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SENTENCING GUIDELINES

Washington State Sentencing Guidelines Held Unconstitutional

In *Blakely v. Washington*, 124 S.Ct. 2531 (June 24, 2004), the Supreme Court, relying upon its prior decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), invalidated, pursuant to the Sixth Amendment, an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the trial judge at sentencing.

As to the facts of the case, Blakely pleaded guilty to second-degree kidnapping with a firearm. As a class B felony under the Washington State law, it was punishable under the state criminal code by a sentence of up to 10 years. However, Washington State's Sentencing Reform Act specified a presumptive range of only 49 to 53 months for this particular crime. At sentencing, the judge imposed an exceptional sentence of 90 months on the ground that Blakely had acted with "deliberate cruelty," a statutorily enumerated ground for an upward departure. Blakely objected to the increase, which was still below the statutory maximum of 120 months, but the trial judge adhered to his decision. In holding that Blakely's sentence violated the Sixth Amendment of the Constitution, the Supreme Court applied the rule of law that it initially set forth in *Apprendi*, *i.e.*, that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum had to be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, 124 S.Ct. at 2537.

In doing so, the Supreme Court noted that Blakely received a sentence that far exceeded the 53-month statutory maximum due to the district court's determination that he had acted with "deliberate cruelty." Further, the Court recognized that the facts supporting such a finding were neither admitted by Blakely nor found by a jury, and that the exceptional 90-month sentence could not have been imposed solely on the basis of the facts admitted in the guilty plea. *Id.*, at 2538. Since "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment," the Supreme Court founded that the

Washington State sentencing procedure did not comply with the Sixth Amendment and proceeded to declare the exceptional sentence imposed by the district court invalid.

Although the Supreme Court specifically noted that the Federal Sentencing Guidelines were not before it and declined to express any opinion as to whether its Sixth Amendment analysis applied thereto, it is clear that *Blakely* represents a significant threat to the continued imposition of the Federal Sentencing Guidelines during the sentencing of federal defendants.

Federal Sentencing Guidelines Deemed Unconstitutional

In *United States v. Green*, No. 02-10054-WGY, 2004 WL 1381101 (June 18, 2004), during sentencing proceedings of five defendants convicted of various drug and racketeering charges, the U.S. District Court for the District of Massachusetts declared unconstitutional the Federal Sentencing Guidelines to the extent that the system provides sentence enhancements on the basis of facts not found by a jury or admitted as part of a defendant's guilty plea. In doing so, the district court relied upon the Sixth Amendment right to a jury trial as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), and opined that the Guidelines violate a defendant's right to have a jury determine every factor, beyond a reasonable doubt, that could conceivably increase his or her sentence.

It should be noted that the district court's reasoning is identical to that which the Supreme Court recently employed in *Blakely v. Washington* despite the fact that the *Blakely* Court explicitly limited its analysis to the state sentencing system that was at issue and declined to address the constitutionality of the Federal Sentencing Guidelines.

As part of his sentencing memorandum, Chief Judge Young discussed the historical framework behind the creation and imposition of the Guidelines as well as the practical reality of sentencing under the current system. Chief Judge Young began his discussion by noting that the true purpose behind the imposition of the Federal Sentencing Guidelines was to

increase plea bargaining by “candidly marginalizing the judicial role” in such a way that “offenders would be more likely to plead guilty as they could know with greater certainty what to expect if they did.”

He then addressed the role that judges play in sentencing in light of the Feeney Amendment and the practice of “real offense sentencing” whereby a judge first determines an offender’s “relevant conduct” from materials prepared primarily by the Department of Justice and then imposes a sentence based upon his or her “real offense.” The net effect of this approach, the Chief Judge concluded, is the Department controls the flow of information to the judge and ultimately establishes the sentence while the federal judge simply imposes it.

The district court then found itself at an impasse as to how it should proceed to sentence the five defendants in question given its invalidation of the Sentencing Guidelines. The court theorized that it could simply ignore the existence of the Guidelines and return to the system that was in place prior to their imposition, it could impose a sentence that was within the ranges set forth in the Guidelines while considering only the prior convictions of each defendant in conjunction with those facts that were found by the jury or admitted in each defendant’s plea agreement, or it could leave the Guidelines in place and empanel “sentencing juries” who would then decide whether the government had proved the existence of any aggravating factors. The district court chose to forego the use of sentencing juries and to simply sentence each defendant based upon his/her prior convictions and the facts supporting each underlying offense of conviction.

Sentencing Enhancement for Obstruction of Justice May Be Based on Pre-Investigation Conduct

In *United States v. Amedeo*, 370 F.3d 1305 (11th Cir. 2004), the Eleventh Circuit held a U.S. Sentencing Guidelines’ enhancement for obstruction of justice set out in U.S.S.G. § 3C1.1 may be imposed even if the obstructive conduct took place before a formal investigation into the offense of conviction had begun. Amedeo was a criminal defense attorney who supplied the 18-year old student/victim with cocaine and other drugs while representing him in an unrelated drug case. The victim died of a drug overdose at Amedeo’s residence.

Prior to the arrival of the police and commencement of the an investigation into the victim’s death, Amedeo, with the assistance of two friends, attempted to destroy evidence by washing away cocaine residue, removing trash and hiding drug paraphernalia. Amedeo also asked his friends to lie to the police about his relationship with the victim and about the presence of one of them in the apartment.

Amedeo was indicted on multiple counts but pleaded guilty to one count of distributing cocaine to a person under the age of 21, and in exchange, the government dropped the remaining counts. At sentencing, the court adjusted the sentence upward two levels for obstruction of justice pursuant to U.S.S.G. § 3C1.1(A). Amedeo appealed arguing there was no evidence he obstructed the investigation into his offense of conviction because the investigation into his drug use/distribution did not commence until sometime after the incriminating videotape was discovered.

The Eleventh Circuit ruled that conduct occurring before a formal investigation into the offense of conviction may support an enhancement if it foreseeably relates to that offense. Here, since the victim died of a drug overdose in Amedeo’s home, the court determined it was reasonably foreseeable an investigation into the cause of the victim’s death would encompass an investigation into illegal drug use. Further, the scope of the investigation would have been particularly foreseeable to Amedeo given his position as a criminal defense attorney.

‘Mental Condition’ Downward Departures

In *United States v. Derbes*, 369 F.3d 579 (1st Cir. 2004), the First Circuit vacated the district court’s downward departure based on Derbes’s mental condition and remanded for further findings. Derbes and his brother owned a construction company in Massachusetts. Beginning in 1995, they used various devices to understate company and personal federal tax liability, including issuing company checks made payable to fictitious subcontractors, deducting the checks as business expenses, then having their employees cash the checks and return the cash to the company. Both brothers were charged with and pleaded guilty to income tax evasion. The district court granted Derbes a four level downward departure based on his mental health problems and sentenced him to nine months of home confinement with electronic monitoring, plus fifteen months of probation. His brother received a sentence of a year and a day in prison, plus two years of supervised release. The government appealed the four level departure, arguing mental health was an impermissible ground for departure.

The First Circuit agreed, finding downward departure for mental condition was specifically discouraged by the sentencing guidelines. It noted, however, the sentencing record was insufficient to determine whether Derbes’s circumstances regarding his medication and relationship to his therapist were extraordinary enough to remove the case from guideline mandates and grant the departure. In this regard, the First Circuit reviewed the presentence investigation report and a letter from Derbes’s psychiatrist in addition to the abbreviated findings of the district court at the sentencing hearing. Although the psychiatrist wrote it was important to maintain Derbes’s treatment, including

a specific prescription of three different medications, and any change could cause him to revert to deep depression, the First Circuit concluded there was no evidence the Bureau of Prisons would not be able to maintain such a regimen. Thus, it remanded for further findings.

Also of note, in reviewing the sentence, the appellate court applied the PROTECT Act de novo standard of review, even though the Act was not effective until the day after Derbes was sentenced, but did not hold the district court to the PROTECT Act's written statement requirements, since the court would have not known it was required to do so on the day of sentencing. That section of the PROTECT Act would have permitted the district court, on remand, to depart only on a ground specifically and affirmatively included in its written statement of reasons, which in this case only mentioned "medical reasons as more fully stated on the record in open court." Therefore, the First Circuit not only protected the possibility of maintaining the mental condition departure, but also did not eliminate the possibility of a departure on a ground orally mentioned, that Derbes was essential to a small business whose innocent employees might suffer if the company went bankrupt.

'Cumulative Effects' Downward Departures

In *United States v. Lauersen*, 362 F.3d 160 (2^d Cir. 2004), the Second Circuit held a sentencing judge may depart downward from the sentencing guidelines to mitigate the effect of overlapping sentence enhancements when the enhancements result in a sentence at the higher end of the sentencing table. Lauersen, an ob/gyn, submitted false claims to insurance companies by misrepresenting fertility treatments, which were not covered by his patients' insurance, as other procedures that were covered. He was convicted of health care fraud and, at sentencing, the district court calculated his adjusted offense level under the sentencing guidelines to be 29, yielding a sentencing range of 87 to 108 months. The court sentenced Lauersen to 87 months imprisonment. In the original appeal, the government argued the district court had erred in not increasing the adjusted offense level by an additional four levels under U.S.S.G. § 2F1.1(b)(8)(B), which applies if the offense affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense. The Second Circuit agreed and remanded with instructions to increase the offense level to 33. However, the Second Circuit also ruled the additional four level enhancement created a new circumstance that could justify a downward departure since the new enhancement overlapped substantially with the existing 13 level adjustment for the large amount of money involved. The court reasoned the additional four level enhancement increased Lauersen's sentence by four years and, thus, presented a circumstance present to a degree not adequately considered by the sentencing guidelines.

The government petitioned for a rehearing on the issue of the 'cumulative effects' downward departure ruling, arguing the two factors the Second Circuit cited for the allowance of such a departure were considered by the sentencing commission. Since the commission considered the effects of both increases, the overlapping enhancements did not constitute a circumstance present to a degree not adequately considered by the commission to justify the departure. The Second Circuit agreed with the government's assertion regarding the separate enhancements, but not with its conclusion regarding the commission's consideration of its severe effect. Although the enhancements were appropriately both applied, and the commission intended such, there was no indication the commission had considered every possible combination of enhancements and their cumulative effects on the overall sentence. Thus, a judge could not be precluded from considering departure in cases such as the instant case.

Imposition of the Mass Marketing Enhancement

In *United States v. Olshan*, 371 F.3d 1296 (11th Cir. June 3, 2004), the Eleventh Circuit held the two-level mass-marketing enhancement contained in the Federal Sentencing Guidelines was not precluded by the fact Olshan solicited only those individuals within his already existing client base rather than the public at-large and that the imposition of that enhancement, along with the enhancement received for defrauding more than one victim, did not amount to impermissible double counting.

Between December 1998 and April 2001, in an effort to retain investors, Olshan encouraged clients to invest their money in Mortgage Investors, Inc. (MII), an Alabama company that had been owned and operated by Olshan and his family for over 60 years. Olshan made a series of misrepresentations and omissions of material fact while marketing MII to his clients. As a result of his overzealous marketing, Olshan was charged with two counts of mail fraud, in violation of 18 U.S.C. § 1341, and one count of filing a false income tax return in violation of 26 U.S.C. § 7206(1). He pleaded guilty to all three counts.

In preparing the pre-sentence investigation report, the probation office applied a two-level enhancement under U.S.S.G. § 2F1.1(b)(2)(B) because Olshan defrauded more than one victim along with a two-level enhancement under § 2f1.1(b)(3) because the offense was committed through mass-marketing. Olshan was eventually sentenced to a prison term of 90 months. Olshan then noted a timely appeal whereby he proffered the mass-marketing enhancement was inapplicable since his targeted audience consisted solely of pre-existing clients and its imposition amounted to impermissible double counting given the imposition of the enhancement for defrauding more than one person.

The Court of Appeals found there was no support within the statutory text of the Guidelines and/or their related commentaries for Olshan's first contention and declined to read into the Guidelines any requirements not explicitly stated or implied therein. Thus, the mass-marketing enhancement was found to be as applicable to fraud against a pre-existing group of clients as it was to fraud against a group of complete strangers.

The Court then addressed Olshan's second contention and recognized "[i]mpermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *Id.*, at 1300 (citing *United States v. Matos-Rodriguez*, 188 F.3d 1300, 1309 (11th Cir. 1999)). It also relied upon a Tenth Circuit holding for the basic premise that, in order to prevail on his claim that application of both §2F1.1(b)(3) and §2F1.1(b)(2)(B) constituted impermissible double counting, Olshan was required to show that those two provisions overlapped, were not distinct, and served identical purposes." *Id.*, at 1301 (citing *United States v. Fredette*, 315 F.3d 1235 (10th Cir.), *cert. denied*, 538 U.S. 1045, 123 S.Ct. 2100 (2003)). Olshan's second contention was subsequently rejected based upon the Court's determination that the provisions in question "do not overlap to the extent necessary before impermissible double counting will be found." *Id.*

Sentencing – Application of Double Jeopardy Clause, Grouping & Downward Departure

In *United States v. Martin*, 363 F.3d 25 (1st Cir. March 30, 2004), the First Circuit remanded Martin's sentence based on its finding the district court erred in its grouping decision and its grant of a downward departure for extraordinary acceptance of responsibility. Martin participated in a scheme to defraud several food distributors and a supermarket chain of more than \$1.8 million through the embezzlement of promotional incentives. Martin's share was approximately \$600,000, which he failed to report to the IRS resulting in a tax loss of approximately \$254,500. Martin pleaded guilty to fraud and tax evasion and was sentenced to three years of probation, with six months to be served in home detention. Believing Martin's sentence was too lenient, the government appealed arguing that the district court improperly grouped the fraud counts with the tax evasion counts and improperly granted downward departures for extraordinary acceptance of responsibility and extraordinary physical impairment. Martin countered, claiming that he already served a significant portion of his original sentence and any subsequent sentence of imprisonment would violate the double jeopardy clause.

The court initially addressed Martin's double jeopardy claim which he argued prevented the crediting of time served on probation against a term of imprisonment. The court held double jeopardy principles do not preclude crediting of

probation already served on an erroneous sentence against subsequent imprisonment. Although probation and imprisonment are different types of sentences, each restricts a defendant's liberty, allowing the sentencing court to compare the degree and length of restriction when determining the proper amount of credit to apply. The court noted, however, that fully crediting probation against a subsequent sentence of imprisonment does not require a day-today offset against time served in prison.

The court next considered grouping of the fraud counts with the tax counts. When looking solely at the Guidelines, it would appear reasonable to group the counts, however, the court remarked that their interpretation was bound by the commentary provided by the Sentencing Commission. According to Application Note 5 of the Commentary to U.S.S.G. § 3D1.2(c), the purpose of the provision is to prevent "double counting of offense behavior . . . if the offenses are closely related." The court determined the fraud and tax counts were not closely related. The two crimes involved different victims and harms, and required different conduct. As such, the connection between the two crimes was too tenuous to be deemed closely related.

The court then turned to the downward departure for extraordinary acceptance of responsibility. The district court granted Martin a three level downward adjustment pursuant to U.S.S.G. § 3E1.1(a)-(b). It then departed downward an additional four levels for Martin's extraordinary acceptance of responsibility. The district court based its additional departure primarily on the restitution Martin paid to his victims. The court held Martin's decision to pay restitution promptly upon being discovered, and to pay more than the amount he claims to have received from the scheme, deserves consideration in the sentencing calculation. Martin was granted such consideration in the form of his three level downward adjustment. As for the additional departure, nothing in the record moved the case sufficiently out of the "heartland" of the Guidelines.

Finally, the court considered the downward departure for physical impairment noting that departures based on physical condition are discouraged. The court, however, acknowledged an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range. A court may find such an extraordinary impairment when imprisonment would threaten or shorten a defendant's life or when the Bureau of Prisons (BOP) would be unable to adequately meet the defendant's medical needs. In this case, the district court found such extraordinary circumstances. For more than 30 years, Martin suffered from Crohn's disease which also resulted in the suppression of his immune system. Agreeing with the district court, the court found Martin's serious medical conditions made his health exceptional fragile. On this record, the court was not convinced the BOP could adequately provide for Martin's medical needs.

Based on these holdings, the First Circuit remanded the case for re-sentencing but held the district court was free to reconsider the three level departure for physical impairment in light of the changed sentencing scenario.

District Court's Error in Failing to Determine the Exact Amount of Tax Loss from a § 7206 Violation was Harmless

In *United States v. Roselli*, 366 F.3d 58 (1st Cir. May 5, 2004), the First Circuit upheld Roselli's sentence for preparing false tax returns in violation of 26 U.S.C. § 7206, ruling that the district court's failure to make a finding concerning the exact amount of tax loss was harmless error.

Roselli worked as a partner in an accounting firm providing tax services. In 1997 and 1998, Roselli prepared federal income tax returns on behalf of clients that included false deductions for charitable contributions and business deductions. The government alleged that Roselli prepared more than 140 false tax returns, amounting to a total tax loss of \$101,524.

Roselli pleaded guilty to one count of conspiracy to aid, assist, and abet the filing of materially false tax returns in violation of 26 U.S.C. § 7206(2). The plea agreement recited the government's contention that the tax loss was \$101,524. Roselli disputed the amount of the tax loss, claiming that the "tax loss was not readily ascertainable and, in any event, was far less than \$101,524." The district court sentenced Roselli in accordance with provisions of the United State Sentencing Guidelines. The district court "ruled that a finding as to the exact amount of the tax loss would 'not affect sentencing' and was therefore unnecessary." The court did reach a "general finding that the tax loss was 'not less than \$8,000.'"

The government appealed the district court's decision to not determine the exact amount of tax loss. The First Circuit ruled that the district court's error in failing to make a finding concerning the exact amount of tax loss was a harmless error since it did not affect Roselli's sentence. The First Circuit noted that the district court had explicitly stated that it would have imposed the same sentence on Roselli whether or not it had accepted the government's proposed tax loss amount.

Sentencing Guidelines And The Imposition Of The Obstruction Of Justice Enhancement

In *United States v. Uscinski*, 369 F.3d 1243, (11th Cir. May 12, 2004), the Eleventh Circuit found the district court's findings of fact in support of the imposition of the obstruction of justice enhancement sufficient to permit meaningful appellate review, that Uscinski's false statements to investigators regarding funds that he withdrew from a client's bank account for his personal use supported the

imposition of the sentencing enhancement, and that the actual imposition of the enhancement was not impermissible double counting.

In January of 1996, Uscinski began representing Claude Louis DuBoc in extradition proceedings. In May of the same year, DuBoc granted Uscinski access to a bank account located in Austria along with the authority to handle certain unspecified financial affairs related to that account. Uscinski proceeded to withdraw approximately \$1,500,000 from DuBoc's account for his personal use and failed to report the receipt of those funds as income on his 1996 federal income tax return.

In 1997, investigators became aware of the existence of DuBoc's foreign bank account as well as the fact that Uscinski had transferred funds from the account for his personal use. Uscinski lied about the location of the transferred money and the purpose behind the transfer when he was eventually questioned by the government. Specifically, Uscinski told investigators that the funds were transferred to support DuBoc's family.

After the government discovered the money had been used for Uscinski's personal benefit, it filed tax evasion charges to which the Uscinski ultimately pleaded guilty. Uscinski's Pre-Sentencing Investigation Report recommended a two-level increase for obstruction of justice and indicated a \$250,000 maximum fine. The district court sentenced Uscinski to a prison term of 42 months and imposed the maximum fine permitted. Uscinski noted a timely appeal shortly thereafter.

Uscinski initially argued the district court erred in applying the obstruction of justice enhancement without making adequate findings of fact. The Eleventh Circuit recognized that, "[t]o permit meaningful review, a district court should make specific findings of fact when applying § 3C1.1," but found a remand was not necessary in this case because the record adequately revealed that "the enhancement was based upon Uscinski's statements that the money had been transferred to support DuBoc's family." *Id.*, at 1246 (citing *U.S. v. Alpert*, 28 F.3d 1104, 1107-08 (11th Cir. 1994).

Uscinski then argued his statements in no way obstructed the government's investigation. In holding Uscinski "did not simply deny his guilt, but instead concocted a false, exculpatory story that misled the government," the Eleventh Circuit relied upon the fact that Uscinski's statements forced the government to enlist the aid of a foreign government to determine whether the funds actually went to DuBoc's family. *Id.*, at 1247.

Lastly, Uscinski proffered the district court erred in applying the enhancement for obstruction because its imposition amounted to impermissible double counting. The Eleventh Circuit disagreed and opined the imposition of the enhancement did not amount to impermissible

double counting because Uscinski's statements did not constitute part of the offense of tax evasion. Further, because Uscinski's "tax evasion was complete upon the filing of his tax return, his false statements to the government were not a continuation of his crime." *Id.*, at 1247-48.

TITLE 26

26 U.S.C. § 7201

Motion Denied to Sever Tax Evasion Charges from Using False Social Security Numbers Charges

In *United States v. George, Jr.*, 93 AFTR 2d 2004-1637 (D. Mass. Apr. 6, 2004), the U.S. District Court for the District of Massachusetts denied George's pre-trial motion to sever the tax evasion charges from the charges of using false social security numbers. George had been indicted and charged with several counts of tax evasion under 26 U.S.C. § 7201 and several counts of using a false social security number under 42 U.S.C. § 408(a)(7)(B).

George operated a business that manufactured, sold, and analyzed mineral and herb products. George also received a substantial amount of interest income. Although George had taxable income of over \$800,000 for the tax years 1996 through 1999, he neither filed federal income tax returns, nor paid any federal income taxes.

George attempted to evade paying federal income taxes by "engaging in affirmative acts of evasion to conceal and attempt to conceal" his income. Specifically, George deposited unreported business receipts into various bank accounts he had opened using four different false social security numbers, and had failed to report interest income he earned.

George filed a motion with the district court to sever the tax evasion charges from the charge of using false social security numbers on the grounds that joinder was improper or, in the alternative, unduly prejudicial. The court ruled that, in George's case, joinder of the tax fraud and false social security number counts is proper under the "common scheme or plan" prong of Rule 8(a) of the Federal Rules of Criminal Procedure because one of George's illegal activities provided the impetus for the other illegal activity. Accordingly, George's motion to sever the charges was denied.

26 U.S.C. § 7201

District Court Denies Defendant's Motion to Set Aside Jury Verdict Convicting him of Tax Evasion

In *United States v. Hollier*, 314 F. Supp. 2d 250 (SDNY April 19, 2004), the district court denied Hollier's motion for the court to set aside the jury's verdict convicting him of tax evasion and enter an acquittal.

Hollier, who was employed as a carpenter for the New York City Housing Authority (NYCHA), was indicted by a grand jury on three counts of tax evasion, in violation of 26 U.S.C. § 7201. During the trial, the government "presented substantial and compelling evidence" that Hollier sought to be considered "exempt" from having NYCHA withhold a portion of his wages.

Hollier's tax evasion scheme was to falsely declare on IRS Forms W-4 that he was exempt from withholding even though he was earning a substantial amount of taxable income from NYCHA. Based on the false Forms W-4 he filed, Hollier was initially considered "exempt" and apparently received paychecks without any amounts withheld for federal income tax. Noticing "an obvious discrepancy," the IRS sent letters to NYCHA directing it to begin withholding federal taxes from Hollier's paychecks. The IRS also sent letters to Hollier notifying him of the change in his withholding status. Later, Hollier's employer, NYCHA, "received a series of letters, purportedly from the IRS, directing NYCHA to ignore the IRS's previous letters and to consider Hollier exempt. The evidence overwhelmingly suggested that those letters were fake . . ." and had actually been prepared and mailed to NYCHA by Hollier.

After a trial in the district court, Hollier was convicted by a jury on all three counts of tax evasion. Hollier then moved for the court to set aside the verdict and enter an acquittal. The court, however, concluded that viewing the evidence in Hollier's case in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Accordingly, following the U.S. Supreme Court's ruling in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the district court denied Hollier's motion for a judgment of acquittal.

26 U.S.C. § 7201

Structuring Transactions and Tax Evasion

In *United States v. Pang*, 362 F.3d 1187 (9th Cir. 2004), the Ninth Circuit held, *inter alia*, the government need not show a defendant knew structuring currency transactions was illegal and also held evidence of belated tax payments,

made while awaiting prosecution, should not be admitted to demonstrate a lack of intent to willfully evade or defeat tax laws. Pang owned and operated a wholesale company that sold cooking oils to restaurants and retailers and failed to report income derived from sales to six of the company's customers. Pang was charged by criminal information with structuring, tax evasion and filing false tax return violations. Representatives of five of the customers testified at trial concerning how they conducted business with Pang and his company. Invoices and canceled checks were introduced to demonstrate how Pang and his company's earnings compared to his reported income. Pang was convicted on all counts and he appealed.

The Ninth Circuit affirmed the conviction and upheld the district court's factual findings at the suppression hearing. Regarding the structuring charges, the Ninth Circuit upheld the district court's decision to exclude the word 'knowingly' from the jury instructions, since the government need not prove that element. Pang argued this change in the language was a constructive amendment of the criminal information. The Ninth Circuit reiterated its previous findings in *United States v. Lindberg*, 220 F.3d 1120 (9th Cir. 2000) that Congress amended 31 U.S.C. § 5324 and eliminated the willfulness requirement imposed by *United States v. Ratzlaf*, 510 U.S. 135 (1994). Thus, the district court correctly instructed the jury on the elements of structuring, which no longer includes the knowledge requirement. Furthermore, the failure to include surplusage from the information was not erroneous, nor did it constructively amend the information because only the essential elements of the charge needed to be included in the instructions. With respect to the tax evasion charges, Pang argued the district court erred in preventing him from offering evidence that he paid the amount due for the tax years in question while awaiting trial, which demonstrated a lack of intent to willfully evade or defeat the tax laws. The Ninth Circuit agreed with the district court's ruling that evidence of belated tax payments pending trial is irrelevant, adding "were the rule otherwise, tax evaders could avoid criminal prosecution simply by paying up after being caught." *Pang*, 362 F.3d at 1194.

26 U.S.C § 7201

Tax Due and Owing

In *United States v. Schoppert*, 362 F.3d 451 (8th Cir. 2004), the Eighth Circuit held failure to pay tax due and owing can still be tax evasion, even when the correct amount of tax owed was reported. Schoppert was convicted by a jury of income tax evasion in violation of 26 U.S.C. § 7201 for evading the payment of more than \$450,000 in federal income taxes by using cash extensively, obtaining assets using another person's credit card, and making false statements to IRS agents who attempted to collect the taxes. Schoppert appealed, arguing a tax deficiency is required under § 7201, and since the government conceded to that

required element and to the fact he did not owe tax in addition to what he had reported on his returns, he was entitled to an acquittal.

Schoppert noted § 7201 does not define deficiency, but argued § 6211 defines it as an amount by which the tax imposed exceeds the amount of tax indicated on the return.

Since the government conceded Schoppert did not have tax due and owing in addition to the amount on his returns, he argued he had no deficiency and, thus, could not be convicted under § 7201. The Eighth Circuit disagreed, finding the statutory language clearly establishes a violation of § 7201 if anyone willfully attempts in any manner to evade a tax or its payment. Although evading the assessment of an income tax can be accomplished only through a course of action including underreporting of income and, thus, requires the existence of unreported taxable income, evading the payment of income tax can be accomplished even when a taxpayer reports all taxable income on his return. The Eighth Circuit cited its decision in *United States v. Silkman*, 156 F.3d 833 (8th Cir. 1998), supporting its interpretation of tax evasion cases as being either evasion of tax assessment or evasion of tax payment. In *Silkman*, the court described the deficiency element in a generic way applicable to both evasion of assessment and evasion of payment. The taxes evaded need only have been imposed by the Internal Revenue Code and owed by the taxpayer.

Thus, the Eighth Circuit found Schoppert's filing of accurate returns did not preclude his prosecution under § 7201. His subsequent willful acts of attempting to evade payment of the taxes he reported on those returns was sufficient to show he evaded payment of a Title 26 tax that he owed. Finally, the court held the trial judge adequately stated the law and the evidence was sufficient to support the jury's finding Schoppert evaded payment of taxes.

TITLE 18

18 U.S.C. § 287

18 U.S.C. § 287 – Presentation of False Claim

In *United States v. McBride*, 362 F.3d 360 (6th Cir. 2004), the Sixth Circuit affirmed McBride's convictions for obstruction of justice, obstruction of the due administration of the Internal Revenue Code, and bankruptcy fraud. The Sixth Circuit, however, reversed McBride's conviction for presenting a false claim against the government, in violation of 18 U.S.C. § 287. The § 287 false claim charge was based on a check for \$12,990.67 that McBride had written to the IRS to cover the outstanding federal income tax liability of his girlfriend. McBride submitted the check to the IRS knowing that it would not clear because it was

drawn on an account he had closed one year earlier.

The Sixth Circuit based its dismissal of the § 287 count on its conclusion that McBride's payment of his girlfriend's tax liability with a bad check did not constitute a "claim," and therefore, as a matter of law, he could not be found liable under § 287. As the Sixth Circuit pointed out, the word "claim" is not defined in the statute. Typical cases involving this statute involve filing a fraudulent tax return seeking an erroneous refund. McBride argued that by sending the bad check to the IRS on behalf of his girlfriend, he could not possibly have obtained any money, property, credit, or reimbursement from the government in return, thus making the § 287 charge inappropriate.

The Sixth Circuit's opinion indicates the government relied on the holding in United States v. Jackson, 845 F.2d 880 (9th Cir. 1988) to support its § 287 charge. The Sixth Circuit's opinion distinguished the facts in Jackson from those in the instant case. Specifically, Jackson received and cashed several checks from an agency of the U.S. government for which he was not entitled. Furthermore, Jackson also attempted to have the checks re-issued to him by falsely claiming that he had not received them in the first place. As the Sixth Circuit noted, nothing McBride did involved the disbursement of government funds. He neither received any undue payments from the government, nor tried to induce the government to send him duplicate payments.

In the absence of a definition within § 287, the Sixth Circuit looked to Black's Law Dictionary and other statutes to determine the plain meaning of the term. Black's Law Dictionary defines a "claim" as a "[d]emand for money or property of right." The False Claims Act, 31 U.S.C. §§ 3729 – 3733, the civil counterpart to § 287, defines a "claim" as "[a]ny request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded"

Both definitions of "claim," the Sixth Circuit noted, reaffirm its prior decisions and the prevailing understanding in the Sixth Circuit that a "false claim" for the purposes of § 287 is an unjustified demand for money or property from the government. The Sixth Circuit failed to locate any case law holding the sending of an insufficient-funds check to the IRS constitutes a false claim under § 287 and declined to be the first court to do so.

18 U.S.C. § 1956(a)(1)(A)(i) and FORFEITURE

Gambling Bets Used to Pay Winning Bets— Money Laundering Violation

In *United States v. Iacaboni*, 363 F.3d 1 (1st Cir. 2004), the First Circuit held that using money received as gambling bets to pay off the winning bettors promoted the illegal gambling operation and constituted a money laundering violation. Furthermore, the court held the amounts paid out to winning bettors were subject to forfeiture. Iacaboni operated an illegal sports betting operation in which he paid out over \$340,000 in winning bets over several years. In connection with this gambling activity, Iacaboni pleaded guilty to conspiracy, conducting an illegal gambling operation, and money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) ("promotional" money laundering); however, Iacaboni contested the government's forfeiture allegations. After conducting a hearing, the district court concluded the \$340,000 paid out in winning bets was subject to forfeiture.

On appeal, Iacaboni contended the district court erred in its determination of the amount to be forfeited which included amounts representing payments to the winning bettors. He initially argued that the payment of the winning bets could not constitute a money laundering offense because the payments were not made with proceeds of an SUA. Iacaboni then argued that the payment of the winning bettors could not be considered "promotion" because the payments were an integral part of the gambling business.

The First Circuit initially looked to the language of the statute (18 U.S.C. § 1956(a)(1)(A)(i)) to determine whether the payments to the winning bettors constituted financial transactions involving proceeds of illegal gambling, an SUA. Iacaboni, citing to the Seventh Circuit's decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), argued "proceeds" refers to net income of the illegal gambling operation, not payouts. In *Scialabba*, the Seventh Circuit held money paid out to winning players in an illegal video poker scheme could not be considered proceeds, defining proceeds as net profits. The First Circuit declined to follow *Scialabba* and rejected Iacaboni's argument, citing its earlier decision in *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), where it quoted the legislative history of RICO forfeiture provisions for the proposition that the term "proceeds" has been used in lieu of the term "profits" in order to alleviate the unreasonable burden on the government of proving net profits.

Turning to Iacaboni's second argument, the district court reasoned that even though the payouts were not typical examples of promotional money laundering (such as the reinvestment of criminal proceeds through the payment of

business expenses), they nonetheless promoted the gambling business. The district court concluded the transactions fell within the statute since “nothing makes an illegal gambling operation flourish more than the prompt payment of winners.” The First Circuit agreed, stating that targeting the payouts reflects the decision of Congress (embodied in §1956) to proscribe not only certain unlawful cash-generating schemes, but also the means by which they are carried out and hidden from investigators. Because the payments made to winning bettors constituted money laundering offenses, the amounts paid were subject to forfeiture as property involved in the money laundering offense.

MONEY LAUNDERING

Money Laundering “Sting” Provision – Insufficient Representation Money from a SUA

In *United States v. Wayne Anderson*, 371 F.3d 606 (9th Cir. June 10, 2004), the Ninth Circuit reversed Anderson’s conviction under the money laundering “sting” provision because the government undercover agent failed to make a sufficient representation that the money involved in the sting transaction was derived from a specified unlawful activity.

Anderson was one of the principals in an international organization named Anderson Ark & Associates (AAA) which was under criminal investigation for facilitating income tax evasion and bankruptcy fraud. During the investigation, an IRS undercover agent, posing as a potential client, sought Anderson’s assistance in hiding his money. Originally, the agent represented he had \$100,000 he wanted to conceal from a bankruptcy court. During a meeting between the agent and Anderson, the agent represented the money was really the proceeds of a leasing scam in which the agent was involved. The agent claimed that through various leasing arrangements he set up for clients, he was able to defraud banks of 5 percent of the return on their financing. Based on this conversation, Anderson told the agent he could help him and have the cash credited to the agent’s AAA account in Costa Rica. The agent then gave Anderson the cash which was later credited to the AAA account as promised. Anderson was convicted, among other things, of money laundering in violation of 18 U.S.C. § 1956(a)(3), predicated on bank fraud in violation of 18 U.S.C. § 1344.

On appeal, Anderson challenged the sufficiency of evidence used to convict him on the money laundering/bank fraud count. The money laundering conviction hinged entirely on the agent’s representations to Anderson. Reviewing the matter, a Ninth Circuit panel found the agent’s efforts in setting up the bank fraud predicate for the money laundering sting failed to adequately represent two of the elements of bank fraud—that the money was obtained from a financial

institution and that the financial institution was federally chartered or insured. As to the first element, the agent did not represent to Anderson the money he gave Anderson was obtained from a financial institution “by making a false statement or promise.” To the contrary, the agent’s “story” was that he had obtained the money from his clients, not the bank. Thus, the agent represented fraud perpetrated on the clients, not the bank.

With respect to the second element, the panel found the undercover agent did not represent to Anderson the \$100,000 he gave him was obtained from a federal-chartered or insured financial institution. In making the “representations” on which its case hinges, the agent gave Anderson no details whatsoever about the banks purportedly used in the scheme. According to the panel it is incumbent on the government to ensure its representations sufficiently track the federal crime in order to put the participants on notice of the crime. Based on these findings, the Ninth Circuit panel reversed Anderson’s sting conviction.

18 U.S.C. § 1957

Known Criminal’s Lack of Legitimate Income Insufficient to Support Money Laundering Charges

In *United States v. Carucci*, 364 F.3d 339 (1st Cir. Apr. 2004), the First Circuit overturned Carucci’s money laundering convictions because the court determined the government had failed to prove the predicate criminal conduct.

Carucci is a real estate broker and business associate of Stephen Flemmi, a notorious Boston mobster. At trial, Carucci was convicted of engaging in monetary transactions in criminally derived property in violation of 18 U.S.C. § 1957. The money laundering charges against Carucci stemmed from his handling of the sale of two condominium buildings to Flemmi who paid in cash, money orders, and checks drawn from third-party accounts. Carucci’s indictment charged four specified unlawful activities (SUAs), gambling, extortion, drug trafficking, and loan sharking, that were the predicate crimes for the money laundering charges under 18 U.S.C. § 1957.

To prove Carucci’s involvement in the SUAs, the government relied on the immunized and rather vague testimony of Flemmi’s son, as well as evidence of Flemmi’s leadership in organized crime and his apparent lack of legitimate income. While the court noted that a jury was permitted to reasonably infer a predicate illegal act from an overall criminal scheme, the evidence produced by the government in Carucci’s case failed to establish a definite link between Flemmi’s real estate transactions and the SUAs alleged by the government.

Accordingly, the First Circuit ruled that a conviction in violation of § 1957 may not be based solely on a known criminal's apparent lack of legitimate income and the suspicious structuring of the financial transaction. Therefore, the court ruled that the evidence in the instant case was insufficient to sustain a conviction. Consequently, the First Circuit overturned Carucci's money laundering convictions under § 1957.

BRADY v. MARYLAND

Withholding Exculpatory *Brady* Material

In *United States v. Davidson*, 308 F.Supp.2d 461, S.D.N.Y.(Mar. 18, 2004), the U.S. District Court for the Southern District of New York denied Davidson's motion for a new trial alleging the government had failed to turn over exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). In 1999, Davidson was convicted of one count of conspiracy to commit tax fraud, three counts of money laundering, eight counts of wire fraud, and three counts of income tax evasion. Davidson's aforementioned convictions were subsequently affirmed by the U.S. Court of Appeals for the Second Circuit. Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Davidson then moved for a new trial on the above-stated ground.

The undisclosed material at issue was a 464 page file created and maintained by the FBI's Houston, Texas office during 1994-1995. The FBI's file resulted from its investigation into a transaction that involved Davidson, a business entity known as J&T, and the Texas Commerce Bank (the J&T/TCB transaction). This underlying transaction and the resulting proceeds were also the subject of one of the fraud and money laundering counts for which Davidson was convicted.

As Davidson was aware of the FBI's earlier investigation and the existence of its file, he sought the production of the file throughout his trial but was repeatedly advised by the government that all but 20 pages had been destroyed during a routine document purge. After his trial and subsequent convictions, Davidson continued to seek the production of the missing file and was ultimately successful. Amongst the undisclosed documents was a memorandum that had been drafted by the Special Agent in charge of the investigation wherein she concluded that the file should be closed administratively because the evidence submitted to her did not demonstrate criminality. After the production of these additional documents, Davidson filed his motion for a new trial claiming that many of the documents constituted *Brady* material that should have been produced during the course of his trial.

District Court Judge McMahon conducted a thorough review of the F.B.I.'s file and found that some of the undisclosed documents did indeed constitute *Brady* material.

However, he ultimately held that the few items of undisclosed *Brady* material did not mandate a new trial, even on the J&T wire fraud and money laundering counts, because he was unable to "conclude that there is a reasonable probability that the jury would have reached a different result on the J&T wire fraud counts if they had been disclosed" since none of the documents contained any evidence that directly undermined the government's case or proved Davidson's innocence. *Id.*, at 488.

It should be noted that District Court Judge McMahon also held, assuming *arguendo* that the undisclosed *Brady* material required a new trial as to the counts that arose from the J&T/TCB transaction, Davidson's convictions on the remaining counts would not be disturbed as there was sufficient evidence as to the transactions underlying those counts that was wholly independent of the evidence related to the J&T/TCB transaction.

FOURTH AMENDMENT

Vehicle Search Incident to Arrest

In *Thornton v. United States*, 124 S.Ct. 2127 (May 24, 2004), the Supreme Court held the Fourth Amendment allows an officer to search a vehicle's passenger compartment as a contemporaneous incident to arrest, even when the officer does not make contact until after the person arrested has already left the vehicle. After observing suspicious driving behavior, a police officer ran a check of the license plates on the vehicle Thornton was driving and determined they did not match. Before the officer had an opportunity to pull Thornton over, Thornton drove into a parking lot, parked, and exited the vehicle. The officer approached Thornton and informed him that his plates did not match his vehicle. Noticing that Thornton appeared nervous, the officer performed a protective frisk, which led to the discovery of drugs and resulted in Thornton's arrest. After handcuffing Thornton, the officer searched the vehicle and found a handgun. Thornton was charged and convicted of federal drug and firearms violations.

In denying Thornton's motion to suppress the firearm as a fruit of an unconstitutional search, the district court found the automobile search valid under *New York v. Belton*, 453 U.S. 950 (1981), in which the Supreme Court held that when a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment as a contemporaneous incident of arrest. Thornton appealed his conviction, arguing *Belton* was limited to situations where the officer initiated contact with an arrestee while he was still in the car. The Fourth Circuit affirmed, noting that Thornton conceded he was in close proximity, both temporally and spatially, to his vehicle, placing it within his immediate control.

The Supreme Court granted certiorari and faced the question of whether its prior decision in *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle. The Court began its analysis citing its prior decision in *Chimel v. California*, 395 U.S. 752 (1969), in which it held the Fourth Amendment allows a police officer, incident to an arrest, to make a warrantless search of the person of the arrestee and the area into which the arrestee might reach in order to obtain a weapon or to destroy evidence. The Court based the rule on the dual interests in protecting the officer and preventing the destruction of evidence. Twelve years later in *Belton*, the Court, seeking to eliminate some of the problems that officers and courts had in applying *Chimel* in the context of arrests of vehicle occupants, held that an officer who makes an arrest of the “occupant” or “recent occupant” of a vehicle may search the entire passenger compartment of the vehicle incident to the arrest.

In affirming the Fourth Circuit’s decision, the Supreme Court held the rule of *Belton* governs even when an officer does not make contact until the person arrested has left the vehicle. In *Belton*, the Court placed no reliance on the fact that the officer ordered the occupants out of the vehicle, or initiated contact with them while they remained within it. The Court found no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he was in the car. In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside.

MIRANDA WARNINGS

Suppression of Physical Evidence Not Required For Failure to Give In-Custody Suspect *Miranda* Warnings

In *United States v. Patane*, 124 S.Ct. 2620 (June 28, 2004), the Supreme Court, in a splintered majority, held the failure of police to provide an in-custody suspect the warnings required by *Miranda*, does not require suppression of reliable physical evidence derived from the suspect’s unwarned but voluntary statements. Two groups of justices reaching this conclusion were unable to agree on a single rationale, but both emphasized the idea that the “core” objective of the *Miranda* decision, the safeguarding of a suspect’s Fifth Amendment right against compelled self-incrimination, is not implicated by admission of the non-testimonial fruits of unwarned statements.

Police went to Patane’s home to arrest him for violating a restraining order. The arresting officer began to read Patane his *Miranda* rights but stopped when Patane said he knew them. The officer then asked Patane about a Glock handgun

he knew Patane owned and Patane lead him to the gun. The gun was used to convict Patane of being a felon in possession of a handgun. The district court suppressed the handgun because it found the officers lacked probable cause to arrest Patane. The Tenth Circuit reversed the probable cause ruling, but affirmed the suppression order finding the handgun should be suppressed as the fruit of an unwarned statement.

The plurality and concurrence agreed that since the self-incrimination clause of the Fifth Amendment was not implicated by the use at trial of the physical fruit of a voluntary statement, there was no reason to extend the *Miranda* rule to this situation. The plurality also reaffirmed the Court’s holdings that the “fruit of the poisonous tree” doctrine does not apply to mere failures to give *Miranda* warnings. The concurrence found it unnecessary to decide whether the failure to give full *Miranda* warnings should be characterized as a violation, or whether there was anything to deter provided unwarned statements were not later introduced at trial.

“Question First, Warn Later” Interrogation Technique Requires Suppression

In *Missouri v. Seibert*, 124 S.Ct. 2601 (June 28, 2004), a plurality of the Supreme Court held that *Miranda* warnings given mid-interrogation, after Seibert gave an unwarned confession, were ineffective, and thus the confession repeated after warnings were given was inadmissible at trial. The Court’s opinion abrogates *United States v. Orso*, 266 F.3d 1030 (9th Cir. 2001) and *United States v. Esquilin*, 208 F.3d 315 (1st Cir. 2000).

Seibert was interrogated at the police station for about 50 minutes regarding a fire in her home that killed a teenager. Following a 15-20 minute break, the same police interrogator advised Seibert of her *Miranda* rights, obtained a waiver, and again began to question her. The police made references back to Seibert’s pre-warning admissions to illicit another confession from her, which was used to convict her of second degree murder.

The plurality affirmed the reversal of Seibert’s conviction by the Missouri Supreme Court finding the post-*Miranda* confession should have been suppressed. The Court said the “question first, warn later” technique purposefully employed by police undercut *Miranda*’s goal of reducing chances of admitting a coerced confession. Further, it believed that subsequent warnings under these circumstances were unlikely to have served their intended purpose. The plurality distinguished *Oregon v. Elstad*, 470 U.S. 298 (1985), which held that a suspect who has answered unwarned but coercive questions may validly waive his rights and provide a statement after being warned.

The Court found telling that in *Elstad*, the omission of *Miranda* warnings was inadvertent, while in this case it was a deliberate, studied technique. Further, the contrast between *Elstad* and this case illuminated factors that bear on whether *Miranda* warnings delivered midstream could be effective, the plurality said. Those factors include “the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first.”

The plurality found significant that the police did not warn Seibert that her prior, unwarned statements could not be used against her; moreover, the officer made references back to the prior confession. Unless the delayed warnings could place a just-questioned suspect in a position to make an informed choice whether to talk or remain silent, “there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment,” the plurality said.

SIXTH AMENDMENT

Jury Intimidation

In *United States v. Rutherford*, 371 F.3d 634 (9th Cir. 2004), a jury convicted Dr. Martin Rutherford and his wife of filing a false tax return in violation of I.R.C. § 7206(1), and failing to file in violation of I.R.C. § 7203. Prior to the commencement of their five month sentences, the Rutherfords filed a motion for a new trial, alleging the jury was intimidated by several IRS employees present in the courtroom during the trial. The district court ordered a hearing on the issue of jury tampering. Prior to the hearing, the district court concluded the only claims in the jurors’ affidavits regarding conduct of IRS personnel in the courtroom that could be admitted were those that might relate to ex parte contacts or jury tampering. The court also found, in accordance with Federal Rule 606(b), it would not allow jurors to testify about the effect any such conduct had on the jurors’ state of mind in reaching a verdict.

The Rutherfords’ attorney interviewed several jurors about whether the presence of IRS employees at trial and other factors may have influenced their verdict. In support of their new trial motion, the Rutherfords submitted the affidavits of three jurors and one non-juror. Each of the jurors’ affidavits swore that no government employee spoke to him or her, made any threat, nor made any overtly threatening gesture towards him or her during the trial.

After hearing the evidence, the court found there was no disruptive behavior during the trial, nor any evidence the IRS tried to fill the courtroom with a strong government

presence, noting there were just as many, if not more, supporters for the Rutherfords as for the government. The district court denied the Rutherfords’ motion for a new trial, finding they failed to show that the conduct of the IRS employees in the courtroom intentionally influenced the jury. The Rutherfords appealed the district court’s denial of their motion.

On appeal, the Ninth Circuit vacated the ruling, finding the district court was incorrect in determining the Rutherfords must show actual prejudice from the government’s intentional conduct; rather, the appropriate inquiry should have been whether the unauthorized conduct or contact was potentially prejudicial, and what the jurors’ perceptions were of the conduct at issue. The Ninth Circuit vacated the district court’s ruling and remanded with a direction to the district court to conduct another evidentiary hearing regarding the jury tampering issue.

RESTITUTION

Restitution to Include Losses Occurring Outside the Statute of Limitations

In *United States v. Dickerson*, 370 F.3d 1330 (11th Cir. 2004), the Eleventh Circuit held Dickerson’s restitution order was properly comprised of losses related to the counts of conviction as well as relevant conduct, which included losses incurred beyond the statute of limitations. Dickerson applied for Social Security disability benefits based on a disabling condition. Shortly after submitting his application, but prior to the receipt of any benefits, Dickerson took a paying job. Although this made him ineligible to receive disability benefits, he failed to inform Social Security. As a result of receiving ineligible payments, Dickerson was indicted on and pleaded guilty to thirty-six counts of wire fraud and one count of Social Security fraud. The district court ordered him to pay restitution in the full amount of his victim’s loss. Dickerson appealed claiming the district court unlawfully included losses for conduct occurring outside the statute of limitations.

In affirming the restitution order, the Eleventh Circuit first found a “federal district court has ‘no inherent authority to order restitution, and may do so only as explicitly empowered by statute.’” Further, the court held that where a defendant is convicted of wire fraud, a crime which involved as an element a scheme to defraud, a district court must order restitution under the Mandatory Victims Restitution Act of 1996 (MVRA). Thus, the court held Dickerson was to pay restitution to all victims for the losses suffered from his conduct in the course of the scheme, even where such losses were caused by conduct outside of the statute of limitations. The court noted that under the MVRA, the district court must find the loss resulted directly from the defendant’s conduct in the course of the

scheme, and the “harm to the victim must be closely related to the scheme, rather than tangentially linked.”

The Eleventh Circuit had previously joined five other Circuits in holding that a district court may consider criminal conduct occurring outside of the statute of limitations period as relevant conduct for sentencing purposes. Thus, if a court may consider relevant conduct occurring outside the statute of limitations in determining the offense level and, indirectly, the range of possible sentences, then, the court determined, what could preclude a district court from considering such conduct in determining a restitution order.

SUMMONS ENFORCEMENT

Summons to S Corp President Enforced

In *United States v. Milligan*, 93 A.F.T.R.2d 2004-2577 (D. Ariz. 2004), the district court denied Milligan’s various claims and ordered him to produce the records sought by the IRS. The IRS issued a summons to Milligan, in his capacity as president of his jointly owned S corporation, to produce for examination certain books, papers, records or other data. The government sought enforcement of the summons after Milligan appeared but did not produce the documents requested.

Milligan invoked his Fifth Amendment privilege against self-incrimination to oppose enforcement of the summons. Milligan asserted that as the officers of his subchapter S corporation are husband and wife and because of the marital privilege, the corporation is a one-person corporation that should not be subject to a subpoena pursuant to *Braswell v. United States*, 487 U.S. 99 (1988). Milligan also argued the corporation’s S classification as a “flowthrough” entity should allow it to receive personal treatment for purposes of the Fifth Amendment.

The district court enforced the summons finding the government had established a prima facie case for enforcement. The court found Milligan was not entitled to assert a Fifth Amendment privilege, pursuant to the possible exception stated in *Braswell*, as he was not the only officer of the corporation. Further, the Arizona Supreme Court has expressly declined to extend the marital privilege from confidential verbal communications to acts, ruling that a spouse is not precluded from testifying about the selection and identification of requested documents as that does not constitute a confidential communication. Finally, the privilege against self-incrimination could not be asserted for or by the S corporation as the Supreme Court has consistently held the privilege against self-incrimination should be limited to its historic function of protecting only the natural individual.

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