Number: **200142002**
Release Date: 10/19/2001
CC:CT

CT-100476-01
UILN: 9999.98-00
May 14, 2001

Criminal Tax Bulletin

Department of Treasury
Internal Revenue Service

Office of Chief Counsel
Criminal Tax Division

FEBRUARY/APRIL **This bulletin is for informational purposes. It is not a directive.** **2001**

SUPREME COURT CASES

Suspect Barred From Entering His Home While Warrant Sought To Search For Drugs

In ***Illinois v. McArthur***, 121 S. Ct. 946 (2001), the Supreme Court held the Fourth Amendment was not violated by police officers who prevented McArthur from entering his home for approximately two hours, while they obtained a warrant to search the premises for drugs. McArthur's wife had requested two police officers to accompany her to the trailer where she lived with McArthur, so they could keep the peace while she removed her belongings. Upon leaving the trailer, McArthur's wife remarked her husband "had dope in there." McArthur refused the police officer's request to search the premises. One of the officers was then dispatched to get a search warrant. The remaining officer, who was standing on the porch with McArthur, informed him he could not reenter the trailer unless a police officer accompanied him. After obtaining the warrant, the officers searched the trailer, discovering marijuana and a pipe. Subsequently, McArthur was prosecuted for misdemeanor possession. The trial court suppressed the evidence as "fruit" of an unlawful police seizure of McArthur. The Appellate Court of Illinois affirmed.

In reversing the Illinois Appellate Court, the Supreme Court stated "rather than employing a per se rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." The Court then set forth a combination of circumstances which allowed it to find the restriction of McArthur did not violate the Fourth Amendment. First, the police had probable cause to believe McArthur's trailer home contained evidence of a crime and contraband, namely unlawful drugs. Second, the police had good reason to fear, unless restrained, McArthur would destroy the drugs before the police could return with a warrant. Third, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy by neither searching the trailer nor arresting McArthur before obtaining a warrant. Finally, the police imposed the restraint on McArthur for a limited period of time, two hours. Moreover, prior case law revealed overwhelming support that the restriction was reasonable.

Ineffective Assistance Of Counsel

In ***Glover v. United States***, 121 S. Ct. 696 (2001), Glover was convicted of labor racketeering, money laundering and tax evasion. At sentencing, the government argued the money laundering counts should not be grouped with the other counts. Glover's attorneys did not contest the government's argument against grouping and failed to raise the grouping issue when they appealed to the Seventh Circuit on other grounds, despite the existence of judicial precedent holding grouping money laundering with other counts was proper under some circumstances. Accordingly the district court did not group the counts and, as a result, Glover's offense level was increased by two levels, resulting in a six to 21 month increase to his sentence.

Glover filed a *pro se* motion to correct his sentence arguing the failure of his attorneys to press the grouping issue constituted ineffective assistance of counsel and was prejudicial since it increased his sentence. The district court denied Glover's motion. The Seventh Circuit, relying on

Strickland v. Washington, 466 U.S. 668 (1984), affirmed because an increase of six to 21 months was not significant enough to amount to prejudice. *Strickland* held, to reverse a sentence on grounds of ineffective assistance of counsel, a defendant must show counsel's deficient performance resulted in "sufficient prejudice" to warrant setting aside the sentence.

Granting Glover's petition for *certiorari*, the Supreme Court noted a minimal amount of additional time in prison was not a mere different outcome, but rather constitutes prejudice. The Court expounded any amount of actual jail time has Sixth Amendment significance. The Court also noted the Seventh Circuit's holding was flawed since it lacked any indication how much longer a sentence must be for the increase to constitute substantial prejudice. The Court did not reach the question of whether it was error not to group the money laundering counts with the other counts, but held only, if it were error, prejudice resulted from counsel's failure to pursue the issue.

Attachment Of Sixth Amendment Right To Counsel

In ***Texas v. Cobb***, 121 S. Ct. 1335 (2001), the Supreme Court held because the Sixth Amendment right to assistance of counsel is "offense specific," it does not necessarily extend to offenses which are factually related to or intertwined with those actually charged. While in custody, Cobb confessed to burglarizing his neighbor's home, denying any knowledge of the disappearance of a woman and child who resided at the home. Cobb was indicted for the burglary and counsel was appointed to represent him. Approximately fifteen months later, Cobb told his father he had killed the missing woman and child during the burglary. After the father contacted the police, Cobb was arrested and taken into custody. He voluntarily waived his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) and confessed to the murders. Subsequently, his confession was used to convict him of capital murder.

On appeal to the Texas Court of Criminal Appeals, Cobb argued his confession should have been suppressed because it was obtained in violation of his Sixth Amendment right to counsel which had attached when counsel was appointed to represent him in the burglary case. The Texas court agreed holding once the right to counsel attaches to the offense charged, it also attaches to any other offense that is closely factually related to the charged offense.

In reversing, the Supreme Court cited *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991), where it held "a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." The Court declined to read into *McNeil's* "offense specific" definition an exception for crimes factually related to a charged offense. Stating there is "no constitutional difference between the meaning of the term offense in the contexts of double jeopardy and of the right to counsel," the Court referred to the definition of "offense"

set forth in *Blockbuster v. United States*, 284 U.S. 299 (1932) and opined "when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test."

TITLE 26 AND TITLE 26 RELATED CASES

Failure To Receive Tax Notice Is Not *Prima Facie* Showing Service Abused Its Civil Summons Power

In ***United States v. Utecht***, 238 F.3d 882 (2001), the district court denied Utecht's *LaSalle* motion to dismiss, finding the Service's failure to send Utecht a tax notice once the criminal investigation had begun was not an abuse of its civil summons power. Utecht was the owner of an entertainment equipment corporation which supplied pinball machines and pool tables to bars in Wisconsin. In 1990, Utecht began supplying video poker machines to his bar owner customers. Video gambling is illegal in Wisconsin, so Utecht concealed the proceeds of the machines and fabricated Forms 1099 for his bar owner customers. Ultimately, Utecht failed to report income from the machines on his corporate and personal income tax returns. Utecht pled guilty to "making false statements in his tax returns" and was sentenced to thirty-six months imprisonment. Utecht appealed the district court's denial of his *LaSalle* motion, which was based on the grounds he was denied discovery because the Service abused its civil summons power.

In affirming the denial of Utecht's motion, the Seventh Circuit noted "[i]f the IRS uses civil subpoenas without establishing the probable cause necessary for criminal cases after having made an institutional commitment to recommend prosecution. . .evidence obtained through these

subpoenas possibly could be suppressed at a criminal trial." *Id*. at *9. The court also recognized "civil matters should be suspended once a criminal investigation begins." *Id*. at *10. The court found Utecht's failure to receive a tax notice after a civil audit did not constitute a *prima facie* showing the Service abused its civil summons power and, if anything, demonstrated the Service properly maintained a separation of its civil and criminal functions.

Defendant Must Prove Assignment Of Duty To Perform Along With Assignment Of Income To Avoid *Lucas v. Earl*

In ***United States v. Newell***, 239 F.3d 917 (7th Cir. 2001), Newell was president and 50 percent shareholder of "Inc.," a commodity trading business incorporated under Subchapter S. Newell directed one of Inc.'s large clients to send to "Ltd.," a Bermuda corporation also owned by Newell, $1.3 million the client owed for services Inc. had rendered pursuant to a contract. Neither Inc. nor Newell reported the $1.3 million received by Ltd. as income. Newell was convicted of willfully filing false federal income tax returns in violation of 26 U.S.C. § 7206(1). The district court, in reaching its decision, relied on *Lucas v. Earl*, 281 U.S. 111 (1930) which held a taxpayer cannot escape his tax obligations by assigning income he has earned, to another person.

On appeal, Newell argued his case fell into an exception to *Lucas v. Earl.* The exception provides, in the case of a contract, an assignor may shift his tax liability to an assignee only if the assignor assigns the duty to perform along with the right to be paid. Mere assignment of the income, without assignment of the duty to perform, does not shift tax liability.

Judge Posner, writing for the Seventh Circuit, acknowledged the existence of this exception but found Newell had not proven its applicability since Newell had not proven the contract itself was assigned. The court noted it was not the government's burden to disprove possibilities which may exonerate Newell. Moreover, the Seventh Circuit questioned whether any assignment had occurred at all since the assignment was to an alter ego of Newell and not to another person as in *Lucas v. Earl.* The Seventh Circuit held the assignment was a sham only designed to facilitate tax evasion.

Affirmative Acts of Evasion

In ***United States v. Carlson***, 235 F.3d 466 (9th Cir. 2000), the Ninth Circuit affirmed Carlson's conviction for tax evasion. Carlson was convicted of three counts of evasion of assessment of taxes and two counts of evasion of payment. Carlson appealed his conviction arguing, *inter alia*, the evidence was insufficient to show an affirmative act of evasion. Carlson had been a successful dentist in Hawaii for nearly twenty years, who had operated under the theory the tax code did not apply to him and he had not filed a tax return since 1983. Moreover, on his returns for 1981, 1982 and 1983, he claimed he owed no taxes, despite having earned substantial income in those years.

The Ninth Circuit affirmed Carlson's conviction finding he had clearly engaged in affirmative acts of evasion. The court found both documentary evidence and testimony which established Carlson had opened secret bank accounts using false social security numbers and places and dates of birth, after learning the Service was attempting to levy on his bank account. Carlson then withdrew money from the accounts which were known to the Service and deposited the money in the secret accounts. Consequently, it was clear Carlson's acts could easily have misled the Service or concealed information from it.

SEARCH AND SEIZURE

Probable Cause

In ***United States v. Reinholz***, No. 00-1166, 2001 U.S. App. LEXIS 5046 (8th Cir. Mar. 29, 2001), the Eighth Circuit held a search warrant affiant's misleading characterization of an informant should be remedied by evaluating the sufficiency of the evidence without the intelligence from the informant, not by evaluating the sufficiency of the affidavit after supplementing it with accurate information about the character of the informant. In this case, a pharmacist who sold Reinholz iodine crystals called the police and gave them a description of Reinholz, believing he was manufacturing, distributing, and using methamphetamines. After the police searched trash bags in front of a co-defendant's residence where Reinholz was staying, a magistrate judge issued a search warrant for the residence. The police searched the residence and arrested Reinholz for drug manufacturing.

The district court granted Reinholz's motion to suppress the evidence found during the search on the ground the affiant officer misled the magistrate regarding the nature of his source and the remaining information in the affidavit relating to the solitary garbage search was not enough to provide

probable cause to support the warrant. On appeal, the Eighth Circuit held pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), a search warrant may be invalid if the affidavit contained false statements made knowingly and intentionally or with reckless disregard for their truth. The court observed the same analysis which applies to false statements, applies to omissions. Thus, to prevail on a *Frank's* claim a defendant must show: (1) a false statement knowingly and intentionally, or with reckless disregard for the truth was included in the affidavit; and, (2) the affidavit's remaining content is insufficient to establish probable cause.

The Eighth Circuit agreed with the district court that the affidavit's characterization of the informer as "reliable and confidential" was misleading. Rejecting the government's approach of supplementing the affidavit with accurate information, the court held a *Franks* misrepresentation is remedied by deleting the false statements. The court concluded the remaining facts in the affidavit, including the garbage search, provided sufficient probable cause to support the warrant.

PROCEDURE

Requirement of *Brady* Waiver for 'Fast Track' Guilty Plea Held Unconstitutional

In ***United States v. Ruiz***, 241 F.3d 1157 (9th Cir. 2001), the Ninth Circuit held the Fifth Amendment's Due Process Clause does not permit the government to require defendants to waive their rights under *Brady v. Maryland*, 373 U.S. 83 (1963), as a condition of participating in the local United States Attorney Office's "fast track" program. The Constitution's requirement that plea agreements be knowing and voluntary precludes waiver of a right to receive unknown information. Plea bargains offered under the "fast track" program required defendants, in addition to pleading guilty, to waive their rights to an indictment, to an appeal, to present motions, and to receive certain *Brady* material. Specifically, the defendants had to waive their right to receive impeachment material concerning government witnesses. In exchange for the waiver, the government recommended a two level downward departure from the applicable offense level.

Ruiz claimed she declined the government's "fast track" plea offer because it contained the *Brady* waiver condition, and the government opposed her request for a "fast track" departure only because she refused to enter into a plea agreement containing the *Brady* waiver provision. The majority of the Ninth Circuit agreed with Ruiz that the right to discovery under *Brady* is one of those rights which can never be waived. The majority relied on the Ninth Circuit's earlier holding in *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995), where it held *Brady* rights are not automatically waived by entry of a guilty plea. The majority decided here the rationale of Sanchez applied with equal force to plea agreements. The disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea. In both situations, the defendant's decision is often influenced by her appraisal of the prosecution's case. The court concluded Ruiz had presented substantial evidence which revealed the government withheld its downward departure recommendation based on this improper motive and, accordingly, remanded the case for a hearing on this issue and on the issue of whether Ruiz refused the government's plea offer because of the *Brady* waiver requirement.

EVIDENCE

Rule 608, Prior Consistent Statements, Relevance And Jury Instructions

In ***United States v. Simonelli***, 237 F.3d 19 (1st Cir. 2001), the First Circuit affirmed Simonelli's conviction for filing false returns, aiding and abetting in the filing of a corporate return and conspiracy. Simonelli challenged his conviction on the ground the admission of evidence and failure to give an accomplice testimony jury instruction were in error. Specifically with respect to the admission of evidence, Simonelli challenged questions the government asked him about prior bad acts which tended to show untruthfulness, on the basis the ". . . mere violation of a company gratuity policy [was] not evidence probative of untruthfulness, admissible in the discretion of the court under [Federal Rule of Evidence] Rule 608, and the questions were so prejudicial they should have been excluded under Rule 403." Simonelli also argued his father's testimony was irrelevant and was an attempt to bias the jury against him and the admission of his accountant's prior consistent statements was in error.

The court, in evaluating Simonelli's arguments, made the following determinations: first, the admission of cross-examination questions and answers regarding the gratuity policy of Simonelli's main customer was in error because there was no showing the evidence met Rule 608; second, the district court did not abuse its discretion in admitting Simonelli's father's testimony finding the evidence was relevant to Simonelli's company paying Simonelli's personal expenses and his failure to report them as income or a loan; third, the accountant's prior consistent statements were inadmissible because neither the rule of completeness nor the common law doctrine of admissibility of such statements

justified their admission; and lastly, since the district court had already given an immunized witness instructions that accomplished the same purpose, declining an accomplice jury instruction was not error. The court considered whether the errors committed by the district court required reversal and concluded the ". . . evidentiary errors were harmless individually and cumulatively as there was no rational basis to conclude that they had any effect on the jury," thus reversal was not required.

PRIVILEGES

Crime-Fraud Exception

In ***In Re: Grand Jury Proceeding Impounded***, 241 F.3d 308 (3rd Cir. 2001), the Third Circuit vacated the decision of the district court to quash a grand jury subpoena issued to the attorney for the target of a grand jury investigation. Over the course of several years, a grand jury had issued subpoenas for the production of various documents, business records, etc., relating to businesses controlled by the target of the investigation. The target's attorney assumed responsibility for complying with the subpoenas and produced some of the requested records. However, he asserted many of the records simply did not exist. Upon the execution of a search warrant, many of the records the attorney claimed were nonexistent were discovered. The government then subpoenaed the attorney to testify before the grand jury concerning his previous assertions that the records did not exist. After the attorney invoked the attorney-client privilege, the government filed a motion to compel his testimony. The government argued the crime-fraud exception invalidated the attorney-client privilege because the target of the investigation used the attorney to obstruct justice. The district court quashed the subpoena finding it "fundamentally unfair" to compel the attorney's testimony. In doing so, the court failed to assess the applicability of the crime-fraud exception and stated the government could have pursued other avenues in its efforts to obtain the desired information.

On appeal, the Third Circuit stated the two principal mechanisms for judicial review of grand jury subpoenas are FED. R. EVID. 501, which recognizes the attorney-client privilege, and FED R. CRIM. P. 17(c), which allows a court to quash a subpoena if compliance with it "would be unreasonable or oppressive." Here, the Third Circuit agreed with the government that the district court failed to properly analyze the invocation of the attorney-client privilege and the applicability of the crime-fraud exception. Moreover, by requiring the government to demonstrate the information sought could not be obtained by other means, the district court exceeded its authority under Rule 17 and improperly placed a burden on the government not provided for in the rules or case law. *See United States v. R. Enter., Inc.* 498 U.S. 292, 298-99 (1991).

FORFEITURE

When Forfeiture Notice Is Returned The Government Must Check All Obvious Sources

In ***Foehl v. United States***, 238 F.3d 474 (3rd Cir. 2001), Foehl was stopped for speeding in Texas and, upon searching the vehicle, the officers discovered marijuana and $93,163 in cash hidden in Foehl's vehicle. Foehl provided the officers with a driver's license listing his old address and a vehicle registration card listing his new address, both which were in Alabama. The parties disputed whether Foehl also informed the officers of his new address. The Texas authorities forfeited Foehl's truck, sending their forfeiture notice to Foehl's new address. The DEA adopted the forfeiture of the cash, sending its forfeiture notice to Foehl's old address. After the DEA's forfeiture notice was returned, the DEA contacted its Houston Division in an unsuccessful attempt to find Foehl's new address but made no further efforts to locate Foehl. Several months later, the DEA's Alabama Division, which had been separately investigating Foehl before his arrest in Texas, arrested Foehl on other drug charges.

Foehl sued to invalidate the DEA's forfeiture of his cash on grounds the DEA failed to properly notify him of its forfeiture. The district court granted the government's motion for summary judgment on grounds the lack of notice was Foehl's own fault for not updating his driver's license. Foehl appealed.

The Third Circuit found the DEA's single call to its Houston Division, after receiving its returned forfeiture notice, failed to comport with due process which requires notice to the claimant be reasonably calculated to apprize the claimant of the pendency of the action and to afford him an opportunity to present his objections. With minimal effort the DEA could have obtained Foehl's correct address from the Texas police, the Texas district attorney, the DEA's Alabama Division, or the Alabama Driver's License Bureau. The Third Circuit noted the DEA was not required to check all possible sources for a claimant's address but, under the circumstances, its actions were unreasonable.

Payment Of Interest Not Required In Unsuccessful Civil Drug Forfeiture Actions

In ***United States v. $30,006.25 (Rodgers)***, 236 F.3d 610 (10th Cir. 2000), following the government's unsuccessful attempts to forfeit property seized from Rodgers, the district court ordered the government to return his property. On appeal, Rodgers argued the district court erred when it failed to require the government to pay interest on the amounts due him. The Tenth Circuit concluded sovereign immunity prohibited the award of interest on the currency and proceeds returned to Rodgers.

The Tenth Circuit noted there is a circuit split on whether the government can be ordered to pay interest when it must return seized property to a claimant following an unsuccessful forfeiture action. The Second and Eighth Circuits hold sovereign immunity bars an award of interest since the government has not waived its immunity from suit in this respect. On the other hand, the Sixth and Ninth Circuits acknowledge there is no waiver of sovereign immunity but view the matter, not as an award of interest, but as the government's duty to disgorge property earned while the seized *res* was in the government's hands. The Tenth Circuit found it could not agree with the Sixth and Ninth Circuits that recharacterizing an interest award as a disgorgement of profits circumvents the effect of sovereign immunity. Consequently, the Tenth Circuit held Rodgers was not entitled to interest upon the government's return of the property to him.

The Tenth Circuit acknowledged the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA") had now waived sovereign immunity with respect to interest on returned currency, negotiable instruments and proceeds. CAFRA, however, did not apply to this case as it was only effective with respect to forfeiture proceedings commenced after August 23, 2000.

MONEY LAUNDERING

Venue

In ***United States v. Villarini***, 238 F.3d 530 (4th Cir. 2001), Villarini was convicted of one count of embezzlement, in violation of 18 U.S.C. § 656, and four counts of money laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i). The convictions arose from Villarini's theft of money from a bank in Virginia, at which she worked as a teller, and four subsequent transactions she conducted at a bank in Florida involving the stolen funds. Although the transactions which gave rise to the money laundering charges occurred in Florida, the government charged Villarini in the Western District of Virginia. Villarini's motion to dismiss the charges based upon improper venue was denied at trial.

On appeal, the Fourth Circuit held, although the evidence was sufficient to support the money laundering convictions, they nevertheless should be vacated due to improper venue. The court stated "[v]enue on a count is proper only in a district in which an essential conduct element of the offense took place." *See United States v. Bowens*, 224 F.3d 302, 309 (4th Cir. 2000). Here, the conduct alleged in the money laundering counts consisted solely of four transactions conducted entirely in Florida. The court rejected the government's argument that venue was proper in Virginia pursuant to 18 U.S.C. § 3237(a), which provides for venue in any district where an offense was begun, continued, or completed. The court relied upon *United States v. Cabrales*, 524 U.S. 1 (1998), in which the Supreme Court construed § 3237(a) in relation to money laundering prosecutions, determining the money laundering statute prohibits only the financial transaction and "not the anterior criminal conduct" which produced the funds that were laundered. 524 U.S. at 7. Thus, the Supreme Court abrogated the Fourth Circuit's decision in *United States v. Heaps*, 39 F.3d 479 (4th Cir. 1994), where the appellate court held venue for the laundering of drug proceeds was proper in the district in which the proceeds were criminally generated. *Id*. at 482. The government's reliance on *Heaps* and its attempt to differentiate Villarini's case from that of the factual situation in *Cabrales* was flawed as *Heaps* was based upon the proposition that the generation of the funds to be laundered was an essential element of the crime of money laundering, a proposition rejected in *Cabrales*.

First Circuit Relies on Congressional Intent, Dower to Uphold "Innocent Owner" Defense

In ***United States v. 221 Dana Avenue***, 239 F.3d 78 (1st Cir. Feb. 6, 2001), the First Circuit vacated the district court's decision and directed dismissal of the government's forfeiture action with prejudice. The issue on appeal was whether a claimant may assert an innocent owner defense

where the claimant was unaware of illegal activity at the time it occurred but was aware of the illegal activity at the time the claimant acquired her interest in the property through her husband's will.

The government started forfeiture proceedings against the claimant because her late husband used the marital home for his side business as a drug dealer, unbeknownst to his wife. At the close of evidence the district court granted the government's motion for a directed verdict and denied the claimant's motion for entry of judgment. The court concluded the claimant was not entitled to assert the "innocent owner" defense since she did not possess an ownership interest in the property until after she learned the property had been used for drug dealing.

In vacating the district court's decision, the court reasoned the claimant had satisfied the requirements of the innocent owner defense. Specifically, the court found the claimant was innocent with respect to the illegal activities when they occurred and learned of those activities only upon the arrest of her husband. The court found, under Massachusetts law on dower interests, the claimant had a partial interest in the property, the marital home, at the time of the illegal activity, and that interest existed long before she knew her husband was dealing drugs. Thus, the court found the claimant had a sufficient interest in the property at the time to also qualify as an "owner" as to that interest. Accordingly, the court concluded, because the claimant had a partial (dower) interest in the property prior to learning about the illegal activities and because the congressional purpose of deterring drug crimes would not be served by forfeiture, she could assert the innocent owner defense.

SENTENCING

Application Of Revised Sentencing Guidelines To Pre-Revision Tax Crime Does Not Violate *Ex Post Facto* Clause

In ***United States v. Lewis***, 235 F.3d 215 (4th Cir. 2000), the Fourth Circuit held the *Ex Post Facto* Clause of the United States Constitution was not violated when revised sentencing guidelines were applied to offenses which predated and postdated the revision of the guidelines. At trial, Lewis was convicted of, *inter alia*, four counts of filing false tax returns. The first offense occurred on April 13, 1993, when Lewis filed a false tax return for 1992. The other three offenses occurred on December 10, 1993, when Lewis filed false amended tax returns for 1990, 1991, and 1992. In the meantime, on November 1, 1993, the United States Sentencing Guidelines were amended to increase the base offense level for filing a false tax return, so that a tax loss of more than $40,000.00 resulted in a base offense level of 13, instead of 11. When sentencing Lewis, the district court followed the guidelines which specifically instruct if a "defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines manual became effective, the revised edition of the Guidelines manual is to be applied to both offenses." *See* U.S.S.G. § 1B1.11(b)(3). Accordingly, the court applied the revised version of the guidelines.

On appeal, Lewis argued the district court violated the *ex post facto* clause by applying the revised version of the guidelines in determining her sentence causing her to receive increased punishment for the first, pre-revision tax offense. In rejecting her claim, the Fourth Circuit stated the central concern of the *ex post facto* prohibition is "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Miller v. Florida*, 482 U.S. 423, 430 (1987). The court opined, since the guidelines were changed on November 1, 1993, Lewis had "ample warning" when she committed the later acts of tax evasion, that those acts would cause her sentence for the earlier crime to be determined by the guidelines applicable to her later offenses. Therefore, "it was not § 1B1.11(b)(3) that disadvantaged Lewis, but rather her decision to commit further acts of tax evasion after the effective date of the 1993 guidelines."

Use Of Tax Guidelines Affirmed In False Claims and *Klein* Conspiracy Conviction

In ***United States v. Aragbaye***, 234 F.3d 1101 (9th Cir. 2000), Aragbaye and his co-conspirators ran two tax preparation businesses which they used to prepare false returns in the names of customers and other people whose names and personal information they obtained from state welfare agencies. In addition, Aragbaye duped an unrelated legitimate payroll company into preparing fictitious Forms W-2 for these individuals and opened a check cashing business to deposit the $551,664 of refunds he ultimately received. Following a plea to 18 U.S.C. §§ 287 and 371, the district court calculated Aragbaye's sentence using the tax guidelines (U.S.S.G. §§ 2T1.4 and 2T1.9) rather than the fraud guidelines (U.S.S.G. § 2F1.1). On appeal to the Ninth Circuit, Aragbaye contested the district court's use of the tax guidelines.

Aragbaye argued U.S.S.G. § 1B1.2(a) directs the district court to use the Statutory Index in Appendix A to determine which guidelines are most applicable to the offense of conviction. Since the Statutory Index recommends use of the fraud guidelines for a violation of § 287, the district court should have applied the fraud guidelines. The Ninth Circuit

analogized § 287 to 18 U.S.C. § 1001 which also proscribes a range of conduct. The notes to § 2F1.1 state where the indictment charges §1001 but establishes an offense more aptly covered by another guideline, that other guideline should be applied, not § 2F1.1. In Aragbaye's case, since his indictment charged § 287 but established a tax offense, the district court was correct in applying the tax guidelines.

Aragbaye also contended § 2T1.9 only applies to offenses involving interference with tax collection, such as money laundering or tax shelters. The notes to § 2T1.9 provide § 2T1.9 should not be applied to taxpayers who only file a fraudulent return. The Ninth Circuit found the purpose of the notes was to distinguish between actual conspiracies and mere joint filers of a fraudulent return. Although Aragbaye's scheme did not involve money laundering or tax shelters, the court found it was the type of complex conspiracy to which § 2T1.9 was meant to apply.

Tax Loss And Sophisticated Concealment

In ***United States v. Utecht***, 238 F.3d 882 (7th Cir. 2001), as factually set forth on page two of this Bulletin, the Seventh Circuit upheld the district court's sentencing calculations and affirmed Utecht's sentence. The district court rejected Utecht's arguments for offense level reductions for acceptance of responsibility, unclaimed deductions and depreciation, and imposed a two level increase for sophisticated concealment.

On appeal, the Seventh Circuit affirmed the district court's refusal to decrease the sentence for acceptance of responsibility, finding Utecht's prevarication under oath denying he had filed false tax returns was sufficient basis for denying the downward adjustment.

Utecht also argued the amount of tax loss was improperly calculated because the district court failed to reduce the tax loss for depreciation of the poker machines. Utecht's accountant testified he could not recall whether the video poker machines had depreciated in value after he learned the machines existed. The court upheld the district court's calculation of the tax loss where the accountant's lack of recollection was insufficient to show Utecht was entitled to a depreciation deduction. The Seventh Circuit, therefore, found no clear error in the district court's calculation of tax loss.

Utecht also appealed the sophisticated concealment enhancement, arguing his actions were no more complex than a routine tax evasion case. The Seventh Circuit stated Utecht's activities, including ". . .hiding the existence of the video poker machines and proceeds from his accountants; fabricating receipts to account for the proceeds, generating false 1099s that caused bar owners to file false tax returns. . .and generating false personal property returns" were more complex than the standard tax fraud case and warranted the imposition of the sophisticated concealment increase. *Id*. at *17. Accordingly, the Seventh Circuit found no error in any of the district court's sentencing calculations and affirmed Utecht's sentence.

Grouping

In ***United States v. Syrax***, 235 F.3d 422 (9th Cir. 2000), the Ninth Circuit held Syrax's convictions of wire fraud and money laundering should not be grouped. Syrax used some of the proceeds from a wire fraud scheme involving telemarketing to further promote the fraud in violation of 18 U.S.C. § 1956. Syrax contended the district court erred by failing to group his fraud and money laundering counts as a single group under U.S.S.G. § 3D1.2(b) or (d). Section 3D1.2 provides for the grouping of closely related counts or those that involve substantially the same harm.

The court held Syrax's contention that his fraud and money laundering counts should have been grouped together under § 3D1.2(d) was foreclosed by *United States v. Taylor*, 984 F.2d 298 (9th Cir. 1993), which held grouping under § 3D1.2(d) is inappropriate when the guidelines measure harm differently. In *Taylor*, the Ninth Circuit noted the offense level under the fraud guideline was determined based on the loss attributable to the scheme, while the money laundering guideline looked at the value of the funds attributable to the scheme. The court held the rationale underlying *Taylor* applies whether a defendant is charged under 18 U.S.C. § 1956 or 18 U.S.C. § 1957, since the guidelines for wire fraud and money laundering measure harm differently. The court, however, did recognized the Seventh and Eleventh Circuits have held otherwise. Syrax also cited *United States v. Rose*, 20 F.3d 367 (9th Cir. 1994), in which the court upheld the grouping of fraud and money laundering convictions. The court pointed out in *Rose* it distinguished *Taylor* based on the fact, unlike *Rose*, there was complete identity between the laundered funds and the fraudulently obtained funds. *Rose*, therefore, was not controlling.

The court also rejected Syrax's contention that his convictions should be grouped under § 3D1.2(b). The court held Syrax's telemarketing scheme had identifiable victims whereas society was the victim of his money laundering,

therefore, his convictions did not involve the same victims for purposes of grouping under subsection (b). Although some circuits agree with the Ninth Circuit that money laundering and fraud involve different victims and should not be grouped, other circuits have held such convictions do involve the same victims and should be grouped.

Obstruction of Justice

In ***United States v. Arambula***, 238 F.3d 865 (7th Cir. 2000), the Seventh Circuit held the giving of testimony which aids in the conviction of a co-conspirator but fails to reveal the true scope of the conspiracy does not equate to obstruction of justice meriting an enhancement under U.S.S.G. § 3C1.1. Noting obstruction of justice by perjury requires material misstatements, the court concluded merely withholding details about related third parties was not material when Arambula was testifying on the issue of the co-conspirator's guilt.

In this case, as part of a plea bargain, Arambula agreed to provide complete and truthful information regarding the involvement of himself and others in a drug distribution conspiracy. He testified for the government at the trial of a co-conspirator, which resulted in a conviction. Although Arambula provided information at his co-conspirator's trial, the trial judge was convinced his testimony failed to accurately describe the overall extent of the conspiracy. At sentencing, the trial court enhanced Arambula's sentence for obstruction of justice based on his alleged false testimony.

On appeal, Arambula argued his false testimony did not address a material matter and, therefore, was not perjury. He reasoned the minimizing of the scope of the conspiracy was not crucial to the guilt or innocence of his co-conspirator. The Seventh Circuit agreed. Arambula's false statements minimizing the conspiracy were immaterial to the issue of his co-conspirator's guilt or innocence and did not affect the outcome of the trial. There was no evidence Arambula's testimony implicating the co-conspirator was false, and any further testimony the government could have elicited from Arambula would not have aided the case in which he was testifying.

The court observed the nature of the false testimony provided by Arambula was different than any it had previously found to merit an obstruction enhancement. Prior cases reserved obstruction enhancements for instances in which a defendant falsely testified that a co-conspirator was innocent. *See, United States v. Parker*, 25 F.3d 442 (7th Cir. 1994), and *United States v. Senn*, 129 F.3d 886 (7th Cir. 1997).

Downward Departure For Extraordinary Family Ties and Employment History

In ***United States v. Thompson***, 234 F.3d 74 (1st Cir. 2000), Thompson pled guilty to one count of distributing cocaine in violation of 21 U.S.C. § 841(a)(1). At the first sentencing hearing, the district court, taking into account Thompson's timely plea, acceptance of responsibility, and criminal history, determined his guideline sentencing range to be 87 to 108 months of imprisonment. Thompson then moved, pursuant to U.S.S.G. §§ 5H1.6 and 5H1.5, for a downward departure to the mandatory minimum of 60 months in prison, based on his extraordinary family obligations and employment history. The district court continued the sentencing hearing and invited Thompson to present more evidence regarding his family and employment history.

At the next sentencing hearing, based on information and testimony provided by and on behalf of Thompson, the district court found Thompson exhibited extraordinary family ties and employment history. Consequently, it departed downward to the 60 month minimum. The court explained its decision to depart downward was justified after reviewing offenders similarly situated to Thompson as to place of residence, time, and offense committed, *i.e.*, sale of crack cocaine.

On appeal, the First Circuit stated, although the district court's reasoning made sense, it was nevertheless contrary to the law of the circuit. The court cited *United States v. DeMasi*, 40 F.3d 1306, 1324 (1st Cir. 1994), where it held when a district court contemplates a downward departure based upon discouraged factors, such as family ties and responsibilities and employment history, it must compare the defendant to others who have exhibited those factors, not to others who have been convicted of the same offense. The court stated a sentencing court "should survey those cases where the discouraged factor is present without limiting its inquiry to cases involving the same offense, and only then ask whether the defendant's record stands out from the crowd." *Id*. In the present case, by limiting its inquiry to cases involving only crack cocaine dealers and then asking whether Thompson's record stood apart, ". . .the district court did what *DeMasi* forbids." Accordingly, Thompson's sentence was vacated and the case remanded for resentencing.

Prosecutor's Inconsistent Statements In Closing Arguments And At Sentencing Are Not Occasion For Application Of Judicial Estoppel Doctrine

In ***United States v. Newell***, 239 F.3d 917 (7th Cir. 2001), as factually set forth on page two Newell was convicted of willfully filing false federal income tax returns in violation of 26 U.S.C. § 7206(1).

On appeal, Newell argued the district court's application of an enhancement for sophisticated means was barred by judicial estoppel because of the prosecutor's statement in closing arguments in which he said Newell's scheme was "not particularly sophisticated." The judicial estoppel doctrine forbids a litigant who has obtained a judgment on some ground to seek judgment in another case on an inconsistent ground. The Seventh Circuit found the judicial estoppel doctrine inapplicable here since conviction is not the judgment in a criminal case, the sentence is the judgment. The prosecutor, therefore, was not trying to obtain a second judgment on inconsistent grounds by making inconsistent statements in closing arguments and at sentencing. Although the Seventh Circuit acknowledged the existence of case law applying the judicial estoppel doctrine without requiring a previous judgment, the Seventh Circuit disparaged this line of cases. The Seventh Circuit, affirming Newell's sentence, analogized the prosecutor's inconsistent arguments to pleading in the alternative which is permitted.

Employment Taxes Included In Tax Loss

In ***United States v. Twieg***, 238 F.3d 930 (7th Cir. 2001), the Twiegs pled guilty to three counts of filing false federal income tax returns in violation of 26 U.S.C. § 7206(1). The Twiegs owned a carpet sales and installation business from 1990 through 1996, during which time they underreported receipts of the business and filed false tax returns. The Twiegs' sentence was based on a tax loss which included unpaid self-employment taxes. The Twiegs appealed the sentence, arguing the district court erred in including self-employment taxes in calculating the tax loss.

The Twiegs argued the self-employment taxes should be excluded from the calculation of tax loss for the following reasons: the Eleventh Circuit has excluded self-employment taxes; a review of pre and post 1993 Guideline language revealed such an intent to exclude those taxes from tax loss; and, the government suffered no tax loss.

The Seventh Circuit dismissed each of the Tweigs' arguments and affirmed the district court sentence, citing the plain language in U.S.S.G. § 2T1.1(c)(1), and the corresponding Application Note, stating "[n]othing in that language indicates that self-employment taxes should be excluded from the calculation of tax loss." *Id*., at 3-4. Further, the court distinguished the Eleventh Circuit case cited by the Twiegs, stating the "court faced the issue of whether interest and penalties should be included in the tax loss," noting the applicable Guideline specifically excluded interest and penalties, and there was no such provision excluding self-employment taxes. *Id*., at *8. The court indicated that a review of pre and post 1993 Guideline language refuted the Twiegs argument and must be considered with the language of the Internal Revenue Code, which "indicates that self-employment taxes are a subcategory of "Income Taxes." *Id*., at *5. Finally, the court dismissed the assertion that the government suffered no tax loss and stated the "failure to pay the self-employment taxes results in a loss to the government of at least the present value of the tax payments, and possibly the future value as well because the individual may never become entitled to collect those payments." *Id*., at *6. The Seventh Circuit affirmed the sentence and calculation of tax loss, which included self-employment taxes.

Sentence Extended For Violation Of Court's Order

In ***United States v. Hoover***, 240 F.3d 593 (7th Cir. 2001), Hoover, after being previously convicted of violating 26 U.S.C. § 7206(1) and 18 U.S.C. § 1001, was sentenced to imprisonment and ordered to turn over his savings bonds to the government for application to the costs of his defense. On application of the government, the court also ordered Hoover "not to cash, negotiate, or transfer . . . not to do anything with them" prior to turning the bonds over to the government. Within weeks of this order, however, Hoover gave his son approximately half of the bonds. The court found Hoover in contempt and extended the sentence he had received on the substantive charges by six months. Hoover appealed.

The elements of criminal contempt are a lawful and reasonably specific order of the court and a willful violation of that order. On appeal, Hoover contended the district court's order did not meet these elements. Specifically, he claimed because the bonds had always been held in his sons' names, he did not "transfer" the bonds but rather merely returned the bonds to their natural owner. The Seventh Circuit disposed of Hoover's semantical argument noting "transfer" includes both changing of physical posssession as well as title. In any event, the district court had previously held title to the bonds remained in Hoover since he had put the bonds in his sons' names only to evade legal

responsibilities and he, rather than his sons, controlled the bonds at all times. The Seventh Circuit noted the purpose of the district court's order was to prevent Hoover from causing the bonds to be unavailable for restitution and Hoover accomplished exactly what the order was intended to avoid, namely making the bonds unavailable. Having determined the district court's order was sufficiently clear, the Seventh Circuit concluded a trier of fact could determine beyond a reasonable doubt Hoover was aware his conduct was unlawful and Hoover's transfer of the bonds to his son was a willful violation of the court's order.

Outside "Heartland" And Departure Discretion

In ***United States v. Buckowich***, 243 F.3d 1081 (7th Cir. 2001), Buckowich was convicted of wire fraud and money laundering and was sentenced to forty months' imprisonment. Buckowich defrauded an individual of $500,000 with the promise the money would grow to $93 million within three months. She used bank transfers to move the individuals funds overseas, then spent the money. Buckowich appealed the district court's sentence, arguing the district court judge erroneously believed he lacked authority to depart downward to a sentence below the applicable Sentencing Guideline range. The Seventh Circuit disagreed and affirmed the sentence, stating "the district judge did not act as if constrained to sentence Buckowich to a longer term than the judge believed appropriate." Id., at *2.

The court noted the sentencing court imposed a sentence at the higher end of the guideline range. "A judge who preferred to depart downward, but thought the legal rules blocked such a step, would sentence the defendant at the bottom of the available range." Id., at *2-3. Furthermore, the court remarked, "[a] top-of-range sentence surely dispels ambiguity in the district judge's rulings." Id., at *3.

Relying on an Eighth Circuit holdng, Buckowich also argued the sentence was an unjust result of the disparity between the base offense levels for fraud and money laundering and because the nature of her actions were outside the heartland of money laundering cases, the fraud guideline offense level should have been used for sentencing. The Seventh Circuit declined to follow the Eighth Circuit, noting its decision relied heavily on a 1995 Sentencing Commission amendment proposal which was nullified by Congress. "[Congress] enacted legislation that nullified the proposed amendment, which would have abrogated all punishment for money laundering unless that were the only offense of which the defendant was convicted." Id., at *10. The court also noted Buckowich failed to ask for a one or two level departure; rather, she wanted a reduction to the base offense level for fraud, disregarding the money laundering district court's sentense and its decision not to exercise its discretion in Buckowich's favor.

CRIMINAL TAX BULLETIN
TABLE OF CASES
FEBRUARY/APRIL 2001

SUPREME COURT CASES

TITLE 26 AND TITLE 26 RELATED CASES

SEARCH AND SEIZURE

Department of the Treasury
Internal Revenue Service
Document 10023 (2/4-2001)
Catalog Number 24304B