Number: **200007002**
Release Date: 2/18/2000

September 23, 1999
CC:EL:CT

Criminal Tax Bulletin

Department of Treasury
Internal Revenue Service

Office of Chief Counsel
Criminal Tax Division

October **This bulletin is for informational purposes. It is not a directive.** **1999**

UILN: 9999.00-00

SEARCH AND SEIZURE

No Fourth Amendment Violation In Placing A Tracking Device On A Suspect's Vehicle

In ***United States v. McIver***, 186 F.3d 1119 (9th Cir. 1999), United States Forest Service officers identified McIver's vehicle from a surveillance video taken of a marijuana patch located in a national forest. They traced the tag and learned McIver's address. The officers surreptitiously placed two tracking devices on the undercarriage of McIver's vehicle which was parked outside the curtilage of his residence. McIver ultimately was convicted of conspiracy to manufacture marijuana and appealed his conviction to the Ninth Circuit arguing, among other things, the warrantless placement of the tracking devices on his vehicle constituted an unreasonable search and seizure.

Though a question of first impression, the Ninth Circuit found adequate precedent to rule the placement of the devices on the vehicle did not constitute a search. There is no reasonable expectation of privacy in the exterior of a car because the exterior of a car is thrust into the public eye and thus to examine it does not constitute a search. *United States v. Class*, 475 U.S. 106 (1986). The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy. *United States v. Rascon-Ortiz*, 944 F.2d 749 (10th Cir. 1993). Here, the officers did not pry into a hidden or enclosed area and McIver produced no evidence to show he intended to shield the undercarriage of his vehicle from inspection by others.

The court also rejected McIver's assertion that the placement of the devices on the vehicle constituted a unlawful seizure. In *United States v. Karo*, 468 U.S. 705 (1984) the Supreme Court held a "seizure" occurs only when there is some meaningful interference with an individual's possessory interests in property. The *Karo* court ruled the placement of a beeper in a can of ether before selling and tracking it to the suspect, was at most a technical trespass on the space occupied by the beeper and was of marginal relevance to establishing a constitutional violation. Applying this principle, the Ninth Circuit found McIver presented no evidence the devices deprived him of dominion and control of his vehicle or caused any damage to the electronic components of the vehicle. Thus, no seizure occurred because there was no meaningful interference with McIver's possessory interest in his vehicle.

Roadblocks Designed To Catch Drug Offenders Violate Fourth Amendment

In ***Edmond v. Goldsmith***, 183 F.3d 659 (7th Cir. 1999), a class action lawsuit was filed to enjoin the City of Indianapolis ("City") from setting up roadblocks to catch drug offenders. On six different occasions, between August and November of 1998, the City's police department set up roadblocks on certain streets in the City with the intention of catching drug offenders. Over 1,160 vehicles were randomly stopped at the checkpoints. Police officers demanded driver's licenses and vehicle registrations, peered through windows and circled the vehicles with drug sniffing dogs. The roadblocks resulted in 55 successful drug "hits" along with 49 other arrests for conduct unrelated to narcotics violations. Claiming the random roadblocks violated the Fourth Amendment, the plaintiffs moved for a preliminary injunction to prevent the City from carrying on the activity. Determining the roadblocks to be legal, the district court denied the motion,

causing the plaintiffs to file an interlocutory appeal.

On appeal, the Seventh Circuit noted there was a divergence of opinion between the circuits regarding the legality of drug roadblocks. In order to clarify the issue, the court reviewed the Supreme Court's previous decisions with respect to roadblocks and other suspicion less searches and seizures.

The court began its analysis by stating "stopping a car at a roadblock is a seizure within the meaning of the Fourth Amendment." *Whren v. United States*, 517 U.S. 806, 809-810 (1996). Whether the seizure is reasonable depends on whether reasonableness is to be assessed at the level of the entire program or at the individual stop. The court stated, when dealing with searches related to general criminal law enforcement, courts usually refrain from assessing reasonableness at the program level. The Supreme Court has "insisted that to be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." Only in those instances where "specific civil regulatory programs for the protection of health, safety, and the integrity of our borders" exists, will these types of random seizures be permitted. Employment drug tests, sobriety checkpoints, the use of x-ray machines to screen entrants to government buildings, and border searches are all examples of the common sense principle that employers and government entities "have a right to take reasonable measures to protect the safety and efficiency of their operations."

In this case, the City did not claim the program promoted highway safety or was for the protection of its citizens against drivers high on drugs. Nor did the City claim the program was designed to exclude a harmful substance or dangerous persons, such as in the case of customs searches or roadblocks to intercept illegal immigrants. The City conceded the program was specifically designed to catch drug offenders and to deter others through criminal prosecution. Finding this insufficient to justify the legality of the program with respect to the rights afforded by the Fourth Amendment, the Seventh Circuit reversed the lower court's holding.

OTHER CONSTITUTIONAL ISSUES

Sixth Amendment Interests Of Grand Jury Targets

In ***United States v. Hayes,*** No. 98-50609, 1999 U.S. App. LEXIS 21388 (9th Cir. Sept. 8, 1999), Hayes was one of several targets of a grand jury investigation involving a complicated conspiracy to sell passing grades to foreign students who attended no classes, performed no work, or took no exams. During the course of this investigation the government was given permission to take pre-indictment depositions of material witnesses who were foreign students imminently scheduled to return to their home countries. The government also obtained the cooperation of one of Hayes' co-conspirators who agreed to allow the government to record a conversation between himself and Hayes. Hayes incriminated himself in the recorded conversation and was subsequently indicted. This recording was used against Hayes in court, over his objection, and Hayes was found guilty. Hayes appealed his conviction on the ground the lower court should have excluded the recording as obtained in violation of his Sixth Amendment right to counsel.

In *Massiah v. United States*, 377 U.S. 201 (1964), a post-indictment recording of a conversation in which the defendant incriminated himself was held to be a surreptitious interrogation violative of the defendant's post-indictment right to counsel. In the instant case, although his incriminating statements were recorded before his indictment, Hayes argued taking depositions of material witnesses was equivalent to an indictment because it created an atmosphere resembling a trial and, therefore, the right to counsel had attached.

The Ninth Circuit rejected Hayes' position. The court stated, resemblance to a trial is not the standard triggering the Sixth Amendment's right to counsel. Rather the Sixth Amendment's right to counsel is triggered by adversarial proceedings which can only be initiated by an indictment. The court stated a preference for keeping the *Massiah* rule against post-indictment interrogations "clean and clear," rather than carving out pre-indictment exceptions to *Massiah*.

Direct Evidence Of Conflict Of Interest Not Required For Disqualification Of Chosen Counsel

In ***United States v. Register***, 182 F.3d 820 (11th Cir. 1999), Register appealed the district court's ruling disqualifying his first counsel of choice for a conflict of interest. Register argued the evidence the government introduced of his lawyer's wrongdoing was not strong enough to overcome his Sixth Amendment right to counsel

of one's choice. Register further argued an order disqualifying his counsel of choice must be supported by "direct evidence of an actual conflict of interest." After finding another lawyer, Register was unable to pay him because the government had filed *lis pendens* notices on his only assets, two pieces of real estate. He complained to the district court the *lis pendens* notices effectively prevented him from using the assets to retain counsel, and doing so without an adversarial, pretrial hearing, deprived him of his Fifth Amendment right to due process and his Sixth Amendment right to be represented by a lawyer of his choice.

The disqualification ruling came after a full hearing in which testimony implicating Register's original lawyer of choice in the alleged criminal conduct was presented. The district court concluded the lawyer might be more strongly motivated to protect his own interest rather than the interests of Register and, therefore, refused to accept Register's waiver of conflict free counsel and disqualified the lawyer. In affirming, the Eleventh Circuit pointed out, courts today consider indirect or circumstantial evidence to be no less valuable or reliable than direct evidence. In finding no abuse of discretion, the court relied on the Supreme Court decision, *Wheat v. United States*, 486 U.S. 153 (1988), which delineated circumstances where a district court may override a defendant's waiver of his attorney's conflict of interest. The Court in *Wheat* also found the Sixth Amendment's more important protection is the assurance of a fair trial, "to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."

Confrontation Clause Violated By Admission Of Absent Co-Defendants' Custodial Statements

In ***United States v. Gomez***, No. 98-2160, 1999 U.S. App. LEXIS 21057 (10th Cir. Sept. 3, 1999), the Tenth Circuit held the admission against a defendant of the custodial statements of non-testifying co-defendants, which were given to authorities in the hope of obtaining leniency, violated the defendant's rights under the Sixth Amendment's Confrontation Clause. In April 1997, Border Patrol agents in New Mexico stopped the car Gomez was driving after observing unusual maneuvers which appeared to be related to another vehicle, a truck the agents knew was transporting marijuana in a propane tank. Traveling in the car with Gomez were two passengers from whom the agents eventually obtained incriminating, written confessions linking Gomez to the narcotics being transported in the truck. Gomez and the passengers were each charged with violating 21 U.S.C. §§ 841 and 846. Prior to trial the two passengers absconded, forcing the government to try Gomez alone. As part of its case, the government was allowed to introduce the incriminating, written statements of the absent co-defendants. Gomez was convicted on each count.

On appeal, Gomez argued, *inter alia*, the district court violated her Sixth Amendment Confrontation Clause rights by admitting the confessions of her absent co-defendants, which were made while in the custody of the Border Patrol and in exchange for leniency. The government contended the statements at issue were statements made against penal interest, admissible under FED. R. EVID. 804(b)(3), as narrowly interpreted by the Supreme Court in *Williamson v. United States*, 512 U.S. 594 (1994) (statements against penal interest include only those which are truly self-inculpatory).

The Tenth Circuit framed the issue as whether the two hearsay statements were admissible under the exceptions outlined in *Ohio v. Roberts*, 448 U.S. 56 (1980). There, the Supreme Court held hearsay statements are deemed sufficiently reliable to allow their admission without the benefit of cross-examination when the statements (1) "fall within a firmly rooted hearsay exception," or (2) contain "adequate indicia of reliability." The court then analyzed the government's claim the statements were admissible according to the holding in *Williamson*, for the statements were "truly self-inculpatory." The court declined to adopt this conclusion based upon the Supreme Court's more recent holding in *Lilly v. Virginia*, 119 S. Ct. 1887 (1999), where the court divided statements against interest into three subcategories and held statements used as evidence to establish the guilt of an alleged accomplice of the declarant, such as those at issue in this case, do not fall into a firmly rooted hearsay exception.

Next, the court determined whether the statements exhibited sufficient indicia of reliability to justify their admission. Turning again to *Lilly*, the court pointed out, statements such as these, which shift blame, have consistently been deemed "presumptively unreliable." Prior cases overcoming this presumption indicate the "absence of an offer of leniency and a co-defendant's low degree of agitation" at the time the statements were made "as important indicators of reliability." Here, the record contained evidence showing the statements were made after the detaining agent said the co-defendant's cooperation would be beneficial and a description of the declarants as appearing nervous and agitated. Moreover, one declarant, at the time of his statement, was hiding his true identity from the police. Accordingly, the Tenth Circuit ruled the

admission of the statements violated the Confrontation Clause. Concluding the erroneous admission of the statements was not harmless, the court vacated the decision of the district court and remanded for a new trial.

Acts Of Production Privilege Extends To Former Employees

In ***In Re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999; United States v. John Doe #1, John Doe #2, John Doe #3***, 185 F.3d 326 (2nd Cir. 1999), the Second Circuit held former employees of a corporation may claim a Fifth Amendment privilege to refuse to produce corporate documents on the ground the act of producing those documents would be both testimonial and incriminating. A grand jury issued subpoenas for corporate records relating to a federal criminal investigation of the corporation and its employees into falsification of books and records and misapplication of funds. John Does #1, #2, and #3 were corporate officers working in the division where the wrongdoings took place during the period the illegal activities occurred. Each resigned after the corporation responded to the subpoenas, and two of them signed severance agreements pledging to cooperate in any investigation to follow.

Subsequently, the government served grand jury subpoenas on the former officers ordering them to turn over any records, in their control, created in the course of their employment. They declined to comply, asserting a Fifth Amendment privilege against production. Trying to enforce the subpoenas, the government argued the records were corporate documents, the former officers remained corporate custodians of them after resigning, and the Fifth Amendment privilege was undercut by *Braswell v. United States*, 487 U.S. 99 (1988). *Braswell*, when referring to current corporate employees, held a custodian's production of documents is deemed an act of the corporation and not a personal act, thereby creating the collective entity rule.

The former officers argued they had a Fifth Amendment right not to produce the documents because the act of production itself would amount to compelled testimony as to the existence, unlawful possession, and/or authenticity of the documents. The court agreed. Relying on *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 & June 22, 1983*, 722 F.2d 981 (2nd Cir. 1983) (Saxon Industries) and the Fifth Amendment act of production doctrine established by the Supreme Court in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605 (1984), the district court held "the act of testimonial [production] on behalf of a person who is no longer with the corporation is self incrimination in the most classic sense of the word, and the Constitution does not permit it."

In distinguishing *Braswell*, the court explained, former employees are situated differently from current employees with regard to corporate documents in their possession. It declined to extend *Braswell* to former employees, relying on its ruling in *Saxon Industries* that "[o]nce an officer leaves the company's employ . . . he no longer acts as a corporate representative but functions in an individual capacity in his possession of corporate records." The Second Circuit reasoned, as they were no longer employed by the corporation, they no longer held the corporate documents in a representational capacity. Therefore, the "collective entity rule" did not apply.

PROCEDURE

Juror's Dismissal During Deliberations

In ***United States v. Symington***, No. 98-10070, 1999 U.S. App. LEXIS 13674 (9th Cir. June 22, 1999), Symington, the former Governor of Arizona, was convicted of, *inter alia*, five counts of making false statements to financial institutions in violation of 18 U.S.C. § 1014. Prior to being elected governor in 1991, Symington was a commercial real estate developer in Phoenix. Between 1986 and 1992, Symington and his company obtained several construction and permanent loans from various lenders in order to finance several real estate projects. In a 23 count indictment, the government charged Symington with making materially false statements regarding his financial position by overstating the value of his assets and understating or failing to disclose his liabilities. Trial by jury began on May 13, 1997, and lasted until the first week of August of 1997. After seven days of deliberation, the jury sent the judge a note expressing their concern over the ability of one juror to effectively participate in the deliberative process. The note stated that Juror Cotey, a woman in her mid-seventies, had prematurely made a decision in the case, was unable to maintain focus on the subject of discussion and refused to discuss her views with

the other jurors. The judge then conducted individual interviews with each juror, as well as with Cotey. All of the jurors agreed removal of Cotey from the panel would resolve the problem. Upon completion of the interviews, the judge decided to dismiss Cotey because she was "either unwilling or unable to participate in the deliberative process in accordance with the instructions of the court." Symington's subsequent motion for a mistrial based upon the juror's dismissal was denied.

On appeal, Symington argued the other jurors' complaints about the juror in question were based upon substantive disagreements over the merits of the case and by dismissing the juror because of those disagreements violated his Sixth Amendment right to an impartial jury. The government contended dismissal of Cotey for "just cause" was warranted pursuant to FED.R.CRIM.P. 23(b). *See, United States v. Walsh*, 75 F.3d 1, 4-5 (1st Cir. 1996).

The Ninth Circuit began its analysis of Symington's argument by observing "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence." *United States v. Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987). In determining what evidentiary standard a trial judge must employ to make this decision, the court stressed, when examining a jury's motivations, a trial judge runs the risk of influencing the jury and exposing its deliberations to public scrutiny, thereby undermining the "integrity of the deliberative process." Due to the weight of this burden, the court opined "a trial judge may not be able to determine conclusively whether or not a juror's alleged inability or unwillingness to deliberate is simply a reflection of the juror's opinion on the merits of the case . . . ." In light of this, the court held if there is any "reasonable possibility" the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror. Here, there was ample evidence to suggest the other jurors' frustrations with Cotey derived primarily from the fact she held a position opposite to their own with respect to the merits of the case. Accordingly, the Ninth Circuit held it was error to dismiss Cotey and reversed Symington's conviction.

New Federal Rule of Criminal Procedure 32.2

Rule 32.2 of the Federal Rules of Criminal Procedure was approved by the United States Judicial Conference, sent for approval to the United States Supreme Court and unless disapproved by the Court or Congress provides otherwise, the Rule is set to take effect on December 1, 1999. The new Rule creates a comprehensive guide for criminal forfeiture cases, replaces current Rules 7(c)(2), 31(e) and 32(d)(2), and strikes the forfeiture related provisions of Rule 38(e).

Rule 32.2 requires the government to give a defendant notice it will be seeking forfeiture and requires the court, as soon as practicable after the verdict or finding of guilt, to determine whether the property is subject to forfeiture in accordance with the applicable statute and enter a preliminary order of forfeiture. The Rule addresses the different kinds of forfeiture judgments in criminal cases, personal judgments for a sum of money or a judgment forfeiting specific property and directs the court on how to proceed. The preliminary order defers the determination of third party interests until an ancillary proceeding is held and sets forth a procedure for amending the order of forfeiture to include later discovered property traceable to the offense and substitute assets. In addition, the rule sets forth procedures governing motion practice and discovery in the ancillary proceeding.

Further, once the court enters a preliminary order of forfeiture, the Attorney General or a designee, may seize the property. If no third party files a claim, at the time of sentencing the court enters a final order forfeiting the property and the order becomes final as to the defendant. If a third party files a claim, the order remains subject to amendment in favor of a third party pending the conclusion of the ancillary proceeding. An ancillary proceeding is not required if the order of forfeiture consists of a money judgment or if no third party files a claim.

The Rule provides for the entry of a final order of forfeiture at the conclusion of the ancillary proceeding. If no third party files a claim of interest in the ancillary proceeding, the court must nonetheless determine if the defendant had an interest in the property and, if so, the preliminary order becomes the final order of forfeiture. The rule makes it clear, untimely petitions claiming an interest in the property to be forfeited will not be considered.

The Rule grants to either party the right to request a jury to determine, by special verdict, whether the government established the requisite nexus between the offense and the property to be forfeited. The Rule informs third parties, if multiple third party petitions are filed in the same case, an order dismissing or granting one petition is not appealable until rulings are made on all petitions. Additionally, the Rule provides, as the ancillary proceeding is not part of sentencing, the Federal Rules of Evidence apply.

Finally, a court may stay an order of forfeiture pending a defendant's appeal from a conviction or forfeiture order and notes the district court is not divested of jurisdiction over the ancillary proceeding even if the defendant appeals his or her conviction. If the court rules in favor of any third party while an appeal is pending, the court may amend the order of forfeiture but shall not transfer any property interest to a third party until the defendant's appeal is decided.

PRIVILEGES

Psychotherapist-Patient Privilege Subject To Crime-Fraud Exception

In ***In re Grand Jury Proceedings (Violette)***, 183 F.3d 71 (1st Cir. 1999), Violette was the target of a federal grand jury investigation into alleged health care, bank and mail fraud. The government claimed Violette made false statements to financial institutions in order to obtain loans and credit disability insurance. Then, the government alleged, he provided false information to health care providers regarding nonexistent disabilities, which information was then transmitted to the credit disability insurance providers, thus fraudulently inducing payments. In an effort to expose this scheme, the government subpoenaed two licensed psychiatrists, who had treated Violette, to appear and testify before the grand jury. Each psychiatrist asserted the psychotherapist-patient privilege on behalf of Violette and refused to testify. Seeking enforcement of the subpoenas by the district court, the government argued the psychiatrists could be compelled to testify through operation of the crime-fraud exception. The district court agreed, finding the crime-fraud exception applicable to the facts of the case and ordered each psychiatrist to testify before the grand jury.

On appeal, Violette argued the crime-fraud exception was inapplicable to the psychotherapist-patient privilege. Alternatively, he argued the evidence sought by the government fell outside the scope of any such exception. In opposition, the government urged the First Circuit to apply the crime-fraud exception to the psychotherapist-patient privilege in the same manner as it is applied to the attorney-client privilege.

Characterizing the issue as one of first impression, the First Circuit initially determined sufficient facts had been set forth to establish all of the elements of the psychotherapist-patient privilege. A party asserting the privilege must show the allegedly privileged communications were made "(1) confidentially (2) between a licensed psychotherapist and her patient [and] (3) in the course of diagnosis or treatment." *See*, *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996). Next, in addressing the applicability of the exception to the case at hand, the court identified the rationale supporting the crime-fraud exception. The exception "grew up in the shadow of the attorney-client privilege," the purpose of which is "to encourage full and frank communication between attorneys and their clients and thereby promote . . . the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The justification for the exception is "that statements made in furtherance of a crime or fraud have relatively little (if any) positive impact on the goal of promoting the administration of justice." Turning to the foundation of the psychotherapist-patient privilege, the court found it "strikingly" similar to that of the attorney-client privilege. In this context, just as the crime-fraud exception excludes from the veil of the attorney-client privilege communications made in furtherance of a crime, it is reasonable for it to exclude from the psychotherapist-patient privilege similar communications since the "mental health benefits . . ., of protecting such communications pale in comparison to the normally predominant principle of utilizing all rational means for ascertaining truth." Accordingly, the First Circuit affirmed the district court which held the communications were made in furtherance of fraud, thereby serving no therapeutic purpose and were not made in the course of diagnosis or treatment.

FORFEITURE

Mobility Of Personal Property Justifies Its Seizure Under Forfeiture Law With No Prior Hearing

In ***United States v. All Assets and Equipment of West Side Building Corp.***, 188 F.3d 440 (7th Cir. 1999), the Seventh Circuit held the requirement to hold a hearing prior to the seizure of real property for forfeiture, pursuant to *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), did not apply to the personal property, home appliances and furniture, possessed by the property owners on their seized premises. Under the drug forfeiture statute, 21 U.S.C. § 881, the government seized *ex parte* the real and personal property of the defendants, alleging it represented the fruits of a narcotics distribution conspiracy. In awarding the defendants damages for the loss of their real property, the district court ruled exigent circumstances did not exist to justify the failure to provide a hearing prior

to the seizure of the realty, as required by *Good*. The district court, however, denied the defendants' plea for damages arising from the *ex parte* seizure of their home appliances and furniture.

On appeal, the Seventh Circuit focused on the mobility rationale underlying the holding in *Good*. There, the Supreme Court employed the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in which "the private interests affected by the government action, the risk of erroneous deprivation through the procedures used, and the probable value of additional safeguards are weighed against the government's interest and the administrative burden additional procedures would require." 510 U.S. at 53. The Court concluded, pre-deprivation notice and hearing are required by the Fifth Amendment in cases of real property because the concerns of the government in the loss of the property are less immediate than they would be in the case of property that is mobile. Drawing upon this distinction, the Seventh Circuit reasoned the present case was more analogous to that of *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), where the Supreme Court held the *ex parte* seizure of a yacht was justified due to its mobility because it could be "removed to another jurisdiction, destroyed, or concealed, if advance warning of the confiscation were given . . . ." 416 U.S. at 679-80. The Seventh Circuit concluded the personal property in the present case was more like the yacht in *Calero-Toledo* than the real estate in *Good*, for the home appliances and furniture were "sufficiently mobile" to warrant *ex parte* seizure in order to prevent their removal from the jurisdiction, concealment or destruction. Accordingly, the judgement of the district court was affirmed.

MONEY LAUNDERING

Jury Instruction

In ***United States v. Zanghi***, No. 98-1047, 1999 U.S. App. LEXIS 20787 (1st Cir. Aug. 31, 1999), the First Circuit upheld the Zanghi's money laundering convictions after concluding the trial court's jury instructions incorrectly required the jury to find Zanghi's sole intent in making financial transactions with proceeds of securities fraud was tax evasion. On appeal, the court determined, despite the erroneous jury instruction, sufficiency of the evidence is measured by asking whether the evidence, viewed in the light most favorable to the prosecution, would permit a rational jury to find each essential element of the crime charged beyond a reasonable doubt. In this case, the indictment did not charge tax evasion as Zanghi's sole intent. Instead it merely mirrored the statutory language of 18 U.S.C. § 1956(a)(1)(A)(ii) in charging Zanghi conducted financial transactions with the proceeds of securities fraud with the intent to engage in conduct constituting tax evasion.

Zanghi was charged and convicted on twenty-three counts of securities fraud, tax evasion and money laundering. The two money laundering counts alleged he transferred proceeds of the securities fraud from corporate accounts to his own use with the intent to evade taxes. This case involved a business venture to revive the Indian Motorcycle Company. After obtaining an interest in the Indian trademark, Zanghi sold shares of preferred stock and options not authorized by the articles of incorporation. Zanghi later transferred much of the funds raised through this fraudulent sale of securities and other illegal licensing arrangements into his personal accounts. Although he realized substantial income from these transfers, Zanghi paid little or no personal income tax. The money laundering counts alleged Zanghi twice withdrew $25,000 in funds traceable to securities fraud from Indian Motorcycle Company accounts with the intent to engage in conduct constituting tax evasion. Zanghi wrote "repayment of loan" on each check, making it appear the check was in repayment of a loan.

The trial court instructed the jury "in order to convict the defendant on either or both counts of money laundering you must agree that the defendant conducted the financial transaction charged in the Indictment with the purpose of evading taxes and not for any lawful purpose or other unlawful purpose." Zanghi argued the evidence was insufficient to sustain a conviction on the basis of this instruction. The trial court's instructions on the money laundering counts were incorrect to the extent they required the jury to find Zanghi's sole intent in making the transactions was tax evasion. For purposes of assessing a sufficiency challenge on appeal, an instruction may add elements to the government's burden of proof beyond those required by statute if that instruction has become the law of the case. A "patently incorrect" jury instruction, however, may not become the law of the case.

The erroneous sole intent instruction, therefore, did not establish the standard by which the appellate court would measure the sufficiency of the evidence. Instead, the court evaluated the evidence produced against Zanghi to determine if it would allow a rational jury to find each essential element of the violation as charged beyond a reasonable doubt, disregarding the patently erroneous "sole intent" element. The court determined a reasonable jury could have easily found beyond a reasonable doubt these facts were evidence of Zanghi's intent to engage in conduct

constituting a violation of 26 U.S.C. § 7201 and, thus, sufficed to support Zanghi's convictions under 18 U.S.C. § 1956(a)(1)(A)(ii).

INVESTIGATIVE TECHNIQUES

Interceptions Of Cellular Telephone Communications

In *United States v. Duran*, No. 98-50116, 1999 U.S. App. LEXIS 20812 (9th Cir. Aug. 31, 1999), the Ninth Circuit held a judicial order authorizing the interception of communications made on a cellular telephone did not become inoperative when, unbeknownst to the agents monitoring the calls, the owner of the cell phone purchased a new instrument which retained the old one's telephone number but had a different electronic serial number (ESN). The intercept order identified the target phone by telephone number and serial number and it explicitly provided that the authorization applied to any changed telephone number assigned to a telephone with the same ESN as the original phone, but it did not address the situation which actually occurred.

Duran argued the district court erred in denying his motion to suppress evidence obtained from a wiretap of a co-defendant's cell phone after he purchased a new instrument because neither the ESN on the new phone nor the phone number for that phone, was identified in the order authorizing the electronic surveillance. Accordingly, Duran contended suppression of the conversations intercepted over the new telephone was required. Initially, the court concluded, since the officers in this case had a warrant to intercept conversations on a cell phone, the subject interceptions were not warrantless searches requiring suppression under *Katz v. United States*, 389 U.S. 347 (1967). The court next addressed whether the communications were unlawfully intercepted because they did not satisfy the particularization requirement of 18 U.S.C. § 2518(4)(b).

In this case, the court determined the wiretap application contained sufficient information to establish probable cause to wiretap any cell phone associated with the phone number identified in the order, and the order had as its clear purpose the authorization to tap all such phones. The order's failure to identify the proper ESN for the intercepted phone did not result in a failure to ensure the surveillance would occur only in situations clearly calling for its use. To the contrary, the essential requirement of § 2518, that "law enforcement authorities . . . convince a district court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone" was met. The phone over which the interceptions occurred was connected to the phone identified in the order and there was no bad faith on the part of the officers. The fact the order only contemplated the possibility of changing telephone numbers, rather than changing ESNs, did not diminish the fact the district judge intended to authorize interception of any such cell phone during the period in question.

SENTENCING

Criminal Fine Not Creditable Against Civil Tax

In ***Schachter v. Commissioner***, 113 T.C. 14 (1999), the United States Tax Court held a taxpayer convicted of tax evasion was not entitled to off-set the criminal fine he paid against the civil fraud penalty subsequently assessed against him. Schachter pleaded guilty to charges of income tax evasion and conspiracy to defraud the government with respect to his income tax liability. The district court sentenced Schachter to two years in prison, to pay a fine of $250,000, and to pay restitution of $161,845 to the IRS. After the criminal conviction and sentencing, the Service determined income tax deficiencies and asserted the civil fraud penalty against Schachter.

Schachter originally maintained the imposition of the civil fraud penalty on top of his two year prison sentence and the $250,000 criminal fine would constitute double jeopardy. In an earlier opinion, the Tax Court rejected Schachter's double jeopardy argument, and sustained the Service's determination of the civil fraud additions to tax. *Schachter v. Commissioner*, T.C. Memo. 1998-260. In the current computational dispute, Schachter argued the $250,000 criminal fine which was imposed on Schachter should be allowed as a credit against the civil fraud penalty. Schachter's argument was premised on his contention the $250,000 criminal fine did not constitute punishment, in that it served only remedial purposes and, therefore, it should be treated as restitution. Schachter then argued, since the Service routinely reduced outstanding civil income tax deficiencies by the amount of restitution, he should be allowed to offset the civil fraud penalty by the $250,000

criminal fine. Schachter further argued the sentencing factors listed in 18 U.S.C. § 3622, which federal judges take into account in imposing fines under 18 U.S.C. § 3623, support his contention that the $250,000 should be regarded as remedial in nature and as restitution.

The Tax Court agreed with the government's position that Schachter should not be allowed a credit against the civil fraud penalty because criminal fines and civil fraud penalties serve different purposes. The Supreme Court has described civil fraud penalties as established for the protection of the revenue and to reimburse the government for the heavy expense of investigating and the loss resulting from a taxpayer's fraud. 18 U.S.C. § 3623 was enacted to encourage judges to impose more fines as punishment and 18 U.S.C. § 3622 simply provides guidance to judges in deciding whether to impose a fine as punishment and if a fine is to be imposed, the amount of the fine. The factors listed in 18 U.S.C. § 3622 do not convert the purpose of criminal fines imposed under 18 U.S.C. § 3623 into something other than punishment. The Tax Court noted, if it were to allow a credit for criminal fines, Congress' intent in making taxpayers responsible for a portion of the government's costs in detecting, investigating and prosecuting a taxpayer's fraud would be substantially frustrated.

Grouping Of Offences

In ***United States v. Zanghi***, No. 98-1047, 1999 U.S. App. LEXIS 20787 (1st Cir. Aug. 31, 1999), as factually set forth on page seven of this Bulletin, the First Circuit upheld the trial court's grouping of Zanghi's money laundering and monetary transaction offenses in calculating the total amount of harm or loss under U.S.S.G. § 3D1.2(d). On appeal, Zanghi claimed the trial court erred in computing the sentencing range on certain counts by grouping those counts together improperly under the guidelines.

Zanghi was convicted on two counts which charged he laundered a total of $50,000 in violation of 18 U.S.C. § 1956. He was also convicted on four counts which charged he engaged in monetary transactions with the proceeds of securities fraud, in violation of 18 U.S.C. § 1957(a). The indictment alleged the total dollar amount involved in those four transactions was $324,999. In calculating Zanghi's sentence, the district court divided Zanghi's offenses into three groups: one group for securities and fraud offenses, one group for the corporate and personal tax offenses and one group for the money laundering/monetary transaction offenses.

In calculating the total amount of harm or loss, the district court added the amounts indicated in the indictment, listed above, to the additional $238,000 of Indian Motorcycle Company funds Zanghi had converted to his own use in 1992 (but which had not been the subject of any charge in the indictment). This addition led to a total amount of harm or loss of $612,999. On appeal, Zanghi claimed the district court erred in adding the monetary transaction amounts to the 18 U.S.C. § 1956 money laundering amounts and applying the more punitive U.S.S.C. § 2S1.1 to the total.

The First Circuit concluded the district court's grouping was correct as a matter of law. U.S.S.G. § 3D1.2(d) states that offenses covered by the following guidelines are to be grouped together: §§ 2S1.1, 2S1.2, and 2S1.3. Section 2S1.1 corresponds to statutory provision 18 U.S.C. § 1956, and § 2S1.2 corresponds to statutory provision 18 U.S.C. § 1957. By its literal terms, § 3D1.2(d) requires grouping of offenses involving money laundering and engaging in a monetary transaction in property derived from specified unlawful activity. Because §§ 2S1.1 and 2S1.2 are listed in the same row of § 3D1.2(d), the court concluded they were to be grouped automatically. Since the counts were grouped together pursuant to § 3D1.2(d), the court was required to apply the offense guideline that produced the highest offense level, in this case the money laundering guideline § 2S1.1, and to aggregate the total value of the funds involved in determining the applicable offense level under that guideline.

Court Ordered Restitution Not Bar To Collection Of Additional Deficiency

In ***Hickman v. Commissioner***, 183 F.3d 535 (6th Cir. 1999), Hickman was convicted of failing to file federal income tax returns for the years 1984 to 1988. During the trial, the government submitted an exhibit indicating Hickman's gross income for the years in question and his corresponding tax liability. The Presentence Investigation Report adopted these amounts and the judge ordered Hickman, as part of his sentence, to pay this amount as restitution. After Hickman paid this amount, the IRS issued a notice of deficiency for an amount due which included an additional amount for the years 1986-88, representing the difference between the amount paid as restitution and Hickman's accurately calculated tax liability.

Hickman petitioned the Tax Court, requested a redetermination of his tax deficiencies and contended the Service was collaterally estopped from asserting he owed taxes for the years 1986-88 in excess of what had been determined as restitution in the criminal proceeding. The

Tax Court rejected the argument on the grounds the determination of Hickman's liability was not essential to the district court's judgment and the specific tax liability was not an element of the crime of which he was convicted.

The Sixth Circuit affirmed the Tax Court's decision. In addition, the court found the restitution was not a final adjudication of Hickman's tax liability and the Service's claim was not barred by collateral estoppel. The court stated the policy behind the doctrine of collateral estoppel is that one fair opportunity to litigate an issue is enough. Here, Hickman's tax liability was not fully litigated at trial; the precise amount of tax liability was not an element of the government's case and was not in direct contention at trial. The court, accordingly, held collateral estoppel was not applicable.

Relevant Conduct, Grouping And Acceptance Of Responsibility

In ***United States v. Lindsay***, 184 F.3d 1138 (10th Cir. 1999), Lindsay, a known tax protestor was convicted on three counts of tax evasion, one count of failure to file a tax return, two counts of bank fraud and one count of mail fraud.

The Tenth Circuit affirmed Lindsay's sentence and his conviction on all counts except the bank fraud counts because the court concluded the evidence presented was insufficient to sustain the conviction. Despite the reversal of the bank fraud convictions, the court found the offense level calculated for the mail fraud conviction, with which the bank fraud convictions were grouped, remained the same. The court found Lindsay's mail fraud offenses caused sufficient loss to sustain the assigned offense level. Likewise, the sentence enhancement for the specific offense characteristic of perpetrating a scheme to defraud more than one victim, as provided by U.S.S.G. § 2F1.1(b)(2)(B) remained the same.

The court based its decision to group the mail fraud conviction with the reversed bank fraud counts on § 1B1.3(a) which recognizes a defendant can be held accountable for "relevant conduct" for which he has not been convicted. The court found the circumstances here satisfied the three pronged standard required by § 1B1.3(a)(2) because 1) there was a finding Lindsey committed the offenses, 2) the offense was the type that, if Lindsey had been convicted of both offenses (which he initially was), grouping was required for sentencing purposes and, 3) the offense was "part of the same course of conduct or common scheme or plan." Therefore, the court found Lindsay's bank fraud to be relevant conduct for purposes of affirming the two level enhancement he received pursuant to §2F1.1(b)(2)(B).

Next the Tenth Circuit found no error in the district court's conclusions that Lindsay's tax and mail fraud convictions involved unrelated conduct and should be separately grouped under § 3D1.2(d). The tax offenses deprived the federal government of revenue to which it was entitled to under the tax code, while the mail fraud constituted an attempt to obtain funds fraudulently from the State of Kansas.

Lastly, the court upheld the district court's decision not to grant a downward departure for acceptance of responsibility. The court concluded, not only is the sentencing judge entitled to great deference on review of sentencing decisions and those decisions should not be disturbed unless they are without foundation, but it also independently concluded Lindsay's numerous efforts to obstruct justice were inconsistent with acceptance of responsibility and provided ample foundation for the district court's denial of the downward adjustment.

Grouping Drug And Money Laundering Offenses

In ***United States v. Rice***, 185 F.3d 326 (5th Cir. 1999), Rice pled guilty to several drug and money laundering charges. At sentencing, Rice objected because the money laundering count was not grouped with the three drug related counts pursuant to U.S.S.G. § 3D1.2. The district court overruled the objection and sentenced Rice to 360 months of imprisonment on each drug count and to a concurrent 240 months of imprisonment on the money laundering count. Rice appealed his sentence arguing the district court erred in failing to group his drug related counts with his money laundering count. Rice contended he was being punished twice for the same conduct because the drug counts embody conduct that was treated as a specific offense characteristic which increased his offense level for the money laundering count by three levels.

Relying on *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997), the court held Rice's convictions of drug trafficking offenses should be grouped, pursuant to § 3D1.2(c) with his conviction of laundering the proceeds of the drug trafficking. Section 3D1.2(c) requires grouping where one count embodies conduct treated as a specific offense characteristic in the guideline applicable to another count. The court found Rice's drug offenses were impermissibly counted twice toward his sentence; once as the basis for his conviction on his drug counts and again as a specific

offense characteristic of the money laundering count. This resulted in an increase in the money laundering offense level because he knew the funds were proceeds of the unlawful distribution of marijuana. Thus, the court found the drug convictions should have been grouped with the money laundering conviction instead of being used to enhance the money laundering offense level.

Grounds For Departure

In ***United States v. Contreras***, 180 F.3d 1204 (10th Cir. 1999), the Tenth Circuit held neither disparity of sentences nor coercion was an appropriate ground for departure. A departure for disparity was impermissible because the defendants Contreras was compared to were not similarly situated. The coercion was inappropriate because any coercion exerted on Contreras was not present to an exceptional degree taking her case outside the heartland of the Guidelines. The court, combining the legally impermissible and factually inappropriate grounds for departure, did not believe the case was one of the "extremely rare" cases contemplated by U.S.S.G. § 5K2.0.

Contreras was convicted of conspiracy, investment of illicit drug profits, and two counts of money laundering. At sentencing, the district court adopted the factual findings and guideline application in Catreras' presentence report, which assessed her base offense level at 38, her criminal history category at I, and her sentencing range at 235 to 293 months imprisonment. Nevertheless, the district court granted Catreras' motion for a downward departure and sentenced her to 120 months in prison. The government appealed and the Tenth Circuit reversed the district court's decision to depart downward and remanded the case for resentencing.

At resentencing, the district court again departed downward, reaching the same sentence of 120 months imprisonment. The district court identified two reasons for its downward departure. First, the court focused on the influence exerted on Catreras by her father. Second, the court alluded to the disparity between the sentence range the Guidelines dictated for Catreras and the actual sentences received by two of her co-defendants. Because neither factor individually, nor the two in combination, justified a departure from the Guideline range, the Tenth Circuit again reversed the sentence.

The Tenth Circuit determined a parent's unique position to wield influence over a child was most appropriately analyzed under the "coercion and duress" factor recognized in U.S.S.G. § 5K2.12. Catreras argued there were two components to her father's coercive influence over her, a financial dependence and an emotional dependence. As the § 5K2.12 policy statement makes clear, personal financial difficulties do not warrant a decrease in sentence. With respect to the emotional coercion, departure will be warranted only when the coercion involves a threat of physical injury, substantial damage to property, or similar injury resulting from the unlawful action of a third party or from a natural emergency. These elements were clearly not present in this case.

With respect to the sentencing disparity, the Tenth Circuit concluded Catreras' situation was sufficiently different to warrant a more severe sentence. Each of the other co-defendants accepted responsibility and pled guilty to a lesser charge. The court noted, the purpose of the Guidelines is to eliminate disparities in sentencing nationwide, not to eliminate disparity between co-defendants. Sentencing disparity between co-defendants is an impermissible departure factor when the defendants being compared either (1) pled to or were convicted of different offenses or (2) played significantly different roles in the commission of the same offenses

Underlying Nonserious Crime Outside "Heartland" Of Money Laundering Sentencing Guidelines

In ***United States v. Smith***, 186 F.3d 290 (3rd Cir. 1999), Smith was convicted of, *inter alia*, fraud and money laundering arising out of an embezzlement/kickback scheme. In the early 1990's, Smith was the national sales manager for GTECH Corporation which provided lottery services to many states, including New Jersey. In order to secure New Jersey's approval of GTECH's new gambling game, "Keno," Smith contacted Benchmark Enterprises, a consulting company with alleged ties to the New Jersey Governor's chief of staff. GTECH agreed to pay Benchmark $30,000 per month in exchange for introductions to top state officials. Although Keno ultimately failed in New Jersey in 1993, Benchmark continued to assist GTECH in its relations with governmental officials. As a result of a federal investigation into the conduct of state officials, it was later discovered that at the same time GTECH was paying money to Benchmarck, Benchmark made a series of payments to Smith, or to his creditors, totaling $169,500.00. This formed the basis for the embezzlement/kickback scheme and led to Smith's money laundering conviction for which he was sentenced to 63 months of imprisonment.

On appeal, Smith argued the district court erred in using the more severe money laundering guideline rather than the

one for fraud, as the basis for sentencing. Smith asserted the particular conduct for which he was being punished fell outside the "heartland" of the money laundering guidelines. The guidelines, he alleged, were intended to harshly punish money laundering associated with drug trafficking and other serious criminal activity, as opposed to the somewhat innocuous kickback scheme for which he was convicted.

The Third Circuit agreed with Smith, holding the money laundering guideline, U.S.S.G. § 2S1.1, "suggests that its heavy penalty structure was addressed to the activity detailed in the statute's legislative history-namely, the money laundering associated with large scale drug trafficking and serious crime." The court found support for this finding in the report of the Sentencing Commission to Congress which provides for a high offense level in ". . . situations in which the laundered funds [derive] from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime." *See*, *United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses (Sept. 18, 1997)*. The court further noted, in response to a Congressional request for its opinion on the money laundering guidelines, the Justice Department stated they "should not be used in cases where the money laundering activity is minimal or incidental to the underlying crime." Finally, the court placed reliance upon the cases of *United States v. Woods*, 159 F. 3d 1132 (8th Cir. 1998) and *United States v. Hemmingson*, 157 F. 3d 347 (5th Cir. 1998), where it was similarly held the underlying criminal conduct, bankruptcy fraud and campaign finance fraud, respectively, fell outside the heartland of the money laundering guidelines in the context of sentencing. Accordingly, since Smith's money laundering conviction was based on 15 checks sent by Benchmark to Smith's creditors and not drug trafficking or some other serious crime, the court vacated the sentence and remanded the case for resentencing.

Intended Loss Not Limited By Impossibility Of Actual Loss In Sting Situations

In ***United States v. Klisser,*** No. 98-1642, 1999 U.S. App. LEXIS 20031 (2nd Cir. Aug. 24, 1999), Klisser undertook to defraud a pension fund accountant who had come to Klisser seeking to invest ten million dollars from his pension fund. Actually the pension fund accountant was an undercover agent and, on the basis of his investigation, Klisser was later convicted of wire fraud. Klisser was sentenced under U.S.S.G. § 2F1.1, and a fifteen level enhancement was applied based on Klisser's ten million dollar loss, (though the court reduced this fifteen level enhancement to a twelve level enhancement because the court considered Klisser's intended ten million dollar loss too high and an inaccurate representation of Klisser's culpability). Klisser, citing *United States v. Galbraith,* 20 F.3d 1054 (10th Cir. 1994), appealed the court's refusal to use a zero loss figure based on the impossibility of actual loss in sting situations.

The Second Circuit rejected Klisser's position. Rather, the court chose to rely on the opinion in *United States v. Studevent,* 116 F.3d 1559 (D.C. Cir. 1997). The appellant in *Studevent* was also caught in a sting operation and appealed his enhanced sentence and the court's refusal to use a zero loss figure. The appellant in *Studevent* argued, "intended loss" in Application Note 7 to § 2F1.1, which states, the defendant's intended loss figure which should be used for sentencing purposes, is limited to a realistically possible loss. The *Studevent* court examined Application Note 7 to § 2F1.1 in light of other guideline provisions such as § 2X1.1, Application Note 10 to § 2F1.1, and § 1A3. The *Studevent* court found, these provisions suggest, a major purpose of the guidelines is to tailor punishment to a defendant's particular degree of culpability, as determined by his intended loss, rather than to punish defendants intending small losses the same as defendants intending large losses. The *Studevent* court concluded, Application Note 7 to Guidelines § 2F1.1 is concerned with punishing a defendant's particular mental culpability as determined by the amount of intended loss, without regard to realistically possible loss. The Second Circuit adopted the *Studevent* court's reasoning without adding any new reasoning of its own.

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