

Criminal Tax Bulletin

*Department of Treasury
Internal Revenue Service*

*Office of Chief Counsel
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This bulletin is for informational purposes. It is not a directive.

2003

TITLE 26 AND TITLE 26 RELATED CASES

Aiding and Assisting

In *United States v. Fletcher*, 322 F.3d 508 (8th Cir. 2003), the Eighth Circuit upheld Fletcher's convictions for conspiring to defraud the United States in its efforts to collect taxes in violation of 18 U.S.C. § 371 and for aiding and assisting in the preparation of false income tax returns in violation of 26 U.S.C. § 7206(2). Fletcher and his coconspirators controlled JO&C, a tax service company. JO&C employees testified Fletcher directed payment to others for the tax return preparation work, solicited clients and controlled how company funds were spent. Fletcher also conducted seminars promoting JO&C's tax services, which included converting personal expenses into deductible business expenses, such as deducting cats as rodent control devices. An employee also testified Fletcher, in the face of an IRS audit, directed her to create a phony invoice to support a \$1275 deduction for his services on a client's filed tax return. On appeal, Fletcher argued (1) the evidence was insufficient to support a conviction and he had a right to free speech; (2) the court should have granted his motion for a mistrial instead of merely instructing the jury to disregard some of the witnesses' testimony and prosecutorial remarks; and, (3) prior civil adjudications arising out of Fletcher's past tax services were improperly admitted as evidence.

The Eighth Circuit affirmed, finding the evidence sufficient to support the convictions. The court also found Fletcher's free speech argument without merit, since his seminars included more than just mere advocacy of violation of the tax laws. The district court correctly limited the testimony considered by the jury to testimony relating to the conspiracy time frame and, although the prosecutor's closing remarks erroneously referred to excluded testimony, they did not impact Fletcher's rights in any significant way to warrant a mistrial. The court also found the admission of two prior

civil adjudications was not improper, since the evidence possessed significant probative value with respect to establishing Fletcher's intent, knowledge and motive, and was not substantially outweighed by the threat of unfair prejudice. Moreover, the district court instructed the jury the civil adjudications were not to be considered as proof of the criminal acts charged.

Statute of Limitations

In *United States v. Anderson*, 319 F.3d 1218 (10th Cir. 2003), Anderson was convicted of income tax evasion relating to his tax return filed on April 15, 1992, on which he failed to report \$50,000 in income he placed in a Swiss bank account. Anderson argued the six year statute of limitations for the tax evasion offense had expired because the indictment was filed on March 24, 1999, nearly seven years after his 1992 tax return was required to be filed. The Tenth Circuit found Anderson committed an affirmative act of evasion in 1996 after incurring tax liability in 1992, and therefore, the indictment was filed within the six year statute of limitations.

In affirming the conviction, the Tenth Circuit agreed with the First, Fourth, Sixth, Seventh, Ninth and Eleventh Circuits, all of which have held when a defendant commits a series of evasive acts over several years after incurring a tax liability, the statute of limitations begins to run on the date of the last evasive act. The Tenth Circuit followed the First Circuit's reasoning, which distinguished felony tax evasion under 26 U.S.C. § 7201 from misdemeanor failure to file under 26 U.S.C. § 7203. "Section 7201 criminalizes not just the failure to file a return or the filing of a false return, but the willful attempt to evade taxes in any manner." *Id.*, *5 (citing *United States v. Ferris*, 807 F.2d 269 (1st Cir. 1986)). Since evasive acts following the filing of a return may be considered part of the offense, the date of the latest act of evasion, not the due date of taxes, triggers the statute of limitations. In this case, Anderson, after incurring tax liability by not reporting the \$50,000 on his 1992 income tax

return, committed additional evasive acts when he denied any interest in a foreign bank account on his tax returns for years 1993 through 1996. Anderson's affirmative acts of evasion through 1996, therefore, brought the offense within the statute of limitations period.

Attorney's Lien Inferior To A Tax Lien

In *United States v. Ripa*, 323 F.3d 73 (2nd Cir. 2003), Ripa's client was stopped at the Canadian border and found to have \$359,500 in proceeds from illegal gambling activities. Since no currency reporting form was filed, customs agents seized the currency. On the same day, the IRS made a termination assessment for \$169,973 in income tax, based upon the \$359,500 in cash. Because the tax liability was due immediately, the IRS sent a notice of levy to Customs and filed a notice of tax lien with the court. The IRS' termination assessment was reduced to judgment after the district court granted summary judgment to the government in the amount of \$169,973, plus interest.

In the meantime, the government brought a civil action against Ripa's client seeking forfeiture of the seized currency. During the pendency of the forfeiture proceeding, a criminal action for tax evasion was brought against Ripa's client. Ultimately, the charges were overturned on appeal. After the criminal proceeding concluded, the district court ruled on the forfeiture case that had been remanded to it nearly ten years earlier. The district court concluded Ripa's client lacked the requisite knowledge of the reporting requirement and ruled in his favor. However, instead of awarding the disputed money, the district court issued an order allowing an interpleader action so the interested parties could litigate their rights to the fund. The fund now consisted of \$491,237, which consisted of the seized currency plus interest paid on it by the government.

The IRS asserted a claim based on its original tax lien, plus interest and penalties, which totaled more than \$750,000. Ripa asserted a statutory attorney's lien in the amount of \$156,246 and his client sought equitable relief from the assessment of interest and penalties, arguing it was unfair for the government to charge a higher rate of interest than it paid. The district court granted summary judgment for the government, giving priority to its tax lien. It rejected Ripa's claim under 26 U.S.C. § 6323(b)(8), which provides for superpriority of attorney's liens except in cases involving a "judgment . . . of a claim or of a cause of action against the United States." The district court also rejected Ripa's client's equitable arguments. Ripa and his client appealed the district court's findings.

The Second Circuit affirmed the district court's holding that

Ripa could not assert priority for his attorney's lien over the federal tax lien under § 6323(b)(8). While the district court concluded the plain language of the statute included forfeiture suits within the exception set forth in § 6323(b)(8), the Second Circuit focused on the purpose of § 6323(b)(8) which was to collect taxes, not bestow benefits on attorneys. The court noted when an attorney represents a taxpayer against a party other than the government, the attorney is working to reach a result that will, if successful, enlarge the amount of funds available to the government to satisfy its tax claim. If, however, the attorney represents a taxpayer whose interests are adverse to the government, as in the forfeiture case, the funds available to the government will not be enhanced by the attorney's services and, accordingly, the exception would not apply.

Additionally, the Second Circuit determined it lacked the equitable powers to grant Ripa's client relief from whatever unfairness resulted from the tax code and other federal statutes. The different rates of interest applied to money held by the government and money owed by the government are set by statutes and courts are not at liberty to change them.

Hyde Amendment

In *United States v. Manchester Farming Partnership*, 315 F.3d 1176 (9th Cir. 2003), the Ninth Circuit adopted a definition for "bad faith" with respect to the third factor in the test used to determine whether a criminal defendant should be awarded attorneys' fees pursuant to the Hyde Amendment. The Hyde Amendment permits a criminal defendant to recover fees when the government's position was vexatious, frivolous, or in bad faith. 18 U.S.C. § 3006A. In this case, Robert Stephens, a farmer in Montana, formed Manchester Farming and three other farming entities, and accepted Federal farm program payments for the entities. Stephens' neighbor, who unsuccessfully sued Stephens in an unrelated civil claim, told the government Stephens was operating his farms unlawfully and had accepted farm program payments illegally. The government initiated an investigation into Stephens' farm operations and subsequently indicted Stephens and the three entities, alleging Stephens had formed the entities for the sole purpose of receiving additional farm program payments unlawfully. After a jury acquitted Stephens and the entities of all criminal charges, Manchester Farming *et al.* moved to recover fees and costs associated with their defense pursuant to the Hyde Amendment. The district court denied their request, finding the government's position was not vexatious, frivolous, or in bad faith.

The Ninth Circuit affirmed the denial of fees and costs. Applying the three part test in the Hyde Amendment to the

facts, the court agreed the government's position was neither vexatious nor frivolous pursuant to its previous decisions in *United States v. Sherburne*, 249 F.3d 1121 (9th Cir. 2001) and *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002). Neither of those previous decisions, however, had provided a definition of the third term in the test, "bad faith," and so the court adopted the Eleventh Circuit's definition in *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999). In *Gilbert*, the court defined "bad faith" as "not simply bad judgment or negligence, but . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity. . . it contemplates a state of mind [of] furtive design or ill will." *Id.* The Ninth Circuit noted the district court applied the *Gilbert* test and correctly found no evidence of a state of mind of ill will or furtive design in the government's decision to prosecute.

Incorrectly Reporting Money Received As Wages Constitutes A False Tax Return

In *United States v. Boulерice*, 325 F.3d 75 (1st Cir. 2003), the First Circuit affirmed Boulérice's convictions for filing false returns in violation of 26 U.S.C. § 7206(1) for tax years 1993 and 1994. Boulérice's indictment resulted from an investigation into her father's businesses revealing she was on the business' payrolls without doing any work. Boulérice reported the proceeds she received as "wages" on her 1991-1994 tax returns. In addition, the business paid the rent on her New York City apartment and deducted it as a business expense. Also, in regard to a 1992 audit of her father's business, Boulérice backdated job description forms which falsely described her duties as an employee. Boulérice was found guilty of filing false returns and sentenced to two years' probation. On appeal, Boulérice contended the district court erred in denying her Rule 29 motion for a judgment of acquittal. Boulérice conceded she filed the returns, and did not challenge the materiality of the false statements. Boulérice's argument was the government had failed to demonstrate she willfully violated the statute and she had actual knowledge of the material falsity of the returns.

The First Circuit found there was ample evidence to support the jury's finding Boulérice willfully filed tax returns she knew to be false. Further, "the jury reasonably could have found that Boulérice knew of her obligation to accurately report her income, she knew that the money she was receiving from [her father's companies] was not "wages," and she repeatedly attempted to cover up the truth about her relationship with [these companies]." The court found Boulérice nevertheless "reported as 'wages' on her tax returns the money she received from [these companies]." The court also held although the government had to prove to the jury the materiality of Boulérice's false statements, the government was not required to prove Boulérice knew the

false statements were material.

EVIDENCE

Use of "Overview" Witness

In *United States v. Griffin*, 324 F.3d 330 (5th Cir. 2003), the Fifth Circuit held a party may not put a witness on the stand to give an overview of evidence that has yet to be presented. Griffin, along with several other co-defendants, was prosecuted on charges stemming from a scheme involving tax credits for a low income housing project. As its second witness, the government presented an FBI agent who gave an overview of evidence that would be presented later. The agent used a chart containing pictures of persons and symbols for the entities involved in the alleged conspiracy. Griffin's attorney objected on the basis of hearsay on more than one occasion during the agent's testimony. The district court overruled the objections and allowed the testimony to continue in an overview manner in order to orient the jury because of the complexity of the case.

On appeal, Griffin argued that the FBI agent's testimony was improper because he was never qualified as an expert witness and because the government did not establish a factual foundation for lay witness opinion. Furthermore, Griffin asserted there was nothing for the agent to summarize because the first witness did not testify to most of the facts of the case. The court noted there is an established tradition which permits a summary of evidence to be put before the jury with proper limiting instructions. However, the purpose of the summaries is simply to aid the jury in its examination of the evidence already presented. In this case, the evidence had not yet been presented. Accordingly, the agent was testifying more as an "overview witness" than a summary witness.

This was the first time the Fifth Circuit had addressed the use of an overview witness where the witness was put on the stand before any evidence has been admitted for the witness to summarize. While the court "unequivocally condemn[ed]" this practice as a tool employed by the government to paint a picture of guilt before the evidence has been introduced," the court acknowledged "permitting a witness to describe a complicated government program in terms that do not address witness credibility is acceptable. However, allowing that witness to give tendentious testimony is unacceptable." The court further noted "allowing that kind of testimony would greatly increase the danger that a jury might rely upon the alleged facts in the overview as if those facts had already been proved, or might use the overview as a substitute for assessing the credibility of witnesses that have not yet testified." Despite the court's findings, it ultimately held the

agent's testimony and use of the chart to be harmless.

GRAND JURY RULE 6(e)

Disclosure

In *In re Grand Jury Subpoena*, 223 F.3d 213 (3rd Cir. 2000), the Third Circuit held a grand jury target whose attorney had been subpoenaed to testify against him and produce documents that would ordinarily be privileged was not entitled to review an ex parte affidavit in which the government asserts the crime fraud exception to the attorney client privilege. The court, emphasizing the investigative nature of grand juries, rejected the target's reliance on cases recognizing the right to view such affidavits in adversarial proceedings. In the instant case, the government sought counsel's testimony and, after counsel moved to quash the subpoena, filed an ex parte affidavit to establish the applicability of the crime fraud exception to the attorney client privilege. The affidavit contained details of the grand jury investigation. The target contended without seeing the affidavit, he and counsel could not effectively rebut the crime fraud exception. The Third Circuit concluded all of the target's arguments for access to the affidavit failed on the fact grand jury proceedings are investigative rather than adversarial.

The court pointed out it has consistently endorsed the use of ex parte affidavits and in camera proceedings to preserve grand jury secrecy when the government must present information beyond the minimal requirements of *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3rd Cir. 1073). In *Schofield*, the Third Circuit required the government to justify a grand jury subpoena by making some preliminary showing by affidavit that each item was at least relevant to a grand jury investigation and properly within its jurisdiction. The government followed *Schofield* in this case by making its case for the crime fraud exception in an ex parte affidavit.

The defendant relied on *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3rd Cir. 1992), which held in the context of civil litigation, the party invoking the attorney client privilege must be given an opportunity to rebut the opponent's prima facie showing in support of the crime fraud exception. The court, however, differentiated *Haines*, emphasizing that it was adversarial while the instant case remained in the investigative stage. In this context, grand jury secrecy assumes primary importance. The court rejected the target's argument that the length of the investigation (two years) and the public disclosure of the nature of the investigation required the district court to order disclosure of the ex parte affidavit. The court concluded it was neither an abuse of

discretion nor a violation of due process for a district court to rely on ex parte affidavits to determine whether the crime fraud exception applies. The court cited other opinions from the Second and Tenth Circuits supporting the same conclusion. The investigative nature of the proceedings also led the court to reject an argument based on the Sixth Amendment right to counsel. The target contended compliance with the subpoena would lead to counsel's disqualification and, thus, effectively infringe upon his right to counsel. The court pointed out the target's right to counsel had not attached, and the possibility of eventual disqualification was merely speculative at this point.

FORFEITURE

Attorneys' Fees

In *United States v. McCorkle*, 321 F.3d 1292 (11th Cir. 2003), the Eleventh Circuit held an attorney who received forfeitable funds as payment for legal work is entitled to keep only that part of the money reflecting the value of the services performed while the attorney qualified as a bona fide purchaser. In this case, the McCorkles were found guilty of laundering the proceeds of a fraudulent telemarketing scheme, and the jury returned a special verdict forfeiting the McCorkles' interest in certain assets, including \$2 million placed in trust for payment of their lawyers' fees.

The court noted pursuant to 21 U.S.C. § 853, title to the funds vested in the United States at the moment the McCorkles laundered them. Then, as provided by § 853(n)(6)(B), the attorney had the burden to prove he was a "bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture." The attorney brought a petition under § 853(n) asserting a right to the money, which the court denied. The court, however, noted some of the money had been dissipated and indicated the government could only seize and forfeit property traceable to the tainted funds. Further, the court observed the government could use a common law action for conversion to go after the attorney's substitute assets in place of the dissipated funds.

The court said the bona fide purchaser for value standard "means that the only assets that are potentially immunized from forfeiture are those for which value has been given." Furthermore, the court opined, the value given by an attorney "is the performance of legal services that have already been rendered when the attorney receives payment." The court, accordingly, determined this was not the case herein since the payment of the \$2 million was paid for future legal services.

Retroactivity of CAFRA

In *United States v. One Piper Aztec*, 321 F.3d 355 (3rd Cir. 2003), the Third Circuit held the burden of proof provision of the Civil Asset Forfeiture Reform Act (“CAFRA”) applies only to forfeiture actions commenced on or after the effective date of the CAFRA. The owner of a Piper Aztec authorized use of his aircraft to transport three illegal aliens to the British Virgin Islands, where the passengers were transferred to a vessel which entered U.S. waters. The boat was stopped and the aliens were detained. The government filed forfeiture proceedings for the Piper Aztec on May 19, 1999. The district court decreed the property forfeited on March 22, 2002. The owner appealed on April 1, 2002, arguing his appeal constituted a new proceeding which brought the action under CAFRA and changed the burden of proof. Under CAFRA, the government must prove the illegal use of the subject property by a preponderance of the evidence, instead of the lesser pre-CAFRA probable cause standard. Once the government establishes probable cause, the burden shifts to the claimant to prove by a preponderance of the evidence the property was not used illegally.

The Third Circuit upheld the forfeiture decree, citing the plain language of the statute, which states CAFRA applies to any forfeiture proceeding commenced on or after August 23, 2000. The court noted “the commencement of a forfeiture proceeding can mean only the point when the government first files a complaint for forfeiture . . . the proceeding commences with the government’s action and ends when the final appeal is exhausted. No other interpretation is sensible.” *Id.*, *8. The court further noted Congress expressly applied CAFRA retroactively to only the part which prevents fugitives from pursuing forfeiture claims, thus indicating it had no intention of applying CAFRA retroactively to any other part. Since the civil forfeiture proceeding of the Piper Aztec commenced with the filing of the government’s complaint on May 19, 1999, the pre-CAFRA burden of proof standard applied. The court noted the government satisfied its burden of proof through witness testimony, which shifted the burden of proof to the owner. The owner offered no controverted evidence other than his overturned criminal conviction. The court found this information irrelevant to the civil forfeiture proceeding and insufficient to meet the owner’s burden of proof.

Dog Alert Not Enough For Probable Cause

In *United States v. \$242,484*, 318 F.3d 1240 (11th Cir. 2003), the Eleventh Circuit reversed the forfeiture order of \$242,484 seized from a claimant (Stanford) when she

arrived in Miami after a flight from New York, for which she paid \$93 in cash. When questioned, Stanford admitted to New York airport security she was carrying approximately \$200,000 in cash and they alerted DEA agents in Miami. Upon arriving in Miami, Stanford was approached by DEA agents inquiring if she had any cash in her possession. She admitted she did and after a narcotics sniffing dog alerted to the cash, the DEA agents seized the cash for forfeiture. When questioned about the cash, Stanford was unable or refused to provide a detailed explanation as to where she had been staying or from whom she received the cash and refused to provide any documentation connecting the cash to her business in Miami. The cash was sorted by denomination, bundled by rubber bands, wrapped in black plastic, and placed inside a Christmas bag type package in her backpack. The district court ordered the cash’s forfeiture and Stanford appealed.

On appeal, the Eleventh Circuit reversed, holding the government failed to establish probable cause that a substantial connection existed between the cash and drug dealing. Since probable cause is a “totality-of-the-circumstances” test, the court considered each circumstance relied on by the district court in finding probable cause which were: 1) large quantity of cash and physical condition; 2) the route and circumstance of travel; 3) Stanford’s lack of knowledge surrounding her trip and receipt of money; 4) the fact that Stanford was twice a “no show” for her scheduled departure from New York; and 5) the narcotics dog alert to the cash. The court determined that none of these standing alone was sufficient to establish probable cause. The court found that although there were possible indications of a connection to crime, these indications were weak and fell “short of showing a ‘substantial connection’ between the funds at issue and a narcotics transaction.” The court also noted Stanford was an American citizen with no criminal record who never denied she was carrying a large amount of cash.

MONEY LAUNDERING

Proceeds of Fraud

In *United States v. Rogers*, 321 F.3d 1226 (9th Cir. 2003), the Ninth Circuit held Rogers, who was engaged in laundering the proceeds of a large-scale Ponzi scheme, could be convicted under 18 U.S.C. § 1957 even though the only fraud of which he was convicted involved just \$5,000. As a referral agent for the scheme, Rogers brought in investor funds and received a five percent commission for his efforts. The money Rogers solicited from investors was deposited and later withdrawn in the form of cashier’s checks or cash, paid to other investors to further the scheme, or transferred

to another company operated by the scheme's creator. Rogers was charged with two counts of mail fraud under 18 U.S.C. § 1341, but was convicted on just one count for mailing a \$5,000 cashier's check. He was also convicted on five counts of money laundering for conduct related to the shuffling between accounts of much larger amounts of funds derived from the overall contributions to the Ponzi scheme.

A conviction for money laundering under § 1957 requires the government show: (1) the defendant knowingly engaged in a monetary transaction; (2) he knew the transaction involved criminal property; (3) the property's value exceeded \$10,000; and (4) the property was derived from a specified unlawful activity. On appeal, Rogers argued since he was convicted of only one count of mail fraud involving a \$5,000 cashier's check, he could not have been convicted of money laundering in excess of the requisite statutory floor of \$10,000. The Ninth Circuit disagreed with Rogers. Based on the record before the court, it was clear Rogers had laundered the proceeds of the larger operation, which defrauded hundreds of people out of hundreds of thousands of dollars. Regardless of how much money Rogers personally solicited to form the basis of the mail fraud conviction, Rogers' conduct in laundering the money brought in by the entire Ponzi scheme was the relevant standard for determining if the elements of the money laundering statute had been met.

While this issue was one of first impression in the Ninth Circuit, it has been raised in three other circuits including the Third, Fifth and Tenth Circuits. These courts have held in determining whether a defendant laundered the requisite amount of proceeds derived from a particular scheme, a court must look at the fraudulent scheme as a whole. A scheme refers to the overall design to defraud and has a wider meaning than an individual act of fraud.

SENTENCING

Use Of Section 2T1.4 In False Claim Convictions

In *United States v. Barnes*, 324 F.3d 135 (3rd Cir. 2003), the Third Circuit rejected Barnes' claim that his sentencing counsel was ineffective because he failed to object to the district court's application of the tax instead of the fraud guidelines during sentencing. Barnes was charged in a ten count indictment with filing false claims for refunds with the IRS and with aiding and abetting the presentation of the claims in violation of 18 U.S.C. §§ 287 and 2. After a jury trial, Barnes was convicted on nine of the counts. The Probation Office's presentence report calculated the total

offense level on the basis of a tax offense rather than a fraud offense. The use of the tax guidelines resulted in an offense level which was two levels higher than the fraud guidelines would have yielded. Barnes appealed claiming that he suffered from ineffective assistance of counsel at the time of sentencing when his attorney failed to object to the court's application of the tax guidelines found in U.S.S.G. §§ 2T1.4 and 2T4.1 instead of the guidelines called for by § 2F1.1.

Barnes argued Appendix A, Statutory Index, specified § 2F1.1 as the guideline applicable to Barnes' conviction. The Appendix at the time of Barnes' sentencing made § 2F1.1 applicable for an 18 U.S.C. § 287 offense. Barnes noted the appendix further provided "if more than one guideline is referenced for the particular statute, use the guideline most appropriate for the offense conduct charged in the count of which defendant was convicted." Since the Appendix only referenced § 2F1.1, Barnes argued he must be sentenced under § 2F1.1. The Third Circuit rejected Barnes' argument since it only gave part of the guideline picture. In particular, Application Note 14 to § 2F1.1 makes clear that a different guideline should be used if an "offense is more aptly covered by another guideline." Section 2T1.4 covers "Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud" and thus describes the offense Barnes committed and is more apt for use here than § 2F1.1. Accordingly, the Third Circuit held Barnes' attorney could not have been ineffective for failing to contend that § 2F1.1 rather than § 2T1.4 should have been applied.

Official Victim Enhancement

In *United States v. Blackwell*, 323 F.3d 1256 (10th Cir. 2003), the Tenth Circuit held a federal sentencing court may consider only a defendant's offense of conviction, not other acts constituting relevant conduct under the Guidelines, in determining whether Blackwell qualified for an "official victim" enhancement under U.S.S.G. § 3A1.2(a). Police officers noticed a red dot moving across their chests and suspected it might be a laser sight attached to a gun emanating from a car in which Blackwell was sitting. A gun was discovered and Blackwell was convicted of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court found Blackwell targeted the officers because of their status as police officers and imposed a three level enhancement under U.S.S.G. § 3A1.2(a), which applies when the victim is a government officer or employee and "the offense of conviction was motivated by such status."

Pointing to its analysis in *United States v. Holbert*, 285 F.3d 1257 (10th Cir. 2002), the court reversed the application of the enhancement based on the different meanings of "offense" and "offense of conviction" as described in the

subchapter of the Guidelines pertaining to victim related adjustments. Specifically, the court in *Holbert* noted the guidelines do not define “in the course of the offense” but do define “offense” as “the offense of conviction and all relevant conduct, as provided by § 1B1.3, unless a different meaning is specified or is otherwise clear from the context.” The court found nothing about the officers’ status, motivated Blackwell’s commission of the possession offense, nor were the officers victims of that offense. Thus, the court determined the district court erred when it considered other relevant conduct that accompanied the offense of conviction when imposing the three-level enhancement for official victim.

causing the court to cancel Turner’s bond and issue an arrest warrant. The grand jury returned a superseding indictment for three counts of contempt of court, one of which related to Turner providing false information to the probation officer, violating curfew, and practicing law without a license. Turner filed motions to withdraw his original guilty plea and for new counsel. After the court appointed Turner new counsel, Turner pled guilty to one contempt of court count. The court never ruled on Turner’s motion to withdraw his original guilty plea. Turner was sentenced to 100 months’ imprisonment for the tax fraud and contempt of court counts. The sentence reflected an enhancement for obstruction of justice based on Turner’s myriad lies to the court.

Obstruction Enhancement

In *United States v. Turner*, 324 F.3d 456 (6th Cir. 2003), the Sixth Circuit upheld the district court’s grouping of tax fraud counts with a contempt of court count. Prior to pleading guilty to three counts of tax fraud, Turner failed to appear for a court proceeding and provided the court with false information regarding his job status and child-support obligations. After pleading guilty, Turner provided a probation officer with false information during a presentence interview. Specifically, he told the officer he was licensed to practice law in California and had accepted money for legal services he provided to a fellow inmate. Before the sentencing hearing, the probation officer discovered Turner had never attended law school. Prior to sentencing, Turner violated his court imposed curfew at least three times,

The Second Circuit rejected Turner’s arguments regarding the obstruction enhancement. The court found Turner’s lies were directly related to the investigation and prosecution of his crime and thus supported the enhancement. The court also found Turner did not prove his diminished mental capacity affected his ability to willfully obstruct justice. Furthermore, since the district court witnessed Turner’s lies first hand, the court was in the best position to determine his willfulness and therefore did not err in failing to find Turner lacked the mental capacity to obstruct justice. Finally, the court found the sentencing enhancement did not violate the Double Jeopardy clause because the contempt charge to which Turner pled guilty encompassed his disobedience of the court, which was different than his lies, which were the basis for the sentencing enhancement.

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