Criminal Tax Bulletin

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FOURTH AMENDMENT

Eleventh Circuit Holds Deception by Law Enforcement Does Not Render Consent to Search Residence Involuntary

In ***United States v. Spivey***, 861 F.3d 1207 (11th Cir. 2017), the Eleventh Circuit held, *inter alia*, that deception by law-enforcement officers did not render a consent to search the defendants' residence involuntary.

The home of Chenequa Austin ("Austin") and Eric Spivey ("Spivey") was burglarized twice by Caleb Hunt ("Hunt"), who was caught and informed police that substantial credit-card fraud was happening at the house. Officers, including a United States Secret Service Special Agent ("SA"), planned a ruse operation to obtain consent to enter and search the residence without a warrant. Two officers told Austin they were at the home to investigate the burglaries and she invited them in. The SA impersonated a crime-scene technician, including pretending to take fingerprints. Inside the home, the officers saw evidence of credit-card fraud and Spivey showed them video of Hunt's burglary. The ruse was then ended, and Spivey gave further written consent to search the home and Austin was arrested on an outstanding warrant. The defendants' motion to suppress all evidence was denied. Ultimately, both conditionally pled guilty to various identity theft-related charges subject to the appeal of the denial of their motion.

On appeal, Austin and Spivey argued that Austin's consent to search was not voluntary due to the officers' deception. The Eleventh Circuit rejected Austin's argument stating that the Fourth Amendment allows some deception by the police and not all deception invalidates consent. The court explained the existence of a ruse does not invalidate consent—what matters is the existence of a "legitimate reason to be there, not the priority that the officers gave that reason." Here, the officers legitimately were there to search for evidence of Hunt's burglary, which they found. That this was not their primary reason and that they did not tell Austin or Spivey of their primary reason did not invalidate the consent. The court agreed that "the government [had] shown by clear and positive testimony that the consents were voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion."

The appellate court, however, noted that deceit can be relevant to determine voluntariness—*e.g.*, the deception in *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977), where a taxpayer asked whether a "special agent" was involved and was improperly told no by the IRS, made the consent involuntary. But, the court noted that *Tweel* has been applied only in an administrative context and not in a case where the suspect knows a criminal investigation exists. Accordingly, the Eleventh Circuit affirmed the denial of the motion to suppress and the convictions.

Dissenting, Judge Martin analyzed the totality of the circumstances and concluded there was no voluntary consent. Citing *Tweel*, the dissent noted that this circuit has stated that "consent searches are almost always unreasonable when government agents induce consent by 'deceit, trickery or misrepresentation.'"

***Note*:** On December 11, 2017, Spivey and Austin petitioned for writ of certiorari.

Second Circuit Holds Search Warrant Not Required for Pen/Trap Orders and Search of Laptop Did Not Lack Particularity

In ***United States v. Ulbricht***, 858 F.3d 71 (2d Cir. 2017), the Second Circuit held, *inter alia*, that warrantless pen/trap orders did not violate the Fourth Amendment, and that a search warrant authorizing search of a laptop did not violate the Fourth Amendment's particularity requirements.

Ross Ulbricht ("Ulbricht") was convicted of drug trafficking and numerous other crimes based on his creation of and role in the Silk Road marketplace, a site on the dark web used for drug sales, money laundering, and other illegal activities. Using the moniker "Dread Pirate Roberts," Ulbricht concealed his identity as the administrator of Silk Road.

Pen/Trap Orders. Ulbricht challenged the pen/trap orders that law enforcement obtained to collect internet protocol ("IP") traffic information to and from his home router. An IP address, which is unique to a device, is analogous to a telephone number and can be used to determine the location of a device. The pen/trap orders enabled law enforcement to determine the IP address for devices that regularly connected with Ulbricht's router. The orders did not authorize the collection of any content or communications, but only the online identity of each communicating device, as evidenced through its IP address, along with transmission dates, times, and durations.

Ulbricht asserted that he had a constitutional privacy interest in IP address traffic information to and from his home, and since the pen/trap orders were obtained without submission of a warrant based on probable cause, the use of the orders violated his Fourth Amendment rights. The Second Circuit, however, held that collecting IP information is "constitutionally indistinguishable" from the use of a standard pen register, concurring with several other circuits that have considered the issue. IP addresses are disclosed to third parties when communicating with other devices, just as telephone numbers are disclosed when making a call. There is no privacy interest in telephone numbers, and similarly, there is no privacy interest in IP addresses revealing the existence of connections between communication devices. The government was not required to obtain a warrant to collect the IP addresses since no communication content was sought or collected.

Laptop Search. Ulbricht also challenged the search of his laptop for lack of particularity based on both the scope of the information to be searched and the protocol for conducting the search. The Second Circuit discussed several issues inherent to the search of electronic devices and evidence, including unintentional access to a vast array of sensitive information and the difficulty in segregating responsive information.

The Second Circuit, however, held that the Fourth Amendment requires the government to link the evidence sought to the alleged criminal activity, but does not require an exact description of the data to be searched and seized. Relying in part on *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013), the appellate court noted that some degree of ambiguity describing the information to be seized is permissible, provided that law enforcement has acquired all the facts that a reasonable investigation would be expected to cover and described those facts in the supporting affidavit.

Although the search warrant seeking electronic evidence in this case was broad, the Second Circuit stated that "a search warrant does not necessarily lack particularity simply because it is broad." The court reviewed the affidavit, incorporated by reference into the warrant, and the two categories of information to be searched and seized: information concerning Silk Road and its operation, and information tying Ulbricht to the Dread Pirate Roberts identity. The court determined that all elements of particularity had been met through the description of the crimes, the location of the search, and the connection of the information to be seized to the crimes. The court held that the warrant was sufficiently particular to satisfy the Fourth Amendment.

The court also rejected Ulbricht's challenge to the search protocols used by investigators in searching his laptop. The warrant described procedures to be used by investigators, including conducting cursory reviews of the first several pages of a file, key word searches, and review of directories and hidden files. Ulbricht argued that the warrant was invalid because the protocols were not specifically outlined and no search terms to be used were specified in the warrant.

The Second Circuit rejected this argument, stating that it was often impossible to specify search terms, since people could use misspelled or misleading file names. The court specifically noted that Ulbricht himself stored relevant information in a file misspelled as "aliaces." The court held that the absence of such limitations on the search to be conducted, in light of the facts of this case, did not violate the particularity requirement.

***Note*:** On December 22, 2017, Ulbricht petitioned for writ of certiorari and the government filed its response on March 7, 2018, to which Ulbricht filed a reply on March 21, 2018.

Sixth Circuit Holds Use of Real-Time GPS Cell-Phone Data Not a Search

In ***United States v. Riley***, 858 F.3d 1012 (6th Cir. 2017), the Sixth Circuit held that law enforcement use of real-time global positioning system ("GPS") coordinates of defendant's cell phone for seven hours on the date of his arrest did not constitute a search under the Fourth Amendment.

Two days after an arrest warrant was issued for Montai Riley ("Riley"), he purchased a cellphone (serviced by AT&T) and provided the number to his girlfriend, who in turn, provided it to law enforcement. The next day, per court order, AT&T provided to U.S. Marshals real-time tracking (GPS data) of Riley's cell phone, which revealed that Riley's cell phone was located at a hotel. Law enforcement went to the hotel, showed the front desk clerk a picture of Riley, and determined Riley's specific hotel room. Officers then entered the room and arrested Riley–a handgun was in plain sight and Riley was indicted on one count of being a felon in possession of a firearm. Ultimately, Riley was convicted of armed robbery and sentenced to 7.5-25 years' imprisonment. Riley moved to suppress the handgun, arguing that the method the government used to find him intruded upon his reasonable expectation of privacy, and thus, required a search warrant. The district court denied Riley's motion and he appealed.

Relying on *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012) (location data emitted by a voluntarily procured cell phone could not be subject to a reasonable expectation of privacy, even if the cell-phone user had no reason to expect that the government would compel the service provider to disclose such data, because the defendant's movements could have been observed by any member of the public), the Sixth Circuit reasoned that because the GPS data (seven hours' worth) only alerted the government that Riley was located at the hotel and the government still had to determine Riley's exact room, the GPS data provided no greater insight into Riley's whereabouts than what Riley exposed to public view as he traveled along public thoroughfares to the hotel lobby. Thus, under *Skinner*, Riley had no reasonable expectation of privacy against such tracking. The Sixth Circuit concluded that since there was no Fourth Amendment search requiring a warrant, Riley's motion to suppress the handgun was properly denied. The district court's decision was affirmed.

In a concurring opinion, Judge Boggs noted that he would hold that Riley's Fourth Amendment claim fails, alternatively, because Riley was a fugitive subject to a valid arrest warrant (*i.e.*, diminished expectation of privacy) and because the officers had a reasonable suspicion that Riley was in possession of the phone they were tracking.

***Note*:** On September 9, 2017, Riley petitioned for writ of certiorari, arguing that unlike *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (2017), which deals with the implications of historical tracking, his case deals with the "more important issue of real-time tracking." Riley contended that tracking individuals prospectively violates the Fourth Amendment because real-time tracking implicates two distinct privacy interests: (1) the subject's right to privacy in his location; and (2) his right to privacy in his movement. Riley also posited that the Supreme Court would have an opportunity to address the concurrence by Justice Sotomayor in *United States v. Jones*, 565 U.S. 400 (2012) (because GPS monitoring allows the government to gather substantial information about any individual at a low cost, the relationship between citizen and government could be altered in "a way that is inimical to democratic society."). On January 12, 2018, the government filed its brief in opposition.

First Circuit Holds Swiping Credit Card Through Card Reader is Not a Search

In ***United States v. Hillaire***, 857 F.3d 128 (1st Cir. 2017), the First Circuit joined the Sixth and Eighth Circuits in holding that swiping a credit card through a magnetic-strip reader is not a search within the meaning of the Fourth Amendment.

Jervis A. Hillaire ("Hillaire") sought to suppress evidence obtained by law enforcement as a result of swiping 17 credit cards through a card reader during a traffic stop. Hillaire, as passenger, and his co-defendant the driver Gyadeen P. Ramdihall, were indicted on charges including possession and use of counterfeit access devices, and aiding and abetting such possession and use (18 U.S.C. §§ 2; 1029(a)(1), (a)(3)), and conspiracy to possess and use counterfeit access devices with intent to defraud (18 U.S.C. §§ 371; 1029(a)(1), (a)(3), (b)(2)). Hillaire entered a plea of guilty conditioned upon this appeal in which he argued credit cards are analogous to cellular telephones and require a warrant for search.

The First Circuit found no merit to Hillaire's argument and upheld the district court's conclusion that there was no constitutional violation in the swiping of credit cards through a card reader, which accesses information stored on the magnetic strip. The evidence presented in the district court showed these magnetic strips contain the information that is also visible on the card, except when "altered for criminal purposes." Accordingly, the First Circuit affirmed.

***Note*:** The First Circuit in *Hillaire* did not cite *United States v. Turner*, 839 F.3d 429 (5th Cir. 2016), in which the Fifth Circuit also held that the scanning of the magnetic strip on the back of a gift card is not a search within the meaning of the Fourth Amendment.

FIFTH AMENDMENT

Fourth Circuit Holds Double Jeopardy Clause Prohibits Dividing One Overarching Conspiracy Into Two Separate Counts

In ***United States v. Jones***, 858 F.3d 221 (4th Cir. 2017), the Fourth Circuit held that in the context of multiple conspiracies, the Double Jeopardy Clause of the Fifth Amendment prohibits dividing one overarching conspiracy into two separate counts.

In October 2012, Edward Jones ("Jones") pled guilty to a one-count information in the Eastern District of Virginia alleging conspiracy to possess with intent to distribute cocaine. Per the information, the government alleged that between July 2012 and August 22, 2012, Jones and two others conspired to purchase 17 kilograms of cocaine from a Drug Enforcement Administration confidential informant in Lynchburg, Virginia, for $510,000.

Two years later, in July 2014, Jones was indicted in the Western District of Virginia for, among other offenses, conspiracy to possess with intent to distribute cocaine. In that case, the government alleged that Jones and others, including the same two people involved in the conspiracy to which Jones previously pled guilty, operated a vast drug trafficking organization in the Lynchburg, Virginia area from 1998 through 2012. Jones moved to dismiss the Western District of Virginia's indictment on double-jeopardy grounds. The district court denied the motion, reasoning that the longer time span and broader scope of the conspiracy alleged in the second case differentiated it from the earlier conspiracy to which Jones pled guilty.

On appeal, the Fourth Circuit reversed the district court's decision. The appellate court explained that in order to assess whether there are two distinct conspiracies, the court looks to the entire record and applies a totality of circumstances test by examining five factors: (1) time periods in which the alleged activities of the conspiracy occurred; (2) the statutory offenses charged in the indictments; (3) the places where the alleged activities occurred; (4) the persons acting as co-conspirators; and (5) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted. In applying the factors, the Fourth Circuit found that the two conspiracies shared the same substantive offense, occurred during the same time, encompassed the same geographic reach, and had a serious and substantial overlap as to co-conspirators. Further, the court noted that the money used to buy the cocaine that was the subject of the first indictment was likely the profits from the drug trafficking activity in the second indictment, and the cocaine that was going to be purchased in the first indictment would have been used to distribute to Jones' network of drug dealers identified in the second indictment. As such, the Fourth Circuit held that the government failed to distinguish the two conspiracies, and the record demonstrated that the first indictment was part and parcel of the second indictment. The court concluded that "[t]he law is clear that ... the government cannot avoid double jeopardy by splitting one large conspiracy into two."

Second Circuit Prohibits Use of Foreign-Sovereign-Compelled Testimony in American Criminal Proceeding

In ***United States v. Allen***, 864 F.3d 63 (2d Cir. 2017), the Second Circuit held, *inter alia*, that the Fifth Amendment's prohibition on the use of compelled testimony applied even though a foreign sovereign had compelled the testimony in proceedings in the United Kingdom.

Defendants Anthony Allen ("Allen") and Anthony Conti ("Conti"), employees in the London office of Rabobank, were involved in a scheme to manipulate the London Interbank Offered Rate ("LIBOR"), a benchmark interest rate designed to reflect available borrowing rates for banks to borrow money from other banks. The U.S. Department of Justice ("DOJ") and the U.K. Financial Conduct Authority ("FCA") commenced investigations into Rabobank and other institutions. FCA's interviews of Allen and Conti were compulsory—a witness' failure to provide testimony could result in imprisonment. As part of an

FCA regulatory-enforcement action against another Rabobank trader, Paul Robson ("Robson"), the FCA provided Robson with the relevant evidence against him, including the compelled testimony of Allen and Conti. Robson reviewed the testimony of Allen and Conti in great detail and took five pages of notes. The FCA decided to drop its regulatory proceeding while DOJ sought a criminal prosecution of Robson in the U.S. Robson later signed a cooperation agreement with DOJ and provided information to investigators that led to the indictments of Allen and Conti on one count each of conspiracy to commit wire and bank fraud, and several counts of wire fraud. At trial, the district court denied the defendants' motion to dismiss the indictment or suppress Robson's testimony, and the defendants were found guilty on all counts.

On appeal, Allen and Conti argued, *inter alia*, that the government violated their Fifth Amendment rights when it used, in the form of tainted evidence from Robson, their own compelled testimony against them. The Second Circuit agreed, determining that the prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony lawfully pursuant to foreign legal process. The court clarified that "the Self-Incrimination Clause prohibits the use and derivative use of compelled testimony in an American criminal case against the defendant who provided that testimony." Additionally, the Second Circuit held that the government could not prove under *Kastigar v. United States*, 406 U.S. 441 (1972), that Robson's review of the compelled testimony of Allen and Conti had not shaped, altered, or affected the evidence used by the government. Accordingly, the Second Circuit reversed the convictions and dismissed the indictment.

SIXTH AMENDMENT

Sixth Circuit Holds Introduction of Recorded Conversations Did Not Violate Defendant's Sixth Amendment Rights

In ***United States v. King***, 865 F.3d 848 (2017), *cert. denied*, 138 S. Ct. 704 (2018), the Sixth Circuit held, *inter alia*, that defendant's rights under the Sixth Amendment had not been violated when recorded conversations were played at trial because they were not offered to prove the truth of the matter asserted.

Matthew King ("King"), a lawyer, approached Marcus Terry ("Terry") and offered to assist him launder drug money. In fact, Terry was a confidential informant who held himself out as a drug dealer and recorded various conversations with King, in which they discussed money laundering. King was recorded proposing methods to launder the supposed drug proceeds, including the use of his attorney-trust account to accept the proceeds and disguise them as payments for legal services from Terry to King. Eventually, Terry provided King with $20,000 (purportedly from a drug sale), which King deposited into his attorney-trust account and began laundering/repaying to Terry. Thereafter, King was convicted of money laundering violations and sentenced to 44 months' imprisonment. King appealed his convictions arguing, in part, that the introduction of the recorded conversations violated his right to confront the witness against him under the Confrontation Clause of the Sixth Amendment.

Affirming King's convictions, the Sixth Circuit stated that to establish a Confrontation Clause claim, King had to establish that the government used an out-of-court statement for its truth. Here, the government introduced the recorded conversations to convict King of money laundering under 18 U.S.C. §1956(a)(3), which requires, *inter alia*, that the laundered money was "represented to be the proceeds of specified unlawful activity" (*i.e.*, Terry represented the $20,000 was drug proceeds and King believed him). King argued that the conversations were being offered for the truth of the matter asserted since they directly proved an element of the offense. The Sixth Circuit disagreed, noting that although the conversations did prove an element of the offense, they were not offered for their truth (King's belief that the funds were drug proceeds was necessary to prove the charge, not whether the funds were actually drug proceeds). The fact that the conversations proved an element of the offense was "happenstance" and did not result in a violation of the Confrontation Clause.

TITLE 18 – MAIL FRAUD, WIRE FRAUD, AND MONEY LAUNDERING

Second Circuit Holds Definition of "Official Act" Too Expansive and No Requirement to Trace Criminal Funds Comingled with Legitimate Funds

In ***United States v. Silver***, 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018), the Second Circuit held, *inter alia*, that in light of the Supreme Court's opinion in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), that the district court's

jury instruction regarding "official act" was overbroad and, in a matter of first impression, to prove money laundering under 18 U.S.C. § 1957, the government is not required to trace criminal funds that are comingled with legitimate funds.

Sheldon Silver ("Silver"), former Speaker of the New York State Assembly, was indicted on charges of honest services fraud, Hobbs Act extortion, and money laundering. The government alleged that Silver abused his public position by engaging in *quid pro quo* schemes in which he performed official acts in exchange for bribes and kickbacks, and then laundered the resulting proceeds. After Silver was found guilty on all counts and sentenced, the Supreme Court issued its opinion in *McDonnell*, defining "official act" in honest services fraud and extortion charges as a decision or action on a "question, matter, cause, suit, proceeding or controversy" involving "a formal exercise of governmental power." *Id*. at 2371-72.

On appeal, Silver argued, *inter alia*, that the district court's jury instructions defining "official act" as "any action taken or to be taken under color of official authority" was erroneous under *McDonnell*, and that his money laundering conviction under 18 U.S.C. § 1957 required the government to trace "dirty" funds comingled with "clean" funds.

With respect to the former, the Second Circuit reviewed the district court's jury instruction, which defined official act in its honest services fraud and extortion charges as encompassing "*any action* taken or to be taken under the color of official authority." In concluding the instruction was overbroad, the court reasoned that it captured lawful conduct (*e.g.*, hosting events with constituents) and did not contain any of the three instructions specified in *McDonnell* (*i.e.*, the instruction "must identify a 'question, matter, cause, suit, proceeding or controversy' involving the formal exercise of governmental power;" "the pertinent 'question, matter, cause, suit, proceeding or controversy' must be something specific and focused that is 'pending' or 'may by law be brought before any public official;'" and "merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter.").

With respect to the latter, the Second Circuit adopted the majority view of its sister circuits in holding that the government is not required to trace criminal funds that are comingled with legitimate funds to prove a violation of § 1957. The court reasoned, because money is fungible, once funds obtained from illegal activity are combined with funds from lawful activity, such funds cannot be distinguished from each other. As such, a tracing requirement would allow individuals to defeat prosecution for money laundering by simply comingling legitimate funds with criminal proceeds.

Because the district court's jury instruction defining an official act was erroneous under *McDonnell*, the error was not harmless. And because the money laundering verdict was predicated upon the verdicts rendered on the fraud and extortion counts, the Second Circuit vacated Silver's judgment of conviction on all counts and remanded to the district court.

TITLE 18 – ACCESS DEVICE FRAUD UNDER 18 U.S.C. § 1029

Eleventh Circuit Holds Social Security Numbers Qualify as "Access Devices" Under 18 U.S.C. § 1029(e)(1)

In ***United States v. Wright***, 862 F.3d 1265 (11th Cir. 2017), the Eleventh Circuit held, *inter alia*, that Social Security numbers constitute "access devices," as defined in 18 U.S.C. § 1029(e)(1), and as a result, possession of stolen Social Security numbers can increase the loss amount under the Special Rules of the U.S. Sentencing Guidelines.

Keyiona Wright ("Wright") was a participant in a stolen identity refund fraud scheme. Throughout 2014-2015, 734 fraudulent tax returns that claimed refunds totaling $868,472 were filed from an Internet Protocol address assigned to her apartment. In 2015, IRS Criminal Investigation executed a search warrant at her apartment. Therein, they found personal identifying information ("PII") for 14,545 individuals, including numerous Social Security numbers. The PII included the individuals in whose names the 734 fraudulent tax returns were filed.

Wright was charged with: (1) conspiracy to commit wire fraud (18 U.S.C. § 1349); (2) possessing 15 or more counterfeit and unauthorized access devices with the intent to defraud (18 U.S.C. § 1029(a)(3)); and (3) aggravated identity theft (18 U.S.C. § 1028A(a)(1)). She pleaded guilty to conspiracy to commit wire fraud and aggravated identity theft. A Presentence Investigation Report was prepared, which held Wright responsible for $7,773,972 in intended losses. This amount included the claimed refunds totaling $868,472 from the fraudulent returns filed using PII from 734 individuals. The remaining

loss of $6,905,500 was computed from the Special Rules of the Guidelines. Application Note 3(F) of § 2B1.1 provides that "[i]n a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than $500 per access device." Thus, Wright was held responsible for $500 for each of the remaining 13,811 compromised identities. She was sentenced to 84 months' imprisonment, which she appealed.

On appeal, Wright, *inter alia*, objected to the calculation of the intended loss, asserting that Social Security numbers are not "access devices" under § 1029 and, therefore, would not result in additional loss under the Special Rules of the Guidelines. The Eleventh Circuit noted that the term "access device" is broadly defined in § 1029(e)(1) and includes any personal identification number. Previous, unpublished Eleventh Circuit decisions concluded that Social Security numbers can be considered access devices because they are personal identification numbers. The appellate court further noted that the Second, Third, and Ninth Circuits addressed this issue and concluded that Social Security numbers qualify as access devices. Based on this precedent, the Eleventh Circuit held that a Social Security number qualifies as an access device under § 1029(e)(1) and for purposes of determining loss under the Special Rules of the Guidelines.

FORFEITURE

Supreme Court Holds Defendant Not Jointly and Severally Liable Under Forfeiture Statute for Property Co-conspirator Derived from Crime

In ***Honeycutt v. United States***, 137 S. Ct. 1626 (2017), the Supreme Court held, *inter alia*, that under 21 U.S.C. § 853 a defendant is not jointly and severally liable for property that his co-conspirator derived from the crime but that the defendant himself did not acquire.

Terry Honeycutt ("Honeycutt") managed a hardware store owned by his brother. After several suspicious individuals purchased Polar Pure (an iodine-based water-purification product) from the store, Honeycutt contacted police and discovered that Polar Pure could be used to manufacture methamphetamine. Although police suggested Honeycutt cease selling the product, the store continued doing so and eventually grossed about $400,000 from these sales. While his brother pleaded guilty to various federal drug crimes and agreed to forfeit $200,000, Honeycutt was convicted on various drug charges and sentenced to 60 months' imprisonment. The government also sought forfeiture money judgments against each brother (the proceeds of the illegal sales) pursuant to § 853(a)(1), which mandates forfeiture of proceeds obtained from drug distribution. Although the government conceded Honeycutt had no "controlling interest" in the hardware store and "did not stand to benefit personally" from the illegal sales, it sought to hold him jointly liable for the profits. The District Court declined to do so, but the Sixth Circuit reversed.

On certiorari, the Supreme Court held joint and several liability does not apply under § 853 because the statute limits forfeiture to tainted property (property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of the crime or property used in the crime itself (§§ 853(a)(1) and (2)). The Court noted that the statute's definition of forfeitable property (in terms of personal possession or use only) also negates joint and several liability. These limitations are incorporated throughout the statute (§§ 853(c) and (e)(1)) and reiterated in § 853(d). Finally, the Court explained that § 853(p), which provides for the forfeiture of "substitute property" and allows the government to confiscate property untainted by the crime, forecloses joint and several liability because in that provision Congress authorized the confiscation of (substitute) assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation.

Fourth Circuit *En Banc* Holds Government May Not Restrain Untainted Substitute Assets Pretrial

In ***United States v. Chamberlain***, 868 F.3d 290 (4th Cir. 2017), the Fourth Circuit, sitting *en banc*, held that criminal forfeiture statute, 21 U.S.C. § 853, does not permit the pretrial restraint of untainted substitute property.

William Todd Chamberlain ("Chamberlain"), who allegedly conspired to steal approximately $200,000 in federal funds while serving abroad in the armed forces, was charged with conspiracy to defraud the government. The indictment included a notice of the government's intent to seek forfeiture of $200,000 in funds derived from the alleged scheme and that, in the event such proceeds were unavailable, the government intended to pursue forfeiture of any substitute property pursuant to 21 U.S.C. § 853(p).

While the charges were pending, the government sought a restraining order pursuant to 21 U.S.C. § 853(e)(1)(A) (a statute providing for the pretrial restraint of assets) to prevent the sale of a piece of real property owned by Chamberlain and his wife with an estimated value of $200,000. Chamberlain objected, arguing that prior Fourth Circuit decisions, setting out that circuit's atypical rule permitting the pretrial restraint of *substitute* assets, were abrogated by the Supreme Court's recent decision in *Luis v. United States*, 136 S. Ct. 1083 (2016) (holding that the pretrial restraint of a defendant's legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment). The district court disagreed, finding that it was bound to abide by the Fourth Circuit's pre-*Luis* precedent, and ordered Chamberlain to refrain from selling or otherwise disposing of his real property during the pendency of the proceedings.

On interlocutory appeal, the Fourth Circuit noted that although the Supreme Court was not called upon to consider whether 18 U.S.C. § 853(e) permitted the pretrial restraint of untainted property that is *not* needed to retain counsel, the *Luis* Court's discussion of 18 U.S.C. § 853—and pretrial restraint more generally—presented an opportunity for reconsideration of the Fourth Circuit's unique interpretation of that section. Based upon a review of the plain language of § 853(e), its explicit authorization of restraining orders to preserve the availability of property described in § 853(a)—with no similar reference to § 853(p)—the Fourth Circuit determined that Congress intended to limit pretrial restraining orders to property directly forfeitable under § 853(a). The Fourth Circuit held, by its plain text, 18 U.S.C. § 853(e) permits the government to obtain a pretrial restraining order over only those assets that are directly subject to forfeiture as property traceable to a charged offense. The court overruled its precedents to the contrary and vacated the district court's order.

D.C. Circuit Holds Claimants Established Constitutional Standing at Summary Judgment to Contest Civil Forfeiture

In ***United States v. $17,900 in U.S. Currency***, 859 F.3d 1085 (D.C. Cir. 2017), the D.C. Circuit in a matter of first impression, held that at summary judgment, claimants alleging an ownership interest need only make an assertion of ownership and provide "some evidence" of ownership to establish standing to contest the civil forfeiture.

In March 2014, an Amtrak passenger mistakenly removed someone else's backpack from a train and later opened the backpack to discover a bag containing $17,900 in cash. The passenger turned the backpack over to Amtrak Police, who found the name Peter Rodriguez ("Peter") in the bag. Peter was also listed on the train's manifest. A police narcotics dog alerted to the backpack, suggesting the presence of drug residue. When contacted, Peter gave a detailed description of the backpack's contents, except for the bag of money. When specifically asked if there was money in the backpack, Peter stated "no." Thereafter, Peter's mother, Angela Rodriguez ("Rodriguez"), contacted police and explained that the cash belonged to her and her partner, Joyce Copeland. The couple claimed that they had left the money in a bag in Peter's apartment, but neglected to tell him that it contained currency. When Peter told Rodriguez that he would be going to New York to visit her, she told him to bring the bag. Unconvinced, the police seized the currency and turned it over to the Drug Enforcement Administration, which initiated administrative forfeiture proceedings. The couple filed claims of interest in the property, and the government commenced the civil judicial forfeiture proceeding at issue. The couple provided sworn statements explaining how they amassed the cash, but no other evidence supporting their claims. The government moved to strike the couple's claims for lack of standing. The district court granted the government's motion for summary judgment, finding that no reasonable jury could believe the "Claimants' bizarre explanation" for how they amassed the currency.

On appeal, the D.C. Circuit agreed with other appellate circuits (First, Fifth, Seventh, Ninth, and Tenth) that to establish standing to challenge a forfeiture at summary judgment, a claimant asserting an ownership interest must only provide "some evidence" of ownership. Here, viewing the evidence in the light most favorable to the couple, the court held that the sworn affidavits met the burden of establishing "some evidence" of ownership and was sufficient to withstand summary judgment.

SENTENCING

Eleventh Circuit Holds State Sentence Imposed After Federal Sentence Vacated is "Prior Sentence" for Criminal History Purposes at Resentencing

In ***United States v. Burke***, 863 F.3d 1355 (11th Cir.), *cert. denied*, 138 S. Ct. 277 (2017), the Eleventh Circuit held that a state sentence imposed after a defendant's federal sentence was vacated, but before he was resentenced, is a "prior sentence" for purposes of calculating criminal-history points under the U.S. Sentencing Guidelines.

In 2010, Willie Burke, Jr. ("Burke") pled guilty to being a felon in possession of a firearm and an armed career criminal and received the statutory-minimum sentence of 180 months' imprisonment. In 2016, the Supreme Court held that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, and Burke moved to vacate his sentence. The district court granted his motion and ordered a "full resentencing." The revised Presentence Investigation Report ("PSR") calculated a base-offense level of 20 because Burke was previously convicted of one "crime of violence," Florida armed robbery in 1999. A three-level reduction for acceptance of responsibility reduced the offense level to 17. The PSR also gave Burke ten criminal-history points to arrive at a criminal-history category of V. Three of those criminal-history points pertained to Burke's 2011 Florida convictions for three counts of attempted armed robbery, nine counts of armed robbery with a firearm, and 12 counts of kidnapping to facilitate a felony or terrorize with a firearm. These convictions occurred after his initial sentencing. The revised report recommended a term of imprisonment of 46-57 months.

Burke objected to the PSR on two grounds, one of which was that the report impermissibly added three criminal-history points for his 2011 Florida conviction. He argued that because the judgment and sentence for the 2011 conviction was imposed a year after the initial sentencing, the 2011 conviction could not be considered a "prior sentence" as that term is defined under U.S.S.G. § 4A1.2(a). The district court overruled Burke's objection, ruling that a prior sentence includes any unrelated sentence imposed before resentencing. Burke was sentenced to 57 months' imprisonment, to be served consecutively with his state sentences. Burke appealed, contending that it was error to treat a state sentence imposed after he was originally sentenced as a "prior sentence" in calculating his criminal-history points.

The Eleventh Circuit affirmed the finding of the district court. The court explained that when a court vacates a sentence, that sentence becomes void in its entirety, so the term "prior sentence," as used in § 4A1.1(a), includes a state sentence imposed after defendant was first sentenced, but before resentencing. The Eleventh Circuit recognized a circuit split on the issue, noting that the Eighth and Ninth Circuits (with which the Eleventh Circuit agreed) also held that when a defendant's initial sentence is vacated, a sentencing court shall add criminal-history points for any unrelated sentences imposed after the initial sentencing, but before resentencing. *See United States v. Tidwell*, 827 F.3d 761, 764 (8th Cir. 2016); *United States v. Klump*, 57 F.3d 801, 803 (9th Cir. 1995). In contrast, the First Circuit held that a "prior sentence" in this context means a sentence that was imposed prior to the original sentence that was vacated and remanded only for resentencing. *See United States v. Ticchiarelli*, 171 F.3d 24, 35 (1st Cir. 1999).

Eleventh Circuit Holds Defendant Had Right to Allocute at Sentencing

In ***United States v. Doyle***, 857 F.3d 1115 (11th Cir. 2017), the Eleventh Circuit held, *inter alia*, that a defendant, who was denied the opportunity to allocute at sentencing, was entitled to the presumption of prejudice and, therefore, satisfied the "plain error" standard of review, even if the defendant was sentenced to a term of imprisonment at the bottom of the U.S. Sentencing Guidelines range.

In 2011, Anthony Eugene Doyle ("Doyle") pleaded guilty to possessing with intent to distribute more than 50 grams of a substance containing a detectable amount of cocaine base (21 U.S.C. § 841(a)(1)), which exposed Doyle to a mandatory-minimum sentence of 120 months and a maximum sentence of life imprisonment. At sentencing, the district court determined that the Guidelines range was 262-327 months' imprisonment. The district court asked Doyle's counsel if she wished to make a statement, and she argued for a sentence at the bottom of the

Guidelines range. The district court, however, did not ask Doyle if he wished to make a statement, as required under Fed. R. Crim. P. Rule 32(i)(4)(a)(ii). At the time of the hearing, Doyle's counsel did not object to the court's failure to allow him to allocute. Sentenced to 262 months' imprisonment, Doyle appealed.

Since Doyle did not object to the district court's failure to allow him to allocute at the sentencing hearing, the Eleventh Circuit reviewed for plain error. Under this standard, the district court's decision would be reversed if there was: (1) error; (2) that is plain; (3) that affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Without elaboration, the appellate court concluded that the district court's failure to allow allocution was error and that it was "plain." The Eleventh Circuit previously has held that if the failure to allow allocution affects a defendant's substantial rights, then the integrity of judicial proceedings is also seriously affected. The court noted that, prior to the Supreme Court's decision in *United States v. Booker/Fanfan*, 543 U.S. 220 (2005), prejudice was presumed if a defendant was denied the right to allocute, unless the defendant was sentenced at the low end of the mandatory Guidelines range. In this circumstance, the defendant could not persuade the sentencing court to impose a lower sentence because the mandatory Guidelines range limited the court's discretion. In *Booker*, however, the Supreme Court ruled that the Guidelines should be treated as advisory, and it is no longer unusual for a defendant to receive a sentence that is lower than the minimum Guidelines range. Therefore, the court reasoned, the exception to the presumption of prejudice is no longer appropriate. In the instant case, Doyle could have been sentenced to the mandatory-minimum term of 120 months' imprisonment. The Eleventh Circuit concluded that Doyle was entitled to a presumption of prejudice because, given the right to allocute, he could have persuaded the district court to sentence him to a term less than the Guidelines range. The appellate court vacated Doyle's sentence and remanded to allow Doyle the opportunity to allocute and be resentenced.

TABLE OF CASES