Criminal Tax Bulletin

Department of Treasury
Internal Revenue Service

Office of Chief Counsel
Criminal Tax Division

December - February **This bulletin is for informational purposes. It is not a directive.** **2006- 2007**

FOURTH AMENDMENT

Suspicionless Search of a Known Parolee Did Not violate the Fourth Amendment

In ***Samson v. California***, 126 S.Ct. 2193 (2006), the Supreme Court held that the search of a known parolee did not violate the Fourth Amendment.

A police officer observed Samson, a parolee in California, walking down a street. The police officer knew Samson was on parole and believed he had an outstanding parole warrant. The officer stopped Samson and asked whether he had an outstanding parole warrant. Samson stated that he did not and the police officer confirmed. Nevertheless, the police officer searched Samson, based solely on his status as a parolee and the officer found methamphetamines. The trial court denied Samson's motion to suppress evidence of the methamphetamines and the court of appeals affirmed.

California law requires every parolee to submit to warrantless searches with or without cause. California law also prohibits searches that are arbitrary, capricious or harassing. Holding that a suspicionless search of a known parolee does not violate the Fourth Amendment, the Supreme Court found that the state's interest in fighting recidivism is far more substantial than a parolee's right to privacy and noted that parolees are on a continuum of state imposed punishment. "[P]arole is an established variation on imprisonment of convicted criminals." *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The Court found the law prohibiting arbitrary, capricious or harassing searches provided adequate protection, noting that under California precedent, an officer would act unreasonably in conducting a suspicionless search absent knowledge that the person stopped for the search was a parolee.

Fourth Amendment Does Not Require List of Items to Be Seized To Accompany Warrant When Executed

In ***Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco, and Firearms***, 452 F.3d 433 (6th Cir. 2006), the Sixth Circuit, in an *en banc* rehearing, held the Fourth Amendment does not require a search warrant affidavit to accompany the warrant when it is executed, even if the affidavit is the only document containing a particular description of the items to be seized.

In this case, Bureau of Alcohol, Tobacco, and Firearms (ATF) agents obtained a search warrant that satisfied the particularity requirement of the Fourth Amendment at the time it was issued. By the time it was executed, however, the supporting affidavit that particularly described the items to be seized, though cross-referenced in the warrant, had been placed under seal and was not present during the search.

Pars International Corporation, the owner of the warehouse searched, and Keith Baranski, the owner of the guns seized, filed a money-damages action against the agents who conducted the search contending that the search was conducted in violation of their Fourth Amendment rights.

In a seven to six decision, the court concluded that the search did not violate the Fourth Amendment because the warrant described the items to be seized when the magistrate issued it and because the agents conducted the search in a reasonable manner.

In reaching its decision, the court distinguished the current case from *Groh v. Ramirez*, the Supreme Court case that established a Fourth Amendment requirement that a warrant expressly incorporate any necessary supporting documents and that the warrant be presented to the premises owner at the time of a search.

In *Groh*, the warrant was declared invalid because, although the agent had orally described the guns to be seized before the magistrate and the agent was present at the scene to ensure nothing else was seized, the warrant mistakenly described the location to be searched under items to be seized. In distinguishing *Groh*, the Sixth Circuit concluded that *Groh* turned on the facial invalidity of the warrant, not the manner in which the officers conducted the search. Here, the issue was the agent's failure to produce the accompanying affidavit at the time of the search and not a defect in the warrant or affidavit.

FIFTH AMENDMENT

Document Production is Testimonial and Invokes Fifth Amendment Protection if Government Lacked Prior Knowledge of Existence or Whereabouts

In ***United States v. Ponds,*** 454 F.3d 313 (D.C. Cir. 2006), the Court of Appeals for the District of Columbia held that a taxpayer's act of document production is sufficiently testimonial to invoke the Fifth Amendment right against self-incrimination where the government cannot show with reasonable particularity that it knew in advance the existence and location of the subpoenaed documents.

Ponds, a criminal defense lawyer, agreed to represent a drug dealer, Jerome Harris. As a retainer, Harris's mother gave Ponds a 1991 Mercedes. Jerome Harris was convicted and at sentencing, the district court questioned Harris as to the whereabouts of the Mercedes for forfeiture purposes. Ponds failed to inform the court that he had the car.

When the government learned this, a grand jury investigation was initiated into Ponds' acquisition of the Mercedes and his failure to reveal possession to the court. The government conducted surveillance and found the car parked outside Ponds' apartment complex. Prosecutors then issued a subpoena, ordering Ponds to produce seven categories of documents and the Mercedes. Ponds expressed his intent to invoke his Fifth Amendment privilege against self-incrimination, so the government revised the subpoena and filed a motion pursuant to 18 U.S.C. § 6003 for a judicial order authorizing act of production immunity under 18 U.S.C. § 6002, which the court granted.

Ponds produced more than 300 pages of documents under this order. Soon after Ponds' response, the government sought copies of Ponds' 1996 and 1997 tax returns and learned he had never filed for those years. The investigation into Ponds continued and in 2001, the government applied for search warrants based on information first learned during the grand jury. Searches of Ponds' home and office resulted in six boxes of seized documents.

As a result of this evidence, Ponds was indicted in the District of Columbia on five counts of tax evasion, one count of wire fraud, and one count of fraud in the first degree. Ponds sought a hearing that forced the government to demonstrate the charges in the matter and the evidence it proposed to use at trial did not derive directly or indirectly from Ponds' immunized testimony and document production before the grand jury. The district court was satisfied with the government's response and Ponds was tried and convicted on all counts and sentenced to 20 months' imprisonment and restitution to the federal and district governments.

On appeal, the Court of Appeals for the District of Columbia explained the difference between document production that is "testimonial" and document production that is "surrender". Document production is testimonial, and the Fifth Amendment privilege invoked, if the government had no prior knowledge of either the existence or the whereabouts of the documents produced. The court concluded that the government failed to show with sufficient particularity that it had prior knowledge and so the majority of the documents produced were deemed testimonial.

The appellate court concluded that although the government, to some extent, violated its immunity agreement with Ponds by impermissibly using his self-incriminating testimony and its derivative evidence, questions remained as to the precise nature of the government's use of the evidence and as to whether the constitutional error was harmless beyond a reasonable doubt.

Ponds' conviction was reversed and the case remanded to the district court. The appellate court stated that unless the government's use of the evidence, in light of evidence from independent sources, was so unimportant and insignificant and had so little likelihood of changing the result of the proceedings that it could be deemed harmless, violation of Ponds' right not to be a witness against himself cannot be excused as harmless beyond a reasonable doubt.

CONFRONTATION CLAUSE

Supreme Court Reviews "Testimonial" Statements for Purposes of the Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witness against him." In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held the Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." The Court also held that statements taken by police during the course of interrogations were clearly "testimonial" though the Court did not fully define the term.

In ***Davis v. Washington,*** 126 S.Ct. 2266 (2006), the Supreme Court provided some clarification as to the types of statements that qualify as "testimonial" for purposes of the Confrontation Clause. "Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of

the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Court illustrated the rule by consolidating two domestic violence victim cases. In the first case, the victim identified the defendant during a 911 call, before police arrived. In the second, the victim described events to a police officer at her home right after she was assaulted. In both cases, the victims did not testify and the statements were admitted into evidence as non-testimonial statements. Both defendants were found guilty and appealed. In reviewing the cases, the Supreme Court held that the statement made to the 911 operator was non-testimonial because the purpose was to enable the police to assist in an ongoing emergency. In the second case, the court held the statement was testimonial because the victim was no longer in danger and the primary purpose of the interrogation was to prove past events potentially relevant in a later criminal prosecution.

CONSPIRACY

Eighth Circuit Rejects Slight Evidence Rule in Conspiracy Cases

In ***United States v. López,*** 443 F.3d 1026 (8th Cir. 2006), the Eighth Circuit rejected use of the so-called slight evidence rule which states that a defendant may be convicted for even a minor role in a conspiracy, so long as the government proves the defendant's guilt beyond a reasonable doubt.

Police executed a search warrant and discovered methamphetamines and marijuana in Green's house. Green informed the police that Cervantes and his associates provided her with drugs and she paid him back with her drug sale proceeds. Green stated that López had once collected a large sum of money she owed Cervantes for drugs. With Green's assistance, police set up a buy between Cervantes and Green. López and Cervantes met Green and gave her 600 grams of methamphetamines. Cervantes and López were then charged with conspiring to distribute more than 500 grams of methamphetamines.

The court stated that some recent conspiracy challenges had been dismissed with a simple statement that slight evidence was sufficient for conviction. The court wanted to make clear that the Government had to prove each element beyond a reasonable doubt even if the conspirator's role was minor. Reviewing the evidence against López, the court found there was sufficient evidence to support a finding beyond reasonable doubt that López participated in the conspiracy and his conviction was affirmed.

DOUBLE JEOPARDY

Pretrial Dismissal of Possible Multiplicitous Count Premature Under Double Jeopardy Clause

In ***United States v. Josephberg,*** 459 F.3d 350 (2d Cir. 2006), the Second Circuit held that pretrial dismissal of an obstruction clause was premature under the Double Jeopardy Clause.

The defendant was charged with obstruction of the administration of the tax laws under 26 U.S.C. § 7212(a) and tax evasion under 26 U.S.C. § 7201. During the pretrial proceedings, the defendant successfully motioned the district court for dismissal of the obstruction count on the ground it was multiplicitous in violation of the Double Jeopardy Clause. Under *Blockburger v. United States*, 284 U.S. 299 (1932), the applicable rule states that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The government appealed the district court's ruling and prevailed on the argument that any pretrial dismissal was premature. Where there has been no prior conviction or acquittal, the Double Jeopardy Clause does not protect against simultaneous prosecutions of the same offense so long as no more than one punishment is ultimately imposed.

Thus, the Second Circuit found the defendant could be tried on both counts. If the jury found the defendant guilty of both the obstruction and tax evasion counts, then the trial court could determine whether the charges were multiplicitous and whether punishment for both offenses would violate the Double Jeopardy Clause.

EVIDENCE

Non-Testimonial Hearsay Must Still Have "Sufficient Indicia of Reliability" to be Admitted in a Criminal Trial

In ***United States v. Thomas,*** 453 F.3d 838 (7th Cir. 2006), the Seventh Circuit held that non-testimonial hearsay statements must satisfy the "indicia of reliability" test from *Ohio v. Roberts*, 448 U.S. 56 (1980), before they may be admitted against a defendant in a criminal trial.

In this case, an anonymous and later non-testifying witness phoned 911 and described the events of the crime to the operator as the events were occurring. At issue in this case, was the caller's statement that the defendant had a gun, which the court found non-testimonial in light of *Davis v. Washington*, 126 S.Ct. 2266 (2006). In *Davis*, the Supreme Court held that statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance

to meet an ongoing emergency.

The Seventh Circuit decided that in the case of non-testimonial hearsay statements, the test from *Ohio v. Roberts* still applies. The *Roberts* court held that a hearsay statement may be admitted against a criminal defendant, even if the declarant is unavailable, and still satisfy the requirements of the Sixth Amendment's Confrontation Clause, provided the statement bears "adequate indicia of reliability."

In deciding that *Roberts* still applies to non-testimonial hearsay statements subject to the Confrontation Clause, the court stated, that "[w]hile at first glance, *Davis* appears to speak of *Roberts* being overruled in general, a closer reading reveals that the discussion of *Roberts* occurs strictly within the context of statements implicating the Confrontation Clause…Where the Court addresses non-testimonial statements such language is conspicuously absent."

Finding that the statement bore sufficient indicia of reliability as an excited utterance and present sense impression, the court allowed the statement to be admitted against the defendant.

FINANCIAL CRIMES

Federal Statute Lacking Scienter Requirement as to Legal Element of Crime Did Not Violate Due Process

In ***United States v. Talebnejad,*** 460 F.3d 563 (4th Cir. 2006), the Fourth Circuit held that the operators of a money transmitting business in violation of state licensing requirements did not need to know their conduct was in violation of state law in order to be convicted of a federal crime under 18 U.S.C. § 1960(b)(1)(A).

Section 1960(b)(1)(A) makes it a federal offense to operate a money transmitting business that affects interstate commerce and is unlicensed under state law when state law requires a license and the state law punishes the lack of a license as a felony or misdemeanor. The crime is complete regardless of whether the defendants had knowledge of the state licensing requirement or knowledge that failure to obtain a license was punishable.

In this case, the district court dismissed the charges under Section 1960(b)(1)(A) on the ground that the statute's lack of a scienter element regarding the requirements of state law violates the federal Due Process Clause. On appeal, the defendants sought to uphold the district court's ruling, again challenging the federal law on due process grounds and arguing Congress exceeded its authority when it decreed that ignorance of the state licensing requirement is not a defense to the federal crime.

The Fourth Circuit disagreed, upholding the general principle that ignorance of the law is no defense and concluding that Congress has authority to preclude an "ignorance of the law" defense so long as it retains a requirement that the defendants had knowledge of the facts that made their conduct illegal.

The court concluded that the federal statute is valid, as it requires *mens rea* as to the factual elements of the offense and only allows for no *mens rea* requirement as to a legal element of the offense. Due process does not require Congress to absolve an individual of criminal liability due to his or her ignorance of the legal elements of a crime.

GRAND JURY

Targets of Grand Jury Permitted to Conduct Their Own Privilege Review of Subpoenaed Documents

In ***In re Grand Jury Subpoenas,*** 454 F.3d 511 (6th Cir. 2006), the Sixth Circuit reversed the district court's approval of the government's proposed "taint team" procedure to review subpoenaed documents. In this case, after Winget, the sole owner of an automotive supplier LLC, filed for bankruptcy, the LLC's new management conducted an internal investigation into Winget that ultimately led to a suit against him. The suit alleged Winget had committed fraud by conveying goods and services from the LLC to other entities he owned or controlled.

An ensuing federal grand jury issued two subpoenas to the replacement LLC, New Venture, which had taken over the LLC's assets and liabilities. Wignet and seven affiliated entities filed a motion to intervene, demanding the right to conduct their own privilege review of the subpoenaed documents. The government opposed the motion, asserting a government taint team should conduct the privilege review. The district court approved the government's proposed taint team procedure, which involved review of subpoenaed documents by government attorneys not involved in the grand jury investigation.

Reversing the district court, the Sixth Circuit held the grand jury's broad investigative authority does not take precedence over an individual holder's privilege claims. The attorney-client and work-product privilege doctrines are integral to the proper functioning of the legal system and the grand jury is not empowered to override these protections without sufficient cause. The court also rejected the government's argument that grand jury secrecy requires use of the taint team procedure. The court pointed out that Winget and affiliated companies could have reviewed the documents for privilege had they been served with the subpoenas rather than New Venture and Winget had already had access to the documents in question through the ordinary course of business.

The court also pointed to the fact that Winget and the

affiliated companies were not demanding access to all of the documents covered by the subpoenas; instead, they only asked to review those documents that contained the names of particular lawyers, law firms, and entities. Further, the court found little risk in allowing Winget and the other entities access to documents involving their own communications with counsel. The court also stated its belief that the taint team process is flawed as "taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors."

PRIVILEGES

The Federal Circuit Rules on Whether Waiver of the Attorney-Client Privilege Extends to Work Product

In re EchoStar Comm. Corp., 448 F.3d 1294 (2006), a patent infringement action, involved a defendant company whose defense was reliance on the advice of in-house counsel. Plaintiff sought production of related documents, including documents from the defendant's outside counsel whose advice was not relied upon. The district court determined that the defendant had waived its attorney-client privilege with respect to any attorney-client communications relating to the same subject matter and that waiver extended to communications with counsel other than in-house counsel. The defendant petitioned the Federal Circuit for a writ of mandamus, which the court granted, in part.

The Federal Circuit held that the defendant waived its attorney-client privilege with regard to any attorney-client communications relating to the defendant's claims or defenses, including work product communications with both in-house and outside counsel. The court also held, however, that outside counsel's work product, not communicated to the defendant and not reflecting a communication, was not within the scope of the defendant's waiver of the work product immunity.

Work product waiver is not a broad waiver of all work product related to the same subject matter. Rather, it only extends to factual or non-opinion work product concerning the same subject matter as the disclosed work product. Work product reflecting counsel's opinions and mental impressions, which is never communicated to the client, is not within the scope of a defendant's waiver of work-product immunity.

SEARCH AND SEIZURE

Warrant for Blanket Seizure of Storage Media Must Be Supported by Affidavit Factually Justifying the Scope

In ***United States v. Hill,*** 459 F.3d 966 (9th Cir. 2006), the Ninth Circuit held that a search warrant authorizing the wholesale seizure of computer storage media for later off-site examination is overly broad absent a supporting affidavit explaining why such blanket seizure is necessary.

In *Hill*, the defendant conditionally pled guilty to possession of child pornography. He challenged the admissibility of evidence obtained during a search of computer storage media found in his home. Specifically, Hill claimed the search was overly broad in violation of the Fourth Amendment as it allowed officers executing the warrant to seize several floppy disks, CD-ROMs, and zip disks without first determining whether the media actually contained child pornography.

The Ninth Circuit held that warrants allowing the blanket search and seizure of storage media may be permissible in certain cases, but a supporting affidavit factually demonstrating why such a broad scope is reasonable and necessary must accompany the warrant.

In this case, the affidavit accompanying the warrant did not offer such factual support. The Ninth Circuit, however, determined suppression of the evidence resulting from the search and seizure was not necessary since the flaw arose from the officers' failure to justify the scope of the search before the magistrate and not from any failure to act reasonably or properly in executing the warrant.

The court noted that if new technology is developed to make pinpoint or on-site searches of electronic media more efficient and more practical, courts will need to re-examine this issue since such technology may make broad, off-site searches of storage media unreasonable under any circumstances.

Violation of "Knock-and-Announce" Requirement During Execution of Valid Search Warrant Does Not Require Exclusion of All Evidence Obtained During Search

In ***Hudson v. Michigan,*** 126 S.Ct. 2159 (2006), the Supreme Court held that a violation of the knock-and-announce rule during the execution of a valid search warrant does not require the exclusion of all evidence gathered during execution of the warrant.

The police executed a search warrant authorizing a search for drugs and firearms at Hudson's home. The police found large quantities of drugs and a loaded gun between the cushion and armrest of the chair where the defendant was sitting. Prior to entering the home, the police announced their presence, however they only waited three to five seconds before turning the knob of the unlocked door and entering the defendant's home. The district court conceded the entrance was in violation of the knock-and-announce rule. Hudson moved to suppress all the

inculpatory evidence, arguing his Fourth Amendment rights had been violated. The district court granted the motion, however, on interlocutory review, the Michigan Court of Appeals reversed. Hudson was convicted of drug possession and appealed. The Court of Appeals rejected Hudson's renewed Fourth Amendment claim and the Michigan Supreme Court declined to review.

On review by the Supreme Court, the Court held that whether the exclusionary sanction can be appropriately imposed in a particular case is an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct. Since the interests violated in this case had nothing to do with the seizure of the evidence, the exclusionary rule was inapplicable as a remedy for the violation. The Court stated that the more appropriate remedy for this Fourth Amendment violation would be a civil suit.

SENTENCING

Supreme Court Holds *Blakely* Error is Subject to Harmless Error Analysis

In ***Washington v. Recuenco,*** 126 S.Ct. 2546 (2006), the Supreme Court held that failure to submit a sentencing factor to the jury was not a "structural" error, therefore automatic reversal of the sentence was not required.

Respondent fought with his wife and threatened her with a firearm. He was found guilty of assault with a deadly weapon. Under Washington state law, the use of a deadly weapon during an assault requires a one-year enhancement to a sentence; the use of a firearm, however, requires a three-year enhancement. The trial court applied the three-year firearm enhancement even though the jury verdict did not specifically state the respondent used a firearm. The trial court based the three-year enhancement on its own factual findings in violation of *Blakely v. Washington*, 542 U.S. 296. On appeal, the government argued the *Blakely* error was "harmless." The Supreme Court of Washington, however, vacated the sentence concluding the error was "structural" and therefore not harmless.

In holding that a failure to submit a sentencing factor to the jury is not a structural error, and therefore subject to harmless-error analysis, the Supreme Court reasoned that a constitutional error does not entitle a defendant to an automatic reversal. *See Neder v. United States*, 527 U.S. 1, 8 (1999). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579 (1986). "Only in rare cases has this Court held that an error is structural….In such cases, the error 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Neder v. United States at 9*.

CPA's Submission of False Documents to the IRS During Civil Audit of Client Not Sophisticated Means Warranting Enhancement

In ***United States v. Baxter,*** 2006 WL 1155872 (N.D.III. April 27, 2006), the district court found the government had failed to prove by a preponderance of the evidence that Baxter was responsible for a tax loss in excess of the $576,000 figure set forth in the Pre-sentence Investigation Report (PSR). The court also found Baxter had not used sophisticated means to conceal her criminal conduct and was entitled to a three-level reduction for timely acceptance of responsibility. Baxter, a CPA, was involved in the Aegis scheme and, during the audit of one of her clients, had supplied the IRS with a false document. Baxter entered a plea of guilty pursuant to a written plea agreement to a one-count superseding information charging her with obstruction pursuant to 26 U.S.C. § 7212(a).

The PSR calculated the total tax loss as $576,000, the tax loss attributable to the client for whom Baxter submitted the false document. The PSR also provided for a two-level enhancement under § 3B1.3 of the Sentencing Guidelines since Baxter used her special skills as an accountant to facilitate commission of the offense and the PSR included a three-level reduction for timely acceptance of responsibility. Concurring with the offense level calculated in the PSR, the court found, however, the government had failed to prove by a preponderance of the evidence that Baxter was responsible for the total tax loss caused by all of her clients. The court determined the special agent's testimony belied the government's arguments because it supported Baxter's position that she believed the Aegis system was legal. Further, the court determined that providing the IRS with a false document during a civil audit fell solely within the category of using special skills and not sophisticated means warranting a second enhancement.

The Fifth Circuit Reviews Application of Sentencing Guidelines

In ***United States v. Charon,*** 442 F.3d 881 (5th Cir. 2006), the Fifth Circuit affirmed a sentence imposed on a defendant convicted of cocaine distribution and money laundering. The defendant had argued on appeal that: (1) the district court erred by using relevant conduct to calculate his base offense level; (2) the district court erred by imposing a two-level enhancement for sophisticated laundering; and (3) the district court's application of Justice Breyer's remedial opinion in *United States v. Booker,* 543 U.S. 220 (2005), violated the Ex Post Facto and Due Process Clauses.

As part of the defendant's written plea agreement, he stipulated to the occurrence of several drug sales to an

informant between April and December of 2003. During this time, the DEA determined the defendant purchased and distributed between 70 kg and 150 kg of cocaine and sold 2 kg to the informant. In addition, the defendant stipulated to tendering a $20,000 cashier's check as down payment for property; that a third party purchased the cashier's check for the defendant; and that the transaction was designed to make a legitimate investment using drug proceeds, while concealing the source of the funds.

When calculating the defendant's base level offense for money laundering, the district court considered not only drugs related directly to the defendant's money laundering offense, but also the relevant conduct of drug dealing. The defendant argued that only drug dealing activity associated with the money laundering offense should have been considered. The Fifth Circuit affirmed the district court and held that in calculating the defendant's base offense level for money laundering, the sentencing guidelines required grouping of the money laundering offense with the cocaine distribution offense, which required consideration of the defendant's relevant conduct of drug dealing. Accordingly, the district court correctly considered defendant's relevant conduct of drug dealing.

When deciding whether to enhance the sentence based on the sophisticated nature of the money laundering scheme, the district court considered information about the defendant's bank accounts, provided in the defendant's cooperation agreement. Defendant argued that the court should not be able to use information provided by the defendant in a cooperation agreement. The Fifth Circuit held that nothing in the defendant's cooperation agreement prevented the government from using information to enhance the sentence.

Finally, the defendant argued application of the remedial holding in *Booker* violated the limits of ex post facto judicial decision-making. The defendant contended the remedial opinion did not apply retroactively because it was "unexpected and indefensible." The court reaffirmed a previous decision holding that the "concepts of notice, foreseeability, and the right to fair warning" were not violated because the defendant had "fair warning that his conduct was criminal, and enhancements…could be applied to his sentence, and that he could be sentenced as high as the statutory maximum."

CRIMINAL TAX BULLETIN

December/January/February 2006-2007

TABLE OF CASES