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TITLE 26 AND TITLE 26 RELATED CASES

Statute of Limitations

In ***United States v. LaSpina,*** 299 F.3d 165 (2nd Cir. 2002), LaSpina, a manager for IBM, conspired with others to engage in a series of monetary transactions with money received as kickbacks as a result of steering IBM business to a particular contractor. In an effort to conceal the kickback scheme, the co-conspirators used part of the proceeds from the scheme to purchase a certificate of deposit and a piece of investment real estate. Several years later LaSpina withdrew $118,000 from the certificate of deposit and sold the piece of real estate for approximately $1.7 million. LaSpina was convicted of conspiring to engage in monetary transactions in criminally derived property in violation of 18 U.S.C. § 1957(a) and filing false income tax returns in violation of 26 U.S.C. § 7206(1).

On appeal, LaSpina challenged his conviction on several grounds including his belief the conspiracy count and tax counts were time barred. The court determined the withdrawal of the kickback proceeds from the certificate of deposit and wire transfer of funds from the sale of the real estate fell within the scope of the conspiracy. Since these transactions were part of a single continuing agreement and were made by LaSpina, a conspirator who had not withdrawn from the conspiracy, they were overt acts in furtherance of the conspiracy and thus, extended the conspiracy within the statute of limitations.

With respect to the tax counts, LaSpina argued the tax counts in the superceding indictment were substantially broader in scope than those in the original indictment and, therefore, did not relate back to the original indictment. The original indictment charged LaSpina with subscribing to materially false income tax returns for calendar years 1992 and 1993. Because the original indictment made no allegations regarding the kickback scheme, LaSpina argued the superceding indictment impermissibly broadened the basis for the tax evasion charges and despite the identical language, the superceding indictment substantially changed the original charges because it alleged a new source of unreported income. The court noted, however, the source of unreported income is not an essential element of the offense under 26 U.S.C. § 7206(1). Because the charging language and the elements of the offense remained unchanged in the superceding indictment, the charges were not impermissibly broadened by the superceding indictment, and LaSpina had adequate notice of the offense with which he was being charged. The court ultimately concluded the tax counts in the superceding indictment related back to the original indictment and were not time barred.

Venue

In ***United States v. Pace,*** 301 F.3d 1034 (9th Cir. 2002), Pace appealed his convictions for wire fraud and tax fraud, arguing lack of venue on all counts. Pace formed an insurance company and served as vice president and director of a subsidiary of the company which was headquartered in Arizona. The subsidiary was subsequently relocated to Mexico and entered into a contract to share business with a Mexican company. The Mexican company deposited $36,659.28 in premiums into two bank accounts, one under the name of the subsidiary and one under the insurance company originally formed by Pace. Pace failed to provide information in regard to the

income received from the premium deposits to his accountant, who was located in Ohio. The trial was held in Arizona, and Pace was convicted of wire fraud and filing a false tax return in violation of 26 U.S.C. § 7206(1). The Ninth Circuit reversed his convictions on the wire fraud counts, but affirmed his conviction on the tax count. The Ninth Circuit, in reversing the wire fraud convictions, found there was no evidence to establish Pace used wires in Arizona or caused such use of wires in Arizona to establish venue there. Evidence did exist, however, to establish venue for the tax count, since Pace furnished information essential to the completion of the tax return in Arizona, even though the return was prepared in Ohio. The court, citing a previous Ninth Circuit decision, reasoned a violation of § 7206(1) is a continuing offense and may be prosecuted in the district where the false statement is initially provided or where it is ultimately received. Thus, the act of subscribing to a false tax return commenced when Pace, while in Arizona, furnished information essential to the return and was complete when the information was received by the Service.

Promoter's Failure To Comply With Injunction Held In Contempt

In ***United States v. Richmond et al,*** No. 02 C 1559, 2002 U.S. Dist. LEXIS 17247 (N.D. Ill. Sept. 13, 2002), the District Court for the Northern District of Illinois granted the government's motion to hold a promoter of abusive tax schemes in contempt of a prior injunction order. The action began when the government filed a civil action to enjoin defendants' Black and Richmond from promoting abusive tax schemes. Specifically, Black and Richmond advised customers to claim unallowable federal tax benefits. They also prepared tax returns for their customers claiming unallowable deductions which resulted in substantial understatements. The court found Black and Richmond in violation of 26 U.S.C. §§ 7402, 7407 and 7408 (statutes which collectively authorize injunctions against income tax return preparers and promoters of abusive shelters) and issued a permanent injunction.

It was clear Black failed to comply with any aspect of the court's injunction. Black filed a "Conditional Acceptance" with the court, which was a blatant refusal to acknowledge the validity of the injunction. As further evidence of the refusal to honor the injunction, Black failed to take any of the steps the court instructed. Black failed to provide a client list to the government, failed to post a copy of the court's order on any of his websites, and failed to provide any of his clients or course attendees with copies of the court's order or the government's complaint. Based on Black's refusal to acknowledge or comply with the court's order, the court found him in contempt.

Stay Of Civil Proceeding Until Criminal Case Concluded

In ***Turley v. United States,*** No. 02-4066-CV-C-NKL, 2002 U.S. Dist. LEXIS 16964 (W.D. Mo. August 22, 2002), Turley was visited by IRS special agents two years after forming a hotel cleaning business and was informed she and her companies were the subject of a criminal investigation. Approximately seven months later, Turley filed a complaint seeking damages from the United States for 231 wrongful disclosures to third parties of her and her companies' tax return information in violation of 26 U.S.C. § 6103. Specifically, Turley alleged her business had been damaged by statements made by special agents about her and her companies running a scam and being criminals and money launderers. The government requested a stay of the civil proceedings, arguing Turley's civil suit would give her access to evidence gathered during the investigation and allow her to construct defenses and tamper with potential evidence being used in the criminal investigation.

The court granted the government's request for a stay to the civil suit, but limited the stay to a six month period, subject to reconsideration if an indictment was not returned during that time. The court cited case law to support its discretion to grant such a stay, especially if necessary to prevent a litigant from using the liberal discovery procedures applicable to a civil suit to avoid restrictions in criminal discovery and obtain documents they would not be entitled to in the criminal case. Although there was no evidence to indicate Turley had filed suit for that purpose, the court stated good faith was irrelevant to the decision.

Turley argued the civil suit should be allowed to proceed immediately since the disclosures continued to damage her business and reputation. The government argued Turley would not be harmed by a stay of the civil suit, since the remedy of money damages would survive any criminal proceeding which may result from the criminal investigation. The court balanced the parties' competing interests and found although Turley established her business reputation had been harmed as a result of the criminal investigation, allowing the civil discovery to proceed would impose an impermissible burden on the government's criminal investigation.

Summons Enforcement

In ***United States v. Telephone and Data Systems, Inc.,*** No, 02-C-0030-C, 2002 U.S. Dist. LEXIS 15510 (W. D. Wis. July 16, 2002), the United States sought injunctive relief pursuant to 26 U.S.C. § 7401, requesting the court to

direct Telephone and Data Systems, Inc. to produce seven documents pursuant to two IRS summonses. Telephone and Data Systems, Inc., in its motion to quash, argued the documents sought by the United States were protected under both the attorney-client privilege and the work product doctrine. The court conducted an *in camera* review of the documents in dispute and found three of the seven documents were protected by the attorney-client privilege and not subject to the IRS summonses.

In regard to the work product argument, the court found the doctrine inapplicable to all of the documents because the documents were prepared too remotely from any litigation. In analyzing whether the attorney-client privilege applied, the court examined the contents of each document individually. The court found the attorney-client privilege did not apply to a business opinion letter written by tax and transaction experts, nor did it apply to two letters containing only tax advice prepared by the company's accounting firm. Furthermore, a letter written by the company's tax manager making reference to in-house counsel did not turn the tax advice into legal advice.

The three documents satisfying the attorney-client privilege and subsequently excluded from the summons enforcement included a letter from the company's tax manager specifically requesting an opinion as to whether the Service would recognize the loss generated by the transactions at issue. The other letters excluded under the attorney-client privilege were an opinion examining legal issues relating to the transactions in question and a letter containing two attachments from the company's law firm, providing a memorandum and mark-ups of the accounting firm's opinion as to the transactions in question. The court ultimately ordered Telephone and Data Systems, Inc. to comply with the IRS summons regarding four of the seven documents in question.

Canadian Tax Laws Unenforceable Under Federal Wire Fraud Statute

In ***United States v. Pasquantino***, 305 F.3d 291 (4th Cir. 2002), the Fourth Circuit held the federal wire fraud statute, 18 U.S.C. § 1343, cannot be used to enforce foreign tax laws. Pasquantino was convicted of engaging in a scheme to defraud Canada of excise duties and tax revenues by smuggling liquor from the United States into Canada. Pasquantino, a resident of New York, ordered large quantities of discounted liquor from stores in Maryland over the telephone, drove down to purchase the liquor, and smuggled it into Canada in car trunks to avoid Canadian liquor taxes, which are significantly higher than liquor taxes imposed in the United States. The liquor stores cooperated with ATF agents, recording telephone conversations with Pasquantino and advising the agents of purchases made by him. The government indicted Pasquantino on six counts of wire fraud. Pasquantino moved to dismiss the indictment for lack of jurisdiction, arguing a scheme to defraud a foreign government of duties and taxes is not cognizable under the wire fraud statute. The district court denied the motion, the case proceeded to trial, and a jury convicted Pasquantino on all six counts.

The Fourth Circuit, recognizing Canada's right to collect taxes as a valid property right for wire fraud purposes, examined the First and Second Circuits' conflicting decisions involving the same issue, and agreed with the First Circuit's invocation of the revenue rule, holding foreign revenue laws affect the public order of another country and should not be subject to scrutiny by American courts. The court recognized the revenue rule as a longstanding common law doctrine providing courts of one country will not enforce tax claims of other countries. The court reasoned upholding Pasquantino's conviction would be equivalent to penal enforcement of Canadian tax laws, an activity in which neither the United States courts nor prosecutors should be involved. The court disagreed with the Second Circuit's reasoning that the wire fraud statue does not require validation of Canada's laws, noting the mere existence of the foreign law necessitates the ability to prosecute violators for the scheme. Ultimately, the Fourth Circuit reversed Pasquantino's conviction.

SEARCH AND SEIZURE

Contraband

In ***United States v. Vanhorn***, 296 F.3d 713 (8th Cir. 2002), Vanhorn was convicted of 11 counts of mail fraud and three counts of money laundering based on a fraudulent unemployment benefits scheme. Vanhorn created fictitious businesses to receive unlawfully obtained unemployment benefits then routed the benefit checks through various bank accounts, converted the funds to cash at a casino and finally deposited his purported winnings into an investment account. The government seized the funds in the investment account as evidence, but did not institute formal forfeiture proceedings. Vanhorn filed a Rule 41(e) motion to have the seized funds returned to him, asserting these funds were his separate cash casino winnings which he invested.

The court affirmed the district court's denial of Vanhorn's Rule 41(e) motion for return of property seized from his investment account. The court held criminal proceeds, seized as evidence but not forfeited, constitute

"contraband" which Vanhorn, now convicted, had no right to possess. Generally, the court stated, "a Rule 41(e) motion is properly denied if the defendant is not entitled to lawful possession of the seized property, the property is contraband or subject to forfeiture or the government's need for the property as evidence continues."

OTHER CONSTITUTIONAL ISSUES

Waiver Of Right To Counsel

In ***United States v. Modena,*** 302 F.3d 626 (6th Cir. 2002), Modena appealed his conviction and sentence for conspiracy, resulting from his participation in a tax evasion scheme. Modena and five co-conspirators purchased sham trusts to conceal and evade paying taxes on their income. All six were indicted for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. At the pretrial conference, the magistrate judge explained to Modena the consequences of proceeding *pro se* and, based on Modena's answers and demeanor, concluded Modena knowingly and voluntarily waived his right to counsel. Five days later, Modena requested counsel be appointed; however, he subsequently withdrew the request, stating his desire to represent himself. At trial, Modena proceeded without counsel, made no objections, and the jury convicted him. Modena then requested the district court provide a tax attorney to assist him during the sentencing proceedings, and refused to participate in a presentence investigation interview without counsel. The presentencing report was prepared without Modena's input and the district court sentenced Modena to 60 months imprisonment. On appeal, Modena argued, *inter alia*, the district court failed to determine whether he knowingly and voluntarily waived his right to counsel.

In upholding the waiver, the court disagreed with Modena's argument the district court was obligated to conduct a second waiver of counsel proceeding after he expressed doubts about representing himself. The court noted Modena reiterated his desire to proceed *pro se* when he wrote to the court, withdrawing his earlier request to be represented; therefore, the district court, having no reason to suspect Modena was uncertain about representing himself, correctly accepted the magistrate judge's determination that Modena made a knowing and voluntary waiver of counsel. The court further reasoned the duplication of conducting a waiver hearing would waste judicial resources, which is contrary to one of the key purposes of the Magistrates Act.

EVIDENCE

Expert Testimony - Psychologists

In ***United States v. Finley,*** 301 F.3d 1000 (9th Cir. 2002), the Ninth Circuit reversed and remanded Finley's conviction and sentence for attempting to interfere with tax administration, making false claims against the government and bank fraud. Finley was convicted of attempting to negotiate fraudulent financial instruments he obtained as a result of his involvement in a scheme promoted by the "Montana Freemen." At trial, Finley claimed a mental condition prevented him from forming the necessary intent to defraud the government; however, the district court excluded his psychological expert's testimony. The sole issue on appeal was whether the trial court abused its discretion by excluding the psychologist's testimony.

The Ninth Circuit concluded the district court abused its discretion by excluding the expert's testimony under both Fed. R. Evid. 702 and 704(b) and Fed. R. Crim. P. 16. Rule 702 governs the admissibility of expert opinion testimony and consists of three requirements: (1) the subject matter at issue must be beyond the common knowledge of the average lay person; (2) the witness must have sufficient expertise; and, (3) the state of the pertinent scientific knowledge permits the assertion of a reasonable opinion. Since the government did not contest the psychologist's qualifications, the parties' main issues of contention centered on whether the expert's methodology was reliable and whether his testimony would assist the jury. The Ninth Circuit found the expert's methodology reliable since he relied on accepted psychological tests, obtained a thorough patient history and did not base his conclusions solely on Finley's own statements. The expert's testimony exceeded the common knowledge of the average lay person because it offered an explanation as to how an otherwise normal man could believe the financial instruments were valid and reject all evidence to the contrary. Rule 704(b) allows expert testimony on a defendant's mental status so long as the expert does not draw the ultimate inference or conclusion for the jury. In this regard, the Ninth Circuit observed the jury was free to reject the expert's testimony.

The district court also excluded the expert's testimony as a sanction for Finley's failure to give proper notice under

Fed. R. Crim. P. 16(b)(1)(C), which allows the government to obtain information in regard to a defendant's witness. The Ninth Circuit, however, concluded a violation did not occur. While Finley's disclosure may not have been as full and complete as it could have been, it met the minimum requirements of the Rule. The information supplied the government with sufficient notice of the general nature of the expert's testimony.

MONEY LAUNDERING

Lesser Included Offense

In ***United States v. Schlaen,*** 300 F.3d 1313 (11th Cir. 2002), two brothers appealed their convictions for money laundering. The Schlaens initially used their business to sell and export computers. At one point, however, a customer told the Schlaens she wished to pay cash for an order totaling more than $10,000, but did not want a Form 8300 to be filed with the IRS. The customer further explained the cash was from drug traffickers who wished to launder the cash. The brothers agreed not to file the Form 8300 and divided the purchase between two invoices, each under $10,000, to avoid the reporting requirement. The customer was an undercover agent for the IRS and the brothers were subsequently arrested and indicted for money laundering violations and for not filing an IRS Form 8300 in violation of 26 U.S.C. § 6050I. The brothers were both convicted of several money laundering counts, but both were acquitted on the § 6050I count. On appeal, one of the brothers argued, *inter alia*, the § 6050I count was a lesser included offense of money laundering and, therefore, the acquittal on the lesser included offense should have precluded his conviction on the money laundering counts.

The Eleventh Circuit first stated the lesser included offense argument arises only in the double-jeopardy context, which was inapplicable in this case. The court further stated the inconsistency of the verdicts does not require the money laundering counts to be dismissed. Furthermore, where a conviction on one count and acquittal on another count is a logical impossibility, the conviction will stand unless it was otherwise obtained in error. Since the money laundering conviction was not obtained erroneously, the court affirmed the convictions.

INVESTIGATIVE TECHNIQUES

Wiretap Minimization Requirement

In ***United States v. McGuire,*** 307 F.3d 1192 (9th Cir. 2002), the Ninth Circuit held fax interceptions may be read in their entirety to determine the communications' relevance. McGuire was a member of the Montana Freemen who, in an attempt to create their own government and financial system, printed and distributed fraudulent financial instruments. McGuire used the financial instruments to purchase goods and services, knowing the accounts the instruments would be drawn on had insufficient funds. The Ninth Circuit appointed an Oregon federal judge to oversee the FBI's wiretap investigation. The judge approved phone and fax wiretaps and issued orders to postpone sealing the recordings due to the geographical distance between Oregon and Montana. The FBI intercepted phone and fax communications, often reading the contents of an entire fax before determining its relevancy to the investigation. On appeal, McGuire argued the FBI failed to heed the necessity, prompt sealing, and minimization requirements of the wiretap statute.

The Ninth Circuit found the federal judge did not abuse his discretion in finding the wiretap was necessary, holding the government has more leeway with investigative methods when it pursues a widespread and dangerous conspiracy. In regard to the prompt sealing requirement, the court noted the federal judge explicitly directed the sealings be postponed. The wiretap statute requires recordings to be sealed under the issuing court's directions; however, since the government complied with the court's orders and safeguarded the recordings pending judicial sealing, the government's explanation for the delay was satisfactory. Finally, finding the minimization procedures for the fax interceptions adequate, the Ninth Circuit cited *Scott v. United States*, 436 U.S. 128 (1978), in which the Court held the government did not unreasonably listen to all phone calls in a wide range conspiracy, since even a seasoned listener would have had difficulty determining the relevancy of many of the calls before they were completed. Id., at 142. The Ninth Circuit similarly reasoned the government, with this widespread and complex conspiracy, could not be expected to know which faxes were not pertinent without examining them in some detail. The court affirmed the convictions.

Wiretap - Use of Civilian Monitors

In ***United States v. Lopez***, 300 F.3d 46 (1st Cir. 2002), the First Circuit held if the government intends to use civilian monitors in connection with a wiretap, it must disclose such intent to the authorizing court. The court, however, concluded the government's failure to comply did not require application of the statutory exclusionary rule in this case. In the instant case, a DEA agent obtained judicial authorization to wiretap cell phones used by Lopez and

another suspected member of a cocaine distribution ring. 18 U.S.C. § 2518(5) requires the government to take steps to minimize the interception of untargeted communications and specifically authorizes civilians to assist authorized law enforcement officers. Accordingly, the government contracted with civilian monitors to assist with its compliance with the minimization requirement, but the government failed to disclose this fact to the authorizing judge.

The First Circuit, noting it was the first circuit to address the issue, decided Title III generally places a burden of full and complete disclosure on the government in its application for a wiretap, and this burden includes an obligation to disclose the government's intent to use civilian monitors. The court derived its rule from the various subsections of § 2518(1), which require "a full and complete statement" as to such matters relied upon by the applicant to justify belief that an order should be issued. Furthermore, § 2518(4) requires an authorization order to specify such details as the nature and location of the communications facility to be monitored and the identity of the agency authorized to intercept the communications. The court reasoned the government would undermine its candor requirement under these provisions if it could withhold important information about the manner in which the wiretap would be conducted. The court added if the issuing judge is kept unaware of the manner in which the government intends to execute the wiretap, the judge's ability to craft an order that is sufficiently protective of the minimization requirement in § 2518(5) is diminished.

The First Circuit, however, recognized the federal courts have established, despite the broad language of the exclusionary rule provided in § 2515, violations of the requirements of Title III do not require suppression unless they defeat the core, underlying protective purpose of the statute. The court in Lopez decided the government's failure to disclose its plans to use civilian monitors did not rise to that level and the evidence was not suppressed. The court noted "the undisclosed use of civilian monitors did not affect the likelihood that the wiretap would be authorized, nor did it increase the wiretap's intrusion on privacy interests."

SENTENCING

Intended Loss

In ***United States v. Piggie,*** 303 F.3d 923 (8th Cir. 2002), Piggie appealed his sentence for convictions arising out of a scheme to pay high school basketball players to play for his summer basketball team. The scheme earned him income as the coach of the team and helped him retain top athletes, gain access to sports agents, and forge relationships with players to his personal benefit once the players joined the NBA. The payments violated NCAA rules which prohibit paying students for playing basketball. The players who had been paid to play for Piggie's team lied on their applications about having been paid to play, causing many universities to conduct investigations, lose scholarships, and pay fines. Piggie did not file tax returns during the years of his scheme, 1995 through 1998, failing to report the income he made as the team's coach. Piggie pled guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, and one count of failure to file an income tax return in violation of 26 U.S.C. § 7203. In the plea, he also stipulated to a total tax loss of $67,662.69. The district court sentenced Piggie to 37 months imprisonment based on calculations using the tax loss and intended losses to the schools, including forfeited scholarships, investigations costs, and fines.

On appeal, Piggie argued the intended losses were miscalculated and the tax loss calculation was based on insufficient evidence. In affirming the sentence, the court upheld the district court's use of harm to the schools to calculate the intended losses. The court noted the sentencing guidelines permit a court to use the greater of either the actual loss suffered by the schools or the amount of loss intended toward the schools in determining the base offense level. The district court correctly determined the intended loss was greater and, therefore, calculated the base offense level correctly. Regarding the tax loss, Piggie argued the government had submitted a presentence report as its only evidence on the loss amount and, therefore, had failed in its burden to prove the tax loss. The court upheld the district court's determination of tax loss, noting Piggie had stipulated in the plea agreement to the tax loss amount and, therefore, could not later appeal the punishment to which he exposed himself.

Intended Loss

In ***United States v. Kushner,*** 305 F.3d 194 (3rd Cir., 2002), the Third Circuit held the loss a defendant "intended" to cause was properly measured as of the time the fraudulent scheme was in operation, rather than as of the time the defendant surrendered to authorities. Kushner was a member of a conspiracy that created and tendered counterfeit checks. After learning that federal agents were investigating the scheme and had arrested a co-conspirator, Kushner surrendered to authorities, admitted his wrongdoing, and turned over counterfeit checks with a face value of $455,000, which had never been presented for payment. In total, the members of the conspiracy

negotiated $38,452 worth of counterfeit checks. Kushner ultimately pled guilty to bank fraud and was sentenced to 27 months incarceration.

The presentence investigative report recommended the monetary loss, for sentencing purposes, should be measured by the amount of loss Kushner intended to cause, which should be measured by the face amount of all the counterfeit checks, including those never presented for payment. The district court agreed and adjusted Kushner's base offense level of 6 upwards by 9 levels pursuant to § 2F1.1(b)(1)(J) of the 1998 Sentencing Guidelines. On appeal, Kushner challenged, *inter alia*, the district court's calculation of the amount of loss caused by his activities.

In deciding the first issue, the Third Circuit looked to the law of conspiracy. Under such law, a defendant is liable for his own and his co-conspirators' acts for as long as the conspiracy continues unless he withdraws prior to the conspiracy's termination. But even upon withdrawal, a defendant remains liable for his previous agreement and for his own and his co-conspirators' previous acts in furtherance of the conspiracy. The law of the guidelines does the same in calculating a defendant's "intended loss." Even when a defendant's intent changes as he withdraws from the conspiracy, the loss that should be considered for sentencing purposes remains the loss the defendant intended during his active participation in the conspiracy. Thus, the Third Circuit affirmed the district court's loss calculations.

Sophisticated Means And Restitution

In ***United States v. Butler,*** 297 F.3d 505 (6th Cir. 2002), Butler pled guilty to one count of employment tax evasion in violation of 26 U.S.C. § 7201. On appeal, Butler challenged, *inter alia*, the district court's application of a sophisticated means enhancement and its delegation to the Tax Court or the Service the determination of the amount of restitution to be imposed as part of his sentence.

In determining the propriety of the enhancement, the court noted it has previously held "the sophisticated means enhancement requires the sentencing court to look at the actions taken by the individual." Further, even where a tax conspiracy is complex or repetitive, the enhancement is not automatic; the individual's involvement must also constitute sophisticated means. The court found Butler's personal involvement in the scheme constituted sophisticated means because he helped set up the shell companies used in the tax scheme, routinely used various bank accounts and post office boxes, used an alias and tried to mislead the Service. Thus, the district court properly applied the sophisticated means enhancement as provided by U.S.S.G. § 2T1.1(b)(2).

The court held the delegation to the Tax Court or the Service of the determination of the amount of restitution was an impermissible abrogation of the court's judicial authority, and concluded it "affected the fairness, integrity, and public reputation of judicial proceedings." The court found although the restitution order was imposed pursuant to 18 U.S.C. § 3663(b)(3), because it is referenced in § 3583(d) of the Victim and Witness Protection Act ("VWPA"), imposition of a restitution order must comply with § 3538(d) of the VWPA which precludes a district court from delegating the determination of the amount of restitution.

The court also held the amount of restitution was limited since "absent a specific provision in the plea agreement to pay full restitution . . ." a district court may only order restitution for the tax loss related to the count plead. As Butler's agreement did not contain a provision specifically discussing restitution, the district court could only order Butler to make restitution in an amount not to exceed the tax loss related to the count of the superseding indictment to which he plead guilty and not the total tax loss used to calculate the base offense level.

Grouping Of Unrelated Fraud Counts, Even When Windfall Results

In ***United States v. Tolbert,*** 306 F.3d 244 (5th Cir. 2002), Tolbert pleaded guilty to offenses related to a fraudulent factoring scheme and to one count of bank fraud, which had taken place two years after the factoring scheme. Tolbert requested to have the case consolidated and argued the offenses should be grouped for sentencing purposes. The district court refused and sentenced Tolbert to terms of 36 and 12 months imprisonment, sentences to run consecutively. Tolbert contended the offenses involved substantially the same harm and should have been grouped for sentencing purposes.

The Fifth Circuit reversed and remanded holding the guidelines require grouping of counts involving unrelated crimes presented in a single sentencing proceeding when the offense levels are determined largely on the basis of some measure of aggregate harm. Thus, the first clause of U.S.S.G. § 3D1.2(d), must be applied even in circumstances in which the resulting sentence does not provide any additional punishment for one of the crimes. Although other grouping requirements involved factors such as the same victims, the same scheme or plan, or continuous offensive behavior, § 3D1.2(d) only requires the offenses share the same attribute of measurable harm, regardless of whether the harm resulted from different

factual bases.

Further, although the court recognized this interpretation resulted in a windfall for Tolbert who received no extra punishment for the bank fraud because he was sentenced in a single proceeding, it noted the Sentencing Commission anticipated "anomalies" like the one in this case may occur. In such instances, the Sentencing Commission contemplated the use of upward departures by the district court.

Defendant's Right of Allocution

In ***United States v. Green***, 305 F.3d 422 (6th Cir. 2002), the Sixth Circuit affirmed Green's conviction, but remanded the case for resentencing based on its finding the district court denied defense counsel the opportunity to allocute on behalf of his client. In 1990, Green was charged with several others in a 37 count indictment involving drug, conspiracy and tax evasion charges. Green was found guilty by a jury and released on bond pending sentencing. After Green failed to appear for sentencing a bench warrant was issued. Almost ten years later, Green was arrested on the outstanding warrant. Thereafter, a single count information was filed charging him with failing to appear. Green pled guilty and the cases were consolidated for sentencing. Ultimately, the district court sentenced Green to 151 months imprisonment on the drug charges and 14 consecutive months on the failure to appear charge, for a total of 165 months. Green's appeal followed.

The only issue the Sixth Circuit gave merit to involved Green's assertion the trial court improperly limited counsel's right to allocution on behalf of his client. After being informed the court was going to impose a sentence at the low end of the guidelines, or 151 months, Green's counsel understandably said his argument would be much shorter. The district court, however, imposed a sentence of 165 months, an obvious surprise to Green's counsel who legitimately expected a sentence of 151 months. When Green's counsel attempted to raise an objection to the sentence, the district court essentially stopped Green's counsel from saying any more and, thus, denied him the opportunity to allocute on behalf of his client. Accordingly, the Sixth Circuit held the case must be remanded for resentencing to afford Green's counsel the right to allocute as required by Federal Rule of Criminal Procedure 32(c)(3).

Downward Departure

In ***United States v. Louis,*** 300 F.3d 78 (1st Cir. 2002), Louis was convicted of 14 counts of assisting in the preparation of false returns in violation of 26 U.S.C. § 7206(2) and sentenced to 21 months incarceration. Before sentencing, Louis filed a motion for a downward departure pursuant to U.S.S.G. § 5H1.6 based on his family ties and responsibilities; specifically his relationship as a person of color with his biracial son. The downward departure would have permitted Louis to receive a sentence of probation coupled with a special condition of home detention. The district court denied Louis's motion "stating that it could not consider the racial aspect of Louis' family circumstances because the U.S. Sentencing Guidelines Manual prohibited departures on account of race."

On appeal, the court affirmed the district court's denial of Louis's motion based on Louis's ineligibility for an "exceptional family circumstances" departure. The court's decision was based on the Sentencing Guidelines, which deem family circumstances a "discouraged" ground for departure and, therefore, a district court may only depart on the basis of a discouraged ground in an "exceptional" case. A case is "exceptional" only when the discouraged ground is "of a kind, or exists to a degree, not adequately taken into consideration by the Sentencing Commission." And, upon finding the case "exceptional," the court continued, a district court must explain how the case is special when compared to other cases where the reason is presented. The court found the district court could not have done so in this case.

The court noted "even if the district court had considered Louis's race and cultural background while deciding whether to depart on the basis of his family ties and responsibilities, it could not have granted the downward departure," because "the record before the court could not support a determination that Louis's family circumstances merited a departure." A departure based on family circumstances grounds will rarely be appropriate when, as in this case, "there are feasible alternatives of care that are relatively comparable to what the defendant provides."

Supervised Release

In ***United States v. Thomas,*** 299 F.3d 150 (2nd Cir. 2002), the Second Circuit vacated part of Thomas' sentence after he pled guilty to one count of access device fraud, admitting he charged between $70,000 and $120,000 on credit cards which did not belong to him. Thomas appealed five special conditions of supervision imposed as part of his sentence which were included in the written judgment, but were not articulated orally at his sentencing hearing, violating Fed. R. Crim. P. 43(a). Rule 43(a) requires "the defendant . . . be present at . . . the imposition

of sentence." At sentencing, the district court failed to set forth any condition of supervision and did not indicate it would incorporate the conditions set forth in the Presentence Investigation Report (PSR). The written judgment, however, included all the conditions recommended in the PSR, including the five conditions appealed.

Reviewing Thomas' sentence, the court found of the five conditions imposed, two were listed as "special" conditions recommended in U.S.S.G. § 5D1.3(d)(3) and two others were routinely imposed administrative requirements necessary to supervised release. Finding these four conditions standard conditions of supervised release, the court held the imposition of these conditions in the written judgment did not violate Rule 43(a).

The third special condition, the court found, augmented the mandatory requirement that Thomas not commit another federal state or local offense because it encompassed non-criminal behavior and did not overlap with any mandatory or standard conditions of release. Further, the court stated conditions that neither appear on the Sentencing Guidelines' lists of mandated or specifically recommended guidelines nor amount to basic requirements for the administration of supervised release "do not simply clarify ambiguity in the oral imposition of supervised release." Instead, such conditions "place additional burdens on the defendant that are neither necessary to nor a foreseeable result of the imposition of supervised release." Thus, the court held a condition of supervised release prohibiting Thomas from engaging in certain otherwise lawful behavior violated Rule 43(a), and could not be set forth for the first time in the written judgment.

Revocation Of Home Detention

In ***United States v. Tschebaum***, 306 F.3d 540 (8th Cir. 2002), the Eighth Circuit affirmed the order revoking Tschebaum's probation, but vacated the 30 month sentence imposed. Tschebaum was sentenced to five years probation, including six months of home detention after he plead guilty to one count of making a false statement in violation of 18 U.S.C. § 1001, and two counts of failing to file an income tax return in violation of 26 U.S.C. § 7203. The presentence investigation report indicated Tschebaum's sentence range was 15-21 months, but because he provided assistance to the government, the district court departed downward resulting in the sentence imposed.

The government sought to have Tschebaum's probation revoked, alleging he had misrepresented his income and expenditures in the monthly reports he was required to file with his probation officer and that Tschebaum had traveled outside of his home jurisdiction without authorization. Finding Tschebaum had violated his probation, the sentencing court revoked his probation.

In affirming the revocation of probation, the court found there was sufficient evidence Tschebaum committed substantial violations. The court, however, found there was insufficient evidence in the record to indicate the district court considered all the relevant matters in U.S.S.G. § 3553(a) to support the sentence imposed. The court stated a district court is required to take into account the general sentencing considerations set forth in § 3553(a), and although the district court "need not mechanically 'list every consideration of § 3553(a). . .,' it is important . . . there is evidence that the court has considered the relevant matters, and that some reason is stated for the court's decision." The court then requested the district court, on remand, "explain in greater detail the reasons for the sentence imposed, and, where necessary, that it explain where in the record support for these reasons may be found.

Use Of Information Disclosed In Proffer Session At Sentencing Prohibited

In ***United States v. Gonzalez,*** No. 01-11467, 2002 U.S. App. LEXIS 21428 (5th Cir. Oct. 14, 2002), the Fifth Circuit reversed and remanded for resentencing holding the district court's use of information garnered through Gonzalez's debriefing breached the plea agreement. Gonzalez entered into a plea agreement with the government which included a promise the government would not use Gonzalez's statements made during a debriefing session, against him except as permitted in the plea agreement or proffer letter. Under their terms, the government was permitted to disclose information obtained from the debriefing session in only two circumstances: 1) if one of the U.S.S.G. § 1B1.8(b) exceptions applied, or 2) for the purpose of cross-examination, impeachment, or rebuttal if Gonzalez testified contrary to the proffer.

During the sentencing hearing, Gonzalez did not testify; however, defense counsel made statements which were deemed inaccurate by the government. The government then disclosed information solely obtained during the debriefing session, in rebuttal, in an effort to correct defense counsel's misstatement. The district court then used this information to enhance Gonzalez's sentence by two levels because of a leadership role in the offense. The Fifth Circuit found the government's disclosure did not fall within any of the circumstances outlined in the plea agreement/proffer letter. In finding the government had breached the plea agreement, the court stated "mere

disclosure of the information was [not] a breach of the agreements," rather it was the use by the district court in sentencing Gonzalez that resulted in the agreement being breached. Section 1B1.8 does not prohibit disclosure of information provided in a plea agreement, the court noted, it prohibits its use in determining the applicable guideline range. Accordingly, the court concluded "the [g]overnment used information provided by Gonzalez at the debriefing against him and, therefore, breached the plea agreement."

CRIMINAL TAX BULLETIN

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