Criminal Tax Bulletin

Department of Treasury ***Office of Chief Counsel***
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SENTENCING

Supreme Court Holds *Booker* Does Not Authorize Reduction of Sentence Below Amended Guidelines Range

In ***Dillon v. United States***, 130 S. Ct. 2683 (2010), the Supreme Court held that *United States v. Booker*, 125 S. Ct. 738 (2005), did not apply to a sentencing modification under 18 U.S.C. § 3582(c)(2) and thus did not authorize the district court to reduce the defendant's sentence below the amended Sentencing Guidelines range.

In 1993, defendant Percy Dillon ("Dillon") was convicted of several offenses, including conspiracy to distribute more than 500 grams of powder cocaine and more than 50 grams of crack-cocaine. He was sentenced at the bottom of the Guidelines range for the drug counts, for a total of 322 months' imprisonment. In 2007, the Guidelines were amended to reduce the base-offense level for crack-cocaine offenses by two levels, and in 2008 this amendment was made retroactive.

Following the amendment to the Guidelines, Dillon filed a *pro se* motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2), which provides an exception to the general rule that a court may not modify a term of imprisonment once it has been imposed. Section 3582(c)(2) authorizes a court to reduce a sentence in the case of a defendant whose sentence was based on a Guidelines range that was subsequently lowered by the Sentencing Commission, so long as the reduction is consistent with applicable Commission policy statements. The policy statement governing § 3582(c)(2) is U.S.S.G. § 1B1.10, which instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range except to the extent the original term of imprisonment was below the range then applicable.

In addition to the two-level reduction corresponding to the amended Guidelines range, Dillon sought a further reduction based on the sentencing factors in 18 U.S.C. § 3553(a). Dillon argued that, under *Booker*, the court was authorized to grant such a variance because the amended Guidelines range was advisory.

The district court reduced Dillon's sentence for the drug counts to the term at the bottom of the amended Guidelines range, resulting in a total of 270 months' imprisonment. The court declined to make the further reduction sought by Dillon, however, holding that it lacked authority to impose a sentence inconsistent with § 1B1.10. The Third Circuit affirmed, and Dillon sought certiorari.

The Supreme Court affirmed, reasoning that a sentence modification under 18 U.S.C. § 3582(c)(2) is not a resentencing and therefore does not implicate the Sixth Amendment right at issue in *Booker*, *i.e.*, the right to have essential facts found by a jury beyond a reasonable doubt. The Court explained that, because § 1B1.10 requires a court to substitute the amended sentencing range for the range originally applied, any facts found by a judge in a § 3582(c)(2) proceeding do not serve to increase the sentencing range but affect only the judge's exercise of discretion within that range. For this reason, the Court concluded that the remedial aspect of *Booker* does not apply to sentencing modification proceedings (abrogating *United States v. Hicks*, 472 F.3d 1167, 1170 (9th Cir. 2007)).

Eleventh Circuit Upholds Sentencing Guideline Imposing Prison Term for Failure to File Returns

In ***United States v. Snipes***, 611 F.3d 855 (11th Cir. 2010), the Eleventh Circuit rejected the defendant's claim that U.S.S.G. § 2T1.1, the sentencing guideline for willful failure to file returns, is invalid, and held, *inter alia*, that the district court did not err in applying this guideline to the defendant's crimes.

In or about 2000, actor Wesley Snipes ("Snipes") became involved with American Rights Litigators ("ARL"), an organization that challenged the authority of the IRS to collect taxes. After meeting with ARL, Snipes began writing to the IRS about the agency's purported lack of authority and seeking refunds for

taxes he had paid in prior years. He did not file returns for taxable years 1999 through 2004. Snipes was ultimately charged with conspiracy, filing a false claim for refund, and six counts of willful failure to file returns. He was convicted of three counts of willful failure to file returns in violation of 26 U.S.C. § 7203 for the taxable years 1999, 2000, and 2001. The presentence investigation report measured his intended tax loss at $41,038,051. Applying U.S.S.G. § 2T1.1 and other sections of the Sentencing Guidelines, the court sentenced him to thirty-six months' imprisonment.

On appeal, Snipes claimed in part that § 2T1.1 is invalid and that the district court erred in sentencing him pursuant to that section. He argued that no first-time offender should be awarded jail time for a § 7203 misdemeanor offense. The Eleventh Circuit affirmed, reasoning that § 2T1.1 properly imposes probation or imprisonment based on the seriousness of the crime, as determined by the amount of the tax loss. The court also rejected Snipes's claim that § 2T1.1 creates an improper disparity in contravention of 28 U.S.C. § 991(b)(1)(B) because the guideline does not distinguish between misdemeanors and felonies. The court explained that Congress was concerned with the disparity of sentences between similarly situated defendants, not between felons and misdemeanants. Finally, the court rejected Snipes's claim that § 2T1.1 is not the product of careful empirical evidence, noting that the increase in sentences for offenders who had caused major tax losses was adopted in light of legislative history supporting higher sentences for white-collar crime.

Second Circuit Holds $6 Million Fine Based on Judge's Findings Violated *Apprendi*

In ***United States v. Pfaff***, Nos. 09-1702-cr, 09-1707-cr, 09-1790-cr, 2010 WL 3365923 (2d Cir. Aug. 27, 2010), the Second Circuit held that a $6 million criminal fine violated *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), because the fine exceeded the statutory maximum and the jury had made no findings regarding the pecuniary loss.

Robert Pfaff ("Pfaff"), Raymond J. Ruble ("Ruble"), and John Larson ("Larson") were convicted of tax evasion under 26 U.S.C. § 7201, stemming from their involvement in designing, implementing, and marketing fraudulent tax shelters. They appealed their convictions, and Larson also appealed his sentence. The Second Circuit affirmed the defendants' convictions and Larson's term of imprisonment, but concluded that the district court plainly erred by fining Larson $6 million pursuant to 18 U.S.C. § 3571.

The Second Circuit noted that § 3571(b) establishes a maximum fine of $250,000 per felony conviction for individuals. Pursuant to 18 U.S.C. § 3571(d), however, a district court may impose an alternative fine of up to twice the gross pecuniary loss caused by, or gain derived from, the defendant's offenses. Here, although the jury made no findings as to the pecuniary gain or loss caused by Larson's conduct, the sentencing judge found that Larson had caused a gross pecuniary loss in excess of $100 million and concluded that the maximum fine therefore exceeded $200 million. The district court subsequently fined Larson $6 million.

The appellate court analyzed the fine in light of the Supreme Court's decisions in *Apprendi* and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Under *Apprendi*, a fact that increases a criminal penalty beyond the statutory maximum must be proven to a jury beyond a reasonable doubt. Further, under *Blakely*, the "statutory maximum" for *Apprendi* purposes is the maximum sentence that may be imposed on the basis of facts reflected in the jury verdict or admitted by the defendant. The Second Circuit concluded that, in the absence of jury findings as to gain or loss, § 3571's default statutory maximums cap the amount of a criminal fine.

In this case, the statutory maximum fine was $3 million, *i.e.*, $250,000 for each of Larson's 12 convictions. Accordingly, the appellate court vacated and remanded for reconsideration of Larson's fine.

Eighth Circuit Holds Two Sentences for Separate Crimes Committed by Defendant May Be Enhanced by Same Tax Losses

In ***United States v. Morse,*** 613 F.3d 787 (8th Cir. 2010), the Eighth Circuit held, *inter alia*, that tax losses included as relevant conduct in a prior sentencing could be included in a subsequent sentence for a separate crime committed by the same defendant, so long as the earlier sentence was within statutory limits.

In 1999, Kevin J. Morse ("Morse") was convicted of four counts of filing false returns for the years 1991 through 1994. He was sentenced to 18 months' imprisonment followed by a year of supervised release. In determining Morse's sentence, the district court added to the 1991 through 1994 tax loss approximately $83,000 in estimated unpaid taxes for 1996 and 1997.

Despite his 1999 conviction, Morse did not timely file tax returns for 1996 through 2000, the years at issue in this case. In 2001, at Morse's request, a former IRS criminal investigator and revenue agent prepared his tax returns for tax years 1996 to 2000, which showed a tax liability of $142,827. Morse did not file the returns but instead hired another preparer, the Freedom and Privacy Committee, which determined Morse owed no taxes for tax years 1996 through 1999, and owed only $968 for tax year 2000. Morse also claimed an aggregate net refund of $6,410. A subsequent IRS investigation determined that Morse owed $205,237 in back taxes. Morse was ultimately charged with and convicted of five counts of filing false tax returns in violation of 26 U.S.C. § 7206(1). During sentencing, the district court included in its tax loss calculations the 1996 and 1997 tax losses that were included as relevant conduct in Morse's 1999 sentence.

The Eighth Circuit affirmed Morse's convictions and sentence, holding in part that the district court did not err in failing to reduce the tax loss calculations by the amount of the tax losses already assessed against Morse. The court explained that relevant conduct considered in a prior sentencing can be a basis for subsequent prosecution without violating the Double Jeopardy Clause, provided the prior sentence was within the statutory limits.

Second Circuit Holds Application of Amended Guideline Issued after Date of Offense Did Not Violate Ex Post Facto Clause

In ***United States v. Ortiz***, No. 08-2648-cr, 2010 WL 3419898 (2d Cir. Sept. 1, 2010), the Second Circuit held that a sentencing court's application of an amended guideline issued after the date of an offense did not violate the Ex Post Facto Clause because there was no substantial risk that the use of the amended guideline resulted in a more severe sentence.

Eric Ortiz ("Ortiz") pleaded guilty to being a felon in possession of a firearm and to possession of narcotics with intent to distribute. At sentencing, the district court applied the Guidelines in effect at the time of sentencing, which had been amended after the date of Ortiz's offenses to increase the adjustment for an obliterated serial number on a firearm from two to four levels. After arriving at a sentencing range of 168 to 210 months under the amended Guidelines, the Court imposed a non-Guidelines sentence of 120 months, 48 months below the bottom of the applicable range.

On appeal, Ortiz contended that his sentence was unlawful because the Guidelines calculation, which the district court made as the first step in the sentencing process, was incorrect. Ortiz challenged the calculation in part on the ground that use of the amended guideline was barred by the Ex Post Facto Clause. Ortiz's sentencing range under the prior Guidelines would have been 151 to 188 months.

The Second Circuit affirmed. The court explained that, under the advisory Guidelines regime, a defendant making an Ex Post Facto Clause challenge to a non-Guidelines sentence must show that the court's use of the amended Guidelines created a "substantial risk" that the defendant's sentence would be more severe than if the court had applied the Guidelines in effect at the time of the offense.

In this case, the court held that there was no violation because the court had imposed a non-Guidelines sentence well below the then-applicable sentencing range. The court concluded that there was no substantial risk that the sentencing judge, having made "such a generous deviation from the amended Guidelines range," would have imposed an even shorter non-Guidelines sentence had he applied the prior sentencing guideline.

SEARCH AND SEIZURE

Ninth Circuit No Longer Requires Special Procedures for Warrants Involving Electronic Records

In ***United States v. Comprehensive Drug Testing, Inc.***, Nos. 05-10067, 05-15006, 05-55354, 2010 WL 3529247 (9th Cir. Sept. 13, 2010), the Ninth Circuit, sitting *en banc*, issued a revised opinion that no longer requires special procedures for search warrants involving electronic records.

The case arose from an investigation of the Bay Area Lab Cooperative ("Balco"), which was suspected of providing steroids to professional baseball players. Upon learning that ten players had tested positive for steroids under a drug testing program administered by Comprehensive Drug Testing ("CDT"), federal authorities obtained a grand jury subpoena seeking all of CDT's drug-testing records for major league baseball players. The government also obtained a warrant to search CDT's facilities for the records of the ten players who had tested positive and to review the electronic data offsite.

The warrant contained restrictions to ensure that data beyond the warrant's scope would not be reviewed by the investigating agents. Once the computers were seized, however, the investigating agents reviewed all the data. Based on the agents' findings, the government obtained subsequent search warrants and served CDT additional subpoenas.

CDT and the affected players filed motions under Rule 41(g) for the return of the seized property and moved to quash the latest round of subpoenas. These motions were granted, except as to the records of the ten players for whom probable cause existed. The government appealed, arguing that it was entitled to retain incriminating records of other players found in plain view during its review of the seized data.

In its original *en banc* opinion, the Ninth Circuit affirmed two district court orders directing the government to return the seized evidence, other than that pertaining to the ten players for whom probable cause was established. The court dismissed the appeal of a third order as untimely. In addition, the original opinion set forth the following procedures for the wholesale seizure of electronic data:

- Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases;
- Segregation and redaction must be either done by specialized personnel or an independent third party;
- Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora;
- The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents; and
- The government must destroy or return non-responsive data.

United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 1007 (9th Cir. 2009).

In its revised *en banc* opinion, the Ninth Circuit did not alter its holding. The revised opinion, however, no longer imposes the above-listed requirements, which are instead set forth in a concurring opinion. The majority opinion instructs the government, when conducting searches involving electronic records, to follow the general framework provided in *United States v. Tamura,* 694 F.2d 591, 596 (9th Cir. 1982) (requiring a wholesale seizure of material to be monitored by a neutral, detached magistrate). Although it stops short of requiring the government to waive reliance on the plain view doctrine in digital evidence cases, the revised opinion cautions the government not to use the plain view doctrine to gain access to records not encompassed within the warrant. It also continues to interpret Rule 41(g) broadly, allowing any aggrieved party to file for the return of property falling outside the warrant. Finally, the revised opinion still requires the government to disclose to judicial officers prior efforts to obtain the same information in other judicial fora and the results of those efforts.

D.C. Circuit Holds Warrantless Use of GPS Device on Defendant's Vehicle Violated Fourth Amendment

In ***United States v. Maynard***, 615 F.3d 544 (D.C. Cir. 2010), the D.C. Circuit held, *inter alia*, that the warrantless use of a global positioning system ("GPS") device on a defendant's vehicle for a month was an unreasonable search that violated the Fourth Amendment.

Antoine Jones ("Jones") and Lawrence Maynard ("Maynard") were the owner and manager, respectively, of a nightclub in the District of Columbia. In 2004 an FBI-Metropolitan Police Department task force began investigating the two for narcotics violations. Jones and Maynard were ultimately charged with and convicted of conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base. On appeal, Jones argued in part that the district court erred in admitting evidence acquired by the use of a GPS device the police had installed on his Jeep without obtaining a warrant. The GPS device was used to track Jones's movements 24 hours a day for four weeks.

The D.C. Circuit reversed Jones's conviction. The court first determined that use of the GPS device constituted a search because the information the police discovered, *i.e.*, the totality of Jones's movements over the course of a month, was not exposed to the public. The court reasoned that the likelihood anyone would observe all of Jones's movements (as opposed to his movements during a single journey) was effectively nil.

The court distinguished its approach from cases in the Ninth and Seventh Circuits, which have held that the use of a GPS tracking device to monitor an individual's movements over a prolonged period is not a search. *See United States v. Pineda-Moreno,* 591 F.3d 1212 (9th Cir. 2010); *United States v. Garcia,* 474 F.3d 994 (7th

Cir. 2007). These cases relied on *United States v. Knotts*, 103 S. Ct. 1081 (1983), in which the Supreme Court held that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. The D.C. Circuit reasoned that tracking an individual's movements from one place to another was different from tracking that individual's movements 24 hours a day for 28 days. Holding that *Knotts* was not controlling, the court explained that the use of prolonged surveillance defeated Jones's reasonable expectation of privacy because it revealed the totality and pattern of his movements.

Because it held that the GPS data were procured in violation of the Fourth Amendment and were essential to establishing Jones's involvement in the conspiracy, the court reversed his conviction.

Third Circuit Holds Search of Handcuffed Defendant's Gym Bag Was Valid Search Incident to Arrest

In ***United States v. Shakir***, 616 F.3d 315 (3d Cir. 2010), the Third Circuit held that a search of the defendant's gym bag while the defendant was handcuffed was justified as a search incident to arrest, in light of the Supreme Court's decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

Following the armed robbery of a PNC Bank, an arrest warrant was issued for Naim Nafis Shakir ("Shakir"). Shakir was subsequently arrested by a police detective in a hotel lobby, with approximately 20 bystanders nearby. When he was placed under arrest, Shakir dropped the gym bag he was holding to the floor at his feet. The detective patted him down and found no weapons on his person. Shakir was then handcuffed and restrained by two armed police officers while the detective opened the gym bag. The bag did not contain weapons but contained cash that was later identified as having been stolen from a Belco Credit Union, not from the PNC Bank robbery that prompted the arrest warrant.

Shakir was indicted on one count of armed robbery of the Belco Credit Union. Prior to trial, he filed a motion to suppress evidence, claiming that the detective's search of his gym bag violated the Fourth Amendment. After the District Court denied the motion, Shakir proceeded to trial and was convicted.

On appeal, the Third Circuit held that the search of Shakir's gym bag was a legal search incident to arrest. The court began its analysis by interpreting the Supreme Court's decision in *Gant* to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it. Based on this interpretation, the Third Circuit held that a search is permissible incident to a suspect's arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched.

Applying this legal standard to Shakir's appeal, the court noted that although he was handcuffed and guarded by two policemen, there remained a sufficient possibility that he could access a weapon in his bag to justify its search. Accordingly, the court held that suppression of the cash found within the bag was not required.

MONEY LAUNDERING

Sixth Circuit Holds Concealment Money Laundering Requires Purpose to Conceal

In ***United States v. Faulkenberry***, 614 F.3d 573 (6th Cir. 2010), the Sixth Circuit reversed the defendant's money laundering conviction on the ground that the evidence did not establish that a purpose of the transaction at issue was to conceal the illicit nature of the funds involved.

Roger Faulkenberry ("Faulkenberry") was Executive Vice President for Client Development at National Century Financial Enterprises ("NCFE"), a company that sold bonds to investors and used the proceeds to purchase the accounts receivable of healthcare providers. Contrary to what it told investors, NCFE routinely advanced funds to healthcare providers without obtaining any receivables in return. As a result of his participation in this scheme, Faulkenberry was convicted of securities fraud, wire fraud, money laundering, and conspiracy.

On appeal, the Sixth Circuit reversed Faulkenberry's convictions for money laundering and conspiracy to commit money laundering. The transaction underlying the money laundering charges was a $22 million advance of investor funds to a health care provider, which funds were obtained through fraudulent misrepresentations. The transaction was structured to conceal the illicit nature of the funds, using a phony Receivables Purchase Report and a promissory note that falsely stated the transaction was funded with NCFE's own money rather than investor monies.

Citing *Cuellar v. United States*, 128 S. Ct. 1994 (2008), which was decided after Faulkenberry's trial, the Sixth Circuit held that, to prove concealment money laundering under 18 U.S.C. § 1956(a)(1)(B)(i), it is not sufficient for the government to prove that a particular transaction had the effect of concealing the illicit nature of funds, or that it was structured to do so. Rather, the government must prove that concealment was an "animating purpose" of the transaction. The court concluded that the government had not established the $22 million advance constituted money laundering because there was insufficient evidence to show that a purpose of the advance was to conceal the fraudulent nature or source of the $22 million.

EMPLOYMENT TAXES

Sixth Circuit Holds Ability to Pay Taxes Is Not an Element of 26 U.S.C. § 7202

In ***United States v. Blanchard***, 618 F.3d 562 (6th Cir. 2010), the Sixth Circuit held that a defendant's ability to pay taxes when due is not an element of 26 U.S.C. § 7202 (failure to pay over employment taxes).

Richard Blanchard ("Blanchard") was the owner and operator of the R. Blanchard Construction Company. In 2001, the IRS began a civil audit of the company, which became a criminal investigation in 2002. The investigation revealed that, between 1997 and 2003, the company had failed to pay over $195,000 in employments taxes. In August 2007, a jury convicted Blanchard of 18 counts of violating 26 U.S.C. § 7202. He was sentenced to 22 months' imprisonment and 36 months' supervised release.

On appeal, Blanchard argued that the trial court had erred in not instructing the jury that, in order to establish an offense under 26 U.S.C. § 7202, the government had to prove the defendant either (1) possessed sufficient funds to pay the taxes when due; or (2) lacked such funds because of a voluntary and intentional act without justification. In making this argument, Blanchard relied on *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975), in which the Ninth Circuit reasoned that willfulness under § 7202 must include "some element of evil motive and want of justification." 521 F.2d at 333.

The Sixth Circuit rejected Blanchard's argument, noting that in *United States v. Easterday*, 564 F.3d 1004 (9th Cir. 2009), the Ninth Circuit had recently overruled *Poll* on the ground that the "evil motive" requirement was inconsistent with the later Supreme Court decision in *United States v. Pomponio*, 97 S. Ct. 22 (1976). The Sixth Circuit also noted that it had reached a similar conclusion in a case dealing with 26 U.S.C. § 7203, in which it held the district court had not erred in instructing the jury that a defendant's financial ability to pay federal income taxes was not a defense to that charge. *See United States v. Ausmus*, 774 F.2d 722 (6th Cir. 1985). The appellate court concluded that although an inability to pay taxes when due bears on the willfulness of the act, it is not an element of the offense under 26 U.S.C. § 7202.

BRIBERY

Eleventh Circuit Holds Bribery Conviction under 18 U.S.C. § 666 Does Not Require Proof of *quid pro quo*

In ***United States v. McNair***, 605 F.3d 1152 (11th Cir. 2010), the Eleventh Circuit held that, to convict a defendant of bribery under 18 U.S.C. § 666, the government is not required to link a specific payment to a local government employee with a specific official act by that employee, *i.e.*, a *quid pro quo*.

This was a consolidated appeal arising from five bribery and public corruption cases relating to the $3 billion repair and rehabilitation of a sewer and wastewater treatment system in Jefferson County, Alabama. Several County officials in charge of the sewer program had received bribes from contractors, who obtained large payments on construction and engineering contracts with the County. Nine of the original 16 defendants – two former County officials, three corporate contractors, and four individuals who owned these respective contractors – appealed their convictions on charges of conspiracy to commit bribery as well as substantive offenses of bribery and honest services mail fraud.

On appeal, the defendants-appellants challenged their bribery convictions under 18 U.S.C. § 666(a)(1)(B), which criminalizes a local government employee's "corruptly" soliciting or accepting a bribe, and 18 U.S.C. § 666(a)(2), which criminalizes "corruptly" offering or giving a bribe to a local government employee. The defendant-appellants argued that the government failed to prove the contractors gave specific benefits to County officials in exchange for the performance of a specific act, *i.e.*, a *quid pro quo*.

The Eleventh Circuit affirmed the bribery convictions, reasoning that nothing in the plain language of § 666 requires a *quid pro quo*. Although the statute does require a "corrupt" intent, the court explained that the

term "corruptly" merely means dishonestly seeking an illegal goal or seeking a legal goal illegally. Accordingly, the court held that § 666 does not require the government to allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act.

LAW ENFORCEMENT PRIVILEGE

Second Circuit Holds Law Enforcement Privilege Applied to Undercover Reports

In the civil case of ***In re The City of New York***, 607 F.3d 923 (2d Cir. 2010), the Second Circuit held that certain police reports were protected from discovery by the law enforcement privilege. The reports at issue had been prepared by undercover officers of the New York City Police Department ("NYPD") and contained sensitive intelligence information.

The plaintiffs had been arrested and detained after demonstrating at the 2004 Republican National Convention ("RNC") in New York City. They brought the underlying suits under 42 U.S.C. § 1983 and state law claiming that their arrest and treatment at the hands of the NYPD violated the Constitution and New York law.

During pretrial discovery proceedings, the plaintiffs brought a motion to compel the City to produce confidential reports created by undercover NYPD officers who were investigating potential security threats in the months before the RNC. The City opposed the motion to compel by asserting, among other things, that the documents were protected from disclosure by the law enforcement privilege. A magistrate judge granted the motion to compel, and the district court affirmed. The City then filed a petition for a writ of mandamus in the Second Circuit, seeking relief from the order.

The Second Circuit held that a writ of mandamus was warranted under the circumstances because disclosure of the confidential reports would cause irreparable harm to the public and because the City had no other adequate means to obtain relief. The court further held that the plaintiffs could not overcome the strong presumption against lifting the law enforcement privilege. The court reasoned that (1) the law enforcement privilege applied to the reports because they contained detailed information about the NYPD's undercover law enforcement techniques and procedures; and (2) the plaintiffs did not have a compelling need for the reports because the City had previously disclosed other reports regarding security threats to the City, and those reports were not contradicted or undermined by the confidential reports now sought.

FIFTH AMENDMENT

Seventh Circuit Holds Government's Negative References to Fifth Amendment Was Error

In ***United States v. Hills***, 618 F.3d 619 (7th Cir. 2010), the Seventh Circuit held, *inter alia*, that the government's references to the Fifth Amendment in its closing argument, which cast invocations of the right to remain silent in a negative light, affected a defendant's substantial rights and warranted the vacating of her conviction.

Defendants Debra Hills ("Hills"), Kenton Tylman ("Tylman"), and Brent Winters ("Winters") promoted fraudulent trust packages and were charged with conspiracy to impede the authority of the I.R.S. in violation of 18 U.S.C. § 371. Hills and Winters were also charged individually with filing false tax returns in violation of 26 U.S.C. § 7206(1). At trial, Tylman and Winters testified, but Hills invoked her Fifth Amendment right to remain silent. The trial judge expressly cautioned the prosecution to refrain from any references to the Fifth Amendment. During its closing, however, the prosecution made two references to the Fifth Amendment, including the assertion that "you don't really need to worry about that Fifth Amendment protection unless you're worried that you're [d]oing something illegal." The jury convicted Tylman and Hills of conspiracy, and also Hills and Winters for filing false tax returns.

Hills appealed her conviction partly on the grounds that the prosecution committed misconduct by referring to her invocation of the Fifth Amendment. The Seventh Circuit determined that the prosecution's statements most likely referred not to Hills's invocation of the right to remain silent but to Tylman's assertions that, if investigated, he would plead the Fifth Amendment. Nonetheless, the court reasoned that, because Hills was the only defendant who did not testify on her own behalf, a jury could view the prosecution's references as casting insinuations of guilt upon Hills. Concluding that these references affected Hills's substantial rights because the evidence of her guilt, standing alone, was not sufficient to convict her, the court vacated her conviction. The court noted, however, that there was no double jeopardy bar to Hills's retrial.

RELIANCE DEFENSE

Eleventh Circuit Holds Defendants Entitled to "Reliance on Accountant" Jury Instruction

In ***United States v. Kottwitz***, 614 F.3d 1241 (11th Cir. 2010), the Eleventh Circuit held, *inter alia*, that the district court's failure to instruct the jury on the defendants' claim of good faith reliance on their accountant seriously impaired their defense. As a result, the court reversed and remanded for a new trial.

The trial evidence indicated that Gerard Marchelletta, Sr. ("Senior") and Marchelletta, Jr. ("Junior"), shareholders of a closely held corporation, failed to report as income numerous home construction and personal expenditures made by the corporation on their behalf. The evidence also showed that Theresa Kottwitz ("Kottwitz"), the company's bookkeeper, knew these expenditures were booked incorrectly and provided incorrect information to the company's accountant in connection with his preparation of the corporate and shareholder tax returns.

At the close of the evidence, the defendants requested a "reliance on accountant" jury instruction, which the trial court denied. The jury convicted all three defendants of conspiring to defraud the IRS and of aiding and assisting in the filing of a false corporate tax return. In addition, the jury convicted Junior and Senior of filing false personal income tax returns for the year 2000 and also convicted Senior of evading taxes. The three defendants appealed their convictions and sentences.

On appeal, the Eleventh Circuit held that the defendants were entitled to the requested jury instruction concerning their good-faith reliance on their accountant's advice. The court explained that defendants bear an "extremely low" threshold to justify this instruction and do not need to prove good faith. Rather, the questions of whether a defendant fully disclosed the relevant facts and relied in good faith on his or her advisor are matters for the jury to determine.

In light of the district court's refusal to deliver the requested instruction, the appellate court reversed Junior's and Senior's convictions for filing false personal income tax returns for 2000 and Senior's conviction for evading taxes and remanded for a new trial on those counts.

FORFEITURE

Second Circuit Holds $12 Million Forfeiture Not Excessive for Failure to File Currency Transaction Reports

In ***United States v. Castello***, 611 F.3d 116 (2d Cir. 2010), a case involving a mandatory forfeiture for failure to file currency transaction reports ("CTRs"), the Second Circuit vacated the district court's second forfeiture order, which had fixed the defendant's forfeiture amount at zero, and remanded for the district court to reinstate its first forfeiture order of over $12 million.

Joseph Castello ("Castello") ran a check-cashing business that cashed more than $600 million in checks from 1995 to 2004. Castello failed to file CTRs for thousands of checks in amounts greater than $10,000, totaling approximately $200 million. He was convicted of failure to file CTRs in violation of 31 U.S.C. § 5313(a), an offense for which forfeiture is mandatory. In addition to sentencing Castello to five years' imprisonment and a $250,000 fine, the district court ordered forfeiture of over $12 million, plus Castello's equity in his family home.

Castello appealed the district court's forfeiture order. The Second Circuit vacated and remanded for further fact finding, on the ground that the record was insufficient to test whether the forfeiture amount was excessive under the Eight Amendment, as interpreted by *United States v. Bajakajian*, 118 S. Ct. 2028 (1998). On remand, the district court determined that no forfeiture at all was appropriate.

The government appealed the second forfeiture order, arguing that forfeiture in some (unspecified) amount was mandatory. The Second Circuit again vacated and remanded for the district court to reinstate the first order.

In explaining its conclusion, the appellate court described the rule for mandatory forfeitures under § 5317(c)(1)(A) as follows: "The proper amount of forfeiture following a § 5313(a) conviction is the total forfeitable amount required by the statute, discounted by whatever amount is necessary to render the total amount not 'grossly disproportional' to the offense of conviction." 611 F.3d at 120. Applying the factors from *Bajakajian*, the court determined that these factors weighed in favor of full forfeiture. Although Castello was convicted of no other crime, he knowingly and willfully cashed thousands of checks without filing the

required CTRs and thus enabled his customers to commit various acts of fraud. Given the seriousness of his offense, the court concluded that the original forfeiture amount of more than $12 million was not grossly disproportional to the crime.

TABLE OF CASES