No. 99-1096

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE LOREN REED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause requires proof by clear and convincing evidence, rather than proof by a preponderance of the evidence, to establish the applicability of specific offense characteristics and sentencing adjustments under the Sentencing Guidelines that together increase the defendant's offense level by seven.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Alice Hopper, Terry Ingram, George Kendall Reed, David L. Ries, Janice Mallen, Robert McKendrick, and Roger Knight were co-defendants of respondent at trial, and the court of appeals disposed of their appeals in the same opinion in which it disposed of respondent's appeal.

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 177 F.3d 824. The opinion of the district court (App, *infra*, 18a-89a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1999. Petitions for rehearing were denied on August 31 and September 17, 1999. On November 18, 1999, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 29, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "[N]or shall any person be * * * deprived of life, liberty, or property without due process of law."

STATEMENT

After a jury trial in the United States District Court for the Eastern District of California, respondent was convicted of conspiracy to obstruct proceedings before the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371, and one count of obstruction of IRS proceedings, in violation of 18 U.S.C. 1505. The court of appeals affirmed his convictions, but remanded the case to the district court for resentencing, holding, *inter alia*, that the district court had erred in failing to require proof by clear and convincing evidence, rather than by a preponderance of the evidence, to establish a specific offense characteristic and an adjustment that enhanced respondent's sentence under the Sentencing Guidelines.

1. During the 1980s, respondent failed to pay the IRS $146,000 in federal taxes withheld from employees of Reed Trenching, a firm controlled by respondent. In early 1989, the IRS obtained a judgment against respondent in the amount of $357,000, which included penalties and interest on the amount that Reed Trenching failed to pay. App., *infra*, 32a. In contesting his responsibility for the taxes, respondent asserted that "he was not required to file tax returns or to pay tax obligations because the Internal Revenue Code did not apply to him" as a "free citizen of the Republic of California." *Ibid.* On December 11, 1989, the IRS recorded a lien with the Stanislaus County, California, Recorder, in the amount of $416,000 (which included further accrual of penalties and interest) against a property

(the "Beckwith property") owned by respondent in Modesto, California. *Ibid.*

By April 1992, respondent had become involved with the Juris Christian Assembly (JCA), an organization that "had as a primary purpose the evasion by persons of the payment of future or outstanding tax obligations due and owing to the United States." App., *infra*, 31a; see *id.* at 33a. The sentencing issues on which this petition is based concern petitioner's involvement with the conspiracy centering around the JCA and, in particular, whether the JCA's use of violence and threats of violence to government officials were foreseeable to respondent and therefore properly used as the basis for the two sentencing enhancements. See Sentencing Guidelines § 1B1.3(a)(1)(B).

Respondent transferred the Beckwith property "into a 'religious trust' to be managed by the JCA so that [respondent] would show no income upon which taxes could be assessed by the IRS." App., *infra*, 33a. Respondent invited the JCA's leader, Everett Thoren, "to live on the Beckwith Property to facilitate the efforts to end [respondent's] tax problems and long struggle with the IRS." *Ibid.* Other members of the conspiracy lived on the Beckwith property, did business there, or congregated there. *Id.* at 34a.

Members of the JCA took various actions to obstruct the enforcement of the lien against the Beckwith property. The attorney for the government who was seeking to enforce the lien received a package of documents, including one purporting to be an "order of arrest" and another purporting to be a "complaint claiming that [the attorney] was conspiring against the United States." App., *infra*, 5a. Respondent's son, Kendall Reed, who was a co-conspirator, attempted to pay the judgment against respondent's property with a spuri-

ous document purporting to be a "Government Article I, §§ 1, 2 Warrant." *Ibid.* A U.S. Marshall's Service employee, however, refused to accept it, and the Treasury Department refused to accept it as payment when it was sent to the Department in Washington. *Ibid.*

Members of the conspiracy took other steps to obstruct the lien as well. Respondent and others visited the Stanislaus County Recorder, Karen Mathews, "demanding the tax liens on the Beckwith property be removed." App., *infra*, 38a. Mathews refused to do so. As the district court found, "[o]n one occasion, a box was placed under the County Recorder's car, containing an object, to simulate a pipe bomb, with the word 'boom' written on it." *Ibid.* In addition, "a letter was mailed to [Mathews] which stated that unless the lien was removed, the Recorder would be an 'example' to all other recorders in the state of California." *Ibid.* An envelope was sent to Mathews in which a bullet was enclosed and a note that "threatened that unless the liens were removed, the next bullet would be for her." *Ibid.*

On January 30, 1994, another member of the conspiracy, Roger Steiner,

> gained entry into Mathews' garage and waited for her to return home. After Mathews parked her car in the garage and closed the garage door, Steiner attacked her, inflicting physical and psychological injury.

App., *infra*, 39a. Steiner "scratched Mathews on the neck, held a gun to her head, dry fired the gun numerous times and told Mathews to file the documents she had been ordered to file." *Ibid.* "The purpose of the planned attack was to further the overall goal of the

conspiracy—to impede or obstruct the IRS, i.e., defeat the collection of taxes by sale of the real property." *Id.* at 50a.

In addition to its attempts to defeat respondent's tax lien, the conspiracy was also involved in obstructing an IRS tax levy placed on the wages of co-conspirator Terry Ingram, who owed $13,000 in taxes. Two members of the conspiracy went to Ingram's employer and unsuccessfully demanded that the tax levy be removed. App., *infra*, 3a-4a. Subsequently, the conspirators prepared some documents, signed by respondent and others, which were mailed to IRS Agent Mary Ryan, who had been assigned to collect the taxes Ingram owed. The documents, many of which "purported to be issued by the Solicitor General's Office, the Department of Justice, and the War Department," included a document purporting to be "an arrest warrant for Ryan" signed by respondent and others. *Id.* at 4a.[1]

2. Respondent was indicted on one count of conspiring to obstruct the lawful function of the IRS, in violation of 18 U.S.C. 371, one count of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952, and three counts of obstruction of proceedings before the IRS, in violation of 18 U.S.C. 1505. The interstate travel count alleged that respondent aided and abetted in Steiner's travel from Oregon to California for purposes of committing the assault on Mathews. Resp. C.A. Excerpt of Rec. 13-14. The three obstruction counts related to the attempted use of the phony "warrant" to satisfy respondent's tax obligations, the mailing of the fictitious "arrest warrant" to the IRS

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[1] Many of the documents were in the form of legal pleadings, and purported to relate to proceedings in the "United States of America, Supreme Court." Gov't C.A. Supp. Exc. of Rec. Tab 1.

attorney, and the assault on Mathews. Resp. C.A. Excerpt of Rec. 10, 12, 14. Respondent was convicted after a jury trial on the conspiracy count and the obstruction count based on the attempted use of the phony "warrant," but was acquitted on the other counts. App., *infra*, 18a-19a n.1, 28a. All eight of his co-conspirators were also convicted on the conspiracy count, and various of them were also convicted on various of the other substantive counts. See *id.* at 26a, 29a-31a.

The district court calculated respondent's sentence under Sentencing Guidelines § 2T1.9, which provides that the base offense level should be determined from the tables at Guidelines Sections 2T1.1 (tax evasion) or 2T1.4 (aiding, assisting, procuring, counseling, or advising tax fraud). App., *infra*, 54a, 65a, 112a. The court employed Section 2T1.4, which in turn bases the offense level on the amount of tax loss under the Tax Table at Section 2T4.1. App., *infra*, 71a. Based on the district court's finding that the total tax loss was the $416,000 at issue in the lien on the Beckwith property plus the $13,000 at issue in the tax levy on Ingram's wages, see *id.* at 76a-77a, respondent's base offense level was in the range of more than $325,000 and less than $550,000, resulting in an offense level of 17, *id.* at 78a, 112a.

The court then applied the four-level enhancement under Guidelines § 2T1.9(b)(1) for "the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." The court found that, although petitioner had not "himself engaged in any * * * conduct that was directly hostile or threatening towards Miss Mathews," see App., *infra*, 111a, "the plan or threatened use of violence was foreseeable to you, and, therefore, the Court is going to enhance by

those four levels." *id.* at 114a. Based on the foreseeable violence and threats of violence directed at Mathews and the threats to IRS agent Ryan, the court also applied the three-level enhancement under Guidelines § 3A1.2(a), see App., *infra*, 115a, applicable where "the victim was a government officer or employee * * * and the offense of conviction was motivated by such status." The court also applied the two-level enhancement under Guidelines § 2T1.9(b)(2) for encouraging "persons other than * * * co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." App., *infra*, 116a. The result was that respondent's sentencing range was 63-78 months' imprisonment. *Id.* at 116a. The court imposed a sentence of 63 months' imprisonment. *Id.* at 117a.

3. The court of appeals affirmed respondent's conviction, but remanded the case to the district court for resentencing. App., *infra*, 1a-18a. Of primary significance for present purposes, the court addressed the four-level enhancement for use of violence and the three-level enhancement for a government-officer victim. *Id.* at 15a-16a.[2] The court stated that, in *United*

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[2] The court of appeals also held that the district court had made two other errors at sentencing that should be corrected on remand. The court held that "the district court erred by including penalties and fees in the amount of loss." App., *infra*, 12a-13a. The court also held that the district court had erred in applying the two-level Section 2T1.9(b)(2) enhancement for encouraging non-conspirators to obstruct the collection of taxes, since Sentencing Guidelines § 2T1.9(b) instructs that, in cases in which both that enhancement and the four-level Section 2T1.9(a) enhancement for use of violence applies, the sentencing court must "use the greater." App., *infra*, 16a. The court of appeals' rulings on those claims are not at issue here.

States v. *Restrepo*, 946 F.2d 654, 659 (9th Cir. 1991) (en banc), it had "held that 'when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction,' the government may have to satisfy a 'clear and convincing' standard." App., *infra*, 14a. The court then found that:

> The seven-level adjustment increased the sentencing range from 24-30 months to 63-78 months. Given the relative shortness of [respondent's] sentence, a potential increase of 48 months satisfies the *Restrepo* extremely disproportionate impact test. Consequently, the district court erred in failing to apply the clear and convincing standard.[3]

App., *infra*, 15a. The court held that: "We therefore vacate respondent's sentence and remand this case to the district court for re-sentencing on this issue using the clear and convincing standard." *Id.* at 15a-16a.[4]

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[3] The court of appeals incorrrectly stated that, without the seven-level enhancement, the sentencing range was 24-30 months. Respondent was sentenced at offense level 26. Without the four-level and three-level enhancements, respondent would have been sentenced at offense level 19. The indicated sentencing range for offense level 19, however, is 30-37 months, not 24-30 months. We brought this error to the attention of the court in our Petition for Rehearing and Suggestion of Rehearing En Banc, at 6 n.4, but the court denied the petition and suggestion without comment.

[4] The court of appeals also held that there was sufficient evidence of a single conspiracy, App., *infra*, 6a-8a, that there was sufficient evidence that the defendants attempted to obstruct a pending proceeding before the IRS, *id.* at 8a-11a, that the district court did not err in instructing the jury that the alleged invalidity of a levy is not a valid defense to a charge of obstructing an IRS proceeding, *id.* at 11a-12a, that the district court properly sentenced respondent and the other defendants under Sentencing Guidelines § 2T1.9, see *id.* at 13a-14a, and that the district court did

REASONS FOR GRANTING THE PETITION

This Court has twice "acknowledge[d] that there is a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam); accord *Almendarez-Torres* v. *United States*, 523 U.S. 224, 248 (1998). The court of appeals' decision that the two sentencing enhancements in this case could be applied only if proven by clear and convincing evidence presents the question of which of the opposing views is correct. The Ninth Circuit's holding conflicts with decisions of three courts of appeals that the preponderance standard is always sufficient to support application of a sentencing factor. See *United States* v. *Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993), cert. denied, 511 U.S. 1020 (1994); *United States* v. *Lombard*, 102 F.3d 1 (1st Cir. 1996), cert. denied, 520 U.S. 1266 (1997); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-39 (4th Cir.), cert. denied, 493 U.S. 943 (1989). The decision also conflicts with numerous decisions of other circuits holding that sentencing factors with similar or greater effect on the defendant's sentence than the increase in this case did not have to be supported by more than a preponderance of the evidence. The court of appeals' standard not only is incorrect, but will require the application of differing standards of proof to various sentencing factors that are potentially applicable to a single defendant, and to a single sentencing factor that is potentially applicable to multiple defendants who have committed the same crime. It will thus unduly

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not err in including respondent's tax liabilities in a co-defendant's relevant conduct, *id.* at 16a-17a.

complicate sentencing proceedings in the Ninth Circuit. Further review is therefore warranted.

1. In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court held that a Pennsylvania statute that treated visible possession of a firearm as a sentencing factor requiring a minimum five-year prison sentence for certain specified offenses was constitutional, *id.* at 84-91, and it rejected the claim that due process nevertheless required that sentencing factor to be proven by at least clear and convincing evidence, *id.* at 91-93. The defendants in *McMillan* who were subject to the five-year minimum included one whose sentence, without the enhancement, would have been 11 1/2 to 23 months and another whose sentence would have been 1 to 6 years. *Id.* at 82 n.2.[5] The sentencing factor in *McMillan* thus had at least as great an effect on those defendants' sentences as the enhancements at issue in this case. This Court nonetheless stated that it "ha[d] little difficulty concluding that in this case the preponderance standard satisfies due process." *Id.* at 91.

In reaching its conclusion in *McMillan*, the Court noted that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *Ibid.* The Court further stated that it "s[aw] nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing." *Id.* at 91-92. Finally, the Court pointed out that courts of appeals had "uniformly rejected due process challenges to the preponderance standard under the federal 'dangerous special offender' statute, 18 U.S.C. § 3575, which provides for an enhanced sen-

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[5] Without the five-year minimum, the other defendants' sentences would have been 3 to 10 years, 4 to 8 years, and 2 1/2 to 5 years. 477 U.S. at 82 n.2.

tence if the court concludes that the defendant is both 'dangerous' and a 'special offender.'" *Id.* at 92-93 (citing *United States* v. *Davis*, 710 F.2d 104, 106 (3d Cir.) (collecting cases)).

In the course of concluding that the Pennsylvania statute had not in effect added an element (visible possession of a firearm) to the underlying offenses and then permitted that element to be found by a judge by a preponderance of the evidence, the Court in *McMillan* noted that "[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." 477 U.S. at 88. That statement was apparently intended to address the possibility that a legislature might mask an element of an offense as a sentencing factor, and thereby evade the defendant's constitutional right to proof beyond a reasonable doubt and a jury trial. It was not intended to vitiate the Court's conclusion that legitimate sentencing factors may be proven by a preponderance of the evidence.

Nonetheless, some courts—notably the Ninth Circuit in *Restrepo*, see 946 F.2d at 659, and the Third Circuit in *United States* v. *Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990)—have suggested that that language in *McMillan* may be read to indicate that something more than a preponderance-of-the-evidence standard may sometimes be required before a sentencing enhancement may be applied in a given case. Referring, *inter alia*, to *Restrepo* and *Kikumura*, this Court in *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam), "acknowledge[d] a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." See also *id.* at 156 (stating that *McMillan* established

that "application of the preponderance standard at sentencing generally satisfies due process"); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 248 (1998) (acknowledging divergence among courts of appeals but expressing no view on its proper resolution). But before the decision in this case, no court of appeals had squarely held that proof of a sentencing factor under the Guidelines required more than a preponderance of the evidence.

In *Restrepo*, the Ninth Circuit held that the circumstances in that case did not require a higher burden of proof. See 946 F.2d at 659. While the Third Circuit in *Kikumura* did hold that factors warranting an extensive upward departure—a "twelve-fold, 330-month departure from the median of an applicable sentencing range," 918 F.2d at 1102—must be proven by clear and convincing evidence, *Kikumura* addressed an upward departure from the Guidelines, rather than the routine application of sentence enhancements in the course of applying the Guidelines. The court in *Kikumura*, moreover, ultimately rested its decision on a reading of the statute authorizing departures from the Guidelines, rather than on a direct application of the Due Process Clause. See 918 F.2d at 1102 ("We hold that the clear and convincing standard is, under these circumstances, implicit in the statutory requirement that a sentencing court 'find' certain considerations in order to justify a departure, 18 U.S.C. 3553(b).").[6] See *United States* v.

[6] Since *Kikumura*, the Third Circuit has applied the clear-and-convincing standard in three cases that involved upward departures. See *United States* v. *Paster*, 173 F.3d 206, 216 (1999); *United States* v. *Bertoli*, 40 F.3d 1384, 1411 (1994); *United States* v. *Seale*, 20 F.3d 1279, 1288 (1994). In *United States* v. *Paulino*, 996 F.2d 1541, 1545 n.4 (1993), however, the court confined *Kikumura* to the departure context, holding that the preponderance standard

Lombard, 102 F.3d 1, 4 (1st Cir. 1996) (*Kikumura* holding "much discussed but generally not followed").

2. After the decision in *Kikumura*, the Sentencing Commission added commentary to Sentencing Guidelines § 6A1.3 stating that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." See Sentencing Guidelines, App. C, Amdmt. 387 (effective Nov. 1, 1991). In this case, however, the court of appeals nevertheless held that two sentencing factors, with a cumulative effect on respondent's sentence of seven offense levels and an increase in respondent's sentencing range from 24-30 months to 63-78 months, may be applied only if proven by clear and convincing evidence.[7] While the court of appeals did not explicitly identify the legal authority justifying its rule, its

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applied to the determination of the quantity of drugs distributed by a conspiracy, because "the present fact-finding dispute does not arise in a *Kikumura* significant-departure context." Moreover, even if *Kikumura* were applicable outside the departure context, the Ninth Circuit's holding that two adjustments resulting in a seven-level increase in respondent's offense level required an elevated standard of proof is in conflict with a statement in *Kikumura* that the preponderance standard would probably be sufficient as to a ten-level increase, under Sentencing Guidelines § 2K1.3(b)(4), for distributing explosives to a fugitive from justice. See 918 F.2d at 1100.

[7] As we note above, see p. 8 n.3, *supra*, the seven-level enhancement in fact increases respondent's sentencing range from 30-37 months to 63-78 months, not from 24-30 months to 63-78 months. Because the court of appeals' legal ruling, however, rests on the premises that it recited, we assume for purposes of this case that the two enhancements increased respondent's sentence as the court of appeals stated.

citation to *Restrepo*, see App., *infra*, 14a, 15a, indicates that the court intended to invoke the Due Process Clause. The cited passage in *Restrepo* stated the court of appeals' view that *McMillan* recognized "that there may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." *Restrepo*, 946 F.2d at 659. The court in this case found that such an exception existed on the facts of this case, and that clear and convincing evidence was therefore required.

That decision conflicts with decisions of the Tenth, First, and Fourth Circuits. The Tenth Circuit has rejected the proposition "that relevant conduct causing a dramatic increase in sentence ought to be subject to a higher standard of proof." *United States* v. *Washington*, 11 F.3d at 1516. In *Washington*, the sentencing court found that the quantity of drugs involved in the defendant's offense was more than six kilograms, rather than the 61 grams that defendant claimed. That increased defendant's sentence under the Guidelines from level 32 to level 40, and, after taking into account other adjustments for the defendant's role in the offense and obstruction of justice, it increased his sentencing range more than 150 months, from 210-262 months to life imprisonment, which under the Guidelines is considered to be greater than 360 months' imprisonment. See Sentencing Guidelines, Ch. 5, Pt. A (Sentencing Table). Citing *Kikumura*, the court reserved judgment about whether a court must apply "a higher standard for significant departures from the guidelines sentence." 11 F.3d at 1516. But, as this Court in *Watts* noted, the Tenth Circuit stated that "[a]t least as concerns making guideline calculations the

issue of a higher than a preponderance standard is foreclosed in this circuit." *Watts*, 519 U.S. at 157 n.2 (quoting *Washington*, 11 F.3d at 1516). See also 11 F.3d at 1516 ("[T]he Due Process Clause does not require sentencing facts in the ordinary case to be proved by more than a preponderance standard.").

Similarly, in *United States* v. *Lombard*, 102 F.3d 1 (1996), the First Circuit upheld the use of the preponderance-of-the-evidence standard in enhancing the defendant's sentence, based on relevant conduct for which the defendant had been acquitted in an earlier proceeding, from a 20-30 year range to mandatory life imprisonment. The court rejected the defendant's argument that factors that had such a large effect on sentencing must be proven beyond a reasonable doubt, holding that "the Constitution does not require a heightened proof standard in a case such as ours." 102 F.3d at 5. See also *Watts*, 519 U.S. at 156 n.2 (noting that *Lombard* stated that a downward departure in an extreme case may be warranted).

The Fourth Circuit has also squarely rejected the proposition that sentencing factors must be proven by more than a preponderance of the evidence, albeit in a case in which only a two-level adjustment was at issue. In *United States* v. *Urrego-Linares*, 879 F.2d at 1237-39, the court explained that, in *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986), this Court "ruled that, as prescribed by Pennsylvania statute, due process is satisfied by application of a preponderance standard to factual findings made by a court during sentencing." 879 F.2d at 1237. The Fourth Circuit also rejected the contention that a more rigorous standard should be adopted on fairness grounds, even if not constitutionally required. *Id.* at 1237-1238. In doing so, the court noted, *inter alia*, that this Court had stated in

McMillan "that the adoption of a clear and convincing standard of proof 'would significantly alter criminal sentencing,' [*McMillan*, 477 U.S. at 92 n.8], a change which the Court determined would be unnecessary and burdensome." *Ibid.*

Although some courts in addition to the Ninth Circuit have held or suggested that a higher standard than preponderance might apply in extreme cases, we have found no case in which one of those courts has held or suggested that a sentence increase on the order of magnitude of the one in this case warranted a higher standard than preponderance. To the contrary, greater sentence increases than the increase in this case have been held not to warrant a higher standard. See *United States* v. *Rodriguez*, 67 F.3d 1312, 1322-1323 (7th Cir. 1995) (increase from 51-63 months to life imprisonment in drug case); *United States* v. *Thompson*, 51 F.3d 122, 125 (8th Cir. 1995) (fourfold increase in sentence did not require higher standard). In *United States* v. *Carreon*, 11 F.3d 1225, 1240 (1994), the Fifth Circuit made the point clear, holding that a sentencing factor that would increase the defendant's term of imprisonment from six years to almost twenty years "does not justify considering, much less imposing, the higher burden of proof."

3. Before this case, the Ninth Circuit had indicated that, whatever the scope of *Restrepo*, sentencing factors that enhanced a sentence to at least the same extent as in this case need not be proven by more than a preponderance of the evidence.[8] On that basis, we

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[8] In *United States* v. *Harrison-Philpot*, 978 F.2d 1520 (9th Cir. 1992), the defendant was convicted of distributing cocaine, and an uncharged quantity of cocaine raised her offense level from 22, with a sentencing range of 41-51 months, to 34, with a sentencing

filed a petition for rehearing en banc in this case, but the court of appeals denied our suggestion. Nonetheless, in a subsequent case, the Ninth Circuit confirmed that it views the decision in this case as expressing the law of the circuit on the application of a clear-and-convincing evidence standard at sentencing.

In *United States* v. *Lawton*, 193 F.3d 1087 (1999), the Ninth Circuit reversed an upward departure imposed by the district court, on the ground that the district court had in effect "deprived [the two defendants] of the benefit of their plea bargain" by sentencing them for "the suspected but uncharged real offense conduct." *Id.* at 1089. In remanding for resentencing, the court held that the district court could consider the uncharged conduct as "relevant conduct" under Sentencing Guidelines § 1B1.3. But, citing its decision in the instant case, the court added that "if any disputed fact has a 'disproportionate impact' on the sentence, the fact must be established by clear and convincing evidence." *Id.* at 1095.[9]

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range of 292-365 months. *Id.* at 1522. In *United States* v. *Sanchez*, 967 F.2d 1383 (9th Cir. 1992), amounts of heroin included as relevant conduct raised the defendant's offense level from 12 to 26 and his sentencing range from 10-16 months to 63-78 months. *Id.* at 1384.

[9] In *United States* v. *Romero-Rendon*, 1999 WL 1101292 (Dec. 7, 1999), the Ninth Circuit refused to apply its decision here to hold that a sentencing factor must be shown by clear and convincing evidence in that case, but its decision rested on the ground that the defendant had never challenged the accuracy of the information on which the sentencing court had based the sentence enhancement. *Id.* at *2. In *United States* v. *Kaluna*, 192 F.3d 1188 (9th Cir. 1999) (en banc), the Ninth Circuit upheld the constitutionality of the federal three-strikes law, 18 U.S.C. 3559(c)(1), providing for life imprisonment for felons who had previously been convicted of two or more serious violent felonies or serious drug offenses. In hold-

4. The decision of the court of appeals is likely to sow substantial confusion in the sentencing process throughout the Ninth Circuit. Enhancements of the same magnitude as the three-level and four-level enhancements at issue in this case are prevalent throughout the Guidelines. As in *McMillan*, "embracing [the court of appeals'] suggestion that we apply the clear-and-convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the [sentencing enhancements] at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence." 477 U.S. at 92 n.8.

For example, Guidelines § 2A2.2 is a typical provision, covering aggravated assault. Section 2A2.2 provides for a base offense level of 15, which is comparable to respondent's base offense level of 17. It then provides, *inter alia*, for a two-level increase for more than minimal planning, a five-level increase if a firearm was discharged, increases of from two to six levels depending on the degree of injury suffered by the victim, a two-level increase if the offense was motivated by a payment of money, and a two-level increase if the offense involved violation of a court protective order. Under the Ninth Circuit's decision, the application of any one of those enhancements could be determined on the basis of a preponderance of the evidence, but an application of two or more could frequently require application of the clear and convincing standard.

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ing that the government had the burden of proving the prior offenses, the court cited *United States* v. *Young*, 33 F.3d 31, 32 (9th Cir. 1994), and added in a parenthetical that "[t]he Government bears the burden of proving factors enhancing a sentence by a preponderance of the evidence." 192 F.3d at 1194 (quoting *Young*, 33 F.3d at 32).

Indeed, even aside from issues arising in the determination of the base offense level and the application of specific offense characteristics, the application of one or more other sentencing adjustments can easily have a similar effect in a great many cases. For example, a determination of the defendant's role in the offense can add four levels under Section 3B1.1(a) of the Guidelines or subtract four levels under Section 3B1.2(a) from the otherwise applicable offense level. Thus, a decision on the question of what role a defendant played in an offense can cause an eight-level swing in the defendant's offense level, greater than the seven-level enhancement that the court required to be proved by clear and convincing evidence in this case.

The difficulties in applying the Ninth Circuit's ruling are compounded by the fact that a district court often does not know what sentencing factors it will apply until after it completes the sentencing process. In a typical case, the presentence report will recommend a base offense level, with one or more enhancements or reductions, the defendant may argue for a lower base offense level and for the application of one or more mitigating factors, and the government may argue for a higher base offense level and for one or more enhancements. There is no way to determine how much effect one or more of the sentencing factors would have on the sentence—and therefore whether the application of those factors must be proven by clear and convincing evidence under the Ninth Circuit's ruling—until the court has decided all or most of the other disputed sentencing issues. The result can only be to inject needless confusion and indeterminacy into the sentencing process; a court that has found a particular enhancement applicable by a preponderance of the evidence will have to revisit that determination as soon as

it finds sufficient other enhancements applicable to make the total enhancement equal to that in this case. In practice, district courts may have to apply the clear and convincing evidence standard to adjustments that increase (but not, presumably, to those that decrease) the sentence in a great many cases as a safe harbor, or risk unpredictable appellate reversals and resentencings based on commonplace and unexceptionable applications of the Sentencing Guidelines.

5. On November 29, 1999, this Court granted certiorari in *Apprendi* v. *New Jersey*, No. 99-478. In that case, the defendant was convicted of weapons offenses that carried a maximum penalty of ten years' imprisonment. The New Jersey Supreme Court held that it was constitutional to apply a state "hate crimes" statute providing for extending the maximum term of imprisonment to twenty years if the court finds, by a preponderance of the evidence, that the defendant acted with the purpose to intimidate an individual because of race, gender, religion, or other specified characteristics. This Court granted certiorari to consider whether the New Jersey statute "unconstitutionally provides for an extended term of imprisonment increasing the maximum possible penalty by ten years, based on proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt, and denies the defendant rights to notice by indictment and trial by jury." 99-478 Pet. at i.

The question presented in *Apprendi* is quite distinct from the question presented in this case. In *Apprendi*, the "hate crimes" sentencing statute extends the maximum term of imprisonment to which the defendant is subject. The case thus presents the question whether a factor that extends the maximum term of imprisonment authorized by statute must be "charged in an indict-

ment, submitted to a jury, and proven beyond a reasonable doubt." 99-478 Pet. App. 19a (quoting *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)). By contrast, there is no claim in this case that either of the sentencing enhancements at issue—for use of violence or for official victim—must be proven as elements of the underlying offense, and neither enhancement has any effect on the maximum punishment authorized by the statutes under which respondent was convicted. Instead, this case simply presents the question whether the Due Process Clause requires a clear and convincing standard of proof, rather than a preponderance of the evidence, to establish two sentencing enhancements, in light of their effect on respondent's sentence within the maximum statutory term. The Court's disposition of the quite different question in *Apprendi* is unlikely to affect the disposition of this case, and the issue presented in this case warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-10445, 97-10457, 97-10463, 97-10494,
97-10495, 97-10496, 97-10515, 97-10527

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ALICE HOPPER, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TERRY INGRAM, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE KENDALL REED, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DAVID L. RIES, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE LOREN REED, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JANICE MALLEN, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT MCKENDRICK, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROGER ARDELL KNIGHT, DEFENDANT-APPELLANT

[Argued and Submitted: April 13, 1999[1]
Filed: May 20, 1999]

Before: Alfred T. Goodwin and Stephen S. Trott, Circuit Judges, and Samuel P. King, District Judge.[2]

TROTT, Circuit Judge:

Alice Hopper ("Hopper"), Terry Ingram ("Ingram"), George Kendall Reed ("Kendall Reed"), David Ries ("Ries"), George Loren Reed ("George Reed"), Janice Mallen ("Mallen"), Robert McKendrick ("McKendrick") and Roger Knight ("Knight") (collectively "Appel-

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[1] Alice Hopper and Roger Knight were submitted on the briefs. All other appeals were argued. Fed. R. App. P. 34(a)(2).

[2] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

lants") appeal their convictions and sentences for conspiracy to obstruct proceedings before an agency in violation of 18 U.S.C. § 371, obstruction of proceedings before an agency in violation of 18 U.S.C. § 1505, false personation of a government official in violation of 18 U.S.C. § 912, and HUD fraud in violation of 18 U.S.C. § 1010. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we affirm in part, reverse in part and remand this case to the district court for further sentencing proceedings in conformity with this opinion.

BACKGROUND

Appellants are members of, or were otherwise associated with, the Juris Christian Assembly ("JCA"). The JCA was established by the late Everett Thoren ("Thoren"), who convinced his followers that the JCA was a tax exempt religious organization. Originally established in Oregon, Thoren moved the JCA to a warehouse owned by George Reed in Modesto, California. JCA members would place all their property in a trust with the JCA appointed as trustee. The JCA would pay its members' bills and transfer the remaining money back to its members, minus an administrative fee of ten percent. Because of the JCA's purported religious status, JCA members declared themselves tax exempt.

The IRS assigned IRS agent Mary Ryan ("Ryan") to investigate and collect unpaid taxes from Ingram. Ryan placed a IRS tax levy on Ingram's wages from Ingram's employer Modesto Toyota. Thoren promised Ingram that the JCA would "take care" of the wage levy. Shortly thereafter, Ries and another individual

went to Modesto Toyota, and demanded that the IRS levy be removed. Modesto Toyota refused. Subsequently, Ries and Knight prepared a packet of documents, which were signed by George Reed, Mallen, McKendrick, Knight, and Ries and mailed to Ryan by Hopper. These documents included: (1) an arrest warrant for Ryan; (2) requests for admissions; (3) a complaint demanding a refund of money garnished from Ingram's wages; (4) a verification form, informing Ryan that if she tried to enforce the levy she would be tried and have a sentence imposed upon her; (5) a letter informing Ryan that the levy was unconstitutional; (6) a letter informing Ryan that a court-martial had been conveyed; (7) an order stating that the levy constituted a declaration of war; (8) a letter requiring Ryan to respond to the charges; and (9) a pamphlet on "Silent Weapons for Quiet Wars." Many of these documents purported to be issued by the Solicitor General's Office, the Department of Justice, and the War Department.

After receiving the documents in the mail, Ryan checked the status of Ingram's tax liabilities. She learned that the IRS had received two "Article 1 Section 2" warrants for the amount of the wage levies and had applied those warrants in satisfaction of Ingram's debt. Ryan requested the warrants, determined they were worthless homemade checks, and reinstated Ingram's debt.

George Reed failed to pay more than $100,000 in withholding taxes he had collected from his employees at Reed Trenching. With fees and interest, that amount grew to over $416,000. IRS agent Michael Cash ("Cash") was assigned to investigate and collect George Reed's taxes. Cash caused liens to be filed against

George Reed's property in Modesto. Assistant United States Attorney Diana Noweski ("Noweski") was assigned to prosecute the matter on behalf of the IRS. Noweski obtained a judgment in federal court against George Reed and sought to foreclose the judgment lien. Later, Noweski received a package of documents similar to those received by Ryan, including an order of arrest and a complaint claiming that Noweski was conspiring against the United States.

Shortly after Noweski received the documents, George Reed's son Kendall Reed went to the U.S. Marshal's Service and attempted to pay the judgment against George Reed's property with a "Government Article I, §§ 1, 2 Warrant" similar to the spurious warrant received by the IRS on behalf of Ingram. Kendall Reed presented the warrant to Colleen Maloney ("Maloney") a U.S. Marshal's Service employee and insisted that she accept the warrant as satisfaction of the judgment. Maloney, however, refused to accept the warrant. Later, that same warrant was mailed to the Treasury Department in Washington D.C., but the IRS mailed the warrant back to George Reed, stating that it would not be accepted as payment.

In December 1993, Kendall Reed went to the Stanislaus County Recorder's office to have the liens removed from George Reed's land. Karen Mathews ("Mathews"), the county recorder, refused to remove the liens. George Reed also went to see Mathews to have the liens removed, but she again refused to remove the liens. Previously, Mathews had received a letter from Knight that quoted the Supreme Court decision in *Simmons v. United States*, 390 U.S. 377, 390-91, 88 S. Ct. 967, 19 L.Ed.2d 1247 (1968), to the effect

that "it is intolerable that one Constitutional Right should have to be surrendered in order to assert another." Knight's letter threatened that "anyone who attempts to enforce a void 'unlaw' does so at their own peril and risk." After George Reed's visit, Mathews received another letter also quoting *Simmons*, which contained a bullet and threatened that if Mathews continued to enforce a "void 'unlaw,'" "the next bullet would be directed at [her] head." Later, Mathews was assaulted by Roger Steiner. Steiner scratched Mathews on the neck, held a gun to her head, dry fired the gun numerous times and told Mathews to file the documents she had been ordered to file.[3]

Based on these actions, Appellants were indicted in a multi-count indictment, which among other charges alleged a conspiracy by Appellants to obstruct the due and proper proceedings of law before the IRS. The jury found Appellants guilty of the conspiracy, and this appeal followed.

DISCUSSION

I. Single Conspiracy

Appellants argue that there was insufficient evidence to prove that they were members of a single conspiracy as opposed to two or more separate conspiracies. There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the pro-

[3] Steiner was a defendant in the trial and was convicted of carrying out this attack on behalf of the JCA. Steiner's appeal has been severed.

secution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

A single conspiracy "is one overall agreement to perform various functions to achieve the conspiracy's objectives." *United States v. Shabani*, 48 F.3d 401, 403 (9th Cir.1995) (internal quotation omitted). A formal agreement is not necessary; an agreement may be inferred from the Appellants' acts pursuant to the scheme, or other circumstantial evidence. *See United States v. Clevenger*, 733 F.2d 1356, 1358 (9th Cir. 1984). "A single conspiracy may involve several subagreements or subgroups of conspirators." *United States v. Bibbero*, 749 F.2d 581, 587 (9th Cir. 1984). To distinguish a single from a multiple conspiracy, we examine "the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." *Id.*

In this case, the scheme encompassed a sham organization created to evade tax liabilities. The participants were all members of or somehow affiliated with the JCA. Although each defendant's level of participation differs with each act, all defendants engaged in one or more overt acts. The actions were performed at the JCA headquarters in Modesto and had as its purpose preventing the collection of lawful taxes from persons sheltered by the JCA. Viewing this evidence in the light most favorable to the government, we hold there

was sufficient evidence to prove that Appellants were engaged in a single conspiracy.[4]

II. Obstruction of a Proceeding Before An Agency

Kendall and George Reed argue that there is insufficient evidence to prove that they attempted to obstruct a pending proceeding before the IRS. George and Kendall Reed were indicted under § 1505 for obstructing a proceeding before a department or agency of the United States, in this case the IRS. The indictment alleged that Kendall Reed attempted to prevent collection of the tax deficiencies by paying the judgment with a "fraudulent monetary instrument, entitled 'Government Art I §§ 1,2 Warrant.'" The Reeds argue that their actions may have obstructed a judgment of the federal courts, but because federal courts are not "departments" or "agencies," they should not have been charged under § 1505.

In *United States v. Aguilar*, 515 U.S. 593, 600, 115 S. Ct. 2357, 132 L.Ed.2d 520 (1995), the defendant was indicted under 18 U.S.C. § 1503 for obstructing a judicial proceeding. The indictment alleged that Aguilar had intentionally given false information to federal investigators who were potentially going to be called to testify before a grand jury. The Supreme Court held that lying to an investigating agent who "might or

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[4] Appellants argue that the jury rejected the single conspiracy theory by finding some defendants guilty of one part of the conspiracy but acquitting them of others. However, the existence of facially inconsistent jury verdicts is not grounds for reversing a conviction. *United States v. Lennick*, 18 F.3d 814, 821 (9th Cir. 1994).

might not testify before a grand jury" did not constitute obstruction of a judicial proceeding. *Aguilar*, 515 U.S. at 600. The Court noted, however, that had the investigators been subpoenaed or summoned by the grand jury, or had there been proof that they were acting as an arm of the grand jury, there would have been enough to support a conviction for obstructing a judicial proceeding. *Id.* at 600-02. The Court held that in order to be indictable for obstruction of a judicial proceeding, the defendant's actions must have a "natural and probable effect of interfering with the due administration of justice." *Id.* at 601 (internal quotation marks omitted); *see also United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972) ("The acts complained of must bear a reasonable relationship to the subject of the grand jury inquiry."); *United States v. Kassouf*, 144 F.3d 952, 956-57 (6th Cir. 1998) (holding that the act must have a relationship in time, causation or logic with the judicial proceedings).

In this case, we hold that the actions taken by the Reeds had the "probable and natural" affect of obstructing a proceeding before the IRS. If accepted, the phony warrant would have precluded collection of the tax debt and the enforcement of the IRS tax liens. Until the debt behind those liens was satisfied, the collection proceeding before the IRS continued. Moreover, the Reeds knew that the judgment was for the IRS liability, which the IRS was seeking to collect. Indeed, the Reeds' warrant was made payable to the "U.S. District Court/*IRS* C/O U.S. Marshall (sic)." (emphasis added). Additionally, after the warrant was rejected by the U.S. Marshal, the warrant was mailed to the Treasury Department for payment to the IRS. The Reeds knew that if the phony warrant had been

accepted by the U.S. Marshal, the "natural and probable" effect would be to satisfy the delinquent taxes and prevent collection of money owed to the IRS. That understanding and the actions taken to prevent collection constitute obstruction of an IRS proceeding. *See Aguilar*, 515 U.S. at 599-601.

The Reeds rely on the Supreme Court's decision in *Hubbard v. United States*, 514 U.S. 695, 115 S. Ct. 1754, 131 L.Ed.2d 779 (1995) for the proposition that they may have obstructed a judicial proceeding, but not a "department" or "agency" of the United States. *Hubbard* is distinguishable. In *Hubbard*, the defendant made false representations in papers filed in a bankruptcy proceeding and was indicted under 18 U.S.C. § 1001. Section 1001 criminalizes the making of false statements or similar conduct "in any manner within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001. The Supreme Court held that a court is not a department or agency, and therefore that submitting false documents to a bankruptcy court did not violate § 1001. *Hubbard*, 514 U.S. at 715. However, in *Hubbard*, the only government entity involved was the bankruptcy court, and the only activity was the bankruptcy proceeding. The false statements did not, therefore, have the "natural and probable" effect of interfering with proceedings before a department or agency. Conversely, in this case, the IRS was a party to the judicial proceeding, and the phony warrant had the "natural and probable" effect of obstructing collection of delinquent taxes by the IRS. Additionally, enforcement of tax liens by the IRS is an IRS proceeding. The fact that the IRS was required to enforce its lien in federal court does not change the IRS's involvement. It was an IRS tax lien, prosecuted

by an Assistant United States Attorney representing the IRS, and any money collected would have been paid to the IRS.

The Reeds correctly point out that the IRS levies merged with the judgment, and that the judgment was to be collected by the United States Marshal's service not the I.R.S. However, money paid to the U.S. Marshal is then paid to the party who holds the judgment, in this case the IRS. Therefore, preventing the collection of the funds by the U.S. Marshal would have the direct effect of obstructing collection of those funds by the IRS. Because collection of delinquent taxes is an IRS proceeding, the Reeds were properly convicted under 18 U.S.C. § 1505.

III. Requested Affirmative Defense Instruction

At trial, the Appellants argued that the Ingram wage levies were invalid and therefore that they could not be criminally responsible for obstructing collection of those levies. The district court rejected their argument and instructed the jury that "[t]he alleged invalidity of a levy under the revenue laws of the United States is not a defense." Appellants argue that this instruction was erroneous. Whether a jury instruction accurately states the law is an issue of law reviewed de novo. *United States v. Eshkol*, 108 F.3d 1025, 1028 (9th Cir. 1997).

We have not addressed whether the invalidity of the underlying levy is a defense to a charge of obstruction under § 1505. However, in *United States v. Lewis*, 657 F.2d 44, 45 (4th Cir. 1981), the Fourth Circuit held that "the underlying validity of the levy under the revenue

laws of the United States is a matter to be determined in a separate action of a civil nature and may not be used as a defense to a criminal charge such as [obstructing an IRS proceeding]." We agree with the Fourth Circuit and hold that the invalidity of the underlying levies is not a defense to charges of obstruction. If Appellants sincerely believed the levies were invalid, they should have challenged those levies in a civil action, rather than with threatening letters, phony warrants and violence. Because the invalidity of the underlying levy is not a defense to an obstruction charge, the district court did not err in refusing to give the requested instruction.

IV. Calculating Amount of Loss

Appellants argue that the district court erred by including penalties and fees into the amount of loss for sentencing. The district court's interpretation of the Guidelines is reviewed de novo. *United States v. Bailey*, 139 F.3d 667, 667 (9th Cir. 1998).

The Guidelines instruct the district court to determine tax loss and then to determine the offense level by using the tax table at § 2T4.1. U.S.S.G. §§ 2T1.1, 2T1.4. The application notes specifically state that "tax loss does not include interest or penalties." U.S.S.G. §§ 2T1.1 cmt. 1. The government argues that subtracting the penalties and fees from the amount of loss fails to adequately address the nature of the conspiracy, which sought to prevent the collection of over $400,000. We agree but are confined by the plain language of the Guidelines. *See United States v. Pollen*, 978 F.2d 78, 91 n. 29 (3d Cir. 1992) (noting that by failing to include interest and penalties, the Guidelines fail to "reflect

accurately the criminal behavior," but affirming the sentence based on tax amount without interest and penalties). Given the plain language of the Guidelines, the district court erred in including interest and penalties in the amount of tax loss. We therefore vacate Appellants' sentences and remand this case to the district court for re-sentencing.

V. Sentencing Under § 2T1.9

Appellants argue that the district court erred in sentencing them under § 2T1.9 instead of § 2J1.2. Section 1B1.2 of the Guidelines instructs the sentencing court to determine "the offense guideline section . . . most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." U.S.S.G. § 1B1.2(a). The accompanying commentary refers to the Guidelines's Statutory Index (Appendix A), which "specifies the guideline section or sections ordinarily applicable to the statute of conviction." U.S.S.G. App. A. at 373. However, the Statutory Index does not establish "immutably the exclusive list of available guidelines for given offenses," *United States v. Cambra*, 933 F.2d 752, 755 (9th Cir. 1991), and in an atypical case, the court may use "the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted." U.S.S.G. App. A. at 373.

Appellants were convicted of conspiracy under § 371 and obstruction of proceedings under § 1505. In this case, the district court properly sentenced Appellants according to § 2T1.9, which covers conspiracies to "impede, impair, obstruct or defeat tax." *See* U.S.S.G.

§ 2X1.1(c)(1) ("When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.").

According to the Statutory Index, defendants convicted of violating § 1505 should normally be sentenced under § 2J1.2. In this case, however, the district court looked at the overt acts taken by Appellants and held that § 2J1.2 did not "address the seriousness of the defendants' conduct." We agree. Section 2J1.2 does not consider the amount of tax liability Appellants attempted to obstruct or the sometimes violent nature of the conspiracy. Therefore, the district court correctly applied § 2T1.9.

VI. Enhancement for Violent Conduct Under § 2T1.9(b)(1)

George Reed and Knight argue that the district court erred in increasing their sentences based on violent activity for which they were acquitted. We review the district court's factual findings in the sentencing phase for clear error. *See, e.g.*, *United States v. Ladum*, 141 F.3d 1328, 1344 (9th Cir. 1998).

"[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 136 L.Ed.2d 554 (1997). However, in *United States v. Restrepo*, 946 F.2d 654, 659 (9th Cir. 1991) (en banc), we held that "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction," the government may have to

satisfy a "clear and convincing" standard. *See also Watts*, 519 U.S. at 156-57 (recognizing, but not addressing, a split in the Circuits as to whether relevant conduct must be proven by clear and convincing evidence in extreme circumstances).

Knight's resulting four-level increase in sentence is not an exceptional case that requires clear and convincing evidence. *See Watts*, 519 U.S. at 156-57 (holding that an increase of two levels is not an extreme case); *United States v. Kikumura*, 918 F.2d 1084, 1100-01 (3d Cir. 1990) (noting that the preponderance of evidence standard would satisfy due process when the result is a four-level increase in offense level). However, even if Knight's enhancement required clear and convincing evidence, the district court found that "the evidence was clear and convincing," that Knight wrote the threatening letter sent to Mathews. The letters in this case contain identical language and punctuation and the letters were both received by Mathews, who happened to be working on the George Reed tax liability. Given the similarity of the letters and the fact that both were delivered to the person working on the George Reed tax liability, we hold that the district court correctly held that Knight sent the threatening letter.

In George Reed's case, the result was a seven-level increase, three for official victim and four for violent conduct. The seven-level adjustment increased the sentencing range from 24-30 months to 63-78 months. Given the relative shortness of George Reed's sentence, a potential increase of 48 months satisfies the *Restrepo* extremely disproportionate impact test. Consequently, the district court erred in failing to apply the clear and convincing standard. We therefore vacate George

Reed's sentence and remand this case to the district court for re-sentencing on this issue using the clear and convincing standard.

VII. Enhancement Under § 2T1.9(b)(2)

George Reed argues that the district court erred in applying both a four-level increase under § 2T1.9(b)(1) and a two-level increase under § 2T1.9(b)(2). The Guidelines provide that if both (b)(1) and (b)(2) enhancements apply, the court should "use the greater." Here, the district court erred in applying both. We therefore vacate George Reed's sentence and remand for re-sentencing.

VIII. Ingram's Sentence

Ingram argues that the district court erred by including the George Reed tax liabilities in his relevant conduct. Section 1B1.3(a)(1)(B) provides that the relevant conduct in a conspiracy includes "all reasonably foreseeable acts and omissions of others in furtherance of the [conspiracy]." A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy or after the defendant has properly withdrawn from the conspiracy. U.S.S.G. § 1B1.3(a)(1)(B) cmt. 2; *Levine v. United States*, 383 U.S. 265, 266, 86 S. Ct. 925, 15 L.Ed.2d 737 (1966).

Ingram argues that because the George Reed tax liabilities had reached judgment before he joined the JCA he should not be responsible for George Reed's tax amount. However, obstruction of the collection of George Reed's liabilities had not ended when Ingram

joined the JCA. Ingram first contacted the JCA in February 1993 and he began to filter money through the JCA shortly thereafter. Although the Reed tax liabilities had been reduced to a judgment before Ingram joined the JCA, the JCA took acts to prevent collection of the Reed tax liability after Ingram joined the conspiracy. Specifically, the arrest warrant and other documents sent to Noweski were mailed in June or July of 1993. Because the conspiracy to prevent collection of the Reed tax liabilities was ongoing during the time that Ingram was a co-conspirator in the JCA, he is responsible for the Reed tax loss.

Ingram argues that obstruction of the Reed tax liability was not foreseeable. We disagree. Ingram knew that other persons were using the JCA, as he was, to filter money and prevent the collection of taxes. Additionally, the district court correctly held that because George Reed owned the land on which the JCA was headquartered, it was foreseeable that he was one of the people filtering money through the JCA. Ingram was therefore liable for the George Reed tax liabilities. *See United States v. Lorenzo*, 995 F.2d 1448, 1460 (9th Cir. 1993).

IX. Other Issues

Finally, we note that Appellants raise numerous other points of error on appeal. After having carefully considered each issue, we affirm the district court on the remaining issues.

CONCLUSION

For the reasons stated herein we affirm in part, reverse in part and remand for further proceedings in conformity with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR-F-95-5174 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROGER KNIGHT, ET AL., DEFENDANTS

[Filed: Oct. 24, 1997]

MEMORANDUM OPINION AND ORDER RE: 18 U.S.C. § 371 (COUNT ONE) SENTENCING ISSUES

I. INTRODUCTION

This criminal case has been pending since June 22, 1995, when the nine defendants were charged as alleged members of a criminal conspiracy.[1] The third super-

[1] The original indictment was filed June 22, 1995. Superseding indictments were filed December 21, 1995 (Doc. 189), December 19, 1996 (Doc. 466) and January 7, 1997 (Doc. 492). The third superseding indictment charges defendants as follows: Count I, 18 U.S.C. § 371; Count II, 18 U.S.C. § 2, 1505 (obstruction of IRS Proceedings George L. Reed and George Kendall Reed); Count III, 18 U.S.C. § 1505 (Obstruction of IRS Proceedings Roger Steiner and David Ries); Count IV, 18 U.S.C. § 912 (Obstruction of IRS Proceedings by Attack on Stanislaus County Recorder Knight,

seding indictment charges in Count One, a criminal conspiracy to commit an offense against the United States by obstructing and impeding the due and proper administration of the law under which a matter was proceeding before the Internal Revenue Service. 18 U.S.C. §§ 371, 1505. Following a 41 day jury trial, the defendants were convicted on various counts of the superseding indictment.[2] All defendants were convicted of Count One, the conspiracy. Counts Two through Nine of the superseding indictment, charge one or more defendants with substantive offenses allegedly committed in furtherance of the conspiracy. Some of the individual defendants were found guilty of the substantive crimes. Others were acquitted of the separate crimes.

The United States Probation Office prepared presentence reports ("PSRs") for each of the defendants which contain sentencing recommendations. Defendants filed formal objections to the PSRs and the government filed responses to the objections. The court continued defendants' sentencing dates to permit supplemental objections and for responses to the PSRs

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George L. Reed, George K. Reed and Steiner); Count V, 18 U.S.C. § 2, 1505 (Obstruction of Proceedings Knight, Hopper, Ries, George L. Reed, Robert McKendrick and Janice Mallen); Count VI, 18 U.S.C. § 2, 1505 (Obstruction of IRS Proceedings Ingram and Knight); Count VII, 18 U.S.C. § 2, 1952 (Interstate Travel in Aid of Racketeering and Aiding and Abetting Knight, George L. Reed, George K. Reed, and Roger Steiner); Count VIII, 18 U.S.C. § 2, 1505 (False Persecution of Government Official, Ries and Steiner); and Count IX, 18 U.S.C. § 1010 (HUD Fraud, Knight).

[2] Following their convictions, defendants filed motions for acquittal or, alternatively, new trial. Some of those motions have been denied by the court at the time of hearing.

and to questions propounded by the court. These extensive briefings have been fully reviewed and all defendants have been provided an opportunity to present oral argument on the Count One sentencing issues.

To determine the "tax loss" resulting from defendants' acts, the court permitted IRS agents Michael Cash and Mary Ryan to testify at an evidentiary hearing at which all defendants, their counsel, and the government were present. Although not constitutionally mandated, *see United States v. Beltran*, 109 F.3d 365, 369 (7th Cir. 1997), in exercise of its discretion such a hearing was warranted due to the complexity of the sentencing issues.

Having considered the papers, oral argument, and testimony, and having undertaken an independent analysis, the following order shall govern the issues raised in respect to the Count One conspiracy. Individual factual findings will be made as to each defendant at the time of sentencing.

II. SENTENCING UNDER THE SENTENCING GUIDELINES

The principle goal of the United States Sentencing Guidelines (USSG or Guidelines) is to eliminate disparity and uncertainty in federal sentencing for similarly situated defendants. The Guidelines encourage sentences based on the relative seriousness of different crimes. Of the key sentencing compromises resolved by the Guidelines, the most relevant here is whether defendants are to be sentenced for the "charged offense" or for the "real offense" conduct. *See* (Justice) Stephen Breyer, *The Federal Sentencing Guidelines*

and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988).

At sentencing, the court must find by a preponderance of the evidence that the individual defendants were involved in the charged activity in a manner which is reasonably foreseeable to be in furtherance of the jointly undertaken criminal activity, same course of conduct or common scheme or plan as the offense of conviction. *See Witte v. United States*, 515 U.S. 389, 401, 115 S. Ct. 2199, 132 L.Ed.2d 351 (1995) (Government need not prove facts related to the severity of punishment beyond a reasonable doubt) (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 84, 106 S. Ct. 2411, 91 L.Ed.2d 67 (1986)); *Nichols v. United States*, 511 U.S. 738, —-, 114 S. Ct. 1921, 128 L.Ed.2d 745 (1994) (conduct considered in sentencing must be proved by a preponderance of the evidence); *United States v. Restrepo*, 946 F.2d 654, 656 (9th Cir.) (*en banc*) (Sentencing Guidelines do not alter standard of proof required of facts related to sentencing), *cert. denied*, 503 U.S. 961, 112 S. Ct. 1564, 118 L.Ed.2d 211 (1992); *United States v. Wilson*, 900 F.2d 1350, 1353-54 (9th Cir. 1990) ("district courts are constitutionally required to make factual determinations underlying application of the Guidelines by at least a preponderance of the evidence"). A sentencing court may consider facts not proven or even introduced at trial, as long as the government establishes those facts by a "preponderance of evidence." *United States v. Karterman*, 60 F.3d 576, 580 (9th Cir. 1995) (citing *Restrepo*, 946 F.2d at 656-57); USSG § 6A1.3 commentary.

III. THE CHARGED OFFENSE

The third superseding indictment charged defendants in Count One as members of an unlawful conspiracy (18 U.S.C. § 371) to commit an offense against the United States, the purpose of which was to impede or obstruct lawful proceedings before the IRS in violation of 18 U.S.C. § 1505.[3] The conspiracy alleged spans April 1, 1992 to April 10, 1995. The indictment charged the following overt acts[4] in furtherance of the conspiracy:

1. On April 29, 1992, George Loren Reed ("George Reed") transferred property owned by him and located on Beckwith Road, Modesto, California (the "Reed Property" or "Beckwith Property"), to the Juris Christian Assembly so as to avoid payment of federal tax liens placed on the property by the IRS.

2. On June 23, 1992, George Kendall Reed ("Kendall Reed") attempted to pay tax liens on the Reed Property by presenting to the United States Marshal Service a monetary instrument in the amount of

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[3] The federal criminal code at 18 U.S.C. § 371 states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title. . . .

18 U.S.C.S. § 371 (Supp. 1997).

[4] Each overt act was charged as a substantive offense in the remaining eight counts of the superseding indictment.

$416,343.32. The instrument, "Government Art. I, 1 & 2 Warrant, was fraudulent and valueless.

3. On August 3, 1993, David Ries and Roger Steiner demanded an IRS wage levy placed on Terry Ingram's wages be removed by Ingram's employer, Modesto Toyota.

4. On August 3, 1993, defendants Roger Knight, Alice Hopper, Janice Mallen, George Reed and Robert McKendrick issued a fraudulent warrant of arrest against the IRS employee responsible for placing the wage levy on Ingram's wages.

5. On August 23, 1993, Ingram and Knight prepared and mailed two documents to the IRS purporting to be monetary instruments in the amounts of $12,550.48 and $1,238.94, to satisfy the wage levy imposed on Ingram. The instruments were fraudulent and valueless.

6. On November 12, 1993, JCA members went to the Stanislaus County Recorder's office and attempted to have the IRS lien removed from the Beckwith property. On January 15, 1995, Knight, George Reed, and Kendall Reed devised a plan to physically assault or threaten the Stanislaus County Recorder, Karen Mathews, so she would remove the IRS lien on the Beckwith property. On January 29, 1994, Steiner traveled from Oregon to California for the purpose of assaulting Karen Mathews.

7. On November 29, 1993, JCA members attempted to place liens on property belonging to IRS employees through the Stanislaus County Recorder.

8. On January 30, 1994, Steiner physically assaulted the Karen Mathews. Mathews was beaten, cut and threatened with a gun during the assault.

IV. THE OFFENSE OF CONVICTION

In a conspiracy prosecution, the government must prove both the existence of the conspiracy and that each defendant was a member, beyond a reasonable doubt. *United States v. Garza*, 980 F.2d 546, 552 (9th Cir. 1992). Conspiracy under 18 U.S.C. § 371 requires (1) an agreement between two or more persons (2) to commit in concert an unlawful act, and (3) an overt act in furtherance of the conspiracy. *Pettibone v. United States*, 148 U.S. 197, 13 S. Ct. 542, 37 L.Ed. 419 (1893); *United States v. Falcone*, 311 U.S. 205, 61 S. Ct. 204, 85 L.Ed. 128 (1940); *United States v. Bendis*, 681 F.2d 561 (9th Cir.), *cert. denied*, 459 U.S. 973, 103 S. Ct. 363, 74 L.Ed.2d 286 (1982); *United States v. Heck*, 499 F.2d 778 (9th Cir. 1974), *cert. denied*, 419 U.S. 1088, 95 S. Ct. 677, 42 L.Ed.2d 680 (1974); *Weniger v. United States*, 47 F.2d 692 (9th Cir. 1931). In a conspiracy to defraud (or commot an unlawful act against) the United States or one of its agencies, the government is required to prove beyond a reasonable doubt the existence of an agreement to defraud or commit an unlawful act against the United States and that one or more persons acted in pursuit of the objective. *United States v. Browning*, 723 F.2d 1544, 1546 (11th Cir. 1984); *see also United States v. Carruth*, 699 F.2d 1017 (9th Cir. 1982) (conspiracy to defraud United States exists where conspirators attempt to defeat IRS collection of taxes for direct benefit of others and indirect benefit of themselves). Under the substantive law of conspiracy, every member of a conspiracy need not know every other

member or be aware of all acts committed in connection with the conspiracy. *United States v. Lorenzo*, 995 F.2d 1448, 1458 (9th Cir. 1993). A single conspiracy may involve several subagreements or subgroups. *United States v. Lulan*, 936 F.2d 406, 411 (9th Cir. 1991).

The jury convicted all defendants of the Count One, 18 U.S.C. § 371 conspiracy to commit an unlawful act against the United States by impeding or obstructing the collection of tax in proceedings before the IRS, an agency of the United States, a violation of 18 U.S.C. § 1505. The evidence established essential elements of the conspiracy—that defendants violated or attempted to violate the laws of the United States by impeding or obstructing the collection of tax revenue in a proceeding before the IRS, that each defendant agreed to participate in the conspiracy, and that one or more overt acts were perpetrated to further the purpose of the conspiracy—beyond a reasonable doubt. The manner or means included, *inter alia*, false and valueless warrants submitted for payment of George Reed's and Terry Ingram's taxes; wrongfully demanding removal of the tax lien on the Beckwith Ranch property and Ingram wage levy; threatening arrest of Mary Ryan, I.R.S. agent; intimidating Sharon Mein at Modesto Toyota concerning the Ingram tax levy; and threatening and attacking Karen Matthews for refusing to release the Reed tax lien from record.

The forms of verdict did not require the jury to make special findings as to the conspiracy count. If a jury returns a general verdict which does not specify the object of a conspiracy, the defendant must be sentenced on the basis of the object yielding the lowest offense level. *United States v. Garcia*, 37 F.3d 1359 (9th Cir.

1994).[5] In *Garcia*, the jury returned a general verdict as to a conspiracy to commit various drug related offenses. The Ninth Circuit reversed a fifteen year sentence as to the conspiracy which was determined from convictions on the underlying substantive offenses. The court found the evidence sufficient to find the object of the conspiracy either to violate 18 U.S.C. § 843(b) or to violate § 841(a)(1), but the district court could not make such a finding at sentencing. 37 F.3d at 1370-71.

Garcia is not applicable here. Factually, this does not involve violations of narcotics laws nor a multiple object conspiracy. This conspiracy had a single object: to impede or obstruct the collection of taxes by the IRS. A number of overt acts were charged as such and as separate substantive counts. That there was such a conspiracy, that all defendants knew of its object was proved by direct and circumstantial evidence beyond a reasonable doubt. There is no ambiguity in the jury's finding that defendants were guilty of the single object conspiracy. The evidence varies from defendant to defendant as to what *means* or *methods* allegedly were used by the defendants to achieve the object of the conspiracy and ultimately requires factual findings to be made separately for each defendant. At sentencing, however, so long as relevant conduct is proved by a

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[5] Terry Ingram contends *Garcia* requires the court to assess the lowest appropriate base offense level because the jury did not make special findings as to the object of the JCA conspiracy. The government asserts the JCA had but one object—using unlawful means to obstruct and impede lawful proceedings of the IRS. The government argues each of the separately charged offenses are acts that occurred in attempting to accomplish the object of the conspiracy.

preponderance of the evidence, it may be considered. Finally, *Garcia* was decided under pre-Guidelines sentencing laws and the Ninth Circuit has not addressed its continued vitality in light of the Guidelines.

Other Circuit Courts which cite *Garcia* have not found it improper for a sentencing court to determine from the record as a whole the object of a generally found conspiracy, so long as no ambiguity as to that object appears in the record. *United States v. Bush*, 70 F.3d 557, 561 (10th Cir. 1995);[6] *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997).[7]

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[6] In *Bush*, 70 F.3d 557, the defendant was sentenced for 7.5 kilograms of cocaine base after entering a plea of guilty to conspiracy to distribute cocaine in violation of 21 U.S.C. § 841. Bush appealed, arguing he should have been sentenced under the Guidelines for powder cocaine. The Eleventh Circuit did not find the colloquy between Bush and the court at the change of plea hearing or at sentencing reasonably ambiguous as to whether he intended to plead guilty to conspiring to distribute cocaine base or powder. The Court stated: "if a guilty plea or verdict is ambiguous regarding the *object* of the conspiracy, the appropriate remedy is to remand the case to the district court with directions to hold a hearing and make a finding as to the *object* of the conspiracy." *Id.* at 561. On the record as a whole, the court determined Bush intended to plead guilty to distribution of cocaine base and affirmed his sentence.

[7] In stating its outright disagreement with prior cases, including *Garcia*, *Edwards* found that "under the Sentencing Guidelines, the judge alone determines which drug was distributed, and in what quantity." 105 F.3d at 1180. The Seventh Circuit recognized "relevant conduct" case law permits the sentencing court to consider drugs not specified in the indictment, not considered by the jury, or for which the defendant has been acquitted, so long as the sentencing judge finds their existence by a preponderance of the evidence.

The sole object of the conspiracy to commit an unlawful act against the United States of which defendants have been convicted is to impede, obstruct, or impair lawful proceedings before the IRS. Each of the additional substantive offenses are other crimes committed by some of the members of the conspiracy, most of which constituted overt acts of obstruction of IRS proceedings. Except count Count Nine which is an unrelated crime committed by Roger Knight. That a number of crimes to obstruct proceedings of the IRS were committed does not change the single object of the conspiracy. Each defendant's sentence must be determined by his or her relevant conduct in furtherance of the conspiracy and reasonably foreseeable acts by coconspirators. Ingram's "lowest objective" theory does not apply to a single-object conspiracy issue violation of 18 U.S.C. § 371 and § 1505.

A. Defendants' Convictions.

Defendants were convicted of the substantive offenses charged in Counts Two through Nine of the superseding indictment as follows:

Kendall Reed and George Reed were convicted of the substantive offense charged in Count Two, 18 U.S.C. §§ 2, 1505, obstruction of proceedings of the IRS and aiding and abetting, for presenting a false financial warrant to the United States Marshal Service on June 21, 1992 for the purpose of attempting to satisfy an IRS lien on the Beckwith property.

David Ries and Roger Steiner were convicted of the substantive offense charged in Count Three, 18 U.S.C. § 1505, for entering Modesto Toyota for the purpose of

having the wage levy removed from Ingram's wages on August 3, 1993, to obstruct IRS proceedings by defeating collection of the tax.

David Ries and Roger Steiner were convicted of the substantive offense charged in Count Four, 18 U.S.C. § 912, for impersonating a government official while attempting to have the wage levy removed from Ingram's wages to obstruct IRS proceedings by defeating the collection of tax.

Alice Hopper, Roger Knight, and Ries were convicted of the substantive offense charged in Count Five, 18 U.S.C. §§ 2, 1505, for obstruction of proceedings of the IRS and aiding and abetting, by transmitting a false warrant of arrest to IRS agent Mary Ryan on August 3, 1993. Janice Mallen, Robert McKendrick, and George Loren Reed were acquitted of the Count Five offense.

Roger Knight was convicted of the substantive offense charged in Count Six, 18 U.S.C. §§ 2, 1505, for obstructing the proceedings of the IRS and aiding and abetting, by presenting false financial warrants to the IRS on August 23, 1993. Terry Ingram was acquitted of the Count Six offense.

Roger Steiner was convicted of the substantive offense charged in Count Seven, 18 U.S.C. §§ 2, 1952, traveling interstate for the purpose of committing or aiding and abetting a racketeering activity. Roger Knight, Kendall Reed, and George L. Reed were acquitted of the Count Seven offense.

Roger Steiner was convicted of the substantive offense charged in Count Eight, 18 U.S.C. §§ 2, 1505,

assaulting the Stanislaus County Recorder on January 30, 1994. Roger Knight, Kendall Reed, and George L. Reed were acquitted of the Count Eight offense.

Roger Knight was convicted of the substantive offense charged in Count Nine, 18 U.S.C. § 1010, HUD fraud.

B. Factual Findings From Evidence At Trial.

The following facts were proved beyond a reasonable doubt at trial. The JCA had as a primary purpose the evasion by persons of the payment of future or outstanding tax obligations due and owing to the United States. Although the JCA operated out of the Reed Property, the evidence showed that the purpose of the JCA was to obstruct, impair or impede the IRS in carrying out its lawful functions of enforcing the tax laws. *See, e.g. United States v. Rivera*, 696 F.2d 1213 (9th Cir. 1982)[8] ("the standard for determining the existence of a single conspiracy is whether there was 'one overall agreement' among the parties to carry out the objectives of the conspiracy"). Within that object, the JCA attempted to obstruct two proceedings pending before the IRS: collection of the George Reed tax lien and collection of the Terry Ingram wage levy. *United States v. Guzman*, 852 F.2d 1117 (9th Cir. 1988) (a single conspiracy exists where there is one overall agreement to perform a variety of functions to achieve

[8] In *Rivera*, the court found one overall conspiracy because the conduct of the Union official defendant involved "the same scheme, the same central actors, the same activities, and the same goals"—namely, to use ignore violations of union rules by demanding payment from employers seeking visas for Latin American musicians. *See id.*, at 1214.

the objectives of the conspiracy, and may include subgroups or subagreements).

1. George Reed Tax Dispute

The tax dispute between defendant George Reed and the IRS began in the early 1980s. The tax dispute arose from the non-payment of federal taxes on withheld employee wages for Reed Trenching, as well as George Reed's non-payment of personal income taxes. George Reed owed the IRS some $146,000 in unpaid, but previously assessed, taxes. In 1989, the IRS obtained a judgment against George Reed in the amount of $356,778.28, plus penalties and interest from February 28, 1988. The IRS sought to enforce the judgment and on December 11, 1989, recorded an Abstract of Judgment in Stanislaus County, California, in the amount of $416,343.32, which represented the Judgment plus penalties and interest accumulated to date. An Attorney for the Justice Department, Diane Noweski, represented the IRS in the court proceedings. The abstract of judgment was a lien recorded with the Stanislaus County Recorder against the Reed Property, located at Beckwith Road, in Modesto, California. In defending the tax case, Reed asserted he was not required to file tax returns or to pay tax obligations because the Internal Revenue Code did not apply to him. Reed claimed he was a "free citizen of the Republic of California," not subject to the Internal Revenue Code.[9]

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[9] The Ninth Circuit in *United Stated v. Studley*, 783 F.2d 934 (9th Cir. 1986) found such an argument to be "utterly meritless," instead finding "an individual is a 'person' under the Internal Revenue Code and thus subject to Title 26." *Id.* at 937 & n. 3, cited with approval in *United States v. Hanson*, 2 F.3d 942, 945 (9th Cir.

2. Involvement of the JCA

The JCA became active in the Reed tax dispute in April 1992 when Everett Thoren, George Reed, Kendall Reed and David Ries agreed that the JCA and Mr. Thoren would solve George Reed's tax problems. The Beckwith property was transferred into a "religious trust" to be managed by the JCA so that George Reed would show no income upon which taxes could be assessed by the IRS.

George Reed and David Ries first met Everett Thoren at a meeting in San Jose, California, at which Everett Thoren, a self-proclaimed "free citizen of the republic of Oregon,[10] described the Juris Christian Assembly, a tax protest organization. Thoren claimed the JCA was a tax exempt religious organization and individuals could avoid payment of income taxes by transferring their assets in trust to the JCA. Everett Thoren espoused the illegality of United States tax laws and the JCA advocated changing constitutional government under Articles I and II of the State Constitution.

George Reed invited Thoren to live on the Beckwith Property to facilitate the efforts to end Reed's tax problems and long struggle with the IRS. Everett Thoren accepted the offer and moved to Modesto in April, 1992. George Reed transferred the Beckwith

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1993) (rejecting claim of defendant that he was a natural born citizen of Montana and therefore a non-resident alien not deemed a taxpayer under Title 26.)

[10] Sometimes called the "sovereign state of Oregon" or "Article I & II government."

Property in trust to the JCA on April 29, 1992. The conspiracy commenced on or about April 1, 1992.

David Ries operated a business on the Beckwith property. He drafted "legal documents" for the JCA. Ries was more overt in his activities. Others who congregated at Beckwith Road did not agree with Ries' confrontational methods.

Alice Hopper began working as a secretary for Everett Thoren and the JCA in 1992. The JCA offices were located on the Beckwith property. Ms. Hopper believed in the sentiments espoused by Thoren and the JCA and gave substantial assistance in preparing and/or mailing various documents to IRS agents as well as various other federal and state offices and officers, and private entities, regarding both the George Reed tax lien and the Ingram wage levy. Ms. Hopper was aware of the JCA Trust and, by her work, assisted a number of individuals who transferred assets to Thoren and the JCA to evade the payment of United States income taxes.

Ms. Mallen and Mr. McKendrick moved onto the Beckwith property in 1992 at the invitation of David Ries, with George Reed's permission. Although McKendrick frequently visited the JCA's offices for coffee, he disagreed with Everett Thoren's theories and was not a member of the JCA. Ms. Mallen was not a member of the JCA.

3. Terry Ingram Wage Levy Tax Issue

In February 1992, Terry Ingram was encouraged by Judy Hatfield, a friend of Ries', who also helped JCA

work at the Beckwith Road property, to transfer his assets to the JCA for the purpose of avoiding payment of previously assessed and future income taxes. Hatfield testified she told Ingram he could avoid paying taxes by filing a declaration of non-citizenship. Hatfield introduced Ingram to Everett Thoren, who explained to Ingram the JCA "religious trust" concept to avoid payment of federal income taxes. The JCA agreed to assist Ingram in defeating the collection of his tax obligations.

Everett Thoren, Ingram, or other JCA members prepared and filed false W-4 statements with the IRS claiming Ingram was a foreign citizen in April, 1992. Such statements were made under oath and/or penalty of perjury. The JCA also mailed a request dated April 9, 1992 to have Ingram's past social security contributions refunded to him, again claiming Ingram was not a United States citizen. Ingram declared himself a free citizen of the Republic of California, not subject to the tax laws or obligations of the United States.

In June 1993, Ingram received a notice from the IRS from agent Mary Ryan, that he owed back taxes and notice that a wage levy was being placed by the IRS on Ingram's earnings payable to him by Modesto Toyota for his work as an independent contractor.

In August 1993, David Ries and Steiner (although some defendants contend it was Roger Knight) went to Modesto Toyota and demanded that accounting manager, Sharon Mein, remove the IRS wage levy on Ingram's earnings. Ries presented a false identification which represented that he was an agent for the United States House Banking Committee. Ms. Mein photo-

copied the identification card and it was introduced into evidence during the trial. When Mein refused to release the wage levy, Ries became angry, slammed his fist on her desk in a threatening manner and addressed Ms. Mein pejoratively as a "bitch," and told her she "didn't know who she was dealing with."

Defendants Knight, Mallen, McKendrick, Ries, and Hopper prepared, signed and sent a "warrant of arrest" to IRS agent Mary Ryan and other documents intended to deter Mary Ryan from collecting Ingram's taxes. Aside from living on the Beckwith property, the only evidence adduced at trial of Mallen's involvement was her signature as a member of the "Court of Conscience" on the warrant of arrest mailed to Mary Ryan. Although Mr. McKendrick disagreed with Everett Thoren and did not subscribe to the JCA's beliefs, he signed the warrant of arrest sent to Mary Ryan as a member of the "Court of Conscience" with three others besides Mallen. Alice Hopper signed proofs of service for the arrest warrant sent to Mary Ryan and mailed the packet of documents. Ms. Ryan testified that upon receiving the warrant she feared she would be arrested or otherwise taken into custody.

Knight and Ingram also prepared or signed two false and valueless financial warrants which were presented to the IRS as payment of Ingram's wage levy. The financial warrants were "drawn" under the "Article I and II government" which the JCA purportedly represented. The warrants were sufficiently credible in appearance to cause the IRS to credit Ingram for any back tax liability. It was not until after Mary Ryan received the warrant for her arrest, that she checked Ingram's tax account record which showed his tax

obligation had been satisfied. When further investigation determined the financial warrants satisfying Ingram's tax obligation were valueless, she ordered Ingram's tax liability reinstated.

4. George Reed/Beckwith Property Tax Lien Issue

Upon the instructions of Everett Thoren, and the direct and indirect help of JCA members Hopper, Knight, Ries and others, around April 1992 George Reed sought to have the $416,343.32 tax lien released from the Beckwith Property. JCA members mailed threats to the Stanislaus County Recorder, Karen Mathews, and Diane Noweski, the United States Department of Justice attorney representing the IRS against George L. Reed. JCA members also visited the Stanislaus County Recorder demanding the Reed tax lien be released from the property, presented false financial warrants to attempt to discharge the IRS lien, and physically assaulted Karen Mathews, all in an effort to defeat or avoid payment of the lien amount.

George Reed had engaged in obstructive conduct for years to prevent the Reed Property from being sold to satisfy his outstanding tax debt. Hopper prepared or assembled documents for JCA members to sign which she knew or should have known were false or fictitious or threatening, and were prepared by the JCA to prevent the satisfaction of George Reed's tax liability. JCA members signed the documents placed out on a counter in the Beckwith Road JCA office for signature by Hopper. Mr. McKendrick's signature appears on two documents sent to Diane Noweski, the United States Justice Department attorney who prosecuted the tax case against George Reed. Mr. McKendrick's

name also appears in Roger Steiner's notebook found during a search of one of Steiner's trailers in Oregon.

Kendall Reed, Knight, George Reed, and Everett Thoren all went to the Stanislaus County Recorder's office at various times in 1992, 1993, and early 1994, demanding the tax liens on the Beckwith property be removed. On one occasion, a box was placed under the County Recorder's car, containing an object, to simulate a pipe bomb, with the word "boom" written on it. In another, a letter was mailed to the County Recorder which stated that unless the lien was removed, the Recorder would be an "example" to all other recorders in the state of California. In still another incident, the County Recorder received a bullet in a letter delivered to her residence. The accompanying note threatened that unless the liens were removed, the next bullet would be for her.

In late 1993, Roger Steiner, who was living in Baker, Oregon, was observed in Grass Valley, California. Mr. Steiner was known to Everett Thoren, through an Oregon acquaintance the two shared.[11] A witness, Anthony Dalglish, testified he heard Knight, George Reed and Kendall Reed discussing at Knight's residence, bringing someone from Oregon to deal with "the problem." Dalglish did not know what was meant by "the problem." The jury convicted Steiner for traveling from Oregon to Modesto for the purpose of

[11] Evidence introduced by Steiner showed he used similar nomenclature in signing documents and expressing his philosophy of the WCC, which was utilized by co-conspirators in this case in their communications to Ms. Noweski and Ms. Ryan.

carrying out the intimidation of and physical assault on Karen Mathews.

On January 30, 1994, Steiner gained entry into Mathews' garage and waited for her to return home. After Mathews parked her car in the garage and closed the garage door, Steiner attacked her, inflicting physical and psychological injury. Up until the assault of Karen Mathews, the JCA's methods of carrying out the conspiracy did not involve actual, physical violence.

5. Frustration of the Conspiracy

After the confrontation of Sharon Mein at Modesto Toyota by Ries and Steiner, Ingram became disillusioned with the JCA and its methods. He began to remove himself from the JCA, it took several months after August 1993 for Ingram to disassociate himself from the JCA. Ingram ultimately left California in early 1994 to return to Pennsylvania.

After the Mathews assault, the FBI increased its investigation efforts with respect to the JCA. In early 1994, the JCA moved its offices from the Beckwith property to Hopper's apartment. The JCA's records were stored by Hopper in her apartment.

Mallen and McKendrick left the Beckwith property in 1995.

Everett Thoren died in April 1995. He is an unindicted coconspirator.

V. SENTENCE RECOMMENDATION BY PROBATION OFFICE

The United States Probation Office utilized the May 1997 version of the USSG to calculate the sentencing ranges for each of the defendants.[12] As to the Count One conspiracy, the Probation Office stated:

> Base Offense Level: The guideline for a violation of 18 USC 371, Conspiracy, is found at USSG § 2T1.9, Conspiracy to Impede and Impair, Obstruct or Defeat Tax. USSG § 2T1.9 advises the base offense level is to be determined from 2T1.1 or 2T1.4 as appropriate. USSG § 2T1.4, Aiding, Assisting, Procuring, Counseling or Advising Tax Fraud is most appropriate and advises the base offense level is based on the Tax Table at 2T4.1 in an amount corresponding to the tax loss. According to the Tax Table at USSG § 2T4.1, if the total loss is more than $325,000 but less than $550,000, the base offense level is 17. In this case, the lien placed against the Beckwith properties owned by the Reed family trust was in the amount of $416,343. The loss should also include the fraudulent financial warrants in the amount of $13,789.42 the JCA used to attempt to lift the wage levies imposed against Terry Ingram by the IRS. The actual tax loss to the government is the IRS tax lien amount which originated from the Reeds' business, "Reed Trenching," and the amount of the fraudulent financial warrants used by JCA in an attempt to get the

[12] The Probation Office made identical recommendations for all defendants except Steiner for whom the base offense level depended on a consideration of certain grouping factors.

wage levies placed against defendant Ingram, under a failure to pay Federal Withholding and Federal Insurance Contribution Act taxes, removed. Pursuant to USSG § 2T4.1(L), because the loss is in excess of $325,000, however, less than $550,000, the base offense level is 17. Therefore the base offense level of 17 is recommended.

Specific Offense Characteristics: None.

Victim-Related Adjustments: USSG § 3A1.2 allows for a three-level increase in the base offense level if the victim was a Government office or employee. In this case, the conspirators sent to the IRS an arrest warrant for IRS agent Mary Ryan. . . . Because the IRS agent is an official victim, a three level increase is recommended.

VI. SENTENCING ISSUES RAISED BY THE COURT

On September 11, 1997, the court issued an Order re Count One Sentencing Issues, which was served on all the parties. The Order outlined common issues as to all defendants with respect to the conspiracy conviction that the court must consider in determining each defendants' individual sentence. The parties responded to the Order in briefs and a hearing was held September 29, 1997 to permit further argument as to the common sentencing issues. The issues raised in the Order are addressed below in no particular order.

A. Version of the Guidelines to Apply to Count One.

Ordinarily the court applies the Guidelines in effect at the time of sentencing. 18 U.S.C. § 3553(a)(4); *United States v. Warren*, 980 F.2d 1300, 1304 (9th Cir.) (district court applies the Guidelines in effect at sentencing), *cert. denied*, 510 U.S. 950, 114 S. Ct. 397, 126 L.Ed.2d 344 (1993); *United States v. Mapp*, 990 F.2d 58, 61 (2d Cir. 1993) (same).

However, when the later set of Guidelines would subject a defendant to a harsher penalty than the earlier applicable Guidelines, constitutional *ex post facto* concerns arise. *See* United States Constitution, Art. I, § 9.

> To fall within the Ex Post Facto prohibition, two elements must be present: "first, the law must be retrospective, that is, it must apply to events occurring before its enactment; and second, it must disadvantage the offender affected by it." *Miller v. Florida*, 482 U.S. 423, 430, 107 S. Ct. 2446, 2451, 96 L.Ed.2d 351 (1987) (quotations omitted).
>
> [¶] The Ex Post Facto Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Weaver v. Graham*, 450 U.S. 24, 30, 101 S. Ct. 960, 965, 67 L.Ed.2d 17 (1981).

Hamilton v. United States, 67 F.3d 761, 764-65 (9th Cir. 1995).[13]

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[13] In *Hamilton*, 67 F.3d 761, the issue before the court was "whether a court, in resentencing a defendant pursuant to a retroactive amendment to the Sentencing Guidelines, must apply the Guidelines in effect at the time of *resentencing* or those in effect at

When the *ex post facto* clause is violated, the defendant must be sentenced under the Guidelines as they existed at the time the offense is committed. *Hamilton*, 67 F.3d at 765; *United States v. Garcia-Cruz*, 40 F.3d 986 (9th Cir. 1994) (on remand district court applies Guidelines in effect on date of original sentencing where amended Guidelines results in increased sentence); *United States v. Seligsohn*, 981 F.2d 1418, 1424 (3d Cir. 1992);[14] *see also* USSG 1B1.11(b)(1) (1997) ("if the court

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the time of the *offense*." *Id.* at 762. There, a defendant originally sentenced in 1990 for violation of 18 U.S.C. § 922(g)(1) (felony in possession of a firearm) to a term of 84, sought resentencing under November 1, 1991 USSG amendment of retroactive application. *Id.* at 763. The district court re sentenced defendant, without the enhancement under the 1993 USSG. The later Guidelines increased the base offense level from 9 to 24.

The Ninth Circuit concluded application of the 1993 USSG violated the ex post facto clause:

> The 1993 Guidelines satisfy squarely the first element: the 1993 version of section 2K2.1 has been applied to a crime that occurred in 1989, four years prior to its enactment.
>
> We are further persuaded that the application of the 1993 Guidelines disadvantaged Hamilton. As Hamilton agrees, the 1993 version of section 2K2.1 imposes a base offense level 15 levels higher than that imposed under the 1988 version. . . .

Id. at 765.

[14] In *Seligsohn*, the defendants were convicted for consumer mail fraud, skimming of cash receipts to pay under-the-table compensation to employees and owners, defrauding union welfare benefit plans of required contributions, paying bribes to a union shop steward; destroying company records, defrauding insurance carriers, and filing false tax returns.

The district court calculated defendants' sentences under post-1989 version of the USSG, without considering whether the offenses at issue had been committed before or after the effective date of the Guidelines' amendments. Defendants appealed the dis-

determines that use of the Guidelines in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction is committed.")

Under the general rule, the 1997 USSG are utilized to calculate defendants' sentences under Count One. Under *ex post facto* concerns, if the 1997 Guidelines impose harsher penalties on defendants for criminal activity for which they were convicted, then the Guidelines in effect at the commission of the offense determines the appropriate Count One sentences base offense level.[15] Here, the question of the correct version of the Guidelines to apply is further complicated because conspiracy is a continuing offense.

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trict court's calculations asserting that some of the acts for which they were sentenced *concluded before* the effective date of the Guidelines.

The Third Circuit reversed. Whether or not a change in the Guidelines has minimal effect in the total points assessed, application of the correct version of the Guidelines is mandatory. 981 F.2d 1424-1425.

[15] Application Note 2 to 1B1.11 defines "the offense of conviction" as "the conduct charged in the count of the indictment or information of which the defendant was convicted." Here, the conspiracy charged in the third superseding indictment is alleged to have existed from April 1, 1992 to April 10, 1995. The government's evidence did not prove a conspiracy that operated after February 1994. The verdict forms did not require the jury to make special findings regarding the duration of the conspiracy. The court may make its own findings as to the duration of the conspiracy for the purposes of sentencing so long as those findings are based on a preponderance of the evidence. The government agrees that for sentencing purposes the conspiracy did not operate beyond February 1994.

The defendants contend the most favorable set of Guidelines in effect during the life of the conspiracy applies. Ries argues, and McKendrick agrees, if § 2T1.9(a)(1) is utilized to determine defendants' base offense levels, then the 1992 Guidelines, which provides a more favorable base offense level under the tax tables must apply. Ingram argues he engaged in no relevant conduct after the 1993 Guidelines amendments to the tax table, and for that reason, should be sentenced under the 1992 Guidelines.

The defendants' arguments are rejected, because the facts proved the conspiracy continued beyond November 1, 1993, the effective date of the 1993 Guidelines amendments. *Cf.* 1B1.11(b)(3) ("if the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.") (1997).

The Ninth Circuit's decision in *United States v. Ortland*, 109 F.3d 539 (9th Cir. 1997), is instructive. Ortland was convicted for mail fraud and appealed his conviction and sentence. The scheme, which spanned from August 1986 to July 1990, involved defrauding investors of a partnership. Ortland contended his former wife, who fled before trial, had hidden facts pertaining to wrongdoing from him. However, several former employees testified Ortland had taken money from the partnership, although no such right was specified in the partnership agreement, and ultimately helped to divert almost $1.5 million from the partnership's accounts. Ortland argued his sentence under the 1989 Guidelines violated the ex post facto clause because it increased

the penalty for his conduct, most of which occurred prior to the amendment.[16] The Ninth Circuit agreed in part:

> When a law has retrospective application which disadvantages the offender affected by it, its application is prohibited by the ex post facto clause. Therefore, when application of a version of the Guidelines enacted after the offense leads to a higher punishment than would application of the Guidelines in effect at the time of the offense, there is an ex post facto problem. We hold that application of the 1994 version of § 2F1.1 to Ortland's pre-December, 1989 conduct disadvantaged Ortland and created an ex post facto violation, as to *those* counts. Even if the later offenses are sentenced at the higher level, that does not undercut the fact that the earlier offenses cannot be.

109 F.3d at 546 (internal citations omitted). The Court also noted:

> We *have* required all single-count conduct to be sentenced under a single Guidelines manual. *United States v. Warren*, 980 F.2d 1300, 1306 (9th Cir. 1992). Clearly, the Sentencing Commission agrees with that approach. *See* USSG § 1B1.11(b)(2) (adopted for sentences on or after November 1, 1992). *We have also required that all continuing offenses be sentenced under one Guidelines man-*

[16] The district court calculated the total loss from fraud to be $886,000. At the time of Ortland's conduct, i.e., when the crimes were committed, the base offense level was 8. The 1989 Guidelines increased the base offense level to 11. The district court sentenced Ortland under the higher Guideline because Ortland committed an act of mail fraud, charged in the fifth count, after the effective date of the amendment. 109 F.3d at 546.

> *ual: the later one*. *See United States v. Morales*, 11 F.3d 915, 197 (9th Cir. 1993).
>
> However, we have applied more than one Guidelines manual to multiple counts involving offenses completed at different times, and we must do so in this case. *See Castro*, 972 F.2d at 1112. In *Castro*, . . . [w]e held that the 1989 Guidelines were *properly applied to the conspiracy count, because conspiracy is a continuing offense and at least some of the conspiracy's acts occurred after the amendment*. On the other hand, we reversed and remanded for sentencing under the 1988 Guidelines of the three earlier possession counts. We suggested than use of the 1989 Guidelines violated the ex post facto clause.

109 F.3d at 546-47 (emphasis added).

Defendants' argument that their acquittals of substantive offenses bars a later application of the Guidelines is also without merit. In *United States v. Brady*, 928 F.2d 844, 850-52 (9th Cir. 1991), the Ninth Circuit concluded the sentencing court may not reconsider facts necessarily rejected by the jury's not guilty verdict. This approach to sentencing was overruled by the Supreme Court in *Koon v. United States*, —- U.S. —-, 116 S. Ct. 2035, 135 L.Ed. 2d 392 (1996). The Ninth Circuit expressly recognized that *Brady* was overruled in *United States v. Sherpa*, 110 F.3d 656, 661 (9th Cir. 1996) ("[w]e now hold that the approach we took in *Brady* is overruled"), concluding the district court correctly reconsidered facts rejected by the jury in deciding whether to apply the safety valve provision (18 U.S.C. § 3553(f)) to depart below the mandatory minimum sentence for drug-related offenses of which the

defendant was convicted based on circumstantial evidence, rather than evidence of actual knowledge.

Finally, none of the defendants legally withdrew from the conspiracy so as to limit their sentencing liability to the pre-1993 Guidelines. During the life of a conspiracy, the Guidelines may be amended several times. In *United States v. Inafuku*, 938 F.2d 972, 974 (9th Cir.), *cert. denied*, 502 U.S. 1034, 112 S. Ct. 877, 116 L.Ed.2d 782 (1992), the court held that because the agreement to participate in a conspiracy occurs not only at the point of entry into the conspiracy but also on an ongoing basis until withdrawal or cessation of the conspiracy, it does not violate the prohibition against ex post facto laws to apply the standards in effect when the conspiracy terminates.

In *United States v. Stanberry*, 963 F.2d 1323 (10th Cir. 1992), the Tenth Circuit affirmed the district court's decision to sentence the defendant under an amended Guidelines although the majority of the conspiratorial acts occurred under less harsh Guidelines. Only one act of the conspiracy occurred under the new Guidelines. The court stated:

> When a conspiracy begins during a period where the application of certain Guidelines would be controlling and extends into a period when another Guideline application would be appropriate, *there is no violation of the ex post facto clause in applying the Guidelines in effect at the time of the last act of the conspiracy*.

963 F.2d at 1327 (Citations omitted, emphasis added).

The *Stanberry* principle is generally followed by the Ninth Circuit. In *United States v. Stoddard*, 111 F.3d 1450 (9th Cir. 1997), the court recognized that "the time period of a conspiracy is determined not by the dates alleged in the indictment, but by the evidence adduced at trial." 111 F.3d at 1454 n. 4 (citing *Guzman*, 852 F.2d at 1120); *United States v. Lurz*, 666 F.2d 69, 74 n. 3 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005, 102 S. Ct. 1642, 71 L.Ed.2d 874 (1982).

United States v. Robertson, 73 F.3d 249 (9th Cir. 1996), is one of the few cases found where a straddling offense did not result in sentence under the later Guidelines. Robertson was convicted for his involvement in a RICO enterprise. The enterprise began prior to the Guidelines and continued after their November 1, 1987 effective date. The sentencing court denied the government's request to sentence under the Guidelines. The Ninth Circuit affirmed this decision, recognizing that a continuing course of criminal conduct straddles the Guidelines could be sentenced under the Guidelines; *United States v. Kohn*, 972 F.2d 294, 298 (9th Cir. 1992); *United States v. Castro*, 972 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 507 U.S. 944, 113 S. Ct. 1350, 122 L.Ed.2d 731 (1993); however, the government failed to tie any post-guidelines conduct to an investment or operation of the RICO enterprise. *Id.* Accordingly, Robertson could not be sentenced under the USSG.

The evidence establishes that the last overt act in furtherance of the conspiracy was the Karen Mathews assault on January 30, 1994. Ingram moved back to Pennsylvania later in 1994. In November and December 1993, George Reed, Kendall Reed, and Everett Thoren all, separately entered the Stanislaus County Re-

corder's office and demanded that the lien on the Reed Property be removed. Knight had entered the Recorder's Office on earlier occasions, Ms. Matthews testified George L. Reed was in her office in January, 1994. Steiner traveled from Oregon to California to "teach" Karen Mathews a "lesson," on account of her prior refusals to take the IRS lien off the Beckwith property. The purpose of the planned attack was to further the overall goal of the conspiracy—to impede or obstruct the IRS, i.e., defeat the collection of taxes by sale of the real property. Mallen and McKendrick left the Beckwith property in 1995, however, there is no evidence of any conduct or activity by them or any other coconspirator after February 1994. Everett Thoren died in the Spring of 1995. The evidence shows affirmative conduct was undertaken by some members in furtherance of the conspiracy after the November 1, 1993, effective date of the 1993 Amendments to the USSG.

It is also disingenuous for defendants to argue that they disassociated from the JCA prior to the Mathews attack, in an effort to have an earlier version of the Guidelines apply to them.[17] When one agrees to join a

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[17] Ingram argues, for example, he began to disassociate himself from the JCA in August 1993, before the November 1, 1993 amendments to the Guidelines. Ingram asserts he should not be held accountable for offenses committed by other conspirators after his withdrawal, relying on *United States v. Lothian*, 976 F.2d 1257 (9th cir. 1992). Ingram was acquitted of direct involvement in obstruction by use of fraudulent government warrants which occurred in late August 1993.

Ingram asserts that under the *ex post facto* prohibition, the Guidelines in effect in 1992 must be applied to him. Ingram's position fails because the evidence showed by a preponderance

conspiracy, he or she agrees to all acts that have been or will be committed by the conspiracy, and is responsible for those acts regardless of his role in their commission. *United States v. Inafuku*, 938 F.2d 972, 974 (9th Cir.), *cert. denied*, —- U.S. —-112 S. Ct. 877 (1992). Under the Guidelines, a defendant can be sentenced for any acts undertaken by coconspirators that are reasonably foreseeable and done in furtherance of the conspiracy. § 1B1.3; *United States v. Conkins*, 987 F.2d 564, 572-73 (9th Cir. 1993). The limit on vicarious liability is foreseeability. For other reasons, however, all conspiracy conduct is not foreseeable to all defendants and cannot be considered as to all defendants for determining their sentences. The evidence does not show that Hopper, Mallen, McKendrick, or Ingram condoned or discussed violence, ever employed violence, or that they had reason to foresee violence would be used. Although the evidence established Karen Mathews advised law enforcement of the threats against her, there was no evidence these threats were publicized or communicated to Hopper, Mallen, McKendrick or Ingram.

Ingram sought to distance himself from the conspiracy by requesting the return of his assets and by ultimately moving to Pennsylvania. Although the Ninth Circuit has not ruled on the issue, the Seventh Circuit determined geographic removal from an unlawful conspiracy does not constitute legal withdrawal

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that Ingram had not legally withdrawn from the conspiracy for the purposes of negating his further implication in the conspiracy, and to so limit the application of the Guidelines is contrary to their express purpose.

from the conspiracy. *United States v. Bullis*, 77 F.3d 1553 (7th Cir. 1996).

Bullis and others were convicted for conspiring to fix milk prices in Indiana school districts in violation of the Sherman Act. The conspiracy lasted from 1985 to 1992. Bullis, however, left the Indiana dairy industry in July 1989, relocating to Florida. Bullis challenged his sentence under the 1993 USSG as an ex post facto clause violation. Bullis asserted his relocation to Florida was a withdrawal from the conspiracy. The district court rejected this argument, instead finding Bullis remained a conspirator until 1992 because he communicated with coconspirators after moving to Florida. Bullis could be sentenced for acts of coconspirators reasonably foreseeable to him and in furtherance of the conspiracy. 77 F.3d at 1562-64.

Likewise, Ingram did not effectively withdraw from the JCA conspiracy simply by returning to Pennsylvania. It is well-established that when a criminal conspiracy exists, the cessation of criminal activity by a conspirator *without more* is not enough to constitute withdrawal. *United States v. Castro*, 972 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 113 S. Ct. 1350 (1993). A conspirator can withdraw from a conspiracy in at least three ways: (1) by disavowing the unlawful goal of the conspiracy; (2) by affirmatively acting to defeat the purpose of the conspiracy; or (3) by taking "definite, decisive, and positive" steps to disassociate himself from the conspiracy. *Lothian*, 976 F.2d at 1261; *United States v. Loya*, 807 F.2d 1483, 1493 (9th Cir. 1987); *United States v. Smith*, 623 F.2d 627, 631 (9th Cir. 1980); *United States v. Juodakis*, 834 F.2d 1099, 1102 (1st Cir. 1987). There must be evidence either of a full confession to authorities or a communication by the

accused to his co-conspirators that he has abandoned the enterprise and its goals. *Juodakis*, 834 F.2d at 1102.

"To punish a defendant simply because of his relationship to guilty parties is the height of injustice." *United States v. Reese*, 2 F.3d 870, 890 (9th Cir. 1990). Here, the evidence shows Mr. Ingram communicated his withdrawal from the JCA by requesting return of his property and leaving California. He testified he no longer wished to be associated because he disagreed with David Ries' methods. It is not apparent Mr. Ingram communicated his disillusionment with the JCA to law enforcement or to the JCA leader, Mr. Thoren. Ninth Circuit authority squarely holds that a conspirator who takes steps to defeat the object of a conspiracy or otherwise withdraw from the conspiracy can escape liability only for the underlying substantive offense, and not for the conspiracy itself. *Lothian*, 976 F.2d at 1262 ("[o]nce an overt act has taken place to accomplish the unlawful objective of the agreement, the crime of conspiracy is complete and the defendant is liable despite his later withdrawal.") Accordingly, because all defendants participated in the unlawful agreement to obstruct or impede the collection of revenue by the IRS with the intent of frustrating the tax code, it is not improper to sentence all defendants for the Count One conspiracy under the 1993 version Guidelines.

B. Guidelines Section Most Applicable to the Conspiracy

Guidelines § 1B1.2 instructs the court to determine the offense guideline from Chapter Two (Offense Conduct) that is most applicable to the offense of conviction,

i.e., the offense conduct charged in the indictment of which the defendant was convicted. USSG § 1B1.2(a) (1993). Appendix A provides statutory references for each Guidelines section. If a statutory reference is inappropriate because of the offense conduct involved, the Guidelines section most applicable given the nature of the offense conduct is to be used to calculate the base offense level. *Id.* App. Note 1.

Cross-referencing the charged offense, 18 U.S.C. § 371, with the statutory references in Appendix A, provides four Guidelines sections. Of these, § 2X1.1, general conspiracy, and § 2T1.9, conspiracy to violate tax laws, are the more relevant Guidelines. USSG, Appendix A (1993).

The Guideline § 2X1.1 refers the court to the underlying substantive offense in order to determine the base offense level for the conspiracy.[18] The substantive offense means the "offense that the defendant was convicted of conspiring to commit." USSG § 2X1.1, App. Note 2 (1997). The substantive offense charged was conspiracy to commit an offense against the United States, 18 U.S.C. § 371, with the object of this conspiracy, 18 U.S.C. § 1505,[19] impeding or obstructing the

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[18] The base offense level under § 2X1.1 is determined as follows:

> The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

USSG § 2X1.1(a) (1993).

[19] 18 U.S.C. § 1505 provides in relevant part:

lawful proceedings of the IRS. Cross-referencing this offense with Appendix A, leads to guideline § 2J1.2,[20] which some of the defendants contend provides the applicable base offense level.

The conspiracy to which § 2T1.9 applies,[21] as stated in the commentary, are "conspiracies to defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue. *United States v. Carruth*, 699 F.2d 1017, 1021 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038 (1984)." App. Note 1 (1993). The base offense level from § 2T1.1 or § 2T1.4 relate to violations of the tax laws, including 26 U.S.C. § 7201[22] and 26 U.S.C. § 7206.[23] The government elected not to

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> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States. . . [shall be guilty of a felony].

18 U.S.C.S. § 1505 (1994).

[20] The base offense level under § 2J1.2 is 12. (1993.)

[21] Section 2T1.9 provides a base offense level as follows: "(a)(1) Offense level determined from § 2T1.1 or § 2T1.4, as appropriate; or (2) 10." (1993.)

[22] 26 U.S.C. § 7201 provides:

> Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony.

26 U.S.C.S. § 7201 (1996).

[23] The statutory provision at 26 U.S.C. § 7206 contains five subsections. Of these, subsections (1) and (2) are relevant to the conduct at issue here. Those subsections provide:

> Any person who—(1) Willfully makes and subscribes any return, statement, or other document, which contains or is

charge defendants with violation of any of these statutes.

1. Elements of the Relevant Offenses

The offense "obstruction of proceedings" chargeable under 18 U.S.C. § 1505 has three essential elements. *United States v. Price*, 951 F.2d 1028, 1031 (9th Cir. 1991). First, there must be a proceeding pending before a department or agency of the United States. *See United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir.), *cert. denied*, 469 U.S. 1157, 105 S. Ct. 903, 83 L.Ed.2d 919 (1985). Second, the defendant must be aware of the pending proceeding. *See id.* Third, the defendant must have intentionally endeavored corruptly to influence, obstruct or impede the pending proceeding. *See United States v. Laurins*, 857 F.2d 529, 536-37 (9th Cir.), *cert. denied*, 492 U.S. 906, 109 S. Ct. 3215, 106 L.Ed.2d 565 (1989). "The obstruction need not be successful; the jury may convict one who 'endeavors' to obstruct such a proceeding." *United States v. Vixie*, 532 F.2d 1277, 1278 (9th Cir. 1976).

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verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . .; [or]

(2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony. . . .

26 U.S.C.S. § 7206 (1996).

The offense of tax evasion, chargeable under 26 U.S.C. § 7201, includes only one offense which can be committed either by evading assessment or evading payment. *United States v. Mal*, 942 F.2d 682, 686 (9th cir. 1991) ("Nothing in the text of § 7201 suggests that Congress intended to define two distinct crimes. The statute prescribes evasion of assessment ("to evade or defeat any tax") and evasion of payment ("or the payment thereof") in a single sentence and imposes a single penalty for either act, a construction which indicates that Congress did not mean to create more than one offense"; *Sansone v. United States*, 380 U.S. 343, 354 (1965). However, under either type of evasion, the government must prove: (1) the existence of a tax deficiency; (2) willfulness; and (3) an affirmative act constituting an evasion or attempted evasion of the tax. *United States v. Wood*, 943 F.2d 1048, 1050 (9th Cir. 1991).

26 U.S.C. § 7206(1), filing false returns or statements, requires proof that (1) defendant filed a return, statement, or other document that was false as to a material matter; (2) signed the document under penalty of perjury; (3) did not believe the document was true as to every material matter; and (4) willfully subscribed the false document with the specific intent to violate the law. *United States v. Hanson*, 2 F.3d 942, 945 (9th Cir. 1993).

Finally, the elements of the offense aiding and abetting the preparation of a false tax return under 26 U.S.C. § 7206(2) are: "(1) the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) the return was fraudulent or false as to a material matter; and (3) the act of the defendant was

willful." *United States v. Salerno*, 902 F.2d 1429, 1432 (9th Cir. 1990). Willfulness is established by showing defendant (1) acted with bad purpose or evil motive, or (2) voluntarily and intentionally violated a known legal duty. *United States v. Kellogg*, 955 F.2d 1244, 1248 (9th Cir. 1992). Willfulness may be proved circumstantially. *Id.* (defendants creation of fictitious deductions sufficient to show wilfulness under tax laws because defendant knew of duty not to defraud IRS); *United States v. Conforte*, 624 F.2d 869, 875 (9th Cir. 1980).

2. Analysis

Defendants contend Guidelines § 2J1.2, derived from § 2X1.1, applies to this conspiracy. Defendants assert the offense of conviction was a conspiracy to obstruct the IRS by means which violate 18 U.S.C. § 1505. Hopper argues § 2J1.2 fairly encompasses the offense of which defendants were charged, and in some cases convicted, in the indictment.[24] The defendants contend the evidence establishes by a preponderance that defendants sought prevent or interfere with the IRS's ability to collect a tax which had already been deter-

[24] In an unreported case, the Tenth Circuit rejected such arguments. *See United States v. Scott*, 13 F.3d 407, 1993 WL 490259 (10th Cir. 1993). There, defendant who was convicted of conspiring to defraud the United States (18 U.S.C. § 371) by impeding, impairing, obstructing and defeating the lawful functions of the IRS, argued Guidelines § 2T1.9 was incorrectly utilized to calculate his sentence because he was neither indicted nor convicted of the underlying tax crimes. The sentencing court instead found defendant's conduct supported the sentence and "Section 2T1.9 does not expressly direct that a conviction is required . . . under 26 U.S.C. § 7201 or § 7206 . . . before applying Section 2T1.1 or Section 2T1.3. . . ." 1993 WL 490259 at **3.

mined. Some defendants also argue the tax guidelines should not be applied because they were not allowed to present evidence at trial regarding a good faith belief that they were complying with the tax laws.[25] This is not a good faith argument because defendants called an expert and contested the validity of the Ingram tax liability.

The government asserts, however, to sentence defendants under Guideline § 2J1.2 for simple obstruction fails to account for the acts committed by defendants during and in furtherance of the conspiracy

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[25] Defendants confuse the scope of the evidence which was required for their convictions at trial with the standard required at sentencing. In support of their contention that § 2J1.2 is the appropriate Guideline, the defendants have advanced arguments that they believed the JCA to be a religious trust based on Everett Thoren's representations, and they believed their freedom to protest tax laws motivated, at least in part, their conduct. Some defendants have also argued that JCA members did not harbor ill will toward the government and are law-abiding citizens. The evidence, however, shows all defendants participated as members of a group that protested the payment of income taxes to the federal government. This collective involvement began at least as of April 1, 1992, although the evidence showed several defendants engaged in various forms of tax protest acts prior to the involvement of the Juris Christian Assembly. Within the JCA, members engaged in numerous acts which show that they specifically intended to obstruct the IRS. The evidence illustrated, but by no means is this list exhaustive, defendants engaged in the following: submitted false W-4 forms claiming exemption from federal withholding as foreign citizens; refused to pay federal income taxes or to file voluntary tax returns; responded to letters from the IRS to delinquent JCA members with documents refuting the obligation to pay taxes, issued false and valueless financial warrants in the name of a fictitious governmental entity; claimed unwarranted and unlawful refunds of federal wages paid as social security taxes.

to obstruct the collection of revenue due and owing to the federal government. The government refers to the Application Notes to § 2X1.1, which require use of the most appropriate Guidelines section when the conspiracy is covered by another section, to contend the proper guideline is § 2T1.9. The government asserts the evidence shows the JCA provided assistance to members for the purpose of preventing the IRS from collecting taxes due and successfully impeded or obstructed payment to the IRS of more than $420,000 in tax obligations. The government distinguishes defendants' reliance on *Hanson*, 2 F.3d 942, stating the Ninth Circuit's holding rested on the fact that § 2T1.9 is reserved for concerted activity.[26]

In *Van Krieken*, 39 F.3d 227 (9th Cir. 1994), the court held that the obstruction Guidelines applied to offense conduct, the purpose of which was to defeat the collection of tax by the IRS. There, the defendant was convicted for filing false returns in violation of 26 U.S.C. § 7206(1) and interference with the administration of the revenue laws in violation of 26 U.S.C. § 7212(a). Van Krieken had a long history of disagreements with the IRS regarding his tax obligations. He had been assessed tax deficiencies for multiple years and refused to file returns and to complete tax forms required to be filed by his employers. After his conviction at a bench trial, Van Krieken was sentenced to 24 months imprisonment. He appealed, asserting that the district court should have sentenced him under the Guidelines for fraudulent returns, § 2T1.5. The Ninth Circuit held that based on the relevant offense conduct—filing false

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[26] *Hansen* did so find. *See United States v. Van Krieken*, 39 F.3d 227 (9th Cir. 1994).

Forms 1099, filing false returns and seeking a tax levy on innocent tax payers, as well as filing a groundless lawsuit and police theft report—the district court did not err in applying the obstruction guideline. 39 F.3d at 231.

Van Krieken is distinguishable from the conspiracy here, because the relevant offense conduct shows that concerted action was used by the defendants to impede and obstruct the payment of taxes by use of unlawful acts, threats, extortion, and fraud. To apply obstruction guidelines 2J1.1 as Hopper suggests simply does not address the seriousness of the defendants' conduct. The Guidelines state that conduct which must be considered to determine the appropriate sentence includes:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity. . . .

§ 1B1.3(a)(1) (1993). Accordingly, while the conspirators agreed to obstruct the IRS in its efforts to collect amounts due and owing from Ingram and George Reed, the actual base offense level for each defendant must be individually determined.

Here, a single object conspiracy was indicted and proved by direct and circumstantial evidence. The

single object was to defeat the IRS' collection of taxes, which was carried out by a number of different overt acts, some criminal, some not. While the overall JCA conspiracy among the defendants was to obstruct the IRS in its efforts to collect tax amounts due and owing from Terry Ingram and George Reed, and to wrongfully keep Ingram from paying taxes, each defendant can only be sentenced for foreseeable acts within the scope of his or her agreement with his or her coconspirators. *See United States v. Bracy*, 67 F.3d 1421 (9th Cir. 1995).

The relevant conduct proved at trial by a preponderance of the evidence does not support the application of the more generalized obstruction Guidelines, § 2J1.2. Rather, the nature of defendants' conduct in furtherance of the Juris Christian Assembly facilitated evasion of taxes, by the religious trust and renunciation of citizenship, use of fraudulent warrants to avoid payment of taxes, and impeding conduct to interfere with public employees and officers' performance of their duties to stop taxes from being collected; all of which makes application of § 2T1.9, the most appropriate Guideline, given the charged offense, offense of conviction and relevant conduct. *See*, *Mal*, 942 F.2d 682 (filing of a false W-4 form constitutes a sufficient affirmative act to support a felony tax evasion prosecution).

The Ninth Circuit's recent decision in *United States v. Newland*, 116 F.3d 400 (9th Cir. 1997), also produces this result. In *Newland*, the defendant was indicted for a money laundering and a drug conspiracy. In an unreported opinion, the Ninth Circuit reversed Newland's convictions of the substantive offenses and affirmed the conspiracy and money laundering convictions. *See*

United States v. Newland, 69 F.3d 545 (Table), 1995 WL 422515 (9th Cir. 1995).[27] The district court was required to consider the amount of drugs possessed by Newland's coconspirators in the drug offenses, which were foreseeable in light of Newland's own involvement in assisting the conspiracy. The court stated that the district court was not precluded from considering the quantity of drugs trafficked in by the conspiracy although as an aider and abettor of the drug conspiracy Newland could not be liable under *Pinkerton* for the subsequent acts of the coconspirators:

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[27] "A reasonable jury could find beyond a reasonable doubt that the alter ego of a closely-held corporation which has no declared source of income, but has a substantial increase in assets, who pays cashier's checks for a warehouse in a way that avoids currency transaction reports, who facilitates cash transactions for three motor homes, two of which . . . have been used for drug smuggling, who pays $20,000 as a down payment on the house to be owned by one of the bosses in the drug ring, knows that he is laundering money . . . and in this way aiding and abetting the drug conspiracy. . . . There was sufficient evidence to convict him of money laundering and, as an aider and abettor, of conspiracy to import cocaine and of conspiracy to possess with intent to distribute marijuana and cocaine. However, as an aider and abettor he cannot be held liable under a *Pinkerton* theory for the subsequent acts of his coconspirators, *Hernandez v. United States*, 300 F.2d 114, 121 n. 17 (9th Cir. 1962), and so his convictions of importation of cocaine, of possession with intent to distribute cocaine, and of possession with intent to distribute marijuana must be reversed." 1995 WL 422515 at ** 2.

Newland is all the more puzzling because he was convicted of the conspiracy. Additionally, *Hernandez* does not appear to reach the same finding that an aider and abettor cannot be vicariously liable for acts of coparticipants in a concerted course of criminal conduct.

> Although Newland's participation in the criminal enterprise does not invoke *Pinkerton* liability, Newland was found to have aided and abetted the drug conspiracy by laundering its illicit proceeds. Accordingly, the district court should have considered the quantity of drugs that was imported or possessed as a direct result of Newland's acts of money laundering.
>
> The district court must [also] consider the quantity of drugs linked to Newland's involvement in the Guzman organization even though we reversed his convictions on the substantive drug offenses.

Newland, 116 F.3d at 403-5. *Newland* also cited *United States v. Diaz-Rosas*, 13 F.3d 1305, 1308 (9th Cir. 1994) ("[A] defendant who is guilty of conspiracy to possess and distribute cocaine [but not of the underlying offenses] may properly be held accountable for any cocaine possessed or distributed by coconspirators, so long as that cocaine was foreseeable to him.")

The Supreme Court stated in *Watts*, —- U.S. —-, 117 S. Ct. 633, 136 L.Ed.2d 554 (1997): "[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." For the purposes of sentencing, foreseeable relevant conduct must be proved by a preponderance of the evidence:

> "While the inquires demanded by *Pinkerton* and U.S.S.G. § 1B1.3(a)(1)(B) are similar, *See United States v. Rodriguez*, 67 F.3d 1312, 1324 (7th Cir. 1995), *cert. denied*, —- U.S. —-, 116 S. Ct. 1582, 134 L.Ed.2d 679 (1996), the standards of proof are not.

> Criminal liability under *Pinkerton* must be proved beyond a reasonable doubt, while relevant conduct generally must be proved by a preponderance of the evidence."

Newland, 116 F.3d at 405, n 3.

Accordingly, § 2T1.9 is the most applicable guideline for sentencing defendants for the Count One conspiracy.

3. 2T1.9(a)(1) OR 2T1.9(a)(2)?

The next issue concerns whether the base offense level must be calculated utilizing the Guidelines tax tables after determining the "tax loss" under § 2T1.1 or § 2T1.4, or whether the default base offense level of 10 is most appropriate. *See* USSG § 2T1.9(a) (1993). The base offense level for § 2T1.9(a)(1) requires the application of § 2T1.1 or § 2T1.4, as appropriate, in light of the defendants' relevant conduct. Section 2T1.9 does not expressly require a conviction under the tax laws as a prerequisite for applying the Guidelines section.[28]

The government asserts § 2T1.9(a)(1) is the appropriate guideline to apply to the conspiracy to obstruct and impede the payment of more than $429,000 in out-

[28] Where a conviction of the underlying offense is required for application of a stated guideline section, the USSG so specifies. The guideline for § 2D1.1 instructs a base offense level of 43 or 38, "if the defendant is convicted under 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. §§ 960 (b)(1), (b)(2), or (b)(3)." (1997 Version.) Similarly, § 2S1.1(a)(1) provides a base offense level of "23, if [the defendant is] convicted under 18 U.S.C. §§ 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)". (1997 Version.)

standing tax assessments.[29] If the entire amount of tax that the conspiracy sought to defeat is not considered, the defendants' sentences will not adequately reflect the true nature of the offense conduct. The government asserts the court first determines the base offense level under § 2T1.9(a)(1). If the level is less than 10, then the default provision in § 2T1.9(a)(2) applies, citing *United States v. Kraig*, 999 F.2d 1361 (6th Cir. 1996).[30]

The defendants collectively assert reference to the tax tables is not warranted because they have neither been charged with nor convicted of the tax crimes defined in 26 U.S.C. § 7201 or § 7206 and because the government suffered no "tax loss." If the tax tables are

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[29] This amount includes interest and penalties.

[30] While *Kraig* did so find, the court believes that the Sixth Circuit's interpretation fails to give effect to each provision of the Guidelines. In *Kraig*, a lawyer was convicted of his role in a conspiracy to conceal the assets of Reuben Sturman, a marketer of adult entertainment material, from the IRS. The conspiracy involved the creation of foreign shell corporations and trusts to conceal Sturman's assets. Kraig was convicted and sentenced. The district court determined Kraig's base offense level pursuant to § 2T1.9(a)(1), applying § 2T1.1 or § 2T1.3 (deleted). Kraig asserted on appeal that the default score of 10 applied to his conduct. The Sixth Circuit did not agree:

> The plain language of section 2T1.9 states that the applicable statutory provision is 18 U.S.C. § 371. Application Note 2 provides that the base offense level should come from sections 2T1.1 or 2T1.3, whichever is most applicable, if the base offense level is more than 10. As the base offense level applicable here under either section is greater than 10, the plain language of the guideline directs that one of these two sections is to be used.

99 F.3d at 1370.

applied, they contend the tax loss is much lower than $420,000.[31]

In the alternative, defendants argue if § 2T1.9 applies, then § 2T1.9(a)(2) requires a base level of 10. McKendrick and Ries assert the § 2T1.1 Guideline refers to various forms of personal tax evasion; § 2T1.4 involves tax fraud. The conspiracy charged in this case only relates to obstruction of the IRS proceedings, which is covered by neither of these Guidelines. Because neither § 2T1.1 nor § 2T1.4 is appropriate, they argue the base offense level 10 under the default provision must be applied.[32]

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[31] The first argument fails because, as already stated, § 2T1.9 does not require a conviction under the tax code. As to the "tax loss," defendants' assess the amount differently. All defendants agree the amount of "tax loss" should not include interest and penalties. McKendrick asserts none of the Ingram or Reed tax obligations are foreseeable to him. Terry Ingram asserts he is only responsible for $8,397, which represents the principal amount of his unpaid tax exclusive of interest and penalties.

[32] The government asserts the Guidelines require a minimum a base offense level of 10., relying on Application Note 2 ("The base offense level is the offense level . . . from § 2T1.1 or § 2T1.4 . . . if that offense level is greater than 10. Otherwise, the base offense level is 10.") A correct reading of relevant case law refutes this contention. In *United States v. Hunt*, 25 F.3d 1092 (D.C. Cir. 1994), the court rejected arguments that calculation of "tax loss" should reflect only the amount of money actually lost by the government because of fraudulently obtained refunds or reduction in taxes paid. 25 F.3d at 1095. However, the court stated:

> *United States v. Telemaque*, 934 F.2d 169 (8th Cir. 1991), . . . involved a tax protest rather than a serious attempt to defraud the United States. In *Telemaque*, the sentencing court drew from sources other than the tax loss provisions in applying the guidelines. It is perfectly possible that a legitimate category of exceptions to the guidelines exists for those

Ingram also asserts no loss to the government occurred within the scope of his agreement in the conspiracy or while he was actively associated with the JCA. He asserts his acquittal of the Count Six charge, obstruction of the IRS proceedings by filing a false, fictitious and valueless financial instrument to satisfy tax obligations, is evidence that no conduct attributed to him resulted in a tax loss.

The decision of the district court in *United States v. Krause*, 786 F. Supp. 115 (S.D.N.Y. 1992), is helpful. There, a tax protestor filed income tax forms seeking a refund of $23,472,858, setting forth huge sums of money as his earnings ($32,595,126), which were obviously fictitious. Krause filed forms with the IRS as a protest, in furtherance of his ultimate goal of being treated as a non-taxpayer. Krause protested the obligation to pay taxes and whether his salary from his employer was taxable income. Following an IRS levy on Krause's property, he began a course of conduct which resulted in his convictions.

At sentencing, the government sought punishment under § 2T1.3(a)(1) requiring application of the tax

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> cases in which there is no serious attempt to evade. . . . [¶] The present [1992] version of § 2T1.4 provides for a base offense level of 6 "if there is no tax loss." USSG § 2T1.4(a)(2).

25 F.3d at 1096. Accordingly, if there is no tax loss, the court is instructed to apply the default base offense level stated in § 2T1.9(a)(2), or 10. To read the Guidelines in the manner suggested by the government would not give full effect to all the Guidelines provisions, in that, if there is a tax loss and the base offense level for the amount is less than 10, under an appropriate application of § 2T1.9, a defendant would have his or her base offense level increased without engaging in any relevant conduct.

table; Krause sought sentencing under § 2T1.3(a)(2), the default provision. The government contended that the proper amount of the tax loss was based on the amount asserted in Krause's tax forms ($32,595,126) because that represented a false credit against tax. Moreover, the government asserted that the target offense to impede or obstruct the IRS, namely by causing confusion, had succeeded. The government asserted that if departure was warranted because of mitigating circumstances, the court could do so under Chapter 5 of the Guidelines. Krause contested this calculation of the base offense level, in part relying on the Fourth Circuit's decision in *United States v. Schmidt*, 935 F.2d 1440 (4th Cir. 1990), where the tax loss was calculated as the actual loss of tax revenue to the IRS determined from the amount of revenue that should have been collected by the government.

The district court concluded there was no tax evasion, no tax loss and no false tax credits involved, because no one at the IRS seriously considered making any refunds to Krause based on these amounts. The district court stated:

> *The figures stated by Krause in his tax return and forms were an obvious exaggeration and patently fictitious.* No reasonably prudent tax examiner or IRS employee would have refunded 23 million dollars based on Krause's return. . . . Further it is reasonable to believe that *there was no actual loss intended by the defendant.* Krause was angry with the person who filed tax liens against him. In order to hurt these people, he engaged in this scheme to harass, frighten and confuse them.

> The whole scenario, although constituting criminal acts, was an obvious fictional device of protest.

786 F.Supp. at 1156 (emphasis added). The district determined the sentence under the default provision was appropriate.

A like result occurred in *United States v. Telemaque*, 934 F.2d 169 (8th Cir. 1991). In *Telemaque*, the defendant was convicted of conspiring to defraud the Untied States with an elaborate scheme under which she would file fraudulent tax returns, claiming a refund for money reported on a Form 1099. Telemaque claimed refunds in excess of a billion dollars. Applying Guidelines § 2T1.9, the district court determined the default provision applied. Her offense level was increased based on her encouragement of others to violate the tax code and because of the extent of the intended monetary loss or disruption of the government. The Eighth Circuit affirmed, stating: "We are convinced that the District Court's application of the guidelines was not clearly erroneous." 934 F.2d at 171.

The circumstances warranting application of the default provision in *Krause* and *Telemaque*, are not applicable here. The ultimate goal of the JCA conspiracy was that the IRS would accept defendants' Article I & II fraudulent financial warrants in satisfaction of over $420,000 in IRS tax obligations owed by Terry Ingram and George Reed and cease further collection efforts. To accomplish the conspiracy, defendants engaged in conduct which can reasonably be construed as tax evasion, filing fraudulent documents under penalty of perjury with the IRS and aiding and abetting the preparation of false documents to interfere

with or impede the collection of taxes. Defendants' acts included, among other things: attempting to "revoke United States citizenship by declaration of foreign citizenship, claiming to be a citizen of a "sovereign republic state;" using a purported tax-exempt religious trust to receive and administer assets to evade income taxes; threatening federal and state officials both in person and using the United States mails to wrongfully induce removal of IRS liens or levies placed on members' property or wages; attempting to record liens on the property of IRS agents; impersonating federal officials and demanding that private and public individuals remove tax liens; issuing false warrants for the arrest of IRS agents; using false and valueless financial warrants to satisfy IRS obligations; and attacking the Stanislaus County Recorder. This conduct requires application of § 2T1.9(a)(1) to calculate the base offense levels for defendants sentences. Accordingly, the amount of "tax loss" attributable to defendants conduct is to be utilized as the basis for calculating defendants' base offense levels for the Count One conspiracy.

3. <u>Calculating the Tax Loss</u>

The base offense level under either § 2T1.1 or § 2T1.4 is calculated as follows:

> (a)(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or (2) 6, if there is no tax loss.

(1993). "Tax loss" is defined in § 2T1.1(c):

> (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss

> that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).
>
> (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.
>
> (3) If the offense involved wilful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
>
> (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
>
> (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

(1993.) Application Note 1 provides in relevant part: "The tax loss does not include penalties or interest." (1993.) "In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) . . . as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed." App. Note 1 (1993). All conduct violating the tax laws is considered as part of the same course of conduct or common scheme unless the evidence demon-

strates that the conduct is "clearly unrelated." App. Note 2 (1993).

The government asserts the object of the JCA conspiracy was to obstruct the proceedings of the IRS in the collection of over $416,323 owed to the IRS by George Reed and over $13,700 for Terry Ingram. For that reason, the government seeks to have the guideline range represent the entire amount sought to be obstructed. The defendants take varying positions on the amount of the tax loss.

Aside from cases such as *Telemaque* where the amount of tax loss was not based upon the erroneous amount sought to be gained by false reporting of income in a tax return, the courts are uniform in deciding that the "actual loss" to the government does not bear on the amount of loss determination. *See*, *United States v. Tandon*, 111 F.3d 482, 490 (6th Cir. 1997) ("tax loss" is based on the amount by which income is understated on the false tax return, not whether the government ultimately lost money). This is so because "the purpose of the guideline rules is to measure the size of the lie, not the size of the government's loss after all corrections in both directions." *United States v. Valentino*, 19 F.3d 463, 465 (9th Cir. 1994).

In *Valentino*, the defendant pleaded guilty to violating § 7206(1) for wilful underreporting of $100,000 of interest income, discovered by the IRS after Valentino applied for a bank loan and showed annual taxable income as substantially more than stated on tax returns. He appealed the calculation of his sentence arguing that the sentencing judge should have allowed evidence

whether he was entitled to depreciation deductions to lower the tax loss amount. The Ninth Circuit found no error. Offset for allowable depreciation deductions need not be considered by the court; rather, only the amount concealed. *Id.* at 464. The court noted critically:

> Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction may not yet have resulted in a tax loss.

Id. at 464-5.

Likewise, the Third Circuit has calculated tax loss based on the amount sought to be obstructed. *United States v. Pollen*, 978 F.2d 78 (3d Cir. 1992). There, the defendant plead guilty to tax evasion and the tax loss determination at sentencing was calculated at $488,000. Pollen appealed, asserting that if the tax loss had properly been calculated, he would have owed slightly more than $100,000 in taxes. The Circuit Court found no error. It concluded that the full tax debt attempted to be evaded without any credit for payments made to the IRS could form the basis of the sentencing calculation. In footnote 29 (relied upon here by the government), the court stated in part:

> Guideline section 2T1.1, Application Note 2, provides that for the purposes of imposing sentence for violation of section 7201, the tax loss considered cannot include interest or penalties. *See* U.S.S.G. § 2T1.1. *While such a limitation may be appropriate in an evasion of assessment case, it is not always so when imposing sentence for tax evasion*

> *committed through the evasion of payment*. [¶] The Guidelines' requirement that his sentence be calculated based on only his evasion of the . . . raw taxes owed, and not also on his evasion of the payment of interest and penalties, fails to reflect accurately the criminal behavior involved in this type of evasion of payment of taxes offense.

Pollen, 978 F.2d at 91, n. 29 (emphasis added). The Fourth Circuit has also permitted a similar calculation of tax loss. *See United States v. Fleschner*, 98 F.3d 155, 160 (4th Cir. 1996) (base offense level included entire amount sought to be camouflaged by defendants under fraudulent tax scheme).[33] *see also*, *United States v. McLaughlin*, —- F.3d —-, 1997 WL 572533 (3d Cir. 1997) ("including interest in computing tax loss to the government merely recognizes the time value of money. [I]t is a rational calculation of the real loss sustained as a consequence of a taxpayer's illegally concealing his income from assessment. [I]t is always within the

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[33] In *Fleschner*, defendants were convicted of a conspiracy to defraud the United States of revenue under 18 U.S.C. § 371. Defendants formed an organization called the "Carolina Patriots," the purpose of which was to advise and conceal taxable income of members. The Patriots activities included claiming illegitimate allowances from withholding, refusing or filing to file tax returns, removing themselves from the banking system by dealing in cash so as to hide income. One of the leaders of the Patriots operated a separate business during the relevant conspiracy period and paid all employees in cash so to avoid federal withholding and reporting. The tax evaded from these separate activities was $219,051, which represented nearly the entire amount of the calculated tax loss attributable to defendants. The Fourth Circuit held the amount was properly included because the manner in which it was evaded was consistent with and related to the methods utilized by the Patriots.

taxpayer's power to pay the deficiency and to stop interest from accruing.")

The government's position that the entire tax loss consisting of the amount sought to be obstructed by nonpayment of the George Reed tax lien ($416,343.32) *and* the amount of the Ingram wage levy sought to be satisfied with fraudulent financial warrants ($13,788.42), must be attributed to all defendants is untenable. Keeping in mind the nature of the conspiracy proven was to obstruct the collection proceedings of the IRS, which included conduct to obstruct seizure of the Beckwith property and payment of Ingram's wage levy, the relevant conduct and knowledge of each defendant must be considered in assessing the tax loss.

a. Ingram Tax Levy

Each of the defendants engaged in relevant conduct which establishes their agreement to impede the collection of Ingram's tax obligation. The amount sought to be obstructed, *i.e.* the amount of loss defendants intended to inflict, is established by the amount of the fraudulent financial warrants they issued and delivered to the IRS. That amount was proved to be $13,788.42. The base offense level for this amount is 11. *See* § 2T4.1(F) (applies to amounts more than $13,500 and less than $23,500). Although all defendants were linked to the JCA by their common contact with Everett Thoren, the evidence showed that Mallen, McKendrick, Ingram, Hopper, Knight, Ries and Steiner all engaged in overt acts to impede the collection of Ingram's tax. Additionally, this amount is properly attributed to George and Kendall Reed because they

knew the purposes of the JCA, George L. Reed provided the Reed family property to facilitate the unlawful activities of the JCA, and their conduct was jointly undertaken to obstruct the IRS' efforts to collect tax liabilities and they could reasonably foresee that their coconspirators were acting to defeat the tax liabilities of others including Ingram.

b. Reed Tax Lien

Everett Thoren, Ries, Knight, Steiner, and George and Kendall Reed, by their conduct and words agreed to obstruct the collection of George Reed's tax obligation. The amount of the outstanding obligation which they sought to obstruct, is the amount of the Abstract of Judgment, $416,343.32. Although the underlying tax amount was originally $146,000, if only this amount is considered in the calculation of defendants' base offense levels, the defendants will have succeeded in obstructing the collection proceedings of the IRS without responsibility for the full amount of the liability and tax lien. Moreover, the amount they intended to defeat was the $416,343.32 lien, which was recorded against the Reed property prior to 1992.

As to defendants Mallen and Ingram, the government failed to show they participated in the conspiracy to obstruct this larger amount. More than presence or convenience in living arrangements must be shown in order to permit calculation of these defendants' guideline sentencing offense levels for the amount of the Reed taxes. The evidence did not establish that Mallen or Ingram had knowledge of or participated in the conduct to defeat the tax lien on the Reed property.

As to McKendrick, his signature appears on two documents sent to Diane Noweski regarding the Beckwith property. This issue will be treated separately at his sentencing. As to Hopper, her claim that merely signing a proof of service does not evidence knowledge or acquiescence in the contents of the document that is being served is without merit, is belied by the extent her overall involvement in the JCA conspiracy. She is the person who worked most closely with Everett Thoren. She knew his philosophies and the manner and means by which he utilized the purported religious trust. Hopper, despite her assertions, was well aware of the JCA's goals and the means or methods utilized to attain that purpose. The evidence also showed that after the JCA left the Beckwith property, it continued to operate from her apartment, where all JCA records and accounts were maintained. She is chargeable with knowledge of the amount of the tax sought to be obstructed by the JCA's conduct and will be held accountable for the Reed tax liability.

The base offense level for these latter defendants is 17. *See* § 2T4.1(L) (applies to amounts more than $325,000 and less than $550,000).

D. Special Offense Characteristics Under § 2T1.9(b)

The special offense characteristics under § 2T1.9(b) instruct the court to apply the greater, if applicable:

> (1) if the offense involved the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment or collection of revenue, increase by 4 levels.

> (2) if the conduct was intended to encourage persons other than or in addition to the co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue, increase by 2 levels. Do not, however, apply this adjustment if an adjustment from § 2T1.4(b)(1) is applied.

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The special offense characteristic in § 2T1.4(b)(1) does not apply. The offense characteristics in § 2T1.4(b)(1) applies to tax preparers or persons who derive substantial income from the failure to report.

Only the special offense characteristics in § 2T1.9(b) are considered. Application Note 4 under § 2T1.9(b) states "subsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the laws (e.g., an offense involving a "tax protest" group that encourages persons to violate the tax laws. . . .)" (1993). Because the special offense characteristic in § 2T1.9(b)(1) provides a greater increase, it will be considered first.[34]

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[34] The evidence does not show Ingram, Mallen, McKendrick, Hopper, Kendall Reed or Steiner by their conduct, encouraged others, including coconspirators, to obstruct IRS proceedings by impeding collection of taxes owed. Rather, the evidence presented showed that George Reed, with Everett Thoren's support, encouraged the remaining defendants to engage in conduct calculated to obstruct the collection on the tax lien. Knight engaged in similar conduct with respect to the Ingram wage levy. Ries engaged in such conduct as to both the Reed lien and the Ingram levy.

Section 2T1.9(b)(1) does not expressly provide that the victim of the threats be a government official. "Planned or threatened use of violence" to impede the collection of revenue can occur even without threats being made to the government. For instance, if a witness has knowledge of a conspiracy's obstructionist activities and is threatened by members of the conspiracy if he or she informs law enforcement authorities of the obstruction, the special offense characteristic would be applied.

The four level increase applies to George Reed, Kendall Reed, Knight, Ries and Steiner with respect to the several threats to harm the Stanislaus County Recorder because she refused to remove the lien from the Beckwith property. All of these individuals threatened or actually used violence in carrying out the purposes of the conspiracy. Defendants placed a false bomb under the County Recorder's car, mailed a bullet to her home and threatened to make an example of her if she did not "do her job" and file liens brought to her office against IRS employees. The evidence proves by more than a preponderence that Defendant Knight sent one of the threatening letters to Matthews. These threats and plans of violence culminated in Steiner's attack on Karen Mathews in her garage on January 30, 1994. These acts constitute threatened and actual use of violence to obstruct or impede the collection of revenue by the IRS.

The question as to whether the "warrant of arrest" can also be considered a "threatened use of violence" is more difficult to decide. The evidence shows IRS agent Mary Ryan was threatened with the prospect of personal arrest if she failed to remove the tax levy from

Ingram's wages. The government contends the arrest warrant involved the threatened use of violence for the purposes of increasing the base offense level by 4. Certain of the defendants dispute this contention.

Defendants Mallen, McKendrick, Knight, and George Reed signed the warrant of arrest; Hopper executed the attached proof of service and mailed the documents to Ms. Ryan. Some of the defendants assert the warrant of arrest cannot constitute the threatened use of violence because no contact with Mary Ryan was contemplated by the document and, when construed in its proper light, the warrant was meant only as a protest statement. Hopper contends the most analogous offense which can apply to mailing the "warrant of arrest" is the offense defined under 18 U.S.C. § 876, threatening communications, which neither includes as an element the use of force nor the substantial risk of injury. The defendants' arguments in this regard have merit.

Section 2T1.9(b)(1) does not define the phrase "planned or threatened use of violence." However, the term "crime of violence" is defined in Guidelines § 4B1.2, under the career offender provisions. That provision states in part:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—(I) has as an element the use, attempted use, or threatened use of physical force against the person of another. . . .

(1993). The Application Notes following this provision apply the term "crime of violence" to a host of enumer-

ated offenses including offenses where the "use, attempted use, or threatened use of physical force against the person of another" is contemplated. App. Note 2 (1993).

In construing the "crime of violence" characteristic, the Ninth Circuit narrowly construes the Guideline so as to restrict its application to the categories of offenses enumerated in the Guidelines. *See United States v. Sherbondy*, 865 F.2d 966 (9th Cir. 1988) (construing "violent felony" and "crime of violence" under 18 U.S.C. § 924). Other Circuit Courts have also construed the Guideline in a restrictive manner. *United States v. Left Hand Bull*, 901 F.2d 647, 649 (8th Cir. 1990) (deeming a letter by defendant threatening to kill his estranged wife a crime of violence for the purposes of sentencing under the career offender statute because "an essential element of section 876 is that the communication convey a "threat to injure the person of the addressee or of another"); *United States v. McCaleb*, 908 F.2d 176 (7th Cir. 1990) (letter threatening life of President sufficient to constitute a crime of violence where defendant had undertaken affirmative steps to carry out threat).[35] But *see United States v. Poff*, 926 F.2d 588 (7th Cir. 1991) ("Threats are themselves a form of violence that 'may

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[35] The *McCaleb* court stated in part:

> The crime of threatening the life of the President . . . [requires that t]he threat must be a "true threat" as opposed to mere political hyperbole or constitutionally protected speech. (Citations) This court has required that the government prove that the defendant made the threat with the intent that it be interpreted by the recipient as a genuine expression of an intent to take the life of the President.

908 F.2d at 178.

be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out.'") (citing *Rogers v. United States*, 422 U.S. 35, 46-7, 95 S. Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring).

Under California statutes, neither an arrest without authority nor false imprisonment constitute felonies. Cal. Penal Code § 146 states:

> Every . . . person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, does any of the following, without a regular process or other lawful authority, is guilty of a misdemeanor: (a) Arrests any person or detains that person against his or her will.

Cal. Penal. Code § 146 (1988). The crime and punishment of false imprisonment, Cal. Penal Code §§ 236 and 237 state:

> False imprisonment is the unlawful violation of the personal liberty of another.
>
> False imprisonment is punishable by fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not more than one year, or by both. If such false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison.

Cal. Penal Code §§ 267, 267 (1988). Under the California provision, misdemeanor false imprisonment can be punished as a felony where great force is used.

In *California v. Hendrix*, 8 Cal.App.4th 1458 (1992), the court explained the false imprisonment statutes:

> Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as "violence" with the false imprisonment effected by such violence a felony.

Id. at 1462 (reversing felony conviction for false imprisonment because trial court failed to give lesser included offense instruction).

In *California v. Fernandez*, 26 Cal.App.4th 710 (1994), the court affirmed defendant's conviction under the false imprisonment statute for his role in beating another man. The court found that an essential of misdemeanor and felony false imprisonment is restraint of the person. *Id.* at 717. "Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both." *Id.* (quoting *California v. Zilbauer*, 44 Cal.2d 43, 51 (1955)) (internal quotations and further citations omitted).

While a "warrant of arrest" contemplates some sort of physical restraint, there is no evidence here which supports construing it as a "crime of violence" because none of the defendants threatened to use "physical force" or "violence" to hold Mary Ryan. Although Mary

Ryan testified she was uncertain as to the meaning of the "warrant of arrest," no violence or force was actually contemplated by it.

The government's analogy to a case involving child stealing, *United States v. Lonczak*, 993 F.2d 180 (9th Cir. 1993), is not sufficiently analogous. The actual physical caption and restraint of the child demonstrate a degree of action not proven in this case. No evidence was adduced that any defendant intended to take Ms. Ryan into custody. The California Penal Code provisions cited by the government clearly define when false imprisonment constitutes a crime of violence. The relevant case law leads to the conclusion that the warrant of arrest did not manifest an intent to use the required level of force. Accordingly, the four level increase does not apply.

E. Official Victim Enhancement, 3A1.2

The Official Victim enhancement, § 3A1.2, states:

> If—(A)the victim was a government officer or employee . . . and the offense of conviction was motivated by such status; . . . increase by 3 levels.

(1993).

The Application Notes apply § 3A1.2 "when specified individuals are victims of the offense." The enhancement "does not apply when the only victim is an organization, agency, or the government." App. Note 1. The adjustment also does not apply when the offense guideline specifically incorporates the official status of the victim. App. Note 3.

The defendants assert increasing the base offense level by four under § 2T1.9(b)(1) and adding a three level enhancement under § 3A1.2 results in impermissible "double counting." Ingram and Hopper assert that in order for defendants to have potentially interfered with the activities of the IRS by the use or threatened use of violence, such acts would have necessarily been directed toward the government's agents. They assert only government agents can be the target of threatened violence in the obstruction of tax laws.

Hopper further argues "threatening the use of violence" under the special offense characteristic in § 2T1.9(b)(1) means threats made to the government. Hopper argues "if an individual is going to threaten violence [to impede or obstruct the lawful proceedings of the government], there can thus be only two objects of that threat, (1) the governmental property, or (2) its agents." She asserts for this reason, the § 2T1.9(b)(1) enhancement takes into account the official status of the victim. Accordingly, applying both § 2T1.9(b)(1) and § 3A1.2 would constitute impermissible "double counting" to enhance the base offense level.

There are no cases directly on point. However, the principle of "double counting" for sentencing is discussed in several Ninth Circuit decisions. In *United States v. Williams*, 14 F.3d 30 (9th Cir. 1994), defendant was convicted of threatening a federal official in violation of 18 U.S.C. § 115(a)(1)(B). The district court determined the guideline for threatening communications, § 2A6.1, applied. The court also imposed a three level increase under the official victim enhancement. Williams appealed asserting the applicable Guidelines provision incorporated the status of the victim, or

alternatively, status as an official was an element of the underlying offense. The Ninth Circuit rejected these arguments, concluding instead:

> [T]he proper comparison to determine whether impermissible double-counting occurred is "between the applicable guidelines provisions, not between the guidelines provisions and the criminal code."

14 F.3d at 32 (quoting *United States v. McAnich*, —- U.S. —-, 114 S. Ct. 394, 126 L.Ed.2d 342 (1993). Accordingly, the official victim enhancement was properly applied by the district court.

In *United States v. Pritchett*, 908 F.2d 816 (11th Cir. 1990), the court applied the four level increase under § 2T1.9(b)(1) although the victim of the defendants' threats was not a government agent. Rather, the victim of the threats was a witness to the underlying drug conspiracy whose purpose included evading payment or collection of taxes. In *Pritchett*, the Guidelines applied were those in effect prior to 1990, when the § 2T1.9(b)(1) enhancement simply provided: "if the offense involved the planned or threatened use of violence, increase by 4 levels." This change in the Guidelines is significant because under the 1993 Guidelines, applicable here, the threat of violence must be for the purpose of impeding, impairing, obstructing or defeating the collection of revenue. While Hopper's argument is not frivolous, it is not persuasive.

If the Sentencing Commission wanted to include the official status of the victim under the § 2T1.9(b)(1) enhancement, it would have done so in clear and explicit language. For instance, the Guidelines specifically

advise against applying the official victim enhancement under § 2A2.4, obstructing or impeding officers. Application Note 1 under § 2A2.4 states: "The base offense level reflects the fact that the victim was a governmental officer performing official duties. Therefore, do not apply § 3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under § 2A2.2 (Aggravated Assault)."

Accordingly, the official victim enhancement should be applied to conduct which was motivated because of the official status of the victim. In the Ingram wage levy, the defendants mailed a false arrest warrant with papers specifically addressed to Mary Ryan to threaten her in her official capacity, as opposed to the government generally, for the purpose of interfering with her official functions as a collection agent for the IRS to impede her duties to collect the outstanding Ingram taxes. Hopper prepared and mailed the documents to IRS Agent Ryan at Ms. Ryan's office. The package was mailed after Ms. Ryan initiated the wage levy against defendant Ingram. One of the documents mailed was the warrant of arrest, which named Ms. Ryan personally. Even if the arrest warrant was a threatening communication motivated by Mary Ryan's official status as an IRS agent, the official victim enhancement apply. Mary Ryan was the revenue officer investigating Ingram's tax liability. The purpose of the warrant of arrest was to stop Ryan's official investigation or enforcement efforts to satisfy the outstanding tax obligation. The "victim" of Ingram's obstruction efforts were the IRS and Ms. Ryan. Ms. Ryan was personally threatened. Accordingly, Mallen, McKendrick, Ingram and Hopper, whose conduct reasonably furthered the communication of the threats to Ryan to defeat tax

obligations of Ingram, are subject to the § 3A1.2 enhancement.

As to the attack on Karen Mathews, who could reasonably foresee such conduct because of the nature of their agreement, must be individually determined. Mathews was threatened on several occasions by various defendants to remove liens from the Beckwith property. George Reed, Kendall Reed, Knight and Everett Thoren all went to Mathews and demanded she remove IRS liens on the Beckwith property. A fake "bomb" was placed under Ms. Mathews' car and a letter was mailed to Ms. Mathews' personal residence which threatened her with physical harm if she failed to carry out her official functions as Stanislaus County Recorder and remove the liens or otherwise do what they demanded.

All of these acts were proved beyond a reasonable doubt to be motivated because of the official status of Karen Mathews as the Stanislaus County Recorder. The Guidelines makes no distinction as to whether the official victim must be a state or federal officer. It is sufficient that the victim was employed in an official position. Additionally, the acts were undertaken so as to impede the collection of tax revenue due and owing to the United Stated by George Reed.

VII. CONCLUSION

The base offense levels and some of the recommended enhancements for each of the defendants convicted of participation in the criminal conspiracy to impede or obstruct the administration of the tax laws by the Internal Revenue Service in violation of 18

U.S.C. 1505 and 18 U.S.C. 371, charged in Count One of the superseding indictment, will be calculated in accordance with this decision.[36]

SO ORDERED.

DATED: October ___, 1997.

OLIVER W. WANGER
UNITED STATES DISTRICT JUDGE

countone.frm

[36] This decision does not consider all sentencing issues or applicable Guidelines provisions which relate to the Count One conspiracy. For that reason, this decision does not calculate the sentencing scores for each defendant on the Count One conspiracy. Further Guidelines provisions may be applicable depending on each coconspirators' role in the JCA. Additionally, this decision does not take into consideration applicable grouping concerns for the purpose of determining sentence.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CR-95-5174-OWW

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GEORGE L. REED, DEFENDANT

SENTENCING

[Oct. 24, 1997]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE CLERK: Going to item Criminal-F-95-5174, United States versus George Reed for sentencing.

MR. CONKLIN: Jon Conklin and Carl Faller for the United States.

MR. SERRA: J. Tony Serra on behalf of George Reed who is present and before the Court.

THE COURT: Thank you very much.

All right, are the parties ready to proceed with sentencing?

MR. SERRA: Yes, Your Honor.

MR. CONKLIN: Yes, Your Honor. Thank you.

THE COURT: All right. I believe that there was additionally a motion for new trial that had been previously not ruled on by the Court. I have read and fully considered that motion, and I am ready to rule on it. I don't know whether the parties wish to present any argument on the subject of the new trial motion.

MR. SERRA: We'll submit it, Your Honor.

THE COURT: Thank you.

Does the Government wish to—

MR. CONKLIN: We'll submit it, Your Honor. Thank you.

THE COURT: All right. The ground for the motion is that there was a violation of due process within the meaning of the Basurto, B-A-S-U-R-T-O, and related cases that the alleged knowing use of perjured testimony so interfered with and tainted the trial process as to deprive Mr. Reed of a fair trial.

The Court finds that although there was impeachment of the witness, Anthony Dalglish, that some of what Mr. Dalglish testified to was undisputedly true. Some of it was undisputedly false, and it was ultimately the determination of the trier of fact whether they

accepted or rejected Mr. Dalglish's testimony, and the Court was not provided with evidence that satisfies the standard that there was a knowing use of false or perjured testimony on the part of Mr. Dalglish.

I suspect everybody received what I would call surprises in listening to Mr. Dalglish's testimony, and I do not have evidence to support that where Mr. Dalglish's testimony was established to be false, that there was a knowing use of the false testimony, or that that preknowledge was possessed by the Government other than it could have expected impeachment based on Mr. Dalglish's background, and there was such impeachment. So the motion for new trial is denied.

MR. SERRA: Your Honor, may I just preserve what I believe is present in our moving papers, and that is that that motion was also directed to the—what we view as perjury before the grand jury. I want to only preserve that aspect of this motion for potential appellate review.

THE COURT: Yes, and certainly this is in your papers, and it is preserved. I didn't mention the grand jury, but, again, the testimony of Mr. Dalglish, there were shown to be inconsistencies between his trial testimony and his grand jury testimony, but given the evidence in the case, the Court does not find that the prosecution knew of perjured testimony, or that it had reason to believe that Mr. Dalglish was going to give, if any, testimony was inconsistent, inconsistent testimony at the trial.

MR. CONKLIN: Thank you, Your Honor.

THE COURT: So that issue is preserved, Mr. Serra.

MR. SERRA: Thank you, Your Honor.

THE COURT: Moving to the sentencing, Mr. Reed, have you had an opportunity to read the presentence investigation report that has been prepared by the probation officer?

THE DEFENDANT: Yes, I have.

THE COURT: First, have you read it?

THE DEFENDANT: Yes, I have.

THE COURT: And have you had a chance to discuss it with Mr. Serra, your attorney?

THE DEFENDANT: Yes.

THE COURT: Have you also had a chance to see the objections that have been filed to the probation officer's formal report and the response—I should say the probation officer did not respond to that, but there were formal objections filed by your lawyers and also a motion for a downward departure. Have you read and considered all of that?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: And had a chance to review it with Mr. Serra?

THE DEFENDANT: Yes.

THE COURT: The Government did file opposition to the sentencing objections, and have you had a chance to see those as well?

THE DEFENDANT: Yes.

THE COURT: All right. In the sentencing, we're going to proceed as we have in the other cases. I will start by listening to Mr. Serra, and I will go over the objections and will rule on the objections that have been made. When Mr. Serra has concluded with the statement of views that he wishes to proceed to the Court concerning your sentence, I will, then, listen to the Government's attorneys who will present the Government's position so that you can hear that before you have a chance to speak.

I'll then let Mr. Serra respond, and after Mr. Serra is finished, if he chooses to respond, I'll give you the opportunity to say anything that you think will help the Court choose the right sentence in your case.

Do you understand what we're going to do?

THE DEFENDANT: Yes.

THE COURT: All right, Mr. Serra.

MR. SERRA: Yes, Your Honor. And I appreciate the opportunity. I am going to, however, be succinct because I have received the—what was entitled, the "Sentencing Memorandum of Opinion" and have perused it. That means superficially scanned it, and I note by virtue of talking with other attorneys, that certain issues, in essence, have been resolved. So I am not

going to reiterate our position on a number of issues that have been raised in our papers.

Further, Your Honor, I'm going to submit for your findings those disputes, which I think both sides have made presentations in respect to in regard to the allegations or findings by the probation department. So I'm trying to streamline it and get to what I consider the single remaining significant issue, and that is relevant conduct as it relates to my client's reasonable foreseeability in terms of violence that was perpetrated here on Karen Mathews.

So in that respect, and I know well, that the Court has detailed recall, but allow me just, once again, to superficially present our position on that.

Firstly, taking into account this, my client is not richly endowed in one formal education. And secondly, through life's experience, he's not what I'd call worldly. He's not a sophisticated human being. He's not a person of letters. He's not a person of language. He is not a person who well articulates himself, or at least in written form. His strength has been in his—oh, what I'll call the tenacity with regard to his livelihood.

He digs ditches. He has a ditch-digging machine. He has had a variety of relationship with family and others. With reference to that business as you well recall, it was good at one time. There was a large economic drought that occasions severely declined his income, and as we approached the trial, as I recall, the business was better for him. But I characterized him previously, and I recharacterized him. He's a person who spends life in the dirt, in the ditches, hard work, leaving,

delegating most of the formal business necessities in terms of the accounting and the check-writing, even the filing of forms and income tax returns. Most of that was all delegated to others throughout his whole lifetime.

So I want you to take into account, I'm talking about whether violence was foreseeable. I want you to first take into account his unsophisticated nature. His, dare I say, naivete in trustingness. And I say this is supported by the strong ties he has had to family, who are here today, many of them, and who were with him as you perceived during the course of the trial. So his strength is an extended family, and he's like a spoke on this family. And he's the work spoke, and the work ethic was most prominent in his life.

So he had this calamitous event, and we stand on his testimony. I know your findings are contrary, but he believed that in the engaging of various entities and in his association here with JCA, he was hopeful that somehow a tax resolution could occur.

What I'm stressing is that violence was never, Your Honor, on the horizon for him. We have an episode, I'm mindful of it, that predated the conspiracy, and we're aware of it, wherein I would say, very acting out, almost adolescent behavioral way. He drew the line, you know, and "This is my property," and "That's your property." And there was this small confrontation. But recall, there is no conviction of any misdemeanor that occurred, and once again, that doesn't signal in any fashion a character trait. It was one isolated, let's call it heat, passion, small episode that did not even culminate into a misdemeanor conviction. And there were no blows exchanged. And there was, in essence, heat of

passion or, you know, emotions of your property, I guess, being taken from you. So—

THE COURT: You should know that there is in my mind a second incident at the courthouse that was described in reports that were furnished early on in the case, and so if you want to address that as well. This is where allegedly Mr. Reed and his son were present during a hearing on papers that the money brokers had brought—as I recall, it had to do with the eviction of the Reeds from their family property, and there was a confrontation between Mr. Reed and his son and some representative of the party who was seeking to eject him from the property. Threatening words type of thing.

MR. SERRA: Going beyond what the Court has read, there was a confrontation. It was an exchange of words. My client says that he did not utter angry words at that occasion. That did not culminate, I believe, in any arrest or conviction.

And, once again, though, Your Honor, you have to look at that kind of behavior, which is open—how would I call it, emotionally based, dare I say a manifestation of an unsophistication. You see, here, we have an entirely different type of—I don't know—image of violence. What we have is the alleged conspiracy. We have probably alleged secretive conversations and potential planning, and everything that is, in essence, concealed and premeditated and stealthy—that's not his nature. He bubbled over twice. Not very severe. He has an utter clean record. Then, you know, tracing the evidence in the case, there is no evidence that he did anything violent. Adopting the testimony, which we

disputed, that he was in the County Recorder's Office on more than one occasion. His recollection is one. There is no testimony that says that he, you know, threatened in any fashion.

Recall the testimony, at least on one occasion, that's the occasion that he recalls, that he was invited behind the counter. They walked for, I don't know, a distance, and they showed him some files and directed him to Sacramento, and he went to Sacramento. So I would suggest not only is that not violent, it was congenial. It was a satisfactory contact. Not at all anything untoward.

We have rejected—my client has testified on all occasions. He is nonviolent, he doesn't believe in violence. He would never have participated in any kind of conspiracy to perpetrate violence on anyone. There is no direct evidence he had anything at all to do with the fake pipe bomb and the bullet sent in the mail. These would be speculative conjecture, a nexus, if, you know, one is going to engage in any nexus whatsoever.

Recall, Your Honor, his testimony in regard to when JCA came and Thorne was there. This is true. My client didn't live there. He lived somewhere else. My client didn't share an office with them. He didn't work for them. He didn't prepare the accounts. He didn't keep records. He wasn't on the phone. He had a separate phone. He was in a separate area. And all of the testimony is, is that he busied himself with his machinery, that he was out for a substantial period on various jobs that he was undertaking, that he was not a consort of Mr. Thorne. That he was not—whatever Thorne was planning, whatever Thorne, you know,

ultimately perpetrated, indirectly or directly, my client was not part of it. He was not privy to it. He would not have endorsed it. It is against his character to endorse it. And I think that we showed that in trial.

Now, you can engage in this kind of presumption, oh, the jury. I heard that this was argued previously. The jury believed Mr. Anthony Dalglish. There was a meeting. But merely being at a meeting didn't satisfy the high criteria of beyond a reasonable doubt.

Well, we reject that. That is, both my client and his son testified, as did another defendant, that there was no meeting, and it never occurred. And if you have to infer, if you want to sit here and infer whether the jury believed my client, his son, one other defendant, that there was such a meeting, or they believe Dalglish, then you cannot ever find to a preponderance of the evidence standard that there was such a meeting. And that's the only—that's why we were charged with the case, based on what everyone considers profane and perjurious testimony by Dalglish. We really wouldn't have really been charged. There would be no evidence whatsoever. So I'm trying to argue as strongly as I can, that he has not in any way associated himself, endorsed. It was not foreseeable. He did not see it.

Now, he signed a Court of Conscience. That is clear. He used to put them on the courter. Every witness testified to this. They were not attached to anything. And he had his aged mother sign one, the same one that he signed, and it was not attached to the so-called arrest warrant for Mary Ryan. That was attached sometime later as was the practice of JCA, so you can't even say, "Well, you knew something was cooking. You

knew that this Thorne, he had violence, you know, planned on the agenda. When you brought him into the property, you knew that if—if his litigation process failed, that he would resort to violence." You can't say that. You can't say it because the evidence doesn't support it, and certainly doesn't support it to a preponderance of the evidence. And you can't point to that he signed a Court of Conscience, which is like an affidavit of service, when it was not attached to the arrest warrant for Mary Ryan. He has no inkling that that would be attached to that type of a document. There is no testimony that he had any inkling.

So what I am trying to show you, there is no bridge, Your Honor, for you to infer to the necessary standard that my client engaged in or foresaw the use of violence. It would have been against his nature to go along with it, which demonstrated that through the evidence.

So we ask you to make that kind of a finding so that he isn't, from my perspective given, you know, what will be a life sentence. He is an aged man. If he's visited with the relevant conduct of violence that he did not participate in, did not foresee and did not know about, why, I think we take the greater part of his remaining days away. So that's my major thrust here.

I don't dignify this notion that he misled the jury when he testified. And, therefore, there should be an obstruction of justice, you know, levied against him. The U.S. Attorney says he distanced himself from Thorne, and this was somehow inaccurate. He distanced himself from Thorne because he was distant,

as I indicated in both his living and in his relationship to him.

So I'm asking the Court for a finding that my client here did not foresee and could not have reasonably foreseen from his position and from his simple state of mind that Thorne would engage in any form of violence.

THE COURT: Thank you very much, Mr. Serra.

Mr. Conklin.

MR. CONKLIN: Your Honor, briefly. The Government submits that proper sentencing calculations are as follows: Base offense level would be a 17 pursuant to 2T1.9 considering the $400,000 plus loss. That that offense level would be increased by two, pursuant to 2T1.9(b)(2), because as this Court has previously ruled on other defendants, and this defendant is no different, JCA was in the business of encouraging others to obstruct the IRS.

That further, that level is increased by three for the official victim enhancement pursuant to guidelines Section 3, which equates to a 22 to start.

The only offense calculations there at issue, therefore, would be the four-level enhancement pursuant to 2T1.9(B)(1) for the use of violence or the foreseen use of violence, and the obstruction enhancement, and I'll address the obstruction enhancement first.

This defendant lied. As unpleasant as that is to admit, the defendant took the stand and told this jury he had nothing to do with JCA. And when that conduct

is considered in the denial that this defendant has exhibited throughout the case, the Government submits that that is a very plausible enhancement. This defendant has denied that he prepared any of the prior pleadings involved in the prior act evidence. That a neighbor down the street did it.

He's denied the pleadings in this case, attributing those, I believe, to Mr. Thorne and Mr. Ries. He even today, through his attorney, denies knowledge of the arrest warrant stating that he was just signing the form. To his credit, the defendant's own son testified that his father was, in fact, active in JCA in the sense that his father ran money through JCA. I believe even the businesses that Mr. Reed so proudly admits to own and to run were run through JCA. That was established through the Government's evidence and the gas receipts, where Mr. Thorne—we recovered documents in the search warrant where Mr. Reed signed the gas receipts as an administrator of JCA.

So, again, Your Honor, it is very material. The defendant here didn't want this jury to think he was involved in JCA. He wanted them to believe he had a different office. He didn't live there. He didn't know about it. How could he ignore the banner that was over the office in his building? How could he ignore the activities that were going on every day? He didn't ignore them. He relished them. They were his savior. They were the ones that were going to get him out of this tax problem. Therefore, the additional two points for obstruction, the Government submits, is clearly warranted.

The next issue, then, is the four points for violence. Could this defendant foresee that violence would be used? And I would join with Mr. Serra in his initial arguments. This defendant exhibited, to quote Mr. Serra, "tenacity." That was exactly what he did. He exhibited tenacity before JCA came along in preparing and submitting the prior documents to get out of the tax debt with the money brokers. That there is not even an issue that he owed that.

He exhibited tenacity when JCA came along. He exhibited tenacity the day that the money brokers' representatives came out to his property, innocently, simply to review the property and show the property to potential buyers, and he did draw the line in the sand. He did threaten at that point, I believe—I believe he threatened physical violence in the sense that he was going to beat the material out of the witness that was there. And then at the courthouse, that same type of tenacity was continued to be exhibited when he got into at least the oral confrontation with the witnesses.

To quote Mr. Serra again, Mr. Reed bubbles over. He was at the end of his rope in this case. His property was all but taken from him. All but worthless and his business was finished. He was clearly able to foresee that violent means would be used based upon his own conduct. And the government would, therefore, submit that the additional four levels is warranted, taking it from a clear level 24 to a 28. And we would request the Court impose the sentence at that guideline level.

We'd submit it.

THE COURT: Thank you.

Mr. Serra, do you wish to respond?

MR. SERRA: Very short.

My client had nothing to do with the everyday workings of JCA. That's what was meant. From his perspective, there was, like, no membership, I don't know, meetings and rituals that he participated in. For a very short time, I think two to three months, when the IRS closed his business bank account, he did run his checks through there, but that was the extent of it. It wasn't of long duration, nor was it continuous.

Tenacity he showed, but it was tenacity in having people in the entity file that he believed were legal documents, that is, in terms of litigation, not tenacity in any violent or physical way. My word, "tenacity" was not utilized in that fashion, and the evidence does not bear out that he was tenacious in that fashion.

I think, Your Honor, I'm not even going to dignify the obstruction issue. My client testified in every respect in an honest, frank, and open way, and if they had anything to impeach him, they should have done it, not claim here in hindsight, that somehow when he distanced himself from the JCA, that that was invalid. The fact is, he wasn't living there. And the fact is that his office was different, and the fact is, he was working on his own business most of the—of that time period.

So he was, in fact, distant, and his distancing as is in the brief was, therefore, supported by the evidence.

THE COURT: Thank you, Mr. Serra.

Mr. Reed, at this time, do you wish to say anything? And the Court is prepared and ready to hear from you.

THE DEFENDANT: Yes, Your Honor, I have two things that I would like to mention. That is, I am not a violent person. I never advocated it. And I wish to make that very well known that violence is not my issue. My family will back me up on that and my friends.

I gave my two years with the military with an honorable discharge with no violence in there, and that's the statement on violence I wish to make.

The other is I wish to thank you, Your Honor, for your comments when my son was sentenced, for your comments about my family and his. I appreciate that very much. Thank you.

THE COURT: Thank you, Mr. Reed. Is there any legal cause why sentence should not now be pronounced?

MR. SERRA: Your Honor, I should have said, I am submitting the family relationship to the support of his mother and the logistic concern—

THE COURT: Yes, in concerns with your motion for downward departure, yes.

MR. SERRA: Yes, I'm submitting that—

THE COURT: On the papers that I have read and fully considered?

MR. SERRA: Yes, Your Honor. And there is no legal reason why sentence should not be pronounced.

THE COURT: Thank you. If the parties bear with me, if I didn't apologize, I do now for the late start. We were set to begin at 10:30, and you all saw why we didn't start on time, and I am sorry.

I should also note that in considering all of the submissions in connection with the sentencing, that I did receive and review the letter that George Reed sent to Mr. Hatfield explaining in his own words his view of the case, and I have read and fully considered that.

The Court has filed now its memorandum opinion and order concerning what I have referred to as the Count 1 sentencing issues, and I have also indicated that this case requires that each defendant be individually sentenced, individually considered, and I am not other than doing the legal analysis on which year of the guidelines apply, and which sections of the guidelines apply to the conspiracy count, intending that omnibus analysis, which took a lot longer than the Court would have preferred, but that seems based on the issues that were raised to be what was required to discuss it.

The Court is going to commence by adopting those sections of the presentence investigation report that are not inconsistent with my written decision, and I will also make findings today at this time which I intend to control and prevail over other matters that may be stated to the extent that what is stated in the presentence investigation report is to the contrary. I intend my oral findings to take precedence over and to supersede to the extent and consistent with the written

findings, but I otherwise will incorporate the presentence investigation report, except as it is inconsistent where I am not doing that.

The Court has determined that this was a conspiracy; that the operation of which extended beyond the amendment to the guidelines effective November 1st of 1993, and because those guidelines are more advantageous to the defendant than the 1997 guidelines, which is the time of sentencing guidelines, and those are amendments to the 1995 guidelines, the Court is going to use as it must those guidelines more favorable to the defendant as is required by the law, which is the '93 version. I do find that the evidence showed that conduct was continuing. That there were the visits to the County Recorder's Office in January of 1994, which show that active participation by persons who are found to be members of the conspiracy was ongoing and where the conduct of the conspiracy straddles the temporal change in the guidelines. The Court applies the section of the guidelines that addresses the conduct here are the '93 guidelines. And so the defendant's objections to the application of that set of the guidelines are overruled.

As to the objections to the presentence investigation and recommendation, the written report of the probation officer, the objection to paragraph 4, the Court overrules the objection. The Court believes that the evidence at trial showed that Mr. Reed associated with the JCA to avoid his tax obligation, that it was Mr. Reed's position that he, although at trial, he said he acknowledge the tax obligation. There has been no evidence of prior acknowledgment. In fact, the evidence showed that he tried to avoid payment of the obligation

in very way that he could. And so that objection is overruled.

As to paragraph 6, I don't believe that there was any evidence that George Reed ever submitted a W-4 form. Is the prosecution familiar with any?

MR. CONKLIN: A W-4 form specifically, no, Your Honor.

THE COURT: That objection is sustained.

As to paragraph 8, the Court believes that the invitation to Ms. Mallen and to Mr. McKendrick was from David Ries. That Mr. George L. Reed did give them permission to stay, but that he didn't invite them, and so that objection in paragraph 8, is that the prosecution's belief of the evidence?

MR. CONKLIN: Our belief of the evidence is he allowed them to stay there once they arrived.

THE COURT: Yes, that is my finding, but he didn't invite them there. It was David Ries, from my interpretation of the evidence, who invited them. So as to that part, the objection is sustained, but I do find that he allowed them, permitted them to stay.

As to the objection, I don't really think it's an objection, and I'm not going to rely on the Committee of the State's evidence in sentencing, so I'm not going to rule on that.

As to paragraph 12, this, it seems to me, is somewhat ambiguous to avoid paying his taxes. The Court finds

that he was trying to avoid paying the $416,000 lien for taxes, and so to that extent, this objection is ambiguous, but I overruled the objection because the evidence the Court believes proves to the contrary, beyond a reasonable doubt.

As to paragraph 15, the evidence did not specifically show that all of the pleadings were reviewed or signed by Mr. Reed personally, and I will treat this fact in the overruled basis that I state factually for sentencing, and so I'm going to pass that objection because it will be subsumed within my findings.

As to paragraph 16, the Court believes that Mr. Reed did give the JCA authority to do whatever the JCA could to avoid his payment of the tax obligation, and this objection is overruled. But he did run income from his business through the JCA, and that was the evidence at trial.

As to paragraph 20, the fact that two lien sales were scheduled and cancelled without George Reed's knowledge, and that he had expected the property would be sold, I believe that Mr. Reed may have testified to that, but I do not find that it is relevant where other conduct that was being taken showed that actions to try to defeat or to avoid the obligation represented by the lien, $416,323 and some cents were undertaken, and, therefore, the Court finds this to be an immaterial objection because the conduct of Mr. Reed was proved to whether or not certain of the foreclosure sales were cancelled. His conduct was nonetheless in avoidance and with the endeavor to defeat the Internal Revenue Service's endeavors to execute and ultimately foreclose to satisfy the obligation on the Reed property.

Paragraphs 21 through 24 are objected to as not having to do with his behavior, but since the count is a conspiracy actions of persons found to be coconspirators is relevant, and so the Court overrules that objection. It is not necessary to delete it from the report. The Court will describe how Mr. Reed will be held responsible and for whose conduct, and so there is no prejudice from the inclusion of those background paragraphs concerning activities of other coconspirators.

The Court recognizes that George L. Reed was acquitted of the counts relating to the assault of Karen Mathews, and that he claims that he was not aware that any assault was to take place. The evidence also did not directly show that Mr. Reed mailed any of the letters, placed the phony pipe bomb, or that he himself engaged in any other conduct that was directly hostile or threatening towards Miss Mathews. Miss Mathews testified that Mr. Reed was not threatening when he was in her office, but that his statement to her were that he wanted the lien on his property removed, and she declined to do that, as was her legal right.

The balance of this, objects to the fact that Mr. Reed has an individualized right, and I am considering the facts individually as to Mr. Reed. And although these facts are relevant that are described, I do not recall any testimony that Mr. Reed knew the limits of the legal authority that Miss Mathews had, and, therefore, I'm going to overrule this objection because the evidence is relevant. It may not be attributable directly to Mr. Reed, but the evidence referred to is relevant. The same paragraph 49, the objection is overruled.

And as 50 to 62, this is the issue. Whether or not violence was reasonably foreseeable to Mr. Reed, as a result of his participation in the conspiracy, and the Court is going to deal with that in its factual findings.

The Court has selected 2T1.9 as the applicable guideline for the conspiracy count, and on Count 1, the analysis is, then, that the base level under 2T1.9 is found in the tax table. It makes no difference whether the Ingram tax liability is included, because the obligation sought to be avoided by Mr. Reed was $416,000, which is more than 325,000, but less than $550,000, and so the offense level from 2T4.1 is a 17.

The next provision of the guideline that is to be applied under 2T1.9 is whether the offense involved the plan or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation assessment or collection of revenue. And the Court has noted and continues to note that just as I said to your son, Mr. Reed, you make a fine appearance before the Court. You appear to be an upstanding citizen. You present yourself very well. The evidence has shown in the case that your commitment to your family and your property, it's the Court's belief blinded you in this instance to the line between conduct that is acceptable in society and conduct that is not, because when people get seriously injured, and when people as a result of the kind of conduct that was proved in this case beyond a reasonable doubt are subjected to threats to their personal safety, are subjected to threats that they are going to be—whether it is arrest or removed from their office or interfered with, or if they don't do their jobs the way somebody wants them to do them, they're

going to suffer consequences. That conduct crosses the line.

And I find, it, frankly, not believable that with Mr. Thorne there every day, that although I do believe the evidence established without question that your office was not in the JCA part of your—I'm going to call it a warehouse kind of property. I know it wasn't a formal warehouse, but it was a machine shop, and that kind of a forum property building.

The Court does believe that the evidence reasonably established by a preponderance of the evidence that Mr. Thorne's views about the Internal Review Service, essentially being a foreign power, that the declarations by individuals, that they were not citizens of the United States, but were citizens of sovereign states here that are different from the United States, such language was in papers that you signed. You signed as a free person, a free man was the exact word. You signed in sui juris. You used the constitutionalist rhetoric in many of your papers, before even Mr. Thorne came on the scene, and the issue is, is that free speech? Are you simply redressing and petitioning to have your views known?

And the Court finds again, that the line was crossed. That you can say all the things you want. You can write all the letters that you want, you can go to the point of where you start threatening people, but when the message that you're sending is to threaten, and what you're saying to people who are doing their jobs as government servants, is then to say, "We're going to arrest you, we're going to harm you, we're going to take the actions that are taken." The Court finds that it

was reasonably foreseeable to you in this instance, that threats were being made, that they were being carried out.

The Court recognizes that the jury did not find you directly responsible for the Mathews attack. However, your providing of the forum of the JCA gave them encouragement, your, in effect, provision of the facilities for the conduct that was engaged in by other members of the conspiracy, which include Mr. Thorne, Mr. Ries, Mr. Knight, Miss Hopper and others. I have analyzed McKendrick, Mallen and Ingram separately because I think that they are in a separate category, but nonetheless rightfully conducted of the conduct—some of the conduct that they were accused of.

At some point, starting in 1983, thereabouts, when this whole involvement started through the years as you had to battle for your property, it seems reasonable to the Court that you would have looked at what was happening, and looked to yourself to say there must be a better way to do this, candidly. And by the support and the furnishing of the resources of your facilities to Thorne and what I find to be at the least constructive, if not actual knowledge of the activities that were being carried out there, and the rhetoric, you heard Mr. Thorne speak in San Jose. You went with David Ries. There have been witnesses at the trial who described Mr. Ries as an extreme person who was willing to use extreme methods. It is the Court's belief that the plan or threatened use of violence was foreseeable to you, and, therefore, the Court is going to enhance by those four levels.

I have already determined that it—and it's in the memorandum that the official victim enhancement applies here because Karen Mathews was singled out. Mary Ryan was singled out. They were addressed as persons who had specific identities, yes, as government officials, but the cases cited in my written memorandum support that enhancement. The whole raison d'etre, the reasons for existence of the JCA was to encourage people to not pay their taxes. It was to impair or obstruct by declarations of foreign citizenship, by committing funds to trusts, to have it not subject to tax, and, therefore, I do find that the encouragement, however, according to the use note in 1993 is not to be applied if 2T1.4(B)(1) is applied.

MR. CONKLIN: That wasn't pled, Your Honor. That's . 4, not . 9.

THE COURT: That is correct. 2T1.4 is for the tax service provider or consultant.

So on the obstruction, the Court understands the Government's argument clearly. The Court believes that you may have in your mind thought that you were sufficiently disassociated as to have given the testimony that you gave. You were represented very well at this trial, and the Court does not find that you intentionally obstructed justice by testifying the way you did at the trial.

I am not suggesting that anybody counseled you on how you should testify, but I believe overall, that you did not intend to lie. I think that it is a human inclination and a natural tendency, when you are standing accused, to distance yourself from the organization, and

the evidence did not in the Court's belief show that you were an active day-to-day participant, keeping the books. You weren't preparing the documents, you weren't counseling and consulting, but I do believe you had enough information about what was going on on a continuing basis as to not negate my finding as to the foreseeable foreseeability by you of violence.

That makes the offense level a 17 plus 4 is 21. The Official Victim—I'm sorry, the encouragement is two more, making it a level 23. And my recollection of the Official Victim enhancement is—if you'll bear with me.

MR. CONKLIN: Three levels, Your Honor.

THE COURT: That that is a three level, making the total offense level a 26, if my math is right.

MR. CONKLIN: Yes, Your Honor.

THE COURT: The report shows your Criminal History Category to be a I.

As to Count 2, which is the obstruction of justice, I'm following the analysis of the probation officer, and that adjusted offense level is a 23, following the analysis on pages 19 and 20. Under the grouping rules, the Court finds that the higher of the two is the Count 1 level, making the total offense level a 26. The guideline range for someone in offense level 1—I'm sorry, offense level 26 in a Criminal History Category I is 63 to 78 months.

The Court is well cognizant of your family responsibilities, and history, and has fully considered the motion for a downward departure, but does not find that there

is a basis for a downward departure, and I will provide in writing the additional reasons for that. It does appear that there are resources.

I do recognize that you have other family members who can assist with the care of your very elderly mother. And the Court believes that in this case, a sentence at the low end of the guideline adequately addresses, given your age, and given the overall posture of your participation in the case. It is, therefore, the judgment of the Court that the defendant George L. Reed is hereby committed to the custody of the Bureau of Prisons, to be imprisoned for a term of 63 months on each count to be served concurrently. You shall pay a special assessment of $100.00, payable immediately.

As to the matter of fine, the Court recognizes that you have an obligation, and instead of imposing a separate fine on top of that, I provide as an order that you pay the obligation owed to the Internal Revenue Service. I do not find that you have additional resources to pay a fine. I am imposing that required payment as a condition of your sentence, so I'm not going to order a separate fine.

Upon your release from custody, you shall be placed on supervised release for a term of 36 months. Within 72 hours following your release from custody, you shall report in person to the probation office in the district where you are released. While on supervised release, do not commit another federal, state, or local crime, do not possess a firearm or illegally possess controlled substances. There will be standard conditions furnished to you recommended by the United States

Sentencing Commission. Refrain from unlawful use of a controlled substance. Submit—I don't believe that there is any evidence that there would be a need for drug testing, Mr. Hatfield?

MR. HATFIELD: Your Honor, if I may review the report for a moment, if you like.

THE COURT: Well, I don't find that there is any evidence.

Mr. Conklin, do you know of any objection—

MR. CONKLIN: No, Your Honor, I—

THE COURT: I'm not going to impose drug testing on Mr. Reed. Special conditions include submit to the search of of your person, property, home, and vehicle by a probation officer, or someone acting in the immediate personal supervision of a probation officer without a search warrant. Failure to do so may be grounds for revocation.

Make payments on the IRS obligation as ordered in installments determined by your probation officer. Provide your probation officer with access to requested financial information. Provide the probation officer with copies of your filed tax returns by May 1st for each year during your term of supervised release, and for any reason, you should need an extension, that will have to be approved by your probation officer.

I advise you now that you have a right to appeal this case, both your conviction and your sentence. In order to perfect your right to appeal, you must file with this

Court a written Notice of Appeal. It has to say "Notice of Appeal." It has to be filed within 10 days of today's date. If you cannot afford an attorney for an appeal, the Court will appoint one for you.

Do you understand the appeal rights I have just explained?

THE DEFENDANT: Yes, I do.

THE COURT: There is a motion made for release pending appeal. I am going to take that under submission. I am going to rule on those motions in writing.

At this time, is there anything further?

MR. SERRA: Yes, Your Honor.

THE COURT: Yes.

MR. SERRA: May we have the recommendation to Sheridan, Oregon, and this is for purposes of convenience to family, some of whom live in Oregon, and others who desire that as convenience for visiting.

THE COURT: Yes, I will, and I will set a date. Do you have any objection to Mr. Reed surrendering?

MR. CONKLIN: No, Your Honor.

THE COURT: All right. When would be a reasonably convenient date to surrender?

MR. SERRA: We would like it where in the same time frame, as I believe other defendants have been allowed to wait, second week of February.

MR. CONKLIN: That's fine, Your Honor. I'm sure it goes without saying, this defendant is aware of his obligation not to have contact in or not around Miss Mathews. And would the Court recognize its discretion for the downward departure that it had the discretion to do that—

THE COURT: Very definitely. If I didn't state it explicitly, I do recognize that I had discretion. I do not believe the grounds for downward departure were established.

MR. CONKLIN: Thank you, Your Honor.

THE COURT: I will then—may I have a date, Mr. Lucas?

THE CLERK: February 2nd.

THE COURT: You should surrender—you must surrender on February 2nd, your choice is to surrender directly to the institution.

MR. SERRA: Did you say 10th or 2nd?

MR. CONKLIN: 2nd.

THE COURT: 2nd. February 2nd. If you don't surrender at Sheridan, if you get assigned to Sheridan, Oregon, or whichever institution, Mr. Reed, you can surrender here to the marshals. As I have indicated to

other defendants in this case, it's to your advantage to surrender to the institution.

Is there anything further?

MR. CONKLIN: Your Honor, very briefly. The Government submitted its opposition to request for bail pending appeal. This defendant did not formally submit one. I did not address him. I simply ask the Court to adopt this motion. If it would like further pleadings, we'll provide those.

MR. SERRA: This—

THE COURT: I believe you joined in the motion for bail pending appeal, but am I wrong?

MR. SERRA: You may be wrong because our intention is to file a formal motion, and you calendared it obviously before February 2nd, subsequent to filing a Notice of Appeal.

MR. CONKLIN: Then we'll address it, then. Thank you, Your Honor.

THE COURT: Yes. Anything further?

MR. SERRA: I'm forgetful. Do you have to pronounce credit for time served of approximately three months, or is that taken into account by—

THE COURT: The Bureau of Prisons has the sole jurisdiction to do that. I don't do that.

MR. SERRA: Okay.

THE COURT: But I will note for the record that Mr. Reed does have time that was served in this case for which he should receive credit.

MR. SERRA: I appreciate that.

MR. CONKLIN: Fine, Your Honor. Thank you.

THE COURT: All right, we'll stand in recess.

I, Gail Lacy Thomas, Official Court Reporter, certify that the foregoing transcript is true and correct.

January 13, 1998 /s/ GAIL LACY THOMAS

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-10495

D.C. No. CR-95-05174-3-OWW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE LOREN REED, DEFENDANT-APPELLANT

[Filed: Aug. 31, 1999]

ORDER

Before: GOODWIN and TROTT, Circuit Judges, and KING, District Judge.[1]

The panel as constituted above has voted to deny the Government's petition for rehearing filed July 6, 1999. Judge Trott has voted to deny the petition for rehear-

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[1] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

ing en banc, and Judges Goodwin and King so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on them. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc are DENIED.

APPENDIX E

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-10463, 97-10494, 97-10495, 97-10496, 97-10515

D.C. Nos. CR-95-05174-4-OWW, CR-95-05174-2-OWW,
CR-95-05174-3-OAW, CR-95-05174-9-OWW,
CR-9505174-8-OWW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE KENDALL REED, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DAVID L. RIES, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GEORGE LOREN REED, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JANICE MALLEN, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT MCKENDRICK, DEFENDANT-APPELLANT

[Filed: Sept. 17, 1999]

ORDER

Before: GOODWIN and TROTT, Circuit Judges, and KING, District Judge.[1]

The panel as constituted above has voted to deny the petitions for rehearing. Judge Trott has voted to deny the petitions for rehearing en banc, and Judges Goodwin and King so recommend.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on them. Fed.R.App.P.35(b).

The petitions for rehearing, and the petitions for rehearing en banc, are DENIED.

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[1] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.