

# Criminal Tax Bulletin

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## SEARCH AND SEIZURE

### **Supreme Court Holds Detention Incident to Execution of Search Warrant is Limited to Immediate Vicinity of Premises to Be Searched**

In *Bailey v. United States*, 133 S. Ct. 1031 (2013), the Supreme Court held that the rule in *Michigan v. Summers*, 452 U.S. 692 (1981), which allows officers executing a valid search warrant to detain the occupants of the premises without probable cause to arrest them, is limited to the immediate vicinity of the premises.

The case involved the search of a residence for a handgun. As local police prepared to execute the warrant they had validly obtained, they observed two men leaving the residence and entering a vehicle parked in the driveway. After following the vehicle for almost a mile, the officers pulled it over and conducted a pat-down search of both occupants, discovering a ring of keys in the pocket of Chunon Bailey (“Bailey”). Bailey identified himself and said he was coming from his home at the premises being searched. Both men were returned to the search location and were told they were being detained incident to the execution of a warrant. After incriminating evidence was discovered at the search location, the men were arrested and Bailey’s keys, one of which opened the door of an apartment at the search location, were seized incident to the arrest.

At trial, Bailey moved to suppress the keys and the statements he made when he was stopped in his car, arguing they derived from an unreasonable seizure. The district court held the detention was permissible under *Summers* as incident to the execution of a search warrant and, in the alternative, the detention was valid as an investigatory detention supported by reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968). Bailey was convicted of drug- and firearms-related offenses. On appeal, the Second Circuit ruled that the detention was justified under *Summers*, and did not reach the question of whether *Terry* applied.

The Supreme Court reversed, holding that none of the law enforcement interests that justified the detention in *Summers* (i.e., reducing the risk of harm to the officers, facilitating the orderly completion of the search, and allowing the officers to secure the scene of the search) applied to the detention of recent occupants beyond the immediate vicinity of the search location. The Court expressed no view on whether the detention was lawful under *Terry* and invited the Court of Appeals to address that issue on remand.

### **First Circuit Holds Search-Incident-to-Arrest Exception Does Not Authorize Warrantless Search of Arrestee’s Cell Phone Data**

In *United States v. Wurie*, No. 11-1792, 2013 WL 2129119 (1st Cir. May 17, 2013), the First Circuit held that the search-incident-to-arrest exception to the Fourth Amendment’s warrant requirement does not allow a warrantless search of data on a cell phone seized from an arrestee’s person.

Brima Wurie (“Wurie”) was arrested after he was observed conducting what appeared to be a drug sale from a vehicle. At the police station, officers seized two cell phones from Wurie. When one of the cell phones began ringing repeatedly, displaying “my house” on the screen, the police opened the phone to access its call log, which they used to obtain Wurie’s home phone number and ultimately his address. The officers proceeded to Wurie’s apartment and entered it to secure the evidence while they obtained a search warrant. After obtaining the warrant, the police seized narcotics and a firearm. At trial, the district court denied Wurie’s motion to suppress the evidence obtained as a result of the warrantless search of his cell phone data. He was convicted of possessing and distributing narcotics and of being a felon in possession of a firearm, and he was sentenced to 262 months’ imprisonment.

On appeal, Wurie argued that the district court erred in denying his motion to suppress. The First Circuit agreed, holding that warrantless searches of cell phone data are not authorized by the search-incident-to-arrest

exception because such searches are not necessary to protect arresting officers or to prevent the destruction of evidence. In so holding, the court rejected the government's argument that the search in this case may have been necessary to preserve the call log on Wurie's phone, noting that there are a number of means to protect such information, including switching the phone off or removing its battery. Although it held that the search-incident-to-arrest exception did not apply, the court acknowledged that another exception to the warrant requirement – such as the exigent circumstances exception – might justify a warrantless search of a cell phone's data under the right conditions.

In the absence of an applicable exception to the warrant requirement, the court vacated Wurie's conviction, and remanded the case for a new trial.

## **SENTENCING**

### **Supreme Court Bars Retroactive Application of Higher Sentencing Guidelines Range under *Ex Post Facto* Clause**

In *Peugh v. United States*, No. 12-62, 2013 WL 2459523 (U.S. June 10, 2013), the Supreme Court held that the *Ex Post Facto* Clause of the Constitution was violated when the defendant was sentenced under a version of the U.S. Sentencing Guidelines ("Guidelines") that was promulgated after the offense was committed, and the new Guidelines provided a higher sentencing range than the Guidelines in effect at the time of the offense.

Marvin Peugh ("Peugh") and his business partner owned two farming-related businesses. In 1999 and 2000, Peugh and his partner were involved in fraudulent schemes that involved obtaining bank loans based on fraudulent misrepresentations and artificially inflating their account balances by "check kiting." At trial, Peugh was convicted on five counts of bank fraud (18 U.S.C. § 1344). At sentencing, Peugh argued that he should be sentenced under the 1998 Guidelines in effect at the time of the offense (which provided a sentencing range of 30 to 37 months), not the 2009 Guidelines in effect at the time of sentencing (which provided a sentencing range of 70 to 87 months). The district court disagreed and sentenced him to 70 months' imprisonment, the bottom of the 2009 Guidelines range. The Seventh Circuit affirmed the district court's decision. The Supreme Court granted certiorari to resolve a circuit split regarding whether the *Ex Post Facto* Clause, which prohibits laws that inflict

a greater punishment than the law in effect when the crime was committed, is applicable to the Guidelines, given their advisory status.

In a 5 to 4 decision, the Supreme Court overturned the Seventh Circuit. The government argued that the Guidelines do not carry the force and effect of "law" within the meaning of the *Ex Post Facto* Clause. Rejecting this argument, the Court reasoned that the advisory nature of the Guidelines does not deprive them "of force as the framework for sentencing." The Court held that, in this case, the *Ex Post Facto* Clause was violated because there was a "significant risk" that Peugh's sentence would be higher as a result of the retrospective increase in the Guidelines range applicable to him.

### **Eleventh Circuit Holds IRS Issuance of Refunds Sufficient to Support Inference that Stolen Social Security Numbers Used on Returns Belonged to Actual Persons**

In *United States v. Philidor*, 717 F.3d 883 (11th Cir. 2013), the Eleventh Circuit held that the sentencing court did not clearly err in inferring that there were 250 or more actual victims of the defendants' scheme, based on the IRS's issuance of refunds for returns listing more than 250 stolen Social Security numbers ("SSNs").

Alland Philidor and his brother Willman Philidor (collectively, the "Philidors") participated in a fraudulent refund scheme involving the filing of false tax returns using stolen SSNs in order to receive refund checks, which they deposited into corporate bank accounts they controlled. The Philidors each pled guilty to one count of conspiracy to steal government funds (18 U.S.C. § 371) and one count of theft of government funds (18 U.S.C. § 641). The presentence investigation report ("PSI") indicated that the Philidors used thousands of stolen SSNs, and accordingly, recommended that a six-level enhancement for offenses involving 250 or more victims be applied to their base offense level, pursuant to § 2B1.1(b)(2)(C) of the Sentencing Guidelines. The PSI, however, noted that the government had only positively identified 26 of the victims. The district court imposed a sentence that incorporated the six-level enhancement. The Philidors appealed, arguing that the court erred because the government did not prove by a preponderance of the evidence that 250 of the SSNs were authentic and also belonged to living people.

The Eleventh Circuit opined that IRS verification of identifying information on returns could be inferred

from the issuance of refunds for those returns. Thus, it was not error for the district court to infer, based on the IRS's issuance of refunds to the Philidors, that the SSNs listed on the fraudulent returns they filed were associated with real people. In addition, the circuit court held that the district court did not err in applying the six-level sentencing enhancement without first finding that the victims were living. The circuit court explained that, under the Guidelines, a victim whose means of identification was used unlawfully must be an "actual" individual, but need not be alive.

### **Eleventh Circuit Holds Mandatory Sentence for Aggravated Identity Theft Does Not Preclude Enhancement for Use of Device-Making Equipment**

In *United States v. Cruz*, 713 F.3d 600 (11th Cir. 2013), the Eleventh Circuit held that the sentencing enhancement for use of device-making equipment under U.S. Sentencing Guidelines ("U.S.S.G.") § 2B1.1(b) may be imposed on a defendant who is convicted of access device fraud (18 U.S.C. § 1029(a)(2)) and receives a mandatory two-year sentence for aggravated identity theft (18 U.S.C. § 1028A).

Jose Cruz ("Cruz") and Yuremys Marchante ("Marchante") provided a credit card skimming device to a restaurant server and paid the server to steal credit card numbers from her customers. Subsequently, Cruz and Marchante used fraudulent credit cards to purchase Target gift cards and merchandise through Lisandra Cruz ("Lisandra"), who was Cruz's sister and a Target employee. Lisandra then used some of the fraudulently obtained gift cards to purchase Target merchandise. Cruz, Lisandra, and Marchante were convicted of access device fraud and aggravated identity theft. Their aggravated identity theft convictions resulted in mandatory two-year terms of imprisonment under U.S.S.G. § 2B1.6. The district court also applied a two-level enhancement to the defendants' sentences for use of device-making equipment under then-U.S.S.G. § 2B1.1(b)(10).

The defendants appealed, arguing in part that the use or possession of device-making equipment was "relevant conduct" for their § 1029(a)(2) offenses and that imposition of the enhancement constituted impermissible double-counting under the Commentary to § 2B1.6. Agreeing with the First and Eighth Circuits, the Eleventh Circuit rejected this argument and affirmed the sentences, holding that the use of device-making equipment is not the type of relevant conduct

addressed by § 2B1.6. Rather, the court explained, the commentary to § 2B1.6 precludes only the application of enhancements based on "the transfer, possession, or use of a means of identification."

### **Eleventh Circuit Holds Probationary Sentence for Health Care Fraud Was Substantively Unreasonable**

In *United States v. Kuhlman*, 711 F.3d 1321 (11th Cir. 2013), the Eleventh Circuit held that a sentence of probation for "time served" while the defendant was out on pretrial release was substantively unreasonable because it failed to provide adequate deterrence.

Rick A. Kuhlman ("Kuhlman"), a chiropractor, pleaded guilty to perpetrating a five-year, approximately \$3 million health care fraud scheme. Although the Sentencing Guidelines called for a sentencing range of 57-71 months' imprisonment, the plea agreement provided that the government would recommend 36 months' imprisonment, which represented a five-level downward variance. Prior to sentencing, Kuhlman paid the full amount of restitution ordered (approximately \$3 million). Based on his restitution payment, his performance of community service prior to sentencing, and the sentencing judge's general concerns regarding the high costs of incarceration, Kuhlman received a non-custodial sentence of probation for his "time served" while awaiting sentencing, which amounted to a downward variance of 20 levels, or 57 months from the bottom of the Guidelines range. The government appealed, arguing that the sentence was both procedurally and substantively unreasonable.

The Eleventh Circuit noted that the sentencing court fulfilled its procedural obligations when it calculated the Guidelines range accurately, and cited several 18 U.S.C. § 3553(a) factors as the bases for the downward variance. Accordingly, the appellate court concluded the sentence was procedurally reasonable.

However, the court concluded that the sentence was substantively unreasonable because it failed to achieve an important goal of sentencing in white-collar prosecutions, *i.e.*, the need for general deterrence. The court reasoned that the sentence did not reflect the seriousness and extent of the crime, promote respect for the law, provide just punishment, or adequately deter other similarly inclined health care providers. The court further emphasized that white-collar offenders should not be treated more leniently than other criminals. Accordingly, Kuhlman's sentence was vacated, and the case was remanded for resentencing.

## RESTITUTION

### **Ninth Circuit Holds Use of Account with Deceptive Name Warranted Application of Sophisticated Means Enhancement**

In *United States v. Jennings*, 711 F.3d 1144 (9th Cir. 2013), the Ninth Circuit held that the defendants' personal use of a bank account with a name resembling that of their company's vendor was "sophisticated means" for purposes of the two-level enhancement under § 2T1.1(b)(2) of the Sentencing Guidelines.

Thomas Jennings ("Jennings") and David Feuerborn ("Feuerborn") owned and operated Environmental Soil Sciences, Inc. ("ESS"), which claimed to possess technology for extracting oil from dirt and other materials. After raising funds from investors, ESS hired a vendor, Eco-Logic Environmental Engineering ("Eco-Logic"), to develop machinery that would use the purported technology to capture oil. ESS paid Eco-Logic approximately \$2.5 million from its business account. Meanwhile, Jennings and Feuerborn opened a separate bank account of their own named "Ecologic." They wrote checks from ESS's business account and deposited them into their Ecologic account, often contemporaneously mirroring legitimate payments to Eco-Logic. Jennings and Feuerborn used their Ecologic account to fund new homes, cars, and cash payments to family members, without reporting the income to the IRS. Jennings was convicted of subscribing to false returns (26 U.S.C. § 7206(1)), and Feuerborn was convicted of tax evasion (26 U.S.C. § 7201). Both were convicted of conspiracy to defraud the IRS (18 U.S.C. § 371). At sentencing, the district court applied the two-level enhancement for sophisticated means, resulting in a recommended Guidelines range of 53 to 61 months' imprisonment. The court sentenced each defendant to 48 months' imprisonment.

On appeal, the Ninth Circuit upheld the application of the enhancement. The appellate court rejected the defendants' arguments that the enhancement did not apply because they opened the Ecologic account using Jennings' real name, used the account for some legitimate ESS business, and did not create corporate shells or offshore accounts. The court cited the Seventh Circuit for the principle that the enhancement "does not require a brilliant scheme, just one that displays a greater level of planning or concealment than the usual tax evasion case." 711 F.3d at 1147 (citation omitted).

### **Seventh Circuit Holds Losses Labeled "Relevant Conduct" Were Attributable to an Offense of Conviction and Were Properly Included in Restitution**

In *United States v. Scheuneman*, 712 F.3d 372 (7th Cir. 2013), the Seventh Circuit held that tax losses labeled in the presentence report ("PSR") as resulting from "relevant conduct" were directly attributable to the specific conduct underlying the defendant's conviction under 26 U.S.C. § 7212(a) and were thus properly included in the defendant's restitution obligation.

Kurt Scheuneman ("Scheuneman") purchased a sham tax avoidance system in 1999, forming a limited liability company and two illegitimate trusts to hide income from the IRS. In 2004, the IRS warned Scheuneman about his possible involvement in an abusive tax scheme and notified him that it would audit his 2003 returns. Although Scheuneman denied involvement in an abusive tax scheme, he failed to file federal income tax returns for 2003 to 2005 and repeatedly sent frivolous correspondence to the IRS. He was ultimately convicted of three counts of tax evasion (26 U.S.C. § 7201) for the 2003-2005 tax years and one count of interfering with the administration of the Internal Revenue laws (26 U.S.C. § 7212(a)) from "2004 or before" until 2007. As part of his sentence, the district court imposed restitution based on the findings of the PSR, which calculated a \$48,535 tax loss resulting from the tax evasion convictions, and an additional \$35,847 tax loss for 2000 to 2002, which the PSR designated as relevant conduct for purposes of determining Scheuneman's Guidelines range.

Scheuneman appealed, arguing in part that the district court improperly ordered restitution for the 2000-2002 losses, which were not caused by the conduct underlying his 2003-2005 tax evasion convictions. The Seventh Circuit noted that, unless agreed to in a plea agreement, restitution for tax offenses may only be ordered for losses caused by the specific conduct underlying the offense of conviction or committed during the offense of conviction. Nonetheless, the court affirmed the restitution award on the grounds that the 2000-2002 tax losses were directly attributable to the obstructive conduct underlying Scheuneman's § 7212(a) conviction.

### **Third Circuit Holds Mandatory Victims Restitution Act (“MVRA”) Applies to Conspiracy to Defraud the IRS in Violation of 18 U.S.C. § 371**

In *United States v. Turner*, 718 F.3d 226 (3d Cir. 2013), the Third Circuit held that a conspiracy to defraud the IRS in violation of 18 U.S.C. § 371 constitutes an “offense against property” that is covered by the MVRA (18 U.S.C. § 3663A). Accordingly, the court upheld the imposition of restitution in the full amount of the government’s tax loss.

Donald Turner (“Turner”), the author of a book on how to avoid federal and state income taxation through the use of common law trust organizations (“colatos”), created First American Research (“FAR”), which assisted its members in implementing the “colato” program. In 1991, Turner assisted Daniel Leveto (“Leveto”), owner of a veterinary clinic, in setting up foreign “colatos” for his veterinary business, which allowed Leveto to access to the clinic’s income while failing to pay the clinic’s taxes.

A jury convicted Turner of conspiring with Leveto and Leveto’s wife to defraud the IRS by concealing the Levetos’ assets, thereby preventing the IRS from computing and collecting the Levetos’ income taxes. Turner was sentenced to 60 months’ imprisonment and ordered to pay restitution to the government of \$408,043, which represented the full amount of the government’s loss. Turner appealed, arguing that the restitution order was improper because the trial court failed to make specific findings regarding his ability to pay, as required under 18 U.S.C. § 3663.

On appeal, the government claimed the MVRA, which requires a sentencing court to order a defendant to pay the full amount of a victim’s losses without considering the defendant’s economic circumstances, applied to violations of 18 U.S.C. § 371. The Third Circuit agreed, holding that Turner’s conspiracy to defraud the IRS of its property (*i.e.*, Leveto’s tax dollars) in violation of § 371 was an “offense against property” under Title 18, and was consequently covered by the MVRA under 18 U.S.C. § 3663A(c)(1). Applying the MVRA to the facts of the case, the Third Circuit affirmed the district court’s \$408,043 restitution order.

### **IDENTITY THEFT**

### **Sixth Circuit Holds Aggravated Identity Theft Statute Applies to Purchase of Personal Information for Unlawful Use**

In *United States v. Lumbard*, 706 F.3d 716 (6th Cir. 2013), the Sixth Circuit held that purchasing personal information from its lawful possessor for subsequent use in fraudulent activity constitutes a violation of the aggravated identity theft statute (18 U.S.C. § 1028A).

While released on bond and awaiting trial for larceny and other crimes, Nathan Lumbard (“Lumbard”) purchased the driver’s license and social security number of a willing seller and used the information to obtain a driver’s license and passport in the seller’s name, but with Lumbard’s photograph. Lumbard used this documentation to leave the country, but was subsequently located in Burma, arrested, and returned to the U.S. He was indicted for knowingly providing false information and identifying documents in an application for a passport (18 U.S.C. § 1542), and for aggravated identity theft, which adds two years of incarceration to the sentence of a defendant who “during and in relation to a felony violation ... knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” Lumbard’s motion to dismiss the aggravated identity theft charge was denied. He pleaded guilty but reserved the right to appeal the district court’s denial of his motion to dismiss.

On appeal, Lumbard argued that the phrase “without lawful authority” in § 1028A did not include cases, such as this one, in which a defendant obtained a person’s consent to use his or her information unlawfully. Lumbard further argued that the Supreme Court had limited the application of § 1028A to instances of theft of a person’s means of identification in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). The Sixth Circuit rejected Lumbard’s arguments, holding that the phrase “without lawful authority” in § 1028A is not limited to instances of theft, but rather includes cases where the defendant obtained the permission of the person whose information the defendant misused. The court explained that an individual cannot confer “lawful authority” to use his identifying information unlawfully.

### **Fourth Circuit Holds Aggravated Identity Theft Statute Applies to Use of Identifying Information with Owner’s Consent**

In *United States v. Otuya*, No. 12-4096, 2013 WL 3037607 (4th Cir. June 19, 2013), the Fourth Circuit held that the aggravated identity theft statute (18 U.S.C. § 1028A) prohibits the use of another person’s identifying information to commit an enumerated felony, regardless of whether the information is used with the person’s consent.

Okechukwo Ebo Otuya (“Otuya”) and several co-conspirators engaged in a scheme to steal credit card convenience checks from roadside mailboxes and process them through Bank of America (“BOA”) accounts belonging to local college students. The students willingly provided their personal identification information and access to their accounts, in exchange for a fee. As a result of the scheme, BOA was defrauded of hundreds of thousands of dollars. Otuya was ultimately convicted of bank fraud, conspiracy to commit bank fraud, and aggravated identity theft, in violation of 18 U.S.C. §§ 1344, 1349, and 1028A, respectively. His §§ 1344 and 1028A convictions were based on his individual conduct in depositing stolen checks into an account belonging to a co-conspirator. Otuya was sentenced to 72 months’ imprisonment, plus the mandatory two-year consecutive period for the § 1028A conviction. On appeal, he argued that the phrase “without lawful authority” in § 1028A requires the use of another’s identifying information without that person’s consent. Because Otuya’s co-conspirator had consented to the use of his identifying information, Otuya contended that his § 1028A conviction should be vacated.

The Fourth Circuit rejected this argument, stating that “one does not have ‘lawful authority’ to consent to the commission of an unlawful act.” 2013 WL 3037607, at \*5. The appellate court reasoned it would be an unacceptable result if a co-conspirator’s consent excused Otuya’s use of the co-conspirator’s identifying information to defraud a bank. The court explained that a defendant who uses another person’s means of identification in relation to any felony violation enumerated in § 1028A necessarily does so “without lawful authority,” regardless of whether the rightful owner of the identifying information gave his consent to its use. Accordingly, the Fourth Circuit affirmed Otuya’s aggravated identity theft conviction.

### **D.C. Circuit Holds Proof of Stolen Identities or Individual Harm Not Required for Aggravated Identity Theft Convictions**

In *United States v. Reynolds*, 710 F.3d 434 (D.C. Cir. 2013), the D.C. Circuit held that the aggravated identity theft statute (18 U.S.C. § 1028A) does not require a showing that identities were stolen or that the individuals whose identities were unlawfully used suffered individual harm.

Jason T. Reynolds (“Reynolds”), the chief financial officer of a Washington, D.C. church, had access to church officers’ digital signatures, which he used to falsify a document that he submitted to a bank in order to increase the church’s line of credit. Reynolds subsequently exploited the line of credit by misappropriating more than \$850,000 for his personal benefit. A jury convicted Reynolds of aggravated identity theft and other crimes. Reynolds appealed, arguing that the government was required to show both: (i) that he stole the officers’ identities; and (ii) that the officers suffered individual harm beyond that suffered by the church. Because the government did not present evidence on these points at trial, Reynolds argued that his § 1028A convictions must be vacated.

On appeal, the D.C. Circuit rejected Reynolds’ claims. In evaluating his argument that § 1028A applies only to stolen information, the court noted that the statute explicitly applies to a defendant who “‘uses’ a means of identification without lawful authority.” The court interpreted this language to encompass situations in which a defendant has not actually stolen the identifying information but rather gains access to the information legitimately and then uses it in excess of the authority granted. The court noted that the other circuits to consider this issue – *i.e.*, the First, Fourth, and Sixth – have agreed with this interpretation of the statute. The court also indicated that Reynolds’ second argument – *i.e.*, that the aggravated identity theft statute applies only where individuals whose means of identification were used unlawfully have suffered individual harm – had no support in the statutory language. Concluding that the statute was clear and that both of Reynolds’ arguments lacked merit, the D.C. Circuit affirmed his § 1028A convictions.

## DISCLOSURE

### **Sixth Circuit Holds Defendant's Purported Lack of Due Diligence Does Not Relieve Government of its *Brady* Disclosure Obligations**

In *United States v. Tavera*, No. 11-6175, 2013 WL 3064599 (6th Cir. June 20, 2013), the Sixth Circuit held that a defendant's purported failure to exercise due diligence to discover exculpatory statements made by his codefendant did not relieve the government from its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

In May 2010, Abel Martinez Tavera ("Tavera") was arrested with four others after the police found large amounts of methamphetamine hidden in a construction truck driven by codefendant Pablo Mendoza ("Mendoza"), in which Tavera was a passenger. All of the defendants pleaded guilty except Tavera, who was convicted of participating in a drug conspiracy and was sentenced to 15 years' and 6 months' imprisonment. After his conviction, Tavera learned that a few days before his trial, Mendoza told the prosecutor that Tavera had no knowledge of the drug conspiracy. Tavera did not learn of Mendoza's statements prior to his conviction because the prosecutor did not disclose them, and because Tavera's lawyer did not interview Mendoza.

On appeal, Tavera argued that the government's failure to disclose Mendoza's statements constituted a *Brady* violation warranting a new trial. The Sixth Circuit agreed, after concluding that (1) Mendoza's statements were exculpatory; (2) the statements were suppressed by the government; and (3) Tavera suffered prejudice as a result of this suppression. Based on the Supreme Court's decision in *Banks v. Dretke*, 540 U.S. 668 (2004), the Sixth Circuit rejected the government's argument that Tavera's failure to discover Mendoza's statements through the exercise of due diligence relieved the government of its *Brady* obligations. Although it recognized that prior to *Banks* some courts, including the Sixth Circuit itself, had allowed the prosecution to claim a broad defendant-due-diligence rule, the court noted that this practice should have ended with the *Banks* decision. Finally, the court concluded that Mendoza's statements were material because they counterbalanced the government's proof of Tavera's intent to join the conspiracy and distribute the drugs, and thus there was a reasonable probability that the verdict would have been different if the statements had been disclosed. Accordingly, the court

vacated Tavera's conviction and remanded the case for a new trial.

## CONFRONTATION CLAUSE

### **Eighth Circuit Holds Confrontation Clause Does Not Bar Admission of GPS Tracking Reports Generated to Locate Bank Robber**

In *United States v. Brooks*, 715 F.3d 1069 (8th Cir. 2013), the Eighth Circuit held that the admission of GPS tracking reports generated by a bank's security company to locate a robber and recover stolen money did not violate the defendant's Confrontation Clause rights under Sixth Amendment because the reports were not testimonial.

Robin T. Brooks ("Brooks") entered a credit union and handed a note to a teller, stating that he had a firearm and directing her to put money in an envelope. The teller placed approximately \$6,000 in an envelope along with a Global Positioning System ("GPS") tracking device concealed in a stack of bills. After Brooks left the premises, the credit union's security company and the police located him by tracking the GPS device. At trial, the district court admitted the GPS tracking reports over Brooks' objections, and he was convicted of bank robbery, possession of a firearm in furtherance of a crime of violence, and being a felon in possession of a firearm.

Brooks argued on appeal that the GPS tracking reports were testimonial because they were created primarily for a law enforcement purpose and, as such, their admission violated his Confrontation Clause rights. The Eighth Circuit disagreed, noting that not all statements obtained in the course of a law enforcement investigation are testimonial. Rather, the crucial inquiry is whether the record was "created . . . for the purpose of establishing or proving some fact *at trial*." *Brooks*, 715 F.3d at 1079 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)) (emphasis in original). The Eighth Circuit compared the GPS evidence in this case to the victim statements at issue in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) and *Davis v. Washington*, 547 U.S. 813 (2011), which the Supreme Court held were non-testimonial because they had been obtained to resolve ongoing emergencies, not to establish the defendants' guilt. Although the GPS reports in this case were ultimately used to link Brooks to the bank robbery, the court determined that they were not created for this purpose. Rather, they were generated for the purpose of locating a robber and

recovering stolen money. Therefore, the Eighth Circuit held the reports were non-testimonial, and their admission did not violate Brooks' Confrontation Clause rights.

### **SPEEDY TRIAL ACT**

#### **Second Circuit Holds Extensions of 70-Day Period for Retrial May Be Granted After 70-Day Period Has Expired**

In *United States v. Shellef*, 718 F.3d 94 (2d Cir. 2013), the Second Circuit held that the Speedy Trial Act does not preclude extensions of the 70-day period for retrial under 18 U.S.C. § 3161(e) that are granted after the 70-day period has expired, provided the requisite impracticality finding is based on factors arising before or within that initial period.

Dov Shellef ("Shellef") was convicted of tax and tax-related crimes based on a scheme to buy and sell an ozone-depleting chemical without paying federal taxes. On March 4, 2008, the Second Circuit vacated the convictions and remanded the case for retrial on the grounds that Shellef was entitled to severance of the charges and original defendants. At an April 2008 status conference, the government informed the court that the parties were considering an early 2009 retrial. The court acknowledged the complexity of the case and instructed the parties to consider the matter further so that they could ask for appropriate Speedy Trial Act exclusions at future court appearances. In June 2008, Shellef moved to dismiss, arguing the 70-day retrial period that began on March 4, 2008 had expired. The court denied the motion, finding that at the April 2008 status conference it had implicitly granted a speedy-trial exclusion based on the case's complexity. On November 4, 2008, Shellef filed a motion to modify his bail conditions. After various intervening events, the retrial began on December 14, 2009. Before retrial, the court denied Shellef's second motion to dismiss based on the delays that occurred prior to his November 4, 2008 motion. (Shellef did not contest the exclusion of the time between November 4, 2008 and December 14, 2009 from the Speedy Trial calculation.) In its post-trial memorandum and order, the court explained it had construed the April 2008 record of proceedings as granting a retrial extension to 180 days under 18 U.S.C. § 3161(e), based on an implicit finding that retrial within 70 days would have been impractical due to factors resulting from the passage of time.

On appeal, Shellef argued the trial court improperly granted an extension after expiration of the initial

70-day retrial period. In rejecting this argument the Second Circuit held the Speedy Trial Act imposed no temporal limitation on a trial court's authority to grant a retrial extension if the extension is based on factors occurring within the initial 70-day period. The court also held that, as required by the statute, the extension in this case was supported by factors "resulting from passage of time," including a severance order that increased the complexity of the case, an intervening Supreme Court decision, and multiple reassignments of the case to different judges.

### **PROSECUTORIAL MISCONDUCT**

#### **Fourth Circuit Holds District Court Erred in Allowing Prosecutor to State that Defendant Lied Under Oath**

In *United States v. Woods*, 710 F.3d 195 (4th Cir. 2013), the Fourth Circuit held that the trial court committed plain error in allowing the prosecutor to state in closing argument that the defendant had lied under oath.

Michael Ray Woods ("Woods") was employed as a data warehouse manager with the U.S. Department of Veterans Affairs ("VA"). Woods supplemented his income by operating a tax preparation business out of his home. He was charged with tax, tax-related, and identity theft crimes arising from a fraudulent scheme orchestrated through his tax preparation business. The evidence showed that he added false information to his clients' tax returns to qualify them for substantial tax refunds, and for an additional \$500 fee, he falsely listed VA patients as dependents on his clients' tax returns. Woods represented himself at trial and testified in his own defense, claiming the incorrect information entered on his clients' tax returns was provided by his clients themselves, and that the \$500 payments were loan repayments. Woods was convicted of all charges and sentenced to 132 months' imprisonment.

On appeal, Woods argued in part that the court committed reversible error in allowing the prosecutor to state in closing argument that Woods charged clients a fee to add false dependent information and then "lied about it under oath" when he testified in his own defense. The appellate court criticized the prosecutor's statement as "highly improper," noting that when the government makes statements of personal belief or otherwise comments on a witness's veracity, there is a risk of suggesting to the jury that the prosecutor's personal opinion has evidentiary weight, and of inviting the jury to infer the prosecutor had access to

information not available to the jury. The court added that the gravity of these risks is amplified in the case of a criminal defendant who testifies in his own defense. The court held that the prosecutor's improper statement constituted plain error and strongly cautioned the government against engaging in such conduct in the future. However, the court affirmed Woods' convictions on the grounds that the evidence against him overwhelmingly supported a finding of guilt and undermined his credibility.

**CRIMINAL TAX BULLETIN**

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