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SUPREME COURT CASES

Terry Stop Not Justified When Based Solely On Anonymous Tip That A Person Is Carrying A Gun

In ***Florida v. J. L.***, 120 S. Ct. 1375 (2000), an anonymous caller reported a young black male, standing at a particular bus stop and wearing a plaid shirt, was carrying a gun. Officers went to the bus stop and saw three black males. J. L. was wearing a plaid shirt but the officers did not observe a gun or any suspicious behavior. Apart from the tip, they had no reason to suspect any of the three of illegal conduct. One officer frisked J. L. and seized a gun from his pocket. J. L. was charged with a firearms violation under state law. The trial court granted his motion to suppress the gun as the fruit of an unlawful search. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

Upon a grant of *certiorari*, the Supreme Court unanimously held an anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. In its seminal "stop and frisk" decision, *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Here, the officers' suspicion that J. L. was carrying a weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The Court found the tip clearly lacked sufficient indicia of reliability to provide reasonable suspicion to make a *Terry* stop. It provided no predictive information and, therefore, left the police without means to test the informant's knowledge or credibility. *See Alabama v. White*, 496 U.S. 325, 327 (1990). The Court explained reasonable suspicion requires a tip to be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

The Court declined to adopt the argument that the standard *Terry* analysis should be modified to license a "firearm exception," under which a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing. The facts of this case did not require the Court to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great -- *e.g.*, a report of a person carrying a bomb -- as to justify a search even without a showing of reliability.

TITLE 26 AND TITLE 26 RELATED CASES

Retroactive Application Of *Gaudin* Barred On Collateral Review

In ***United States v. Mandanici***, 205 F.3d 519 (2nd Cir. 2000), Mandanici was convicted in 1983 of making false statements when he applied for federal rent subsidy benefits from the Department of Housing and Urban Development, in violation of 18 U.S.C. § 1001. Pursuant to then current Second Circuit law, the trial judge made a finding of

materiality with respect to Mandanici's statements, employing a preponderance of the evidence standard. In June 1995, the Supreme Court ruled if materiality is an element of an offense under § 1001, a finding of materiality must be made beyond a reasonable doubt by a jury. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). In *United States v. Ali*, 68 F.3d 1468 (2nd Cir. 1995), the Second Circuit followed *Gaudin*, holding materiality is an element of any and all charges under § 1001. *See id.* at 1474-75. Arguing the holding of *Gaudin* should be applied retroactively, Mandanici filed a petition for a writ of error *coram nobis* to vacate and expunge his conviction. The district court denied the petition, relying on the Second Circuit's prior decision in *Bilzerian v. United States*, 127 F.3d 237 (2nd Cir. 1997), where it concluded *Gaudin* does not apply retroactively on collateral review.

On appeal, the Second Circuit pointed out that in *Bilzerian*, it had examined the retroactivity of *Gaudin* and *Ali* with respect to *habeas corpus* relief. There, the court held that pursuant to the framework established by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), the holding in *Gaudin* was a "new rule" of constitutional criminal procedure which did not qualify for retroactive application, for it did not fall within one of the two narrow exceptions annunciated by the Supreme Court in *Teague*. According to *Teague*, new rules of constitutional criminal procedure do not apply retroactively unless they "(1) place an entire category of primary conduct beyond the reach of the criminal law, or . . . prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense," or are "(2) new watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990). Conceding the first *Teague* exception was inapplicable to his case, Mandanici urged the court to find the new *Gaudin* rule "necessary to the fundamental fairness of criminal proceedings" and thus, falling within the second *Teague* exception.

Acknowledging that *Teague* applies to petitions for *habeas corpus*, the court stated by analogy, it also applies to *coram nobis* petitions. *See United States v Swindall*, 107 F.3d 831, 833-34 (11th Cir. 1997). Additionally, the court recognized the second *Teague* exception was arguably applicable in the present case, for the *Gaudin* rule promotes accuracy and fairness, factors held sufficient in *Sanders v. Sullivan*, 900 F.2d 601 (2nd Cir. 1990), to qualify as a "new rule" for the second exception. More recently, however, the Supreme Court "underscored the narrowness of the second *Teague* exception by invoking the sweeping rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of the type of rule that fits within the exception." *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997). Unlike *Gideon*, which established the affirmative right to counsel in all felony cases, *Gaudin's* requirement that materiality be proved beyond a reasonable doubt for conviction under § 1001 is a "narrow right" that affects only a "limited class" of cases. Thus, "it has none of the primacy and centrality of the rule adopted in *Gideon*," nor does it measure up to the "watershed" standard. Accordingly, the court held the rule does not apply retroactively on collateral review and Mandanici could not challenge his 1983 conviction on the basis of any such error.

Filing Status Is a Material Matter For 26 U.S.C. § 7206(1) Convictions

In ***United States v. Scarberry***, No. 99-6234, 2000 U.S. App. LEXIS 3239 (10th Cir. Mar. 2, 2000), Scarberry was the proprietor of a small return preparation business. She filed a 1994 joint return with her husband claiming business losses associated with his part time employment for a carpet installation business which he did not own. Additionally, she filed a second 1994 joint return with another man and she prepared a 1994 individual income tax return for a client falsely claiming a farm loss. On the basis of these returns, Scarberry was convicted, *inter alia*, of violating 26 U.S.C. § 7206(1). Scarberry appealed her conviction, arguing the "married filing jointly" filing status she falsely claimed, was not material as a matter of law.

Falsity as to a material matter is one of the elements of a § 7206(1) conviction. For information to be "material," *United States v. Clifton*, 127 F.3d 969 (10th Cir. 1997) requires the information to be necessary to the correct determination of tax liability. The Tenth Circuit found the revenue agent had specifically testified filing status affects tax rates, dependency status of children and computation of the earned income credit. Since filing status is thus necessary to the correct determination of tax liability, Scarberry's false claim of "married filing jointly" was material.

Cash On Hand Must Be Established With Reasonable Certainty

In ***United States v. Mounkes***, 204 F.3d 1024 (10th Cir. 2000), Mr. and Ms. Mounkes owned and operated a resale business incorporated under Subchapter C. To avoid bank reporting requirements they requested purchasers of items costing over $10,000 to pay them in several checks rather than one check. They then deposited some of the checks into their personal accounts and failed to report these checks on either their corporate or personal tax returns. Also, the Mounkes made large cash expenditures. They were

convicted of tax evasion in violation of 26 U.S.C. § 7201.

On appeal, the Mounkes argued evidence of cash on hand used as a starting point to derive unreported taxable income and ultimately to prove the tax liability element of § 7201 was insufficient to support a guilty verdict. The Tenth Circuit relied on *United States v. Conaway*, 11 F.3d 40 (5th Cir. 1993) which required the government to establish a defendant's pre-income cash on hand with reasonable certainty, but not a "mathematical exactitude." Applying *Conaway* to the agent's testimony she had explained "cash on-hand" to the Mounkes and they had submitted a written statement of cash on hand to her which matched the figures reported on their corporate tax returns, the Tenth Circuit held the court could determine the Mounkes' cash on hand with reasonable certainty.

Obviousness Of Scheme Does Not Render Scheme Immaterial

In ***United States v. Cordero***, No. 99-1363, 2000 U.S. App. LEXIS 810 (2nd Cir. Jan. 21, 2000), Cordero filed false claims for tax refunds with attached tax protest brochures and he was convicted of violating 18 U.S.C. § 287. Cordero appealed arguing the included tax protest brochures made his scheme obvious, hence his false claims for tax returns were immaterial.

The Second Circuit, relying on *United States v. Nash*, 175 F.3d 429 (6th Cir. 1999), held obviousness as a defense against materiality "would render the taxpayer with an ill-gotten refund if his scheme worked, yet allow him to claim immateriality if he got caught." Rejecting obviousness as a defense against materiality, the Second Circuit held, Cordero's false claims for tax returns were material since failure to report substantial amounts of income is material as a matter of law.

The Second Circuit did note the question of whether *United States v. Gaudin*, 515 U.S. 506 (1995) applies to prosecutions under 18 U.S.C. § 287 has yet to be decided in the Second Circuit and other circuits are split on the issue. The Second Circuit, however, did not reach the issue of the applicability of *Gaudin* since the district court instructed the jury on materiality and left that issue for the jury to decide.

Government Paid Informant Does Not Violate The Anti-Gratuity Statute

In ***United States v. Anty***, 203 F.3d 305 (4th Cir. 2000), Anty moved prior to trial pursuant to 18 U.S.C. § 201(c)(2), the anti-gratuity statute, to suppress the testimony of Jerome, a paid informant. She argued the government violated the statute which prohibits offering unlawful inducements to a witness by impermissibly paying Jerome for his testimony. The district court allowed Jerome to testify but stated it would revisit the issue if Anty were convicted. Upon Anty's conviction, the district court granted her motion for a mistrial ruling the payment to Jerome violated § 201(c)(2) and his testimony must be suppressed.

On the government's appeal, the Fourth Circuit concluded § 201(c)(2) does not prohibit the government from using the testimony of a paid informant. The court, in deciding an issue of first impression and following the holding in *United States v. Richardson*, 195 F.3d 192 (4th Cir. 1999), held "[t]o interpret § 201(c)(2) to preclude the payment of money to informants to assist in investigating and prosecuting crimes, by giving truthful testimony, would not only 'rob the government of its long-standing prerogative . . .' to do so as established by statute and recognized practice, it would also work an obvious absurdity in implicitly repealing numerous statutes that authorize the payment of expenses, fees, and rewards to witnesses." 2000 U.S. App. LEXIS at *11 (quoting *Richardson*, 195 F.3d at 196).

Moreover, Anty did not argue Jerome's testimony was false, rather she argued his testimony should have been excluded solely because he received payment for his assistance, including his testimony at trial. Because the court failed to find a violation of § 201(c)(2), it did not reach the question of whether the appropriate sanction for such a violation was the exclusion of the testimony at trial.

SEARCH AND SEIZURE

Government Employer's Warrantless Search And Seizure Of Employee's Computer Does Not Violate The Fourth Amendment

In ***United States v. Simons***, 206 F.3d 392 (4th Cir. 2000), Simons was convicted for receiving and possessing materials constituting and containing child pornography, in violation of 18 U.S.C. §§ 2252A(a)(2)(A) and (a)(5)(B). Simons was employed as an electronic engineer at the Foreign Bureau of Information Sciences ("FBIS"), a division of the Central Intelligence Agency. He was provided with a private office and a computer with Internet access. In June, 1998, FBIS instituted a policy regarding Internet access by its employees, whereby use of the Internet was to be for official government business only. Additionally, FBIS placed all employees on notice that their Internet access would be monitored and subject to periodic audits and inspections. In July 1998, while conducting an

inspection for inappropriate use of computer resources, FBIS discovered Simons had accessed a large number of pornographic websites, downloading multiple pornographic files onto his computer's hard drive. From a neutral workstation, FBIS then copied all of the files contained on the hard drive of Simons' computer. Next, after consultation with the CIA OIG, an FBIS employee entered Simons' office, removed the hard drive from his computer and replaced it with a copy. Subsequently, the government executed two search warrants for Simons' office. The first which occurred outside the presence of Simons in August 1998, resulted in copies being made of all computer related items in his office; however, no copy of the warrant or list of items seized was left behind. The next search occurred in September 1998, with Simons present. Original evidence was seized and removed from the office and a copy of the warrant and an inventory of the items seized was properly left behind. Simons' motion to suppress the evidence seized from his office was denied.

On appeal, the Fourth Circuit first concluded the remote searches of Simons' computer did not violate his Fourth Amendment rights. The court determined Simons lacked a legitimate expectation of privacy in the files he downloaded from the Internet, because FBIS's Internet policy clearly stated it would "audit, inspect, or monitor" employees' use of the Internet, including all file transfers, web-sites visited, and e-mail messages. The court opined regardless of "whether Simons subjectively believed that the files he transferred from the Internet were private, such a belief was not objectively reasonable after FBIS notified him that it would be overseeing his Internet use."

Next, the court determined Simons' Fourth Amendment rights were not violated by the warrantless entry into his office by an FBIS employee and the subsequent seizure of his computer's hard drive. Finding Simons to possess a legitimate expectation of privacy in his office, the court was compelled to consider whether one of the "specifically established and well-delineated exceptions" to the warrant requirement was applicable. One exception to the warrant requirement arises when the requirement is rendered impracticable by a "special needs, beyond the normal need for law enforcement." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Moreover, the Supreme Court has held a government employer's interest in "the efficient and proper operation of the workplace" may justify warrantless work related searches. *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987). In particular, when a government employer conducts a search pursuant to an investigation of work related misconduct, the Fourth Amendment will be satisfied if the search is reasonable in its inception and its scope. *Id*. at 725-26. Here, at the inception of the search, FBIS had "reasonable grounds for suspecting" Simons' hard drive would yield evidence of misconduct. The search was permissible in scope, for the measure adopted, entering Simons' office, was "reasonably related to the objective of the search, retrieval of the hard drive."

Finally, the court rejected Simons' challenge to the validity of the August search warrant on the basis that by failing to leave behind a copy of the warrant and an inventory of the items seized, the government violated FED. R. CRIM. P. 41(d), thus rendering the search constitutionally unreasonable. The court, however, did remand the issue of whether Rule 41(d) was intentionally or deliberately disregarded.

EVIDENCE

Expert Testimony Admissible To Show Witness Bias

In ***United States v. Hankey***, 203 F.3d 1160 (9th Cir. 2000), Hankey was convicted of distributing and conspiring to possess with intent to distribute PCP. At trial, Hankey's co-defendant testified Hankey was not involved in the transactions. To impeach the co-defendant's testimony, the government presented the testimony of a police expert on street gangs. Over objection, the district court admitted this testimony. The police gang expert testified gang members who testify against one of their own are customarily beaten or killed by other members of their gang. Hankey appealed his conviction on several grounds.

With regard to the district court's evidentiary ruling admitting the expert testimony, Hankey contended the court failed to perform its gate keeping obligations under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), directing trial judges to consider such factors as peer review and error rates when making determinations as to the admissibility of expert scientific testimony under FED. R. EVID. 702.

The Ninth Circuit explained the factors for evaluating scientific evidence set out in *Daubert* are not exhaustive and that *Kumho* makes clear that trial judges are to be given wide discretion, not only in deciding whether to admit the testimony but also as to how to test its reliability. The court emphasized the trial judge in this case conducted extensive *voir dire* to assess the basis for the expert testimony and the relevance and reliability the expert's testimony. Although the expert relied on his street intelligence gained over a 21 year career to support his testimony, the court found this

experience was the only way to obtain information about street gangs. Moreover, the *Duabert* factors raised by Hankey – peer review, publication, potential error rates – simply were not applicable to this type of testimony because the reliability of the testimony depends on the knowledge and experience of the expert rather than on the methodology or theory behind it. The court also found the officer's gang experiences were current and thus reliable and relevant. The court, therefore, concluded the district court did not abuse its discretion in admitting the testimony of the police gang expert.

PRIVILEGES

Attorney-Client Privilege Does Not Protect Identity Of Client If Client Has Already Divulged Confidential Communications

In ***In re Grand Jury Subpoena; United States v. Under Seal***, 204 F.3d 516 (4th Cir. 2000), the Fourth Circuit held, compelling a lawyer to reveal the identity of a client during a grand jury proceeding does not violate the attorney-client privilege even though disclosure might link the client to confidential communications. The court based its conclusion on the fact the communications at issue had already been divulged by the client when he authorized his lawyer to reveal them in a letter written to prevent civil litigation.

A federal grand jury in the District of Maryland was investigating allegations that 37 Forrester Street, S.W., a residential property located in Washington, D.C., was an open air drug market. In 1998, the D.C. Council enacted laws which permit community groups to file civil lawsuits against owners of properties used for drug dealing. The Bellview Improvement Council, Inc. ("BIC") retained a law firm to help stop drug activity at 37 Forrester Street. In September 1998, counsel for BIC wrote a letter to "Daniel Quispehuman," the owner of record for the property, demanding all drug activity to stop. After receiving no response, BIC's counsel wrote another letter on April 9, 1999, threatening civil litigation. He received a letter on April 28, 1999, from Mark Rochon, an attorney claiming to represent an anonymous client who was in the process of re-titling 37 Forrester Street and dealing with the concerns expressed in BIC's letters. Rochon declined to disclose the identity of his client, but did state it was not Quispehuman. In July 1999, Rochon was served with a grand jury subpoena seeking his testimony regarding 37 Forrester Street and his client's interest in the property, as well as his client's identity.

Arguing disclosure of his client's identity would reveal his client's purposes and motives for hiring him and, therefore, reveal confidential communications protected by the attorney-client privilege, Rochon moved to quash the subpoena. He submitted a declaration in support of his motion stating the client retained him in connection with certain issues related to the property, the client requested his identity not be disclosed, and that Rochon had not revealed the client's identity to any third parties. Adopting Rochon's arguments, the client moved to intervene and quash the grand jury subpoena as well. The district court granted the client's motion to intervene but denied the motions to quash.

In rejecting Rochon's and the client's arguments, the Fourth Circuit stated "we have consistently held that a client's identity is privileged only if disclosure would in essence reveal a confidential communication." *See, e.g*, *Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir. 1999); *In re Grand Jury Matter*, 926 F.2d 348, 352 (4th Cir. 1991). Ordinarily, "the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege," *Chaudhry*, 174 F.3d at 402, because such information does not reveal confidential communications between the attorney and the client. The court did acknowledged it had recognized a narrow exception to the general rule in *NLRB v. Henry*, 349 F.2d 900 (4th Cir. 1990), where the court stated the privilege may extend to a client's identity where so much of the actual communication has already been disclosed that naming the client amounts to disclosure of a confidential communication. However, in *Henry*, unlike the present situation, neither the client nor the attorney voluntarily disclosed the client's confidential interests; it was a third party. Here, the court stressed the client's attorney made an authorized disclosure of the client's motives and purposes in seeking legal representation in the April 28, 1999, letter to BIC's counsel. The communications ceased to be confidential when the letter was sent. "Simply put . . . we do not recognize an exception that protects the client's identity because the client has authorized the disclosure of information that he could have kept confidential."

FORFEITURE

Notice Of Forfeiture Must Be Addressed And Sent Directly To Inmate At His Place Of Confinement

In ***United States v. McGlory***, 202 F.3d 664 (3rd Cir. 2000), the Third Circuit held when a person is in the government's custody and detained at a place of its choosing, due process

requires that notice of a pending administrative forfeiture proceeding must be mailed to the detainee at his or her place of confinement. In September 1989, the Drug Enforcement Administration (DEA) arrested McGlory for, *inter alia*, conspiracy to possess heroin with the intent to distribute. Incident to his arrest, the DEA seized various items of McGlory's property, including cash, cellular phones and luggage. A jury convicted McGlory on all charges and he was subsequently sentenced in to life imprisonment. From the time of his arrest until sentencing, McGlory remained in the custody of the United States Marshals Service, housed in various pretrial detention facilities. Before McGlory's criminal trial began, the DEA initiated administrative forfeiture proceedings with respect to the property it had seized when McGlory was arrested. The DEA provided notice of the administrative proceedings by three methods: 1) publishing notice in a newspaper of general circulation; 2) sending notice by certified mail to McGlory's last known address; and 3) sending notice by certified mail, return receipt requested, addressed to McGlory to or in the care of the United States Marshals Service, Pittsburgh, Pennsylvania. After his property was forfeited, McGlory filed a motion for return of property pursuant to FED. R. CRIM. P. 41(e) claiming he failed to receive adequate notice of the forfeiture proceedings. The district court denied the motion.

On appeal, McGlory argued in order to satisfy constitutional requirements, the DEA was required to address the certified mail containing the notice of forfeiture directly to him at the detention facility where the government was confining him. In contrast, the government argued due process was satisfied by sending the notices to the Marshals Service because under the Service's standard policy, any correspondence addressed to a person in custody was forwarded to the intended recipient at his place of confinement, by first class mail, postage prepaid.

The statute governing administrative forfeitures requires, in addition to notice by publication, "written notice . . . to each party who appears to have an interest in the seized article." Evaluating this standard in light of the Supreme Court's rulings in *Robinson v. Hanrahan*, 409 U.S. 38 (1972) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Third Circuit determined "in order to give notice that meets the requirement of due process, the agency responsible for sending notice must, at least in the first instance, address and direct notice to the detainee at his place of confinement." In *Mullane*, the Supreme Court declared the means employed to provide notice "must be such as one desirous of actually informing the absentee might reasonable adopt to accomplish it." 339 U.S. at 315. Moreover, *Robinson* stands for the proposition that a state cannot satisfy its due process obligation to a prisoner in its own custody by sending notice of forfeiture to the prisoner's last known address. The Third Circuit interpreted this to mean notice to a person whose name and address are known or easily ascertainable, such as in the case of McGlory, must be provided in a manner which has "practical use" to the person. The court stated "[o]ne who was 'desirous of actually informing' McGlory would have taken the time to ascertain the easily ascertainable fact of his whereabouts and would, at the least, have directed the notices to him at that address." Finally, the court rejected the government's argument that because pretrial detainees are frequently moved between detention facilities, the most efficient and reasonable manner to send notice to McGlory was via the Marshals Service. The court opined this only duplicated the number of agencies handling the mail, increased the possibility of error, and doubled the time until McGlory's receipt of the notice. The district court's holding was reversed and the matter was remanded.

SENTENCING

Consideration Of Criminal Conduct Unrelated To Offense Of Conviction Is Permissible In Determining Whether To Apply Acceptance Of Responsibility Adjustment

In ***United States v. Prince***, 204 F.3d 1021 (10th Cir. 2000), Prince was indicted on one count of bank robbery in violation of 18 U.S.C. § 2113(a). He entered into an agreement with the government to plead guilty in return for the government's agreement not to oppose a three level sentence reduction for acceptance of responsibility and to take no position on the sentence to be imposed. While in custody awaiting sentencing, the government received an F.B.I. report indicating Prince had stabbed another prisoner. The government forwarded this report to the probation officer, who included the information in his pre-sentence investigation report. The district court declined to apply the three level reduction for acceptance of responsibility.

On appeal, Prince argued the government violated the plea agreement by forwarding the F.B.I. report to the probation officer. The Tenth Circuit, relying on *United States v. Jimenez*, 928 F.2d 356 (10th Cir. 1991), rejected Prince's argument. The Tenth Circuit found prosecutors have an ethical duty to inform the court of conduct relevant to sentencing. The Tenth Circuit held the government did not violate the plea agreement by informing the probation officer of post-plea agreement criminal conduct.

Prince also argued even if the government did not violate

the plea agreement when it disclosed the information in the F.B.I. report, the district court should not have considered this information since it was unrelated to the criminal conduct for which he was convicted. The Tenth Circuit rejected Prince's argument, finding the notes explaining the adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a) do not qualify application to permit consideration only of criminal conduct of the same nature as the offense of conviction. Further, the majority of circuit courts which have addressed the issue have held sentencing courts are entitled to consider all criminal conduct, regardless of relation to the offense of conviction. Since the district court was correct in considering the information in the F.B.I. report and since Prince offered no evidence against the accuracy of the report, the district court's decision not to grant the adjustment was affirmed.

Obstruction Adjustment Affirmed Based On Court's Express *Dunnigan* Findings

In ***United States v. Mounkes***, 204 F.3d 1024 (10th Cir. 2000), as factually set forth on page 3 of this Bulletin, Mr. and Ms. Mounkes were convicted of violating 26 U.S.C. § 7201. The sentencing court applied the adjustment for obstruction of justice predicated on perjury provided by U.S.S.G. § 3C1.1 to enhance Mr. Mounkes' sentence.

Mr. Mounkes appealed his sentence arguing the court did not comply with *United States v. Dunnigan,* 507 U.S. 87 (1993), which requires a finding the defendant has given false testimony concerning a material matter with willful intent to provide false testimony, or with *United States v. Anderson,* 189 F.3d 1201 (10th Cir. 1999), which qualified *Dunnigan* by requiring the court to make a specific finding the defendant perjured himself, identifying the testimony at issue.

The Tenth Circuit, examining the record, found the sentencing court had cited two examples of Mr. Mounkes' testimony which contradicted the testimony of other witnesses. The sentencing court also found this cited testimony material, since it concerned affirmative acts of evasion. Though the sentencing court was not explicit as to the reasons it found the testimony willful, the Tenth Circuit deferred to its express finding of wilfulness. Since the sentencing court was in the best position to observe Mr. Mounkes' testimony and since the record revealed it did not misunderstand the *Dunnigan* requirements, the Tenth Circuit affirmed the sentencing court's enhancement of Mr. Mounkes' sentence.

Court Ordered Restitution Not Offset For Assets Forfeited To Government

In ***United States v. Alalade***, 204 F.3d 536 (4th Cir. 2000), the Fourth Circuit affirmed the criminal judgment against Alalade ordering him to pay restitution in the amount of $667,858.18, the full amount of the victims' losses. Alalade plead guilty to fraudulently obtaining $667,858.18 from financial institutions in a credit card fraud scheme. As part of his plea bargain, he agreed not to contest the forfeiture of approximately $80,000 worth of fraudulently obtained property seized by the government. Alalade appealed the district court's restitution order challenging the court's refusal to reduce the total amount of restitution by the value of the items the government seized from him and retained in administrative forfeiture.

The Fourth Circuit held the district court lacked discretion, under the plain language of the Mandatory Victims Restitution Act (MVRA), to order restitution in an amount less than the full amount of each Victim Financial Institution's loss by allowing an offset for the value of fraudulently obtained property the government seized from Alalade and retained for forfeiture. The court reasoned if the MVRA prohibits district courts from reducing the amount of restitution by the amount of third party compensation received by a victim prior to entry of the district court's order of restitution, it would be nonsensical for the district court to have discretion to reduce the amount of restitution by the value of property seized from Alalade and retained by the government in administrative forfeiture.

The court also noted Congress deleted the language of the predecessor to the MVRA, the Victim and Witness Protection Act of 1982, which afforded the district court discretion in cases such as this to consider any factor it deemed appropriate in determining the amount of restitution to be ordered and replaced it with language requiring the district court to order restitution in the full amount of the loss to each victim as determined by the district court.

CRIMINAL TAX BULLETIN
TABLE OF CASES
APRIL 2000

SUPREME COURT CASES

TITLE 26 AND TITLE 26 RELATED CASES

SEARCH AND SEIZURE

EVIDENCE

PRIVILEGES

FORFEITURE

SENTENCING

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