

CIVIL AND CRIMINAL TAX PENALTIES
IMPORTANT DEVELOPMENTS - CRIMINAL

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ABA SECTION OF TAXATION

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Important Criminal Tax Developments

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On October 12, 2006, Wesley Snipes was charged in a superseding indictment with one count of conspiracy to defraud the United States under 18 U.S.C. § 371, one count of aiding and abetting the making of false claims against the United States in violation of 18 U.S.C. § 2 and § 287, and six counts of failure to file in violation of 26 U.S.C. § 7203. Snipes' accountant, Douglas P. Rosile, Sr., was also charged. Rosile allegedly prepared or helped prepare false returns for 174 clients in 34 states, involving at least \$29 million in refund claims. In 2002, the U.S. District Court for the Middle District of Florida granted an injunction against Rosile, barring him from preparing returns. The indictment alleges that Snipes filed false amended returns using a classic tax protestor theory that argues domestic income of U.S. citizens and residents is not taxable. The firm promoting this theory, American Rights Litigators, was to receive 20% of any refunds obtained.

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THE *STEIN* (KPMG) CASE

***Stein* (KPMG)** (www.usdoj.gov/usao/nys/pressrelease2005)

United States v. Jeffrey Stein, et al., 05 CRIM. 888 (S.D.N.Y.)

Background

On October 17, 2005, the government filed a superseding indictment in *United States v. Jeffrey Stein, et al.*, adding 10 additional defendants to what is billed as “the largest criminal tax case ever filed.” Press Release (October 17, 2005), United States Attorney, Southern District of New York. The defendants include the former Deputy Chairman of KPMG, several former heads of KPMG’s Tax Practice, the former CFO of KPMG, the former head of KPMG’s Department of Professional Practice, a former KPMG Associate General Counsel, a former tax partner of a prominent national law firm, and numerous other KPMG tax partners. The 19 defendants are charged with conspiracy to defraud (18 U.S.C. § 371), tax evasion (26 U.S.C. § 7201), and obstruction (26 U.S.C. § 7212), for devising, marketing, and implementing fraudulent tax shelter schemes, which generated at least \$11.2 billion in phony tax losses. KPMG is not a defendant in the *Stein* indictment, having executed a deferred prosecution agreement, available at www.usdoj.gov/usao/nys/pressrelease2005.

In furtherance of this tax shelter fraud, the defendants allegedly issued opinion letters containing false representations that the tax shelter losses would “more likely than not” survive IRS challenge, as well as other false documentation regarding the tax shelter transactions. The superseding indictment also alleges that the defendants fraudulently concealed the tax shelters from the Service by failing to register the tax shelters and by preparing tax returns that fraudulently concealed phony losses. The government alleges that the defendants obstructed the IRS and United States Senate investigations into their tax shelter scheme by: (1) attempting to conceal documents and information with sham attorney-client privilege claims; (2) failing to turn over requested documents; and (3) falsely testifying before both the IRS and Senate.

Recent Developments:

United States v. Stein, et al., 435 F.Supp.2d 330 (S.D.N.Y. 2006) (June 26, 2006) – Judge Lewis Kaplan ruled that the government unconstitutionally pressured KPMG not to pay legal fees for the defendants. “Those who commit crimes – regardless of whether they wear blue or white collars – must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it has sworn to defend.” *Id.* at 335. Judge Kaplan noted that while the government did not literally request or direct that KPMG do anything with respect to the legal fees, it was clear that “KPMG refused to pay because the government held the proverbial gun to its head.” *Id.*

In the earlier stages of the investigation, and in an attempt to demonstrate cooperation and avoid prosecution, KPMG put significant pressure on its employees, using legal fees as leverage. According to a form letter KPMG sent to counsel for its employees and to the government, the firm authorized \$400,000 in fees for employees willing to cooperate, and failure to cooperate or being charged with a crime resulted in nothing. Judge Kaplan also pointed to the

Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys, Re: Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), which advises prosecutors to grant more lenient treatment to firms under criminal investigation if they stop paying legal fees on behalf of potentially culpable employees.

Judge Kaplan stopped short of dismissing the charges or ordering the government to pay the legal fees, which would literally require an act of Congress, but said the defendants could proceed against KPMG in an ancillary civil action, over which he would preside and move expeditiously. He suggested that KPMG should pay the fees to avoid “more unpalatable relief” being granted to the defendants.

United States v. Stein, et al., 2006 WL 2417295 (S.D.N.Y.) (July 19, 2006) – Defendant Ritchie, joined by others, moved for a four-month continuance of the September 11, 2006 trial date, on the grounds that the government produced voluminous discovery significantly past the discovery deadline, the format of and conditions in which the documents have been produced have been “less than satisfactory,” and KPMG has refused to pay the legal fees, forcing the defendants to resort to civil action. Based on these arguments, Judge Kaplan granted the request to continue and rescheduled the trial date for January 15, 2007, ordered the government to complete discovery by July 27, 2006, ordered the government to identify, by page and line numbers, the portions of all depositions and other transcripts on its witness or exhibit list that it proposes to offer in its case in chief, and ordered production of *Jencks* material by November 15, 2006. The court also ordered the parties to come up with a plan for improved performance of the Maspeth document depository.

United States v. Stein, et al., 440 F.Supp.2d 315 (S.D.N.Y. 2006) (July 25, 2006) – Defendants moved to suppress statements proffered to the government. Judge Kaplan again reviewed the history of the legal fees issue. He noted that, when KPMG told its employees that it would cut off payment of legal expenses of any employee who refused to talk to the government, the government took full advantage, seeking interviews and encouraging KPMG to pressure employees to cooperate. When employees hesitated, the government told KPMG, which, in turn, threatened to cut off fees or terminate employment. The government obtained proffers from nine of the thirteen defendants. Those defendants contend that their statements were coerced in violation of their Fifth Amendment privilege against self-incrimination.

Following a detailed review of communications among KPMG, its counsel, the government, and counsel for the defendants, Judge Kaplan found that the government essentially threatened KPMG with capital punishment and is responsible for the pressure KPMG applied to its employees. The government initially argued that the motion was untimely, having been filed after the deadline established by the court, and therefore must be denied. Judge Kaplan responded that the delay was due to excusable neglect and extended the deadline to the date the motion was filed. In addressing the merits of the motion, Judge Kaplan found that 7 of the 9 moving defendants had not presented admissible evidence to make out a *prima facie* case that their statements were in fact coerced, as opposed to being made in the hope of obtaining a cooperation agreement, to negotiate a plea, or to avoid prosecution entirely. However, Judge Kaplan granted the motion and suppressed the statements of those defendants who hesitated to

cooperate and were then threatened by KPMG with termination, as the result of intentional governmental action.

United States v. Stein, et al., --- F.Supp.2d ---, 2006 WL 2556076 (S.D.N.Y.) (September 6, 2006) – Defendants filed suit against KPMG seeking advancement of legal defense costs, and KPMG filed a motion to dismiss for lack of subject matter jurisdiction and on the merits. In particular, KPMG argued that the defendants are obliged, by the terms of their employment contracts, to arbitrate these claims. KPMG further argued that the claims by some of the defendants were foreclosed by the partnership agreement or released.

Judge Kaplan held that the district court had ancillary jurisdiction over the advancement claim. He further held that, assuming the existence of a valid arbitration agreement regarding the claim, the enforcement of any such agreement would violate public policy by compromising the court's ability to ensure a speedy trial, protect the public interest by avoiding possible dismissal of the criminal charges, safeguard the defendants' rights to a fundamentally fair trial, and seek to avoid imposing defense costs on the taxpayers if any of the defendants are required to seek appointed counsel. Finally, Judge Kaplan held that the allegations stated a claim for contract implied in fact and, with the possible exception of one defendant whose claim may be subject to dismissal on summary judgment, the claims would proceed to trial.

United States v. Stein, et al., --- F.Supp.2d ---, 2006 WL 2689682 (S.D.N.Y.) (September 18, 2006) – KPMG filed a jury demand and the defendants moved to strike, arguing that their claims were essentially for specific performance and therefore, equitable in nature. KPMG did not oppose the motion to strike. Judge Kaplan struck the jury demand, noting that the equitable nature of the defendants' claims was not altered by the fact that the defendants sought reimbursement of the funds expended to date.

United States v. Stein, et al., --- F.Supp.2d ---, 2006 WL 2724079 (S.D.N.Y.) (September 25, 2006) – KPMG moved to stay the civil proceedings pending appeal of the court's order denying its motion to dismiss the claims for advancement of legal fees. Judge Kaplan denied the motion to stay, holding that KPMG would not be injured if compelled to participate in pretrial discovery, since it would do so if permitted to arbitrate, and would face minimal injury if required to try to case prior to an appellate decision being entered. On the other hand, the defendants would face irreparable harm if denied a prompt adjudication. Finally, Judge Kaplan expressed his doubt that the Court of Appeals had jurisdiction over this ancillary jurisdiction issue or that KPMG would prevail on the merits. KPMG has appealed this decision to the Second Circuit.

26 U.S.C. § 7201 (intent to evade or defeat tax)

In *United States v. Miller*, 2006 WL 1932715 (N.D.Tex.) (July 10, 2006), Miller was charged with evasion of payment in violation of 26 U.S.C. § 7201, by hiding in foreign bank accounts funds withdrawn from his IRA in 1998 and 1999, and failing to disclose those assets on an Offer in Compromise filed on March 25, 2000. Miller moved to dismiss the indictment, arguing that the affirmative acts alleged are discrete and unrelated, that the first overt act (the removal of retirement funds and deposit of those funds offshore) was beyond the six-year period of limitations, and that the presence of the two affirmative acts in the indictment could result in a non-unanimous verdict. The court disagreed, finding that the indictment charged a single scheme of evasion and that the limitations period does not begin to run until the last act of evasion, which the government alleged was the filing of the Offer in Compromise.

In *United States v. Anderson*, 441 F.Supp.2d 15 (D. D.C. 2006) (July 24, 2006), Anderson was charged with corruptly obstructing, impeding and impairing the administration of the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a), and evasion in violation of 26 U.S.C. § 7201. The indictment alleged that Anderson filed false returns and made false and misleading statements to his accountants about, *inter alia*, deductions and foreign bank accounts.

Anderson moved for a bill of particulars, requesting information as to what false statements were made, what was false about them, the date, time, and place of each false statement or concealment, and the persons involved. The government responded that it had an open file discovery policy, that it had produced voluminous documents that contained the information Anderson sought, and that it would make its summary agent available for an “off-the-record” interview one month before trial.

The court held that, in response to a motion for a bill of particulars, it is insufficient to point to voluminous discovery or an open file policy. Moreover, in a false statement case, it is insufficient for the government to provide only “the substance” of the statements or offer to make a particular witness available prior to trial. While noting that the government is not required to provide the type of specificity required under Rule 9(b) of the Federal Rules of Civil Procedure, the court held that Anderson was entitled to know precisely which statements the government relied on in each paragraph of the indictment at issue, what about these statements made them false and approximately when and to whom the statements were made.

In *United States v. Thomas*, 2006 WL 2225302 (D.Me.) (August 2, 2006), Thomas moved to dismiss count three of an indictment alleging evasion under 26 U.S.C. § 7201, on the grounds that the tax return at issue was filed on April 15, 1999, more than six years prior to the filing of the indictment on January 11, 2006. The district court denied the motion, finding the Thomas’ motion to quash a third party summons during the investigation sufficiently tolled the statute of limitations beyond the filing of the indictment.

In *United States v. Farnsworth*, 456 F.3d 394 (3rd Cir. 2006) (August 8, 2006), Farnsworth was indicted for attempted evasion of the assessment and payment of tax. Prior to trial, and over the government’s objection, the district court stated its intention to instruct the jury that, to establish evasion of *payment*, the government was required to prove the existence of

an assessment. *Id.* at 396. It was undisputed that no assessment had been made. The government appealed, arguing that under 18 U.S.C. § 3731, the Third Circuit had jurisdiction because the court's instruction was tantamount to a dismissal of the attempted evasion of payment charge.

The Third Circuit held that it did not have jurisdiction to consider the appeal. First, the jury instruction “merely announces the District Court's view on a point of law to be covered in the jury instructions, thus advising the parties of a fact which the District Court determined is necessary to sustain a conviction on the attempted evasion of payment theory of tax evasion.” *Id.* at 399. Thus, the instruction does not serve to “dismiss” any part of the indictment or prevent the government from attempting to prove any charge or theory in the case. The Third Circuit also rejected the government's alternative argument under the Double Jeopardy Clause, finding that jeopardy had not attached because “[s]uch a ruling might be reconsidered or modified by the District court before the end of trial, it may be mooted by any number of unanticipated developments at trial, or it might prove harmless, even if erroneously delivered.” *Id.* at 400.

The Third Circuit also denied the government's request to issue a writ of mandamus under 28 U.S.C. § 1651 because the proposed instruction was not clearly erroneous, despite the fact that the weight of authority in other circuits does not require an assessment to prove evasion of payment. Since the Third Circuit had not taken that position, the district court did not commit a clear error of law and a writ of mandamus is inappropriate.

In *United States v. Van Meter*, 2006 WL 2323191 (E.D.Tex.) (August 9, 2006), the defendants were charged with attempting to evade the payment of taxes in violation of 26 U.S.C. § 7201. The government moved to exclude documentary evidence on which the defendants relied in forming their beliefs about the federal income tax laws. The defendants argued that such evidence was relevant to their defense – essentially a lack of willfulness. The court found that it could balance the defendants' rights under the Sixth Amendment, to present their defense to the jury, and the provisions of Rule 403 of the Federal Rules of Evidence, by excluding the documentary evidence, but allowing the defendants to testify about the contents of the documents and the impact the information had in forming their beliefs.

In *United States v. Scotto*, 2006 WL 2494430 (S.D.N.Y.) (August 29, 2006), Scotto was charged with one count of evasion in violation of 26 U.S.C. 7201, and 28 counts of aiding and assisting in the preparation of false payroll tax returns in violation of 26 U.S.C. § 7202. Scotto moved to dismiss the evasion charge, arguing, *inter alia*, that it was barred by limitations.

Scotto owned and operated corporations which failed to pay employment taxes in as the 1980s and through 1990. In 1991 and 1992, the IRS assessed Scotto with the trust fund recovery penalties. The indictment, filed on April 5, 2006, alleges that Scotto engaged in overt acts to evade the payment of taxes through 2002. Scotto argued that since the employment tax at issue was due and payable more than ten years ago, the 6-year period of limitations under § 6531 expired prior to indictment. He further argued that the charge must be dismissed because the 10-year statute of limitations for collecting these taxes has also expired. The court denied the motion, finding that since the indictment alleged evasion through 2002, the charges were timely “even if the taxes at issue were due and payable at a prior time.” *Scotto*, at *2

26 U.S.C. § 7202 (failure to collect, account for and deposit federal employment tax)

In *United States v. Pflum*, 2006 WL 1793623 (D.Kan.) (June 28, 2006), following his conviction for violations of 26 U.S.C. § 7202 and § 7203, and unsuccessful appeal, *United States v. Pflum*, 2004 WL 3037959 (D.Kan.) (December 7, 2004), Pflum moved to vacate his sentence pursuant to 28 U.S.C. § 2255, arguing that he was denied effective assistance of counsel because his attorney failed to timely object to spreadsheets listing his employees, their wages and federal employment taxes, and to testimony of an IRS Special Agent regarding the use of a 28% income tax withholding rate – testimony which defense counsel had elicited. Pflum contends that, had such an objection been made, the jury could have found that there was no way to know how much if any should have been withheld, and therefore found Pflum not guilty.

The district court rejected this argument, noting that the *amount* of tax loss was not an element of the § 7202 offense, and that other employment taxes that Pflum failed to pay (Social Security and Medicare) were not affected by the 28% withholding rate. Finally, with respect to any adverse impact on his ultimate sentence, Pflum failed to show that the challenged testimony would have been inadmissible at a sentencing proceeding to calculate the tax loss. In *United States v. Pflum*, 2006 WL 2506180 (D.Kan.) (August 29, 2006), the district court denied Pflum's request for a certificate of appealability, finding that he failed to make a substantial showing of the denial of a constitutional right.

26 U.S.C. § 7203 (failure to file)

In *United States v. Osbourne*, 2006 WL 1627879 (S.D.N.Y.) (June 12, 2006), Osbourne was charged by information with failing to file his return for tax year 2000, in violation of 26 U.S.C. § 7203. During 2000, Osbourne received gross income of \$29,980, including a \$5,000 payment from an Iraqi Intelligence Service operative, and owed tax of \$6,338. Osbourne is 58 years old and resides with his parents in Tennessee, caring for his mother, who suffers from Alzheimer's Disease and his father. He is single, college-educated, has no criminal history, and has been sporadically employed as an adjunct teacher at a local college. He suffers from depression and has been in treatment with the same doctor since 1983. The court sentenced him to a year of probation and ordered restitution for the tax due.

26 U.S.C. § 7206 (false statement)

In *United States v. Senty-Haugen*, 449 F.3d 862 (8th Cir. 2006) (June 8, 2006), Senty-Haugen, while civilly committed to the Minnesota Sexual Psychopathic Personality Treatment Center and then incarcerated at a Minnesota Department of Correction facility, implemented a sophisticated scheme to defraud the IRS by creating and obtaining federal identification numbers for business that were either completely fictitious or, for tax purposes, shams. He then created fictitious payrolls using social security numbers of deceased individuals, which he obtained on the Internet, as well as of himself and his fellow inmates. Senty-Haugen filed false Forms 941 claiming refunds for monies purportedly advanced to the fictitious employees under the Earned Income Tax Credit (EITC). He also either filed or assisted in filing 29 individual income returns on behalf of 18 alleged employees seeking \$67,000 in refunds, based on false

Forms W2. Before the scheme was uncovered, the IRS paid a total of \$71,610.90 to employees and businesses that filed these false claims.

Senty-Haugen pled guilty to five counts of filing false claims and to conspiring to defraud the United States in violation of 18 U.S.C. § 2, 286 and 287. At sentencing, the court imposed a four-level enhancement for his role as an organizer or leader pursuant to USSG § 3B1.1(a) and ordered mandatory restitution to the IRS pursuant to the Mandatory Victim Restitution Act of 1996 (MVRA) under 18 U.S.C. § 3663A. Senty-Haugen appealed.

The Eighth Circuit affirmed the role enhancement, rejecting Senty-Haugen's argument that he did not exercise the requisite control over the other participants or profit from their activities. The court also affirmed the restitution order, finding that government agencies, including the IRS, qualify as a "victim" for purposes of the MVRA. *Id.* at 865 (citing *United States v. Ekanem*, 383 F.3d 40, 42-44 (2nd Cir. 2004)).

In *United States v. Redmond*, 2006 WL 1974588 (C.A.6 (Tenn.)) (July 13, 2006), Redmond was convicted of fifteen counts of aiding and assisting with the preparation of fraudulent tax returns in violation of 26 U.S.C. § 7206(2) and 18 U.S.C. § 2. At trial, the government called seven of Redmond's clients, each of whom testified regarding examples of false itemized deductions. The tax loss established at trial was \$32,000. The presentence report calculated the total relevant tax loss at \$517,485 and imposed enhancements because Redmond was in the business of preparing tax returns and obstructed justice by creating and having clients submit false receipts in support of their claimed deductions during the IRS investigation. At sentencing, the district court accepted the enhancements, but reduced the tax loss to \$86,299.87, which was based on interviews with actual taxpayers and not simply on a review of returns. Redmond was sentenced to 30 months on each count, to run concurrently.

On appeal, Redmond argued that the district court improperly based his sentence on facts set forth in the presentence report but not proven to a jury or admitted by Redmond. The Sixth Circuit rejected this argument, noting that under the advisory regime, "findings under the guidelines that increase a defendant's sentence are constitutional so long as they are based on reliable information and supported by a preponderance of the evidence." *Id.* at *2.

Redmond also challenged the enhancement for obstruction and the calculation of tax loss. Again, the Sixth Circuit disagreed, noting that Redmond's creation and indirect submission of false documents during the audits of his clients' returns clearly obstructed justice, and the district court's tax loss computations was more than reasonable.

In *United States v. Letizia*, 2006 WL 2237828 (E.D.Wis.) (August 3, 2006), Letizia was indicted for violating 18 U.S.C. § 1956(a)(3)(B) and (C), for selling a Cadillac Escalade with the intent to conceal the source, ownership and control of the property believed to be proceeds of a specified unlawful activity, and for violating 26 U.S.C. § 7206(1) for filing false Forms 8300. Letizia moved to compel disclosure of the government's confidential informant, referenced in transcripts of recorded conversations. The government opposed, arguing that Letizia failed to satisfy his burden of demonstrating that disclosure was required.

The court acknowledged that the government has a limited privilege of withholding the identity of informants, but noted that the privilege was not absolute and may be overcome if the defendant shows that disclosure is either relevant and helpful to his defense or essential to a fair determination of a cause. *Id.* at *1 (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)).

Here, the informant was not a mere witness, but a participant and facilitator of the offense – “the confidential informant’s participation was.... so significant that had he not been working with law enforcement, he may well have been subject to criminal liability as a coconspirator.” *Id.* at *2. The government did not argue that the informant was at risk if his/her identity was disclosed, but that *generally* informants may be at some personal risk since “persons willing to engage in crimes may have the tendency to engage in acts of violence.” *Id.* The court found this general concern insufficient to overcome Letizia’s interest in the information.

Despite the foregoing, the court noted that Letizia had not articulated any basis as to how the informant’s identity was relevant to any defense or why disclosure is necessary, and that it would not allow a fishing expedition. The court ordered Letizia to provide this information and gave the government an opportunity to respond.

26 U.S.C. § 7212 (obstruction)

In *United States v. Biller*, 2006 WL 2431710 (N.D.W.Va.) (July 18, 2006), Biller was charged with filing false returns in violation of 26 U.S.C. § 7206(1), and obstructing and impeding the due administration of the internal revenue laws in violation of 26 U.S.C. § 7212. The affirmative acts supporting the obstruction charge included filing false returns, canceling meetings with the IRS, and sending letters to the IRS asserting classic tax protestor arguments.

Biller moved to suppress evidence provided to the IRS his attorneys, Gianola, Barnum & Wigal, on the grounds of attorney-client privilege. Gianola represented Biller since the early 1980s and introduced him to Binge, an accountant and representative of the Aegis Trust System. Biller claimed that based on Gianola’s advice that business trusts were legal, he became an Aegis client. Gianola was interviewed by the IRS regarding Biller, and when asked if he represented Biller with regard to the trusts, Gianola said “no.” The agents then proceeded to interview Gianola about communications with Biller regarding Aegis.

Based on the evidence presented, the court found that Biller *did* have an attorney client relationship with Gianola with regard to the Aegis trusts, and that Biller had not waived that privilege. However, the court could not say that Gianola did not have an honest, albeit mistaken, belief that he was not Biller’s attorney with respect to the trusts. Because Gianola denied the existence of an attorney client relationship, the court found that the IRS had no reason to believe that his communications with Biller were privileged and thus no suppression was required.

Biller also sought a *Kastigar*-like hearing. See *Kastigar v. United States*, 406 U.S. 441 (1972) (holding that the Government may compel grand jury testimony from witnesses over Fifth Amendment objections if the witnesses receive “use and derivative use immunity”). The court denied this request because the IRS did not compel disclosure by Gianola. Since a *Kastigar* analysis is triggered by the government’s efforts to *compel* a witness to testify over the

witness's claim of privilege, the protections did not apply. See *United States v. Biller*, 2006 WL 2623868 (N.D.W.Va.) (September 13, 2006) (district court adopting recommendations of magistrate judge).

In *United States v. Biller*, 2006 WL 2221695 (N.D.W.Va.) (August 2, 2006), the district court addressed Biller's motion to strike the obstruction count on the grounds that it is multiplicitous, alleges behavior that is not criminal in nature, arises from letters to the Service that are protected under the First Amendment, and alleges "overt acts" that do not imply corrupt or forcible interference. The court held that the obstruction count was not multiplicitous because § 7212 requires proof of facts different than those required to prove violations of § 7206(1), and that although the acts alleged – canceling meetings and raising classic tax protestor arguments – may not be independently illegal, taken together the overt acts could be violate § 7212. In response to Biller's constitutional arguments, the court noted that despite the freedoms provided by the First Amendment, certain "speech brigaded with action" is limited or prohibited, including blackmail, extortion, perjury, criminal solicitation, conspiracy, forgery, public false alarms, etc. *Id.* at *7 (citing *Rice v. The Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997)). The court held that Biller's letters may constitute impeding or obstructing an IRS agent's performance of his or her duties by threats of such assaults and therefore, should not be stricken from the indictment. See also *United States v. Varani*, 435 F.2d 758 (6th Cir. 1970).

In *United States v. Josephberg*, 459 F.3d 350 (2nd Cir. 2006) (July 27, 2006), Josephberg was the subject of a 17-count indictment that alleged, *inter alia*, obstruction in violation of 26 U.S.C. § 7212, and substantive offenses under 26 U.S.C. § 7201, § 7206 and § 7203. Josephberg argued that the obstruction count (Count 16) was multiplicitous in violation of the Double Jeopardy clause of the Fifth Amendment, in that it charged him with obstructing the administration of the Internal Revenue laws by committing the substantive offenses contained in other counts without independent factual allegations. The Second Circuit looked to *Blockburger v. United States*, 284 U.S. 299 (1932), for the proposition 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 court held that, because proof of evasion under § 7201 could establish a violation of § 7212, and because the government presented no additional facts to support obstruction, the obstruction count was multiplicitous and subject to dismissal. *United States v. Josephberg*, 2005 WL 1979164 (S.D.N.Y.) (August 15, 2005).

The government appealed, arguing that Count 16 did not impermissibly overlap any other count, and that even if there were an impermissible overlap, the dismissal prior to trial was premature. The Second Circuit reviewed the Double Jeopardy Clause and its three distinct guarantees: (1) protection against a second prosecution for the same offense after *acquittal*; (2) protection against a second prosecution for the same offense after *conviction*; and (3) protection against multiple punishments for the same offense. 493 F.3d at 355 (citing *Illinois v. Vitale*, 447 U.S. 410, 415 (1980)). The court noted that "where there has been no prior conviction or acquittal, ... simultaneous prosecutions for the same offense are not prohibited, so long as no more than one punishment is imposed." *Id.* In the event Josephberg is convicted on both counts, and the counts are determined to be multiplicitous, his rights will be protected by having the

district court enter judgment on only one of the multiplicitous counts. Thus, the Second Circuit vacated the dismissal and remanded the case.

In *United States v. Richardson*, 2006 WL 2505930 (S.D. Ohio) (August 29, 2006), Richardson was charged with conspiring to commit offenses against or to defraud the United States in violation of 18 U.S.C. § 371 and filing false returns in violation of 26 U.S.C. § 7206, stemming from his use and promotion of domestic and foreign trust schemes marketed by The Aegis Company.

Richardson has been the subject of civil and criminal investigations by the IRS based on his use and promotion of the Aegis trusts. He moved to dismiss the indictment on the grounds that the IRS instituted civil investigations in bad faith, for the purpose of collecting evidence for a criminal prosecution in violation of his Fourth and Fifth Amendment rights. He also argues that evidence seized from his business should be suppressed because the affidavit in support of the warrant did not establish probable cause. Finally, he contends that the trusts are legitimate business organizations, and that he has a First Amendment right to advocate their use.

The civil investigation into Richardson's personal returns began in 1999 when the IRS learned that Richardson was using a trust for tax avoidance purposes. The IRS sent Richardson a notice regarding the trust and gave Richardson the option of filing an amended return or providing the trust documents. Richardson responded that his legal counsel had advised that the trust was operated in compliance with the Internal Revenue Code. This response caused the IRS to initiate a civil examination, including scheduling meetings at which Richardson failed to appear, and issuing summons for documents to third parties. In 2000, the revenue agent closed the civil exam and referred the case to CID, which initiated a criminal investigation.

In 2001, the IRS searched Richardson's office and seized various records. While the criminal investigation proceeded, the IRS continued to audit Richardson's clients' returns and concluded that Richardson was promoting the Aegis trusts. This led to a promoter investigation under 26 U.S.C. § 6700 and § 6701. In 2002, Richardson met with the IRS to oppose the promoter penalties. In 2003, the Department of Justice filed an injunction action against him pursuant to 26 U.S.C. § 7408 to stop him from promoting the Aegis scheme. The agents and attorneys involved in those civil proceedings stated that they had no access to or discussions with CID or DOJ attorneys regarding the criminal investigation.

In 2002, the government seized funds from a company related to Richardson and filed an *in rem* civil forfeiture action. To prevent the return of funds to Richardson, the IRS issued a notice of a jeopardy assessment. Richardson filed a Collection Due Process Appeal and at the hearing, he protested the presence of CID agents and was erroneously told by one of the Special Agents that he was not under investigation by CID. Richardson promptly corrected the agent. That agent later executed an affidavit confirming that at the time of the hearing, she was not assigned to or aware of any criminal investigation of Richardson.

The IRS denied Richardson's appeal of the jeopardy assessment and he appealed that decision to the U.S. Tax Court. *Richardson v. Commissioner*, 2006 T.C.M. 2006-069 (RIA) (upholding the assessment). During these proceedings, Richardson answered interrogatories,

responded to document requests, and testified on his own behalf. Counsel for the IRS in that case asserted that his discovery requests were for the sole purpose of the civil case, and that he prepared those requests without any involvement of or direction from CID, the Criminal Tax Division of the Office of Chief Counsel, or DOJ. Richardson was represented by counsel during these proceedings and did not invoke his rights under the Fifth Amendment.

In addition to the foregoing, in 1998 and 2001, the IRS sent undercover CID agents to speak to and record their conversations with Richardson about the Aegis trust system.

The district court reviewed the distinction between the Criminal Investigation Division and the civil Examination Division of the IRS. It noted that a civil audit must be suspended when a revenue agent finds a firm indication of fraud, and that IRS regulations prohibit an agent from developing a criminal case under the guise of a civil investigation. *Id.* at *7 (citing *United States v. McKee*, 192 F.3d 535, 537-38 (6th Cir. 1999)). As such, if an agent made an affirmative misrepresentation regarding the status of an investigation, any evidence obtained as a result would be subject to suppression. This does not mean the Service is prohibited from conducting parallel civil and criminal investigations. *Id.* at *8 (citing *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978), and *United States v. Daffin*, 653 F.2d 121, 124 (4th Cir. 1981)).

The court found no bad faith on the part of the IRS or the government in any of the civil proceedings, and found that Richardson produced no evidence as a result of a misrepresentation by the IRS. The court noted that the civil summons to third parties had been issued prior to the initiation of the criminal investigations, and that the promoter investigation was developed separate and distinct from the criminal case. The court further noted that the government conducted no discovery in the civil injunction case, the only discovery propounded in the Tax Court proceedings was in support of the jeopardy assessment, and that despite the opportunity to do so, Richardson failed to invoke any Fifth Amendment privilege. As to the undercover recorded conversations, the court stated that the Fifth Amendment does not apply to noncoercive conversations with undercover informants. *Id.* at *9 (citing *United States v. Cope*, 312 F.3d 757, 773 (6th Cir. 2002)).

The court also rejected Richardson's alternative arguments based on the legitimacy of the Aegis trusts. The court held that Richardson's conduct was similar to that of the defendants in *United States v. Smith*, 424 F.3d 992 (9th Cir. 2002), and that since the Ninth Circuit sustained the convictions in *Smith*, there was sufficient probable cause to believe that Richardson was committing tax offenses, and to support the issuance of a search warrant.

26 U.S.C. § 7214

In *United States v. Temple*, 447 F.3d 130 (2nd Cir. 2006) (May 1, 2006), Temple, an eighteen-year IRS employee, was charged with violating 26 U.S.C. § 7214, for threatening to initiate an audit of two New York City Police officers' tax returns while they were arresting her for aggravated harassment, and for violation of 18 U.S.C. § 111, for assaulting and interfering with a person designated in 18 U.S.C. § 1114 (an IRS supervisor) while engaged in and on account of the performance of official duties. At trial, the officers testified that they took Temple's threats to be true and significant enough to pass along to an agent of the Treasury

Inspector General for Tax Administration. Temple was convicted of both counts, and moved for judgment of acquittal. The district court granted Temple's motion with respect to § 7214 on the grounds that she did not in fact have authority to initiate audits of the police officers and was not acting within the scope of the Service's authority when she made those threats. Temple appealed the § 1114 conviction and the government cross-appealed the dismissal of the § 7214 charge.

In a case of first impression, the Second Circuit interpreted "willful oppression under color of law" in the context of a criminal prosecution under § 7214. It noted that "[o]ne who abuses a position given to him or her by the government is said to act under color of law." *Id.* at 138. The court found that Temple made a specific and direct threat under the guise of apparent authority, and that the arresting officers had no reason to doubt that she could carry out these threats. In reinstating the conviction, the court rejected the district court's finding that no rational jury could find that Temple acted under color of law.

Sentencing Issues

In *United States v. Perkins*, 181 Fed.Appx. 765 (11th Cir. 2006) (May 9, 2006), Perkins pled guilty to making false claims in violation of 18 U.S.C. § 287 and aiding and assisting in a false tax return, in violation of 26 U.S.C. § 7206(2). Perkins acknowledged his involvement in preparing 32 fraudulent returns in 1998, 1999, 2000 and 2001. The Guideline range was 41 to 51 months; however, the court sentenced Perkins to the statutory maximum of 60 months and 36 months on each count, to run consecutively, based on Perkins **29** criminal history points. Perkins appealed, arguing that the sentence was unreasonable because it failed to consider the factors under § 3553(a) and to take into consideration that the majority of criminal history points were traffic offenses. The Eleventh Circuit affirmed the sentence, noting that its review for reasonableness is deferential and that the district court had properly explained why the Guideline range was inadequate.

In *United States v. Bond*, 181 Fed.Appx. 357 (4th Cir. 2006) (May 16, 2006), Bond pled guilty without a plea agreement to one count of evasion under 26 U.S.C. § 7201. In sentencing Bond to 15 months, the district court imposed a sophisticated concealment enhancement under USSG § 2T1.1(b)(2) based on Bond's use of "pure trusts" to evade income tax. Specifically, Bond used money from the trusts to purchase vehicles, a restaurant and a Cessna aircraft. Bond also used credit cards in the name of his administrative assistant and titled his house in the name of one of his companies, and then had the company sell it to his brother, who rented it back to Bond. On appeal, Bond argued that he did not conceal his actions, as evidenced by the affidavits of an accountant, his lawyer and his administrative assistant, and that the trusts were not sophisticated because they were mass marketed. The Fourth Circuit rejected Bond's attempt to characterize his actions as simple, routine evasion. Finding that Bond engaged in "deliberate steps ... to make the offense, or its extent, difficult to detect," the court affirmed his sentence.

In *United States v. Toohey*, 448 F.3d 542 (2nd Cir. 2006) (May 17, 2006), Toohey continues his path to a final sentence. By way of background, Toohey pled guilty to one count of making a false statement on his 1994 return in violation of 26 U.S.C. § 7206(1). In the plea agreement, Toohey reserved the right to move for a departure on the ground that his imprisonment would "have an extraordinary impact on his business, and consequently, on its

employees and clients." At sentencing, the district court departed downward six levels, requiring the defendant to serve two years of probation and to pay a \$20,000 fine. As grounds for the departure, the district court rejected the impact on Toohey's business and, instead, referred (though not by name) to another case, in which "another lawyer ... did, in [the Judge's] mind, much crasser work *vis-a-vis* the income tax laws than did [defendant]," and in which the court "did not put [the defendant] in jail." *United States v. Toohey*, 85 Fed.Appx. 263, 2004 WL 75374 (2nd Cir.) (January 15, 2004)

The government appealed. In reversing the departure, the Second Circuit found that the district court failed to articulate its specific reasons for departure and that awarding a departure based merely on a perceived disparity between the Guidelines sentence prescribed in the case at bar and the sentence imposed on one other defendant would create unwarranted disparities among similarly situated defendants throughout the country.

On remand, the district court identified the mystery defendant by name and case number, and then proceeded to impose the same probationary sentence on Toohey. The government appealed. The Second Circuit vacated and remanded again, holding that the trial court failed to provide sufficiently specific reasons for departure and to establish that the sentence "eliminate[d] rather than create[d] an unwarranted disparity in sentencing." *United States v. Toohey*, 132 Fed.Appx. 883, 886, 2005 WL 1220361 (May 23, 2005).

This time, the district court sentenced Toohey to 15 months incarceration. In response to his counsel's argument that the Second Circuit was not *requiring* incarceration, the court stated: "Those first two sentences really go back to a lot of the relationship that you and I had when I was practicing law. You were a great friend, a good guy, and you bent over backwards, and I apologize to the prosecution. I really bent over backwards on your behalf in that regard. That explains those two sentences." 448 F.3d at 544.

On appeal, the Second Circuit remanded – again. It reiterated that it was not requiring incarceration, only consideration of the factors set forth in § 3553(a) in forming a reasonable sentence. It noted that the sentencing judge misunderstood the statutory requirements and sentencing range. It also ordered that the case be reassigned to another judge for resentencing.

In *United States v. Suzuki*, 180 Fed.Appx. 751 (9th Cir. 2006) (May 22, 2006), Suzuki pled guilty to one count of conspiracy to defraud the IRS in violation of 18 U.S.C. § 371, and was sentenced to 36 months. Suzuki appealed, arguing that the court denied him a fair hearing on the calculation of tax loss, and that the government should have been required to prove the amount of loss beyond a reasonable doubt. In affirming the sentence, the Ninth Circuit held that the district court, which considered Suzuki's written objections to the presentence report prior to sentencing, was not required to grant a hearing to allow Suzuki to assert the same arguments orally. The court further held that the standard for calculating tax loss is preponderance of the evidence, not beyond a reasonable doubt.

In *United States v. Brisson*, 448 F.3d 989 (7th Cir. 2006) (June 2, 2006), Brisson used a check kiting scheme to fund a down payment for a hotel, obtained a bank loan for hotel renovations, secured by room receipts, and then diverted the receipts to pay personal expenses,

and failed to pay employment taxes due, arguably to make up the shortfall in the hotel's operating revenue. After the bank foreclosed the loan, Brisson filed tax returns claiming false income tax refunds based on withholdings that were never deposited.

Brisson pled guilty to bank fraud, submitting a false claim for refunds in violation of 18 U.S.C. § 287, and failing to pay over employment taxes in violation of 26 U.S.C. § 7202. The pleas agreement suggested grouping of counts 1 (bank fraud) and 2 (false refund claim), since they both involved financial fraud. Brisson argued that count 3 should also be grouped because all three counts involved economic offenses and stemmed from Brisson's operation of the hotel. The district court disagreed, deciding that the tax offenses under count 2 and 3 (failure to withhold) should be grouped and calculated under USSG § 2T1.1 and § 2T4.1. The court declined to group count 1 (bank fraud) because it involved loss to a separate party and was covered by USSG § 2B1.1. Brisson appealed his 30-month sentences, arguing improper grouping and an unreasonable sentence.

The Seventh Circuit affirmed the sentence, holding that "there is no automatic grouping of counts [under subsection 3D1.2(d)] simply because those counts are on the "are to be grouped" list." *Id.* at 992. The court agreed that count 1 involved a separate fraud and victim, and that the offenses "did not represent substantially the same harm." *Id.* As to the reasonableness of his sentence, the court rejected Brisson's arguments that incarceration for economic offenses do not deter others from engaging in similar deeds, and that the sentence would prevent him from accepting a potential job offer to be a business consultant earning \$200,000. The court stated, "we're not sure what it is about his recent achievements that would make someone want to pay him \$200,000 to impress his wisdom on others. Yet, if that is the case, he can only hope that the opportunity will stay warm while he's on ice." *Id.* at 993.

In *United States v. Ture*, 450 F.3d 352 (8th Cir. 2006) (June 13, 2006), Ture pled guilty to evasion in violation of 26 U.S.C. § 7201. Based on the tax loss of \$240,252, as set forth in the presentence report, the district court calculated the total offense level to be 13, with a range of 12 to 18 months. The court sentenced Ture to 2 years of probation and 300 hours of community service, with no imprisonment. It imposed no fine or restitution, since the IRS would be pursuing collection of tax, penalties and interest due. The government appealed, arguing that the extraordinary variance was not supported by any extraordinary circumstances.

The Eighth Circuit found that the district court failed to give appropriate consideration to the applicable Guideline range, the seriousness of the offense or the need to avoid sentencing disparities. The court noted that Ture's sentence "does not promote respect for federal tax laws, provide just punishment, or ensure adequate deterrence to willful tax cheats." *Id.* at 357. In rejecting the district court's concern that incarceration would hamper Ture's ability to repay the tax due, the Eighth Circuit noted that, "the lesson would be the more you cheat, the more lenient your sentence." *Id.* at 359. The court also found that the factors considered by the district court – including lack of criminal history, remorse, cooperation, age and health – were relevant but not extraordinary enough to warrant a 100% downward departure. Ture's sentence was vacated, and the case was remanded for re-sentencing.

In *United States v. Robledo*, 2006 WL 2128163 (S.D.Tex.) (July 27, 2006), Robledo pled guilty, without a plea agreement, to an indictment charging conspiracy to defraud the United States by claiming false refunds in violation of 18 U.S.C. § 286, and 19 substantive counts of filing or causing to be filed false claims for refunds with the IRS in violation of 18 U.S.C. § 287. The presentence report recommended enhancements for more than minimal planning (USSG § 2F1.1(b)(1)(J)) and owning a tax business and abusing a position of trust (USSG § 3B1.1(a)).

Prior to sentencing Robledo objected to the PSR on the grounds that owning a tax business does not put her in a position of trust, and her clients were not “victims” but in fact “co-conspirators,” since they agreed to report artificially inflated withholdings and to split the improper refunds with Robledo. Robledo’s counsel continued this argument at sentencing, repeatedly asserting that Robledo’s clients were co-conspirators, not victims over whom she held a superior position. In response, counsel for the government pointed out the two level enhancement may be grounded either on abuse of position *or* the use of a special skill, which he argued Robledo clearly used in committing the offense. Alternatively, counsel invited the court to accept Robledo’s argument regarding the co-conspirator theory, and replace the two-level enhancement for abuse of position with a four-level enhancement under USSG § 3B1.1 for the organizer or leader aggravated role adjustment.

As luck would have it, the district court declined the government’s invitation and adopted the findings of the PSR. Not content leaving well enough alone, Robledo appealed, arguing that the § 3B1.1 enhancement should not have been imposed. The Fifth Circuit affirmed.

After her conviction became final, Robledo filed a motion to vacate, set aside or correct her sentence pursuant to 18 U.S.C. § 2255, arguing that her sentence violated *United States v. Booker*, 543 U.S. 220 (2005). The district court denied the motion on the grounds that *Booker* does not apply to cases on collateral review. In doing so, the court joined all of the circuits that have considered the issue.

In *United States v. Pruitt*, 2006 WL 2226540 (C.A.5 (Miss.)) (August 4, 2006), Pruitt was convicted of 17 counts of aiding or assisting in the filing of fraudulent tax returns (26 U.S.C. § 7206(2)). At trial, some, but not all, of Pruitt’s clients testified on behalf of the government. Pruitt appealed, arguing that the evidence was insufficient to support a conviction. Specifically, Pruitt argued that the Confrontation Clause requires the government to call *every* signatory from *every* fraudulently filed tax return. The Fifth Circuit rejected this argument, holding that “the government is not obligated to call additional witnesses to disprove every possible theory of defense.” *United States v. Pruitt*, 119 Fed.Appx. 629, 2004 WL 2988568 (5th Cir.(Miss.)), 95 A.F.T.R.2d 2005-314 (December 28, 2004).

The Supreme Court granted Pruitt’s petition for writ of *certiorari*, vacated the Fifth Circuit’s judgment and remanded for further consideration in light of *Booker*. Following supplemental briefing, the Fifth Circuit reaffirmed the conviction and remanded to the district court for resentencing. *United States v. Pruitt*, 2005 WL 1767755 (5th Cir.(Miss.)), 96 A.F.T.R.2d 2005-5409 (July 27, 2005).

On remand, the district court *increased* Pruitt's sentence to 72 months – higher than the guideline range - based on its belief that the Guidelines did not properly reflect the seriousness of Pruitt's offenses, the need for deterrence and need to protect the public. Pruitt appealed again, arguing that the court's factual findings violated his rights to due process and under the Sixth Amendment, and that the sentence was vindictive. The Fifth Circuit affirmed.

In *United States v. Molesworth*, 2006 WL 2404576 (C.A.9 (Idaho)) (August 18, 2006), after his unsuccessful attempts to dismiss (2005 WL 1660833 (D. Idaho) (July 14, 2005) and 383 F.Supp.2d 1251 (D.Idaho 2005)), Molesworth was convicted of corruptly endeavoring to obstruct the IRS in violation of 26 U.S.C. § 7212(a), and filing false documents with the IRS in violation of 26 U.S.C. 7206(1). On appeal, Molesworth argued, *inter alia*, that the district court impermissibly relied on his inability to pay a fine in imposing the sentence. At sentencing, the court stated: "You obviously do not have the means of paying a high fine, so I am perfectly comfortable with 12 months and one day. I possibly would have felt I would have departed even further if there was some way that you could afford to pay the costs of litigation." Citing *United States v. Chastain*, 84 F.3d 321 (9th Cir. 1996) and *United States v. Estrada de Castillo*, 549 F.2d 583 (9th Cir. 1976), the Ninth Circuit agreed, and vacated and remanded to allow the district court to clarify and, if necessary, adjust the sentence.

In *United States v. Roush*, 2006 WL 2773476 (N.D.Tex.) (Sept. 27, 2006), Roush pled guilty to evasion in violation of 26 U.S.C. § 7201 and was ordered to pay restitution under a specific monthly payment schedule. Prior to the conclusion of the payment schedule, and without any default by Roush, the government sought to garnish bank accounts maintained by Roush's spouse to expedite collection of restitution. Roush moved to quash.

The government argued that the restitution order creates a debt that it may collect through a writ of garnishment at any time. Roush argued that the payment schedule determines what is currently due on the debt, and since no payment is currently due, there is no current debt for the government to collect.

The court agreed with Roush, finding that if the government believed expedited collection was warranted, it could seek a change in the payment schedule based on "changed circumstances" under 18 U.S.C. § 3664(k). To allow garnishment in the face of an established payment schedule, without any evidence of default, would "contravenes Congress's evident intent for the courts to oversee the timing of payment, both in initially establishing the schedule, and in modifying it in response to changed circumstances." *Roush*, at *4.

Miscellaneous

(withdraw of guilty plea) - In *United States v. Sullivan*, 178 Fed.Appx. 1006 (11th Cir. 2006) (June 9, 2006), Sullivan pled guilty to filing false tax returns in violation of 26 U.S.C § 7206(1) and causing false returns to be filed on behalf of others in violation of 18 U.S.C. §§ 2 and 287. Shortly before sentencing, Sullivan moved to withdraw her plea on the grounds that it was not voluntary, in that she pled guilty because she thought that her daughters would be indicted if she did not.

The court denied Sullivan's motion, finding that she failed to establish a "fair and just reason for requesting withdrawal." Fed.R.Crim.P. 11(d)(2)(B). The court noted that Sullivan's statements at the plea hearing that she and her family had not been threatened and that her plea was voluntary, belied her last minute arguments to the contrary. The court attributed Sullivan's change of heart to her review of the presentence report and realization that she could face incarceration. The court also noted that judicial resources would be conserved by denying the motion, and that the government would be prejudiced if the motion was granted, since it would have to "round up witnesses who were difficult to locate."

(suppression) - In *United States v. Srivastava*, 444 F.Supp.2d 385 (D.Md. 2006) (August 4, 2006), a magistrate judge signed search warrants authorizing the search of Srivastava's home and medical offices for "financial, business, patient and other records related to" his "business ... which may constitute evidence of violations of Title 18 U.S.C. §1347," a statute prohibiting health care fraud. The affidavit in support of the warrants alleged that Srivastava billed for services not rendered to patients, billed patients for duplicate services, listed inappropriate codes on patient claims, improperly billed patients for incidental services, and/or altered medical records.

In executing these warrants, the government seized extensive business and personal financial papers. At issue here are faxes found in Srivastava's office directing wire transfers from his accounts with the Bank of India, as well as faxes from a brokerage firm listing stock transactions for 1998 and spreadsheets showing capital gains of approximately \$40 million in 1999, found at Srivastava's residence.

Following the searches, Special Agent Marrero of the Department of Health and Human Services, Office of Inspector General ("HHS-OIG") sent the Bank of India faxes to the U.S. Attorney's Office, which in turn forwarded them to the Supervisory Special Agent ("SSA") at the local IRS office. The IRS determined that the documents indicated a possible FBAR violation and contacted Marrero, who turned over the documents reflecting wire transfers and Srivastava's tax returns, also seized in the search, which showed that Srivastava did not check the appropriate block on the Schedules B to acknowledge the foreign accounts. The IRS initiated an investigation into possible FBAR violations, which led to a formal criminal tax investigation. Srivastava was later charged with evasion and false statements on his tax returns.

Srivastava moved to suppress, alleging that the agents exceeded the scope of the warrant since the seized documents, which the government now seeks to use against him in the tax prosecution, have no nexus to the business records listed in the warrant or to health care fraud. The government argued that the warrant authorized agents to seize financial records that *either* related to the defendant's business *or* constituted evidence of violations of 18 U.S.C. §1347. The court agreed with Srivastava, holding that the agents were not entitled to seize *any* financial record of any kind, but rather could only seize documents that related to Srivastava's business *and* that may show in some way that health care fraud had been committed.

The court noted that the existence of many personal records does not excuse the agents from properly complying with the restrictions and qualifications listed in the warrant. The court also rejected the government's contention that the agents seized the documents at issue because

they reflected possible “proceeds” of the health care offenses. As noted by Srivastava’s counsel, the court found that “concerns for proceeds of Dr. Srivastava’s alleged crimes would involve *money laundering activities*, activities distinct from health care fraud, and evidence of which was not authorized by the warrant here.” The court held that the seizure of the Bank of India faxes was not authorized by the warrant.

The court then considered whether the agents “grossly exceeded” the scope of the warrant, so as to mandate wholesale exclusion of all evidence seized. Based on Marrero’s testimony, the court found that blanket suppression was warranted. Marrero testified that he did not consider himself to be bound by the language of the warrant, noting that the restricting language in the warrant “go by” and that he “didn’t give much thought to what [it] meant.” He further stated that he *intended* to seize all personal financial records and did not intent to limit the records seized to business records.

The court further found that the illegally seized documents were not admissible under any exception to the exclusionary rule, including “inevitable discovery” or “independent source.” The court noted that the “independent source” doctrine required a “critical degree of separation from the tainted source.” Here, there was no such separation, since the entire IRS investigation stemmed from Marrero’s seizure and introduction of the relevant documents to the IRS. Using those documents, the IRS obtained additional records that the government now seeks to admit. Since the taint is continuous, no independent basis for discovery of the evidence exists.

In the end, the court excluded *all* of the documents generated by the IRS investigation. The court stated that, “[t]he exclusionary rule has exacted a mighty toll in this case. ... With great disappointment, and for the reasons discussed above, the Court will, by separate order, grant Dr. Srivastava’s Motion to Suppress.”

(Fifth Amendment) - In *Pansier v. Kocken*, 2006 WL 1388829 (E.D.Wis.) (May 16, 2006), Pansier was indicted for filing false Forms 8300 and sight drafts in violation of 26 U.S.C. § 7212(a). The government moved to direct Pansier to furnish handwriting and printing exemplars, noting that prior grand jury subpoenas to obtain exemplars were ignored by Pansier. The court issued the order and, in response, Pansier refused to comply and filed two separate appeals, which were consolidated and dismissed. When Pansier continued to refuse to comply, the district court ordered him in contempt, placed him in the county jail and imposed a graduated fine pending compliance. Pansier filed for writ of habeas corpus, arguing that the order directing him to provide a handwriting exemplar was unconstitutional in that it forced him to provide an element in the case that the government had to establish prior to an indictment.

The court found that Pansier has no constitutional privilege to refuse to furnish handwriting and printing exemplars because the Fifth Amendment privilege against self-incrimination protects against defendant’s compulsory communication. Since handwriting and printing exemplars are not protected communication, the court’s order was constitutional and incarceration was an appropriate, and apparently the only effective, means of obtaining compliance with the order.

(Fifth Amendment) - In *United States v. Ponds*, 454 F.3d 313 (D.C.Cir. 2006) (July 14, 2006), Ponds, a criminal defense attorney, was the subject of a grand jury investigation for his failure to reveal acquisition of a Mercedes from a client, as payment for fees, when the client was sentenced and asked, in open court, about the whereabouts of the vehicle. The Assistant U.S. Attorney (“the MD AUSA”) assigned to case issued a subpoena *duces tecum* ordering Ponds to produce documents and the vehicle. Ponds expressed his intent to invoke his Fifth Amendment privilege, the MD AUSA revised the subpoena to omit the request for production of the car, and adding that Ponds produce financial and tax records. The MD AUSA also filed a motion pursuant to 18 U.S.C. § 6003 for an order granting act-of-production immunity. The court granted the motion and Ponds appeared before the grand jury produced approximately 300 pages of documents.

The AUSA then filed an *ex parte* application, which had been prepared prior to the production, authorizing the IRS to disclose Ponds’ tax returns. The application was granted and, armed with returns that failed to reflect income revealed in the document production, the AUSA contacted the U.S. Attorney’s Office in the District of Columbia to initiate a criminal tax investigation. Using the information provided by the MD AUSA, the DC AUSA obtained warrants to search Ponds’ home and office. Ponds was later indicted on five counts of evasion in violation of 26 U.S.C. § 7201.

Ponds requested and was granted a *Kastigar* hearing, to determine if the charges were derived directly or indirectly from Ponds’ immunized testimony and production of documents. The district court denied Ponds’ motion to dismiss the indictment and Ponds was convicted on all counts. Ponds appealed, arguing that the documents and grand jury testimony used against him at trial were produced pursuant to a grant of immunity under 18 U.S.C. § 6002 and were sufficiently testimonial in nature to violate his Fifth Amendment right against self-incrimination.

The Fourth Circuit found that Ponds’ act of production was sufficiently testimonial to implicate the Fifth Amendment if the prosecutor needed Ponds’ assistance to identify potential sources of information and to produce those sources. However, if the government can show that it had prior knowledge of the existence and location of the subpoenaed documents, then Ponds’ act of producing the documents would not be testimonial. Because the government admitted to being surprised by some documents produced, demonstrating a lack of prior knowledge of those documents, the court held that those portions of the production were testimonial.

The court next considered whether the documents could be used despite the grant of immunity on the grounds that they were derived from a legitimate independent source or the use was harmless beyond a reasonable doubt, such that the immunized documents were so inconsequential that it did not influence the Government’s actions. *United States v. Nanni*, 59 F.3d 1425, 1443 (2d Cir. 1995). Here, the Fourth Circuit found that the district court was in a better position to determine the nature and extent of any *Kastigar* violation, as it would require a detailed inquiry of each witness and document. Based on the government’s concession that it use the subpoenaed documents to prepare its prosecution of Ponds, the Fourth Circuit reversed the conviction and remanded the case back to the district court to consider the degree of the impermissible use and whether it constituted harmless beyond a reasonable doubt.

(Fifth Amendment) - In *United States v. Carlin*, 2006 WL 2619800 (E.D.Pa.) (Sept. 11, 2006), the government filed a complaint to enforce an IRS summons against Carlin, directing him to “testify . . . and produce for examination all documents and records in his possession or control” Carlin challenged the summons, arguing, *inter alia*, that enforcing the summons would violate his Fifth Amendment privilege against self-incrimination.

The court noted that the privilege against self-incrimination applies “only where a person is compelled to make a testimonial communication that is incriminating,” *quoting Fisher v. United States*, 425 U.S. 391, 408 (1976). The court held that in producing third-party documents in his possession, such as bank statements and receipts for money orders, Carlin is not testifying and therefore the act of production is not privileged. With respect to documents he created, however, Carlin would be testifying by admitting that the documents exist, are in his possession or control and are authentic. *Carlin*, at *3. The government argued that the documents should still be produced because it has not and did not intend to refer the matter to DOJ for prosecution.

The court found that a present intention not to refer a matter to DOJ does not bar the IRS from initiating a criminal investigation at a later date. It also noted that the government had not offered Carlin use immunity for the act of production. Finally, the government argued that, under *Pickel v. United States*, 746 F.2d 176, 184 (3d Cir. 1984), “a taxpayer must produce any and all documents sought by an IRS summons so long as the matter has not been referred to the Justice Department.” *Carlin*, at *4. The court disagreed, noting that *Pickel* had not raised the privilege against self-incrimination as a defense to the summons and therefore, the Third Circuit had not addressed the issue.

(Kastigar hearing) – In *United States v. Lansing*, 2006 WL 2460665 (M.D.Fla.) (August 23, 2006), Lansing entered into a proffer agreement with the government, under which Lansing gave statements and produced documents. He was later charged with conspiring to file fraudulent returns for himself and others in violation of 18 U.S.C. § 286. Lansing moved to dismiss on the grounds that the government improperly used his proffered statements in violation of the “use” immunity granted by the proffer agreement. The court granted the motion, but the government re-indicted, again alleging violation of § 286, as well as failing to file returns in violation of 26 U.S.C. § 7203. Lansing moved to dismiss for the new indictment for violation of the Speedy Trial Act and requested a *Kastigar* hearing.

The magistrate judge conducted an *in camera* review of the Special Agent’s grand jury testimony, and interviewed the agent *in camera*. Although the magistrate judge found no evidence that Lansing’s proffered statements or records produced during the proffer were used as evidence before the grand jury, and that no direct use of this information occurred. However, since the magistrate judge’s interview of the agent was not disclosed, the court agreed to conduct an abbreviated *Kastigar* prior to trial. The court rejected Lansing’s speedy trial contentions because he failed to establish either actual prejudice or a deliberate design by the government to gain a tactical advantage.

(letters rogatory) - In *United States v. Hilsenrath*, 2006 WL 2433174 (N.D.Cal.) (August 21, 2006), and *United States v. Hilsenrath*, 2006 WL 1761380 (N.D.Cal.) (June 27, 2006), Hilsenrath was charged with conspiracy to commit an offense against or defraud the

United States (18 U.S.C. § 371), mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and evasion (26 U.S.C. § 7201). His counsel identified witnesses with information relevant to those charges residing in Israel and France, and moved the court for assistance securing the testimony of those witness in accordance with procedures set forth in the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. In response, the court issued Letters Rogatory to the judicial authorities in Israel and France (which are the citations noted above). These may be helpful to anyone representing a client with similar issues.

(expungement) - In *Lind v. United States*, 2006 WL 2087726 (E.D.Mich.) (July 25, 2006), Lind filed for an expungement of her 2001 conviction for evasion in violation of 26 U.S.C. § 7201, on the grounds that (1) her probation was completed without incident and all fines and restitution had been paid; (2) no prior or subsequent criminal conduct; (3) she subsequently obtained her Bachelors, Masters Degree and social work licensure, and is working toward a Doctorate; (4) she is serving as a Guardian ad Litem and was appointed volunteer ambassador to the National Health Services Corp.; and (5) that, although there is no immediate financial or employment harm due to the conviction, she believed that the conviction will most likely preclude her from obtaining a job as a high school teacher.

The court denied the motion, finding the equitable considerations set forth by Lind were insufficient to establish “compelling and extraordinary circumstances warranting an expunction.” *Id.* at *1. The court agreed with the Ninth Circuit’s reasoning in *United States v. Smith*, 940 F.2d 395 (9th Cir. 1991), that if employment problems were “sufficient to outweigh the government’s interest in maintaining criminal records, expunction would no longer be the narrow, extraordinary exception, but a generally available remedy.” *Id.* at 396.

(motion to intervene) - In *Patridge v. J.K. Harris Company*, 2006 WL 1215189 (C.D.Ill.) (May 5, 2006), Denny and Judy Patridge sued J.K. Harris Company and two of its representatives, Bobbie Mickey and Larry Phillips, alleging breach of contract and fraud. In April 2000, the Patridges hired J.K. Harris to represent them with respect to notices of deficiency issued by the IRS regarding their 1996 and 1997 returns. Mr. Patridge was later charged and convicted of evasion in violation of 26 U.S.C § 7201, wire fraud in violation of 18 U.S.C. § 1343, and money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and § 1956(a)(1)(A)(ii).

In their civil action, the Patridges allege that Phillips falsely testified to a federal grand jury during the criminal investigation. The United States filed a Statement of Interest in the civil action. The Patridges filed an objection, in response to which the United States filed a motion to intervene pursuant to 28 U.S.C. § 517, on the following grounds: (1) protecting witnesses in federal court from civil litigation based on allegations of false testimony; (2) protecting federal witnesses from harassment through frivolous civil litigation; and (3) preventing misuse of civil litigation as pretext to gather information to challenge a criminal conviction.

Based on Federal Rule of Civil Procedure 24(a) and 28 U.S.C. § 517, the court denied the government’s motion, finding that it failed to satisfy the procedural requirement of a pleading attached to the motion setting forth the claim or defense for which intervention is sought. Moreover, reviewing the government’s interests, as articulated in its motion, the court found that the government did not state a claim or defense. The court finally noted that if the government

opted to resubmit its motion, after satisfying the procedural requirements, it would have to establish Article III standing to intervene as a party.

(estoppel/civil fraud penalty) - In *McGowan v. Commissioner*, 2006 WL 1761127 (C.A.11) (June 28, 2006), the U.S. Tax Court addressed whether a prior conviction under 26 U.S.C. § 7206, in and of itself, was sufficient to establish a taxpayer's intent to evade for purposes of the civil tax fraud penalty under 26 U.S.C. § 6663. Following his conviction for willfully making and subscribing false individual income tax returns and willfully aiding and assisting in the preparation of false corporate income tax returns, the Service issued McGowan a notice of deficiency and asserted civil fraud penalties. At trial, McGowan claimed that the underpayments were due to confusion between him and his accountant. Rather than respond to this assertion, the Service simply rested on McGowan's conviction. The Tax Court held that while McGowan was estopped from disputing that he filed false returns and under-reported his taxes, other badges of fraud were not present, and the Service failed to meet its burden of proving McGowan's intent to evade by clear and convincing evidence. This holding was affirmed by the Eleventh Circuit.