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TITLE 26 AND TITLE 26 **RELATED CASES**

Fifth Amendment Privilege Not Violated By Filing Requirement

In *United States v. Roberts*, No. 00-3405, 2001 U.S. App. LEXIS 9299 (8th Cir. May 16, 2001), the Eighth Circuit affirmed Roberts' conviction of two counts of failing to file income tax returns for 1993 and 1994, in violation of 26 U.S.C. § 7203. Roberts was sentenced to sixteen months' imprisonment and one year supervised release. On appeal, Roberts argued, *inter alia*, the requirement to file a tax return under penalty of perjury violated his Fifth Amendment right against self incrimination because had he filed returns in 1993 and 1994, he would be admitting he was required to but failed to file returns for tax years 1990 through 1992. The court rejected Roberts' argument because case law has held a taxpayer cannot rely on the Fifth Amendment privilege against self incrimination to fail to file a tax return or fail to disclose any information.

Roberts also argued the indictment was deficient because it failed to cite 26 U.S.C. § 6012, the statute requiring him to pay taxes. The court rejected this argument holding an indictment is ordinarily sufficient if it states each material element of the crime charged. In this case, Roberts was charged with violating § 7203, which provides punishment for willfully failing to file a tax return and the court found each element of the charge was recited in the indictment.

Content Requirements Of Hyde Amendment Pleadings Not Jurisdictional

In *United States v. True*, 250 F.3d 410 (6th Cir. 2001), True was tried and acquitted of one count of conspiring to

unreasonably restrain interstate trade and commerce in violation of Section 1 of the Sherman Act. After his acquittal, True filed an application under the Hyde

Amendment seeking to recover his litigation costs. Codified in the statutory notes to 18 U.S.C. § 3006A, the Hyde Amendment authorizes reasonable attorneys' fees and litigation expenses to a prevailing party in a criminal case if a court determines the government's position was "vexatious, frivolous, or in bad faith." In his application, True claimed the government's prosecution was vexatious and/or in bad faith because, *inter alia*, the government knew there was insufficient evidence to prove beyond a reasonable doubt he was a member of the price fixing conspiracy. True failed, however, to include itemized statements from his attorneys stating the time they spent on his case and their rates. The government moved to dismiss the application arguing it was jurisdictionally defective and True had failed to meet his burden of showing the government's position was vexatious, frivolous, or in bad faith. The district court denied True's application on the merits, but then denied the government's lack of jurisdiction motion.

On appeal, the Sixth Circuit first examined the government's argument claiming True's application was jurisdictionally defective because it did not conform to the pleading requirements set forth in the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq., as incorporated by the Hyde Amendment. The court looked to the decisions of several circuits where the content requirements were held to simply be pleading requirements and not jurisdictional. The court agreed that interpreting the content requirements as jurisdictional would narrowly construe the EAJA's waiver of sovereign immunity and cause attorneys to make their fee demands and statements of time as large as possible. Accordingly, the court found True's application was timely and not defective for failing to include statements of his

attorneys' time and fees. The court then determined the government's prosecution was not vexatious or in bad faith for there was probable cause to bring the indictment and prosecute True. Accordingly, the court affirmed the district court's denial of True's Hyde Amendment motion.

Hyde Amendment Award Of Attorney Fees Requires Harassment And Legal Insufficiency

In *United States v. Sherburne*, 249 F.3d 1121(9th Cir. 2001), the government appealed the district court's award of attorneys' fees to Sherburne, pursuant to the Hyde Amendment, who was tried for HUD fraud but not convicted. The Hyde Amendment permits a criminal defendant to recover fees when the government's position was vexatious, frivolous, or in bad faith as provided by 18 U.S.C. § 3006A. At trial, thirteen defendants were prosecuted for alleged abuses in the funding and construction of a housing development in Montana using Department of Housing and Urban Development funds. The jury acquitted the defendants on some charges but other charges resulted in a hung jury. The latter charges were later dismissed. Some of the defendants (including Sherburne) moved for attorneys' fees. The district court awarded fees to Sherburne and to one other defendant.

On appeal, the Ninth Circuit recognized the Hyde Amendment "establishes three separate grounds upon which attorney's fees may be awarded: for conduct that is vexatious, frivolous, or in bad faith." *Id.*, at *11. The district court awarded attorneys' fees based on the vexatiousness of the prosecution, relying on the interpretation of vexatious in *United States v. Holland*, 34 F.Supp.2d 346 (E.D. Va. 1999). The Ninth Circuit indicated the *Holland* standard was incorrect. "A standard that focuses solely on the 'reasonable prosecutor' and 'proof beyond a reasonable doubt' requires too much of the United States." *Sherburne*, at *15. Instead, the court stated vexatious "includes an element of maliciousness" and "contemplates a suit that is objectively deficient." *Id.*, at *12. Both are required for the court to grant attorneys' fees under the Hyde Amendment. Accordingly, the Ninth Circuit vacated the award of fees and remanded the case for the district court to apply the proper vexatious, frivolous, or bad faith standard.

SENTENCING

Amendment Abrogating "Heartland" Analysis Cannot Be Applied Retrospectively

In *United States v. Diaz*, 245 F.3d 294 (3rd Cir. 2001), Diaz pled guilty to fraud and money laundering counts and was sentenced to thirty-three months' imprisonment. Diaz owned a for-profit vocational school, which participated in federal student financial assistance programs. She manipulated the school's default rates in order to continue to receive federal funds the school was no longer entitled to, thus defrauding the government of \$846,000. Diaz appealed the sentence, arguing her conduct was outside the heartland of the money laundering guideline and, therefore, her sentence should have been computed under the fraud guideline. The Third Circuit agreed, despite a new amendment to the sentencing guidelines enacted after Diaz was sentenced. Amendment 591, effective November 1, 2000, abrogated the courts' ability to consider whether the conduct punished is atypical of the conduct usually punished under the money laundering statute and should be sentenced under another guideline.

Although the court recognized "under the guidelines as amended, sentencing courts may not conduct an inquiry into the heartland of [the money laundering guideline] and courts have no discretion to decide that the money laundering guideline is inappropriate," it held the amendment could not be applied retroactively in this case. *Id.*, at *24. "The Constitution does not . . . permit retroactive application of an amended sentencing guideline where, as here, a harsher penalty might result." *Id.*, at *26. The court then applied the pre-amendment guideline and case law analysis from its prior decisions to "determine whether the defendant's conduct is atypical of cases ordinarily sentenced under that guideline, and, if so, determine what guideline would be more appropriate given the offense conduct." *Id.*, at *28-29. Although the evidence supported her money laundering plea, "Diaz never used the proceeds of her fraudulent activities to promote additional criminal conduct by reinvesting in further criminal conduct," and she did not attempt to conceal the funds or transfer them anywhere except her business. The court remanded the case for resentencing, concluding Diaz' conduct was atypical and should have been sentenced under the fraud guideline.

Promotion Money Laundering Should Not Be Grouped With Fraud

In *United States v. Kalust (Percan)*, 249 F.3d 106 (2nd Cir. 2001), Percan orchestrated a conspiracy to steal and resell airbags in his auto parts store. He was convicted of transportation of stolen goods, money laundering and conspiracy to commit these offenses. At sentencing, his transportation of stolen goods and money laundering convictions were not grouped together, resulting in an offense level two levels higher than if they had been

grouped. Percan objected to the sentencing court's failure to group his fraud and money laundering convictions.

Although the circuits are split regarding the grouping of fraud and money laundering counts, the seminal case in the Second Circuit is *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), which held grouping to be appropriate if all counts involve the same victim. On appeal, Percan argued because he was convicted of promotion money laundering, rather than concealment money laundering, the victims of his money laundering were the same as the victims of his underlying fraud. The Second Circuit disagreed, finding the victims different despite the fact Percan's money laundering was promotion money laundering. Moreover, the court found Percan's deposit of the SUA proceeds into his business bank account lent legitimacy to the SUA proceeds. The court found although Percan's fraud and promotion money laundering convictions were more highly interwoven than the fraud and concealment money laundering convictions in *Napoli*, the victims were still not the same, therefore, the footnote in *Napoli* sanctioning grouping in uniquely interwoven circumstances did not apply. Percan's sentence was affirmed.

To Determine The Object Of Racketeering Offense, Courts Must Use Beyond A Reasonable Doubt Standard

In *United States v. Farese*, 284 F.3d 1056 (11th Cir. 2001), Farese plead guilty to racketeering in violation of 18 U.S.C. § 1962. The applicable sentencing guideline, U.S.S.G. § 2E1.1, provides the base offense level for racketeering shall be the greater of 19 or the offense level applicable to the underlying object of the racketeering offense. At sentencing, the district court found the object of Farese's racketeering offense was money laundering.

Accordingly the court based Farese's sentence on the 20 offense level applicable to money laundering. The court found Farese's other underlying offense, mail fraud, was not the object of his racketeering offense. Since finding mail fraud was the object of Farese's racketeering would have resulted in a 19 offense level, the issue on appeal was whether the court correctly determined money laundering was the object.

On appeal, Farese contended the district court had incorrectly applied the preponderance of the evidence standard, rather than the proof beyond a reasonable doubt standard, to determine the object of Farese's racketeering offense was money laundering. The Eleventh Circuit looked to the general application principles found in U.S.S.G. Chapter 1, Part B. The Application Notes to U.S.S.G. § 1B1.2(d) concern cases such as Farese's where there are multiple underlying offenses and the plea does not establish which offense was the object.

The Application Notes provide the court should determine which offense was the object based on whether "the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." The Eleventh Circuit interpreted the words "were it sitting as a trier of fact" to mean the district court must find beyond a reasonable doubt Farese conspired to commit the object offense before it can sentence him on the basis of that offense. Since the district court had found Farese conspired to commit money laundering by a preponderance of the evidence, the Eleventh Circuit vacated Farese's sentence and remanded.

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