Criminal Tax Bulletin

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TITLE 26 AND TITLE 26
RELATED CASES

Earnings And Profits

In *United States v. Bok*, 156 F.3d 157 (2d Cir. 1998), Bok was the sole shareholder of a corporation who diverted certain funds or assets from the corporation for the purchase of an apartment and a bond. These appropriations were not reflected as income on his personal income tax return or the corporate return. At trial, neither Bok nor the government produced any evidence to suggest the corporation lacked earnings and profits for the year in question. *Relying on United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998), Bok sought a jury instruction on the nontaxability of a shareholder's return of capital, but the district court declined to give Bok the instruction. Bok was convicted by a jury for filing a false income tax return in violation of 26 U.S.C. § 7206(1).

On appeal Bok contended, *inter alia*, the court erred by refusing to instruct the jury on the nontaxability of a shareholder's return of capital. The Second Circuit rejected Bok's argument that the trial court erred in not instructing the jury that a distribution of money he received from a corporation in which he was the sole shareholder may have constituted a nontaxable return of capital. The court explained, in prosecutions for income tax violations, production of a rather slight amount of evidence by the government may transfer the burden of going forward to the defendant. Since the court found Bok failed to satisfy his burden of going forward on the nonexistence of corporate earnings and profits, it concluded thre was not an adequate basis in the record to justify the proposed instruction. *See also, United States v. Peters*, 153 F.3d 445 (7th Cir. 1998) and Criminal Tax Bulletin, October, 1998.

Government Liable For Attorney's Fees For Failure To Turn Over Brady Material

In *United States v. Ranger Electronic Communications Inc.*, No. 1:96-CR-211, 1998 U.S. Dist. LEXIS 146673 (W.D. Mich. Aug. 24, 1998), the defendant was indicted for importing federally banned radio equipment. The government agreed to dismiss the case with prejudice after trial had begun due to problems that developed in the government's case. Four months after dismissal, the defendant moved for attorney's fees pursuant to the Hyde Amendment which was enacted as part of a 1997 appropriations bill and is found as a statutory note to 18 U.S.C. § 3006A. The Hyde Amendment allows federal courts to award attorney's fees to "prevailing" criminal defendants where the government's litigating position is found to be vexatious, frivolous, or in bad faith.

The defendant's motion was based upon the contention that the government acted in bad faith by concealing *Brady* material which included e-mail communications with the Federal Communications Commission regarding public confusion about federal regulations concerning the importation of electronic equipment and the need for public notices to clarify those regulations. The defendant did not discover the government's failure to disclose this information until after the case was dismissed.

Under the Hyde Amendment, requests for attorney's fees are subject to the procedures and limitations used by civil litigants under the Equal Access to Justice Act (EAJA). The EAJA requires applications for attorney's fees be made within 30 days of final judgment. Notwithstanding EAJA limitations, the court found there was no judicial precedent as to how the temporal bar should apply to cases where the government's bad faith in concealing exculpatory evidence was not revealed until after the expiration of the 30 day period. The court refused to apply a strict reading of the limitation period, finding

such a reading to be diametrically opposed to the purposes of the Hyde Amendment which would convert the law into an empty legislative promise. The court, therefore, concluded that in order to give effect to Congress' purpose and words, a further reasonable time period beyond 30 days after judgment should be permitted for the filing of an application for attorney's fees. The court then ordered briefing from the parties as to the exact amount of the award. *See also, United States v. Gardner*, No. 97-CR-34-H, 1998 U.S. Dist. LEXIS 15106 (N.D. Okla. July 7, 1998). *But see, United States v. Reyes*, 16 F.Supp. 2d 759 (S.D. Tx 1998).

Tax Evasion - Jury Must Decide All Elements

In *United States v. Silkman*, 156 F.3d 833 (8th Cir. 1998), Silkman was convicted on five counts of tax evasion. In regard to establishing the element of a tax due and owing in this tax evasion case, the government relied on a notice of deficiency and five certificates of assessment. Silkman sought to introduce evidence to dispute the certificates of assessment, however, the district court ruled he could not present his evidence and instructed the jury, as a matter of law, that the tax assessment for each year established the tax due and owing, thus satisfying one of the elements of tax evasion. The remaining elements of willfulness and an affirmative act constituting evasion or attempted evasion were left for determination by the jury. Silkman appealed his conviction.

The Eighth Circuit agreed with Silkman and held, although an assessment is *prima facie* proof of a tax deficiency, this evidence unless unchallenged, is not, in and of itself, completely dispositive of the issue of a tax due and owing in an evasion case. Accordingly, Silkman had a constitutional right to present his rebuttal evidence and to have the jury decide his guilt beyond a reasonable doubt, on every element of the crime. Once the district court removed from the jury's consideration proof of an essential element of the offense, Silkman's constitutional rights were violated, thus mandating reversal and a new trial.

Misworded Question Will Not Preclude Perjury Prosecution

In *United States v. DeZarn*, 157 F.3d 1042 (6th Cir. 1998), DeZarn planned and attended a "1990 Preakness Party" fundraising event for a gubernatorial candidate. During an investigation concerning the event, an investigator mistakenly asked DeZarn whether the "1991 Preakness Party" was a political fund raiser and whether he observed anyone making campaign contributions. DeZarn answered negatively to both questions. A subsequent investigation revealed that DeZarn had planned the "1990 Preakness Party" as a political fund raiser and had personally accepted campaign contributions. DeZarm was indicted and convicted of perjury in violation of 18 U.S.C. § 1621. On appeal, DeZarn relied on *Bronston v. United States*, 409 U.S. 352 (1973), and argued, *inter alia*, that the indictment was insufficient because his answers to the investigator's questions were "literally true."

The Sixth Circuit distinguished *Bronston* pointing out that the witness's answers in *Bronston* were technically "nonresponsive," whereas DeZarn's answers were "unequivocal and directly and fully responsive" to the investigator's questions. The court noted that context and circumstances evidenced DeZarn knew the investigator's question related to the "1990 Preakness Party," since there existed no "1991 Preakness Party." The court concluded that DeZarn's answers were not "nonresponsive," but were instead, "answers to questions with a partially mistaken premise or presupposition." Relying upon *United States v. Robbins*, 997 F.2d 390 (1993), the court held ". . . when questions and answers proceed on a false premise of which the defendant is aware, he may not evade the true intent of the line of questioning by stacking literally true answers on top of the false premise." Accordingly, the court affirmed the conviction.

Concealment of Bank Fraud Proceeds Is Insufficient Evidence Of *Klein* Conspiracy

In *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998) (*Adkinson I*) and *United States v. Adkinson*, 158 F.3d 1147 (11th Cir. 1998)(*Adkinson II*), the court vacated and then reversed the convictions of Adkinson and four other defendants for, *inter alia*, conspiring to impede the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. § 371. The convictions stemmed from a land development project in the Florida panhandle where false statements and misrepresentations were made to two private banks to procure large loan amounts which were then allegedly diverted by the defendants for their personal use. The government contended that through the concealment of income from the fraudulently obtained bank loans and by failing to file tax returns or filing false income tax returns, a conspiracy to impede the IRS had transpired.

On appeal, the court examined the record for evidence of an agreement between the defendants to impede the IRS. The government argued that the corporate records of the various real estate enterprises demonstrated that certain payments had been made to the defendants which had not been reported to the IRS. Furthermore, the defendants' individual tax returns failed to show this

alleged income. In rejecting the government's argument, the court stated "[t]his evidence...at most implies separate purposes to evade taxes; it does not support the inference that each alleged tax evader even knew of the other's tax evasion, much less that they agreed to do so."

The court specifically noted that the government, at trial and in its appellate briefs, had alleged the purpose of the conspiracy was to commit bank fraud. Any "tax related activities" of the defendants were referred to in the context of their efforts to conceal the money they had defrauded the banks out of and to conceal the diversion of this money in the form of loans. The false tax returns furthered the concealment of this diversion. The court opined that without "independent evidence" of a tax purpose, the tax related activities of these defendants did not give rise to a *Klein* conspiracy.

Finally, the court considered the question as to whether a tax conspiracy to impede the IRS can be inferred strictly from efforts to conceal illegally obtained income. The court found that the scheme itself did not support an inference of an intent to impede the IRS. The only "tax related activities" of the defendants, filing false income tax returns and reporting certain illegal payments as loans, occurred in concealing the diversion of the bank fraud proceeds. Absent substantial evidence of both an agreement and intent to impede the IRS "a conspiracy to conceal the source of illegally obtained money is not automatically a *Klein* conspiracy, even if it collaterally impedes the IRS in the collection of taxes." *See, United States v. Vogt*, 910 F.2d 1184, 1202 (4th Cir. 1990). Accordingly, the defendants' convictions were reversed.

EVIDENCE

Waiver Of Federal Rules As Part Of Plea Agreement

In *United States v. Burch*, 156 F.3d 1315 (D.C. Cir. 1998), Burch pled guilty to one count of drug possession with the intent to distribute. As part of the plea agreement, Burch waived his rights under Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410 ("Rules"), and also agreed to assist law enforcement authorities in other matters, although he later proved uncooperative in assisting authorities. The Rules waived by Burch preclude the admissibility of evidence of a withdrawn guilty plea and statements made during the course of plea negotiations. Burch subsequently filed a motion to withdraw his guilty plea alleging he was innocent of the narcotics offense and he had been coerced by a co-defendant to plead guilty. After a hearing, the trial court allowed Burch to withdraw his plea pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure. The trial court, however, held Burch to the waiver of his rights under Rules 11(e)(6) and 410 and ruled that statements made by Burch during the plea hearing and law enforcement debriefings could be used as "evidence for impeachment, rebuttal, or the case-in-chief in any future trial, an act that belies any view that the plea or the waiver were coerced." Subsequently, a jury convicted Burch of possession. Burch appealed.

On appeal, the D.C. Circuit examined, among other things, whether a defendant can waive his rights under the Rules for purposes of the prosecution's case-in-chief. In resolving the waiver issue, the D.C. Circuit cited *United States v. Mezzanatto*, 513 U.S. 196 (1995), which held that a defendant can waive his rights under the Rules for purposes of impeachment and rebuttal based on the following principles: (1) Voluntary agreements to waive protections under the Rules are presumptively enforceable, absent an affirmative congressional limitation; (2) The rules and accompanying advisory notes do not express a congressional disfavor towards waivability; and, (3) A court should consider public policy in deciding whether to override a presumption of waivability. Applying these three principles, the D.C. Circuit refused to draw a distinction between permitting waivers for purposes of impeachment or rebuttal and the prosecution's case-in-chief. Finally, the court noted that the extensive colloquy conducted by the trial court clearly supported the determination that Burch knowingly and voluntarily waived his rights under the Rules. Accordingly, the D.C. Circuit affirmed the conviction.

FORFEITURE

Knowledge Requirement

In *United States v. $359,500 in U.S. Currency*, No. 84-CV-661C, 1998 U.S. Dist. LEXIS 17678 (W.D.N.Y. Sept. 28, 1998), the government brought a civil action pursuant to 31 U.S.C. §§ 5316(a) and 5317(b) seeking the forfeiture of the subject currency because the claimant failed to file a CMIR, in violation of 31 U.S.C. § 5311, when he crossed a bridge heading from Buffalo, New York to Ontario, Canada, on November 17, 1983.

This case originally went to trial on May 10, 1985. On September 29, 1986, the district court denied the government's petition for forfeiture, finding that actual knowledge of the currency reporting requirements is required for a civil forfeiture and that there was insufficient evidence to support such a finding. On September 8, 1987,

the Second Circuit held that although actual knowledge of the reporting requirements is not required for civil forfeiture, under the Fifth Amendment's Due Process Clause, a claimant must have constructive knowledge of the requirements. *United States v. $359,500 in U.S. Currency*, 828 F.2d 930 (2d Cir. 1987). The Second Circuit remanded the case for a determination of whether the claimant had constructive knowledge. However, since the claimant was being investigated for income tax evasion by a grand jury, the district court granted the government's motion to stay the proceeding until the multiple civil and criminal actions against the claimant were concluded. Finally, in May of 1997, the district court held a trial as to whether the claimant had constructive notice of the currency reporting requirements.

The district court held that the record failed to support a finding that the claimant should reasonably have been aware of the likelihood of having to report the currency he was carrying when going from the U.S. to Canada. The three previous times he left the U.S., he was not required to provide any information with respect to currency. There were no signs indicating currency reporting requirements for people leaving the country. The court distinguished this case from other Second Circuit cases because those cases all involved travelers who went by airplane and who were asked before leaving the U.S. about their currency amounts. In this case, the claimant was not asked about the currency until he left the U.S. and was told to turn around by Canadian officials. The fact that the claimant obtained the currency through illegal gambling did not support a finding that he should have had reason to believe he had to report the currency he was carrying out of the country.

The district court also concluded the claimant had no constructive notice of the reporting requirement. The government argued unsuccessfully that publication of the currency reporting requirement statute in the Federal Register constituted constructive notice of the contents so as to satisfy due process. Given the circumstances of the case and the complete failure of the Customs Service to take any affirmative steps to inform the casual traveler of the currency reporting requirements, it would be unfair to deprive the claimant of his property based on publication of the statute.

Finally, the Supreme Court's recent decision in *United States v. Bajakajian*, 118 S.Ct 2028 (1998), is instructive. In *Bajakajian* the Supreme Court adopted a new standard that makes punitive forfeitures excessive if they are "grossly disproportional" to the gravity of the defendant's offense. In addition to its finding above, the district court rejected the government's contention that *Bajakajian* only relates to punitive criminal forfeitures and held that the forfeiture of the claimant's $359,500 was improper.

Racketeer's "Nonforfeitable" Individual Retirement Annuity Subject to Criminal Forfeiture

In *United States v. Infelise*, 159 F.3d 300 (7th Cir. 1998), Infelise was convicted of racketeering and his primary residence and $3 million from his racketeering activity were forfeited. The government sought to collect the $3 million pursuant to the substitute assets provision of 18 U.S.C. § 1963(m), which allows the government to take other property belonging to a defendant when the illegally obtained property cannot be located. One of the substitute assets the government sought to obtain, which the district court refused to forfeit, was Infelise's individual retirement annuity in the amount of $134,000. The government appealed this decision.

In response to the government's appeal, Infelise argued the annuity was a nonforfeitable asset, immune from criminal forfeiture. Infelise based his reliance upon 26 U.S.C. § 408(b) which was enacted as part of the Employee Retirement Income Security Act (ERISA). Section 408(b)(4), in pertinent part, defines "individual retirement annuity" and specifies that "[t]he entire interest of the owner is nonforfeitable."

In response to Infelise's argument that nonforfeitable means nonforfeitable, the court stated, "[w]hile we must respect the plain language of a statute, we also must read the words of a statute in context," and held "nonforfeitable," as used in § 408(b), "refers to a requirement that an individual retirement annuity must be vested in the owner." Emphasizing that the provisions of 18 U.S.C. § 1963 are to be liberally construed, the court remarked that § 408(b) says nothing as to whether the government, pursuant to a criminal forfeiture proceeding, can obtain the forfeiture of an individual retirement annuity.

Thus, in the context of ERISA and the Internal Revenue Code, an individual retirement annuity may enjoy a "nonforfeitable" status; however, this protection vanishes in the context of seizure by the government after a racketeering conviction. Accordingly, the Seventh Circuit reversed the district court's order denying the forfeiture of the individual retirement annuity.

Forfeitures Not Deductible For Tax Purposes

In *King v. United States*, 152 F.3d 1200 (9th Cir. 1998), the Ninth Circuit affirmed the judgment which held

that illegally obtained narcotics proceeds were taxable as income but that no business deduction or credit was allowable when the money was forfeited. King pled guilty to narcotics charges and agreed to forfeit $636,940 in drug proceeds as part of a plea bargain. The FBI seized the full amount forfeited.

King filed an amended tax return including the amount forfeited as income and claimed a deduction for an uncompensated loss in a trade or business. There is no dispute as to the taxability of illegal income. King argued, however, that without being able to deduct the forfeiture, the tax due will have been paid twice. The court, unpersuaded, followed existing precedent which holds that amounts forfeited, regardless of the circumstances, are not deductible for tax purposes.

Res Judicata

In *United States v. Cunan*, 156 F.3d 110 (1st Cir. 1998), the First Circuit affirmed dismissal of a criminal forfeiture action under *res judicata* principles. Prior to commencement of the criminal case, the government pursued civil forfeiture actions against Cunan as provided by 28 U.S.C. § 881 and 18 U.S.C. § 981. At the government's request, the civil forfeiture actions were dismissed with prejudice, primarily for judicial economy as the government also sought forfeiture in the criminal case and to prevent disclosure of evidence gathered for the criminal trial.

A jury convicted Cunan of conspiracy and money laundering and, as part of his conviction, a criminal forfeiture order was issued. Cunan filed motions to dismiss the criminal forfeiture orders asserting *res judicata*, which were granted. Criteria for *res judicata* which were met, included a final judgment on the merits, which a dismissal with prejudice satisfied, and that "sufficient identity" existed between the parties and causes of action in the cases.

28 U.S.C. § 881(i) and 18 U.S.C. § 981(g) specifically provide mechanisms to stay civil proceedings pending resolution of criminal matters. The government, in this case, failed to avail itself of this option even after it was aware that *res judicata* would apply to any dismissals with prejudice. As the government did not use the available mechanisms to preserve its right to forfeit Cunan's properties, *res judicata* was applicable even though it resulted in an unfair windfall for Cunan.

Excessive Fines Clause

In *One 1995 Toyota Pick-up Truck v. District of Columbia*, 718 A.2d 558 (D.C.C.A. 1998), the defendant plead guilty to solicitation and was fined $150.00 as a first time offender. The maximum statutory fine for this offense is $300.00. In 1992, the District of Columbia passed the Safe Streets Forfeiture Act of 1992, D.C. Code § 22-2723 (1996), authorizing the city to forfeit any instrumentality used to commit a prostitution crime. The Act uses virtually identical language as the federal drug forfeiture statute. When under the Act, the city brought a forfeiture action against the defendant's truck worth $15,500.00, he challenged the forfeiture claiming it violated the Eighth Amendment's Excessive Fines Clause because the forfeiture constituted a penalty 50 times the authorized fine and 100 times the fine imposed under the solicitation charge.

A statutory forfeiture is a fine for Eighth Amendment purposes if it constitutes punishment even in part. *Austin v. United States*, 113 S.Ct. 2801 (1993). The court concluded the forfeiture statute here had punitive aspects and thus the fine was excessive when it applied the "grossly disproportional" standard recently adopted by the Supreme Court in *United States v. Bajakajian*, 118 S.Ct. 2028 (1998). The grossly disproportional standard is a pure proportionality test applied to determine if the fine is constitutionally excessive when compared to the gravity of a defendant's offense. Accordingly, having determined the fine to be excessive, the court overturned the forfeiture.

MONEY LAUNDERING

Valueless Checks Obtained By Fraud Are "Proceeds"

In *United States v. Akintobi*, 159 F.3d 401 (9th Cir. 1998), the defendants used stolen credit cards to make purchases and draw cash advances until available credit limits were exhausted. Then, using the stolen credit cards and illegally obtained credit information on the cardholders, the defendants opened checking accounts in the cardholders' names, and subsequently, withdrew the money from the checking accounts, leaving zero balances. Finally, the defendants used blank "starter" checks to pay down the balances on the original stolen credit cards. Before the credit card companies became aware that the checks were written on accounts with insufficient funds, the defendants were once again able to deplete the available credit through cash advances.

In a multi-count indictment, the defendants were charged, *inter alia*, with money laundering in violation of

18 U.S.C. § 1956(a)(1)(A)(i). The defendants filed a motion to dismiss the money laundering charge claiming that the "starter" checks used to pay down the credit card balances were worthless and, therefore, could not represent "proceeds" of illegal activity, as required by the statute. The district court denied the motion and the defendants entered conditional guilty pleas, reserving their right to appeal the money laundering issue.

On appeal, the Ninth Circuit rejected the defendants' argument and held that fraudulently obtained checks can be "proceeds" under 18 U.S.C. § 1956(a)(1)(A)(i) and submission of these checks to credit card companies, in order to pay down illegally obtained credit card accounts, constituted money laundering. Turning to the definition of "proceeds," which is not defined by statute, the court determined that "while the term proceeds may refer to something of value, the term has the broader meaning of that which is obtained by any transaction." The court reasoned that blank "starter" checks which were obtained through bank fraud, *i.e.*, opening an account in an assumed name, are the "proceeds" of the crime of bank fraud. Subsequently, when these checks or "proceeds" were then sent by the defendants to the credit card companies, in order to pay down the credit card balances, they were involved in a financial transaction; the goal of which was to promote a specified unlawful activity, *i.e.*, credit card fraud.

Proceeds "Involved in" the Offense

In *United States v. Trost*, 152 F.3d 715 (7th Cir. 1998), Trost was an elected official (county clerk and recorder). As part of an embezzlement scheme, Trost created a "special" bank account and deposited approximately $57,000 of county payments into the account. He transferred $23,000 of the $57,000 to a personal bank account which he held jointly with his wife. Trost was convicted of laundering the $23,000 in violation of 18 U.S.C. § 1956 and subsequently ordered to forfeit the entire $57,000 pursuant to 18 U.S.C. § 982. On appeal, Trost argued that the appropriate forfeiture sum should have been $23,000, which represented the amount he was specifically convicted of laundering.

The Seventh Circuit disagreed with Trost citing its decision in *United States v. $448,342.85*, 969 F.2d 474 (7th Cir. 1992), where the court held that funds which remain in an account after the laundering offense can be forfeited, if involved in the crime. The court agreed with the lower court's assessment that "significantly more than $23,000 was funneled through the account to conceal or disguise the true nature of [Trost's] activities . . . [and] . . . there was no evidence that the use of the funds was bona fide or justified." Furthermore, the court noted that sometimes legal source funds are used to disguise illegal funds. In examining the funds left behind in the first bank account and funds transferred to the second bank account, the court found no legitimacy for any portion of the $57,000. The court concluded the forfeited sum of $57,000 represented the full amount of money involved in the money laundering offense under § 1956. Accordingly, the lower court's forfeiture action was affirmed.

INVESTIGATIVE TECHNIQUES

Recording of Voicemail Constitutes Illegal Intercept Of Wire Communication Under Wiretap Act

In *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998), Smith was an executive of a computer software corporation convicted of insider trading. An SEC investigation into Smith's insider trading was initiated after an employee of the corporation went to authorities with a tape recorded viocemail message in which Smith discussed his plans to sell a large block of his stock in the corporation based on insider information that the company's profits were going to be less than projected. Upon indictment on eleven counts of insider trading, Smith moved to dismiss the indictment on the grounds that all the evidence was derived from an illegal wire recording. The district court suppressed the voicemail recording but refused to suppress the remainder of the government's evidence. Smith was convicted on all counts. Smith appealed the court's refusal to suppress the government's evidence contending that it was derived from an illegal wiretap in violation of 18 U.S.C. § 2515.

Preliminary to a determination of whether suppression of the government's evidence was warranted, the Ninth Circuit carefully dissected the Wiretap Act, 18 U.S.C. §§ 2510-2520, and the Stored Electronic Communications Act (SECA), 18 U.S.C. §§ 2701-2710, to determine which statute applied to the act of tape recording an electronically stored voice message. The Wiretap Act provides for an exclusionary remedy to illegally intercepted wire communications, whereas the SECA has no exclusionary provision. Under the Wiretap Act, the term interception is defined as the acquisition of the contents of any wire communication or any electronic storage of such communication through the use of any device. Acquisition of the voicemail message in this case plainly fit within the language of the exclusionary provision of the Wiretap Act. The message itself, left in the voicemail system via telephone, was a wire communication since it was an "aural

transfer" made using a wire facility (the telephone line) and was subsequently "electronically stored" within the voicemail system. The act of recording the message on a handheld audiotape recording "device" constituted "aural or other acquisition" of the contents of the communication and, hence, an "interception" of the message.

The government argued for a narrow definition of the term "interception," contending that it pertained only to acquisition of a wire communication contemporaneous with its transmission. Thus, the government contended, accessing stored wire communications was not a violation of the Wiretap Act, but rather, a violation of the SECA. The Ninth Circuit rejected this argument, reconciling the statutory overlap of these acts as covering different crimes and different levels of culpability. The court explained the word "intercept" as used in the Wiretap Act entails actual acquisition of the contents of a communication, whereas the word "access" as used in the SECA merely involves being in a position to acquire the contents of a communication. In other words, access is, for all intents and purposes, a lesser included offense of interception.

Based on this analysis, the court upheld the suppression of the viocemail message as a violation of the Wiretap Act and determined that the remainder of the government's evidence in this case was not derived from the illegally intercepted voicemail. The court concluded that the recording only amounted to an investigative lead in the case.

Judicial Sealing Of Wiretap Tape Recording Not Prerequisite To Admission Of Compilation Recording From Duplicate Tapes

In *United States v. Rivera*, 153 F.3d 809 (7th Cir. 1998), DEA agents used wiretaps of cellular phones to investigate a cocaine distribution conspiracy. The DEA's equipment simultaneously made three tape recordings of each telephone call. Immediately upon expiration of the period of the wiretap order, one set of the tapes was judicially sealed in compliance with 18 U.S.C. § 2518(8)(a). A second set was given to the prosecutor's office and the third set was retained by the DEA. In preparation for trial, the DEA created a compilation of the most relevant telephone calls, essentially reducing many hours of recordings to less than two hours. The compilation tape was played to the jury over Rivera's objections and he was convicted on cocaine conspiracy charges.

On appeal to the Seventh Circuit, Rivera challenged the admissibility of the wiretap audiotapes. His argument turned on the fact that whereas the Wiretap Act expressly authorizes the use of duplicate tapes for investigative purposes, it does not mention use of such tapes for evidentiary purposes. Rivera relied on the cannon of construction that inclusion of one implies exclusion of all others. The court observed this cannon of construction does not have uniform application and found that in the context of § 2518(8)(a), it does not apply. Section 2518(8)(a) delimits procedures for preserving wiretap tapes. The provision does not contemplate preventing disclosure of their contents. The language of the provision places no restrictions on the form in which the contents of the recordings may be disclosed in court proceedings. Neither the statute nor the legislative history indicates an intent to impose the same requirements on duplicate tapes as on originals. Thus, the court was hesitant to find an implied restriction. In context, the language concerning duplicate tapes serves to make clear that sealing is not intended to prevent law enforcement officers from having duplicates and disclosing them to other law enforcement officers. Also, use of duplicates is judicially efficient and allows the original tapes to remain sealed, thus preserving their authenticity. There was no authenticity challenge in this case.

Concluding the government adequately established the chain of custody, the court noted that the DEA's set was as original as the sealed tapes. Either set of tapes could have been chosen to be sealed and the government was not required to compare the two sets of tapes to determine that the tapes were the same. The court affirmed Rivera's conviction.

SENTENCING

Grouping Money Laundering and Mail Fraud

In *United States v. O'Kane*, 155 F.3d 969 (8th Cir. 1998), O'Kane, a manager of a grocery store, devised a scheme to order large volumes of baseball cards on the store account. When the cards arrived, O'Kane retained a portion of the shipments for his personal collection and sold the remainder. The scheme enabled O'Kane to defraud his employer of over $300,000 worth of baseball cards. O'Kane pled guilty to one count of mail fraud and one count of money laundering. Applying U.S.S.G. § 3D1.2(b), the district court grouped the two counts together into a single group involving a single victim. On appeal, the government argued that the district court erred in grouping

the mail fraud and money laundering counts and, in the alternative, if grouping was correct, § 3D1.2(d) was the appropriate guideline.

The Eighth Circuit agreed with the government's assertion that the district court did not properly group the two counts under § 3D1.2(b), reasoning that each count harmed different victims. The court, however, rejected the applicability of § 3D1.2(d) because, in this case, the offense level for money laundering was not ". . . determined largely on the basis of the total amount of harm or loss . . ." since O'Kane laundered less than $100,000. The Eighth Circuit concluded that none of the grouping rules properly applied to O'Kane's two counts of conviction and, therefore, those counts must remain separate counts for sentencing purposes. The court then concluded that § 3D1.4 should be applied and instructed the sentencing court to count the most serious offense (money laundering) as one unit and add an additional unit for the less serious count (mail fraud). Accordingly, the Eighth Circuit vacated the sentence and remanded the case for re-sentencing.

Downward Departure In Campaign Debt Money Laundering Scheme

In *United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998), Hemmingson, an attorney and president/CEO of a crop insurance business, was solicited by Ferrouillet, who was also an attorney, to assist in paying off campaign debts of an unsuccessful congressional candidate ("Espy"). Espy asked Hemmingson and other fund raisers to pledge funds to retire his congressional campaign debt. As part of a campaign laundering scheme, Hemmingson drew a $20,000 check on the crop business account. He then gave Ferrouillet the $20,000 check as a "retainer" for purported services to be rendered on behalf of the crop business. In order to avoid campaign reporting requirements, Ferrouillet cashed the $20,000 check and promptly deposited the funds into a newly opened "Espy for Congress" bank account. The cash deposit was eventually applied to Espy's campaign debt.

Hemmingson and Ferrouillet were convicted, *inter alia*, on multiple counts of money laundering in violation of 18 U.S.C. §§ 1956 and 1957. The district court sentenced the defendants pursuant to U.S.S.G § 2S1.1, the money laundering guideline.

Hemmingson and Ferrouillet requested a downward departure on grounds that their conduct did not fall within the "heartland" of § 2S1.1. The district court agreed, sentencing the defendants pursuant to § 2F1.1, a more lenient fraud guideline.

On appeal, the Fifth Circuit, citing *Koon v. United States*, 518 U.S. 81 (1996), held the election campaign scheme was sufficiently unusual to fall outside the "heartland" of conduct for money laundering under the sentencing guidelines. The court emphasized that § 2S1.1, primarily targets large scale money laundering, which often involves the proceeds of drug trafficking or other types of organized crime." The court agreed with the district court's reasoning that Hemmingson's and Ferrouillet's scheme ". . . when viewed alongside the conduct that is usually prosecuted under the money laundering statutes, was atypical . . . ." *See also, United States v. Woods*, No. 98-1884WM, 1998 U.S. App. LEXIS 28072 (8th Cir. Nov. 5, 1998). Accordingly, the court found.no abuse of discretion by the district court in its downward departure.

Restitution

In *United States v. Bok*, 156 F.3d 157 (2d Cir. 1998), as factually set forth on page one of this Bulletin, the court rejected Bok's argument that the imposition of restitution as a condition of supervised release violated 18 U.S.C. § 3663. Section 3663 limits a court's authority to order restitution to certain enumerated offenses or pursuant to the terms of a plea agreement. Since tax crimes are not among those offenses, plea agreements have been the mechanism for obtaining restitution in tax cases. There was no plea agreement in this case. Nevertheless, the court found a plain reading of the provisions in 18 U.S.C. §§ 3563 (Conditions of Probation) and 3583 (Terms of Supervised Release After Imprisonment) permit a court to award restitution as a condition of supervised release without regard to the limitations in § 3663. Additional support for this conclusion is found in § 5E1.1(a) of the Sentencing Guidelines of 1990 which specifically authorize a sentencing court to order restitution as a condition of supervised release in all cases, without reference to the limitations in § 3663. Accordingly, the court upheld the restitution order. *See also, United States v. Bugai*, No. 97-1280, 1998 U.S. App. LEXIS 20967 (6th Cir. Aug. 21, 1998) and Criminal Tax Bulletin, October, 1998.

No Grouping For Wire Fraud And Tax Evasion

In *United States v. Vitale*, No. 98-5072, 1998 U.S. App. LEXIS 28168 (3d Cir. Nov. 6, 1998), Vitale, a corporate vice president, pled guilty pursuant to a plea agreement to one count of wire fraud and one count of tax evasion. The two counts stemmed from Vitale's embezzlement of approximately $12 million from his employer.

Vitale argued the district court erred in denying his request to group the two counts because U.S.S.G. § 3D1.2

requires grouping when the counts involve substantially the same harm. In addition, he argued, grouping is required because the government stipulated, in the plea agreement, that the conduct underlying the wire fraud offense was embezzlement and case law supports grouping an underlying embezzlement offense with a tax evasion offense. Relying on *United States v. Astorri*, 923 F.2d 1052 (3d Cir. 1991), the court rejected both of Vitale's arguments and held that grouping under the guidelines was not appropriate because Vitale was charged with wire fraud, not embezzlement, and wire fraud and tax evasion are not closely related offenses. Moreover, if grouping were allowed here, the purpose of deterring and punishing tax evaders would be lost because there would be no accounting in the sentence for the fact that Vitale evaded taxes. Thus, Vitale's sentence was affirmed.

CRIMINAL TAX BULLETIN

TABLE OF CASES

DECEMBER 1998

TITLE 26 AND TITLE 26 RELATED CASES

EVIDENCE

FORFEITURE

MONEY LAUNDERING

INVESTIGATIVE TECHNIQUES

SENTENCING

Department of the Treasury
Internal Revenue Service
Document 10023 (Rev. 12-1998)
Catalog Number 24304B