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TITLE 26 AND TITLE 26 RELATED CASES

Hyde Amendment Appeals Should Be Reviewed For Abuse Of Discretion

In *United States v. Lindberg*, 220 F.3d 1120 (9th Cir. 2000), the Ninth Circuit held the standard of review of a federal district court's denial of a criminal defendant's motion for attorney's fees and litigation costs pursuant to the Hyde Amendment, 18 U.S.C. § 3006A, is for abuse of discretion. Moreover, the court determined in order to recover expenses, a defendant must show more than the government's position was not "substantially justified," the standard for recovery under the Hyde Amendment's civil counterpart, the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A).

In 1997, Lindberg was convicted of conspiracy to defraud the government of federal income taxes and to structure and assist in structuring currency transactions for the purpose of evading reporting requirements. The prosecution was premised on a scheme employed by Lindberg's mother, the owner of several "hostess bars" in Honolulu, where through the assistance of her children, she orchestrated the structuring of cash receipts from her businesses into various bank accounts. On appeal, the Ninth Circuit reversed Lindberg's conspiracy conviction citing insufficient evidence to prove he knew tax evasion was the object of the conspiracy or that he knew it was illegal to structure currency transactions to avoid reporting requirements. Subsequently, he filed a motion pursuant to the Hyde

Amendment seeking attorney's fees and litigation costs. The district court denied his motion, noting that although the Ninth Circuit concluded the evidence was insufficient to convict him, it was sufficient

for the grand jury to indict, for the district court to deny a motion for acquittal and for the jury to convict. Hence, the government's prosecution of him was not "vexatious, frivolous, and or in bad faith," the standards for recovery under the Hyde Amendment.

On appeal, the Ninth Circuit addressed the issue of what is the correct standard of review to apply to appeals under the Hyde Amendment? The court found guidance from the Eleventh Circuit which had noted in *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999), that under the Hyde Amendment, an award of attorney's fees "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under the EAJA." *Id.* at 1297-98 (quoting 18 U.S.C. § 3006A). Therefore, because the denial of an award of attorney's fees under the EAJA is reviewed for an abuse of discretion, so should the denial of an award under the Hyde Amendment. *Id.* The Fourth Circuit also adopted this conclusion in *In re 1997 Grand Jury*, 214 F.3d 430 (4th Cir. 2000). However, it was the Fifth Circuit's rationale in *United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000), which the Ninth Circuit found to be most persuasive in reaching the same conclusion. There, the court opined the abuse of discretion standard should be employed because "district courts are well situated to evaluate the government's case and need flexibility to develop a workable standard for what constitutes a vexatious, frivolous, or bad faith position." *Id.* at 906. Emphasizing these sentiments, the Ninth Circuit

said the district court "is in a better position than this court to distinguish between a good faith prosecution which is thin on evidence and a prosecution so lacking in support it can only be vexatious, frivolous, or in bad faith."

Next the Ninth Circuit turned to the burden of proof required under the Hyde Amendment. The court concluded the legislative history behind the enactment of the Hyde Amendment "clearly illustrates" the standard for recovering fees under the Amendment is more demanding than under the EAJA. This undermined Lindberg's argument that in order to prevail, he only had to show the government's position was not "substantially justified," the standard for recovery under the EAJA.

Ethical Rule Prohibiting *Ex Parte* Communications Applies In Pre-Indictment, Non-Custodial Setting

In *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000), the Ninth Circuit refrained from creating a bright line rule that would restrict the ethical prohibition against *ex parte* communications between federal prosecutors and represented parties to only post-indictment or custodial settings. Indeed, the court determined the rule was applicable in a pre-indictment situation where the government and target corporation had clearly assumed adversarial roles, grand jury proceedings were impending, and the corporation's counsel had initiated settlement talks with the government regarding both its civil and criminal investigations. The court, however, reversed the district court's finding that an Assistant United States Attorney ("AUSA") had violated the rule by a pre-indictment interview outside the presence of corporate counsel of an employee of the target corporation, when the employee said she was being pressured by the owner of the corporation to provide false testimony to the grand jury.

At issue on appeal was the applicability of Rule 2-100 of the California Rules of Professional Conduct which bars *ex parte* communications with represented parties. Here, the employment practices of the subject corporation gave rise to a union grievance, a complaint to the Department of Labor, a *qui tam* action, and, ultimately, a criminal investigation by the Department of Justice. Prior to indictment, the corporation's lawyer contacted the AUSA assigned to the case to discuss settlement of the government's civil and criminal investigation. When the owner of the corporation learned the corporation's bookkeeper had been subpoenaed to testify before the grand jury, he instructed the corporate lawyer to meet with her and be present during her testimony. On the day of her grand jury appearance, the bookkeeper arrived at the

federal building ahead of the corporation's lawyer and encountered the AUSA handling the case. The bookkeeper intimated she did not wish to be represented by the corporation's lawyer. When the AUSA asked why, the bookkeeper revealed the owner of the corporation had instructed her to lie to the grand jury and she believed the lawyer's presence was to intimidate her into providing false testimony. The discussion then turned into a formal interview in which the bookkeeper provided further instances of corporate wrongdoing.

In rejecting the district court's finding that the AUSA had committed an ethical violation, the Ninth Circuit began by stating the applicability of Rule 2-100 in pre-indictment, non-custodial settings must be determined on a case by case basis. See *United States v. Hammad*, 858 F.2d 834 (2nd Cir. 1988). Here, in view of the "fully defined adversarial roles" assumed by the parties, the AUSA's contact with the bookkeeper was governed by Rule 2-100. The court, however, went on to opine "[w]e deem manifest that when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, Rule 2-100 does not bar discussions between the employee and the attorney." Additionally, the court stated, once the employee of a corporation comes forward to give truthful information concerning potential criminal activity, a "clear conflict of interest exists between the employee and the corporation." This conflict serves a dual purpose for it extinguishes the ability of the corporate counsel to represent both the employee and the corporation and, most significantly, deprives the corporation of a basis to invoke the rule against *ex parte* communications with respect to the employee.

EVIDENCE

Unfiled Tax Returns Admissible To Show Willfulness

In *United States v. Chmielewski*, 218 F.3d 840 (8th Cir. 2000), the Eighth Circuit affirmed Chmielewski's conviction and sentence for violations of 31 U.S.C. § 5324(a)(3), 26 U.S.C. § 7206(1) and 18 U.S.C. §§ 371 and 1001. Chmielewski sold slot machines to customers in the Republic of South Africa between 1993 and 1995. To aid his customers in avoiding the duty imposed by the South African government, Chmielewski sent them false sales invoices grossly understating the value of the slot machines they were importing. Likewise, Chmielewski sent the false

invoices to his United States freight forwarders who filled out the required documentation for United States Customs. Finally, Chmielewski used unfiled tax returns reflecting higher income than the ones he actually filed with the Internal Revenue Service to secure bank loans.

On appeal, in regard to his tax conviction, Chmielewski argued the district court erred in admitting evidence of prior bad acts by admitting unfiled tax returns pursuant to FED. R. OF EVID. 404(b). In rejecting Chmielewski's argument, the Eighth Circuit followed its prior holding that evidence of a taxpayer's prior misconduct with tax returns may be relevant evidence of willfulness. *See, United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986). As such, the district court did not abuse its discretion when it allowed the government to show Chmielewski used false returns to misrepresent his income as evidence of Chmielewski's willfulness to violate the tax laws.

PRIVILEGES

Crime Fraud Exception

In *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), the D.C. Circuit held the government cannot force a lawyer to produce a client's privileged documents to a grand jury under the crime fraud exception if the client's claimed offense does not constitute a crime. The instant appeal evolved from a previous appeal by the Republican National Committee ("RNC") of an order requiring it to produce an RNC lawyer's written material on grounds it was related to a grand jury investigation into whether a loan repayment transaction amounted to solicitation and receipt of foreign contributions by the RNC in violation of campaign laws and whether the RNC conspired to defraud the United States by failing to disclose the transaction.

In the previous appeal, the D.C. Circuit reversed an order which held documents need not have been prepared in connection with a specific claim in order to be shielded by the work product privilege, so long as they were prepared in anticipation of litigation. On remand from that decision, the district court reviewed the documents *in camera* and held them subject to production under the crime fraud exception. The district court found the evidence demonstrated the RNC sought the advice of counsel in an effort to construct the transaction in a manner designed to evade federal election campaign laws and to conceal the source of the funds used to repay the loan.

The D.C. Circuit again reversed, holding the government

failed to allege any conduct was criminal under federal election campaign laws. The court deferred to a civil enforcement recommendation issued by the Federal Elections Commission ("FEC") when the loan repayment was before it. By a 3-3 deadlock, the FEC found no probable cause to believe the RNC had violated the law. The FEC's interpretation of the federal campaign laws invalidated the government's theories about how the RNC may have violated those laws. Since the government's theories were faulty, it was legally impossible for the government to accuse the RNC of conspiring to defraud or commit an offense against the United States, thus there is no crime fraud exception.

Crime Fraud Exception

In *In re Grand Jury Subpoena*, 223 F.3d 213 (3rd Cir. 2000), the Third Circuit held a grand jury target whose attorney had been subpoenaed to testify against him and produce documents which would ordinarily be privileged was not entitled to review an *ex parte* affidavit in which the government asserted the crime fraud exception to the attorney client privilege. . The affidavit which had been filed to establish the applicability of the crime fraud exception to the attorney client privilege, contained details of the grand jury investigation. The target contended without seeing the affidavit, he and counsel could not effectively rebut the crime fraud exception. The Third Circuit rejected the target's reliance on cases recognizing the right to view such affidavits in adversarial proceedings and concluded all of the target's arguments for access to the affidavit failed on the fact grand jury proceedings are investigative rather than adversarial.

The court pointed out it has consistently endorsed the use of *ex parte* affidavits and *in camera* proceedings to preserve grand jury secrecy when the government must present information beyond the minimal requirements of *In re Grand Jury Proceedings* (Schofield), 486 F.2d 85 (3rd Cir. 1073). In *Schofield*, the Third Circuit required the government to justify a grand jury subpoena by making some preliminary showing by affidavit that each item was at least relevant to a grand jury investigation and properly within its jurisdiction. The government followed *Schofield* in this case by making its case for the crime fraud exception in an *ex parte* affidavit.

The defendant relied on *Haines v. Liggett Group Inc.*, 957 F.2d 81 (3rd Cir. 1992), which held in the context of civil litigation, the party invoking the attorney client privilege must be given an opportunity to rebut the opponent's *prima facie* showing in support of the crime fraud exception. The court, however, distinguished *Haines* emphasizing it was adversarial while the instant case remained in the

investigative stage. In the grand jury context, secrecy assumes primary importance. The court rejected the target's argument that the length of the investigation (two years), as well as public knowledge of the nature of the investigation, required the district court to order disclosure of the *ex parte* affidavit. The court concluded it was neither an abuse of discretion nor a violation of due process for a district court to rely on *ex parte* affidavits to determine whether the crime fraud exception applies. The court cited other opinions from the Second and Tenth Circuits supporting the same conclusion. The investigative nature of the proceedings also led the court to reject an argument based on the Sixth Amendment's provision of right to counsel. The target contended compliance with the subpoena would lead to counsel's disqualification and, thus, effectively infringe upon his right to counsel. The court pointed out the target's right to counsel had not attached and the possibility of eventual disqualification was merely speculative at this point.

FORFEITURES

Civil Forfeiture Valid And Not Excessive Even Though Underlying Structuring Charge Was Reversed

In *United States v. Ahmad*, 213 F.3d 805 (4th Cir. 2000), the Fourth Circuit reversed the district court's holding that funds seized from Ahmad were not subject to forfeiture. Ahmad operated a money exchange business and used the funds he received from his Pakistani clients in the United States to supply bridge loans to various Pakistani companies. The companies would repay the bridge loans by distributing rupees to the family members of Ahmad's clients. Following a conversation with a bank officer in 1989, Ahmad structured all of his cash deposits in amounts less than \$10,000.00 to avoid the filing of currency transaction reports. From 1990 to 1993, Ahmad deposited \$5.6 million in cash, cashier's checks and wire transfers.

The Fourth Circuit affirmed Ahmad's customs fraud and related conspiracy convictions, but reversed Ahmad's convictions for structuring and conspiring to structure deposits to evade the reporting requirements because the government failed to prove Ahmad "wilfully" violated the anti-structuring statute, 31 U.S.C. § 5324(a)(3). Ahmad then filed for return of the seized funds and, in response, the government filed an action for civil forfeiture of the \$186,587.42 seized. The district court entered judgment in favor of Ahmad finding no statutory basis for the forfeiture and concluded the forfeiture would have, in any event, constituted an excessive fine.

On appeal, the government contended the \$85,000.00 was forfeitable because it was directly traceable to the structuring violations and the \$101,587.42 was forfeitable as a substitute for property involved in the customs fraud violations and, the entire amount did not constitute an excessive fine in violation of the Eighth Amendment. In reversing the district court, the Fourth Circuit addressed each of the government's contentions separately.

First, the court addressed the validity of the forfeiture for structuring. The court found, although willfulness was a requirement for violations of the anti-structuring statute at the time Ahmad was prosecuted, and although the charges against Ahmad had been reversed for lack of willfulness, the government could still obtain forfeiture of the \$85,000 on grounds of structuring because under 31 U.S.C. § 5322, Congress provided for civil forfeiture without a willfulness requirement.

Second, the court addressed the validity of the forfeiture for customs fraud violations. The court found, Ahmad's conviction for customs fraud and for conspiracy commit customs fraud satisfied the government's burden of demonstrating probable cause that a customs fraud violation had occurred and entitled it to civil forfeiture of the \$101,587.42.

Finally, the Fourth Circuit found the property was forfeitable only if the forfeiture did not constitute an excessive fine prohibited by the Eighth Amendment. The court turned to the Supreme Court's "grossly disproportional" analysis in *United States v. Bajakajian*, 524 U.S. 321 (1998), to determine whether the forfeiture in this case was excessive. *Bajakajian's* "grossly disproportional" analysis required the consideration of several factors including the nature and extent of the criminal activity, its relation to other crimes, its penalties and the harm it caused.

Applying a "grossly disproportional" analysis to the forfeiture for structuring, the court found Ahmad's structuring violations were not a single isolated untruth affecting only the government, but rather a series of sophisticated commercial transactions over a period of years which were related to a customs fraud scheme. Thus, the forfeiture of \$85,000.00 was not grossly disproportional to that offense. The court found the remaining forfeiture of \$101,587.42 for customs fraud also was not grossly disproportional because the customs violations also were not a single isolated crime. They were directly related to tax fraud because the company president used inflated invoices unlawfully in filing his tax returns. They were also indirectly related to Ahmad's structuring violations and caused the government to lose approximately \$370,000.00 of tax revenues in 1990 and 1991.

Government Not Held To Actual Notice Standard Where Property Owner Is Not Incarcerated

In *Krecioch v. United States*, 221 F.3d 976 (7th Cir. 2000), Krecioch filed a collateral attack on the administrative forfeitures in district court and argued the DEA deprived him of due process by failing to provide actual notice of the pending proceedings when he was jailed. Krecioch was charged with federal narcotics offenses and offered a plea bargain. Two days before he accepted the deal and had his bond revoked, the DEA mailed to his home, notices of forfeiture action against cash and automobiles seized from him. A month later, the DEA mailed to Krecioch's home a notice of forfeiture proceedings against handguns also seized from him even though DEA knew of his incarceration and had sent notice of another forfeiture action to him at the jail where he was detained. Krecioch argued the DEA agent who appeared at his plea hearing could have served him with notice of the forfeitures. Krecioch relied on *United States v. Cupples*, 112 F.3d 318, 320 (8th Cir. 1997) which held actual notice was required when "the government is prosecuting someone who is actively contesting the criminal charges against him, including a count of the indictment seeking forfeiture."

In considering Krecioch's arguments, the Seventh Circuit stated, under established principles of due process, a party is only entitled to notice that is reasonably calculated to alert him to the pendency of the action so as to afford him an opportunity to present an objection. Due process does not require authorities to use the best possible method of notification.

In this case, at the time the notices regarding the cars and cash were sent, there was no way the DEA could have known Krecioch was going to accept a plea agreement and have his bond revoked. The court held, therefore, mailing the notices to Krecioch's home was reasonable and personal service was not required. The Seventh Circuit disagreed with the degree to which *Cupples* required actual notice even when the claimant is free and available at his home address because due process only requires that the government reasonably believe that notice would be likely to reach the claimant. Based on this, the Seventh Circuit affirmed the district court's grant of summary judgment as to the cash and automobiles. The Seventh Circuit, however, vacated an order of summary judgment as to the handguns because it found the notices inadequate. The Seventh Circuit found the notices relating to the forfeiture of the handguns which were sent to Krecioch's home after the DEA knew he was incarcerated did not satisfy due process.

MONEY LAUNDERING

Depositing of Checks Obtained in Fraud Scheme Violated 18 U.S.C. § 1957

In *United States v. Cefaratti*, 221 F.3d 502 (3rd Cir. 2000), the Third Circuit held a beauty school owner's deposits of financial aid checks for the tuition of ineligible students constituted money laundering in violation of 18 U.S.C. § 1957. Cefaratti pled guilty to mail fraud, student loan fraud, destruction of property to prevent seizure and to engaging in monetary transactions in property derived from specified unlawful activity, in violation of 18 U.S.C. § 1957, arising from his execution of a scheme to defraud the United States Department of Education ("DOE") out of student financial assistance funds. Cefaratti implemented a scheme to maintain his DOE financial aide eligibility by submitting false deferment and forbearance forms to student loan lenders and by making payments on behalf of student borrowers who were on the verge of defaulting. In over a two year period, Cefaratti's beauty school received over \$840,000.00 in federal funds to which it was not entitled.

On appeal, Cefaratti argued the superseding information was deficient because it failed to charge an essential element of an 18 U.S.C. § 1957 offense, that the funds involved in the monetary transaction constituted or were derived from proceeds obtained from specified unlawful activity. The Third Circuit determined the information tracked the statutory language when it alleged Cefaratti knowingly engaged in monetary transactions in criminally derived property valued over \$10,000.00. The court found the mail fraud to which Cefaratti plead guilty was completed when he mailed fraudulent materials in furtherance of his scheme to defraud. Thus, when he engaged in monetary transactions with the proceeds of the criminal activity after the completion of the mail fraud, Cefaratti's actions fell within the statute. Further, the loan checks made payable to both Cefaratti and the students became criminally derived property when they were endorsed by the student borrowers and any subsequent monetary transactions, including depositing the checks, violated 18 U.S.C. § 1957.

Transaction Involving Commingled Funds

Supports Conviction Under 18 U.S.C. § 1957

In *United States v. Davis*, 226 F.3d 346 (5th Cir. 2000), Davis was convicted of, *inter alia*, three counts of money laundering in violation of 18 U.S.C. § 1957. His convictions arose from the operation of an advance fee scheme, wherein Davis would offer to obtain funding in the form of venture capital for clients in return for a fee. Typically, clients would approach Davis seeking between \$75 to \$100 million. Based on fraudulent representations, Davis would contract to secure the funding for an average fee of \$100,000.00. Once Davis received the fee, he would deposit the proceeds into various "escrow" accounts, with no intention of ever securing any future funding. At trial, the government alleged Davis defrauded one client into wiring \$100,000.00 into an account Davis controlled. This "tainted" money became commingled with \$18,585.55 of "untainted" funds already in the account. Subsequently, Davis committed a § 1957 violation by writing a check on the account in the amount of \$25,000.00, as the issuance of the \$25,000.00 check constituted engaging in a monetary transaction greater than \$10,000.00 in property derived from the specified crime of wire fraud.

On appeal, Davis argued the \$10,000.00 threshold requirement specified in § 1957 was not met, as the difference between the existing account balance of untainted funds, \$18,585.55, and the \$25,000.00 check, amounted to only \$6,414.45 in proceeds from criminal activity. See *United States v. Adams*, 74 F.3d 1093, 1101 (11th Cir. 1996) (under § 1957 there must be proof the transaction involved more than \$10,000 of tainted money).

In rejecting Davis' approach, the Fifth Circuit relied upon a rule it had developed in previous commingling cases dealing with the interstate transfer of funds obtained by fraud. The court stated "when the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account." Here, the court looked to the record of trial where the government had introduced banking records showing various withdrawals from the account in question, made after receipt of the \$100,000.00 wire transfer, totaling more than \$100,000.00. One of these withdrawals was the \$25,000.00 check which, after it cleared the account, actually lowered the account balance to under \$14,000.00. In support of its aggregate theory, the court cited its prior rationale in *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992), where, in deciding whether a defendant could have engaged in a transaction in tainted funds, the court opined "[t]o view each transaction in isolation . . . would defeat the purpose of

the statute, allowing sophisticated criminals to spirit stolen funds from one state to another, so long as each check written did not exceed the amount of legitimate funds on hand in the bank account." *Id.* at 1403. The court determined the commingling problem under the money laundering statutes was the same as under the transfer of funds statute, and applied its own precedents, rather than choosing between the commingling rules applied in other circuits. Compare *United States v. Moore*, 27 F.3d 969, 976-77 (4th Cir. 1994) (where clean and tainted money has been commingled, any withdrawal from account is presumed tainted under § 1957, up to amount of tainted funds deposited), with *United States v. Rutgard*, 116 F.3d 1270, 1292 (9th Cir. 1997) (in case of commingling, withdrawal is only shown to be tainted under § 1957 if it is the entire balance of commingled account). Accordingly, Davis' conviction was affirmed.

INVESTIGATIVE TECHNIQUES

Wiretap Order Invalid If Issued Prior To Department Of Justice Authorization

In *United States v. Reyna*, 218 F.3d 1108 (9th Cir. 2000), the Ninth Circuit held under the law governing the ability of law enforcement officials to seek judicial authority to intercept communications, 18 U.S.C. §§ 2510-2520, a federal court order for a wiretap is invalid if it is issued prior to securing authorization by the Attorney General or one of his/her designees. Accordingly, here the interception of communications pursuant to such an order was unlawful and any evidence obtained must be suppressed.

In October 1997, an Assistant United States Attorney ("AUSA") submitted to the Office of Enforcement Operations ("OEO") in the Criminal Division of the Department of Justice, a draft application for an order to intercept communications over a cellular telephone line. An OEO staff attorney reviewed the application and then notified the AUSA he would recommend its approval by the appropriate Department of Justice official. Prior to securing this authorization, however, the application and order were brought before a federal district judge. The AUSA informed the judge that written authorization was on its way but had not yet been received. Despite this, the judge signed the order approving the, as of yet, unauthorized application, adding in his own handwriting: "This order is not to be executed until and unless formal approval in writing is received from the United States Attorney General or her designee." Shortly thereafter, OEO faxed the AUSA a memorandum authorizing the wiretap application. Immediately, the government commenced the wiretap

operation, resulting in a 20 count indictment charging conspiracy to manufacture and distribute methamphetamine and related offenses. The judge presiding over the criminal case granted the defendants' motion to suppress the intercepted communications, holding the wiretap authorization order was invalid because the government failed to obtain the required authorization for the application before submitting it to the court for approval.

On appeal, the government contended, although it disobeyed the statutes which set forth the mandatory procedures required in order to obtain a wiretap order, partial compliance sufficed to avoid the sanction of suppression. In dismissing this argument, the Ninth Circuit strictly scrutinized 18 U.S.C. § 2518 which explicitly mandates the authorization of the Attorney General or his designated agent must be secured prior to submitting an application for a wiretap order for judicial approval. Moreover, the identity of the authorizing official must be included in the application presented to the court. These requirements were highlighted in *United States v. Giordano*, 416 U.S. 505, 514 (1974), where the Supreme Court stated "it is at once apparent that [the wiretap law] not only limits the crimes for which intercept authority may be obtained but also imposes preconditions to obtaining any intercept authority at all." *Id.* Furthermore, in *United States v. Chavez*, 416 U.S. 562 (1974), the Supreme Court opined "failure to secure approval of [the Attorney General or her designees] prior to making application for judicial authority to wiretap renders the court authority invalid and the interception of communications pursuant to that authority 'unlawful' within the meaning of 18 U.S.C. § 2518(10)(a)(i)." *Id.* at 571. As § 2518(10)(a) provides for the suppression of unlawfully intercepted communications, the Ninth Circuit affirmed the holding of the district court.

Informant Agreement

In *Jarvis v. United States*, 47 Fed. Cl. 698 (2000), the Court of Federal Claims dismissed an IRS informant's claim for a reward under a tax informant agreement, holding the informant breached his agreement with the Service and, therefore, was not entitled to a reward. Jarvis entered into an agreement with the Service under which he was to provide information on taxes owed by several taxpayers. In return, the Service agreed to pay Jarvis, a portion of the taxes collected and not disclose his identity. Jarvis expected the Service would collect \$100 million in taxes. Instead, the Service ultimately settled with the taxpayers and collected only \$23 million. Furthermore, a special agent disclosed Jarvis' identity to the taxpayers resulting in a suit by the taxpayers against Jarvis.

Jarvis submitted a claim for his reward to the Service, and the Service asserted Jarvis would be entitled to \$1,769,100 if he satisfied all the contractual conditions of the informant agreement. The Service paid Jarvis no money and he sued the government for breach of contract, arguing he was entitled to at least \$3 million as a reward and the Service breached an implied covenant to collect the full amount of taxes owed. Jarvis also sought damages in the form of litigation costs incurred in defending himself in the taxpayer's civil litigation resulting from the Service's disclosure of his identity. In a prior opinion, the Court of Federal Claims dismissed a lawsuit brought by Jarvis, holding there was no bad faith in the Service's calculation of his reward, the Service had no duty to maximize the reward, and the government had no obligation to pay litigation costs arising from the disclosure of the informant's identity. *Jarvis v. United States*, No. 97-806T, 1999 TNT 114 - 15 (May 19, 1999). The Court of Federal Claims also denied Jarvis' motion to reconsider its previous decision, explaining the agreement contained no indemnification provision and the Service was not bound by any provision implied from the parties' dealings. *Jarvis v. United States*, No. 97-806T, 1999 TNT 164 - 12 (Aug. 16, 1999).

In the current proceeding, the sole issue before the court was whether Jarvis had breached the informant agreement, thereby making himself ineligible for a reward. The agreement provided "the Informant shall not be entitled to any payment under this agreement if . . ." It then goes on to list specific disqualifying circumstances, including a provision which states no reward is due if "payment . . . would be inappropriate." The government relied on this language to bring in violations of other provisions of the contract, specifically, two sections which dealt with disclosure of information and delegation of the reward. The court held Jarvis violated these two sections by disclosing information regarding the taxpayers to others involved in a civil suit against the taxpayers at the same time the Service was investigating the taxpayers and agreeing to split his reward with others who had assisted him in his dealings with the Service. The court ultimately held, by breaching his agreement with the Service, Jarvis was not entitled to a reward.

Violation Of Code Of Professional Responsibility

In *In re Complaint as to the Conduct of Daniel J. Gatti*, 330 Ore. 517 (2000), Gatti, a private practitioner licensed to practice law in Oregon, while gathering facts as part of his representation of a client misled others to believe he was a medical doctor. When confronted by the Oregon Bar, Gatti responded the State Professional Responsibility Board of the Oregon Bar had previously held Oregon Department of

Justice lawyers who, in the course of an undercover operation, advised “investigators to have individuals pose as janitors and injured workers for the purpose of infiltrating chiropractors’ and lawyers’ offices to obtain information about suspected fraudulent workers’ compensation claims,” had violated no provisions of the Oregon Code of Professional Responsibility. Citing this holding Gatti argued, since government attorneys can oversee undercover operations, private practice attorneys, for the purpose of gathering information, should be able to conduct “investigations,” even if in doing so they mislead.

Since Gatti put into play the role of government attorneys overseeing or rendering advice in the course of undercover operations, both the United States Attorney for the Judicial District of Oregon and the Attorney General for the State of Oregon filed *amicus curiae* briefs urging the Supreme Court of Oregon to recognize a “prosecutorial exception” to the Oregon Code of Professional Responsibility. In deciding the case, the Supreme Court of Oregon rejected Gatti’s argument as well as the positions asserted by those government and private parties who had filed *amicus curiae* briefs. The Supreme Court of Oregon held neither government nor private attorneys were “. . . entitled to misrepresent identity and purpose to gather information without violating the [Oregon] Code of Professional Responsibility and ORS 9.527(4)”

SENTENCING

Certainty Of Collection Of Tax Owed By Others Is Not Relevant To Computation Of Tax Loss

In *United States v. Andra*, 218 F.3d 1106 (9th Cir. 2000), Andra, a member of an organization called “The Pilot Connection Society,” sold “untaxing packages” to several individuals against whose property the Service had obtained liens. Andra falsely represented these untaxing packages as, being capable of permanently and legally removing any obligation to pay income taxes or maintain records, as well as removing the Service’s levies and liens. Andra pled guilty to conspiracy to defraud the Service and to corrupt intimidation of and interference with Service agents. Andra appealed his sentence arguing the district court erred by including in its calculation of tax loss the liabilities of the individuals to whom he had sold untaxing packages. Andra argued, because these tax liabilities were already delinquent before Andra joined The Pilot Connection Society, the government had failed to prove, but for Andra’s involvement these individuals would have paid their tax liabilities.

The Ninth Circuit rejected Andra’s argument noting the Sentencing Guidelines do not require proof of “but for” causation in calculating tax loss. Rather the tax loss is the total amount of loss that was the object of the offense. Since Andra’s plea admitted the object of the offense was conspiracy to evade payment of back taxes owed by his individual customers, the inclusion of their liabilities in the tax loss resulted in Andra’s sentence which correctly reflected the object of his conspiracy.

New Opinion Holds An Unchallenged Presentence Report Constitutes Clear And Convincing Evidence

The Ninth Circuit has issued a new opinion replacing its previous opinion in *United States v. Romero-Rendon*, 198 F.3d 745 (9th Cir. Dec. 7, 1999). The new opinion may be found at *United States v. Romero-Rendon*, 220 F.3d 1159 (9th Cir. 2000).

Romero-Rendon was arrested while trying to enter the United States illegally. Computer checks revealed he had a criminal history in the United States and had previously been deported. Romero-Rendon pled guilty to being a deported alien found in the United States in violation of 8 U.S.C. § 1326. At his sentencing hearing, the government requested a sixteen level enhancement since his criminal history involved a violent crime. Romero-Rendon objected to the enhancement on grounds it was based only on the Presentence Report (“PSR”), not on conviction documents. He did not allege the PSR was inaccurate or challenge the PSR’s characterization of his previous crime as violent.

On appeal, Romero-Rendon argued the government should be required to prove his previous violent crime by clear and convincing evidence, which it cannot do based only on the PSR. He based his argument on *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999). *Hopper* also involved a defendant whose sentence was being enhanced due to his previous violent crime. *Hopper* held, when a sentencing enhancement has a severe effect on the sentence relative to the offense of conviction, the government must satisfy the “clear and convincing” standard, rather than the usual “preponderance of the evidence” standard.

In its December, 1999, opinion, the Ninth Circuit failed to state whether Romero-Rendon’s sixteen level enhancement had triggered the clear and convincing standard and, if so, whether the PSR constituted clear and convincing evidence of Romero-Rendon’s previous violent crime. Rather, the Ninth Circuit distinguished *Hopper* on the basis Romero-Rendon, unlike the defendant in *Hopper*, had never alleged

the PSR was inaccurate or challenged the PSR's characterization of his previous crime as violent. The Ninth Circuit held, where a defendant does not challenge the accuracy of the information on which the judge bases the sentence enhancement, a preponderance of the evidence is the appropriate standard, regardless of the severity of the enhancement.

In its July, 2000, opinion, the Ninth Circuit modified its December, 1999, opinion by stating the PSR did, in fact, constitute clear and convincing evidence of Romero-Rendon's previous violent crime. The Ninth Circuit began by referencing its previous holding in *United States v. Marin-Cuevas*, 147 F.3d 889 (9th Cir. 1998), that a PSR whose accuracy is unchallenged may be relied upon to prove the defendant's previous violent crime by a preponderance of the evidence. The Ninth Circuit noted uncertainty existed as to when the clear and convincing standard is triggered. The court, however, found it did not need to resolve the conflict over when the clear and convincing standard is triggered since *Marin-Cuevas* did not limit its holding to instances in which the proposed enhancement is not severe. The Ninth Circuit held, a PSR whose accuracy is unchallenged constitutes clear and convincing evidence of the defendant's previous violent crime.

Government Bears Burden at Sentencing to Prove Tax Loss

In *United States v. Tucker*, 217 F.3d 960 (8th Cir. 2000), the Eighth Circuit reversed the district court's restitution order and remanded the case for resentencing. Tucker plead guilty to conspiracy to defraud the United States by impeding the assessment and collection of income tax in violation of 18 U.S.C. § 371. In a series of complicated transactions involving 26 U.S.C. § 1374, Tucker and a co-conspirator effectively eliminated a corporate level tax their company would have paid on the substantial capital gain realized on the sale of company assets actually and fraudulently sold by Tucker.

At sentencing, the district court ordered Tucker to present his evidence of the tax loss first and then rejected his loss theory as a matter of law. As this obviated the need for government rebuttal, the government presented no evidence of the actual loss to the government. The government instead relied on the tax loss calculation contained in the presentence report and the cross-examination of Tucker's witness. The district court based its restitution order on the amount of loss contained in the presentence report.

The Eighth Circuit reversed the restitution order holding the government failed to meet its burden to present affirmative evidence, at sentencing, of the tax loss. The Eighth Circuit, following its holdings in prior cases, stated that the presentence report was not evidence and the actual loss as determined in the presentence report could not be upheld. Further, the court stated the government had the burden to prove fact-intensive issues such as tax loss by a preponderance of the evidence. Finding the government failed to meet this burden, but finding the government was entitled to a new sentencing hearing on remand to present its loss theory, the court remanded for resentencing.

Extraterritorial Loss Included When Crime Of Conviction Is Against United States

In *United States v. Chmielewski*, 218 F.3d 840 (8th Cir. 2000), as factually set forth on page two of this Bulletin, the Eighth Circuit affirmed Chmielewski's conviction and sentence. Chmielewski argued the district court erred by enhancing his sentence based on loss of duties to the South African government.

In affirming Chmielewski's sentence, the Eighth Circuit found Chmielewski's false statements were domestic acts and the crime charged was a crime against the United States. Therefore, the principle that extraterritorial acts which are not crimes against the United States cannot be included in determining the offense level, did not apply in this case. Further, the Eighth Circuit found there was no intrusion into foreign jurisdictions when the severity of Chmielewski's domestic crime was gauged by measuring the damage done to his extraterritorial victims.

Sentencing Under Money Laundering Guidelines and Two Level Enhancement for Leadership Role

United States v. Cefaratti, 221 F.3d 502 (3rd Cir. 2000), as factually set forth on page five of this Bulletin, the Third Circuit affirmed Cefaratti's conviction and sentence of 51 months imprisonment and a two year period of supervised release. Cefaratti argued the district court erred by calculating his sentence using the money laundering guidelines rather than the fraud guidelines and by enhancing his sentence two levels under U.S.S.G. § 381.1(c) for a leadership role in the offenses.

First, Cefaratti argued his was an atypical case in which the guideline section indicated for the statute of conviction, *i.e.*, money laundering, was inappropriate. He argued he should have been sentenced under U.S.S.G. § 2F1.1, the fraud

guideline because his conduct did not involve large scale drug trafficking or organized crime and his conduct as a whole was little more than routine fraud to which the money laundering was incidental. In affirming Cefaratti's sentence, the Third Circuit decided nothing in its prior decisions suggested the money laundering guidelines, U.S.S.G. §§ 2S1.1 and 2S1.2, could be used only for defendants who had engaged in large scale drug trafficking or organized crime. Further, the court pointed out it had applied the money laundering sections in situations involving conduct similar to Cefaratti's and had not questioned the propriety of that application of the guidelines. The court found Cefaratti used criminally derived property to promote further fraud, thus it could not say such conduct was minimal incidental to the underlying fraud.

Second, Cefaratti argued when counts are grouped under the guidelines, a defendant's sentence is based on the highest offense level of the counts in the group, in his case, the 18 U.S.C. § 1957 charge. Cefaratti argued, therefore, even if he had been a leader in the fraud, he played no leadership role in the money laundering and the offense level applicable to the fraud count, even when adjusted for the leadership role, would have been less than that of the unadjusted 18 U.S.C. § 1957 offense. The court pointed to the guidelines in stating the determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of U.S.S.G. § 1B1.3 (relevant conduct) and not solely on the basis of elements and acts cited in the count of conviction. Further, the Third Circuit found even if Cefaratti was correct and the court should have determined the applicability of the adjustment before grouping, there was sufficient evidence to support a leadership adjustment on both the fraud and the money laundering counts.

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