

Criminal Tax Bulletin

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CONSPIRACY

Supreme Court Holds Defendant Bears Burden of Proving Withdrawal from Conspiracy

In *Smith v. United States*, 133 S. Ct. 714 (2013), the Supreme Court held that when a defendant raises as an affirmative defense the claim that he withdrew from a charged conspiracy prior to the statute-of-limitations period, the defendant bears the burden of establishing that withdrawal.

Calvin Smith (“Smith”) was convicted of drug conspiracy (21 U.S.C. § 846); RICO conspiracy (18 U.S.C. § 1962(d)); and several murder charges. Before trial, Smith moved to dismiss the conspiracy counts as barred by the applicable 5-year statute of limitations, 18 U.S.C. § 3282, because he had spent the last six years of the charged conspiracies in prison for a felony conviction. The district court denied his motion, and Smith renewed his statute-of-limitations defense at trial. The jury convicted Smith of the conspiracy offenses. Subsequently, Smith’s convictions were affirmed by the D.C. Circuit.

The Supreme Court granted certiorari to consider Smith’s claim that once he presented evidence of his withdrawal from the conspiracy prior to the statute-of-limitations period, it became the government’s burden to prove that his participation in the conspiracy persisted within the applicable five-year window. The Court held that a defendant has the burden of establishing withdrawal from a conspiracy regardless of when the purported withdrawal took place.

The Court explained that the burden of proving an affirmative defense rests with the defendant unless the defense negates an element of the crime. Where a defense merely excuses conduct that would otherwise be punishable, the government has no constitutional duty under the Due Process Clause to overcome the defense beyond a reasonable doubt. Here, the Court noted that rather than negating an element of

conspiracy, withdrawal presupposes that the defendant has committed the offense. Similarly, a statute-of-limitations defense does not call the criminality of the defendant’s conduct into question. Thus, the Court concluded that the union of withdrawal with a statute-of-limitations defense did not place upon the prosecution a constitutional responsibility to prove that the defendant did not withdraw.

TAX SHELTERS

Second Circuit Reverses Two Convictions in Ernst & Young Tax Shelter Case for Insufficient Evidence

In *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012), a complex tax shelter case, the Second Circuit affirmed the convictions of two defendants and the prison sentence of a third,¹ but reversed the convictions of the remaining two defendants based on insufficiency of the evidence.

Defendants Robert Coplan (“Coplan”), Martin Nissenbaum (“Nissenbaum”), Richard Shapiro (“Shapiro”), and Brian Vaughn (“Vaughn”), former partners and employees of Ernst & Young, LLP (“E&Y”), were involved in the development and audit defense of tax shelters that were sold or implemented by E&Y between 1999 and 2001. Coplan, Nissenbaum, Shapiro, and Vaughn (jointly, the “defendants”) were the core members of an E&Y group that designed strategies for individuals seeking to shelter at least \$20 million from tax liability. The group developed four tax shelters: the (1) Contingent Deferred Swap (“CDS”); (2) Currency Options Bring Reward Alternatives (“COBRA”); (3) CDS Add-On (“Add-On”); and (4) Personal Investment Corporation (“PICO”) shelters. Coplan, Nissenbaum, and Shapiro also personally

¹ Defendant Charles Bolton (“Bolton”) pleaded guilty to conspiracy and was sentenced to 15 months’ imprisonment and a \$3 million fine. The Second Circuit affirmed the prison sentence but vacated the fine on grounds of excessiveness.

invested in a fifth tax shelter, which was not marketed to E&Y clients.

Based on their actions with respect to these shelters, the defendants were variously charged with conspiracy (18 U.S.C. § 371), tax evasion (26 U.S.C. § 7201), obstructing the IRS (26 U.S.C. § 7212), and false statements (18 U.S.C. § 1001). At trial, the government sought to demonstrate that the defendants conspired to conceal the true nature of the shelters by creating a variety of “cover stories” regarding the shelters’ purported business purpose. The jury returned a general verdict of guilty on all counts, and the district court sentenced the defendants to between 20 and 36 months’ imprisonment.

On appeal, the defendants raised a number of issues. The first issue concerned the legal validity of the government’s *Klein* conspiracy theory under the “defraud clause” of 18 U.S.C. § 371. The defendants argued that the *Klein* conspiracy theory is textually unfounded, *i.e.*, that a *Klein* conspiracy is a crime created by the courts rather than by Congress. Although the Second Circuit found the defendants’ arguments persuasive, it noted that it was bound by Supreme Court precedent on this issue. Accordingly, the court rejected the defendants’ challenge to the validity of the *Klein* conspiracy theory.

Shapiro and Nissenbaum also challenged the sufficiency of the evidence with respect to their counts of conviction. After reviewing the record and the arguments of counsel, the Second Circuit concluded that the evidence against Shapiro and Nissenbaum, which included their own statements in emails, was “equivocal” and therefore was insufficient to support their convictions.

Coplan and Vaughn raised a number of evidentiary and venue challenges, but the court rejected their arguments. In addition, the court rejected the defendants’ allegations of prosecutorial misconduct, as well as their claim that the district court’s jury instructions were flawed.

Accordingly, the Second Circuit reversed the convictions of Shapiro and Nissenbaum in their entirety, and affirmed the convictions of Coplan and Vaughn in their entirety.

FIFTH AMENDMENT

Eleventh Circuit Holds Required Records Exception to Fifth Amendment Privilege Applies to Foreign Bank Account Records

In *In re Grand Jury Proceedings, No. 4-10*, 707 F.3d 1262 (11th Cir. 2013), the Eleventh Circuit joined the Fifth, Seventh, and Ninth Circuits in holding that the Required Records Exception to the Fifth Amendment’s privilege against self-incrimination applies to foreign bank account records required to be maintained under the Bank Secrecy Act (“BSA”).

In the course of a grand jury investigation regarding an individual’s alleged failure to report his foreign bank accounts, the target of the investigation and the target’s wife received subpoenas *duces tecum* for production of foreign financial account records required to be kept pursuant to the BSA. When the target and his wife refused to produce the records, the government filed a motion to compel compliance with the subpoenas. The district court granted the government’s motion to compel, holding that the requested documents fell within the Required Records Exception, an exception to the Fifth Amendment for records kept pursuant to a valid regulatory scheme. The target and his wife did not comply with the district court’s order, and the government subsequently moved to hold them in contempt. The district court issued a contempt order, but stayed enforcement pending the outcome of any appeal. The target and his wife appealed, arguing that they properly invoked their Fifth Amendment privilege against self incrimination, and that the district court erred in concluding that the Required Records Exception applied to the subpoenaed records.

On appeal, the Eleventh Circuit held that the Required Records Exception applied to the records in question. Specifically, the court determined that: (1) the government’s interest in the recordkeeping and reporting requirements imposed on foreign financial accounts is essentially regulatory; (2) the records are of a kind “customarily kept” in connection with the regulated activity of offshore banking; and (3) the records assumed “public aspects” which rendered them at least analogous to public documents. The court further held that the Required Records Exception extinguished the target’s privilege not only as to the records themselves but also as to the act of producing the records.

Ninth Circuit Holds “Foregone Conclusion” Exception to Fifth Amendment Applies to Client’s Tax Records Held by Law Firm

In *United States v. Sideman & Bancroft, LLP*, 704 F.3d 1197 (9th Cir. 2013), the Ninth Circuit determined that the “foregone conclusion” exception to the Fifth Amendment privilege applied to certain tax records held by a law firm on behalf of its client. Accordingly, the court upheld the enforcement of an IRS summons for the records.

The law firm of Sideman & Bancroft, LLP (“Sideman”) was retained by Mary Nolan (“Nolan”), who was under investigation by the IRS for tax evasion. The IRS obtained a search warrant to locate Nolan’s tax documents for the years at issue. While executing the warrant, the IRS learned that Nolan had given the documents it sought to her tax return preparer. The preparer informed the IRS that she had provided the documents to Nolan’s civil tax attorney, who in turn gave them to Sideman. The IRS issued a summons to Sideman, which refused to comply, claiming that production of the documents would violate Nolan’s Fifth Amendment privilege against self-incrimination. The district court granted the IRS’s petition to enforce the summons, on the grounds that the summonsed documents fell within the “foregone conclusion” exception to the Fifth Amendment.

On appeal, the Ninth Circuit affirmed the district court’s order, holding that the “foregone conclusion” exception did apply to the documents in question because their production added little or nothing to the information already in the government’s possession. The court noted that, for purposes of applying the exception, the government had met its burden of proving that (1) it had sufficient information as to the existence and Sideman’s possession of the documents prior to issuance of the summons; and (2) it was able to independently verify the documents’ authenticity, based on the return preparer’s extensive knowledge of the documents and other corroborating evidence.

SIXTH AMENDMENT

Ninth Circuit Holds Appropriate Remedy for Sixth Amendment Violation Was Vacating Guilty Plea

In *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012), the Ninth Circuit held that the appropriate remedy for a Sixth Amendment violation of ineffective assistance of counsel during plea negotiations was to vacate the defendant’s guilty plea.

In June 2005, Kennard Johnson (“Johnson”) was arrested for submitting a fraudulent check to a car dealership and providing false information on a credit application in order to steal a vehicle. He was initially charged with three theft-related felonies, to which he pleaded not guilty, and he was released on conditional own-recognition status. Subsequently, he pleaded not guilty to an Information and a First Amended Information that were filed against him. His attorney failed to object to the First Amended Information’s erroneous addition of three of Johnson’s prior prison terms for enhancements to his sentence, which were improper enhancements under California law.

When Johnson failed to appear at his next scheduled hearing, he was placed in custody. At the pretrial hearing, he asked to be released in order to attend the birth of his child. The prosecutor conditioned the release on Johnson’s agreement to plead guilty to all charges and to accept a sentence of 172 months unless he returned to the court for resentencing. Johnson’s attorney neglected to advise him that the prosecutor’s offer of 172 months was greater than the sentence he could lawfully receive if he went to trial and were found guilty of all charges. Johnson accepted the offer. When he failed to appear for resentencing, the court imposed a sentence of 172 months.

After exhausting his claims in state court, Johnson filed a habeas petition in federal district court alleging ineffective assistance of trial counsel. The district court granted his petition and remanded the matter to the state court for resentencing. Johnson appealed the district court’s remedy.

On appeal, the Ninth Circuit determined that, had Johnson’s assistance of counsel been constitutionally adequate, his attorney would have objected to the erroneous addition of the enhancements, which would have altered the bargaining positions of the parties and could have resulted in a more favorable plea offer for Johnson. The court held that the appropriate remedy in

this situation was to return Johnson to the pre-plea stage of the proceedings by granting a conditional writ of habeas corpus, subject to the state court vacating Johnson's guilty plea and granting him a new trial.

TITLE 26/WILLFULNESS

Seventh Circuit Upholds District Court Ruling Barring Evidence of Legality of Abusive Trust Scheme

In *United States v. Vallone*, 698 F.3d 416 (7th Cir. 2012), the Seventh Circuit held that the district court's decision to bar evidence of the legality of the defendants' trust scheme did not prevent the defendants from establishing their good-faith belief in the scheme's legality.

Michael Vallone, William Cover, Michael Dowd, Robert Hopper, Timothy Dunn, and Edward Bartoli (collectively, the "defendants") promoted an abusive trust scheme through The Aegis Company ("Aegis") and its sister company, Heritage Assurance Group ("Heritage"). Aegis and Heritage marketed a multi-trust system (the "Aegis system") as a means for high-income individuals to minimize their income taxes by concealing their assets from the IRS. The defendants used backdated and false documents, fictitious loans, and fraudulent tax returns to further the scheme, and they assisted clients in preparing tax returns and defending against IRS audits. In addition, the defendants used the Aegis system to conceal their own income from the IRS.

Based on their promotion and use of the Aegis system, the defendants were charged with conspiracy and related fraud and tax offenses. In advance of trial, the district court granted the government's motion in limine to bar the defendants from presenting any evidence or argument suggesting that the Aegis system was a lawful means of tax avoidance. At trial, the government argued that the Aegis system was a sham and that the defendants knew as much. The defendants disputed this premise, contending that they had a good-faith belief that the Aegis system was a legitimate means of income tax minimization. Under *Cheek v. United States*, 498 U.S. 192 (1991), this required the government to negate their claim of good faith and to prove that they in fact realized that the Aegis system was not legitimate. The evidence presented by the government showed that the defendants had actively tracked court decisions and legal opinions as to the validity of the Aegis trusts and had received notice from multiple sources that the Aegis system was illegal. The jury found that the

defendants had acted willfully, and the defendants were variously convicted of conspiracy (18 U.S.C. § 371), mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), tax evasion (26 U.S.C. § 7201), filing false tax returns (26 U.S.C. § 7206(1)), and aiding and assisting the filing of false tax returns by others (26 U.S.C. § 7206(2)). The defendants were sentenced to prison terms ranging from 120 to 223 months.

On appeal, the defendants contended in part that the district court undermined their *Cheek* defense by precluding them from demonstrating to the jury that they had a good-faith belief in the legality of their actions. The Seventh Circuit disagreed, noting that the legality of the Aegis system was a question of law and therefore was not a matter for the jury to resolve. The appellate court held that the district court's ruling did not preclude the defendants from attempting to establish their good faith belief that the Aegis system was a lawful means of tax avoidance.

EMPLOYMENT TAXES

Tenth Circuit Holds Government Has Discretion to Charge Tax Evasion in Employment Tax Case

In *United States v. Farr*, 701 F.3d 1274 (10th Cir. 2012), the Tenth Circuit held that the government had discretion to charge the defendant with tax evasion under 26 U.S.C. § 7201 for failure to pay the civil trust fund recovery penalty rather than charging her under 26 U.S.C. § 7202 for failure to pay over employment taxes.

Skoshi Farr ("Farr"), the manager of her husband's alternative medical clinic, failed to pay over to the IRS quarterly employment taxes withheld by the clinic. As a result, the IRS assessed a civil trust fund recovery penalty against her, which she also failed to pay. Farr was convicted by a jury of violating § 7201 for willfully attempting to evade or defeat payment of the trust fund recovery penalty. She was sentenced to 33 months' imprisonment and ordered to pay restitution in the amount of \$72,076.21.

On appeal, Farr argued that the district court erred in denying her pretrial motion to dismiss the indictment for failure to charge the offense under the appropriate statute, *i.e.*, § 7202. The Tenth Circuit affirmed, holding that the government had broad discretion to determine the appropriate charge. The appellate court noted that when a defendant's conduct violates more than one criminal statute, the government may prosecute under

either or both statutes, subject to limitations on conviction and punishment.

In addition, the appellate court held that evidence of Farr's prior bad acts presented by the government at trial, such as changing the name of the clinic repeatedly to avoid IRS collection efforts and failing to pay earlier trust fund recovery penalties, was admissible under Fed. R. Evid. 404(b). Farr argued that this evidence was inadmissible and irrelevant, in part because the wrongful acts occurred substantially prior to the instant case. The appellate court, however, rejected her arguments, holding that this evidence was relevant to proving she was aware of and willfully evaded the payment of the trust fund recovery penalty.

IDENTITY THEFT

Fourth Circuit Holds Identity Theft Statutes Are “Fatally Ambiguous” Regarding Application to Corporations

In *United States v. Hilton*, 701 F.3d 959 (4th Cir. 2012), the Fourth Circuit held that the statutes prohibiting identity theft and aggravated identity theft, 18 U.S.C. §§ 1028(a)(7) and 1028A, are “fatally ambiguous” regarding whether they prohibit the unauthorized use of a corporation's means of identification.

Jacqueline, Tamatha, and Jimmy Hilton (collectively, the “defendants”) engaged in a scheme to defraud the Woodsmiths Company (“Woodsmiths”), a furniture manufacturer, of about \$655,000, by stealing and cashing numerous checks written to Woodsmiths by its customers. Tamatha Hilton, Woodsmiths' office manager and bookkeeper, stole the checks from Woodsmiths' post office box and gave them to her husband Jimmy, who endorsed the checks with a pre-printed stamp bearing Woodsmiths' name. Jacqueline Hilton (Jimmy's former wife) then deposited the checks into a bank account she had opened as the purported owner of “Woodsmiths Furniture Company.” During the course of the fraud, the defendants made repeated withdrawals and transfers from the account.

The defendants ultimately were indicted on charges including identity theft, mail fraud, mail theft, money laundering, conspiracy, passing forged securities, and making a false statement to a financial institution. Jacqueline was acquitted of the latter charge, but the defendants were convicted on all remaining counts and sentenced to prison terms ranging from 65 to 120 months. All three defendants appealed.

On appeal, Jimmy and Jacqueline Hilton argued that the use of the stamp bearing Woodsmiths' name did not constitute a violation of the identity theft statutes because those statutes do not apply to the act of stealing a corporation's identity. The Fourth Circuit agreed, noting that the identity theft statutes use both the terms “individual” and “person” when referring to victims of identity theft, and that it is unclear whether the term “individual” includes corporations. The court concluded that nothing in the text, structure, articulated purpose, or legislative history of the identity theft statutes compelled the conclusion that Congress intended to make the theft of a corporation's identity a crime.

Accordingly, the court reversed Jimmy's and Jacqueline's convictions for identity theft and aggravated identity theft, but affirmed the defendants' other convictions.

Second Circuit Holds Bank Fraud and Related Aggravated Identity Theft Charges Require Evidence of Intent to Victimize Banks

In *United States v. Nkansah*, 699 F.3d 743 (2d Cir. 2012), the Second Circuit held that evidence of the defendant's opening of bank accounts in a fictional name and his deposits of fraudulent refund checks into the accounts was insufficient to support his convictions for bank fraud and aggravated identity theft, because the evidence did not demonstrate an intent to victimize the banks.

From 2005 through 2008, Felix Nkansah (“Nkansah”) was part of a group that stole names, birthdates, and social security numbers from foster care, hospital, and childcare databases. This information was used to file thousands of fraudulent tax returns in the victims' names with fictitious income figures. The group filed for \$2.2 million in fraudulent refunds and ultimately obtained \$536,167. Like other group members, Nkansah received fraudulent refunds in the form of checks made out to identity-theft victims, which he endorsed over to “William K. Arthur,” a fictional name. Nkansah then deposited the checks into bank accounts which he controlled under that name.

Nkansah was charged with violating 18 U.S.C. §§ 286 (conspiracy to file false claims), 287 (filing false claims), 1028 (identity theft), 1344 (bank fraud), and 1028A (aggravated identity theft related to the bank fraud). He was found guilty on all five counts and sentenced to 51 months' imprisonment on each count other than aggravated identity theft, to run concurrently,

and 24 months' imprisonment for aggravated identity theft, to run consecutively to the other counts.

On appeal, Nkansah argued that, in order to support the bank fraud and related aggravated identity theft charges, the government was required to prove he intended to victimize the banks as opposed to the Treasury. He claimed there was no evidence of such an intent or even that the banks had actually lost money. The Second Circuit agreed, noting that Nkansah's use of a fictional name to open bank accounts and his deposit of fraudulent refund checks into those accounts demonstrated his intent to avoid detection rather than to injure the banks. Moreover, there was no clear exposure to loss by the banks that could have supported an inference of intent, because the risk of loss was borne by the Treasury. Accordingly, the Second Circuit vacated Nkansah's convictions for bank fraud and aggravated identity theft and remanded for resentencing.

Fourth Circuit Holds Evidence Sufficient to Establish Defendant's Knowledge that Social Security Number Belonged to Real Person

In *United States v. Castellanos-Loya*, No. 12-4293, 2013 WL 71789 (4th Cir. Jan. 8, 2013) (unpub.), the Fourth Circuit affirmed the defendant's convictions for false representation as a United States citizen, in violation of 18 U.S.C. § 911, and for aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). The court held that the evidence was sufficient to establish the defendant knew the Social Security number he had purchased to commit his offenses belonged to a real person.

Eduardo Castellanos-Loya ("Castellanos-Loya") did not dispute that he had falsely represented himself as an American citizen to a government agent and that this violation qualified as a predicate offense for aggravated identity theft. However, Castellanos-Loya argued on appeal that the government had failed to prove, as required under *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), that he knew the Social Security number he unlawfully used belonged to a real person. The Fourth Circuit rejected this argument, explaining that Castellanos-Loya's assertion would demand of defendants "a degree of certainty that is foreign to long-accepted notions pertaining to a mens rea of 'knowledge.'" 2013 WL 71789 at *2. Here, Castellanos-Loya admitted that the person who sold him the Social Security number told him the number belonged to a real person and that Castellanos-Loya

subjectively believed the number was authentic. The court was unpersuaded by his claim that he did not "actually know" the number belonged to a real person because he did not verify that the seller was not lying to him.

The court concluded that a jury could have found the requisite knowledge to support Castellanos-Loya's aggravated identity theft conviction based on the facts of the case.

MONEY LAUNDERING

Fifth Circuit Holds No "Merger Problem" Exists Where Defendant Is Not Charged with Predicate Offense

In *United States v. Lineberry*, 702 F.3d 210 (5th Cir. 2012), the Fifth Circuit held that the money laundering statute did not merge with the statute governing the defendant's underlying unlawful activity because the defendant had not been charged with the underlying offense. Accordingly, the court concluded that the defendant's money laundering convictions were properly based on a broad definition of "proceeds" as gross receipts, rather than profits.

Jed Stewart Lineberry ("Lineberry") operated a prostitution business disguised as an escort agency. In 2004, he was convicted of 18 counts of money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). The specified unlawful activity ("SUA") that formed the basis for the money laundering convictions was aggravated promotion of prostitution in violation of Texas law, an offense for which Lineberry was not indicted. The transactions underlying the money laundering convictions were payments of expenses associated with the operation of the prostitution business, such as rent, salaries, and advertisements. Lineberry filed a habeas corpus petition, alleging his money laundering convictions were based on a misapplication of the term "proceeds" as defined in *United States v. Santos*, 553 U.S. 507 (2008). Specifically, Lineberry argued that his transactions involved gross receipts rather than profits, and therefore did not involve "proceeds" for purposes of the money laundering statute. The district court dismissed the petition.

In affirming the district court's dismissal of Lineberry's petition, the Fifth Circuit relied on the *Santos* decision as interpreted by *Garland v. Roy*, 615 F.3d 391 (5th Cir. 2010). Noting that Lineberry's case was distinguishable from *Santos* and *Garland* because

Lineberry had not been charged with the underlying SUA of promoting prostitution, the court first concluded that the facts of the case did not present a merger problem. The court then cited *Garland* for the presumptive definition of “proceeds” as “gross receipts” in the absence of a merger problem. Applying the “gross receipts” definition of “proceeds” to Lineberry’s case, the court declined to vacate his money laundering convictions.

STATUTE OF LIMITATIONS

Fifth Circuit Holds Statute of Limitations for 26 U.S.C. § 7201 Runs from Date Return Was Due or Last Affirmative Act

In *United States v. Irby*, 703 F.3d 280 (5th Cir. 2012), the Fifth Circuit held that the statute of limitations for violations of 26 U.S.C. § 7201 (tax evasion) begins to run from the later of: (1) the date the tax return was due; or (2) the last affirmative act of evasion.

Charles W. Irby, Jr. (“Irby”) failed to file tax returns for several years, up to and including 2001, and subsequently failed to pay the taxes he owed. His last affirmative act of evasion of payment was his use of nominee trusts to conceal assets in 2006. He was indicted in 2011 and ultimately convicted of one count of tax evasion in violation of 26 U.S.C. § 7201; four counts of willful failure to file a tax return in violation of 26 U.S.C. § 7203; and one count of attempting to interfere with the administration of internal revenue laws in violation of 26 U.S.C. § 7212(a). He was sentenced to a total of 108 months’ imprisonment.

On appeal, the Fifth Circuit considered as a matter of first impression whether the six-year statute of limitations for § 7201 offenses (26 U.S.C. § 6531(2)) begins to run from the date the tax return was due or from the last affirmative act of evasion. The court acknowledged that, because Irby last failed to file his taxes in 2001 and was indicted in 2011, the tax evasion count would be time-barred unless the statute-of-limitations period began to accrue following his last affirmative act of evading payment.

The court noted that all of the other circuits to consider the issue – *i.e.*, the First, Second, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh – had concluded that the statute of limitations for § 7201 offenses runs from the later of the date the return was due or the defendant’s last affirmative act of evasion. Joining the other circuits in upholding the “last affirmative act of tax evasion rule,” the Fifth Circuit held that, in this

case, the statute of limitations began running in 2006, when the defendant used nominee trusts to conceal his assets. Accordingly, the appellate court affirmed the district court’s judgment that the tax evasion count against Irby was not barred by the statute of limitations.

APPELLATE JURISDICTION

Third Circuit Holds It Has Jurisdiction to Hear Appeal of Disclosure Order Issued to Disinterested Third Parties

In *In re Grand Jury*, 705 F.3d 133 (3d Cir. 2012), the Third Circuit held that it had jurisdiction to hear a corporation’s appeal of a district court’s disclosure order in a grand jury investigation, where the information to be disclosed was in the possession of the corporation’s former in-house counsel.

This case involved a tax-related grand jury investigation of a corporation’s acquisition and sale of closely-held companies. In connection with the investigation, the government issued subpoenas for records to the target corporation, two law firms that represented the corporation, and the corporation’s former in-house counsel. In response, the law firms and former in-house counsel produced a number of documents but withheld others on privilege grounds. The government moved to compel production of the allegedly privileged documents, under the crime-fraud exception to the attorney-client and work-product privileges. The district court largely rejected the privilege claims and issued two disclosure orders, the first of which was directed to the corporation and its law firms (the “March Order”), and the second of which was directed to the corporation’s former in-house counsel (the “June Order”). The corporation sought to appeal both Orders.

The Third Circuit dismissed the appeal of the March Order, holding that it lacked jurisdiction because the “traditional contempt route” to obtaining immediate appellate review of that Order was available to the corporation. In other words, the corporation had the option of taking possession of the documents from the law firms, defying the district court’s order, and appealing any resulting contempt sanctions. With respect to the June Order, however, the court held that it did have jurisdiction to hear the corporation’s appeal because the order was directed at the corporation’s former employees, who were disinterested third parties unlikely to risk contempt sanctions on the corporation’s behalf. The appellate court further held that the district court correctly applied the crime-fraud exception to the

documents at issue.

EVIDENCE

First Circuit Holds Revenue Agent's Characterization of Cash Payments as "Unreported Payroll" in Trial Testimony Was Not Improper Legal Conclusion

In *United States v. Powers*, 702 F.3d 1 (1st Cir. 2012), the First Circuit held that an IRS revenue agent's characterization of cash distributions to workers as "unreported payroll" in his trial testimony did not constitute a legal conclusion reserved to the jury.

Michael Powers ("Powers") and John Mahan ("Mahan") were the officers and directors of Commonwealth Temporary Services ("CTS"), an agency supplying temporary workers to companies that needed manual labor. The companies paid CTS a contractually fixed hourly rate per worker. CTS, in turn, paid recruiters, workers, and some office staff in cash. CTS filed quarterly Forms 941, but did not report the cash wages it paid, and it did not pay payroll taxes or withhold any taxes. Further, CTS did not file any Forms 1099 with the IRS.

Powers and Mahan were charged with tax and tax-related violations. At trial, a revenue agent testified as a summary witness and presented calculations of the payroll taxes due. The agent estimated that the total tax due on unreported payroll was over \$7.5 million. Powers and Mahan were variously convicted of conspiracy to defraud the IRS, mail fraud, and subscribing to and procuring false returns.

On appeal, the defendants argued that the district court erred in allowing the agent to characterize CTS's cash payments to workers as "unreported payroll" because this was a legal conclusion reserved to the jury. The First Circuit disagreed, noting that agents testifying as summary witnesses in criminal tax cases may analyze facts already admitted into evidence and describe the tax consequences that flow from those facts. Although an IRS summary witness may not testify about the defendant's state of mind or the meaning of provisions of the Internal Revenue Code, the court concluded that the agent in this case had done neither. Rather, the agent's assumption that CTS's cash payments went to workers who were CTS employees was supported by evidence in the record and was explicitly acknowledged by the agent as the basis for his analysis. Accordingly, the appellate court held that the district court did not abuse its discretion in admitting the agent's testimony.

ATTORNEY-CLIENT PRIVILEGE

Eighth Circuit Holds Attorney-Client Privilege Inapplicable When Attorney Only Prepared Client's Tax Returns

In *United States v. Spencer*, 700 F.3d 317 (8th Cir. 2012), the Eighth Circuit held that the attorney-client privilege did not protect a client's communications with a tax return preparer who was also a lawyer, because the client sought only return preparation services and not tax-planning advice from the preparer.

John A. Spencer ("Spencer"), a mortgage broker, was indicted on several fraud-related offenses. Before trial, the government moved to introduce the testimony of Spencer's tax return preparer, William Hogle ("Hogle"), regarding Hogle's receipt of documents from Spencer that purportedly mischaracterized fraud proceeds as loans and gifts. Because Hogle was a lawyer, Spencer moved to block his testimony by asserting the attorney-client privilege, claiming that he had sought tax-planning advice from Hogle. The district court denied Spencer's motion, ruling that Hogle was not acting in his capacity as an attorney when preparing Spencer's income tax returns. The jury found Spencer guilty of ten counts of wire fraud and three counts of other fraud-related crimes.

On appeal, the Eighth Circuit affirmed the district court's evidentiary rulings. In so doing, the appellate court stated that when an attorney acts in another capacity, rather than providing legal services, the attorney-client privilege does not apply. The court noted that, under Eighth Circuit precedent, an attorney who only prepares a client's income tax returns is acting as a "scrivener," and thus no attorney-client relationship is established.

Because Spencer presented no evidence that he sought tax-planning advice from Hogle, and because Hogle testified that he had done nothing other than preparing a tax return, the appellate court held that the district court's finding of no attorney-client relationship was not clearly erroneous. Accordingly, the court concluded that Hogle's testimony was properly admitted.

SENTENCING

Eleventh Circuit Holds Mere Transfer of Identifying Information Is Not Unlawful “Use” for Purposes of Sentencing Enhancement

In *United States v. Hall*, 704 F.3d 1317 (11th Cir. 2013), the Eleventh Circuit held that the sentencing enhancement under U.S. Sentencing Guideline (“U.S.S.G.”) § 2B1.1(b)(2)(B) for fraud offenses involving 50 or more victims was not applicable to the defendant’s “mere transfer or sale” of unauthorized identifying information, because such transfers did not constitute “use” of the information.

Erica Hall (“Hall”), an office assistant in a medical office, provided personal identifying information (“PII”) of between 65 and 141 patients to her co-conspirators in a scheme to obtain fraudulent credit cards using the information. The co-conspirators used at least 12 of the patients’ PII to obtain fraudulent credit cards. Hall pleaded guilty to various offenses, including conspiracy to commit identity theft and access device fraud, in violation of 18 U.S.C. § 371. At sentencing, the district court applied a four-level enhancement under U.S.S.G. § 2B1.1(b)(2)(B) because it determined that the offense involved more than 50 but less than 250 victims. Hall objected to the court’s assessment of the number of victims based on Application Note 4(E), which defines “victim” in cases involving means of identification as “any individual whose means of identification was used unlawfully or without authority.” Hall argued that the mere “transfer” of PII unlawfully does not equate to the “use” of PII for a fraudulent purpose. Hall argued that, since information of only 12 of the patients had been used to obtain fraudulent credit cards, the two-level enhancement for offenses involving between 10 and 50 victims was more appropriate.

The Fourth Circuit agreed with Hall. The court reasoned that Hall’s transfer of the PII to her co-conspirators did not “implement the purpose of the conspiracy,” which was to obtain cash advances and to purchase items using fraudulent credit cards. The court held that the plain language of the sentencing guideline at issue did not apply to Hall’s mere sale or transfer of the patients’ identifying information, and that the information was not “used” until the co-conspirators secured the fraudulent credit cards. Concluding that Hall’s offense involved only 12 victims for purposes of applying the § 2B1.1(b)(2) enhancement, the court vacated Hall’s sentence and remanded the case for

resentencing.

FORFEITURE

Fourth Circuit Holds Government’s Untimely Filing of Forfeiture Complaint Did Not Cause District Court to Lose Jurisdiction

In *United States v. Wilson*, 699 F.3d 789 (4th Cir. 2012), the Fourth Circuit held that the 90-day deadline for the government to file a civil forfeiture action under 18 U.S.C. § 983(a)(3) was not a condition of the district court’s subject-matter jurisdiction over the forfeiture proceeding. The court further held that the government’s failure to release the claimant’s property in the absence of a timely-filed complaint did not immunize the property from forfeiture.

Donald Wilson (“Wilson”) was arrested for drug trafficking offenses on October 27, 2006. The arresting officers seized \$13,963 from Wilson, who later filed a claim for return of the seized money. Wilson’s claim triggered a 90-day period during which the government was required, pursuant to 18 U.S.C. § 983(a)(3), to file a civil forfeiture complaint in the district court. Although the government filed its complaint 20 days late, the U.S. Marshal executed a warrant for the seized money and brought it into judicial custody. The district court entered a judgment of forfeiture, and the Fourth Circuit affirmed. Two weeks later, Wilson filed a motion to set aside the judgment as void because the government had filed its complaint untimely. The district court denied the motion.

On appeal, the Fourth Circuit affirmed the order denying Wilson’s motion. Based on the statutory language and other factors, the court held that the 90-day requirement in § 983(a)(3) was not jurisdictional and that therefore Wilson forfeited any objection to the government’s late filing by failing to raise it during the forfeiture proceeding.

The appellate court also addressed Wilson’s contention that the district court lacked *in rem* jurisdiction over the seized currency because the money should have been released when the government untimely filed its forfeiture complaint. Conceding that the government should have released Wilson’s property, the appellate court nonetheless held that government’s failure to do so did not immunize the property from arrest by the district court and subsequent forfeiture.

Second Circuit Holds Profits Generated by Defendant on Behalf of Employer Not Subject to Forfeiture

In *United States v. Contorinis*, 692 F.3d 136 (2d Cir. 2012), the Second Circuit held that the district court erred in ordering the defendant to forfeit the profits that he had generated on behalf of his employer through insider trading.

Joseph Contorinis (“Contorinis”) was a co-portfolio manager of the Jeffries Paragon Fund (the “Fund”). In September 2005, Contorinis, on behalf of the Fund, began purchasing shares of Albertsons grocery store chain (“ABS”) after ABS announced it was considering selling the company. Periodically, Contorinis adjusted the Fund’s holdings in ABS based on information he received from a friend, who worked for a potential purchaser of ABS. In January 2006, Contorinis sold the Fund’s entire ABS holdings, generating millions of dollars in profits. At trial, Contorinis was found guilty of conspiracy to commit securities fraud and insider trading. The district court also entered a forfeiture order of \$12.65 million against him, representing the profits made and losses avoided by the Fund as a result of Contorinis’s insider trading.

On appeal, the Second Circuit affirmed the conviction but vacated the forfeiture order on the grounds that the funds at issue did not constitute “proceeds” for purposes of 18 U.S.C. § 981(a)(1)(C). In so holding, the court noted that, under 18 U.S.C. § 981(a)(2)(B), the forfeitable “proceeds” of insider trading are defined as “the amount of money acquired through the illegal transactions[.]” The court reasoned that the “proceeds” sought by the government here were “acquired” by the Fund rather than by Contorinis, an employee of the Fund. To meet the definition of “proceeds” for purposes of forfeiture, the property must have, at some point, been under Contorinis’s control. Given that neither Contorinis nor his co-conspirators possessed or controlled the \$12.65 million of Fund profits, the appellate court ruled that the district court’s forfeiture order was improper.

The court remanded the case to determine the extent to which Contorinis’s salary, bonuses, and other income should be considered money he “acquired” through insider trading that might be subject to forfeiture.

Ninth Circuit Holds Forfeiture Judgment Cannot Be Offset by Amount of Restitution

In *United States v. Davis*, 706 F.3d 1081 (9th Cir. 2013), the Ninth Circuit held that the defendant was not entitled to offset the forfeiture judgment against him by the amount of restitution ordered as part of his sentence for money laundering.

Samuel Davis (“Davis”) was approached by undercover Federal Bureau of Investigation (“FBI”) agents, who requested his assistance in laundering purportedly stolen money. Davis agreed to take the money and engaged in various financial transactions designed to conceal the nature and source of the money, while retaining a percentage of the funds as compensation. In total, Davis laundered approximately \$1.29 million and kept over \$73,000 as compensation for his services. Davis ultimately pleaded guilty to one count of conspiring to commit money laundering and 30 counts of money laundering and aiding and abetting money laundering. The government also sought judicial forfeiture of \$1.29 million, representing the funds Davis laundered. The district court ordered the forfeiture of the \$1.29 million to be paid to the Department of Justice (“DOJ”), and also ordered, as part of Davis’s sentence, restitution in the amount of \$95,782 to the FBI for funds expended in the investigation.

On appeal, Davis argued that, because the FBI is essentially a part of the DOJ, the two entities are functionally the same. Accordingly, Davis maintained that the forfeiture amount should be offset by the restitution amount to avoid an impermissible double recovery by the government. The Ninth Circuit rejected Davis’s argument, emphasizing that forfeiture and restitution serve different purposes and goals: forfeiture is imposed as punishment for a crime, and restitution makes a victim whole again. The court concluded that collecting both restitution and forfeiture does not result in a double recovery, regardless of the relationship between the forfeiture and restitution recipients. Accordingly, the court held that Davis was not entitled to an offset.

RESTITUTION

Second Circuit Holds Defendant's Bankruptcy Filing Did Not Preclude Enforcement of Restitution Order

In *United States v. Colasuonno*, 697 F.3d 164 (2d Cir. 2012), the Second Circuit held that an automatic stay obtained by the defendant through his bankruptcy filing did not preclude the government from enforcing the probation condition that he pay restitution to the IRS.

In 2006, after having been convicted of bank fraud for submitting inflated financial statements to obtain business loans, Philip Colasuonno ("Colasuonno") also pleaded guilty to conspiracy to commit tax fraud and aiding and abetting the preparation of false tax returns, in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7206, respectively. His tax crimes stemmed from his "off the books" cash payments to certain employees over the course of five years and his resulting underpayment of \$781,467 in payroll taxes.

In a consolidated proceeding, the district court sentenced Colasuonno to time served (one day) with concurrent terms of five years' supervised release on the two bank fraud counts and the tax fraud conspiracy count, and to a concurrent five years' probation on the false tax preparation count. The court imposed special conditions on Colasuonno's probation, confining him to his home for 46 months and ordering him to pay restitution to the IRS in the amount of \$781,467.

Over the following three years, Colasuonno made sporadic and insufficient restitution payments in defiance of several court orders. During this time, he also filed for Chapter 7 bankruptcy. On October 20, 2010, the district court found Colasuonno in violation of probation and resentenced him on the substantive tax crime of conviction to four months' imprisonment followed by a one-year term of supervised release. As a special condition of supervised release, the district court required Colasuonno to pay restitution in the amount of \$846,913.61 (adjusted for interest) in monthly installments equal to 15% of Colasuonno's gross monthly income.

Colasuonno appealed, arguing that the automatic stay provision of § 362(a) of the Bankruptcy Code barred the district court from revoking his probation based on his non-payment of restitution. The Second Circuit rejected this claim, reasoning that proceedings to enforce a probationary sentence fell within 11 U.S.C. § 362(b)(1), the exception to the automatic stay

provision for the "commencement or continuation of a criminal action or proceeding against the debtor."

The appellate court concluded that Colasuonno's bankruptcy filing did not preclude the government from enforcing the restitution order. The court emphasized that, although the purpose of restitution is essentially compensatory, the person compensated is not a creditor but rather the victim of a crime committed by the defendant. For this reason, the court held that a defendant's bankruptcy filing does not relieve that defendant of a probation condition to pay restitution.

Accordingly, the court affirmed the amended judgment of conviction revoking probation and resentencing Colasuonno.

D.C. Circuit Holds Restitution Amount under MVRA Determined by Victim's Loss, Not Defendant's Gains

In *United States v. Fair*, 699 F.3d 508 (D.C. Cir. 2012), the D.C. Circuit held that a district court may not determine the amount of a restitution order under the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A, by substituting the defendant's ill-gotten gains for the victim's actual, provable loss.

From 2001 to 2007, Gregory Fair ("Fair") engaged in high-volume sales of pirated Adobe Systems software on eBay. In 2009, he pleaded guilty to copyright infringement, in violation of 17 U.S.C. § 506(a) and 18 U.S.C. § 2319, and mail fraud, in violation of 18 U.S.C. § 1341. The plea agreement acknowledged that the MVRA mandated restitution, but did not specify an agreed-upon amount.

The district court sentenced Fair to 41 months' imprisonment and ordered him to pay to Adobe Systems restitution of \$743,098.99, an amount representing Fair's total sales revenue as calculated by the government (\$767,465.99) less forfeited funds that had been turned over to Adobe Systems by the Postal Inspection Service (\$24,367.00). Fair appealed the restitution order.

On appeal, Fair contended that the district court had abused its discretion in ordering restitution because the government had offered only evidence of Fair's gain and not of Adobe Systems' loss. The D.C. Circuit agreed and joined the majority of circuit courts in holding that a district court may not substitute a defendant's ill-gotten gains for the victim's actual, provable loss when ordering restitution pursuant to the MVRA.

Because the government failed to present evidence from which the district court could either determine Adobe Systems' actual loss or find that Fair's gain was a reasonable measure of that loss, the court vacated the order of restitution.

CRIMINAL TAX BULLETIN

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