

# *Criminal Tax Bulletin*

*Department of Treasury  
Internal Revenue Service*

*Office of Chief Counsel  
Criminal Tax Division*

July - December

This bulletin is for informational purposes. It is not a directive.

2013

## SIXTH AMENDMENT

### **Supreme Court Holds Sixth Circuit Failed to Apply Correct Standard of Review to State Prisoner's Claim of Ineffective Assistance of Counsel**

In *Burt v. Titlow*, 134 S.Ct. 10 (2013), the Supreme Court held that the Sixth Circuit failed to apply the “doubly deferential” standard of review required when a state prisoner asks a federal court to set aside a sentence based on ineffective assistance of counsel during plea bargaining.

After Vonlee Titlow (“Titlow”) was charged with murder, her attorney Richard Lustig (“Lustig”) helped her negotiate a plea agreement with state prosecutors, whereby she agreed to plead guilty to manslaughter and receive a 7- to 15-year sentence in exchange for testifying against her co-defendant Billie Rogers (“Rogers”). Lustig explained to Titlow that the state’s evidence could support a conviction for first-degree murder. Three days before Rogers’ trial was scheduled to begin, Titlow, assisted by her new attorney Frederick Toca (“Toca”), demanded a lower sentence in exchange for her testimony against Rogers. When the prosecutor refused, Titlow withdrew her guilty plea, acknowledging in open court the consequences of withdrawal, which included reinstatement of the first-degree murder charge. Titlow subsequently stood trial, was convicted of second-degree murder, and received a 20- to 40-year sentence.

On appeal, Titlow claimed that Toca provided ineffective assistance of counsel by advising her to withdraw her guilty plea without sufficiently reviewing the state’s evidence. The Michigan Court of Appeals affirmed Titlow’s conviction, concluding that her attorney’s advice was reasonable in light of Titlow’s assertion of innocence. Titlow then filed a federal habeas corpus petition, which was denied by the district court. The Sixth Circuit reversed, on the grounds that the factual predicate for the state court’s decision was an unreasonable interpretation of the record. The Sixth

Circuit held that Toca rendered ineffective assistance of counsel that resulted in Titlow’s loss of the benefit of the plea bargain.

On certiorari, the Supreme Court observed that when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court’s decision only if it was based on an unreasonable determination of the facts. In this case, the Court determined that the Michigan Court of Appeals’ decision was reasonable and supported by the record. The Court concluded that the Sixth Circuit failed to apply the required “doubly deferential” standard of review when it refused to credit the state court’s factual finding and assumed that counsel was ineffective where the record was silent. Accordingly, the Court reversed the Sixth Circuit’s decision.

### **Eleventh Circuit Holds Admission of Wiretap Translation without Translator’s Testimony Did Not Violate Confrontation Clause**

In *United States v. Curbelo*, 726 F.3d 1260 (11th Cir. 2013), the Eleventh Circuit held that the district court’s admission of translated transcripts of wiretapped conversations based on the testimony of a participant in the conversations rather than the testimony of the translator did not violate the Confrontation Clause of the Sixth Amendment.

In 2007, Ivan Curbelo (“Curbelo”) joined an indoor marijuana-growing operation controlled by Jose Diaz (“Diaz”). During the investigation of Diaz’s organization, DEA agents conducted court-authorized interceptions of Diaz’s cell phone conversations with Curbelo and another individual, in which they discussed the marijuana-growing operation. During Curbelo’s trial for drug-related offenses, the government played recordings, mostly in Spanish, of the wiretaps of Diaz’s cell phone. The government provided the jury with English-language transcripts of the recordings but did not identify the individual who prepared the transcripts. Instead, over the defendant’s objections, the district court allowed the government to establish the

transcripts' accuracy through the testimony of Diaz, who spoke and read both Spanish and English. Curbelo was convicted and sentenced to 120 months' imprisonment.

On appeal, Curbelo argued in part that the district court had violated his right of confrontation by admitting the transcripts without affording him an opportunity to cross-examine the translator who prepared them. In rejecting this argument, the Eleventh Circuit first concluded that the transcripts, which contained no explicit certification as to their accuracy, were out-of-court testimonial statements, but only to the extent they reflected the translator's implicit representation that the translation was accurate. Because the translator's implicit statement was not admitted at trial, the Eleventh Circuit concluded that the translator was not a witness against Curbelo. Noting that the only statement the jury heard about the transcripts' accuracy came from Diaz, who was subject to cross-examination by Curbelo, the court held that the admission of the transcripts did not violate the Confrontation Clause.

#### **Fifth Circuit Holds Admission of Deceased Person's Affidavit Violated Confrontation Clause**

In *United States v. Duron-Caldera*, 737 F.3d 988 (5th Cir. 2013), the Fifth Circuit held that the district court erred in admitting the affidavit of the defendant's deceased grandmother because the government failed to prove that the affidavit was nontestimonial.

Humberto Homero Duron-Caldera ("Duron-Caldera") was indicted in March 2011 on one count of illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a). In order to convict him of this offense, the government had to prove that he was an alien. Under 8 U.S.C. § 1401, Duron-Caldera could derive citizenship through his mother, a U.S. citizen, if she had been physically present in the U.S. for ten years prior to his birth in 1962. To prove Duron-Caldera's alienage, the government introduced the 1968 affidavit of his maternal grandmother, Francisca Serrato de Caldera ("Serrato"), which stated that his mother had lived in the U.S. from September 1960 until April 1961. The government introduced the affidavit through an immigration officer, who testified that she found the affidavit in the alien files of Duron-Caldera's parents. The jury returned a guilty verdict, and the court sentenced Duron-Caldera to 92 months' imprisonment.

On appeal, Duron-Caldera argued that the district court's admission of the affidavit violated his right of confrontation under the Sixth Amendment. The Fifth

Circuit agreed, noting that Serrato was deceased and Duron-Caldera had not had a prior opportunity for cross-examination. The court further determined that the government had not met its burden of proving that the affidavit was nontestimonial. The court explained that Serrato's statement regarding the number of years Duron-Caldera's mother lived in the United States prior to his birth was the same testimony she would have been expected to provide if called at trial. In addition, the court rejected the government's argument that the affidavit had not been created for the primary purpose of providing evidence for criminal proceedings, noting that it was taken as part of a document fraud investigation that resulted in a criminal prosecution. The court also rejected the government's contention that the affidavit was nontestimonial because it was not made to "accuse" Duron-Caldera of illegal reentry.

The Fifth Circuit concluded that the district court erred in admitting the affidavit, and that this error was not harmless. Accordingly, the court vacated Duron-Caldera's conviction and remanded for further proceedings.

#### **FIFTH AMENDMENT**

#### **Fourth Circuit Holds Required Records Exception to Fifth Amendment Privilege Applies to Foreign Bank Account Records**

In *United States v. Under Seal*, 737 F.3d 330 (4th Cir. 2013), the Fourth Circuit joined the Fifth, Seventh, Ninth, and Eleventh Circuits in holding that foreign bank account records required to be maintained under the Bank Secrecy Act ("BSA") fall within the required records doctrine and are therefore outside the scope of the Fifth Amendment privilege.

John and Jane Doe (the "Does") were the targets of a grand jury investigation seeking to determine whether they used secret Swiss bank accounts to conceal assets and income from the IRS. The Does were served grand jury subpoenas requesting that they produce certain foreign bank account records that they were required to keep pursuant to the BSA. The Does moved to quash the subpoenas, citing their Fifth Amendment privilege against self-incrimination. The district court denied the motion on the grounds that the required records doctrine overrode the Does' Fifth Amendment privilege, and ordered them to comply with the subpoenas. The Does refused, and the district court held them in civil contempt, but stayed the execution of the contempt order pending their appeal.

On appeal, the Fourth Circuit held that the records at issue met the three prongs of the required records doctrine, and that the Fifth Amendment privilege was therefore inapplicable. Specifically, the court determined that: (1) because the BSA's recordkeeping requirements serve a number of purposes unrelated to criminal law enforcement, the requirements are "essentially regulatory;" (2) because a reasonable account holder would keep foreign bank account records in order to access his or her account, such records are of a kind "customarily kept;" and (3) because the data obtained from foreign bank account records is shared among government agencies for important public purposes, such records are imbued with "public aspects."

Concluding that the required records exception to the Fifth Amendment privilege applied to the records sought by the subpoenas, the appellate court affirmed the judgment of the district court.

### **Second Circuit Holds Required Records Exception to Fifth Amendment Privilege Applies to Foreign Bank Account Records**

In *In re Grand Jury Subpoena Dated February 2, 2012*, 741 F.3d 339 (2d Cir. 2013), the Second Circuit joined the Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits in holding that the required records exception to the Fifth Amendment's act of production privilege applies to foreign bank account records required to be maintained under the Bank Secrecy Act ("BSA").

A federal grand jury in the Eastern District of New York issued a subpoena to an individual ("John Doe," or "Doe"), calling for him to produce records of his foreign bank accounts, which the BSA required him to maintain. When Doe refused to comply, the government moved to compel him to produce the documents, and the district court granted the motion. After Doe still refused to comply, the district court entered an order holding him in contempt. The court imposed a sanction (suspended pending his appeal) of \$1,000 per day until he complied.

On appeal, the Second Circuit held that the subpoenaed records fell within the required records exception to the Fifth Amendment privilege. The court explained that: (1) although the applicable BSA recordkeeping requirement has mixed criminal and civil purposes, it is "essentially regulatory" because people who own foreign bank accounts are not inherently guilty of criminal activity; (2) the presumption that the majority of foreign bank account owners keep records in order to access their accounts and keep track of their balances

supports the conclusion that such records are "customarily kept;" and (3) basic bank account information required to be maintained by lawful statute necessarily has "public aspects" that make it potentially subject to a grand jury subpoena. Accordingly, the court concluded that the three-prong test to determine whether the required records exception applied had been met.

Because Doe could not lawfully excuse his failure to comply with the subpoena, the appellate court concluded that the district court was within its discretion to impose sanctions for his noncompliance.

## **FOURTH AMENDMENT**

### **Fifth Circuit Upholds Constitutionality of Court Orders to Compel Production of Historical Cell Site Data**

In *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013), the Fifth Circuit held that the Stored Communications Act's ("SCA's") authorization of court orders for historical cell site information is not *per se* unconstitutional, and that if the government meets the SCA's statutory requirements, a magistrate does not have discretion to deny the government's application for such an order.

In October 2010, the government sought court orders pursuant to 18 U.S.C. § 2703(d), a provision of the SCA, to compel the cell phone service providers for three particular cell phones to produce 60 days of historical cell site data and other subscriber information. The magistrate granted the requests for subscriber information, but denied the requests for historical cell site data, despite finding that the applications met the SCA standard for granting an order to compel such data. After inviting the government to brief the issue, the magistrate ruled that the compelled warrantless disclosure of cell site data violated the Fourth Amendment. The magistrate's ruling was upheld by the district court, which concluded that cell site data may only be disclosed pursuant to a warrant based on probable cause.

On appeal, the Fifth Circuit held that the Fourth Amendment does not protect the disclosure of historical cell site data. The court reasoned that such information is not collected by the government or at the government's request but by private third parties (*i.e.*, cell phone providers). Further, cell site information is "addressing information" rather than communications content and is used by cell phone providers for their

own business purposes. Accordingly, the court concluded that cell site information constitutes a business record, and that the SCA's authorization of § 2703(d) orders if an application meets the statute's "specific and articulable facts" standard (rather than the Fourth Amendment's probable cause standard) is not *per se* unconstitutional. The court also concluded that as long as the government meets the statutory requirements of the SCA, the magistrate judge does not have discretion to deny the government's application for a § 2703(d) order. In light of these conclusions, the Fifth Circuit vacated the district court's order and remanded the case with instructions to grant the government's applications.

### **Ninth Circuit Holds Search Warrant Affidavit Failed to Establish Probable Cause and "Good Faith" Exception to Exclusionary Rule Did Not Apply**

In *United States v. Underwood*, 725 F.3d 1076 (9th Cir. 2013), the Ninth Circuit held that an affidavit submitted in support of a state search warrant for the defendant's home was so deficient as to render official belief in the existence of probable cause entirely unreasonable, and therefore the "good faith" exception to the exclusionary rule did not apply.

Between January and July 2010, the Drug Enforcement Administration ("DEA") and local police conducted an investigation into a suspected drug trafficking organization in which John Underwood ("Underwood") was believed to be a participant. In July 2010, federal agents, assisted by local law enforcement including Los Angeles Police Department Detective James Kaiser ("Kaiser"), simultaneously executed federal arrest warrants for 17 suspected co-conspirators of the drug trafficking organization and federal search warrants for fifteen residences, stash houses, and vehicles. A DEA agent had prepared the 102-page affidavit in support of the federal warrants. Later that day, agents arrested Underwood at his home and conducted a protective sweep of the house. Following Underwood's refusal to consent to a full search of the house, a DEA agent instructed Kaiser to obtain a state search warrant.

To obtain the warrant, Kaiser prepared an affidavit that included several pages he had copied from the federal affidavit, but did not explain that the pages were copied or provide the underlying facts to support the conclusions drawn therein. Kaiser's affidavit included only two facts, *i.e.*, that Underwood was seen delivering two unmarked crates to two of his co-defendants three months before the warrant application,

and that agents had observed a baggie containing a personal-use amount of marijuana while conducting the sweep of Underwood's home. Kaiser did not attach the federal affidavit to his affidavit for the state search warrant.

Based on Kaiser's affidavit, a Los Angeles Superior Court judge issued a search warrant for Underwood's house. The search pursuant to the state warrant resulted in the seizure of thirty-three kilograms of cocaine, \$417,000 in cash, 104 ecstasy pills, and other items. Underwood was charged with conspiracy to possess and distribute controlled substances under 21 U.S.C. §§ 841 and 846, and possession with intent to distribute cocaine and ecstasy under 21 U.S.C. § 841. He moved to suppress the evidence found during the search of his house, arguing that the state warrant lacked probable cause and the good faith exception to the exclusionary rule did not apply. The district court granted his motion.

On appeal, the Ninth Circuit explained that conclusions of an affiant unsupported by underlying facts cannot be used to establish probable cause. The court observed that the facts regarding the baggie of marijuana and Underwood's delivery of two crates, without more, did not support the conclusion that Underwood was an ecstasy trafficker. Viewing the affidavit "in the totality of the circumstances," the court determined that it failed to establish probable cause.

The court then addressed whether the evidence obtained pursuant to the state warrant should be suppressed under the exclusionary rule, or whether the "good faith" exception to the exclusionary rule applied, on the grounds that the officers who executed the search acted "in objectively reasonable reliance" on the warrant. The court noted that one situation that *per se* fails to satisfy the good faith exception is where the affidavit is a "bare bones" affidavit, *i.e.*, so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Here, the court agreed with Underwood that the affidavit submitted by Kaiser in support of the state search warrant for Underwood's house was a "bare bones" affidavit, to which the good faith exception to the exclusionary rule did not apply. Accordingly, the appellate court affirmed the district court's suppression of the evidence obtained pursuant to the warrant.

## WIRETAP ACT

### **Fifth Circuit Holds Government Failed to Comply with Wiretap Act's Monitoring Minimization Requirements**

In *United States v. North*, 735 F.3d 212 (5th Cir. 2013), the Fifth Circuit held on rehearing that the government failed to comply with the Wiretap Act's monitoring minimization requirements when it listened for almost an hour to a non-pertinent cell phone conversation.

As part of their investigation of a drug-trafficking organization, DEA agents and federal prosecutors obtained authorization from a district court to intercept calls to and from the cell phone of Richard North ("North"), who was believed to be planning a delivery of cocaine from Houston, Texas to Jackson, Mississippi. When North was en route to Jackson, state troopers stopped him for speeding and searched his vehicle. After no drugs were found, North was released. Immediately thereafter, a federal agent intercepted a phone call between North and a female friend who was not involved in the drug conspiracy. Approximately one hour into the call, after talking about a recent concert and the traffic stop, North revealed he had cocaine hidden in the car and was returning to Houston. The listening agent forwarded this information to officers in Texas, who arrested North at his home for possession of cocaine. Following his indictment, North moved to suppress the evidence obtained through the wiretap on his cell phone, arguing in part that the government failed to comply with monitoring minimization requirements. The district court denied North's motion.

On appeal, the Fifth Circuit noted that the Wiretap Act requires the government to conduct electronic surveillance "in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). In this case, rather than stop listening to a non-pertinent conversation and conduct brief "spot checks" as proposed in the wiretap application, the agents listened for nearly an hour, suspending monitoring eight times for an average of less than a minute each time. Based on these facts, the court concluded that the government failed to make objectively reasonable attempts at minimization. Accordingly, the Fifth Circuit reversed the district court's denial of North's motion to suppress.

## CRIMINAL REFERRALS

### **Tax Court Holds IRS Loses Authority to Compromise Tax Liabilities Once Case Is Referred for Criminal Prosecution**

In *Isley v. Commissioner*, 141 T.C. No. 11 (2013), the United States Tax Court held that, when a taxpayer's case is referred to the Department of Justice ("DOJ") for prosecution, the Internal Revenue Service ("IRS") loses its authority to compromise the taxpayer's liabilities.

Ronald Isley ("Isley") had a successful recording and concert career. For a number of years, Isley failed to pay taxes on much of his income from royalties and performance fees. In October 2004, he was indicted on five counts of tax evasion and one count of willful failure to file a tax return, covering the tax years 1997 to 2002. He was convicted of all charges, and the district court sentenced him to 37 months' imprisonment, followed by three years' supervised release. The judgment and probation commitment ("JPC") order required that during the three-year period of supervised release, Isley make full payment of taxes owed for the years of conviction. In 2008, the Court of Appeals for the Ninth Circuit affirmed the district court's sentence.

Between December 12, 2006, and August 31, 2007, the IRS issued to Isley two Notices of Federal Tax Liens ("NFTLs") and two notices of intent to levy, covering the assessed liabilities for the conviction years (1997–2002), plus 2003, 2004, and 2006. In 2007, while in prison, Isley filed a request for a Collection Due Process ("CDP") hearing. In response to Isley's request, several meetings were held between Isley's counsel and an IRS Appeals officer, which ultimately resulted in Isley's submission of Form 656, Offer in Compromise ("OIC"), in the sum of \$1,047,216, accompanied by a partial payment. After the IRS Office of Chief Counsel concluded that 26 U.S.C. § 7122(a)<sup>1</sup> precluded acceptance of Isley's OIC, the Appeals officer rejected the OIC. Isley petitioned for Tax Court review of the IRS decision.

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<sup>1</sup> Section 7122(a) provides: "The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense."

The Tax Court agreed with the IRS that, once a case has been referred to DOJ for prosecution or defense, section 7122(a) precludes Appeals from unilaterally approving an OIC. The court further noted that DOJ's primary authority to compromise tax liabilities continues until the terms of the judgment have been satisfied.

Holding that Appeals did not abuse its discretion by rejecting the OIC, the Tax Court remanded the case to Appeals for further consideration and instructed Appeals to seek DOJ's approval before entering into any newly-proposed compromise.

### **TITLE 26/TITLE 31**

#### **Seventh Circuit Upholds Convictions for Failure to File FBARs and Filing False Tax Returns**

In *United States v. Simon*, 727 F.3d 682 (7th Cir. 2013), the Seventh Circuit affirmed the defendant's convictions for failing to file Foreign Bank Account Reports ("FBARs") and filing false tax returns, holding that he was ineligible for IRS extensions of the FBAR filing deadlines, and that his failure to disclose his signature authority over foreign accounts on his returns was sufficient to support the false return charges.

James Simon ("Simon"), a CPA, accounting professor, and entrepreneur, was the managing director of three foreign companies and held signature authority over the companies' foreign bank accounts. For the tax years 2003 through 2006, the Simon family received approximately \$1.8 million from a domestic partnership and the foreign companies that Simon managed, and the family spent approximately \$1.7 million during this time. Most of these monies were recorded as loans in Simon's personal financial records. Simon paid \$328 in income taxes for 2005 and claimed refunds for the other three years. He was convicted of filing false tax returns in violation of 26 U.S.C. § 7206(1) and failing to file FBARs, in violation of 31 U.S.C. §§ 5314 and 5322, among other charges.

On appeal, Simon argued that his convictions for failing to file FBARs should be reversed because he filed the reports within the time allotted by retroactive extensions granted by the IRS. These extensions applied to taxpayers who qualified for the Offshore Voluntary Disclosure Program, as well as those who had properly reported their income and paid their taxes but failed to timely file their FBARs. Simon conceded he did not qualify for the Offshore Voluntary

Disclosure Program, but argued that he was in the second group of taxpayers eligible for administrative relief. The Seventh Circuit disagreed, holding that Simon's failure to report all of his taxable income, which the government proved at trial, rendered him ineligible for the filing extensions. Further, the court held that because Simon was not relieved of his FBAR filing obligations, and because he raised no separate argument concerning the government's false return charges, Simon's failure to report his signature authority over foreign bank accounts by checking the "yes" box on Schedule B of Form 1040 was sufficient to support his convictions for filing false returns.

### **TITLE 18**

#### **Eighth Circuit Holds Evidence of Defendant's Good Faith Reliance Was Irrelevant to False Claims Charge**

In *United States v. Jirak*, 728 F.3d 806 (8th Cir. 2013), the Eighth Circuit held that evidence of the defendant's alleged good faith reliance on tax advice was properly excluded as irrelevant to the charge that he violated 18 U.S.C. § 287 by filing false claims for refund.

From 2005 to 2009, Gene Jirak ("Jirak") was employed as a factory worker, earning between \$32,000 and \$35,000 per year. In 2009, he filed a fraudulent amended federal tax return for 2005. Five 1099-OID Forms were attached to the amended return, falsely indicating that four financial institutions withheld income tax due on Jirak's purported investments and financial obligations. Based on these five forms, Jirak claimed a refund in the amount of \$56,999. Also during 2009, Jirak filed a fraudulent 2008 federal tax return, falsely claiming that three financial institutions withheld income tax due on his alleged investments and that he was entitled to a \$53,787 refund.

Jirak was indicted on charges of making a false claim for a tax refund in violation of 18 U.S.C. § 287; uttering a forged treasury check in violation of 18 U.S.C. § 510(a)(2); mail fraud in violation of 18 U.S.C. § 1341; and aggravated identity theft in violation of 18 U.S.C. § 1028A. He was convicted of all charges and sentenced to 45 months' imprisonment.

On appeal, Jirak argued that he should have been permitted to present evidence of his good faith reliance on tax advice from a purported tax service company, in order to show that he acted without willfulness, as defined in *Cheek v. United States*, 498 U.S. 192 (1991). The court held that this evidence was properly excluded

as irrelevant because Jirak was convicted under 18 U.S.C. § 287, which does not require proof of willfulness, unlike the tax statutes at issue in *Cheek*. The court further held that the evidence offered did not establish the elements of a good faith reliance defense because the advice received was not from an expert tax preparer and because there was no evidence indicating that Jirak gave the purported expert complete disclosure. Based in part on this ruling, the Eighth Circuit affirmed the judgment of the district court.

### **IDENTITY THEFT**

#### **Sixth Circuit Holds Defendant’s Inclusion of Other Person’s Names on Document Claiming Authority to Act on Behalf of Their Company Was Not “Use” of a Means of Identification**

In *United States v. Miller*, 734 F.3d 530 (6th Cir. 2013), the Sixth Circuit held that the defendant did not “use” a means of identification for purposes of the aggravated identity theft statute when he included the names of other members of his limited liability company (“LLC”) in a document falsely stating that he had authority to act on the LLC’s behalf.

In order to buy a parcel of real estate as an investment property, David Miller (“Miller”) and William Wellons (“Wellons”) formed Fellowship Investors, LLC (“Fellowship”) and recruited investors to purchase investment units in the company. Because he was unable to raise the full purchase price, Miller approached First Bank to obtain a loan of \$337,500, pledging the property as collateral without informing Fellowship’s other members.

First Bank required a written resolution showing that Fellowship’s members had authorized Miller to take this action. To complete the resolution, Miller supplied Wellons with the members’ names, and Wellons handwrote those names on the document. The resolution falsely stated that the Fellowship members had unanimously voted to allow the property to be pledged as collateral. Miller and Wellons both signed the resolution, but Wellons did not know it was false. Miller was charged with two counts of making false statements to a bank, in violation of 18 U.S.C. § 1014, and two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. He was convicted on all counts and sentenced to 45 months’ imprisonment.

On appeal, Miller argued in part that 18 U.S.C. § 1028A – which punishes a person who, in relation to

an underlying felony, “uses, without lawful authority, a means of identification of another person” – did not apply to his actions. Although Miller acknowledged he had lied about whether the other Fellowship members had given him authority to act on behalf of Fellowship, he maintained that this conduct did not constitute “use” of their names. Concluding that the statute was ambiguous and the rule of lenity should apply, the Sixth Circuit ruled that Miller did not “use” a means of identification within the meaning of § 1028A. Accordingly, the court reversed Miller’s aggravated identity theft convictions (as well as one other conviction), and remanded for further proceedings.

### **STATE TAXES**

#### **Second Circuit Holds District Court Was Barred from Enjoining Collection of State Tax Penalties**

In *Abuzaid v. Mattox*, 726 F.3d 311 (2d Cir. 2013), the Second Circuit held that the district court was barred from enjoining the New York State Department of Taxation and Finance (the “Department”) from imposing penalties on cigarette vendors for violations of state tax laws.

Zaid Abuzaid and Arref Kassem (collectively, the “plaintiffs”) owned newsstands that sold cigarettes. In May 2006, the plaintiffs pleaded guilty to willfully possessing unlawfully stamped cigarettes for the purpose of sale, in violation of criminal provisions of the New York tax laws. Subsequently, in November 2006, the Department imposed monetary penalties against the plaintiffs for possession of unlawfully stamped cigarettes. The plaintiffs sued in federal court to block the collection of the penalties, arguing they were punitive and thus constituted a second criminal punishment for the same conduct, in violation of the Fifth Amendment’s Double Jeopardy Clause. The district court agreed and enjoined the Department from collecting the penalties.

On appeal, the Second Circuit held that the district court erred in granting declaratory and injunctive relief to the plaintiffs. The court explained that the comity doctrine requires federal courts to refrain from granting relief that would interfere with a state’s administration of its tax laws. The court observed that in this case, the injunction did disrupt the state’s administration of its tax laws because the penalties at issue were part of the state’s tax system. In addition, the court rejected the plaintiffs’ argument that the penalties were criminal rather than civil in nature. The court noted, however,

that even if the penalties were criminal, the comity doctrine bars federal courts from restraining state criminal prosecutions absent a showing of bad faith, harassment, or other extraordinary circumstance, which the plaintiffs did not allege. Finally, because denying the plaintiffs' challenge to the state tax ruling would not interfere with the state's administration of its tax laws, the court concluded that the comity doctrine did not bar it from dismissing the plaintiffs' challenge. Accordingly, the Second Circuit reversed the district court's judgment and remanded the case with instructions to dismiss the action, with prejudice.

## **BRADY VIOLATION**

### **Ninth Circuit Holds Government's Failure to Disclose Interview Notes and Payments to Key Witness Was *Brady* Violation**

In *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013), the Ninth Circuit held that the government's nondisclosure of interview notes and government payments to a central government witness was in violation of its obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

In 1997, Pirouz Sedaghaty (known as "Seda") co-founded the U.S. branch of the Al-Haramain Islamic Foundation, Inc. ("Al-Haramain"), a Saudi Arabian charity that the U.S. government suspected of funding terrorist activities under the guise of humanitarian aid. In 2004, Seda was indicted on charges of violating 18 U.S.C. § 371 (conspiracy to defraud the U.S.) and 26 U.S.C. § 7206(1) (filing a false return) based on his alleged falsification of Al-Haramain's 2000 charitable organization tax return (Form 990) in order to conceal the organization's support of an independence movement in Chechnya. At trial, to establish that the errors on the Form 990 were willful, the government called Barbara Cabral ("Cabral"), whose testimony provided the only direct evidence of Seda's alleged intent to fund the Chechen mujahideen.

Seda was convicted on both charges and sentenced to 33 months' imprisonment. After trial but before sentencing, the government produced reports and notes for twelve previously undisclosed interviews the FBI had conducted with Cabral and her husband, who passed away before the trial. Among other things, the notes and reports revealed that the FBI had paid Cabral's husband \$14,500 over the course of the investigation, that at least one of those payments was made in the presence of Cabral, and that the FBI had

made an offer of payment to Cabral shortly before trial, when she was experiencing financial difficulty. The notes also revealed inconsistencies in the couple's stories. Upon production of this material, Seda moved for a new trial. The district court concluded that a discovery violation had occurred, but denied Seda's motion on the grounds that Cabral's testimony was not material to his conviction.

On appeal, the Ninth Circuit focused its analysis on the materiality of the suppressed evidence. The court reasoned that because of the suppression, Seda's counsel had virtually no material with which to question Cabral's neutrality. The court concluded that records of the FBI's payments provided significant impeachment evidence that would have influenced the jurors' perceptions of Cabral's credibility because they suggested that Cabral had a motive for testifying. Accordingly, the court held that Seda had established a *Brady* violation that merited a new trial.

## **PROSECUTORIAL MISCONDUCT**

### **Ninth Circuit Holds Defendants Failed to Present Clear and Convincing Evidence of Prosecutor's Conflict of Interest**

In *United States v. Kahre*, 737 F.3d 554 (9th Cir. 2013), the Ninth Circuit upheld the district court's denial of the defendants' motions to disqualify the federal prosecutor, holding that the defendants failed to present clear and convincing evidence that the prosecutor had indicted them in retaliation for being named in a *Bivens* action.<sup>2</sup>

Robert Kahre ("Kahre") operated a painting and drywall business. Kahre and his two co-defendants engaged in a scheme to avoid the payment of payroll and income taxes by paying Kahre's employees their wages in gold and silver coins, which the employees later exchanged for envelopes of cash. Following the execution of search warrants at Kahre's properties, the arrest of Kahre, and the seizure of \$210,913 in cash, Kahre and several others filed a *Bivens* action against the federal prosecutor, alleging that these actions were illegal. The government subsequently indicted Kahre and his co-defendants, charging them with various conspiracy, fraud, and tax violations. The district court stayed the *Bivens* proceedings pending resolution of the criminal case.

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<sup>2</sup> See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).



Prior to trial, Kahre moved to disqualify the prosecutor because of an alleged conflict of interest, based on the prosecutor's purported statement that Kahre's counsel had threatened his job and his pension, making the case "personal," as well as Kahre's allegation that the prosecutor had filed the indictments in retaliation for being named in the *Bivens* action. The district court denied Kahre's motions. All three co-defendants were convicted, and their sentences ranged from 26 to 190 months' imprisonment.

On appeal, the Ninth Circuit noted that proof of a conflict of interest must be clear and convincing, and that defendants must demonstrate prejudice from the conflict in order to justify a prosecutor's removal. Here, the court observed that the prosecutor's alleged statements occurred in 2008, almost three years after the filing of the initial indictments in 2005, and thus did not support the inference that he filed the criminal charges in retaliation for being named in the *Bivens* action.

Holding that the defendants had failed to present clear and convincing evidence of an impermissible conflict of interest or of prejudice, the appellate court concluded that the district court properly denied their motions to disqualify the prosecutor. Based in part on this ruling, the court affirmed the defendants' convictions and Kahre's sentence.

## **SENTENCING**

### **Fourth Circuit Holds Defendant Was Bound by Tax Loss Figure in Plea Agreement**

In *United States v. Weon*, 722 F.3d 583 (4th Cir. 2013), the Fourth Circuit held that the district court did not err in holding that the defendant was bound by the \$2,400,000 tax loss figure to which he stipulated in the plea agreement.

Yooho Weon ("Weon") owned a pawn shop and an internet-based business, which he operated as a single business enterprise. For the years 2004 through 2008, Weon failed to file a corporate income tax return for the companies. He was charged with five counts of tax evasion, in violation of 26 U.S.C. § 7201, and pleaded guilty to all the charges. In the plea agreement, the parties stipulated that the total tax loss was approximately \$2,400,000. The \$2,400,000 figure represented a compromise determined at plea bargaining, during which Weon was advised by counsel and by a CPA.

Prior to the sentencing hearing, Weon filed a sentencing memorandum arguing that the tax loss was actually around \$40,000, based on the findings of his new forensic accountant. The district court held that Weon was bound by his stipulation in the plea agreement concerning the tax loss. Weon then filed a motion seeking to withdraw his guilty plea. The district court denied the motion and proceeded to conduct Weon's sentencing hearing. Refusing to consider any evidence that the tax loss was materially lower than \$2,400,000, the court imposed a sentence of 30 months' imprisonment.

On appeal, Weon argued that the district court committed procedural error in refusing to consider his proffered evidence that the tax loss amount was incorrect. The Fourth Circuit disagreed, noting that, absent a successful withdrawal from a plea agreement or other exceptional circumstances, a defendant remains bound by the factual stipulations in his plea agreement once the plea has been accepted by the district court. Observing that Weon had stated under oath during the Rule 11 hearing that the factual stipulations in the agreement were true and correct, the appellate court concluded that the district court was within its discretionary authority to hold Weon to the loss amount stipulated in the plea agreement.

### **Tenth Circuit Holds Violations of Omnibus Clause of 26 U.S.C. § 7212(a) Should Be Sentenced under Sentencing Guideline § 2T1.1**

In *United States v. Neilson*, 721 F.3d 1185 (10th Cir. 2013), the Tenth Circuit held that, in sentencing a defendant for violating the omnibus clause of 26 U.S.C. § 7212(a) (corrupt interference with administration of Internal Revenue laws), the district court properly applied Federal Sentencing Guideline ("U.S.S.G.") § 2T1.1, which is entitled "Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents," rather than U.S.S.G. § 2J1.2, which is entitled "Obstruction of Justice."

As the basis for a guilty plea, Kenneth Neilson ("Neilson") admitted to violating the omnibus clause of 26 U.S.C. § 7212(a) by using third parties to transfer property to trusts; reporting financial information to the IRS that was different from the information he reported to lenders; mailing frivolous letters to the IRS; presenting "Bills of Exchange" as payment of his tax debts; declaring that he was a sovereign citizen of Utah; and sending harassing documents to the IRS.

At sentencing, the district court calculated the Guidelines range under § 2T1.1 and sentenced Neilson to 30 months' imprisonment. On appeal, the Tenth Circuit rejected Neilson's argument that the district court should have applied § 2J1.2, holding that § 2T1.1 was more appropriate. The appellate court noted that § 2T1.1 targets both tax evasion and various other illegal and fraudulent actions involving taxation, whereas § 2J1.2 covers a broad range of conduct that generally involves interfering with the administration of the justice system. The court explained that, in order for the defendant's violation of § 7212(a) to be punishable under § 2T1.1 rather than § 2J1.2, his conduct need not meet all the elements of tax evasion, but need only be more similar to the types of tax offenses punishable under § 2T1.1. The court concluded that § 2T1.1 was more appropriate because, although some of Neilson's conduct arguably obstructed justice, his conduct overall was more related to taxation. Accordingly, the court affirmed Neilson's sentence.

### **Eighth Circuit Holds District Court Provided Insufficient Explanation for Downward Variance from Guidelines Range**

In *United States v. Cole*, 721 F.3d 1016 (8th Cir. 2013), the Eighth Circuit held that the district court committed procedural error by providing an insufficient explanation for its downward variance from the Sentencing Guidelines range.

Abby Rae Cole ("Cole") was the owner and CEO of Chip Factory, Inc., a computer parts distributor. Between 2003 and 2007, Chip Factory's main customer was Best Buy, a large electronics retailer. Chip Factory used Best Buy's automated online bidding system to submit low bids for parts orders. Once it was awarded an order, Chip Factory re-entered the system and increased its bid so that it could invoice Best Buy for the higher amount. This scheme resulted in Chip Factory's theft of nearly \$33 million from Best Buy over a four-year period. Cole participated in the scheme, along with her husband and other employees of Chip Factory.

In addition to participating in the theft scheme, Cole gave her tax return preparer inflated cost data to use in preparing tax returns for her and her husband, as well as for Chip Factory. She and her husband paid for various personal expenses through Chip Factory and then deducted the expenses as business expenses, and they also diverted portions of Chip Factory's income directly into their personal joint bank account without reporting

the income. These actions resulted in the evasion of more than \$3 million in taxes between 2004 and 2007.

A jury found Cole guilty of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349; tax evasion, in violation of 26 U.S.C. § 7201; and conspiracy to commit tax fraud, in violation of 18 U.S.C. § 371. Cole's advisory Guideline range was 135 to 168 months' imprisonment, but the district court varied downward and sentenced her to three years' probation. Cole's co-conspirators received much harsher sentences.

On appeal, the Eighth Circuit affirmed Cole's convictions but remanded her case to the district court to provide a fuller explanation of her sentence. The appellate court reasoned that, given the magnitude of the downward variance, the district court's "brief and contradictory" explanation of Cole's sentence was not sufficient to allow for meaningful appellate review. 721 F.3d at 1025.

### **Seventh Circuit Holds Possession of Identifying Information Is Not "Use" for Purposes of Applying Number-of-Victims Enhancement**

In *United States v. Rabiou*, 721 F.3d 467 (7th Cir. 2013), the Seventh Circuit held that writing down and retaining identifying information does not constitute "use" of that information for purposes of defining the term "victim" when applying the Sentencing Guidelines' number-of-victims enhancement under U.S.S.G. § 2B1.1(b)(2)(B).

Tajudeen Rabiou ("Rabiou") worked as a teller at three different banks between September 2003 and February 2007. During that time, he stole the identifying information of at least 86 bank account holders, writing the information down and taking it home to his apartment. He subsequently placed the identifying information of a portion of the 86 account holders on documents in order to divert funds into fraudulently opened bank accounts. Rabiou was arrested in April 2009 and pleaded guilty to one count of bank fraud, in violation of 18 U.S.C. § 1344, and one count of aggravated identity theft, in violation of 18 U.S.C. § 1028A. Before sentencing, the government asserted that Rabiou's offense level should be increased by four levels under U.S.S.G. § 2B1.1(b)(2)(B), because the bank fraud had involved 50 or more victims. The government cited the Guidelines' definition of "victim" for offenses involving identity theft, which includes persons "whose means of identification was used

unlawfully or without authority.” U.S.S.G. § 2B1.1 cmt. n.4(E)(ii). At sentencing, Rabiou argued that the government had to prove he actively employed the identifying information of 50 or more accountholders in connection with the bank fraud to show that the fraud involved 50 or more victims. The government countered that Rabiou had “used” the identifying information of 50 or more account holders by writing it down and taking it to his apartment. The district court agreed with the government, added four levels to Rabiou’s offense level, and ultimately sentenced him to 102 months’ imprisonment.

On appeal, the Seventh Circuit addressed the question of what constitutes “use” of someone’s identifying information for purposes of the definition of “victim.” Relying on Supreme Court precedent, the court stated that “‘use’ ... means ‘to employ,’ ‘to avail oneself of,’ and ‘to carry out a purpose or action[.]’” 721 F.3d at 473. The court also stated that the Guidelines’ definition of “use” in other contexts confirms that some action more than acquiring or possessing is required. On this basis, the court concluded that the evidence showed fewer than 50 persons’ identifying information had been “used,” and therefore Rabiou should have received a two-level rather than a four-level upward adjustment to his offense level, resulting in a lower Guidelines range. Nonetheless, because the district court had stated that it would have given the same sentence even if it had accepted Rabiou’s calculation of the Guidelines range, the Seventh Circuit concluded that the error was harmless and affirmed the judgment of the district court.

### **RESTITUTION**

#### **First Circuit Holds Defendant’s Waiver of Right to Appeal Sentence Precluded Appeal of Restitution Order**

In *United States v. Okoye*, 731 F.3d 46 (1st Cir. 2013), the First Circuit held that the appellate waiver contained in the defendant’s plea agreement barred him from appealing the district court’s restitution order.

Augustus Okoye (“Okoye”) used his brother’s identifying information, without his brother’s knowledge, to obtain approximately \$1,000,000 in fraudulent mortgage loans. After his brother learned of Okoye’s actions, Okoye was indicted on several counts of wire fraud and identity fraud. He agreed to plead guilty to three counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of identity fraud, in violation of 18 U.S.C. § 1028(a)(7). The waiver-of-

appeal provision in the plea agreement began by stating that Okoye would not appeal “any prison sentence” of 27 months or less. The provision ended by stating that, in exchange for a downward departure, Okoye would not appeal “any sentence imposed.” After a hearing, the district court granted the government’s motion for a downward departure and sentenced Okoye to serve 21 months in prison and to pay \$454,207 in restitution to the defrauded mortgage companies.

On appeal, Okoye advanced a number of substantive challenges to the restitution order. As a threshold matter, the First Circuit examined whether Okoye could appeal the order in light of the plea agreement’s waiver-of-appeal provision. Okoye argued that the plea agreement was ambiguous as to whether he had waived his right to appeal the restitution order because the waiver-of-appeal provision began by referring to “any prison sentence.” The court disagreed, noting that Okoye had provided no evidence that the parties meant to include the qualifier “prison” in the final clause of the waiver provision, which referred to “any sentence.” The court further opined that the plea agreement unambiguously included restitution as part of Okoye’s sentence. Concluding that Okoye’s waiver of his right to appeal “any sentence” encompassed a waiver of his right to appeal the restitution order, the court dismissed Okoye’s appeal.

### **FORFEITURE**

#### **Second Circuit Holds “Proceeds” Means Gross Receipts in Criminal Forfeiture Statute**

In *United States v. Peters*, 732 F.3d 93 (2d Cir. 2013), the Second Circuit held that the term “proceeds” as used in the criminal forfeiture statute (18 U.S.C. § 982(a)(2)) means the gross receipts, not only the profits, attributable to the criminal violation.

Frank E. Peters (“Peters”) and his wife owned two related companies (the “companies”) that sold after-market auto parts. In 1996, pursuant to an asset-based credit agreement, Chase Bank extended to the companies a \$9 million revolving line of credit, which was later increased to \$10.5 million. Under the agreement, the companies were allowed to borrow a fixed percentage of their “borrowing base,” which was determined by reference to the companies’ inventory and accounts receivable. In 1997, Peters and other employees began manipulating the accounts receivable in order to inflate the companies’ borrowing capacity. Peters was ultimately convicted of various offenses,

including wire fraud, mail fraud, and conspiracy to commit bank fraud. The district court sentenced him to 108 months in prison and ordered him to pay \$11,988,501 in restitution. Having determined that the companies were Peters' corporate alter egos, the court also entered a forfeiture order against him for \$23,154,259, *i.e.*, the gross receipts or "draws" from the revolving line of credit during the time period of the fraud.

On appeal, Peters challenged the forfeiture order, arguing in part that § 982(a)(2), which provides for forfeiture of the "proceeds" of wire, mail, and bank fraud violations affecting a financial institution, applies only to the profits of the underlying fraud. The Second Circuit disagreed, holding that, as used in § 982(a)(2), the term "proceeds" means gross receipts. The court explained that the Supreme Court's decision in *United States v. Santos*, 553 U.S. 507 (2008), an illegal lottery case in which the term "proceeds" in the anti-money laundering statute was construed to mean profits, did not apply to section § 982(a)(2). The court noted that the *Santos* decision was largely driven by the Supreme Court's concern that if "proceeds" were interpreted to mean gross receipts, nearly every violation of the illegal-lottery statute would also be a violation of the anti-money laundering statute. The risk of this type of "merger problem," the court reasoned, was not present in the context of the criminal forfeiture statute, because that statute is a form of punishment and not a substantive criminal offense. Further, the court opined that interpreting "proceeds" to mean gross receipts better accomplished the punitive purpose of the forfeiture statute by punishing all convicted criminals who received income from illegal activity, whether or not the activity was profitable. Accordingly, the Second Circuit affirmed the forfeiture order in its entirety.

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