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SUPREME COURT CASES

Use Of Evidence After Grant Of Immunity

In ***United States v. Hubbell***, 120 S. Ct. 2037 (2000), Hubbell refused to comply with a broadly worded subpoena asserting his Fifth Amendment privilege against self-incrimination. Hubbell subsequently produced the requested documents after he was granted immunity under 18 U.S.C. §§ 6002 and 6003. The Court found the government made "derivative use" of the testimonial aspect of the act of production in obtaining the indictment against Hubbell and in preparing its case for trial. The Court concluded the indictment must be dismissed absent a showing "the evidence [the government] used in obtaining the indictment and proposed to use at trial was derived from legitimate sources 'wholly independent' of the testimonial aspect of [Hubbell's] immunized conduct in assembling and producing the documents described in the subpoena."

The government argued its use of the documents Hubbell produced did not violate his Fifth Amendment privilege and was outside the protection afforded by the grant of immunity. Furthermore, citing *Fisher v. United States*, 425 U.S. 391 (1976), the government argued the existence and possession of the business records covered by the subpoena was a "forgone conclusion," therefore, Hubbell's act of production lacked a sufficient testimonial aspect to trigger the protection of the privilege.

The Court found the Fifth Amendment's protection against the government's use of incriminating information derived directly or indirectly from Hubbell's compelled testimony which was of primary relevance. The Court rejected the government's claim that Hubbell's immunity did not preclude its derivative use of the produced documents because its possession of the documents was the fruit only of the physical act of production. Moreover, the Court distinguished *Fisher* by pointing out the government in that case knew the documents it wanted were in the possession of third parties and could confirm their existence and authenticity through other third parties who created them. Here, by contrast, the government showed no prior knowledge of the existence or whereabouts of the documents Hubbell produced. The Court also noted it was apparent from the subpoena's text the government needed Hubbell's assistance both to identify potential sources of information and to produce those sources. The Court likened the breadth of the description of the categories of documents called for by the subpoena to be tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions.

Further, the Court stressed the government received the incriminating documents only through Hubbell's truthful reply to the subpoena of which it made substantial use in the investigation. Quoting *Doe v. United States*, 487 U.S. 201 (1988), the Court added Hubbell had to "make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena." Finally, the Court noted Hubbell's response provided the government with the "lead to incriminating evidence" and the "link in the chain of evidence needed to prosecute." Without it, the Court intimated, the government would not have had the necessary evidence to indict.

Miranda Governs Admissibility Of Statements Made In Custodial Interrogation, Not 18 U.S.C. § 3501

In ***Dickerson v. United States***, 120 S. Ct. 2326 (2000), the Supreme Court held *Miranda v. Arizona*, 384 U.S. 436 (1966) and its progeny govern the admissibility of statements made during custodial interrogation in both state and federal courts. The majority opinion confirmed *Miranda* as a constitutional decision of the Supreme Court that could not be, in effect, overruled by a legislative Act of Congress. Accordingly, the Court reversed the decision of the Fourth Circuit in *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) which held Dickerson's confession, although obtained in violation of *Miranda*, was nevertheless voluntary for purposes of the Due Process Clause of the Fifth Amendment, and therefore admissible into evidence pursuant to 18 U.S.C. § 3501. See, *Criminal Tax Bulletin*, April, 1999.

Subsequent to the decision in *Miranda*, Congress enacted § 3501 which provides the admissibility of statements made during custodial interrogation is to be determined solely on whether they were voluntarily given. In effect, Congress attempted to overrule *Miranda*. However, due to questions concerning the constitutionality of § 3501, it was rarely enforced. In Dickerson's case, he was indicted for bank robbery and other related federal crimes. He moved to suppress a statement he made to an FBI agent, on the ground he had not received his "*Miranda* warnings" before being interrogated. The district court granted his motion and the government took an interlocutory appeal to the Fourth Circuit. There, the court held even though Dickerson had not received his *Miranda* warnings, his statement was nevertheless voluntarily made and, therefore, under § 3501, admissible into evidence. In doing so, the court concluded *Miranda* was not a constitutional holding, and as such, Congress had the authority to overrule it.

Because of the apparent conflict between *Miranda* and the voluntariness standard set forth in § 3501, the Court first had to decide whether Congress actually possessed the constitutional authority to supersede *Miranda*. The Court acknowledged "the power to judicially create and enforce nonconstitutional rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." It is Congress which retains "the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution." Congress, however, may not legislatively supersede the Court's decisions interpreting the Constitution. Hence, the present case turned on whether "the *Miranda* court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."

First and foremost, the Court opined, the strongest factor militating in favor of viewing *Miranda* as a constitutional decision was "both *Miranda* and two of its companion cases applied the rule to proceedings in state courts - - to wit, Arizona, California, and New York." The Court stressed in state court proceedings, its "authority is limited to enforcing the commands of the United States Constitution." *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991).

Next, the Court found further support for the conclusion that *Miranda* was constitutionally based by examining the actual language of the opinion. The Court emphasized it was "replete with statements indicating that the majority thought it was announcing a constitutional rule." *See, e.g.*, *Miranda*, 384 U.S. at 479.

Finally, the Court stated the principles of *stare decisis* weighed heavily against overturning the decision. "[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" In light of *Miranda* becoming "embedded in routine police practice to the point where the warnings have become part of our national culture," the Court was unable to find such justification. Accordingly, the Court concluded *Miranda* announced a constitutional rule Congress could not supersede legislatively.

TITLE 26 AND TITLE 26 RELATED CASES

Unauthorized Disclosure

In ***Jones v. United States***, 207 F.3d 508 (8th Cir. 2000), Terry and Patricia Jones, husband and wife, filed a 26 U.S.C. § 7431 lawsuit in 1991, seeking damages in excess of $112 million for unauthorized disclosures made in violation of 26 U.S.C.§ 6103(a). The Joneses alleged one or more Service employees wrongfully disclosed their tax return information to a confidential informant who, in turn, notified the local media that the Service was executing a search warrant on their company, Jones Oil. During the liability phase of the trial, the court determined § 6103 did not authorize the special agent's disclosure to the informant but the United States was not liable for damages because the Joneses failed to prove the disclosure was based on a

bad faith misinterpretation of § 6103. *Jones v. United States*, 898 F. Supp. 1360 (D. Neb. 1995). The Eighth Circuit remanded the case holding the United States bore the burden of proving good faith pursuant to § 7431(b)(1). *Jones v. United States*, 97 F.3d 1121 (8th Cir. 1996). On remand, the trial court found the special agent did not make the unauthorized disclosure based upon a "good faith, but erroneous interpretation" of § 6103. *Jones v. United States*, 954 F. Supp. 191 (D. Neb. 1997). Consequently the government was liable for damages and the court awarded actual damages to the Joneses in the amount of $5.4 million. *Jones v. United States*, 9 F. Supp. 1119 (D. Neb. 1998).

On appeal, the Eighth Circuit concluded the disclosure of information under the specific circumstances of this case was not authorized by the regulations pursuant to § 6103 (k)(6) (investigative disclosures) but the district court erroneously included pre-judgment interest of $2.5 million in its damages award. The court also upheld the district court's refusal to award punitive damages and attorneys' fees. The court further held the government failed to carry its burden by showing the special agent's actions were within the "good faith" safe harbor of § 7431, noting none of the regulations which implement § 6103(k)(6) allows for the disclosure of return information under the circumstances of this case.

Both parties requested a petition for rehearing. The government petitioned for rehearing on the court's award of post-judgment interest and sought rehearing *en banc* on the court's holding the special agent's actions were not the result of a good faith but erroneous interpretation of § 6103(k)(6). The Joneses petitioned on the grounds the pre-judgment interest and punitive damages were proper and attorney's fees should have been awarded. The court denied the government's petitions for rehearing and rehearing *en banc*. *Jones v. United States* 2000 U.S. App. LEXIS 12195 (8th Cir. June 1, 2000). Jones' petition is still pending.

26 U.S.C. § 7623 Creates No Contract Between The Service And An Informant

In ***Swofford v. United States***, No. 99-CV-4064-JPG, 2000 U.S. Dist. LEXIS 7730 (S.D. Ill., May 17, 2000), Swofford alleged he provided information to a Service agent who filled out an application form for reward money and explained to him the Service guidelines on the calculation of rewards. Swofford alleged the Service collected over $100,000 based on the information he provided and a "contract" was formed between him and the Service. Swofford further alleged the Service breached this contract by refusing to pay a reward for the information he provided. Though Swofford had not specifically mentioned 26 U.S.C. § 7623 in his *pro se* complaint, the court analyzed his allegations in terms of this statute. The government filed a motion to dismiss for failure to state a claim, pursuant to FED.R.CIV.P. Rule 12(b)(6).

As for existence of a contract, the court noted § 7623 neither explicitly nor implicitly creates a contract with an individual nor does it create an offer to enter into an implied-in-fact contract. Since the statute created no contract and Swofford failed to allege any negotiations or agreements between him and the Service to pay a fixed amount, let alone to pay anything at all, the court found no contract existed. Having found no contract existed, the court never reached the elements of performance and damages as related to the breach of the contract. Since Swofford's complaint made only conclusory allegations, the court held Swofford had failed to state a claim and granted the government's motion to dismiss.

SEARCH AND SEIZURE

Bus Company's Consent to Police Stops Helped Make Seizure of Traveler Reasonable

In ***United States v. Hernandez-Zuniga***, 215 F.3d 483 (5th Cir. 2000), the Fifth Circuit affirmed the district court's denial of Hernandez-Zuniga's motion to suppress cocaine seized from him. Hernandez-Zuniga was a passenger on a commercial bus which was pulled over by the United States Border Patrol to conduct an immigration check. During the stop, an agents' suspicion was aroused by Hernandez-Zuniga's manner, leading to further questioning and the discovery of the cocaine. Hernandez-Zuniga was subsequently convicted of possession of cocaine with intent to distribute. Hernandez-Zuniga appealed his conviction arguing the district court erred in refusing to grant his motion to suppress the cocaine. Hernandez-Zuniga argued the initial stop of the bus by the Border Patrol constituted an unlawful seizure under the Fourth Amendment because there was no warrant or reasonable suspicion of criminal activity on the bus to justify the stop.

In response to Hernandez-Zuniga's argument, the government argued that while the Border Patrol may not have had reasonable suspicion to stop the bus, the stop was nonetheless constitutional because it was conducted pursuant to the bus company's consent. Thus, the bus company's consent alone was sufficient to render the stop constitutional. The Fifth Circuit found the district court had not erred in either its factual or legal conclusions which

included a finding the bus company and the bus driver consented to the Border Patrol stop. Furthermore, because the stop was consensual the stop was constitutional and did not violate Hernandez-Zuniga's Fourth Amendment rights.

The Fifth Circuit analyzed the reasonableness of the seizure conducted pursuant to third party consent, and determined the consent justified the stop. Specifically, the evidence showed the bus company retained the right to stop en route and pick up any passenger who flagged down a bus. The Fifth Circuit held, when a commercial bus company which has a policy of making random unplanned stops to pick up passengers, consents to random stops and immigration inspections of its buses by the Border Patrol, a stop conducted in accordance with that consent does not violate the bus passengers' Fourth Amendment rights.

OTHER CONSTITUTIONAL ISSUES

Sixth Amendment Right to Counsel

In ***United States v. Harrison***, 213 F.3d 1206 (9th Cir. 2000), the Ninth Circuit held when there is a close nexus between the focus of a pre-indictment investigation and the ultimate charges brought in the indictment, a defendant's ongoing relationship with counsel, which is known or should have been known by the government, invokes the Sixth Amendment right to counsel. After being subpoenaed to testify before a grand jury looking into the activities of a drug ring of which he was a member, Harrison retained counsel. The lawyer continued to deal with prosecutors as the government's case focused on Harrison. Harrison was eventually indicted for murder and drug offenses. After Harrison was indicted, he was arrested and advised of his *Miranda* rights. After signing a written waiver, Harrison made several incriminating statements. He then contended the statements should be suppressed on the ground they were obtained in violation of his right to counsel.

The Ninth Circuit noted the Sixth Amendment right to counsel does not come into play until it has both attached through the initiation of formal adversarial proceedings and been invoked by a defendant. Furthermore, attachment must generally come before invocation. Given the indictment, there was no question Harrison's right to counsel had attached. The parties disagreed over whether Harrison had invoked the right by the time the questioning occurred. Harrison argued his ongoing relationship with counsel carried over into the post-indictment phase of the case, whereas the government argued pre-indictment representation does not count and an affirmative invocation was necessary.

The Ninth Circuit rejected the government's argument that counsel's representation of Harrison before the indictment had no relevance to the invocation issue. The government pointed out under *McNeil v. Wisconsin*, 501 U.S. 171 (1991), a defendant's pre-indictment retention of counsel cannot preempt interrogation about any and all crimes. The court, however, said *McNeil* was limited to "cases in which police question a defendant in custody about charges unrelated to those prompting the defendant's confinement." The court stressed this was not such a case. The court also explained away the Supreme Court's rejection in *Moran v. Burbine*, 475 U.S. 412 (1986), of the "suggestion that the existence of the attorney client relationship itself triggers the protections of the Sixth Amendment." Although this statement would appear to bear on this case, the Ninth Circuit concluded it was closely linked to the fact the interrogation there occurred prior to indictment. Viewed in context, the Ninth Circuit limited *Burbine* to pre-indictment attempts to assert the right to counsel.

In this case, the court saw no reason to ignore Harrison's representation merely because it began before indictment. Anybody who retains counsel in connection with a criminal investigation would consider himself to be represented in the event charges are brought and would not expect to be required to affirmatively reassert that representation. The court concluded a defendant invokes the Sixth Amendment right to counsel as a matter of law when (1) the defendant retains counsel on an ongoing basis to assist with a pending criminal investigation; (2) the government knows, or should know, the defendant has ongoing legal representation relating to the subject of the investigation; and, (3) the eventual indictment brings charges precisely anticipated by the scope of the pre-indictment investigation.

EVIDENCE

Court Must Apply *Daubert* Analysis To Determine Admissibility Of Expert Scientific Testimony

In ***Goebel v. Denver and Rio Grande Western Railroad Co.***, 215 F.3d 1083 (10th Cir. 2000), Goebel, a locomotive engineer employed by the Denver and Rio Grande Western Railroad Company ("Rio Grande"), was instructed to operate two "helper" locomotives to push a train through the six mile Moffat Tunnel running over the continental divide in Colorado. Shortly after one o'clock in the morning the

train suddenly broke in half and stopped in the tunnel. While repairing the locomotives, Goebel was exposed to diesel fumes and was taken to the hospital after the locomotives were repaired and the train cleared the tunnel.

After a diagnosis of a mild brain injury, Goebel sued the Railroad Company. At trial, Goebel sought to introduce the testimony of a toxicologist who believed Goebel's brain injury was caused by brain swelling brought on by a combination of exposure to diesel fuel, high altitude, low oxygen, and low barometric pressure. Rio Grande objected three times to the toxicologist's testimony, which it characterized as "junk science." The district court overruled each objection stating only it believed there was sufficient foundation for the jury to hear the testimony and that it (the court) had fully considered the matter. The jury found in favor of Goebel and Rio Grande appealed.

On appeal the Tenth Circuit referred to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* established a "gatekeeper" function for trial judges who were supposed to determine whether proposed scientific expert testimony constituted scientific knowledge which would assist the trier of fact to understand or determine a fact in issue. The Tenth Circuit found it was within the discretion of the trial court how to perform the gatekeeper function but the trial court had no discretion regarding the actual performance of the gatekeeper function. The Tenth Circuit specifically held, for purposes of appellate review, a natural requirement of the gatekeeper function is the creation of a record sufficient to allow an appeals court to determine whether the trial court had performed its gatekeeper function and applied the *Daubert* analysis. In this case, the Tenth Circuit found the record contained no explicit statement whether the court had conducted a *Daubert* analysis. Therefore, in the absence of such findings, it concluded the district court abused its discretion in admitting the testimony. Further, since the toxicologist's testimony purported to establish a causal link between Goebel's exposure to diesel fumes and his brain injury, it was crucial to his case and its erroneous admission was not plain error.

FORFEITURE

Satisfying Due Process In Notice of Forfeiture To A Prisoner

In ***United States v. One Toshiba Color Television (McGlory)***, 213 F.3d 147 (3rd Cir. 2000), the Third Circuit held when the government pursues the forfeiture of property belonging to a prisoner in its custody, although not required by due process to prove actual notice, the government bears the burden of demonstrating procedures exist at the facility housing the prisoner which are reasonably calculated to ensure such notice will reach the prisoner. This question was left unanswered by the Third Circuit in the related case of *United States v. McGlory*, 202 F.3d 664 (3rd Cir. 2000), where the court held when a person is in the government's custody and detained at a place of its choosing minimum due process requires notice of a pending administrative forfeiture proceeding must be mailed to the detainee at his or her place of confinement. The court went on to say "whether anything more is required is not presently before us." The instant case allowed the court to clarify exactly what "more" is required to satisfy the minimal standards of due process.

In September 1989, the Drug Enforcement Administration (DEA) arrested McGlory for, *inter alia*, conspiracy to possess and distribute heroin. Incident to his arrest, the DEA seized various items of McGlory's property, including cash, jewelry, television equipment, cellular phones and luggage. In May, 1990, a jury convicted McGlory on all charges and he was subsequently sentenced to life imprisonment in February, 1991. From the time of his arrest until sentencing, McGlory remained in the custody of the United States Marshals Service, housed in various pretrial detention facilities. Before McGlory's criminal trial began, the DEA initiated administrative forfeiture proceedings with respect to the property it had seized when McGlory was arrested. The present case concerns a forfeiture action against various items of jewelry belonging to McGlory. The government sent notice by certified mail to the prison facility housing McGlory. A prison official signed for the notice of the proposed forfeiture but McGlory claimed he never received it. Subsequently, the government obtained a default judgment.

On appeal, the government argued it had satisfied due process by mailing the notice of the forfeiture to the location of the interested party, in this case, the prison facility housing McGlory. In contrast, McGlory argued a higher standard should prevail when the interested party is held in custody by the same government attempting to serve notice upon him. He argued the government was uniquely positioned to ensure actual notice of the proceedings, just as the Second Circuit had similarly found in *Weng v. United States*, 137 F.3d 709 (2nd Cir. 1998).

Declining to adopt the actual notice requirement of *Weng*, the Third Circuit stated the touchstone of analysis is whether the notice was "reasonably calculated, under all circumstances, to apprise interested parties of the pendency

of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In light of the Supreme Court's reluctance to require the demonstration of actual notice, the court was unwilling to impose this evidentiary burden on federal prosecutors. More appropriately, the court opined, the "jurisprudence of constitutional notice focuses not on what actually occurred, but rather on the procedures that were in place when notice was attempted." Accordingly, if the government chooses to rely on less than actual notice, then it bears the burden of demonstrating the procedures employed at the facility housing a prisoner are reasonably likely to effect such notice. The judgment was vacated and the matter sent back to the district court to determine whether such procedures existed.

MONEY LAUNDERING

Defendant's Actual Possession of Wired Funds Not Required To Establish Proceeds Of Wire Fraud

In ***United States v. Prince***, 214 F.3d 740 (6th Cir. 2000), the Sixth Circuit held funds wired by victims of a fraudulent investment scheme to third parties who later transferred the funds to the defendants constituted the SUA proceeds of the of wire fraud. This provided the predicate offense for the defendants' money laundering convictions, even though at the time of the transfers, the defendants did not have actual physical control of the money. Prince and his co-defendant, White, were indicted and convicted of, *inter alia*, wire fraud and money laundering in violation of 18 U.S.C. §§ 1343 and 1956, respectively. Prince and White devised a scheme to fraudulently solicit investments from individuals, representing to them that White's business was authorized to make discount purchases of property involved in bankruptcy proceedings. Prince and White directed their victims to wire transfer the money they wished to invest to the accounts of third parties, who would then turn the money over to them. At all times, Prince and White were in constructive control of the third parties' bank accounts, for they had preexisting relationships with the third parties and had reached agreements with them to participate in perpetuating their fraudulent scheme.

On appeal, Prince argued the funds obtained through wire fraud did not become the proceeds of the unlawful activity, as defined in the money laundering statute, until he physically obtained the wired funds and this did not occur until the third parties transferred the funds to him. These transfers, therefore, could not have involved the proceeds of the specific unlawful activity of wire fraud. As such, the money laundering charges were fatally flawed.

The Sixth Circuit rejected this argument holding the funds became the proceeds of wire fraud the moment the victims wired the money to the third parties. In arriving at this conclusion, the court relied upon the cases of *United States v. Savage*, 67 F.3d 1435 (9th Cir. 1995) and *United States v. Smith*, 44 F.3d 1259 (4th Cir. 1995), to support the proposition that Prince did not need to have physical possession of the money before it could be considered proceeds for the purposes of § 1956. The court reasoned the transferred funds were criminally derived property at the time they were deposited into the third parties' accounts. Although Prince did not have actual physical control over the funds , his control over the third parties established the requisite control over the funds in the third parties' possession. *See, e.g.*, *United States v. Leahy*, 82 F.3d 624 (5th Cir. 1996). Additionally, the court rejected a claim that evidence of the defendants' use of third parties was insufficient to show the transactions were designed to conceal the nature and source of the proceeds as required by 18 U.S.C. § 1956(a)(1)(B)(i).

INVESTIGATIVE TECHNIQUES

Entrapment

In ***United States v. Brooks***, 215 F.3d 842 (8th Cir. 2000), the Eighth Circuit held coercive tactics used by a paid informant to persuade Brooks, a drug addict, to sell heroin to a law enforcement officer amounted to entrapment as a matter of law. The incident underlying Brook's prosecution began when an informant sold Brooks six $50 packets of heroin. Later the same evening, the informant telephoned Brooks requesting him to give back some of the heroin since the informant's own supply had run out and he needed some for a desperate customer. Brooks refused this request as well as three others the informant made the next day. Not until faced with the threat the informant would cut off his supply did Brooks agree to return some of the heroin. With the informant acting as intermediary, the law enforcement agent posing as the boyfriend of the desperate customer purchased two packets of heroin from Brooks. The law enforcement agent did not know the informant sold Brooks the heroin he bought from Brooks. A jury convicted Brooks of distributing a controlled substance in violation of 21 U.S.C. § 841(a)(1). Brooks appealed, claiming these facts established entrapment as a matter of law.

To demonstrate entrapment the evidence must clearly indicate: (1) a government agent originated the criminal design; (2) the agent implanted in the mind of an innocent person the disposition to commit the offense; and (3) the defendant committed the criminal act with the urging of the agent. The critical question in this case is whether Brooks was predisposed to commit the crime independent of the government's conduct. The court found the facts demonstrated an improper level of governmental involvement thereby establishing inducement. Brooks produced evidence he was an addict and the informer was his only source of heroin. Once the informant sold Brooks the heroin, the informant was unrelenting, accosting Brooks numerous times demanding Brooks return some of the heroin. Brooks was able to fend off the informant until he was overcome by the informant's threat to cut off his supply. Only then did Brooks yield and return some of his heroin in exchange for a portion of his money back.

The court described the case as one in which one government agent (the informant) sold Brooks heroin and then coerced him into selling it back to another agent. The court held the evidence could lead to no conclusion other than Brooks was entrapped as a matter of law. Based on the facts, no reasonable jury could have found beyond a reasonable doubt Brooks was not induced by the informant to commit the crime. The court cited *Sherman v. United States*, 356 U.S. 369 (1958), for the proposition that " . . . ignorance of its agents' actions does not relieve the government of responsibility for the conduct of its agents, including [the informant]." Consequently, even though the government agent was unaware of the informant's coercive tactics to induce Brooks to make the resale, the government was nevertheless responsible for the informant's actions. The court stated the power of the government is abused when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might have obeyed the law.

As to the government's production of evidence of other sales by Brooks, the court pointed out the sales occurred after the informant's initial inducement. Likewise, the court was unpersuaded that Brook's four year old conviction for possession with the intent to sell established Brooks was predisposed to sell heroin to the agent. Accordingly, the court held the government failed to meet its burden of proving Brooks' predisposition.

"Color of Law" Exception To Wiretap Statute

In ***United States v. Andreas***, 216 F.3d 645 (7th Cir. June 26, 2000), Andreas and his two co-defendants were each convicted of one count of conspiring to violate the Sherman Antitrust Act, 15 U.S.C. § 1, which prohibits "any conspiracy or combination to restrain trade." Specifically, the defendants, who were high ranking executives at Archer Daniels Midland Co. ("ADM"), participated in a broad conspiracy during the early 1990's to fix the price of the agricultural product lysine. A large portion of the inculpatory evidence admitted against them consisted of surreptitious audiotape recordings made by a cooperating government witness who was also an ADM executive and participant in the price fixing scheme. Upon confessing to FBI agents that he was attempting to embezzle money from ADM, the cooperating witness agreed to act as an undercover informant. Over the course of the next two and a half years, the cooperating witness, acting under the government's direction and using recording equipment and tapes provided to him by the government, recorded hundreds of hours of conversations and meetings with his fellow conspirators. At trial, the government successfully argued the recordings were admissible under 18 U.S.C. § 2511(2)(c), which allows the use of tape recordings made by a participant to the conversation who was "acting under the color of law."

On appeal, Andreas contended the tape recordings violated federal wiretap laws and should have been excluded from trial pursuant to 18 U.S.C. § 2515, which prohibits the evidentiary use of any illegally obtained tape recording. He argued the FBI failed to properly supervise the cooperating witness and badly mismanaged the two year taping operation by violating internal FBI policies with respect to the timely collection and cataloguing of the tape recordings. Moreover, by acting in direct contravention of the FBI's instructions and not tape recording all of his conversations with the defendants, Andreas claimed the witness was selectively recording certain conversations with the ulterior motive of helping himself. Hence, he was not acting under "color of law" and, therefore, the tapes were inadmissible under § 2511(2)(c).

For purposes of the wiretap statute, the Seventh Circuit held, when assessing whether someone acted under "color of law," the question is "whether the witness was acting under the government's direction when making the recording." *See United States v. Craig*, 573 F.2d 455, 476 (7th Cir. 1977). In the present case, the court acknowledged the FBI's supervision of the witness was lacking and it failed to follow many of its internal guidelines with respect to conducting taping operations. However, deeming these problems as merely "technical deficiencies," the court rejected Andreas' argument that the witness was acting independently.

The court found support for its decision from the Sixth Circuit's opinion in *Obron Atlantic Corp. v. Barr*, 990 F.2d 861, 864 (6th Cir. 1993), where the use of the "color of law" exception was upheld. There, the cooperating witness failed to record all conversations as instructed, used his own equipment, carelessly maintained a log of his recordings, and held on to tapes months after they had been made. Despite these problems, the court held the witness's "continuous, albeit irregular, contact [with] DOJ attorneys, following their explicit request that he assist them . . . outweigh[ed] the lack of direct DOJ supervision over the recording process . . . " *Id*. at 865. From this, the Seventh Circuit deemed essential the fact "the government requested or authorized the taping with the intent of using it in an investigation and that they monitored the progress of the covert surveillance." In the instant case, the FBI requested the cooperating witness to tape record his coconspirators, provided him with the necessary equipment, instructed him as to what to record and met with him to discuss the case and collect the tapes. Accordingly, this evidence was sufficient to prove the witness acted at the direction of the FBI and thus, under the "color of law."

SENTENCING

Use Of Evidence Obtained In Violation Of The Fourth Amendment

In ***United States v. Brimah***, 214 F.3d 854 (7th Cir. 2000), the Seventh Circuit made clear the Fourth Amendment Exclusionary Rule does not apply at sentencing under the United States Sentencing Guidelines, to bar introduction of evidence the district court determined was seized in violation of the Fourth Amendment against unreasonable searches and seizures. After Brimah sold heroin to a cooperating witness, a search warrant was executed which resulted in the seizure of additional heroin found in an air conditioner outside Brimah's property. This evidence was subsequently excluded at trial because it was seized in violation of the Fourth Amendment. Brimah was convicted of distribution of heroin based upon the amount of drugs he sold to the cooperating witness. At sentencing, the district court included the amount of heroin seized during the execution of the search warrant as relevant conduct. Brimah objected to its inclusion arguing the exclusionary rule should bar the inclusion of this heroin deemed inadmissible at trial.

Brimah argued U.S.S.G. § 1B.1.4 limits a sentencing courts' otherwise broad discretion to consider all relevant and reliable evidence by providing that all such evidence may be considered except "information otherwise prohibited by law." Brimah also relied on a line of concurring opinions in which it had been argued that application of the Exclusionary Rule at sentencing is necessitated by the potential for law enforcement officials to obtain a conviction on relatively minor conduct and then seek a significantly enhanced sentence by introducing other evidence at sentencing.

In response the Brimah's argument, the government relied on 18 U.S.C. § 3661, which broadly states "[n]o limitation shall be placed" on the relevant information which may be considered by a federal court at sentencing. The court noted it must weigh the additional deterrent benefit to be gained by applying the Exclusionary Rule at sentencing against the costs such an application would impose on sentencing proceedings and on the goal of achieving fair, accurate and individualized sentences. Although this was a matter of first impression for this court, the Seventh Circuit joined other circuits which have looked at the issue and held the Exclusionary Rule does not bar the introduction of the fruits of illegal searches and seizures during sentencing proceedings. Further, the detrimental effects on sentencing policy flowing from the exclusion of relevant evidence outweigh the "marginal" deterrent effect of applying the Exclusionary Rule at sentencing. The court also pointed out it has previously held the Exclusionary Rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), was inapplicable at sentencing.

Courts May Not Use Departure Power To Equalize Sentence Discrepancies Caused By Differing Prosecution Policies

In ***United States v. Banuelos-Rodriguez***, 215 F.3d 969 (9th Cir. 2000), Rodriguez re-entered the United States, in violation of 8 U.S.C. § 1326, after having previously been deported. Rodriguez plead guilty to violating § 1326 and admitted to a previous conviction relating to the sale of rock cocaine. Because his previous conviction was for an aggravated felony, Rodriguez was subject to the sentencing enhancement provided by § 1326(b)(2). At sentencing, Rodriguez argued for a downward departure based on an alleged discrepancy between the length of sentences received by violators of § 1326 prosecuted in the Central District of California and those prosecuted in the Southern District of California. This discrepancy was based on a policy choice by prosecutors in the Central District to prosecute only § 1326 violators with the worst criminal histories and to seek long sentences for them, whereas prosecutors in the Southern District chose to prosecute more

§ 1326 violators but in most cases obtained pleas to violation of § 1326(a) which carried a shorter sentence. The court denied Rodriguez's motion for a departure and sentenced him under § 1326(b).

Rodriguez appealed the court's failure to grant a departure, citing 18 U.S.C. § 3553(b) which allows a sentencing court to depart from an applicable guideline only when there are "mitigating circumstances" not taken into account by the Sentencing Commission. Rodriguez argued the discrepancy between the length of sentences received by § 1326 violators prosecuted in the Central and Southern Districts of California was a mitigating factor not taken into account by the Sentencing Commission. The Ninth Circuit defined mitigating circumstance as a circumstance lessening the severity of a defendant's conduct or making his criminal or personal history more sympathetic. Under this definition, nothing about the Southern District's different prosecution policy constituted a mitigating circumstance or made Rodriguez' otherwise lawful sentence less justified.

To determine whether a departure was otherwise warranted, the Ninth Circuit turned to U.S.S.G., Ch. 1, Pt. A(4)(b) which provides departures may be granted only for cases which are "atypical" in comparison to cases of other offenders who have been convicted of committing the same offense. The Ninth Circuit found since the offenders in the Southern District had plead guilty of violating § 1326(a), they were not convicted of the same offense as Rodriguez, who was convicted of violating § 1326(b), even though their behavior was similar to that of Rodriguez. Since Rodriguez had committed a different crime, his case could not be considered atypical and deserving of a departure in comparison to cases of offenders in the Southern District.

In addition to permitting departures only in atypical cases, U.S.S.G. Ch. 1, Pt. A(4)(a) also suggests a court may not use its departure power to manipulate a plea agreement. A court may only accept or reject a plea agreement unless there is a showing that the plea agreement or charging decision rested on an impermissible bias. The Ninth Circuit interpreted this provision as promoting prosecutorial discretion and separation of powers. Since Rodriguez did not allege any impermissible bias, the court could not use departure to nullify the Central District's prosecution policies.

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