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TAX CRIMES

Willful Failure To Collect Or Pay Over Taxes

In *United States v. Ramirez*, 2003 WL 22995118 (W.D. Tx. Dec. 16, 2003), the United States District Court for the Western District of Texas denied Ramirez's motion to dismiss the indictment which charged her with failing to account for and pay over \$69,984 in income and employment taxes in violation of I.R.C. § 7202. The indictment alleged that as president, treasurer and 50 percent shareholder, Ramirez deducted federal income, FICA and Medicare taxes from her employees' wages but willfully failed to account for and pay over such taxes to the IRS. Ramirez argued the indictment was deficient because it failed to allege that she was a person required to collect, account for, and pay over any tax. In the alternative, Ramirez argued that even if she was such a person, the statute was unconstitutionally vague in that neither §7202, nor any other statute, imposes upon a corporate officer or shareholder an unequivocal duty to collect, account for, and pay over any tax, with the specificity required for a criminal statute.

With respect to the first argument the court, citing Fifth Circuit precedent, held an indictment is sufficient if it contains the elements of the charged offense, fairly informs the defendant of the charges against her, and ensures that there is no risk of future prosecutions. Here, the indictment charged that Ramirez was: (1) the president and treasurer; (2) that she deducted and collected various taxes from her employees' wages; and (3) that she willfully failed to account for and pay over such taxes to the IRS in violation of I.R.C. § 7202. The court found that the indictment fairly informed Ramirez as to the charges against her and the mere fact the indictment failed to include a statement that she was a person "required . . . to collect, account for, and pay over and tax imposed" did not render the indictment

deficient.

With regard to Ramirez's alternative argument that the statute was unconstitutionally vague, the court noted in the Fifth Circuit the standard for finding a statute void for vagueness is whether the statute: (1) fails to define the offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited; and (2) fails to establish minimum guidelines to govern law enforcement so as to invite arbitrary and discriminatory law enforcement. In denying Ramirez's argument, the court found an ordinary person is able to understand the conduct prohibited by the statute and accordingly, §7202 is not void for vagueness. Section 7202 clearly imposes a penalty on any person who fails to willfully collect or truthfully account and pay over taxes and the term "person" includes a corporate officer who "is under a duty to perform the act in respect of which the violation occurs."

SEARCH WARRANTS

Warrant Required To Inspect Package Held By Third Party Bailee

In *United States v. James*, 353 F.3d 606 (8th Cir. 2003), the Eighth Circuit held a search warrant was required to view computer disks James had given to a third party in a sealed envelope to destroy. While James was incarcerated on charges of sexual misconduct with a child, he attempted to smuggle out a letter to a long-time friend asking him to destroy computer disks he had given him in a sealed envelope. James did not tell his friend what was on the disks nor did he give his friend permission to open the envelope or view the disks. James told his friend the disks were old and one even contained a virus. This letter was forwarded to the police and the friend later consented to allowing the police to inspect the disks. The evidence found on the disks was used to convict James of possession of child pornography.

The Eighth Circuit held the evidence obtained from the disks should have been suppressed because the police had not obtained a search warrant prior to viewing the disks. The court distinguished this case from a case involving the joint occupancy of a space in which each cotenant has a diminished expectation of privacy, a function of communal living. The shared-access theory does not apply when the person giving consent is only a bailee, the court found. Although the bailee may have physical possession and access to the contents, that kind of possession or access does not imply actual authority to examine the contents or to allow another to do so. The court stated that “one does not cede dominion over an item to another just by putting him in possession.” Thus, the “mere act of storage” in this case was insufficient to support a finding the bailee, *i.e.*, the custodian, had actual authority to consent.

Moreover, the court concluded there was ample evidence that James did not give his friend, as bailee, permission to exercise control over the disks or consent to their search. James had sealed the disks with tape, marked them confidential and private, placed them in a sealed envelope, and conveyed them to his friend for the sole purpose of storing them.

The court also concluded the district court erred when it found the police reasonably relied on the bailee’s apparent authority. Citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the issue is whether the facts available to the officers at the time the consent was given warranted a reasonable person to believe the consenting party had authority to consent to the search. The court said “[t]he standard or reasonableness is governed by what the law-enforcement officers know, not what the consenting party knows.” Here, the police not only knew all of the facts that militated against a finding of actual authority to consent to a search, but also knew one more fact that the bailee himself did not know: that James wanted him to destroy the disks. The court found the police knew too much about James’ manifested desire to keep others, including his long-time friend, from seeing the content of the disc to rely on the friend’s authority to consent.

FOURTH AMENDMENT

Expectation Of Privacy In Fed-Ex Package

In *United States v. Young*, 2003 U.S. App. LEXIS (11th Cir. November 18, 2003), the Eleventh Circuit held Young and his co-defendant’s had no legitimate expectation of privacy in the contents of a Fed-Ex package where the envelop explicitly warned that sending cash was illegal and Federal Express retained the right to inspect any package for any reason. Young was convicted of various tax crimes in connection with the computation and collection of motor fuel excise tax. Specifically, Young misrepresented to the IRS when he applied for a 637 exemption certificate that he

would be using the fuel for off-road purposes. In reality, Young and his co-defendants engaged in a scheme to sell tax-free fuel for on-road purposes. Much of their business was conducted in cash and about two to three times per month, the cash proceeds were shipped via Federal Express between the parties to the crime.

As part of their investigation into the scheme, IRS agents requested that Federal Express allow them to inspect the suspect packages. Federal Express consented and the agents x-rayed several of the packages which were found to contain large amounts of currency. During trial, the co-defendant’s moved to suppress the evidence obtained through the x-ray of the packages. The district court denied the motion, finding the warnings on the package rendered unreasonable any expectation of privacy in the contents. On appeal, Young raised several issues, but the appellate court found only the suppression issue merited discussion.

In deciding the case, the Eleventh Circuit looked to the Supreme Court’s decision in *United States v. Jacobson*, 466 U.S. 109 (1984). In *Jacobson*, employees of a private freight carrier observed a white powdery substance during their examination of a damaged package. The employees then notified authorities who later determined the substance was cocaine. The Court acknowledged that letters and other sealed packages are in a class of effects in which the public has a legitimate expectation of privacy, but ultimately concluded Jacobson lacked such an expectation of privacy in the subject package when a third party opened the package on its own accord, and the government agents merely repeated a search that was already conducted by a private party. This case is distinguishable from *Jacobson*, however, because the IRS agents initiated contact with Federal Express, obtained the packages, x-rayed them, all without first obtaining a warrant.

Ultimately, the Eleventh Circuit found that no reasonable person would expect to retain a privacy interest in a package after signing an airbill containing an explicit warning that the carrier was authorized to act in direct contravention to that interest. The carrier told its customers not to ship cash and that it could open and inspect the packages at the carrier’s option. The court believed the presence of these two warnings removed the case from post-*Jacobson* jurisprudence. In fact, the court speculated that the warnings were probably added in the wake of *Jacobson*. The court held, as a matter of law, the warnings simply eliminated any expectation of privacy. Under an alternative theory, the court found there was also a consent to the search because the defendant authorized the carrier, as bailee of the packages, to consent to the search.

SIXTH AMENDMENT

Speedy Trial

In *United States v. Knop*, No. 88-20015-BC, 2003 U.S. Dist. LEXIS 18024 (E.D.MI Oct. 6, 2003), the district court denied Knop's motion to dismiss the information for violations of the right to a speedy trial as guaranteed by the Sixth Amendment. Knop was charged by information in 1988 for failing to file income tax returns in violation of IRC § 7203 for tax years 1981 through 1983. An arrest warrant was issued as a result of these charges. During the next 14 years, the IRS tried unsuccessfully to locate Knop. Finally, in 2002, the IRS found and arrested Knop. Knop filed a motion to dismiss the information on the ground the 14 year lapse violated his right to a speedy trial as guaranteed by the Sixth Amendment.

During the investigation, IRS agents visited Knop's home and sent letters advising him of the pending criminal investigation. Further, agents searched public records and notified police of the IRS's search for Knop. Following the issuance of the arrest warrant, agents routinely drove by Knop's residence and followed up on multiple leads, including that Knop was living at the Hunt Club he belonged to. Agents also recorded the arrest warrant on several databases, including the National Crime Information Center and the Treasury Enforcement Communication System. These entries alert other law enforcement agencies and conduct periodic searches of other records for any financial activity related to identifying data associated with a person, such as a social security number. These leads proved fruitless until 2002.

At the same time, Knop changed his lifestyle by using an alias, abandoning his dental practice, abstaining from having a driver's license, holding property in his own name or registering vehicles, quit-claiming his house to his girlfriend, living in an unheated cabin during the Michigan fall season, and refusing to pursue activities that would generate IRS Forms W-2 or 1099. Finally in 2002, a database search revealed Knop had received a Form 1099 for Social Security benefits issued with his first and middle names reversed.

In determining whether a speedy trial violation had occurred, the district court looked to the four factors established by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972), which were: 1) the length of delay, 2) the reason for the delay, 3) Knop's assertion of his speedy trial right, and 4) the resulting prejudice to Knop. The court found the 14-year delay between the filing of the charges and Knop's arrest, although extraordinarily long, was not a Sixth Amendment violation where there was no specific prejudice to Knop's defense resulting from the delay. Further, the court found that although the government had failed to do all that it could to locate and to arrest Knop, Knop was a greater cause for the delay as his lifestyle change was plainly designed to avoid detection. Finally, Knop did not raise the Sixth Amendment claim until after he was arrested. Based on an application of the facts to these

factors, the district court denied Knop's motion.

FORFEITURE

Comingling Of Drug-Tainted Funds With Legitimate Funds Makes Legitimate Funds Forfeitable

In *United States v. Puche*, 2003 U.S. App. LEXIS 23099 (11th Cir. Nov. 12, 2003), the Eleventh Circuit held the intermingling of drug-tainted funds with legitimate funds renders the legitimate funds forfeitable. The Puches, a father and two sons, and their money transmitting business, appeal from their convictions and sentences on one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(a)(3) and (h). The court also entered a forfeiture order pursuant to 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853, finding them jointly and severally liable in the amount of \$1,628,693.60 for money used in the offense and money involved in each financial transaction that the Puches conspired to conduct.

The Puches, through their money transmitting business, conducted several significant offshore wire transactions for undercover agents as part of a sting operation. The court found the Puches' suspicions should have been and were aroused by the size of the undercover agents' cash deliveries, their frequency, and the fact the cash was always delivered in small denominations and brought in duffel bags or boxes. Further, the manner in which the Puches structured their business's bank deposits showed the business frequently made deposits of less than \$10,000, thereby circumventing the submission of currency transaction reports.

On appeal, the Puches argued the district court's forfeiture order was erroneous because it included \$1,606,318.60 in legitimate funds that shared bank accounts with the undercover DEA money and that only \$22,375 in commissions paid to them in the laundering scheme should be subject to forfeiture. Further, they argued that the order was excessive in violation of the Eighth Amendment. The Eleventh Circuit disagreed and affirmed the order of forfeiture.

The court found that "property" under the statute includes any property used to facilitate the offense. Further, the court, citing with approval *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998), held that the forfeiture of commingled funds was proper when, as in this case, "the government demonstrates that the defendant pooled the funds to facilitate or 'disguise' his illegal scheme." The court found the evidence in this case showed that funds, both tainted and untainted, were rapidly moved into bank accounts to conceal the nature and source of the drug proceeds. Moreover, the jury could have inferred that the legitimate proceeds facilitated the illegal proceeds by

acting as a “cover,” the court added.

Finally, the court found the forfeiture of over \$1.6 million in untainted funds was not grossly disproportionate to the gravity of the Puches’ offenses in violation of the Eighth Amendment’s Excessive Fines Clause as the Puches were liable for a civil penalty in the amount of the funds involved in the transactions. In this case, the court held the \$1.6 million in untainted funds was used to “cover” the transfer of the tainted funds, and thus was properly forfeitable.

Forfeitable Funds Accepted As Legal Fees Not Basis For Conversion Or Civil Theft Charge

In *United States v. Bailey*, No. 6:01-cv-875-Orl-2KRS, 2003 U.S. Dist. LEXIS 19948 (M.D. Fl Oct. 22, 2003), the district court granted Bailey’s request for reconsideration of the grant of summary judgment on the conversion claim and part of the civil theft claim, and move to set aside the punitive damages verdict. Upon reconsideration, the court reversed the grant of summary judgment in favor of the government, and threw out the civil judgment of at least \$9 million against Bailey.

Following a Special Verdict of Forfeiture, including a \$2 million fee that Bailey’s clients transferred to him for their legal defense, Bailey filed a third-party petition claiming superior title to the funds, which was treated as a claim. The court denied Bailey’s claim and found the government held clear title to the funds, which related back to the date the funds were laundered in violation of 18 U.S.C. §§ 1956 and 1957. The court ruled that because Bailey knew from the outset that the money was subject to forfeiture, he did not qualify as an innocent third-party transferee whose claim would supersede the government’s title to the funds under federal forfeiture law. As Bailey no longer had the funds, the court gave the government several options, including pursuit of substitute assets or a civil action against Bailey for the full amount of the funds transferred to him. Further, the court reprimanded him for not turning over the funds and referred him to state disciplinary authorities.

The government sued Bailey alleging conversion and civil theft of the \$2 million fee because Bailey obtained the funds from his clients and disbursed funds to himself and other lawyers, that he knew was subject to forfeiture in the clients’ criminal case. The count alleging conversion included a claim for punitive damages, and the count alleging civil theft sought treble damages pursuant to Florida law. The court granted the government’s motion for summary judgment and Bailey went to trial on the remaining issues. At trial, the jury awarded the government \$3 million in punitive damages and found Bailey had the felonious intent to commit a theft when he obtained the fee, justifying a trebling of the government’s \$2 million in damages. Bailey appealed the holding asking the court to reconsider its summary judgment

and to set aside the punitive damages award. Bailey argued the court improperly applied the relation back doctrine to satisfy the elements of the claims because it was clear this retroactive vesting was based upon a legal fiction.

Reversing itself, the court held that the relation back doctrine did not satisfy the “possession” element of conversion and civil theft claims under Florida law. Further, at the time of the alleged conversion and theft, the government had neither a present nor immediate right to possess the funds, the court found. Moreover, the government’s possessory interest was contingent upon the conviction of Bailey’s clients, the entry of a special forfeiture verdict, and the rejection of Bailey’s claim to the funds. The court said that such speculative interest was too attenuated to maintain an action for conversion or civil theft under Florida law, and the relation back doctrine could not remedy that deficiency. Finally, the court found Bailey had “rightful possession” of the funds when he received and disbursed it and that the relation back doctrine was a legal fiction. Accordingly, the court held that since the government had no possessory interest until the decree of forfeiture, the relation back doctrine could not support the money award entered against Bailey. The court added, “the concept of retroactive vesting cannot transform Bailey’s rightful possession of the [funds] into a tortious act of interference with Government property under Florida law.”

With respect to the conversion, the court found Bailey’s refusal to return the funds upon demand amounted to conversion since at the time Bailey obtained and disbursed the funds, those acts were authorized. The court found the government had obtained a possessory interest in the funds only after it was dissipated, and Bailey never had the funds at the point when the government had a possessory interest in them. Finally, in rejecting the conversion and civil theft claims against Bailey, the court voided the punitive damages award against him.

Civil Forfeiture Statute Of Limitations Tolled By Pension Law

In *United States v. All Funds*, No. 01-6232, 2003 U.S. App. LEXIS 19279 (2nd Cir. Sept. 17, 2003), the Second Circuit held the statute of limitations applicable to an in rem action to forfeit the proceeds of Medicare fraud is equitably tolled during the time the fraudulently obtained funds were in a pension plan protected by the anti-alienation provision of the Employee Retirement Income Security Act, ERISA. Edward Weiss, owner of an ambulance service which had fraudulently billed Medicare, pleaded guilty to one count of filing false claims in violation of 18 U.S.C. § 287. Weiss commingled the fraud proceeds with legitimate revenues and established a pension plan. In 1998, the pension plan was dissolved and the funds were transferred into an IRA. As the funds were no longer covered by ERISA, the government sought

forfeiture of the funds. Weiss moved to dismiss the government's forfeiture action as barred by the one-year statute of limitations in 18 U.S.C. § 984(c). The district court agreed and dismissed the government's suit.

On appeal, the government alleged that contributions to the company's pension plan were derived from the income from the false Medicare claims. Once in the plan, however, the funds were protected by ERISA's anti-alienation provision, which states that pension funds may not be "assigned or alienated" while the money is held by the plan administrator. Thus, the government argued, ERISA's anti-alienation provision prevented it from initiating the forfeiture action until the pension plan was dissolved and began disbursement of the funds. Reversing the district court, the Second Circuit found that based on Supreme Court case law, the government could not touch the pension plan assets until the plan was terminated and the assets distributed. Further, the court found "it would be inequitable to bar the government from proceeding against the funds in this suit simply because the [Weisses] invested their ill-gotten gains in a pension plan." Thus, the court held that equitable tolling was appropriate in this case as "equitable tolling . . . permits courts to extend a statute of limitations on a case-by-case basis to prevent inequity, even when the limitations period would otherwise have expired."

Division of Commingled Funds

In *United States v. Totaro*, 345 F.3d 989 (8th Cir. 2003), the Eighth Circuit held state family law governing the division of marital property should be applied to determine the property interests of a defendant from those of a spouse for purposes of a RICO forfeiture. This appeal arises from the district court's denial of a spouse's claim to a legal interest in a country estate she shared with her husband for almost thirty years. The country estate was forfeited pursuant to the RICO forfeiture statute, 18 U.S.C. § 1963(l)(1), after the husband was convicted and sentenced in connection with his involvement in an investment fraud scheme committed between the years 1984 and 1999.

The country estate was originally purchased by the couple in 1974. In 1977, the husband filed for bankruptcy, and a year later the wife acquired full legal title to the property after paying off a mechanics lien. The husband's RICO violations began in 1984 and from that date forward, the husband funneled large amounts of proceeds of his illegal scheme into his wife's checking account, from which she paid the mortgage and made other significant improvements to the country estate. Meanwhile, the wife's income during the period 1974 through 1999 was modest, never exceeding \$35,000.

The district court found the wife held legal title to the country estate before her husband began committing RICO violations in 1984. After that time, however, the district court noted the husband's RICO proceeds were used to pay

for the property and the wife's income was too small to have been a primary source of the mortgage payments and improvements. Accordingly, the wife was found to be a "straw owner" with no independent legal right to the property. On appeal, the wife challenged this finding, asserting her legal right to a portion of the estate.

In its initial analysis, the Eighth Circuit noted a RICO forfeiture is an in personam sanction against an individual, not an in rem action, therefore, the forfeiture only reached the defendant's interest in the property. Under § 1963(l)(2)-(6), claimants may challenge the forfeiture by showing by a preponderance of the evidence they had either (1) a vested legal interest in the property or (2) a superior interest at the time the criminal act took place.

With respect to the first test, the Eighth Circuit determined it was undisputed the wife held title to the property before the RICO violations began. The court noted this case did not lend itself to a finding of straw or nominal ownership, since the wife lived in the house and exercised at least partial dominion and control over it. The court, however, found the wife's interest insufficient to prevent forfeiture under the first test since, but for the RICO proceeds and the subsequent payment of the mortgage, the wife would not hold any title to the estate. It would do a severe disservice to the purpose of the RICO forfeiture statute if a criminal were able to protect and enjoy RICO proceeds by investing them in property titled in a spouse.

As for the second test, the Eighth Circuit held it must look to state law to sort out the respective ownership interests, and save from forfeiture the portion of the estate the wife can prove was hers. Here, the wife established she received half of the estate as a gift from her husband prior to his receipt of RICO proceeds and she legally purchased her husband's remaining interest from one of his creditors. Accordingly, the Eighth Circuit concluded her ownership interest was untainted by RICO funds until 1984, by which time it appears she had accumulated some economic value in the estate by her own efforts. As such, the district court erred in finding the entire estate forfeited. It was now up to the trial court to engage in a factual analysis to determine the precise boundaries of the legal interest asserted by the wife.

State law respecting the division of marital property does not normally govern the distribution of property interests of a husband and wife unless the marriage is dissolved. In this case, the wife established some legal interest in the forfeited property superior to her husband's; the question that remains is how much. In the absence of rules specifically designed for the forfeiture context, the Eighth Circuit noted the best rules to sort out the property rights of married people are found in the laws governing divorce. Accordingly, the case was remanded with the instruction that the family property laws of New York, where the property was located, be applied to determine the wife's

interest in the estate.

SENTENCING GUIDELINES

Appellate Standard of Review for Departures

In *United States v. Bell*, 2003 U.S. App. LEXIS 23673 (5th Cir. November 20, 2003), the Fifth Circuit found the district court abused its discretion in granting Bell a downward departure at sentencing. Bell, in an attempt to have her probation hearing postponed or canceled, phoned in a false bomb threat to the courthouse on the day her hearing was scheduled, stating Pakistani terrorists had placed a bomb at the courthouse. State and local police as well as the FBI initiated an investigation, which resulted in the arrest of a Pakistani immigrant. Eventually, police identified Bell as the caller through cellular telephone records. Bell pleaded guilty to using a telephone to convey a false threat to damage a building by means of an explosive.

Bell's criminal history placed her sentencing range at 12 to 18 months' imprisonment. At sentencing, the district court granted a downward departure and sentenced Bell to probation, stating it feared imprisonment would interrupt Bell's mental treatment and that the nature of her criminal history, which consisted mostly of nonviolent, petty crimes, overrepresented her criminal history category.

In vacating the sentence, the Fifth Circuit first determined that the new standard of review analysis under the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) should be applied retroactively, agreeing with the First and Eighth Circuits that the new standard of review was a procedural, not substantive, change and thus was not a violation of the Ex Post Facto Clause. Under the PROTECT Act, the standard of review is de novo, unless the district court either fails to provide a written statement of reasons supporting the downward departure or fails to state a factor which advances an objective specified under the amended statute. Otherwise, the standard of review is abuse of discretion. 18 U.S.C. § 3742(e). The Fifth Circuit recognized the district court's statement at sentencing that the fact Bell needed medical care met the requirement of advancing an objective set forth under the statute and, thus, the correct standard of review was abuse of discretion, not de novo.

Regarding the downward departure, the Fifth Circuit found the district court failed to provide detailed reasoning in its written statement of reasons, but found no limitation in the PROTECT Act preventing the appellate court from considering the sentencing colloquy in addition to the court's written reasons in reviewing the sentence. In this regard, the Fifth Circuit considered both the written statement of reasons and the hearing record and found the district court still failed to provide adequate reasons

supporting departure on the criminal history grounds. Furthermore, although the district court made comments about Bell's need for mental treatment and its fear that imprisonment would interrupt such treatment, the Fifth Circuit found the court's statements were unclear and thus, the appellate court was unable to determine what conclusions the court reached in granting the departure. Thus, it vacated the sentence and remanded the case to the district court to clarify its reasoning.

Tax Crimes and Sentencing

In *United States v. Shevi*, 345 F.3d 675 (8th Cir. 2003), Shevi pled guilty to mail fraud, structuring cash transactions and five counts of filing false tax returns. At sentencing, the district court found the mail fraud loss to be \$305,133 under USSG §2F1.1; imposed an abuse of trust enhancement under §3B1.3; grouped the mail fraud and structuring counts under §3D1.2(c); but declined to group the mail fraud and tax offenses under §3D1.2. Shevi appealed the district court's sentencing determinations.

Shevi, was named trustee of his niece and nephew's social security benefits following his sister's death. Using trust funds to pay the premiums, Shevi purchased two life insurance policies naming himself as the beneficiary. Shortly before filing for bankruptcy, Shevi transferred the policies to his wife, omitted them from the schedule of bankruptcy assets, and obtained the cash surrender values. When Shevi filed for bankruptcy relief he failed to include several assets in the petition and obtained a discharge of secured and unsecured debts. Following the bankruptcy, Shevi used the insurance proceeds to open a personal investment account. Additionally, Shevi structured 21 transactions totaling \$196,667 and filed false individual and business returns, evading \$134,960 in tax liabilities.

Affirming in part and remanding, the court held the abuse of trust enhancement was proper, as well as the district court's refusal to group the mail fraud and tax counts. The court found grouping was not proper under §3D1.2(c) because the offense level for the tax fraud counts was not increased based upon conduct that was punished as mail fraud. Sections 3D1.2(a) and (b) did not apply where the mail fraud and tax fraud had different victims. Finally, §3D1.2(d) did not apply because the offenses, although largely based on the amount of harm or loss, were not of the same general type because the loss tables for the mail fraud and tax fraud offenses punished the same amount of loss differently. Further, the court concluded the district court's fraud loss calculation was inconsistent with its recent decision in *United States v. Wheeldon*, 313 F.3d 1070 (8th Cir. 2002). *Wheeldon* required the district court to determine the value of concealed assets, a determination not made in this case. Accordingly, the court remanded to the district court for a determination of the mail fraud loss.

Sentencing Enhancement – Abuse of Trust

In *United States v. Caplinger*, 339 F.3d 226 (4th Cir. 2003), the Fourth Circuit vacated defendant's sentence after holding the district court erred in applying the abuse of trust enhancement under U.S.S.G. § 3B1.3. The trust the investors placed in the defendant was not based on a special relationship he had with them as a physician, but rather on the investors' misplaced belief in his investment abilities. Caplinger's convictions for wire fraud and money laundering arose out of his successful efforts to attract investment in a bogus scheme to market a drug that was supposed to be effective in treating HIV/AIDS and cancer. Caplinger held himself out as a physician who had medical degrees from schools in Great Britain and the Dominican Republic. In reality, Caplinger's medical degrees were "mail order" ones bought with no study required. The district court adopted the PSR's recommendation for a two-level enhancement for abuse of trust, which Caplinger challenges on appeal.

The basic question is whether Caplinger, by posing as an accomplished physician in order to influence potential investors, abused a position of trust with respect to the victims of his fraud scheme. § 3B1.3. The "position of trust" inquiry must focus on the relationship between the defendant and the victim from the perspective of the victim. Application of the enhancement requires more than a mere showing that the victim had confidence in the defendant.

The fact Caplinger posed as a physician does not by itself mean he occupied a position of trust. Caplinger did not assume a physician-patient relationship with any of the victims. Rather, the victims were simply investors who put their money into Caplinger's scheme based on representations that he was a prominent physician. Any trust the investors placed in Caplinger was not based on a special relationship he had with them as a physician, but on the investor's misplaced belief in false representations about his credentials and the investment's potential for success. As such, the facts did not support the conclusion that Caplinger, by posing as a physician, occupied a position of trust with the victims as that term is used in § 3B1.3.

Downward Departure Objection Must Be Specific

In *United States v. Vieke*, 2003 U.S. App. LEXIS 22565 (9th Cir. November 3, 2003), the Ninth Circuit refused to address the district court's downward departure for aberrant behavior because the Government's general objection to the departure failed to preserve the issue for appeal. Between the Fall of 1997 through the Spring of 2001, Vieke used her parents' names and good credit standing to obtain more than \$50,000 in fraudulent credit charges. Vieke pleaded guilty to one count of identity theft and, prior to sentencing, told the probation officer she has a compulsive gambling

disorder. The probation officer agreed and recommended two grounds for departure: diminished capacity and aberrant behavior. The Government objected to both grounds. First, the Government argued a gambling addiction is not a permitted impairment under the Sentencing Guidelines. Second, regarding the aberrant behavior departure, the Government cited to the United States Attorney's Office policy instructing prosecutors to object to all downward departures. The district court declined to depart downward for diminished capacity, but granted a four-level departure for aberrant behavior and sentenced Vieke to five years' probation. The Government appealed.

In affirming the sentence, the Ninth Circuit found the Government's objection to the aberrant behavior departure was merely a pro forma, blanket objection based on policy reasons of the United States Attorney's Office and gave no articulated reason to support the objection. The Government made a more specific argument on appeal, namely that the district court failed to make the three requisite findings as articulated in the Guidelines to support the aberrant behavior departure. The Ninth Circuit found this argument in effect was raised for the first time on appeal. Since the Government did not object to the legal analysis of the guideline at sentencing, the district court was not provided an opportunity to consider legal arguments, correct possible errors or produce a record to guide appellate review. Moreover, the Ninth Circuit refused to find the sentence was erroneous, since the long standing rule in the Ninth and other circuits is to not consider claims of error if raised for the first time on appeal.

Sentencing Enhancement – Abuse of Trust

In *United States v. Hall*, 2003 U.S. App. LEXIS 22972 (11th Cir. November 10, 2003), the Eleventh Circuit declined to apply a two-level enhancement under U.S.S.G. § 3B1.3 after concluding Hall's status as a pastor failed to create a personal trust relationship between himself and the victims of his fraud scheme. Hall was convicted of mail fraud conspiracy, money laundering conspiracy and mail fraud in connection with his promotion of a fraudulent investment scheme. Hall and his co-defendants held meeting across the country promoting their investment program. Despite using religious rhetoric to encourage participation in the program, the main focus of the meetings was on marketing various investment products. Notwithstanding the defendant's promises of large returns, most investors ended up losing their investments.

In appealing his sentence, Hall contended that the district court erroneously enhanced his sentence under U.S.S.G. § 3B1.3 for abuse of a position of trust due to his status as a pastor. In order for the district court to have applied this increase, two elements must have been established: (1) that the defendant occupied a position of public or private trust;

and, (2) that the defendant abused that position in a significant way to facilitate the commission or concealment of the offense. Within the context of fraud, the Eleventh Circuit has found a position of trust to exist in two instances:

(1) where the defendant steals from his employer, using his position in the company to facilitate the offense, and (2) where a fiduciary or personal trust relationship exists with other entities, and the defendant takes advantage of the relationship to perpetuate or conceal the offense. Based on the facts of this case, the only relevant test is whether a personal trust relationship existed.

In determining whether Hall occupied a position of trust, the court focused on the victims' perspective of their relationship with Hall. In this regard, none of the victims that testified indicated that they came to the meetings for spiritual guidance; rather, all of them stated that they came to invest money, not because Hall was a pastor, but because they wanted to "double their money."

Although Hall may have used his status as a pastor to develop the trust of the investors, this alone did not establish a personal trust relationship. As such, the district court erred in applying a two-level enhancement under U.S.S.G. § 3B1.3.

Obstruction of Justice Enhancement

In *United States v. Carroll*, 346 F.3d 744 (7th Cir. 2003), the Seventh Circuit reversed the district court's application of an enhancement for obstruction of justice and vacated Carroll's sentence. Carroll pleaded guilty to selling fraudulent non-immigrant visas while employed as a foreign service officer at the U.S. Embassy in Guyana, which resulted in an estimated harm of \$5 to \$10 million. In the indictment, the U.S. Government sought forfeiture of traceable illegal visa proceeds or substitute assets in the amount of \$1.7 million. During his interview with the probation officer, Carroll explained that his wife's premarital assets and his legitimate savings in six brokerage accounts totaled \$100,000 and should be exempt from forfeiture. When questioned by the district court whether the six brokerage accounts were excepted from the list of Carroll's forfeitable property, Carroll answered in the affirmative without further explanation. He later clarified that although the six brokerage accounts contained tainted proceeds commingled with legitimate savings, he believed his wife's premarital assets together with the legitimate savings within those accounts amounted to as much as \$100,000. At sentencing, the district court found Carroll misled the probation officer in an attempt to affect the forfeiture determination and applied a two-level obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1. As evidence of Carroll's deceptive intent and material misstatements, the court cited to Carroll's ordinarily meticulous management and knowledge of his finances, which contradicted his vague statements during the plea colloquy regarding the brokerage accounts. Carroll appealed.

The Seventh Circuit agreed and reversed the enhancement, finding Carroll's statement, even if inaccurate, was not an attempt to conceal assets and did not amount to material misstatements required under U.S.S.G. § 3C1.1. Carroll's guilty plea included an agreement to a \$2.5 million forfeiture allegation which was higher than the \$1.7 million amount the government had sought in the indictment; thus, Carroll's statements regarding his brokerage accounts had no impact on Carroll's forfeiture liability since all of his property was subject to forfeiture as substitute assets regardless of the source. The court further noted Carroll's misstatements were distinguishable from other cases upholding obstruction enhancements for concealing assets since there was nothing in the record to establish Carroll concealed any assets. Nor were any hidden assets discovered subsequent to Carroll's guilty plea. The appellate court reversed and remanded for resentencing without the enhancement.

Appellate Standard of Review for Sentencing Departures

In *United States v. Mallon*, 345 F.3d 943 (7th Cir. 2003), the Seventh Circuit vacated Mallon's sentence and remanded with instructions to increase the sentence according to the Sentencing Guidelines. Mallon, a 61-year old citizen of Ireland, father of five and grandfather of ten children, pleaded guilty to using international communication to entice a female under the age of 18 to engage in sexual activity. Mallon met "Marny," who he believed to be a 14-year old girl but who was actually an undercover agent, in an internet chat room and, after months of communication, persuaded her to meet him at a hotel room in Chicago. Mallon was already scheduled to be in the United States for a meeting at the White House and attempted to achieve both goals in one trip. Mallon was arrested after meeting "Marny" in the hotel room. At sentencing, the district court calculated Mallon's total offense level to be 22, with a corresponding range of 41 to 51 months' imprisonment. The district court departed downward six levels to an offense level of 16, with a corresponding range of 21 to 27 months' imprisonment. The district court based its departures on Mallon's severely diminished capacity as well as a combination of factors, including his age, health and non U.S. citizenship, and sentenced Mallon to 21 months' imprisonment. The government appealed.

In reviewing the sentencing decisions of the district court, the Seventh Circuit applied the amended standard of review for sentencing departures from the PROTECT Act. It agreed with the First Circuit the new standard of review did not violate the Ex Post Facto law, since the new standard was a procedural, not substantive, change in sentencing laws, did not change the statutory maximum punishment annexed to Mallon's crime, and did not affect the calculation of his offense level.

Regarding the grounds for departure, the Seventh Circuit found the departures unwarranted. First, although Mallon's doctor stated Mallon's second heart attack had resulted in mental deterioration, there was no evidence to establish Mallon's heart problems and resulting mental deterioration somehow transformed into pedophilia to justify the four-level departure for severely diminished mental capacity. The court also noted Mallon's behavior commenced prior to his second heart attack and stated, "departures are designed to accommodate the abnormal case, not the person whose problems are common among those who commit the crime in question." *Id.*, *14.

Second, there was no justifiable basis for the two-level downward departure for a combination of factors, including Mallon's nationality, age and health. Since Mallon's ailments were as treatable in prison as outside, and his age alone was not enough to establish him as elderly and infirm pursuant to U.S.S.G. § 5H1.1, the departure was not warranted. To find a defendant infirm, the court stated, it must find the physical impairment is extraordinary due to markedly inferior medical treatment within the prison as opposed to treatment available on the outside. The district court specifically found Mallon's ailments were as treatable in prison as outside. Thus, the departure on those grounds was not justified. Further, U.S.S.G. § 5H1.10 provides alien status is not relevant to a sentence; thus, Mallon's Irish citizenship should not be used to warrant a departure. The court vacated Mallon's sentence and remanded with instructions for the district court to sentence Mallon without the departures.

ELECTRONIC SURVEILLANCE

Suppression of Evidence Obtained Through Wiretaps

In *United States v. Cline*, 2003 U.S. App. LEXIS 23792 (10th Cir. November 21, 2003), the Tenth Circuit refused to suppress evidence obtained through a wiretap. The court held the government's wiretap application established a sufficient degree of necessity and the unavailability of a judge to seal the tapes within the time frame provided by statute was a satisfactory explanation that excused the government's failure to obtain the seal timely. Cline was convicted for his involvement in a large drug trafficking organization. On appeal he challenges the district court's decision denying his motion to suppress evidence seized pursuant to wiretaps, a traffic stop and a search of his house.

Cline first argued the wiretaps placed on the phones of his business, residence and co-conspirator's residence were obtained without an adequate showing of necessity. Pursuant to 18 U.S.C. § 2518(1)(c), an application for a wiretap order must contain a "full and complete statement as

to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

Since all the wiretap applications were similar, the Tenth Circuit addressed them collectively finding the applications adequately established that, due to the close-knit community, as well as the suspicious nature of those involved in the drug organization and the difficulty of introducing anyone new into it, the traditional investigative technique of using informants had been tried but was unlikely to be successful. The court further detailed the difficulties encountered in conducting surveillance in the rural area. Finally, the applications for wiretaps pointed out the limited success obtained through search warrants. While the warrants resulted in the seizure of drugs they failed to uncover the scope of the operations, the sources of precursor chemicals, the methods of distribution, and other members of the conspiracy. As such, the Tenth Circuit concluded the government made an adequate showing of necessity for the issuance of the wiretaps.

Cline next argued the government failed to timely seal the tapes of the calls intercepted. According to 18 U.S.C. § 2518(8)(a), "immediately upon the expiration of the period of the order authorizing the wiretap, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." Specifically, Cline argued a one week delay was too long and the government failed to explain the delay, other than to assert that the judge was unavailable.

The government conceded that it did not have the wiretap evidence immediately sealed as required. It argued, however, that it presented the tapes in a timely fashion, but the judge's schedule prevented the government from obtaining the necessary seal until a week later. The government asserted that it presented the tapes for sealing in an "immediate" fashion as required, and thus the tapes were "made available" as required. The Tenth Circuit agreed with the government, finding their explanation reasonable. This decision is consistent with other circuit courts which have considered a judge's scheduling problems when tapes are untimely sealed.

The Tenth circuit also concluded the district court properly denied Cline's motion to suppress evidence found in his vehicle during a traffic stop since the initial stop was valid and his consent to search the vehicle was voluntary.

CRIMINAL TAX BULLETIN

October 2003

TABLE OF CASES

SEARCH AND SEIZURE

United States v Bridges, 344 F.3d 1010 (9th Cir. 2003)..... 1
Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003)..... 1

FORFEITURE

United States v. All Funds, 345 F.3d 49 (2nd Cir. 2003)..... 2
United States v. Saccoccia, 344 F.3d 31 (1st Cir. 2003)..... 2
United States v. McHan, 345 F.3d 262 (4th Cir. 2003)..... 2
Contents of Account Number 03001288 v. United States, 344 F.3d 399 (3rd Cir. 2003)..... 3

SENTENCING

United States v. Thurston, 338 F.3d 50 (1st Cir. 2003)..... 4
United States v. Leon, 341 F.3d 928 (9th Cir. 2003)..... 4
United States v. Pressley, 345 F.3d 1205 (11th Cir. 2003)..... 4