Criminal Tax Bulletin

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FIFTH AMENDMENT DOUBLE JEOPARDY

Double Jeopardy – Punitive Tax on Controlled Substances

In ***Dye v. Frank***, 355 F.3d 1102 (7th Cir. January 27, 2004), the Seventh Circuit held the imposition of a state drug tax was so punitive in purpose and effect that it constituted a criminal punishment for purposes of double jeopardy. During the execution of a search warrant at Dye's residence, police found cocaine which did not bear the controlled substance tax stamps required under state law. Subsequent to the search, the State of Wisconsin instituted a collection procedure to collect the delinquent taxes, interest, and penalties. The State latter seized $4,896 from Dye's bank account, however, the money was returned soon thereafter even though the tax assessment remained in effect for over three years. In addition to the tax assessment, Dye was charged and convicted of possession with intent to distribute a controlled substance. Dye alleges that a tax seizure followed by criminal imprisonment violates the prohibition against multiple punishments. The issue that emerges is whether the tax seizure constituted criminal punishment.

To determine whether a civil penalty is so punitive that it should be characterized as criminal punishment, the Seventh Circuit looked to the factors outlined by the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), and reaffirmed in *Hudson v. United States*, 522 U.S. 93 (1997). These include whether the sanction: (1) involves an affirmative disability or restraint; (2) has historically been regarded as a punishment; (3) comes into play only upon a finding of *scienter*; (4) promotes the traditional aims of punishment such as retribution and deterrence; (5) addresses behavior which is already a crime; (6) serves an alternative purpose; and (7) appears excessive in relation to the alternative purpose. Using the *Kennedy* factors, the court concluded that the drug tax was so punitive in purpose and effect that it constituted a criminal punishment.

In reaching their decision, the court acknowledged that a few of the factors were not present, however, the absence of those factors was not crucial. Specifically, the court noted monetary fines do not involve an affirmative disability or restraint and have not historically been viewed as punishment. Further, the statute imposes strict liability and therefore does not require *scienter*. The court found support for their conclusion in the Supreme Court's decision in the *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994). In *Kurth Ranch* the Supreme Court held Montana's tax on the possession of illegal drugs was a punishment for purposes of double jeopardy.

The second part of the court's analysis focused on whether jeopardy attached to the tax assessment and seizure. The Seventh Circuit adopted the Fifth Circuit's position, reasoning that jeopardy attaches to a punitive tax when the defendant voluntarily pays the amount due in full or when the government takes title to a defendant's assets. Under this approach jeopardy attached as soon as Dye's bank account funds were seized.

The court noted this case was analogous to those where a defendant is sentenced to both a fine and imprisonment when the statute allows for only a fine or imprisonment. In such cases, if the fine has been paid, the defendant has endured one of the alternative punishments. The government cannot undo the punishment by returning the money, nor can it seek to impose another punishment once the money has been paid.

SIXTH AMENDMENT

Under Sixth Amendment's Confrontation Clause Defendants are Entitled to Cross-Examine Witnesses

In ***Crawford v. Washington***, No. 02-9410 (S. Ct. Mar. 8, 2004), defendant Crawford had been convicted in the State of Washington of assault and attempted murder after he stabbed a man who allegedly tried to rape his wife, Sylvia. At trial, the State introduced a tape-recorded, out-of-court statement that Crawford's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Because Sylvia did not testify at trial because of marital privilege, Crawford had no opportunity for cross-examination. The Washington State Supreme Court upheld

Crawford's conviction after determining that Sylvia's statement was reliable because it was interlocked with Crawford's own statement to police.

On appeal to the U.S. Supreme Court, Crawford alleged that admitting Sylvia's out-of-court statement as evidence violates his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio v. Roberts*, 448 U.S. 56 (1980), the right of confrontation does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Since Sylvia's statement had closely resembled Crawford's account of the events, the trial court had allowed the evidence based on its perception of its trustworthiness and reliability.

In the instant case, the U.S. Supreme Court abrogated its earlier holding in *Ohio v. Roberts*. The Court ruled that out-of-court statements by witnesses that are testimonial in nature are barred under the Sixth Amendment's Confrontation Clause, unless the witnesses are unavailable and defendants had prior opportunity to cross-examine the witnesses, regardless of whether such statements are deemed reliable by the court. Accordingly, the U.S. Supreme Court reversed and remanded a decision by the Supreme Court of the State of Washington that had reinstated Crawford's conviction

Rights Violated by Police Questioning without *Miranda* Warning

In ***Fellers v. United States***, 124 S. Ct. 1019 (2004), the U.S. Supreme Court held that police officers violated a defendant's Sixth Amendment rights during a post-indictment visit to his home by deliberately eliciting information from him without first advising him of his *Miranda* rights.

After a grand jury indicted Fellers for conspiracy to distribute methamphetamine, two police officers went to Fellers' home to arrest him. After Fellers admitted the officers into his living room, they informed him they had come to discuss his involvement in methamphetamine distribution. The officers advised Fellers that they had a federal warrant for his arrest and that a grand jury had indicted him. During the ensuing discussion, Fellers made several inculpatory statements. The officers transported Feller to the county jail, where for the first time they advised him of his *Miranda* rights. After Fellers and the officers signed a *Miranda* waiver form, Fellers reiterated his earlier inculpatory statements.

Before trial, Fellers moved to suppress the inculpatory statements he made both at his home as well as at the jail. A magistrate judge recommended that the home statements be suppressed because the officers had not informed Fellers of his *Miranda* rights when they questioned him, and that portions of his jail statements also should be suppressed as fruits of the prior failure to provide *Miranda* warnings. At trial, the district court suppressed the home statements, but admitted the jail statements pursuant to *Oregon v. Elstad*, 470 U.S. 298 (1985), after concluding that Fellers had knowingly and voluntarily waived his *Miranda* rights at the jail before making the statements there. On appeal, the Eighth Circuit held that Feller's jail statements were properly admitted under *Elstad*, and that the officers did not violate his Sixth Amendment right to counsel under *Patterson v. Illinois*, 487 U.S. 285 (1988) because they did not "interrogate" him at his home.

The Supreme Court, however, ruled that the Eighth Circuit erred in holding that the absence of an "interrogation" foreclosed Feller's claim that the jail statements should have been suppressed as fruits of the home statements. In reaching its holding, the Court decided that the officers "deliberately elicited" information from Feller when they first spoke with him at his house. Accordingly, the Court ruled that since the discussion took place after Feller's indictment, outside the presence of counsel, and in the absence of any waiver of Feller's Sixth Amendment rights, the Eighth Circuit erred in holding that the officers' actions did not violate the Sixth Amendment standards articulated in *Massiah v. United States*, 377 U.S. 201 (1964). Further, the Court ruled that because of the Eighth Circuit's erroneous determination regarding the questioning of Feller, the Eighth Circuit improperly conducted its "fruits" analysis under the Fifth Amendment. Consequently, the Supreme Court reversed the ruling of the Eighth Circuit and remanded the case for further proceedings.

Waiving Sixth Amendment Right to Counsel

In ***Iowa v. Tovar***, 124 S. Ct. 1379 (Mar. 8, 2004), the Supreme Court unanimously held the Sixth Amendment right to counsel does not require a trial court to instruct a defendant on the usefulness of an attorney prior to accepting a guilty plea. Between 1996 and 2000, Tovar was convicted on three separate occasions of operating a motor vehicle while intoxicated ("OWI"): once in 1996, when he pleaded guilty without counsel, once in 1998 when he pleaded guilty and was represented by counsel, and a third time in 2000, when he pleaded not guilty and was represented by counsel. Iowa state law permits a third OWI offense to be elevated to a felony upon a showing of two prior OWI convictions.

At the trial of the third offense, Tovar's attorney moved to preclude the use of the 1996 conviction to enhance the most recent charge to a third offense felony, arguing Tovar's waiver of his Sixth Amendment right to counsel at his first guilty plea was invalid. The district court denied the motion and found Tovar guilty. The Iowa court of appeals affirmed, but the Iowa supreme court reversed and remanded the case to the district court with the instruction Tovar's entry of judgment on the 2000 charge be made without consideration of the 1996 conviction. The court held a defendant must be advised specifically that waiving the right to counsel (1)

entails a risk that a viable defense will be overlooked and (2) may deprive the defendant the opportunity to obtain an opinion, based on the facts and applicable law, regarding whether a guilty plea would be wise.

The U.S. Supreme Court held that neither of the two warnings is mandated by the Sixth Amendment, and reiterated its previous holding that a waiver of the right to counsel is knowing and intelligent if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances, even though he may not know the specific detailed consequences of invoking it. Further, the "constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea. *Id*., at 1383. In this case, the Court noted, the trial court not only advised Tovar of his rights and the consequences of waiving those rights should he plead guilty, Tovar affirmatively waived counsel three times during the 1996 offense proceedings and later declined the court's offer of time to hire an attorney. Moreover, the Court noted, throughout the appeals process Tovar never claimed he did not fully understand the charge or the potential punishment prior to pleading guilty, nor did he assert he was unaware of his right to counsel.

Finally, contrary to the Iowa Supreme Court's belief the Sixth Amendment required such specific language to clearly admonish a defendant of the consequences of self representation, the Court found the warnings "might confuse or mislead a defendant more than they would inform him," since the language could be misconstrued as a suggestion, and perhaps an unrealistic one, that a meritorious defense exists. *Id*., at 1390. Although the Sixth Amendment does not require the specific admonitions ordered by the Iowa Supreme Court, the U.S. Supreme Court noted state legislatures are nonetheless free to adopt by statute any guides regarding the acceptance of an uncounseled plea they deem useful.

TITLE 26

26 U.S.C. §§ 6103 and 7431(c)(1)(A)

Statutory Damages Upheld for Negligent Disclosure of Tax Return Information by IRS Special Agent at Retirement Dinner

In ***Siddiqui v. U.S.***, No. 02-17123 (9th Cir. Mar. 2004), the Ninth Circuit affirmed a district court's judgment relating to civil damages stemming from the negligent disclosure of tax return information.

Siddiqui and associates (the taxpayers) owned and operated a restaurant called "Bagel Nosh" in the Phoenix, Arizona area. Bagel Nosh and the taxpayers were the subjects of an IRS criminal investigation. Plaintiffs' two lawyers were present along with other members of the public, including several from the federal and state law enforcement community in the Phoenix area, at a retirement dinner "roast" held to honor a retiring IRS CI special agent who had been based in Phoenix. As part of the exchange of humor staged in front of the approximately 100 assembled guests during the "roast," the retiring special agent presented a colleague with a Bagel Nosh baseball cap while commenting to the entire group that the cap was "[a]n item of evidence that you missed at the search of the [taxpayers' homes]. They want you to have it. It says tax evasion evidence inside. It's still a pending case." Embroidered on the back of the cap was a citation to 26 U.S.C. § 7201. When the citation was read aloud, one of the taxpayers' lawyers called out "7206(1)."

The taxpayers subsequently filed a civil lawsuit against the government seeking punitive damages and $600,000 as statutory damages for 100 acts of disclosure of the taxpayers' tax return information in violation of 26 U.S.C. § 6103. The district court awarded each of the six taxpayers $1,000 in statutory damages for one act of disclosure and held that punitive damages are not available without proof of actual damages.

On appeal, the Ninth Circuit observed that § 6103 mandates that "return information" must be kept confidential and that "return information" includes knowledge whether a taxpayer is under investigation. Moreover, the government conceded that the special agent's remarks constituted a grossly negligent violation of § 6103(a)(1). Section 7431(c)(1)(A) provides for statutory damages of $1,000 for each unauthorized disclosure of return information. The Ninth Circuit rejected the taxpayers' argument that they suffered 100 separate acts of disclosure, ruling that the taxpayers were only entitled to $6,000 ($1,000 for each of 6 taxpayers) because regardless of how many people heard the special agent's negligent disclosure of return information, his single statement constituted under § 6103 only one act of disclosure, not 100 acts of disclosure. Furthermore, the Ninth Circuit ruled that § 7431(c)(1)(B) precludes punitive damages against the United States absent proof of actual damages. Accordingly, the Ninth Circuit affirmed the district court's judgment.

26 U.S.C. §7206 (1) and (2)

Forms 8300 filed for Nonexistent Transactions

In ***United States v. Anderson***, *353 F.3d 490* (6th Cir. December 23, 2003), the Sixth Circuit held convictions under I.R.C. § 7206(1) & (2) for willfully filing and assisting in the preparation of false returns were valid, even though the Forms 8300 the defendants filed were for nonexistent transactions. The indictment alleged that Anderson and her co-defendants were part of a conspiracy with multiple objectives, one of which involved the filing of false returns (Forms 8300) with the IRS that reported cash transactions of over $10,000, when in fact no transaction had occurred, in order to intimidate and harass the individual identified as having participated in the nonexistent transaction. Most of the false 8300s reported nonexistent transactions involving judges, prosecutors, attorneys, public officials, and law enforcement and corrections officers. The defendants were convicted on all counts including § 7206(1) & (2) relative to the false 8300s. Challenging their convictions, the defendants argued that their convictions must be reversed because there was no duty to file a Form 8300 for a nonexistent transaction. Their rationale was that since there was no duty to file the return, there could not be a prosecution for filing a form containing false information, either because it would not be considered "willful" or because the falsity would not be "material." Considering this issue for the first time, the Sixth Circuit held the relevant duty for purposes of willfulness is the duty imposed by the provision of the statute the defendant is accused of violating. The clear meaning behind § 7206 (1) & (2) is that when one makes and subscribes a return, or aids and counsels the preparation of a return, an obligation arises that the return not be false as to any material matter. This duty arises with the making of the return, without regard to whether there was an obligation to file one in the first place.

The Sixth Circuit also rejected defendants' contention that it was immaterial as a matter of law to falsely report a transaction on Form 8300 when no transaction had in fact occurred. The court reasoned a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision making body to which it was addressed.

TITLE 18

18 U.S.C. § 1001

Making False Statements

In ***United States v. Pickett***, No. 03-3018 (DC Cir. Jan. 2004), the D.C. Circuit Court overturned the conviction of a defendant for making false statements because the underlying indictment did not contain the essential elements of the offense being charged.

During the course of the investigation into the potentially lethal Anthrax powder discovered in certain congressional offices on Capitol Hill in 2001, Pickett, then an U.S. Capitol Police officer, left a handwritten note and a small pile of suspicious white powder on the desk of a duty station he had vacated. The note read, "PLEASE INHALE YES THIS COULD BE? CALL YOUR DOCTOR FOR FLU-SYMPTOMS. THIS IS A CAPITOL POLICE TRAINING EXERCIZE [sic]! I HOPE YOU PASS! When questioned by a supervisor, Pickett explained that his actions were part of a "bad joke" and that the powder "was Equal," an artificial sweetener.

Pickett was convicted by a jury trial of violating 18 U.S.C. § 1001 by making false statements in a matter within the jurisdiction of the legislative branch of the government of the United States. Section 1001 renders unlawful the making of a false statement within the jurisdiction of the legislative branch only with respect to investigations or reviews. Accordingly, the D.C. Circuit held that the words "investigations" and "reviews" are elements of the offense. The court cited *Russell v. United States*, 369 U.S. 749 (1962) as support for the requirement that an indictment must contain the elements of the offense being charged. The indictment filed against Pickett, while intending to charge the offense of making a false statement within the jurisdiction of the legislative branch, nevertheless, failed to allege that the false statement was made in an "investigation" or "review." Accordingly, the court determined that the indictment against Pickett failed to charge an offense under § 1001.

On appeal, the government had also argued that even if the indictment was defective, such defect should be viewed as harmless because the evidence of the jurisdictional element was "overwhelming" and "essentially uncontroverted." In rejecting the government's argument, the D.C. Circuit remarked that although it had never addressed the issue of whether an indictment flawed by omission of an essential element is subject to a harmless error review, the court saw no need to consider the question in Pickett's case because the error would not be harmless, even if harmless error analysis were applied.

Consequently, the D.C. Circuit vacated Pickett's conviction because the indictment failed to state the essential elements of the offense, and because the evidence presented to the jury was insufficient to sustain a conviction as to those elements.

18 U.S.C. § 1031(a) – MAJOR FRAUD ACT

Statute of Limitations – Continuing Offense

In ***United States v. Reitmeyer***, 356 F.3d 1313 (10th Cir. February 4, 2003), the Tenth Circuit held an execution of a scheme under the Major Fraud Act, 18 U.S.C. § 1031(a) was

not a "continuing offense" for statute of limitation purposes. The government indicted several construction companies and their officers with executing a scheme to defraud the United States and to obtain money from the United States by false pretenses in violation of the Major Fraud Act. The companies, who were awarded a contract to construct a groundwater treatment facility, filed a $4 million claim in 1994 based on cost overruns they incurred as a result of geological conditions that they claimed were different than those represented by the government. In 1995, the companies met with the Army Corp of Engineers to promote their claim. In 2002, over seven years after the companies initially filed their claim, the government filed their indictment which called into question the integrity of the defendant's claim for damages. The district court held the seven year statute of limitations began to run when the companies filed their claim in 1994, and therefore the government's prosecution was time barred. The government appealed the district court's dismissal.

The Major Fraud Act provides fines and criminal sanctions for a party that "knowingly executes, or attempts to execute, a fraudulent scheme with the intent to obtain money from the government." Accordingly, the limitations issue turns on the meaning of an "execution" of a fraudulent scheme. The Tenth Circuit held that the defendants "executed" their alleged scheme within the meaning of the statute when they filed their claim in 1994. Once the defendants filed their claim, they did not need to engage in any further conduct to realize the ultimate goal of their scheme, the receipt of $4 million from the government. The government's argument focused on the receipt of money, which would have made the defendant's actions at the 1995 meeting part of the "execution" of the scheme. The court rejected this argument, stating "if we were to conclude an execution requires the receipt of money, the phrase 'with the intent to obtain money' would be largely superfluous with respect to executed schemes."

The court noted that no other circuit court had addressed the specific question of whether a violation of the Major Fraud Act was a "continuing offense" for purposes of the statute of limitations. The Tenth Circuit looked to the Supreme Court's decision in *Toussie v. United States*, 397 U.S. 112 (1970) for guidance. *Toussie* instructs that an offense is not continuing unless (1) the explicit language of the statute compels that conclusion, or (2) the nature of the crime is such that Congress must have intended that it be treated as continuing. Here, nothing in the statute compels that the offense is continuing and the nature of the crime does not suggest that Congress must have intended it to be treated as such. The court also rejected the government's reliance on cases from other circuits holding that violations of the bank, mail, and wire fraud statutes are continuing offenses for venue purposes. Congress specifically stated mail fraud was a continuing offense and the continuing offense analysis for venue was sufficiently different to distinguish it.

18 U.S.C. § 3663A MANDATORY VICTIMS RESTITUTION ACT OF 1996

No Obligation to Reduce Defendant's Restitution Amount to Account for Forfeited Funds

In ***United States v. Bright***, No. 02-50492 (9th Cir. Jan. 5, 2004), the Ninth Circuit affirmed a district court's restitution order, which did not apply funds forfeited by the defendant to the government to offset the total amount of his restitution obligation.

Bright, a registered nurse, pleaded guilty to five counts of mail fraud arising out of a scheme that falsely offered nurses the opportunity to be paid for processing medical surveys at home. U.S. Postal Inspectors investigating Bright's mail order businesses seized $86,194 from him, all of which was subsequently forfeited to the U.S. Postal Service. The district court ordered Bright to pay restitution to victims of his mail fraud scheme pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA). On appeal, Bright challenged the court's restitution order, contending that the district court erred because the court improperly ordered restitution for dismissed counts, and because the court should have applied the $86,194 in forfeited funds towards Bright's restitution obligation.

The Ninth Circuit noted that the MVRA makes restitution mandatory for certain offenses involving fraud, including Bright's mail fraud. The Civil Asset Forfeiture Reform Act (CAFRA), however, gives the Postal Service the discretion whether to retain forfeited funds or transfer them to the victims of the offense that gave rise to the forfeiture. The Ninth Circuit observed that the MVRA instructs district courts on how they must calculate restitution when funds are made available to the victims from other sources, and significantly restricts the circumstances in which a district court may use other funds as an offset against the amount of a restitution order. The Ninth Circuit held that "[n]othing in the MVRA indicates that district courts themselves are required to reach out and order the government to transfer forfeited funds from government entities to victims. If anything, there is some indication to the contrary."

Accordingly, the Ninth Circuit ruled that the district court did appropriately order restitution, and did not err in failing to order the transfer of the forfeited funds from the Postal Service to Bright's victims. Consequently, the Ninth Circuit affirmed the district court's sentence and its order of restitution under the MVRA.

SENTENCING GUIDELINES

Acceptance of Responsibility Reduction

In ***United States v. Salazar-Samaniega***, 361 F.3d 1271 (10th

Cir. 2004), the Tenth Circuit reversed the district court's application of an acceptance of responsibility reduction. Salazar-Samaniega ("Salazar") was stopped by a deputy in New Mexico for a seat belt violation. After issuing Salazar a warning, the deputy asked him if he could ask him a few questions and search his vehicle. Salazar consented. Three kilograms of cocaine were found in the vehicle's spare tire. The government offered Salazar a plea that would have allowed him the right to appeal any ruling at the suppression hearing; however, the offer was refused because the plea agreement did not specify the amount of jail time. During the pre-trial suppression hearing, Salazar denied many of the key facts testified to by the arresting officers and denied they had read to him the written consent form (which Salazar admitted to signing). The case proceeded to trial and a jury convicted Salazar of possession with intent to distribute cocaine. At sentencing, the court found Salazar had lied on six separate occasions during the suppression hearing and applied an obstruction of justice enhancement. The court also denied Salazar's motion to disregard a mandatory minimum sentence for truthful and complete information as well as his motion for a two level reduction for being a minimal participant in a criminal scheme. The court did, however, reduce Salazar's sentence by two levels under U.S.S.G. § 3E1.1 for acceptance of responsibility, finding the only reason Salazar went to trial was to preserve his opportunity to appeal the court's ruling at the suppression hearing.

The Tenth Circuit affirmed the district court's findings with respect to the first three adjustments, but reversed the acceptance of responsibility reduction, finding the district court not only found Salazar had lied during court proceedings, which showed no acceptance of responsibility, but also did not find the case so extraordinary to apply the adjustment anyway, as the guideline permits in rare cases. The Tenth Circuit, agreeing with the Eighth Circuit in *United States v. Honken*, 184 F.3d 961 (8th Cir. 1999), found such rare cases require a finding that the obstruction was an isolated incident, the defendant voluntarily terminated his obstructive conduct, and truthfully admitted the conduct. The Tenth Circuit rejected the Seventh Circuit's test in *United States v. Buckley*, 192 F.3d 708 (7th Cir. 1999) which requires the defendant merely refrain from further obstruction. No such finding was made, nor did the evidence demonstrate such extraordinary circumstances to grant the reduction. The Tenth Circuit noted Salazar refused the plea offer due to unspecified jail time, not because he believed he would not be able to appeal any suppression hearing rulings.

Enhancement for Obstruction Prior to Investigation

In ***United States v. Stolba***, 357 F.3d 850 (8th Cir. 2004), the Eighth Circuit held an obstruction of justice enhancement may not be applied to a sentence if the obstructive acts occurred prior to the onset of an official investigation. Stolba was an investment advisor who embezzled client funds and prepared false account statements for over twenty-six years. When a client became suspicious of the account statements Stolba had provided her, she requested specific documentation relating to her investments, and told him if he failed to provide the documentation, she would notify the appropriate authorities. Stolba subsequently told his office manager he was in "big trouble" and asked for assistance in deleting investment statements evidencing his fraudulent conduct from the business computer system. The office manager deleted the files pursuant to her employer's request, but also sent a letter to the state authorities, requesting an investigation be opened. The state referred the matter to the FBI, and a month later the FBI commenced its investigation. A few months later, Stolba pleaded guilty to two counts of mail fraud. At sentencing, the district court applied an obstruction of justice enhancement, which requires a two level increase if the defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1. The district court found Stolba destroyed relevant files as soon as he knew an investigation had either commenced or was about to commence. Thus, the enhancement was applicable.

The Eighth Circuit examined the language of the guideline as well as its commentary and concluded that Stolba's conduct fell outside the literal reading of the guideline due to a 1998 amendment to the commentary. The amendment clarified that the obstructive conduct must occur during the investigation of the offense of conviction and is inapplicable to obstructive acts occurring at any other time. Since Stolba destroyed evidence before the official investigation began, the obstructive conduct did not occur during the investigation as required by the guideline, even though the obstructive acts were relevant to the offense of conviction.

Second Circuit Rejects Six-Level Downward Departure in Tax Crime Sentencing

In ***United States v. Toohey***, No. 03-1400 (2d Cir. Jan. 15, 2004), the Second Circuit determined that a six-level downward departure in sentencing and the resulting avoidance of incarceration was in violation of the United State Sentencing Guidelines (U.S.S.G.).

Toohey, an attorney, pleaded guilty under a plea agreement to one count of making a willfully false statement on a federal income tax return in violation of 26 U.S.C. § 7206(1). Toohey acknowledged that the range provided by the U.S.S.G. was from 15 to 21 months' imprisonment. The plea agreement barred both parties from moving for upward or downward departures in sentencing with the exception that Toohey reserved the right to move for a downward departure on the ground that his imprisonment would "have an extraordinary impact on his business, and consequently, on its employees and clients."

At sentencing, Toohey filed a motion requesting a downward

departure of six levels to a sentence that did not include imprisonment, based on the claim that imprisonment would have a significant "impact on [Toohey's] employees and clients." The district court departed downward six levels, requiring Toohey to serve two years of probation and pay a fine, but imposed no imprisonment. The district court did not, however, adopt the argument put forth by Toohey as the basis for a downward departure. Rather, the district court justified the downward departure by citing the outcome of an unnamed case that involved another attorney who in the judge's mind had done "much crasser work vis-à-vis the income tax laws than did [Toohey]," and whose sentence did not include imprisonment.

On appeal by the government, the Second Circuit concluded that the district court's downward departure lacked the explanation required by 18 U.S.C. § 3553(c). The Second Circuit noted that while the district court referred to an unnamed case involving a defendant who was thought to be more culpable than Toohey, the district court never identified either the case or the defendant. Accordingly, the Second Circuit held that the district court's statements articulated in open court did not constitute a "specific reason for the imposition of a sentence different from that described" in the U.S.S.G. Moreover, the Second Circuit ruled that the district court's written order of judgment and conviction failed to state the reason for departure "with specificity" as mandated by 18 U.S.C. § 3553(c)(2). Consequently, the Second Circuit declared that the sentence imposed on Toohey by the district court was in violation of the U.S.S.G., and thus the sentence was vacated and the case was remanded for re-sentencing.

FORFEITURE

Standard for Obtaining Order Restraining Assets

In ***United States v. Melrose East Subdivision***, 357 F.3d 493 (5th Cir. January 13, 2004), the Fifth Circuit held probable cause was the proper standard of proof the government needed to establish to obtain a pretrial order enjoining the sale or disposal of assets seized for forfeiture under 18 U.S.C. § 981. In reaching this decision, the court rejected the claimant's argument that the Civil Asset Forfeiture Reform Act's (CAFRA) raising of the standard of proof on forfeitures also increased the standard of proof necessary to obtain a restraining order. The government filed a civil forfeiture complaint in conjunction with a Medicaid fraud investigation and obtained a pretrial restraining order under 18 U.S.C. § 983(j)(1)(A), enjoining the transfer of defendant's assets. The claimant, who was indicted on federal charges as part of the same investigation, filed a motion seeking to modify the restraining order to release funds needed to pay for his defense attorney in the criminal case. After a hearing, the district court denied the motion, finding the government had shown probable cause to restrain the assets. The claimant appealed arguing the district court should have applied a standard higher than that of probable cause or in the alternative, if probable cause was the proper standard, the evidence failed to meet that standard.

The government argued that the issue was controlled by the Supreme Court's decision in *United States v. Mansanto*, 491 U.S. 600 (1989), which held due process permitted the government to restrain assets needed to pay attorney's fees as long as long as the government demonstrated probable cause to believe that the assets were subject to forfeiture. The claimant, however, argued that since CAFRA raised the burden of proof the government has to establish to prevail on the merits of a forfeiture, the corresponding standard should likewise apply to a restraining order.

The Fifth Circuit concluded that *Mansanto* still controls. While CAFRA raised the government's ultimate burden of proof on the merits in a civil forfeiture case from probable cause to a preponderance of the evidence, *Mansanto* was a criminal forfeiture case requiring the government to prove the crime beyond a reasonable doubt. With the passage of CAFRA, the ultimate standard on the merits in civil cases has been raised, but it has not been raised beyond the ultimate standard that was applicable in *Mansanto*, a criminal case. After examining all the evidence, the Fifth Circuit also concluded that the government satisfied its burden, under the probable cause standard, of establishing that the property subject to forfeiture was purchased with funds that constituted the proceeds Medicaid fraud.

SEARCH WARRANTS

Reliance on Unincorporated Affidavit

In ***Doe v. Groody***, 361 F.3d 232 (3d Cir. 2004), the Third Circuit held that the scope of a search warrant may not be broadened by language in the agent's affidavit unless the warrant specifically incorporates the affidavit. In this case, a police officer submitted an affidavit in support of a warrant to search a drug trafficking suspect's home, car, and person. The affidavit also requested permission to search "all occupants" of the premises. The affidavit not only set out a factual basis for probable cause to search the house, but also set out a factual basis for probable cause to search anyone on the premises.

The warrant was attached to a separate preprinted face sheet that had open blocks for someone to type the details such as the name of the owner of the premises, the basis for probable cause, and a specific description of the premises, and/or persons to be searched. The section containing the description of the premises and people to be searched, referenced the resident of the premises, but did not reference the affidavit. The sections of the face sheet referring to the

date of the violation and the basis for probable cause, specifically incorporated the attached affidavit. When the police executed the warrant, they searched not only the suspect named in the warrant, but also strip-searched a mother and daughter who were present on the premises. The mother and daughter later sued the officers pursuant to 42 U.S.C. § 1983, alleging violations of their Fourth Amendment rights. The district court denied a motion for summary judgment based on qualified immunity for four of the police officers involved in the execution of the warrant. The four officers filed this appeal.

The Third Circuit affirmed the district court's denial of the officer's motion for summary judgment finding that searching the mother and daughter for drugs clearly exceeded the scope of the warrant. As such, the officers were not entitled to qualified immunity, since the law when the search took place clearly established that the scope of a search could not be broadened on the basis of an unincorporated affidavit. The court made clear the searches of the mother and daughter were not protective searches but were conducted to uncover evidence of drug trafficking. The court also held the Fourth Amendment allows courts to construe a warrant in light of an affidavit that is expressly incorporated into the warrant. In support of its requirement of express incorporation, the court cited Third Circuit precedent as well as the Supreme Court's recent decision in *Groh v. Ramirez*, 124 S.Ct. 1284 (2004), which denied qualified immunity to a law enforcement agent who relied on an unattached and unincorporated affidavit to justify a search pursuant to a warrant, that on its face, failed to particularly describe the items to be seized. In this case, there was no language in the warrant that suggested the premises or people to be searched included anyone but the subject. Since other portions of the warrant face sheet specifically incorporated the affidavit, the court reasoned, as a matter of common sense, the absence of a reference to the affidavit in the section describing the premises and/or people to be searched must be viewed as negating any incorporation of the affidavit.

The opinion did recognize two situations where unincorporated affidavits have been used to cure defective warrants. These cases fall into two categories. The first includes cases with warrants that contain a clerical error or ambiguity that can be resolved with reference to the affidavit. The second category includes cases in which the affidavit is particularized, and the warrant is overbroad. The instant case, however, presents the reverse situation. The affidavit was broader than the warrant, and thus, the police conducted a search that was broader than the warrant. This, the court held, violated the Fourth Amendment.

ELECTRONIC SURVEILLANCE

Warrantless Electronic Surveillance Allowed with Consent of One of the Subjects

In ***United States v. Lee***, No. 01-1629 (3d Cir. Feb. 2004), the Third Circuit affirmed convictions based on electronic surveillance obtained without a warrant, but with the consent of one of the subjects.

Lee, a co-founder and president of the International Boxing Federation (IBF), had been indicted on charges stemming from the alleged payment of bribes by boxing promoters to Lee and other IBF officials. At trial, Lee was convicted on a number of charges, including money laundering and filing false tax returns.

On appeal to the Third Circuit, Lee claimed that the warrantless audio and video monitoring of conversations between himself and an informant violated his Fourth Amendment rights. With the cooperation of an informant, the Federal Bureau of Investigation (FBI) made audio and video recordings of three meetings between the informant and Lee in a hotel suite that had been rented by the informant for the use of Lee. Before Lee's arrival, the FBI had installed monitoring equipment in the room. The FBI agents monitoring the conversations between Lee and the informant were instructed to switch on the monitor and recorder only when the informant was present in the suite, and at all other times to ensure that the monitor and recorder were switched off. While the FBI had not obtained a warrant for the surveillance, the monitoring and recording were done with the informed consent and the full cooperation of the informant. Furthermore, there was no showing by Lee that the FBI agents had not strictly followed the parameters governing the monitoring and taping.

The Third Circuit ruled that the warrantless audio and video monitoring of conversations between Lee and the informant, who had consented to the recording, did not violate Lee's Fourth Amendment rights. The court reasoned that the monitoring devices were installed in the hotel suite at a time when Lee had no reasonable expectation of privacy in the premises and that the tapes do not depict anything that the informant himself was not in a position to hear or see while in the suite. Thus, the court concluded that Lee's argument is "inconsistent with well-established Fourth Amendment precedent concerning the electronic monitoring of conversations with the consent of a participant." Accordingly, the Third Circuit affirmed Lee's convictions.

WIRETAPS

Evidence Obtained under Court-Ordered Wiretaps Admissible after Showing of Necessity and Futility of Normal Investigative Methods

In ***United States v. Gomez***, No. 03-50106 (9th Cir. Mar. 2004), the Ninth Circuit reversed a district court's suppression order relating to evidence obtained through court-ordered wiretaps.

The Federal Bureau of Investigation (FBI) submitted an application to a federal district court judge for an order authorizing wiretaps of Gomez and his co-defendants (the defendants), who were suspected of involvement in a large scale drug-trafficking organization. The application was supported by a 38 page affidavit submitted by one of the FBI special agents investigating the case. The judge authorized a wiretap for the telephones of the defendants, after finding that the FBI had made a sufficient showing of the need for the authorization because normal investigative procedures had been tried and had failed, were reasonably unlikely to succeed, or were too dangerous. The resulting wiretaps yielded information that the government used to obtain indictments of the defendants on drug and conspiracy charges.

At trial, however, the district court ruled that the government had not sufficiently established the necessity of the court-ordered wiretaps, because informants had been used successfully in the past, and in the court's opinion, could have provided sufficient information about the drug-trafficking organization for the government to have obtained a conviction. Accordingly, the district court suppressed the evidence obtained through the court-ordered wiretaps.

On appeal, the Ninth Circuit reversed the suppression order after determining that the wiretaps were a necessity because they were the only feasible way for the government to investigate the whole of the drug-trafficking organization, including suppliers, transporters, distributors, customers, and money launderers. The court was satisfied that the affidavit submitted in support of the request for the wiretap authorization provided a full and complete statement of the facts required under statute. Furthermore, the Ninth Circuit noted that the affidavit explained in great detail how normal investigative procedures had been tried and failed and were unlikely to succeed in the future. Finally, the Ninth Circuit observed that the affidavit adequately addressed the inability of three informants, who had previously been used to gather information on the organization, to provide current information because they were presently incarcerated.

MONEY LAUNDERING

Payments for Ordinary, Legitimate Business Expenses do not Constitute Money Laundering Promotion

In ***United States v. Miles***, *et al*, No. 02-20017 (5th Cir. Feb. 2004), the Fifth Circuit reversed the money laundering promotion convictions of Miles and a co-defendant.

Miles and several co-defendants founded Affiliated Professional Home Health (APRO) a home health service company. After certification, APRO began to treat Medicare-covered patients and obtain reimbursement from Medicare for in-home visits to covered patients. Medicare's reimbursement formula for home health care providers is based in part on their claimed business expenses. The touchstone for reimbursement is that costs must be reasonable, related to patient care, and necessary for the provider's business functions. Through APRO, Miles and his co-defendants submitted to Medicare false cost reports that grossly inflated expenses for items ranging from mileage to employee salaries. Further, APRO also fraudulently obtained reimbursement for personal expenses, including renovations to a private residence.

Miles and a co-defendant were convicted at trial with money laundering promotion under 18 U.S.C. § 1956(a)(1)(A)(l). On appeal, the defendants claimed that the funds were used to pay APRO's "ordinary business expenses," including otherwise normal and legitimate rent, payroll, and payroll tax expenditures.

The Fifth Circuit reviewed its holding in *U.S. v. Brown*, 186 F.3d 661 (5th Cir. 1999), where it had reversed the money laundering promotion convictions of a defendant who had deposited fraudulently obtained funds in the operating account of a generally legitimate car dealership and used the funds to pay for a variety of legitimate business expenses. The court reasoned that the money laundering statute is not a mere money spending statute. The Fifth Circuit also noted that on the other end of the spectrum, there were cases involving a business that was so wholly illegitimate, that "even individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge." *See U.S. v. Peterson*, 244 F.3d, 385 (5th Cir. 2001).

The Fifth Circuit opined that although the scale and scope of the fraud that took place at APRO certainly exceeded the "relatively minor fraudulent transactions" of *Brown*, the fraud at APRO was not so extensive as to be analogous to *Peterson*. Consequently, the court reasoned that the facts of the instant case were closer to those of *Brown* than of *Peterson.* The Fifth Circuit noted that "[t]he correct distinction, for purposes of inferring specific intent, is between payments that further or promote illegal money laundering with ill-gotten gains and payments that represent customary costs of running a legal business." Accordingly, the Fifth Circuit reversed the convictions of Miles and a co-defendant for money laundering promotion.

HYDE AMENDMENT

Reimbursements for Attorney's Fees are Subject to a $125 Hourly Cap and Cannot Contain Interest Payments

In ***United States v. Aisenberg***, No. 03-10857 (11th Cir. Feb. 2004), the Eleventh Circuit refused to reimburse attorney's fees for criminal defendants under the Hyde Amendment in excess of the $125 hourly cap, and also declined to allow additional amounts to compensate for the untimely

reimbursement of the fees.

The Aisenbergs are parents of a daughter who disappeared from the family's Florida home when she was just five months old. After an intense and exhaustive but ultimately fruitless search for the infant, the suspicions of law enforcement officials fell on the Aisenbergs. The Aisenbergs were eventually indicted for several criminal charges relating to the initial missing child report and the subsequent investigation. The district court eventually dismissed the indictments and the Aisenbergs moved for an award under the Hyde Amendment, which provides that the court may award attorney's fees and other litigation expenses if the "court finds that the position of the United States was vexatious, frivolous, or in bad faith." 18 U.S.C. § 3006A.

The district court awarded the Aisenbergs attorney's fees and litigation expenses under the Hyde Amendment. The court's award was based on hourly rates ranging from $150 to $400 per attorney. The court also applied a "multiplier" of 15 percent to the total fee award as compensation for the government's dilatory reimbursement.

On appeal to the Eleventh Circuit, the government conceded that an award of reasonable attorney's fees and litigation expenses under the Hyde Amendment was appropriate in the Aisenbergs' case. The government, however, disputed the proper amount of the attorney's fees owed. The Eleventh Circuit ruled that attorney's fees awarded under the Hyde Amendment are limited to the $125 per hour cap specified in the Equal Access to Justice Act. The court rejected the district court's finding that "special factors" existed to justify removing the fee cap in the Aisenbergs' case. Moreover, the Eleventh Circuit ruled that the 15 percent fee multiplier factor that the district court had fashioned was in reality a disguised interest award, which the judge lacked authority to grant in the absence of an express waiver of sovereign immunity by the government. Consequently, the Eleventh Circuit reversed and remanded the district court's order regarding reimbursement for attorney's fees.

CRIMINAL TAX BULLETIN

March/April 2004

TABLE OF CASES

FIFTH AMENDMENT DOUBLE JEOPARDY

Dye v. Frank, 355 F.3d 1102 (7th Cir. Jan. 27, 2004) 1

SIXTH AMENDMENT

Crawford v. Washington, No. 02-9410 (S. Ct. Mar. 8, 2004) 1

Fellers v. United State, 124 S.Ct. 1019 (2004) 2

Iowa v. Tovar, 124 S. Ct. 1379 (Mar. 8, 2004) 2

TITLE 26

Siddiqui v. United States, No. 02-17123 (9th Cir.Mar. 2004) 3

United States v. Anderson, 353 F.3d 490 (6th Cir. December 23, 2003) 4

TITLE 18

United States v .Pickett, No. 03-3018 (DC Cir. Jan. 2004) 4

United States v. Reitmeyer, 356 F.3d 1313 (10th Cir. February 4, 2003) 5

United States v. Bright, No. 02-50492 (9th Cir. Jan. 5, 2004) 5

SENTENCING GUIDELINES

United States v.Salazar-Samaniega, 361 F.3d 1271 (10th Cir. 2004) 6

United States v. Stolba, 357 F.3d 850(8th Cir. 2004) 6

United States v. Toohey, No. 03-1400 (2d Cir. Jan. 15, 2004) 7

FORFEITURE

United States v.Melrose East Subdivision, 357 F.3d 493 (5th Cir. January 13, 2004) 7

SEARCH WARRANTS

Doe v. Groody, 361 F.3d 232 (3d Cir. 2004) 8

ELECTRONIC SURVEILLANCE

United States v. Lee, No. 01-1629 (3d Cir. Feb. 2004) 8

WIRETAPS

United States v.Gomez, No. 03-50106 (9th Cir. Mar. 2004) 9

MONEY LAUNDERING

United States v. Miles, et al, No. 02-20017 (5th Cir. Feb. 2004) 9

HYDE AMENDMENT

United States v. Aisenberg, No. 03-10857 (11th Cir. Feb. 2004) 10