinement otherwise provided

244/ Id.

245/ Id.

246/ 658 F.2d 33 (2nd Cir. 1981).

for the underlying crime or crimes is not sufficient. Absent such a finding, the court would have no reason to resort to the enhancement provisions of the statute in the first place. 247/

Interestingly, in reaching this decision, the court rejected the government's concession that a minimum sentence was not required by the DSO. The Second Circuit then remanded Di Francesco II so the trial court would resentence the defendant. The court's ruling had the practical effect of making the maximum penalty for the underlying offense the minimum mandatory sentence which a court can impose after it has ruled that the defendant will be sentenced under DSO.

(c) Consecutive Enhanced Sentences

When a defendant is charged with multiple counts, what effect does a special offender determination have with regard to consecutive sentences? For example, if the defendant has been convicted of three separate counts with each providing for a five year maximum penal term the court can ordinarily impose consecutive terms, thus creating an aggregate sentence of imprisonment for 15 years. If the trial court concurs with the prosecution's special offender request for each count, a question exists as to what is the maximum term the defendant faces. The possibilities are threefold: (1) 25 years, with the 15 year cumulative being

247/ 658 F.2d at 38 (emphasis in original).

escalated to 25 years; (2) 35 years, with one count being enhanced and the remaining two run consecutively; and (3) 75 years with each count being increased and then stacked. Although there is little authority addressing this issue, some support exists for the proposition that the last course is correct in that each individual count can be enhanced and then imposed consecutively to other enhanced punishments.

Without question, as regards ordinary sentences, the "district court's discretionary power to impose consecutive, rather than concurrent, sentences upon a defendant convicted on more than one count has been recognized for so long that it may fairly be regarded as [an] inherent ... [option]." 248/ However, in addressing the dangerous special offender statute in Di Francesco I, the Second Circuit Court of Appeals has stated that it had "no opinion as to whether Section 3575 authorizes the imposition of consecutive sentences totalling more than 25 years." 249/ Although declining to specifically rule that consecutive enhanced sentences were authorized under the special offender statutes, that court did state, "[t]he application of Section 3575 depends on a "particularized determination with regard to each of the felonies for which dangerous special offender sentencing is sought". 250/ Even though the Second Circuit declined to reach

248/ United States v. Di Francesco I, 604 F.2d at 788-789 (footnote containing citation omitted, J. Haight concurring).

249/ Id. at 604 F.2d 780-781 n. 13.

250/ Id. (emphasis added).

this issue, this particularization for each count requirement would seemingly endorse consecutive enhanced sentences. But, despite this particularization requirement, if Di Francesco II is the only available authority, this question would still be regarded as open.

Another circuit subsequently allowed consecutive enhanced DSO sentences. In United States v. Schell, 251/ the Tenth Circuit affirmed the trial court's imposition of two consecutive ten year terms for escape offenses in violation of Title 18, United States Code, Section 751(a), after finding the defendant to be a dangerous special offender as defined by § 3575. The ordinary statutory penalty for a Title 18, United States Code, Section 751, violation is imprisonment for five years. Although the Tenth Circuit addressed Section 3575 in the context of the defendant's claim that the two enhanced consecutive ten year terms violated his Eighth Amendment right against cruel and unusual punishment, it did authorize the stacking of special offender sentences. Thus, even though the cumulative enhanced punishment did not exceed 25 years, consecutive special offender sentences were upheld.

Accordingly, the propriety of imposing consecutive enhanced sentences is not devoid of support. The authority for this position includes the affirmance in Schell, the Di Francesco I

251/ 692 F.2d 672 (10th Cir. 1982).

requirement of particularizing the Section 3575 sentence for each felony imposed, and the traditional presumption that it is proper for judges to exercise their discretion by sentencing offenders convicted of multiple violations to consecutive sentences. Moreover, the judicial interpretation of an analogous statute supports this conclusion. 252/

The legislative history of the special offender provisions of Titles 18 and 21 favors this interpretation. Congress enacted the Controlled Substances Import and and Export Act on October 28, 1970, and the same session of Congress also enacted the Organized Crime Control Act of 1970 253/ which contained RICO as Title IX and Section 3575 as Title X. The clearest summary of the legislative history of the dangerous special offender statute is found in an amicus brief written by G. Robert Blakey. 254/ Professor Blakey had previously been the chief counsel of the subcommittee which conducted hearings on the Organized Crime

252/ The sentence enhancement provision for currency violations, which is set forth at 31 U.S.C. § 5322(a), escalates the punishment for certain offenses "committed as part of a pattern of illegal activity." This provision has been construed as authorizing the imposition of enhanced punishment for each offense. United States v. Kattan-Kassin, 696 F.2d 893 (11th Cir. 1983). This section was originally enacted eleven days after the passage of RICO. Id. at 897 n. 4. Kattan-Kassin thus supports the imposition of consecutive enhanced special offender sentences.

253/ 84 Stat. 922.

254/ Filed by Americans for Effective Law Enforcement in United States v. Duardi, 514 F.2d 545 (8th Cir. 1975). This brief was reprinted at 18 The Criminal Law Reporter 3001 (Nov. 13, 1975).

Control Act, and as such was uniquely able to appreciate the intent of Congress. 255/ This brief convincingly documents the congressional intent to reduce the pervasive influence of organized crime in the United States through enactment of remedial legislation.

The organized crime and comprehensive drug acts were thus enacted independently but with parallel provisions, and Section 3575 mirrors Section 849. Similarly, the use immunity provision of Title 21, United States Code, Section 884, duplicates the general compulsion provisions of Title 18, United States Code, Sections 6002 and 6003. 256/ The Title 18, United States Code, Section 3577, provision removing any limitation upon the information concerning the defendant's background, character, and conduct which can be considered at sentencing is replicated at Title 21, U.S. Code, Section 850. The obvious inference to be drawn from this parallelism is that the sponsors of the respective drug and organized crime law reforms did not know which--if either--statutes would be enacted. Accordingly, they

255/ Professor Blakey wrote, with Senator John L. McClellan (sponsor of the Act), "The Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties?" 46 Notre Dame Lawyer 55 (1970). See also, 18 Criminal Law Reporter, id., at 3003 n. 8, 3006 n. 6, and 3010 n. 33.

256/ Interestingly, the Justice Department has a policy against using 21 U.S.C. § 884 in favor of 18 U.S.C. §§ 6002-6003. See United States Attorney's Manual, § 9-2.158. However, there is no analogous administrative limitation upon the exercise of prosecutorial discretion with respect to special offender statutes so prosecutors are free to utilize 18 U.S.C. § 3575 rather than 21 U.S.C. § 849 to obtain enhanced sentences.

hedged their bets by including duplicative provisions which would still improve the criminal justice system if only one would be enacted. Thus, when both were passed some redundancy resulted.

Congress had originally intended the continuing criminal enterprise and dangerous special drug offender statutes to be sentence enhancement tools, but concerns about the constitutionality of several Section 848 features caused its provisions to be amended to create "a new and distinct offense with all its elements triable in court." 257/ As a comparison of Sections 848 and 849 indicates, these provisions retained several similarities with respect to such elements as management, income, and pattern of conduct. The RICO and dangerous special offender statutes are also similar in this respect.

Despite the apparent severity of the special offender punishment, a limitation upon it to one 25-year sentence, when compared to the continuing criminal enterprise maximum sentence, of life imprisonment without parole, does not seem quite so severe. This conclusion is reinforced by the fact that Sections 848 and 849 were originally introduced as a single legislative proposal. Hence, it appears that consecutive enhanced

257/ See "Additional Views," H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. Cong. and Adm. News 4566, 4651. See also, United States v. Jefferson, 714 F.2d 689, 702-703 (7th Cir. 1983), which analyzed this legislative history and determined that "due to concern that the elements of continuing criminal enterprise should be proven beyond a reasonable doubt at trial where the defendant is presumed innocent and given complete procedural safeguards, the provision evolved into a separate offense under the Drug Act" (citation omitted).

sentences are required to effectuate the legislative intent to incapacitate major traffickers with especially severe sanctions. However, as noted, this issue has never been directly addressed by the judiciary.

Accordingly, if prosecutors utilize the special offender statutes more aggressively to seek cumulative enhanced sentences for qualifying defendants, there is little litigative risk involved. Even if the appellate authorities were to reject the instant argument for consecutive enhanced sentences, the remedy would be reduction of the term of imprisonment imposed to no less than 25 years. In contrast, if the government adopts this position and subsequently prevails, future victims of the affected defendants will be spared by the incarceration in federal prisons of a particularly dangerous class of criminal.

(d) Administrative Approval

Both special offender statutes require administrative approval by the Department of Justice before they can be filed. The United States Attorneys' Manual requires approval for use of the dangerous special offender statute [258/] which is given by the Office of Enforcement Operations, Witness Record Unit (FTS 633-5541), as well as for use of the dangerous special drug

258/ § 9-2.158.

offender statute [259/] which is given by the Narcotic and Dangerous Drug Section of the Criminal Division (FTS 724-7123). [260/]

(e) Notice and Pleading Requirements

The special offender statutes are subject to identical pleading and notice requirements. Attached as Appendices VII and VIII are special offender pleadings which have been used in recent cases. [261/] These appendices can be used as models for special offender pleadings.

These statutes require the prosecution to follow certain procedures strictly. Initially, a particularized statement of why the defendant qualifies for an enhanced sentence is required in the tradition of "fact" (rather than "notice") pleading. Where indictments contain extended ways and means clauses in a conspiracy count, it is frequently desirable to incorporate the indictment by reference in the special offender pleading. In utilizing

259/ §§ 9-2.158, 9-100.290, id.

260/ A useful (albeit somewhat outdated) explanation of DSO is contained at § 9-100.900, id.

261/ Appendix VII contains the Section 849 notice as well as the required motions to seal and unseal the notice, whereas Appendix VIII is simply a notice. Although Appendix VII utilizes the professional and organized crime criteria, Appendix VIII includes these as well as the recidivist provision.

this pleading, certain statutory criteria have to be met.

(1) Service upon Defense

The prosecution must serve the pleading upon the defendant well in advance of trial so he will have adequate notice, but the trial judge must not be made aware of this enhancement pleading until after conviction. If the notice is filed after trial, it will be summarily dismissed. 262/ Service is accomplished by filing the pleading with a judge other than the one hearing the case, having it sealed until the trial has been concluded, and serving the defense with a copy. 263/ A proposed change to Rule 49 would codify -- and clarify -- this practice. 264/ As noted,

262/ See, e.g., United States v. Edwards, 379 F. Supp. 617, 621 (M.D. Fla. 1974); United States v. Noland, 495 F.2d 529 (5th Cir.), cert. denied, 419 U.S. 966 (1974).

263/ In United States v. Pugh, 720 F.2d 1255 (11th Cir. 1983), the court determined that it had been harmless error for the prosecution to file the notice with a judge who heard a pretrial suppression motion because the court which subsequently presided over the trial did not know of the existence of the special offender pleading. In United States v. Bailey, 537 F.2d 845 (5th Cir. 1976), cert. denied, 429 U.S. 1051 (1977), the court dismissed the special offender notice because the prosecution informed the presiding judge that the pleading had been filed. Bailey contains a detailed analysis of the legislative history of the notice which it characterized as being the "troublesome aspect...in its prescribed procedure." Id.

264/ "Preliminary Draft of Proposed Amendments," Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, August, 1983. The text of this proposed change, which has been reprinted at 104 S.Ct. CII and 566 F.Supp. CXXXI, (FOOTNOTE CONTINUED)

Appendix VII contains sample pleadings which effectuate the sealing in accordance with this requirement. Once the defendant is convicted, a presentence hearing is conducted wherein the government must establish its claims by a preponderance of the evidence.

The prosecution initially encountered difficulties in implementing these enhanced sentences during the first few years after their passage. 265/ This occurred because the prosecution had filed pleadings which simply repeated the statutory language without stating with particularity the basis for the relief sought. Allegations contained in a notice may not be

(FOOTNOTE CONTINUED)
is reproduced below:

"Rule 49. Service and Filing of Papers

* * *

(e) Filing of Dangerous Offender Notice. A filing with the court pursuant to 18 U.S.C. § 3575(a) or 21 U.S.C. § 849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge in the district, except that in a single-judge district the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

265/ See United States v. Sutton, 415 F. Supp. 1323, 1328 (D. D.C. 1976); United States v. Duardi, 384 F. Supp. 874 (W.D. Mo. 1974), aff'd, 529 F.2d 123, 125 n. 4 (8th Cir. 1975); United States v. Kelley, 384 F. Supp. 1394 (W.D. Mo. 1974), aff'd, 519 F.2d 251 (8th Cir. 1975); United States v. Tramunti, 377 F. Supp. 6 (S.D.N.Y. 1974), modified on other grounds, 513 F.2d 1087 (2nd Cir.), cert. denied, 423 U.S. 832 (1975); wherein various infirmities with the notice were noted.

sufficiently particularized if they merely state in a paragraph or two that a defendant was a DSDO because he committed an offense described in one count of an indictment. 266/

The Sixth Circuit, in United States v. Ilacqua, 267/ stressed the requirement of particularity as it applies to 18 United States Code, Section 3575 (and, by analogy, to Title 21, United States Code, Section 849). That Court viewed the express statutory requirements of the notice as serving the following dual purpose:

> (1) to assure that, before invoking the Act, the prosecutor has made a judgment based upon a separate and informed consideration of the two concepts [of speciality and dangerousness]; and, (2) at least in a rudimentary way, to alert the defendant to the special circumstances upon which the prosecution will rely to demonstrate to the Court that he is dangerous. 268/

266/ Cp., United States v. Sutton, 415 F. Supp. 1323, with United States v. Duardi, 384 F. Supp. 874. However, the pleading requirements for the recidivist clause are less exacting. See infra note 294 and accompanying text.

267/ 562 F.2d 399 (6th Cir. 1977), cert. denied, 435 U.S. 906, 917, 947 (1978).

268/ Id. at 403. However, this requirement should not be interpreted as being more exacting than the test applicable to the sufficiency of the indictment. In United States v. James, No. 82-6043 (11th Cir. appeal pending), the prosecution argued:

> Finally, if tested by the well-settled standards applicable to the sufficiency of indictments, the Notice surely would pass. Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982). The Notice contained the necessary

(FOOTNOTE CONTINUED)

Ilacqua is the government's best guide; it is absolutely essential for the prosecution to comply with this particularity requirement as set forth there. Of course, the prosecution may amend the pleading to ensure particularity, but any amendment must be done prior to trial. 269/

(2) Problem with Guilty Pleas

The special offender procedures conflict with a requirement for Rule 11 guilty pleas. Under Rule 11, the trial court must advise the defendant of the maximum punishment he faces if convicted. However, the trial court cannot advise the defendant of the enhanced maximum penalty because the judge is unaware of the special offender pleading. 270/ There is no ready solution to this dilemma. Fortunately, this situation rarely -- if

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(FOOTNOTE CONTINUED)

> elements of "special" and "dangerous" drug offender, fairly informed appellee of the charge against which he had to defend, and enabled him to assert a claim of double jeopardy if confronted with the same charge in the future. No reason exists to require a notice that triggers the operation of just an enhanced sentencing process to be substantially more exacting than an indictment, which forms the basis for the operation of the entire criminal trial processes.

Government brief at 14.

269/ United States v. Ilacqua, 562 F.2d at 399.

270/ For an indication of how strictly this secrecy requirement is enforced, see United States v. Taylor, 716 F.2d 701, 711-713 (9th Cir. 1983), where the court dismissed a Section 849 pleading

(FOOTNOTE CONTINUED)

ever -- occurs because defendants facing enhanced sentences normally require dismissal of the special offender pleading as a condition precedent to the guilty plea. The prosecutor controls the situation, since he can use dismissal of the enhancement pleading as a bargaining chip. If the importance of the enhancement outweighs the interest in a plea bargain, the only recourse is to proceed with a trial. As in any other situation, a judge who becomes aware of the DSO or DSDO prematurely is precluded from hearing the case. 271/

(3) Signature of United States Attorney

Although the special offender statutes are virtually identical, a difference in the wording of the two statutes suggests a procedural requirement. Section 849(a) provides as follows:

> Whenever a United States Attorney charged with the prosecution of a defendant in a Court of the United States...has reasons to believe that the defendant is a dangerous special drug offender such United States Attorney, a reasonable time before trial...may sign and file with the Court, and may amend, a notice....

(FOOTNOTE CONTINUED)
because the district court clerk's office inadvertently brought the notice to the attention of the trial judge. Although this error was attributable to the clerk's office rather than the prosecution, and it was apparently harmless, the defendant was allowed to escape enhanced punishment despite his failure to demonstrate actual prejudice.

271/ For a discussion of the forum shopping implications of this rule, see United States v. Inendino, 604 F.2d 458, 464 (7th Cir.), cert. denied, 444 U.S. 932 (1979).

This provision seems to require the United States Attorney to personally sign the notice. This particular phrase reflects one of the few deviations from the wording of Title 18, United States Code, Section 3575, which refers to "an attorney charged with the prosecution" as the person who signs this notice. The legislative history of the two statutes fails to reveal a specific congressional intent for the variation, and there appears to be no rational basis for this distinction. Nevertheless, because of the difference in wording it would be prudent for the United States Attorney to personally sign both types of special offender pleadings.

(4) "Dangerous and Special" Criteria

When seeking these enhanced sentences the government must show that the defendant is "dangerous," and that he also is "special" under any one of three separate criteria (viz., recidivist, organized crime offender, or professional criminal).

(a) "Dangerous"

The dangerousness element is satisfied simply by showing

that an enhanced sentence is required to protect the public. 272/ The defendant's criminal behavior itself poses a sufficient threat to the public sufficient to satisfy this clause.

(b) "Special"

This special offender clause can be satisfied by any one of the following three alternate determinations.

(1) Recidivist

The recidivist provision requires two prior felony convictions (as noted above, Section 849 requires prior drug convictions). The convictions may be either state or federal. 273/ The defendant must also have been incarcerated for one of these

272/ See United States v. Warme, 572 F.2d 57, 62 (2d Cir.), cert. denied, 435 U.S. 1011 and 439 U.S. 986 (1978)(sentencing court entitled to rely on variety of evidence in concluding that "protection of the public required [defendant's] confinement for a period longer than provided for [the] felony."); United States v. Williamson, 567 F.2d 610, 616 (4th Cir. 1977) ("Congress intended to provide the public with protection from repeat offenders by enhancing the incarceration the offender faced for any one crime"); United States v. Neary, 552 F.2d 1184, 1193-94 (7th Cir.), cert. denied, 434 U.S. 864 (1977) (purpose of dangerousness inquiry "is to determine whether and to what extent a sentence in excess of the maximum for the particular offense is appropriate"). See generally, United States v. Schell, 692 F.2d 672, 676-676 (10th Cir. 1982) ("dangerousness" is not unconstitutionally vague).

273/ As opposed to 21 U.S.C. § 851 which, as previously noted, (FOOTNOTE CONTINUED)

prior convictions. Sections (E)(1) of both of these statutes impose certain time constraints upon the convictions which can be used. Several courts have found that the particularity in pleading requirement is satisfied by a list of the defendant's prior convictions. 274/

(2) Professional

The professional provision, Section (e)(2), requires a pattern of criminal conduct (for Section 849, a pattern of drug trafficking) which generated a substantial source of the defendant's income and for which he manifested a special skill. Paragraph (e) defines these elements. "Pattern" means acts which are similar or which have interrelated characteristics. "Income" means the minimum wage for a 40 hour week, 50 week year, constituting at least 50% of the defendant's gross income. However, the possession of unexplained wealth alone can be enough to satisfy this requirement. "Special skill" means unusual

(FOOTNOTE CONTINUED)
applies only to federal convictions. For a comparison of the dangerous special offender recidivist clause with Section 851, see generally, United States v. Cirillo, 566 F. Supp. 1340 (S.D.N.Y. 1983).

274/ United States v. Pugh, 720 F.2d 1255 (11th Cir. 1983) (the notice found adequate is reproduced at 1257-158, n. 1); United States v. Warme, 572 F.2d 57, 61 n. 4 (2d Cir.), cert. denied, 435 U.S. 1011 (1978); United States v. Ilacqua, 562 F.2d at 404. See also, United States v. Di Francesco I, 604 F.2d at 769.

knowledge, judgment, or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, or concealment of such dealing, or the disposition of the fruits or proceeds of such crimes. This provision would encompass services performed by pilots, money launderers, ship captains, clandestine laboratory operators, chemists, and many other specialists involved in the drug trade. 275/

(3) Organized Crime

The organized crime offender status as defined by Section (e)(3) requires that the defendant had engaged in a conspiracy with three other individuals and was involved in organizing, planning, or financing activity. This provision of the dangerous special offender statute also has additional criteria which include those who give bribes and use violence to commit crimes; a similar addition to the dangerous special drug offender statute applies to recruiters, persons who dispose of drug money, and accomplices who help offenders escape detection.

However, there is a great deal of similarity between this

275/ For an excellent analysis of how the government proved that a defendant was a "professional" special offender, see United States v. Moccia, 681 F.2d 61, 65-66 (1st Cir. 1982).

statutory definition and that of CCE. The special offender statutes are almost a lesser included sentencing option for Section 848 targets because less evidence is needed to justify a dangerous special drug offender determination than to convict on the CCE count.

(4) Bill of Particulars

The government should make its dangerous special offender and dangerous special drug offender sentence enhancement pleadings as precise as possible. However, in response to a defense motion to dismiss this pleading because of an asserted lack of specificity, the prosecution should argue that the proper remedy would be for the court to require a Bill of Particulars rather than dismissal. 276/ Thus, any prejudice to the accused would be cured by a remedy that would be less drastic than dismissal and would therefore protect the government's interests.

(f) Evidentiary Requirements

The evidentiary standard for finding the defendant to be a dangerous special drug offender is as follows:

> If it appears by a preponderance of the information, including information sub-

276/ Fed. R. Crim. Pro. 57(b) (trial court can utilize any procedure needed to implement a statutory requirement).

> mitted during the trial of such felonious violation, and the sentencing hearing, and so much of the presentence report as the court relies upon, that the defendant is a dangerous special drug offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed 25 years and not disproportionate in severity to the maximum term otherwise authorized by law for such felonious violation. 277/

This provision thus creates a preponderance of the evidence standard for special offender adjudications, 278/ and determines the scope of information which the court can consider. This scope provision is supplemented by Section 850 of Title 21, United States Code, which states:

> no limitation shall be placed on the information concerning the background, character and conduct of the person convicted of the offense which a Court of the United States may receive and consider for the purpose of imposing [an] appropriate sentence.... 279/

In the typical case the evidentiary hearing can impose "[D]emands upon the court's time at sentencing [which] may even

277/ 21 U.S.C. § 849(b). Essentially the same provision is set forth at 18 U.S.C. § 3575(b).

278/ The defense assertion that this preponderance evidentiary standard is unconstitutional was rejected in United States v. Schell, 692 F.2d 672, 676-679 (10th Cir. 1982).

279/ An identical provision is set forth at 18 U.S.C. § 3576.

be greater than for the trial of the principal offense." 280/ Although the prosecution has various means to prove that the defendant qualifies for special offender status, evidence offered on the merits in an "enterprise" case involving a RICO or CCE offense will satisfy virtually all of the criteria for characterization as a professional or organized crime offender. Therefore, in such a case the government may prevail even when it does not offer any additional evidence during the sentencing hearing.

During the special offender hearing, the rules of evidence simply do not apply so the trial court, "[M]ay conduct a broad inquiry largely unlimited either as to the kind of information he may consider, or to the source from which it may come." 281/ This means that it is permissible for the court to, "[C]onsider a virtually unrestriced range of information, including hearsay...or other information that might be inadmissible at trial... and evidence not specified in a Section 849(a) [of Title 21] pretrial notice. 282/ Thus, under this authority the government can readily offer evidence in aggravation. An example of effective exploitation of the evidentiary standards governing sentence

280/ United States v. Ilacqua, 562 F.2d 399, 403 n.6 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978).

281/ United States v. Jarrett, 705 F.2d 198, 208 (7th Cir. 1983) (citations omitted).

282/ United States v. Moccia, 681 F.2d 61, 65 (1st Cir. 1982) (citations omitted). The same is true for 18 U.S.C. § 3576.

hearings occurred in United States v. Zylstra when the prosecution revealed the contents of its case files as evidence in aggravation. 283/

Additional evidence in aggravation can sometimes be obtained by requesting the Federal Bureau of Investigation to disclose the defendant's arrest record. 284/ Once this document has been obtained, the prosecution must then obtain certified copies of the Judgment and Probation/Commitment Order 285/ or the appropriate state court docket entry from the cognizant clerk of court. 286/ It is absolutely essential for the defendant to be

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283/ At that sentence hearing the prosecutors questioned the DEA case agent about the criminal activities of the defendant's 200 co-conspirators with emphasis upon numerous acts of violence and corruption in other jurisdictions. They also elicited additional testimony about Zylstra's vital role in the organization, and placed a DEA intelligence analyst on the stand to describe how Zylstra had been linked to various other conspiracies. The evidence accordingly supported the 210 year term of imprisonment which was affirmed by the Seventh Circuit. United States v. Zylstra, 713 F.2d 1332 (7th Cir.), cert. denied, __ U.S. __, 104 S.Ct. 403 (1983).

284/ This document, which is commonly referred to as a "rap sheet," is formally known as the FBI Identification Record (form 1-4). Prosecutors can obtain this document by requesting it from their local FBI field office, or submitting a request to the Identification Division of FBI Headquarters in Washington, D.C., telephone (202) 324-2222.

285/ In federal practice this order is entered on standard form AO 245 (6/74).

286/ Perhaps the most expedient means of introducing evidence of prior convictions is to request that the trial court take judicial notice of the documents in question pursuant to Rule 201(d) of the Federal Rules of Evidence. See United States v. Gordon, 634 F.2d 639, 642 (1st Cir. 1980) (the trial court is empowered to judicially note the indictment and other court records from a different federal judicial district); Weinstein's Evidence, § 201(03) (courts are particularly apt to take notice of material in court files); McCormick, § 327.

correctly identified in order to avoid jeopardizing the proceeding with the introduction of inaccurate information. 287/

(3) Justification for Use

The special offender statutes have tremendous potential for immobilizing major drug traffickers. In addition to triggering an enhanced sentence, special offender classifications can decrease a prisoner's chances for parole. 288/ There is very little litigative risk other than allowing the defendant to appeal the quantum of sentence imposed. 289/ This right to appeal is not an extra burden to the government as a convicted defendant ordinarily will appeal in any case. The government can dispose of an additional assertion of error in several paragraphs. Indeed, the government might even benefit if the focus of an appeal is shifted from legal issues to an extended analysis of the

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287/ The chance of using incorrect records of conviction can be minimized if the prosecution will give the defense sufficient advance written notice of its intent to use this evidence so the adverse party will have a fair opportunity to contest its use. The procedure is required by Rule 609(b) of the Federal Rules of Evidence when the prosecution intends to use evidence of a stale conviction to impeach a witness.

288/ Cf., Cardaropoli v. Norton, 523 F.2d 990, 994 (2d Cir. 1975), wherein the court noted that the Bureau of Prisons internal administrative classification as a "Special Offender" can extend a defendant's parole release significantly. A similar result is caused by special offender status under the special offender statutes.

289/ 21 U.S.C. § 849(h) and 18 U.S.C. § 3576 empower the appellate authorities to determine if the sentece is appropriate.

defendant's criminal history.

The special offender statutes provide an opportunity for the government to argue for a severe sentence, thus creating an additional forum for written advocacy wherein the prosecution can forcefully assert its position, even if the court does not ultimately classify the defendant as a special offender. 290/ In United States v. Gallo, the prosecution filed sentence enhancement pleadings for each substantive offense of a 70 count indictment. 291/ In response to Frederick Graewe's motion to dismiss these pleadings, the prosecution stated as follows:

> The cumulative maximum penalties are imprisonment for 30 years and a fine of $60,000 for the Title 18 offenses, as well as 19 years and $55,000 for the Title 21 offenses, constituting an aggregate maximum of 49 years and $115,000. Because the confinement total of 49 years was clearly too lenient for a killer such as defendant, the government sought to enhance the maximum sentence with the instant special offender pleadings which escalate defendant's imprisonment exposure to 25 years for each of these eight offenses, an aggregate maximum of 200 years. Defendant now seeks to frustrate the ends of public justice by causing

290/ For example, after filing enhancement pleadings in United States v. Zylstra, No. 80-50032 (S.D. Ill.), aff'd 713 F.2d 1331 (7th Cir.), cert. denied, __ U.S. __, 104 S.Ct. 403 (1983), the prosecution urged the court to impose the following consecutive penal sentences: 25 years each for 37 substantive counts followed by 20 years for the RICO violation, for a total of 945 years, with a consecutive sentence of life without parole on the CCE count. The court characterized this position as being "unreasonable," and declined to classify Zylstra as a special offender, but imposed the 210 year sentence that was subsequently upheld by the Seventh Circuit.

291/ See, e.g., Appendix VIII.

> dismissal of these pleadings. 292/

The trial court nevertheless dismissed these pleadings, stating, "Since four of the five defendants are already subject to sentences of up to life imprisonment without parole and the fifth defendant is subject to sentences totaling up to 49 years imprisonment, the dangerous special offender provisions that provide for enhanced sentences of up to twenty-five years are not needed." 293/ Thus, although they were ultimately dismissed, these pleadings emphasized the prosecution's contention that severe sentences were required.

The filing of these pleadings also has the prophylactic effect of protecting the government's interests during sentencing in the event the defendant is acquitted of all but one offense. 294/ In such an instance the prosecution can still seek

292/ Government Response to Defendant Frederick Graewe's Motion to Dismiss Dangerous Special Offender Pleadings at 2-3, United States v. Gallo, No. 82-119 (N.D. Ohio). He had been convicted on eight counts.

293/ Memorandum of Opinion dated March 14, 1983, at 4, United States v. Gallo, id. The court then imposed a 42 year prison term on Frederick Graewe, and gave the other defendants sentences of life imprisonment without parole for the CCE violation, and a cumulative total of over 100 years for the other counts.

294/ This occurred in United States v. James, No. PCR 81-440 (N.D. Fla.), [a pretrial bond appeal was reported at 674 F.2d 886 (11th Cir. 1982)], and the defendant's appeal of his conviction is now pending sub nom. United States v. Bascaro, No. 82-5547 (11th Cir.). In James the court initially found the defendant to be a dangerous special drug offender, but the trial judge subsequently recused himself and the new judge dismissed the special offender pleading because of a perceived lack of
(FOOTNOTE CONTINUED)

an extended sentence for the one count.

(FOOTNOTE CONTINUED)
particularity in the notice. The government's appeal of this adverse sentence enhancement decision is pending in United States v. James, No. 82-6043 (11th Cir.). These two appeals, by the defendant on the merits and by the government on the sentence enhancement issue, have not been consolidated by the Eleventh Circuit.

IV

PAROLE ELIGIBILITY

Because two convicted defendants with identical sentences may actually serve different terms of imprisonment before being paroled, "[t]he role of the parole board to release prisoners may diminish the power of the judge in setting prison terms." 295/ The role of the prosecutor is similarly minimized by the parole authorities. Because the release decision is influenced by three important factors, the topics of basic federal sentence types, parole guidelines, and information considered by the parole commission are analyzed below so prosecutors will know how to properly influence the ultimate determination of parole date. These matters are important because they control the single fundamental indicator of effective law enforcement: the actual amount of time a criminal serves in prison.

(A) Sentence Types

The basic types of sentences which federal judges can impose upon adult offenders are prescribed by statute. The normal rule is that a prisoner becomes eligible for release on parole after completing one-third of a term of imprisonment, but this is

295/ "Setting Prison Terms," Bureau of Justice Statistics Bulletin (August, 1983), at 2.

subject to several limitations. 296/ Generally, a prisoner receiving a term of between six months and one year or less is not eligible for parole; however, at the time of sentencing the court may, "[p]rovide for the prisoner's release as if on parole after service of one-third of such term...." 297/ There is no such release provision which the court can mandate for a term of less than six months. Thus, a penal sentence of 370 days is more lenient than an ordinary one year sentence because the prisoner with the greater term will be eligible for parole while his counterpart with a shorter sentence normally will not.

Another provision makes a prisoner eligible for parole after serving ten years even if one-third of his sentence exceeds a decade. 298/ Thus, the one-third rule is modified in the case of a sentence of life imprisonment, or for a term in excess of 30 years. It is important to note that sentences are aggregated for this purpose. 299/ For example, a defendant who is serving four consecutive 15 year terms is deemed to have a 60 year sentence and is consequently eligible for parole after ten years of

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296/ 18 U.S.C. § 4205(a).

297/ 18 U.S.C. § 4205(f). See United States v. Pry, 625 F.2d 689 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981).

298/ 18 U.S.C. § 4205(a).

299/ 18 U.S.C. § 4161 (aggregation for good time computation) and § 4205 (aggregation for computation of parole date for prison terms). See Section 2.5, Parole Guidelines, note 308, infra, and accompanying text.

incarceration. 300/ At the other end of the spectrum, a prisoner

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300/ There are two limitations upon this automatic ten year parole eligibility rule. First, under a sentence imposed in accordance with 18 U.S.C. § 4205(h)(1), the sentencing court is authorized to, "[D]esignate, in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court...." Such a sentence would divest the Parole Commission of the authority to release the inmate before he has completed the designated portion of his sentence. Thus, if the trial court were to sentence a defendant to incarceration for 33 years while designating an 11 year minimum term in accordance with Section (b)(1), the prisoner theoretically would serve 11 (rather than ten) years before becoming eligible for parole. However, there is no reported decision endorsing this practice, although it was affirmed in an unreported decision in United States v. Hood, No. 78-5397 (6th Cir. decided May 2, 1979), [the affirmance without opinion is reported at 599 F.2d 1056 (6th Cir. 1979)], which stated as follows:

> The court is further of the opinion that the district court did not err in sentencing appellants. The district court correctly construed 18 U.S.C. § 4205(a) and (b) to permit it to set any minimum sentence before the defendant is eligible for parole, so long as said minimum does not exceed one-third of the total sentence. Nor was the length of the sentence an abuse of discretion in light of appellants' prior criminal records and the seriousness of the crimes.

Slip op. at 2. However, the Bureau of Prisons apparently does not share this interpretation of Section (b)(1). In a program statement of May 21, 1979, entitled "Parole Commission and Reorganization Act," the Bureau of Prisons interprets Section (b)(1) as follows:

> If the court imposes a sentence in excess of one year, the court may "...designate in the sentence of imprisonment imposed, a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed...." This simply means that the court will fix the parole eligibility date by imposing a minimum term not to exceed one-

(FOOTNOTE CONTINUED)

serving a prison term in excess of five years must be paroled

(FOOTNOTE CONTINUED)
third of the maximum sentence imposed, nor can the minimum exceed ten years. Concurrent and/or consecutive minimum terms cannot exceed ten years or one-third of the total sentence imposed.

Paragraph 5(b). Thus, the viability of this practice is uncertain.

Second, prisoners who are sentenced under the provisions of the District of Colombia Code are subject to serving consecutive minimum sentences prior to becoming eligible for parole despite this automatic eligibility role. Thus, in Bryant v. Civiletti, 663 F.2d 286 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia ruled that the defendant must serve two consecutive 20 year minimum sentences (for the murder of two FBI agents) under the provisions of 22 D.C. Code § 2404 in addition to the ten years mandated by 18 U.S.C. § 4205(a) (for three federal bank robbery convictions). At his allocation at sentencing, the defendant stated, "I can't say I'm sorry for what happened to these men [the FBI agents]...I am really not interested in what the sentence is one way or another." 663 F.2d at 288. In response, the trial judge stated:

> Life terms can be so imposed that there will be every practical assurance that the defendant remains in prison until he dies. Clearly, if imprisoned, he should never be released for his crimes are the gravest and society owes him no further chance. The minimum sentence, short of death, which the court can responsibly impose in this case is a sentence to permanent life imprisonment....Mr. Bryant, you will die in jail, but at such time as God appoints. It is the sentence of this Court that you be sentenced to life imprisonment for the murder of Agent Woodriffe. It is the sentence of this Court that you be imprisoned for life for the murder of Agent Palmisano; that these two sentences shall run consecutively.
>
> It is further the sentence of the Court that each of these consecutive

(FOOTNOTE CONTINUED)

after serving two-thirds of his sentence or 30 years--whichever is earlier--unless the Parole Commission takes affirmative steps to retain him in custody. 301/

The defendant may be immediately eligible for parole if the court so specifies when it fixes the maximum sentence. 302/ The time of release is, therefore, not governed by statutory rules. This type of sentence broadens the Parole Commission's discretion.

(FOOTNOTE CONTINUED)

> sentences shall be consecutive to the sentence of 18 to 54 years you are now serving.

Id. at 289 (emphasis in original).

The trial court apparently achieved its objective of permanent imprisonment for the defendant because the appellate court ruled as follows:

> Under the law, therefore, Bryant will not even be eligible for consideration for parole on these offenses until well into the next century; i.e., until 50 years after his sentence began to run in 1968, i.e., until 2017. And the Maryland sentence and the sentence in the Eastern District of Virginia may impose additional mandatory imprisonment. These also are only the earliest dates that the Parole Commission may consider Bryant's parole--not the date when his full sentences will have been served.

Id. at 290 (emphasis in original). There is dicta in this ruling which suggests that federal minimum sentences (such as under 18 U.S.C. § 4205(b)(2)) can also be aggregated to preclude parole consideration despite the automatic ten year rule.

301/ 18 U.S.C. § 4206(d).

302/ 18 U.S.C. § 4205(b)(2).

The sentencing judge has another important option in that he can impose a conditional maximum sentence while committing the defendant to custody for study. [303/] This period of commitment may be for as long as six months. After receiving the results of this study, the court can then either affirm or reduce the conditional maximum sentence.

The term an offender will be required to serve is also reduced under the statutory "good time" provision. [304/] The amount of "good time" which a defendant receives each month depends upon the length of his sentence. [305/] An inmate can also earn "industrial good time" if he is employed by the Bureau of

303/ 18 U.S.C. § 4205(c).

304/ 18 U.S.C. § 4161.

305/ Id. This statute provides the following formula for the computation of "good time":

> Five days for each month, if the sentence is not less than six months and not more than one year. Six days for each month, if the sentence is more than one year and less than three years. Seven days for each month, if the sentence is more than three years and less than five years. Eight days for each month, if the sentence is more than five years and more than ten years. Ten days for each month, if the sentence is ten years or more. When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

Prisons Industries while incarcerated, [306/] or other types of "extra good time" under the qualifying regulations. [307/] Either type of "good time" will shorten a period of incarceration.

A unique penalty provision which provides for incarceration without the possibility of parole is set forth at Section 848, Title 21, United States Code, for defendants convicted of operating a continuing criminal enterprise ("CCE"). Section 848 prescribes a minimum sentence of ten years imprisonment. [308/] The trial court cannot suspend this sentence or grant probation, and parole does not apply. [309/] The convicted CCE defendant is, however, eligible to earn good time while he is incarcerated, so a defendant who receives the minimum CCE term of imprisonment of

306/ 18 U.S.C. § 4126. This statute allows an inmate to earn three days of such good time per month for his first year of incarceration, and five days per month thereafter.

307/ Id. Section 4162 is implemented by a Bureau of Prisons Program Statement entitled "Extra Good Time" of July 16, 1979, which provides for extra good time "...for performing exceptionally meritorious service, or for performing duties of outstanding importance or for employment in an industry or camp" § 1(b). Extra good time is automatically awarded to inmates who participate in work or study release programs and serve their sentences in a community treatment center or camp." Id. at §§ 5, 6, and 8. Inmates can also receive lump sum awards of extra good time for an act of heroism, satisfactory performance of an unusually hazardous assignment, an act which protects the lives of the prison staff, or a suggestion which cuts prison costs. Id. at §9. Even an inmate serving a life sentence may earn extra good time "...since the possibility exists that the sentence may be reduced or committed to a definite term" which would thus create a mandatory release date. Id. at §10(f).

308/ 21 U.S.C. § 848(a)(1).

309/ Id. at § 848(c).

ten years is eligible to earn ten days of "good time" for each month of the stated sentence. 310/ This could result in the

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310/ 18 U.S.C. § 4161. Section 4161 also allows a defendant to accumulate "good time" when he has received a mixed CCE and regular sentence. For example, a defendant who receives a Section 848 sentence of imprisonment for ten years followed by a regular consecutive 20 year sentence will earn "good time" at the rate provided for 30 year sentences under the 18 U.S.C. § 4161 aggregation provision.

It is important to note that this aggregation rule applies only for "good time" and not for parole eligibility under mixed regular and CCE sentences. Thus, under the statutory interpretation promulgated by the Bureau of Prisons and shared by the Parole Commission, a defendant with a 30 year regular prison term followed by a ten year CCE term becomes "eligible for parole to the non-paroleable [CCE] sentence in one-third of the regular sentence..." Bureau of Prisons Sentence Computation Manual, § 7161(D)(1). Thus, if he receives parole after the ten years this inmate then begins to serve his CCE sentence.

However, this official interpretation is not necessarily shared by all authorities. In United States v. Zylstra, for example, the Seventh Circuit Court of Appeals affirmed a 210 year term of imprisonment --which consisted of a 10 year CCE sentence followed by a 200 year regular term--with the following observation:

> We note that under 21 U.S.C. § 848(c) defendants found guilty of violating the continuing criminal enterprise statute are not eligible for parole in conformance with the general parole eligibility standards, 18 U.S.C. § 4201 et seq. Codefendants who were sentenced to lesser total sentences than Zylstra will, under 21 U.S.C. § 848(c), be required to serve greater periods of time before being eligible to be considered for parole. Viewing Zylstra's sentence in this perspective lends additional support to our holding that the trial court did not abuse its discretion in sentencing the defendant. Because Zylstra is eligible for parole after serving ten years of his sentence

(FOOTNOTE CONTINUED)

defendant serving less than seven years of his ten year sentence. "Extra good time" can further reduce this term.

Another feature of CCE is the provision that the defendant may be sentenced to life imprisonment without parole. 311/ Despite frequent defense attacks asserting that this absolute bar on parole and good time adjustments either violates the Equal Protection Clause or constitutes "cruel" punishment as prohibited by the Eighth Amendment, the federal judiciary has repeatedly

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(FOOTNOTE CONTINUED)

> this case is easily distinguishable from Solem v. Helm, __U.S.__, 103 S.Ct. 3001 (1983). See Rummel v. Estelle, 445 U.S. 263, 280-281, 382 (1980).

713 F.2d at 1341 n. 2 (emphasis added). Thus, this appellate court and the Bureau of Prisons view the relationship between regular and CCE sentences differently.

In a Operations Memorandum entitled "Continuing Criminal Enterprise" of May 7, 1981, the Bureau of Prisons observed that "...a number of CCE cases have improperly been made eligible for parole by institution staff." Id. at para. 3. This memorandum contained the following observation:

> Recognizing the fact that CCE cases, standing alone, are not eligible for parole is an easy observation or judgment to make. However, when a CCE sentence is imposed before, at the same time, or after another paroleable sentence(s) and is ordered to run concurrently with, or consecutive to another paroleable sentence, then such situations can become extremely complicated.

Id. Notwithstanding all of these attendant uncertainties, it is clear that a CCE sentence is likely to cause the affected prisoner to serve a substantial term before being paroled.

311/ 21 U.S.C. § 848(a)(1).

upheld this sentence and has noted that there is no constitutional right to parole. 312/

There has been, however, one exception to the absolute nature of the non-parole provision of Section 848(c). This occurred when the Parole Commission mistakenly released a CCE defendant from imprisonment. 313/ In this unique factual setting the Ninth Circuit held that the government was estopped from enforcing Section 848(c) because of its own misconduct in the form of the Parole Commission's erroneous release. Despite this one case, the CCE sentence to life imprisonment remains the only certain federal penal term (other than very short sentences) because it is subject to neither the "good time" nor parole eligibility limitations. With the judicial evisceration of the federal death penalty statutes, CCE has thus emerged as the most severe sanction available in the United States District Courts.

312/ See, e.g., United States v. Chagra, 669 F.2d 241, 264 (5th Cir.), cert. denied, __ U.S.__, 103 S.Ct. 102 (1982); United States v. Bergdoll, 412 F. Supp. 1308, 1314 (D. Del. 1976); United States v. Collier, 358 F. Supp. 1351, 1356-1357 (E.D. Mich. 1973). The Fifth Circuit in Chagra addressed the 1976 Parole Act's repeal of the 18 U.S.C. § 4202 provision cited in Section 848(c) and the subsequent amendment of the parole statutes (viz., 18 U.S.C. § 4205) as follows: "Congress's failure to modify Section 848(c) when enacting the 1976 Parole Act was simply an accidental oversight of no consequence." 669 F.2d at 263. Thus, the recodification of the parole laws has had no effect on the Section 848(c) prohibition of parole.

313/ Johnson v. Williford, 682 F.2d 868 (9th Circuit 1982).

(B) Parole Guidelines

Parole Guidelines 314/ were created by the United States Parole Commission in an effort to achieve greater uniformity in parole practices. 315/ Chapter 9 of these Guidelines governs offenses involving illicit drugs. Although the applicable guidelines vary with the amount and type of drugs involved, the role of the defendant in the trafficking organization, and his prior record, the application of these Guidelines causes similar classes of inmates to receive the same treatment. The Parole Commission, however, will deviate from these guidelines when there is sufficient justification to do so.

When computing the normal parole eligibility date for the term of incarceration which a particular drug defendant should

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314/ United States Parole Commission Rules and Guideline Application Manual, 28 C.F.R. §§ 2.1--2.62 (October 1, 1983), reproduced at United States Attorney's Manual §§ 9-34.224 et seq. (hereinafter cited as "Parole Guidelines"). The Parole Guidelines implement 18 U.S.C. § 4203(a)(1).

315/ The purpose of the Parole Guidelines were stated as follows by the Parole Commission.

> To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

Id. at § 2.20(a).

serve before being released, the prosecutor should refer to the Guidelines. 316/ Thus, notwithstanding the usual statutory rule that the defendant must serve one-third of his sentence before parole, the Commission normally requires the defendant to serve the guidelines for his offense. Thus, a hypothetical defendant convicted of distributing 20,000 pounds of marihuana who is sentenced to imprisonment for three years will not be paroled when he has served one-third of his sentence (one year) because the applicable guideline provides for incarceration between 40 and 52 months. Because the minimum end of the guideline (40 months) exceeds the term of imprisonment, this defendant can be expected to serve his entire sentence less earned "good time" without being paroled.

The effect of this particular guideline is to create greater uniformity in the amount of time prisoners actually serve despite such disparate sentences as imprisonment for three years and imprisonment for ten years. For example, a defendant who committed the same offense as the hypothetical defendant above and received a sentence of ten years of imprisonment could be expected to serve almost the same amount of time as the defendant who received the three year sentence. This defendant would be eligible for parole after having served approximately three and

316/ The U.S. Parole Commission Offense Behavior Severity Index Section of the Guidelines provides, at Section 911(a), that distribution of more than 20,000 pounds of marihuana is deemed to be a category 6 offense. This means that an offender with no prior record would normally serve between 40 and 52 months of confinement before being released.

one-third years, the lower end of his guideline. Even a defendant sentenced to 15 years of imprisonment for distributing 20,000 pounds of marihuana should expect to serve the guideline of 40 to 52 months rather than one-third of his sentence (five years) if he had been sentenced pursuant to Section 4205(b)(2). However, a "normal" sentence rather than a (b)(2) commitment would statutorily obligate the defendant to serve one-third of his sentence (five years), a term which exceeds the guideline.

In computing guidelines, it is important to note that RICO offenses 317/ are for this purpose are deemed to be identical with the underlying offenses. Thus, RICO conspiracy to distribute marihuana would be treated as a marihuana offense with resulting low eligibility, whereas a RICO violation which alleged predicate offenses of murder would be subject to the guidelines for homicide offenses.

The Parole Commission is entitled to render decisions outside its Guidelines. 318/ Consequently, a cooperating defendant can be released early in consideration of his assistance to the government, while in aggravated cases a defendant's parole can be postponed. One basis for aggravation is the defendant's involvement in a sophisticated criminal enterprise over a long time period. 319/

317/ 18 U.S.C. § 1962.

318/ Parole Guidelines, supra note 324, at § 2.20-06.

319/ Id. at paragraph (b)(3).

The importance of the information furnished to the Parole Commission is illustrated by consideration of Section 2.20-5 of the Parole Guidelines which specifies factors used to calculate the severity of drug offenses. This section states that the Parole Commission will, in assessing the severity of drug offenses, consider the quantity and purity of the drug involved as well as its street value. It will also utilize the scale of the operation, as measured by the total illicit income it generated, as well as the total volume of drugs involved. Obviously, the prosecutor can be very helpful to the Commission by making sure that the information it considers accurately reflects the results of the investigation.

(C) Information Considered by the Parole Commission

The United States Parole Commission is entitled to obtain information and recommendations from a variety of sources in order to have a complete record upon which to base its decision. The initial portions of its records are generated during the trial process. Rule 32(c) of the Federal Rules of Criminal Procedure requires the probation service of the court to conduct a presentence investigation and summarize the results in a written report to the Judge. 320/ Information developed during

320/ Rule 32(c) states as follows:

> The report of the presentence investigation shall
(FOOTNOTE CONTINUED)

the sentencing phase of the trial can also be used by the Commission. 321/

The trial judge can also impose a conditional maximum sentence upon the defendant and commit him to custody for the purpose of a study to determine what an appropriate sentence would be. 322/ For example, the court can recommend that the defendant be sent to the Bureau of Prisons medical facilities in Springfield, Illinois, for psychiatric evaluation. The Parole Commission deems any reports so generated to be a portion of the presentence report so they are subsequently considered by the Parole Commission. Similarly, the district court can commit the defendant for a period of 30 days for the purpose of determining whether he is a narcotics addict, and data so generated will also be considered. 323/

In furnishing information to the court and Parole Commis-

(FOOTNOTE CONTINUED)
> contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence, or in granting probation, or in the correctional treatment of the defendant, and such information as may be required by the court.

321/ In an article entitled "Sentencing: the Forgotten Phase", The Florida Bar Journal at 240 (April 1983), Randall C. Berg, Jr., and Malcom C. Young provide the following summary of the role of the defense counsel in extenuation and mitigation: "Counsel presents evidence and witnesses concerning the defendant's bad fortune, good character and sincere apologies. The defendant is then placed at the mercy of the court."

322/ 18 U.S.C. § 4205(c).

323/ 18 U.S.C. § 4252.

sion, the prosecution should know that there are no constraints upon the contents of the presentence report, or upon the sources from which the information contained in the report may be obtained. The probation service can obtain information even from the defendant's wife, 324/ or from the United States Attorney and the case agent, and a plea agreement cannot obligate the government to withhold the disclosure of character and background information about the defendant from the sentencing judge. 325/ However, any incorrect material information contained in the presentence report which prejudices the defendant may well violate his right to due process. 326/

If the government elects to supplement the information contained in the presentence report by offering evidence at a sentencing hearing, it is not required to provide the defense with advance notice of such evidence. 327/ The Supreme Court has ruled that the sentencing judge can consider the defendant's refusal to cooperate with the government as relevant to his attitudes toward society and prospects for rehabilitation. 328/

The Parole Commission will also accept recommendations from

324/ United States v. Burton, 631 F.2d 280, 282 (4th Cir. 1980).

325/ United States v. Avery, 621 F.2d 214, 216 (5th Cir. 1980), cert. denied, 450 U.S. 933 (1981).

326/ See United States v. Cimino, 659 F.2d 535, 537-538 (5th Cir. 1981).

327/ United States v. Jackson, 649 F.2d 967, 978-979 (3d Cir.), cert. denied, 454 U.S. 1034 (1981).

328/ Roberts v. United States, 445 U.S. 552, 557-558 (1980).

various other sources. 329/ For example, another source of information is governed by the requirement that federal prosecutors prepare a Form 792 Report on Convicted Prisoners for submission to the Parole Commission. 330/ This form contains provisions for a description of the offense, prosecutorial recommendations, and any additional aggravating circumstances which should be considered by the Parole Commission concerning the defendant's parole. 331/ In its publication, "Principles of

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329/ The Parole Commission has expressed its view regarding its willingness to accept recommendations and information as follows:

> Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other interested parties are welcomed by the Commission. In evaluating a recommendation concerning parole, the Commission must consider the degree to which such recommendation [contains] specific acts and reasoning relevant to the statutory criteria for parole (18 U.S.C. § 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation should state its underlying factual basis and reasons. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission's discretionary authority to grant or deny parole.

Parole Guidelines, note 324, supra, at § 2.19(d).

330/ United States Attorney's Manual, § 19-34.220, contains this requirement. A sample copy of Form 792 with instructions for preparing it is set forth at § 9-34.222, id.

331/ This monograph cannot overemphasize the importance of accurate data. In Cardaropoli v. Norton, 523 F.2d 990, 992 n. 2 (2nd Cir. 1975), the court found that the defendant had been denied due process when the Strike Force Attorney provided incorrect information in a Form 792 which both the Bureau of Prisons and Parole Commission used to justify unfavorable actions against the defendant.

Federal Prosecution," 332/ the Justice Department requires prosecutors to execute this form. 333/ Despite this requirement, most federal prosecutors evidently fail to submit the required

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332/ Part G, § 9-27.000, United States Attorney's Manual, commentary to Consideration Six, at 55-56.

333/ Id. The reason given for the requirement is as follows:

> The information necessary to determine a prisoner's offense and offender characteristics may be available to the Commission through the presentence report. In some cases there may be no presentence report, however. In other cases the report may not reflect all the facts about the offender or the offense necessary to the informed application of the Parole Commission's guidelines.
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> * * *
>
> In supplying information to the Parole Commission, the prosecutor should bear in mind that the Commission, like the sentencing judge, is permitted to consider unadjudicated charges in assessing the seriousness of an individual's criminal behavior. Accordingly, the information supplied need not be related solely to the offense or the offenses for which the person was convicted, but should reflect the full range and seriousness of the conduct.
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> * * *
>
> Recommendations by the prosecutor concerning parole should be made when, as with a prior plea agreement, the prosecutor has agreed to make a recommendation, or when the prosecutor concludes, preferably after the consultation with his supervisor, that the period of confinement recommended in the parole guidelines would be inappropriate in light of particularly aggravating or mitigating circumstances of the case.

Id. (citation omitted).

Report on Convicted Prisoners. 334/

In addition to filing this report, it would also be prudent for the prosecution to prepare the "Government Version of the Offense" which is included in the presentence report. This practice has the advantage of ensuring that the submitted information is accurate, as well as providing the defendant with a forum in which to correct any assertions he deems to be incorrect.

334/ In an article entitled "Parole Commission Reports - a Critical Missing Link," Narcotics Newsletter (July 1981) at 4, an attorney for the U.S. Parole Commission noted that the failure to file this form has the following result:

> The lack of this important report can be a serious problem for the Parole Commission in attempting to evaluate the gravity of the major narcotics crime and the particular role in the offense played by an applicant. Without a clear and concise report from the prosecutor outlining for the Commission the facts it needs to know, the Commission may grant an unduly lenient parole date to a serious offender. Conversely, if mitigating factors such as substantial unrewarded cooperation are left in the prosecutor's file, an unduly severe parole decision may result.
>
> While presentence investigation reports should contain adequate descriptions of the offense in the "official version" section, no conscientious prosecutor should assume that the probation officer has accomplished this, especially in complex and sophisticated narcotics conspiracies with numerous defendants. If there has been a trial, the probation officer frequently assumes that the trial court is familiar with the case and does not recount or analyze the facts of the offense.

In the interests of justice, it is therefore necessary for the cognizant federal prosecutor to prepare the required Form 792 to insure that the parole commission is fully informed.

V

PENAL DESIGNATIONS

The Bureau of Prisons decides where convicted felons will serve their penal sentences. This decision involves the determination of the appropriate level of security required, as well as designation of a particular institution within that security level. The purpose of this chapter is to briefly explain some of the factors which the Bureau of Prisons considers in classifying prisoners, and to delineate how the federal prosecutor can properly influence this decision.

Appendix IX is a summary chart listing Bureau of Prisons facilities to which federal inmates may be sent. As indicated there, minimum security institutions are those in security level I; medium security facilities are those in security Levels II, III, and IV; and the maximum security facilities are those in Levels V and VI. The Level V facilities are limited to the federal penitentiaries located at Lewisburg, Pennsylvania; Leavenworth, Kansas; and Lompoc, California. The only level VI institution is the penitentiary in Marion, Illinois. As a general rule, the Bureau of Prisons sends the greatest security risks to Marion and other higher level institutions and the least security risks to the Level I camps. 335/

335/ The Bureau of Prison's publication entitled Facilities
(FOOTNOTE CONTINUED)

Appendix X consists of a copy of a Bureau of Prisons Form 14 which is used to compute the security designation of an inmate. The local Bureau of Prisons Community Programs Manager normally prepares the form and completes Section B with information obtained from the probation department, the prosecutor, and the

(FOOTNOTE CONTINUED)
1982, a catalog of all 43 federal penal institutions, describes the facility at Marion as follows:

> [It] houses adult male offenders committed from all parts of the country who have demonstrated a need for high security confinement. Typically, offenders at Marion have compiled serious records of institutional misconduct, have been involved in escape related behavior, or have lengthy and complex sentences which indicate that they require an unusually high level of security.
>
> Designed to replace Alcatraz, Marion opened in 1963...for offenders throughout the federal system who have demonstrated that they cannot function in a general population without threatening the security of the institution, or safety of staff and inmates.

Id. at 53.

In contrast, the prison camp at Eglin Air Force Base in Florida is at the other end of the corrections spectrum:

> The inmates are serving sentences of five years or less, or have completed the major portion of long sentences begun elsewhere. Eglin does not house inmates who have records of escape, sexual offenses, or major medical-psychiatric problems. The offenders must be capable of performing work assignments because of an agreement with the Air Force to supply labor crews. More than half of the inmates work on the base in maintenance projects, while others provide administrative support services for camp operations.

Id. at 33.

case agent. The factors which are considered in Paragraphs one through six of Section B of this form inquire whether there are any detainers lodged against the defendant, the severity of the current offense, the expected length of incarceration, the type of prior commitments, any history of escape attempts, and the defendant's history of violence. The Community Programs Manager uses the Bureau of Prisons Designations Manual to determine the numerical value to be assigned in computing the answers to questions one through six. The numerical scale set forth in this document is used to denote the level of supervision the defendant requires (i.e., the inmate security level).

It is important to note that the inquiry (set forth at question eight of Appendix X) regarding precommitment status has the effect of reducing the score of the defendant and this could cause the Bureau of Prisons to send the defendant to a lower level facility. Accordingly, if the court releases the defendant on his own recognizance after it has imposed sentence, and allows the defendant to voluntarily surrender at the confinement facility, his score is substantially reduced. 336/

Paragraph 6 of Section C of this form sets forth important considerations referred to as "management reasons" for adjusting the security level of the inmate in order to send him to a higher or lower security level institution. Such considerations as age,

336/ The practical effect of allowing voluntary surrender may be to lower the security level of the defendant's place of confinement. Prosecutors should be aware of this result when agreeing to voluntary surrender.

release date, residence, overcrowding, and racial balance are self-explanatory factors. The management reason of sentence limitations is significant because defendants receiving either a RICO or CCE sentence are not eligible for initial designation to a camp.

Included in this list of management factors is the extremely important consideration of judicial recommendation. Generally, the Bureau of Prisons will raise or lower the security designation of an inmate one level based solely on the recommendation of either the judge or prosecutor. With proper support from a prosecutor, the Bureau of Prisons will reassign a cooperating inmate from a maximum to a medium security facility (Level V to Level IV). This practice can be significant when the prosecutor makes it known to an accused during plea negotiations. 337/

337/ In United States v. Mitchell, there arose a situation in which the Bureau of Prisons lowered the designation by two levels (from a Level III medium security facility to a Level I camp) based upon a prosecutorial recommendation. This occurred when the defendant in question was a key government witness whose life might have been endangered if he had been kept in a medium security facility. This prosecutorial recommendation articulated numerous reasons why the assignment to a camp would be in the best interests of the government, and the Bureau of Prisons made the requested designation. The creation of the Witness Security Program with enactment of Title V of the Organized Crime Control Act of 1970, 84 Stat. 933, provides another means of protecting witnesses who are incarcerated. In FY 1982 there were only 315 entries into this program. See "Witness Security Program: An Overview," Narcotics Newsletter (August 1983) at 11. A discussion of this program is outside the scope of this monograph.

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United States v. Zylstra, No. 80-50032 (S.D. Ill.), aff'd, 713 F.2d 1332 (7th Cir.), cert. denied, __ U.S. __, 104 S.Ct. 403 (1983)...... 25, 26, 29, 123, 125, 135

Whalen v. United States, 445 U.S. 684 (1980)........... 68

Williams v. New York, 337 U.S. 241 (1949)............. 79

Williams v. United States, 238 F.2d 215 (5th Cir. 1956), cert. denied, 352 U.S. 1024 (1957)......... 62

APPENDICES

APPENDIX I

GOVERNMENT'S MOTIONS CONCERNING BAIL

[from United States v. Gallo, No. 82-119 (N.D. Ohio), aff'd (on bond questions) sub nom. United States v. Graewe, 689 F.2d 54 (6th Cir. 1982)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CASE NO. CR. 82-119
v.	)	GOVERNMENT'S MOTIONS
Joseph Charles Gallo, *et al.*	)	CONCERNING BAIL
Defendants	)	

I

GOVERNMENT'S MOTION TO DENY BAIL

TO ALL DEFENDANTS

Comes now the United States of America, by and through its undersigned attorneys, and respectfully requests that this Honorable Court exercise its extrastatutory powers by ordering that ALL DEFENDANTS be held without bail to prevent them from unlawfully interfering with the instant criminal ~~prosecution by threatening and murdering prospective~~ witnesses.

The prosecution recognizes that the Bail Reform Act of 1966, 18 U.S.C. Section 3146, contains no provision authorizing pretrial detention without bail. However, it has long been the law in this Circuit "... that courts have the inherent power to confine the defendant in order to protect further witnesses at the pretrial stage as well as during trial." *United States* v. *Wind*, 527 F.2d 672, 676 (6th Cir. 1975); *accord*, *United States* v. *Abrahams*, 575 F.2d 3 (1st Cir. 1978); *see also* *Bitter* v. *United States*, 389 U.S. 15, 16-17 (1967) (recognition of extrastatutory power in an opinion citing the Bail Reform Act).

The ruling in Wind was based upon the following analysis of the legislative history of the Bail Reform Act:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pre-trial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence.... A solution goes beyond the scope of the present proposal and involves many difficult and complex problems which require deep study and analysis. The present problem of reform of existing bail procedures demands an immediate solution. It should not be delayed by consideration of the question of preventive detention. Consequently, this legislation is limited to bail reform only.
>
> Since Congress did not intend to address the problem of pretrial detention without bond in the Bail Reform Act of 1966, the existence of extrastatutory powers to detain persons prior to trial may be considered. Id. at 674.

The reasoning of the Court is set forth as follows:

> In Carbo v. United States, 82 S. Ct. 662, 7 L. Ed. 2d 769 (1962), Circuit Justice Douglas acknowledged that this inherent power may even extend to custody in advance of trial when the court's own processes are jeopardized by threats against a government witness.
>
> * * *
>
> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial.
>
> * * *
>
> We hold that in a pretrial bail hearing on a non-capital offense a judicial officer may consider evidence that the defendant has threatened witnesses and is a danger to the community in determining whether the defendant should be released pursuant to 18 U.S.C. Section 3146. Id. at 675.

In support of this motion, the government respectfully directs the attention of this Honorable Court to Count 1 of the instant indictment which alleges, inter alia, that the defendants have murdered numerous persons in furtherance of their major narcotics trafficking enterprise; that their victims have included numerous prospective witnesses who were brutally slain to prevent the witnesses from communicating information regarding the defendants' illegal activities to law enforcement officials; that the defendants have frequently endeavored to intimidate and dissuade prospective witnesses from testifying in this matter; and that the defendants conspired to kill the two FBI case agents conducting this investigation (as well as the agents' families) to thwart the government's efforts which led to the indictment in this case.

The prosecution also alleges and hereby offers to prove that the defendants have frequently stated their intention to murder the agents and government witnesses in this case, and that this climate of violence motivated the FBI to take the unprecedented prophylactic measure of relocating and hiding the case agents' families in order to insure their safety.

As evidenced by the FBI "rap sheets" which are attached hereto and incorporated by reference, most of the defendants have previously been convicted of various crimes of violence and moral turpitude.

The government respectfully submits that these actions of the defendants manifest a propensity to use violence and coercion to undermine the integrity of the judicial process. Under these circumstances it is strongly urged that this Honorable Court utilize the only viable preventive measure available to preserve the prosecution's right to a fair trial by ordering ALL DEFENDANTS to be held without bond.

II

GOVERNMENT'S ALTERNATE MOTION TO SET BAIL AT $50 MILLION IN CASH FOR EACH DEFENDANT

Assuming, arguendo, that this Honorable Court decides not to grant the motion addressed in Section I, the United States of America, by and through its undersigned attorneys, respectfully requests that bail for each defendant in this case be set at $50 million in cash.

The setting of "... a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof..." is specifically authorized by the Bail Reform Act of 1966 at 18 U.S.C. Section 3146(a)(4). The factors which the District Court can consider include, inter alia, the nature and circumstances of the offenses charged, the accused's financial resources, the accused's record of convictions and of failure to appear at court proceedings, and the weight of the evidence against the accused. Id. at Section 3146(b). Each of these factors is analyzed seriatim below.

A

Nature of the Offenses

The defendants are charged with numerous separate offenses arising from their alleged status as the management infrastructure of a criminal cartel which had controlled the illegal narcotics trafficking business in Cleveland. These charges allege that these defendants reaped multi-million dollar incomes from illegally distributing vast quantities of illegal drugs, and that they resorted to multiple murders and other crimes of violence to further their narcotics-related activities. If convicted of Count 2 of the indictment, each defendant faces imprisonment for life without parole for engaging in a continuing criminal enterprise (CCE). In addition, they face imprisonment for hundreds of years on the other offenses.

In United States v. Smith, 87 F.R.D. 693, 703 (E.D. CA 1980), the court observed that being charged with a Section 848 offense itself "... suggest[s] a very high bail is required."

Although an alleged narcotics trafficking empire of this magnitude is somewhat unusual within this circuit, appropriate bond procedures have evolved in other districts to deal with the unique character of drug trafficking. Research conducted by the Department of Justice's Narcotic and Dangerous Drug Section has demonstrated the propensity of drug traffickers to post large cash bonds and flee, thus forfeiting a small part of their assets as the cost of doing business. Cf. United States v. Wright, 483 F.2d 1068, 1070 n. 5 (4th Cir. 1973); see also, United States v. DeMarchena, 330 F. Supp. 1223, 1226 (S.D. CA 1971); accord, United States v. Nebbia, 357 F.2d 303 (2nd Cir. 1966); United States v. Melville, 309 F. Supp. 824 (S.D. NY 1970). In the narcotics cases listed below, various district courts have set multi-million dollar bonds for defendants charged with offenses much less serious that those sub judice:

	AMOUNT OF BOND	DISTRICT	DEFENDANT	CASE NO.
1	$10 million	ED NY	Clymore	81-CR85(S)
2	$10 million	ED NY	Nataro	82-CR96
3	$10 million	D PR	Ibarra	78-8010 (Misc.
4	$ 5 million	SD FL	Kattan	81-83CR-JLK
5	$ 5 million	SD IL	Viana-Medina	80-50032
	$ 5 million	"	Sullivan	" "
	$ 1 million	"	Zylstra	" "
	$ 1 million	"	Mitchell	" "
6	$ 5 million	CD CA	Valenzuela	CR77-1047
7	$ 5 million	CD CA	Araujo	CR79-641
8	$ 5 million	D MD	Chitmong-Kollert	(Case # not yet assigned)
	$ 5 million	"	Chong-Charoen	" "
	$ 5 million	"	Primiano	" "
	$1.5 million	"	Steebing	" "
	$1 million	"	Baxton	" "

	AMOUNT OF BOND	DISTRICT	DEFENDANT	CASE NO.
9	$ 5 million	D AZ	Cunningham	CR82-100-PH-Cl
10	$ 3 million	D MD	Bello	Y-81-00462
11	$ 3 million	WD VA	Sterling	CR-82-86M
12	$2.5 million	CD CA	Martinez	CR79-985
13	$ 2 million	ED TX	Montemayor	B-81-811

Moreover, in United States v. Cunningham, #CR82-100-PH-CLH (D AZ 1982), the court initially set bond at $5 million, but subsequently ordered the defendant held without bond when he threatened a government witness, and in United States v. Levy, et al. #81-335 (D NJ 1982), three defendants were held without bail, and bond for six others ranged from $1 million to $10 million.

Under these circumstances, the government strongly urges that the realistically high bonds we have requested be set in this case.

When district courts have failed to impose the adequate bonds requested by prosecutors in major narcotics cases, defendants have demonstrated a pattern of forfeiting bond and fleeing the jurisdiction of the court.

Since 1980, Narcotics Section prosecutors assigned to "Operation Greenback" in the Southern District of Florida have indicted 65 defendants alleged to be drug traffickers or money launderers in cases wherein the bonds set were in excess of $500,000. Thirty-three of these defendants subsequently forfeited bond and fled. Thus, our experience is that over one-half (50.569%) of these alleged traffickers were willing to forfeit seemingly substantial bonds in order to avoid prosecution.

In a Wall Street Journal article of November 13, 1981, entitled "Drug Loophole - Prosecutors Complain More Narcotics Dealers Flee by Jumping Bail," the proclivity of alleged drug

traffickers to flee was accurately documented with the following examples:

(1) After the federal district court granted the request of a Narcotics Section Trial Attorney by setting bonds totalling $21 million for Jose Fernandez in an "Operation Grouper" case involving two separate indictments, the defendant subsequently prevailed upon the court to reduce the bonds to a total of $1 million. Mr. Fernandez subsequently disappeared.

(2) Following the setting of her bond at $5 million in the Southern District of Florida, Martha Libia Cardona's attorneys insisted that her constitutional rights were being violated. When bond was reduced to $1 million, she posted it and fled.

(3) Alfredo Gutierrez's bond was originally set at $3 million in Miami, but when it was eventually reduced to $1 million he immediately fled.

(4) The Drug Enforcement Administration (DEA) is currently seeking 2,900 fugitives in drug-related cases. Since that law enforcement agency has only 1,960 agents, the United States has more drug fugitives than DEA agents.

Thus, the unique proclivites of drug defendants to flee militate in favor of the requested bond.

B

Financial Resources

As alleged in the instant indictment, the defendants have realized a gross income totaling millions of dollars. Moreover, the government hereby alleges and offers to prove that the defendants have secreted various funds in order to facilitate their fleeing this jurisdiction.

C

Convictions

As indicated previously, most of the defendants have extensive criminal records.

D

Failure to Appear

Defendant Zagaria has previously fled to avoid confinement in connection with a state drug prosecution. Moreover, the government alleges, and hereby offers to prove, that each defendant has expressed his intention to flee this jurisdiction. "Perhaps more persuasive than any single other factor that could be brought to a court's attention would be the defendant's expressed intention to flee the particular proceedings then being conducted." United States v. Meinster, 481 F.Supp. 1117, 1122 (S.D. FL 1979), affirmed on other grounds, sub nom. United States v. Phillips, 664 F.2d 971 (11th Cir. [former 5th Cir.] 1981), Indeed, in United States v. Wind, supra, and United States v. Abrahams, supra, two Circuits have recognized a defendant's expressed intention to flee as being a basis for their being held without bond.

E

Weight of the Evidence

The government alleges, and hereby offers to prove, that the evidence against the defendants is overwhelming. This case is the result of an extensive two year FBI investigation supplemented by assistance from DEA, IRS, INS, and state and local police forces. The Cleveland Strike Force of the Organized Crime and Racketeering Section of the Justice Department's Criminal Division presented evidence to the Grand Jury for over one year. The evidence, which will be offered at trial, includes the following: recordings in which the defendants incriminate themselves, numerous drug seizures, extensive testimony by co-conspirators corroborated by documentary evidence, financial information, and physical

evidence. The strength of the prosecution case, in and of itself, supports a high bond. United States v. Wright, 482 F.2d 1068, 1070 (4th Cir. 1973). Indeed, in a CCE prosecution much like this one-- the infamous "Black Tuna" case prosecuted in Miami by Narcotics Section Trial Attorneys-- the court ordered the defendants held without bail while observing, that "[t]here is a statutory presumption in pretrial bail proceedings that the likelihood of flight increases with the severity of the charges, the strength of the government's case, and the penalty which conviction would bring." United States v. Meinster, supra, at 481 F. Supp. 1126.

In summary, all of these factors militate in favor of a $50 million cash bond because of the defendants' documented predisposition to flee.

III

CONCLUSION

In conclusion, the government requests that this Honorable Court order that these defendants be held without bond, or, in the alternative, that a $50 million bail be imposed. With regard to this request, the government notes that "the fixing of the amount of bail is peculiarly a matter of discretion with the trial court." United States v. Wright, 483F.2d 1068, 1069 (4th Cir. 1973), citing United States v. Radford, 361 F.2d 777 (4th Cir.), cert. denied,, 385 U.S. 877 (1966), and Kaufman v. United States, 325 F.2d 305 (9th Cir. 1963). As Justice Powell has observed, "Decisions of the District Court with respect to bail are entitled to 'great deference.'" Mecom v. United States, 434 U.S. 1340, 1341 (1977) [as Circuit Justice], quoting Harris v. United States, 404 U.S. 1232 (1971). By statute, the court's order "shall be affirmed [on appeal] if it is supported by the proceedings below." 18 U.S.C. Section

3147(b). The evidence that the government will introduce clearly calls for the denial of bail to the defendants, or at least the imposition of a cash bond of $50 million.

Respectfully submitted,

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APPENDIX II

AFFIDAVIT IN SUPPORT OF BOND REQUEST

[from United States v. Gallo, No. 82-119 (N.D. Ohio), affd (on bond questions) sub nom. United States v. Graewe, 689 F.2d 54 (6th Cir. 1982)]

AFFIDAVIT

I, Dean W. Winslow, Special Agent, Federal Bureau of Investigation (FBI), Cleveland, Ohio, being duly sworn state:

I have been employed as a Special Agent of the Federal Bureau of Investigation for seven and one-half years, principally assigned to investigations of criminal matters within the investigative jurisdiction of the FBI. For the past twenty-seven months, the affiant has been involved in an active investigation of a major narcotics operation controlled by Joseph Gallo, Thomas Sinito, and Carmen Zagaria, in the Cleveland, Ohio, area.

I have supervised the conduct of this investigation and as a result of my personal participation and my knowledge of reports made to me by other law enforcement officers engaged in the investigation, I am familiar with all circumstances of this investigation.

Several results of this investigative effort are summarized as follows:

Flight. Protected witness Don M. Newman as well as other witnesses, such as Gregory Hoven, have explained how, pursuant to their employment by defendant Carmen Pasquale Zagaria, as narcotics traffickers, have learned of all of the defendants proclivities for flight. Zagaria explained how it would be all defendants *modus operandi* to flee, if indicted, to foreign countries from which they could not be extradited. Zagaria has personally searched for "safe haven" in South America, and discussed with his attorneys countries that will not extradite. Zagaria has maintained his wealth

that derived from his trafficking activities in the form of precious metals and gems which could be hastily transported abroad. Moreover Zagaria explained how he had discussed these arrangements with all defendants who concurred with these arrangements and expressed their own individual plans to flee if indicted because they would not remain in custody to be tried.

These representations were corroborated by independent evidence. Searches conducted by the FBI revealed extensive assets maintained by defendant Carmen Zagaria and Joseph Gallo in the form of precious metals and gems as described by Newman (these items are described in detail in the inventory list appendant to the instant indictment as attachment to the "Forfeiture" section of Count 2). Moreover, Zagaria became a fugitive when he failed to appear at his state court sentencing on March 9, 1982, at the Cuyahoga County Common Pleas Court for sale of cocaine and sale of marihuana. Zagaria's location is currently unknown.

Defendant Hartmut Graewe is an alien. Graewe has discussed with witnesses, his proclivity for flight to include having relatives in that part of Germany that would make extradition impossible.

Joseph Charles Gallo has a past history of flight. Gallo was indicted in Cleveland on racketeering charges and fled. Gallo was located in Florida after an extensive search that lasted several months.

Prior Convictions. The FBI "rap sheets" indicating each defendant's prior criminal record are appended hereto. Additionally, the following charges are currently pending against the following

defendants: 1. Joseph Charles Gallo, is currently awaiting sentencing on carrying a concealed weapon and having a weapon under disability. Gallo pled guilty to both of the above-mentioned charges.

2. Frederick Graewe is awaiting sentencing on the following charges which he also has pled guilty to, two counts of possession of marihuana, having a weapon under disability, and possession of criminal tools.

3. Carmen P. Zagaria is currently a fugitive and awaiting sentencing on the sale of cocaine and sale of marihuana which he was found guilty in a Cuyahoga County Common Pleas Court. Zagaria is also awaiting trial on the following charges, having a weapon while under disability (two counts), possession of criminal tools (four counts), possession of marihuana, possession of cocaine, possession of phencyclidine, receiving stolen property, and possession of a dangerous ordnance.

Danger to Witnesses. As alleged in the instant indictment at Count 1, most defendants have previously murdered prospective witnesses and actively conspired to kill the two FBI case agents (and their families) as well as other witnesses. They have also threatened and intimidated prospective witnesses in an effort to thwart the efforts of law enforcement personnel. Several other prospective witnesses have advised the affiant that they will not provide information in this matter until said time as Hartmut Graewe and Carmen Zagaria are off the streets and behind bars. These prospective witnesses stated that they all fear for their safety because of Graewe's and Zagaria's reputation. Hans Graewe and Carmen Zagaria

according to several witnesses have physically tortured and threatened people who have owed them money for narcotics and gambling debts. These same witnesses also advise that Graewe and Zagaria use threats and intimidation to force individuals to follow their instructions.

Strength of the Prosecution Case. The instant indictment is the product of an extensive FBI investigation over two and one-half years supplemented by a prolonged Grand Jury investigation. The techniques used included court-authorized electronic surveillance, and consensual monitoring which produced numerous recordings in which various defendants conduct narcotics dealings, discuss a planned murder, and make numerous other inculpatory statements. Several protected witnesses and other co-conspirators have explained their roles in all defendants narcotics operations and described the admissions by various defendants of their criminal activity, including confessing to numerous murders. Extensive documentary evidence, including telephone toll records, hotel receipts, and rental car agreements, corroborate the statements of co-conspirators. Extensive financial evidence, including information adduced by IRS investigators, establishes the defendants'unexplained wealth as further corroboration of their narcotics trafficking activities. Federal and local investigative efforts have also included months of surveillances of the defendants, and controlled buys and seizures of narcotics from members of the trafficking organization, including some of these defendants personally. There are over 100 witnesses who are prepared to testify against these defendants at trial, if necessary.

CONTINUED

2 OF 3

When convicted, all defendants face a life sentence without parole for the Count 2 offense of operating Continuing Criminal Enterprise (CCE), as well as a cumulative total of incarceration for over 300 years for all 74 counts, and extensive forfeitures of assets under Counts 1.(RICO-Conspiracy) and Count 2 (CCE), and extensive IRS civil penalties.

Because of these facts, it is evident to me that if released on bond, these defendants will either attempt to intimidate or kill prospective prosecution witnesses as well as law enforcement agencies, or to flee the jurisdiction of this Court.

DEAN W. WINSLOW
Special Agent, FBI

Date

APPENDIX III

TRANSCRIPT OF BOND HEARING

[from United States v. Mitchell, No. 80-50032 (S.D. Ill.), aff'd sub nom. United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 403 (Nov. 7, 1983)]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
-vs-) CRIMINAL NO. 80-50032
)
JAMES ANDERSON MITCHELL,)
RICHARD DIAL THORP, JAMES)
CHARLES DUGAN, WILLIAM CECIL)
GREENWALD, ROBERT J. SNYDER,)
G. LLOYD WOODBURY, MANUEL)
VIANA-MEDINA, LIGIA VIANA-)
SALZEDO, EARL RICHARD ZERBE,)
MARVIN J. ZYLSTRA, and)
BRYAN O'NEAL SULLIVAN,)
)
Defendants.)

REPORT OF PROCEEDINGS

BOND HEARING

BE IT REMEMBERED AND CERTIFIED that heretofore on November 12, 1980, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, HONORABLE JAMES L. FOREMAN, United States District Judge, presiding, the following proceedings were had in East St. Louis, Illinois, to-wit:

APPEARANCES:

FOR THE UNITED STATES:
Gregory Bruce English
U. S. Dept. of Justice
Tenth & Constitution Avenue
Washington, D.C. 20530

Clifford J. Proud
Asst. U. S. Attorney
East St. Louis, Illinois

I N D E X

GOVERNMENT WITNESSES

EDMUND IRVIN

Questions by Mr. English---------------------------- 3

Questions by Mr. Proud------------------------------ 6

Questions by Mr. English---------------------------- 10

GOVERNMENT EXHIBITS

NO.	OFFERED	APPROVED
1	12	12

THE COURT: Let the record reflect that the Court has just accepted from the Grand Jury, the return of indictment in Criminal Number 80-50032, which has eleven defendants. At the request of the Assistant United States Attorney, Clifford Proud, the Court is going on the record for purposes of fixing the defendants bonds. This is slightly at variance with the Court's usual procedure because under the pre-trial services program as we have it established, bond would not normally be fixed until the defendant is arrested and brought before the Magistrate. Mr. Proud alleges that there are unusual circumstances in this case that merit consideration by the Court for variance of that procedure. Now, Mr. Proud, I'll let you explain on the record the circumstances you allege that merit the change.

MR. PROUD: Your Honor, Mr. English of the Justice Department and myself would like to bring several things to the Court's attention as to the fixing of bonds in this particular case. Present in the room here are Special Agents Ed Irvin; Roy Shern and Dennis Moriarty of the Drug Enforcement Administration, Special Agent Dave Jackson of the Federal Bureau of Investigation and Agent Leonard Tracey of the Internal Revenue Service. All of these agents have various matters that we may bring to the Court's attention here today as to the fixing of bond.

Mainly, Agent Irvin will probably testify. It's anticipated

1 by the Government that few, if any of the defendants in this
2 cause will be arrested in this District. Several of the de-
3 fendants are already fugitives from various states and other
4 Federal Districts at this time. It's the modus operandi of
5 the organization that is referred to in the suppressed indict-
6 ment in this cause as "The Company" that a revolving bail bond
7 fund has been established to post bond for any member of "The
8 Company" who is in legal trouble anywhere. It's also part of
9 the modus operandi of this organization that any person who is
10 on bond and who wishes to jump bond may freely do so. This
11 actually has occurred in other states and in other districts.
12 Do you have anything to add to that, Mr. English?
13 MR. ENGLISH: None other than the testimony of Agent
14 Irvin as to give the factual basis for these allegations.
15 Would you like to hear Agent Irvin testify now?
16 THE COURT: I would, and ask him to stand and be sworn.
17 EDMUND IRVIN
18 called as a witness on behalf of the Plaintiff, having been
19 first duly sworn, testified as follows:
20 DIRECT EXAMINATION
21 BY MR. ENGLISH
22 Q Could you state your name and occupation?
23 A. Edmund E-D-M-U-N-D C. Irvin I-R-V-I-N. I'm a Federal
24 Agent with the Drug Enforcement Administration, United States
25 Department of Justice.

1 Q How long have you been employed by the Drug Enforcement
2 Administration?
3 A. By the Drug Enforcement Administration and its predecessor
4 agency almost 23 years.
5 Q And you are the case agent in the cause that's developed
6 this case or the investigation that's developed this case, are
7 you not?
8 A. Yes, sir.
9 Q Could you please inform the Court of the members of this
10 alleged conspiracy who have previously posted bond and/or
11 become fugitives?
12 A. Yes, sir. Richard Dial Thorp has been a fugitive in three
13 different jurisdictions, two federal and one state. He last
14 escaped or rather fled early this year on the eve before the
15 expected return of a jury decision in Georgia, near Atlanta
16 where he was charged with a violation of the state narcotic's
17 laws and has been a fugitive since.
18 Michael Grassi is a fugitive also from Georgia. Bryan
19 O'Neal Sullivan fled immediately or sometime before the jury
20 returned with his conviction out of South Carolina. He's also
21 a fugitive from the District of South Carolina in the Federal
22 Judicial District of South Carolina on a Federal narcotics
23 charge. Robert J. Snyder is now a fugitive from the Federal
24 Court in Lexington, Kentucky for violation of parde or proba-
25 tion.

1 Q Now, Mr. Thorp, Mr. Sullivan and Mr. Snyder have been in-
2 dicted in this suppressed indictment here, have they not?
3 A They have.
4 Q Are there other members of this conspiracy who have also
5 fled?
6 A Yes, James Kincade; Kenneth Davidson; Ralph Dennis Nichols;
7 William Frank Bryant and Ronald Sterling Ray. There are others
8 that we are convinced are avoiding us and the only thing that
9 prevents their actual fugitive status is that we have no warrant
10 for them yet.
11 Q These are people who I assume whose whereabouts have been
12 unknown for some time, is that correct?
13 A That's correct, yes, sir.
14 Q I understand you have a sworn statement from a member of
15 this conspiracy. Would you like to introduce it at this time,
16 is that correct?
17 A Yes, sir, I do. It's Grand Jury transcript, copy of
18 witness Michael J. Grassi dated April 22, 1980.
19 MR. PROUD: Let me ask a few questions here, if I could,
20 because I don't believe Judge Foreman is all that familiar
21 with all of the Company members. Michael Grassi is a defendant
22 in this District Court who has entered a plea to racketeering,
23 conspiracy and tax evasion before Judge Beatty of our District
24 Court with regard to the same charges that surround this in-
25 dictment, am I correct?

1 A (By the witness) Yes, sir, you are.
2 EXAMINATION BY MR. PROUD
3 Q And Michael Grassi as a witness before our Federal Grand
4 Jury has testified as to the bail bond matters that you have
5 just related to Judge Foreman, am I right?
6 A Yes, sir, that is correct.
7 Q And has he basically confirmed all that you have just
8 stated?
9 A Yes, sir, he does.
10 Q Is there anything in particular that Mr. Grassi adds?
11 A Mr. Grassi does add, of course, that he was a member of
12 a conspiracy from its -- almost from its inception, that he
13 was a high ranking member of this organization called or that
14 called itself "The Company". He also helped establish the
15 mechanism for escaping justice and avoiding apprehension by
16 way of providing funds and safe houses outside of the United
17 States. That he also helped establish the creations of false
18 identifications, birth records, passports and other documents,
19 giving and permitting the use of different identities both in-
20 sidethe United States and without. That the money amounted to
21 two million dollars or more that was set aside solely for the
22 purpose of providing bonds and that transportation would be
23 provided, mostly with the company or this organization's air-
24 planes and pilots.
25 Q Am I correct that when a bunch of company members were

1 arrested in a District of South Carolina in January of 1979,
2 that almost every person had a fictitious set of documents?
3 A Yes, sir. There were 14 arrested in South Carolina and
4 of the 14, I believe it was 11 had false identifications.
5 False Michigan driver's licenses in most instances, false
6 birth records and several other pieces of documents that pro-
7 vided them with a different identity than their true one.
8 They had a full-time documents expert who provided the docu-
9 ments, including driver's licenses, FAA flying certificates
10 and birth records etc.
11 Q Let me recap a few things on several of the defendants
12 in this cause and please correct me if I'm wrong. Defendant
13 Richard Dial Thorp is currently under a 15 year sentence in
14 the state of Georgia for violation of a Georgia narcotics
15 laws, am I right?
16 A Yes, sir.
17 Q And his appeal on that has been dismissed, am I right?
18 A Yes, sir.
19 Q Am I also correct that Mr. Thorp presently has a Federal
20 warrant outstanding from the Northern District of Georgia for
21 unlawful flight to avoid confinement?
22 A Yes, sir, he does.
23 Q Mr. Thorp, of course, has forfeited his substantial bail
24 in the state of Georgia within the past year, am I right?
25 A He has.

1 THE COURT: Is the only thing holding him up from the
2 Georgia sentence the fact that he just hasn't been apprehended?
3 MR. PROUD: Yes, sir. He fled the courthouse in Clayton,
4 County Georgia the afternoon before a jury verdict of guilty
5 was returned against him and the other defendants in the case.
6 Q (By Mr. Proud) If I am also correct, defendant Bryan
7 O'Neal Sullivan is a Federal fugitive from the District of
8 South Carolina from an indictment charging violations of the
9 Federal drug laws, particularly Title 21 of the United States
10 Code. Am I right?
11 A (By the witness) Yes, sir.
12 Q And he is also a Federal fugitive from the District of
13 South Carolina in an unrelated case that charges mail fraud,
14 am I right?
15 A Yes, sir.
16 Q And he is also a state fugitive from the state of South
17 Carolina from which he received a sentence after a guilty ver-
18 dict that was returned in abstentia against him, am I right?
19 A Yes, sir.
20 Q And he has jumped bail on all the three cases that I just
21 mentioned; two Federal and one State?
22 A Yes, sir, a sizeable bail, several bails.
23 Q And am I also correct that this person that you mentioned
24 by the name of James Kincade and the gentleman named Kenneth
25 Davidson and Ralph Dennis Nichols were also all charged in the

1 same Title 21 case with defendant Sullivan in the District
2 Court of South Carolina?
3 A Yes, sir.
4 Q And am I correct that your information is that they are
5 all Company members?
6 A They are, yes, sir.
7 Q Am I correct that all three of those gentlemen have
8 recently jumped bail in the District of South Carolina?
9 A Yes, sir, they have.
10 Q And Mr. Davidson has recently been arrested by agents of
11 your agency, am I right?
12 A Yes, sir.
13 Q And in Florida?
14 A In Florida.
15 Q And he is now being held on no bail, is that correct?
16 A That's correct.
17 Q Am I correct that defendant Robert J. Snyder is now the
18 subject of a probation revocation warrant issued by the District
19 Court in the Eastern District of Kentucky?
20 A Yes, sir, that's correct.
21 Q And that has just recently occurred, am I right?
22 A It has.
23 Q Defendants Marvin Zylstra and Manuel Viana-Medina are
24 currently on bail from Federal drug charges in the Western
25 District of Texas, am I right?

1 A That's correct.
2 Q The venue of the Western District of Texas case has
3 recently been changed to the Southern District of Florida, am
4 I right?
5 A Yes, sir.
6 Q And that is a substantial bail, am I right?
7 A Yes, sir.
8 Q Could you explain to the Court what Manuel Viana's citizen-
9 ship is and what Ligia Viana-Salzedo's citizenship is?
10 A Yes, sir. Manuel Viana is a Cuban National and his wife
11 is a Columbia, South America National and both now are currently
12 residing in Florida.
13 Q So, Mrs. Viana is not an American citizen?
14 A No.
15 THE COURT: Okay. Anything further?
16 MR. ENGLISH: Yes.
17 EXAMINATION BY MR. ENGLISH
18 Q It's my understanding that 17 members of this organization
19 have pled guilty?
20 A Yes, sir, that's correct.
21 Q What amount, what's the value of the assets they have
22 forfeited, the cumulative value?
23 A About two and one-half million dollars.
24 Q Have you been informed by members of this organization how
25 much money the organization made?

1 A The information I had as a result of the investigation and
2 interviewing of the inner circle of members of "The Company"
3 -- this organization we're talking about led me to believe that
4 there was a 75 million dollar capital sum available and in
5 excess of two million dollars available or set aside for the
6 purpose of bonds.
7 Q Do you have information indicating that members of this
8 conspiracy have secreted money abroad?
9 A Yes, I have.
10 Q Where would that be?
11 A The most recent information is the Cayman Islands. There
12 has been other information that the money has been planted in
13 the Bahamas and in the Antigua Islands in the Carribean.
14 Q Have the members of this conspiracy who are the subject of
15 the indictment returned today ever expressed their intention to
16 flee to other witnesses?
17 A Yes. As part of the operation, the mechanics were set up
18 early on after the inception of the organization itself and
19 put into effect by the higher members of the organization, in-
20 cluding Thorp and Michael J. Grassi who were talking about
21 here, as exhibited in a meeting following an undercover approach
22 by one of our agents to Marvin Zylstra in which Zylstra taped
23 a phone call after he became suspicious and took it to the
24 organization and a meeting was held by Thorp at which time they
25 called in Jack Goldman. Goldman is a defendant in this case.

1 Q Has previously pled guilty?
2 A And has pled guilty. And he was told that he would be
3 provided with the means for escape because his name had come
4 up in that conversation with Zylstra and that he was a "hot"
5 item. They offered a place in hiding in the Carribean on an
6 island, any island he selected in the Carribean and the funds
7 for which to escape. This meeting was called by Thorp who
8 still was the principal controller or one of the principal
9 controllers of the organization and several others on a high
10 level.
11 Q It's my understanding that that statement that you have of
12 Mr. Grassi also indicates that each member of this conspiracy
13 who is indicted here today had told him at various times that
14 their intention was to post bond and flee and not to be present
15 for trial if they were indicted, is that correct?
16 A That's correct, yes.
17 MR. ENGLISH: May we have the statement of Mr. Grassi
18 marked as a Government Exhibit and appended to the record, Your
19 Honor?
20 THE COURT: Yes, sure.
21 Q (By Mr. English) Mr. Irvin, in your experience with the
22 Drug Enforcement Administration, have you made any observations
23 about the normal or the usual tendencies of drug dealers re-
24 garding appearance for trial?
25 A Yes, I have.

1 Q Would you please tell the Court what your observations
2 are?
3 A When faced with charges such as we have here, there is a
4 tendency not only to consider fleeing the jurisdiction, but in
5 actuality to do it for several reasons. To delay the matter,
6 to wait out witnesses who may be weak and just plain to avoid
7 apprehension period.
8 MR. ENGLISH: I have no further questions.
9 THE COURT: What do you represent the bond should be?
10 MR. PROUD: I recommend, Your Honor, that the bonds in
11 general be set in amounts large enough, or no bond perhaps in
12 some cases on some of these defendants who already are Federal
13 or State bail bond jumpers to definitely insure their appearance.
14 THE COURT: What authority does the Court have to fix no
15 bail?
16 MR. PROUD: The authority would have to be Title 18,
17 Section 3146, Your Honor, where the Court can consider the
18 proclivity of the defendant to flee, and I would submit that a
19 defendant who already has fled Federal or State jurisdiction,
20 you know, fits the category of a person who deserves no bond.
21 THE COURT: Have you got a copy of that? Go get it.
22 MR. ENGLISH: I would suggest 20 million, Your Honor.
23 THE COURT: I would say that 20 million is really sort of
24 out of the question.
25 MR. PROUD: Judge, the biggest ones I have seen around

1 the country, except in the situation where they have had no
2 bond because the guy was already a bond jumper, where the Court
3 had to issue the bench warrant and dragging him in is around
4 a million dollars cash. I have seen a million dollars cash
5 within the last year out of the Middle District of Georgia
6 where one of them got locked up in our district and it said a
7 million dollrs cash, don't reduce this bond under any circum-
8 stances and signed by the chief judge. Whether that carried
9 any weight or not, I don't know. It did in this district. But
10 they were another large smuggling group who don't have as much
11 money as these guys, but a real good group.
12 MR. ENGLISH: As we allege in the overt acts at one point
13 they had 709 tons of marihuana ceased. And with a market value
14 in the United States of 300 dollars a pound, it indicates they
15 have incredible resources and they consider the posting of bond
16 and forfeiting one of the costs of doing business.
17 THE COURT: Could they make a million dollar bond?
18 MR. ENGLISH: Easily, sir.
19 MR. PROUD: I would honestly have to say that in my own
20 opinion a few of them probably could. I would say that Mr.
21 Thopr, if he knew he could post a million would or would shortly
22 get it from various sources. Thorp's only problem is that
23 Georgia would probably --
24 THE COURT: Latch onto him?
25 MR. PROUD: Very quickly lodge their detainer which would

1 cause him immediately to go to the state penitentiary in
2 Georgia to do a 15 year sentence.
3 THE COURT: You'd notify them immediately, I imagine,
4 wouldn't you?
5 MR. ENGLISH: Yes, sir.
6 THE COURT: You'd do everything you could to get him there,
7 although he might not be one that would be prone to escape, I
8 don't know. Well, would you say --
9 MR. ENGLISH: Five million dollars.
10 MR. PROUD: I really think that in all honesty anywhere
11 from a million to two million on someone like Thorp would
12 definitely hold him. I do believe that he probably could make
13 a million dollar bond shortly from some sources. However, I
14 don't think he could do it before his Georgia detainer was
15 lodged, so I think anywhere in that range would be sufficient
16 on Mr. Thorp.
17 MR. ENGLISH: For the Columbians or the two Viana's, she
18 being a Columbian and he being a Cuban, a much higher bond
19 would be appropriate. They have another country to go to
20 where they wouldn't be extradited and other evidence indicates
21 they have not only dealt with this organization, but with
22 others. They were the ones that owned the 709 tons of marihuana
23 that were on the ground, and they're, you know, virtually un-
24 limited resources and could post a bond and for them five
25 million would be appropriate.

1 THE COURT: Well, say the Court fixes five million on the
2 Viana's, each of them, two million on Thorp.
3 MR. ENGLISH: For Greenwald, he's now living in the
4 Carribean islands and has not only been involved in this con-
5 spiracy, but in others, and made an incredible amount of money.
6 Possibly five million would be appropriate for him also.
7 THE COURT: What about the rest of them?
8 MR. ENGLISH: I think possibly two million on the rest of
9 them. The reason for the difference on them -- we would nor-
10 mally ask for more on Thorp except for the matter of the de-
11 tainer from Georgia. Two on the rest.
12 THE COURT: After hearing the statements made by the
13 Assistant U. S. Attorney, the witnesses and Mr. Irvin from the
14 Department of Justice, the Court does find that there is a good
15 likelihood that these defendants, based on past activities,
16 that they will likely flee the jurisdiction wherever possible.
17 That apparently forfeiture of bond money is of no real concern
18 and that sufficient assets are available to post these or at
19 least substantial bonds, and based upon the statements made,
20 the Court is convinced that there is a good likelihood that if
21 bonds were posted that these defendants would flee again, and
22 accordingly the Court is going to fix the bonds in unusually
23 high amounts far in excess of what the Court normally would for
24 these reasons. Accordingly, the Court hereby fixes the amount
25 of bond of the various defendants as follows: James Anderson

Mitchell, two million dollars. Richard Dial Thorp, two million dollars. James Charles Dugan, one million dollars. William Cecil Greenwald, two million. Robert J. Snyder, two million. G. Lloyd Woodbury, one million. Manuel Viana-Medina, five million. Ligia Viana-Salzedo, five million. Earl Richard Serbe, one million. Marvin J. Sylstra, one million. Bryan O'Neal Sullivan, two million. The Court would further add for the record that any other judicial officer before whom any of these defendants are brought should not reduce these amounts unless absolute and very good or exceptional circumstances are shown. In any event, it's the Court feeling that the attorneys from this district or from the Department of Justice Narcotics and Dangerous Drug Section that have been charged with the responsibility of this case, be consulted and at least be given an opportunity to appear before the judicial officer considering the bond matters in order that the Government's position can be made clear as to why these bonds are fixed in these amounts.

MR. ENGLISH: Your Honor, these are cash bonds, are they not?

THE COURT: And all of the bonds would be cash bonds.

MR. ENGLISH: Thank you, Your Honor. We'd like at this time to request two other matters. One is we have submitted to the Court a request for a temporary restraining order to in essence freeze the assets of these defendants which are subject

to forfeiture, to prevent them from liquidating these assets. And it's indicated in the motion, specific statutory authority for this request.

THE COURT: Do you think you need anything further on the record for the Court to sign the order?

MR. ENGLISH: No, sir. Also would request that the defendants do post cash bonds, that hearing be conducted to determine the source of that money because under the authority which we have cited in the Motion, there is not a sufficient assurance, moral assurance the defendants will be present for trial if the money is "dirty money" or obtained from drug transactions, and we'd like to assure ourselves of the validity of the surety offered by the defendants.

THE COURT: Well, the motion for restraining order is against only certain defendants.

MR. ENGLISH: Those who have the property which is subject to forfeiture as alleged in the indictment.

THE COURT: Based on the request and the motions presented, the Court does at the hour of 1:05 on the 13th day of November, 1980 issue the temporary restraining order prayed for and the order for conduct at a later time -- the Nebbia hearing if cash is posted for the bail of the defendants.

MR. ENGLISH: Thank you, very much, Your Honor.

1
2 **REPORTER'S CERTIFICATE**
3 I, KAREN S. LANDRUM, RPR, Official Court Reporter for
4 the United States District Court for the Southern District of
5 Illinois, do hereby certify that the foregoing is a true and
6 correct transcript of the proceedings of the Bond Hearing had
7 in this cause, as same appears from my stenotype notes made
8 personally during the progress of said proceedings.
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BEFORE THE UNITED STATES GRAND JURY

FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE; OPERATION GATEWAY; SETTING OF BONDS

TESTIMONY OF A WITNESS: MICHAEL GRASSI

APRIL 22, 1980

APPEARANCES: MR. GREGORY ENGLISH
ASSISTANT U. S. ATTORNEY
U. S. DEPARTMENT OF JUSTICE
750 MISSOURI AVENUE
EAST ST. LOUIS, ILLINOIS

GORE REPORTING COMPANY
408 OLIVE STREET
ST. LOUIS, MISSOURI 63102
241-6750

1 MICHAEL GRASSI,

2 OF LAWFUL AGE, BEING PRODUCED, SWORN AND EXAMINED DID SO

3 TESTIFY:

4

5 QUESTIONS BY MR. ENGLISH:

6 Q WOULD YOU PLEASE STATE YOUR NAME?

7 A MICHAEL JOHN GRASSI, JR. I LIVE AT 4072

8 PANTHERSVILLE ROAD, ELLENWOOD, GEORGIA. OCCUPATIONRIGHT

9 NOW, SMUGGLER.

10 Q AT AN EARLIER SESSION OF THE GRAND JURY

11 TODAY I ADVISED YOU OF YOUR RIGHTS. YOU INDICATED YOU WERE

12 REPRESENTED BY COUNSEL. DO YOU STILL REMEMBER THE RIGHTS

13 I ADVISED YOU OF?

14 A YES.

15 Q DO YOU DESIRE FOR ME TO EXPLAIN THEM TO YOU

16 AGAIN?

17 A THAT WON'T BE NECESSARY.

18 Q I'D LIKE TO ASK YOU SEVERAL QUESTIONS ABOUT

19 THE CRIMINAL ORGANIZATION THAT THIS GRAND JURY IS

20 INVESTIGATING KNOWN AS "THE COMPANY." WOULD YOU ANSWER

21 THESE QUESTIONS IF I ASK THEM?

22 A YES, I WILL.

23 Q MR. GRASSI, DURING YOUR ASSOCIATION WITH

24 THE MEMBERS OF THIS ENTERPRISE, HAVE YOU RECEIVED ANY

25 INFORMATION BEARING UPON THE AVAILABILITY OF THESE PEOPLE

1 TO BE PRESENT AT TRIAL, IF AND WHEN THEY WERE INDICTED?

2 A IT WAS A KNOWN FACT FOR THE COMPANY IF YOU

3 WERE ARRESTED, THE COMPANY WOULD PAY ALL LEGAL AND BOND FEES.

4 IF YOU DECIDED THAT YOU DIDN'T WANT TO SHOW UP FOR TRIAL,

5 THE COMPANY WAS MORE THAN WILLING TO FORFEIT THE BOND AND

6 YOU COULD JUST LEAVE AND NOT SHOW UP.

7 PEOPLE SUCH AS MR. THORP, GREENWALD, MARV

8 ZILSTRA, MANNY VIANA, ALL YOUR TOP MEMBERS OF THE COMPANY,

9 CHANCES OF THEM SHOWING UP FOR TRIAL ARE PRETTY MUCH NIL.

10 THEY WOULD POST BOND, WHATEVER IT MAY BE, AND LEAVE,

11 FORFEIT THE BOND.

12 WE HAD EXTENSIVE CONNECTIONS IN SOUTH AMERICA,

13 AND THE ISLANDS, WHERE WE HAVE ACCESS TO BRITISH PASSPORTS

14 AND COMPLETE PROTECTION FROM THE PREMIERS OR THE PRESIDENTS

15 OF THE ISLANDS. IF I WAS OUT ON THE STREET RIGHT NOW,

16 MYSELF, AND I DECIDED TO LEAVE, WITHIN TWO HOURS I COULD

17 BE ON AN AIRPLANE OUT OF THE COUNTRY. WITHIN FOUR HOURS

18 AFTER I LANDED WHEREVER I WAS, I WOULD BE ANOTHER PERSON,

19 A NEW PASSPORT, BIRTH RECORDS WOULD BE PLACED IN CERTAIN

20 FILES, AND IT WOULD SHOW I WAS BORN SOMEPLACE ELSE.

21 I WOULD GET A PASSPORT WITH ANOTHER PICTURE ON

22 IT. WE HAVE BASICALLY ACCESS TO SOME OF THESE SAME

23 FACILITIES THAT PEOPLE LIKE THE C.I.A. WOULD HAVE.

24 Q SO, IN ESSENCE, THERE ARE PLACES WHERE

25 MEMBERS OF THE COMPANY COULD GO AND HAVE GONE SUCCESSFULLY

1 TO ELUDE APPREHENSION?
2 A YES. BRIAN O'NEAL SULLIVAN IS A GOOD CASE
3 IN POINT. WE FORFEITED A $110,000 BOND ON HIM. WE PUT
4 THE MONEY UP WITH THE SIMPLE IDEA OF GETTING HIM OUT OF
5 JAIL, THAT HE WOULD BE LEAVING. HE HAS BEEN AT LARGE NOW
6 FOR OVER A YEAR.
7 Q MR. THORP IS CURRENTLY A FUGITIVE FROM THE
8 ATLANTA AREA?
9 A HE LEFT FROM TRIAL AND FORFEITED A $50,000
10 BOND. I BELIEVE HE IS STILL IN THE UNITED STATES, BUT
11 IF HE WERE PICKED UP ON THIS CHARGE, HE WOULD POST ANOTHER
12 BOND AND LEAVE. HE WOULD LEAVE THE COUNTRY ENTIRELY.
13 HE MAY HAVE LEFT THE COUNTRY AT THIS POINT.
14 Q HE WAS A SUCCESSFUL FUGITIVE FOR SEVERAL
15 YEARS ON PREVIOUS CHARGES, IS THAT CORRECT?
16 A APPROXIMATELY EIGHT YEARS.
17 Q HE SUCCESSFULLY ELUDED DETECTION.
18 A YES.
19 Q WOULD YOU SAY DURING THAT TIME HE LEARNED
20 CERTAIN TECHNIQUES TO ELUDE DETECTION?
21 A YES. WE HAVE A GUY NAMED JOHN MITCHELL --
22 Q ALSO KNOWN AS "DR. DOOM"?
23 A YES, ALSO "DR. DOOM." JOHN MITCHELL WAS
24 THE NAME. HE CAN SECURE AN OHIO BIRTH CERTIFICATE IN
25 ANY NAME AND BASICALLY ANY KIND OF DRIVER'S LICENSE WITH

1 A PICTURE OR FINGERPRINT ON IT. WE CAN DUPLICATE THEM.
2 WE HAVE HAD PEOPLE STOPPED BY POLICE AND RUN THEM THROUGH
3 A COMPUTER AND THEY WILL COME OUT CLEAN. WE USED THOSE
4 TO GO TO THE PASSPORT OFFICE AND GET U. S. PASSPORTS IN A
5 DIFFERENT NAME.
6 ONCE YOU HAVE A PASSPORT YOU ARE, FOR ALL INTENTS
7 AND PURPOSES, THAT PERSON. IT'S THE HIGHEST AND BEST
8 FORM OF IDENTIFICATION YOU CAN HAVE.
9 Q DURING THE COURSE OF DOING THE BUSINESS,
10 THE COMPANY HAD SUCCESSFULLY INCORPORATED THE LESSONS
11 LEARNED BY MR. THORP DURING THE SUCCESSFUL STINT AS A
12 FUGITIVE, AND ALSO PEOPLE SUCH AS "DR. DOOM" HAVE BEEN ABLE
13 TO GET FALSE IDENTITY FOR THE PEOPLE?
14 A YES. LITERALLY, WE HAVE BEEN ABLE TO CREATE
15 NEW PEOPLE. THE COMPANY, FOR ALL INTENTS AND PURPOSES,
16 WAS PROBABLY ONE OF THE TOP SMUGGLING OPERATIONS IN THE
17 UNITED STATES. IT WAS PROBABLY AMONG THE TOP FIVE, A
18 HIGHLY SOPHISTICATED ORGANIZATION AND HIGHLY SOPHISTICATED
19 IN ELECTRONICS AND LISTENING DEVICES AND SO ON.
20 Q DID MEMBERS OF THE COMPANY ALSO HAVE ACCESS
21 TO AIRPLANES CAPABLE OF MAKING TRANSCONTINENTAL FLIGHTS?
22 A YES, WE HAVE, AND PROBABLY DO HAVE NOW
23 AIRPLANES THAT CAN FLY NON-STOP FROM CHICAGO TO COLOMBIA.
24 Q DURING THE COURSE OF THE COMPANY'S OPERATIONS,
25 DO MEMBERS FREQUENTLY CREATE BANK ACCOUNTS ABROAD TO HAVE

1 ACCESS TO LARGE SUMS OF MONEY?

2 A THERE WERE BANK ACCOUNTS CREATED IN THE

3 CAYMAN ISLANDS BY SEVERAL MEMBERS OF THE COMPANY. I HAVE

4 NO IDEA HOW MUCH MONEY WOULD BE THERE, BUT IT WOULDN'T BE

5 A PROBLEM. IF YOU LEFT THIS COUNTRY, TO BE PERFECTLY

6 HONEST, WITH $25,000 IN YOUR POCKET, AND ONLY HAD THE

7 $25,000, YOU COULD GO TO COLOMBIA AND WITHIN THREE WEEKS

8 BE WORTH SEVERAL MILLION WITHOUT A PROBLEM. I MEAN, YOU

9 SIMPLY INSTEAD OF BEING A SMUGGLER ON THIS END, YOU BECOME

10 A WHOLESALER ON THAT END. YOU CAN'T IMAGINE THE TYPE OF

11 PEOPLE, THE PRESIDENTS OF VARIOUS FOREIGN GOVERNMENTS,

12 OR CLOSE ASSOCIATES OF THE PRESIDENTS, PREMIERS, HIGH

13 GENERALS IN SOUTH AMERICA -- THE ISLAND OF ST. MARTIN HAS

14 NO EXTRADITION TREATY WITH THE UNITED STATES. COLOMBIA

15 ITSELF HAS NO EXTRADITION TREATY WITH THE UNITED STATES,

16 NOR DOES THE BAHAMAS, AND YOU CAN GET THERE AND YOU CAN

17 STAY THERE.

18 Q DURING YOUR ASSOCIATION WITH THE OTHER TOP

19 MANAGEMENT MEMBERS OF THE COMPANY, HAVE ANY OF THEM EVER

20 EXPRESSED A WILLINGNESS TO FLEE IF INDICTED?

21 A YES. THAT'S PRETTY MUCH THE TOP ITEM ON

22 THE AGENDA. IN MY OWN CASE IN POINT, IF I HADN'T BEEN

23 ARRESTED IN CLAYTON COUNTY, I COULD HAVE FLED ANY TIME I

24 WANTED. I COULD PROBABLY HAVE FLED NOW. THE CHARGES

25 I WAS IN ON, I'D BE GETTING OUT ON MAY 30 ON PAROLE, AND

1 I JUST TALKED IT OVER WITH MY WIFE, AND I WANTED TO CLEAN

2 UP MY LIFE. I WANTED TO HAVE A NORMAL EXISTENCE AND HAVE

3 KIDS. I DIDN'T WANT TO RUN.

4 SOME OF THE PEOPLE IN THE COMPANY HAVE NO TIES

5 WHATEVER, AND RATHER THAN SPEND A LOT OF TIME HERE --

6 THEY DON'T FEEL THAT SMUGGLING MARIJUANA IS A CRIME, AND

7 THEY WOULD JUST LEAVE.

8 Q IS MR. MITCHELL CURRENTLY LIVING UNDER AN

9 ASSUMED NAME ELSEWHERE?

10 A YES. I BELIEVE MOST MEMBERS OF THE COMPANY

11 ARE ALL UNDER ASSUMED NAMES.

12 Q YOU MENTIONED IN ANOTHER EARLIER SEGMENT

13 OF THE GRAND JURY TODAY THAT THE PILOT WHO WAS SUCCESSFULLY

14 BROKEN OUT OF JAIL IN COLOMBIA WAS BROUGHT BACK TO THE

15 UNITED STATES AND GIVEN NEW IDENTIFICATION.

16 A YES.

17 Q HAVE THEY SUCCESSFULLY ELUDED DETECTION?

18 A MR. ZERBE, YOU PEOPLE HAVE BEEN LOOKING FOR

19 HIM FOR A LONG TIME. ALSO MR. POWELL AND DESI.

20 Q YOU THINK IT'S SAFE TO SAY THAT MEMBERS OF

21 THE COMPANY HAD ACCESS TO VIRTUALLY UNLIMITED RESOURCES

22 WHEN IT COMES TO MAKING BAIL PAYMENTS?

23 A I DON'T KNOW IF THEY WOULD BE TOTALLY

24 UNLIMITED, BUT THEY WOULD CERTAINLY, IN MY OPINION, IN A

25 SHORT PERIOD OF TIME, BE ABLE TO MAKE ABOUT ANY BAIL AMOUNT.

1 IN OTHER WORDS, I THINK IF ANYBODY YOU REALLY
2 WANTED TO HANG ONTO AND INDICT, YOU BETTER DO SO OR YOU
3 WON'T HAVE THEM FOR VERY LONG.
4 Q BASED ON YOUR ASSOCIATION WITH THOSE PEOPLE
5 AND WORKING WITH THEM ON A DAILY BASIS, AND THE PLANNING
6 YOU DID, DO YOU FEEL THIS IS, IN ESSENCE, THE ONLY WAY
7 THE GOVERNMENT WILL HAVE THEM AVAILABLE FOR TRIAL IS TO
8 HOLD THEM WITHOUT BAIL?
9 A BASICALLY, YES. WHAT I CONSIDER THE TOP
10 MANAGEMENT, ANYONE THAT WOULD HAVE BEEN ON THE CHART.
11 YOUR SMALL PEOPLE, DRIVERS, YOUR LOCAL DISTRIBUTORS AND
12 THINGS LIKE THIS, THESE PEOPLE AREN'T GOING TO RUN.
13 MANY OF THEM HAVE INDICATED TO ME THEY WERE REALLY TO
14 CLEAN UP THEIR LIVES, AND SOME OF THEM HAVE MADE ARRANGEMENTS
15 TO TALK TO YOU. MOST OF THEM WOULDN'T RUN.
16 Q BUT AS A GENERAL MATTER, MOST OF THEM WITH
17 SUFFICIENT ENOUGH STATURE IN THE COMPANY TO BE OPERATING
18 A CONTINUING CRIMINAL ENTERPRISE, FOR EXAMPLE, WOULD BE
19 THE KIND OF PEOPLE THAT WOULD NOT BE AVAILABLE FOR TRIAL.
20 A I WOULD ASSUME THAT'S TRUE.
21 Q AND VARIOUS OTHER PEOPLE THAT WOULD NOT BE
22 AVAILABLE FOR TRIAL.
23 A YES.
24 MR. ENGLISH: CAN WE HAVE A SHORT RECESS?
25 THE FOREMAN: YES.

\- - -

1
2
3 C-E-R-T-I-F-I-C-A-T-E
4
5 I, DALE E. EMERSON, OFFICIALLY AUTHORIZED TO
6 REPORT THE PROCEEDINGS OF THE UNITED STATES GRAND JURY
7 FOR THE SOUTHERN DISTRICT OF ILLINOIS, DO CERTIFY THAT I
8 WAS PRESENT IN THE GRAND JURY ROOM ON APRIL 22, 1980
9 AND DID REPORT THE TESTIMONY OF MICHAEL GRASSI, AND DID
10 AT A LATER TIME CAUSE THE SAME TO BE TRANSCRIBED INTO
11 TYPEWRITTEN FORM. I FURTHER CERTIFY THAT PAGES 2 THROUGH
12 8, INCLUSIVE, ARE A TRUE AND ACCURATE PORTRAYAL OF MY NOTES.
13
14 DALE E. EMERSON
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APPENDIX IV

"NEBBIA MOTION" FOR HEARING TO EXAMINE SOURCES OF BONDS

[from United States v. Mitchell, No. 80-50032 (S.D. Ill.), aff'd sub nom. United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 403 (Nov. 7, 1983)]

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

DOCUMENT NUMBER__________
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NOV 13 1980
FILED

UNITED STATES OF AMERICA, Plaintiff, vs.	)	CRIMINAL NO. 80-50032
JAMES ANDERSON MITCHELL, RICHARD DIAL THORP, JAMES CHARLES DUGAN, WILLIAM CECIL GREENWALD, ROBERT J. SNYDER, G. LLOYD WOODBURY, MANUEL VIANA-MEDINA, LIGIA VIANA-SALZEDO, EARL RICHARD ZERBE, MARVIN J. ZYLSTRA, BRYAN O'NEAL SULLIVAN, Defendants.	)	Title 18 Section 3146 United States Code

GOVERNMENT'S MOTION FOR A HEARING
TO EXAMINE THE SOURCES OF ANY BOND
PROFFERED BY THE DEFENDANTS

NOW COMES the United States of America, by and through its undersigned Attorneys, and respectively moves this Honorable Court for:

(1) A hearing to identify the sources of funds with which the defendants will attempt to post bond in order to ensure that acceptance of any funds proffered will provide the Court with sufficient assurance that the defendants will reappear for trial.

(2) The continued detention of the defendants until the source and status of any proffered bond can be ascertained.

IN SUPPORT hereof, movant alleges and asserts as follows:

(A) That, although 18 U.S.C. §3146(a) provides that a person charged with a non-capital offense shall be released prior to trial, §3146(b) imposes an affirmative obligation upon the cognizant judicial officer to establish appropriate conditions for release, such as a bail bond or deposit of cash, to assure the defendants' appearance at trial.

(B) That, in the instant case, the mere posting of bail is not sufficient to ensure the presence of the defendants at trial. As the Court observed in United States v. Melville, 309 F.Supp. 824, 826-7 (S.D. N.Y., 1970):

> . . . the function of bail is not to purchase freedom for the defendant but to provide assurance of his re-appearance after release on bail; a guarantee of the obligation of the defendant to appear.
>
> . . .
>
> For this purpose it becomes appropriate to identify the sources of bail and ascertain their purpose and satisfy the Court that there is a moral assurance for reappearance to be gained by acceptance of funds emanating from such sources.
>
> The considerations which satisfy moral as well as the financial assurances will necessarily vary from case to case and depend on the particular facts and circumstances developed in an evidentiary hearing where that is demanded by the government.

Thus, it is legal and proper for this Court to conduct a "Nebbia hearing" to ascertain the source of funds the defendants might attempt to use to post bond. Cf., United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966).

(C) As the Government alleges in the attached indictment, which is hereby incorporated by reference as if set forth in full, that: the defendants are in the business of importing marihuana into this country for distribution; they have successfully brought over thirty loads of marihuana into the United States; that they derived a gross income of over $55 million from their illegal activities, and that they consider the forfeiture of posted bond to be one of the costs of engaging in the drug business. This is signficant because " . . . if the security comes from an illegitimate source, it is merely a 'business' expense for a dealer in contraband, there is a paucity of moral force compelling a defendant to reappear." United States v. DeMarchena, 330 F.Supp. 1223, 1226 (S.D. Cal., 1971).

(D) That the Government alleges, and hereby offers to prove, that the following reasons exist for cautiously examining the defendants' representations that they will appear for trial:

1. It has been the modus operandi of members of this conspiracy to post bond and absent themselves from the jurisdiction of the Court, thereby thwarting the ends of public justice.

2. As a result of their illegal activities, the defendants have virtually unlimited resources secreted in foreign banks which are available for the posting of bond.

3. The defendants have false means of identification available to facilitate their flight from the jurisdiction of this Court.

4. The defendants have access to aircraft which could readily transport them to a foreign jurisdiction.

5. The defendants have "safe havens" in foreign countries where they would be welcomed if they would illegally flee from the United States.

6. The defendants face a possible sentence of life imprisonment if found guilty of the Count 2 charge of operating a continuing criminal enterprise in violation of 21 U.S.C. §848.

7. Many of the assets owned by the defendants were acquired in violation of federal law, are subject to forfeiture, and are the subject of a request for a restraining order.

8. The defendants have expressed their intention to post bond and remove themselves from the jurisdiction of this Court. Thus, the Government believes that the defendants will post bond and attempt to flee the jurisdiction of this Court, so an evidentiary hearing to inquire into the source of any posted bond is eminently appropriate.

(E) That, the Court's power to so act is plenary.

(F) That, if the Court fails to enter such an order as prayed by the United States, the said defendants may forfeit bond and absent themselves from the jurisdiction of this Court, thereby frustrating the ends of public justice.

Respectfully submitted,

JAMES R. BURGESS, JR.
United States Attorney
Southern District of Illinois

By: [signature]
GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug Section
Criminal Division
United States Department of Justice

[signature]
CLIFFORD J. PROUD
Assistant United States Attorney

Certified true copy
Clerk
By [signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CRIMINAL NO. 80-50032
JAMES ANDERSON MITCHELL, RICHARD DIAL THORP, JAMES CHARLES DUGAN, WILLIAM CECIL GREENWALD, ROBERT J. SNYDER, G. LLOYD WOODBURY, MANUEL VIANA-MEDINA, LIGIA VIANA-SALZEDO, EARL RICHARD ZERBE, MARVIN J. ZYLSTRA, BRYAN O'NEAL SULLIVAN, Defendants.	)	DOCUMENT NUMBER_________ UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF ILLINOIS NOV 13 1980 FILED

ORDER

THE foregoing motion of the Government having been carefully considered, it is hereby

ORDERED, that the evidentiary hearing prayed for in the motion is hereby granted pending further action by this Court.

The Court will hear from the Government and from the defending parties at a later date, to be set by the Court, on the question of the source of funds to post bond as prayed for in the Government's motion.

SO ORDERED this 13th day of November, 1980.

James L. Foreman
UNITED STATES DISTRICT JUDGE

Presented by:

GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug Section
Criminal Division
United States Department of Justice

Certified true copy
Clerk
By [signature]
Deputy Clerk

APPENDIX V

MOTION FOR RICO/CCE RESTRAINING ORDER

[from United States v. Mitchell, No. 80-50032 (S.D. Ill.), aff'd sub nom. United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S.__ , 104 S.Ct. 403 (Nov. 7, 1983)]

DOCUMENT NUMBER__________
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NOV 13 1980
FILED

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CRIMINAL NO. 80-50032
vs.	)	Title 18 Section 1963 United States Code
JAMES ANDERSON MITCHELL, JAMES CHARLES DUGAN, MARVIN J. ZYLSTRA, EARL RICHARD ZERBE,	)	Title 21 Section 848 United States Code
Defendants.	)	

GOVERNMENT'S MOTION FOR RESTRAINING ORDER
AND ESTABLISHMENT OF PERFORMANCE BOND

NOW COMES the United States of America, by and through its undersigned Attorneys, and, pursuant to Section 1963 of Title 18, and Section 848 of Title 21, United States Code, respectively moves this Honorable Court for:

1. The entry of an order enjoining and restraining the defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them from, during the pendency of this proceeding and until further order of this Court, doing or causing to be done, directly or indirectly, any of the following acts:

Selling, assigning, leasing, pledging, distributing, encumbering, using to pay legal fees and bonds and court costs, or otherwise disposing of, or removing from the jurisdiction of this Court or removing from any checking or savings account, all or part of their interest, direct or indirect, including all property, real, personal or choses in action in which they have an interest, in the entities which are listed under the sections entitled "Forfeiture" following Counts 1 and 2, respectively, of the indictment in this criminal cause, which indictment is attached hereto and incorporated by reference herein, without prior approval of this Court upon notice to the United States.

2. It is further respectfully moved that this Honorable Court appoint a duly qualified appraiser, and authorize and direct said appraiser to appraise and take inventory and accounting of the value of all the above-described property and interest therein, and to make due return thereof to this Court, for the purpose of establishing the amount of a satisfactory bond to secure performance of the terms and conditions of the aforesaid restraining order, and that thereupon the Court set the amount of such at twice the value of the property so appraised, and require and direct the defendants forthwith to deposit such bond, with acceptable surety, with the Clerk of the United States District Court for the Southern District of Illinois upon approval of said bond by this Court.

3. The United States further moves that the cost of the services of the said Court-appointed appraiser be borne by the defendants, subject to reimbursement by the United States in the event that the interests of the defendants in the aforesaid entities are not forfeited to the United States under Sections 1963(a) or 1964 of Title 18, or Section 848 of Title 21, United States Code.

In support hereof, movant alleges and asserts as follows:

A. This proceeding is an action under Title 18, United States Code, Sections 1962 and 1963, and Title 21, United States Code, Section 848.

B. Under the aforesaid statutes as provided in 18 United States Code, Section 1963(b), and 21 United States Code, Section 848(d), this Court has jurisdiction to enter such restraining orders or prohibitions, or to take other actions including, but not limited to, the acceptance of performance bonds in connection with such property subject to forfeiture, as the Court deems proper.

C. That, pursuant to the provisions of 18 United States Code, Sections 1963(a) and (c), and 21 United States Code, Section 848(2), the defendants, upon conviction herein, are subject to the forefeiture of any property or interest acquired or maintained in violation of Section 1962, of Title 18, and Section 848, of Title 21, United States Code, and

any interest in, security of, claim against, or property or contractural right affording a source of influence over the enterprise being conducted through the pattern of racketeering activity, or through engaging in a continuing criminal enterprise, and that all profits so obtained are also subject to forfeiture.

D. That, the Court's power to so act is plenary and may be entered <u>sua sponte</u> or <u>ex parte</u> without the necessity of a hearing.

E. That, if the Court fails to enter such an order as prayed by the United States, the said defendants may sell, alienate, or otherwise place the property beyond forfeitable condition, and thereby frustrate the ends of public justice.

Respectfully submitted,

JAMES R. BURGESS, JR.
United States Attorney
Southern District of Illinois

By: Gregory Bruce English
GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug Section
Criminal Division
United States Department of Justice

Clifford J. Proud
CLIFFORD J. PROUD
Assistant United States Attorney

Certified true copy
By Betty L. McAllister Clerk
Deputy Clerk

Certified true copy
Clerk
By
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES ANDERSON MITCHELL, JAMES CHARLES DUGAN, MARVIN J. ZYLSTRA, EARL RICHARD ZERBE, Defendants.	)	CRIMINAL NO. 80-50032

DOCUMENT NUMBER__________
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
NOV 13 1980
FILED

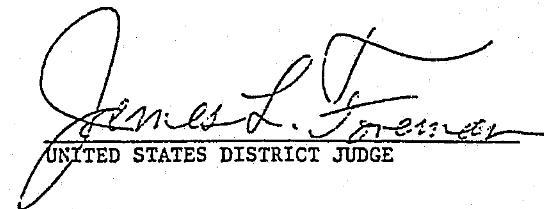
ORDER

THE foregoing motion of the Government having been carefully considered, it is hereby

ORDERED, that the restraining order prayed for in the motion is hereby granted pending further action by this Court.

The Court will hear from the Government and from the defending parties at a later date, to be set by the Court, on the question of the establishment of a performance bond as prayed for in the Government's motion.

SO ORDERED this 13th day of November, 1980.



UNITED STATES DISTRICT JUDGE

Presented by:

Certified true copy
Clerk
By [signature] Deputy Clerk
Date 11-17-80

GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug Section
Criminal Divison
United States Department of Justice

Certified true copy
Clerk
By [signature]
Deputy Clerk

APPENDIX VI

PROPOSED WAIVER OF APPEARANCE FORM

WAIVER OF APPEARANCE

1). I, , having obtained the advice and assistance of counsel regarding this matter, state that I am fully aware of my right and duty to be present in court at the trial of my cause. I agree as a condition precedent of my release on bond that my absence without justification from the trial of my cause shall constitute a voluntary and knowing waiver of any constitutional, statutory, or other right I may have to be present at such trial, and, that in the event of my absence without justification, trial on my cause will proceed in my absence.

2). I also agree that in the event I am tried _in absentia_ my absence without justification shall constitute a voluntary and knowing waiver of my Sixth Amendment right to confront the witnesses against me; and, that no claim of prejudicial error may be brought by me on any appeal from a conviction obtained in a trial _in absentia_ based in whole, or in part, on my absence from the trial on my cause.

3). I, and my counsel, further agree that in the event of my absence without justification from the trial on my cause my counsel will not be permitted to withdraw, and that my counsel will continue to represent me at any trial of my cause held in my absence.

4). I further acknowledge that the jury at my trial _in absentia_ will be informed of my absence without justification and given the following instruction regarding flight and that I hereby knowingly and intentionally waive all objection to the admissibility of this evidence and to the giving of this instruction:

> The intentional flight or concealment of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt and the significance to be attached to any such evidence, are matters exclusively within the province of the jury. Devitt and Blackmar, _Federal Jury Practice and Instructions_ (3rd Ed. 1977), Section 15.08.

5). I further acknowledge that I understand that if I am convicted at a trial in absentia my continued absence without justification will result in any appeal on my behalf being dismissed.

____
Defendant

____
Counsel for Defendant

____
Witness

_______________________, 1983
(DATE)

APPENDIX VII

NOTICE OF INTENTION TO PROSECUTE AS A DANGEROUS SPECIAL DRUG OFFENDER UNDER 21 U.S.C. § 849 WITH

Motion to Seal Notice
Order to Seal Notice
Order to Unseal Notice

[from United States v. Mitchell, No. 80-50032 (S.D. Ill.), aff'd sub nom. United States v. Zylstra, 713 F.2d 1332 (7th Cir. 1983), cert. denied, __ U.S. __, 104 S.Ct. 403 (Nov. 7, 1983)]

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

DOCUMENT NUMBER
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
FEB 03 1981
FILED

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CRIMINAL NO. 80-50032-10
vs.	)	Title 21 Section 849
MARVIN J. ZYLSTRA,	)	United States Code
Defendant.	)	

NOTICE OF INTENTION TO PROSECUTE AS A
DANGEROUS SPECIAL DRUG OFFENDER

NOW COMES the United States of America, by and through its undersigned attorneys, and, pursuant to Section 849(a) of Title 21, United States Code, informs the court that the defendant is a dangerous special drug offender because, after obtaining the age of 21 years, he committed numerous criminal acts justifying this characterization in accordance with the following statutory provisions:

1. SPECIAL DRUG OFFENDER. Under either one or both of the following two tests, defendant is a special drug offender:

(A) Defendant is a professional criminal under the criteria set forth at 21 U.S.C. §849(e)(2) in that he, essentially, (1) committed felonious violations as a pattern of dealing in controlled substances; (2) derived substantial income from these illegal activities; and (3) manifested special skill and expertise in such dealing.

(B) Defendant is an organized crime offender under the applicable definition contained at 21 U.S.C. §849(e)(3) in that he, essentially, (1) conspired with three or more other persons to engage in a pattern of dealing in controlled substances; (2) organized and managed such conspiracy; and (3) was responsible for the use of bribery and force in connection with such dealing.

2. DANGEROUS DRUG OFFENDER. The defendant is also a dangerous drug offender, as that term is defined by 21 U.S.C. §849(f), in that, essentially, an enhanced period of confinement is required to protect the public from further criminal conduct by him.

IN SUPPORT hereof, the prosecution alleges and asserts as follows:

(A) The attached indictment, which is hereby incorporated by reference as if set out in full, contains detailed allegations regarding the defendant's misconduct which are summarized as follows:

(1) The defendant conspired with numerous other persons to import and distribute multi-ton quantities of marihuana into the United States in violation of 21 U.S.C. §846(a)(1) and §952(a).

(2) Over thirty planeloads of marihuana were successfully imported into the United States for distribution by defendant and his co-conspirators.

(3) Defendant was an organizer and manager of this criminal organization, directing the illegal activities of others.

(4) Defendant was paid handsomely for his criminal activities, receiving a significant portion of the proceeds of over $55 million which the members of this conspiracy earned from their illegal activity.

(5) The special skill and expertise which the defendant manifested included, inter alia: (a) the ability to organize and plan criminal activities; (b) management and supervisory expertise; (c) knowledge of the illegal marihuana market; (d) the knowledge of where to obtain the services of other criminals to commit acts of violence; and (e) access to forgers to create false means of identification, and to electronics experts to conduct countersurveillance operations, in order to frustrate the activities of law enforcement officials.

(6) Defendant is criminally responsible for the bribery of a police officer, the threatening of a prospective government witness, and the hiring of a professional killer to murder two other people.

(B) The punishment for one count of possession with intent to distribute and distribution of marihuana is only imprisonment for five years, and/or a fine of $15,000, and a special parole term.

(C) The defendant is the most criminally culpable member of this conspiracy. In addition to these factors set forth above, the government respectfully directs the attention of this Honorable Court to Paragraph AA of Count 1 of the attached indictment which alleges that the defendant committed the offense of premeditated murder in furtherance of this conspiracy to prevent one of the victims, a DEA informant, from revealing

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IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF ILLINOIS

DOCUMENT NUMBER
CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
FEB 03 1981
FILED

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	CRIMINAL NO. 80-50032-10
MARVIN J. ZYLSTRA,	)	
Defendant.	)	

MOTION OF THE UNITED STATES
FOR THE SEALING OF NOTICE

The United States of America, by and through its undersigned attorneys, moves this Honorable Court for an order sealing the attached documents in accordance with the provision of 21 U.S.C. §849(a), and directing the Clerk for the United States District Court for the Southern District of Illinois to assume possession and custody of the attached documents and hold the same sealed and safe from subpoena and public inspection during the pendency of the above-captioned criminal matter, except on order of this court.

WHEREFORE, premises considered, the United States of America moves this Honorable Court to grant its Motion for the sealing of the attached documents.

RESPECTFULLY SUBMITTED,

JAMES R. BURGESS, JR.
United States Attorney
Southern District of Illinois

By: [signature]
GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug Section
Criminal Section
United States Department of Justice

[signature]
CLIFFORD J. PROUD
Assistant United States Attorney

defendant's criminal activities to the Drug Enforcement Administration.

WHEREFORE, these premises considered, NOTICE IS HEREBY GIVEN of the intention of the United States to prosecute the defendant as a dangerous special drug offender pursuant to the provisions of 21 U.S.C. §849, and to subject the defendant to the enhanced sentencing provisions of 21 U.S.C. §849(b) upon his conviction of each and every one of the offenses alleged as Counts 29 through 40, inclusively, of the attached indictment.

RESPECTFULLY SUBMITTED,

JAMES R. BURGESS, JR.
United States Attorney
Southern District of Illinois

By: [signature]
GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug Section
Criminal Division
United States Department of Justice

[signature]
CLIFFORD J. PROUD
Assistant United States Attorney

EDITOR'S NOTE:

The United States Attorney should also sign this pleading (see, Section III(E)(2)(e)(3) of text).

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff,
vs.
MARVIN J. ZYLSTRA, Defendant.

CRIMINAL NO. 80-50032-10

ORDER

This matter having come before the court on the Motion of the United States for an order sealing the "NOTICE" and it appearing to the court that the filing of the Notice as a public record may prejudice the fair consideration of the pending criminal matter, it is

ORDERED, that the Clerk of the United States District Court for the Southern District of Illinois seal the "NOTICE OF INTENTION TO PROSECUTE..." and hold the same in his custody during the pendency of the above-captioned matter.

IT IS FURTHER ORDERED, that the Clerk of the United States District Court for the Southern District of Illinois hold the sealed document safe from subpoena and public inspection during the pendency of said criminal matter, except by further order of the court.

IT IS FURTHER ORDERED, that the Clerk of said Court shall allow the sealed document to be inspected ONLY by the defendant alleged in the document and his counsel:

IT IS SO ORDERED this _______ day of ____________________, 1981.

JAMES L. FOREMAN
Chief Judge, United States District Court

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
MAY 1 1981
FILED

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) CR. NO. 80-50032-10
MARVIN J. ZYLSTRA,)
Defendant.)

ORDER

This matter comes before the Court on motion of the United States to unseal the Notice of Intention to Prosecute as a Dangerous Special Drug Offender, and the Court, being fully advised in the premises, finds that the motion should be GRANTED.

Therefore, it is ORDERED, ADJUDGED and DECREED, that the Clerk of this Court shall forthwith unseal the Notice of Intention to Prosecute as a Dangerous Special Drug Offender filed February 3, 1981.

Enter: May 1, 1981

James L. Foreman
CHIEF JUDGE

APPENDIX VIII

NOTICE OF INTENTION TO PROSECUTE AS A DANGEROUS SPECIAL OFFENDER UNDER 18 U.S.C. § 3575

[United States v. Harmut Graewe, a defendant in United States v. Gallo, No. 83-119 (N.D. Ohio), aff'd (on bond questions) sub nom. United States v. Graewe, 689 F.2d 54 (6th Cir. 1982)]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff	)	CR NO. 82-119-3
v.	)	JUDGE JOHN M. MANOS
HARTMUT GRAEWE, Defendant	)	18 U.S.C. §3575

NOTICE OF INTENTION TO PROSECUTE AS A
DANGEROUS SPECIAL OFFENDER

NOW COMES the United States of America, by and through its undersigned attorneys, and, pursuant to Section 3575(a) of Title 18, United States Code, informs the court that the defendant is a dangerous special offender because, after obtaining the age of 21 years, he committed numerous criminal acts justifying this characterization in accordance with the following provisions:

1. SPECIAL OFFENDER. Under one or more of the following tests, defendant is a special offender:

(A) Defendant is a professional criminal under the criteria set forth at 18 U.S.C. §3575(e)(2) in that he, essentially, (1) committed felonious violations as a pattern of dealing in controlled substances; (2) derived substantial income from these illegal activities; and (3) manifested special skill and expertise in such dealings.

(B) Defendant is an organized crime offender under the applicable definition contained at 18 U.S.C. §3575(e)(3) in that he, essentially, (1) conspired with three or more other persons to engage in a pattern of dealing in controlled substances; (2) organized and managed such conspiracy; and (3) was responsible for the use of bribery and force in connection with such dealing.

(C) Defendant is a recidivist under the definition set forth at 18 U.S.C. §3575(e)(1) in that he has previously been convicted for the offense of manslaughter in 1972 (when he killed his wife by viciously stomping her to death). He was subsequently released from prison in 1974, a date within five years of his commission of some of the instant offenses. He has also received the conviction described below in paragraph 2.

2. DANGEROUS OFFENDER. The defendant is also a dangerous offender, as that term is defined by 18 U.S.C. §3575(f), in that, essentially, an enhanced period of confinement is required to protect the public from further criminal conduct by him. His prior conviction for larceny by trick did not deter him from the instant acts of misconduct.

IN SUPPORT hereof, the prosecution alleges and asserts as follows:

(A) The indictment in this case, which is hereby incorporated by reference as if set out in full, contains detailed allegations regarding the defendant's misconduct which are summarized as follows:

(1) The defendant conspired with numerous other persons to distribute large quantities of various controlled substances by conducting interstate travel in aid of racketeering in violation of 18 U.S.C. §1952, and to commit murders in furtherance of drug trafficking in violation of 18 U.S.C. 1962(d).

(2) Defendant was an organizer and manager of this criminal organization, directing the illegal activities of others.

(3) Defendant was paid handsomely for his criminal activities, receiving a significant portion of the illegal proceeds which the members of this conspiracy earned from their illegal activity.

(4) The special skill and expertise which the defendant manifested included, inter alia: (a) the ability to organize and plan criminal activities; (b) management and supervisory expertise; (c) knowledge of the illegal drug market; (d) the knowledge of where to obtain the services of other criminals to commit acts of violence; and (e) access to corrupt law enforcement officials in order to frustrate the activities of law enforcement officials.

(5) Defendant is criminally responsible for various acts of threatening of prospective government witnesses and numerous murders.

(B) The punishments for Count 1 and Counts 3 through 23, inclusively, are inadequate to address the defendant's rampant criminality.

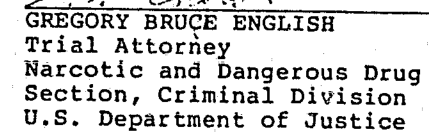
(C) The defendant is, without question, the most criminally culpable member of this conspiracy because he personally committed murder. Indeed, he has openly boasted to associates that he has killed several people. His greatest joy in life appears to be inflicting pain and suffering upon people and animals. He frequently brags about the number of homosexual rapes he committed while imprisoned. His criminal associates refer to him as "Doc" and "The Surgeon" because of his proclivities for mutilating animals and---on occasion---people by cutting off their limbs while they are still alive. The defendant is regarded by local law enforcement personnel as perhaps the most vicious and dangerous killer in the State of Ohio.

WHEREFORE, these premises considered, NOTICE IS HEREBY GIVEN of the intention of the United States to prosecute the defendant as a dangerous special offender pursuant to the provisions of 18 U.S.C. §3575 and to subject the defendant to the enhanced sentencing provisions of 18 U.S.C. §3575(b) upon his conviction of each one of the offenses alleged as Counts 3 through 23, inclusively, of the instant indictment.

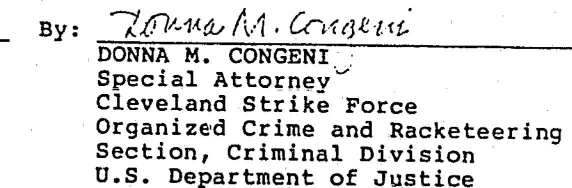
RESPECTFULLY SUBMITTED,

J. William Petro
United States Attorney

STEVEN R. OLAH
Attorney-in-Charge
Cleveland Strike Force



GREGORY BRUCE ENGLISH
Trial Attorney
Narcotic and Dangerous Drug
Section, Criminal Division
U.S. Department of Justice

By: 

DONNA M. CONGENI
Special Attorney
Cleveland Strike Force
Organized Crime and Racketeering
Section, Criminal Division
U.S. Department of Justice

EDITOR'S NOTE:

The United States Attorney should also sign this pleading (see, Section III(E)(2)(e)(3) of text).

APPENDIX IX

BUREAU OF PRISONS FACILITIES

[extract from BOP Designations Manual)]

FACILITY BY REGION AND LEVEL OF SECURITY AND CUSTODY

SECURITY LEVEL	NORTHEAST	SOUTHEAST	NORTH CENTRAL	SOUTH CENTRAL	WESTERN	CUSTODY
1	Allenwood Danbury Camp Lewisburg Camp Petersburg Camp	Eglin Maxwell Lexington	Leavenworth Camp Marion Camp Terre Haute Camp	Ft. Worth Big Spring La Tuna Camp El Reno Camp Texarkana Camp	Lompoc Camp Safford Boron	OUT COMMUNITY
2	Danbury	Tallahassee	Sandstone	La Tuna Seagoville.		IN, OUT COMMUNITY
3	Raybrook Otisville	Ashland	Milan* Springfield Gen. Pop (SL-2 & SL-3)	Texarkana	Terminal Island*	IN, OUT COMMUNITY
4		Memphis* Talladega*	Oxford Terre Haute	Bastrop* (SL-3 & SL-4) El Reno		IN, OUT
5	Lewisburg		Leavenworth		Lompoc* (SL-4 & SL-5)	MAXIMUM IN
6			Marion			MAXIMUM IN
Administrative Facilities	Alderson Morgantown (YCA) New York Petersburg (YCA)	Atlanta (INS Detention) Butner Miami	Chicago Springfield (Medical & Psychiatric)		Englewood (YCA) Pleasanton San Diego Tucson	ALL CUSTODY LEVELS

* Also has a Jail Unit.

APPENDIX X

BUREAU OF PRISONS SECURITY DESIGNATION FORM 14

[extract from BOP Designations Manual)]

U.S. Department of Justice
Federal Prison System

Security Designation

1. DATE MONTH-DAY-YEAR		2. REGIONAL OFFICE CODE		3. CPO CODE	

SECTION A — DEMOGRAPHIC DATA

Item			
1. NAME	LAST / FIRST / INITIAL	2. DATE OF BIRTH MONTH-DAY-YEAR	
3. SEX M = MALE F = FEMALE	4. RACE W = WHITE B = BLACK A = ASIAN I = INDIAN (AMER.)	5. ETHNIC GROUP H = HISPANIC O = NONHISPANIC	
6. LEGAL RESIDENCE	CITY	STATE	ZIP CODE
7. CENTRAL INMATE MONITORING ASSIGNMENT Need to separate from individuals or group or geographical area?	Y = YES N = NO	SEPARATEE	
SEPARATEE		SEPARATEE	
SENTENCE LIMITATIONS	0 = NONE 1 = MISDEMEANOR 2 = JUVENILE 3 = YCA 4 = STUDY 5 = SPLIT SENTENCE 6 = NARA		
ADDITIONAL CONSIDERATIONS	0 = NONE 1 = MEDICAL 2 = PSYCHIATRIC 3 = AGGRESSIVE SEXUAL BEHAVIOR 4 = THREAT TO GOVT OFFICIAL 5 = GREATEST SEVERITY 6 = HIGH SEV. DRUG 7 = DEPORTABLE ALIEN 8 = RICO OR CCE		
JUDICIAL RECOMMENDATION	Y = YES N = NOT APPLICABLE	INSTITUTION	PROGRAM
OFFENSE		12. SENTENCE LENGTH	
JUDGE'S NAME		14. USM OFFICE	

SECTION B — SECURITY SCORING

Item	Scoring	
1. TYPE OF DETAINER	0 = NONE 1 = LOWEST/LOW MODERATE 3 = MODERATE 5 = HIGH 7 = GREATEST	
2. SEVERITY OF CURRENT OFFENSE	0 = LOWEST 1 = LOW MODERATE 3 = MODERATE 5 = HIGH 7 = GREATEST	
3. EXPECTED LENGTH OF INCARCERATION	0 = 0-12 MONTHS 1 = 13-59 MONTHS 3 = 60-83 MONTHS 5 = 84 PLUS MONTHS MONTHS ____	
4. TYPE OF PRIOR COMMITMENTS	0 = NONE 1 = MINOR 3 = SERIOUS	

5. HISTORY OF ESCAPES OR ATTEMPTS		NONE	>15 YEARS	10-15 YEARS	5-10 YEARS	<5 YEARS
	MINOR	0	1	1	2	3
	SERIOUS	0	4	5	6	7

6. HISTORY OF VIOLENCE		NONE	>15 YEARS	10-15 YEARS	5-10 YEARS	<5 YEARS
	MINOR	0	1	1	2	3
	SERIOUS	0	4	5	6	7

Item		
7. SUBTOTAL	TOTAL OF ITEMS 1 THROUGH 6	
8. PRE-COMMITMENT STATUS	0 = NOT APPLICABLE 3 = OWN RECOGNIZANCE 6 = VOLUNTARY SURRENDER	
9. SECURITY TOTAL	SUBTRACT ITEM 8 FROM ITEM 7. IF ITEM 8 IS GREATER THAN 7, ENTER 0	
10. SECURITY LEVEL	1 = 0-6 POINTS 2 = 7-9 POINTS 3 = 10-13 POINTS 4 = 14-22 POINTS 5 = 23-29 POINTS 6 = 30-36 POINTS	
11. IF ELIGIBLE FOR SL-1 IS THERE ANY MEDICAL REASON THAT WOULD PRECLUDE DESIGNATING A CAMP?	Y = YES N = NO	
12. COMMENTS		

SECTION C — REGIONAL OFFICE ACTION

Item				
1. DATE MO-DAY-YR	2. REG. NO.	3. INMATE SEC. LEVEL		
4. INSTITUTION DESIGNATED	INSTITUTION	CODE	LEVEL	5. REASON FOR DESIGNATION S = SECURITY LEVEL M = MANAGEMENT
6. MANAGEMENT REASON	0 = NOT APPLICABLE 1 = JUDICIAL RECOM 2 = AGE 3 = RELEASE RESIDENCE	4 = OVERCROWDING 5 = RACIAL BALANCE 6 = CENTRAL INMATE MON 7 = SENTENCE LIMITATION	8 = ADD CONSIDERATIONS 9 = PAROLE HEARING 10 = VOLUNTARY SURRENDER 11 = OTHER INFO (DOCUMENT)	

END