**UNITED STATES COURT OF APPEALS**
**FOURTH CIRCUIT**

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**CONSOLIDATED CASES 06-4506 AND 06-4507**

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**UNITED STATES OF AMERICA**
**Plaintiff-Appellee,**

**v.**

**JAMES DOMINIC DELFINO AND JEANIENE A. DELFINO**
**Defendants-Appellants.**

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**A DIRECT APPEAL OF A CRIMINAL CASE**
**FROM THE UNITED STATES DISTRICT COURT FOR**
**THE EASTERN DISTRICT OF VIRGINIA**
**RICHMOND DIVISION**

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# INITIAL BRIEF OF APPELLANTS

**THE LAW OFFICE OF**
**WILLIAM MALLORY KENT**

**WILLIAM MALLORY KENT**
**Fla. Bar No. 0260738**
**1932 Perry Place**
**Jacksonville, Florida 32207**
**904-98-8000**
**904-348-3124 Fax**
**kent@williamkent.com**

**Counsel for Appellants**
**JAMES DOMINIC DELFINO**
**AND JEANIENE A. DELFINO**

**NOS. 06-4506 AND 06-4507**

**United States v. James Dominic Delfino and Jeaniene A. Delfino**

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Fourth Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. F. Clinton Broden, District Court Counsel for the Delfinos.

2. Robert G. Bernhoft, District Court Counsel for the Delfinos.

3. Gregory Victor Davis, United States Department of Justice, Tax Division, Appellate Counsel.

4. James Dominic Delfino and Jeaniene A. Delfino, Defendants-Appellants (collectively, "the Delfinos").

5. William Jeffrey Dinkin, District Court Counsel for the Delfinos.

6. G. Wingate Grant, Assistant United States Attorney, Counsel for the United States at the District Court.

7. Patrick Risdon Hanes, District Court Counsel for the Delfinos.

8. Alan Hechtkopf, United States Department of Justice, Tax Division, Appellate Counsel.

9. David J. Ignall, United States Department of Justice, Tax Division.

10. Robert Alan Jones, District Court Counsel for the Delfinos.

11. William Mallory Kent, Appellate Counsel for the Delfinos.

12. Honorable M. Hannah Lauck, United States Magistrate Judge.

13. Jennifer Marie Newman, District Court Counsel for the Delfinos.

14. Honorable Robert E. Payne, United States District Judge.

15. Charles Philip Rosenberg, Assistant United States Attorney, Appellate Counsel for the United States.

16. John Britton Russell, Jr., District Court Counsel for the Delfinos.

## STATEMENT REGARDING ORAL ARGUMENT

Appellants James Dominic Delfino and Jeaniene A. Delfino request oral argument.

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## STATEMENT OF JURISDICTION

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

## STATEMENT OF THE ISSUES

**I. WHETHER THE DISTRICT COURT ERRED IN PROHIBITING THE TESTIMONY OF THE "McCARLEY TRIAL WITNESSES" WHO WOULD HAVE PROVIDED CIRCUMSTANTIAL EVIDENCE OF THE REASONABLENESS OF THE DELFINOS' GOOD FAITH RELIANCE ON ROYCE McCARLEY'S TAX ADVICE.**

**II. WHETHER THERE WAS LEGALLY SUFFICIENT EVIDENCE TO PROVE THE MAIL FRAUD COUNT WHEN THE GOVERNMENT INTRODUCED NO EVIDENCE TO SHOW THE DELFINOS IN FACT USED ANY FORM OF INTERSTATE COMMERCIAL CARRIER TO RETURN THE FRAUDULENT LOAN APPLICATION AT ISSUE.**

**III. WHETHER THE COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL ON THE MAIL FRAUD COUNT WHEN THE GOVERNMENT FAILED TO ESTABLISH VENUE BY A PREPONDERANCE OF THE EVIDENCE.**

**IV. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE TAX LOSS AMOUNT FOR SENTENCING PURPOSES WHEN THE DISTRICT COURT REFUSED TO MAKE A DETERMINATION OF THE ACTUAL TAX LOSS BY APPLYING DEDUCTIONS THE TAXPAYERS WOULD HAVE BEEN ENTITLED TO.**

## STATEMENT OF THE CASE

### Charges

### Count One - Conspiracy to Evade Taxes 1995-2001

James and Jeaniene Delfino (collectively "the Delfinos" and individually "Mr. Delfino" or "Mrs. Delfino"), husband and wife, were charged and proceeded to trial on a four count superseding indictment filed May 17, 2005 [R2]. Count one charged the Delfinos with conspiracy under 18 U.S.C. § 371, beginning on or about 1995 and continuing to the date of the indictment [May 17, 2005], the criminal object of which impede, impair obstruct and defeat the lawful government function of the Internal Revenue Service ("IRS") in the ascertainment, computation, assessment, and collection of revenue, that is, the Delfinos's 1995, 1996, 1997, 1998, 1999, 2000 and 2001 income taxes. Count one charged as the manner and means, attempts to conceal their assets and their ability to pay, by causing their assets and income to be placed in the names of others (nominees), to prevent the IRS from accurately assessing taxes due and owing. Count one alleged 24 overt acts. The first over act alleged that the Delfinos had their income paid to them through two trusts that they controlled, Alpha & Omega Trust and Covenant Foundation Trust during the tax years 1995 through 2001. Overt acts 2-24 alleged various acts occurring between 1995 and 2002. [R2].

**Count Two - Tax Evasion re Mr. Delfino's Taxes 1995-1997**

Count two charged the Delfinos with tax evasion under 26 U.S.C. § 7201 for wilfully attempting to evade and defeat a large part of the income tax, penalties and interest due and owing by *Mr. Delfino* for the calendar years 1995, 1996 and 1997 by concealing and attempting to conceal the nature and extent of his true and correct assets and his ability to pay income tax. Twelve affirmative acts are charged in support of count three, with dates ranging from 1995 to 2002. [R2].

**Count Three - Tax Evasion re Mrs. Delfino's Taxes 1995-1997**

Count three charged the Delfinos with tax evasion under 26 U.S.C. § 7201 for wilfully attempting to evade and defeat a large part of the income tax, penalties and interest due and owing by *Mrs. Delfino* for the calendar years 1995, 1996 and 1997 by concealing and attempting to conceal the nature and extent of her true and correct assets and his ability to pay income tax.[1] Three affirmative acts are charged in support of count three, one in 1995, one in 2002 and one in 2004. [R2].

**Count Four - Mail Fraud**

Count four charges the Delfinos with mail fraud in violation of 18 U.S.C. § 1341 and aiding and abetting under 18 U.S.C. § 2. The gravamen of count four was

[1] Counts two and three do not set forth the statute under which the charge was based, but the caption of the indictment indicates that counts two and three were filed under 26 U.S.C. § 7201.

that the Delfinos were alleged to have caused to be sent by a commercial interstate carrier, United Parcel Service, a uniform residential loan application and a year 2000 and year 2001 Form 1040 tax return, for the purpose of carrying out a fraudulent scheme, that is, concealing and misrepresenting their tax liability in connection with an application for a home equity line of credit. Count four charged that the fraudulent application was sent from the Delfinos' home in Chesterfield, Virginia, to Countrywide Home Loans in Plano, Texas. [R2].

**Facts and Proceedings Pertinent to the Issues on Appeal**

**Motion in Limine - Exclusion of McCarley Trial Witnesses Whose Testimony Would Have Supported the Sole Defense in the Case - Good Faith Reliance on Advice of Tax Expert**

The Delfinos had been customers of a trust promoter/tax advisor named Royce McCarley ("McCarley") and his company, Estate Preservation Consultants ("EPC") and set up the trusts complained of in the indictment based on advice from McCarley and EPC. [R77-1-3] January 11, 2006, thirteen days prior to jury selection in the case, the Government filed a "Motion in Limine to Exclude Testimony of McCarley Customers Unrelated to Defendants and Brief in Support Thereof." [R72] In its motion in limine, the Government asked the Court to exclude the introduction of testimony of customers of McCarley or EPC who had "no dealings with or knowledge of the defendants" and to exclude the introduction of any documents concerning the

legality of any McCarley or EPC program or product unless there was some evidence that the defendants actually relied upon such document. The Delfinos filed in response the "Defendants' Joint Brief in Opposition to Government's Motion in Limine. [R77] The defense response included a copy of the indictment of McCarley and copies of pertinent portions of the trial testimony of seven witnesses who testified at McCarley's trial concerning the tax advice he gave concerning the use of trusts for the receipt of assets and income. [R77-1-3] The person who ran EPC was McCarley, whom the Government had indicted March 28, 2003 and tried August 11-13, 2003 in Dallas, Texas. In that trial *the Government* called a number of EPC'c clients to testify as fact witnesses (the "McCarley Trial Witnesses"). The testimony of these witnesses included, *inter alia*, that McCarley set up trusts and falsely assured his clients that the business structure he recommended was legal, and that the IRS had audited several of his trust clients and found nothing wrong. [R77-2-3] The Delfinos provided to the District Court in their written response to the Government's motion in limine, copies of the transcripts of the testimony of the McCarthy Trial Witnesses whom the Delfinos intended to call as defense witnesses at their trial. [R77; Exhibits 2-8] The District Court conducted a hearing January 19, 2006 on the motion in limine and took the matter under advisement, carrying the motion with the case. [R83]

The case proceeded to trial by jury commencing January 24, 2006. [R101]

During the defense case, the Defense presented John Delfino, James Delfino's brother, and through John Delfino's testimony established that in fact the Delfinos consulted Royce McCarley for tax and trust advice. [T1/25/2006; pp. 590; 596 *ff*] The defense then attempted to introduce the McCarley Trial Witnesses, the admissibility of which had been argued in the motion in limine. [T1/25/2006; pp. 631 *ff*] The District Court found that the McCarley Trial Witnesses testimony was *not admissible*. [T1/26/2006; pp. 683-690; 690-693; 693-701] Based on this, the Court subsequently refused to give a defense requested reliance instruction, but did give a good faith instruction. [T1/26/2006; pp. 732-733; 861-862]

**Mail Fraud - Insufficiency of the Evidence**

The only Government witness to the mail fraud count was Kyle Mays, who was a loan officer for Countrywide Home Loans, Inc. of Plano, Texas. Mays testified that he remembered the Delfino loan application but he could not remember any specifics. Therefore the Court allowed the Government to question Mays, over defense objection, about the ordinary procedure for such loan applications. [[T1/25/2006; p. 453-464] Mays testified about a standard practice that is normallly used, and it included providing the borrower with a return UPS or FedEx envelope. The document in question in this case was returned, but how it was returned the witness had no idea. [T1/25/2006; p. 458; p. 461]

The defense vigorously argued in support of its motion for judgment of acquittal on count four that there simply was no evidence how the loan application was returned to Countrywide. [T1/25/2006; p. 564] Nevertheless, the District Court denied the Rule 29 motion. [T1/25/2006; p. 580] The Rule 29 motion was renewed and denied again at the close of the defense case. [T1/26/2006; p. 750]

**Verdict**

After approximately 6 hours 20 minutes of deliberations over two days, the jury returned guilty verdicts on all four counts as to both Mr. and Mrs. Delfino. [R103; R104; R105; R106]

**Motion for New Trial - Failure to Prove Venue for Mail Fraud**

The District Court extended the time permitted for filing post trial motions and timely motions for new trial were filed by both Delfinos. Mr. Delfino argued that the Government failed to establish venue for the mail fraud count, count four.[2] [R123-6-8] The District Court denied the motion finding that the venue issue had been waived by not raising it in the motion for judgment of acquittal at the close of evidence and alternatively finding that there had been sufficient evidence to establish venue. [T4/27/2006; pp. 58-59]

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[2] The District Court had permitted Jeaniene Delfino to adopt her husband's motions. [R48; R49]

**Sentencing**

The presentence investigation report ("PSR") for both Delfinos established the base offense level for the controlling tax counts at level 24 pursuant to U.S.S.G. § 2T1.1(a)(1) based on a tax loss amount of $4,717,218.22. [PSR p. 8 and Worksheet A] It was the defendants' position that the guideline range should have been that based on a tax loss equal to "the 400,000 to 1 million, which I submit is the appropriate amount . . . " Under U.S.S.G. § 2T4.1(H), this would be a base level 20. [T4/27/2006; p. 91] Had the Delfinos' position been accepted, the base offense level would have been level 20, instead of the base level 24 in the PSR. [T4/27/2006; p. 91] The District Court overruled the defense objection to tax loss amount. [T4/27/2006; pp. 100-101; pp. 121-124] Had the Delfino's objection been sustained, the total offense level would have been 22, criminal history category I, for a sentencing range of 41-51 months, instead of the 63-78 months determined by the District Court.[3]

James Delfino was sentenced April 27, 2006 to 78 months imprisonment structured as follows: 60 months concurrent on each of counts one, three and four and a term of 60 months on count two, 18 months of which is to run consecutive to count one. [T4-27-06; p. 132] Mr. Delfino was sentenced to three years supervised release

[3] The base offense level was increased two additional levels for use of sophisticated means under U.S.S.G. § 2T1.1(b)(2).

on all four counts to run concurrent, to commence upon release from imprisonment. Mr. Delfino was ordered to make immediate payment of $2,827,564.76tax liability to the IRS of which $379,995.45 was joint and several liability with Mrs. Delfino. [T4-27-06; p. 134]

Jeaniene Delfino was sentenced April 27, 2006 to 63 months imprisonment structured as follows: 60 months concurrent on each of counts one, three and four and a term of 60 months on count two, 3 months of which is to run consecutive to count one. [T4-27-06; p. 137] Mr. Delfino was sentenced to three years supervised release on all four counts to run concurrent, to commence upon release from imprisonment. Mr. Delfino was ordered to make immediate payment of $2,137,084.78 tax liability to the IRS of which $379,995.45 was joint and several liability with Mr. Delfino. [T4-27-06; p. 139]

**Appellate Related Proceedings**

The judgment was rendered as to both Delfinos on May 2, 2006. [R167; R169] A timely notice of appeal was filed May 4, 2006 as to Jeaniene Delfino and May 5, 2006 as to James Delfino. [R171; R172] May 25, 2006, Mrs. Delfino, through her prior counsel, Robert Alan Jones, filed a motion to vacate the judgment under 28 U.S.C. § 2255 [R175] May 31, 2006, Mr. Delfino, through the undersigned counsel, filed a memorandum of law in support of Mrs. Delfino's request that the District

Court consider her § 2255 motion prior to the disposition of her appeal. [R183] and a request was made at this Court to stay the appeal pending the District Court's determination of Mrs. Delfino's § 2255 motion, but the District Court denied these requests June 2, 2006 [R184]. June 12, 2006 counsel for Mr. Delfino filed a motion for release pending appeal at the District Court [R188], which was denied by the District Court July 3, 2006. [R194] Thereafter the undersigned counsel was permitted to be substituted for Robert Alan Jones as counsel for Mrs. Delfino and this joint appeal has proceeded in a timely manner thereafter.

## STANDARDS OF REVIEW

All four issues were preserved for appeal by timely, specific objection at the district court.[4]

**Issue One**

The standard of review for evidentiary rulings is abuse of discretion. *United States v. ReBrook,* 58 F.3d 961, 967 (4th Cir.1995). This Court reviews the district court's evidentiary ruling with substantial deference and will not disturb that decision absent a clear abuse of discretion. *United States v. Russell,* 971 F.2d 1098, 1104 (4th Cir.1992), *cert. denied,* 506 U.S. 1066, 113 S.Ct. 1013, 122 L.Ed.2d 161 (1993). "By definition, a court abuses its discretion when it makes an error of law." *United States v. Moye,* 454 F.3d 390, 398 (4th Cir.2006) (en banc) (citation and internal quotation marks omitted). If the district court makes an error of law in deciding an evidentiary question, that error is "by definition an abuse of discretion." See *Hunter v. Earthgrains Co. Bakery,* 281 F.3d 144, 150 (4th Cir.2002).

[4] The Government argued at the district court and Judge Payne agreed that although the venue objection was not apparent from the face of the indictment, nevertheless the objection to lack of venue was waived by failure to present the issue until the motion for new trial. The Delfinos dispute this proposition.

**Issue Two**

The standard of review for sufficiency of the evidence is that the jury's verdict must be upheld on appeal if there is substantial evidence in the record to support it. *See Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). In determining whether the evidence in the record is substantial, the court of appeals views the evidence in the light most favorable to the government and inquires whether there is evidence that a "reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos,* 94 F.3d 849, 862 (4th Cir.1996) ( *en banc*), *cert. denied,* 519 U.S. 1151, 117 S.Ct. 1087, 137 L.Ed.2d 221 (1997).

**Issue Three**

The Government must establish venue by a preponderance of the evidence, and the trial court's decision is reviewed by this court *de novo. United States v. Newsom,* 9 F.3d 337, 338 (4th Cir.1993).

**Issue Four**

In the wake of *Booker,* "a district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines" and then "shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence." *United States v.*

*Hughes,* 401 F.3d 540, 546 (4th Cir.2005). In assessing challenges to a sentencing court's application of the Guidelines, this Court reviews factual determinations for clear error and legal issues de novo. *United States v. Singh,* 54 F.3d 1182, 1190 (4th Cir.1995).

## SUMMARY OF ARGUMENTS

### I. WHETHER THE DISTRICT COURT ERRED IN PROHIBITING THE TESTIMONY OF THE "McCARLEY TRIAL WITNESSES" WHO WOULD HAVE PROVIDED CIRCUMSTANTIAL EVIDENCE OF THE REASONABLENESS OF THE DELFINOS' GOOD FAITH RELIANCE ON ROYCE McCARLEY'S TAX ADVICE.

The lower court committed reversible error as to counts one, two and three, in denying admission of proffered testimony of a series of witnesses (the "McCarley Trial Witnesses"), who had testified for the *Government* at a prior trial of the tax advisor/trust promoter, Royce McCarley. The proffered witnesses, like the Delfinos, were clients of Royce McCarley, whose advice these witnesses and the Delfinos had relied upon in establishing the trusts at the heart of the tax evasion charges against them. The proffered testimony was offered to show that the Delfinos relied in good faith on the tax advice given by McCarley. Without this evidence, the Delfinos were denied a reliance defense jury instruction and denied critical evidence to support their good faith defense. It was error as a matter of law to exclude this evidence, as such the lower court abused its discretion and the error was not harmless because it went to the heart of the theory of defense.

## II. WHETHER THERE WAS LEGALLY SUFFICIENT EVIDENCE TO PROVE THE MAIL FRAUD COUNT WHEN THE GOVERNMENT INTRODUCED NO EVIDENCE TO SHOW THE DELFINOS IN FACT USED ANY FORM OF INTERSTATE COMMERCIAL CARRIER TO RETURN THE FRAUDULENT LOAN APPLICATION AT ISSUE.

Count four alleged that the Delfinos committed mail fraud by sending a home fraudulent home equity line of credit loan application by interstate commercial carrier, UPS, from the Eastern District of Virginia to the lender in Plano, Texas. However, at trial the Government presented only one witness to support this count, the loan officer from Texas, who testified that due to the number of loan applications he processed he could not specifically remember the details of this loan, and had no personal knowledge how the loan application was returned to the lender. He testified that the normal practice was to send the borrower a return UPS or Fed Ex envelope, but he did not know if that was done in this case. No business records of either the lender or UPS or Fed Ex were introduced to prove that an interstate commercial carrier was in fact used by the Delfinos to return the loan application as charged. The evidence was legally insufficient and the lower court erred in denying the motion for judgment of acquittal on this ground.

**III. WHETHER THE COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL ON THE MAIL FRAUD COUNT WHEN THE GOVERNMENT FAILED TO ESTABLISH VENUE BY A PREPONDERANCE OF THE EVIDENCE.**

In a timely motion for new trial the Delfinos objected to the failure to establish venue in the Eastern District of Virginia as to count four, the mail fraud count. No evidence was introduced to establish venue. The lower court erred in ruling that the venue objection was waived by not presenting it in the motion for judgment of acquittal when the Government rested at trial, because the error was not apparent from the face of the indictment. The court also erred in its alternative finding that there was sufficient evidence of venue, when in fact there was no evidence whatsoever to establish venue in the Eastern District of Virginia.

**IV. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE TAX LOSS AMOUNT FOR SENTENCING PURPOSES WHEN THE DISTRICT COURT REFUSED TO MAKE A DETERMINATION OF THE ACTUAL TAX LOSS BY APPLYING DEDUCTIONS THE TAXPAYERS WOULD HAVE BEEN ENTITLED TO.**

Binding precedent of this Circuit required the District Court to allow the defendants to establish their deductible expenses from gross income in arriving at the tax loss for sentencing guideline purposes. The lower court erred in accepting a tax loss amount based solely on gross income determined by the bank deposit method, without offsetting deductions, over the defendants timely objections, when the

defendants stood ready to prove up their deductions. The error in the application of the guidelines prejudiced the defendants because the lower court sentenced both defendants within the erroneously determined guideline range, an error of 27 months at the high end for Mr. Delfino and 22 months at the low end for Mrs. Delfino.

## ARGUMENTS

### I. WHETHER THE DISTRICT COURT ERRED IN PROHIBITING THE TESTIMONY OF THE "McCARLEY TRIAL WITNESSES" WHO WOULD HAVE PROVIDED CIRCUMSTANTIAL EVIDENCE OF THE REASONABLENESS OF THE DELFINOS' GOOD FAITH RELIANCE ON ROYCE McCARLEY'S TAX ADVICE.

The Delfinos had been customers of a trust promoter/tax advisor named Royce McCarley ("McCarley") and his company, Estate Preservation Consultants ("EPC") and set up the trusts complained of in the indictment based on advice from McCarley and EPC. [R77-1-3] The Government's own position was that it had evidence which showed that the Delfinos used the services of McCarley and EPC to set up the trusts into which the Delfinos placed substantially all of their income and assets and thereafter paid no taxes. [R72-1]

January 11, 2006, thirteen days prior to jury selection in the case, the Government filed a "Motion in Limine to Exclude Testimony of McCarley Customers Unrelated to Defendants and Brief in Support Thereof." [R72] In its motion in limine, the Government asked the Court to exclude the introduction of testimony of customers of McCarley or EPC who had "no dealings with or knowledge of the defendants" and to exclude the introduction of any documents concerning the legality of any McCarley or EPC program or product unless there was some evidence that the defendants actually relied upon such document. The Government argued that it

anticipated that the Delfinos would attempt to put on evidence of other McCarley customers, unknown to the defendants, who would testify about representations McCarley made to them about trusts, documents he provided them. And their own reliance of McCarley's advice. The Government argued that because willfulness (a required element of counts one, two and three) is subjective, witnesses unknown to the defendants were not relevant. [R72-1-2] The Government argued that unless the defendants could establish what they were told by McCarley, they cannot, through the testimony of others they did not even know, establish what they believed about the legitimacy of the McCarley advice. Additionally, the Government argued that any statements by McCarley, relayed by his customers, that placing income and assets in trusts relieves the customers of tax obligations were erroneous as a matter of law and not relevant to the defendants' willfulness. Because such statements would be inaccurate the Court may exclude them to prevent confusion and preserve the province of the Court to instruct on the law. Without a foundation to show that the defendants relied upon documents about the legitimacy of the trusts, the documents would only confuse the jury. Finally, the Government argued that the testimony of McCarley's customers be excluded as a waste of time, because it would open the witness up to cross examination whether the witness relied upon the information in good faith, and would open the door to the testimony of other witnesses who thought

McCarley's advice was not legitimate. [R72-1-4] The Government argued that at a minimum the Delfinos would have to first show that they in good faith relied on McCarley's advice and show what McCarley told them. In order to have a reliance defense, the Government argued, the Delfinos would have to show full disclosure of all pertinent facts to the expert relied upon and good faith reliance on his advice. Witnesses who had no knowledge of what the defendants disclosed to McCarley or what McCarley told the defendants would have no relevance to a reliance defense. [R72-6]

The Delfinos filed in response the "Defendants' Joint Brief in Opposition to Government's Motion in Limine. [R77] The defense response included a copy of the indictment of McCarley and copies of pertinent portions of the trial testimony of seven witnesses who testified at McCarley's trial concerning the tax advice he gave concerning the use of trusts for the receipt of assets and income. [R77-1-3] The defendants acknowledged that willfulness is subjective, but disputed the assertion that the evidence of other taxpayers similar experience with the same tax advisor was irrelevant or a waste of time. The defense argued that the Government would rely at trial on evidence that the defendants engaged in certain transactions involving trusts established and managed by EPC. The Government would rely on the appearance of these transactions and the resulting avoidance of reporting taxable

income purportedly facilitated by the use of such trusts as evidence of a *willful* attempt to evade or defeat taxes. The person who ran EPC was McCarley, whom the Government had indicted March 28, 2003 and tried August 11-13, 2003 in Dallas, Texas. In that trial *the Government* called a number of EPC'c clients to testify as fact witnesses (the "McCarley Trial Witnesses"). *The testimony of these witnesses included, inter alia, that McCarley set up trusts and falsely assured his clients that the business structure he recommended was legal*, and that the IRS had audited several of his trust clients and found nothing wrong. [R77-2-3] The Delfinos provided to the District Court in their written response to the Government's motion in limine, copies of the transcripts of the testimony of the McCarthy Trial Witnesses whom the Delfinos intended to call as defense witnesses at their trial. [R77; Exhibits 2-8]

The Delfinos argued that McCarley convinced the Delfinos of the legality of the trust and tax advice and services provided by EPC, and many of the same services and assurances that were given by McCarley and or EPC to the McCarley Trial Witnesses were also provided to the defendants. [R77-3]

The Delfinos assured the Court that they reasonably expected the evidence at their trial to sufficiently establish that the Delfinos themselves relied upon the advice of McCarley and EPC, and did *not* agree with the suggestion in the Government's motion that to establish this reliance the Delfinos would have to waive their Fifth

Amendment right and testify themselves in order to support a jury consideration of good faith and reliance. Otherwise, the burden would be shifted to the defendant, and the defendant has no duty to offer affirmative proof of his good faith, citing *United States v. Phillips*, 217 F.2d 435, 440-443 (7th Cir. 1954) and *United States v. Curry*, 681 F.2d 406, 416 n. 25 (5th Cir. 1982). [R77-3]

Instead, the defense argued, under *Cheek v. United States*, 498 U.S. 192 (1991), the Court held that the jury considering the defendants' good faith belief shold "be free to consider any admissible evidence from any source" and cautioned that "[f]orbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek*, 498 U.S. at 202-203.

The Delfinos argued that each of the McCarley Trial Witnesses was competent to testify as to the fact and manner of McCarley's misrepresentations, including the techniques which McCarley used to make his advice and services appear legitimate to lay persons. Such evidence plainly has the tendency to make the existence of consequential facts - - i.e., McCarley's misrepresentations of legality and the Delfinos' reliance thereon - - more probable than they would be without such evidence, therefore admissible under Rule 401, Fed.R.Evid. This evidence from the former Government witnesses would corroborate other facts demonstrating the

Delfinos' own reliance on McCarley and EPC, and would be essential to the jury in determining whether the Delfinos good faith and reliance were genuine. [R77]

In its reply the Government reiterated its position that the testimony of the McCarley witnesses *would be admissible,* subject to Rule 403, *only to corroborate other evidence as to what McCarley told the Defendants.* [R79-4]

The District Court conducted a hearing January 19, 2006 on the motion in limine and took the matter under advisement, carrying the motion with the case. [R83]

The case proceeded to trial by jury commencing January 24, 2006. [R101] During the defense case, the Defense presented John Delfino, James Delfino's brother, and through John Delfino's testimony established that in fact the Delfinos consulted Royce McCarley for tax and trust advice. [T1/25/2006; pp. 590; 596 *ff*] The defense then attempted to introduce the McCarley Trial Witnesses, the admissibility of which had been argued in the motion in limine. [T1/25/2006; pp. 631 *ff*] The Court understood that the Delfinos were trying to introduce this evidence to show the reasonableness of their reliance on McCarley's advice. [T1/25/2006; pp. 646-647] The Court also understood that there was evidence to show that the Delfinos relied on McCarley's advice was that they set up the trusts that he recommended and they paid McCarley for his advice. [T1/25/2006; p. 647] Further the District Court elaborated that the defense wished to introduce the testimony of the

McCarley Trial Witnesses not to show that McCarley's advice was reasonable, but that other people relied upon it thinking it was reasonable and this is evidence that it was not unreasonable for the Delfinos also to have relied upon it. [T1/25/2006; pp. 649-650] The parties and Court discussed the issue leaving it for the judge to consider overnight. [T1/25/2006; pp. 631-663]

The following morning the district judge seemed to be persuaded in part by the *Curry* case which had allowed third parties to testify about their understanding of the requirement of a political campaign contribution statute in determining the defendant's good faith. [T1/26/2006; p. 670] The Government conceded that *Curry* "does seem analogous" but attempted to distinguish it. [T1/26/2006; p. 674]

The District Court seemed to be persuaded that the evidence was admissible, but then it reached an entirely contrary position when it orally announced its ruling, finding instead that the McCarley Trial Witnesses testimony was *not admissible.* [T1/26/2006; pp. 683-690; 690-693; 693-701] Based on this, the Court subsequently refused to give a defense requested reliance instruction, but did give a good faith instruction. [T1/26/2006; pp. 732-733; 861-862]

The District Court reversibly erred in excluding relevant admissible evidence which was essential to the Delfinos sole theory of defense - that they reasonably relied, in good faith, on false assurances from McCarley. The evidence was direct

evidence of the false representations made by McCarley and was circumstantially relevant to show that the same representations were made by McCarley to the Delfinos.

The Government could not gainsay their own witnesses' prior testimony, which the Government relied upon to convict McCarley. This evidence was crucial to establish the bona fides of the Delfinos's reliance on McCarley's apparently trustworthy advice. Without it the Delfinos were denied a reliance instruction and denied susbstantial evidence to support their good faith defense.

It was error as a matter of law to exclude this evidence, therefore the District Court abused its discretion in excluding the proffered testimony. The error was preserved by timely, specific objection. Therefore the burden is on the Government to show that the error was harmless, that is, that the complained of error did not contribute to the verdict beyond a reasonable doubt. That burden cannot be met, therefore this Court must vacate the convictions of counts one, two and three and remand for a new trial.

**II. WHETHER THERE WAS LEGALLY SUFFICIENT EVIDENCE TO PROVE THE MAIL FRAUD COUNT WHEN THE GOVERNMENT INTRODUCED NO EVIDENCE TO SHOW THE DELFINOS IN FACT USED ANY FORM OF INTERSTATE COMMERCIAL CARRIER TO RETURN THE FRAUDULENT LOAN APPLICATION AT ISSUE.**

The only Government witness to the mail fraud count was Kyle Mays, who was a loan officer for Countrywide Home Loans, Inc. of Plano, Texas. Mays testified that he remembered the Delfino loan application but he could not remember any specifics. Therefore the Court allowed the Government to question Mays, over defense objection, about the ordinary procedure for such loan applications. [[T1/25/2006; p. 453-464] Mays testified about a standard practice that was normally used:

> Q [GOVERNMENT] How do you send these documents back and forth?
>
> A [MAYS] Through *either UPS or FedEx, whichever carrier we're using at that time.*
>
> Q And then they send it back the same way?
>
> A Yes. They put a return envelope in there.

[T1/25/2006; p. 458] (emphasis supplied)

> Q Have you reviewed the documents that were provided to Countrywide Financial?
>
> A I did not actually review the information once it comes back to me, so I don't actually get the tax returns and the financial documents. *They*

> *do not come to me.* They come to my processor, which in this case was Randall. He's the one who puts it all together and then the underwriter reviews it.

[T1/25/2006; p. 461] (emphasis supplied)

On cross examination Mays acknowledged that the Form 1040 tax returns were returned in this case by fax transmission, and he further acknowledged that "there would be other methods that Countrywide likely has used to transmit or receive loan application information" including hand delivery or carried by airplane. [T1/25/2006; p. 464-465]

> Q [DEFENSE COUNSEL] But you don't have any specific knowledge about the transmission of these documents?
>
> A [MAYS] No.

[T1/25/2006; p. 467]

Count four specifically alleged that the Delfinos had caused to be sent *by a commercial interstate carrier, United Parcel Service* ("UPS"), (1) a uniform loan application, (2) a year 2000 Form 1040 tax return and (3) a year 2001 Form 1040 tax return, from the Eastern District of Virginia. The Court heard argument under Rule 29, Federal Rules of Criminal Procedure, that the evidence was insufficient to convict for mail fraud, because the evidence did not show that the Delfinos knowingly caused the loan application to be sent by the commercial interstate carrier alleged in the

superseding indictment. [T1/25/2006; p. 561; argument continues pp. 561-572] The defense asserted that "there was no testimony that you heard that any of those items were transported in a commercial interstate carrier." [T1/25/2006; p. 562] The defense pointed out that Mays testified that he could not remember the return of this material. [T1/25/2006; p. 562] Mays could not testify how any of the materials were transported; he acknowledged that they could have been transported by other means, and in fact conceded that the two Form 1040 tax returns were received by fax transmission, not by UPS as alleged in the indictment. The district judge acknowledged that Mays could not remember how the loan application was received in this case. ("Yes, he didn't remember this return.") [T1/25/2006; p. 563] The defense vigorously argued that there simply was no evidence how the loan application was returned to Countrywide. [T1/25/2006; p. 564] The District Court found that the two Form 1040 tax returns were returned to Countrywide by fax. ("I understand that, but the evidence here is tax returns were sent by fax. . . . So you lose on income tax returns.") [T1/25/2006; p. 566]

The Government then argued in support of the remaining item, the loan application:

> [AUSA IGNALL] So the Delfinos are in Virginia. He's [Countrywide's loan officer] in Plano, Texas. He sent one thing by overnight carrier and interstate commerce. Enclosed an envelope for which they can send the

> other one back. They [Countrywide] get it back. That is certainly some evidence which a reasonable juror could conclude that they sent it back by overnight carrier.
>
> [THE COURT] Like what? What's the evidence that they can conclude that they sent it back by?
>
> [AUSA IGNALL] That it came back and that there was - - that as counsel pointed out, there are any number of other ways they could have done it, but that requires some speculation other than the most logical. There's a reasonable inference to draw that if there's a return envelope in there, and the thing gets back to Plano, Texas. Why wouldn't a reasonable person just put that in there and just send it back?
>
> [THE COURT] So you think the jury can infer that?

[T1/25/2006; p. 568]

Nevertheless, the District Court denied the Rule 29 motion. [T1/25/2006; p. 580] The Rule 29 motion was renewed and denied again at the close of the defense case. [T1/26/2006; p. 750]

Count Four of the superseding indictment charged Mr. Delfino with mail fraud in violation of 18 U.S.C. § 1341. It alleged that, on or about June 11, 2002 *in the Eastern District of Virginia, Mr. Delfino sent documents by United Parcel Service* in furtherance of a scheme to defraud. The recipient of the documents was alleged to have been Countrywide Home Loans, Inc. in Plano, Texas.

The government's only witness to the mail fraud count at trial, Kyle Mays, a loan officer with Countrywide testified that the loan application was returned but he

had no knowledge as to how it was returned or where it was returned from.

The standard of review for sufficiency of the evidence is that the jury's verdict must be upheld on appeal if there is substantial evidence in the record to support it. *See Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). In determining whether the evidence in the record is substantial, the court of appeals views the evidence in the light most favorable to the government and inquires whether there is evidence that a "reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos,* 94 F.3d 849, 862 (4th Cir.1996) ( *en banc*), *cert. denied,* 519 U.S. 1151, 117 S.Ct. 1087, 137 L.Ed.2d 221 (1997).

Even under this generous standard the Government has failed to meet its burden. There simply was no competent evidence to establish this essential element of count four - that the loan application was sent by interstate commercial carrier. Certainly the evidence before the jury was not sufficient to support the defendants' guilt beyond a reasonable doubt. The conviction and sentence on count four must be vacated.[5]

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[5] Retrial on count four is barred by Double Jeopardy, because the Government failed to prove the charge by legally sufficient evidence. *Burks v. United States,* 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978).

## III. WHETHER THE COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL ON THE MAIL FRAUD COUNT WHEN THE GOVERNMENT FAILED TO ESTABLISH VENUE BY A PREPONDERANCE OF THE EVIDENCE.

The District Court extended the time permitted for filing post trial motions and timely motions for new trial were filed by both Delfinos. Mr. Delfino argued that the Government failed to establish venue for the mail fraud count, count four.[6] [R123-6-8] As noted in the motion for new trial, the burden of proof was on the Government to establish venue, *United States v. Burns*, 990 F.2d 1426, 1436 (4th Cir, 1993), but there was no evidence offered to that the alleged UPS package was shipped from the Eastern District of Virginia, assuming such a package was even used. [R123-8]

The Government response was that the defendants' venue objection had been waived by not raising it prior to the motion for new trial, and alternatively, that it could simply be "*presumed*" that the loan application, once filled out, was sent back from the Eastern District of Virginia, because that is where it had been sent to. [R130-5-6][7]

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[6] The District Court had permitted Jeaniene Delfino to adopt her husband's motions. [R48; R49]

[7] The Government argued in its written response to the venue issue that Mays had testified that it was the practice of Countrywide to send out *prepaid* return UPS or FedEx envelopes. [R130-6] The Government appears to be mistaken. A careful examination of Mays's testimony on this point fails to show any evidence that the return package was prepaid. [T1/25/2006; p. 458; p.466] In any event this would go

At the hearing on the motion for new trial, April 27, 2006, counsel for Mr. Delfino argued that the evidence showed that Mr. Delfino was doing computer consulting business around the country and could just as easily dropped the package in the mail at any airport, anywhere. [T4/27/2006; p. 43] However, the District Court ruled that the Delfinos had waived venue by not objecting during trial or alternatively, that the testimony of Mays was sufficient to establish venue, citing, incorrectly, the Government's claim that Mays testified that it was the practice of Countrywide to provide a prepaid return envelope and that it was reasonable to conclude that the Delfinos returned the envelope from the Eastern District of Virginia. [T4/27/2006; pp. 58-59]

The burden of proof is on the government to show venue. *See, e.g., United States v. Burns*, 990 F.2d 1426, 1436 (4th Cir. 1993). At the time the loan application was returned to Countrywide, the evidence at trial was that Mr. Delfino was traveling extensively for business. Moreover, the Delfinos lived relatively close to the Western District of Virginia.

In sum, it is reasonable, if not likely, to conclude that Mr. Delfino mailed the

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only to suggest that the Delfinos may have been inclined to use such a prepaid form of communication - circumstantial evidence that such a commercial interstate carrier was used or not - not to show where the package was sent from, if it was in fact used. But there was no such evidence.

loan application or deposited it with UPS or Fed Ex or, for that matter, the United States Postal Service during his travels. In any event, there was absolutely no evidence offered by the government to establish that the loan application was sent by UPS *from the Eastern District of Virginia.*

The Government must establish venue by a preponderance of the evidence, and the trial court's decision is reviewed by this court *de novo. United States v. Newsom,* 9 F.3d 337, 338 (4th Cir.1993). There was *no* evidence to support the venue element in count four, thus there was no preponderance of evidence. The conviction and sentence as to count four must be vacated because the Government failed to establish venue. Retrial on count four is barred by Double Jeopardy, because the Government failed to prove an element of the charge by legally sufficient evidence. *Burks v. United States,* 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978).

**IV. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THE TAX LOSS AMOUNT FOR SENTENCING PURPOSES WHEN THE DISTRICT COURT REFUSED TO MAKE A DETERMINATION OF THE ACTUAL TAX LOSS BY APPLYING DEDUCTIONS THE TAXPAYERS WOULD HAVE BEEN ENTITLED TO.**

In order to establish the "substantial income tax" element of the tax evasion counts at trial, the government relied primarily upon the testimony of former IRS auditor John Gordon. [*See* T 1/24/06; pp. 54-55] Mr. Gordon testified that he conducted an audit in order to determine the taxes owed by Mr. Delfino for the tax

years 1995-1997 and determined that Mr. Delfino owed $321,659 for 1995, $395,906 for 1996 and $119,233 for 1997. *Id*. at 88. Significantly, however, Mr. Gordon's audit was based only upon the *deposits* into accounts allegedly controlled by Mr. Delfino. *Id*. at 79 ("I used the total of those deposits to be their income.").Moreover, Mr. Gordon's audit did *not* credit Mr. Delfino with most deductions for 1995 and it did not credit him with any deductions for 1996 and 1997 although Mr. Gordon was confident that such deductions existed. *Id*. at 78 ("I disallowed all the deductions because there was no support for those deductions."); 79 ("I'm pretty confident there probably would have been deductions."); 81. Indeed, Mr. Gordon conceded on cross-examination that the figures he presented to the jury did "not accurately reflect[] the tax that [the Delfinos] would owe on that...." *Id*. at 92.

Despite the fact that Mr. Gordon subpoenaed bank records, he limited his subpoena to those records relating to deposits even though he could have requested records related to withdrawals in order to determine deductions to taxable income. *Id*. at 101. He also did not review Alpha & Omega's Quickbooks files or any other documents seized from the Delfino's home and apply any deductions that would have been determinable from those records. *Id*. at 102.[8]

[8] As part of the seizure, the Government seized: numerous bank records and canceled checks, business receipts, financial records as well as Alpha & Omega's Quickbooks file. *See* Attachment A (Inventory Listing of All Items Seized at Search

The PSR in turn based its determination of the "tax loss" for purposes of application of the sentencing guidelines on this trial evidence without any effort being made to make a more accurate determination of the tax loss. Using the deposit method of determining tax liability, the District Court established the base offense level for the controlling tax counts at level 24 pursuant to U.S.S.G. § 2T1.1(a)(1) based on a tax loss amount of $4,717,218.22. [PSR p. 8 and Worksheet A]

This was the IRS's estimate of tax loss without giving the Delfinos the benefit of deductions from income that they would have been entitled to had they filed proper tax returns.

The Delfinos objected at sentencing arguing that they were prepared to establish their proper deductions and thereby allow the Court to determine their actual tax liability. It was the defendants' position that the District Court must calculate the tax loss figure for purposes of application of the federal sentencing guidelines by allowing the defendants proper credit for deductions from income. [T4/27/2006; pp. 89-100] The Delfinos offered to establish their deductions at sentencing, but the District Court determined that such a fact finding was not required under its understanding of the application of the guidelines.

Had the Delfinos' position been accepted, they proffered that the correct base

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Warrant Site).

offense level would have been level 20, instead of the base level 24 in the PSR, a four level difference. [T4/27/2006; p. 91][9]

The Delfinos argued that binding precedent from this Circuit required the District Court to attempt an accurate determination of the actual tax loss and not simply rely upon an objected to estimate that clearly did not reflect the true tax liability. The Delfinos cited *United States v. Schmidt*, 935 F.2d 1440, 1451 (4th Cir. 1991). In *Schmidt* this Court held:

> With such policy as backdrop, the government has urged that 1) to allow appellants to offset understated individual income with falsely claimed, largely untaxed trust income would give an undue degree of approval to the very scheme for which they were convicted and 2) to treat income reported by UBO investors on trust returns as if it had been correctly reported on individual returns would thus subvert the deterrent purpose of the Guidelines set out above.
>
> The choice before us is thus between punishing a crime whose gravity is represented by the actual loss of tax revenue to the IRS and one whose gravity is represented by the full extent of participation in a tax evasion scheme regardless of the tax consequences to the government. A fair reading of Section 2T1.3(a) supports only the former. The government simply is not suffering a "tax loss" merely because the taxpayer reports his income on a trust return rather than an individual return. Certainly such a theory would die of its own weight the minute the Service attempted to collect its "loss" by asserting a claim to all of the income reported on the trust tax returns. In our view, then, the understated gross income here is represented only by non-legitimate deductions and

[9] Mr. Delfino's counsel stated that the guideline range should be that based on a tax loss equal to "the 400,000 to 1 million, which I submit is the appropriate amount . . . " Under U.S.S.G. § 2T4.1(H), this would be a base level 20. [T4/27/2006; p. 91]

> any income "distributed" off-shore to FSBL. We remand the case for a recalculation of all of the appellants' base offense levels consistent with our view of the *actual* tax loss sustained by the government.

The District Court noted *Schmidt* appeared to require the application of the method argued by the Delfinos, nevertheless, the District Court treated the gross income of the Delfinos without benefit of any claimed offsetting deductions, as the tax loss for guideline purposes. [T4/27/2006; pp. 100-101; pp. 121-124]

The District Court suggested that *Schmidt* was no longer controlling authority in light of a subsequent amendment to the guidelines, but the Delfinos rightly argued that the amendment the Court noted, if anything, reinforced their position. Indeed, U.S.S.G. § 2T1.1(c)(2) of the November 2005 version of the guideline manual applied by the District Court, expressly requires "[i]f 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*." U.S.S.G. § 2T1.1(c)(2), comm. n. A instructs the Court is to treat the amount owed as 20% of the gross income *unless a more accurate determination of the tax loss can be made*:

> (A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

This direction from the Sentencing Commission cannot simply be ignored by the District Court. Indeed, Sentencing Commission commentary is binding on the Court unless it is inconsistent with the guideline. *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913 (1993) (Commentary in sentencing guidelines manual that interprets or explains the guideline is authoritative unless it violates the Constitution or the authorizing federal statute or is inconsistent with or a plainly erroneous reading of that guideline.)

*See also United States v. Martinez-Rios*, 143 F.3d 662, 671 (2nd Cir. 1998), which stated in *dicta*:

> In contrast, the 1995 Guidelines, which were in effect at the time of sentencing, do not foreclose consideration of legitimate but unclaimed deductions. The 1995 version of section 2T1.1 defines "tax loss" as "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)." U.S.S.G. § 2T1.1(c)(1) (1995). The Guideline provides, in pertinent part:
>
> > If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, *unless a more accurate determination can be made.*
>
> *Id.* § 2T1.1(c)(1)(A) (emphasis added) (1995). Under this Guideline, the sentencing court need not base its tax loss calculation on gross unreported income if it can make "a more accurate determination" of the intended loss and that determination of the tax loss involves giving the

defendant the benefit of legitimate but unclaimed deductions.

*accord*, *United States v. Gordon*, 291 F.3d 181, 187-188 (2nd Cir. 2002) (agreeing that deductions should be determined in calculating tax loss for § 2T1.1, but finding error harmless on facts of case);

Had the Delfino's objection been sustained, the total offense level would have been 22, criminal history category I, for a sentencing range of 41-51 months, instead of the 63-78 months determined by the District Court.[10] The District Court erred in overruling the Delfinos' objection and the error prejudiced the Delfinos because it increased the advisory guideline by 22 months at the low end and 27 months at the high end, and each of the Delfinos was sentenced within the advisory guideline range as erroneously determined by the District Court.

If the judgment and sentence on counts one, two and three is not otherwise vacated based on the argument in Issue One *supra*, then the sentencing package should be vacated in its entirety for resentencing with instructions on remand that the District Court accurately determine the actual tax loss based on the deductions that can be established by the Delfinos at the sentencing hearing.[11]

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[10] The base offense level was increased two additional levels for use of sophisticated means under U.S.S.G. § 2T1.1(b)(2).

[11] As a practical matter what would be anticipated is that the parties would resolve the objection prior to resentencing by way of the objection resolution

## CONCLUSION

Appellants JAMES DOMINIC DELFINO and JEANIENE A. DELFINO respectfully request this honorable Court vacate their judgments and sentences as to all four counts and remand the case for a new trial on counts one through three. Retrial on count four is barred by Double Jeopardy, because the Government failed to prove the charge by legally sufficient evidence. *Burks v. United States,* 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978).

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

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WILLIAM MALLORY KENT
Florida Bar Number 260738
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000
904-348-3124 Fax
kent@williamkent.com

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procedure of U.S.S.G. § 6A1.2(b) once they probation office and lower court were properly instructed on the procedure to be followed in determining tax loss and little if any further time of the District Court need be spent in determining the actual tax due.

## CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been furnished to G. Wingate Grant, Esq. and Charles Philip Rosenberg, Esq., Assistant United States Attorneys, 600 East Main Street, 18th Floor, Richmond, Virginia, 23219, and Alan Hechtkopf, Esq., Gregory Victor Davis, Esq., and David J. Ignall, Esq., United States Department of Justice, Tax Division, 601 D. Street NW, Washington, D.C. 20530, by Federal Express, overnight delivery, postage prepaid, this October 11, 2006.

_____

William Mallory Kent

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 8,892 words.

## CERTIFICATE OF TYPE SIZE AND STYLE

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