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MONEY LAUNDERING

“Proceeds” Means “Profits” in the Federal Money Laundering Statute

Note: This case summary appeared in the previous edition of the Criminal Tax Bulletin. It is reproduced here to provide context for the cases that follow.

In *United States v. Santos*, 128 S.Ct. 2020 (2008), a case involving an illegal gambling business under 18 U.S.C.

§ 1955, the Supreme Court held, in a narrow 5-4 decision, that the term “proceeds” as used in the federal money-laundering statute (18 U.S.C. § 1956(a)(1)) means “profits,” not “receipts.” The five votes in favor of the judgment consisted of a four-justice plurality and a concurring opinion written by Justice Stevens, which disagreed with the plurality’s rationale but agreed with the holding.

Efrain Santos (“Santos”) operated an illegal lottery from the 1970s until 1994. He employed a number of “runners,” who gathered bets from gamblers and delivered them to “collectors.” The collectors, including Santos’ codefendant Benedicto Diaz (“Diaz”), then delivered the money to Santos, who used some of it to pay the collectors’ salaries and some to pay the winners.

At trial, Santos was convicted of conspiracy to launder money and money laundering, among other charges, and Diaz pleaded guilty to conspiracy to launder money. The Seventh Circuit affirmed their convictions and sentences.

Santos and Diaz subsequently moved to vacate under 28 U.S.C. § 2255. Citing *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), which held that the term “proceeds” in the money-laundering statute means “profits,” the district court vacated the money-laundering convictions. The Seventh Circuit affirmed.

The Supreme Court granted certiorari and affirmed the Seventh Circuit’s decision. The plurality found that the money-laundering statute is ambiguous because it fails to define the term “proceeds.” Invoking the rule of lenity, the plurality reasoned that the term “proceeds” in 18 U.S.C.

§ 1956 should be interpreted to mean “profits,” because such an interpretation would be more “defendant-friendly.” Further, the plurality argued that, if “proceeds” were interpreted to mean “receipts,” a “merger problem” would result, because most defendants found guilty of operating illegal lotteries would also be guilty of money laundering. Finding that none of the payments at issue involved the lottery’s profits, the plurality concluded the convictions should be vacated.

In his concurring opinion, Justice Stevens proposed that the ambiguity of the money-laundering statute be resolved on a case-by-case basis, depending on the nature of the underlying illegal activity. In this particular case, Stevens agreed that “proceeds” should be interpreted to mean “profits,” because the legislative history was silent on the issue and because a merger problem would otherwise result.

First Circuit Remands Case to District Court to Determine Whether *Santos* Ruling Affects Forfeiture Determination

In *United States v. Levesque*, 546 F.3d 78 (1st Cir. 2008), Tammy Levesque (“Levesque”) appealed a \$3,068,000 money judgment forfeiture awarded to the government following her guilty plea to conspiracy to distribute marijuana. Levesque argued in part that the amount of the forfeiture was improperly calculated in light of the Supreme Court’s decision in *United States v. Santos*, 128 S.Ct. 2020 (2008). The First Circuit remanded the case to the district court to determine the effect, if any, of the *Santos* ruling on the forfeiture determination.

Levesque was arrested for possession of ninety-four pounds of marijuana in her pickup truck and ultimately pled guilty to conspiracy to distribute marijuana. In her plea, she agreed to waive all claims to any property subject to forfeiture and also agreed to a money judgment in an amount to be determined by the court. She was sentenced to twenty-three months’ imprisonment and was ordered to forfeit \$3,068,000.

In determining the amount of Levesque's forfeiture under the federal drug forfeiture statute, 21 U.S.C. § 853(a), the district court interpreted the term "proceeds" as used in the statute to mean gross receipts rather than net profits. The court thus calculated the forfeiture amount according to the gross retail value of the marijuana that Levesque transported and declined to take into account the expenses associated with her distribution runs.

On appeal, Levesque argued that, in light of the Supreme Court's decision in *Santos*, which was issued approximately six months after the district court's preliminary order of forfeiture, the district court erred in calculating the forfeiture amount. Levesque argued that *Santos* required the court to determine the amount of forfeitable "proceeds" according to profits rather than receipts.

In its opinion, the First Circuit noted that, in *Santos*, the Supreme Court interpreted the term "proceeds" in the federal money-laundering statute to mean profits rather than receipts, "at least when the predicate offense is an illegal lottery operation." 546 F.3d at 82. The circuit court did not decide whether the *Santos* ruling required a similar interpretation of "proceeds" in 21 U.S.C. § 853. Rather, because the district court had not had the opportunity to consider this argument, the circuit court asked the parties whether they would consent to a remand. Both Levesque and the government gave their consent, and the circuit court accordingly remanded the case to the district court for consideration of whether and to what extent *Santos* should affect the forfeiture determination.

District Court Finds *Santos* Holding Limited to Cases Involving Illegal Gambling

In *United States v. Orosco*, 575 F.Supp.2d 1214 (D. Colo. 2008), Evaristo Orosco ("Orosco") moved to dismiss one count of the superseding indictment against him, in which the government alleged he had laundered drug trafficking proceeds but did not specifically allege that the laundered funds constituted profits of the drug sales. As support for his motion, Orosco cited the Supreme Court's holding in *United States v. Santos*, 128 S.Ct. 2020 (2008). The United States District Court for the District of Colorado found that *Santos* did not apply and denied the motion.

Orosco and his co-defendants were indicted for drug trafficking and money laundering. Immediately following the Supreme Court's decision in *Santos*, Orosco filed a motion to dismiss the money laundering charges, on the grounds that *Santos* required the government to allege and show indicia of proof that the laundered funds constituted profits of the drug sales. The district court found that *Santos* was not binding with respect to the meaning of "proceeds" in the money laundering statute where the underlying specified unlawful activity ("SUA") was an offense other than running an illegal gambling operation. Accordingly, the court denied Orosco's motion to dismiss.

In its opinion, the district court agreed with the government that "(1) *Santos* provided a circumscribed reading of the term 'proceeds' in the money laundering statute only when the underlying SUA is running an illegal gambling operation; [and] (2) *Santos* left Tenth Circuit law undisturbed regarding the meaning of 'proceeds' in the money laundering statute when the underlying SUA is some act other than running an illegal gambling operation." 575 F.Supp.2d at 1216. The district court further noted that, in *Santos*, five justices had agreed in dicta "that the term 'proceeds' 'includes gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales.'" *Id.* at 1218. However, the court reserved judgment on the definition of "proceeds" in this context and invited the parties to submit further briefing on the issue.

SUMMONSES

Seventh Circuit Holds Possible DOJ Referral Did Not Bar IRS from Summoning Third Party

In *Khan v. United States*, 548 F.3d 549 (7th Cir. 2008), the Seventh Circuit reversed the district court's decision to quash several IRS summonses issued to a third-party witness in an examination of the petitioners' participation in potentially abusive tax shelters. Because the IRS would not disclose whether the third-party witness was the subject of a Justice Department referral, the district court found the summonses violated 26 U.S.C. § 7602(d)(1), which provides that no summons may be issued "with respect to any person if a Justice Department referral is in effect with respect to such person." The Seventh Circuit reversed, holding that the IRS could summon a third party in the investigation of another taxpayer even if the IRS had referred the third party to the Justice Department.

During an IRS examination of the tax returns of Shahid and Ann Khan (the "Khans") and their entities, the IRS issued six summonses to the Khans' accountant, seeking his testimony. The Khans filed petitions to quash the summonses, arguing in part that because the IRS would not disclose whether the accountant was the subject of a Justice Department referral, 26 U.S.C. § 7602(d)(1) barred the IRS from summoning him as a third-party witness. The district court granted the petitions, finding that the referral language in 26 U.S.C. § 7602(d)(1) applied to "any person" and was not limited to the taxpayer being investigated. (The court also found an exception to 26 U.S.C. § 6103 that would allow the government to disclose whether a referral was in effect with respect to the accountant, but this issue was not addressed by the Seventh Circuit's opinion.) The government appealed, arguing that the plain meaning of the statute should resolve the case in the government's favor. In the alternative, it argued that 26 C.F.R. § 301.7602-1(c)(1), which interpreted the statute to apply to the taxpayer under examination only, was dispositive of the issue.

On appeal, the Seventh Circuit applied the two-part analysis set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), considering (1) whether the plain meaning of the statute was ambiguous; and (2) if the statute was ambiguous, whether the regulation was a reasonable interpretation of the statute and should therefore be given deference. Applying this analysis, the Seventh Circuit found the statute ambiguous because there were two plausible but different interpretations of the statutory language. The court then turned to *Chevron's* second step and found that the regulation was reasonable because its interpretation was in harmony with the statute and was supported by the legislative history. Accordingly, the Seventh Circuit deferred to the Treasury regulation and held that the IRS could summon the accountant in the investigation of the Khans even if the IRS had referred him to the Justice Department concerning the Khans' tax liabilities.

SEARCH AND SEIZURE

Sixth Circuit Affirms Suppression of Evidence Obtained in Warrantless Search

In *United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008), the Sixth Circuit affirmed the district court's suppression of a firearm discovered during the warrantless search of a hotel room. The court concluded that exigent circumstances did not justify the search and that the individual who consented to the search did not have apparent authority to do so.

In 2006, special agents received a tip that Frederick Purcell, Jr. ("Purcell"), an escapee from prison, was staying at a hotel in Kentucky. The tip indicated that Purcell was residing at the hotel with his girlfriend, Yolande Crist ("Crist"). The agents were further informed that Purcell was a manufacturer of methamphetamine. After arresting Purcell outside the hotel, several agents proceeded to his hotel room. The agents were concerned that Purcell may have been manufacturing methamphetamine in the room. The officers knocked on the door, and Crist let them in, giving her consent for them to take a quick look around the room. During this initial sweep, the agents observed two duffel bags and a backpack.

Observing other suspicious items in the room, the agents called for assistance from officers with experience handling methamphetamine labs. Upon arriving at the hotel, these officers made an initial sweep of the room and then received permission from Crist to conduct a more complete search. When asked whether there was anything dangerous in the room, Crist stated there was a firearm in one of the bags, but she was not sure which one. Upon opening a bag that Crist claimed belonged to her, the agent discovered marijuana but no firearm. In addition to the marijuana, he discovered that the bag did not contain Crist's personal effects, but instead contained only men's clothing.

Although the agent realized that Crist had misstated her

ownership of the bag, he did not ask her to verify whether she owned any of the other bags in the room. Shortly thereafter, another agent found the firearm in a brown-green backpack. After discovering the firearm, the agents asked Crist who owned the backpack, and Crist noted that she owned the backpack itself, but she had given it to Purcell for his use. It turned out that Purcell was the sole user of both the bag containing the firearm and the bag containing the marijuana.

Purcell was indicted for several offenses under 18 U.S.C. § 922(g) and 21 U.S.C. § 844(a) related to his possession of a firearm and his possession and use of marijuana. Prior to trial, he filed a motion to suppress both the firearm and the marijuana that the agents discovered in the search of his luggage. The district court granted his request to suppress the firearm and denied his request to suppress the marijuana. The government filed a motion for reconsideration of the suppression order, which the district court denied. The government then filed an interlocutory appeal challenging the suppression of the firearm.

On appeal, the government attempted to justify the agents' warrantless search under one of two exceptions to the Fourth Amendment's warrant requirement, arguing that (1) exigent circumstances justified the search; or that (2) Crist had apparent authority to consent to the search of the backpack.

The Sixth Circuit rejected the government's exigent circumstances argument on the grounds that there was no evidence to suggest methamphetamine manufacture was ongoing, and therefore there was no exigency to justify searching Purcell's luggage. The circuit court also rejected the government's apparent authority argument. The court noted that, when the agents began their search, they had a good-faith basis to believe Crist had authority to consent. However, once they found that the first bag contained only men's clothing, the situation became ambiguous. The court stated that "[w]hen a situation starts as unambiguous but subsequent discoveries create ambiguity, any apparent authority evaporates." 526 F.3d at 964. Although the agents could have reestablished Crist's authority to consent by asking for clarification, the court found that they failed to do so. The court further noted that Crist's intimate relationship with Purcell did not provide a basis for her apparent authority that survived the discovery of the men's clothing in the first bag searched.

Accordingly, the circuit court concluded that neither exception to the warrant requirement applied, that the firearm was discovered in an illegal search, and that the district court did not err when it suppressed the firearm.

CORPORATE DEFENDANTS

Second Circuit Dismisses Complaint for Failure to Plead Requisite Scierter against Corporate Defendants

In *Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190 (2d Cir. 2008), a case involving allegations of securities fraud, the Second Circuit held that the plaintiff failed to plead the requisite scierter against the corporate defendants. Accordingly, the appellate court vacated the district court's order denying the corporate defendants' motion to dismiss and remanded with instructions to dismiss the complaint but to allow the plaintiff an opportunity to replead.

In 1999, Merit Securities Corp. ("Merit"), a subsidiary of Dynex Capital Inc. ("Dynex"), issued bonds secured by loans made to people seeking to buy manufactured homes. Following the bond issue, the value of the collateral declined sharply as borrowers defaulted on their loans. In 2003, Dynex disclosed that it had understated the repossession rates on the collateral, and the credit ratings of the bonds were downgraded. In 2004, Merit disclosed that its recording of loan losses was inaccurate and that it would therefore need to restate its earnings for 2003. In the aftermath of these events, the bond prices decreased by up to 85%.

In 2005, Teamsters Local 445 Freight Division Pension Fund ("Teamsters"), which had purchased approximately \$450,000 worth of the bonds in early 2002, filed a securities fraud action. The action named Dynex and Merit as corporate defendants and the respective president of each company, Stephen Benedetti ("Benedetti") and Thomas Potts ("Potts"), as individual defendants.

The complaint alleged that Dynex had purchased risky loans made to uncreditworthy borrowers and had failed to disclose these practices in the offering materials that accompanied the bond issues. The complaint further alleged that the defendants misrepresented the cause of the bond collateral's poor performance, misrepresented the reasons for restating its loan loss reserves and concealed the loans' faulty underwriting.

At trial, the district court found that Teamsters had failed to plead scierter adequately with respect to the individual defendants because the complaint did not allege that Potts or Benedetti saw or had access to specific reports indicating malfeasance, nor that they directly supervised or knew of any identified individuals who were engaged in specific wrongdoing. However, as to the corporate defendants, the district court found scierter adequately pleaded because the allegations in the complaint allowed the inference that officers and employees of the corporate defendants had the motive and opportunity to commit fraud.

On appeal, the Second Circuit noted that the Public Securities Litigation Reform Act (the "PSLRA") requires that the facts stated in a plaintiff's complaint give rise to a "strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). With respect to corporate defendants, the Second Circuit interpreted this requirement to mean that the pleaded facts must create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scierter. The court stated that "it is possible to raise the required inference with regard to a corporate defendant without doing so with regard to a specific individual defendant." 531 F.3d at 195.

In this case, however, the circuit court held that the complaint failed to raise the required inference because (1) it failed to allege the existence of information that would demonstrate that the statements made to investors were misleading; and (2) it failed to allege that anyone at Dynex or Merit had a compelling motive to mislead investors regarding the bonds. Therefore, the court held that the PSLRA required dismissal of the complaint.

SENTENCING

Supreme Court Holds Notice of Contemplated Variance from Guidelines Range Not Required

In *Irizarry v. United States*, 128 S.Ct. 2198 (2008), the Supreme Court held that Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a court to give the parties "reasonable notice" if it intends to depart from the applicable the Federal Sentencing Guidelines ("Guidelines") range on grounds not identified in the presentence report or in a prehearing submission, does not apply to a variance from the Guidelines range.

Richard Irizarry ("Irizarry") pleaded guilty to one count of making a threatening interstate communication in violation of 18 U.S.C. § 875(c). The pre-sentence report recommended a Guidelines range of 41 to 51 months of imprisonment. At the sentencing hearing, the trial judge found that the Guidelines range was not appropriate in this case and sentenced Irizarry to the statutory maximum of 60 months' imprisonment. Defense counsel raised the objection that the defendant did not have notice of the court's intent to upwardly depart from the Guidelines range. The court overruled the objection on the ground that the Guidelines are merely advisory.

On appeal, the Eleventh Circuit affirmed, holding that Rule 32(h) did not apply because the sentence was a variance, not a Guidelines departure. The court explained that, after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), parties are on notice that the Guidelines range is advisory and cannot claim unfair surprise if the sentence falls outside that range.

The Supreme Court affirmed the Eleventh Circuit's decision. It noted that Rule 32(h) was promulgated in response to *Burns v. United States*, 501 U.S. 129 (1991), which the Court decided when the Guidelines were mandatory. In *Burns*, the Court held that the provision of Rule 32 that allowed parties an opportunity to comment on the appropriate sentence would be rendered meaningless unless the defendant were given notice of any contemplated departure. However, in the wake of *Booker*, the Court stated, "[t]he due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule set forth in *Burns*[" 128 S.Ct. at 2202. Further, the Court noted that "a sentence outside the Guidelines carries no presumption of unreasonableness." *Id.* Thus, the Court held that Rule 32(h) does not apply to a variance.

In explaining its holding, the Court distinguished between a "variance" and a "departure," explaining that "[d]eparture" is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *Id.*

Ninth Circuit Affirms Above-Guidelines Sentence

In *United States v. Orlando*, No. 07-50473, 2009 WL 153243 (9th Cir. January 23, 2009), a tax evasion case, the Ninth Circuit affirmed a sentence that exceeded the range specified by the Federal Sentencing Guidelines ("Guidelines"). The circuit court held that the district court did not abuse its discretion by failing to grant a continuance before announcing the variance, and that the above-Guidelines sentence was reasonable.

Carl Orlando ("Orlando") pleaded guilty to one count of tax evasion and was sentenced to 40 months' imprisonment and a \$30,000 fine, a sentence that exceeded the 27-33 month Guidelines range.

On appeal, the Ninth Circuit determined that under *United States v. Irizarry*, 128 S.Ct. 2198 (2008), the above-Guidelines sentence was not a "departure" from the Guidelines range, but a "variance," and that therefore the notice requirement in Rule 32(h) of the Federal Rules of Criminal Procedure did not apply. The court then addressed Orlando's arguments that (1) under *Irizarry*, the district court should have granted a continuance *sua sponte* because the upward variance resulted in a prejudicial surprise; and (2) the sentence was unreasonable because it relied on his criminal history (even though that history was already incorporated in the Guidelines range), sought deterrence greater than that called for by the Guidelines and ignored his three-level reduction for substantial assistance to authorities.

In rejecting Orlando's first argument, the court noted that (1) the factual basis for the sentence was not a surprise, but rather stemmed from "garden variety considerations" such as

Orlando's long criminal history, the fact that he committed the offense while on supervised release and the seriousness of the crime; (2) the district court considered the possibility of delaying sentencing, but decided not to do so; and (3) Orlando failed to explain how a continuance would have affected his presentation of evidence, except by giving counsel an opportunity to address the court's concerns. The court stated that this argument had no merit, since a reasonably prepared attorney would have been ready to address the court's "garden variety" sentencing concerns. Accordingly, the Ninth Circuit held that the district court did not abuse its discretion by failing to grant a continuance.

The court then reviewed the substantive reasonableness of the sentence for abuse of discretion, citing *Gall v. United States*, 128 S.Ct. 586, 594 (2007) and *United States v. Booker*, 543 U.S. 220, 260-62 (2005). In light of the non-mandatory nature of the Guidelines, the circuit court held that the district court's conclusions were "reasonable, substantiated by the record, and evaluated with careful reference to the § 3553(a) factors." 2009 WL 153243 at *2. Further, the circuit court noted that "[i]t was the district court's prerogative to impose a sentence based on the totality of the circumstances." *Id.* Accordingly, the court rejected Orlando's argument that the 40-month sentence was unreasonable.

In addition, the court held that the \$30,000 fine, which was the maximum recommended by the Guidelines, was reasonable under 18 U.S.C. §§ 3553(a) and 3572(a) because Orlando did not meet his burden of proving that he was incapable of paying the fine. Finally, in order to resolve a discrepancy between the oral sentencing, which imposed a fine of \$30,000, and the subsequent written judgment, which erroneously stated that the fine was \$60,000, the circuit court amended the written judgment to indicate the correct fine amount.

Seventh Circuit Affirms Above-Guidelines Sentence

In *United States v. Tockes*, 530 F.3d 628 (7th Cir. 2008), the Seventh Circuit reviewed the sentence imposed on Brian Tockes ("Tockes"), who pleaded guilty to two counts of filing a false income tax return in violation of 26 U.S.C. § 7206(1). Although the district court imposed a sentence that exceeded the top of the sentencing guidelines range by six months, the Seventh Circuit affirmed the sentence.

Tockes was charged with three counts of filing a false income tax return in 2000, 2001 and 2002 on the grounds that he failed to report substantial amounts of income allegedly obtained by defrauding elderly victims who had hired him to repair their homes. At the time of sentencing, there was a pending state court charge against him involving home repair fraud and theft.

At sentencing, the district court determined that the applicable sentencing guidelines range was 24-30 months' imprisonment and then sentenced Tockes to the statutory maximum of 36 months' imprisonment on each count, to be served concurrently. After setting the length of the term, the judge commented that he had imposed much longer sentences on people who sold small quantities of drugs. He also remarked that he could have made the sentences run consecutively, for a total of six years, but concluded that three years was sufficient.

On appeal, Tockes argued the district court erred in: (1) stating that he could have received up to six years' imprisonment; (2) comparing his tax offense to other defendants' drug trafficking crimes; (3) allowing testimony relating to the pending state court charges; and (4) substantially departing from the sentencing guidelines range. The Seventh Circuit reviewed the sentence under an abuse of discretion standard, limiting its review to whether the sentence was reasonable.

First, the circuit court held that the district court was correct in stating that the maximum sentence for the two counts could go as high as six years if served consecutively. Although closely-related sentences typically run concurrently under the guidelines, the court noted that the guidelines are merely advisory and that courts are permitted by statute to impose consecutive sentences after considering the factors set forth in 18 U.S.C. § 3553(a). Second, the circuit court held that Tockes failed to explain how the district court's comments about drug trafficking offenses had affected his sentence. The court further stated that, in any case, there was nothing improper or illegal about the comments, which were made after the sentence was announced.

Third, the circuit court rejected Tockes' argument with respect to the admissibility of testimony relating to the pending state court charges. The court explained that sentencing courts have broad discretion as to the kind of information they may consider, and that such information may include reliable evidence of wrongdoing for which the defendant has not been convicted.

Finally, the circuit court stated it was unable to find the sentence unreasonable because the district court had provided more than adequate support for the sentence. Accordingly, the circuit court affirmed the district court's judgment.

D.C. Circuit Affirms Below-Guidelines Sentence

In *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008), the D.C. Circuit reviewed the sentence imposed on Gus Gardellini ("Gardellini"), who pleaded guilty to one count of filing a false income tax return in violation of 26 U.S.C. § 7206(1). Although the Sentencing Guidelines range was 10 to 16 months' imprisonment, the district court imposed a sentence of five years' probation and a \$15,000 fine, and the

D.C. Circuit affirmed.

Gardellini was charged with filing a false income tax return in the tax year 1998, based on his use of offshore bank accounts to hide taxable income derived from the exercise of stock options, interest, and capital gains from real estate transactions. The existence of the accounts was discovered through the execution of a search warrant in an unrelated case.

At sentencing, the district court found that Gardellini: (1) had cooperated with authorities during the investigation; (2) had accepted responsibility for the crimes he committed; (3) posed no risk of recidivism; and (4) had already "suffered substantially" from the stress of the criminal investigation. In addition, the district court did not believe incarcerating Gardellini would have a significant deterrence effect. Based on these findings, the district court imposed a fine of \$15,000 and probation of five years.

The government appealed, arguing that the sentence was substantively unreasonable. The D.C. Circuit reviewed the decision under the abuse of discretion standard, as required by the Supreme Court's decision in *Gall v. United States*, 128 S.Ct. 586 (2007). Under this standard, the appellate court affirmed the sentence, noting that "it will be the unusual case where an Appeals Court overturns a sentence as substantively unreasonable" and that "[t]he District Court's conclusion rests on precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts, as the Supreme Court has repeatedly emphasized." 545 F.3d at 1096, 1095. The circuit court also noted that the result was similar to that in *Gall*, where a probationary sentence was affirmed even though the Guidelines called for 30-37 months' imprisonment. One of the panel judges dissented, arguing that the lower court had abused its discretion by giving no weight to deterrence in its sentencing determination.

First Circuit Holds Sentencing Courts Must Consider Argument that Fast-Track Disparity Justifies Variance

In *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008), the First Circuit held that the district court for the District of Puerto Rico erred in refusing to consider the appellant's argument that the lack of a "fast track" sentencing program in that district created a disparity that justified a variance from the Federal Sentencing Guidelines ("Guidelines") range.

Yonathan Rodriguez ("Rodriguez") pleaded guilty to violating 8 U.S.C. § 1326(a) by attempting to re-enter the United States after having been removed following a felony conviction. He was sentenced to 46 months' imprisonment.

At sentencing, Rodriguez requested a variance from the Guidelines range, in part on the ground that the absence of a

“fast track” sentencing program for immigration offenses in the District of Puerto Rico created an unacceptable disparity. The district court refused to consider this argument, indicating that it had no authority to disregard the advisory guideline sentencing range on that ground. In support of its conclusion, the district court cited case law holding that such a disparity is not “unwarranted” within the meaning of 18 U.S.C. § 3553(a)(6), which requires that a sentencing court consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”

On appeal, the First Circuit vacated the sentence and remanded. It noted that the district court’s decision was in keeping with prior First Circuit law, but that the Supreme Court’s decision in *United States v. Kimbrough*, 128 S.Ct. 558 (2007), required that “a district court should not evaluate a request for a variant sentence piecemeal, examining each section 3553(a) factor in isolation, but should instead consider all the relevant factors as a group and strive to construct a sentence that is minimally sufficient to achieve the broad goals of sentencing.” 527 F.3d at 228. When confronted with an alleged fast-track disparity, the First Circuit stated that a court should make findings with respect to the existence and extent of the disparity and then “engage in a comprehensive evaluation of whether this and other items in the constellation of section 3553(a) factors, viewed as a whole, cast doubt on the suitability of a within-the-range sentence.” *Id.*

The First Circuit cautioned that its holding was “carefully circumscribed” and that sentencing courts were not obligated to deviate from the guidelines based on fast-track disparity. Rather, a sentencing court could make “its own independent determination as to whether or not a sentence tainted by the alleged disparity is nonetheless consistent with the centrifugal pull of the constellation of 3553(a) factors.” *Id.* at 231.

Sixth Circuit Holds Sentencing Court’s Determination of Tax Loss Did Not Preclude Tax Court’s Subsequent Determination of Deficiency

In *Kosinski v. Commissioner*, 541 F.3d 671 (6th Cir. 2008) Timothy and Barbara Kosinski (the “Kosinskis”) appealed a Tax Court deficiency determination following a district court’s sentencing of Timothy Kosinski for related criminal tax offenses. The Kosinskis attempted to invoke issue preclusion, arguing that the district court’s determination of the tax loss at sentencing barred the Tax Court’s imposition of a deficiency with respect to one of the years at issue. The Sixth Circuit rejected this argument and affirmed the Tax Court’s holding.

In the earlier criminal case, the government had successfully prosecuted the Kosinskis for criminal charges involving the underreporting of payments made to Timothy Kosinski’s construction business over a number of years. Barbara Kosinski pleaded guilty to structuring currency transactions,

and Timothy Kosinski was convicted of several counts of filing false tax returns, one count of structuring currency transactions and one count of conspiracy. In 2003, Timothy Kosinski was sentenced under the then-mandatory sentencing guidelines, which directed the court to base the sentence on the tax loss attributable to his conduct. The sentence was vacated and remanded in light of *United States v. Booker*, 543 U.S. 220 (2005), and the sentence imposed on remand was again vacated for *Booker*-related reasons. In the meantime, the Kosinskis received a deficiency notice for 1997, alleging a tax underpayment of \$1.2 million and imposing a 75% fraud penalty on the entire amount of the underpayment. The Kosinskis filed a petition in the Tax Court, and the Tax Court upheld the deficiency and the penalty.

On appeal, the Kosinskis argued that the district court’s findings of fact at Timothy Kosinski’s criminal sentencing hearing precluded the Tax Court from imposing a deficiency with respect to their 1997 tax year. The Sixth Circuit rejected this argument, explaining that the Kosinskis failed to make the requisite showing for issue preclusion. In particular, the court noted: (1) the precise issue before the Tax Court, which concerned the Kosinskis’ underpayment for 1997, had not been raised and litigated in the sentencing proceeding, which made only aggregate findings for several years combined; (2) the district court’s determination of the 1997 underpayment was not necessary to the outcome of the sentencing proceeding because a wide range of tax losses could have resulted in the same sentence, and because, post-*Booker*, the district court had discretion to consider – or not to consider – the tax loss in determining the sentence; (3) when the Tax Court issued its decision, the criminal proceeding had not yet resulted in a final judgment that could be given preclusive effect because the case had been remanded for resentencing; and (4) the government did not have a full and fair opportunity to litigate the tax loss in the criminal sentencing proceeding, where the procedural rules differed considerably from the rules governing civil actions.

In discussing the requirements for issue preclusion, the Sixth Circuit observed that it was unclear how a criminal sentencing proceeding could ever provide the party against whom preclusion was sought with a full and fair opportunity to litigate the issue in question. The court noted that it knew of no case where a federal court had ascribed preclusive effect to a sentencing court’s findings of fact and that two other circuits (the Ninth and the Second) had held issue preclusion presumptively inapplicable to sentencing findings. However, the court declined to decide “whether sentencing determinations categorically or even presumptively lack preclusive power” in the Sixth Circuit. 541 F.3d at 679.

In addition to holding that issue preclusion did not apply in this case, the circuit court also held that the Tax Court did not clearly err in finding that the government met its burden of proving at least part of the Kosinskis’ 1997 tax underpayment was attributable to fraud (which was all that

was required for the entire underpayment to be subject to the fraud penalty under 26 U.S.C. § 6663, because the Kosinskis failed to show that any part of the underpayment was not attributable to fraud). Further, the court affirmed the Tax Court's finding that Barbara Kosinski was not entitled to innocent-spouse relief from the fraud penalty.

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