TAX CRIMES

SUPPLEMENT TO 2008 EDITION
AS FEBRUARY 7, 2011

JOHN A. TOWNSEND, ESQ.
Townsend & Jones, LLP
Houston, TX
Adjunct Professor of Law
University of Houston School of Law

LARRY A. CAMPAGNA, ESQ.
Chamberlain, Hrdlicka, White, Williams & Martin
Houston, TX
Adjunct Professor of Law, University of Houston School of Law

STEVE JOHNSON
E.L. Wiegand Professor of Tax Law
William S. Boyd School of Law
University of Nevada, Las Vegas

SCOTT A. SCHUMACHER
Associate Professor of Law
University of Washington School of Law

PURPOSE AND USE

This supplement is unofficially published by John A. Townsend (jack@tjtaxlaw.com) and Scott Schumacher (sschum@u.washington.edu) in order to provide significant developments since the publication of the 2008 edition. This supplement may be used by users of the original edition. Jack and Scott would appreciate feedback from users as to errors and omissions. Feedback may be given by email at the email addresses indicated.

TABLE OF CONTENTS

PURPOSE AND USE. . . . . **-i-**

TABLE OF CONTENTS. . . . . **-ii-**

Chapter 1 OVERVIEW OF THE CRIMINAL TAX SYSTEM. . . . . **-1-**

Chapter 2A CRIMES UNDER THE INTERNAL REVENUE CODE—TAX EVASION. **-4-**

Chapter 2B CRIMES UNDER THE INTERNAL REVENUE CODE—OTHER OFFENSES . . . . **-7-**

Chapter 3 RELATED CRIMES OUTSIDE THE INTERNAL REVENUE CODE. . . . . . . **-9-**

Chapter 4 MODES OF PROOF. . . . . **-17-**

Chapter 5 PROSECUTION POLICIES AND AFFIRMATIVE DEFENSES. . . . . **-19-**

Chapter 6 INVESTIGATION AND DEVELOPMENT OF CRIMINAL TAX CASES.. **-25-**

Chapter 7 GOVERNMENT INFORMATION GATHERING. . . . . **-26-**

Chapter 8 PRE-TRIAL ISSUES IN CRIMINAL TAX CASES. . . . . **-32-**

Chapter 9 TRIAL AND POST TRIAL. . . . . **-33-**

Chapter 10 SENTENCING IN TAX CASES. . . . . **-34-**

Chapter 11 ETHICAL ISSUES IN CRIMINAL TAX PRACTICE. . . . . **-39-**

Chapter 12 MAJOR COLLATERAL ISSUES.. . . . . **-40-**

Chapter 13 CIVIL TAX CONSIDERATIONS.. . . . . **-41-**

Chapter 14 PUTTING IT ALL TOGETHER.. . . . . **-42-**

Chapter 1
OVERVIEW OF THE CRIMINAL TAX SYSTEM

P. 3. In the second section of III.A. in the second full paragraph of that section, put a footnote after Criminal Tax Manual ("CTM") as follows:

> [n7a.] We cite the CTM at several points in the book. The CTM is an indispensable tool to understanding the criminal tax enforcement priorities. The current version of the CTM is 2008 (with some revisions to the 2008 version in 2009 and, probably 2010). The citations in the original book are to the 2001 CTM, and unless it is noted otherwise, the paragraph citations are to the 2001 version. Unfortunately, some of the 2008 version has paragraphs re-arranged. Where we cite the CTM in this Supplement, we cite to the 2008 version unless specifically noted.

In addition, for good statistical analyses of the IRS Criminal Investigation Function, see the periodic TIGTA Reports, the most recent of which is titled "Trends in the Criminal Investigation Division's Enforcement Activities Showed Improvements; However Some Goals Were Not Attained," dated July 1, 2010 (Reference Number 2010-30-074).

P. 6. Immediately after the Bryan case quote (carryover paragraph on p. 6), put the following before the paragraph beginning "We will revisit"):

> We focus you back on the Bryan statement: "In certain cases involving willful violations of the tax laws, we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." Do not read Bryan's words literally, for, from our experience, it is rare the tax cheat who really knows the Code provisions that well, but, in order to be convicted, he or she must know the law. [n22a]
>
> [n22a..] See United States v. Mousavi, 604 F.3d 1084, 1092 (9th Cir. 2010).

P. 14. Substitute the following for the table in the current edition:

	FY 2010	FY 2009	FY 2008
Investigations Initiated	4,706	4,121	3,749
Prosecution Recommendations	3,034	2,570	2,785
Information / Indictments	2,645	2,335	2,547
Total Convictions	2,184	2,105	2,144
Total Sentenced*	2,172	2,229	1,957
Percent to Prison	81.5%	81.2%	80.9%

*Sentence includes confinement to federal prison, halfway house, home detention, or some combination thereof.

P. 14 Insert the following after the paragraph beginning "Some notes about the statistics:"

The Government's conviction rate is quite high. Considering only those resulting from an IRS criminal investigation in the table above, it appears that the conviction rate is from 82% to 90% (Convictions divided by Information / Indictments). However, DOJ Tax prosecutes more tax and tax related crimes than those referred by the IRS Criminal Investigation, and as recently as 2007, DOJ Tax claimed a conviction rate on the whole subset at 97%. [n41a] We are skeptical as to that percentage, but no one can contest that the conviction rate is quite high.

[n41a.] DOJ Tax's statistics were presented in a report titled: Eileen J. O'Connor, Assistant Attorney General, Statement to the Senate Finance Committee, titled Filing Your Taxes: an Ounce of Prevention Is Worth a Pound of Cure (4/12/07).

Assuming arguendo a conviction rate of 97% and the year for that statistic is representative (of other years), that appears to be – and certainly is – a whopping conviction rate. But, we might extend those statistics working from the known to the unknown and make some interesting speculations. Let's say that tax crimes fit the general federal crimes pattern where 95% of the cases plead. Based on this assumption, only 5% of the tax indictments are tried. Then, assuming a 97% conviction rate, it would appear that only 2 of 5 that go to trial end in conviction. In other words, for those cases going to trial the defendant has an implied success rate of 60%. And what that might further imply is that for at least some of the 95% pleading (say the 10% portion that are the weakest cases among the 95% convicted

data set), the defendants might have been better off had they gone to trial. In this regard, as we shall develop in this class, the Government at the plea bargaining stage will generally offer a great "deal" as compared to a worst case basis, thereby tending to obscure the assessment of the real risk of going to trial. In other words, if all tax cases went to trial, we would suspect that the conviction rate would be materially worse than 97%. But this is just our speculation based on our anecdotal experience.

Chapter 2A
CRIMES UNDER THE INTERNAL REVENUE CODE—TAX EVASION

P. 35. Insert the following at the close of the carryover section (immediately before B on p. 36):

One of the problems with asserting the so-called Cheek good faith "defense" at trial is that, as one court recently commented, the defendant will have to testify to put the good faith defense in play.[n18a] Actually, for clarity, the good faith issue is not a defense at all, but the evidence at trial does have to put the issue in play in order to obtain a Cheek inspired instruction placing the burden of proof on the Government to disprove good faith. While it is hard to imagine a credible assertion of the defense where the defendant did not testify, we are not sure that asserting the defense would require the defendant to testify in every conceivable case. If there is other evidence from which a reasonable jury could conclude that the defendant acted in good faith, the issue should be in play, the defendant should get the Cheek good faith instruction, and the Government must then prove lack of good faith.

[n18a..] United States v. Kokenis, 2010 U.S. Dist. LEXIS 107884 (ND IL 2010).

P. 36. Immediately before the last sentence in the paragraph under C:

This concept is variously referred to as conscious avoidance, willful blindness, willful ignorance, deliberate ignorance, or some variation thereof. DOJ CTM 8.08.[4] (2008).

P. 36. DOJ CTM quote beginning on this page. The current DOJ CTM (2008 ed.) is worded differently (and better), but not materially better enough to justify changing it here. DOJ CTM 8.08.[4] (2008).

P. 38. Add to footnote 26.

The Second Circuit requires that "a conscious avoidance charge must communicate two points: (1) that a jury may infer knowledge of the existence of a particular fact if the defendant is aware of a high probability of its existence, (2) unless the defendant actually believes that it does not exist." United States v. Kaiser, 609 F.3d 556, 566 (2d Cir. 2010) (quoting and citing other Second Circuit cases (quotations and citations omitted).) To reinforce its insistence on these charges, the Second Circuit ordered that its statement of these requirements be circulated to all Assistant United States Attorneys engaged in criminal prosecutions in the Circuit.

P. 38. Insert immediately before "D. Willfulness - Reliance on Professional.

Finally, Judge Posner in United States v. Giovanetti, 919 F.2d 1223, 1228-1229 (7th Cir. 1990) delivered a pungent discussion of the dangers inherent in the deliberate ignorance instruction as follows.

The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent. The criticism can be deflected by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely careless birds. They bury their heads in the sand so that they will not see or hear bad things. [26a] They deliberately avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. A deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires. "To know, and to want not to know because one suspects, may be, if not the same state of mind, the same degree of fault." A good example of a case in which the ostrich instruction was properly given is United States v. Diaz, 864 F.2d 544, 550 (7th Cir. 1988). The defendant, a drug trafficker, sought "to insulate himself from the actual drug transaction so that he could deny knowledge of it," which he did sometimes by absenting himself from the scene of the actual delivery and sometimes by pretending to be fussing under the hood of his car.

[26a.] [Authors' footnote] In United States v. Black, 530 F.3d 596, 604 (7th Cir. 2009), vacated and remanded ___ U.S. ___ 130 S. Ct. 2963 (U.S. 2010), Judge Posner later came to the defense of the ostrich as follows:

The reference of course is to the legend that ostriches when frightened bury their head in the sand. It is pure legend and a canard on a very distinguished bird. Zoological Society of San Diego, Birds:Ostrich, www.sandiegozoo.org/animalbytes/t-ostrich.html (visited June 12, 2008) ("When an ostrich senses danger and cannot run away, it flops to the ground and remains still, with its head and neck flat on the ground in front of it. Because the head and neck are lightly colored, they blend in with the color of the soil. From a distance, it just looks like the ostrich has buried its head in the sand, because only the body is visible"). It is too late, however, to correct this injustice.

The critical question so far as Janis's guilt or innocence was concerned is simple (to pose, not necessarily to answer): what did Janis know? Did he know that he was renting his house for use as a wire-room, or did he believe that he was renting his house to the Orlando crew for some private purpose of theirs unconnected with gambling? (Even criminals have private lives.) The ostrich instruction did not advance this inquiry; it confused it, by pointing the jury to circumstances of deliberate avoidance of knowledge that did not exist. As we said in United States v. Bigelow, 914 F.2d 966, 971 (7th Cir. 1990), when the facts require the jury to make a "binary

choice" between "actual knowledge" and "complete innocence," the ostrich instruction should not be given.

The true intermediate case between a clearly proper giving of the ostrich instruction because the defendant did physical acts to insulate himself from knowledge, as in Diaz, and the clearly improper giving of the instruction because the only issue is the defendant's actual knowledge or complete ignorance, is the case of purely psychological avoidance. Josefik was such a case. "It is inconceivable that Josefik did not believe that the scotch was stolen, and in context all the challenged instruction [the ostrich instruction] meant is that he could not get off the hook simply by resolutely refusing to find out for sure whether it was stolen." In other words, the deliberate effort to avoid guilty knowledge that we said is all the guilty knowledge the law requires can be a mental, as well as a physical, effort -- a cutting off of one's normal curiosity by an effort of will. There is no evidence of either sort of effort here.

P. 38. Insert as final paragraph:

Finally, even if the return preparer on the information given by the taxpayer arguably should have smoked out the problem, the return preparer's negligence is still no defense if the Government can otherwise prove the taxpayer's intentional violation of a known legal duty. In a recent case,[n28a] the defendant sought to introduce expert testimony that the return preparer knew or should have known of the omission of income, but the trial judge sustained the Government's objection to the evidence. The First Circuit held that, even if the return preparer's conduct were negligent, the mere failure to discover and properly treat the undisclosed income would not be a defense in a case where the evidence showed beyond a reasonable doubt that the taxpayer willfully omitted the income. The First Circuit did acknowledge that, in cases where the preparer's neglect could be relevant (presumably where the evidence is not overwhelming as to the taxpayer's intent), such expert evidence might be admissible at trial. So, for a defendant asserting on a reliance on professional defense, the taxpayer should focus on this case as a roadmap for convincing the trial judge at the trial to admit the evidence as reasonably bearing on defendant's reliance.

[n28a.] United States v. Pierre, 599 F.3d 19 (1st Cir. 2010).

Chapter 2B
CRIMES UNDER THE INTERNAL REVENUE CODE—OTHER OFFENSES

P. 65. Last flush paragraph (beginning "The elements"). The crime is "aiding and assisting" rather than "aiding and abetting" which is a separate crime under Title 18. You might annotate your text accordingly.

P. 67. IV.A. at end of first full paragraph put the following footnote:

> [n36a.] For the history and interpretation of § 7212(a) see John A. Townsend, Is Making the IRS's Job Harder Enough?, 9 Hous. & Bus. Tax L.J. 260 (2009).

P. 68. Insert as new paragraph at end of B section:

> Certainly acting with an intent to obtain something unlawfully meets mens rea notions that permeate our criminal laws. If the actor intends something that he or she knows is unlawful, something like willfulness – the common element for other tax crimes – is required. But, the Government's claims for § 7212 and some courts' language in discussing § 7212 at least suggest that § 7212 criminalizes any conduct that simply makes the IRS's job harder. The Government made that claim in United States v. Caldwell, 989 F.2d 1056, 1058 (9th Cir. 1993) for the scope of the Klein conspiracy which, as interpreted, covers the same conduct as § 7212 except for the Klein conspiracy's requirement of multiple actors with a joint undertaking.[n41a] In Caldwell, Judge Kozinski rejected the claim in the Klein conspiracy setting, and we think it should be rejected for § 7212 also. The mechanism that limits § 7212 is the "corruptly" element. There are myriads of actions that taxpayers and their representatives do every day with the intent to influence an investigation by making the IRS's job harder. "Corruptly" means something far worse than merely intentional conduct. The precise contours of the dividing line may necessarily be uncertain, but as in Caldwell it can be recognized in context in a case, and the Government's expansive claims can be reigned in.[n41b]
>
> [n41a.] This is a paraphrase of the Judge Kozinski's formulation of the claim for the Klein conspiracy, which as noted above in the text is analogous in its interpretation to § 7212. United States v. Caldwell, 989 F.2d 1056, 1058 (9th Cir. 1993).
>
> [n41b] See John A. Townsend, Is Making the IRS's Job Harder Enough?, 9 Hous. & Bus. Tax L.J. 260 (2009). In United States v. Doss, ___ F.3d ___, 2011 U.S. App. LEXIS 708 (9th Cir. 2011) interpreted the parallel requirement in one of the general obstruction provisions, § 1512(b), that defendant "corruptly persuade" with intent to affect certain acts, including withholding testimony. Focusing on the "corruptly persuade" requirement, the Court said that merely persuading someone to withhold testimony is not enough, the act of persuading must be corrupt and corrupt really means something wrongful. The Doss court relied significantly on the Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), which was decided after other cases which would have virtually conflated the corrupt and persuade requirements, leaving only a requirement that the defendant act intentionally. Doss and Andersen hold that corruptly means something different than merely intentional. We think a similar analysis can apply to the tax obstruction requirement that the taxpayer "corruptly endeavor."

P. 79. Add the following paragraph to the text at the end of the page.

We noted above that Section 7215 was enacted because it was often difficult to obtain a felony conviction when the withholding agent was trying to keep the business afloat and did not have available funds when it came time to pay over. That was a notion which had some currency earlier, but the courts seem to be retreating from that notion, perhaps because it would gut the significant criminal sanction and the words of the statute do not compel that escape.[n69a]

[n69a.] In United States v. Poll, 521 F.2d 329, 330-332 (9th Circuit 1975), the Ninth Circuit held that a taxpayer could introduce evidence that "that the corporation lacked the liquid resources to pay the full amounts due and that he intended to make up the deficiencies later;" as being relevant to the taxpayer's willfulness. However, the Ninth Circuit recently held that Poll had in effect been overruled by intervening Supreme Court authority. United States v. Easterday, 539 F.3d 1175 (9th Cir. 2008). For an argument that is some vestige of the inability to pay defense remaining after Easterday and the authorities it relies upon, see Steve R. Johnson, Easterday and the "Inability to Pay" Defense for Tax Crimes, 124 Tax Notes 787 (Aug. 24, 2009).

Chapter 3
RELATED CRIMES OUTSIDE THE INTERNAL REVENUE CODE

P. 98. Substitute the following for footnote 7:

n7. The classic dissertation on the Klein conspiracy is Abraham S. Goldstein, Conspiracy to Defraud the United States, 68 YALE L.J. 405 (1959). A lesser but more current effort is at John A. Townsend, Is Making the IRS's Job Harder Enough?, 9 Hous. & Bus. Tax L.J. 260 (2009).

P. 99. Add the following to fn 15:

The text states the majority formulation of the rule. Some courts have, however, found the use of the word "slight" as a possible impairment of the requirement that the Government prove a criminal case beyond a reasonable doubt. The context raising these concerns is an alleged co-conspirator's relationship to the conspiracy alleged. The "slight connection" rule and a related "slight evidence" rule could at least facially suggest something lesser than beyond a reasonable doubt. As Judge Easterbrook of the Seventh Circuit has noted:

> "Conspiracy" is a net in which prosecutors catch many little fish. We should not go out of our way to tighten the mesh. Prosecutors have many legitimate advantages in the criminal process. Defendants' great counterweight is the requirement that the prosecution establish guilt beyond a reasonable doubt. [The slight evidence rule] reduces the power of that requirement.

United States v. Martinez de Ortiz, 883 F.2d 515, 524-25 (7th Cir. 1989) (Easterbrook, concurring) (citations omitted). The Seventh Circuit has reformulated the connection required as a "participatory link" proven by substantial evidence. See United States v. Sasson, 62 F.3d 874, 886 (7th Cir. 1995) ("substantial evidence should be the test rather than slight evidence or slight connection").

P. 115. Include at the end of fn. 85:

There is, of course, a relationship between perjury and false statements in terms of punishing the falsehood. In the perjury context, Bronston v. United States, 409 U.S. 352 (1973) is often cited for the proposition that literal truth is a defense to a perjury charge. Whether or not that is precisely Bronston's holding – or the holding is more nuanced – is beyond the scope of this footnote. The question addressed here is the relevance of Bronston – whatever it's holding – to the crime of false statements, the key difference between them being whether the statement is made under oath in a proceeding or not. The cases that brush up against this issue usually – but not always – treat Bronston as setting the standard for a false statements charge. E.g., United States v. Good, 326 F.2d 589, 592 (4th Cir. 2003). In any event, we think it unlikely that a real world case where a false statement would be prosecuted under§ 1001 where, had it been in a sworn testimony setting, perjury would not.

P. 116. Insert the following paragraph immediately before "C. The "Exculpatory No" Doctrine.":

But, the fourth element raises the issue which recurs in tax and financial crimes as to precisely what "knowingly and willfully" means. As we noted earlier in the text, willfully is a word of many nuances. Certainly, in a tax crimes context, willfully means at a minimum knowing that the conduct is illegal. So, the question is which nuance applies to § 1001? Does the speaker commit the crime by making a knowingly false statement to a federal agent or must the speaker also know that making a knowingly false statement to a federal agent is a crime? The CTM says cryptically on this issue: "As used in Section 1001, the term "willful" simply means that the defendant did the forbidden act (e.g., made a false, fictitious, or fraudulent statement) deliberately and with knowledge." [n94a] With knowledge of what – the

falsity or the falsity and its criminality? We think the CTM fairly read intends the former rather than the latter.

[n94a.] CTM 24.08 (2008).

In a recent case, [n94b] Judge Kavanaugh in a concurring opinion focused on this issue although siding with the majority because the defendant had not properly raised the issue at trial. The facts, highly summarized, are that, incident to a drug investigation, the USPS intercepted a drug package addressed to "Karen White" and then, after substituting white powder for the drug, had a USPS employee deliver it to the address. At the address, the USPS employee delivered the package to the defendant, a male, upon his representation that he was Karen White's boyfriend and upon his signing the receipt with a false name. The defendant was thereafter first charged with drug crimes and the jury hung. He was tried a second time for the same charges but with a false statement charge added for his conduct in accepting the package. On the second trial, the jury hung again on the drug charges but convicted on the false statement charge. On appeal, Moore urged that the falsity was not "materially false" (another element in Section 1001). The panel unanimously and handily rejected that argument. Speaking to the substantive issue of whether "knowingly and willfully" requires knowledge of criminality, Judge Kavanagh echoed the concerns of Judge Kozinski of the Ninth Circuit in dealing with the somewhat amorphous crime of the defraud conspiracy (the Klein conspiracy in tax context) and that is not surprising because, as Judge Kavanaugh cites, Judge Kozinski has addressed this concern in the context of 18 USC § 1001. I quote: [n94c]

[n94b.] CTM 24.08 (2008).

[n94c.] Pp. 703 - 704. Parallel citations omitted. [Note to Students the following is part of the text and not the footnote.]

> Proper application of statutory mens rea requirements and background mens rea principles can mitigate the risk of abuse and unfair lack of notice in prosecutions under § 1001 and other regulatory statutes. In § 1001 cases, that means proof that the defendant knew that making the false statement would be a crime. To be sure, "ignorance of law is no defense" is a hoary maxim. But it does not automatically apply to today's phalanx of federal regulatory crimes. See WAYNE R. LAFAVE, CRIMINAL LAW § 5.6, at 298-311 (5th ed.2010). For some regulatory offenses -- particularly statutes like § 1001 that proscribe only "willful" conduct -- the Supreme Court has recognized an ignorance-of-law or mistake-of-law defense, or has required affirmative proof of the defendant's knowledge that his or her conduct was unlawful. See Bryan v. United States, 524 U.S. 184 (1998); Ratzlaf v. United States, 510 U.S. 135, 141-49 (1994); Cheek v. United States, 498 U.S. 192, 199-201

(1991); Lambert v. California, 355 U.S. 225, 229-30 (1957); cf. Liparota v. United States, 471 U.S. 419 (1985); Dan M. Kahan, Ignorance of Law Is an Excuse -- But Only for the Virtuous, 96 MICH. L. REV. 127, 150 (1997) (noting that"courts permit mistake of law as a defense [] selectively across malum prohibitum crimes"). For criminal statutes prohibiting "willful" violators, those cases together require proof that the defendant was aware that the conduct was unlawful.

In Bryan, the Supreme Court summarized the rule quite clearly: "[I]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." 524 U.S. at 191-92 (internal quotation marks omitted). Since Bryan, the Court has reiterated this formulation on several occasions. See also Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 57 n.9 (2007) ("we have consistently held that a defendant cannot harbor such criminal intent unless he acted with knowledge that his conduct was unlawful") (internal quotation marks omitted); Dixon v. United States, 548 U.S. 1, 5 (2006) (the term"willfully" "requires a defendant to have acted with knowledge that his conduct was unlawful") (internal quotation marks omitted).*

n* To say that the Government must prove the defendant knew the conduct was a crime is not necessarily to say that the Government must prove the defendant knew the specific code provision proscribing the conduct, except with respect to certain highly technical statutes. See Bryan, 524 U.S. at 194; cf. Ratzlaf, 510 U.S. at 141 (anti-structuring statute); Cheek, 498 U.S. at 200 (tax statute).

It is true that our Court many years ago seemed to assume (in addressing a mens rea issue under a different statute) that proving the defendant's knowledge of the law may not be required in § 1001 cases. See United States v. Hsia, 176 F.3d 517, 522 n.3 (D.C. Cir. 1999). In so doing, Hsia referenced a 1994 Third Circuit opinion that pre-dated the Supreme Court's clarifying decisions in Bryan and later cases. That assumption may not endure in light of those subsequent Supreme Court precedents. In a future case, we therefore may need to consider the appropriate mens rea requirements and defenses for § 1001 prosecutions under those Supreme Court decisions.

Here, however, there is no legal obstacle to our affirming Moore's § 1001 conviction: Moore did not contend that the term "willfully" in § 1001 requires proof of the defendant's knowledge of the law, and he did not challenge the jury instructions on that basis. But in a case where the issue is raised, the Supreme Court's

> precedents arguably require district courts in § 1001 cases to give a willfulness instruction that requires proof that the defendant knew his conduct was a crime. To be sure, in many false statements cases the Government will be able to easily prove that the defendant knew his conduct was unlawful. But in some cases, it will not be able to do so -- and those of course are precisely the cases where it would seem inappropriate and contrary to § 1001's statutory text to impose criminal punishment.

Notice that Judge Kavanaugh repeats in the footnote the notion that Bryan somehow requires proof that the defendant knew of the specific Code provision he or she intended to violate. Setting that aside, it is clear that Cheek requires the element that the defendant knew the conduct was illegal and intended to do the illegal act. That is the point to which Judge Kavanaugh focuses his fire.

Finally, just for some broader perspective, we ask that you review again the footnote in Judge Kavanagh's concurring opinion (marked *n), where he repeats Bryan's statement about knowledge of the particular Code section. Readers might review again, the discussion of this issue on page 1, above.

P. 117. Strike the 4 elements in B.1. and substitute the following:

1. The person must conduct or attempt to conduct a financial transaction. Financial transaction is defined quite broadly, but easily picks up the usual suspects (banking transactions).

2. The person must conduct the financial transaction with knowledge that the proceeds of unlawful activity is involved. The knowledge must simply be that unlawful activity is involved; that knowledge need not be that "specified unlawful activity" (of "SUA," a term discussed below) is involved. The term "proceeds" includes the gross revenue from a business enterprise – e.g., drug dealing.[n96] Furthermore, in a controversial decision, the Third Circuit held with respect to Virgin Islands tax: "[u]npaid taxes, which are unlawfully disguised and retained by means of the filing of false tax returns through the U.S. mail, constitute 'proceeds' of mail fraud for purposes of supporting a charge of federal money laundering." [n96a] In so holding, the Third Circuit rejected the defendant's argument that the mailing of false tax returns (the predicate SUA) did not produce "proceeds" from that illegal act; it simply resulted in the defendants not turning over money in payment of the taxes they allegedly under-reported. Does this mean, by extension, that every false federal tax return and resulting underpayment could be a money laundering crime?

[n96.] The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 386, 123 Stat. 1617 (2009), changed prospectively the holding in United States v. Santos, 553 U.S. 507 (2008) that the term "proceeds" referred to the net profit rather than gross proceeds.

[n96a.] United States v. Yusuf, 536 F.3d 178, 180 (3d Cir. 2008), cert. denied 549 U.S. 1338 (2007).

3. The financial transaction must in fact involve the proceeds of specified unlawful activity ("SUA"). SUA is defined broadly to include the crimes that Congress thought particularly involved in organized crime, drug dealing and other national criminal enforcement priorities. These include (a sampling for flavor): drug dealing, murder, kidnaping, extortion, and destruction of property by explosive or fire. A host of other crimes are included within the sweeping definition of SUA. However, tax crimes are not among SUA. So, if all we are talking about is a tax crime and no other crime that falls within the term SUA, we need not be concerned about transaction money laundering. Although tax crimes are not SUA, the steps in pursuing tax crimes almost invariably include some aspect of mail or wire fraud, which is an SUA. While it is DOJ policy generally not to charge mail or wire fraud where a tax specific crime can be charged and vindicates prosecution policies, the policy allows the possibility of mail or wire fraud, either as a separate charged crime, or as a predicate SUA in a money laundering offense.

4. The person must intend to (I) promote an SUA, or (ii) engage in conduct violating 26 U.S.C. § 7201 or § 7206.

5. The person must know that the transaction is designed (I) to conceal the location, nature, etc. of the proceeds of the SUA or (ii) avoid a transaction reporting requirement under state or federal law.

P. 118. Delete the fourth full paragraph on the page (paragraph beginning, "Finally, to establish").

P. 122. Just after the first full paragraph on the page, insert the following:

D. Special Note on DOJ / IRS Initiative Offshore Financial Accounts, FBARs. [n118a]

[n118a.] This section of the supplement is very general and makes no attempt to deal with the nuances of the program. For further reading on the program, we direct readers to Jack Townsend's Federal Tax Crimes Blog. We note specifically that, among the links at the right, is one to a spreadsheet that Jack has prepared for the indictments and prosecutions related to foreign bank accounts.

We noted above the civil reporting requirements for foreign financial accounts and the civil and criminal penalties backing up those reporting requirements. The major IRS compliance initiative – at least in terms of publicity – that has occurred since the original edition has been the IRS compliance program with respect to foreign financial accounts where U.S. depositors hid assets – taxed

and untaxed assets and legal and illegal source assets. At a minimum, those U.S. depositors intent on skirting their U.S. tax obligations could have the assets grow tax-free – or at least unreported. Everyone has known for many years that Swiss banks were the iconic means of hiding assets from the IRS as well as other law enforcement agencies. But, in 2008, DOJ Tax CES and the IRS became aware of some really outrageous methods and means by which a particular Swiss bank, UBS, contributed to U.S. tax evasion by its wealthy U.S. clients. In the case of UBS, such methods and means included all sorts of skulduggery in violation of U.S. laws by UBS's employees and agents. So DOJ Tax CES, directly and through local United States Attorneys officers marshaled the tools at hand to attack the problem.

Initially, DOJ Tax CES brought John Doe summons proceedings against UBS in the Southern District of Florida to give up the names of its U.S. depositors. After much high level intrigue and negotiation: (1) UBS entered a deferred prosecution agreement and paid a fine of $780 million; (2) UBS delivered around 250 names of U.S. depositors and perhaps information and documents related to them, although it is unclear as to precisely the authority for UBS to do so; (3) UBS, with the "blessing" of the Swiss Government agreed to deliver up to 4,500 names, information and documents of U.S. depositors pursuant to the United States' request under the U.S./Swiss Double Tax Treaty (as reinterpreted to permit the disclosures); and (4) upon compliance with these obligations, the deferred prosecution agreement and John Doe summons cases were dismissed. Through all the commotion surrounding these events, the IRS announced and established a special version of its Voluntary Disclosure Practice under the IRM.[n118b] The key points of that voluntary disclosure program (in addition to the conditions set forth in the IRM for the general voluntary disclosure program) were:

[n118b.] IRM 9.5.11.9. Note that this is the IRS general voluntary disclosure practice The special offshore initiative adds other conditions to qualify under that practice.

- The taxpayer would file amended U.S. tax returns for 2003 to present correcting any underreporting and pay the resulting tax and interest; and the taxpayer would file delinquent or amended FBARs as appropriate.

- The taxpayer would be subject to a 20% income tax penalty for each of the years where there was underreporting and would be subject to an "in lieu of" FBAR penalty of 20% of the highest amount in the foreign account(s) from 2003 forward. ("In lieu of" means that the penalty is imposed as a miscellaneous Internal Revenue Code penalty rather than a Treasury penalty under Title 31.)[n118c]

[n118c.] The precise reason for making it an in lieu of penalty is not clear. Some have speculated that it was to pump up the IRS numbers. One consequence apparently is that, as an IRS miscellaneous penalty, it and all

of the documentation the IRS gets with respect to the penalty is subject to the privacy requirements of § 6103. FBAR penalties asserted under Title 31 are open to inspection by many other law enforcement agencies.

The program involved a number of other conditions and nuances, but the foregoing is the gravamen of the taxpayer's cost of entering the program. The principal benefit of entering the program is that the taxpayer would not be criminally prosecuted. The program's ending date was extended once to October 15, 2009, after which date the program continued (although unofficially) but without the benefit of the U.S. depositors' having advance assurance of what the civil penalty regime would be.

Upon announcing the program and before the Swiss turnover with respect to the 4,500 U.S. depositors, DOJ Tax set about to prosecute with great publicity and fanfare some of the persons it had already discovered. These prosecutions of both U.S. depositors and Swiss bank enablers have accelerated up to the present. These developments encouraged many U.S. depositors to join the program, and they continue to be encouraged to join. It is argued by many practitioners that some U.S. depositors may be holding back because of uncertainty as to the amount of the penalty after 10/15/09, but U.S. depositors are continuing to join the program. To encourage those who may be holding back, the IRS Commissioner has recently announced that the IRS will establish another similar formal program which will include a penalty amount. The expectation is that the penalty amount involved will be in excess of 20% (the amount available under the first iteration of the special program ending 10/15/10) and 50% (the amount being imposed upon persons who are indicted and agreeing to plead guilty).

P. 124. Insert immediately after the carryover quote from Neder:

The importation of a materiality requirement is broader than the mail fraud and wire-fraud statutes. Neither of those statutes contain an explicit materiality requirement. In Neder, the Court held that the materiality element was implied in the use of the word "fraud," a common law concept used by Congress in defining the crimes. The Court reasoned that "the common law could not have conceived of 'fraud' without proof of materiality;" hence, the crime defined using the common law word "fraud" implies the requirement of materiality. So, wherever the text of a criminal statute does not have an explicit requirement of materiality, one may be imported from an external referrant such as, most importantly, the common law. By contrast, if the criminal statute does not have such an internal explicit requirement or an external referrant from which the requirement will be inferred, the crime will not require materiality. [n130a]

[n130a.] E.g., United States v. Wells, 519 U.S. 482, 491 (1997) (holding that the crime of false statement in 18 U.S.C. § 1014 does not include a materiality requirement because the text does not require it, the legislative history does not support it and there is no external referrant in the common law to imply that Congress intended a materiality requirement); ; and Neder v. United States, 527 U.S. 1, 23 n. 7 (1999) (citing Wells).

There is another facet of materiality. Use of the mail or wires is required for the crime. Is there some element of materiality as to use – i.e., does there have to be some material relationship between use of the mail or the wires and the intent to defraud?

> The mail- and wire-fraud statutes are not intended to reach all frauds but only those in which a mailing or use of an interstate wire is part of the scheme. Schmuck v. United States, 489 U.S. 705, 710 (1989). The use of the mail or wire need not be an indispensable part of the fraud to satisfy the "in furtherance of" element of the offense; it need only "be incident to an essential part of the scheme . . . or a step in [the] plot." Id. at 710-11. In other words, the success of the scheme must in some measure depend on the mailing [or wire transmission]. The defendant himself need not personally cause the mailing or use of the wire; it is enough that the use of mail or wire "will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." Pereira v. United States, 347 U.S. 1, 8-9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."). The mailing or use of the wires need not itself contain false or fraudulent material; a "routine or innocent" mailing or use of the wire can supply this element of the offense, as long as the use of the mail or wire is part of the execution of the scheme. Schmuck, 489 U.S. at 714-15.[n130b]

[n130b.] United States v. Turner, 551 F.3d 657 (7th Cir. 2008) (some citations or portions of citations, some explanatory material, and some quotations omitted for easier readability).

Chapter 4
MODES OF PROOF

P. 128. Insert after the first full paragraph beginning with "In a non-lay sense":

Trial lawyers love to describe burdens in percentage terms. In the ordinary civil case, the party bearing the burden of persuasion must prove by a preponderance of the evidence which is quantified as evidence which the trier assesses as proving the key fact to be more likely than not – i.e., in excess of 50%. Now, if you were going to state the percentage for beyond a reasonable doubt, what would it be? One author states the inquiry as follows:

> Consider what "proof beyond a reasonable doubt" actually mandates that the jury do. Surely it requires more proof than the preponderance of the evidence standard, which governs in civil cases. As commonly explained to civil juries, the preponderance standard is quantified as any amount of certainty greater than 50%, and proof beyond a reasonable doubt must mean more than that. But how much more proof than a preponderance is needed in a criminal case? The quantity of certainty is never quantified; instead, it is kept quite vague. Is 90% certainty required? 95%? 99%? Or could the amount of certainty be much lower, say perhaps 75%? [n2a]

[n2a.] Erik Lillquist, Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability, 36 U.C. Davis L. Rev. 85, 86 (2002).

Indeed, whatever the "percentage" level of certainty imagined to be inherent in the standard, it is reported that "research has consistently shown that the jurors in criminal cases will often be satisfied with much less certainty than is conventionally assumed."[n2b]

[n2b.] Lillquist, p. 88

Consider again the following from Judge Posner:

> Judges, when asked to express proof beyond a reasonable doubt as a probability of guilt, generally pick a number between .75 and .90 (depending on the judge), and jury quantifications are similar. These may seem shockingly low figures, implying that as many as a quarter of the people convicted of crime are innocent. [n2c]

[n2c.] Posner, supra, p.1506. See Dan Simon, A Third View of the Black Box: Cognitive Coherence in Legal Decision Making, 71 U. Chi. L. Rev. 511, 557 n. 147 (2004) (Empirical "[r]esearch that monitors perceptions of the standard reveals that while assessments vary with the methodology of elicitation, the responses tend to converge in the range of 80 to 90 percent certainty satisfying the standard." citing Reid Hastie, Algebraic Models

of Juror Decision Processes, in Reid Hastie, ed, Inside the Juror: The Psychology of Juror Decision Making 84, 102 (Cambridge 1993)).

Judge Posner notes that prosecutorial selectivity in picking cases to prosecute substantially mitigates the risk that the innocent will be convicted. Still, assuming that there were no prosecutorial selectivity mitigating factors, are you concerned that judges and jurors in 20 or 25% doubt could return a verdict of guilty in a criminal case? [n2d]

[n2d.] For a good discussion of the difficulty of making the concept meaningful to juries, see Thomas Lundy, Comparison of Standards: A Strategy for Explaining Proof Beyond a Reasonable Doubt, 27 Champion 61 (2003).

Judge Posner's conclusions are his own, based on his experience and his anecdotal polling of his colleagues. Other attempts at empirical studies of these issues show that judges and suggest that jurors are all over the lot on the issue. In one study of 10 of his colleagues by Judge Weinstein of the Eastern District of New York, "one gave a probability of 76%, one gave 80%, four gave 85%, two gave 90%, and one gave 95%. In other words, the probabilities hovered around 85%-90%." [n2e] In a larger survey of federal judges throughout the country:

[n2e.] Lawrence Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt, 78 Tex L Rev 105, 126-127 (1999).

> Of the 171 judges who responded, 126 had thresholds that were 90% or higher. Eleven judges had thresholds of 75% or below, one of whom was satisfied with a 50% probability. The other study was conducted among Illinois state court judges. On a scale of 1 to 10, the mean level of certainty in this study was 8.9, with a median of 8.8; 63% of the judges responded with a level of 9.0 or higher. Most (but not all) judges, then, tend to see the government's burden much the way Blackstone did [about 90%]. [n2f]

[n2f.] Solan, p. 127.

Of course, we suggested above that there are unique prosecutorial mitigating factors in tax cases that virtually require that the Government only choose cases to prosecute where the evidence in all except the atypical case will produce a conviction. This further mitigates the possibility of conviction of the innocent in tax cases.

Chapter 5
PROSECUTION POLICIES AND AFFIRMATIVE DEFENSES

P. 160. Add to footnote 7 immediately after et seq. the following:

> see also USAM 9.28.100 et seq. (Principles of Federal Prosecution of Business Organizations).

P. 163. At the end of the carryover paragraph, delete footnote 19 and insert the following after the period:

> The Government's behavior was found to violate the constitution's Sixth Amendment guarantee and Fifth Amendment guarantee of substantive due process; the indictments against those KPMG partners were dismissed accordingly. [n19]

> n19. United States v. Stein, 541 F.3d 130 (2d Cir. 2008), sustaining the district court's dismissal of the indictments. The district court had earlier spotted the issue (United States v. Stein, 435 F. Supp. 2d 330, 367-73 (S.D.N.Y. 2006)), but only later dismissed the case when no other remedy was present. United States v. Stein, 495 F. Supp. 2d 390 (S.D.N.Y. 2007).

P. 163. Add the following to the carryover paragraph:

> The current version of these policies are set forth in what is called the Filip Memorandum, named for then Deputy Attorney General Mark Filip. [n20a] The current version is substantially similar to the McNulty version discussed in the next paragraph. There are differences, and important differences for the practitioner. But they are not important for this class.

> n20a. Memorandum from U.S. Deputy Attorney General Mark R. Filip, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008).

P. 169. At the beginning of the second paragraph under "G. Plea and Sentencing Policies," insert the following footnote after the second word (USAM):

> n39a. In the text we cite to the USAM. At least as relevant to tax cases, the USAM generally quotes or paraphrases the CTM or certain Department memoranda. The relevant portions of the CTM (2008 ed.) which should be consulted are CTM 5.00, Plea Agreements and Detention Policy, and 43.00, Sentencing: Tax Division Policies and Guidelines. Remember that the citations in the original text of this book are to the earlier versions of the CTM where the same or similar matters are discussed under different paragraph numbers.

P. 174. At the end of the page, add the following footnote after "allowable:"

> 50a. It is important to distinguish between the tax due and owing as an element of the tax evasion offense which is a key element of the offense in the criminal trial case in chief and the tax loss which is the principal factor in computing the sentencing guideline range (discussed in Chapter 10). Some courts do not permit unclaimed deductions in the calculation of the tax loss for sentencing, whereas courts seem to consistently permit unclaimed deductions to be in issue in the case in chief. We shall discuss this again below Chapter 10.

P. 175. Insert after 2d paragraph (immediately before D. Cash Hoard Defense):

The reliance on the professional is a variation of the Cheek argument (i.e., the defendant did not know the law) and technically is an argument that the Government failed to meet its burden to prove willfulness rather than a defense per se. The Government thus has to show that the defendant did not rely upon the tax professional in order to show willfulness. [n53a] But, as in Cheek, the defendant has to put the "defense" in play by introducing some evidence of reliance on the tax professional. Once the defendant does that, [n53b] it is then the Government's burden to show that the taxpayer did not rely.

[n53a.] In United States v. Stadtmauer, 620 F.3d 237, 257 n. 22 (3d Cir. 2010), the Court expressed this concept: "[T]o prove willfulness beyond a reasonable doubt, the Government would have to negate the taxpayer's claim that he relied in good faith on the advice of his accountant."

[n53b.] DOJ Tax in its CTM asserts that reliance is an "affirmative defense." CTM 12.07[2] (2008 ed.). Some courts refer to it as an affirmative defense, but we question whether that is correct. See Stadtmauer in the preceding footnote. The defendant bears no burden of pleading or proving the defense, but does have a production burden to put the defense in play by presenting evidence to make it a jury issue as to which the Judge must instruct the jury. See United States v. Wilson, 887 F.2d 69, 73 (5th Cir. 1989). Just how much of a production burden is required is uncertain. For example, the CTM 40.05[1][a] provides: "A reliance-on-advice-of-accountant instruction may be warranted 'even without per se testimony that the defendant relied on the accountant's advice, so long as the circumstances support an inference that he did so rely.'" If the defendant testifies, the defendant will testify as to reliance. See United States v. Moran, 493 F.3d 1002, 1011-1014 (9th Cir. 2007) (holding that the defendant's testimony of reliance is not hearsay because it is admissible to prove that he or she received the advice and not whether substance of the advice was true).

One way the Government can meet its burden is through the tax professional. The tax professional may, however, have a bias to remember the events in a way that favors the professional rather than the defendant. [n53c] By asserting reliance on the tax professional, the taxpayer waives any privilege (other than his own Fifth Amendment privilege, unless he has to waive it to assert the defense) that might otherwise apply. The tax professional may be called by the Government. Often the tax professional can testify as to certain representations made by the taxpayer or advice given to the taxpayer and that alone may be sufficient to rebut the defense or even affirmatively hang the taxpayer. Indeed, if there is no affirmative evidence of proper advice by the tax professional, the defendant may be convicted on the tax professional's testimony that it was his usual practice to give such proper advice. And, perhaps even more dangerously, any hope to successfully mount the defense will require the taxpayer to take the stand, thereby waiving his Fifth Amendment privilege. Doing so will open up the defendant to cross examination on the reliance issue and any other issue. That can be dangerous by itself, but just focusing on the reliance issue, if the jury finds the defendant not credible, that alone could lead to conviction and then, if the sentencing judge finds the defendant to have perjured himself or herself (a conclusion at least by the jury's rejection of the testimony by finding the defendant guilty), there may be a sentencing enhancement consequence. See U.S.S.G. § 3C1.1.

[n53c.] The professional will also often have some potentially adverse bias because the professional is unlikely to admit that he or she violated the standards of the profession, committed malpractice or, worse, that he or she committed the crime. Thus, the professional will often not give up what the defendant needs. For example, in United States v. Yip, 2010 U.S. App. LEXIS 4639 (9th Cir. 2009) (unpublished), the taxpayer was tried for tax perjury for answering the foreign bank account question on 1040 Schedule B in the negative and failing to file FBARs. The defendant's tax preparer, an accountant, apparently could not remember whether he asked the particular defendant about foreign accounts for the period in question but testified that it was his "usual practice" to review the question with him. The Ninth Circuit held that this was sufficient to permit the jury to infer that that occurred for the return in issue and sustained the conviction. Now, the Yip decision is too cryptic to determine whether the tax preparer's self serving bias influenced his testimony or affected the jury inference, but practitioners must recognize the danger. Obviously, in Yip, if the preparer had stopped with just a statement that he or she had no recollection of discussing the question with the defendant, that would have been good for the defendant; the professional, however, went further to testify about usual practice, and that was bad for the defendant.

P. 180. At the end of the carryover paragraph, insert the following paragraph (flush, because it is not part of the quote in the carryover paragraph):

> Finally, DOJ Tax CES claims the authority to conduct criminal tax investigations independent of grand jury investigations and independent of the IRS. That DOJ Tax CES is actually conducting such investigations is really beyond peradventure, claiming to have done so in at least the KPMG criminal tax shelter investigation.

P. 194. At end of the 3rd full paragraph (beginning "Taxpayers are usually"), add the following paragraph:

> The DOJ Tax CES conferences (as well as the IRS conferences) are offered as a matter of Government general practice. The conferences, however, are not matters of right and, therefore, the Government may indict without offering the conferences. [n24a]

[n24a.] United States v. Ohle, 678 F.Supp.3d 215, 233 (SD NY 2010).

P. 203. Add to footnote 63:

The latest iteration of the voluntary disclosure policy, called a "practice," is at IRM 9.5.11.9 (6/26/09). For purposes of this class, there are no material differences between the practice as quoted in the text and the current practice.

P. 205. In the first full paragraph, change the heading from "Direct Disclosure" to the following (heading only, the remainder of the paragraph is not affected):

> Direct Disclosure (Often Called Noisy Disclosure[n63a]).

[n63a.] Use of the word "noisy" became popular in the criminal tax lexicon by analogy to disclosures directly to the SEC that might be required under Sarbanes Oxley; practitioners adopted the noisy disclosure term for direct disclosures to IRS CI and added its tax counterpart – the "quiet" disclosure – to describe the very different process of simply filing amended returns without specific breast beating before a live IRS CI agent.

P. 205. In the second full paragraph, change the heading from "Filing Disclosure" to the following (heading only, the remainder of the paragraph is not affected):

> Filing Disclosure (Often Called "Quiet Disclosure").

P. 205. The 2008 CTM version of the Voluntary Disclosure Policy is substantially shorter than the one in the text, so we decided to quote it in full (but omitting the footnote in the CTM), so that you can delete the one in the text:

> 4.01[1] Policy Respecting Voluntary Disclosure
>
> Whenever a person voluntarily discloses that he or she committed a crime before any investigation of the person's conduct begins, that factor is considered by the Tax Division along with all other factors in the case in determining whether to pursue criminal prosecution. See generally USAM, § 9-27.220, et. seq.
>
> If a putative criminal defendant has complied in all respects with all of the requirements of the Internal Revenue Service's voluntary disclosure practice, the Tax Division may consider that factor in its exercise of prosecutorial discretion. It will consider, inter alia, the timeliness of the voluntary disclosure, what prompted the person to make the disclosure, and whether the person fully and truthfully cooperated with the government by paying past tax liabilities, complying with subsequent tax obligations, and assisting in the prosecution of other persons involved in the crime.
>
> A person who makes a "voluntary disclosure" does not have a legal right to avoid criminal prosecution. Whether there is or is not a voluntary disclosure is only one factor in the evaluation of a case. Even if there has been a voluntary disclosure, the Tax Division still may authorize prosecution. See United States v. Hebel, 668 F.2d 995 (8th Cir.), cert. denied, 456 U.S. 946 (1982).

Practitioners view this change to the CTM as bringing the DOJ Tax voluntary disclosure practice more in line with the IRS voluntary disclosure practice. But, the wording does suggest that DOJ Tax might prosecute even if the taxpayer has made a voluntary disclosure that the IRS would view as consistent with its practice. This raises the issue of whether DOJ Tax would or could prosecute when the IRS says that prosecution is not consistent with its administration of the tax laws. That is a big and potentially distractive issue, so we forego it now.

P. 215. Add the following caption and paragraph immediately before "IX. EGG SHELL AUDITS.":

> **I. Voluntary Disclosure and Advocacy.**
>
> Previously, the IRM suggested that the voluntary disclosure practice was not available if some series of events had transpired which made the IRS's discovery of

the taxpayer's malfeasance inevitable. The limitation is not present in the current version of the practice. We urge the reader to go back and read the policy and why we say that this limitation is not in the current version. The reader will note that the practice is not available to a taxpayer if the IRS has started an investigation of another taxpayer as to a matter that is "directly related" to the taxpayer's liability. This limitation should be read carefully, and obviously the practitioner should be prepared to mount effective advocacy as to why his client's tax liability in the voluntary disclosure is not directly related to another previously discovered taxpayer's tax liability. Advocacy, even in a close case, might be effective here because the IRS could lose more than it could gain by applying the voluntary disclosure practice too narrowly. That is to say, IRS and DOJ Tax can get plenty of fodder for its criminal tax enforcement priorities without being stingy about voluntary disclosure. Your job may be to help the IRS and / or DOJ Tax CES realize that priority in your client's specific case.

J. Special Voluntary Disclosure Initiatives.

In major areas of noncompliance where the IRS's ability to detect noncompliance is limited or other special factors exist, the IRS may offer special "voluntary disclosure" type initiatives in order to encourage compliance. I mention here three prominent recent examples.

1. Offshore Voluntary Compliance Initiatives (and Related Audit Initiatives).

In the later 1990s, the IRS initiated a major initiative to identify taxpayers using offshore credit cards, and more broadly offshore financial institutions, as a means of implementing tax crimes with minimal (they think) risk of detection. The IRS began tracing the credit card charges through the U.S. system of credit card transactions processors into tax haven foreign banks; with some Sherlock Holmes techniques and some luck, the IRS could often identify the U.S. taxpayers and start U.S. audits and, where appropriate, criminal investigation processes. As an early part of this initiative, the IRS encouraged taxpayers with this problem to voluntarily disclose, and offered reasonable assurance that qualifying taxpayers will not be prosecuted. This initiative was called the Offshore Voluntary Compliance Initiative ("OVCI"). The IRS did not expect all taxpayers to accept this voluntary disclosure offer, and thus will still have plenty of taxpayers that it can identify and prosecute. But, for those taxpayers within the scope of the offer, it did offer reasonable assurance that they would not be prosecuted. Still, during audits in which an offshore account was identified or suspected, the IRS usually offered the taxpayers a similar program with stiffened penalties that were still much better than worst case called the Last Chance Compliance Initiative ("LCCI").

2. Tax Shelter Initiatives.

In the early 2000s after a wave of abusive tax shelters, the IRS announced initiatives as to particular highly marketed shelters permitting taxpayers to limit their risk by voluntary disclosure. These initiatives usually facially offer relief only with respect to the taxpayer's civil exposure, principally because the complexity of the shelters and the presence of "opinions" from major tax firms made criminal prosecution unlikely. But, in situations where the opinions were mere window dressing which the taxpayer really did not believe (often with the assistance of his own independent counsel), careful practitioners would at least be concerned that there might criminal investigation or prosecution. The general thinking is that, in the unlikely event the taxpayer's conduct might otherwise be potentially subject to criminal prosecution, participation in the program with full disclosure will avoid the criminal problem.

3. 2009 Offshore Account Initiative.

We discuss above at p. 13 the special 2009 Offshore Voluntary Disclosure Initiative, the most aggressive initiative for offshore financial accounts, and refer readers back to that discussion for context.

Chapter 6
INVESTIGATION AND DEVELOPMENT OF CRIMINAL TAX CASES

P. 197 Add the following after the second sentence in the second paragraph of IV. GRAND JURY CASES:

> Grand Jury investigation cases of this nature have recently included (i) the sprawlling tax shelter criminal cases where many participants and several major professional firms (such as KPMG, Deutsche Bank and Jenkins & Gilchrist, a now defunct law firm) were involved and (ii) the juggernaut against UBS AG, a major Swiss bank, which marketed secret offshore accounts to U.S. persons and thereafter the investigation and prosecution of UBS account owners.

Chapter 7
GOVERNMENT INFORMATION GATHERING

P. 226. Add new text (flush) after the quote at the end of the text:

Recently, the most prominent instances of the IRS use of the John Doe Summons have been to identify U.S. taxpayers using offshore financial accounts to hide taxable income. For such clients playing the offshore account game, the expectation of secrecy is at the core of the game, so this activity is concentrated in countries that are referred to as "tax havens." The IRS is often unable to determine whether the U.S. taxpayer has a Tax Haven financial account or the amount in the account if they knew or suspected he or she had one. The John Doe Summons works well in such a case, at least when the party having information that can identify the U.S. taxpayers is within the IRS summons power (meaning that a U.S. court will impose meaningful sufficient pain via the contempt power to compel compliance).

Most Tax Haven financial institutions participating in this offshore evasion service for U.S. taxpayers try to avoid any U.S. presence that would subject them to the IRS summons and U.S. court contempt powers. They are not always successful. So the IRS has used the John Doe Summons in two prominent "waves."

First, the IRS issued John Doe Summonses to U.S. credit and debit card processors who processed the credit and debit card transactions that U.S. taxpayers used to tap their offshore funds in a way that they and the Tax Haven banks thought would be invisible to the IRS. Once those debit and credit card transaction documents were obtained, the IRS might be able to match names or, in some cases, tie back to charges for U.S. taxpayer accounts at the U.S. vendor. The issuance and approval of the John Doe summonses to the credit and debit card transaction processors were covered with great fanfare in the press. Taking advantage of the press, the IRS created a special voluntary disclosure initiative whereby U.S. taxpayers having offshore accounts could solve their potential criminal exposure. (I will talk more about the special voluntary disclosure initiative later.)

Second, in 2008, the IRS fired the second volley in the offshore financial institution war via the John Doe Summons issued to what appears to have been the worst offender – the giant Swiss bank UBS. UBS, which had a substantial U.S. presence for other reasons, routinely assisted U.S. taxpayers to hide their income from the IRS. Rather than sitting in Switzerland beyond the IRS summons power and U.S. court contempt power, UBS's bankers made substantial forays into the U.S. to practice the skulduggery. The IRS learned of these activities and issued a John Doe Summons to UBS for it to disclose the names of the estimated 50,000+ U.S. taxpayer maintaining accounts with UBS. UBS claimed that Swiss law prevented it from complying with the summons, the Swiss Government got into the fray in order to assert its sovereign right to assist U.S. taxpayer cheat on their taxes by

maintaining their anonymity, and an international crisis was created. Both sides blinked, but not before the U.S. breached the dam of vaunted Swiss bank secrecy. The upshot was that UBS agreed to a deferred prosecution agreement requiring it to pay more than $750 million in fines and, more importantly, the Swiss Government agreed to reinterpret the exchange of information provision of the U.S. / Switzerland double tax treaty to permit UBS to make the disclosures of the names and account information for the taxpayers that the IRS had not identified. So, although the John Doe Summons did not technically produce the information sought, the reinterpretation of the treaty is producing some of the information sought and that reinterpretation was the result, in major part, of the John Doe Summons (as well as the criminal deferred prosecution agreement and other initiatives). The dam was breached, and the expectation is that the hole will get bigger through exchange of information treaty processes and other IRS pressures on other Swiss financial institutions and other Tax Haven financial institutions.

P. 227. Put the following sentence at the end of the first paragraph:

Indeed, the grand jury subpoena has been called the Government's most powerful tool in the investigation of white collar crimes (of which tax crimes are a subset).

P. 233. Put the following immediately after the carryover paragraph:

In this section of the text, we deal principally with privileges that may be asserted in a criminal tax investigation (although they are applicable in other criminal investigations as well). Specifically, we deal in some detail with the Fifth Amendment privilege, the Attorney-Client privilege, and the Work-Product Doctrine that functions like a privilege. But, first, we address the general nature of privileges in the federal universe.

Privileges are an evidentiary concept. The general rule in Anglo-American jurisprudence is that each person – both citizens and artificial entities – may be compelled to tell what he knows to administrative agencies and courts in order to assist those agencies and courts administer the laws and dispense justice. In pithy language, the Supreme Court has admonished that "the public has the right to everyman's evidence." [30a] Privileges, where applicable, permit persons to withhold what they know or, in a broader sense, evidence and hence to hamper the truth finding process in which courts and administrative agencies are involved. Privileges are thus justified only where there is some overriding public benefit – a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

[30a.] Trammel v. United States, 445 U.S. 40, 50 (1980) (internal quotes and words omitted for clarity), quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

In the federal system, the recognized privileges are those that at common law subject to such adjustments as Congress or, sometimes, the courts have made "in light of reason and experience" to the common law privileges." See FRE 501.

The traditional federal privileges most commonly encountered in tax practice are:

(1) The attorney/client privilege;

(2) A variant of the attorney/client applicable only in certain (but not all) tax contexts - the federally authorized tax practitioner privilege;

(3) Work product privilege;

(4) Fifth Amendment privilege against self incrimination; and

(5) Spousal Privileges.

There are other privileges that may apply in a tax setting and, of course, practitioners and students should be aware of them. For example, there is a doctor / patient privilege. Nevertheless, as noted, we focus here only on the Fifth Amendment, the Attorney-client privilege and the work-product privilege.

P. 238. At the end of the paragraph beginning "So where do these cases leave us":

Based on the foregoing, the act of production subset of the Fifth Amendment privilege will apply only where the summons or subpoena requests documents whose existence and possession are a "foregone conclusion." What exactly does that mean? Reading it strictly in favor of the compelled party, the Government's hurdle is to know and be able to prove, if necessary, that the documents requested exist or likely exist. Still, that is a bit of an uncertain standard. In United States v. Ponds, 454 F.3d 313 (D.C. Cir. 2006), the D.C. Circuit attempted to bring more certainty to the inquiry by suggesting that the level of Government knowledge required to avoid a valid act of production privilege is the same as the "reasonable particularity" which echoes the standard used for search warrants. Courts deal routinely with the reasonable particularity standard and this might offer a good way to guide prosecutors and compelled parties as to the ground rules that apply. In United States v. Bright, 596 F.3d 683, 692 (9th Cir. 2010), the Ninth Circuit which earlier had noised about reasonable particularity said, without reiterating, approving or rejecting the reasonable particularity standard and citing only Hubble that "the government must establish its independent knowledge of three elements: the documents' existence, the documents' authenticity and respondent's possession or control of the documents." The question is whether the court meant that the Government must establish those elements with reasonable particularity. Finally, in this regard, would

it make constitutional or logical sense for the Government to have a stricter burden to issue and enforce a subpoena (or summons in an IRS investigation context) that requires a greater showing than required to obtain a search warrant?

P. 248. At end of the carryover paragraph, add the following:

D. Work Product Privilege.

The work product privilege (also referred to as the work product doctrine) protects the work product and thought processes in preparing for litigation. The work product privilege was blessed in the Supreme Court case of Hickman v. Taylor, 329 U.S. 495 (1947) and is now contained in Rule 26(b)(3) of the Federal Rules of Civil Procedure as follows:

> a party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Work product subject to the privilege falls into two broad categories – (i) so-called "opinion work product" such as the mental impressions, conclusions, etc. of the attorney or other representative in the litigation and (ii) other work product that relates to facts. Opinion work product is discoverable only by waiver by disclosure to the adverse party or if disclosed in a manner likely to become known to the adverse party, but even then the strict need requirements of the Rule must be met. [n74a]

[n74a.] See FRCP 26(b)(3) ("[T]he court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative of a party concerning the litigation.").

The work product privilege is sometimes wrongly conceived as an attorney work product privilege. The privilege is not limited to work done by or under the supervision of an attorney. Any work performed that is otherwise within the scope of the privilege may qualify. Thus, work performed by an accountant may qualify for the privilege. [n74b]

[n74b.] E.g., Adlman v. United States, 114 F.3d 1194 (2d Cir. 1998).

Unlike the attorney-client privilege, the work product privilege is not absolute -- with a strong showing of need an opposing party (here the IRS) might be able to overcome the assertion of the privilege for non-opinion work product. Nevertheless, in most cases the Government likely will not be able to avoid the assertion of the privilege, if the privilege is otherwise well grounded. We should note in the case that I mentioned earlier (where the in house corporate lawyer engaged the regular accountants), the work product privilege was successfully asserted in part.

The work product privilege is often asserted along with the attorney-client privilege. Since the attorney-client privilege is absolute, it will be better to avoid disclosure on that grounds. Nevertheless where, for some reason, the attorney-client privilege is not available, e.g., it is deemed to have been waived, the work product privilege is a good fall back.

An interesting and relevant example of the work product privilege was recently addressed in In re Grand Jury Subpoena Dated Oct. 22, 2001 (John Doe A. v. United States), 282 F.3d 156 (2nd Cir. 2001). The background is as follows: In criminal investigations, the Government investigator who will be an IRS special agent in an IRS criminal investigation or an Assistant United States Attorney in a grand jury investigation will often interview witnesses, including potential targets of the investigation, without the questions and answers being recorded. Usually, there will be at least one other Government person present who can testify as to the statements made by the witness in the event the Government were to assert that the witness gave false statements prosecutable under 18 U.S.C. § 1001. Often, there will be another witness as to what the witness said – the witness's own attorney. Can the Government force the witness's own attorney to testify as to what the witness, his client, said? In In re Grand Jury Subpoena Dated Oct. 22, 2001, two IRS Special Agents conducting an investigation interviewed the general counsel of the company being investigated. At some point, the investigation expanded to include the issue of whether the general counsel had lied in the interview. However, one of the Special Agents had died, so the Government's case was based solely on the one live Special Agent. A grand jury investigating the company then issued a subpoena for the testimony of the lawyer who had appeared with the general counsel at the interview. The prosecutor represented to the subpoenaed attorney that her testimony was required only as to a factual report of what the client said in the interview. The court of appeals held an attorney may properly assert the work product privilege to avoid telling a grand jury what her client said to government agents during an interview in the lawyer's presence if the testimony may be used to indict the client for previous criminal conduct. The Court reserved the issue of whether the work product privilege might apply if the government's sole purpose was to prove what was said at trial solely in order to investigate a violation of 18 U.S.C. § 1001.

Finally, the work product privilege may be waived, but the waiver of work product is not as broad as the attorney-client waiver. The attorney-client privilege is waived by intentional disclosure to anyone who is not an attorney (or deemed attorney via such doctrines as the Kovel concept or the joint defense group) or the client. The work product privilege as often formulated requires a disclosure to someone having adverse interests. [n74c] A recent hot topic question is whether a corporation's disclosure to its attesting auditors of its tax accrual workpapers supporting its tax reserve for financial statement purposes is a waiver of the work product privilege. The issue has not been sufficiently litigated to provide clear guidance, but readers should be aware of the issue. [n74d]

[n74c.] United States v. MIT, 129 F.3d 681, 687 (1st Cir. 1997); and Merrill Lynch & Co. v. Alleghany Energy Supply Inc. Co., 229 F.R.D. 441 (S.D.N.Y. 2004).

[n74d.] For differing nuances, see United States v. Textron, Inc., 566 F.3d 21 (1st Cir. 2009), cert. denied sub nom Textron, Inc. v. United States, ___ U.S. ___, 130 S.Ct. 3320 (2010); and United States v. Deloitte, 610 F.3d 129 (D.C. Cir. 2010)

Chapter 8
PRE-TRIAL ISSUES IN CRIMINAL TAX CASES

P. 265. In the paragraph toward the end of the page beginning with "As of this writing," add the following at the end

> Update: In the case as it finally went to trial 13 of the remaining 17 defendants were dismissed and the 4 defendants left had significant resources which might have permitted them to wade through the massive document dump. We don't think the problem was as exacerbated as it had seemed when the earlier dismissed defendants were in the case. And, the Government may have made more specific disclosures before going to trial.

P. 277. Add the following to fn. 3 at the end of the first paragraph (which carries over to p. 278).

> The dismissals were affirmed in United v. Stein, 541 F.3d 130 (2d Cir. 2008).

Chapter 9
TRIAL AND POST TRIAL

No supplemental materials.

Chapter 10
SENTENCING IN TAX CASES

P. 301. Add as a new section immediately before II. Overview of the Sentencing Guidelines:

IA. SUMMARY INTRODUCTION TO THE CURRENT SYSTEM

The key statute for sentencing is 18 USC § 3553 which provides in pertinent part (emphasis supplied by authors):

> (a) Factors To Be Considered in Imposing a Sentence. - The court shall impose a sentence **sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> **(2) the need for the sentence imposed -**
>
> **(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;**
>
> **(B) to afford adequate deterrence to criminal conduct;**
>
> **(C) to protect the public from further crimes of the defendant; and**
>
> **(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;**
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for -
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the **guidelines issued by the Sentencing Commission** pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
>
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;
>
> (5) any pertinent policy statement issued by **the Sentencing Commission** pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) **Application of Guidelines in Imposing a Sentence**. - The court **shall impose** a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

For present purposes, we ask you to focus on the bold-faced in the text. Please note the general statement in § 3553(a) that the sentence should be "sufficient but not greater" than necessary to serve the purposes to be served as specified in § 3553(a)(2). In meeting this standard, the Court is directed in the other subparagraphs of § 3553(a) to "consider," among other things the Guidelines promulgated by the Sentencing Commission. The Guidelines, as we shall see in detail, generated ranges for sentencing based on the Sentencing Commission's consideration of the typical factors that should be considered for sentencing. The goal was to bring some degree of uniformity to the sentencing process based on these typical factors. Then, § 3553(b) requires that court "shall impose" a sentence specified under the Guidelines, thus textually appearing to make the Guidelines sentencing mandatory except where a departure is justified by factors "not adequately taken into consideration" by the Guidelines. From the inception of the Guidelines in the 1980s through 2005, courts had treated the Guidelines as mandatory. In 2005, the Supreme Court held in **United States v. Booker, 543 U.S. 220 (2005)** that the sentencing must be based on the § 3553(a) factors and that the Guidelines are only **advisory** – i.e., the Guidelines must be considered but are not mandatory in imposing sentence. Effectively, the Court read out of the statute § 3553(b)'s "shall impose" mandate for the Guidelines. A general summary of the state of the law at the time of publication of this text is:

> Booker and its sequels certainly changed the dynamics of criminal sentencing. The Guidelines are no longer binding, and district judges can choose sentences that differ from the Sentencing Commission's recommendations - provided of course that they stay within the range set by the statutes of conviction. But this system is not a blank check for arbitrary sentencing. Judges still must start out by calculating the proper Guidelines range - a step so critical that a calculation error will usually require re-sentencing. The reason for this is simple. Congress wants judges to do their best to sentence similar defendants similarly. And starting with the Guidelines' framework - which gives judges an idea of the sentences imposed on equivalent offenders elsewhere - helps promote uniformity and fairness. But having done that, judges can sentence inside or outside the advisory range, as long as they stay within the statutory range and consider the sentencing factors arrayed in § 3553(a) - factors that include the nature of the offense, the background of the defendant, the seriousness of the crime, the need to deter criminal conduct, and the need to protect the public from further crimes by the defendant.[n1a]

[n1a.] United States v. Rodriguez, ___ F.3d ___, ___, 2010 U.S. App. LEXIS 26267 (1st Cir. 2010).

But the Guidelines are still the important first step in the process. So we turn now to the Guidelines.

P. 306. In footnote 39, add the following:

In cases where the taxpayer is the defendant, DOJ Tax practice is now, at least generally, to require a Plea Agreement contractual provision for restitution for the tax loss number agreed to for sentencing.

P. 321. Add after 1st paragraph:

As of the writing of this supplement, Congress has not seen fit to make any changes to the holding of Booker. And, in subsequent cases, the courts, including the Supreme Court, have continued to work out the implications of Booker grant of great discretion to the sentencing courts. Some have said that Booker returns the system to where it was before the Guidelines. As to tax sentencing, the then AAG for DOJ Tax is reported to have said:

> The appeals courts seem to be throwing up their hands and leaving sentencing entirely to the district courts' discretion, he said, adding that "it's sort of a Wild West out there." [n46a]

[n46a.] Jeremiah Coder, Officials Address International Tax Enforcement Efforts, 2008 TNT 235-2.

That is hyperbole, but does give the flavor of the release from the rigors of the mandatory Guidelines. The Guidelines are now advisory but continue to have a significant role in calibrating the sentences.

IVA. The Sentencing Hearing - Proof Issues

The judge resolves factual issues relevant to sentencing under a preponderance of the evidence standard, not the beyond a reasonable doubt standard that applied in determining guilt at the trial. S.G. § 6A1.3, Commentary. Notwithstanding this general rule as to a preponderance burden of proof, from due process concerns, the Ninth Circuit requires that the sentencing proof be "clear and convincing" as to sentencing factors that have a disproportionate impact on the length of the sentence. [n46b] The rationale for the higher standard goes roughly as follows: The higher standard ensures that "legislatures cannot evade the constitutionally required standard of proof by reclassifying an element of a crime as a sentencing factor, thereby depriving a defendant of important criminal procedural protections." The "totality of the circumstances" and, apparently a keen intuition, inform the sentencing court when this higher standard should apply, but the following are considerations in the mix, but the considerations in the mix are:

[n46b.] United States v. Treadwell, 593 F.3d 990, 1000 (9th Cir. 2010).

> (1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof for the crime alleged in the indictment; (3) whether the facts offered in support of the enhancement create new offenses requiring separate punishment; (4) whether the increase in sentence is based on the extent of a conspiracy; (5) whether an increase in the number of offense levels is less than or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the sentence authorized by the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence.

Further, the court may consider any evidence "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." S.G. § 6A1.3(a). Thus, for example:

- "Reliable hearsay evidence may be considered." § 6A1.3, Commentary.
- "Out-of-court declarations by an unidentified informant may be considered where there is good cause for the

non-disclosure of the informant's identity and there is sufficient corroboration by other means." Id.

P. 324. Immediately after the break signaling the end of the Chavin case, add the following:

This holding in Chavin is reported as the majority view among the circuits.[n50a]

[n50a.] See United States v. Clarke, 562 F.3d 1158, 1164-5 (11th Cir. 2009) (citing cases in adopting this majority view).

P. 329. Immediately after the first full paragraph (beginning "Other Significant Guidelines"), add:

E. FBAR Convictions Related to Tax.

FBAR convictions for conduct having tax evasion (or related tax crimes) as their focus are being sentenced under the Tax Guidelines, the first step of which is § 2T1.

Chapter 11
ETHICAL ISSUES IN CRIMINAL TAX PRACTICE

P. 352. Add the following at the end of fn. 51.

The district court's dismissals were affirmed in United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

Chapter 12
MAJOR COLLATERAL ISSUES

P. 368. Add to fn. 50 (which actually carries over to p. 369):

See Kawashima v. Holder, 615 F.3d 1043 (9th Cir. 2010), petition for certiorari filed. There is some expectation or at least hope that the Supreme Court will take the case.

P. 368. Add the following paragraph to the text at the bottom.

In Padilla v. Kentucky, ___ 130 U.S. ___, 130 S.Ct. 1473 (2010), the Supreme Court determined that a failure to advise of the immigration consequences could be ineffective assistance of counsel in violation of the Sixth Amendment. And, an attorney actually misadvising the client as to the immigration consequences would raise 6th Amendment issues. [n50a] Be sure to cover this point with your clients and cover it effectively.

[n50a.] See e.g., United States v. Kwan, 407 F.3d 1005, 1015-16 (9th Cir. 2005) (collecting and discussing cases), discussing inter alia United States v. Couto, 311 F.3d 179, 187-88 (2d Cir. 2002).

Chapter 13
CIVIL TAX CONSIDERATIONS

P. 382. Add as a new paragraph immediately after the carryover paragraph (ending "tax understatement"):

> The civil penalties for failure to file are graduated according to the gravity of the offense. They are: [n24a] (i) if negligent alone, up to $500 per incident; [n24b] (ii) if there is a pattern of negligent activity, a penalty of up to $50,000 for the pattern (not per incident in the pattern); [n24c] (iii) if more culpable than just negligent but not willful, up to $10,000 per incident but with a reasonable cause exception and (iv) if willful, up to the greater of $100,000 or 50% of the balance in the account(s) at the time of the violation. [n24d] The latter penalty applies also to false FBARs. Willful for this purpose is, presumably, Cheek willfulness - the intentional violation of a known legal duty. The Government's position is that willfully means something less in this civil penalty context. [n24e] But, given the potentially draconian nature of the penalty, [n24f] a court recently appeared to hold the Government to a very high standard of proof – perhaps approaching the Cheek standard and relieved a taxpayer from this penalty in a case where his facts were not very good. [n24g]

[n24a.] This summary is drawn from the IRS web page titled Workbook on the Report of Foreign Bank and Financial Accounts (viewed on 8/31/2009 and reviewed or updated on 2/19/09. The web page is at http://www.irs.gov/businesses/small/article/0,,id=159757,00.html.

The table at the web site includes a $500 penalty which appears to relate only to types of business rather than just persons who must file the FBAR. See § 5321(a)(6).

[n24b.] 31 USC §5321(a)(6)(A) 31 CFR 103.57(h).

[n24c.] 31 USC §5321(a)(6)(B).

[n24d.] 31 USC §5321(a)(5).

[n24e.] In a motion for summary judgment in United States v. McBride (D. Utah No. 2:09-cv-378-DB-BCW), the Government said:

> The civil standard for willfulness is satisfied where the individual at issue acts "voluntarily in withholding requested information, rather than accidentally or unconsciously," Lefcourt v. United States, 125 F.3d 79, 83 (2d Cir. 1997), or in reckless disregard of statutory duty. Safeco, 551 U.S. [57] at 57 [(1998)}.

In the same case, the Government does argue alternatively that if the Cheek-type standard does apply to the willfulness element of the FBAR civil penalty, the defendant in McBride met that standard.

[n24f.] Steven Toscher & Barbara Lubin, When Penalties Are Excessive — The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty, Journal of Tax Practice & Procedure 69 (December 2009 - January 2010).

[n24g.] United States v. Williams, 2010 U.S. Dist. LEXIS 90794 (E.D. Va. 2010).

Chapter 14
PUTTING IT ALL TOGETHER

No Supplemental Materials