

# *Criminal Tax Bulletin*

*Department of Treasury  
Internal Revenue Service*

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

2010

## FIFTH AMENDMENT

### **Supreme Court Holds Incriminating Statements Made Without Counsel in Second Interrogation Are Admissible if Break in Custody Lasted Fourteen Days**

In *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), the Supreme Court held that, because the defendant experienced a break in *Miranda* custody lasting more than fourteen days between two police interviews, his incriminating statements during the second interview, when he failed to reiterate his prior request for an attorney, need not be suppressed. The Court also held that release back into the general prison population after custodial interrogation constituted a break in custody.

In August 2003, responding to allegations that Michael Shatzer, Sr. (“Shatzer”) had sexually abused his son, a detective interviewed Shatzer in prison, where he was serving a sentence for an unrelated sexual child abuse offense. The detective terminated the interview when Shatzer invoked his right to counsel, and Shatzer was released back into the general prison population. Two and a half years later, while Shatzer remained incarcerated, more specific allegations were made concerning the same incident, and another detective interviewed him. After waiving his *Miranda* rights, Shatzer failed a polygraph test and made incriminating statements to detectives. He then invoked his right to counsel, and the interrogation was ended.

At trial, Shatzer moved to suppress his statements from the second interrogation pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that when an accused invokes his right to counsel, he cannot be subjected to further interrogation, even if he waives his *Miranda* rights, until counsel is provided or the accused initiates further communication.

The trial court concluded that the *Edwards* protections did not apply because there was a break in Shatzer’s custody between the 2003 and 2006 interrogations.

Shatzer was convicted of sexual child abuse of his son. The Court of Appeals of Maryland reversed and remanded, holding that the passage of time alone did not end the protections of *Edwards*, and that a return to prison did not constitute a break in custody.

The Supreme Court reversed and remanded. The Court explained that the *Edwards* presumption of involuntariness is based on the assumption that subsequent requests for interrogation after a suspect has invoked his right to counsel pose a significantly greater risk of coercion. The Court reasoned, however, that when an accused is released from custody after the initial interrogation and returns to his normal life for some time prior to the subsequent interrogation, it is unlikely that his waiver of the right to counsel has been coerced. Noting that the *Edwards* rule has the cost of suppressing voluntary confessions, the Court opined that the protections of *Edwards* end at the termination of *Miranda* custody and its lingering effects. The Court recognized that police need to know with certainty when they may resume interrogation and determined that fourteen days after the first interrogation is the requisite period. The Court stated that this is adequate time for an accused to resume his normal life and consult with an attorney, and for the coercive effects of prior custody to subside.

The Court then addressed whether Shatzer’s release back into the general prison population for two and a half years after his initial interrogation constituted a break in *Miranda* custody. The Court concluded that it did, on the grounds that lawful imprisonment does not create the coercive pressures identified in *Miranda*.

### **Tenth Circuit Holds No Double Jeopardy Where Defendant Tried Twice for Tax Evasion**

In *United States v. Farr*, 591 F.3d 1322 (10th Cir. 2010), the Tenth Circuit held that the constitutional prohibition against double jeopardy was not implicated by the retrial of the defendant for violating 26 U.S.C. § 7201, where no court had made factual findings tantamount to an acquittal.

Skoshi Thedford Farr (“Farr”), the manager of her husband’s alternative medicine clinic in Oklahoma City from 1984 through 1999, was indicted for tax evasion under 26 U.S.C. § 7201 for 1999. Rather than simply reciting the statute’s generic language, the indictment specifically charged Farr with evading the payment of quarterly employment taxes for the second, third, and fourth quarters of 1999. At trial, however, the government only presented evidence of Farr’s failure to pay the trust fund recovery penalty she had been assessed. The district court instructed the jury to treat the trust fund recovery penalty as the equivalent of the quarterly employment taxes referenced in the indictment. The jury convicted Farr, who appealed.

Concluding that the jury instructions had constructively amended the indictment, the Tenth Circuit reversed and remanded the case for a new trial, and the district court dismissed the case. The government then issued a new indictment charging Farr with violating § 7201 by failing to pay the trust fund recovery penalty. In the second proceeding, Farr moved the district court to dismiss the case on double jeopardy grounds, and it refused. Farr again appealed to the Tenth Circuit, which affirmed.

The circuit court explained that the double jeopardy clause of the Fifth Amendment only creates an impediment to subsequent prosecutions when there was previously a judgment of acquittal on the charge. In analyzing the case, the court determined that no factual findings had been made in the prior proceedings that were tantamount to a judgment of acquittal. The court also noted that constructive amendment of the indictment does not bar retrial for the same offense. Accordingly, the court concluded that the double jeopardy clause was not implicated by Farr’s retrial for the same statutory violation.

### **Third Circuit Holds 18 U.S.C. § 371 Creates a Single Statutory Offense for Double Jeopardy Purposes**

In *United States v. Rigas*, 584 F.3d 594 (3d Cir. 2009), the Third Circuit held that 18 U.S.C. § 371 creates a single statutory offense for purposes of determining whether a second prosecution under that statute constitutes double jeopardy.

John Rigas and his son Timothy (collectively, the “Rigases”) were officers and controlling shareholders of Adelphia Communications Corporation (“Adelphia”), a cable television provider. In the late 1990s, Adelphia incurred debt to finance its acquisition

of other cable television operators. To avoid diluting their control of Adelphia, and to create the appearance that the company was reducing its debt burden, the Rigases entered into sham transactions involving purported stock purchases and the assumption of Adelphia’s debt. When the true state of Adelphia’s finances and operations was discovered, the company collapsed.

In 2004, the Rigases were convicted in the Southern District of New York of conspiracy “to commit any offense against the United States” in violation of 18 U.S.C. § 371. The following year, they were indicted in the Middle District of Pennsylvania on charges that included conspiracy “to defraud the United States” in violation of 18 U.S.C. § 371. They moved to dismiss the indictment on the grounds that they were being tried twice for the same offense, in violation of the Fifth Amendment prohibition against double jeopardy. The district court denied the motion to dismiss, and the Rigases appealed.

On appeal, the Third Circuit noted that a defendant may generally be subject to multiple prosecutions, so long as each prosecution involves a different offense. In this case, both indictments alleged violations of 18 U.S.C. § 371, but they focused on different prongs of the statute. After analyzing the statute and its history, the court concluded that 18 U.S.C. § 371 creates a single offense that can be committed in two ways.

The court then applied a “totality of the circumstances” test to determine whether the Rigases’ conduct violated 18 U.S.C. § 371 multiple times or only once. The court noted that the indictments concerned the same underlying transactions, related to the same time and place, involved the same core group of participants, and related to a common goal of enriching the Rigases.

Based on this analysis, the court concluded that the Rigases had made a non-frivolous showing of double jeopardy. Accordingly, it remanded the case to the district court, stating that the government had the burden of proving that the Rigases entered into two separate conspiratorial agreements.

## **SIXTH AMENDMENT**

### **Tenth Circuit Holds Disqualification of Defendant’s Attorney Did Not Deprive Defendant of Right to Counsel**

In *United States v. Evanson*, 584 F.3d 904 (10th Cir. 2009), the Tenth Circuit held that, in disqualifying the

defendant's original trial counsel on conflict-of-interest grounds, the district court did not violate the defendant's right to counsel.

Dennis B. Evanson ("Evanson") and five codefendants marketed fictitious transactions that enabled clients to conceal income and create artificial deductions. Evanson was charged with conspiracy to commit tax fraud, tax evasion, and aiding and assisting in the preparation of false income tax returns. Before trial, the district court, upon the government's motion, disqualified Evanson's counsel on the grounds of a potential conflict of interest. The government alleged that the attorney was involved in Evanson's efforts to create false documents to substantiate the transactions and would therefore be a necessary witness at trial.

Represented by new counsel, Evanson was convicted. On appeal, he argued that the district court's disqualification of his original counsel violated his right to counsel under the Sixth Amendment. The Tenth Circuit asserted that trial judges must be afforded "broad latitude" to disqualify counsel if they foresee problems at trial. In this case, the circuit court opined, the trial judge reasonably anticipated that documents showing the attorney's involvement in the scheme would be offered into evidence, thus giving Evanson the option of an "advice of counsel" defense. If he elected to forego this defense at trial, he could claim ineffective assistance of counsel on appeal, arguing that his attorney rejected the defense to protect himself. Alternatively, if Evanson were to rely on the "advice of counsel" defense, his counsel could become an "unsworn witness," thereby giving Evanson an unfair advantage.

Given the likelihood of problems arising at trial, the Tenth Circuit affirmed the disqualification of the defendant's attorney.

## **SEARCH AND SEIZURE**

### **Seventh Circuit Rejects Ninth Circuit Approach to Computer Searches**

In *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010), police discovered evidence of pornography during a search of the defendant's computers and hard drives for evidence of voyeurism. Rejecting the search protocol outlined by the Ninth Circuit in *Comprehensive Drug Testing v. United States*, 579 F.3d 989 (9th Cir. 2009), the Seventh Circuit held that the search did not exceed the scope of the warrant.

Matthew Eric Mann ("Mann") was charged with possessing child pornography based on evidence discovered during the aforementioned search. The police conducted the search using filtering software that catalogued the files into a viewable format and also flagged any files previously submitted by law enforcement, most of which were child pornography. During the search, the police found evidence of child pornography that was not flagged and also opened four files that had been flagged.

At trial, Mann moved to suppress the evidence on the ground that the search exceeded the scope of the warrant. The district court denied the motion, and Mann entered a conditional guilty plea. On appeal, he urged the Seventh Circuit to apply the search protocol set forth in *Comprehensive Drug Testing*. In that case, the Ninth Circuit had directed magistrates to insist that the government waive reliance on the plain view doctrine in computer searches. The Ninth Circuit also set forth guidelines for preventing agents who search computers from examining data other than that for which probable cause is established.

The Seventh Circuit declined to follow the Ninth Circuit's approach, opining that abandoning the plain view doctrine in digital evidence cases was an overbroad approach and rejecting the Ninth Circuit's search protocol. Instead, the court advised those searching computers to exercise caution to ensure that searches are narrowly tailored to uncover only the items described in the warrant. The court held that the search at issue was within the scope of the warrant, with the exception of the opening of the flagged files, which were severable from the remaining evidence.

### **Fourth Circuit Applies Plain View Doctrine to Computer Search**

In *United States v. Williams*, 592 F.3d 511 (4th Cir. 2010), the Fourth Circuit affirmed the district court's denial of the defendant's motion to suppress a DVD containing pornographic images. The appellate court held that the DVD was either encompassed within the scope of the search warrant or, alternatively, was admissible under the plain view exception to the warrant requirement.

After a police investigation revealed that Curtis Williams ("Williams") had been sending threatening and obscene emails to fellow members of his church, a county detective applied for a warrant to search Williams' home, computers, DVDs, and other electronic media devices. The affidavit supporting the warrant application summarized the e-mails and established

probable cause to believe that certain violations of state law had occurred, including harassment by computer.

Following execution of the warrant, FBI agents searched the computers that had been seized, finding deleted pornographic images. Subsequently, an agent opened a DVD that had been seized from Williams' home and found additional images. Williams was ultimately convicted of offenses including possession of child pornography and was sentenced to 41 months' imprisonment.

On appeal, Williams argued that the seizure was not authorized by the warrant and that the plain-view exception was inapplicable because the DVD images had not been discovered inadvertently. The Fourth Circuit upheld the district court's conclusion that the images were sufficiently relevant to the crimes designated in the warrant to justify their seizure under the warrant. The court further held that even if the warrant did not authorize a search for child pornography, the seizure of the pornographic images was justified by the plain-view exception to the warrant requirement. Reasoning that the same constitutional requirements apply to searches of electronic and non-electronic information, the court rejected Williams' argument that the plain view doctrine requires "inadvertent" discovery of the evidence.

### **First Circuit Holds Information Dating Back Three Years Not Too Stale to Establish Probable Cause**

In *United States v. McElroy*, 587 F.3d 73 (1st Cir. 2009), the First Circuit held that an affidavit containing evidence dating back three years was adequate to establish probable cause because the facts supported the existence of an ongoing scheme.

Daniel and Aimee McElroy (collectively, the "McElroys") owned and operated three temporary employment agencies that supplied manual laborers to area businesses. They paid their temporary workers in cash and failed to report the payments to the government, resulting in a payroll tax loss of more than \$9.9 million. The McElroys were charged with and convicted of conspiracy to defraud the government, mail fraud, and the procurement of false tax returns. The district court sentenced Daniel McElroy to 108 months' imprisonment and Aimee McElroy to 78 months' imprisonment.

On appeal, the McElroys argued that the district court erred in denying their motion to suppress evidence seized pursuant to a search warrant. They argued that

the warrant was based primarily on stale evidence provided by a bookkeeper who had left the McElroys' employ three years before the warrant was issued. The First Circuit affirmed the district court's denial of the motion, noting that even where an affidavit contains information that is remote in time, it may establish probable cause if it also contains sufficient recent facts corroborating the older data and linking that data to the present. Applying this principle, the court found that the bookkeeper's description of an ongoing scheme, together with evidence of large cash withdrawals up to the year the warrant was issued and a surveillance video showing the continued operation of a business at the location to be searched, adequately refreshed the bookkeeper's information.

## **SENTENCING**

### **Fourth Circuit Vacates Probationary Sentence for Tax Evasion**

In *United States v. Engle*, 592 F.3d 495 (4th Cir. 2010), the Fourth Circuit vacated a probationary sentence for tax evasion because the district court failed to consider the seriousness of the offense and the need for general deterrence, and because the court had improperly focused on the defendant's ability to pay restitution.

Frederick Engle ("Engle") pleaded guilty to tax evasion for tax year 1998, although his relevant conduct included tax evasion for sixteen years between 1984 and 2002. With interest and penalties, his total tax liability exceeded \$2 million. The presentence report calculated an advisory sentencing range of 27-33 months, which the district court reduced to 24-30 months on the ground that Engle's criminal history was overstated. The district court then decided on a variance sentence based on Engle's ability to pay restitution. Reasoning that Engle could earn significant amounts of money if not incarcerated, the court sentenced him to four years' probation, conditioned on confinement for eighteen months in a community corrections center. While at the center, Engle would be permitted to travel to China for his job. The government appealed the sentence.

On appeal, the Fourth Circuit first concluded that the district court had failed to consider the relevant policy statements issued by the Sentencing Commission, which treat tax evasion as a serious crime, emphasize the importance of general deterrence, and reflect the view that under pre-Guidelines practice too many probationary sentences were imposed for tax crimes.

Because the district court made no mention of these policy considerations in imposing a variance sentence, the appellate court determined that the record insufficient to permit meaningful appellate review.

Further, given the district court's near-exclusive focus on Engle's ability to pay restitution, the appellate court concluded that the sentence imposed was substantively unreasonable and an abuse of discretion. The court stated: "Reduced to its essence, the district court's approach means that rich tax-evaders will avoid prison, but poor tax-evaders will almost certainly go to jail. Such an approach, where prison or probation depends on the defendant's economic status, is impermissible." 592 F.3d at 505.

### **Ninth Circuit Holds Tax Loss Should Not Be Reduced by Defendant's Unclaimed Deductions**

In *United States v. Yip*, 592 F.3d 1035 (9th Cir. 2010), the Ninth Circuit held that the defendant's unpaid state taxes were properly included in the tax loss computation for sentencing purposes and that the defendant was not entitled to reduce the tax loss by the amount of deductions for state taxes he might have claimed on his federal return.

Andy S.S. Yip ("Yip") operated an off-the-books business for which he did not report income on his federal or state tax returns for the tax years 1995 through 1998. He also opened bank accounts in Hong Kong but failed to report his interest in the accounts on his returns and failed to file FBARs. During an IRS audit, Yip denied his interest in the foreign accounts, falsely attributed unexplained deposits in his domestic accounts to loans, and provided false documentation. The agent referred the case to IRS Criminal Investigation, and Yip was ultimately indicted.

Yip pleaded guilty to four counts of filing a false tax return and was convicted of several other charges. The district court sentenced him to 67 months' imprisonment for conspiracy to defraud the U.S. and failure to file FBARs, as well as 36 months' imprisonment for filing a false return, with all terms to run concurrently.

On appeal, the Ninth Circuit held that Yip's unpaid state taxes were properly included in the tax loss amount, on the grounds that the Sentencing Guidelines instruct courts to consider "all conduct violating the tax laws," not just federal tax laws. The court further held that the tax loss should not be reduced by Yip's unclaimed deductions for state taxes, explaining that the

Guidelines do not require courts to speculate about deductions a taxpayer chose not to claim.

## **MONEY LAUNDERING**

### **Eleventh Circuit Interprets *Santos* and *Cuellar* Narrowly**

In *United States v. Demarest*, 570 F.3d 1232 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 421 (2009), the Eleventh Circuit affirmed the money-laundering conviction of a yacht dealer targeted by an undercover operation. In rejecting the defendant's challenges, the court interpreted the Supreme Court's definition of "proceeds" in *United States v. Santos*, 128 S. Ct. 2020 (2008) as applicable only in the context of an illegal gambling operation. Further, the court declined to extend the holding of *Cuellar v. United States*, 128 S. Ct. 1994 (2008), to promotion money laundering.

Roger Demarest ("Demarest"), a Florida yacht broker, was approached by undercover agents seeking to purchase a boat for drug smuggling. He agreed to sell them a sailboat for cash in increments of less than \$10,000 and to assist the agents in concealing the true ownership of the vessel. He accepted approximately \$180,000 in cash that was represented by the agents to be drug proceeds.

Demarest was convicted of one count of money laundering and sentenced to 48 months' imprisonment. On appeal, he argued that he had not laundered "proceeds" of illegal activity because *Santos* limited the definition of "proceeds" to the profits of the underlying crime, and the agents had not indicated that the cash they paid for the boat constituted profits. The court disagreed, interpreting *Santos* as applicable only in the context of an unlicensed gambling operation. Thus, the court concluded that *Santos* did not apply to the proceeds of illegal drug trafficking.

The court also held that *Cuellar* was inapplicable to the case because *Cuellar* involved a conviction under 18 U.S.C. § 1956(a)(3)(B) and thus "ha[d] no impact on" Demarest's conviction for promotion money laundering under § 1956(a)(3)(A). 570 F.3d. at 1242.

### **Sixth Circuit Holds “Proceeds” Means “Profits” in 18 U.S.C. § 1957 Only If Conviction Would Radically Increase Sentence**

In *United States v. Kratt*, 579 F.3d 558 (6th Cir. 2009), the Sixth Circuit applied the Supreme Court’s decision in *United States v. Santos*, 128 S. Ct. 2020 (2008), to the defendant’s convictions under 18 U.S.C. § 1957. Affirming the convictions, the Court of Appeals held that “proceeds” meant gross receipts in this case because the convictions did not radically increase the defendant’s sentence.

In June 2001, Fred Kratt (“Kratt”) submitted fraudulently-inflated tax returns to a bank in order to refinance his Cessna airplane. The bank ultimately foreclosed on the plane, leaving a deficiency on the loan. Kratt obtained a second, unsecured loan to satisfy the deficiency and then discharged the debt in bankruptcy, creating a permanent loss for the bank.

Kratt was convicted of numerous offenses, including bank fraud, making a false statement on a loan application, and three counts of engaging in monetary transactions in criminally derived property, in violation of 18 U.S.C. § 1957. Section 1957(f)(2) defines “criminally derived property” as any property constituting or derived from proceeds obtained from a criminal offense. On appeal, the Sixth Circuit addressed the meaning of “proceeds” under § 1957 in light of the recent Supreme Court ruling in *Santos*.

The court first determined that the meaning of “proceeds” was the same for both 18 U.S.C. §§ 1956 and 1957. Next, the court interpreted *Santos* to mean that “proceeds” means profits only when the predicate offense creates a “merger” problem that would lead to a radical increase in the statutory maximum sentence, and only when nothing in the legislative history suggests Congress intended such an increase. The court then concluded that, in the present case, a conviction under § 1957 would not radically increase the statutory maximum sentence because § 1957 imposes lower statutory maximums than the predicate offenses of bank fraud and false statements. Thus, *Santos* did not require the court to apply a profits definition of “proceeds.”

On these grounds, the court applied a “gross receipts” definition of “proceeds” to determine whether Kratt had violated § 1957. Because Kratt did not contest that his transactions involved the gross receipts of his bank fraud and false statements offenses, the court affirmed his convictions under § 1957.

### **Ninth Circuit Holds Certain Ponzi Scheme Payments Cannot Be Basis for Money Laundering Convictions**

In *United States v. Van Alstyne*, 584 F.3d 803 (9th Cir. 2009), the Ninth Circuit held that the Supreme Court’s decision in *United States v. Santos*, 128 S. Ct. 2020 (2008) required reversal of two counts of the defendant’s money laundering convictions but not of a third count. The counts requiring reversal were based on the issuance of distribution checks to investors in a Ponzi scheme, which presented a “merger” problem with respect to the defendant’s mail fraud convictions. However, the court found no such merger problem with respect to the third count, which was based on the refund of an investor’s investment.

Beginning in 1992, Lance Van Alstyne (“Van Alstyne”) operated a Ponzi scheme involving oil and gas partnerships. Under the scheme, victims received distribution checks that were funded by the victims’ own principal. As the scheme unraveled, some victims complained and received refunds of their contributions.

Van Alstyne was found guilty of seven counts of mail fraud in violation of 18 U.S.C. § 1341 and three counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). After one appeal, which resulted in the reduction of his original sentence from 290 to 216 months’ imprisonment, Van Alstyne appealed a second time.

During the pendency of his second appeal, the Supreme Court decided *Santos*. The Ninth Circuit interpreted the holding of *Santos* to mean that the term “proceeds” as used in the money laundering statute means “profits” when viewing “proceeds” as “receipts” would create a “merger” problem, *i.e.*, a situation in which the same conduct supporting a charge for a predicate offense is used as the basis for the money laundering charge.

The court concluded that convicting Van Alstyne of money laundering based on the distributions presented a merger problem because the distributions were inherent to the mail fraud scheme, and the court reversed those convictions. By contrast, the court affirmed the money laundering conviction stemming from the investor refund on the grounds that this refund undermined the scheme to defraud and was thus distinct from the mail fraud charges.

**Second Circuit Holds Guilty Plea to Money Laundering Conspiracy Had Insufficient Factual Basis in Light of *Cuellar v. United States***

In *United States v. Garcia*, 587 F.3d 509 (2d Cir. 2009), the Second Circuit vacated the defendant's guilty plea to money laundering conspiracy on the grounds that the plea did not provide a sufficient factual basis for the offense under *Cuellar v. United States*, 128 S. Ct. 1994 (2008).

In 2006, a drug supplier sold cocaine to a government informant for \$2.2 million. Nelson Garcia ("Garcia"), a truck driver, was tasked with retrieving the funds from the informant and transporting them across the United States. He was arrested after receiving wrapped bags of currency from the informant, and he ultimately pleaded guilty to one count of money-laundering conspiracy in violation of 18 U.S.C. § 1956(h). The object of the charged conspiracy was to conduct a financial transaction with the proceeds of a specified unlawful activity, knowing that the transaction was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(B)(i).

During his plea colloquy, Garcia stated that his role was to pick up packages of money, which he understood were wrapped so as to conceal their contents, and deliver them to an individual. The government and defense agreed that this was a sufficient factual predicate for Garcia's plea, and the judge accepted it. Garcia was sentenced to 108 months in prison.

Shortly after Garcia was sentenced, the Supreme Court held in *Cuellar* that the concealment element of the money laundering statute requires that the purpose, not merely the effect, of the endeavor is to conceal or disguise a listed attribute of the proceeds. Garcia appealed his conviction, arguing in light of *Cuellar* that his plea lacked a sufficient factual basis.

The Second Circuit agreed, noting that the purpose of the transaction here, as in *Cuellar*, was merely to pay for narcotics. As the plea was founded solely on Garcia's admission that the funds were packaged so as to hide them to facilitate transport (and not for the purpose of concealing the source or ownership of the funds), the court found an insufficient factual basis to sustain Garcia's conviction. The court vacated the guilty plea and remanded the case for further proceedings.

**WIRE FRAUD**

**Ninth Circuit Holds Wire Transfers Several Years After Defendant Obtained Fraud Proceeds Cannot Be Basis for Wire Fraud Convictions**

In *United States v. Lazarenko*, 564 F.3d 1026 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 491 (2009), the Ninth Circuit reversed the defendant's convictions for wire fraud on the ground that wire transfers several years after the fraud proceeds were deposited into the defendant's account were not "in furtherance" of the fraud.

Pavel Lazarenko ("Lazarenko"), the former Prime Minister of Ukraine, engaged in a scheme to defraud that involved obtaining interests in Ukrainian companies, granting privileges to friends, concealing assets, and extortion. He kept his proceeds in foreign bank accounts, transferring funds from one country to another to conceal the sources and ownership of the funds. After the money passed through U.S. banks, the government charged him in a fifty-three-count indictment with conspiracy, money laundering, wire fraud, and interstate transportation of stolen property.

At trial, the district court dismissed twenty-four counts of wire fraud and interstate transportation of stolen property. Following a guilty verdict on the remaining counts, the district court, on motion by Lazarenko, dismissed a number of those counts, leaving fourteen convictions. On appeal, the Ninth Circuit affirmed the eight money laundering convictions but dismissed the wire fraud convictions and the conviction based on interstate transportation of stolen property.

In overturning the wire fraud convictions, which involved transfers of fraudulently-obtained funds from Lazarenko's Swiss and Bahamian accounts to several accounts in California, the circuit court explained that the government had failed to show the transfers were "in furtherance" of a fraudulent scheme. The court noted that the fraud at issue was completed in 1994, when the funds reached Lazarenko's control, but the wire transfers to U.S. accounts did not occur until several years later. The court opined that where there is no evidence that a wire transfer is an essential part of the scheme, concealing the source and ownership of fraudulently-obtained property in downstream transactions is better understood as money laundering, not wire fraud.

## **INDICTMENT**

### **Third Circuit Holds Government May Charge Multiple Years of Tax Evasion in a Single Count**

In *United States v. Root*, 585 F.3d 145 (3d Cir. 2009), the Third Circuit held that the government may charge a defendant with multiple years of tax evasion in a single count.

Thomas Root (“Root”) was a special projects director at Reading Broadcasting, Inc. (“RBI”), a television station. In addition to his salary, Root received commissions, which he asked to have paid to his wholly-owned LLC. One of RBI’s presidents also received commissions through an LLC Root established for him. Neither Root nor the RBI president received Forms W-2 reflecting the commissions, and the president instructed RBI’s bookkeeper not to issue Forms 1099 to either LLC. Root also performed legal services for a number of individuals and directed them to pay him through a sole proprietorship. Taxes were not withheld from these payments, and Forms 1099 were not issued. Root’s tax returns for 2001, 2002, and 2003 failed to disclose the commissions and other payments.

Root was charged with one count of conspiracy, one count of tax evasion for 2000 to 2003, and seven counts of filing a false return. In response to Root’s motion to dismiss because of improper venue, the government dismissed the false return charges and limited the tax evasion count to 2001 to 2003. Root was convicted of tax evasion and conspiracy.

On appeal, Root argued that his conviction for tax evasion under 26 U.S.C. § 7201 should be vacated because the indictment alleged multiple years of evasion in a single count and was therefore duplicitous. He argued that evasion of assessment must be charged separately for each year because taxable income is determined on an annual basis.

The Third Circuit affirmed Root’s conviction, explaining that § 7201 did not require the government to bring three separate counts for a single pattern of conduct. The court further reasoned that none of the risks of duplicity were present in this case because Root’s evasive conduct was consistent during the three-year period, each year standing alone met § 7201’s requirement of a substantial tax deficiency, and Root could not point to a valid sentencing concern.

## **BURDEN OF PROOF**

### **Ninth Circuit Holds Government Need Not Prove Defendant Had Money to Pay Taxes in Failure to Pay Case**

In *United States v. Easterday*, 564 F.3d 1004 (9th Cir. 2009), the Ninth Circuit held that, in a failure to pay case under 26 U.S.C. § 7202, the government is not required to prove the defendant had the money to pay the taxes when due.

Jack Easterday (“Easterday”) operated a chain of nursing homes in northern California through a corporation and its subsidiaries. Although his companies’ tax filings accurately stated the corporation’s payroll tax liabilities, the corporation repeatedly failed to pay the full amount of payroll taxes due. Between 1998 and 2005, the companies’ total payroll tax liability was more than \$44 million, of which approximately \$26 million was paid. Following IRS collection actions that did not result in payment, Easterday was charged with 109 counts of failure to pay over taxes in violation of 26 U.S.C. § 7202.

At trial, Easterday argued that he could not meet his tax obligations because the nursing homes had incurred losses of more than \$20 million during the period at issue, and he had to pay other expenses in order to keep the nursing homes operational. He asked the court to instruct the jury that to prove willfulness the government needed to show he had sufficient funds to meet his legal obligations at the time the taxes were due, or that the lack of sufficient funds was not justified by his financial circumstances. The district court declined to give the instruction, and Easterday was convicted on 107 of the 109 counts.

On appeal, Easterday argued that he was entitled to the proposed instruction pursuant to *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975). The Ninth Circuit disagreed, noting that *Poll*’s definition of “willfulness” included an element of “evil motive,” a formulation the Supreme Court had rejected in *United States v. Pomponio*, 429 U.S. 10 (1976). The court held that, insofar as *Poll* could be interpreted as requiring the government to prove the defendant had the money to pay the taxes when due, and as allowing the defendant to argue that he had spent the money for other expenses, *Poll* was inconsistent with *Pomponio* and was no longer binding authority in the Ninth Circuit. Accordingly, the court affirmed Easterday’s convictions.

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