

Criminal Tax Bulletin

**Department of Treasury
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FORFEITURE

Supreme Court Holds Defendants Have No Right to Challenge Probable Cause Determination at Asset Restraint Hearing

In *Kaley v. United States*, 134 S. Ct. 1090 (2014), the Supreme Court held that the defendants were not entitled, at a pre-trial evidentiary hearing on the restraint of their assets, to challenge the grand jury's prior determination of probable cause to believe they committed the crimes with which they were charged.

Kerri Kaley, a sales representative for a subsidiary of Johnson & Johnson, and her husband, Brian Kaley, (collectively, the "Kaleys") were indicted for allegedly transporting stolen medical devices across state lines, reselling the devices for a profit, and laundering the proceeds. Following their indictment, the government sought a restraining order under 21 U.S.C. § 853(e)(1) to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses. Included among those assets was a \$500,000 certificate of deposit that the Kaleys intended to use for legal fees. The district court entered the requested order. Subsequently, in response to the Kaleys' motion to vacate the restraining order, the district court denied their request for an evidentiary hearing and confirmed the order, except as to \$63,000 that it found was not connected to the alleged offenses.

On interlocutory appeal, the Eleventh Circuit reversed and remanded for further consideration of whether an evidentiary hearing was warranted. The district court concluded that it should hold a hearing, but only as to whether the restrained assets were traceable to or involved in the alleged criminal conduct. The Kaleys informed the court that they no longer disputed that issue; rather, they wanted to show that the case against them was "baseless." The district court affirmed the restraining order, and the Kaleys again appealed. The Eleventh Circuit affirmed, holding that the Kaleys were not entitled to challenge the factual foundation of the grand jury's probable cause determination at the post-restraint hearing.

The Supreme Court granted certiorari in light of a circuit split on the issue. The Court concluded that the Constitution does not require enhanced evidentiary procedures to make probable cause determinations with respect to asset restraint, even when defendants seek to use the disputed property to pay legal fees. Accordingly, the Court held that the defendants did not have a constitutional right to contest the probable cause underlying the criminal charges against them at their pre-trial asset restraint hearing.

FOURTH AMENDMENT

Supreme Court Holds Warrant Required to Search Cell Phone Seized Incident to Arrest

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Supreme Court held that a search warrant is required to search digital information on a cell phone seized incident to an arrest, unless another exception to the warrant requirement applies.

The Court's opinion pertained to two cases. In the first case, a traffic stop led to the arrest of David Riley ("Riley") for possession of concealed and loaded firearms. A police officer searched Riley incident to the arrest and found items associated with a street gang. The officer also seized a cell phone – a "smart phone" with advanced computing capability – from Riley's pants pocket. The officer accessed information on the phone and noticed what he believed to be gang-related references. Later, at the police station, a detective conducted a further search of the phone's contents. Riley was ultimately charged with a number of offenses, which the prosecution alleged had been committed for the benefit of a criminal street gang, an aggravating factor that carried an enhanced sentence. Prior to trial, Riley moved to suppress the evidence obtained from his cell phone, contending that the searches of his phone violated the Fourth Amendment. The trial court rejected that argument. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison. The California

Court of Appeal affirmed, and the California Supreme Court denied Riley's petition for review.

In the second case, a police officer observed Brima Wurie ("Wurie") make an apparent drug sale. Wurie was arrested and taken to the police station, where two cell phones were seized from his person. One of the phones – a "flip phone" with a smaller range of features than a smart phone – was repeatedly receiving calls from a source identified as "my house" on the phone's external screen. The officers opened the phone and saw a photograph of a woman. They accessed the phone's call log, and determined the phone number associated with the "my house" label, which they traced to an apartment building. When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon executing the warrant, seized narcotics, drug paraphernalia, a firearm, ammunition, and cash. Wurie was charged with a number of drug and firearms offenses. He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of an unconstitutional search of his cell phone. The district court denied the motion. Wurie was convicted on all three counts and sentenced to 262 months in prison. The First Circuit reversed the denial of Wurie's motion to suppress and vacated two of his convictions.

The Supreme Court granted certiorari in both cases to address the question of whether the exception to the warrant requirement for searches incident to arrest encompasses searches of data on a cell phone found on the arrestee's person. The Court reasoned, on the one hand, that the government does not have a strong interest in warrantless searches of cell phones, because the risk of harm to officers or destruction of evidence is not present in a search of digital data. To the extent that remote erasure of the data is a concern, the court stated that such erasure could be prevented by turning the phone off, removing its battery, or placing it in an enclosure. On the other hand, the Court observed that there are significant privacy interests at stake in the search of a cell phone, which may contain vast quantities of different types of personal information. Accordingly, the Court held that officers must generally secure a warrant before searching a cell phone incident to an arrest. The Court noted, however, that other case-specific exceptions, such as the exception for exigent circumstances, may still justify a warrantless search of a particular cell phone.

Supreme Court Holds One Resident's Consent to a Search of Jointly-Occupied Premises Is Sufficient if Objecting Resident is Absent

In *Fernandez v. California*, 134 S. Ct. 1126 (2014), the Supreme Court held that consent by one resident of jointly-occupied premises was sufficient to justify a warrantless search when the other resident, who objected to the search, was absent due to a lawful arrest.

In October 2009, Walter Fernandez ("Fernandez") threatened Abel Lopez ("Lopez") with a knife, stating that Lopez was in gang-controlled territory. When Lopez tried to flee, Fernandez whistled, and four other men appeared, attacking and robbing Lopez. A police dispatch reported the incident, and two police officers drove to an alley frequented by the gang. There they observed a person run into a building and heard screams. The officers knocked on the door of the apartment from which the screams had been heard. Roxanne Rojas ("Rojas") answered the door. She was holding a baby and appeared to be crying, and the officers noticed signs that she had been injured. After one of the officers asked Rojas to step out of the apartment so that he could conduct a protective sweep, Fernandez appeared at the door and said the police had no right to enter the apartment. Suspecting that Fernandez had assaulted Rojas, the officers removed him from the apartment and placed him under arrest. Lopez identified Fernandez as his initial attacker, and Fernandez was arrested. Approximately one hour later, one of the officers returned to the apartment and informed Rojas of Fernandez' arrest. The officer requested and received both oral and written consent from Rojas to search the apartment, where the police found gang paraphernalia, a knife, ammunition, and a sawed-off shotgun.

Fernandez was charged with robbery, infliction of corporal injury, and several firearm and ammunition violations. Before trial, he moved to suppress the evidence found in the apartment, but the court denied the motion. Fernandez then pleaded nolo contendere to the firearms and ammunition charges. He was convicted on the remaining counts and sentenced to 14 years' imprisonment. The California Court of Appeal affirmed, holding that Fernandez's suppression motion had been properly denied, and the California Supreme Court denied his petition for review.

On certiorari, the Supreme Court noted that although a warrant is generally required for the search of a home, consent searches are constitutionally permissible. Further, the Court remarked that consent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search. The Court acknowledged that it had previously recognized a narrow exception to this rule in *Georgia v. Randolph*, 547 U.S. 103 (2006). In *Randolph*, the Court held that the consent of one occupant is insufficient when another occupant is present and objects to the search. Here, the Court concluded that the *Randolph* exception did not apply because Fernandez was not present at the time Rojas consented, and the police had reasonable grounds for removing Fernandez from the apartment.

Second Circuit Holds Retention of Non-Responsive Computer Records for Use in Future Investigation Was Fourth Amendment Violation

In *United States v. Ganias*, No. 12-240-cr, 2014 WL 2722618 (2d Cir. June 17, 2014), the Second Circuit held that the government violated the defendant's Fourth Amendment rights by indefinitely retaining non-responsive computer records seized during the execution of a warrant, and using those records in a future investigation.

Stavros Ganias ("Ganias") owned and operated an accounting business. His clients included Industrial Property Management ("IPM"), a business that was hired by the Army to provide maintenance and security services. In 2003, the Criminal Investigative Command of the Army began investigating IPM for improper conduct, including stealing materials and false billing. As part of the investigation, the Army obtained a warrant to search Ganias' office. During the search, Army computer specialists imaged the entire hard drives of Ganias' three computers, which included files beyond the scope of the warrant. The data was subsequently copied onto two sets of 19 DVDs, which were maintained as evidence. The Army also seized paper documents during the search, which revealed suspicious payments by IPM. This discovery led the Army to invite the IRS to join its investigation.

Subsequently, IRS review of paper documents from Ganias' office, as well as bank records obtained by subpoena, led to the expansion of the investigation to include possible tax violations. In February 2006, having discovered indications that Ganias might have been underreporting his own income, the government asked Ganias for permission to access certain of his

personal files contained on the DVDs of his computer records. When Ganias did not respond, the government obtained a new warrant to search the preserved images of Ganias' personal financial records, which had been in the government's possession for almost two-and-a-half years. Ganias was ultimately tried and convicted of tax evasion with respect to his personal taxes, and was sentenced to 24 months' imprisonment.

On appeal, the Second Circuit opined that the retention of the non-responsive computer images constituted a warrantless seizure of Ganias' personal files because the government kept the files in its possession "indefinitely" while developing probable cause to search them. The court held that these actions were unreasonable and violated Ganias' Fourth Amendment rights. In addition, the court concluded that the exclusionary rule applied because the government failed to establish it had acted in good faith.

Eleventh Circuit Holds Search Warrant Required for Cell Site Location Data

In *United States v. Davis*, No. 12-12928, 2014 WL 2599917 (11th Cir. June 11, 2014), the Eleventh Circuit held that the government may not obtain a subscriber's cell site location information from a cell phone service provider without a warrant.

On February 18, 2011, a federal grand jury indicted Quartavius Davis ("Davis") and others for violations of the Hobbs Act and possession of a firearm in furtherance of a crime of violence. Before and during the trial, Davis moved to suppress cell site location information that the government had obtained from third-party cell phone providers without a warrant, pursuant to a court order issued under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2703(c) and (d). The district court denied the motions. Davis was convicted on all counts and sentenced to 1,941 months' imprisonment.

On appeal, the Eleventh Circuit acknowledged that the SCA allows the government to obtain subscribers' records from providers of electronic communications pursuant to a court order, without a showing of probable cause. Relying in part on the Supreme Court's opinion in *United States v. Jones*, 132 S. Ct. 945 (2012), however, the court concluded that the government's use of a court order to obtain Davis' cell site location data violated the Fourth Amendment. Although *Jones* involved location data generated by a GPS tracking device attached to an automobile, rather than cell site location data, the Eleventh Circuit found the *Jones* opinion relevant because it demonstrated that

electronically transmitted location information may be protected by the Fourth Amendment. In *Jones*, because law enforcement agents committed a trespass against the defendant's effects when they placed the GPS device on his car, the Supreme Court did not reach the question of whether the defendant's reasonable expectation of privacy had been violated. In this case, by contrast, there was no physical trespass. However, the Eleventh Circuit interpreted *Jones* as indicating that the privacy theory of the Fourth Amendment governs the search and seizure of electronic information in the absence of trespass.

The court of appeals explained that a cell phone, unlike an automobile, can accompany its owner anywhere. Thus, the exposure of the cell site location information may convert what would otherwise be a private event into a public one. The court added that when one's whereabouts are not public, one may have a reasonable expectation of privacy in those whereabouts. In this case, even though the cell site location information did not pinpoint Davis' exact location, the court noted that it was sufficiently specific to place him at the crime scenes. Therefore, the court held that the cell site location information was within Davis' reasonable expectation of privacy, and that obtaining that data without a warrant was a violation of his Fourth Amendment rights. Nevertheless, the court concluded that the denial of Davis' motions to suppress did not constitute reversible error, because the good faith exception to the exclusionary rule applied.

Tenth Circuit Holds Passenger in Vehicle Lacks Standing to Challenge Warrantless Use of GPS Tracking Device

In *United States v. Davis*, 750 F.3d 1186 (10th Cir. 2014), the Tenth Circuit held that a passenger in a vehicle lacked standing to challenge a traffic stop predicated on information obtained through the warrantless attachment of a GPS tracking device to the vehicle.

On March 1, 2011, in the course of investigating armed robberies around Kansas City, Kansas, FBI agents obtained a search warrant to track the GPS signal emitted by the cell phone of Abasi S. Baker ("Baker"). The next day, without obtaining a warrant, the agents installed a GPS tracking device on the rear bumper of a parked car owned by Baker's girlfriend. An agent subsequently received emails relaying GPS coordinates from the car and Baker's phone, which placed the car and phone near a RadioShack that had just been robbed. Using a combination of GPS coordinates from the car

and phone, visual observations, and knowledge that Baker resided in the area, agents were able to locate and stop the car, which contained Baker and his passenger, Mark R. Davis ("Davis"). The agents arrested the two men. In the car, they found clothing matching the description of the robbers, a gun, and a bag containing approximately the amount of cash that had been stolen. Baker and Davis were charged with robbery and firearms offenses and were tried separately.

At trial, Davis moved to suppress the evidence found in the car, arguing that, under the subsequently-decided case of *United States v. Jones*, 132 S. Ct. 945 (2012), the warrantless attachment and use of the GPS device to locate the car violated the Fourth Amendment, and the evidence seized was "fruit of the poisonous tree." The district court denied Davis' motion, and he was convicted of robbery, 18 U.S.C. § 1951, use of a firearm during a robbery, 18 U.S.C. § 924(c), and being a felon in possession of a firearm, 18 U.S.C. § 922(g). He was sentenced to 360 months' imprisonment.

On appeal, the Tenth Circuit noted that under *Jones*, the attachment of a GPS device to a car, and the subsequent use of that device to monitor the car's movements, is a search, and installing such a device without a warrant potentially violates the Fourth Amendment. The court held, however, that because Davis did not own or regularly drive the car to which the GPS device was attached, he lacked a sufficient Fourth Amendment interest to challenge the evidence derived from the warrantless search. Partly on this basis, the appellate court affirmed Davis' conviction.

Sixth Circuit Holds Good-Faith Exception to Exclusionary Rule Applies to Warrantless Use of GPS

In *United States v. Fisher*, 745 F.3d 200 (6th Cir. 2014), the Sixth Circuit held that evidence obtained as a result of the warrantless attachment of a GPS tracking device to the defendant's vehicle was admissible under the good-faith exception to the exclusionary rule.

In May of 2010, the U.S. Drug Enforcement Administration and members of a Michigan narcotics enforcement team received information from a confidential informant that Brian Scott Fisher ("Fisher") was involved in the sale of cocaine. The informant revealed that Fisher was planning to drive to Lansing, Michigan to obtain a shipment of drugs. Without obtaining a warrant, police attached a GPS device to Fisher's car. Relying on a combination of GPS monitoring and physical surveillance, the police confirmed that Fisher traveled to Lansing and later

returned home. The next month, the informant told police about another impending drug run Fisher was planning to make to Chicago, Illinois. Again, a combination of GPS monitoring and physical surveillance corroborated the information. Once Fisher returned to Michigan, he was stopped. After a trained narcotics dog alerted to the presence of drugs in the vehicle, police searched the car and discovered three ounces of cocaine.

Police arrested Fisher for possession with intent to deliver cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Following his indictment, Fisher moved to suppress the evidence seized from his vehicle, arguing that the warrantless use of the GPS device violated the Fourth Amendment. The district court denied his motion, and Fisher subsequently entered a guilty plea conditional upon the right to appeal. He was sentenced to 33 months' imprisonment.

While Fisher's appeal was pending, the Supreme Court decided *United States v. Jones*, 132 S. Ct. 945 (2012), which held that the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constituted a search. In light of *Jones*, the parties jointly moved to remand the appeal to the district court, and the Sixth Circuit granted the motion. On remand, Fisher renewed his motion to suppress, and the district court again denied the motion, applying the good-faith exception to the exclusionary rule. As Fisher did not withdraw his conditional guilty plea, the district court resentenced him to time served.

On appeal, the Sixth Circuit considered whether the good-faith exception to the exclusionary rule applies where the police rely on then-binding precedent that upholds the constitutionality of a police practice that is later overruled by the Supreme Court. The court noted that at the time of the GPS surveillance, no circuit authority had indicated that the warrantless use of a GPS tracking device was unconstitutional; three circuits had held that such conduct was lawful; the relevant Supreme Court case law had indicated such a practice was lawful; and Sixth Circuit precedent provided binding authority permitting such conduct. Concluding that suppression in such circumstances would neither deter police misconduct nor improve public safety, the court held that the police acted in good faith and the exclusionary rule did not apply. Accordingly, the appellate court affirmed the district court's denial of Fisher's motion to suppress.

Eleventh Circuit Holds Warrantless Electronic Surveillance of Attorney-Client Conversations at Sheriff's Office Violated Fourth Amendment

In *Gennusa v. Canova*, 748 F.3d 1103 (11th Cir. 2014), the Eleventh Circuit held that the warrantless recording and monitoring of non-custodial, privileged attorney-client conversations in the interview room of a sheriff's office violated the Fourth Amendment.

Joel Studivant ("Studivant") was under investigation for a possible misdemeanor violation of a domestic violence injunction. In the course of the investigation, Detective Thomas Marmo ("Marmo") conducted a non-custodial interview of Studivant in an interview room at the county sheriff's office. Studivant's attorney, Anne Marie Gennusa ("Gennusa") was present during the interview. Unbeknownst to Studivant and Gennusa, everything that took place in the interview room was recorded and monitored by Marmo and his supervisor, Sergeant Brian Canova ("Canova"), through a concealed camera. When the interview began, Studivant agreed to prepare a sworn written statement. Marmo then left the room, and Studivant and Gennusa discussed matters related to the investigation. When Studivant learned that he was going to be arrested, he decided against providing the statement. Marmo returned to the interview room and demanded the written statement, which Studivant and Gennusa refused to give him. Marmo left the room again and, while monitoring Studivant and Gennusa, he and Canova observed Gennusa placing the written statement on the table. Canova instructed Marmo to retrieve the statement. As he came back into the room, Marmo took the statement from underneath Gennusa's hand. He then arrested Studivant for violation of the domestic violence injunction, and later attached the written statement to his arrest report. Studivant ultimately entered into a deferred prosecution agreement, and the criminal charge against him was dismissed.

Studivant and Gennusa filed suit in federal district court against Marmo and Canova, asserting claims under 42 U.S.C. § 1983 for violations of the Fourth Amendment and under 18 U.S.C. § 2520(a) for violations of the Federal Wiretap Act. The district court ruled in part that the electronic surveillance violated the Fourth Amendment and the Federal Wiretap Act. The district court further concluded that Marmo and Canova were not protected by qualified immunity.

On appeal, Marmo and Canova challenged the district court's qualified immunity ruling. The Eleventh Circuit affirmed, reasoning in part that Studivant and Gennusa had an objectively reasonable expectation of privacy for their privileged attorney-client conversations. The court further noted that Studivant was not under arrest at the time of his conversations with Gennusa, his interview with Marmo was non-custodial, and Studivant and Marmo were unaware of the surveillance. The court concluded that the warrantless recording and monitoring of their conversations violated the Fourth Amendment.

The court further opined that existing case law should have made it apparent to a reasonable law enforcement officer that the Fourth Amendment requires a warrant for electronic monitoring and recording of non-custodial privileged communications between attorneys and their clients. Accordingly, the court concluded that Marmo and Canova were not entitled to qualified immunity for their warrantless recording of Studivant and Gennusa's conversations.

Tenth Circuit Clarifies Requirements of Inevitable Discovery Doctrine

In *United States v. Christy*, 739 F.3d 534 (10th Cir. 2014), the Tenth Circuit held that the inevitable discovery doctrine requires the government to establish that it would have successfully obtained a warrant independent of the illegal search, but it does not require evidence that steps were actually taken to obtain a warrant.

Edward Christy ("Christy") met a sixteen-year-old girl ("K.Y.") on a dating website and arranged to transport her from California to his home in New Mexico. Two FBI task force officers investigated K.Y.'s disappearance. Using K.Y.'s telephone records, they found that she received calls from Christy around the time of her disappearance. The officers then obtained Christy's address and other information from his cellular provider. They contacted the county sheriff's office, which dispatched two deputies to Christy's residence to conduct a welfare check on K.Y. One of the deputies peered through a window, saw K.Y. bound with a rope, and observed camera flashes. When backup arrived, the deputies forced entry into the house and arrested Christy. They conducted a protective sweep and found pornographic materials. Christy was arrested and made a number of admissions during his interview by a detective. The detective prepared and obtained warrants to search Christy's residence, cell phone, vehicle, computer, and person. When executing

the warrants, the sheriff's deputies obtained evidence of child pornography and other crimes.

Christy was indicted on several charges. He filed a motion to suppress all evidence obtained as a result of the warrantless search of his house, including his statements to the detective and all evidence obtained pursuant to the search warrants. The district court first granted the motion to suppress. On the government's motion to reconsider, however, the court determined that the evidence was admissible under the inevitable discovery doctrine, and it denied Christy's motion. Christy then pleaded guilty to coercion, in violation of 18 U.S.C. § 2422(a), and possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B), (b)(2), and 2256. He was sentenced to 108 months' imprisonment.

On appeal, Christy challenged the district court's application of the inevitable discovery doctrine. The Tenth Circuit affirmed, noting that under this doctrine, illegally obtained evidence may be admitted if it inevitably would have been discovered by lawful means. The court explained that application of the doctrine requires probable cause plus a chain of events that would have led to a warrant. In this case, even though no steps had been taken to obtain a warrant at the time of the search, the court observed that the FBI officer leading the investigation had strong probable cause and was cross-designated to obtain state and federal search warrants. In addition, the investigating officers had easily obtained similar warrants in the past. The court concluded that the officers would have obtained a warrant and discovered the evidence legally, had the illegal search not occurred, and that therefore the inevitable discovery doctrine applied.

First Circuit Holds Search by Armed IRS Agents Did Not Require Suppression of Evidence Seized

In *United States v. Adams*, 740 F.3d 40 (1st Cir. 2014), the First Circuit held that a search of the defendant's home conducted by armed IRS agents, allegedly in violation of 26 U.S.C. § 7608, did not warrant suppression of the evidence seized.

In March 2004, pursuant to a search warrant, armed IRS agents searched the home of Charles Adams ("Adams") and seized evidence of tax violations. Adams was subsequently indicted on charges of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and tax evasion, in violation of 26 U.S.C. § 7201. During the pretrial proceedings, Adams moved unsuccessfully to suppress the evidence that had

been obtained in the search of his home. He asserted that the search was unlawful because its execution by armed agents was not authorized by 26 U.S.C. § 7608, the statute governing the authority of internal revenue enforcement officers. Specifically, Adams argued that subsection (a) of the statute, which addresses the enforcement of laws pertaining to alcohol, tobacco, and firearms, explicitly allows agents enforcing those laws to carry guns. By contrast, he noted that subsection (b), which addresses the enforcement of other tax laws, contains no similar grant of explicit permission to carry guns. Adams posited that the absence of any such explicit permission in subsection (b) indicated Congress' intent to prohibit IRS agents from carrying firearms when enforcing tax laws other than those pertaining to alcohol, tobacco, and firearms. On this basis, Adams argued that the search of his home was unlawful and that the evidence seized should be suppressed. The district court denied his motion. Adams was convicted of all charges and sentenced to 48 months' imprisonment.

On appeal, the First Circuit affirmed the denial of Adams' motion to suppress. The court assumed without deciding that the agents who executed the search of Adams' home violated 26 U.S.C. § 7608 because they were armed. The court reasoned, however, that a statutory violation does not justify suppression of evidence in the absence of a constitutional violation. In this case, the court concluded that there was no constitutional violation, because the warrant requirement of the Fourth Amendment was fully satisfied, and because the fact that the agents were armed had no impact on the scope of the search or the extent of the evidence seized.

FIFTH AMENDMENT

Seventh Circuit Holds Indictment Was Not Constructively Amended by Admission of Unmentioned Returns

In *United States v. Phillips*, 745 F.3d 829 (7th Cir. 2014), the Seventh Circuit held that the defendant's indictment was not constructively amended by the admission of tax returns that were not specifically mentioned in the indictment.

Betty Phillips ("Phillips") and her husband Wayne submitted a total of four fraudulent tax returns for 2008 and 2009 on behalf of purported trusts in each of their names. The returns falsely claimed that the trusts had overpaid federal taxes and were entitled to more than \$800,000 in refunds. In response to one of the trusts'

returns, the IRS issued a refund check for about \$350,000, which the couple cashed.

Phillips and her husband were indicted on charges of conspiracy to defraud the government in violation of 18 U.S.C. § 286, and presenting a false claim in violation of 18 U.S.C. § 287. Although the indictment specifically mentioned only two of the trusts' returns, the government introduced all four returns during trial and argued that the conspiracy included all four returns. Phillips was convicted on both charges, sentenced to 41 months' imprisonment, and ordered to pay (jointly with her husband) \$352,528 in restitution.

On appeal, Phillips argued that the government violated the Grand Jury Clause of the Fifth Amendment by introducing evidence that invited the jury to convict her on different bases than those set forth in the indictment. Reviewing for plain error, the Seventh Circuit disagreed. The court noted that the indictment described a conspiracy to "submit false, fictitious, and fraudulent claims" that lasted from March 2009 to April 2010, a time period that included all four returns. The court further remarked that the unmentioned returns merely supplied "more technical details" about the mechanics and depth of the conspiracy. Accordingly, the court rejected Phillips' argument that the government constructively amended the indictment. Based in part on this decision, the court affirmed Phillips' conviction.

SIXTH AMENDMENT

Fourth Circuit Holds Defendant Failed to Establish Ineffective Assistance of Counsel

In *United States v. Dehlinger*, 740 F.3d 315 (4th Cir. 2014), the Fourth Circuit held that the defendant, a participant in a fraudulent tax scheme, failed to establish that his lawyer had provided ineffective representation as the result of a conflict of interest.

In 1999, Dr. Erik Dehlinger ("Dehlinger"), an emergency room doctor, began using tax programs marketed by Anderson's Ark and Associates ("AAA") to avoid current income tax liability and "recapture" taxes paid in the previous two years. By using the AAA programs and having his tax returns prepared by AAA employees, Dehlinger avoided \$363,207 in tax liability and obtained annual refunds on his income taxes.

Dehlinger was indicted on tax fraud charges in August 2006. He retained Scott Engelhard ("Engelhard") as his trial counsel, based largely on Engelhard's relative

success as court-appointed counsel for Tara LaGrand (“LaGrand”), one of the AAA employees who had prepared Dehlinger’s returns. Dehlinger asked Engelhard to call three AAA planners, including LaGrand, to testify at his trial, but Engelhard advised him that their testimony would be harmful rather than helpful. Dehlinger was convicted of three counts of filing false income tax returns and sentenced to 42 months’ imprisonment. He appealed his conviction and sentence, and the Fourth Circuit affirmed. Dehlinger then moved for habeas relief, asserting that Engelhard had a prejudicial conflict of interest in violation of Dehlinger’s Sixth Amendment rights. Dehlinger contended that Engelhard’s decision not to call the AAA planners as witnesses was driven by a conflict of interest arising from Engelhard’s prior representation of them. The district court denied Dehlinger habeas relief.

On appeal, Dehlinger again contended that Engelhard had provided ineffective representation. The Fourth Circuit disagreed, noting that to establish a Sixth Amendment ineffective assistance claim, Dehlinger would have to establish that an actual conflict of interest had adversely affected the lawyer’s performance. Based on its review of the record, the court concluded that Engelhard’s decision to refrain from calling the AAA planners was based on objectively reasonable strategic considerations. Accordingly, the appellate court affirmed the judgment of the district court denying Dehlinger habeas relief.

TITLE 26

Seventh Circuit Limits Defendant’s Ability to Negate Willfulness with Evidence of Remedial Actions

In *United States v. Beavers*, No. 13-3198, 2014 WL 2925436 (7th Cir. June 30, 2014), the Seventh Circuit held that the district court properly conditioned the admission of evidence of the defendant’s amended returns and other remedial actions upon a showing that these actions had a connection to the defendant’s state of mind at the time he filed his incorrect returns.

William Beavers (“Beavers”), a former Chicago alderman and Cook County Commissioner, filed federal tax returns from 2005 to 2008 that failed to report a number of income items, including 100 checks totaling \$226,300 that he wrote to himself from his three campaign-committee accounts and only partly repaid. In April 2009, Beavers was informed by federal agents that he was under grand jury investigation. One week after the agents contacted him, Beavers filed amended

tax returns for 2007 and 2008, reporting nearly \$20,000 in additional income for each year. The following month, Beavers wrote a \$68,000 check, drawn on the account of one of his campaign funds, to repay another campaign fund. Subsequently, Beavers filed a second amended return for 2008 in which he reported an additional \$11,000 in income.

In 2012, the government charged Beavers with three counts of violating 26 U.S.C. § 7206(1) (willfully making a materially false statement on a tax return) and one count of violating 26 U.S.C. § 7212(a) (corruptly obstructing the IRS). At trial, Beavers argued that the transfers from his campaign committees were loans, not income. Beavers attempted to present evidence of his amended tax returns and payments to reimburse his campaign committees, and the government moved in limine to exclude this evidence. Relying on Federal Rules of Evidence 401 and 403, the government argued that Beavers’ actions were not probative of his state of mind at the time he filed the original returns, and that the jury would be confused by the admission of evidence of remedial actions. The district court ruled that the evidence would be admissible only if Beavers could establish that each remedial action was relevant to his state of mind at the time he filed the original tax returns. Because Beavers elected not to testify and failed to establish the required evidentiary foundation, the evidence was not presented at trial. The jury convicted Beavers on all counts and sentenced him to six months’ imprisonment.

On appeal, the Seventh Circuit upheld the district court’s ruling as to the admissibility of evidence of Beavers’ conduct once he knew he was under investigation. The court of appeals explained that this evidence had little bearing on whether Beavers considered the transfers to be loans at the time he took the funds. Based in part on this holding, the Seventh Circuit affirmed Beavers’ conviction.

Fifth Circuit Holds Jury Instruction Regarding Good Faith Misunderstanding of Tax Law was Erroneous

In *United States v. Montgomery*, 747 F.3d 303 (5th Cir. 2014), the Fifth Circuit held that the district court’s willfulness instruction was erroneous because it did not advise the jury that a defendant’s good-faith misunderstanding of tax law may be objectively unreasonable.

David and Bridget Montgomery (collectively, the “Montgomerys”), husband and wife, owned and

operated Montgomery's Contracting LLC, a sole proprietorship that performed construction work. For tax years 2003-2005, the Montgomerys underreported the gross receipts of Montgomery's Contracting on Schedule C of their joint federal income tax return by a total of \$2.1 million. They used a variety of means to conceal their business receipts, including transferring funds among fourteen separate bank accounts.

The Montgomerys were charged with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and two counts of filing a false federal income tax return in violation of 26 U.S.C. § 7206(1). At trial, the Montgomerys did not challenge the \$2.1 million of unreported income, but instead argued that they had not acted willfully because they did not know their actions violated the tax law. When defining the element of willfulness, the district court instructed the jury that it must acquit if the Montgomerys acted in good faith, but it did not say that the Montgomerys' beliefs could be "unreasonable or irrational," as both the government and defense counsel requested. The jury returned a verdict of guilty on all counts as to each defendant, and the district court sentenced each of them to 41 months' imprisonment for the conspiracy charge and 36 months' imprisonment for each of the false return charges, to run concurrently.

On appeal, the Montgomerys argued in part that the district court incorrectly instructed the jury on the willfulness element of the charged tax offenses. The Fifth Circuit agreed, on the grounds that the district court failed to advise the jury that a defendant's good-faith misunderstanding of tax law may be objectively unreasonable. Nevertheless, the court concluded that the erroneous jury instruction was harmless because the evidence showing that the Montgomerys intentionally underreported their income was so overwhelming that the error could not have contributed to the jury's decision to convict. Accordingly, the court affirmed the Montgomerys' convictions.

Tenth Circuit Holds Jury Instructions on Section 7212(a) Need Not Include Willfulness Requirement

In *United States v. Williamson*, 746 F.3d 987 (10th Cir. 2014), the Tenth Circuit held that the district court was not required to include a mens rea requirement of willfulness in its jury instructions on 26 U.S.C. § 7212(a).

John S. Williamson ("Williamson") owed back taxes and failed to cooperate with the IRS' collection efforts. In May 2008 the IRS levied his wife's wages to collect

his back taxes. Williamson returned the notice of the levy, enclosing an affidavit explaining why he did not need to pay income taxes. In June 2008, Williamson sent an invoice for \$909,067,650.00 to two IRS agents who had worked on the matter. The invoice listed the value of real and personal property allegedly seized by the IRS, added damages for various alleged torts, and then trebled the total "for racketeering." In December 2008, Williamson and his wife filed a claim of lien against the agents' real and personal property for the same amount as the invoice.

Williamson and his wife were indicted on two counts: (1) corruptly endeavoring to impede the due administration of the Internal Revenue laws by filing a false and fraudulent claim of lien, in violation of 26 U.S.C. § 7212(a); and (2) filing a false lien and encumbrance against the real and personal property of the IRS agents on account of the performance of their official duties, in violation of 18 U.S.C. § 1521. Williamson's wife pleaded guilty to the second count in return for dismissal of the first count against her. Williamson proceeded to trial, was found guilty on both charges, and was sentenced to four months' imprisonment.

On appeal, Williamson challenged the district court's jury instructions on § 7212(a), on the grounds that they did not inform the jury that he could be guilty only if he intentionally violated a known legal duty. The court interpreted Williamson's argument – which was raised for the first time on appeal and therefore reviewed under the plain error standard – to mean that the instructions did not impose the proper mens rea requirement. The court noted that the wording Williamson proposed was the Supreme Court's standard for willfulness under *Cheek v. United States*, 498 U.S. 192 (1991). The court remarked that rather than use the term "willfully," § 7212(a) used "corruptly," which the district court's instructions had properly defined as acting "with the intent to gain an unlawful advantage or benefit either for oneself or for another." Given that the district court's jury instructions were in common use and that Williamson had not cited any judicial decision holding them improper in a § 7212(a) prosecution, the court held that Williamson failed to establish they constituted plain error. Based in part on this ruling, the court affirmed Williamson's convictions.

TITLE 18

Ninth Circuit Holds Mail Fraud Statute Applies to Mailings Sent to Avoid Detection or Responsibility for Scheme

In *United States v. Tanke*, 743 F.3d 1296 (9th Cir. 2014), the Ninth Circuit affirmed the defendant's mail fraud conviction for a letter he mailed to facilitate concealment of his embezzlement scheme. The court's decision to uphold the conviction was based on its determination that the mailing fell within the scope of the scheme as devised by the defendant, rather than occurring after the scheme's completion.

Thomas Tanke ("Tanke") embezzled more than \$192,000 from two construction businesses, Azteca Construction Company ("Azteca") and Construction Equipment Rental and Service ("CERS"), which were owned by Rafael Martin ("Martin") and his family. At the time of the embezzlement, Tanke was employed by Azteca and also maintained his own consulting business, Cedar Creek Associates ("Cedar Creek"). Tanke caused the issuance of checks from Azteca for his personal expenses, diverted checks payable to CERS, Martin, and Azteca into his Cedar Creek bank account, and falsified records to conceal the embezzlement. After Tanke left Azteca in July 2004, he exchanged a number of emails with Martin, who questioned him about certain irregularities.

On September 16, 2004, Tanke mailed a letter from Cedar Creek to Martin. This mailing stated that Azteca and CERS had previously paid some invoices due to Cedar Creek and alleged that Azteca had provided false information to Cedar Creek's bank, which resulted in reversal of these payments. The letter enclosed an invoice from Cedar Creek that requested payment for the previous invoices as well as interest, totaling \$159,990.95. Martin rejected the new invoice and stated that Azteca had never paid any of the previous fictitious invoices. Martin later testified at trial that Cedar Creek did not perform the services reflected on the invoice.

In 2009, a grand jury indicted Tanke on five counts of bank fraud, in violation of 18 U.S.C. § 1344, and two counts of mail fraud, in violation of 18 U.S.C. § 1341. The second mail fraud count was for the September 16, 2004 mailing. A jury found Tanke guilty on all counts, and the district court sentenced him to 70 months' imprisonment.

On appeal, Tanke contended in part that there was insufficient evidence to support his conviction on the second mail fraud count. He argued that the September 16, 2004 letter was not mailed for the purpose of executing his fraudulent scheme, as 18 U.S.C. § 1341 requires. The Ninth Circuit disagreed, holding that mailings designed to avoid detection or responsibility for a fraudulent scheme fall within the mail fraud statute when they are sent before the scheme is completed. The court further held that the timing of a scheme's completion should be determined by the scope of the scheme as devised by the perpetrator. In this case, the court opined that a reasonable jury could have found that the September 16 letter was part of a series of false and misleading financial transactions and statements that comprised the embezzlement scheme, rather than a post-completion cover-up.

IDENTITY THEFT

Tenth Circuit Holds Signature Is a Means of Identification

In *United States v. Porter*, 745 F.3d 1035 (10th Cir. 2014), the Tenth Circuit held that a signature is a "means of identification" for purposes of the aggravated identity theft statute, 18 U.S.C. § 1028A.

Gloria Porter ("Porter") served as secretary/treasurer of the Armed Material Command ("AMC") Council of the National Federation of Federal Employees ("NFFE"), an independent federal union representing approximately 115,000 federal workers. While serving as an NFFE officer, Porter diverted funds from the AMC Council's bank account for her personal use and created fraudulent bank statements that she sent to other NFFE officers. During this time, Porter also forged the signature of the AMC Council president on a financial report filed with the Department of Labor. Porter was charged with 105 counts of wire fraud in violation of 18 U.S.C. § 1343, one count of mail fraud in violation of 18 U.S.C. § 1341, and one count of aggravated identity theft in violation of 18 U.S.C. § 1028A. She was convicted on all counts.

On appeal, Porter argued in part that the district court erred by instructing the jury that a signature is a "means of identification" for purposes of the aggravated identity theft statute. The statute punishes the use of another person's "means of identification" in relation to certain felony violations. In this case, the alleged use of a "means of identification" was Porter's forgery of the AMC Council president's signature. The Tenth Circuit noted that the applicable definition of a "means of identification," which is found under 18 U.S.C.

§ 1028(d)(7), includes “any name” that may be used to identify a specific individual. The court held that a signature is a “means of identification” under § 1028(d)(7) because it is a form of a name. After rejecting each of Porter’s arguments to the contrary, the appellate court concluded that the district court did not err in its jury instruction. Based in part on this determination, the Tenth Circuit affirmed Porter’s convictions.

STRUCTURING

Seventh Circuit Holds District Court Erred in Allowing Government to Cross-Examine Defendant about Financial Filings

In *United States v. Abair*, 746 F.3d 260 (7th Cir. 2014), a case involving allegations of structuring, the Seventh Circuit held that the district court erred by allowing the prosecutor to cross-examine the defendant about certain tax and financial aid forms for the purpose of undermining her credibility.

Yulia Abair (“Abair”) emigrated to the United States from Russia in 2005 and married an American citizen. In 2010, after being divorced, she sold an apartment she owned in Moscow and deposited the proceeds into her account with Citibank Moscow. The next year, she signed a contract to buy a home for cash in South Bend, Indiana. When Abair asked Citibank Moscow to transfer the purchase price from her account, the bank refused, apparently because her Indiana bank account was in her married name and the Citibank Moscow account used her maiden name. In order to obtain the money in time for the closing, Abair began withdrawing it from Citibank ATMs in Indiana. Over a period of two weeks, she repeatedly withdrew the maximum daily amount of cash (approximately \$6400). Over the same period, she made eight deposits at her local bank in amounts ranging from \$6400 to \$9800. Because of a holiday weekend, her last two deposits were posted together, resulting in a total deposit that exceeded \$10,000. This triggered the filing of a currency transaction report and led to a criminal investigation of Abair. She was charged with structuring financial transactions for purposes of evading the reporting requirements, in violation of 31 U.S.C. § 5324(a)(3).

At trial, over the objections of Abair’s attorney, the prosecutor was permitted to attack Abair’s truthfulness under Federal Rule of Evidence (“FRE”) 608(b) by questioning her repeatedly about alleged false statements on her 2008 joint income tax return and her

student financial aid applications. Abair, who testified to having difficulty conducting complex conversations in English, was convicted on all counts, sentenced to two years of probation, and ordered to sell her new home and forfeit to the government the proceeds of the sale, amounting to \$67,060.

On appeal, Abair argued that the district court abused its discretion in allowing the questions about her financial filings. The Seventh Circuit agreed, noting that FRE 608(b) requires that a defendant’s prior conduct be sufficiently relevant to truthfulness before it can be the subject of cross-examination. In this case, the court concluded that the government failed to establish a good-faith basis to believe the filings were probative of Abair’s character for truthfulness. Specifically, the court opined that the government failed to prove Abair misrepresented her business expenses on the tax return, in light of testimony from Abair’s ex-husband that he was the one who had filled out the disputed expense information. In addition, the court observed that the government had not established that Abair affirmatively reported having no assets on her financial aid applications, given Abair’s testimony and other indications that she simply exercised her option to skip inapplicable questions about her assets. The court further held that the district court’s error was not harmless because the trial’s outcome depended on Abair’s credibility.

Accordingly, the appellate court reversed Abair’s conviction and sentence and remanded the case to the district court for a new trial.

PRIVILEGE

Third Circuit Holds Attorney Was Properly Compelled to Testify before Grand Jury

In *In re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. 2014), the Third Circuit upheld an order compelling an attorney to testify before a grand jury that was investigating his former client, on the grounds that the crime-fraud exception to the attorney-client privilege and the work product privilege applied.

The case involved a grand jury investigation of a consulting firm and its managing director. The firm was retained by five companies to provide assistance in obtaining financing for oil and gas projects. In 2008 and 2009, the firm made payments totaling more than \$3.5 million to the sister of a banker at a foreign-owned bank. The banker was responsible for approving the

financing sought by the firm's clients. In April 2008, the firm's managing director consulted an attorney about one of the proposed payments. The attorney asked the managing director whether the bank was a governmental entity and whether the banker was a government official. The attorney advised the managing director not to make the payment and gave him a copy of the Foreign Corrupt Practices Act ("FCPA"), but the managing director decided to proceed with the payment. Subsequently, the managing director and the attorney ended their relationship.

The consulting firm and its managing director were targeted by a grand jury investigation that sought to determine whether they had made corrupt payments in violation of the FCPA. The grand jury served a subpoena on the attorney. The consulting firm and its managing director sought to quash the subpoena by asserting the attorney-client privilege and work product protection. After questioning the attorney in camera, the district court concluded that the crime-fraud exception applied and compelled the attorney to testify.

On appeal, the Third Circuit held that the district court did not abuse its discretion in finding that the crime-fraud exception applied. The court explained that, for the exception to apply, the client must intend to commit a crime or fraud at the time he consults the attorney, and must use the advice in furtherance of the alleged crime or fraud. The court noted that the managing director's pre-existing intent could be inferred from his statement to the attorney that he was going to make the payment in spite of the attorney's advice. The court further reasoned that the attorney's questions to the managing director implied that a violation of the FCPA depended on the payment being made to a government official, which could have led to the idea of routing the payment through the banker's sister. The court concluded that the crime-fraud exception applied and affirmed the district court's order compelling the attorney to testify.

FREEDOM OF INFORMATION ACT

D.C. Circuit Holds Information about Cases Ending in Acquittal or Dismissal Is Exempt from Disclosure under FOIA

In *American Civil Liberties Union v. U.S. Dep't of Justice*, 750 F.3d 927 (D.C. Cir. 2014), the D.C. Circuit held that the law enforcement exception to the Freedom of Information Act ("FOIA") applies to docket information about cases ending in acquittal or dismissal.

The American Civil Liberties Union ("ACLU") learned that federal law enforcement agencies were obtaining location data from cell phone companies without first obtaining a warrant. The ACLU filed FOIA requests with these agencies, seeking, among other things, records related to the case name, docket number, and court of all criminal prosecutions of individuals who were tracked using mobile location data, where the government did not first secure a warrant for the data. To compel production of these records, the ACLU then sued the Department of Justice ("DOJ").

In response, DOJ identified 229 prosecutions in which a judge had, since September 2001, granted the government's application to obtain cell phone location data without making a probable cause determination. DOJ refused to turn this list of cases over to the ACLU, claiming that the information fell within FOIA Exemption 7(C), which provides that an agency may withhold "records or information compiled for law enforcement purposes" if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7). The district court directed DOJ to disclose the requested information regarding prosecutions that resulted in conviction but permitted DOJ to withhold the information regarding cases ending in acquittal or dismissal.

Both sides appealed. The D.C. Circuit agreed with the district court that FOIA required DOJ to disclose docket information concerning prosecutions ending in conviction. The court left open the question whether DOJ was also required to disclose information concerning cases ending in acquittal or dismissal. The court of appeals remanded the case for the district court to determine whether any of the docket numbers actually referred to cases ending in acquittal or dismissal. Following the remand, DOJ identified 214 prosecutions that had resulted in convictions or public guilty pleas and released the docket information for these cases. This left a total of fifteen prosecutions that were responsive to the ACLU's request and had ended in dismissals or acquittals, or had been sealed. Because the ACLU did not challenge DOJ's authority to withhold the information regarding sealed cases, only six cases remained at issue, four of which ended in dismissal and two of which ended in acquittal. The district court granted DOJ's motion for summary judgment, and the ACLU appealed.

On appeal, the D.C. Circuit concluded that defendants whose prosecutions ended in acquittal or dismissal have a stronger privacy interest in controlling information concerning those prosecutions than defendants who

were convicted, because the public may assume that an individual who is charged with a crime is guilty regardless of how the case is resolved. The court determined that release of the docket information sought by the ACLU would substantially infringe this privacy interest. Holding that DOJ had properly withheld this information, the appellate court affirmed the district court's grant of summary judgment to DOJ.

PLEA AGREEMENTS

Eleventh Circuit Affirms Conviction Despite Judge's Participation in Plea Discussions

In *United States v. Davila*, 749 F.3d 982 (11th Cir. 2014), the Eleventh Circuit affirmed the defendant's conviction despite a magistrate judge's improper participation in plea discussions.

In May 2009, a federal grand jury indicted Anthony Davila ("Davila"), alleging that he caused the filing of more than 120 false income tax returns in other individuals' names and collected more than \$423,000 in fraudulent refunds. At his arraignment, Davila pleaded not guilty to all charges. Subsequently, at a hearing to address Davila's complaints about his court-appointed attorney, the magistrate judge urged Davila to plead guilty. On May 17, 2010, Davila entered a guilty plea in district court, pleading to one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 286. At the change-of-plea hearing, Davila stated under oath that he had not been forced or pressured to plead guilty. The district court accepted Davila's plea. Subsequently, Davila filed a pro se motion to vacate his guilty plea and dismiss the indictment. At a district court hearing on his motion, no mention was made of the magistrate judge's comments regarding the plea. The court held that Davila's plea was knowing and voluntary, and denied Davila's motion. The court then sentenced Davila to 115 months' imprisonment.

Davila appealed his conviction and sentence to the Eleventh Circuit, which vacated his plea. The Supreme Court granted certiorari and reversed, holding that judicial participation in plea discussions does not in itself demand automatic vacatur. The Supreme Court remanded the case to the Eleventh Circuit to determine whether Davila was prejudiced by the magistrate judge's comments.

On remand, the Eleventh Circuit determined that the magistrate judge's comments constituted plain error. The court noted, however, that to obtain reversal Davila

needed to show a reasonable probability that, but for the error, he would not have entered the plea. After examining a number of factors, the court held that it was at least equally plausible that Davila chose to plead guilty in order to shorten the duration of his sentence as it was that he did so because of the magistrate judge's comments. Accordingly, the court of appeals affirmed Davila's conviction.

Second Circuit Holds Guilty Plea Waives Territorial Nexus Requirement

In *United States v. Yousef*, 750 F.3d 254 (2d Cir. 2014), the Second Circuit held that, where a territorial nexus requirement is not an element of the charged offense, the requirement may be waived by a defendant's guilty plea.

In July 2008, confidential sources working with the U.S. Drug Enforcement Administration reported that Jamal Yousef ("Yousef") was directing an arms-trafficking organization from inside a Honduran prison, where he was incarcerated on unrelated charges. In an undercover operation, Yousef and his associates agreed to exchange military-grade weapons for a large quantity of cocaine. While Yousef was still imprisoned in Honduras, the U.S. government obtained several superseding indictments against him in the Southern District of New York. After the third indictment was returned, the district court issued a warrant for Yousef's arrest. Soon after, following Yousef's conditional release from prison, he was detained and transported from Honduras to New York.

Yousef moved to dismiss the indictment on the grounds that it failed to allege a sufficient nexus between him and the U.S. The district court denied the motion, basing its decision in part on recorded conversations which indicated that the weapons exchanged for narcotics were taken from a U.S. military arsenal in Iraq. Yousef later filed a motion for reconsideration, claiming that discovery had revealed the prosecutors' knowledge that the weapons allegedly stolen from a U.S. arsenal did not exist. The district court denied the motion for reconsideration, and the government obtained a fourth superseding indictment against Yousef, charging him with one count of conspiracy to engage in narco-terrorism and one count of conspiracy to provide material support to a foreign terrorist organization. On May 4, 2012, Yousef entered an unconditional plea of guilty to one count of conspiring to provide material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. He was sentenced to twelve years' imprisonment.

On appeal, the Second Circuit acknowledged that in order for a federal criminal statute to apply extraterritorially to a defendant without violating the Due Process Clause, there must be a sufficient nexus between the defendant's alleged conduct and the U.S. The court of appeals further noted, however, that a defendant's guilty plea generally waives all challenges to the prosecution except those related to the district court's subject matter jurisdiction. In this case, the alleged absence of a territorial nexus did not implicate the district court's jurisdiction, because a nexus requirement was not an element of the charged offense. The court of appeals concluded that, by pleading guilty, Yousef had waived the territorial nexus requirement.

SENTENCING

Tenth Circuit Holds Defendant's Insanity Defense Precluded an Acceptance-of-Responsibility Adjustment

In *United States v. Herriman*, 739 F.3d 1250 (10th Cir. 2014), the Tenth Circuit held that the district court did not abuse its discretion in denying the defendant, who asserted an insanity defense, a downward adjustment to his sentence for acceptance of responsibility.

After planting an explosive device near a gas pipeline and then seeing the bomb reported on the news, Daniel Herriman ("Herriman") voluntarily turned himself in to the authorities and confessed. The government charged him with attempting to destroy or damage property by means of an explosive, in violation of 18 U.S.C. § 844(i), and illegally making a destructive device, in violation of 26 U.S.C. §§ 5822, 5861(f), and 5871. At trial, Herriman asserted an insanity defense, claiming he had unknowingly planted the bomb at the behest of imaginary voices that spoke to him. He argued that when he heard the news story about the bombing, he became lucid and immediately called the police and took responsibility for his actions, volunteering every detail relating to the bomb and thus sparing the authorities from having to conduct any investigation. Rejecting Herriman's defense, the jury convicted him of both charged offenses. At sentencing, the district court declined to apply the acceptance-of-responsibility adjustment under § 3E1.1 of the U.S. Sentencing Guidelines ("U.S.S.G.") and sentenced Herriman to 63 months' imprisonment.

On appeal, the Tenth Circuit acknowledged that under Application Note 2 to U.S.S.G. § 3E1.1(a), there are rare situations in which a defendant who goes to trial may demonstrate an acceptance of responsibility by

showing that he only disputed purely legal questions and did not contest material facts relating to his guilt. For the adjustment to apply in this case, the parties would have to have been in agreement that Herriman was delusional at the time he placed the bomb, and the only issue in dispute would have been whether Herriman lacked the necessary intent to commit the crime or was not guilty by reason of insanity. The court determined, however, that the factual issue of whether Herriman was delusional at the time of the offense was disputed by the parties at trial. Accordingly, the court held that Herriman did not qualify for a § 3E1.1 downward adjustment, and it affirmed Herriman's sentence.

Eleventh Circuit Holds Government Failed to Prove Willful Blindness for Purposes of Sentencing Enhancement

In *United States v. Mathauda*, 740 F.3d 565 (11th Cir. 2014), the Eleventh Circuit held that the district court erred in applying a sentencing enhancement for the defendant's violation of a prior judicial order, on the grounds that the government failed to prove the defendant was willfully blind to the order.

Sirtaj "Tosh" Mathauda ("Mathauda") and his co-conspirators operated a series of companies that sold fraudulent business opportunities to U.S. residents. The sales were made over the phone from a call room in Costa Rica. Each company would operate for a few months, take money from would-be franchisees, and then cease operations, leaving victims unable to recover their funds.

In 2005, the Federal Trade Commission ("FTC") brought a civil action against Mathauda, who hired an attorney to represent him while he continued to operate his conspiracy. Unbeknownst to Mathauda, his attorney failed to respond to the FTC complaint. A default judgment was entered in 2006, pursuant to which Mathauda was ordered to cease his fraudulent activity. The final court order entering the default judgment was never served on Mathauda, and he continued to conduct his fraudulent scheme. In March 2009, he was charged with mail fraud, wire fraud, and conspiracy. He was convicted and sentenced to 252 months' imprisonment. On appeal, Mathauda objected to the district court's imposition of a two-level sentencing enhancement based on his violation of a prior judicial order under U.S.S.G. § 2B1.1(b)(8)(C). He argued that the two-level enhancement was erroneous because he never received the court's order. The government argued that Mathauda should not be able to avoid the consequences of violating the terms of the default judgment issued

against him by remaining willfully blind to the outcome of a case of which he was aware.

The Eleventh Circuit noted that there are two predominant formulations of willful blindness: (1) when a defendant purposely contrives to avoid learning all the facts; and (2) when a defendant is aware of the high probability of a fact in dispute and consciously avoids confirming that fact. The court concluded that the government failed to prove by a preponderance of the evidence that Mathauda was willfully blind to the court order under either of these formulations. Holding that the district court erred in applying the two-level enhancement, the appellate court vacated Mathauda's sentence and remanded for resentencing.

Ninth Circuit Holds False Testimony at Bond Revocation Hearing May Warrant Obstruction of Justice Enhancement

In *United States v. Taylor*, 749 F.3d 842 (9th Cir. 2014), the Ninth Circuit held that a defendant who willfully provides materially false testimony at a bond revocation hearing may be subject to an enhancement for obstruction of justice under U.S.S.G. § 3C1.1.

Terazze Taylor ("Taylor") was arrested for submitting fraudulent travel vouchers to the Veteran's Administration ("VA"). After his arrest, Taylor was released on a pretrial appearance bond. Shortly thereafter he was charged with domestic violence for assaulting his ex-girlfriend. The state prosecutor dismissed the charges, but Taylor was arrested for violating a condition of his appearance bond, prompting a pretrial bond revocation hearing. At the hearing, contrary to independent witness testimony, both Taylor and the alleged victim denied that Taylor had assaulted her. At the conclusion of the hearing, the magistrate judge found by a preponderance of the evidence that Taylor had committed the assault. Taylor ultimately pleaded guilty to defrauding the VA. At sentencing, the district court imposed a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1, based on Taylor's false and misleading testimony at the bond revocation hearing.

On appeal, Taylor argued that the obstruction of justice enhancement was unwarranted because his statements at the hearing were not related to his offense of conviction, or to any relevant conduct. The Ninth Circuit disagreed, explaining that a bond revocation hearing is part of the prosecution of a federal offense, and therefore Taylor's false testimony during the hearing was related to his prosecution for defrauding the VA. The court also determined that Taylor had

provided materially false testimony to the magistrate judge, as required under § 3C1.1, because Taylor's testimony, if believed, could have affected his custodial status pending trial. Concluding that the district court had made sufficient findings to impose the obstruction of justice enhancement, the appellate court affirmed Taylor's sentence.

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