Criminal Tax Bulletin

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FOURTH AMENDMENT

Eleventh Circuit Holds Fourth Amendment Does Not Require Warrant, Probable Cause, or Suspicion for Border Forensic Searches of Electronic Devices

In ***United States v. Vergara***, 884 F.3d 1309 (11th Cir.), *cert. denied*, 139 S. Ct. 70 (2018), the Eleventh Circuit held that forensic searches of electronic devices conducted at the border do not require a warrant or probable cause.

Two months later, in ***United States v. Touset***, 890 F.3d 1227 (11th Cir. 2018), the Eleventh Circuit held that these searches of electronic devices at the border do not require suspicion.

Upon the arrival of Hernando Vergara ("Vergara") in Florida from Mexico, U.S. Customs and Border Protection ("CBP") and Department of Homeland Security ("DHS") conducted a forensic search of three cell phones found on Vergara's person and in his luggage. After the district court denied his motion to suppress evidence from the warrantless forensic searches of his cell phones, Vergara was convicted of transportation and possession of child pornography and sentenced to 96 months' imprisonment, followed by supervised release for life. Vergara appealed.

The Eleventh Circuit affirmed Vergara's conviction, holding that the Supreme Court's decision in *Riley v. California*, 573 U.S. 373 (2014) (holding search incident-to-arrest exception to the warrant requirement does not apply to cell phones), did not change the longstanding rule that border searches are an exception to the Fourth Amendment's warrant and probable cause requirements. The court noted that the highest standard for a search at the border is reasonable suspicion and that standard only applies to highly intrusive searches of a person's body.

Karl Touset ("Touset") also was convicted of child pornography offenses, after the district court denied his motion to suppress evidence obtained through CBP and DHS's border search of electronic devices found on Touset's person and in his luggage. While the court opined that reasonable suspicion is required for a forensic search of electronic devices at the border, it concluded that such suspicion existed in this case. Ultimately, Touset was sentenced to 120 months' imprisonment, followed by supervised release for life, and he appealed.

The Eleventh Circuit affirmed Touset's conviction, holding that the Fourth Amendment does not require any suspicion for forensic searches of electronic devices at the border, noting that "searches at the border … 'never require probable cause or a warrant,'" and "are reasonable without suspicion simply by virtue of the fact that they occur at the border." Alternatively, the appellate court held that even if the forensic searches of Touset's electronic devices required reasonable suspicion, such suspicion was present in this case as the government had a "particularized and objective basis for suspecting" that Touset possessed child pornography on his electronic device.

Judge Corrigan, who concurred in part and concurred in the judgment, emphasized that the Fourth and Ninth Circuits have concluded that the Fourth Amendment requires at least reasonable suspicion for forensic searches of electronic devices at the border.

Ninth Circuit Upholds Warrantless Search of Vehicle Based on Circumstantial Evidence

In ***United States v. Faagai***, 869 F.3d 1145 (9th Cir. 2017), the Ninth Circuit, in a split-panel opinion, upheld a warrantless search of a truck under the automobile exception. The Ninth Circuit concluded that the totality of the circumstances established probable cause to believe the truck contained contraband, despite the absence of any objectively-suspicious conduct.

John Penitani ("Penitani") was under investigation for running a methamphetamine ring when he met Jacob Del Mundo Faagai ("Faagai"). A few days after their initial meeting, authorities seized five pounds of methamphetamines from a known-Penitani courier. Under a court-authorized wiretap investigation, law enforcement agents conducted surveillance through intercepted text messages ("texts") between the Penitani and Faagai. After changing the meeting time and location several times, the two men agreed to meet again, this time at a 7-Eleven. The agents arrived late to the meeting, within 16 minutes of the intercepted texts, but ultimately observed Faagai walk back to his truck from Penitani's car empty-handed. After Faagai left the 7-Eleven, authorities stopped his truck. Faagai became belligerent after the officers said they suspected the truck had been involved in a robbery and requested consent to search it. Officers subsequently conducted a warrantless search of the truck and found methamphetamines in a seat pocket.

Faagai was charged with narcotics crimes and moved to suppress the truck search. After the motion was denied, Faagai entered a conditional guilty plea but reserved the right to appeal the denial of his suppression motion. On appeal, Faagai argued that the warrantless search of his truck was illegal because the police had no probable cause to believe the truck contained evidence of a crime.

The Ninth Circuit affirmed the trial court's denial of the suppression motion. The majority concluded that the co-conspirators' use of code words to describe the drugs, the various meeting locations discussed, combined with Faagai's belligerent reaction to the traffic stop, and dishonest statements regarding his whereabouts provided probable cause to believe the parties had met for the illicit purpose of exchanging contraband. Further, the majority reasoned that there was probable cause to believe the truck contained fruits of that exchange since Faagai drove the truck from the meeting.

TITLE 18 - MONEY LAUNDERING

Sixth Circuit Holds Venue for Concealment Money Laundering May Lie in District Where Unlawful Proceeds Were Obtained but Not Laundered

In ***United States v. Myers***, 854 F.3d 341 (2017), *cert. denied*, 138 S. Ct. 638 (2018), the Sixth Circuit held that venue for concealment money laundering prosecution is proper where the defendant obtained possession of the unlawful "proceeds," even though the proceeds were laundered elsewhere.

Ronald Myers ("Myers") and a co-conspirator stole three motor homes in Michigan. Myers then posed as the owner and sold the motor homes to dealers outside of Michigan. Myers was convicted of, *inter alia*, concealment money laundering (18 U.S.C. § 1956) in the U.S. District Court for the Western District of Michigan. He was sentenced to 360 months' imprisonment.

On appeal, Myers challenged his money laundering convictions on the basis of improper venue because he did not conduct the financial transactions (sales of the motor homes) in Michigan. The Sixth Circuit disagreed, noting that the plain language of the money laundering statute (18 U.S.C. § 1956(i)(1)(B)) permits venue in "any district where a prosecution for the underlying specified unlawful activity ("SUA") could be brought, if the defendant participated in the transfer of the proceeds of the SUA from that district to the district where the financial or monetary transaction is conducted." Here, the appellate court concluded that Myers participated in transferring the proceeds of his thefts out of Michigan when he transported the three motor homes from Michigan to Pennsylvania and Mississippi, where he sold them. Thus, Myers was part of a "continuing offense" that started in the Western District of Michigan and continued elsewhere.

Judge Kethledge, who concurred in part and dissented in part, stated that the Constitution requires determining venue crime-by-crime, rather than in-gross. Laundering unlawful proceeds, not possession, constitutes the charged offense. The judge reasoned that "essential conduct elements" determine proper venue—i.e., the financial transactions that occurred at banks in Pennsylvania and Mississippi, and that the defendant merely gained possession of unlawful proceeds, a "circumstance element," in Michigan. Thus, no charged offenses occurred in the Western District of Michigan.

Eighth Circuit Disregards Use of Multiple Payments in Determining Money Laundering Transaction

In ***United States v. Atkins***, 881 F.3d 621 (8th Cir. 2018), *reh'g denied* (April 24, 2018), the Eighth Circuit held, *inter alia*, that the defendant engaged in a monetary transaction in criminally derived property valued greater than $10,000 even though he used multiple payments to accomplish the transaction.

Kenneth Atkins ("Atkins") was convicted of one count of conspiracy to commit wire fraud (18 U.S.C. § 371) and three counts of money laundering (18 U.S.C. § 1957) for his participation in a scheme to defraud a paper mill. Among other things, Atkins argued for the first time on appeal that the government failed to establish that the transfer of funds at issue in the third money laundering count was of a value greater than $10,000. Specifically, Atkins argued that the government improperly aggregated separate transactions to arrive at the $10,000 threshold amount under § 1957.

The Eighth Circuit rejected this argument, noting Atkins caused cashier's checks in the amounts of $9,000 and $4,000, which constituted proceeds of the specified unlawful activity (wire fraud), to be issued and used these funds to purchase a $13,000 tractor. The transaction that violated § 1957 was Atkins' purchase of the tractor. The fact that Atkins attempted to disguise the payment by purchasing separate cashier's checks, and then purchased the tractor in two installments with separate checks, was of no significance. Therefore, the Eighth Circuit determined that the district court did not commit plain error by not dismissing the count *sua sponte*.

FORFEITURE

Fourth Circuit Holds Constitution Does Not Require Release of Substitute Assets Forfeited Post-Conviction for Retainer of Defendant's Appellate Counsel of Choice

In ***United States v. Marshall***, 872 F.3d 213 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1274 (2018), the Fourth Circuit held, *inter alia*, that the Constitution does not require the release of a criminal defendant's forfeited funds to pay for defendant's appellate counsel of choice because title to the funds vested in the government upon the post-conviction order of forfeiture.

After Andracos Marshall ("Marshall") was charged with money laundering and drug offenses, the government provided notice that it would seek forfeiture of approximately $59,000 from Marshall's credit union account. After Marshall's conviction, the district court entered a $51.3 million forfeiture order against him. Marshall filed a motion for the district court to release the $59,000 in his credit union account for use in his appeal because those funds were not specified in the forfeiture order. The government filed a motion for a second forfeiture order, specifically requesting the forfeiture of the funds in Marshall's credit union account. The district court granted the government's motion, and Marshall appealed.

On appeal, Marshall argued, *inter alia*, that he had a constitutional right to the release of substitute assets forfeited post-conviction because he needed the funds for appellate representation. The Fourth Circuit disagreed, holding that the Sixth Amendment does not require the release of forfeited funds to pay for post-conviction counsel. The appellate court reasoned that while a defendant is entitled to use any assets he owns for his defense, upon a post-conviction order of forfeiture, title to the forfeited assets vests in the government, and a defendant has no right to spend the government's money to retain appellate counsel of choice. The Fourth Circuit added that the Constitution only requires that Marshall be represented by counsel, but not necessarily by his choice of appellate counsel; counsel would be appointed if Marshall was indigent.

SENTENCING

Seventh Circuit Holds Total Loss in Sentence for Unauthorized Access Device Fraud Includes Non-Functional Devices

In ***United States v. Popovski***, 872 F.3d 552 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1017 (2018), the Seventh Circuit held that in determining the sentence in access device fraud cases, the total loss must be calculated based on the total number of devices the defendant possessed, irrespective of whether each device was capable of producing funds.

Karl Popovski ("Popovski") pleaded guilty to wire fraud (18 U.S.C. § 1343) based on a scheme to encode stolen credit and debit card numbers onto blank cards intended for making ATM withdrawals. The district court sentenced Popovski to 30 months' imprisonment. He appealed his sentence claiming the court should have calculated total loss based on the cards that were functionally capable of producing funds, and exclude the cards with account numbers that were over the credit limit, expired or revoked.

The Seventh Circuit affirmed Popovski's sentence, holding that loss for sentencing purposes under the access device fraud statute (18 U.S.C. § 1029) must include the full amount of intended harm, even if actual harm was impossible or unlikely to occur. The appellate court based its decision on the U.S. Sentencing Guidelines, which set the minimum loss for sentencing under § 1029 at $500 per device. The Seventh Circuit interpreted this loss was applicable to all devices possessed by a defendant whether used or not. The Seventh Circuit viewed the Ninth Circuit's opinion in *United States v. Oneysoh*, 674 F. 3d 1157 (9th Cir. 2012), which calculated loss under § 1029 based on cards functionally capable of producing funds, as inconsistent with the clear wording of § 1029. Instead, the Seventh Circuit adopted the Sixth Circuit's position in *United States v. Moon*, 808 F. 3d 1085 (6th Cir. 2015), which held that § 1029 applied to all cards obtained with intent to defraud even if lost, stolen, expired, cancelled or revoked. The Seventh Circuit noted that in the rare, extreme case in which charges are based on caches of cards that had been hidden for generations and dug up long after the cards had expired, the trial judge could adjust the sentence to properly reflect the seriousness of the offense in conformity with *United States v. Booker*, 543 U.S. 220 (2005) and 18 U.S.C. § 3553(a). This was not such a case.

RESTITUTION

Ninth Circuit Holds Mandatory Victim Restitution Act Permits Restitution to Victims Harmed by Conduct Beyond Offenses of Conviction

In ***United States v. Johnson***, 875 F.3d 422 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 703 (2018), the Ninth Circuit held the district court could properly order restitution for all victims harmed by the defendant's scheme, even those victims harmed by conduct for which the defendant was not convicted.

Donald Johnson ("Johnson") obtained funds by fraudulently promoting charity events and promising items to be auctioned. In 2014, Johnson was convicted for wire fraud (18 U.S.C. § 1343). The indictment specifically identified a single wire transmission from one 2012 charity event. Prior to trial, Johnson successfully moved to restrict the government's case to evidence associated with that one wire transmission. After Johnson's conviction, the government sought restitution of over $70,000 for the entire scheme. The district court refused to consider evidence outside of the specified event for restitution purposes, and limited restitution to $5,648.58. The government appealed.

The Ninth Circuit reversed the restitution order, holding that the district court abused its discretion. Specifically, the Ninth Circuit held that the district court's reliance on *United States v. Hughey*, 495 U.S. 411 (1990), to limit the restitution order was misplaced because the 1982 Victim and Witness Protection Act ("VWPA") had been amended in 1990, to partially overrule *Hughey*. Following the 1990 amendments, the Ninth Circuit has recognized that under the VWPA and the Mandatory Victim Restitution Act ("MVRA"), "restitution may be ordered for all persons harmed by the entire scheme" and "is not confined to harm caused by the particular offenses for which [the defendant] was convicted." Accordingly, the Ninth Circuit vacated the restitution order and remanded the case to the district court to make appropriate factual findings to determine whether Johnson's activities beyond the 2012 single wire fraud event are sufficiently related to be included for restitution purpose in Johnson's overall scheme to defraud.

FIRST AMENDMENT – ACCESS TO PROCEEDINGS

Fifth Circuit Holds Common Law Right of Access to Judicial Records May Extend to Pre-Indictment Warrant Affidavits

In ***United States v. Sealed Search Warrants***, 868 F.3d 385 (5th Cir. 2017), the Fifth Circuit held that the common law right of public access to judicial records may extend to pre-indictment search warrant materials based on a case-by-case determination.

IRS special agents obtained and executed three pre-indictment search warrants at properties related to Justin Smith ("Smith"). Smith filed motions seeking to unseal the supporting affidavits, which were granted in part and required the government to submit redacted affidavits. Finding the redactions too extensive, the Magistrate Judge issued her own redacted affidavits. The government objected, and the district court ordered the affidavits to remain sealed during the investigation. Smith appealed.

The Fifth Circuit held that district courts have discretion to grant access to pre-indictment search warrant materials pursuant to the common law right of public access to judicial records. However, the court must make this determination on a case-by-case basis, after consideration of the particular facts and circumstances of each case. In reaching its holding, the Court rejected the Ninth Circuit's bright-line rule that the right of access does not extend to pre-indictment warrant materials as held in *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989). Instead, the Fifth Circuit adopted the Fourth Circuit's case-by-case requirement as held in *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989). The Fifth Circuit reasoned that the Fourth Circuit's approach accounted for the policy concerns expressed by the Ninth Circuit in formulating its broad rule, noting that if release of the pre-indictment material could threaten an ongoing investigation, or endanger an unindicted target's reputation, the district court retains discretion to either redact such information or leave the material sealed. In adopting the Fourth Circuit's reasoning, the appellate court stated the policy promotes trustworthiness in the judicial process itself. Accordingly, the Fifth Circuit vacated the district court's judgment and remanded the case for further findings on the decision to leave the affidavits under seal.

TABLE OF CASES