IRS

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Department of the Treasury | Internal Revenue Service
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FOURTH AMENDMENT

Second Circuit Holds Fourth Amendment Does Not Apply to Data Stored Outside the United States, or Provided to Third Parties

In ***United States v. Guzman Loera***, 24 F.4th 144 (2d Cir.), *cert. denied*, 142 S. Ct. 2780 (2022), the Second Circuit held, *inter alia*, that the Fourth Amendment does not apply to telephone calls stored on servers outside the United States, or to data searched and seized from telephones given to third parties.

Joaquin Guzman Loera (Guzman) a/k/a "El Chapo" is the former leader of a Mexican drug-trafficking cartel, which imported substantial amounts of methamphetamine, cocaine, heroin, and marijuana into the United States. The cartel used murder, kidnapping, torture, bribery of officials, and other illegal methods to control territory in Mexico and subdue opposition. To further his criminal activities, Guzman had a computer engineer set up a private, encrypted communications system, which Guzman used to communicate with Colombian cocaine suppliers.

In 2008, the engineer set up a similar network (Guzman Network) to enable Guzman and members of the Sinaloa Cartel to communicate with each other. The Guzman Network consisted of servers that supported voice communications, emails, and text messages. The servers were initially located in Colombia, but the engineer eventually moved them to the Netherlands after becoming a confidential source (CS). Before becoming a CS, Guzman had also asked the engineer to provide the capability for Guzman to monitor the conversations of his girlfriends. The CS purchased licenses for FlexiSpy, a spyware program that collects information without the device users' knowledge. The engineer installed the spyware on various mobile devices that Guzman gave to his girlfriends and Sinaloa Cartel members. The FlexiSpy software stored messages sent to and from these devices, including messages from Guzman discussing his criminal activities. The messages were ultimately stored on an Amazon cloud server located in the Western District of Washington. Subsequently, at the FBI's direction, the CS downloaded the data from the Amazon server, for which the FBI obtained warrants to search.

Guzman was indicted in 2009 and extradited to the U.S. in 2017. After the district court denied Guzman's motion to suppress the evidence obtained from the Netherland servers and the FlexiSpy software, a jury convicted Guzman of conducting a continuing criminal enterprise (CCE), money-laundering and drug-trafficking conspiracies, and unlawful use of a firearm. He was sentenced to five concurrent terms of life imprisonment for the drug trafficking and CCE violations, 30 years consecutively for the firearms violation, and ordered to forfeit over $12 billion.

On appeal, the Second Circuit held the government did not violate the Fourth Amendment or Fed. R. Crim. P. 41, *Search and Seizure*, when it obtained the phone records stored on the Dutch servers, or when it searched and obtained data captured by FlexiSpy. With respect to the phone calls, the Second Circuit held, *inter alia*, that the Fourth Amendment does not apply to U.S. searches and seizures of property owned by a nonresident alien and located in a foreign country. Neither Guzman nor the servers were located in the U.S. With respect to the FlexiSpy data, the Second Circuit held Guzman had no reasonable expectation of privacy on data from phones he had given to associates and girlfriends because he had given access to the data to third parties. Lastly, the appellate court held that even though the warrants were obtained in the Southern District of New York for phone data that was located in the Western District of Washington, the venue limitation in Fed. R. Crim. P. 41(b) does not apply to warrants issued pursuant to the Stored Communications Act. Accordingly, the Second Circuit affirmed the district court's evidentiary rulings.

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Ninth Circuit Holds Search Warrant Affidavit Showed Sufficient Nexus Between Unlawful Activity and Home Searched

In ***United States v. Kvashuk***, 29 F.4th 1077 (9th Cir.), *cert. denied*, 143 S. Ct. 310 (2022), the Ninth Circuit, *inter alia*, upheld the denial of a motion to suppress evidence seized from defendant's home, holding the warrant affidavit sufficiently established a nexus between the unlawful activity and the searched premises.

Volodymer Kvashuk (Kvashuk) stole $10 million in digital gift cards from his employer, Microsoft, using his co-workers' login credentials. Microsoft referred the matter to law enforcement, and the IRS investigated the gift-card theft and defendant's failure to report the illegal income on his tax returns. Additional evidence was collected by execution of a search warrant on defendant's home and vehicle. Ultimately, Kvashuk was convicted of 18 fraud-related counts, including mail fraud, wire fraud, making/subscribing to a false tax return, money laundering, and aggravated identity theft. He was sentenced to nine years' imprisonment.

On appeal, Kvashuk argued, *inter alia*, the evidence seized from his house should have been suppressed for lack of probable cause because the warrant affidavit did not establish a nexus between his unlawful activities and his searched home. The Ninth Circuit disagreed, explaining that while it had not directly addressed the nexus issue, its cases confirm the nature of cybercrimes, *i.e.,* a reliance on computers and personal electronic devices, is relevant to probable cause to search a home. In this case, the affidavit detailed how Kvashuk committed the suspected crimes almost entirely via digital devices, which he used to, *inter alia*, access Microsoft's online store, set up and access email accounts, conduct online research to further his scheme, communicate with tax preparers, and conduct bitcoin transactions. The affidavit also provided extensive evidence that Kvashuk kept his digital devices at home. The Ninth Circuit concluded the evidence, taken together, was sufficient to establish a nexus between the seized digital devices and Kvashuk's home. The appellate court also rejected Kvashuk's claim that he could not have committed the crimes from his house because Microsoft disabled the test accounts before he moved there. The Ninth Circuit noted: "probable cause to believe that a person *conducts* illegal activities in the place where he is to be searched is not necessary; the proper inquiry is whether there was probable cause to believe that *evidence* of illegal activity would be found in the search." In this case, there was internet service and an IP address associated with the house used to access Kvashuk's accounts, which made it reasonable to infer Kvashuk brought his digital devices with him—including those used to perpetrate the theft—when he moved into the house. Based on a totality of the circumstances, the Ninth Circuit concluded the search-warrant affidavit established a proper nexus between the unlawful activities and Kvashuk's home.

Finally, the Ninth Circuit held the evidence of the theft, which was 15-20 months old, was not stale, explaining that the mere passage of substantial time does not control in a question of staleness, particularly when electronic evidence is involved. "Given the long memory of computers, evidence of a crime typically remains on a computer even if the defendant attempts to delete it." Thus, a temporal gap of 15-20 months is "not extreme relative to the lifespan of a computer."

FOURTH, FIFTH, AND SIXTH AMENDMENTS

Eighth Circuit Holds Exclusionary Rule Inapplicable to CSLI Obtained Pursuant to Then-Existing Binding Authority and Government Privilege Filter Procedures Did Not Violate the Constitution

In ***United States v. Scarfo***, 41 F.4th 136 (3d Cir. 2022), the Third Circuit held, *inter alia*, that the exclusionary rule did not apply to cell site location information (CSLI) evidence obtained in objective, good-faith reliance on then-existing binding authority, and the government filter-team procedures used to segregate attorney-client privileged materials did not violate the defendant's Fifth Amendment Due Process Clause rights because the government's conduct was not so outrageous as to shock the universal sense of justice, and did not result in actual and substantial prejudice.

Defendants Nicodemo Scarfo (Scarfo), member of the Lucchese organized crime family of La Cosa Nostra (LCN), Salvatore Pelullo (Pelullo), associate of the Lucchese and Philadelphia LCN families, and brothers William and John Maxwell (the Maxwells), engaged in an extortion scheme to takeover a publicly held mortgage company, causing a loss of over $14 million and leaving over 1,000 shareholders with worthless investments. The defendants were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, conspiracy to commit securities fraud, conspiracy to commit wire fraud, wire fraud, and related offenses. Scarfo and Pelullo were each sentenced to 30 years' imprisonment, while the Maxwells were each sentenced to 20 and 10 years in prison. The defendants were ordered to pay over $14 million in restitution and forfeit $12 million in proceeds.

On appeal, Pelullo argued, *inter alia*, the district court's failure to suppress CSLI evidence obtained without a warrant violated his Fourth Amendment rights, and that the government's filter-team procedures to segregate attorney-client privileged materials violated his Fifth Amendment right to Due Process and Sixth Amendment right to counsel. The Third Circuit rejected both claims. First, the appellate court held that the exclusionary rule did not apply to evidence obtained by law enforcement in objective, good-faith reliance on then-existing binding legal authority. Pelullo's argument centered on *Carpenter v. United States,* 138 S. Ct. 2206 (2018), which held that the collection of historical CSLI is a "search" under the Fourth Amendment and that the Stored Communications Act's (SCA) "reasonable grounds" standard for obtaining a court order "falls well short" of the probable cause standard of the Fourth Amendment. However, at the time of law enforcement's conduct in this case, the SCA permitted the government to obtain CSLI pursuant to a court order. The Third Circuit reasoned that it could not have expected the government to have anticipated the new rule announced a decade later in *Carpenter*, and thus found the government's reliance on the SCA was reasonable; accordingly, the good-faith exception applied to its acquisition of CSLI data without a warrant.

As to the government's filter-team procedures, Pelullo asserted that it was improper for an agent to be on both the Wiretap Filter Team and the investigative team that had regular contact with the prosecution because privileged information would necessarily make its way from the Wiretap Filter Team to the prosecution. Pelullo also contended that some of the filter team's attorney-client privilege determinations were improperly made by a non-attorney investigative agent. The Third Circuit first explained that appellate courts exercise scrupulous restraint before declaring government action so outrageous as to shock the universal sense of justice which would warrant a finding that it violated the Fifth Amendment's Due Process Clause. The Third Circuit also observed that courts only make such a finding after a defendant has shown the government knew of and deliberately intruded into the attorney-client relationship, which resulted in actual and substantial prejudice. The Third Circuit held that, in this case, Pelullo had not claimed the government's conduct amounted to an abuse of official power that shocks the conscience or otherwise explain how his due-process rights were violated. The appellate court also observed that contrary to Pelullo's claim, while a non-attorney agent screened the seized materials to ensure they fell within the scope of the warrant, the initial privilege review was performed by an Assistant U.S. Attorney (AUSA). The Third Circuit further observed that Pelullo had, in conclusory fashion, asserted that the alleged errors violated the Sixth Amendment, even though the Sixth Amendment does not attach before indictment. Thus, the Third Circuit held Pelullo failed to identify any constitutional deficiencies in the procedures employed by the filter teams and the appellate court could discern none.

WIRE FRAUD – 18 U.S.C. § 1343

Eighth Circuit Reverses Wire Fraud Convictions Involving Fund Transfers Not Made in Furtherance of Fraud Scheme

In ***United States v. Garbacz***, 33 F.4th 459 (8th Cir. 2022), the Eighth Circuit held, *inter alia*, that fund transfers made to pay off debts were not made in furtherance of defendant's scheme.

Marcin Garbacz (Garbacz) was a Catholic priest in Rapid City, South Dakota. Between 2012 and 2018, Garbacz stole over $258,000 in cash from weekly mass donations from various parishes. Garbacz used the stolen money to acquire numerous gold-plated chalices, bronze statues, a diamond ring, a grand piano, Mont Blanc fountain pens, and other items. When he became aware of the federal investigation, Garbacz withdrew all the funds from his bank account and bought a one-way plane ticket to Poland, but he was arrested before his flight departed. A jury convicted Garbacz on various counts of wire fraud, money laundering, transporting stolen funds in interstate commerce, and filing false tax returns for 2013-2017 by not reporting the embezzled funds. Ultimately, he was sentenced to 93 months' imprisonment.

On appeal, Garbacz argued, *inter alia*, that the evidence was insufficient to support his wire-fraud convictions. The Eighth Circuit reversed some of the wire-fraud convictions, holding it was not plain error for the district court to uphold the jury's finding that Garbacz's credit-union deposits and transfers furthered his fraudulent scheme. However, the appellate court also held the district court plainly erred in upholding the jury's wire-fraud counts related to Garbacz's transfers of funds to his credit card, concluding the transfers did not further Garbacz's fraudulent scheme. The appellate court explained the jury could reasonably conclude that Garbacz deposited the cash into his credit union account to prevent detection by his fellow priests. Thus, these deposits furthered his scheme. However, Garbacz used the credit-card transfers to pay off debt, not to keep suspicions at bay. Thus, no reasonable juror could conclude these transfers helped Garbacz further his scheme. Accordingly, the Eighth Circuit reversed the three wire-fraud convictions related to Garbacz's credit-card transfers.

EVIDENCE – FED. R. EVID. 404(b)

Fifth Circuit Affirms Pre-Trial Denial of Prior Tax History Evidence

In ***United States v. Williams***, 30 F.4th 263 (5th Cir. 2022), the Fifth Circuit affirmed the district court's disallowance of defendant's prior tax history evidence, holding any probative value of the evidence was outweighed by the risk of undue prejudice, confusion, and delay.

New Orleans District Attorney Jason Williams (Williams) and his former law partner allegedly devised a scheme to inflate Williams' Schedule C business losses, which reduced Williams' taxes by $200,000. They also allegedly misclassified Williams' personal expenses as business expenses and failed to file Forms 8300 relating to cash received in a trade or business. After Williams was indicted, but before trial, the government filed a notice of intent to introduce "other acts" evidence under Fed R. Evid. 404(b)(3), such as evidence of Williams' tax history, including late-returns filings and payments and related correspondence with the IRS. The district court allowed some of Williams' tax history but excluded the "granular details of Williams's late filings, late payments, liens, enforcement actions, and communications with the IRS that were resolved before he met the tax preparer."

On interlocutory appeal, the government argued the excluded prior tax history was probative of Williams' willfulness to commit tax fraud. The Fifth Circuit rejected the government's argument, explaining that while Williams' tax history may be allowed under Rule 404(b) to prove his willful intent or knowledge of tax obligations, the district court did not clearly abuse its discretion in excluding the evidence under Rule 403, reasoning that any probative value of the excluded tax history would be outweighed by the risk of undue prejudice, confusion, and delay. The Fifth Circuit agreed with the district court that admitting the evidence would give the jury the chance to decide the case on an improper basis, *i.e.,* that Williams is guilty because he is the type of person who does not follow the tax laws. The appellate court stated: "[p]aying taxes late is not the same as lying on tax forms. And although Williams's tax delinquencies and communications with the IRS might show his familiarity with how taxes work in general, they say little about his knowledge of Schedule C business expenses." Additionally, the appellate court explained that "risks of confusion and delay abound," as the exhibits the government sought to introduce span close to a decade, raising the strong possibility of minitrials over late filings and civil IRS disputes that might distract the jury from the charged conduct. Accordingly, the Fifth Circuit affirmed the district court's ruling denying Williams' prior tax history predating the alleged conspiracy.

BIVENS ACTION

Supreme Court Holds *Bivens* Does Not Extend to New Contexts Under Fourth and First Amendments

In ***Boule v. Egbert***, 142 S. Ct. 1793 (2022), the Supreme Court held, *inter alia*, that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), does not extend to create causes of action for an alleged Fourth Amendment excessive-force claim and First Amendment retaliation claim.

Robert Boule (Boule) owned and operated an inn that abutted the international border between the United States and Canada. Boule often helped the U.S. Customs and Border Protection (CBP) identify and apprehend people involved in unlawful border crossings, however, the CBP believed Boule also helped facilitate illegal border crossings. In 2014, after learning from Boule that a foreign national would be arriving at Boule's inn, CBP Agent Erik Egbert (Egbert) followed one of Boule's vehicles into the inn's property. After Boule asked Egbert to leave and Egbert refused, a physical struggle ensued, with Egbert allegedly shoving and injuring Boule. Boule filed a grievance with Egbert's supervisors and an administrative claim with CBP. Egbert allegedly retaliated against Boule by reporting potential illegal activity, and by contacting the IRS and prompting an audit of Boule's tax returns. After Boule's claims were denied, he brought a *Bivens* action against Egbert, alleging violation of the Fourth Amendment by use of excessive force and a First Amendment violation for unlawful retaliation. The district court granted summary judgment in Egbert's favor, but the Ninth Circuit reversed.

On writ of certiorari, the Supreme Court reversed the Ninth Circuit's opinion, holding *Bivens* should not be extended to grant Boule's Fourth Amendment excessive force or First Amendment retaliation claims because prescribing a cause of action is generally a job for Congress, not the courts. In *Bivens*, the Court held it had authority to create a damages action against federal officials for alleged violations of the Fourth Amendment. In subsequent cases, the Court extended *Bivens* to new causes of action under the Fourth, Fifth, and Eighth Amendments until approximately 1980. Since then, the Court has declined similar causes of action for other alleged constitutional violations. Rather than dispense with *Bivens,* the Court now applies a two-step inquiry to determine whether to uphold a *Bivens* claim: (1) does the case present "a new *Bivens* context," *i.e.,* is the case meaningfully different from the cases in which the Court has implied a damages action; and (2) if a claim arises in a new context, are there "special factors" indicating that the Judiciary is "arguably less equipped than Congress to weigh the costs and

benefits of allowing a damages action to proceed." The Court noted the two-step inquiry often resolves to the single question of *whether there is any reason to think Congress might be better equipped to create a damages remedy*. The Court further noted that courts may not fashion a *Bivens* remedy if Congress has already provided an alternative remedy.

Applying the two-step inquiry to Boule's Fourth Amendment claim, the Court concluded Boule's claim presented a new context for *Bivens* purposes, and that Congress was better positioned to create remedies in the border-security context. Additionally, alternative remedies already existed to protect plaintiffs like Boule. By regulation, CBP must investigate grievances of "any person," and the agency did so with respect to Boule. Boule's dissatisfaction with CBP's adverse determination regarding his administrative claims did not create alternative judicial review rights such as a *Bivens* claim.

The Court also declined to extend *Bivens* to Boules' First Amendment claim, concluding that the claim presented a new constitutional right at issue, and further reasoned that extending *Bivens* to alleged First Amendment violations would "unduly inhibit officials in the discharge of their duties," and that Congress was again better suited to authorize such a damages remedy.

Justices Sotomayor, Kagan, and Breyer concurred in part and dissented in part. They concurred that Boule's First Amendment claim should fail because "evaluating the impact of a new species of litigation on the efficiency of civil service is a task for Congress, not the courts." Their dissent noted the Court's failure to grant Boule's Fourth Amendment claim further eroded *Bivens'* deterrent function in law enforcement, arguing his claim did not "arise in a new context" distinct from *Bivens*, and that the "alternative remedy" was inadequate as it was created by the Executive Branch, was non-participatory, and lacked judicial review.

ATTORNEY-CLIENT PRIVILEGE

Ninth Circuit Holds Primary Purpose Test Applies to Determine Attorney-Client Privilege in Dual-Purpose Communications

In ***In Re Grand Jury***, 23 F.4th 1088 (9th Cir. 2021), *cert. dismissed as improvidently granted*, 143 S. Ct. 543 (2023), the Ninth Circuit held that in dual-purpose communications, courts must apply the primary purpose test to determine whether the attorney-client privilege applies.

A law firm specializing in tax law (Law Firm) and its client (Company) were served with grand jury subpoenas for records related to a criminal investigation. In response, the Law Firm and Company produced some documents but withheld others, claiming, *inter alia*, attorney-client privilege. The district court ruled that certain dual-purpose communications were not privileged because the "primary purpose" of the documents was to obtain tax, not legal, advice, and ordered production of some of the withheld documents. The Law Firm and Company continued to withhold the disputed documents and were both held in contempt.

On appeal, the Ninth Circuit, as a matter of first impression, held the district court correctly relied on the "primary purpose" test in determining the application of the attorney-client privilege to dual-purpose communications. The appellate court first noted that when communications have both a legal and non-legal purpose, courts have adopted either the "primary purpose" or the "because of" test. The "primary purpose" test looks at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice. The "because of" test—which typically applies in the work-product context—considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation. The Ninth Circuit explained that unlike the work-product doctrine, the attorney-client privilege is not tied to any adversarial process or necessarily concerned with the fairness of litigation as it is with providing a sanctuary for candid communication about any legal matter. In the Ninth Circuit's view, applying the broader "because of" test to attorney-client privilege might harm our adversarial system if parties try to withhold key documents as privileged by claiming they were created "because of" litigation concerns. "Indeed, it would create perverse incentives for companies to add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in any future litigation." Because of these different aims, the Ninth Circuit concluded it makes sense to apply different tests for the attorney-client privilege and the work-product doctrine. Accordingly, the Ninth Circuit rejected the Law Firm and the Company's invitation to extend the "because of" test to the attorney-client privilege context and held that the "primary purpose" test applies to dual-purpose communications.

The appellate court expressly left open the Law Firm and Company's argument that even if the primary purpose test applies, courts should adopt "*a* primary purpose" as the test instead of "*the* primary purpose" test. While the Ninth Circuit acknowledged there was merit to a test that focuses on *a* primary purpose instead of *the* primary purpose, it saw no need to adopt that reasoning in this case. The appellate court explained that only one court had adopted that test, and that case dealt with the very specific context of corporate internal investigations, such that its reasoning does not apply with equal force in the tax

context. The Ninth Circuit further explained that, in any event, the universe of documents in which *a* primary test would make a difference is limited, as it would only change the outcome of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a non-legal purpose.

Note: The Supreme Court granted certiorari on the issue and heard oral arguments, but subsequently dismissed the writ as improvidently granted. *In re Grand Jury*, 143 S. Ct. 543 (2023).

FORFEITURE

Ninth Circuit Holds "Proceeds" in Criminal-Forfeiture Statute Means Receipts and is Not Limited to Profits

In ***United States v. Prasad***, 18 F.4th 313 (9th Cir. 2021), the Ninth Circuit held, *inter alia*, that under 18 U.S.C. § 982(a)(6)(A)(ii)(I) "proceeds" obtained from the offense of conviction was not limited to profits and included receipts.

Abhijit Prasad (Prasad) was convicted of visa fraud (18 U.S.C. § 1546(a)) and aggravated identity theft (18 U.S.C. § 1028A) for engaging in a fraudulent scheme involving the filing of petitions for H1-B status to recruit foreign workers. Prasad falsely represented in the filings that specific positions were available for the workers at the time the petitions were filed. Prasad was convicted and sentenced to thirty-six months' imprisonment and three years' supervised release, and order to forfeit $1,193,440.87.

On appeal, Prasad argued, *inter alia*, that the amount subject to forfeiture should be limited to $238,688.17, which represented his fraud profits, because he did not obtain the full $1,193,440.87. The Ninth Circuit rejected this argument, construing the term "obtained" in 18 U.S.C. § 982(a)(6)(A)(ii)(I) under its plain meaning, as coming into possession or acquiring, and controlling. The appellate court concluded that because Prasad controlled the $1,193,440.87, he possessed it and so necessarily had obtained it. The Ninth Circuit also rejected Prasad's claim that even if he had "obtained" the full amount, only the "proceeds" thereof, which excluded what he paid to the H-1B beneficiaries was subject to forfeiture. The Ninth Circuit first noted that because the term "proceeds" could mean gross receipts or profits, it had to be construed in the context of the forfeiture statute, the statute's punitive purpose, and prior judicial construction of virtually identical criminal-forfeiture provisions. First, the appellate court stated that when interpreted in the context of the term "obtained" and the entire statutory provision, the term meant receipts. Second, the Ninth Circuit explained that the punitive purpose of the statute would be hindered if "proceeds" was limited to profits because a defendant could defeat the United States' claim to the criminally derived property by reinvesting the property into the criminal enterprise before his conviction, rather than keeping it as a profit. Finally, the appellate court noted that construing the term "proceeds" as receipts was consistent with the court's prior construction of substantially similar criminal-forfeiture provisions. Accordingly, the Ninth Circuit affirmed the district court's forfeiture order.

Eighth Circuit Affirms Dismissal of Third-Party Forfeiture Claims Based on Claimants' Failure to Present Evidence at Ancillary Forfeiture Proceedings

In ***United States v. Mills***, 18 F.4th 573 (8th Cir. 2021), the Eighth Circuit held claimants could not prevail in their third-party ancillary forfeiture proceeding because they did not show a superior ownership interest in the forfeited assets after receiving notice of the proposed forfeiture, and any lack of diligence on the part of claimants' attorney did not constitute excusable neglect to warrant relief from final forfeiture order.

A jury convicted Jacqueline Mills (Mills) of wire fraud, money laundering, and bribery, resulting from her scheme to defraud the United States of monies intended to feed low-income children. The indictment included criminal-forfeiture allegations. After Mills' conviction, the jury found several properties traceable to proceeds of her fraud, including $187,340.67 seized from a business account at Southern Bancorp. The district court issued a preliminary order of forfeiture, which was final as to Mills, giving rise to ancillary forfeiture proceedings for any third parties to assert a superior interest in the forfeited assets. Rosie and John Farr filed third-party claims. However, when they failed to properly respond to the government's discovery requests and subsequent summary-judgment motion, the district court dismissed the ancillary proceedings and issued a final order of forfeiture in the government's favor.

The Farrs appealed the forfeiture of the $187,340.67 seized from Southern Bancorp. The Eighth Circuit first noted that a third-party claimant may not relitigate the underlying forfeiture order against the criminal defendant, but must prove, by a preponderance of the evidence, that he or she has a superior ownership interest in the property than the government's interest. The appellate court next noted that in the two years between the Farrs' third-party claims and the government's motion for summary judgment, the Farrs failed to present evidence supporting their claims of superior ownership interest. In contrast, in its summary judgment motion, the government showed the forfeited funds were derived from Mills' fraud. Accordingly, the district court properly dismissed the ancillary forfeiture proceeding after adopting the government's statement of undisputed facts. The appellate court explained the Farrs failed to prove a prior or superior interest in the property under 21 U.S.C. § 853(n)(6)(A) because "the proceeds of

an offense do not exist before the offense is committed, and when they come into existence, the government's interest under the relation-back doctrine immediately vests." The Eighth Circuit further concluded the Farrs failed to present evidence they qualified as bona-fide purchasers for value under § 853(n)(6)(B), as their failure to present evidence of superior ownership interests "irreparably crippled" their third-party claims.

The Eighth Circuit also held that the district court properly rejected the Farrs' motion to reconsider, claiming that their failure to respond to the government's discovery requests and motion for summary judgment was due to their attorney's lack of diligence. The appellate court explained that "[i]t is generally held that 'excusable neglect' under [Fed. R. Crim. P.] Rule 60(b) [Relief from a Judgment or Order] does not include ignorance or carelessness on the part of an attorney."

Lastly, the Eighth Circuit rejected the Farrs' argument that they failed to respond because the preliminary forfeiture order cited the criminal-forfeiture statute, which by its terms does not apply against third parties. The appellate court explained that a preliminary forfeiture order is part of the criminal-forfeiture process, intended in part to give third parties notice of the impending forfeiture and an opportunity to claim a superior interest in an ancillary proceeding. Thus, if a third party prevails in the ancillary proceeding, the preliminary order of forfeiture fails as to that property, and it will be transferred to the third-party owner unless the government succeeds in a subsequent *civil* forfeiture proceeding against the third party. Here, however, the Farrs' third-party claims failed, and the district court properly entered a final forfeiture order pursuant to 21 U.S.C. § 853(n)(7) and Fed. R. Crim. P. 32.2(c)(2), and the Farrs, by filing timely third-party claims, confirmed that they had adequate notice the government intended to seek forfeiture.

SENTENCING

Eleventh Circuit Holds Sentencing Enhancement Was Not Impermissible Double Counting Under Sentencing Guidelines

In ***United States v. Grushko***, 50 F.4th 1 (11th Cir. 2022), the Eleventh Circuit affirmed defendants' convictions and sentences holding, *inter alia*, that the sentencing enhancement for possessing or using device-making equipment did not constitute impermissible double counting under the U.S. Sentencing Guidelines.

Brothers Igor Grushko and Denis Grushko (the Grushkos) and co-conspirator Vadym Vozniuk used stolen credit-cards to fraudulently obtain high-value electronic goods from Target Corporation. To carry out the scheme and avoid detection, they engaged in an elaborate scheme involving online purchases picked up by persons with fake driver's licenses of non-existent third parties, followed by a return of the items in exchange for gift cards that were later redeemed for high-value electronics.

A federal grand jury returned a nine-count indictment charging all three men with conspiring to commit access device fraud (18 U.S.C. § 1029(b)(2)); charged Igor and Vozniuk with using unauthorized access devices (18 U.S.C. § 1029(a)(2)); and charged the Grushkos with possession of fifteen or more unauthorized access devices (18 U.S.C. § 1029(a)(3)); possession of device-making equipment (18 U.S.C. § 1029(a)(4)); production of a false identification document (18 U.S.C. § 1028(a)(1)); and aggravated identity theft (18 U.S.C. § 1028A(a)(1)). After a jury trial, the Grushkos were found guilty on all counts and each sentenced to a total of 145 months' imprisonment (24 months' imprisonment for the aggravated identity theft counts and 121 months' imprisonment for the remaining counts).

On appeal, the Grushkos argued, *inter alia*, that the district court erroneously applied two-level enhancements per U.S.S.G § 2B1.1(b)(11)(A) to their base-offense levels for possessing device-making equipment. While they did not dispute they possessed or used device-making equipment, they claimed that the district court's application of the § 2B1.1(b)(11)(A) two-level enhancement punished them twice for the same conduct, ostensibly because they were each convicted of possessing device-making equipment in violation of 18 U.S.C. § 1029(a)(4).

The Eleventh Circuit explained that under § 2B1.1(b)(11)(A), a defendant's offense level is increased by two if the offense conduct involved the possession or use of any device-making equipment. According to the appellate court, impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines. On the other hand, double counting is permissible where (1) the Sentencing Commission intended the result; and (2) each guideline section in question concerns a conceptually separate consideration related to sentencing. The Eleventh Circuit reasoned that it presumes that the Sentencing Commission intended to apply separate guidelines sections cumulatively unless specifically directed otherwise and that the application of multiple guidelines sections can be triggered by the same conduct. In response to the Grushkos' argument, the Eleventh Circuit further explained that impermissible double counting does not occur when, as here, a substantive conviction informs the district court's application of a guideline enhancement. Thus, the Eleventh Circuit held the district court properly applied the § 2B1.1(b)(11)(A) two-level enhancement to the Grushkos' sentences.

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