Criminal Tax Bulletin

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SIXTH AMENDMENT

Supreme Court Holds Rule of *Apprendi* Applies to Imposition of Criminal Fines

In ***Southern Union Co. v. United States***, 132 S. Ct. 2344 (2012), the Supreme Court held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to the imposition of criminal fines. Under *Apprendi*, other than the fact of a prior conviction, any fact that increases a criminal penalty beyond the prescribed statutory maximum must be determined by a jury.

Southern Union Company ("Southern Union") was indicted for knowingly storing liquid mercury without a permit, in violation of the Resource Conservation and Recovery Act of 1976 ("RCRA"). A jury convicted Southern Union on this count, and the verdict form stated that Southern Union was guilty of unlawfully storing liquid mercury "on or about September 19, 2002 to October 19, 2004." At sentencing, the probation office set a maximum fine of $38.1 million, on the grounds that the RCRA provides a fine of up to $50,000 for each day of violation, and Southern Union had violated the RCRA for 762 days from September 19, 2002 through October 19, 2004. Southern Union objected that this calculation violated *Apprendi*, because the jury had not been asked to determine the precise duration of the violation.

The government acknowledged that the jury was not asked to specify the duration of the violation, but argued that *Apprendi* does not apply to criminal fines. The district court disagreed and held that *Apprendi* does apply to fines, but concluded that the jury had found a 762-day violation. The court therefore set a maximum potential fine of $38.1 million, from which it imposed a fine of $6 million and a community service obligation of $12 million. On appeal, the First Circuit held that *Apprendi* does not apply to criminal fines, and affirmed the sentence on that basis. The First Circuit's holding created a circuit split, and the Supreme Court granted certiorari to resolve the conflict.

The Supreme Court reversed the judgment of the First Circuit, holding that the rule of *Apprendi* applies to the imposition of criminal fines. The Court noted that, where a fine is so insubstantial that the underlying offense is considered "petty," the Sixth Amendment right of jury trial is not triggered, and no *Apprendi* issue arises. By contrast, where a fine is substantial enough to trigger the Sixth Amendment's jury trial guarantee, the Court concluded that *Apprendi* applies in full.

In this case, the Court opined that a maximum fine of $50,000 for each day of violation was serious enough to trigger the jury trial right, and noted that the district court had made factual findings that increased both the potential and actual fines the court imposed. Accordingly, the Court reversed and remanded the case for further proceedings consistent with its opinion.

CONFRONTATION CLAUSE

Supreme Court Holds Expert May Refer to Out-of-Court Statements to Explain Basis of Opinion

In ***Williams v. Illinois***, 132 S. Ct. 2221 (2012), the Supreme Court held that an expert's testimony did not violate the Confrontation Clause of the Sixth Amendment where the expert referred to out-of-court statements in order to explain the assumptions on which the expert's opinion was based.

In February 2000, a Chicago hospital sent samples taken from a rape victim to the Illinois State Police ("ISP") lab, which forwarded the samples to a Maryland lab for DNA testing. The Maryland lab sent back a report with a DNA profile produced from semen taken from the samples. Sandra Lambatos ("Lambatos"), an ISP lab forensic specialist, matched this DNA profile to another profile produced from the blood of Sandy Williams ("Williams") after Williams' arrest on unrelated charges.

At Williams' bench trial, Lambatos testified that the DNA from the semen found in the samples taken from the rape victim matched the DNA profile that had been identified from Williams' blood sample. The report from the Maryland lab was not admitted into evidence. Williams was convicted, and the state appellate court affirmed.

A plurality of the Supreme Court held there was no Confrontation Clause violation in this case. The Court distinguished *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), in that the forensic reports in those cases were introduced into evidence for the purpose of proving the truth of what they asserted. Here, the Maryland lab report was not admitted as substantive evidence against Williams, but rather was referenced by the expert for the limited purpose of showing it matched the DNA profile produced from Williams' blood. The truth of the expert's testimony was not dependent on the origin of the samples, which was established through the introduction of other evidence. The Court added that there would have been no Confrontation Clause violation even if the Maryland lab report had been introduced for its truth because the report had not been prepared for the primary purpose of obtaining evidence against Williams, who was neither in custody nor under suspicion at the time the samples were sent to the Maryland lab.

Sixth Circuit Holds Admission of IRS Tax Transcripts Did Not Violate Confrontation Clause

In ***United States v. Maga***, 475 Fed. Appx. 538 (6th Cir. 2012) (unpub.), the Sixth Circuit held that IRS official tax transcripts and certificates of official record are testimonial statements subject to the Confrontation Clause of the Sixth Amendment. The court further held that the admission of these documents into evidence was proper where the IRS employee who generated the transcripts was presented for cross-examination.

Dominic Joseph Maga ("Maga") stopped filing tax returns in 1996. When the IRS sent a levy notice, Maga requested a collection due process hearing, claiming that he was not required to file tax returns. Eventually, he was indicted on five counts of failure to file tax returns (26 U.S.C. § 7203) between 2002 and 2006, as well as four counts of tax evasion (26 U.S.C. § 7201). At trial, the district court admitted into evidence Maga's IRS official tax transcripts, which contained the statement "No record of return filed." The government called the IRS employee who had generated the tax transcripts to identify them and explain how they were generated. The government did not call the Resident-Agent-in-Charge who signed the certificates of official record at the end of each transcript. Maga objected to the admission of the transcripts and certificates, and he moved for acquittal, but his motion was denied. He was convicted of multiple counts of failure to file a tax return.

On appeal, Maga argued that the district court's admission of the transcripts and certificates violated his Sixth Amendment right to confrontation. The Sixth Circuit disagreed and affirmed Maga's convictions. Relying on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the court held that the transcripts and certificates were testimonial statements subject to the Confrontation Clause. The court also held, however, that admission of the transcripts and certificates did not violate Maga's confrontation rights because Maga had an adequate opportunity for cross-examination. In so holding, the court rejected Maga's argument that the government had presented the wrong witness for cross-examination and should have presented the Resident-Agent-in-Charge who verified the transcripts and signed the certifications, instead of the IRS employee who generated the transcripts. The court concluded the government had presented the correct witness, reasoning that the incriminating information – *i.e.*, the portion of the transcripts that stated "No record of return filed" – was derived from the act of generating the transcripts, not verifying or signing them.

SPEEDY TRIAL ACT

Seventh Circuit Holds Ends-of-Justice Continuances Did Not Violate Speedy Trial Act

In ***United States v. Wasson***, 679 F.3d 938 (7th Cir. 2012), the Seventh Circuit held, *inter alia*, that the district court's granting of several ends-of-justice continuances pursuant to 18 U.S.C. § 3161(h)(7)(A) did not violate the defendant's right to a speedy trial.

Brian K. Wasson ("Wasson") participated in an extensive tax fraud conspiracy involving the Aegis Company, which promoted an abusive trust scheme. In September 2006, Wasson was charged with aiding in the filing of a false tax return in violation of 26 U.S.C. § 7206(2). The grand jury then twice superseded the indictment to add two other defendants and to charge all three with conspiracy under 18 U.S.C. § 371. The Speedy Trial Act's 70-day time limit began running when the third co-defendant was arraigned on May 11,

2007, and the trial ultimately began on March 2, 2009. Prior to the trial date, the district court granted several continuances based on its findings that the ends of justice warranted excluding the delays from the 70-day limit because of the complex and changing nature of the case, as well as Wasson's need to prepare adequately for trial, and the need to ensure continuity of government counsel. Although Wasson himself had moved for or agreed to all of the continuances, he moved to dismiss the indictment for failure to comply with the Speedy Trial Act. The district court denied the motion, and Wasson was convicted of all charges.

On appeal, the Seventh Circuit noted that there are two statutory prerequisites for excluding ends-of-justice continuances from the 70-day time limit under 18 U.S.C. § 3161(h)(7)(A): (1) the court must find that the ends of justice served by granting a continuance outweigh the interests of the public and the defendant in a speedy trial; and (2) the reasons for such finding must be set forth in the record. Wasson argued that, to satisfy the Speedy Trial Act, the district court's findings must be both explicit and contemporaneous with the granting of the continuance. The Seventh Circuit disagreed, explaining that the trial court's findings need only be articulated by the time it rules on a defendant's motion to dismiss. The appellate court examined the record and concluded that the trial court had made the necessary findings in granting the continuances. Accordingly, the court held that the continuances did not violate the Speedy Trial Act.

FIFTH AMENDMENT

Seventh Circuit Holds Required Records Doctrine Applies to Foreign Bank Account Records Maintained Pursuant to Bank Secrecy Act

In ***In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011***, 691 F.3d 903 (7th Cir. 2012), the Seventh Circuit held that the Required Records exception to the Fifth Amendment privilege against self-incrimination was applicable to foreign bank account records required to be maintained under the Bank Secrecy Act ("BSA").

The target witness ("T.W.") of a grand jury investigation into the alleged use of secret offshore accounts to evade federal income taxes received a subpoena for foreign bank account records required to be kept under the BSA. T.W. moved to quash the subpoena, arguing that production of the records would violate his privilege against self-incrimination. The government countered that the Required Records Doctrine – which creates an exception to the Fifth Amendment for records kept pursuant to a valid regulatory scheme – overrode T.W.'s privilege. The district court found the Required Records Doctrine inapplicable and granted T.W.'s motion to quash.

On appeal, the Seventh Circuit held that the Required Records Doctrine did apply to the records sought. The appellate court first determined that the doctrine could apply in situations where the act of producing records is self-incriminating and triggers Fifth Amendment protection even though the contents of the records may not be privileged. The court then considered whether the records sought fell within the doctrine, noting that in order for the doctrine to apply, three requirements must be met: (1) the purpose of the government's inquiry must be essentially regulatory; (2) the records are of a kind which the regulated party customarily kept; and (3) the records have assumed public aspects which render them at least analogous to public documents. Citing the Ninth Circuit's analysis in a similar case, *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011), the Seventh Circuit concluded that the records sought from T.W. fell within the doctrine and were outside the scope of the Fifth Amendment privilege. Accordingly, the court reversed the district court's order granting T.W.'s motion to quash the subpoena.

FOURTH AMENDMENT

Sixth Circuit Holds Defendant Did Not Have Reasonable Expectation of Privacy in Location Data Emitted from His Cell Phone

In ***United States v. Skinner***, 690 F.3d 772 (6th Cir. 2012), the Sixth Circuit held that the defendant did not have a reasonable expectation of privacy in location data broadcast from his cellular phone while he was traveling on public thoroughfares.

Melvin Skinner ("Skinner") was a courier in a large-scale drug-trafficking operation, transporting marijuana and drug payments cross-country and communicating with others in the operation by means of a "pay as you go" cell phone. Through intercepts of various phone calls, investigators learned that Skinner would be meeting a drug supplier in Tucson, Arizona on July 11, 2006, to pick up 900 pounds of marijuana to haul to Tennessee in a motor home. In order to learn Skinner's location while he was en route to deliver the drugs, the authorities obtained an order from a federal magistrate

judge authorizing the phone company to release subscriber information, cell site information, GPS real-time location, and “ping” data (*i.e.*, cell tower location information) for the cell phone used by Skinner.

By continuously “pinging” the cell phone, authorities learned that Skinner left Tucson, Arizona on July 14, 2006, and was traveling across Texas. On July 16, 2006, the phone’s GPS indicated that Skinner had stopped at a truck stop near Abilene, Texas. Upon searching the motor home at the truck stop, agents discovered over 1,100 pounds of marijuana. Skinner was ultimately convicted of drug trafficking and money laundering conspiracy. On appeal, he argued that the use of the GPS location information emitted from his cellphone constituted a warrantless search that violated the Fourth Amendment.

The Fourth Circuit held that Skinner did not have a reasonable expectation of privacy in location data broadcast by his cell phone. The court distinguished this case from *United States v. Jones*, 132 S. Ct. 945 (2012), in which the Supreme Court held that the attachment of a GPS tracking device to a suspect’s car constituted a search under the Fourth Amendment because it was a “trespass” of the suspect’s private property for the purpose of obtaining information. Here, the Fourth Circuit determined that there was no physical intrusion, as Skinner had obtained the cell phone himself, and the phone included the GPS technology used to track its whereabouts.

FIRST AMENDMENT

Ninth Circuit Holds Operation of Tax Evasion Scheme Not Protected by First Amendment

In ***United States v. Meredith***, 685 F.3d 814 (9th Cir. 2012), the Ninth Circuit held that the First Amendment did not prohibit the defendants’ convictions for mail fraud and conspiracy based on their operation of an enterprise that instructed and assisted people in evading taxes.

Lynne Meredith, Teresa Giordano, and Gayle Bybee (collectively, the “defendants”) operated various businesses that sold books and held seminars promoting the use of a financial instrument known as a “pure trust,” which the defendants claimed was tax-exempt, to avoid paying personal income taxes. The defendants’ scheme involved providing their customers with explicit instructions on how to evade taxes, drafting letters to the IRS, structuring and selling the “pure trusts,” and serving as trustees.

The defendants were convicted of conspiracy to defraud the United States, mail fraud, false representation of a Social Security number, passport fraud, and failure to file income tax returns. In June 2005, a district court sentenced Meredith to 121 months’ imprisonment, Bybee to 60 months’ imprisonment, and Giordano to 40 months’ imprisonment.

On appeal, the defendants argued that insufficient evidence supported their conspiracy and mail fraud convictions because their conduct was protected by the First Amendment. The Ninth Circuit acknowledged that mere advocacy of tax evasion cannot support convictions for conspiracy or fraud, but opined that in this case the defendants went beyond mere advocacy to create a “vast enterprise” that helped clients hide their income from federal and state tax authorities. The court concluded that this conduct was prohibited under the exception to the First Amendment for speech that is integral to a crime. Accordingly, the court rejected the defendants’ claims that their convictions violated the First Amendment.

The court distinguished this case from that of *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), which addressed the applicability of the First Amendment exception for incitement of imminent unlawful activity, rather than the exception for speech that is integral to a crime.

TITLE 26/WILLFULNESS

Fourth Circuit Upholds Willful Blindness Jury Instruction in Tax Case

In ***United States v. Jinwright***, 683 F.3d 471 (4th Cir. 2012), the Fourth Circuit upheld the trial court’s issuance of a “willful blindness” jury instruction in a case involving conspiracy, tax evasion, and filing false tax returns.

Anthony and Harriet Jinwright (the “Jinwrights”) were co-pastors of Greater Salem Church (“GSC”) in North Carolina. Between 2002 and 2007, the Jinwrights understated their taxable income by over $2 million. The Jinwrights were convicted of conspiracy and tax evasion, and Mr. Jinwright was also convicted of filing false tax returns. Mr. and Mrs. Jinwright were sentenced to 105 months’ and 80 months’ imprisonment, respectively.

At trial, to satisfy its burden of proving that the Jinwrights acted willfully, the government presented evidence that they purposely avoided learning of their tax liability. At the government's request, the trial court issued a willful blindness jury instruction. On appeal, the Jinwrights contended in part that the instruction was not supported by the evidence and misstated the legal standard of willful blindness.

The Fourth Circuit held that the instruction was not an abuse of discretion and adequately stated controlling law. The court noted that willful blindness may satisfy the knowledge requirement in a criminal tax prosecution, where "the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability." 683 F.3d at 479 (citation omitted). In this case, the court determined that the evidence presented at trial satisfied these conditions. The court noted, for example, that several auditors and GSC administrators advised the Jinwrights that they were underreporting their income, but the Jinwrights never raised these concerns with their personal accountant.

The Fourth Circuit also rejected the Jinwrights' contention that the willful blindness instruction violated their Fifth Amendment due process rights by allowing the jury to convict them based on recklessness. The court reasoned that the instruction required a conscious purpose to avoid learning the truth.

IDENTITY THEFT

Eleventh Circuit Holds Use of Deceased Person's Identification Was Proper Basis for Aggravated Identity Theft Conviction

In ***United States v. Zuniga-Arteaga***, 681 F.3d 1220 (11th Cir. 2012), the Eleventh Circuit held that aggravated identity theft under 18 U.S.C. § 1028A punishes the theft of any person's identity, regardless of whether that person is still alive.

Graciela Zuniga-Arteaga ("Zuniga-Arteaga"), a Mexican national, was arrested for an alleged drug offense. At the time of her arrest, Zuniga-Arteaga claimed to be another individual (identified in the record by the initials "MSG") and provided a false Texas identification document in the name of MSG. She was convicted on drug charges and sentenced to federal prison. On several occasions during her incarceration, Immigration and Customs Enforcement ("ICE") agents interviewed Zuniga-Arteaga, who continued to claim to be MSG and to be born in Texas, provided a valid birth certificate for MSG, and signed a sworn statement that the birth certificate was hers. Upon further investigation, law enforcement agents determined that MSG was a U.S. citizen who had died as a child in 1960. In December 2010, Zuniga-Arteaga was convicted of falsely representing to be a U.S. citizen in violation of 18 U.S.C. § 911 and aggravated identity theft in violation of 18 U.S.C. § 1028A.

On appeal, Zuniga-Arteaga argued that the term "person" in the aggravated identity theft statute referred only to the living and did not apply to the theft of a deceased person's identity. Noting that the term "person" as used in § 1028A is not explicitly defined, the Eleventh Circuit analyzed the statute to interpret the term. In discussing the statute's purpose, the court reasoned that the theft of a deceased person's identity may cause considerable harm to the living and is more likely to go unnoticed and unpunished than the theft of a living person's identity. Based on the text, structure, and purpose of § 1028A, the court determined that the term "person" as used in the statute is not limited solely to the living, and held that § 1028A "criminalizes the use of a real person's identity, regardless of whether that person is currently living." 681 F.3d at 1225. Accordingly, the court affirmed Zuniga-Arteaga's conviction.

INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

Second Circuit Holds IEEPA Regulations Permit Family Remittances to Iran

In ***United States v. Banki***, 685 F.3d 99 (2d Cir. 2012), the Second Circuit vacated a defendant's convictions for violating the Iranian Transactions Regulations ("ITR") (31 C.F.R. pt. 560), holding that the ITR did not prohibit family remittances to Iran.

Mahmoud Reza Banki ("Banki") was a naturalized United States citizen who had lived in the United States since 1994. While he resided in the U.S., many of his family members continued to live in Iran. In 2006, Banki's family began to transfer large amounts of money – ultimately totaling over $3.4 million – from Iran to the U.S. To transfer the funds, the family used an informal *hawala* system: when Banki's family wanted to send money to the U.S., a hawala broker would identify U.S.-based contacts who wanted to send comparable amounts of money to Iran. Once a match was identified, the U.S. source would deposit funds into Banki's U.S. bank account. Upon receipt, Banki would

direct his family in Iran to deposit the same sums into the accounts in Iran requested by the U.S. source.

The ITR, which were promulgated under the International Emergency Economic Powers Act ("IEEPA"), prohibit the exportation of goods, technology, and services to Iran. Based on the above-described transfer of funds, Banki was convicted of: (1) conspiracy to violate the ITR and operate an unlicensed money-transmitting business; (2) violating the ITR; (3) operating an unlicensed money-transmitting business; and (4) two counts of making false statements in response to government subpoenas. In August 2010, he was sentenced to 30 months' imprisonment.

On appeal, Banki argued that the plain language of the ITR permits non-commercial remittances to Iran, including a family remittance. The government countered that the regulations permit non-commercial remittances only if such remittances are passed through a U.S. depository institution. The Second Circuit held that the regulations are ambiguous on this issue. Applying the rule of lenity, the court interpreted the regulations in Banki's favor, vacated his convictions relating to violations of the ITR, and remanded for a new trial.

MONEY LAUNDERING

Fourth Circuit Holds Defendant's Payments to Co-conspirators Could Not Be Basis of Money Laundering Convictions

In ***United States v. Cloud***, 680 F.3d 396 (4th Cir. 2012), the Fourth Circuit held, *inter alia*, that the defendant's use of funds generated by his mortgage fraud scheme to pay co-conspirators created a merger problem requiring reversal of his money laundering convictions.

William Roosevelt Cloud ("Cloud"), the leader of a mortgage-fraud conspiracy, recruited buyers with good credit to purchase various properties. Unbeknownst to the buyers, Cloud first bought the properties and then "flipped" them to the buyers for a profit. Cloud falsified the buyers' loan applications, misstating their income, and had them purchase multiple properties before their credit reports could be updated. Using funds generated by the scheme, he made payments to buyers, brokers, and recruiters for their assistance. Cloud was convicted of money laundering under 18 U.S.C. § 1956(a)(1) and money laundering conspiracy under 18 U.S.C. § 1956(h), among other charges.

Citing *United States v. Santos*, 553 U.S. 507 (2008), as interpreted by *United States v. Halstead*, 634 F.3d 270 (4th Cir. 2011), the Fourth Circuit noted that one cannot be convicted of money laundering for paying the "essential expenses of operating" the underlying crime. The court held that Cloud's payments to others for their roles in the scheme, which formed the basis for his money laundering convictions under § 1956(a)(1), were payments of the "essential expenses" of the underlying fraud and thus created a merger problem. Accordingly, the court reversed those convictions.

Unlike the § 1956(a)(1) charges, however, the money laundering conspiracy charge against Cloud was not tied to any specific payment to a recruiter, buyer, or other co-conspirator. Rather, the charge was based on Cloud's use of profits from prior "flips" to finance additional purchases of properties. Because these purchases did not constitute payments of the essential expenses of the underlying crime, the court concluded that the conspiracy charge did not present a merger problem warranting reversal of Cloud's money laundering conspiracy conviction.

EVIDENTIARY PRIVILEGES

Third Circuit Requires Privilege Holder to Disobey Disclosure Order and Incur Contempt Sanctions in Order to Obtain Immediate Appellate Review

In ***In re Grand Jury***, 680 F.3d 328 (3d Cir. 2012), the Third Circuit held that, where a district court orders production of documents claimed to be privileged, and a third party has custody of the documents, the privilege holder can obtain immediate appellate review of the order only by taking possession of the documents, refusing to produce them, and appealing any resulting contempt sanctions.

This case involved a tax-related grand jury investigation of a corporation's acquisition and sale of closely-held companies. In connection with the investigation, the government issued subpoenas for records of certain transactions to the two law firms that represented the corporation, its president and sole shareholder, and the president-shareholder's son (collectively, the "appellants"). In response, the law firms produced a number of documents but withheld others on privilege grounds. The government moved to compel production of the allegedly privileged documents on the basis of the crime-fraud doctrine. The district court granted the motion and ordered the appellants to produce the requested documents.

The appellants sought to appeal the district court's order. The Third Circuit noted that, when a district court orders the production of supposedly privileged documents, its order usually is not an immediately appealable final decision. To obtain immediate appellate review, an objecting privilege holder must disobey the disclosure order, be held in contempt, and then appeal the contempt order. The appellants countered that *Perlman v. United States,* 247 U.S. 7 (1918), provided an exception to the contempt rule in this case because the documents were in the custody of a third party who was not willing to suffer contempt for the sake of an immediate appeal. The Third Circuit rejected this argument, holding that *Perlman* does not allow immediate appeal when the court order is directed at the privilege holder itself and the privilege holder is able to obtain custody of the documents. In this case, the court noted, the appellants and their law firms had a joint-defense agreement in place that would allow the corporation to obtain the documents.

The appellate court concluded that the corporation's only path to appellate review of the district court's crime-fraud ruling was to take possession of the documents and defy the district court's order before appealing any resulting contempt sanctions. Because the corporation had not met these preconditions, the appellate court dismissed the appeal for lack of jurisdiction.

RESTITUTION

Sixth Circuit Vacates Order of Restitution to Defendant's Embezzlement Victim Where Defendant Pleaded Guilty to Structuring and Tax Charges

In ***United States v. Ciccolini***, 2012 WL 2545802 (6th Cir. July 3, 2012) (unpub.), the Sixth Circuit held that the district court lacked authority to order the defendant to pay restitution to a charitable foundation from which he had embezzled funds, where the defendant pleaded guilty only to Title 26 and Title 31 charges.

Samuel R. Ciccolini ("Ciccolini"), a Catholic priest, was the director of the Interval Brotherhood Home ("Home"), a drug and alcohol rehabilitation facility, and president of the Interval Brotherhood Home Foundation, Inc. ("Foundation"), which raised funds for the Home. Ciccolini filed false tax returns for the years 2002 to 2006 and failed to pay a total of $292,136 in taxes. Between April and June 2003, he also deposited more than $1 million in his bank accounts by making 139 separate deposits of less than $10,000 each. After admitting that the source of the structured funds was embezzlement from the Foundation, he repaid the money he had taken. He pleaded guilty to one count of structuring in violation of 31 U.S.C. § 5324(a)(3) and one count of subscribing a false tax return in violation of 26 U.S.C. § 7206(1). Prior to his guilty plea, he paid $292,136 as restitution to the IRS. At sentencing, the district court calculated a Sentencing Guidelines range of 63 to 78 months' imprisonment, but sentenced Ciccolini to one day in prison and ordered him to pay $3.5 million in restitution to the Foundation.

On appeal, the Sixth Circuit vacated the sentence. The court noted that federal courts may only order restitution when authorized by statute. Restitution in criminal cases is governed by the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, which authorizes restitution when a defendant is convicted of one of the offenses listed in the VWPA, or to the extent agreed upon in a plea agreement. In this case, Ciccolini was not convicted under any of the statutes listed in the VWPA, and his plea agreement did not contain a provision for payment of restitution beyond the amount he had already paid to the IRS. Therefore, the Sixth Circuit concluded that the district court lacked authority to order restitution to the Foundation.

SENTENCING

Seventh Circuit Holds Unclaimed Exclusions and Deductions Are Irrelevant to Guidelines Calculation of Tax Loss

In ***United States v. Psihos***, 683 F.3d 777 (7th Cir. 2012), the Seventh Circuit held, *inter alia*, that unclaimed exclusions and deductions should not be considered in calculating tax loss for purposes of applying the Sentencing Guidelines ("Guidelines" or "U.S.S.G.").

John Psihos ("Psihos"), a restaurant owner, kept two sets of books and substantially underreported his gross receipts for tax years 2001-2004. He pleaded guilty to four counts of making false statements on a tax return. At sentencing, the government argued that the total tax loss, based on the additional taxes due on Psihos' unreported receipts, was $837,724. Psihos countered that the tax loss should be reduced by cash payments for excludable items and deductible expenses, for a total of $22,292.27. The district court rejected Psihos' tax loss calculation, imposed a sentence of 24 months, and ordered restitution of $837,724.

On appeal, Psihos argued that the district court erred in determining the tax loss for sentencing purposes and also erred in ordering restitution of $837,724 because the actual tax loss was only $22,292.27. The Seventh Circuit disagreed, holding that Psihos' argument was foreclosed by its prior decision in *United States v. Chavin*, 316 F.3d 666 (7th Cir. 2002). In *Chavin*, the court held that the intended loss (*i.e.,* the amount by which the defendant underreported his tax liability), rather than the actual loss to the government, was the proper basis of the tax-loss figure for sentencing purposes. Following *Chavin*, the Seventh Circuit concluded that Psihos' alleged cash payments were irrelevant in determining the tax loss. The court rejected Psihos' contention that *Chavin* was distinguishable because it concerned deductions and not "above-the-line" reductions from gross income.

Psihos also argued that even if the $837,724 tax loss calculation was permissible for Guidelines purposes, the district court erred in ordering restitution in that amount because that was not the true loss the government suffered. The Seventh Circuit agreed that a restitution order, unlike a calculation of tax loss under the Guidelines, must be based on the amount of the loss actually caused by the defendant. In this case, however, the court concluded that the restitution order was proper because the cash outflows claimed by Psihos were not adequately documented.

Eleventh Circuit Holds Tax Counts Should Be Grouped Together for Sentencing

In ***United States v. Register***, 678 F.3d 1262 (11th Cir. 2012), the Eleventh Circuit held that the defendant's counts of conviction under 26 U.S.C. §§ 7202 and 7206(1) should be grouped together for sentencing purposes, resulting in a lower range under the Guidelines.

Stuart Matthew Register ("Register") was the owner and operator of Criminal Research Bureau, Inc. ("CRB"), a provider of background-check services for employers. From the first quarter of 2003 through the fourth quarter of 2007, Register failed to remit to the IRS $316,220 in taxes that were withheld from the wages of CRB employees. In addition, Register falsified his individual income tax returns during this period for tax years 2003 to 2006 to indicate that federal taxes had been withheld from his salary when in fact none had been withheld. As a result, he collected fraudulent refunds for those years.

Register pleaded guilty to thirteen counts of willful failure to pay over taxes in violation of § 7202, and four counts of filing false individual federal income tax returns in violation of § 7206(1). At sentencing, the district court calculated the applicable Guidelines range by grouping all of Register's failure-to-pay-over counts together into one group and all of his filing-false-returns counts together into a separate group, resulting in a total offense level of 16 and a Guidelines range of 21 to 27 months. If the district court had grouped together all seventeen counts, Register's total offense level would have been 15 instead of 16, yielding a Guidelines range of 18 to 24 months. The district court ultimately sentenced Register to 27 months' imprisonment, the top of the Guidelines range that resulted from the separate grouping.

On appeal, the Eleventh Circuit held that all seventeen of Register's counts should have been grouped together under U.S.S.G. § 3D1.2(d) as "counts involving substantially the same harm," because the offense level for each crime was determined largely on the basis of the amount of loss, the underlying offenses were of the same general type, and they were closely related counts. The court explained that, although the counts under § 7202 and § 7206(1) were governed by different Guidelines, both were tax offenses involving a monetary objective, and the base offense level for both was based on the amount of tax loss. In addition, the court reasoned that the offenses involved overlapping conduct with respect to the withholding of taxes. Accordingly, the court vacated Register's sentence and remanded for resentencing.

Third Circuit Holds Creation of Special Trust Fund Account for IRS Collection Purposes Did Not Support Enhancement for Abuse of Position of Trust

In ***United States v. DeMuro***, 677 F.3d 550 (3d Cir. 2012), the Third Circuit affirmed the defendants' convictions but remanded the case for re-sentencing. The court held that the creation of a special trust fund account did not put the defendants in a position of trust with respect to the IRS and therefore the district court erred in applying the two-level enhancement for abuse of a position of trust.

James and Theresa DeMuro (the "DeMuros") owned and managed TAD, a New Jersey engineering and surveying company. Between 2002 and 2008, TAD failed to pay over to the IRS more than $500,000 in withheld employment taxes. After unsuccessful

attempts to collect back taxes, the IRS required TAD to establish a special trust fund account into which the DeMuros would deposit withheld trust fund taxes within two days of withholding. The IRS also required the DeMuros to keep the funds in the account until they were paid to the IRS. The DeMuros deposited funds into the account, but then made withdrawals for unrelated expenses and later closed the account without IRS permission. They were convicted of conspiracy and failure to account for and pay over employment taxes in violation of 26 U.S.C. § 7202, and sentenced to 51 months' imprisonment. At sentencing, the district court applied a two-level enhancement under § 3B1.3 of the Guidelines for abuse of a position of trust based on the DeMuros' use of the trust fund money for expenses other than trust fund taxes.

In appealing their sentence, the DeMuros argued they did not occupy a position of trust with the IRS and therefore the two-level enhancement was erroneously applied. The Third Circuit agreed. In determining that the DeMuros did not occupy a position of trust, the appellate court reasoned: (1) the IRS-imposed trust fund account made it easier for the IRS to monitor whether the DeMuros were properly paying the trust fund taxes; (2) the trust fund account decreased the DeMuros' discretion and authority by requiring them to pay the withholdings within two days; and (3) the IRS imposed the trust fund account because it could not rely on the DeMuros' integrity. The court also held the error was not harmless because the government failed to prove unambiguously that the sentencing judge would have imposed the same sentence under the correct Guidelines range.

Seventh Circuit Holds District Court Lacked Discretion to Deny Government's Motion for Downward Adjustment

In ***United States v. Mount***, 675 F.3d 1052 (7th Cir. 2012), the Seventh Circuit held that once a sentencing court grants a two-level decrease in offense level under the Guidelines for acceptance of responsibility, the court lacks discretion to deny the government's subsequent motion for an additional one-level reduction for the defendant's timely notice to prosecutors of his intention to plead guilty.

Jamie Mount ("Mount") was charged with possession of a gun by a felon and was released to a residential facility while awaiting trial. After notifying the court of his intent to plead guilty, Mount disappeared from the facility. He was captured nearly three months later and pleaded guilty two weeks before the scheduled trial date. At sentencing, the court granted Mount a two-level reduction in offense level pursuant to U.S.S.G. § 3E1.1(a). In keeping with the plea agreement, the government then moved for Mount to receive an additional one-level reduction under § 3E1.1(b) for timely notifying prosecutors of his intent to plead guilty. Citing Mount's flight and the government's expenditure of resources to capture him, the court denied the government's motion. Mount appealed.

The Seventh Circuit held that in cases where a sentencing court has determined that (1) the defendant qualifies for a two-level reduction under § 3E1.1(a); (2) the defendant's offense level is greater than 16 before § 3E1.1(a) is applied; and (3) the government makes a motion for an additional one-level downward adjustment under § 3E1.1(b), the additional one-level reduction is mandatory. The court noted that its interpretation of § 3E1.1(b) was consistent with that of the Second, Fifth, and Eighth Circuits. Concluding that the sentencing court erred by failing to grant the government's motion, the Seventh Circuit vacated the judgment and remanded the case for further proceedings consistent with its opinion.

Seventh Circuit Holds Failure to Consider Guidelines Factors in Ordering Consecutive Sentences for Aggravated Identity Theft Was Plain Error

In ***United States v. Dooley***, 688 F.3d 318 (7th Cir. 2012), the Seventh Circuit held that the district court committed plain error when it failed to explicitly consider the application note to the appropriate Sentencing Guideline in deciding whether to sentence the defendant concurrently or consecutively for violations of the aggravated identity theft statute under 18 U.S.C. § 1028A.

Karen Dooley ("Dooley") pleaded guilty to six fraud offenses and three counts of aggravated identity theft related to her operation of a long-running identity theft scheme, which involved stealing credit cards and identifying documents from patients at the hospital where she worked. Dooley was sentenced pursuant to the penalty provision of § 1028A, which requires that every conviction be punished by two years in prison and that sentences for multiple aggravated identity theft convictions may run concurrently or consecutively. In Dooley's case, the district court imposed three two-year sentences to run consecutively, for a total of 72 months' imprisonment for the aggravated identity theft convictions.

On appeal, the Seventh Circuit noted that in determining whether multiple counts should run concurrently or consecutively, the aggravated identity theft statute directs courts to exercise discretion in accordance with any applicable Guidelines or policy statements. The applicable provision, found in Application Note 2(B) to U.S.S.G. § 5G1.2, provides that a sentencing court should consider a non-exhaustive list of factors, including (1) the nature and seriousness of the underlying offenses; (2) whether the underlying offenses are groupable under § 3D1.2; and (3) whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) would be better achieved by imposing a concurrent or a consecutive sentence.

The appellate court held that in failing to consider the factors listed in Application Note 2(B), the sentencing court committed plain error. Accordingly, the appellate court concluded that Dooley was entitled to be resentenced.

FORFEITURE

Sixth Circuit Holds "Relation Back" Principle Does Not Apply to Substitute Assets

In ***United States v. Erpenbeck***, 682 F.3d 472 (6th Cir. 2012), the Sixth Circuit held that the relation-back provision of the forfeiture statute (21 U.S.C. § 853(c)) does not apply to substitute assets.

In July 2002, the creditors of A. William Erpenbeck, Jr. ("Erpenbeck"), a real estate developer, filed an involuntary bankruptcy petition against him. The following year, in April 2003, Erpenbeck pleaded guilty to bank fraud and was ordered to forfeit nearly $34 million in proceeds. Six years later, the FBI learned that, before he went to prison, Erpenbeck gave a friend more than $250,000 in cash to hold for him. FBI agents unearthed the cash, which the friend had buried at a golf course, and the government initiated forfeiture proceedings. In November 2009, after finding that Erpenbeck's fraud proceeds were no longer available for forfeiture, a district court entered a second preliminary order of forfeiture, which included the cash as a substitute asset.

The government posted notice of the forfeiture online in November and December 2009. Three months later, the trustee of Erpenbeck's bankruptcy estate contacted an Assistant United States Attorney ("AUSA") and told her the estate had an interest in the cash. The AUSA did not inform the trustee of the forfeiture proceedings. Because no one filed a petition asserting an interest in the cash, the district court entered a final order of forfeiture.

The bankruptcy trustee filed a motion to stay the final order of forfeiture in November 2010, contending that the cash belonged to the bankruptcy estate. The district court denied the motion, holding that the trustee had waived his claim by failing to file a timely petition. On appeal, the government argued that under the forfeiture statute's relation-back provision, 21 U.S.C. § 853(c), title to the cash retroactively vested in the government at the time of Erpenbeck's fraud. The government contended that because the cash did not belong to Erpenbeck, it did not become part of the bankruptcy estate, and the trustee had no right to direct notice of the forfeiture.

The Sixth Circuit rejected the government's argument, noting that the government sought forfeiture of the cash not as tainted property but as "substitute property," *i.e.*, untainted property that the government may seize to satisfy a forfeiture judgment if the tainted property is unavailable. *See* 21 U.S.C. § 853(p). The court held that the relation-back clause only applies to tainted property, not to substitute property, and therefore title to the buried cash did not retroactively vest in the government at the time of Erpenbeck's fraud.

The court further concluded that the trustee had a plausible claim to the cash because, as substitute property, the cash did not become subject to forfeiture until the tainted assets became unavailable for forfeiture, which occurred after Erpenbeck's conviction and several months after the bankruptcy filing. Because the trustee had a plausible claim, the court held that the government should have given him direct notice of the forfeiture action and an opportunity to assert the claim.

Ninth Circuit Holds Excessive Fines Analysis Requires Consideration of Property Owner's Culpability

In ***United States v. Ferro***, 681 F.3d 1105 (9th Cir. 2012), the Ninth Circuit held that, in reviewing a forfeiture under the Eighth Amendment's Excessive Fines Clause, a court must consider the culpability of the property's owner.

Between 1983 and 1992, Robert Ferro ("Ferro") collected hundreds of firearms, obtaining federal firearms licenses to do so. In 1991, he was charged with possession of explosives in violation of California state law. Prior to his trial, Ferro conveyed ownership of "all of his property and possessions," including the firearms, to his wife, Maria. Upon conviction, Ferro

was sentenced to two years' imprisonment. He was paroled in 1996. A decade later, in April 2006, ATF agents searched the Ferros' home twice and seized over 700 collectible firearms, 87,983 rounds of ammunition, 35 machineguns, and an assortment of other related items, much of which was hidden in the walls and floors of the house, as well as in hidden rooms and an underground bunker. The district court found that Maria was unaware of the vast majority of the firearms hidden in the house.

The government filed a civil *in rem* forfeiture action, seeking to forfeit the firearms in its custody – which the court valued at $2.55 million – as "instrumentalities" of the crime of being a felon in possession of firearms. During the forfeiture proceeding, Maria moved to remit the forfeiture, arguing that it constituted an excessive fine under the Eighth Amendment. The district court granted her motion in part and reduced the forfeiture by ten percent.

On appeal, the government contended that the firearms were immune from excessiveness review because they were instrumentalities of a crime. The Ninth Circuit disagreed, holding that under the Civil Asset Forfeiture Reform Act ("CAFRA"), forfeitable property is subject to excessiveness review even if it can be considered an instrumentality of an offense. The appellate court further held, however, that the district court misapplied the excessiveness inquiry by focusing solely on Ferro's conduct and failing to consider Maria's culpability, even though the punishment was actually levied on her. Accordingly, the appellate court remanded to the district court for a redetermination under the proper standard.

CRIMINAL TAX BULLETIN

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