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SUPREME COURT CASES

Use Of Thermal Imaging Device Is Warrantless Search

In ***United States v. Kyllo***, 121 S. Ct. 2038 (2001), the agents used an Agema Thermovision 210 imaging device to determine the amount of heat emanating from Kyllo's house. The scan showed the heat emanating from Kyllo's garage roof and side wall was consistent with heat that emanates from high intensity lamps typically used for indoor marijuana growth. The magistrate issued a warrant to search Kyllo's home based, in part, on the thermal imaging scan. Kyllo unsuccessfully moved to suppress the evidence seized from his home. The Ninth Circuit affirmed the district court's denial of Kyllo's motion to suppress, holding there was neither a subjective nor objective expectation of privacy because the technology exposed no intimate details of Kyllo's life, only hot spots on the home's exterior. The Supreme Court reversed, holding such a use of technology without a warrant is presumptively unreasonable.

In its Fourth Amendment analysis, the Court compared the case to its decision in *Katz v. United States*, 88 S. Ct. 507, (1967), where the privacy of a conversation in a public phone booth was upheld. Reversing the approach established in *Katz* "would leave the homeowner at the mercy of advancing technology - - including imaging technology that could discern all human activity in the home." *Kyllo*, 121 S. Ct. at 2044. Although the dissent argued the readings were on the exterior of the house, the majority stated "just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house." *Id.* Further, the Court noted its decision is consistent with the holding in *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986), where use of enhanced aerial photography of an industrial complex was upheld. In *Dow Chemical*, "we found it 'important that this is not an area immediately adjacent to a private home where privacy expectations are most heightened.'" *Kyllo*, 121 S. Ct. at 2043. Ultimately, the Court remanded the case, holding "where the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id*. at 2046.

TITLE 26 AND TITLE 26 RELATED CASES

26 U.S.C. § 7206(1) Requires Knowledge That Illegal Income Is Taxable

In ***United States v. Ytem***, 255 F.3d 394 (7th Cir. 2001), Ytem was an accountant who embezzled $135,000.00 from his employer and failed to report the income on his federal income tax return. Ytem was convicted of willfully filing a false return in violation of 26 U.S.C. § 7206(1) and sentenced to twenty-seven months in prison. Ytem appealed, arguing the evidence was insufficient to convict him as it was not proven he knew the illegal income was taxable.

The Seventh Circuit affirmed the conviction, holding there was sufficient circumstantial evidence of Ytem's intent to avoid paying the tax. The court noted a conviction under § 7206(1) requires proof the defendant knew illegal income

is taxable, and acknowledged there was no direct evidence Ytem knew the embezzled funds should have been reported. The circumstantial evidence, however, was more than enough to convict. Ytem was an experienced accountant, he prepared the fraudulent tax return, the amount of money taken was substantial, and he used the money for ordinary expenses. *Id*. at 396-97.

Furthermore, the court noted, it is widely known illegal income is taxable. "Everyone knows that Al Capone, for example, was nailed for income-tax evasion, not for the bootlegging, loan-sharking, extortion and prostitution that generated the income. Accountants know better than anyone except tax lawyers that illegal income is taxable." *Id*. at 397. Therefore, absent evidence to show Ytem's lack of knowledge, such as "some psychiatric disorder that had deranged his knowledge of elementary tax law," *Id*., the possibility Ytem did not know the illegal income was taxable was too remote to compel an acquittal. The court found it unlikely Ytem "thought embezzled income tax-free–a token of the government's affection for embezzlers and other thieves," and affirmed the judgment. *Id*.

DOJ Sues Oregon Bar Asserting The Need For 'Prosecutorial Exception'

In ***United States v. Oregon State Bar***, No. 6-01-06168-HO (D. Or. May 23, 2001), the Department of Justice ("DOJ") responded to last year's decision of the Oregon Supreme Court, by filing suit seeking to enjoin the Oregon bar from trying to discipline government lawyers who engage in subterfuge as part of undercover and "sting" operations. DOJ filed suit because of concern over broad dicta in a lawyer disciplinary decision issued last year by the Oregon Supreme Court, *In re Gatti*, 8 P.3d 966 (Or. 2000)(reported in the December 2000 Criminal Tax Bulletin). The Oregon Supreme Court stated no "prosecutorial exception" exempts government lawyers who authorize or engage in covert operations from having to comply with two disciplinary rules in particular: DR 1-102, which prohibits lawyers from engaging in deceit or dishonesty, and DR 7-102, which forbids lawyers to knowingly make a false statement.

The government contended the United States Constitution's Supremacy Clause prevents the state's application of DRs 1-102 and 7-102 to federal attorneys when those lawyers are engaged in otherwise lawful activities related to their official duties. Federal attorneys, the government asserted, must be allowed to participate in undercover investigations in a variety of situations, to ensure the operations are effective and they remain within legal bounds. Further, the government argued, "attorney oversight is a vital component of covert operations." The complaint also alleged the FBI has been forced to suspend several investigations developed by undercover agents or utilizing cooperating witness as a result of Oregon's interpretation of its lawyer ethics rules.

Shortly after the *Gatti* decision, the Oregon bar appointed a study group which compiled two alternative proposals to amend DR 1-102. The Supreme Court of Oregon, however, did not like the proposal, finding it gave attorneys too much latitude. Consequently, the Oregon bar has since reconvened another study group to revamp the original proposals.

Hyde Amendment Award Of Fees

In ***United States v. Knott***, 256 F.3d 20 (1st Cir. 2001), the First Circuit held, in order for a defendant to obtain an award of attorneys' fees pursuant to the Hyde Amendment, 18 U.S.C. § 3006A, the defendant must show not only that the prosecution was unfounded but also that the circumstances objectively demonstrate the government harbored malice or an intent to harass or annoy. Further, the court held the Hyde Amendment's incorporation of the Equal Access to Justice Act's (EAJA) "procedures and limitations" includes EAJA's limits on the net worth of defendants eligible for an award of fees. Here the corporation and its owner were indicted for violations of the Clean Water Act. The government voluntarily dismissed the criminal action following the court's suppression of certain water sampling results. The district court awarded the corporation fees, but denied the owner fees based on the limitation in EAJA § 2412(d). On appeal, the First Circuit affirmed the district court's denial of attorneys' fees to the owner and reversed the award of fees to the corporation.
The court determined the procedures and limitations of EAJA § 2412(d) applied to applications for fees under the Hyde Amendment. Section 2412(d) includes a limitation for recovery based on the net worth of individuals ($2 million) which was applied to the owner and precluded his ability to recover fees under the Hyde Amendment.

The court also found the district court had applied an incorrect legal standard for determining vexatiousness. The court held ". . . a determination that a prosecution was 'vexatious' for the purposes of the Hyde Amendment requires both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy." *Id*. at 29. Here, the court determined the government's conduct, when viewed objectively, did not manifest maliciousness or an intent to harass or annoy. In addition, the court found the government's case was not objectively deficient as the government had a reasonably sufficient evidentiary basis upon which to pursue charges against the owner and

corporation both prior to and after the suppression ruling.

Suppression Of Evidence Improper Remedy For Violation of 26 U.S.C. § 6103

In ***Nowicki v. Comm'r***, No. 01-11679, 2001 U.S. App. LEXIS 18748 (11th Cir. Aug. 20, 2001), the Eleventh Circuit held the suppression of evidence was not an appropriate remedy even if the evidence was obtained as a result of violation of the confidentiality of tax return information as provided by 26 U.S.C. § 6103. Nowicki, a veterinarian, operated several incorporated animal clinics with her long time companion handling the clinic's administrative and financial matters. Following the end of the relationship, the companion told the IRS that Nowicki's professional corporation had paid some of her personal living expenses which Nowicki had not reported as income. As part of the IRS investigation, Nowicki produced, among other records, canceled corporate checks and bank statements which were reviewed by the companion at the Service's request. The companion assisted in differentiating between business and personal expenses.

As a result of the investigation, the IRS determined Nowicki had realized additional taxable income in the form of constructive dividends for the tax years 1992 through 1994 which resulted in additional tax due and owing. Nowicki petitioned the tax court for a redetermination of the tax deficiency and filed a motion to suppress the evidence she claimed was obtained in violation of § 6103. She argued the Service violated § 6103 when it asked the companion to review her corporate canceled checks because it improperly disclosed her tax return information. The Tax Court denied her motion. After settling her civil tax case with the Service, Norwicki appealed the tax court's denial of her motion to suppress arguing the disclosure of her return information violated § 6103 and any evidence obtained as a result of that violation must be suppressed.

The court affirmed the Tax Court's denial of her motion to suppress. It found even assuming the disclosure to the companion violated § 6103, suppression of the evidence was not an appropriate remedy. Congress specifically provided civil (26 U.S.C. § 7431) and criminal (26 U.S.C. § 7213) remedies for violations of the confidentiality provisions of § 6103.

Conspiracy - Sufficiency Of The Evidence

In ***United States v. Searan***, 259 F.3d 434 (6th Cir. 2001), Searan and his mother were convicted of, *inter alia*, conspiracy to assist and advise others in the preparation and presentation of materially false income tax returns, in violation of 18 U.S.C. § 371. From 1990 to 1993, Searan and his mother owned and operated a tax service which primarily prepared and electronically filed individual income tax returns. Unbeknownst to the clients, the returns omitted income, inflated deductions, and included false forms, in order to generate false refunds. After a former Searan client contacted the Service, a successful undercover operation was initiated, leading to the execution of a search warrant. Records relating to 93 falsely prepared returns for 65 clients were seized as evidence.

On appeal, Searan challenged, *inter alia*, the sufficiency of the evidence supporting his conspiracy conviction. He contended most of the taxpayers went to his mother for assistance in preparing their returns; therefore, since he did not personally file the returns, the government failed to prove not only his intent to enter into an agreement to break tax laws, but also his knowledge of the returns' falsity.

In rejecting Searan's arguments, the Sixth Circuit stated "[t]o support a conspiracy conviction, the defendant need not be an active participant in every phase of the conspiracy, so long as he is party to the general conspiratorial agreement." *Id*. at 15. Moreover, "[p]roof of a formal agreement is not required; it must only be proven that the members of the conspiracy had at least a tacit or material understanding to try to accomplish an unlawful goal." *Id*. Noting Searan's depiction of the evidence presented at trial was not complete, the court provided a laundry list of facts, witness testimony, and documentary evidence which unequivocally showed Searan entered into an agreement with his mother to aid or assist others in the presentation of materially false tax returns. The evidence clearly demonstrated from the time he entered into the agreement, Searan knew any returns ultimately filed in furtherance of the agreement would, in fact, be false. Accordingly, his conviction was affirmed.

SEARCH AND SEIZURE

Qualified Immunity

In ***Leveto v. Lapina***, 258 F.3d 156 (3rd Cir. 2001), Leveto and his wife filed an action against several agents of the IRS asserting constitutional claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Levetos alleged, on May 2, 1996, 15 IRS special agents executed search warrants at Leveto's veterinary office/hospital and their residence. When Leveto arrived at work that morning, he was rushed by several armed agents in the parking lot, informed of the search

warrant, and immediately patted down. He was then escorted into his office building where he was held in a small room for one hour and prohibited from speaking to anyone. The agents then ordered Leveto to accompany them to his residence. At the Leveto's home, the agents displayed another search warrant and proceeded to pat down Leveto's wife, who was wearing only a nightgown. The agents then detained her for six hours, interrogated her without providing a *Miranda* warning, and conducted a search of the premises. Meanwhile, Leveto was ordered back to his office, where he was detained and interrogated by armed agents for approximately six hours. During this time period, agents sent Leveto's employees home and turned away clients in the parking lot. The district court dismissed the Levetos' complaint for failure to state a claim.

On appeal, Leveto and his wife successfully argued the agents, in executing the search warrants, improperly patted them down, detained them for up to eight hours without probable cause or reasonable suspicion, and unlawfully closed Leveto's office, all in violation of the Fourth Amendment. However, due to uncertainties in the law at the time regarding all three issues, and the court's opinion as to what a reasonable agent could have believed, the court held the agents were entitled to qualified immunity with respect to the Levetos' claims. Under the qualified immunity doctrine, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Uncorroborated Tip From Confidential Informant

In ***United States v. Allen***, 211 F.3d 970 (6th Cir. 2001), the investigating detective received a tip from a reliable informant. The confidential informant indicated Allen was in possession of cocaine and gave specifics as to the date and location of Allen's drug possession. The detective based the search warrant affidavit solely on the confidential informant's tip. Allen pled guilty to possession of crack cocaine and possession of an illegal firearm after his motion to suppress was denied. Allen appealed the denial of the motion, arguing the affidavit was based on uncorroborated information from a confidential informant and the seized evidence was, therefore, insufficient to provide probable cause for the warrant. A panel of the Sixth Circuit agreed, reversing Allen's conviction, however on a rehearing *en banc*, the Sixth Circuit affirmed the district court's denial of Allen's motion to suppress and his conviction.

The Sixth Circuit noted in previous decisions it had upheld the validity of search warrants in cases where the affidavit was based solely on a reliable confidential informant's personal observations of a defendant's illegal activity. In another previous case, however, the court had agreed no probable cause existed when a warrant was issued based on an anonymous tip sparse in detail and wholly uncorroborated by the police. In *Allen*, the Sixth Circuit found such corroboration was unnecessary because the informant was known to the detective and, for over five years, the informant had provided reliable information in criminal investigations in which the detective was involved. Furthermore, the information was gained through personal observation of Allen's criminal activity, and therefore, no corroboration was necessary.

Ultimately, the Sixth Circuit held where a known informant, named to the magistrate and whose reliability is known and attested to by the officer, gives information regarding a particular crime involving particular evidence, a neutral and detached magistrate may believe probable cause exists to issue a search warrant. The court warned police, however, that failing to confirm easily corroborated information could result in a magistrate not issuing a warrant, or worse, at trial, the government losing the evidence gained in the field.

Emergency Exception

In ***United States v. Cervantes***, 219 F.3d 882 (9th Cir. 2000), the Ninth Circuit recognized "the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Id*. at 888. Responding to a call from a firefighter, a police officer investigated a complaint of a strong chemical odor. Upon identifying the source of the odor, two police officers entered the apartment Cervantes occupied and, in plain sight, saw a large pot containing a substance believed to be methamphetamine. Subsequently, a police investigator searched the premises and then obtained a search warrant. Cervantes was convicted for manufacturing and possessing with intent to distribute methamphetamine. On appeal, Cervantes argued the district court erred by admitting evidence of items seized pursuant to an invalid search warrant.

The court focused on the emergency doctrine which provides if a police officer, while investigating within the scope necessary to respond to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe such evidence would be found. The court applied the three part test outlined in *People v. Mitchell*, 39 N.Y.2d 173 (N.Y. 1976), which provides: (1) a reasonable belief that an emergency is at hand and that aid is immediately necessary; 2) the search is not primarily motivated by the desire to collect evidence; and 3) a reasonable basis for associating the place

searched with the emergency). The court found all three requirements were met and the search by the police officers responding to the chemical odor was legal. The court did not, however, find the subsequent search by the police investigator, prior to the warrant, satisfied the emergency doctrine's requirements. Analyzing the issuing magistrate's decision, the court excised the portion of the affidavit supporting the warrant containing information obtained during the illegal search. After excising the investigator's observations, the court found the magistrate still had a "substantial basis" for concluding there was probable cause to believe contraband or evidence of a crime would be found in the apartment. Thus, the district court did not err in admitting evidence of items seized pursuant to the warrant.

FORFEITURE

Statute Of Limitations Starts When Connection To Crime Is Discovered

In ***United States v. Carrell***, 252 F.3d 1193 (11th Cir. 2001), the Eleventh Circuit reversed the district court's dismissal of the forfeiture proceeding. The court determined the five year statute of limitations applicable to civil *in rem* forfeiture actions against properties purchased with the illegal drug proceeds begins to run when the government discovers the connection between the properties and the drug crimes and is tolled by concealment of that connection. The court's holding addressed 19 U.S.C. § 1621 prior to its amendment by CAFRA and noted it is contrary to decisions by the Eighth and Ninth Circuits.

In 1998, the government sought forfeiture of two parcels of real property allegedly purchased, with the proceeds of his drug trafficking crimes, by Allen's father. Allen's father had been under investigation for drug trafficking since the 1980s. The parcels were titled in Allen's name, rather than his father's name. The district court determined the five year statute of limitations had expired as the two parcels had been properly recorded in the land records since 1990 and the government could have easily found their existence with due diligence. On that ground, the district court held the limitations period had run.

On appeal, the court found under § 1621, a forfeiture action must be commenced within five years after the time when the alleged offense was discovered, excluding the time of any concealment of the property. The court found "...the time when the alleged offense was discovered..." meant the time when the government discovered the drug proceeds' connection to the property or their use to purchase the property. Further, to obtain forfeiture, the court noted, the government must show probable cause to believe there is a substantial connection between the property and the criminal activity. This link was not uncovered until April 1996, when the government's investigation revealed Allen's father purchased the parcels despite any legitimate source of income and titled them in the names of family members to conceal its true ownership. Discovery of the link was effectively postponed by Allen's father's active concealment of his purchase of the two parcels.

Pre-CAFRA Innocent Owner Defense

In ***United States v. 221 Dana Ave.***, 2001 U.S. App. LEXIS 18744 (1st Cir. Aug. 17, 2001), the claimant sought dismissal of the government's forfeiture action against her home located at 221 Dana Avenue, Hyde Park, Massachusetts. The claimant's late husband, unbeknownst to the claimant, had used part of the residence to facilitate his drug dealing. He was arrested for selling cocaine from their residence and eleven days later committed suicide. Before committing suicide, the husband made a will leaving his wife the marital home. The claimant first learned of her husband's illegal drug activities the day of his arrest. The district court granted the government's motion to seize the marital home, concluding the claimant was not entitled to assert the innocent owner defense pursuant to the pre-CAFRA forfeiture statute, 21 U.S.C. § 881(a)(7) because she knew the property was tainted before obtaining the ownership interest in it, even though she was not aware of the drug activities at the time they occurred.

In a panel decision, the First Circuit vacated the district court's decision and dismissed the government's motion, holding the pre-CAFRA forfeiture statute did not apply to the claimant because she was an innocent owner. The issue turned on how to treat the innocent owner defense in the context of a post-illegal act transfer, which the pre-CAFRA forfeiture statute did not address. The court elected not to adopt the position of other circuits which defined innocent ownership at the time of the transfer of property, because that theory improperly distinguishes between transferees who learn of the crime immediately after the transfer and transferees who learn of the crime immediately before the transfer. "The more rational approach is to assess innocence in light of whether there was an opportunity, untaken, to prevent the use of such property for a crime." *Id.* at 21. The court chose to look to the time of the illegal act instead of the transfer, and found the claimant had no knowledge of nor consented to her husband's drug activities. Finally, the court noted CAFRA resolves the issue since the new innocent owner defense applies to bona fide purchasers or sellers for value and for spouses and legal dependents who use the property as a primary

residence and rely on it as a basis for shelter.

SENTENCING

Obstruction Of Justice Enhancement

In ***United States v. Hernandez-Ramirez***, 254 F.3d 841 (9th Cir. 2001), the Ninth Circuit held the submission of a false financial affidavit to a magistrate judge for the purpose of obtaining court appointed counsel was sufficiently related to the offense of conviction to support application of a two level enhancement for obstruction of justice pursuant to the amended version of U.S.S.G. § 3C1.1. Convicted of various tax offenses, Hernandez-Ramirez, a professional tax preparer, argued on appeal that his failure to disclose an ownership interest in a sports bar was not material to the determination of his eligibility for court appointed counsel and, even if he had included his interest in the bar, he would nevertheless have qualified. In addition, he contended the enhancement was incorrectly applied for there is no relationship between the underlying criminal tax offenses and the conduct supporting the obstruction of justice enhancement, *i.e.*, omitting material information on a financial affidavit submitted to a magistrate judge.

With respect to the materiality argument, the Ninth Circuit stated Hernandez-Ramirez's position ran counter to a long line of cases where false representations made "to probation officers have been found to be material whether or not they result in actual obstruction." *Id*. at 843-44. Here, "[w]ithout doubt, . . . providing information that he had significant debt and essentially no assets would tend to influence or affect whether the magistrate found him qualified for appointed counsel." *Id*. at 844.

In regard to the lack of relationship argument, the Ninth Circuit opined "nothing about the amendment to § 3C1.1 suggests it was intended to add a requirement that the obstructive conduct relate substantively to the offense of which the defendant is convicted." *Id*. For example, the court stated "[j]ust as [providing false information to probation officers] relates to sentencing of the offense, providing a false financial affidavit to a magistrate judge to obtain legal representation relates to the prosecution of the offense." Accordingly, the sentence was affirmed. *Id*.

Relevant Conduct And Prior Conviction Within The Meaning Of U.S.S.G. § 4A1.2

In ***United States v. Hunerlach***, 258 F.3d 1282 (11th Cir. 2001), Hunerlach was convicted of willfully attempting to evade payment of his income taxes for tax years 1981 through 1988 and for willfully filing a false Collection Information Statement ("CIS") in violation of 26 U.S.C. § 7206(1). The case arose from a 1988 guilty plea for filing a false income tax return for tax year 1983, in which Hunerlach agreed to pay taxes due and owing. Hunerlach failed to pay the taxes, lied on a CIS about his ability to pay the taxes, and was subsequently convicted. The sentence in the subsequent conviction was vacated and the case was remanded for resentencing. On remand, the district court departed upward from a Criminal History Category I to Criminal History Category III. Additionally, the court fined Hunerlach the statutory maximum of $250,000.00.

On appeal, the Eleventh Circuit noted the district court believed U.S.S.G. § 4A1.2 prevented it from considering Hunerlach's 1988 prior sentence, because the prior sentence involved conduct which was already part of the instant offense. Section 4A1.2 prohibits courts from considering such prior offenses in computing a defendant's criminal history category. The district court then applied U.S.S.G. § 4A1.3 and departed upward to Criminal History Category III. Section 4A1.3 includes "prior sentence" in its list of items the court may consider for departing if the criminal history category does not adequately reflect the seriousness of a defendant's past criminal conduct or there is a likelihood the defendant will commit other crimes. The district court departed upward because the exclusion of Hunerlach's prior sentence resulted in a category which failed to represent the seriousness of Hunerlach's past criminal conduct.

The Eleventh Circuit held the district court's upward departure under U.S.S.G. § 4A1.3 was improper because it was apparent the district court still considered the prior sentence, which it was precluded from considering under § 4A1.2. The Eleventh Circuit reasoned the definition of "prior sentence" in § 4A1.2 applies not just to § 4A1.1 but also to § 4A1.3. The Eleventh Circuit remanded the case for resentencing, but affirmed the fine due to Hunerlach's untimely objection requirement.

Departure For Co-Defendants' Sentence Disparity

In ***United States v. Caperna***, 251 F.3d 827 (9th Cir. 2001), Caperna was a small part of a large marijuana importing organization. His job was two fold: to secure a stash house for a large shipment of marijuana scheduled to arrive in Washington state and to hire a trusted person to drive the shipment from the off load site to the safe house. Caperna eventually accepted the government's offer and pled guilty to violating Interstate and Foregin Travel or Transportation in Aid of Racketeering Enterprises ("ITAR"). At sentencing, the district court calculated Caperna's sentence range to be fifty-seven to seventy-one months. The court departed downward and sentenced Caperna to thirty-six months in prison because a sentence within the guideline range would have created a disparity between Caperna's sentence and the sentences of two other similarly culpable co-defendants, Ricker, who pled guilty to ITAR, and Cliett, who pled guilty to conspiracy to distribute marijuana. The government appealed, arguing it is not appropriate for a sentencing court to depart on the basis of co-defendant sentence disparity unless the co-defendant was convicted of the same offense as the defendant. The Ninth Circuit agreed.

In its decision, the Ninth Circuit stated the district court erred in considering two co-defendants' sentences as the basis for downward departure, because one of the co-defendants was convicted of a different offence than Caperna. The Ninth Circuit acknowledged it previously held a court has the authority to depart downward on the basis of disparity among co-defendants' sentences; however, it also noted it did not identify what circumstances would make such a departure appropriate. *See United States v. Daas*, 198 F.3d 1167 (9th Cir. 1999). After *Daas*, the Ninth Circuit held a district court may not depart based on co-defendant sentence disparity if the co-defendant was convicted of a different offense than the defendant. *See United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000). The Ninth Circuit in *Caperna* explained the *Banuelos-Rodriguez* case simply began where *Daas* left off and indicated when it is not appropriate for a district court to use co-defendant sentence disparity as a ground to depart. The Ninth Circuit vacated the sentence and remanded the case for clarification as to whether it departed downward based on other factors, including whether the departure was based solely on the sentence recieved by Ricker.

Notice To Defendant Of Sentencing Court's Intention To Depart Upward

In ***United States v. Hernandez***, 251 F.3d 1247 (9th Cir. 2001), Hernandez pled guilty to conspiracy to affect interstate commerce by extortion, extortion and filing a false federal income tax return. The plea stemmed from Hernandez's abuse of his position as a California Deputy Labor Commissioner wherein he required owners of garment businesses to pay him bribes in order to receive advance notice of government inspections. At sentencing, the district court stated it was inclined to apply a four level upward adjustment based on Hernandez's role as a leader/organizer of the offense. Additionally, the court stated it was considering an upward departure on grounds Hernandez's conduct was part of a "systematic or pervasive corruption of a governmental function." U.S.S.G. § 2C1.1, App. Note 5. Although Hernandez's counsel requested additional time to address the leader/organizer adjustment, he did not request additional time with respect to the upward departure, instead, arguing against it on the merits. The court sentenced Hernandez to, *inter alia*, 36 months imprisonment imposing the aforementioned upward departure.

On appeal, Hernandez contended the district court erred in failing to provide adequate notice of its intention to impose an upward departure at sentencing, in violation of Fed. R. Crim. P. 32. In assessing this argument, the Ninth Circuit turned to *Burns v. United States*, 501 U.S. 129, 138-39 (1991), where the Supreme Court unequivocally established that Rule 32 requires "reasonable notice" to be given when departing upward. The Court, however, explicitly left open the question of when notice must be given to qualify as reasonable, "leav[ing] . . . the lower courts . . . to adopt appropriate procedures by local rule." *Id.* at 139 n.6. Interpreting lower courts to mean district courts, the Ninth Circuit found no error in Hernandez's sentencing because "the court thoroughly explained both the factual and legal grounds that might justify an upward departure and permitted counsel the opportunity to comment at length before imposing sentence." *Hernandez* 251 F.3d at 1252. Moreover, Hernandez's counsel failed to object to the district court's failure to provide notice before the sentencing hearing of its intention to depart upward. Accordingly, Hernandez's sentence was affirmed.

Threat Of Upward Adjustment For Failure Of Third Party To Surrender Right To Assets Improper

In ***United States v. Bennett***, 252 F.3d 559 (2d Cir. 2001), the Second Circuit held the district court's threat of an enhanced sentence was, in effect, an attempt to force Bennett's wife to abandon her legal right to defend her interest in the ancillary proceeding and was improper. Bennett was convicted of public integrity crimes, money laundering, bank fraud and securities fraud. The jury also returned a forfeiture verdict of $109 million. At sentencing, the district court forewarned Bennett his sentence would be enhanced if he did not surrender the criminal proceeds, including those held by his wife. When Bennett's wife refused to surrender her assets, the district court entered an upward departure from the sentencing guidelines, increasing Bennett's sentence by ten years. On appeal, Bennett argued the district court improperly enhanced his sentence because of his wife's refusal to surrender her interest in assets in her name.

The court noted the district court's use of threats of increased punishment to compel action by Bennett was itself unusual but found it even more unusual to use the threat of an increased sentence to compel action by Bennett's wife. In spite of the district court judge's concern for the victims of Bennett's crimes, the judge could not achieve his objectives by threatening to increase Bennett's sentence unless his wife waived her right to contest the forfeiture.

The court further noted, while Bennett's wife had every right to assert an interest in the forfeited property in an ancillary proceeding, Bennett had no right to frustrate the forfeiture by transferring his criminal proceeds to his wife in the first place. Accordingly, the district court may consider on remand, apart from Bennett's wife's refusal to surrender the assets, whether Bennett's own acts of concealment or any other appropriate factors warrant a departure from the sentence the court would have otherwise imposed.

Civil Audit Tax Loss Included As Relevant Conduct

In ***United States v. McLeod***, 251 F.3d 78 (2nd Cir. 2001), McLeod pled guilty to assisting in the preparation of 46 fraudulent income tax returns and with obstructing the administration of the tax laws with respect to one false tax return, in violation of 26 U.S.C. §§ 7206(2) and 7212(a), respectively. The charges stemmed from McLeod's operation of a tax return preparation firm, which offered its customers assistance in filing fraudulent income tax returns. For sentencing purposes, the total tax loss caused by McLeod's actions was $7,578,925.00. This was determined by adding the tax loss from the 46 charged fraudulent returns to a $7,238,058.00 tax loss determined by an IRS civil audit of 2,866 other returns, which were considered by the court as relevant conduct. McLeod was sentenced to 121 consecutive months of imprisonment.

On appeal, McLeod challenged the sentencing court's inclusion of the $7.2 million tax loss resulting from the civil audit as relevant conduct. Extracting a claim for a higher standard of proof from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), McLeod contended the sentencing judge could not include the tax loss determined from the civil audit as relevant conduct unless the court found beyond a reasonable doubt that the evidence presented at the sentencing hearing established such a loss.

In rejecting McLeod's claim, the Second Circuit explained an understanding of the Sentencing Guidelines' concept of "total punishment" was required. Pursuant to U.S.S.G. § 5G1.2(b), this is the punishment determined after all relevant Guidelines' calculations have been made. If the "total punishment" exceeds the highest statutory maximum on any count, as in McLeod's case, the Guidelines require the sentence run consecutively, to the extent necessary to achieve the "total punishment." In *United States v. White*, 240 F.3d 127, 136-37 (2d Cir. 2001), the court ruled the "preponderance of the evidence" standard applies to determinations of relevant conduct for purposes of ascertaining the "total punishment" which may exceed the statutory maximum on a single count. Moreover, in *White*, the Second Circuit also ruled that *Apprendi* is inapplicable to a sentencing judge's decision to run sentences consecutively when required by the Guidelines.

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