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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. LINDA PAYNE, Defendant.	CASE NO. CR 03-0096 MMM ORDER ON MOTION TO DISMISS

Linda Payne is charged in a three-count indictment with theft of government property in violation of 18 U.S.C. § 641, Social Security fraud in violation of 42 U.S.C. § 408(a)(3), and making a false statement in violation of 18 U.S.C. § 1001. All counts are based on allegations that Payne, *inter alia*, cashed her deceased grandmother's Social Security checks between January 1994 and April 2002. Payne has moved to dismiss the first count, asserting that it is duplicitous. The first count charges that, beginning in or around January 1994, and continuing until in or around April 2002, Payne "did embezzle, steal, and purloin money of the Social Security Administration . . . namely, Social Security Retirement Insurance Benefits ("RIB") payments made to her to which she knew she was not entitled, having a value of approximately $63,591."[1]

[1] Indictment, Count One.

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I. DISCUSSION

A. Duplicity[2]

"An indictment is duplicitous where a single count joins two or more distinct and separate offenses." *United States v. Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir. 2001), cert. denied, 537 U.S. 930 (2002). Payne asks the court to dismiss the indictment because of alleged duplicity. The rule against duplicitous indictments is intended, in part, to protect a criminal defendant's right to a unanimous jury verdict. Because a duplicitous indictment charges more than one offense in the same count, there is a risk that "a jury may find a defendant guilty on a count without having reached a unanimous verdict on the commission of a particular offense." *Id.* (quoting *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir.), cert. denied, 430 U.S. 966 (1977)). A duplicitous indictment may also violate a defendant's right to notice of the charges against her. See *United States v. King*, 200 F.3d 1207, 1212 (9th Cir. 1999) ("A duplicitous indictment compromises a defendant's Sixth Amendment right to know the charges against him . . ."). Finally, duplicity raises double jeopardy concerns, because a duplicitous indictment may hinder a defendant's ability to plead double jeopardy as a defense to a subsequent prosecution. See *id.* ("A duplicitous indictment compromises a defendant's . . . Fifth Amendment protection against double jeopardy"); *United States v. Aguilar*, 756 F.2d 1418, 1420, n. 2 (9th Cir. 1985) ("A duplicitous indictment also could eviscerate the defendant's Fifth Amendment protection against double jeopardy, because of a lack of clarity concerning the offense for which he is charged or convicted").

The rules regarding "duplicity are pleading rules, the violation of which is not fatal to an indictment." *Ramirez-Martinez*, *supra*, 273 F.3d at 915 (quoting *United States v. Robinson*, 651 F.2d 1188, 1194 (6th Cir. 1981)). "[A] defendant indicted pursuant to a duplicitous indictment

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[2] In her reply, Payne requests that the court dismiss count one of the indictment as "multiplicitous." An indictment is multiplicitous if it charges "the same offense in more than one count." 1A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 145 (3d ed. 1999). Here, as reflected in Payne's moving papers, she contends count one is duplicitous, i.e., that it charges more than multiple substantive offenses. Payne does not argue that multiple counts of the indictment charge the same offense.

may be properly prosecuted and convicted if either (1) the government elects between the charges in the offending count, or (2) the court provides an instruction requiring all members of the jury to agree as to which of the distinct charges the defendant actually committed." *Id.*; see also *Robinson*, *supra*, 651 F.2d at 1194 ("Defendant's remedy is to move to require the prosecution to elect . . . the charge within the count upon which it will rely. Additionally, a duplicitous . . . indictment is remediable by the court's instruction to the jury particularizing the distinct offense charged in each count in the indictment").

B. Whether Count One Is Duplicitous

Payne argues that count one is duplicitous because it charges several discrete acts of theft, dating back to 1994 and spanning some six years. Payne contends that each alleged theft of a social security check is a separate and distinct offense. Because count one alleges multiple thefts that took place prior to January 31, 1998, Payne argues that portions of the count are time-barred.[3] The government counters – as it alleged in the indictment[4] – that Payne's theft of social security checks constitutes a single "continuing offense."

Various courts have held that indictments charging a continuing course of criminal conduct in a single count are not duplicitous. See *United States v. Buchmeier*, 255 F.3d 415, 421 (7th Cir. 2001) ("an indictment charging multiple acts in the same count, each of which could be charged as a separate offense, may not be duplicitous where these acts comprise a continuing course of conduct that constitutes a single offense"); *United States v. Jaynes*, 75 F.3d 1493, 1503 & n. 7 (10th Cir. 1996) (holding that a count which charged multiples acts of forgery was not duplicitous, and stating: "Count one of the indictment charged Ms. Jaynes with forging her

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[3] The statute of limitations on the offense is five years. See 18 U.S.C. § 3282 ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed"). Payne was indicted on January 31, 2003. Assuming that each theft of a social security check is a separate offense, thefts that took place prior to January 31, 1998, would be barred by the statute of limitations.

[4] Indictment, Count One.

grandmother's name on sixty-four Treasury checks, and count two charged her with uttering and passing those same checks. Presumably, the alleged forgeries were all part of a single scheme and thus properly charged in a single count"); *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989) ("This Circuit has held that acts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme," citing *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) ("a single count of an indictment should not be found impermissibly duplicitous whenever it contains several allegations that could have been stated as separate offenses, . . . but only when the failure to do so risks unfairness to the defendant"), cert. denied, 461 U.S. 913 (1983)); *United States v. Shorter*, 809 F.2d 54, 56 (D.C. Cir.) (rejecting a duplicity challenge to an indictment because "it is well established that two or more acts, each of which would constitute an offense standing alone, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme"), cert. denied, 484 U.S. 817 (1987), abrogated on other grounds, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *United States v. Berardi*, 675 F.2d 894, 898-99 (7th Cir. 1982) (noting that "the indictment, fairly interpreted, charge[d] Berardi with a continuing course of conduct, during a discrete period of time, to influence" one witness's grand jury testimony, the court concluded that the acts constituted one violation of § 1503 and the count was not duplicitous); *id.* at 899 ("'[w]hen the offenses joined bear a relationship to one another and may be said to constitute a continuing course of conduct, the 'distinct and separate' test should be applied, not as a metaphysical exercise, but with a view toward serving the purposes of the prohibition against duplicity,'" quoting *United States v. Pavloski*, 574 F.2d 933, 936 (7th Cir. 1978)); *Cohen v. United States*, 378 F.2d 751, 754 (9th Cir.) (". . . the first count charged but a single offense of knowingly transmitting wagering information by interstate telephone between the points, during the period, and for the purpose specified. It was not rendered duplicitous because the bill of particulars and subsequent proof related to a series of calls, even though each might have been alleged as a separate violation"), cert. denied, 389 U.S. 897 (1967); see also *United States v. Morales*, 11 F.3d 915, 918 (9th Cir. 1993) ("The government probably could have divided the scheme into multiple counts, but the

form of the indictment has never been an issue in this case. . ."). Whether or not the government has alleged a "continuing offense," it has clearly alleged a continuing course of conduct. Under the authorities cited, therefore, count one is not duplicitous so long as it does not result in prejudice or unfairness to the defendant.

Defendant asserts that the manner in which the count is charged does prejudice her, however, because theft under § 641 is not a "continuing offense," and certain of the thefts charged in count one fall outside the five year statute of limitations. Any analysis of this issue must begin with the Supreme Court's decision in *Toussie v. United States*, 397 U.S. 112 (1970). There, the Court noted that generally the statute of limitations begins to run when an offense is "complete." (*id.* at 115), or more precisely, "when each element of that offense has occurred" (*United States v. Yashar*, 166 F.3d 873, 875 (7th Cir. 1999); *United States v. McGoff*, 831 F.2d 1071, 1078 (D.C. Cir. 1987)). An exception to this general rule exists, however, where there is a "continuing offense." The Supreme Court has cautioned that the continuing offense doctrine "should be applied in only limited circumstances," and that offenses should not be deemed continuing "unless [1] the explicit language of the substantive criminal statute compels such a conclusion, or [2] the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, *supra*, 397 U.S. at 115. The following discussion by the Seventh Circuit is helpful in understanding the doctrine:

> "The classic example of a continuing offense is a conspiracy, but other offenses such as escape or kidnapping also may fall within those definitions. The hallmark of the continuing offense is that it perdures beyond the initial illegal act, and that 'each day brings a renewed threat of the evil Congress sought to prevent' even after the elements necessary to establish the crime have occurred. For those crimes, the statute of limitations does not begin to run when all elements are first present, but rather begins when the offense expires. Therefore, for a conspiracy offense, the statute of limitations would not run from the time of the first overt acts, but instead would run from the occurrence of the last act in furtherance. Because the continuing offense doctrine extends the statute of limitations, we are admonished

to construe that term narrowly." *Yashar*, *supra*, 166 F.3d at 875-76 (quoting *Toussie*, *supra*, 397 U.S. at 122 (internal citations omitted)).

The parties agree that the express language of 18 U.S.C. § 641 does not compel a conclusion that the offense is continuing. The question, rather, is whether "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, *supra*, 397 U.S. at 115.

The only federal court of appeals that has addressed this issue is the Fourth Circuit.[5] In

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[5] The government appears to contend otherwise, but relies on cases that interpret a different clause of § 641 than the one charged here. Specifically, the government relies on *United States v. Blizzard*, 27 F.3d 100 (4th Cir. 1994), which considered whether unlawfully *concealing* and *retaining* government property, in violation of the second clause of § 641, constitutes a continuing offense. *Id.* at 102; see also 18 U.S.C. § 641 (prohibiting, in its second clause, the "conceal[ing] or retain[ing]" of stolen government property; *United States v. Beard*, 713 F. Supp. 285, 287-89 (S.D. Ind. 1989) (distinguishing the offenses defined in the first and second paragraphs of § 641). The *Blizzard* court held that it did, likening "retaining and concealing" property to possession. *Blizzard*, *supra*, 27 F.3d at 102 (citing *Jordan v. Virginia*, 653 F.2d 870, 875 (4th Cir. 1980) ("[p]ossession is by nature a continuing offense")); *id.* at 103 (". . . the gravamen of the offense of concealing and retaining stolen government property is simply the possession of that property"). This holding is unremarkable, as other cases make clear that unlawful possession of a person or thing is generally considered a continuing offense. See, e.g., *United States v. Horodner*, 993 F.2d 191, 193 (9th Cir. 1993) (gun possession is a continuing offense); *United States v. Kayfez*, 957 F.2d 677 (9th Cir. 1992) ("The 'instant offense' in this case is the possession of counterfeit notes on or about October 26, 1988. Possession is a continuing offense"); *United States v. Garcia*, 854 F.2d 340, 343 (9th Cir. 1988) ("[T]he crime [of kidnapping] continues as long as the victim is held"). As the indictment does not charge Payne with retaining or concealing government property, the court cannot rely on cases that interpret that portion of § 641 in deciding whether count one charges acts that are barred by the statute of limitations.

United States v. Fleetwood, 489 F. Supp. 129 (D. Or. 1980), *United States v. Morrison*, 43 F.R.D. 516 (N.D. Ill. 1967), and *United States v. Frezzo*, 659 F. Supp. 54 (E.D. Pa. 1987), are inapposite for the same reason. Like *Blizzard*, *Fleetwood* dealt with the second clause of § 641, and relied on the fact that "the Ninth Circuit . . . appl[ies] the continuing crime doctrine to crimes where the 'essence of the offense' is possession." *Id.* at 131; see also *id.* at 132 ("the nature of a crime such as concealing and retaining stolen property, where possession is the essence of the offense, is such that Congress must have intended it be treated as a continuing offense"). Similarly, in *Morrison*, the information charged that defendant had willfully and knowingly concealed her mother's death to secure the payment of Social Security benefits. See *Morrison*, *supra*, 43 F.R.D. at 517; *id.* at 518 ("No duplicity is created because the lack of disclosure continued throughout a series of payments"). Here, as charged by the government, the "essence

United States v. Smith, __ F.3d __, 2004 WL 1405320 (4th Cir. June 24, 2004), the court held that a continuing course of embezzling, stealing, purloining and converting to defendant's own use of funds belonging to the Social Security Administration in violation of § 641 constituted a continuing offense.[6] It concluded that because the defendant had "formulated 'a plan or scheme or [set] up a mechanism which, when put into operation, [would] result in the taking or diversion of sums of money on a recurring basis,' the crime may be charged in a single count." *Id.* at * 2 (quoting *United States v. Billingslea*, 603 F.2d 515, 520 (5th Cir. 1979)), and stating that "Smith's failure to report his mother's death evidences the intent to establish a mechanism for the automatic and continuous receipt of funds for an indefinite period. Smith's criminal conduct was patterned and methodical. Therefore, the indictment properly aggregated his charged conduct into one count").

Noting that the government was required to prove only that defendant engaged in one of the prohibited acts alleged in the indictment (i.e., embezzling, stealing, purloining or converting), the court concluded that Congress must have intended that embezzlement could constitute a continuing offense under certain circumstances. *Id.* It noted first that a defendant who comes into

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of the offense" is not possession or concealment. Rather, it is the "embezzl[ing], steal[ing], and purloin[ing] money of the Social Security Administration."

[6] Prior to this decision, no federal appeals court had addressed the issue. See *United States v. Silkowski*, 32 F.3d 682, 690 (2d Cir. 1994) ("Although no Court of Appeals has decided the issue to date, we note that several district courts have construed a violation of section 641 as a non-continuing offense regardless of the language contained in the underlying charging document, while others have found to the contrary" (internal citations omitted)). Each party argues that *Silkowski* supports her or its position. *Silkowski* concerned a provision of the Victim and Witness Protection Act that, in the absence of an express agreement between the parties to the contrary, authorizes restitution only for losses caused by the offense of conviction. *Silkowski*, *supra*, 32 F.3d at 689. The government conceded that it had not charged a continuing offense in the information, and the court noted that even if it had, it was doubtful the defendant had entered a valid guilty plea to such an offense. *Id.* at 690. As a result, the court held that the defendant could be ordered to pay restitution "only [for] conduct going back five years from the date of the information and waiver of indictment, March 31, 1993." *Id.* In so concluding, the *Silkowski* court did not address the issue presently before the court. Indeed, it intimated no view on the subject, noting only that district courts had reached different conclusions as to whether a violation of § 641 could constitute a continuing offense. *Id.*

lawful possession of funds that he thereafter unlawfully retains can be convicted of embezzlement. Since the SSA deposited monies into a joint bank account that Smith held with the decedent, the court concluded that he had come into possession of the funds lawfully, and that this fact distinguished his crime from larceny. *Id.* at * 5-6. It then concluded that "the indictment [could] be fairly construed to aver a charge of embezzlement that could be proven, without surprise to Smith, by evidence showing that Smith, having legal possession of the funds as they were initially deposited into his account, then, after realizing that his continued possession was improper, willfully retained the funds for his own use, and maintained that recurring, automatic scheme of embezzlement during the charged period." *Id.* at * 6. As respects the "continuing offense" doctrine, the court held that

> "[a]t least in those cases where the defendant created a recurring, automatic scheme of embezzlement under section 641 by conversion of funds voluntarily placed in the defendant's possession by the government, and maintained that scheme without need for affirmative acts linked to any particular receipt of funds – cases in which there is a strong 'temporal relationship between the [completion of the] offense and culpability,' . . . – we think that Congress must have intended that such be considered a continuing offense for purposes of the statute of limitations."
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> " And, of course, that is precisely what Smith has done. . . . Accordingly, we believe that the specific conduct at issue here is more properly characterized as a continuing offense rather than a series of separate acts. The facts found by the district court were sufficient to prove that he set into place and maintained an automatically recurring scheme whereby funds were electronically deposited in his account and retained for his own use without need for any specific action on his part, a scheme which continued from his mother's death until payments were terminated in February of 1998." *Id.*

The Fourth Circuit cautioned, however, that it did not mean "to say that all conduct constituting embezzlement may necessarily be treated as a continuing offense as opposed to merely 'a series of acts that occur over a period of time'; indeed, it may well be that different embezzlement

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conduct must be differently characterized in this regard." *Id.* at * 7.

> In his dissenting opinion, Judge M. Blane Michael noted this caution, and wrote: "The majority's opinion concludes that a particular offense, in this case embezzlement, may be treated as either a continuing offense or a non-continuing offense for statute of limitations purposes, depending on how the crime is carried out. . . . Because I do not believe this conclusion is consistent with the teachings of *Toussie v. United States*, 397 U.S. 112 . . . (1970), I respectfully dissent. . . . The majority relies on the second Toussie factor – the nature of the crime – to conclude that embezzlement is a continuing offense 'at least in those cases where the defendant created a recurring, automatic scheme.' . . . The majority goes on to say that 'it may well be that different embezzlement conduct must be differently characterized' for purposes of the continuing offense doctrine. . . . Under *Toussie*, however, whether an offense is continuing 'turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue.'" *Id.* at * 7 (quoting *United States v. Niven*, 952 F.2d 289, 293 (9th Cir.1991)).

Judge Michael also took issue with the majority's attempted distinguishing of larceny and embezzlement. He stated:

> "There is nothing inherent in the act of embezzlement that makes it a continuing offense. . . . Embezzlement is simply a variant of larceny with the additional element that 'the original taking of the property was lawful or with the consent of the owner.' . . . The majority says that embezzlement is frequently conducted 'over some time and in relatively small, but recurring, amounts.' . . . But to say that embezzlement is frequently conducted in this way does not alter the substantive (or inherent) nature of the offense. Indeed, the fact that embezzlement can be completed in one distinct transaction undermines the notion that it is inherently a continuing crime." *Id.* at * 8.

Judge Michael concluded that because the language of the first clause of § 641 did "not 'clearly contemplate a prolonged course of conduct,'. . . the manner in which the offense [was] carried

out [could not] provide justification for finding a continuing offense." *Id.* He warned that "[b]y introducing the prospect that an offense may be either continuing or non-continuing, depending on the manner in which it is committed, the majority [had brought] about an unwarranted expansion of the continuing offense doctrine." *Id.*

Various district courts have also considered whether the first clause of § 641 defines a "continuing offense" for statute of limitations purposes. Like the judges of the Fourth Circuit, these courts have reached different conclusions. Compare *Beard*, *supra*, 713 F. Supp. at 291 (analogizing the first clause of § 641 to common law conversion, concluding that a violation of the clause is not a "'continuing offense' and [holding] that the five-year statute of limitations set out in 18 U.S.C. § 3282 begins running at the time the actual conversion is accomplished, not upon the date the converter ceases to exercise control over the money or property in question") with *United States v. Miller*, 200 F. Supp. 2d 616, 619 (S.D. W.Va. 2000) (the government properly charged a defendant's unlawful endorsing and cashing of numerous social security checks as a continuing offense because "by endorsing the checks in her mother's name, Defendant gave the United States a basis to assume Ruth Howard was alive and therefore, the Government continued without suspicion to mail the checks to the joint post office box. Because each fraudulent endorsement perpetuated the overall ruse, the offense properly is charged as a single, continuing offense"); *United States v. Aubrey*, 53 F. Supp. 2d 1355, 1356 (E.D. Tex. 1999) (holding that the crime described in the first paragraph of § 641 is a continuing offense, if charged as such, and relying on *United States v. Bustamante*, 45 F.3d 933, 942 (5th Cir. 1995), which held that accepting illegal gratuities was a continuing offense because "Bustamante is not accused of committing a crime that has continuing effects after its completion. Rather he was charged with accepting illegal gratuities over an extended period of time. . . . Bustamante was therefore charged with continuing criminal behavior").

The Ninth Circuit has addressed the continuing offense doctrine on multiple occasions. In *United States v. Niven*, 952 F.2d 289 (9th Cir. 1991), applying *Toussie*, the court held that whether an offense is continuing "turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue." *Id.* at 293. After examining the mail

and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, the court concluded that they "criminalize[d] each specific use of the mail or wire." *Id.* Because "[e]ach offense [was] complete when the fraudulent matter [was] placed in the mail or transmitted by wire, respectively," the court held that violations of the statutes were not continuing offenses. *Id.*; see also *United States v. Barger*, 178 F.3d 844, 847 (7th Cir. 1999) ("Mail fraud is not an offense listed as a 'continuing offense' whose statute of limitations begins at the end of a continuous course of criminal conduct").

In *Morales*, *supra*, 11 F.3d 915, a criminal defendant charged with bribery in violation of 18 U.S.C. § 201(b)(2) argued that his sentence violated the *Ex Post Facto* Clause (see U.S. CONST., ART. I, § 9, cl. 3) because he was sentenced under sentencing guidelines that were not in effect on the date he accepted certain of the bribes underlying the conviction. *Morales*, *supra*, 11 F.3d at 916. The guidelines in effect on the date of sentencing mandated a two-level increase in the base offense level if the offense "involved more than one bribe." *Id.* While the defendant acknowledged that he had accepted several bribes, he argued that only one had been received after the effective date of the relevant guidelines, and thus that the adjustment should not be applied. *Id.* A split panel of the circuit rejected defendant's argument. It held that "defendant was not sentenced for any individual offense based on a Guideline provision that became effective after that offense was completed. Rather, the conduct for which appellant was sentenced extended beyond the time when the relevant Guideline provision became effective." *Id.* at 917 (citing *United States v. Nivens*, 952 F.2d 289, 293 (9th Cir. 1991)).[7]

The court also concluded that the district court did not err in aggregating losses from pre- and post-Guideline bribes in calculating the amount of loss under § 2F1.1 of the Guidelines, and

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[7] The "continuing offense" doctrine was not critical to this aspect of the court's holding, as the evidence showed that defendant had received numerous payments from various sources after the effective date of the guideline in question. As a result, the court noted, the two level adjustment for "more than one bribe" was properly applied irrespective of any pre-Guideline conduct. See *Morales*, *supra*, 11 F.3d at 917 (detailing defendant's receipt of payments after the effective date of the guideline in question, noting that there were several "separate acts of bribery," and concluding that "[t]here was no error in utilizing the enhancement provision for multiple bribes occurring after the effective date of the Guideline").

in grouping offenses that occurred both before and after enactment of the Guidelines. *Id.* It held that circuit authority clearly permitted "[e]nhancing penalties for post-Guideline conduct [based] on acts that occurred before the Guidelines. . . ." *Morales*, *supra*, 11 F.3d at 917 (citing *United States v. Ahumada-Avalos*, 875 F.2d 681 (9th Cir.), cert. denied, 493 U.S. 837 (1989)). Noting the dissent's reliance on the continuing offense doctrine, the majority stated: "The doctrine of 'continuing offense' has no applicability to a situation like this where the charged criminal conduct itself extends over a period of time. The doctrine comes into play where it is contended that the actual conduct of the defendant ended but the crime continued past that time." *Morales*, *supra*, 11 F.3d at 918.[8]

Finally, in *United States v. Nash*, 115 F.3d 1431 (9th Cir. 1997), cert. denied, 522 U.S. 1117 (1998), the court concluded that violation of 18 U.S.C. § 1344 constituted a continuing offense because the statute prohibited execution of a scheme to defraud, not individual fraudulent acts. *Id.* at 1440-41; see also *United States v. Najjor*, 255 F.3d 979, 983-84 (9th Cir. 2001) (holding that the execution of a scheme to defraud or obtain money "is a continuing offense" for statute of limitations purposes, and therefore that the statute on bank fraud begins to run when the last act "in furtherance of the scheme" is committed), cert. denied, 536 U.S. 961 (2002). In reaching this result, the court specifically distinguished *Niven*, noting "that mail and wire fraud

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[8] The Seventh Circuit criticized this reasoning in *Yashar*, *supra*, 166 F.3d 873. Under the Ninth Circuit's reasoning, the Seventh Circuit argued, "a prosecutorial decision regarding the scope of the charge would determine the running of the limitations period. In that manner, the statute of limitations, designed as a control on governmental action, would instead be defined by it. Virtually any criminal actions that extend over time could fall within this expansive definition depending upon how a prosecutor chose to charge a case. The government could then wait to prosecute until well beyond five years after the initial drug sales, as long as at least one overt act occurred within the last five years, and regardless of whether that one act constituted an element of the charged crime. With this approach, the limitations period would be virtually unbounded." *Id.* at 878-89; see also *Morales*, *supra*, 11 F.3d at 919 (O'Scannlain, J., dissenting in part) ("I do not dispute the fact that 'the *conduct* for which appellant was sentenced extended beyond the time when the relevant Guideline provision became effective.' But this fact is not dispositive, and is indeed irrelevant, under our precedents . . . [because under *Toussie*,] "*the analysis turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue*," quoting *Niven*, *supra*, 952 F.2d at 293 (emphasis original)).

. . . punish each use of the mail or wires," while "Section 1344, on the other hand, involves the execution of the overall scheme." *Id.* at 1441.

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Reviewing these cases, it is clear that, in the Ninth Circuit, whether or not a crime constitutes a continuing offense depends on "the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue." *Niven*, *supra*, 952 F.2d at 293. In making this evaluation, the court must determine whether the nature of the crime contemplates that the defendant's criminal conduct will end before the crime itself is complete. *Morales*, *supra*, 11 F.3d at 918.[9] In the instant case, the crime with which Payne is charged is not one which continues after defendant's criminal acts have ceased. It cannot, therefore, constitute a continuing offense.

The result in *Smith* does not change this analysis. As Judge Michael noted in dissent, the *Smith* majority's decision that the embezzlement charged in that case constituted a continuing offense relied on "the manner in which the offense [was] carried out" rather than on the nature of the substantive crime. *Smith*, *supra*, 2004 WL 1405320 at * 8.[10] Such an approach is fundamentally inconsistent with the Ninth Circuit's direction that application of the continuing

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[9] The *Morales* court's additional statement that "[t]he doctrine of 'continuing offense' has no applicability to a situation like this where the charged criminal conduct itself extends over a period of time" does not, in the court's view, compel the conclusion that the government can charge discrete acts of criminal conduct extending over a period of time as a single offense in order to capture conduct that falls outside the statute of limitations. The court merely expressed its view that discussion of the doctrine was inapposite in the circumstances of the case before it, and that conduct that occurred before the Guidelines were enacted could be considered in enhancing a sentence under the Guidelines. *Morales*, *supra*, 11 F.3d at 917 (stating that prior cases authorized "[e]nhancing penalties for post-Guideline conduct [based] on acts that occurred before the Guidelines. . .").

[10] Even if the court were to apply the rule announced by the majority in *Smith*, it could not conclude on the face of the indictment that Payne's offense was a continuing one. The indictment does not allege that Payne "set into place and maintained an automatically recurring scheme whereby funds were electronically deposited in his account and retained for his own use without need for any specific action on his part. . . ." *Smith*, *supra*, 2004 WL 1405320 at * 6. The scheme could just as well have required recurring acts on Payne's part - i.e., monthly endorsement and deposit of Social Security checks issued in her grandmother's name.

offense doctrine turns on "the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue." *Niven*, *supra*, 952 F.2d at 293. It is also inconsistent with the Supreme Court's direction that the "continuing offense" doctrine "should be applied in only limited circumstances." *Toussie*, *supra*, 397 U.S. at 115. Accordingly, the court declines to follow *Smith*.

III. CONCLUSION

For the reasons stated, the motion to dismiss the first count of the indictment is denied. The government, however, may prosecute Payne only for those thefts of government monies that took place within five years of the date the indictment was filed, i.e., January 31, 2003.

DATED: June 28, 2004

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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