UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-60209-CR-DIMITROULEAS/SELTZER

UNITED STATES OF AMERICA

vs.

KENNETH C. JENNE,

Defendant.
_______________________________________/

UNITED STATES' UNOPPOSED OBJECTIONS
TO THE PRESENTENCE INVESTIGATION REPORT

The United States, by and through the undersigned Assistant United States Attorneys, hereby files its objections to the revised Presentence Investigation Report ("PSI") dated October 30, 2007. Contrary to the parties' jointly stipulated recommendation and the prevailing case law, the PSI incorrectly groups all four counts of conviction into a single group. As a result, the PSI miscalculates the defendant's advisory sentencing range as being12 to 18 months. The United States hereby asks this Court to apply the grouping rules in the manner contemplated by the parties' plea agreement and, thereby, to arrive at the proper advisory sentencing range of 18 to 24 months. Jenne's defense attorney, J. David Bogenschutz, has advised the undersigned Assistant United States Attorneys that he has no objection to this request.

BACKGROUND

On September 5, 2007, the defendant, Kenneth C. Jenne, pled guilty to one count of conspiracy to commit mail fraud and three counts of filing a false tax return. The parties entered into a written plea agreement containing a joint recommendation as to how the parties believe the Court should apply the Sentencing Guidelines to the defendant. See Plea Agreement at ¶ 7.

According to the parties' joint recommendation, "under § 3D1.2, the three false tax return counts are grouped together and the conspiracy to commit mail fraud count is grouped separately." Id. The parties also jointly agreed to recommend that "two levels are added because of the defendant's abuse of his position of public trust." Id. The joint recommendation further specified that, in the parties' view, after the various grouping calculations are completed, "the combined offense level is 15" which "results in an applicable advisory guideline range for the defendant of 18 to 24 months." Id.

Despite the parties' agreement as to the proper Guidelines calculations, the PSI grouped all four counts of conviction in a single group. See PSI at ¶ 93. According to the PSI, the mail fraud conspiracy count is "grouped with the tax counts, pursuant to § 3D1.2(c), because [the mail fraud conspiracy count] embodies conduct that is treated as a specific offense characteristic in § 2T1.1," the guideline applicable to the tax counts. Id. Because of the way the grouping rules work, the decision to group all counts of conviction in a single count results in an overall two-level difference in Jenne's combined offense level. Rather than the combined offense level of 15 jointly recommended by the parties, the PSI calculated a combined offense level of 13. Accordingly, the PSI calculated an advisory guideline range of 12 to 18 months' imprisonment, as opposed to the 18 to 24 month range that the parties contemplated.

DISCUSSION

I. THE CONSPIRACY TO COMMIT MAIL FRAUD COUNT SHOULD BE GROUPED SEPARATELY FROM THE TAX COUNTS.

As noted above, the PSI improperly grouped all four counts of conviction together pursuant to § 3D1.2(c). See PSI at ¶ 93. Section 3D1.2(c) provides, in pertinent part, that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule . . . . [w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." U.S.S.G. § 3D1.2(c). In other words, when the conduct from one count is already fully captured by an adjustment in the guideline calculations for another count, those two counts should be grouped together. The Commentary to § 3D1.2(c) further provides that "[o]f course, this rule applies only if the offenses are closely related." U.S.S.G. § 3D1.2(c), Application Note 5. For grouping to be proper under § 3D1.2(c), both circumstances must be present. See United States v. Martin, 363 F.3d 25, 42 (1st Cir. 2004) ("Thus, even when one count embodies conduct treated as an adjustment to a second count, the counts cannot be properly grouped under § 3D1.2(c) unless they are 'closely related.'").

Where, as here, a defendant fails to report proceeds from a mail fraud conspiracy on his taxes, the grouping provisions of § 3D1.2(c) do not apply. First, a mail fraud conspiracy does not embody conduct treated as a "specific offense characteristic" in § 2T1.1, the guideline that governs the tax counts. While it is true that § 2T1.1 does provide for a two-level enhancement where "the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity," U.S.S.G. § 2T1.1(b)(1), such adjustment is simply "too broad to require the conclusion that it encompasses [mail] fraud in particular" as required for grouping under § 3D1.2(c). United States v. Vucko, 473 F.3d 773, 779 (7th Cir. 2007); see also United States v. Peterson, 312 F.3d 1300, 1302-04 (10th Cir. 2002) (holding that "the specific offense characteristic for failure to report criminally-derived income is not sufficiently based here on conduct embodied in the mail fraud count as to warrant grouping"); United States v. Astorri, 923 F.2d 1052, 1056 (3rd Cir. 1991) (holding that specific offense characteristic applicable to tax offenses did not "constitute conduct embodied in the fraud count"). As the Seventh Circuit recently held:

> To suggest that any criminal offense that produces income is subsumed into the tax guidelines calculation with a two-level enhancement is to create a category without limits. This is different from possessing a gun during a bank offense, where precisely that conduct is identified as a specific offense characteristic, or obstruction of justice, which is a specific adjustment under § 3C1.1. There is a distinction between saying that any underlying criminal act increases the offense level and that a specific underlying act increases the offense level.

Vucko, 473 F.3d at 779. In addition, as is reflected in the Commentary to § 2T1.1, the purpose of the two-level enhancement is to address the problem that "[c]riminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated," not to award additional punishment reflecting the harm from an underlying fraud. U.S.S.G. § 2T1.1, Commentary; see Vucko, 473 F.3d at 779. Moreover, because of the way the Guidelines calculations work in this case, grouping Jenne's four counts of conviction together "would have the anomalous result that an enhancement designed to increase a sentence has the effect of reducing it." United States v. Vitale, 159 F.3d 810, 814 (3rd Cir. 1998). For all of these reasons, the two-level enhancement found in § 2T1.1(b)(1) does not constitute the type of "specific offense characteristic" required to trigger the grouping provisions of § 3D1.2(c).

Second, Jenne's conviction for conspiracy to commit mail fraud should not be grouped with his tax convictions because they are not "closely related" as required by § 3D1.2(c). U.S.S.G. § 3D1.2(c), Application Note 5; see Martin, 363 F.3d at 42. In comparison to the tax counts, Jenne's conviction for conspiracy to commit mail fraud was "based on different elements, affected different victims, and involved different criminal conduct. To commit these crimes, the defendant had to make separate decisions to violate different laws." Peterson, 312 F.3d at 1303. Thus, grouping Jenne's four counts of conviction together under § 3D1.2(c) is improper. See Vucko, 473 F.3d at 779 (declining to group tax count with fraud count because "Vucko committed two different crimes, causing two different harms and harming two different victims. She did so at different times through different actions."); Martin, 363 F.3d at 42-43 (holding "connection between the two crimes [of fraud and tax evasion] too tenuous to be deemed 'closely related'" as required by § 3D1.2(c)); Peterson, 312 F.3d at 1303 ("We are convinced that tax evasion and mail fraud are not closely related because the victims of tax evasion and mail fraud are not the same, the offenses involve distinct behaviors . . . and the harms attributable to each crime are dissimilar."); Weinberger v. United States, 268 F.3d 346, 355 (6th Cir. 2001) (rejecting grouping pursuant to § 3D1.2(c) because the "fraud counts and the tax count consisted of different elements, affected different victims and involved different criminal conduct"); Vitale, 159 F.3d at 813-14 (recognizing that "the counts here involve different victims . . . different harms and different types of conduct" and rejecting grouping of wire fraud and tax evasion counts pursuant to § 3D1.2(c)). But see United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (holding that fraud counts and tax evasion counts should be grouped together under § 3D1.2(c)).

The specific facts of this case make grouping the four counts together under § 3D1.2(c) particularly unwarranted, as the counts of conviction here are even less "closely related" than in other cases where grouping has been rejected. For example, in the majority of the reported cases cited above, the defendant was convicted of tax counts that were based solely on the defendant's failure to report funds obtained through fraud. Here, in contrast, the money that Jenne obtained through the conspiracy to commit mail fraud figures in only one of the three tax counts (Count 4), and even with regard to that single count, comprises only part of the income that Jenne knowingly failed to report for that tax year. Put another way, the three tax counts in the Information reflect a total of $68,798 in unreported income. The majority of that unreported income (approximately

$40,279 of the $68,798 total) relates to Jenne's failure to report payments made for his benefit by his former law firm concerning a Mercedes convertible, not to money obtained through the conspiracy to commit mail fraud. Accordingly, regardless of whether this Court accepts or rejects the majority rule that a tax count based on a defendant's failure to report fraud proceeds on his taxes is not "closely related" to the underlying fraud count for purposes of grouping under § 3D1.2, the counts of conviction in this particular case bear no such close relation. See United States v. Tanner, No. 06-10107, 2007 WL 2859664, at *3 (9th Cir. Oct. 1,2007) (rejecting grouping under § 3D1.2 where majority of unreported income forming basis of tax counts was from source unrelated to fraud count). Grouping under § 3D1.2(c) is therefore not proper here.

CONCLUSION

For all of the foregoing reasons, this Court should reject the PSI's conclusion that the four counts of conviction should be grouped together pursuant to § 3D1.2(c) and should instead compute Jenne's advisory guideline sentence in accordance with the joint recommendation contained in the parties' plea agreement. As a result, this Court should calculate Jenne's combined offense level to be 15 and his advisory guideline range to be 18 - 24 months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 7, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Matthew S. Axelrod
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