Number: **200412003**
Release Date: 3/19/04
UIL: 9999.98-00

Criminal Tax Bulletin

Department of Treasury
Internal Revenue Service

Office of Chief Counsel
Criminal Tax Division

February **This bulletin is for informational purposes. It is not a directive.** **2002**

SUPREME COURT CASES

Warrantless Search Of Probationer's Apartment

In *United States v. Knights,* 122 S. Ct. 587 (2001), Knights was placed on probation for a drug offense. The probation order included a condition requiring Knights to submit to searches of his residence at anytime, with or without a search warrant. Knights, consenting to the probation condition, signed the order. Three days after Knights was placed on probation, the local electric company's property was set on fire. Knights' court dates for theft of the electric company's services coincided with other acts of vandalism to the electric company's property. A detective investigating the arson and vandalism conducted surveillance on Knights' apartment and saw Knights' friend carry pipe bombs out of the apartment. Further, a truck carrying explosives which Knights had previously been seen in, was parked in Knights' driveway. Looking at the truck, the detective saw more explosive materials as well as brass padlocks belonging to the electric company. Based on these observations and suspicions as well as knowing about the probation condition, the detective searched Knights' apartment. When Knights was indicted on arson, explosives, and ammunition charges, he moved to suppress evidence obtained during the warrantless search of his apartment. The district court granted the motion on the grounds the search was for investigatory rather than probationary purposes. The Ninth Circuit affirmed.

The Supreme Court reversed, upholding the warrantless search. First, the Court noted the probation order did not confine the search to probationary purposes, nor did it limit the searching officers to probation officers. The Court then applied the reasonableness test, stating, "the touchstone of the Fourth Amendment is reasonableness," which is determined by balancing the degree of intrusion on an individual's privacy with the necessity of promoting legitimate government interests. Id., *13-14. The Court found the search condition reasonable, as it furthered the two primary goals of probation: rehabilitation and the protection of society from future criminal violations. Furthermore, the probation condition was clearly communicated to and accepted by Knights, which significantly diminished his reasonable expectation of privacy. The warrantless search, therefore, was reasonable under the Fourth Amendment, because it was supported by reasonable suspicion and authorized by a condition of probation.

Forfeiture Notice to Federal Prisoners

In *United States v. Dusenbery,* 122 S. Ct. 694 (2002), the Supreme Court held notice to a federal prisoner of the right to contest the administrative forfeiture of property requires the government's effort to be reasonably calculated to apprise the party of the pendency of the action. Dusenbery was arrested for and convicted of cocaine distribution and was sentenced to a term of imprisonment. While Dusenbery was in prison, the government initiated proceedings for administrative forfeiture of property seized from Dusenbery's trailer on the day of his arrest, pursuant to 21 U.S.C. § 881 and 19 U.S.C. § 1607. The government published a notice in the newspaper and sent notice by certified mail to Dusenbery at three locations, including to the correctional facility where he was incarcerated. The agency received no response within the time allotted and declared the items administratively forfeited. Five years later, Dusenbery filed a motion seeking return of the property seized. A mail room officer who worked where

Dusenbery was incarcerated testified in detail as to the procedures for accepting and delivering certified mail addressed to inmates. The district court ruled the government's notice sent to Dusenbery at the correctional facility satisfied his due process rights, even though there was no proof the mail actually reached him. The Court of Appeals affirmed and the Supreme Court granted *certiorari* to resolve a circuit conflict concerning due process notice requirements in an administrative forfeiture case involving an incarcerated interested party.

In affirming the Sixth Circuit's decision, the Supreme Court applied the "reasonably calculated" test from an earlier decision, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to determine the adequacy of the notice method used. The Court also noted the statute in this case indicated the government need only attempt to provide actual notice. Dusenbery misinterpreted the requirement of actual notice to mean actual receipt of notice and argued the government could have ensured delivery of the notice. The Court held such heroic efforts are not required. Short of allowing the prisoner to go to the post office himself, the government had to depend on a system provided by the prison and staff, and the government's use of that system in this case was reasonably calculated to apprise Dusenbery of the action.

TITLE 26 AND TITLE 26 RELATED CASES

Tax Evasion Deficiency Element

In *United States v. Bishop, III,* 264 F.3d 535 (5th Cir. 2001), Bishop, III ("Bishop"), a sole proprietor of a law firm was convicted of attempted tax evasion and filing a false income tax return. Bishop appealed his conviction and argued the indictment was defective because two counts omitted the tax deficiency and knowledge elements of tax evasion, since it failed to acknowledge certain items that would offset any tax deficiency. Bishop also contended the jury instructions were inadequate because they limited the jury's inquiry to the content of the returns he filed and prevented consideration of credits, refunds, and payments he made or qualified for but did not report on his returns. Finally, Bishop argued the court erred in allowing a revenue agent to summarize the government's evidence and erred in denying Bishop's motion for a new trial based on a juror's dishonesty concerning her prior conviction.

The Fifth Circuit affirmed Bishop's conviction, finding the indictment counts explicitly charged the three elements of tax evasion. The court noted "the non-existence of credits, refunds, and other payments may affect the extent of any deficiency but is not a specific element of tax evasion. There is no need to list each potentially offsetting item in the indictment." *Id.*, at 546. In regard to Bishop's jury instruction argument, the court stated the instructions were adequate and the district court did not prevent the jury from considering payments Bishop may have made to the Service. In fact, in their closing arguments, Bishop's attorneys stressed to the jury that Bishop made substantial payments to the Service on several occasions. Finally, even if Bishop was entitled to all of the credits, refunds, or payments he claimed, a substantial deficiency remained. The jury properly, and in accordance with the court's instructions, found Bishop had knowledge of the deficiency.

In addressing Bishop's remaining arguments, the court held the district court did not err in allowing summary testimony, and the district court's admittance of the agent's notes into evidence was harmless error. Finally, the district court did not err in denying Bishop's motion for new trial, since he failed to show how the juror, who admittedly should have been disqualified, affected the outcome of the case.

Conspiracy

In *United States v. Gricco*, 277 F. 3d 339 (3rd Cir. 2002), the Third Circuit held, to sustain a conviction for conspiracy to defraud the United States under 18 U.S.C. § 371, the evidence must be sufficient to prove beyond a reasonable doubt that impeding the Service was one of the conspiracy's objectives and not merely a foreseeable consequence or collateral effect. Gricco and McCardell, the defendants, were convicted of conspiracy to defraud the United States, tax evasion and making false tax returns. All of the charges related to Gricco and McCardell's failure to report, on their personal income tax returns, money stolen by cashiers working at airport parking facilities. Gricco and McCardell managed the parking facility and were responsible for devising the scheme and recruiting others to carry it out. Gricco and McCardell contended their convictions for conspiracy were not supported by sufficient evidence.

The government relied on three categories of circumstantial proof to meet their burden. First, the government relied on evidence the participants in the scheme did not report their illicit income. The court held while this evidence of parallel conduct had some probative value, it was not enough by itself to show an agreed upon object to impede the Service. Second, the government pointed to evidence that Gricco and a real estate broker who assisted in purchasing property with the illicit proceeds, structured various financial transactions to avoid filing currency transaction reports. The court again held the value of the evidence was limited because Gricco an McCardell were not convicted of conspiring to violate the anti-structuring statutes, but with conspiring to obstruct

the Service and structuring does not necessarily result in the evasion of taxes.

The government's third category of evidence consisted of testimony that Gricco told various participants not to deposit their illicit income in a bank but rather to purchase safes for their homes. The individuals testified they followed this advice because they did not want to attract the attention of the Service. The court held a rational jury could infer not only that Gricco foresaw the participants would pay no tax on their illicit income, but actually intended it to occur. Viewing all the evidence together, the Third Circuit held it was sufficient to support the conspiracy conviction.

Merger of Offenses

In *United States v. Gricco*, 277 F.3d 339 (3rd Cir. 2002), as factually set forth above, the Third Circuit held even if the district court erred in entering judgements of conviction and imposing sentences on both offenses of tax evasion and subscribing false tax returns because both offenses merged, such error did not affect Gricco and McCardell's substantial rights and would not warrant reversal. The Supreme Court in *Blockberger v. United States*, 284 U.S. 299, 304 (1932), set forth a rule for determining whether two provisions proscribe the same offense. The rule asks whether each offense requires proof of an element the other does not. If each offense contains such an element, it is presumed multiple punishment is allowed. Since Gricco and McCardell failed to raise the merger argument in the district court, under Fed.R.Cr.P. 52(b), to reverse the decision of the trial court, the Third Circuit held the lower court's error must be plain and affect the parties' substantial rights.

The government argued the offenses of tax evasion and making a false return each contain an element the other lacks. The offense of tax evasion requires proof of an attempt to evade the payment of a tax due and owing, whereas the offense of making a false return does not require proof of this element. Similarly, the offense of making a false return requires proof of a false statement on a return, whereas a violation of 26 U.S.C. § 7201 may be shown even if the taxpayer failed to file a tax return. Nevertheless, Gricco and McCardell argued the *Blockberger* test merely raises a presumption Congress meant to permit punishment under both provisions and many other Circuits have held the offenses of tax evasion and making a false return merge when they are based on the same act.

Ultimately, the Third Circuit found it unnecessary to decide whether the district court erred by entering judgments of conviction and imposing sentences on both offenses. The court noted, assuming for the sake of argument, the district court erred, the other prongs of the test under Rule 52(b) were not met. The sentences imposed on the defendants under 26 U.S.C. § 7206(1) were concurrent to their sentences for tax evasion, and thus the former sentences did not increase the length of their incarceration. *But see*, *United States v. Citron*, 783 F.2d 307, 312-14 (2nd Cir. 1986) (court vacated § 7206(1) convictions since the factual elements of the § 7201 counts were substantially identical to those of the lessor included § 7206(1) counts).

SEARCH AND SEIZURE

Search Of Password Protected Files In A Shared Computer

In *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001), the Fourth Circuit considered an appeal by Trulock seeking review of a dismissed *Bivens* suit brought against the former director of the FBI alleging an unconstitutional search of Trulock's home and seizure of a computer. Trulock had served as the United States Department of Energy's ("DOE") Director of Intelligence and Counterintelligence. After leaving DOE, Trulock wrote an article criticizing the White House, DOE, the FBI, and the CIA for ignoring security breaches and incompetence in their investigation of espionage at the Los Alamos Nuclear Laboratory. Trulock believed the FBI conducted its search in retaliation for Trulock's published criticism of the federal government. Trulock lived with his former executive assistant, Linda Conrad.

After the FBI falsely claimed to possess a search warrant and threatened to break down the front door in the presence of the media, a crying and shaken Conrad reluctantly gave the FBI her consent for them to search the townhouse she shared with Trulock. During the search, the FBI seized a personal computer shared by Trulock and Conrad, each of whom used private passwords unknown to each other. A FBI computer specialist searched the computer's files, looking at Trulock's password protected files on the shared computer's hard drive.

The court first determined Conrad's consent to the search had been coerced and, therefore, was not voluntary. Moreover, the court reasoned password protected files are analogous to a locked footlocker in a shared living situation. Since Trulock kept his password secret from Conrad, the court concluded Trulock had intended to exclude Conrad as well as outsiders from his personal computer files. Consequently, the court ruled Trulock possessed a reasonable expectation of privacy in the password protected computer files and, therefore, Conrad's authority to consent to a search of the shared townhouse and shared personal computer did not extend to Trulock's computer files. Thus,

even if Conrad had truly consented to a search, without a warrant the FBI could not have searched Trulock's computer files. Accordingly, the Fourth Circuit ruled the FBI's search of Trulock's password protected computer files was unconstitutional since the search violated Trulock's Fourth Amendment rights.

Evidence Suppressed Because Portions Of Pre-Warrant Search Violated The Fourth Amendment

In *United States v. Runyan,* 275 F.3d 449 (5th Cir. 2001), Runyan had been convicted of sexual exploitation of children and of possession, receipt, and distribution of child pornography. While searching for her belongings on Runyan's ranch, Runyan's estranged wife Judith discovered and removed pornographic pictures, CDs and computer discs belonging to Runyan, as well as her own computer. After Judith and some friends viewed a sampling, she turned the computer and pornographic material over to law enforcement officers, who unlike the private searchers examined all of the materials and computer files. Based on their examination of the materials and computer files, the police obtained a search warrant for Runyan's ranch. A search of the premises uncovered more pornography.

Runyan appealed his conviction to the Fifth Circuit asserting the pornographic material found on his ranch should be suppressed because the private and police search of his belongings before the issuance of the search warrant violated his Fourth Amendment rights. The Fifth Circuit ruled portions of the pre-warrant search of Runyan's belongings were unlawful because the police examined all of the pornographic material and computer files turned over, rather than just the selections viewed by the private searchers. Thus, the police exceeded the scope of the private searchers. The court determined the critical inquiry under the Fourth Amendment was whether prior to the issuance of the search warrant, the police gathered material with respect to which Runyan's "expectation of privacy" had not already been frustrated. Since the police exceeded the scope of the private search, they viewed material in which Runyan still enjoyed an expectation of privacy. Consequently, all of the pornographic material and computer files as well as any evidence obtained as a result of the information was subject to suppression. Accordingly, the Fifth Circuit remanded the case to the district court for further consideration whether the search warrant would have been sought and issued in the absence of the evidence obtained in violation of the Fourth Amendment.

OTHER CONSTITUTIONAL ISSUES

No Fifth Amendment Privilege For Failure To File Federal Income Tax Returns

In *United States v. Sabino, 274 F.3d 1053* (6th Cir. 2001), Sabino and co-defendants, Daniel and Donna Stewart, were convicted of conspiracy to defraud the United States by obstructing the functions of the Service, in violation of 18 U.S.C. § 371. The Stewarts were also convicted of tax evasion under 26 U.S.C. § 7201. Through the execution of a search warrant, Criminal Investigation discovered the Stewarts' names on a list of people affiliated with the Pilot Connection Society (PCS), an anti-tax organization. The Stewarts owned and operated Danco, Inc., a transmission business. Following PCS' "untax instructions," the Stewarts first closed their bank accounts and dissolved Danco, then created and funded a series of abusive trusts with the proceeds. Sabino served as the trustee for several of the trusts and his signature or signature stamp appeared on many of the documents underlying transactions undertaken by the trusts.

During the investigation, a special agent advised the Stewarts of their *Miranda* rights. Thereafter, an attorney allegedly advised them not to file income tax returns because filing returns would constitute making self-incriminating statements. The Stewarts contended their rights under the Fifth Amendment were violated because their failure to file returns was charged as an over act and was introduced at trial as evidence of willfulness to evade taxes.

The Sixth Circuit noted a taxpayer raising the Fifth Amendment as a privilege against filing a tax return must specifically claim the privilege "in response to particular questions, not merely in a blanket refusal to furnish any information." *United States v. Saussy*, 802 F.2d 849, 855 (6th Cir. 1986) (quoting *United States v. Johnson*, 577 F.2d 1304, 1311 (5th Cir. 1978)). Further, the court reasoned the requirement to file tax returns was not directed at the Stewarts because they were suspected of criminal activities. Moreover, the court observed the Stewarts failed to file federal income tax returns and consequently did not raise any particular objections to filing the requested information. Accordingly, the Sixth Circuit rejected the Stewarts' claim and ruled their Fifth Amendment rights are not violated by the fact they are required to file returns.

GRAND JURY

Disclosure From One Assistant United States Attorney To Another

In *Impounded*, 277 F.3d 407 (3rd Cri. 2002), an attorney appealed to the Third Circuit a district court's decision denying the attorney's motion for a protective order under Fed. R. Crim. P. 6(e)(2) to prevent an Assistant United States Attorney ("AUSA") from disclosing grand jury information to another AUSA, without first obtaining a court order.

During a grand jury investigation involving the attorney as a subject, one AUSA disclosed information to an AUSA in a different judicial district regarding a potential conflict of interest between the attorney and his client in a pending criminal case. The Third Circuit reasoned the text of Fed. R. Crim. P. 6(e)(3)(A)(i) authorizes an AUSA to disclose grand jury material to another AUSA for use in the performance of the AUSA's law enforcement duties, without regard to geographic limitations. In reaching its holding, the Third Circuit noted subsection (C)(iii) reflects Congressional intent to expedite and facilitate the use of one grand jury's information by other grand juries investigating other crimes.

Accordingly, the Third Circuit upheld the district court's order denying the attorney's motion for a protective order relating to the disclosure of grand jury information.

EVIDENCE

Summary Witness Testimony Allowed With Appropriate Jury Instructions

In *United States v. Sabino, 274 F.3d 1053* (6th Cir. 2001), as factually set forth on page four of this Bulletin, the Sixth Circuit upheld the district court's jury instructions regarding a summary witness. During trial, the government called a Service employee to testify as a summary witness. On appeal to the Sixth Circuit, the Stewarts contended the witness offered impermissible credibility determinations as well as legal conclusions and, consequently, the district court committed plain error by allowing the witness' testimony as evidence. Testimony summarizing evidence in income tax prosecutions is admissible provided the judge properly instructs the jury. *United States v. Sturman*, 951 F.2d 1466, 1480 (6th Cir. 1991) (quoting *United States v. Lattus*, 512 F.2d 352, 353 (6th Cir. 1975)). Moreover, the testimony of a summary witness "should be accompanied by a limiting instruction which informs the jury of the summary's purpose and that [the summary itself] does not constitute evidence." *United States v. Paulino*, 935 F.2d 739, 753 (6th Cir. 1991).

The Sixth Circuit concluded in the instant case, the jury instructions given by the district court were proper, complete, and included the appropriate limitations, such as the witness was appearing as an opinion witness and not as an expert witness. Further, the court determined the use of the Service employee as a summary witness was not improper because the defendants cross-examined her extensively. Accordingly, the Sixth Circuit concluded the district court had not committed error by allowing the testimony of the government's summary witness and upheld the lower court's ruling.

FORFEITURE

Use Of Seized Assets To Fund Criminal Defense

In *United States v. Farmer,* 274 F.3d 800 (4th Cir. 2001), United States Customs special agents executed search warrants at Farmer's residence, seeking evidence Farmer was engaged in the counterfeiting of trademarked clothing. Agents seized more than $500,000 in currency and property. When Farmer was indicted two years later for trafficking in counterfeited clothing and for money laundering, he filed a motion for a hearing to determine whether a portion of the seized funds should be released to fund his criminal defense. Farmer alleged the government seized essentially all of his assets, including legitimate assets, during the execution of the search warrant, which put him out of business and prevented him from hiring counsel. As a result, Farmer argued, he had been deprived of his Sixth Amendment and Due Process rights to be heard on the use of his legitimate property to hire the attorney of his choice. The district court summarily denied Farmer's motion.

Farmer appealed the denial of the motion, asserting he had a right to demonstrate some of the seized assets were untainted and necessary to be released to him so he could hire counsel for his criminal defense. The Fourth Circuit agreed, concluding due process required holding a hearing for Farmer for the limited purpose of determining how the civil seizures affected Farmer's right to select counsel of his choice in the related criminal case. In so holding, the court cited the three factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to be considered when identifying the specific dictates of due process. Addressing the three factors, the court found: (1) Farmer had advanced a private interest in obtaining a pretrial hearing; (2) there existed a risk of erroneous deprivation of Farmer's interest in the absence of a hearing; and, (3) the government would not be unduly burdened by the hearing. The Fourth Circuit remanded the

case with an order to hold a hearing, but noted Farmer would have the burden of showing, by a preponderance of the evidence, that the government seized untainted assets without probable cause and he (Farmer) needs those same assets to hire counsel.

Federal Preemption Over State Homestead Exemption

In *United States v. Wagoner County Real Estate*, 278 F.3d 1091 (10th Cir. 2002), the Tenth Circuit held Oklahoma's statutory and constitutional provisions protecting homesteads did not prevent the federal government from obtaining forfeiture of a home used to facilitate federal drug law violations under 18 U.S.C. § 881. After arresting an individual on drug charges, the police obtained a search warrant to search the residence where the drugs were purchased. The search produced additional drugs and firearms. The government then initiated a forfeiture action against the residence, which the trial court granted. On appeal, the homeowner contended the residence was not subject to forfeiture because it was subject to the state's homestead exemption and because the forfeiture was excessive, given the property's appraised value of $136,000.

The homeowner claimed, as a resident of Oklahoma and a Native American Indian, her property may not be forfeited because it is protected by the general Oklahoma homestead exemption and by the Oklahoma constitutional provision relating to Indian homesteads. The Tenth Circuit, holding federal preemption of the state homestead exemption was necessary, noted Congress has the power to preempt state law under Article VI of the Supremacy Clause of the United States Constitution. Section 881(a)(7) provides for forfeiture of "all real property" used to commit a federal drug violation. Thus, the statute's broad, unambiguous language is in direct conflict with Oklahoma law allowing forfeiture of all property except homestead property. Furthermore, all the other federal circuits which have considered the conflict between § 881(a)(7) and state homestead protections, have determined residential property is subject to forfeiture despite state exemptions.

MONEY LAUNDERING

Proof of Proceeds

In *United States v. Rodriguez,* 278 F.3d 486 (5th Cir. 2002), Rodriguez was convicted of illegal transportation of aliens and money laundering. Rodriguez was involved in an operation of smuggling undocumented aliens from Mexico into North Texas. Rodriguez charged each alien between $1,000.00 and $1,200.00 to illegally transport them into the United States. Eventually Rodriguez was stopped at a border checkpoint and seven undocumented aliens were found concealed beneath clothing in the rear of Rodriguez' van. Subsequently, a search warrant was executed at Rodriguez' home, where agents found cash and financial documents as well as multiple vehicles and personal luxury items. The van in which Rodriguez was stopped had been selected and purchased by Rodriguez with cash and was the subject of the money laundering counts. Bank records revealed the van was purchased during a period in which Rodriguez was depositing and withdrawing large sums of money into and out of his bank account, which included an insurance settlement check for $10,884.25.

On appeal, Rodriguez argued there was insufficient evidence to prove the money he used to purchase the van involved proceeds of the specified unlawful activity of transporting and harboring aliens. Rodriguez further argued he had deposited the $10,884.25 settlement check into his bank account, withdrew nearly all of it three days later and could have used the money he withdrew to purchase a cashier's check for $10,209.42, which was ultimately used to purchase the van. Rodriguez claimed there was no proof the cashier's check was purchased using proceeds from a specified unlawful activity.

In affirming Rodriguez' money laundering convictions, the Fifth Circuit cited its previous decision in *United States v. Willey*, 57 F.3d 1374, 1386 (5th Cir. 1995), in which it held "[i]t is not necessary to prove with regard to any single transaction that the defendant removed all trace of his involvement with the money or that the particular transaction charged is itself highly unusual." The court further noted although Rodriguez offered an alternate source for the funds used to purchase the van, Rodriguez ignored the fact the jury was free to discredit his theory the funds were from a legitimate source.

Robber Also Convicted Of Money Laundering

In *United States v. Carcione,* 272 F.3d 1297 (11th Cir. 2001), Carcione was convicted under the Hobbs Act, 18 U.S.C. § 1951, based on his participation in the planning and execution of the violent robbery of expensive jewelry belonging to a wealthy, elderly woman. After the robbery, Carcione and a co-conspirator crossed state lines, later selling a seven and one-half carat diamond stolen during the robbery and dividing the proceeds among all the co-

conspirators. Carcione was also convicted of money laundering under 18 U.S.C. § 1956 (a)(1)(A)(i) because of his involvement in the sale of the diamond ring for cash. Carcione appealed his convictions to the Eleventh Circuit.

For Carcione to be convicted of money laundering, the government must prove the elements required under 18 U.S.C. § 1956 (a)(1)(A)(i). After reviewing Carcione's case, the Eleventh Circuit was satisfied all of the requirements for conviction had been met. Carcione clearly conducted a financial transaction, knowing the diamond ring to be the proceeds of a specified unlawful activity ("SUA"), to promote the furtherance of the SUA (Hobbs Act). In reaching its conclusion, the court noted the sale of the diamond ring was "simply one further step in the ongoing Hobbs Act conspiracy" because by transforming stolen property into cash, the financial transaction promoted "the ultimate objective of the conspiracy." Accordingly, the Eleventh Circuit affirmed Carcione's convictions.

INVESTIGATIVE TECHNIQUES

Statements Of Necessity In Spin Off Wiretap Applications

In *United States v. Blackmon,* 273 F.3d 1204 (9th Cir. 2001), Blackmon appealed his conviction for controlled substance-related offenses, arguing the district court erred in denying his motion to suppress wiretap evidence. The Blackmon wiretap application was a spin off application from the initial wiretap application, which targeted an alleged drug dealer who lived in Blackmon's housing project. Blackmon argued the application was a duplicate of the initial wiretap and, therefore, the government's application for the wiretap failed to make the statutorily required showing of necessity pertaining to him. The Ninth Circuit agreed, holding the wiretap evidence should have been suppressed because the application contained material misstatements and omissions, and because the application did not otherwise make a particularized showing of necessity.

In reversing the conviction, the Ninth Circuit found the statements of necessity in the wiretap application for Blackmon were a carbon copy of those in the application for the initial suspect and, therefore, did not pertain to Blackmon. Thus, the statements of necessity in the wiretap application concerning the use of surveillance and informants in the investigation of the initial suspect were material misstatements when it came to the Blackmon investigation. Furthermore, the Blackmon wiretap application failed to include any statement of investigative efforts expended on Blackmon specifically, other than trap and trace devices and pen registers, as required by the necessity provision in 18 U.S.C. § 2518(1)(c) and (3)(c).

The court then purged the Blackmon wiretap application of the material misstatements. The remainder of the application contained only "boilerplate" assertions true of any drug investigation, and failed "to contain sufficiently specific facts to satisfy the requirements of 18 U.S.C. § 2518(1)(c)." *Id*., at *17.

SENTENCING

Acceptance Of Responsibility

In *United States v. Leal-Mendoza*, No. 00-50737, 2002 U.S. App. LEXIS 1213 (5th Cir. Jan. 29, 2002), the court vacated the district court's finding that Leal-Mendoza and Galindo did not qualify for a three level reduction for "acceptance of responsibility" under U.S.S.G. § 3E1.1(b). Leal-Mendoza and Galindo were convicted of transporting a large quantity of drugs in a nonjury trial. At sentencing, the district court reluctantly granted a two level reduction for "acceptance of responsibility" under § 3E1.1(a), finding the policy of the court was to grant it. The district court, however, declined to grant an additional reduction of one level under U.S.S.G. § 3E1.1(b) ". . . because of its reluctance on whether even the two level decrease was justified."

On appeal, the Fifth Circuit analyzed whether Leal-Mendoza and Galindo qualified for a three level reduction under § 3E1.1(b) based on whether they qualified for a two level reduction under § 3E1.1(a). To qualify for a three level reduction under § 3E1.1(b), a defendant must meet three criteria: (1) he/she must qualify for the two level reduction under § 3E1.1(a); (2) the offense level prior to the operation of § 3E1.1(a) must be a level 16 or higher; and, (3) he/she must either "timely provide complete information to the government concerning his own involvement in the offense" or timely enter a guilty plea. Here, the court found once the district court granted Leal-Mendoza and Galindo a two level reduction under § 3E1.1(a), the district court was not entitled to revisit whether they merited an acceptance of responsibility reduction under § 3E1.1(b). Having found Leal-Mendoza and Galindo met the first prong of § 3E1.1(b), the court limited its determination to whether Leal-Mendoza and Galindo met the two remaining prongs under § 3E1.1(b). Thus the court, upon concluding Leal-Mendoza and Galindo met the two remaining prongs under § 3E1.1(b), vacated their sentences and remanded for re-sentencing.

Minor Participant, Sophisticated Concealment, Obstruction Of Justice and Departure

In *United States v. Sabino 274 F.3d 1053* (6th Cir. 2001), as factually set forth on page four of this Bulletin, the Sixth Circuit held Sabino was not entitled to a reduction in his offense level for serving as a minor participant in the conspiracy. While Sabino contributed no special knowledge or skills to the completion of the conspiracy, the Sixth Circuit ruled Sabino's actions as trustee were indispensable to the conspiracy and thus the district court's reduction in his offense level was clearly erroneous. Because of the complexity of the case, coupled with the use of seven trusts and other sham financial transactions to complete the tax evasion conspiracy and conceal the Stewarts' ownership interests, the Sixth Circuit also ruled the district court abused its discretion by failing to apply the sophisticated concealment enhancement to Sabino and the Stewarts.

The government contended the district court erred in failing to enhance Sabino's and Donna Stewart's sentences for obstruction of justice as a result of false testimony they gave in grand jury proceedings. The Sixth Circuit, however, determined since the false statements were overt acts in furtherance of the conspiracy, to impose an enhancement for obstruction of justice "would constitute double-counting." Accordingly, the Sixth Circuit upheld the district court's failure to enhance Sabino's and Donna Stewart's sentences for obstruction of justice. Finally, the government contended the district court erred in granting Sabino a downward departure based on the recent death of Sabino's wife, his age (72), his poor health, absence of any physical risk to others, absence of a risk of flight, and the court's conclusion Sabino played a minor role in the conspiracy. Because of the relatively small departure, the Sixth Circuit opined the district court did not abuse its discretion by departing downward three levels in Sabino's offense level.

Government Not Compelled To Seek Downward Departure

In *United States v. Hawkins, 274 F.3d 420* (6th Cir. 2001), Hawkins pled guilty to two counts of aiding and abetting in two armed bank robberies. As part of his plea agreement, Hawkins agreed to cooperate with authorities. Hawkins did everything expected of him, giving federal agents helpful information regarding the involvement, identity and whereabouts of other individuals involved in the bank robberies. When Hawkins was sentenced, the government failed to move for a downward departure based on Hawkins's substantial assistance to the government pursuant to U.S.S.G. § 5K1.1. Consequently, Hawkins appealed to the Sixth Circuit claiming the district court erred by failing to compel the government to file a motion for a downward departure. The government responded by arguing: 1) filing a motion for a downward departure was within the government's discretion; 2) absent unconstitutional motives, the government could not be compelled to file the motion; and, 3) Hawkins was not entitled to a reduction because he had not been required to plead guilty to two associated firearms offenses.

As articulated in its decision in *United States v. Moore,* 225 F.3d 637 (6th Cir. 2000), the Sixth Circuit's rule is the government's refusal to move for a downward departure, where a plea agreement gives complete discretion to the government in regard to a § 5K1.1 departure, is subject to review by the court only to ascertain whether it was grounded on unconstitutional motives, such as race or religion. Hawkins has made no allegation the government's action was precipitated by unconstitutional motives; rather, Hawkins claims the government's refusal to request a downward departure in his sentencing violates his constitutional rights to due process and equal protection, and was "not rationally related to any legitimate government purpose." Accordingly, the Sixth Circuit affirmed the decision of the district court. Nevertheless, the panel hearing Hawkins' case opined the rule followed by the Sixth Circuit may create an unduly restrictive interpretation of the Supreme Court's decision in *Wade v. United States*, 504 U.S. 181 (1992), and recommended an *en banc* review of their decision in this case to possibly modify or clarify the Circuit's interpretation of *Wade*, especially when, as here, the government conceded a defendant had done everything expected of him.

Government's Failure To Adhere To Terms Of Plea Agreement Violates A Defendant's Substantial Rights

In *United States v. Barnes,* 278 F.3d 644 (6th Cir. 2002), the Sixth Circuit vacated the district court sentence and remanded the case for re-sentencing because the government failed to make an express sentence recommendation agreed to in the plea agreement. Barnes pleaded guilty to using a communication device to facilitate a drug felony. As part of the plea agreement, the government agreed to recommend the district court impose a sentence at the low end of the guideline range. Even though the terms of the plea were read aloud by the court at the plea hearing, including the government's specific sentence recommendation, the government failed to state on the record, its recommendation at the sentencing hearing. At the sentencing hearing, the guideline range was determined to be 12 to 18 months, and the court sentenced Barnes to eighteen months' imprisonment. Barnes appealed the sentence.

On appeal, the Sixth Circuit applied a plain error standard of review to Barnes' claim because he failed to object to the sentence at the sentencing hearing. Under this standard of review, the court could only reverse if it found plain error had affected the Barnes' substantial rights and had seriously affected the fairness, integrity or public reputation of the judicial proceedings. The Sixth Circuit followed previous decisions in which it held it was irrelevant whether the sentencing judge would or would not have been influenced had the details of the negotiations for the plea been known. Thus, even though the court may have read and had the Barnes' plea agreement before it, that alone was insufficient to establish the government had upheld its part of the plea agreement. By failing to expressly request that Barnes be sentenced at the low end of the guideline range at the sentencing hearing, the government breached the plea agreement. This failure to adhere to the letter of the plea agreement affected Barnes' substantial rights as well as the integrity of the judicial proceeding. The court vacated the sentence, remanded the case and ordered Barnes to be re-sentenced before a different district court judge.

A Guilty Plea Can Be Withdrawn At Any Time Before The Plea Agreement Is Accepted By The Court

In *United States v. Shaker*, 279 F.3d 494 (7th Cir. 2002), the Seventh Circuit considered an appeal by Shaker, who had pleaded guilty to a charge of possession of a firearm by a felon as a condition of a plea agreement. Before the district court had accepted the plea, however, Shaker changed his mind and sought to withdraw his plea. The government argued Federal Rule of Criminal Procedure 32(e) prevented the withdrawal of a plea without a "fair and just reason" and Shaker had proffered no such reason. The district court sided with the government and denied Shaker's motion to withdraw his guilty plea

On appeal the government maintained the district court did not abuse its discretion by denying Shaker's motion to withdraw his guilty plea because Shaker failed to comply with Rule 32(e). The Seventh Circuit articulated its view that a guilty plea arrangement is a process involving both the defendant and the court, culminating in the court's acceptance of the plea. A crucial component of the process is the court's ultimate acceptance of the guilty plea. *See*, *United States v. Hyde*, 520 U.S. 670 (1997). Indeed, the Seventh Circuit opined "until the plea is accepted it might be said that there is nothing for the defendant to withdraw."

The Seventh Circuit ruled Rule 32(e) is "triggered only when the district court completes the plea process by accepting the plea." Accordingly, in Shaker's case the Seventh Circuit reversed the decision of the district court, holding the district court should have permitted Shaker to withdraw his plea at any time before the plea was accepted by the court. Furthermore, the Seventh Circuit stated the district court should have allowed Shaker to withdraw his plea without any inquiry into his reasons for seeking to set the plea aside.

Upon Remand For Re-sentencing, A District Court Is Not Limited To The Existing Record

In *United States v. Matthews*, 278 F.3d 880 (9th Cir. 2002), Matthews was convicted in district court of being a felon in possession of a firearm and sentenced as an Armed Career Criminal to 280 months of incarceration. Matthews appealed both the underlying conviction as well as his sentence. A three judge panel of the Ninth Circuit affirmed Matthews' conviction, reversed his sentence, and remanded the case to the district court for re-sentencing on the existing record. The Ninth Circuit agreed to rehear Matthews' case *en banc* to determine when remanding for re-sentencing, whether it should limit the district court's discretion to consider additional evidence.

The Ninth Circuit held, if a district court errs in sentencing and the case is remanded for re-sentencing without placing limitations on the evidence, the district court can consider all matters relevant to sentencing even though they may not have been raised at the first sentencing hearing. *See, Witte v. United States*, 515 U.S. 389 (1995). However, under certain circumstances, the Ninth Circuit limits the discretion of the district court to repentance *de novo*. Such cases "involve circumstances in which either additional evidence would not have changed the outcome. . . or where there was a failure of proof after a full inquiry into the factual question at issue . . . ." *United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (*en banc*). In Matthews' case, the Ninth Circuit opined the circumstances of the case did not warrant a departure from its general practice of remanding without limiting the district court's sentencing discretion and remanded accordingly.

CRIMINAL TAX BULLETIN

FEBRUARY 2002

TABLE OF CASES

SUPREME COURT CASES

United States v. Knights, 122 S. Ct. 587 (2001) 1

United States v. Dusenbery, 122 S. Ct. 694 (2002) 1

TITLE 26 AND TITLE 26 RELATED CASES

United States v. Bishop, III, 264 F.3d 535 (5th Cir. 2001) 2

United States v. Gricco, 277 F. 3d 339 (3rd Cir. 2002) 2

United States v. Gricco, 277 F.3d 339 (3rd Cir. 2002) 3

SEARCH AND SEIZURE

Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2001) 3

United States v. Runyan, 275 F.3d 449 (5th Cir. 2001) 4

OTHER CONSTITUTIONAL ISSUES

United States v. Sabino, 274 F.3d 1053 (6th Cir. 2001) 4

GRAND JURY

Impounded, 277 F.3d 407 (3rd Cri. 2002) 4

EVIDENCE

United States v. Sabino, 274 F.3d 1053 (6th Cir. 2001) 5

FORFEITURE

United States v. Farmer, 274 F.3d 800 (4th Cir. 2001) 5

United States v. Wagoner County Real Estate, 278 F.3d 1091 (10th Cir. 2002) 6

MONEY LAUNDERING

United States v. Rodriguez, 278 F.3d 486 (5th Cir. 2002) 6

United States v. Carcione, 272 F.3d 1297 (11th Cir. 2001) 6

INVESTIGATIVE TECHNIQUES

United States v. Blackmon, 273 F.3d 1204 (9th Cir. 2001) 7

SENTENCING

United States v. Leal-Mendoza, No. 00-50737, 2002 U.S. App. LEXIS 1213 (5th Cir. Jan. 29, 2002) 7

United States v. Sabino 274 F.3d 1053 (6th Cir. 2001) 7

United States v. Hawkins, 274 F.3d 420 (6th Cir. 2001) 8

United States v. Barnes, 278 F.3d 644 (6th Cir. 2002) 8

United States v. Shaker, 279 F.3d 494 (7th Cir. 2002) 9

United States v. Matthews, 278 F.3d 880 (9th Cir. 2002) 9

Department of the Treasury
Internal Revenue Service
Document 10023 (02-2002)
Catalog Number 24304B