Criminal Tax Bulletin

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FOURTH AMENDMENT

Warrantless Search Invalid Where One Co-Tenant Consents and Another Objects at the Time of the Search

In ***Georgia v. Randolph***, 126 S.Ct. 1515 (2006), the Supreme Court held that a physically present co-occupant's stated refusal to permit entry renders a warrantless entry and search unreasonable and invalid as to that occupant.

The defendant was charged with drug possession after police discovered cocaine pursuant to a warrantless search of the defendant's marital residence. The defendant was present at the time of the search and unequivocally refused consent, however his estranged wife and co-occupant of the property gave police permission to conduct the search. The defendant moved to suppress the evidence on the basis that the search violated the Fourth Amendment. The Georgia Supreme Court granted the motion and the Supreme Court affirmed.

In ***United States v. Matlock***, 415 U.S. 164 (1974), the Supreme Court held that the Fourth Amendment does recognize a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property and no present co-tenant objects.

Thus, the rule regarding a co-tenant's ability to consent to a warrantless search turns on reasonableness. There is a presumption that co-tenants share common authority to admit visitors, with the consequence that a guest obnoxious to one may be admitted in his absence. Without evidence to the contrary, it is reasonable for police to assume this is the arrangement between co-tenants and lawfully conduct a search where one co-tenant consents and the other is absent.

If, however, consent is clearly in dispute as it was in this case, it is unreasonable for police to conduct the search. The court stated, "…a disputed invitation, without more, gives an officer no better claim to reasonableness in entering than the officer would have absent any consent."

Fourth Amendment Does Not Require Triggering Condition In Anticipatory Search Warrant To Be Stated In The Warrant Itself

In ***United States v. Grubbs***, 126 S.Ct. 1494 (2006), the Supreme Court held the Fourth Amendment does not require the triggering condition to an anticipatory search warrant be set forth in the warrant itself. In this case, a Magistrate Judge issued an anticipatory search warrant for Grubbs' home based on a postal inspector's affidavit. The affidavit provided that the warrant was not to be executed until delivery of a parcel containing a videotape of child pornography ordered by Grubbs and physically taken into his residence. The affidavit also referred to two attachments describing the residence and the items to be seized. Upon execution of the warrant, Grubbs was given a copy of the warrant, which included the attachments, but did not include the supporting affidavit. Following his indictment, Grubbs moved to suppress the seized evidence arguing the warrant was invalid because it failed to list the triggering condition. On appeal to the Ninth Circuit, the court held "the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant."

As a preliminary matter, the Court found that anticipatory warrants are constitutional. It then turned to the Ninth Circuit's rationale for invalidating the anticipatory warrant. Reversing the Ninth Circuit, the Court held the Fourth Amendment's particularity requirement "…specifies only two matters the warrant must particularly describe: the place to be searched and the persons or things to be seized." The Court found that language decisive as the particularity requirement does not include the conditions precedent to execution of the warrant. Further, the Court concluded Grubbs' argument also assumed the executing officer must present the property owner with a copy of the warrant before conducting a search. The Court, however, determined that "…neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure imposed such a requirement." Because the Fourth Amendment does not require the triggering condition for an anticipatory search warrant to be set forth in the warrant itself, the Ninth Circuit erred in invalidating the warrant and the judgment was reversed.

Air Travelers Cannot Revoke Consent to Objectively Based Security Checks After Initial Submission

In ***United States v. Aukai***, 440 F.3d 1168 (9th Cir. 2006), the Ninth Circuit held that an air traveler cannot revoke his implied consent to security checks after initially submitting.

The defendant in this case submitted to an initial metal detector screening without triggering an alarm before boarding a plane. However, he did not produce a government-issued identification card and according to procedure had to submit to a secondary screening process. During the secondary screening, the defendant asked to leave the airport. Officials refused and eventually discovered methamphetamine in his pockets.

The defendant appealed his conviction, citing *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973), in which the Ninth Circuit held that "airport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amendment provided each prospective passenger retains the right to leave rather than submit to the search." The defendant argued officials violated his Fourth Amendment rights when he was not permitted to leave the airport during the secondary screening process.

The court held that "once a potential passenger voluntarily submits to an initial screening at an airport, he or she cannot revoke consent to a secondary search." However, the court reconciled its decision with *Davis* by limiting its holding to secondary searches based on wholly objective criteria. Here, the secondary search was objective, as it was airport policy to conduct a secondary search of anyone failing to produce government-issued id.

The court left open whether a secondary screening triggered by nothing more than a subjective evaluation of the prospective passenger violates the *Davis* requirement that an airport search be "confined in good faith to [detect the presence of weapons or explosives],'…rather than more objective criteria…"

Fifth Circuit Denies Motion to Suppress Evidence and Grants in Part a Motion for Disclosure of Grand Jury Transcripts

In ***United States v. Rose,*** 2005 WL 1279128 (E.D.Pa. 2005), the defendants, husband and wife, were charged with five counts of willful failure to file federal tax returns under 26 U.S.C. § 7203. The IRS searched the defendants' home and seized documents and videos. Defendants argued that the affidavit lacked sufficient probable cause and asserted that the search warrant and resulting evidence seized were invalid and did not pass constitutional muster. The court found that the warrant and accompanying affidavit did meet the requirements of the Fourth Amendment pursuant to ***Illinois v. Gates***, 462 U.S. 213 (1983).

The defendants argued there was no need for the government to seize additional evidence because the defendants had admitted they were not paying their taxes and that they disagreed with the tax laws. The court stated that the government does not know all of the defenses or positions a defendant will offer at trial and the government is entitled to secure evidence in a defendant's possession through a search warrant with probable cause.

The defendants also asserted their motion should be granted because the evidence sought was not related to criminal activity. The defendants admitted to not filing tax returns. The search warrant related to the defendants' income, therefore the court found the search warrant was based on probable cause that the defendants were involved in criminal activity, namely the non-filing of tax returns.

Finally, the defendants claimed that the evidence sought was not specific and limited. The court found that where defendants claim their behavior was not "willful," the government has wide leeway in securing evidence.

The Motion for Disclosure of Grand Jury Transcripts was granted with respect to portions showing instructions by the government counsel to the grand jury on points of law. The reasons for granting the motion were not published.

SIXTH AMENDMENT

Appointed Counsel in State Case Does Not Preclude Federal Interrogation

In ***United States v. Alvarado,*** 440 F.3d 191 (4th Cir. 2006), the Fourth Circuit held the Sixth Amendment right to counsel does not prevent federal agents from interrogating a suspect who is represented by counsel in connection with state charges. A joint state-federal narcotics investigation led to the arrest of Alvarado on state conspiracy charges based on events that transpired on a single day. Counsel was appointed to represent Alvarado. A couple of months later, the state charges were dismissed and a federal agent, who had previously questioned Alvarado at the time of his state arrest, immediately took Alvarado into custody pursuant to a federal arrest warrant. At that time, Alvarado waived his Miranda rights and was questioned outside the presence of his state-appointed attorney. Alvarado made incriminating statements that were later used to convict him on federal conspiracy charges. On appeal, Alvarado contended the incriminating statements he made during his interrogation should have been suppressed at his federal trial because the statements were taken in violation of his Sixth Amendment right to counsel.

In affirming the district court's denial of suppression, the

Fourth Circuit held that "…federal and state crimes are necessarily separate offenses for the purposes of the Sixth Amendment, because they originate from autonomous sovereigns that each have the authority to define and prosecute criminal conduct." Further, it held that "…the filing of a federal criminal complaint does not trigger the Sixth Amendment right to counsel." As the Fourth Circuit has previously held, the right to counsel does not attach immediately after arrest and prior to arraignment, and the filing of a federal criminal complaint does not give rise to any Sixth Amendment right. Rather, the court explained, the main reason a criminal complaint is filed is to establish probable cause for an arrest warrant, which was the case here. Accordingly, as the federal criminal complaint did not give rise to Alvarado's Sixth Amendment right to counsel, the incriminating statements he made during the interrogation were admissible at his federal trial.

EXCLUSIONARY RULE

Voluntary Statement Obtained in Violation of *Miranda* Admissible at Sentencing

In ***United States v. Nichols***, 438 F.3d 437 (4th Cir. 2006), the Fourth Circuit held that a statement obtained from an in-custody suspect in violation of ***Miranda v. Arizona***, 384 U.S. 436 (1966), though inadmissible at trial, may be admissible at sentencing if the statement was voluntary.

The court decided that absent coercive tactics by police, there is nothing inherently unreliable about statements obtained in violation of *Miranda*. The burden on the sentencing process that would result from excluding this reliable evidence outweighs the deterrence value of excluding evidence already barred during the guilt phase of the trial.

The purpose of the exclusionary rule is to deter police misconduct. The court decided exclusion of illegally obtained statements during the government's case-in-chief provides adequate deterrence. There is no need to extend the exclusion to sentencing.

The Supreme Court set forth an exception to this rule for death penalty cases in ***Estelle v. Smith***, 451 U.S. 454 (1981), but made clear the exception does not go beyond the context of capital cases.

The Fourth Circuit's decision is in accord with the Seventh Circuit's decision in ***Del Vecchio v. Ill. Dep't of Corr.***, 31 F.3d 1363, 1388 (7th Cir. 1994), the only other federal court of appeals case directly addressing the issue. In that case, the Seventh Circuit held that the exclusionary rule does not apply during sentencing.

SEPARATION OF POWERS

In ***Stolt-Neilen v. United States***, 442 F.3d 177 (3d Cir. 2005), the Third Circuit addressed whether federal courts have the authority to enjoin the executive branch from filing an indictment or whether this is inconsistent with the separation of powers clause. Stolt-Neilen was engaged in illegal collusive trading practices with competitors in violation of the Sherman Act. The company offered proof of the illegal practices in exchange for immunity for itself and its employees. The Government consented and agreed "not to bring criminal prosecution…for any act or offenses that may have been committed prior to the date of this agreement" subject to several conditions.

Subsequently, the Government informed Stolt-Neilen of its intent to withdraw from the agreement and issue indictments because of the company's failure to comply with all of the conditions. Shortly before the Government revoked the agreement, Stolt-Neilen filed complaints in the district court seeking enforcement of the agreement and an injunction to prevent the Government from filing indictments. The district court permanently enjoined the Government from indicting Stolt-Neilen for violations of the Sherman Act.

The Supreme Court has acknowledged the executive branch's "exclusive authority and absolute discretion to decide whether to prosecute a case." ***U.S. v. Nixon***, 418 U.S. 683, 693 (1974). However, courts have created an exception where the mere filing of an indictment may chill First Amendment rights.

The Third Circuit found in favor of the Government, holding that the district court lacked authority to employ the extraordinary remedy of enjoining the Government's indictments. However, the court noted that Stolt-Neilen could file a federal forum post indictment asserting the agreement as a defense.

TITLE 26

Car Dealer's Cash Reporting Failures Were Not Intentional - $100,000 Penalty Not Warranted

In ***Tysinger Motor Company, Inc. v. United States,*** 428 F.Supp.2d 480 (E.D.Va. 2006), the district court reversed a $100,000 penalty imposed on Tysinger, a car dealership, by the IRS for its failure to report cash receipts over $10,000 on four separate occasions. In 1992 and 1996, the IRS conducted Compliance Reviews of Tysinger to determine whether it was filing Forms 8300 as required. During both reviews, the IRS determined Tysinger had failed to report several transactions involving cash in excess of $10,000. As a result, the IRS assessed nominal penalties against Tysinger and its two main executives and

required them to sign an "Acknowledgment of Requirement to File Form 8300." The form advised the executives of the currency reporting requirement and the possibility of civil and criminal penalties for non-compliance. Following this review, Tysinger implemented a system to identify cash transactions requiring a Form 8300. Tysinger trained its employees on use of the system and required them to report every transaction involving $5,000 or more in cash. The company also created a cash transaction checklist, circulated a memorandum describing the new cash reporting and compliance system and added the reporting requirement to the Employee Handbook. The IRS agent who had conducted the 1996 review examined the new system and advised Tysinger's CFO it was sufficient.

The IRS conducted another Compliance Review for the 1999 and 2000 tax years and found Tysinger had failed to file Forms 8300 for four cash transactions. Tysinger had sold 3,000 vehicles during this period, eight of which involved cash down payments of $10,000 or more, but only filed Forms 8300 for four of them. The IRS adopted the field agent's recommendation and assessed Tysinger the maximum penalty for failure to file, $25,000, for each of the unreported transactions. There was no determination that any member of Tysinger's management had consciously decided to evade the reporting requirement nor were any of the transactions involved illegal. The penalty recommendation was based on Tysinger's past violations, the executives' acknowledgment in writing of their knowledge of the Form 8300 filing requirement, and the fact that the reporting system had failed to work in four cases. Tysinger paid the penalties and then sought a refund for the $100,000.

The district court found that Tysinger's failure to file Forms 8300 was an inadvertent rather than intentional disregard for the reporting rules. The court concluded that the regulations require a voluntary, rather than mistaken, failure to comply for there to be an "intentional disregard" of the rule. The court also rejected the IRS's attempt to treat any failure by Tysinger to file Forms 8300 after its 1996 Compliance Review as automatically willful because it had previously failed to file Forms 8300 and its executives had knowledge of the reporting requirements. To do otherwise would impermissibly turn an intent-based statute into a strict liability statute, contrary to the plain language of the statute (26 U.S.C. § 6721). Accordingly, the court granted Tysinger a refund of $100,000 with interest.

Sixth Circuit Finds Prosecutor's Statements Amounted to Prosecutorial Misconduct But Did Not Render Trial Fundamentally Unfair

In ***United States v. Johnson***, 169 Fed.Appx. 946 (6th Cir. 2006), the Sixth Circuit held that a prosecutor's remarks during closing statements did not violate the defendant's substantial rights.

Johnson appealed his conviction for aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2) arguing that four statements made by the Government were improper and constituted reversible error. The court affirmed the conviction.

In reviewing claims of prosecutorial misconduct, the court first determines whether the statements were improper. ***United States v. Carroll,*** 26 F.3d at 1387. If the court deems them improper, it then determines whether they were flagrant. *Id* at 1389-90.

In determining whether the statements were flagrant, the court looks at 1) whether the statement tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused. ***United States v. Francis,*** 170 F.3d at 546, 549-50 (6th Cir. 1999).

In the first statement, the prosecutor said the witness's chance of receiving a Rule 35 sentence reduction for testifying was as likely as the prosecutor winning the lottery. The court found the remark a permissible response to defense counsel's attempt to use the potential Rule 35 sentence reduction as an attack on the witness's credibility and held it was not improper.

In the second statement, the prosecutor said the defendant lied to the jury. The court held that there was a reasonable evidentiary basis for the statement and held it was not improper.

The third statement was the prosecutor's remark that the government charged "only the three top people in th[e] company, all of whom were intimately involved or intimately directed this massive fraud." The court found the remark may have been improper since it suggested the defendant was guilty merely because he was being prosecuted and may have constituted improper vouching in a testimonial way by the government attorney. However the court found that the statement was not "flagrant or repetitive and did not violate Defendant's substantial rights, in light of the overwhelming evidence of Defendant's guilt which was presented to the jury."

Finally, the defendant challenged the prosecutor's reference to the fact that there were other tax frauds involving other clients since the only allegations at issue in the current trial against the defendant involved Jo'Ann Fabrics. While the court found the reference to be somewhat improper, the court did not find the remark flagrant or find that it had affected the defendant's substantial rights.

TITLE 18

Supreme Court Hears Oral Argument to Decide Whether Third Party Can Prove Competitive Injury Under RICO Based on Competitor's Tax Evasion

The Supreme Court heard oral arguments March 27, 2006 in ***Anza v. Ideal Steel Supply Corp.***, 126 S.Ct. 713 (Mem) (November 28, 2005), a civil RICO action between two New York steel competitors.

Ideal Steel Supply Corp. sued National Steel Supply Inc. and its owners, Joseph and Vincent Anza, in federal district court, alleging breach of contract and RICO violations. Ideal alleged that the Anzas deliberately failed to collect sales or use taxes on cash purchases over a period of several years allowing National Steel to undercut prices and costing Ideal millions in lost sales and profits.

The district court dismissed Ideal's suit on the basis that Ideal failed to establish reliance on the Anzas' allegedly fraudulent sales tax returns and therefore, lacked standing to sue. On appeal, the Second Circuit reversed. The case was then appealed to the Supreme Court.

The Supreme Court heard oral arguments to decide whether a competitor is injured in his business or property by a RICO violation, as required for a RICO civil action seeking treble damages, where the alleged predicate acts were mail and wire fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior.

If the Supreme Court finds Ideal has standing under these circumstances, the decision will create a private RICO action for what may more appropriately be a state unfair competition claim. As a result, any time the government successfully prosecutes a business for tax evasion; competitors may likely file civil RICO claims on the basis that the competitor's evasion cost them in lost profits and amounted to competitive injury under RICO entitling them to treble damages.

Honest Services Fraud Encompasses Services of Private Fiduciary

In ***United States v. Williams,*** 441 F.3d 716 (9th Cir. 2006), the Ninth Circuit held that the intangible rights theory of fraud applies to private individuals as well as public figures. Under the intangible rights theory of fraud, the object of the fraudulent scheme is the victim's intangible right to receive honest services. Williams, a financial planner, was convicted of defrauding an 87-year-old client out of thousands of dollars through a scheme in which Williams used his unlimited power of attorney to transfer funds from his client's trust account into his own offshore bank account. Williams was convicted of four counts of wire fraud and three counts of mail fraud with references to 18 U.S.C. § 1346 (honest services fraud), and three counts of money laundering. Williams was sentenced to 51 months imprisonment. On appeal, he argued that "the government improperly charged him under an 'intangible rights' theory of mail and wire fraud, because that theory does not apply to private individuals…."

Affirming Williams' conviction, the court held that "under 18 U.S.C. §§ 1341 and 1343, the 'intangible rights' theory applies to private-sector fraud, at least where (as here) defendant has a fiduciary duty to the victim." The court further stated that the "intangible rights" theory of fraud was codified in § 1346 and under this theory the object of the fraudulent scheme is the victim's intangible right to receive honest services. The court noted that several circuits have recognized the viability of the "intangible rights" theory when the private defendant stands in a fiduciary or trust relationship with the victim of the fraud. Since the "intangible rights" theory can apply in a private commercial setting and Williams had a fiduciary relationship with the victim, the "intangible rights" theory embodied in § 1346 was properly applied to him.

D.C. Circuit Clarifies the Meaning of "Official Act" Under the Federal Anti-Gratuity Statute

In ***United States v. Valdes***, 437 F.3d 1276 (D.C. Cir. 2006), the D.C. Circuit clarified the meaning of "official act" under 18 U.S.C. § 201(c)(1)(B), the federal anti-gratuity statute. The court specified that "official act" does not include every action that falls within range of the public official's official duties, but rather is limited to acts that could affect a specific pending matter.

In this case, an undercover FBI informer, posing as a judge, paid the defendant, a police detective, to run license plate numbers through a law enforcement database to determine whether there were any outstanding warrants on certain fictitious persons named by the informer.

The defendant was prosecuted and convicted under 18 U.S.C. § 201(c)(1)(B), the federal statute that prohibits public officials from accepting bribes in exchange for the performance of an official act. The D.C. Circuit overturned the defendant's conviction after finding his conduct did not satisfy the official act element of the statute. The court based its decision on the fact that the defendant was paid only to run the license plate numbers and not to change the status of any persons, fictitious or otherwise. The defendant's database queries, while unethical, were not decisions or actions that could directly affect any formal government decision made in fulfillment of the government's public responsibilities.

MONEY LAUNDERING

Seventh Circuit Holds Mail Fraud Can Be a Predicate Offense to Money Laundering Charge

In ***United States v. Boscarino,*** 437 F.3d 634, (7th Cir. 2006), the Seventh Circuit held that a mail fraud scheme, in violation of 18 U.S.C. §§1341 and 1346, can be the predicate offense for a money laundering conviction under 18 U.S.C. § 1956.

Every year with Boscarino's encouragement, the city of Rosemont purchased insurance through ABI. Aulenta, an ABI employee, procured a kickback check from ABI that he split with Boscarino. Aulenta then over-billed Rosemont to make up for the kickback check.

The Seventh Circuit held that mail fraud, in violation of 18 U.S.C. §1341, is specifically listed as a predicate offense in 18 U.S.C. § 1956, money laundering, and therefore can be a predicate offense to money laundering.

The lower court had ordered Boscarino to pay restitution to ABI, instead of Rosemont, who Boscarino alleged on appeal was the improper party to receive restitution. The Seventh Circuit agreed with the lower court stating that ABI "is just a way station for the funds." ABI will be able to reimburse Rosemont, therefore requiring Boscarino to reimburse ABI was proper.

Finally, the Seventh Circuit reviewed Boscarino's contention that his 36 months imprisonment term was unreasonable given his accomplice, Aulenta, was sentenced to only 20 months. The Seventh Circuit held that 36 months was within the sentencing guidelines and proper. In addition, Aulenta, though sentenced to a shorter term, had also pled guilty and assisted the prosecution by testifying against Boscarino who did not cooperate or admit guilt. Thus, there was justification for the lowered sentence.

Fifth Circuit Reverses International Money Laundering Conviction

In ***United States v. Cuellar,*** 441 F.3d 329 (5th Cir. 2006), the Fifth Circuit held that the Government failed to prove the defendant's activity was designed to "conceal or disguise the nature, location, the source, the ownership, or the control of the proceeds of specified unlawful activity" under 18 U.S.C. § 1956(a)(2)(B)(i).

Cuellar was arrested while traveling to Acuna, Mexico with $83,000 hidden in a compartment of the car he was driving. He was later convicted of international money laundering.

The elements of international money laundering are: (1) transportation or attempted transportation of funds across U.S. borders; (2) funds in question are proceeds of specified unlawful activity; (3) defendant knew that funds represented such proceeds; (4) transportation of the funds was designed, in whole or in part, to conceal or disguise nature, location, source, or control of proceeds; and (5) defendant knew that such concealment was design of enterprise.

The Fifth Circuit found that the Government had established the first three elements, but had failed to demonstrate what was going to happen with the money once in Mexico. The court stated that "[t]he statute would prohibit taking drug money to Mexico for the purpose of concealing the fact that it was drug money. [However], the statute does not outlaw concealing drug money from the police for the purpose of taking it to Mexico."

SENTENCING GUIDELINES

Second Circuit Holds Sentencing Guidelines Are Not Presumptively Reasonable

In ***United States v. Fernandez,*** 443 F.3d 19 (2d Cir. 2006), the Second Circuit held that sentencing ranges set forth in the Sentencing Guidelines are no longer presumptively reasonable. Fernandez was convicted of a single count of conspiracy to distribute and possess with intent to distribute heroin. In a written motion at sentencing, Fernandez argued for a reduced sentence based on a disparity between similarly situated co-defendants, although she did not raise this argument during the sentencing hearing. She also argued for a reduced sentenced based on her cooperation with the government. The sentencing judge considered but rejected both of Fernandez's arguments and sentenced her to a term of 151 months imprisonment. Fernandez argued that although the government deemed her cooperation insufficient to warrant a departure under § 5K1.1 of the Guidelines, the sentencing judge had the power to impose a sentence below the Guidelines to account for her cooperation. Title 18 U.S.C. § 3553(a) sets forth the factors to be considered at sentencing and includes cooperation with authorities. ***United States v. Booker***, which changed the Guidelines from a mandatory system to an advisory system, gave district courts the power to impose a sentence below the Guidelines range even in the absence of a § 5K1.1 departure motion.

The Second Circuit held that although it had the authority to determine the reasonableness of Guidelines sentences, it chose to join two other circuits in declining to reduce the reasonableness standard to a bright-line rule. Currently, courts are divided on how to apply the "reasonableness" standard of review required by *Booker*. Most circuits that have addressed the issue have adopted a presumption that a sentence within the Guidelines range is per se reasonable. The Second Circuit also held that a government motion is no longer required for a district court to impose a sentence

below the Guidelines range based on a defendant's cooperation with authorities. The court agreed with Fernandez that in formulating a reasonable sentence, a sentencing judge must consider the factors enumerated in § 3553(a) and should take into account any related arguments including the defendant's efforts to cooperate, even if those efforts did not yield a government motion for downward departure pursuant to § 5K1.1. In this case, however, the court concluded the record clearly indicated the district judge was aware of the general discretion to impose a non-Guidelines sentence under the post-*Booker* advisory scheme but was under no obligation to provide such benefit if she did not deem it appropriate.

TABLE OF CASES