Criminal Tax Bulletin

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SIXTH AMENDMENT

Sixth Amendment Does Not Preclude Judge from Determining Amount of Forfeiture or Restitution in a Criminal Case

In ***United States v. Leahy***, 438 F.3d 328 (3rd Cir. 2006), the Third Circuit held that the Sixth Amendment right to a jury trial does not preclude a judge from finding the facts necessary to determine the amount of forfeiture or restitution to be imposed on a criminal offender.

Several recent Supreme Court decisions have altered the ways in which the Sixth Amendment applies to criminal cases. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court established that any fact, other than a prior conviction, that increases the penalty for an offense beyond a statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court defined "statutory maximum" as the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In *United States v. Booker*, 543 U.S. 220 (2005), the Court held the mandatory U.S. Sentencing Guidelines unconstitutional.

The Third Circuit relied on *Libretti v. United States*, 516 U.S. 29 (1995), in deciding that the Sixth Amendment does not apply to forfeiture determinations by a judge. In *Libretti*, the Court held that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protections since forfeiture is an element of the sentence imposed following a guilty plea, and thus outside the scope of the Sixth Amendment. The *Blakely* and *Booker* line of cases undercut *Libretti* in that they made clear that the classification of facts as either elements of a crime or sentencing factors is irrelevant; rather it is the effect of the fact finding on the sentence that determines whether a fact is one that must be submitted to the jury. However, the Third Circuit refused to undermine *Libretti*, as it remains Supreme Court precedent and other circuits have reached a similar conclusion regarding forfeitures.

The Third Circuit also held that the Sixth Amendment does not apply to restitution determinations by a judge; however, the justices disagreed on why a jury is not required.

The lead opinion resolved the issue by examining the concept of a "statutory maximum". It first determined that restitution imposed pursuant to a criminal conviction is a criminal penalty, not a civil sanction. The key inquiry in determining whether the Sixth Amendment applies is whether a judge's calculation of the sum a defendant must restore to his or her victim constitutes an increase in punishment exceeding that authorized by plea or jury verdict. Both the Victim and Witness Protection Act and the Mandatory Victims Restitution Act authorize restitution as a matter of course "in the full amount of each victim's losses." Thus, the "statutory maximum" punishment authorized by a guilty plea or verdict is the full amount of the loss. Provided the judge does not issue a restitution order for more than the full amount of the loss, there is no violation of the Sixth Amendment

CONFRONTATION CLAUSE

First Circuit Adopts Case-by-Case Approach In Deciding Whether 911 Call Is "Testimonial"

In ***United States v. Brito***, 427 F.3d 53 (1st Cir. 2005), the First Circuit held that hearsay evidence of excited utterances made during 911 emergency calls is "testimonial" under *Crawford v. Washington* only if a reasonable person in the caller's circumstances "would have had the capacity to appreciate the legal ramifications of her statement," despite the stress of the startling event that prompted the excited utterances.

In *Brito*, an anonymous 911 caller reported she had just heard gunshots and was driving away when a man with a particular description pointed a gun at her and her son. The call also suggested that the man was blocks away but still within her line of sight. The defendant was arrested at the scene, and evidence of the 911 call was admitted at his trial. He was convicted of various federal firearms offenses and sentenced to 210 months' incarceration.
On appeal, defendant argued the 911 tape was inadmissible

under *Crawford* since defendant did not have the opportunity to confront and cross-examine the anonymous speaker on the tape. In *Crawford*, the Supreme Court held that the Confrontation Clause does not allow the admission at a criminal trial of a "testimonial" statement made by a witness who does not appear at trial unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness. The Court, however, left open the definition of "testimonial."

In *Brito*, the First Circuit rejected defendant's argument and found that the anonymous 911 caller's statements were not testimonial as the call "strongly suggest[ed] that [the caller] and her son, as well as others in the vicinity, were in imminent personal peril when the call was made."

The court noted that ordinarily statements made to police while the declarant or others are still in personal danger are made "out of urgency and a desire to obtain a prompt response," without "consideration of their legal ramifications." However, the court warned against an all or nothing approach and held that the correct inquiry "require[s] an ad hoc, case-by-case approach," with the court deciding, in light of the circumstances, whether a reasonable person making what is determined to be an excited utterance "would have either retained or regained the capacity to make a testimonial statement at the time of the utterance."

Crawford Does Not Apply to Testimonial Statements Made In Furtherance of a Conspiracy to Obstruct Justice

In ***United States v. Stewart***, 433 F.3d 273 (2d Cir. 2006), the Second Circuit held that evidence of testimonial statements made in furtherance of a conspiracy to obstruct justice does not have to satisfy normal rules for the admission of testimonial evidence set out in *Crawford v. Washington*, 541 U.S. 36 (2004).

Under *Crawford*, the Confrontation Clause prohibits the admission of out-of-court testimonial statements in a criminal case unless the accused had an opportunity to cross-examine the declarant and the declarant is unavailable to testify at the accused's trial. While the Court did not fully define "testimonial", it did hold that statements made in furtherance of a conspiracy are generally not testimonial.

In *Stewart*, the statements at issue were both testimonial and made in furtherance of a conspiracy. Martha Stewart and her former stockbroker, Peter Bacanovic, were prosecuted on charges of lying to government officials investigating possible insider trading by the pair. Neither defendant testified at trial, but evidence of out-of-court statements made by each defendant was admitted against the other under FRE 801(d)(2)(E), which states that co-conspirator statements qualify as admissions of a party-opponent and are non-hearsay.

Here, however, the co-conspirator statements were clearly testimonial as they were made to federal investigators during formal interviews. Thus, the court faced a novel and seemingly irreconcilable issue. Under *Crawford*, the Confrontation Clause applies to testimonial statements but does not apply to statements made in furtherance of a conspiracy. How is *Crawford* to be applied when a statement is both testimonial and made in furtherance of a conspiracy?

Rather than resolve this tension, the court focused on the truthfulness of the statements made. In *Stewart*, the false statements were intended to mislead authorities and obstruct justice. Combined with the false statements were some truthful statements, meant to make the false statements sound more believable. In light of this, the court decided that evidence of the truthful portions were offered "not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice." Since the statements were not offered for the truth of their assertions, the Confrontation Clause did not apply and they were admissible.

Thus, the court held that "when the object of a conspiracy is to obstruct justice, mislead law enforcement officers, or commit similar offenses by making false statements to investigating officers, truthful statements made to such officers designed to lend credence to the false statements and hence advance the conspiracy are not rendered inadmissible by the Confrontation Clause."

The court further explained that "[i]t would be unacceptably ironic to permit the truthfulness of a portion of a testimonial presentation to provide a basis for keeping from a jury a conspirator's attempt to use that truthful portion to obstruct law enforcement officers in their effort to learn the complete truth."

Two-Way Video Teleconferencing Violation of Confrontation Clause When Only Reason for Conferencing Is Judicial Expediency

In ***United States v. Yates***, 2006 WL 319348 (11th Cir. 2006), the Eleventh Circuit held that the government's presentation of the testimony of foreign witnesses beyond its subpoena power using two-way video teleconferencing, violated the Sixth Amendment's Confrontation Clause.

Defendants were charged with conspiracy to commit fraud, money laundering, and other offenses in connection with their operation of an internet pharmacy. Two essential government witnesses living in Australia refused to travel to the United States to testify in person at the defendants' trial. Instead, the district court allowed the witnesses to testify via two-way video teleconferencing.

In *Craig v. Maryland*, 497 U.S. 836 (1990), the Supreme Court held a "defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial, but only where denial of such confrontation is necessary to further an important public policy…"

The Eleventh Circuit held that the government's reasons for using video teleconferencing, making and expeditiously resolving the case, were not public policies important enough to satisfy the *Craig* test in the absence of case-specific findings that other options–such as pretrial depositions pursuant to Fed.R.Crim.P.15—were unavailable.

There is a circuit split on the issue. In *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), the Second Circuit held that the *Craig* test does not apply to two-way video teleconferencing. However, four other circuits have agreed with the Eleventh Circuit in holding that *Craig* does apply. Additionally, in making changes to the Federal Rules of Criminal Procedure to allow for two-way video teleconferencing of initial appearances and arraignments with the defendant's consent, the Supreme Court specifically declined to transmit to Congress an additional proposed amendment allowing trial testimony taken by that sort of teleconferencing.

TITLE 26

Attorney Not Subject to Disbarment for Misdemeanor Conviction of Willful Failure to Pay Taxes

In ***In re Wray***, 433 F.3d 376 (4th Cir. 2005), the Fourth Circuit held that an attorney's misdemeanor offense of willful failure to pay income taxes does not constitute a "serious crime" under the Federal Disciplinary Rules and cannot serve as grounds for disbarment.

Wray, a Virginia attorney, properly filed his income tax returns but failed to pay all of the taxes due, choosing instead to repay several business lenders to whom he owed substantial debt. In 2001, Wray pled guilty in district court to a misdemeanor count of willful failure to pay income taxes. As a result of his conviction, the United States District Court for the Eastern District of Virginia instituted disciplinary proceedings against Wray and disbarred him from the practice of law before the court on the grounds that he had committed a "serious crime" within the meaning of Federal Rule of Disciplinary Enforcement I.B.

The rule defines a "serious crime" to include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of any other to commit a "serious crime."

On appeal, the Fourth Circuit disagreed with the district court's conclusion that Wray's conduct was deceitful and found his conduct did not constitute a "serious crime." The prosecution conceded Wray did not commit fraud or conceal income in an attempt to avoid tax liability; he simply chose not to pay his full tax obligation. Thus, the court opined Wray's actions were not deceitful. Even if viewed as deceitful, deceit is not a necessary element of the misdemeanor offense of willful failure to pay taxes. Thus, the conviction does not meet the standards as set forth in the disciplinary rule and though grounds for disciplinary action; Wray's conduct was not grounds for disbarment.

Tax Shelter Promoters Convicted of Willfully Aiding and Abetting Clients in Filing Fraudulent Returns

In ***United States v. Smith***, 424 F.3d 992 (9th Cir. 2005), the Ninth Circuit affirmed defendants' convictions for violating 26 U.S.C. § 7206(2), tax fraud; 18 U.S.C. § 1341, mail fraud; 18 U.S.C. § 1343, wire fraud; 18 U.S.C. §§ 1956, 1957, money laundering; and 18 U.S.C. § 371, conspiracy.

Defendants set up hundreds of client trusts known as "Unincorporated Business Organizations" (UBOs), through which income was funneled in order to avoid taxes. Defendants advised clients to transfer all income and assets into the names of their UBOs instead of their own names. They assured clients no taxes were due on the income and there was no need to file a personal return. Defendants then instructed clients to make "distributions" out of their UBOs. Clients were told the "distributions" went offshore into an investment program where they earned a profit. Clients were able to access their money for a short time, but defendants eventually transferred the money into other banks denying clients access. Losses ranged from $20,000 to $400,000.

Defendants challenged their convictions on a number of counts including: 1) magistrate judge's lack of authority to conduct arraignment, 2) double jeopardy based on multiplicity of conspiracy counts and plain error, 3) potentially biased grand jury, and 4) denial of motion to suppress evidence based on defects in the search and arrest warrants.

The Ninth Circuit rejected defendants' arguments. The court held that evidence defendants aided and assisted their clients in preparing personal income tax returns that omitted revenue in business trusts was sufficient to establish that defendants caused the preparation and presentation of false returns. Evidence that defendants specifically advised clients income from the UBOs did not

need to be reported and directed clients not to consult with friends, family, or accountants about the UBOs was sufficient to prove defendants acted willfully with specific intent to defraud the government in the enforcement of tax laws.

Definition of "Willfulness" in Tax Cases

In ***United States v. Whistler***, 139 Fed.Appx. 1 (9th Cir. 2005), the Ninth Circuit affirmed defendant's conviction for aiding and assisting in the preparation of fraudulent income tax returns in violation of 26 U.S.C. § 7206(2).

Whistler, a CPA, established trusts to reduce his clients' tax liability. Whistler backdated or had employees backdate documents to allow clients to claim deductions for years prior to establishment of the trusts, deducted for expenses that never occurred, and misstated ownership of assets. Whistler then prepared and filed tax returns containing those misrepresentations.

On appeal, Whistler challenged his conviction and sentence based on: 1) sufficiency of the grand jury indictment, 2) failure of the district court to disclose grand jury transcripts, and 3) certain evidentiary rulings by the district court.

Whistler argued the grand jury indictment lacked sufficiency because the word "willful" was too vague to allege he intended to violate a known legal duty. The Ninth Circuit disagreed, holding that, in the tax context, willfulness means a voluntary, intentional violation of a known legal duty, but does not require malice, bad faith, or an evil motive. The court said, "[t]he term 'willfulness' is not vague but is a term of art with a known meaning for tax defendants of knowing one's duty and voluntarily and intentionally violating it."

Whistler also challenged the failure of the district court to disclose grand jury transcripts on the basis that he had a particularized need for them since the indictment lacked sufficiency. The Ninth Circuit rejected this argument and held the indictment did not lack sufficiency.

Finally, Whistler challenged several evidentiary rulings by the appellate court. The court found no reversible error but allowed a limited remand of Whistler's sentence on Sixth Amendment grounds pursuant to *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005).

Jury Instruction for Willfulness Does Not Require Language Stating "Defendant Is Not Presumed to Know the Law"

In ***United States v. Pflum***, 150 Fed.Appx. 840 (10th Cir. 2005)(unpublished), the Tenth Circuit upheld the district court's denial of defendant taxpayer's proposed willfulness instructions related to violations of 26 U.S.C. §§ 7202, 7203.

Pflum was convicted of eight counts of willful failure to pay quarterly employment taxes in violation of 18 U.S.C. § 7202 and three counts of willful failure to pay federal income tax in violation of 26 U.S.C. § 7203 and sentenced to 30 months in prison. On appeal, Pflum argued the district court erred in refusing to give a proposed instruction relating to the "willfulness" of his acts. The Court of Appeals disagreed, affirming Pflum's conviction and sentence.

Pflum's proposed additional language instructed the jury: "In this case, the Defendant is not presumed to know the law." The Court of Appeals agreed that to establish willfulness the government had to prove beyond a reasonable doubt that Pflum had knowledge of the law. However, the court found sufficient language in the given instructions that stated the defendant acted willfully if: "the law imposed a duty on him [and] he knew of that duty"; "defendant knew of his legal duty and violated it"; "an act is not done willfully if the person believes in good faith that he is acting within the law"; and "defendant does not have an obligation to prove anything in this case."

The court felt the above instructions "more than adequately instructed that the government had to prove beyond a reasonable doubt that Mr. Pflum was aware of the duties the law imposed upon him and that he intentionally violated those duties." Language indicating there is no presumption that defendant had the requisite knowledge extends beyond what is required for a jury instruction on "willfulness" for 26 U.S.C. §§ 7202, 7203.

MONEY LAUNDERING

Attorneys' Fee Exception Limited Defense to Money Laundering

In ***United States v. Elso***, 422 F.3d 1305 (11th Cir. 2005), the Eleventh Circuit restricted use of the attorneys' fee exception under 18 U.S.C. § 1957(f) by defendants prosecuted under different money laundering statutes.

Elso, an attorney, represented two cocaine importers on drug trafficking charges. After one of his clients expressed concern that law enforcement officials would find $266,800 in drug money secreted in his home, Elso agreed to "take care of the situation", retrieving the money himself

and later claiming the money was payment for legal services. Elso was prosecuted under 18 U.S.C. § 1956(a)(1)(B)(i) which makes it a crime to conduct a financial transaction involving proceeds of a crime knowing that the transaction is designed to conceal the nature, location, source, ownership, or control of those proceeds.

As an affirmative defense, Elso raised the statutory exception in 18 U.S.C. § 1957(f). The exception allows an attorney to avoid culpability if the attorney accepts, *as payment for legal services*, money the attorney knows to be the proceeds of criminal activity.

The court rejected this defense and found the § 1957 statutory exception does not carry over into § 1956. The crime in § 1956 is the intent to conceal criminal proceeds, while the crime in § 1957 is the intent to accept criminal proceeds. The two are not the same. "The issue of whether the money involved in [the] transaction was for attorneys' fees is not relevant to the issue of whether [the defendant] had the requisite knowledge and intent to support a conviction under § 1956."

First Circuit Rules on Sufficiency of Concealment Evidence for Money Laundering and Money Judgments in Criminal Forfeitures

In ***United States v. Hall,*** 434 F.3d 42 (1st Cir. 2006), the defendant appealed his conviction on charges of drug trafficking, money laundering, and tax evasion. Among his arguments on appeal, the defendant claimed there was insufficient evidence to sustain the money laundering conviction and that the court erred in issuing a money judgment as part of the criminal forfeiture order against him.

In order to disguise proceeds from drug trafficking, the defendant used the money to fund several legitimate loans. He told borrowers the money was an inheritance from his father, however evidence showed the defendant received nothing from his father's estate. The defendant then deposited some of the repaid loan funds into a personal bank account, later transferring the funds into a stock trading account that also bore his name. The government charged the movement of the funds as money laundering. The defendant claimed there was nothing about the transaction that suggested concealment or intent to conceal, a requirement for money laundering.

The First Circuit sided with the government, acknowledging that although there was nothing about the second transfer that, standing alone, necessarily suggested intent to conceal, the transaction could not be viewed in isolation and constituted one of a series of transactions that began with the deceptive loan. Thus, "[a] design to conceal on a particular transaction may be imputed to a subsequent transaction if the subsequent transaction, while innocent on its face, is part of a larger money laundering scheme."

The First Circuit also held that a district court may issue a money judgment as part of a criminal forfeiture order. Issuing a money judgment allows the government to seize future assets to satisfy the forfeiture order. The court gave two primary reasons for allowing this type of *in personam* judgment against the defendant for the amount the defendant obtained as proceeds of the offense. First, criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, so it is not necessary to prove the defendant actually has the forfeited proceeds in his possession at the time of conviction. Second, allowing a money judgment as part of a forfeiture order prevents a drug dealer from ridding himself of his ill-gotten gains to avoid the forfeiture sanction.

INFORMANT TESTIMONY

Government's Bounty Payment to Informer Did Not Prevent Him from Testifying at Trial

In ***United States v. Dawson***, 425 F.3d 389 (7th Cir. 2005), the Seventh Circuit held that the government's payment to an informant of a bounty in exchange for his cooperation did not require exclusion of that informant's testimony at trial.

Defendants were convicted of federal drug crimes based on testimony and recordings by their cocaine supplier, Diaz, an informer working with the Drug Enforcement Administration (DEA). On appeal, defendants argued that Diaz's testimony should have been disallowed in light of the benefits he received in exchange for assisting the prosecution. The Court of Appeals disagreed.

Pursuant to his agreement with the DEA, Diaz received 20 percent of any drug sale proceeds the government recovered as a result of Diaz's assistance in setting up drug deals. In addition, the DEA promised not to inform Immigration and Naturalization Services (INS) that Diaz lied on his application for U.S. citizenship when he denied committing any crimes.

The court defined the payments to Diaz as a bounty and distinguished a bounty from a witness or contingency fee. The court said, "A bounty is a reward for rendering a service that the offeror wants done, whether it's shooting wolves that prey on sheep or catching criminals who prey on humans. Here the bounty was for helping the authorities nail drug offenders…the bounty was not a contingent fee for testimony because it was paid whether or not Diaz testified."

"Any general policy…against giving a witness inducements to testify, rather than relying entirely on his

love of truth or the terrors of the oath, would require reinstating the old rule…that the party to a case may not testify at all because he has an interest, pecuniary or otherwise, in the outcome and is therefore not a disinterested witness….Most of the key witnesses in cases of drug dealing and other "victimless" crimes…are criminals testifying in the hope of obtaining leniency or other benefits from the government." The court refused to evaluate the government's need to offer monetary or other inducements in exchange for this type of "indispensable" testimony.

The court acknowledged that payment of bounties may induce an informer to testify more favorably for the government and any inducements should be revealed to the jury. However, the court ultimately concluded that the reliability of an informant's testimony is a question left for the jury. In doing so, the court declined to fashion an exclusionary rule prohibiting the testimony of an informant who receives a bounty from the government.

TABLE OF CASES