UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 03-13882-D

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MICHAEL J. BLOOMQUIST
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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NO. 03-13882-D

United States v. Michael J. Bloomquist

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I HEREBY CERTIFY that the following named persons are parties interested in the outcome of this case:

1. Charlie L. Adams, Pre-trial Counsel for Bloomquist

2. Allen B. Bickart, Pre-trial Counsel for Bloomquist

3. Michael J. Bloomquist, Defendant-Appellant

4. Louis Robert Hardin, Jr., Co-trial Counsel for Bloomquist

5. William Mallory Kent, Appellate Counsel for Bloomquist

6. William Mackie, Assistant United States Attorney, Co-trial Counsel for the United States

7. Paul L. Perez, United States Attorney

8. Susan Humes Raab, Assistant United States Attorney, Appellate Counsel for the United States

9. Honorable Harvey E. Schlesinger, United States District Judge

10. Troy Sellers, Department of Justice, Co-Trial Counsel for the United States

11. Mitchell Adam Stone, Lead Trial Counsel for Bloomquist

12. Stephen J. Weinbaum, Pre-trial Counsel for Bloomquist

STATEMENT REGARDING ORAL ARGUMENT

Michael J. Bloomquist respectfully requests oral argument for his appeal. The argument concerning the expiration of the term of the grand jury is a question of first impression in our Circuit and there is little law on the topic from any jurisdiction. Likewise there is no case on point from our circuit on the issue of the *Klein* conspiracy and grantor trusts. The questions presented by the denial of the continuance and its interrelationship with the refusal to admit the affidavit of the lead co-conspirator, under Rule 804(b)(3), though not involving novel issues of law, are fact intensive and uniquely framed by the facts of this case and may benefit from oral argument. The sentencing issue is self-evident and does not require oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Michael J. Bloomquist certifies that the size and style of type used in this brief is 14 point Times New Roman.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court and under 18 U.S.C. § 3742, which provides for appeal by a criminal defendant of a sentence imposed under the Sentencing Reform Act of 1984. This appeal was timely filed within ten days of entry of judgment and sentencing.

STATEMENT OF THE ISSUES

I. The Trial Court Lacked Jurisdiction to Prosecute Bloomquist Because the Term of the Grand Jury had Expired at the Time the Indictment Was Returned.

II. The Trial Court Erred in Refusing to Admit under Rule 804(b)(3) of the Federal Rules of Evidence, the Self-Incriminating Affidavit of the Lead Co-Conspirator, Donald Fleming, Which Exculpated Defendant Bloomquist, on the Sole Basis that Fleming's Declaration Did Not Sufficiently Subject Fleming to Criminal Liability or in the Alternative, The Trial Court Erred in Postponing Fleming's Sentencing Rendering Fleming Unavailable as a Defense Witness Due to His Fifth Amendment Privilege Which Fleming Retained Until He Was Sentenced.

III. The Trial Court Abused it's Discretion in Denying Bloomquist's Request for a Continuance of Trial When the Request Was Prompted by Bloomquist Retaining Counsel Three Weeks Prior to Trial in a Case That Had Been Previously Continued Upon Motion of the Government For Over Two Years and As Condition of Allowing Bloomquist to Have Counsel of His Choice the Court Required Bloomquist on the Morning Trial Began, to Waive In Advance Any Ineffective Assistance of Counsel Claims Against Both His Newly Retained Counsel and His Prior Court Appointed Counsel.

IV. The Creation of the Trusts Could Not and Did Not as a Matter of Law or Fact Operate to Impair or Impede the Function of the IRS, Therefore Bloomquist's Agreement to Create or Manage the Trusts Could Not Constitute a *Klein* Conspiracy.

V. The Court Violated the *Ex Post Facto* Clause of the United States Constitution in Denying Bloomquist a Downward Departure Based in Part on the Feeney Amendment, Which Was Enacted Subsequent to the Date of Bloomquist's Alleged Offense.

STATEMENT OF THE CASE

Course of Proceedings, Disposition in the Court Below and Relevant Facts[1]

Michael J. Bloomquist was indicted and charged in five counts of a sixteen count indictment that was filed on June 27, 2000 charging him in a *Klein* conspiracy and related tax charges. [R2] The grand jury which indicted Evans and Bloomquist was identified as Middle District of Florida grand jury 99-2-R, sometimes referred to as "the Landon Grand Jury." The Landon Grand Jury was impaneled on January 22, 1999 for a term of twelve months, which would have expired January 21, 2000. On January 11, 2000, ten days prior to the expiration of the term of the grand jury, District Court Judge Harvey E. Schlesinger signed an order extending the term of the grand jury for an additional period of "six months" to a date certain, "up to and including June 22, 2000." The last call of the grand jury was June 27, 2000. The indictment in this case was returned on June 27, 2000. On June 29, 2000, two days after the return of the indictment and seven days after the grand jury's extended term had expired pursuant to the date certain in the January 11, 2000 order, Judge

[1] References to the record on appeal are in the format "R" followed by the docket number, or "R" followed by the docket number followed by the appropriate page number of the docket item. References to transcripts are in the form "TR" followed by the transcript volume, followed by the appropriate page or pages.

Schlesinger entered a second order purporting to amend the January 11, 2000 order and which purported to extend the term of the grand jury to July 22, 2000. [R786; R976; R976 Hearing Exhibits 10-13]

The government sought repeated continuances of the trial of the case, causing the trial to be continued for over two years and four months past the original trial date. [*See* citations at footnote 16, *infra*] Bloomquist complained to the court that his court appointed counsel refused to communicate with him or work with him to prepare the defense of the charges. After having previously complained to the district judge about his concern that his court appointed counsel was unprepared and was not communicating with him, Bloomquist began keeping records of his attempts to communicate with his court appointed counsel. In December 2002, in a hearing on Bloomquist's *pro se* motion for substitution of counsel, Bloomquist showed the court nine months of weekly letters to his court appointed counsel, which documented and detailed his weekly effort to communicate with his counsel, all of which letters to his counsel had gone unanswered. [R1029; R1342-2-7; R1342-9-14] Calling the case a walking 2255, the magistrate judge appointed Bloomquist new counsel just before Christmas 2002 and just before the trial was set to start. [R1342-10] This resulted in Bloomquist being severed from the co-defendants and a joint motion to continue the trial. [R1118] The trial was continued just to March 3, 2003. [R1119]

Ten days prior to the scheduled trial date, Bloomquist retained counsel, who appeared on February 20, 2003 and filed a motion for continuance of the trial on the following day. [R1133; R1134] The trial judge denied the continuance but scheduled the trial first for March 10, then March 20, 2003. [R1136; R1138]

The morning trial commenced the trial judge insisted that as a condition of allowing Bloomquist's retained counsel to appear, and serve as lead counsel (the court had not and did not relieve the court appointed counsel who had come into the case just before Christmas), Bloomquist had to waive in advance any claim of ineffective assistance of counsel he might then or thereafter have against either his retained counsel or the court appointed counsel. Bloomquist did so and the trial proceeded that day.[2] [R1167]

Bloomquist had anticipated that the lead coconspirator, Donald Fleming, who had already pled guilty (*pro se*) on December 21, 2002 and was set for sentencing March 27, 2003, would appear voluntarily as a defense witness for Bloomquist and exonerate him of Fleming's wrong doing. [TR5-78-79; Def. Ex. 3] Prior to the start of trial, Fleming had authored an affidavit that both incriminated Fleming and

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[2] When it came time to try the case, the government dismissed all but one charge against Mr. Bloomquist, electing to go to trial solely on the *Klein* conspiracy count, a five year felony. [R1347]

exculpated Bloomquist and given this affidavit to Bloomquist. [Def. Ex. 3] However after feeling threatened by the Assistant United States Attorney as to the sentencing consequences for him (Fleming), if he testified on behalf of Bloomquist, Fleming asked the court to appoint him counsel, and on advice of that counsel refused to testify for Bloomquist. This happened in the middle of Bloomquist's trial. [TR5-92-93; TR5-183; TR 5-192-193] The new court appointed counsel immediately requested a continuance of Fleming's sentencing, which the court granted. [R1171,1172, 1174, 1180] The district judge then allowed Fleming to assert his Fifth Amendment privilege against testifying for Bloomquist, [TR5-192-193] however when Bloomquist attempted to introduce Fleming's affidavit in lieu of his testimony, the court refused to allow its admission in evidence, ruling that it was not sufficiently incriminating as to Fleming to be admissible under Rule 804(b)(3) of the Federal Rules of Evidence. [R1190]

Bloomquist's counsel moved for judgment of acquittal arguing that the trust activity on Bloomquist's part did not constitute a crime under Section 371. The court denied the motion. [TR5-1; TR5-26]

The jury was out over a part of two days before returning its verdict of guilty to the single conspiracy charge. [R1186]

At the sentencing hearing Bloomquist requested a *Koon* downward departure,

which the court denied in part stating that the newly enacted Feeney Amendment overruled *Koon* and he no longer had the authority to grant a downward departure except based on a factor expressly provided by the Sentencing Commission. [TR8-43-44; TR8-63-64] The court sentenced Mr. Bloomquist to 24 months imprisonment followed by 36 months supervised released. [R1290]

PSR Description of the Offense[3]

Don Fleming and the TraffiCenter

From October 1988 through 1999, Donald C. Fleming ("Fleming") was the owner and operator of a Jacksonville, Florida radio broadcast business that operated under different names at various times, including "Jacksonville Broadcast Network," "Jacksonville Radio Network," First Coast TraffiCenter," "Jacksonville Traffic Center," "AAA Enterprises Trust," and the "Info Distribution Trust." For purposes of this brief the business will simply be referred to as the "Trafficenter." During this time period the business was operated as either a sole proprietorship, partnership or trust, that Fleming effectively controlled and managed.

The nature of the business was to provide live broadcasts of traffic conditions to numerous radio and television stations in the Jacksonville area. The radio stations

[3] Unless and except as expressly provided otherwise, the following narrative is taken more or less verbatim from the Presentence Investigation Report.

and television stations provided free time to the Trafficenter in exchange for the traffic reports, and the Trafficenter in turn was able to sell advertising to third parties for this free time. It was the position of the government that the income attributable to the Trafficenter was all attributable to Fleming. Fleming did not report any of this business income to the IRS during the time from 1993 through 1996.

To operate the business, Fleming paid a number of people to work as employees, broadcast personnel, sales staff and operations technicians. Fleming routinely paid these salaries in cash without withholding any employment taxes. Fleming did not report the payment of these salaries to the IRS, and did not pay the required Federal Insurance Contribution Act ("FICA") taxes and Federal Unemployment Tax Act ("FUTA") taxes.

Fleming and his wife stopped filing income tax returns after the 1982 tax year. Thereafter, beginning in 1986, when Fleming was contacted by the IRS regarding his delinquent returns, he ignored them.

Starting about March 1993 Fleming opened and began utilizing a "warehouse bank" account operated by the Christian Patriots Association in Clakamas, Oregon. The Trafficenter business receipts (checks) were routinely deposited into this warehouse bank account and then exchanged for cash. One of Fleming's purposes in doing this was to impede the IRS in the assessment and collection of his tax

liability.

Bloomquist's Alleged Role

In May 1993 the Flemings enlisted the assistance of Douglas Carpa and his employee, Michael Bloomquist, to establish several trusts, into which the Flemings placed their personal assets and the Trafficenter business. Bank accounts were opened and various documents were filed with the IRS in the names of these trusts. In June 1993 Bloomquist assisted the Flemings in creating these trusts and he was named trustee on the trust documents. Liens were then filed by the Flemings against the trusts in amounts equal to the value of the trust assets.

During the course of the IRS investigation the IRS had advised the Flemings's customers to do backup withholding until valid W-9 Forms were filed. Letters in Bloomquist's name, as trustee of the business holding trust, were sent to the customers who were doing backup withholding attempting to stop the backup withholding and have the customers make direct payments to the trusts. The IRS directed the customers to ignore these letters, and the customers continued to do backup withholding as requested by the IRS.[4]

[4] This statement does not come from the PSR but is from TR4-121-122.

STANDARDS OF REVIEW

Issue I. Grand Jury Term Had Expired.

The trial court completely lacks jurisdiction to proceed under an indictment returned by a grand jury whose term has expired and it is fundamental error that may be raised at any time, even after trial of the case is concluded. *United States v. Bolton,* 893 F.2d 894 (7th Cir. 1990) ("It is well settled that unless there is a valid waiver, the lack of a valid indictment in a felony case is a defect going to the jurisdiction of the court. *citing Smith v. United States,* 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041 (1959)).

Issue II. Error in Refusing to Admit Affidavit under 804(b)(3).

This Court generally reviews a district court's evidentiary rulings for "clear" abuse of discretion. *United States v. Novaton,* 271 F.3d 968, 1005 (11th Cir.2001), *cert. denied,* 535 U.S. 1120, 122 S.Ct. 2345, 153 L.Ed.2d 173 (2002). Under this standard of review, an incorrect evidentiary ruling will not be grounds for reversal unless there is a reasonable likelihood that the error affected the defendant's substantial rights. *See United States v. Hands,* 184 F.3d 1322, 1329 (11th Cir.1999); *see also* Fed.R.Evid. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...."); *United States v. Brown,* 299 F.3d 1252, 1255-1256 (11th Cir. 2002).

Issue III. Denial of Request for Continuance.

This Court reviews the disposition of requests for trial continuances for abuse of discretion. *United States v. Wright,* 63 F.3d 1067, 1071 (11th Cir. 1995). The party denied the continuance must also show specific, substantial prejudice in some circumstances, such as when the claim is based on an alleged inadequate opportunity to prepare for trial. *See United States v. Bergouignan,* 764 F.2d 1503, 1508 (11th Cir. 1985).

Issue IV. Use of Grantor Trusts Did Not Constitute a *Klein* Conspiracy.

This a pure question of law and is subject to *de novo* review; to the extent it is a mixed question of law and fact it is also reviewed *de novo*, see *Tinker v. Moore*, 255 F.3d 1331, 1332 (11th Cir. 2001).

Issue V. *Ex Post Facto* Sentencing Issue.

Bloomquist's challenge to the court's denial of his motion for downward departure is subject to plain error review, because no contemporaneous objection was made by Bloomquist at the district court. In order to establish that "plain error" has occurred party must demonstrate: (1) that there was error in lower court's action, (2) that such error was plain, clear or obvious, and (3) that error affected substantial rights, i.e. it was prejudicial and not harmless, with defendant rather than government having burden of persuasion with respect to prejudice. Fed.Rules Cr.Proc.Rule 52(b);

United States v. Foree, 43 F.3d 1572 (11th Cir. 1995). However, an Ex Post Facto violation apparent from the face of the record should be noticed as plain error. *United States v. Hickman*, 331 F.3d 439 (5th Cir. 2003) ("we hold the *Ex Post Facto* error affected Hickman's substantial rights because it affected the outcome of the district court proceedings.")

SUMMARY OF ARGUMENTS

I. The Trial Court Lacked Jurisdiction to Prosecute Bloomquist Because the Term of the Grand Jury had Expired at the Time the Indictment Was Returned.

The grand jury that indicted Bloomquist was a one year grand jury that would expire January 22, 2000. Shortly before its term was to expire the government moved the court to extend the term of the grand jury for an additional six months. The district court entered an order extending the grand jury for an additional six months "up to and including, June 22, 2000." The indictment in this case was returned on June 27, 2000, five days after the grand jury term had expired. Recognizing the problem, on June 28, 2000 the government moved the district court to amend its prior order of extension to extend the term to July 22, 2000. The court did so. This second order of extension exceeded the six month extension permitted by Rule 6, Federal Rules of Criminal Procedure, by one day, and as such was invalid. In any event, it was not and could not have been a *nunc pro tunc* order, and could not have retroactive effect to revive an expired grand jury. As such the indictment that was returned in this case was a nullity.

II. The Trial Court Erred in Refusing to Admit under Rule 804(b)(3) of the Federal Rules of Evidence, the Self-Incriminating Affidavit of the Lead Co-Conspirator, Donald Fleming, Which Exculpated Defendant Bloomquist, on the Sole Basis that Fleming's Declaration Did Not Sufficiently Subject Fleming to Criminal Liability or in the Alternative, The Trial Court Erred in Postponing Fleming's Sentencing Rendering Fleming Unavailable as a Defense Witness Due to His Fifth Amendment Privilege, Which Fleming Retained Until He Was Sentenced.

The leading co-conspirator, Donald Fleming, pled guilty *pro se* December 21, 2002. He offered to be a defense witness for Bloomquist and prior to trial he authored an affidavit that was incriminating as to himself, Fleming, but exculpatory as to Bloomquist.

Fleming's sentencing was set for March 27, 2003, and Bloomquist's trial was set to commence March 20, 2003. Bloomquist's trial continued until March 28, 2003.

As Bloomquist's trial commenced, Fleming felt threatened by the Assistant United States Attorney assigned to the case that if he testified for Bloomquist it could hurt him, Fleming, at his sentencing. Fleming asked the court to appoint him counsel, that was done, and that counsel advised Fleming to assert his Fifth Amendment privilege. That counsel also immediately moved to continue Fleming's sentencing, which Bloomquist's trial judge agreed to do.

When Fleming invoked his Fifth Amendment privilege, which the trial judge accepted, Bloomquist attempted to introduce Fleming's affidavit instead. The trial

judge refused to admit the affidavit finding that it was not sufficiently incriminating to Fleming at the time he made it so as to be admissible under Rule 804(b)(3), Federal Rules of Evidence. This finding was based on the government's argument not that the affidavit was not incriminating to Fleming, only that it did not subject Fleming to any *more* criminal liability than he already faced as a result of his guilty plea. This, of course, was the wrong standard to apply to determine admissibility under Rule 804(b)(3).

Alternatively, Fleming's sentencing should not have been postponed if it would have the effect, as it did, of preventing Bloomquist from calling Fleming as a witness, given that it was only Fleming's sentencing jeopardy that prevented him from testifying and as to which he retained his Fifth Amendment privilege.

III. The Trial Court Abused it's Discretion in Denying Bloomquist's Request for a Continuance of Trial When the Request Was Prompted by Bloomquist Retaining Counsel Three Weeks Prior to Trial in a Case That Had Been Previously Continued Upon Motion of the Government For Over Two Years and As Condition of Allowing Bloomquist to Have Counsel of His Choice the Court Required Bloomquist on the Morning Trial Began, to Waive In Advance Any Ineffective Assistance of Counsel Claims Against Both His Newly Retained Counsel and His Prior Court Appointed Counsel.

The government had asked for and gotten two years and four months of continuances in this case before Bloomquist retained counsel ten days prior to trial and asked for his continuance. Bloomquist only retained counsel after complaining

repeatedly about his first court appointed counsel, who was himself relieved from the case on the eve of trial in a setting which the magistrate judge referred to as a "walking 2255," referring to Bloomquist's documentation of nine months of repeated weekly letters attempting to communicate with his court appointed counsel, none of which letters were responded to. Although the court did appoint new counsel at that point, triggering a severance for Bloomquist and a *joint motion* for a one month continuance of the trial, Bloomquist had by then lost confidence in court appointed counsel.

When Bloomquist's newly retained counsel appeared and asked for a continuance, the court allowed his appearance, kept the new court appointed counsel on the case as well, but denied the continuance. The morning of trial the court took it one step further, making a last minute demand that as a condition of the retained counsel appearing and serving as lead counsel Bloomquist was required to waive in advance any claim for ineffective assistance of counsel he might then or thereafter have against both his newly retained counsel as well as the court appointed counsel. The judge's order requiring and accepting this waiver of any IAC claims presupposed that it was not possible for newly retained counsel to be competently and adequately prepared on such short notice for such a complex case.

In addition, the denial of the continuance caused Bloomquist to not be able to

subpoena and present Donald Fleming, who would have presented key exculpatory testimony, because it caused Bloomquist's trial to take place before Fleming could be sentenced, resulting in Fleming retaining his Fifth Amendment privilege at Bloomquist's trial.

Together, these actions caused Bloomquist to be denied effective assistance of counsel at trial and denied his right to compel the attendance of a key witness. The denial of the continuance on these facts was an abuse of discretion resulting in compelling prejudice for Bloomquist.

IV. The Creation of the Trusts Could Not and Did Not as a Matter of Law or Fact Operate to Impair or Impede the Function of the IRS, Therefore Bloomquist's Agreement to Create or Manage the Trusts Could Not Constitute a *Klein* Conspiracy.

The trusts in question functioned as grantor trusts as such term is used in 26 U.S.C. § 671*et seq*. Grantor trusts are taxable to the grantor, in this case, Donald Fleming, the person allegedly seeking to evade the assessment and payment of taxes. We argue that by definition, at least on the facts of this case, it was a legal and factual impossibility for grantor trusts to impede or impair the IRS.

V. The Court Violated the *Ex Post Facto* Clause of the United States Constitution in Denying Bloomquist a Downward Departure Based in Part on the Feeney Amendment, Which Was Enacted Subsequent to the Date of Bloomquist's Alleged Offense.

The district court mistakenly applied the newly enacted Feeney Amendment to an offense that was alleged to have been committed prior to its enactment. The court cited the Feeney Amendment and the PROTECT Act as a basis for its lack of authority to grant a downward departure. This had the effect of a prohibited *Ex Post Facto* application an amendment to the Sentencing Guidelines. Because the court did not understand that it had the authority to grant a downward departure, when it in fact did, the denial of the downward departure is appealable, is clear error, and requires a remand for resentencing in the event this Court does not otherwise vacate the conviction for any of the reasons set forth above.

ARGUMENTS

I. The Trial Court Lacked Jurisdiction to Prosecute Bloomquist Because the Term of the Grand Jury had Expired at the Time the Indictment Was Returned.

Pro se co-conspirator Joseph Evans moved to dismiss the indictment in this case on the basis that the indictment was returned after the extended term of the Grand Jury had expired. [R786, R825 and R1024, collectively referred to as the "Grand Jury Motions."] Through dogged determination Evans established the following:

1. The grand jury which indicted Evans and Bloomquist was identified as Middle District of Florida grand jury 99-2-R, sometimes referred to as "the Landon Grand Jury."

2. The Landon Grand Jury was impaneled on January 22, 1999 for a term of twelve months, which would have expired January 21, 2000.

3. On January 11, 2000, ten days prior to the expiration of the term of the grand jury, District Court Judge Harvey E. Schlesinger signed an order extending the term of the grand jury for an additional period of "six months" to a date certain, "up to and including June 22, 2000."

4. The last call of the grand jury was June 27, 2000.

5. The indictment in this case was returned on June 27, 2000.

6. On June 29, 2000, two days after the return of the indictment and seven days after the grand jury's extended term had expired pursuant to the date certain in the January 11, 2000 order, Judge Schlesinger entered a second order purporting to amend the January 11, 2000 order and which purported to extend the term of the grand jury to July 22, 2000.

[R786]

The June 29, 2000 order, which came after the return of the indictment in this case, was not by its terms retroactive and was not styled as a *nunc pro tunc* order. [R976 Hearing, Exhibit 13]

The government, in response to Evans's *pro se* Grand Jury Motions, conceded all the above operative facts. [R809] The government limited its reply to the argument that the January 11, 2000 order had granted an extension of "an additional period of six months," and therefore the grand jury was properly extended to July 22 [*sic*], 2000.[5] The government simply ignored the fact that the judge had expressly specified that the term would expire on a date certain, June 22, 2000. The January

[5] The original term had commenced January 22, 1999, for a period of one year. That original term would have expired on January *21*, 2000, the 365th day of the term. A six month extension would have commenced on January 22, 2000 and expired on July *21*, 2000.

11, 2000 Order clearly and unequivocally extended the term of the grand jury to a date certain, June 22, 2000.

The government received the January 11, 2000 order and did not raise any objection to it. The Landon Grand Jury proceeded under authority of the January 11, 2000 order without the government ever asserting that there was any error in the order. The January 11, 2000 order was in effect for over five months before the government approached the court again with a further extension request.

June 22, 2000 came and went and under the express language of the January 11, 2000 Order the term of the grand jury expired.

Five days after the expiration of the term of the grand jury, on June 27, 2000, the former grand jury assembled and voted the indictment in this case. [R2]

The day after returning the indictment in this case, the government approached the court in an *in camera, ex parte* motion filed June 28, 2000 seeking an amended order. The government's motion was styled "*In Camera* Government's *Ex Parte* Motion for an Amended Order for Extension of Grand Jury." [R976 Hearing, Exhibit 12]

The government did not allege in its June 28, 2000 motion that the Court had made a typographical mistake in its prior order extending the grand jury, and did not cite nor rely on Rule 36, Federal Rules of Criminal Procedure, as the basis for its

pleading. Rather, the government plainly cast its motion as a motion seeking an *amended* order.

The government expressly did not ask that the proposed amended order be given retroactive or *nunc pro tunc* effect.

Specifically in its prayer for relief the government expressly asked for one and only one action by the court, that was, to issue *an amended order* "for an additional period of six months, up to and including July 22, 2000."

In response, the district court entered a second order *after the return of the indictment in this case* that stated:

> Upon consideration of the *In Camera* Government's *Ex Parte* Motion for an Amended Order of Extension of Grand Jury, the Court finds that the Order of January 11, 2000, was intended[6] to extend the Landon Grand Jury for a period of six months from January 22, 2000, up to and including July 22, 2000. It is therefore,
>
> ORDERED AND ADJUDGED: that the Court's *In Camera* Order of January 11, 2000, that extended the Landon Grand Jury for an additional period of six months ***is hereby amended to correct a typographical error*** so that the Order should read "that the Landon Grand Jury empaneled January 22, 1999, be and hereby is extended for an additional period of six months, up to and including July 22, 2000 . . . " All other provisions of the Order of January 11, 2000, remain in effect as originally stated.

[R976 Hearing, Exhibit 13; emphasis supplied]

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[6] Intended by whom? By the government or by the Court?

At common law, the grand jury's term expired at the end of the term of the court during which the grand jury was convened. Many states continue to adhere to this common law rule; others have altered the common law rule by enacting statutes or rules governing the length of the grand jury's term. Federal grand juries are creatures of Rule 6, Federal Rules of Criminal Procedure. Ordinarily, a regular grand jury in the federal system can sit for up to a maximum of eighteen months, although the court can discharge the grand jury before the end of the eighteen-month period. Rule 6(g), Federal Rules of Criminal Procedure. In fact, it is the practice in many districts to excuse grand juries after only 12 months or as soon thereafter as the grand jury's business is concluded and in this case, the express term of the original term of the grand jury was only twelve months.[7] Rule 6 provides that in the case of a regular grand jury, the court may extend the service of the grand jury for a period of six months or less if the court determines that the extension is in the public interest. Fed.R.Crim.P., 6(g).

The purpose of this provision of Rule 6 was to permit some degree of flexibility as to the discharge of grand juries and to avoid (1) the waste of time and resources required to present a case to a successor grand jury when the first grand jury

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[7] *See* Grand Jury Law and Practice § 4:12 (2d ed.), Sara Sun Beale, William C. Bryson, James E. Felman, Michael J. Elston, editors, from which this history is taken.

has expired shortly before the end of an investigation; and (2) precipitous action to conclude an investigation on the eve of the expiration date of the grand jury. Advisory Committee Note to 1983 Amendment to Rule 6(g), 97 F.R.D. 245, 277 (1983). Rule 6(6) appears to contemplate only one six-month extension. Moreover, the Advisory Committee Note on the amendment which added subsection (g) indicates that extending grand juries was intended to be the exception and not the norm. Advisory Committee Note to 1983 Amendment to Rule 6(g), 97 FRD 25, 277 (1983).

A grand jury whose term has expired is no longer considered a grand jury; it loses the power to indict, to subpoena witnesses, and to engage in any of the other actions that a grand jury is otherwise entitled to perform. *United States v. Bolton*, 893 F.2d 894 (7th Cir. 1990); *United States v. Macklin*, 523 F.2d 193 (2d Cir. 1975). *See also United States v. Armored Car Transp., Inc.*, 629 F.2d 1313 (9th Cir. 1980); *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974).[8]

It is well settled that the return of an indictment after expiration of the term of

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[8] *Fein* contains an excellent historical survey of grand jury session, term and extension procedures through the date of the *Fein* decision. For a complete early history of the grand jury under the Federal Rules of Criminal Procedure, see The Federal Grand Jury, Prof. Lester B. Orfield, 22 F.R.D. 343 (1958).

a grand jury is a nullity. Wright & Miller, 1 Fed. Prac. & Proc. Crim.3d § 112 ("An indictment issued by a grand jury whose term had expired is void and no effect can be given to a nunc pro tunc order that purported to extend the term of the grand jury retroactively.") The trial court completely lacks jurisdiction to proceed under such an indictment and it is fundamental error that may be raised at any time, even after trial of the case is concluded.[9] *United States v. Bolton,* 893 F.2d 894 (7th Cir. 1990) ("It is well settled that unless there is a valid waiver, the lack of a valid indictment in a felony case is a defect going to the jurisdiction of the court. *citing Smith v. United States,* 360 U.S. 1, 10, 79 S.Ct. 991, 997, 3 L.Ed.2d 1041 (1959)).

Both regular and special grand juries are statutory creations, *See, e.g.*, *In re Mills*, 135 U.S. 263, 267, 10 S.Ct. 762, 763, 34 L.Ed. 107 (1890), and each can exist only as authorized by the statute or rule pertaining to it. *See, e.g.*, *United States v. Macklin*, 523 F.2d 193, 197 (2d Cir.1975). *Accord United States v. McKay*, 45 F.Supp. 1007, 1015 (E.D.Mich.1942). *See also* Federal Grand Jury: A Guide To Law And Practice, Susan W. Brenner, Gregory G. Lockhart and Lori E. Shaw, § 6.8.1. When a regular grand jury is convened in accordance with Rule 6 it exists for no longer than specified, and its actions during the specified period only are lawful. Id.,

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[9] Bloomquist did not raise this issue at the trial court either independently or by moving to adopt Evans's Grand Jury Motions.

at 195. *See also* Federal Grand Jury: A Guide to Law and Practice, § 6.8.1, *supra*.

A grand jury's existence beyond its initial term depends on the district court: If a court extends a grand jury's term, and if the extension is authorized by the statute or rule governing that grand jury, the grand jury's existence has been lawfully continued and its actions during the extended term are valid. Id., at 195-197. If a district court does not extend a grand jury's term, or does not do so in accordance with the statute or rule governing that grand jury, the grand jury ceases to exist at the end of its term and any actions it takes thereafter are void *ab initio*. Id., at 197. *See also United States v. Daniels*, 902 F.2d 1238, 1240 (7th Cir.1990), *cert. denied,* 498 U.S. 981, 111 S.Ct. 510, 112 L.Ed.2d 522 (1990) ("An indictment issued by a grand jury whose term is up and has not been validly extended is void."). An indictment returned by a grand jury after its term lapsed without being lawfully extended is a nullity, which does not give the district court jurisdiction to proceed in that matter. Id., at 196-197. *Accord United States v. Bolton*, 893 F.2d 894, 895 (7th Cir. 1990). An unauthorized extension of the term of a grand jury beyond 18 months is a defect that goes to the very existence of the grand jury itself. *United States v. Macklin*, 523 F.2d 193 (2nd Cir. 1975). A grand jury created under Rule 6 could not function as de facto grand jury beyond its term even though it had color of right to exist in order extending term, and such a grand jury was powerless to return an indictment based

on testimony given after expiration of the term of the grand jury. *United States v. Fein*, 504 F.2d 1170 (2nd Cir. 1974).

A claimed *nunc pro tunc* order cannot necessarily validate an indictment returned after expiration of the term of the grand jury. *United States v. Lytle*, 658 F.Supp. 1321, 1326 -1327 (N.D.Ill. 1987); *United States v. Fein,* 504 F.2d 1170, 1173 (2d Cir.1974); *United States v. Johnson,* 123 F.2d 111, 120 (7th Cir.1941), *rev'd on other grounds,* 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943) (a reversal that, at least by implication, effectively confirmed the nullity of an indictment by a grand jury that was then without legal existence; see *id.* at 507, 508, 63 S.Ct. at 1235, 1236).

A court's failure to act, or a Court's incorrect action, does not authorize the entry of a *nunc pro tunc* decision. *Occidental Fire & Casualty Company of North Carolina v. Great Plains Capital Corp.*, 912 F.Supp. 515 (S.D.Fla. 1995), citing *Recile v. Ward,* 496 F.2d 675, 680 (5th Cir.1974) (quoting Freeman on Judgments, § 131). Similarly, it is not the function of a *nunc pro tunc* order to supply or modify matters of fact. *Id.* "It is familiar doctrine that a *nunc pro tunc* order is not a permissible synonym for retroactivity but rather is limited to current correction of the record to speak an earlier truth: an order made earlier but not formally entered." *Board of Education of Evanston Township v. Admiral Heating & Ventilation, Inc.,*

525 F.Supp. 165 (N.D.Ill.1981). *See also Cypress Barn, Inc. v. Western Elec. Co., Inc*. 812 F.2d 1363, 1364 (11th Cir. 1987). Such orders are allowable only to make the record reflect something that actually *happened* but was not recorded. *Crosby v. Mills,* 413 F.2d 1273, 1277 (10th Cir.1969).

The issuance of orders *nunc pro tunc* is a mechanism by which the Court corrects errors which are primarily clerical in nature. That mechanism is not available for the benefit of parties who fail to observe proper procedure. *Delays or errors which are attributable to the laches of the parties do not entitle those parties to the benefit of a retrospective judgment. Mitchell v. Overman,* 103 U.S. (13 Otto) 62, 64-65, 26 L.Ed. 369 (1881).

Judge Schlesinger's purported extension of the grand jury term after the term had already expired was a nullity as was the indictment returned by the grand jury prior to the second extension order. Even if it were possible for the second extension order to reach back *nunc pro tunc*, which we dispute on the facts of this case, the second order he entered purported to extend the grand jury six months and one day, which is one day in excess of the period of time Rule 6 authorizes for an extension. The second order was itself invalid, as an excessive extension not permitted by Rule 6, and therefore it could not serve to revive the grand jury nor its prior indictment.

[R815; R833][10]

[10] In the July 6, 2001 hearing on Evans's first motion [R786], Judge Schlesinger stated "I'll deny the motion on the grounds that the first order extended the life of the grand jury for six months from the date it was signed in January, and as the order in June said, there was a typographical error that went from January to June instead of January to July, and that's why the second order was entered to correct the date." [R944-77]

II. The Trial Court Erred in Refusing to Admit under Rule 804(b)(3) of the Federal Rules of Evidence, the Self-Incriminating Affidavit of the Lead Co-Conspirator, Donald Fleming, Which Exculpated Defendant Bloomquist, on the Sole Basis that Fleming's Declaration Did Not Sufficiently Subject Fleming to Criminal Liability or in the Alternative, The Trial Court Erred in Postponing Fleming's Sentencing Rendering Fleming Unavailable as a Defense Witness Due to His Fifth Amendment Privilege, Which Fleming Retained Until He Was Sentenced.

During the course of the trial, on the morning of March 26, 2003, Bloomquist attempted to introduce into evidence the affidavit of lead co-conspirator Donald Fleming under Rule 804(b)(3), Federal Rules of Evidence.[11] [TR5-74; Def. Ex. 3] The Fleming affidavit was exculpatory as to Bloomquist but incriminating as to Fleming,

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[11] Rule 804(b)(3) provides for the admissibility of a statement against interest:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

its author.[12]

Fleming was the central figure in the conspiracy. According to the government's indictment, Fleming was the taxpayer who was evading the payment of income and payroll taxes, which he did in part by the use of trusts to hide his ownership and control of his business and assets. [R2] The effect of the Fleming affidavit was that Fleming took responsibility for his actions with respect to the trusts and exculpated Bloomquist. [Def. Ex. 3] Fleming authored the affidavit on February 28, 2003, two months after he had already pled guilty to the conspiracy charge. [Def. Ex. 3; R1059]

By the time of Bloomquist's trial in March, 2003, Fleming had entered into a plea agreement with the government, had pled guilty and was awaiting sentencing. [R1059] Fleming pled guilty December 20, 2002 [R1059] and Fleming's sentencing was set for March 27, 2003 [R1061]. Fleming was *pro se* at this point in the case, but he filed an emergency motion for appointment of counsel on March 19, 2003 [R1164], the very day before Bloomquist's trial was to start. [R1166] The court conducted a hearing on Fleming's request for counsel on March 21, 2003, after

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[12] Bloomquist's counsel offered to the court:

> Your Honor, I believe it is -- it is exculpating in that it actually goes to the heart of our defense. [TR5-91]

Bloomquist's trial had started, and appointed counsel, James Hernandez. [R1171] On March 25, 2003, while Bloomquist's trial was still in progress, Fleming through his new counsel requested a continuance of Fleming's sentencing. [R1172] On March 26, 2003, *the very same day Judge Schlesinger denied the admissibility of the Fleming affidavit, he continued Fleming's sentencing to April 28, 2003*, after the conclusion of Bloomquist's trial. [R1178] This is important because it was Fleming's sentencing jeopardy which entitled Fleming to assert the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 119 S.Ct. 1307 (1999).

In an earlier trial of Joe Evans, another coconspirator, Fleming had been called as a defense witness and been allowed to invoke the Fifth Amendment and the same judge presided over that trial as well as the Defendant's trial. [TR5-78-79] The trial judge knew that this issue might come up again, because he knew that Fleming was listed as a defense witness on Bloomquist's witness list. [TR5-78]

When Bloomquist attempted to introduce the Fleming affidavit, the government took the position that Fleming was not unavailable in that (1) he was not under subpoena and (2) the court had not determined that Fleming could invoke the Fifth Amendment privilege, if subpoenaed and called to testify. [TR5-77; TR5-78] The judge acknowledged that he had not ruled on whether Fleming would be allowed to assert the Fifth Amendment privilege or not. [TR5-78] The judge suggested that

Bloomquist's counsel would need to subpoena Fleming, counsel agreed, and that was subsequently accomplished later that same trial day. [TR5-79; TR6-27-28]

Following that exchange the trial judge next suggested that there was no corroboration of the statement as required by Rule 804(b)(3). After counsel demonstrated from a review of the trial record and the affidavit that the statements were in fact corroborated by the government's own case, the judge appeared to abandon that objection. When the court asked the government to respond to Bloomquist's assertion of the evidence corroborating the statement the government made no objection and acquiesced in Bloomquist's assertion of corroboration.

However, the government did raise an additional objection, that Fleming's statement in his affidavit would not subject Fleming to any ***more criminal liability than he already had having pled guilty***.

> MR. MACKIE [AUSA]: While they're pulling it up, the other thing that I forgot to mention, of course, is that at this point, having pled guilty to exactly the issue here, I don't think that this statement would be so far contrary to his pecuniary interest or proprietary interest or subject him to any more criminal liability than he already has. [TR5-92]

The court denied admission of the affidavit based on the government's objections, (1) the failure to determine that Fleming was unavailable for Rule 804(b)(3) purposes,

and (2) that the affidavit did not subject Fleming to ***more criminal liability than he already had as a result of his guilty plea to the conspiracy charge***.[13]

Bloomquist's counsel explained that he had not had Fleming under subpoena because Fleming had originally agreed to come voluntarily, but now was refusing to come. The trial judge already knew this, because he himself had communicated this message to Bloomquist's counsel in the course of the trial the day before:

> [THE COURT]: Subsequent to that, Mr. Fleming now has his own lawyer. Mr. Hernandez was appointed. All I know is that yesterday you went down to a hearing before Judge Snyder. I believe, subsequent to that hearing, I delivered a message to Mr. Stone that Ms. Janes had

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[13] The court's ruling was:

So, first of all, he wasn't subpoenaed. Okay? So he's not a nonavailable declarant. If you want to get a subpoena on him, get a subpoena on him right away. Get him down here with his lawyer, and I'll go through the same thing. I do find as a matter of law that the statement, which is Exhibit 3 -- if you would please give it to Mr. Randolph so it can be marked for identification -- I'll sustain the objection made by the government [*which was solely as to unavailability and failure to expose Fleming to* ***more criminal liability than he already had as a result of his guilty plea***] because it doesn't fit within the purview of the rule. [TR5-94; bracketed material inserted]

called my office and said that Mr. Fleming, or Mr. Fleming's lawyer, had called Mr. Stone's office and said he would not meet with Mr. Stone. Period. So Mr. Stone did not have Mr. Fleming here yesterday for me to advise of his rights. [TR5-78-79]

At that point, Bloomquist's counsel played a tape recording of a voice mail left by Fleming for Bloomquist, in which Fleming said that AUSA Mackie had told Fleming that testifying for Bloomquist could affect his sentencing and for that reason and his new court appointed lawyer's advice, he could not testify. [TR5-92-93]

Bloomquist thereafter subpoenaed Fleming the afternoon of March 26, 2003. Fleming appeared in court with his court appointed counsel, James Hernandez. Fleming's concerns and the concern of his court appointed counsel were focused on the *sentencing* consequences to him that any testimony he might give for Bloomquist could have. [TR5-183] Fleming invoked the Fifth Amendment on this basis on advice of counsel and the judge excused him. [TR5-192-193]

Then on March 28, 2003, the final day of trial, the court entered a written order denying admissibility of the Fleming affidavit stating that it was not admissible because:

nothing in the statement at the time of its making was so far contrary to Mr. Fleming's pecuniary or proprietary interest, or so far tended to

subject Mr. Fleming to civil or criminal liability, or to render invalid a claim that he might have against another.[14] [R1190]

Judge Schlesinger did not go through the averments in the Fleming affidavit and explain how it was that he found that they were not incriminating. Indeed, even the government, which had a more comprehensive understanding of the facts of the case than the Court, did not argue that Fleming's affidavit was not incriminating to Fleming - instead, ***the government argued that Fleming's affidavit did not expose Fleming to more criminal liability than he had already pled guilty to, because the affidavit affirmed the same facts that were the basis of the criminal charge he had admitted***. Of course the affidavit was incriminating and we do not expect the government in its answer brief to now argue otherwise. Our Circuit holds that the standard is merely whether the statement *tends* to subject the declarant to criminal liability and includes disserving statements that would have probative value at the trial of the declarant:

The statement offered by Thomas satisfies the requirement that it be against Weeks' penal interest. The government argues that Weeks'

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[14] The court concluded that *nothing* in the statement subjected Fleming to criminal liability. *Cf. Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431 (1994).

> statement was not against his penal interest because he did not expressly confess to the crime involved. ***We do not read Rule 804(b)(3) to be limited to direct confessions of guilt. Rather, by referring to statements that "tend" to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant.***

United States v. Thomas, 571 F.2d 285, 288 (11th Cir. 1978) (emphasis supplied). Clearly Fleming's statements meet this test.

The only argument that can fairly be made is that which the government made to the trial court, which we submit the trial court accepted and incorporated in its order, that is, that Fleming's statements did not subject Fleming to any ***more criminal liability*** than he had already exposed himself to by his December 2002 guilty plea.

The problem is that this rationale is not justified by Rule 804(b)(3), which does not concern itself with whether the person has pled guilty or not and does not and cannot require such additional liability. In fact, it is well settled that the plea colloquy itself may satisfy the requirement for admission under Rule 804(b)(3). *See United States v. Gallego,* 191 F.3d 156 (2nd Cir. 1999) and *United States v. Nazareno*, 65 Fed. Appx. 354 (2nd Cir. 2003). Rather this is what makes the statement admissible. It is no less admissible for having been made out of court (though under oath), than

the guilty plea colloquy itself would have been.

Additionally, we submit that the trial court cannot have it both ways. If the subject matter of the affidavit is not against penal interest, then it was error to allow Fleming to invoke the Fifth Amendment when he was being called as a witness to testify as to the very same matters in the affidavit.

For a witness to invoke a claim of Fifth Amendment privilege, there must be a "substantial and 'real' fear" of self-incrimination. *Marchetti v. United States,* 390 U.S. 39, 52, 88 S.Ct. 697, 705, 19 L.Ed.2d 889 (1968); *United States v. Cuthel,* 903 F.2d 1381, 1384 (11th Cir.1990) ("A witness may properly invoke the privilege when he 'reasonably apprehends a risk of self-incrimination.' ") (quoting *In re Corrugated Container Anti-Trust Litigation,* 620 F.2d 1086, 1091 (5th Cir.1980)), *Grand Jury Subpoena Dated April 9, 1996 v. Smith,* 87 F.3d 1198, 1204 (11th Cir. 1996). The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination. *Rogers v. United States*, 340 U.S. 367, 374, 71 S.Ct. 438, 442 (1951); *Brown v. Walker*, 161 U.S. 591, 600, 16 S.Ct. 644, 648, (1896), *Marchetti v. U.S.,* 390 U.S. 39, 53, 88 S.Ct. 697, 705 (1968).

A witness may properly invoke the privilege when he "reasonably apprehends a risk of self-incrimination, ... though no criminal charges are pending against him ...

and even if the risk of prosecution is remote." *In re Corrugated Container Anti-Trust Litigation,* 620 F.2d 1086, 1091 (5th Cir. 1980), *United States v. Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990).

If it were proper to allow Fleming to invoke the Fifth Amendment, and it was, then it was error to exclude his affidavit on the basis that the statements in the affidavit were not self-incriminating.[15]

The Committee notes to Rule 804(b)(3) explain the intent to expansively open the door to such statements:

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[15] Bloomquist is not arguing that the one conclusion *automatically* results in the other. We are aware of and do not dispute the narrow holding of *United States v. Thomas*, 62 F.3d 1332, 1338 (11th Cir. 1995), that the "against penal interest" requirement of Rule 804(b)(3) is more narrow than the Fifth Amendment's declaration that no person "shall be compelled in any criminal case to be a witness against himself." Rather, on the facts of Bloomquist's case the two sets are in congruence.

> And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States,* 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People v. Spriggs,* 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); *Sutter v. Easterly,* 354 Mo. 282, 189 S.W.2d 284 (1945); Band's Refuse Removal, Inc. v. Fairlawn Borough, 62 N.J.Super. 522, 163 A.2d 465 (1960); *Newberry v. Commonwealth,* 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446.

The trial court erred in not admitting Fleming's affidavit, the error was not harmless because it went to the heart of Bloomquist's defense, therefore the error requires this Court to vacate the conviction and remand the case for a new trial.

Alternatively, under the uniquely peculiar procedural posture of the issue, it was error for the trial court to postpone Fleming's sentencing. Fleming had been scheduled to be sentenced on March 27, 2003. Bloomquist's trial did not end until March 28, 2003. Had the court not continued Fleming's sentencing, then this issue would never have arisen, because Fleming could then simply have been called as a witness, he would no longer have had a Fifth Amendment privilege to invoke, and the statements presented in the affidavit could have been brought out through Fleming's

testimony at trial. The only reason Bloomquist was forced to turn to the affidavit was Fleming's last minute invocation of his Fifth Amendment privilege.

The privilege would have disappeared had the court held to the scheduled sentencing date. The court boxed Bloomquist in by its scheduling orders, denying Bloomquist his request for a continuance, but granting Fleming his requested sentencing continuance despite the fact that Fleming's motion was made at the last possible minute and at a time and in a context that irreparably harmed Bloomquist. The trial court's decision refusing to admit the affidavit has to be evaluated in this broader context.[16]

III. The Trial Court Abused it's Discretion in Denying Bloomquist's Request for a Continuance of Trial When the Request Was Prompted by Bloomquist Retaining Counsel Three Weeks Prior to Trial in a Case That Had Been Previously Continued Upon Motion of the Government For Over Two Years and As Condition of Allowing Bloomquist to Have Counsel of His Choice the Court Required Bloomquist on the Morning Trial Began, to Waive In Advance Any Ineffective Assistance of Counsel Claims Against Both His Newly Retained Counsel and His Prior Court Appointed Counsel.

Bloomquist was indicted June 27, 2000 and arrested July 14, 2000. *The government* made repeated requests for continuances of the trial date of his case,

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[16] Bloomquist, of course, lacked any standing to object to the rescheduling of Fleming's sentencing, therefore the government should not be heard to argue that Bloomquist waived this objection by not presenting it to the trial court.

causing the trial date to be postponed for over two years and four months.[17] The trial

[17] The pertinent docket entries are:

6/27/00 2 INDICTMENT

7/14/00 -- ARREST of Michael J. Bloomquist in District of Arizona

8/1/00 119 STANDING ORDER as to Michael J. Bloomquist: setting . . . Jury Trial for trial term commencing 9:00 9/5/00;

8/23/00 213 MOTION by USA . . . to continue the trial

8/29/00 233 ORDER . . granting the USA's [213-1] motion for . . . continuance of trial date;

7/13/01 781 MOTION . . . by USA . . .to continue trial

8/6/01 823 ORDER granting [781-1] motion to continue trial . . .resetting jury trial for 9:30 1/7/02;

12/18/01 931 ORDER . . . resetting jury trial for term commencing 9:30 on 2/4/02

1/18/02 -- ORAL MOTION in open court by USA . . . to continue trial until July 2002

5/24/02 986 ORDER . . . granting [975-1] motion to continue trial . . . resetting jury trial for 9:30 1/6/03

1/28/03 1118 JOINT MOTION by Michael J. Bloomquist, USA to continue trial (JOINT)

judge continued the trial *at the government's request from the first trial date of September 5, 2000 to January 6, 2003,* a period of two years and four months.

There was one joint motion for continuance thereafter on January 28, 2003, resulting in the trial being reset for March 3, 2003. This was simply the result of Bloomquist being severed from his codefendants after his repeated complaints about his court appointed counsel, complaints which he documented with nine months of correspondence beseeching his court appointed counsel to call him, fax him, write him, or meet with him, all of which went unanswered.

1/28/03 1119 ORDER as to Michael J. Bloomquist granting [1118-1] joint motion to continue trial as to Michael J. Bloomquist . . .set[ting] jury trial for term commencing 9:30 3/3/03

2/20/03 1133 NOTICE of attorney appearance for Michael J. Bloomquist by Mitchell Adam Stone

2/21/03 1134 MOTION with memorandum in support by Michael J. Bloomquist to continue the trial

2/25/03 1136 ORDER as to Michael J. Bloomquist (4) denying [1134-1] motion to continue the trial reset jury trial for 9:30 3/10/03

2/25/03 1138 ORDER as to Michael J. Bloomquist, reset jury trial for term commencing 9:30 3/20/03

When presented with this evidence, the magistrate judge deftly and delicately appointed new counsel for Mr. Bloomquist, finding that the attorney client relationship was irretrievably broken - a more accurate statement would have been that his counsel had never done anything to establish the attorney client relationship or prepare a defense of the case. [R1029; R1342-2-7; R1342-9-14] Magistrate Judge Howard T. Snyder candidly referred to the situation as a "walking 2255." [R1342-10]

It was this and only this situation, hardly caused by Bloomquist, that resulted in the only continuance that Bloomquist requested, and even that was a *joint motion by the government and Bloomquist.* Bloomquist's new court appointed counsel, Louis R. Hardin, was appointed December 20, 2002 for a trial set March 3, 2003. This gave the new attorney 47 working days that straddled Christmas and New Year's, to prepare a defense for an unusual and complex case. The docket had over a thousand entries by the time the new counsel was appointed. [R1052]

At this point, faced with another court appointed counsel whose ability to defend the case was not clear to Bloomquist, Bloomquist retained counsel, Mitchell Stone, who filed his appearance on February 20, 2003. [R1133] The very next day Stone filed a motion for a continuance. [R1134] The trial court just as promptly denied the continuance. [R1136] The court set the trial for March 10, 2003, then later

reset it for March 20, 2003. The new attorney ended up having 19 working days to prepare for trial.

Anticipating that this record screamed ineffective assistance of counsel, the trial judge - on the morning trial commenced - insisted on Bloomquist waiving any future claim of ineffective assistance of counsel as a condition of allowing the retained counsel to stay on the case and serve as lead counsel. [R1167] The trial judge then entered a written order, the day trial began, explaining how complex the case and record was, noting that counsel had had limited time to prepare for trial, and the trade off the court had Bloomquist consent to as a condition of keeping counsel of his choice, that is, a waiver of any ineffective assistance of counsel claims. [R1167]

The timing of this waiver - insisting on it the morning trial was to begin - made it involuntary. What was Bloomquist to do? The trial court had previously accepted Stone's appearance a month earlier. Now with trial set to begin, with the motion for continuance already denied, the judge refused to allow Stone to proceed as counsel for Bloomquist unless Bloomquist would waive any ineffective assistance of counsel claims, and not just as to Stone, but as to the court appointed counsel, Hardin, as well, whom the court kept on the case.

The Sixth Amendment to the United States Constitution guarantees that every

person brought to trial must be afforded the right to assistance of counsel before he or she can be validly convicted and punished by imprisonment. *Faretta v. California*, 422 U.S. 806, 807 (1975). Under circumstances such as those presented by Bloomquist's case, the denial of a motion for continuance violates this fundamental right to assistance of counsel. *United States v. Verderame*, 51 F.3d 249, 251 (11th Cir. 1995). "To prevail on such a claim, a defendant must show that the denial of the motion for continuance was an abuse of discretion which resulted in specific substantial prejudice." Id.

For the very reasons stated in the court's order waiving Bloomquist's ineffective assistance of counsel claims, it was error to deny the continuance Bloomquist had requested.

The court was aware that a listed defense witness was Donald Fleming. The court was aware that Donald Fleming had previously invoked his Fifth Amendment privilege in the trial of the severed coconspirators. [TR5-78-79] The court was aware that the sentencing of Fleming was set for March 27, 2003, one week after the trial date for Bloomquist. A continuance would have resulted in Fleming being sentenced prior to Bloomquist's trial, taking from Fleming the ability to assert the Fifth Amendment privilege, and making Fleming available as a defense witness.

Fleming would have been prepared to offer testimony exculpatory to

Bloomquist. We know this from Fleming's affidavit. [Def. Ex. 3] Fleming was the key figure in the conspiracy, had pled guilty, and accepted his responsiblity for the offense. [R1059] It substantially prejudiced Bloomquist's right to a fair trial to not have Fleming available to testify in his defense.

Each case must be judged on its own facts. Whether a denial of a motion for continuance was an abuse of discretion must be decided on a case by case basis. *McKinney v. Wainwright*, 488 F.2d 28 (5th Cir. 1974). In a case that had already been continued at the request of the government for almost two and a half years, in a case in which Bloomquist had been severed from his co-defendants, so that no issues existed relating to the effect on co-defendants' speedy trial rights, in a case in which the defendant had made one and only one prior motion for continuance, assented to and joined in by the government due to the failure of the court to appoint him competent counsel, in a case in which there was no reason, much less compelling need or necessity to go to trial on the date set, in a case in which the government could show no prejudice to it by the requested continuance, in a case in which the cause for the continuance is reasonable and clearly not submitted for the purpose of delay, in a case in which the court itself recognized that it was impossible to adequately and competently prepare for trial on such short notice - in such a case - it was an abuse of discretion to deny the requested continuance.

As our predecessor Fifth Circuit, in *Gandy v. State of Ala.*, 569 F.2d 1318 (5th Cir. 1978), held, the determination of when to allow a continuance is committed to deliberate discretion of the trial judge; however, viewing all the circumstances surrounding the trial court's decision, denial of a continuance may be so arbitrary and fundamentally unfair as to do violence to constitutional principle of due process. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11 L.Ed.2d 921 (1964) (citations omitted). As this Court stated in *Verderame*:

> While we appreciate the heavy case loads under which the district courts are presently operating and understand their interest in expediting trials, we feel compelled to caution against the potential dangers of haste, and to reiterate that an insistence upon expeditiousness in some cases renders the right to defend with counsel an empty formality. In our system of justice, the Sixth Amendment's guarantee to assistance of counsel is paramount, insuring the fundamental human rights of life and liberty. "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be

done." *Gideon v. Wainwright,* 372 U.S. 335, 343, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963) (citation and quotations omitted).

Verderame, at 252.

A trial judge's discretionary power to deny a motion for continuance is necessarily limited by the Sixth Amendment right to compulsory process and any denial of an attempt by accused to present testimony in his behalf must be weighed against that right. *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir. 1982). But for the denial of the continuance in Bloomquist's case, he would have been able to compel the attendance of Fleming as a witness in his behalf. Under these circumstances, the denial of the continuance prejudiced Bloomquist both in his Sixth Amendment right to have competent counsel adequately prepared to defend the case and in his Sixth Amendment right to compel the attendance of witnesses in his behalf. Under these unusual circumstances, the denial of the requested continuance was an abuse of discretion which substantially prejudiced Bloomquist's rights.

IV. The Creation of the Trusts Could Not and Did Not as a Matter of Law or Fact Operate to Impair or Impede the Function of the IRS, Therefore Bloomquist's Agreement to Create or Manage the Trusts Could Not Constitute a *Klein* Conspiracy.

The government charged Bloomquist with being a coconspirator in a *Klein* conspiracy. *United States v. Klein,* 247 F.2d 908 (2nd Cir. 1957) (a section 371

conspiracy where the victim is the IRS and the objective is to defeat its lawful functioning). Bloomquist worked for a company that set up what the government described as "sham trusts." [TR6-46] Donald Fleming, the primary taxpayer in the case, placed his business and assets in various "sham" trusts, also referred to in the indictment as "Unincorporated Business Organizations" or "UBOs," as to which Bloomquist served as the nominal trustee, at least for a portion of the time period that the conspiracy functioned, as alleged in the indictment. [R2]

The government argued that this was done for the purpose of impeding, impairing, defeating and otherwise obstructing the lawful function of the IRS in the ascertainment, computation, assessment and collection of the personal income taxes of Donald and Joyce Fleming and the employment related taxes associated with their businesses. [R2]

This argument fails as a matter of law, because the government itself must concede that although the trusts were in form irrevocable, they operated as so-called "grantor trusts," as that term is defined in the Internal Revenue Code. 26 U.S.C. §§ 671, 674. This is because Donald and Joyce Fleming continued to maintain full control over the so-called trust assets. "[T]he [grantor trust] rules arose under the Code because it was recognized by Congress that taxation of income is not concerned so much with refinements of title as it is with actual command over the property

taxed." *Sun First Nat. Bank of Orlando v. United States,* 607 F.2d 1347, 1359 (Ct.Cl. 1979) (citing *Corliss v. Bowers*, 281 U.S. 376, 50 S.Ct. 336, 74 L.Ed. 916 (1930)). Where the form of a transaction has not, in fact, altered any cognizable economic relationships, the courts may look through the form and apply the tax law according to the substance of the transaction. See *Markosian v. Commissioner,* 73 T.C. 1235, 1241, 1980 WL 4562 (1980). Whether a trust is to be regarded as lacking in economic substance for income tax purposes represents a question to be decided on the totality of the facts. See *United States v. Cumberland Pub. Serv. Co.,* 338 U.S. 451, 454, 70 S.Ct. 280, 94 L.Ed. 251 (1950). The following factors are generally considered in deciding whether, for income tax purposes, a purported trust is to be treated as lacking in economic substance: (1) Whether the taxpayer's relationship, as grantor, to the property differed materially before and after the trust's formation; (2) whether the trust had an independent trustee; (3) whether an economic interest passed to other beneficiaries of the trust; and (4) whether the taxpayer honored restrictions imposed by the trust or by the law of trusts. See *Markosian v. Commissioner, supra* at 1243-1245. Clearly the "trusts" in this case qualified as "grantor trusts" under the grantor trust provisions of the Internal Revenue Code.

As a grantor trust, all of the income of the "trusts" was attributable to and taxable to the putative grantor (Donald and Joyce Fleming), irrespective of the fact

that bare legal title had been transferred to the so-called trusts. *Sandval v. Commisioner Internal Revenue,* 898 F.2d 455 (5th Cir. 1990).

The evidence failed to establish that Bloomquist or any other conspirator took any step to present the "trusts" to the IRS as anything other than what they were, grantor trusts. Had Bloomquist filed with the IRS a trust income tax return for the trusts and then coordinated with the Flemings to disguise from the IRS the true ownership and control of the trust assets, that would have constituted an effort to imped or impair the ascertainment or collection of the Flemings's tax obligations. Niether Bloomquist nor any other conspirator did so.

Indeed the evidence showed that the IRS disregarded the "trusts" and instructed the various customers of the Flemings's businesses to do likewise. [TR5-18]

In response to Bloomquist's argument for judgment of acquittal, the government cited *United States v. Schmidt*, 935 F.2d 1440 (4th Cir. 1991) and argued as follows:

> But the nature of it is if you -- if it's an abuse of trust -- we're not saying that trusts are illegal. We're just saying that if you're using a trust for the purpose of obscuring the true nature of who owned the business, then that suffices. [TR5-22; emphasis supplied].

We neither agree with the government's proposition nor agree that the facts of

this case support the theory. As a matter of law, when neither Bloomquist nor any other conspirator took any step to convince the IRS that these trusts were anything other than "grantor trusts," then the *Klein* conspiracy charge must fail.

V. The Court Violated the *ex Post Facto* Clause of the United States Constitution in Denying Bloomquist a Downward Departure Based in Part on the Feeney Amendment, Which Was Enacted Subsequent to the Date of Bloomquist's Alleged Offense.

Bloomquist argued for a downward departure at sentencing under U.S.S.G. § 5K2.0 based on a *Koon* heartland argument. *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996). [TR8-31-40] The district court denied the downward departure motion stating that:

> Also, you have to remember the last amendment that was made to the Sentencing Reform Act by way of the Amber Alert thing basically taking away the Koon case, and telling judges, if it's not written in there, you don't have the authority to depart. So I'll deny the request. [TR8-43-44]

Again, prior to imposing sentence, the district court explained to those sitting in the court room why he had to impose the sentence he was imposing:

> And recently two months ago, they passed an amendment, as I mentioned, overruling the Supreme Court's *Koon* case which basically said there are circumstances where the Court could depart, and basically said if the departure isn't listed in the guidelines, you're stuck. And if

> my reading of the "Washington Post" this week and I believe the end of last week is correct, a bunch of elected officials in Washington have now set up a Court Watch Committee and their press releases specifically say that they're going to make sure that judges follow the law that they enact. And I don't know whether it might lead to impeachment or what of those who they believe are not following the law. So while asking for people to return to the community and not be taken away from the community prior to guideline sentencings were things that the Court might consider, it can't anymore. So I want people to realize that the judge doesn't have discretion like a lot of people think so that I can try to explain and at least have you understand the constraints that courts are under.[18] [TR8-63-64]

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[18] President Bush signed into law on April 30, 2003, the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act). The PROTECT Act, also known as the AMBER Alert law, deals generally with issues related to missing, abducted, and exploited children. The Feeney Amendment, which included a provision imposing reporting requirements on district courts, was attached as an amendment to the PROTECT Act. The Feeney amendment was added at the last minute and "[e]nacted without hearings or meaningful debate." *See* 149 Cong. Rec. S6708-01, S6711 (daily ed. May 20, 2003)(statement of Sen. Kennedy). The PROTECT Act requires that:

> [t]he Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense

The court erred in considering the Feeney Amendment in deciding that the court did not have the authority to grant a downward departure. Although the denial of a downward departure is generally not subject to appellate review, that is not the case when the court is under the mistaken impression that it lacked the legal authority to depart. *United States v. Chase*, 174 F.3d 1193 (11th Cir. 1999). In this instance the court clearly was under the impression that it was bound by the Feeney

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> for which it is imposed, the age, race, sex of the offender, and information regarding factors relevant by the guidelines. The report shall also include--
>
> (A) the judgment and commitment order;
>
> (B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);
>
> (C) any plea agreement;
>
> (D) the indictment or other charging document;
>
> (E) the presentence report; and
>
> (F) any other information as the Commission finds appropriate.

PROTECT Act of 2003, § 401(h), 117 Stat. 650, 672 (2003)(to be codified at 28 U.S.C. § 994(w)(1)).

Amendment, under which *Koon* was overruled. Under the Feeney Amendment, without an express provision in the guideline for a downward departure, the court lacked the authority to grant a departure.

Blooomquist's offense predated the enactment of the Feeney Amendment and the PROTECT Act. The indictment alleged that the conspiracy ran from February 1986 through November 1999. The PROTECT Act and Feeney Amendment were signed into law by President Bush on April 30, 2003.

Retroactive application of a change in the sentencing guidelines that would increase a defendant's punishment violates the *Ex Post Facto* provision of the United States Constitution, and for that reason is prohibited under U.S.S.G. § 1B1.11. *United States v. Pressley*, 345 F.3d 1205, 1215 (11th Cir. 2003) ("We are instructed to apply the version of the guidelines in effect on the date of sentencing unless that would violate the ex post facto clause").[19]

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[19] The *Ex Post Facto* Clause, U.S. Const. art. I, §§ 9, cl. 3, "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). Additionally, a sentencing scheme violates this constitutional ban if it is enacted after the commission of the crime and before sentencing, and its application results in a more onerous penalty. *See Miller v. Florida,* 482 U.S. 423,

Generally, a convicted defendant's sentence is based on the United States Sentencing Commission Guidelines Manual "in effect on the date the defendant is sentenced." 18 U.S.C. §§ 3553(a)(4); U.S.S.G. §§ 1B1.11(a), p.s. (Nov.1992); *United States v. Lance,* 23 F.3d 343, 344 (11th Cir.1994) (per curiam). If the effective Sentencing Guidelines Manual on the date of sentencing violates the *Ex Post Facto* Clause of the United States Constitution, then the district judge must use the Sentencing Guidelines Manual that was in effect on the date that the crime was committed. U.S.S.G. §§ 1B1.11(b)(1), p.s. (Nov.1992); *Lance,* 23 F.3d at 344; *United States v. Bailey*, 123 F.3d 1381, 1403 (11th Cir. 1997).

Bloomquist is entitled to a remand for resentencing to allow the district court to revisit the downward departure motion with instructions that it not apply the Feeney Amendment to its determination of the issue.

431-33, 107 S.Ct. 2446, 2451-52, 96 L.Ed.2d 351 (1987).

CONCLUSION

Appellant Michael J. Bloomquist respectfully requests this honorable Court reverse his conviction, or in the alternative, to vacate his sentence and remand to the district court for resentencing.

Respectfully submitted,

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RULE 28-1(m) CERTIFICATE OF WORD COUNT AND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY pursuant to 11th Cir.R. 28-1(m) and FRAP 32(a)(7) that this document contains 12,917 words.

I ALSO HEREBY CERTIFY that two copies of the foregoing have been furnished to Susan Humes Raab, Esquire, Assistant United States Attorney, Office of the United States Attorney, 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, by United States Postal Service, first class mail, postage prepaid, this November 25, 2003.

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William Mallory Kent