# CRIMINAL TAX BULLETIN

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Department of the Treasury | Internal Revenue Service
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## FOURTH AMENDMENT

### Eleventh Circuit Holds Good-Faith Exception Applies to Constitutionally Overbroad Warrant

In ***United States v. McCall***, 84 F.4th 1317 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 1042 (2024), the Eleventh Circuit held (1) assuming the detective lacked probable cause to search defendant's iCloud account, the search warrant provided sufficient indicia of probable cause; (2) assuming the warrant was overbroad, it was not so facially deficient that the detective could not have reasonably relied on it; and (3) the detective's reliance on the warrant was not objectively unreasonable, and thus the good-faith exception to the exclusionary rule applied.

While losing in a high-stakes poker game, Kevin McCall (McCall) used his cellphone to arrange an armed robbery to reclaim his losses. His cellphone was directly tied to the crime, so there was no dispute that probable cause existed to search the cellphone; however, the search proved largely useless because the locked cellphone required a passcode that detectives did not have. A second warrant was secured to search the iCloud account that backed up the cellphone; however, the most recent backup was 12 hours before the poker game and robbery and spanned the 2.5-month period prior to the robbery. The iCloud warrant permitted a search of seven broad categories of data, encompassing almost all the account's data, with no time limitation.

The iCloud data provided included photos of McCall, a felon, holding a 9-millimeter semi-automatic pistol. Based on this evidence, the government charged McCall with being a felon in possession of firearms and ammunition (18 U.S.C. § 922(g)(1)). McCall moved to suppress the evidence seized from his iCloud account. In denying McCall's motion, the district court determined that the good-faith exception to the exclusionary rule applied. McCall entered a conditional guilty plea and was sentenced to 27 months' incarceration. He appealed the suppression decision to the Eleventh Circuit.

On appeal, McCall argued that, given the warrant's breadth and the iCloud account's indirect link to the crime, the evidence should have been suppressed because (1) the affidavit was so lacking in probable cause that no reasonable officer would believe he had probable cause to search the iCloud account; (2) the warrant was so facially deficient in its particularity that the executing officers could not have reasonably presumed it to be valid; and (3) the warrant was so defective that the executing officers' reliance on it was objectively unreasonable.

As to the first argument, the Eleventh Circuit declined to decide whether the warrant violated the Fourth Amendment and instead assumed that no probable cause existed to search the iCloud account. The appellate court stated that the warrant provided an obvious link between the cellphone and crime, and given that established link, the affidavit also tied the cell phone's associated iCloud account to the crime. Ultimately, the Eleventh Circuit held that even if no probable cause existed, it was not so obvious that an officer could not reasonably rely on the warrant and thus, the good-faith exception applied.

Regarding the second argument, the government conceded that the warrant fell short of the particularity requirement and therefore the appellate court assumed the warrant was overbroad. However, it again found the good-faith exception applied, explaining that while there was no facial time limit, the iCloud account contained stored data for only 2.5 months, and any temporal limitation that satisfied the particularity requirement likely would have covered that amount of time. Moreover, the warrant specified seven categories of data, which were tailored to the crime under investigation. Thus, the Eleventh Circuit held the detective reasonably could have believed that the seven categories of iCloud information fell within the "practical margin of flexibility for his broad investigative task," given the close connection between the cellphone used to commit the robbery and the iCloud account.

Finally, the appellate court found the detective's reliance on the warrant was not objectively unreasonable, noting, *inter alia*, that before acting on the warrant, he received

approval from several other individuals, including lawyers, that it passed factual and constitutional muster. Thus, the appellate court held that even assuming probable cause or particularity was lacking, the error was not so obvious that any reasonably well-trained officer would question the validity of the warrant. As such, the Eleventh Circuit affirmed.

## FOURTH AND FIFTH AMENDMENTS

### Ninth Circuit Holds Special Electronic Parole Conditions Do Not Limit General Parole Search Conditions and Use of Biometrics to Unlock Electronic Device is a Nontestimonial Act

In ***United States v. Payne***, 99 F.4th 495 (9th Cir. 2024), the Ninth Circuit held, *inter alia*, that special electronic search conditions of parole documents do not limit general parole search conditions and that the compelled use of a biometric to unlock an electronic device is nontestimonial, and thus, outside a defendant's Fifth Amendment privilege against self-incrimination.

In November 2018, Jeremey Travis Payne (Payne) was arrested for assault with a deadly weapon on a peace officer. He was sentenced to three years' imprisonment and later released on parole. As a condition of being placed on parole, Payne signed two documents—a Notice and Conditions of Parole (Notice) and a Special Conditions of Parole (Special). The Notice document stated that Payne's person, residence, and any property could be searched any time without a search warrant or cause. The Special document included a specific condition that Payne must submit any electronic device for inspection and provide any passcode to access the devices. The Special document also stated that "[f]ailure to comply can result in your arrest … and/or confiscation of any device pending investigation."

In November 2021, California police officers conducted a traffic stop on Payne's vehicle. When approached, Payne informed the officer that he was on parole. After confirming Payne was on parole, the officer asked Payne to exit the vehicle, handcuffed Payne, and detained him in the back of a squad car. The officers proceeded to search Payne's person and vehicle. On his person, they found a key ring with several keys. The officers asked Payne if he had a cellphone and Payne informed them of its location in the vehicle. Once the officers found the cellphone, Payne began to deny ownership of the device and stated he did not know the password. The officers then forcibly grabbed Payne's thumb and used it to unlock the cellphone via a built-in biometric unlocking feature.

Once unlocked, the officers found two videos. The first video showed a room with drug paraphernalia. The second video was of a residence with audio of Payne saying "life is good in Palm Desert … I have a Beamer out front." The officers then searched the device's maps application and found a pin dropped to a parked vehicle on a street in Palm Desert, California. At the pin dropped location, they found a BMW that could be unlocked with a key found on Payne's person. The officers then used a key on Payne's keyring to open the residence behind the BMW and found drug paraphernalia that matched the first video. The officers then wrote and obtained a search warrant for the residence.

Payne was charged in a three-count indictment for possession and intent to distribute. Payne filed a motion to suppress the evidence seized from the residence, primarily arguing that the searches of his cellphone and the residence violated his Fourth and Fifth Amendment rights. The district court denied the motion, finding that the search of the Payne's cellphone was reasonable and that the compelled use of Payne's thumb to access the phone was a nontestimonial act.

On appeal, Payne argued that the Special document limited the officers to arresting him or confiscating his device for noncompliance and that the forcible use of his thumb violated his Fifth Amendment rights. The Ninth Circuit disagreed with the first argument and held that the search of the cellphone and residence were reasonable, stating that the inclusion of the Special document conditions did not vitiate the force of the Notice conditions that Payne agreed to. Next, the appellate court held that the use of Payne's thumb to unlock his device was nontestimonial, placing it outside of Payne's Fifth Amendment privilege against self-incrimination. As a matter of first impression, the Ninth Circuit reviewed two lines of Supreme Court precedent—the physical-trait cases (nontestimonial) and the act-of-production cases (testimonial). The Ninth Circuit reasoned that for an act to be of production, it requires a defendant to divulge the contents of his mind. In this case, the use of Payne's thumb was more akin to a physical trait as it "required no cognitive exertion, placing it firmly in the same category as a blood draw or fingerprint taken at booking. The act itself merely provided access to a source of potential information."

## AGGRAVATED IDENTITY THEFT – 18 U.S.C. § 1028A

### Fifth Circuit Affirms Aggravated Identity Theft Convictions Where Use of Names and Information Was at the "Crux" of Wire-Fraud Convictions

In ***United States v. Croft***, 87 F.4th 644 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1130 (2024), following a remand from the Supreme Court, the Fifth Circuit held that the usage of individuals' names and information on an application met the "crux of the criminality" standard set

forth in *United States v. Dubin*, 599 U.S. 110 (2023), and affirmed the defendant's convictions for aggravated identity theft (18 U.S.C. § 1028A).

Bradley Croft (Croft) owned and operated a school that trained handlers and dogs for police work and submitted applications to the Texas Veterans Commission (TVC), the state agency designated to approve educational institutions and programs that sought to receive certain veterans' educational benefits. In March 2016, Croft submitted an application that was approved and accepted. On the application, Croft listed four instructors whose duties were to teach classes and train dogs and included certificates showing their qualifications.

At trial, three of the listed instructors testified that they had not given their permission to be named as instructors for purposes of the TVC application and had not served as instructors for the listed courses. The fourth listed instructor had died two years prior to Croft submitting the application. A TVC representative testified that the application would not have been approved without the names of the instructors, their qualifications, and information about the classes they would teach.

Croft was convicted of multiple counts, including eight counts of wire fraud and four counts of aggravated identity theft. Croft's convictions were affirmed by the Fifth Circuit. The Supreme Court thereafter vacated and remanded for further consideration in light of its decision in *Dubin*. On remand, the Fifth Circuit considered whether Croft's four convictions for aggravated identity theft should be upheld under *Dublin*.

The aggravated identity theft statue prohibits the knowing transfer, possession, or use of, without lawful authority, a means of identification of another person "during and in relation to" certain enumerated felonies. In *Dubin*, the Court clarified the meaning of "during and in relation to," holding that under section 1028A(a)(1), "[a] defendant 'uses' another person's means of identification 'in relation to' a predicate offense when this use is at the crux of what makes the conduct criminal." The Court explained that "being at the crux of the criminality requires more than a causal relationship, such as 'facilitation' of the offense or being a but-for cause of its 'success,'" and for crimes involving fraud or deceit, "the means of identification specifically must be used in a manner that is fraudulent or deceptive."

On remand, Croft argued that no aggravated identity theft occurred because neither he nor any other employee of the training school falsely claimed to be one of the four individuals listed in the application. In light of the "crux of criminality" standard articulated in *Dubin*, the Fifth Circuit held that the government met its "core" or "crux" burden under *Dubin*. In rejecting Croft's argument, the appellate court stated that Croft's use of the four men's names and information was at the crux of what made the underlying conduct fraudulent, and the material misrepresentations were the basis and "heart" of his wire fraud convictions. The Fifth Circuit reasoned that Croft's application to the TVC was fraudulent because of his misappropriation of the four men's means of identification and this theft was the key mover in his criminality. The Fifth Circuit affirmed the convictions for aggravated identity theft.

Judge Ho filed a separate opinion, *dubitante*, questioning, among other things, whether it was the names of the purported employees or their qualifications which were "the crux of the fraud." Judge Ho was skeptical as to whether the affirmance could be reconciled with *Dubin*.

## FILING OR ATTEMPTING TO FILE A FALSE LIEN OR ENCUMBRANCE AGAINST A FEDERAL EMPLOYEE – 18 U.S.C. § 1521

### Eleventh Circuit Holds 18 U.S.C. § 1521 Does Not Cover Actions Against Former Federal Officers and Employees

In ***United States v. Pate***, 84 F.4th 1196 (11th Cir. 2023) (en banc), the Eleventh Circuit held that the terms "officer" and "employee" do not include former federal officers and employees against whom false retaliatory claims are filed, within the context of 18 U.S.C. § 1521.

In October 2017, Timothy Jermaine Pate (Pate) filed a civil complaint against former Internal Revenue Service (IRS) Commissioner John Koskinen (Koskinen) in connection with two tax refunds totaling $3.8 million for tax years 2015 and 2016 that Pate claimed were due to him as he "could not be a debtor [to the United States]," among other frivolous arguments. In March and May 2018, Pate filed four liens against former IRS Commissioner Koskinen and former Secretary of the Treasury Jacob Lew (Lew) in connection with this complaint. In October 2018, Pate was indicted, in pertinent part, on sixteen counts of filing false retaliatory liens against federal officers (18 U.S.C. § 1521). Included among the sixteen counts were four counts in connection with the false retaliatory liens against Koskinen and Lew. At trial, Pate moved for a directed verdict for these four counts as Koskinen and Lew were not public officials at the time Pate filed the liens and thus, the jury could not conclude that Pate filed the liens against Koskinen and Lew "on account of the performance of their official duties." Pate was found guilty on all counts and sentenced to 300 months' imprisonment. Pate appealed this verdict on the four counts in connection with the false liens filed against Koskinen and Lew.

On appeal, a panel of the Eleventh Circuit initially affirmed Pate's convictions in connection with the false liens filed against Koskinen and Lew. The appellate court relied on the statute's cross reference to 18 U.S.C. § 1114 and concluded that there was no temporal restriction applied to the language of "on account of the performance of official duties," and thus, the terms "officer" and "employee" included both current and former officers and employees for the purposes of sections 1114 and 1521. As such, the Eleventh Circuit held that 18 U.S.C. § 1521 applied to former IRS Commissioner Koskinen and former Secretary Lew, despite the fact that they were no longer working in their official capacities, as Pate's retaliatory liens were filed "on account of the performance of [their] official duties."

On rehearing *en banc*, the Eleventh Circuit held that former officers and employees are not covered by the language of 18 U.S.C. § 1521. The appellate court relied on the definition of the term "officer" in the Dictionary Act (1 U.S.C. § 1), which includes any person "authorized by law to perform the duties of office." Additionally, the Eleventh Circuit discussed other statutes, *i.e.*, 18 U.S.C. §§ 111 and 115 that, like 18 U.S.C. § 1521, cross referenced 18 U.S.C. § 1114 in defining covered persons. The appellate court noted that Congress revised both statutes to explicitly cover individuals "who formerly served as ... person[s] designated." The Eleventh Circuit found that given these revisions, it could be inferred that 18 U.S.C. § 1521 did not cover former officers and employees. The appellate court distinguished this case from other similar cases, *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) and *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), on the basis that unlike those cases, there was no indication from 18 U.S.C. § 1521 that "officer" and "employee" should be broadly construed. As such, the Eleventh Circuit held that Koskinen and Lew were not covered employees under 18 U.S.C. § 1521, and vacated Pate's convictions as to his liens filed against Koskinen and Lew.

## FILING OR ATTEMPTING TO FILE A FALSE LIEN OR ENCUMBRANCE AGAINST A FEDERAL EMPLOYEE – 18 U.S.C. § 1521 AND ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS – 26 U.S.C. § 7212

### Fourth Circuit Upholds Conviction for Filing a False Lien Against Agent Using a Pseudonym and Holds Omnibus-Clause Conviction Complied with *Marinello* Requirement

In ***United States v. Reed***, 75 F.4th 396 (4th Cir. 2023), the Fourth Circuit held, *inter alia*, the Internal Revenue Service (IRS) agent's use of an agency-approved pseudonym did not bar defendant's conviction for attempting to file a false lien or encumbrance against a federal employee (18 U.S.C. § 1521) and that the IRS agent's efforts to collect tax from the defendant were a targeted investigation and enforcement action in satisfaction of 26 U.S.C § 7212(a)'s *Marinello* requirement.

Jeffrey Reed (Reed) owed the IRS a substantial amount in past due taxes. After ordinary collection efforts by the IRS failed, the case was transferred to the Service's Abusive Tax Avoidance division, which is a specialized unit that handles difficult cases involving tax avoiders and repeat offenders. The case was assigned to an IRS agent who used an agency-approved pseudonym "T.L. Blake." To intimidate the agent into halting her efforts to collect his delinquent tax debt, Reed filed a false lien against her agency-approved pseudonym. Reed was convicted of filing or attempting to file a false lien or encumbrance against a federal employee (18 U.S.C. § 1521) and for attempting to interfere with the administration of internal revenue laws (26 U.S.C § 7212(a)).

On appeal, Reed argued that the 18 U.S.C. § 1521 conviction was invalid because the lien was filed against a pseudonym. Reed argued that § 1521 does not apply to fictitious persons and his mistake about the IRS agent's real name precludes criminal liability. Rejecting this argument, the Fourth Circuit noted that an individual is described as "any officer or employee of the United States or of any branch of the United States Government." The appellate court held that the pseudonym used by the agent does not make her any less of an individual described in 18 U.S.C. § 1114(a). The Fourth Circuit explained that § 1521 was enacted by Congress to prevent attempts to harass and intimidate federal employees described in § 1114(a) and that the IRS agent would fall within that definition.

Reed also contended that his 26 U.S.C § 7212(a) conviction did not comply with the Omnibus Clause, arguing that the IRS agent's actions were routine, day-to-day IRS work and not the kind of targeted administrative action required under *Marinello v. United States*, 138 S. Ct. 1101 (2018). Also rejecting this argument, the Fourth Circuit held that the agent's efforts of completing an analysis of the case, issuing correspondence to Reed, and attempting to contact Reed were far from routine IRS work carried out in ordinary course and instead were a targeted investigation into and enforcement against Reed's persistent refusal to pay taxes. Accordingly, the Fourth Circuit affirmed Reed's convictions.

# CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION – 26 U.S.C. § 6103 AND CIVIL DAMAGES FOR UNAUTHORIZED INSPECTION OR DISCLOSURE OF RETURNS AND RETURN INFORMATION – 26 U.S.C. § 7431(b)(1)

## Fifth Circuit Affirms Safe-Harbor Provision Shielding Government from Liability for Disclosure

In ***Castro v. United States***, No. 23-10630, 2023 WL 8825316 (5th Cir. Dec. 21, 2023), *cert. denied*, 144 S. Ct. 2606 (2024) (unpub.), the Fifth Circuit held, assuming *arguendo* that an Internal Revenue Service, Criminal Investigation (IRS-CI) Special Agent (SA) did disclose that appellant was under criminal investigation, the safe-harbor provision in 26 U.S.C. § 7431(b)(1) (civil damages for unauthorized inspection or disclosure of returns and return information) shields the government from liability because the disclosure was based on a good faith, but erroneous, interpretation of 26 U.S.C. § 6103 (confidentiality and disclosure of returns and return information).

John Castro (Castro) was under criminal investigation for his business practices as a paid return preparer. During the IRS-CI investigation, an IRS-CI SA contacted two potential witnesses, a former client and a former employee, to obtain information in furtherance of his investigation. Castro filed suit against the government under 26 U.S.C. § 7431 alleging the SA disclosed his confidential tax return information in violation of 26 U.S.C. § 6103(a)(3). The district court entered summary judgment in favor of the government and Castro appealed. The parties dispute whether the SA disclosed to the two potential witnesses that Castro was under criminal investigation, but for the purpose of the instant appeal, it was assumed that the disclosure occurred.

The Fifth Circuit held that the SA's disclosure fell within 26 U.S.C. § 7431(b)(1)'s "good faith" exception to government liability. The appellate court explained that the safe-harbor provision in 26 U.S.C. § 7431(b)(1) shields the government from liability if the agent's disclosure was based on "a good faith, but erroneous, interpretation of section 6103." Citing *United States v. Gandy*, 234 F.3d 281 (5th Cir. 2000), the Fifth Circuit stated that 26 U.S.C. § 7431(b)(1)'s good-faith exception protects an agent's disclosure of "the nature of their official duties as a criminal tax investigation." The appellate court reasoned that the SA reasonably and in good faith believed that, based on case law, statutory authority, regulations, and the Internal Revenue Manual (IRM), the disclosures were necessary in obtaining information, which was not otherwise reasonably available. The Fifth Circuit affirmed.

***Note*:** This is an unpublished opinion.

# BANKRUPTCY

## Supreme Court Holds that Debtor Partner Cannot Discharge Debt Obtained by Another Partner's Fraud, Regardless of Culpability

In ***Bartenwerfer v. Buckley***, 598 U.S. 69 (2023), the Supreme Court held, *inter alia*, that a debtor who is liable for a partner's fraud cannot discharge that debt in bankruptcy, regardless of the debtor's culpability.

In 2005, Kate Bartenwerfer and her then-boyfriend, David Bartenwerfer, jointly purchased a house in San Francisco and, acting as business partners, remodeled the house to sell it for a profit. David handled most of the remodel and Kate was uninvolved. During the sale of the property, Kate and David attested they disclosed all material facts related to the property; however, the buyer discovered several defects after the sale, resulting in a judgment of $200,000 against the Bartenwerfers for damages. The Bartenwerfers could not pay the judgment or other creditors and filed for Chapter 7 bankruptcy protection.

The Bankruptcy Court found David committed fraud, which it imputed to Kate based on their partnership to renovate and sell the property. The Bankruptcy Appellate Panel disagreed as to Kate's culpability and discharged her debt to the buyer. The Ninth Circuit reversed and held that Kate could not discharge her debt related to her now husband's fraud in bankruptcy, regardless of her own culpability. In a unanimous opinion, the Supreme Court affirmed the Ninth Circuit's decision.

The Court analyzed 11 U.S.C. § 523(a)(2)(A), the exception to discharge of debt for "money … obtained by …fraud." The Court determined that the provision was framed by Congress to emphasize an event, not a specific actor, making the actor's culpability irrelevant. The Court first analyzed the text of the statute, including the use of the passive voice, which placed significance on the act, not the actor. Next, the Court considered the notable absence of the debtor's culpability from the text of § 523(a)(2)(A). Finally, the Court discussed Congress' response to its ruling in *Strang v. Bradner*, 114 U.S. 555 (1885), where the Court imputed the fraud of one partner to all the partners and held the innocent partner could not discharge the debt in bankruptcy. The Court came to this conclusion despite interpreting a previous version of the discharge exception,

which seemed to explicitly bar discharge only for the debtor committing the fraud. Following the Court's ruling in *Strang*, Congress amended § 523(a)(2)(A) effectively embracing *Strang*'s interpretation. Based on these considerations, the Court held that Kate Bartenwerfer's debt was not dischargeable in bankruptcy.

# STATUTE OF LIMITATIONS

## Ninth Circuit Holds Statute of Limitations on IRS Assessment Begins When Return is Filed in Compliance with Regulations

In ***Seaview Trading, LLC v. Commissioner***, 62 F.4th 1131 (9th Cir. 2023) (en banc), *cert. denied*, 144 S. Ct. 548 (2024), the Ninth Circuit held, *inter alia*, that a tax return is not considered properly filed, for purposes of beginning the statute of limitations on assessment, until it is filed in compliance with the Tax Code and IRS regulations.

Seaview Trading, LLC (Seaview Trading) is a flow-through entity required to file Forms 1065, *U.S. Return of Partnership Income*. In 2005, an IRS revenue agent informed Seaview Trading that the IRS had no record of receiving Seaview Trading's Form 1065 for tax year 2001. An accountant for Seaview Trading faxed the revenue agent a copy of the 2001 Form 1065. In 2007, after the IRS commenced an audit of Seaview Trading, Seaview Trading's counsel mailed the same copy of the 2001 Form 1065 to an IRS attorney. Seaview Trading did not forward a copy of the return to the IRS Ogden Service Center for processing. Nor did the IRS revenue agent or attorney. In 2010, the IRS issued a notice of final partnership administrative adjustment (NPAA) concerning Seaview's 2001 Form 1065 that disallowed a $35.5 million loss. Seaview filed a petition with the U.S. Tax Court, claiming the disallowance of the loss was untimely because the statute of limitations on assessment is three years after the date that the partnership return was filed. The Tax Court rejected Seaview's argument, finding that Seaview never properly filed a 2001 return. A three-judge panel of the Ninth Circuit reversed the Tax Court; a majority of the Ninth Circuit voted to rehear the case en banc.

The Ninth Circuit, en banc, affirmed the decision of the Tax Court, holding that the IRS's NPAA was timely because Seaview Trading did not file a 2001 Form 1065 when it faxed a copy of the return to an IRS revenue agent nor when it mailed a copy to an IRS attorney. The appellate court reasoned that IRS regulations in place in 2005 and 2007 offered effective guidance regarding the place for filing returns, and that Seaview Trading failed to comply with the regulation's requirements.

In dissent, one judge argued that the IRS regulation was insufficiently specific, and that the regulation contradicts other nonregulatory guidance promulgated by the IRS.

# VENUE

## Supreme Court Holds Retrial is Appropriate Remedy When Defendant is Convicted in Improper Venue

In ***Smith v. United States***, 599 U.S. 236 (2023), the Supreme Court unanimously held, *inter alia*, that when a defendant is improperly tried and convicted in an improper venue and before a jury drawn from the wrong location, the appropriate remedy is retrial in a proper venue.

Timothy Smith (Smith) lived in Mobile, Alabama, which is located in the Southern District of Alabama. From his home, he accessed data that belonged to a company whose headquarters were located in the Northern District of Florida. However, the company's servers were separately located in the Middle District of Florida. Smith was indicted in the Northern District of Florida for, *inter alia*, theft of trade secrets (18 U.S.C. § 1832). Before trial, Smith moved to dismiss the indictment for lack of venue. The district court denied the motion, and Smith was subsequently convicted. Smith appealed, arguing, *inter alia*, that venue for the theft-of-trade-secrets conviction was improper, and that the appropriate remedy for a defendant who is convicted in an improper venue is acquittal or dismissal with prejudice. The Eleventh Circuit vacated Smith's theft-of-trade-secrets conviction, holding that venue was improper for the charge, but that the appropriate remedy was retrial in a proper venue.

The Supreme Court granted certiorari to determine whether the Constitution permits the retrial of a defendant following a trial in an improper venue and before a jury drawn from the wrong district. The Court first stated the "general rule" is that retrial is the appropriate remedy for prejudicial trial error. The Court noted that the Speedy Trial Clause is the only established exception to this general rule, and a violation of the Speedy Trial Clause precludes retrial. The Court went on to hold that a violation of the Venue or Vicinage Clause does not preclude retrial, reasoning that neither the common law nor history requires such a result. Thus, the Court held that retrial is the appropriate remedy when a defendant is tried in an improper venue and before a jury drawn from the wrong location. The Court further stated that retrial under these circumstances does not trigger the Double Jeopardy Clause because determining that venue is improper, even after conviction, terminates the proceeding without adjudicating the defendant's underlying criminal culpability. Accordingly, the Court affirmed the judgment of the Eleventh Circuit.

# SENTENCING

## Tenth Circuit Holds Commentary to U.S.S.G. is Controlling

In ***United States v. Maloid***, 71 F.4th 795 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 1035 (2024), the Tenth Circuit held, *inter alia*, that commentary in the U.S. Sentencing Guidelines (U.S.S.G.) is controlling unless it runs afoul of the Constitution or a federal statute, is plainly erroneous, or inconsistent with the guideline provision it addresses.

Quindell Tyree Maloid (Maloid) pleaded guilty to being a felon in possession of a firearm and was sentenced to 51 months' imprisonment. Maloid's plea was based on his belief that his base offense level of 12 would result in a sentence between 27-30 months. However, Maloid was subject to a five-level sentencing enhancement for a prior state conviction for conspiracy to commit felony menacing with a firearm. The sentencing court applied the enhancement under U.S.S.G. § 2K2.1(a)(4), which set a base offense level of 20 if the defendant has a previous conviction for a crime of violence. Commentary to § 2K2.1 refers to U.S.S.G. § 4B1.2(a) and its commentary for the definition of a crime of violence. While § 4B1.2(a) defines crimes of violence as felony convictions which (1) include as an element the use, attempted use, or threatened use of physical force against another, or (2) is one of ten enumerated offenses, the commentary to the section extends crimes of violence to include the "aiding and abetting, conspiring, and attempting to commit such offenses."

Maloid appealed his sentence, arguing, in part, that the commentary should only be applied where the guidelines are ambiguous. The Tenth Circuit rejected Maloid's argument, which relied on *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). The appellate court noted that *Kisor* dealt with deference to agency regulations in interpreting administrative law and did not reach the U.S.S.G., as the Sentencing Commission is part of the judicial branch. The appellate court also explained that Congress has direct oversight over the Sentencing Guidelines and its included commentary. The Tenth Circuit distinguished the U.S.S.G. as being a starting point with no legal effect and held deference should be given to the commentary unless it is clearly erroneous, inconsistent with the guideline it is commenting on, or unconstitutional or in conflict with a federal statute. Accordingly, the Tenth Circuit affirmed the sentence.

# RESTITUTION

## Sixth Circuit Holds Jurisdiction Did Not Exist to Reduce Restitution Post-Judgment

In ***United States v. Asker***, No. 21-1643, 2023 WL 3370440 (6th Cir. May 11, 2023) (unpub.), the Sixth Circuit held that the district court did not have jurisdiction to reduce the defendant's restitution after issuance of the judgment.

Happy Asker (Asker), owned Happy's Pizza, a restaurant chain located in Michigan. During tax years 2004 through 2011, Asker underreported payroll taxes at various Happy's Pizza stores. Asker was convicted of numerous tax violations and sentenced to 50 months' imprisonment and ordered to pay restitution of $2.5 million.

At sentencing, the parties initially disputed the tax loss caused by Asker. The government argued the loss totaled $7.2 million, while the defendant claimed the loss was $1.4 million. Following an evidentiary hearing, the parties informed the court they were prepared to stipulate to a tax loss of $2.5 million. The district court accepted the stipulation; but, prior to issuing the judgment, the court pressed the parties as to whether the tax loss would change if Asker amended his returns to show less than $2.5 million in taxes. In response, Asker's counsel stated, "I would not think that this court's restitution award would be conclusive on the IRS. In fact, if there was some civil basis to seek additional penalties or interests, the IRS could do that. I suppose if it turns out the number is less, we may probably come back and apply to the court for some relief from the restitution amount." The government agreed with the Asker's counsel's statement. Thereafter, the district court entered its judgment, which ordered restitution of $2.5 million.

Asker filed amended returns for the years at issue that reported taxes of $1.1 million. Asker moved the district court to reduce his restitution order to $1.1 million and the government argued that the court did not have jurisdiction to amend the restitution order. The district court agreed with the government's jurisdiction argument and denied the defendant's motion.

On appeal, Asker asserted, *inter alia*, two sources of authority for amending his restitution. First, Asker claimed Rule 36 of the Federal Rules of Criminal Procedure authorized the district court to correct clerical errors or oversights in the judgment and record. Asker argued the district court expressed an intention to lower Asker's restitution amount if his amended taxes showed less than $2.5 million when it pressed the parties as to whether the tax loss would change if Asker amended his returns to show less than $2.5 million in taxes.

The Sixth Circuit noted that that intention was not included in the written judgment and Asker argued that the court's failure to include its intention was an error in the record, which the court could correct at any time. The Sixth Circuit disagreed stating that clerical errors are a matter of keystrokes, of the sort a clerk or court reporter might make. The appellate court further noted that errors of oversight or omission include discrepancies between the oral sentence and the written judgment. The Sixth Circuit stated that it was possible to infer from the hearing transcript that the district court intended to reconsider its restitution order, but that intention was not clear or fully developed. Thus, the appellate court held that the district court's omission from the written judgment was not a "clerical error" or oversight, and Rule 36 does not authorize the amendment Asker sought.

Next, Asker cited the Mandatory Victims Restitution Act, arguing that 18 U.S.C. §§ 3663A(b)(1) and 3664(d)(4) read together allowed the restitution order to be amended. Again, the Sixth Circuit disagreed, stating that section 3663A(b)(1) outlined how to calculate restitution but did not speak to amending that amount later and section 3663A(d)(5) concerned how a victim could seek an increase to restitution. Consequently, the appellate court held that these sections did not establish jurisdiction for the district court to reduce the amount of restitution order.

Thus, the Sixth Circuit affirmed the district court's conclusion that it lacked authority to amend Asker's restitution amount.

***Note*:** This is an unpublished opinion.

# TABLE OF CASES