

# Criminal Tax Bulletin

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This bulletin is for informational purposes. It is not a directive.

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## COUNTERTERRORISM

### Supreme Court Upholds Statute Barring “Material Support” to Foreign Terrorist Organizations

In *Holder v. Humanitarian Law Project, et al.*, Nos. 08-1498, 09-89, 2010 WL 2471055 (U.S. June 21, 2010), the Supreme Court held that 18 U.S.C. § 2339B, which prohibits the provision of “material support or resources” to foreign terrorist organizations, is constitutional as applied to particular forms of support. The plaintiffs, consisting of two U.S. citizens and six domestic organizations, sought to provide support for the humanitarian and political activities of the Partiya Karkeran Kurdistan (“PKK”) and the Liberation Tigers of Tamil Eelam (“LTTE”), which had the stated purposes of creating independent states for Kurds and Tamils, respectively. Each group had committed terrorist attacks, some of which harmed U.S. citizens.

The plaintiffs challenged the constitutionality of 18 U.S.C. § 2339B, arguing that its prohibition against certain types of material support – *i.e.*, training, expert advice, personnel, and services – was unconstitutionally vague in violation of the Fifth Amendment Due Process Clause and violated their First Amendment freedoms of speech and association. The Ninth Circuit Court of Appeals affirmed the district court’s grant of partial relief to the plaintiffs on vagueness grounds, and the Supreme Court granted both parties’ petitions for certiorari.

As a threshold issue, the Court first concluded that the necessary mental state for a violation of section 2339B was knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities. The Court then turned to the constitutional issues, beginning with the plaintiffs’ due process challenge. Because the Court determined that the statutory terms were clear in their application to the plaintiffs’ proposed conduct, it concluded that the statute was not impermissibly vague.

Next, the Court held that section 2339B did not violate

the plaintiffs’ First Amendment freedoms of speech and association. The Court explained that the statute did not penalize pure political speech or mere association with a foreign terrorist organization, and that any burden on these freedoms was justified by the government’s interest in preventing terrorism.

## HONEST SERVICES FRAUD

### Supreme Court Holds Honest Services Statute Applies Only to Bribery and Kickback Schemes

In *Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (U.S. June 24, 2010), the Supreme Court held, *inter alia*, that the honest services statute, 18 U.S.C. § 1346, applies only to bribery and kickback schemes. The Court further held that § 1346 did not apply to the defendant’s alleged misconduct, which did not entail a bribe or kickback.

Jeffrey Skilling (“Skilling”) became chief executive officer of Enron Corporation, the seventh highest-revenue-grossing company in the U.S., in February 2001. By the end of 2001, Enron filed for bankruptcy, and the company’s stock plummeted to pennies per share. A government investigation uncovered a conspiracy to inflate Enron’s stock prices by overstating the company’s financial well-being.

In 2004, Skilling was indicted on numerous charges, including conspiracy to commit wire fraud by depriving Enron and its shareholders of his honest services in violation of 18 U.S.C. §§ 371, 1343, and 1346. Skilling was found guilty of 19 counts, including the honest-services-fraud conspiracy charge, and was sentenced to 292 months’ imprisonment, three years’ supervised release, and \$45 million in restitution. The Fifth Circuit affirmed the convictions, and the Supreme Court granted certiorari to determine in part whether Skilling was wrongly convicted of honest-services-fraud conspiracy.

The Court’s analysis focused on § 1346, which defines the term “scheme or artifice to defraud” in the context

of mail and wire fraud to include a scheme to deprive another of honest services. The Court construed § 1346 to apply only to the most common types of honest-services cases prior to its enactment, which involved bribery or kickback schemes. The Court determined that § 1346, confined to these “core” applications, is not unconstitutionally vague.

The Court then applied its interpretation of § 1346 to determine whether Skilling’s conduct violated the statute. Because the government did not allege that Skilling solicited or accepted side payments from a third party in exchange for misrepresenting Enron’s fiscal health, the Court held that he did not commit honest-services fraud. Accordingly, the Court vacated and remanded for proceedings consistent with its opinion.

### **MIRANDA RIGHTS**

#### **Supreme Court Holds Suspect Must Unambiguously Invoke Right to Remain Silent but May Implicitly Waive That Right through Uncoerced Statement**

In *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), the Supreme Court held in a 5-4 decision that a suspect who has received and understood the *Miranda* warnings and has not unambiguously invoked his right to remain silent, may implicitly waive that right by making an uncoerced statement to the police, even if he does so after remaining silent for most of the interrogation.

Van Chester Thompkins (“Thompkins”) was arrested as a suspect in a drive-by-shooting homicide. Investigators provided him with a written notification of his *Miranda* rights and had him read one of the warnings out loud. Thompkins declined to sign the form to demonstrate that he understood his rights. During the subsequent interrogation, Thompkins did not explicitly invoke his *Miranda* rights, but he remained largely silent. After two hours and 45 minutes of interrogation, the investigators asked if he believed in God, and he replied “Yes.” The investigators then asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes,” and the questioning stopped shortly thereafter.

Thompkins was charged with first-degree murder, assault with the intent to commit murder, and other firearm-related offenses. At his state court trial, he moved to suppress the statement he made in the interrogation, arguing that he had invoked his right to remain silent. The trial court denied his motion, and he

was convicted of all charges and sentenced to life without parole. After the state appellate courts upheld his conviction, Thompkins challenged the decision in the federal courts. The Sixth Circuit held that the state court had been unreasonable in finding that Thompkins had implicitly waived his right to remain silent because his silence for nearly three hours indicated he did not wish to waive that right.

In reversing, the Supreme Court applied the standard used to determine whether a suspect has invoked his right to counsel to the present context of invoking the right to remain silent. Concluding that an accused must unambiguously invoke the right to remain silent, the Court held that Thompkins’ silence during the interrogation was insufficient. The Court further held that Thompkins waived the right to remain silent by responding to a question during the interrogation.

### **SPEEDY TRIAL ACT**

#### **Supreme Court Holds Pretrial Motion Preparation Time Is Not Automatically Excluded from Speedy Trial Act’s 70-Day Limit**

In *Bloate v. United States*, 130 S. Ct. 1345 (2010), the Supreme Court clarified the scope of subsection (h)(1) of the Speedy Trial Act, 18 U.S.C. § 3161, which automatically excludes certain delays from the Act’s 70-day limit for time elapsed between indictment and trial. The Court held that subsection (h)(1) does not automatically exclude time granted to prepare pretrial motions.

On August 24, 2006, Taylor James Bloate (“Bloate”) was indicted on weapons and drug possession charges. On September 7, he filed a motion to extend the deadline to file pretrial motions, which the court granted. On October 4, however, the court determined that Bloate’s subsequent waiver of his right to file motions was valid. After several other delays, Bloate moved to dismiss the case, claiming the Speedy Trial Act’s 70-day limit had elapsed. The district court denied the motion. In calculating how many days counted toward the 70-day limit, the trial judge automatically excluded the pretrial motion preparation period of September 7 through October 4. Bloate went to trial and was found guilty on both counts. On appeal, the Eighth Circuit agreed that pretrial motion preparation time was automatically excludable and affirmed.

The Supreme Court reversed and remanded, holding

that pretrial motion preparation time is not automatically excludable. The Court's analysis focused on subsection (h)(1)(D) of the Speedy Trial Act, which governs the excludability of delays resulting from proceedings involving pretrial motions. The Court interpreted this provision to render delay resulting from pretrial motions automatically excludable only from the time a motion is filed through the motion's disposition. The Court noted, however, that a district court may exclude pretrial motion preparation time from the 70-day limit under subsection (h)(7) if it grants a continuance for that purpose based on recorded findings that the delay is justified.

## **DOUBLE JEOPARDY**

### **Third Circuit Reaffirms that 18 U.S.C. § 371 Creates a Single Statutory Offense for Double Jeopardy Purposes**

In *United States v. Rigas*, 605 F.3d 194 (3d Cir. 2010), the *en banc* Third Circuit reaffirmed its prior panel holding, 584 F.3d 594 (3d Cir. 2009), that 18 U.S.C. § 371 creates a single statutory offense for double jeopardy purposes.

John Rigas and his son Timothy (the "Rigases") were officers and controlling shareholders of a cable television provider. In 2002, following a series of sham transactions that led to the company's collapse, the Rigases were indicted in the Southern District of New York on charges that included conspiracy "to commit an offense against the United States" in violation of 18 U.S.C. § 371. In 2005, they were indicted in the Middle District of Pennsylvania on charges that included conspiracy "to defraud the United States" in violation of section 371. The Rigases moved to dismiss the Pennsylvania action on double jeopardy grounds, and the Middle District of Pennsylvania denied the motion.

On appeal, a panel of the Third Circuit held that the "offense" and "defraud" clauses of section 371 describe a single offense that may be committed in two ways. The panel remanded to the district court to determine whether the Pennsylvania prosecution should be dismissed on double jeopardy grounds. The government petitioned for a rehearing *en banc*.

Explaining that section 371 criminalizes the unlawful agreement and not the substantive offenses that may be the object of the conspiracy, the Third Circuit, sitting *en banc*, reaffirmed its panel holding that section 371 creates a single offense. Accordingly, the circuit court remanded to the district court to apply a "totality of the

circumstances" test to determine whether the conspiracy charged in Pennsylvania was part of the conspiratorial agreement charged in New York.

**NOTE: The prior Third Circuit panel decision was reported in *Criminal Tax Bulletin*, Oct.-Mar. 2010.**

## **SEARCH AND SEIZURE**

### **Third Circuit Holds Warrant Must Expressly Incorporate Affidavit into Section Lacking Particularity**

In *United States v. Tracey*, 597 F.3d 140 (3d Cir. 2010), the Third Circuit held that the overbroad description of items to be seized in a search warrant was not cured by the attachment of a narrower affidavit, where the affidavit was not expressly incorporated into that section of the warrant. The court further held, however, that the good-faith exception to the exclusionary rule applied.

Ralph Douglas Tracey ("Tracey") was charged with receiving and distributing child pornography and possession of child pornography. He moved to suppress evidence seized pursuant to a search warrant, alleging that the warrant lacked the particularity required under the Fourth Amendment. The district court granted the motion, and the government appealed.

Conceding that the warrant's description of the items to be seized lacked the requisite particularity, the government argued on appeal that this defect was cured by incorporation of the affidavit into the warrant. The Third Circuit noted that the affidavit was attached to the warrant and that its attachment was indicated in two places on the standardized application form. The court concluded, however, that these references failed to incorporate the affidavit explicitly into the warrant's description of the items to be seized. For an affidavit to cure an overbroad warrant, the court held that the words of incorporation in the warrant must make clear that the section lacking particularity should be read in conjunction with the attached affidavit.

The court went on to hold, however, that the good faith exception to the exclusionary rule applied, explaining that a reasonable officer would have assumed that by checking the boxes on the form and attaching the affidavit, he had expressly incorporated the affidavit. Further, in executing the warrant, the officer had seized only items consistent with the scope of the affidavit.

## EVIDENCE

### **Eleventh Circuit Holds Prosecutor's Failure to Disclose Lead Investigator's Criminal Activities Was *Brady* Violation**

In *Arnold v. Sec'y, Dep't of Corr.*, 595 F.3d 1324 (11th Cir. 2010), the Eleventh Circuit affirmed and adopted the opinion of the district court in *Arnold v. McNeil*, 622 F. Supp. 2d 1294 (M.D. Fla. 2009), holding that the prosecutor's failure to disclose evidence of the lead investigator's criminal activities constituted a *Brady* violation, even though the investigator's crimes were not known to the prosecutor at the time of trial.

Darryl Arnold ("Arnold") was convicted in state court of the unlawful sale or delivery of cocaine and sentenced to twenty-six years' imprisonment. At trial, Detective Aric Sinclair ("Sinclair"), the lead investigator in the case, identified Arnold as a drug dealer. While investigating and testifying against Arnold, Sinclair was himself involved in criminal conduct that led to multiple felony convictions, including selling cocaine and facilitating a murder. Sinclair's criminal conduct was not known to the prosecutor at the time of Arnold's trial and was not revealed to Arnold. Arnold subsequently filed a petition for writ of habeas corpus challenging his conviction and asserting that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to turn over evidence of Sinclair's criminal conduct.

In an opinion that was affirmed and adopted by the Eleventh Circuit, the district court granted Arnold's petition and vacated his conviction. The court distinguished the facts of Arnold's prosecution from other cases in which no *Brady* violation occurred because the nature of the information known to the corrupt officer in those cases either bore no connection to the evidence needed to prove the crimes charged, or the officer's testimony was tangential or cumulative. By contrast, in Arnold's case, Sinclair's knowledge of his own criminal conduct was properly imputed to the prosecution because Sinclair was an essential member of the prosecution team whose information and testimony were vital to secure the conviction against Arnold. Having determined that the prosecution's failure to disclose Sinclair's criminal conduct was a *Brady* violation, the court concluded that Arnold did not receive a fair trial and granted his petition for writ of habeas corpus.

### **Ninth Circuit Affirms Broad Suppression of Evidence as Appropriate Remedy for *Brady/Giglio* Violations**

In *United States v. Struckman*, No. 08-30312, 2010 WL 2573211 (9th Cir. June 29, 2010), the Ninth Circuit upheld the district court's decision to suppress a substantial amount of evidence, rather than grant dismissal, as the appropriate remedy for *Brady/Giglio* violations by government investigators.

David Struckman ("Struckman") co-founded an organization that sold products advocating illegal means to avoid U.S. income tax. In 2004, Struckman was indicted for conspiracy and tax evasion for failing to report profit distributions from the organization's more than \$40 million in gross receipts. Struckman, a U.S. citizen, fled to the Republic of Panama but was deported and returned to the U.S. in 2006.

Before trial, Struckman filed motions to dismiss the indictment based on alleged government misconduct leading to his deportation from Panama and during the criminal investigation in the United States. The district court made no finding of illegality or misconduct with regard to the manner in which Struckman was removed from Panama, but it did find serious *Brady/Giglio* violations. These violations included the government's attribution of certain information to an informant who did not appear to exist and the government's failure to disclose an agent's "secret deal" to obtain witness testimony in exchange for audit protection. Despite the district court's findings, however, it denied Struckman's motion to dismiss on *Brady/Giglio* grounds and instead excluded the evidence related to the violations. At trial, Struckman was convicted of conspiracy and three counts of tax evasion. He was sentenced to 70 months' imprisonment and ordered to pay more than \$2.9 million in restitution.

On appeal, the Ninth Circuit affirmed the district court's denial of dismissal as a remedy for the government's *Brady/Giglio* violations. The court concluded that it had no authority to sanction the government's out-of-court misconduct directly. Rather, under *Brady* and *Giglio*, the court's role was to assure that the misconduct did not give the government an advantage in obtaining a conviction. This assurance was adequately provided, the court held, by the broad, pre-trial suppression of evidence derived from the misconduct.

### **Seventh Circuit Holds Circumstantial Evidence Was Sufficient to Establish Willfulness and Conspiracy in False Return Case**

In *United States v. Kruse*, 606 F.3d 404 (7th Cir. 2010), the Seventh Circuit held that the circumstantial evidence presented at trial was sufficient to prove the defendant willfully filed false tax returns and conspired with his tax preparer.

Wayne W. Kruse (“Kruse”) owned a sole proprietorship. Using the services of a paid tax preparer, he filed false income tax returns for 2002, 2003, and 2004, claiming deductions for non-existent business expenses. Kruse’s underreporting of his business income resulted in a tax loss of \$168,532. He was convicted of one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and three counts of filing false income tax returns, in violation of 26 U.S.C. § 7206(1).

On appeal, Kruse contended, *inter alia*, that the government failed to prove his conduct was willful. The Seventh Circuit disagreed, holding that the circumstantial evidence presented at trial was sufficient to justify his convictions. The evidence supporting the false return counts included testimony about Kruse’s conflicting explanations of the figures on his returns to the revenue agent who conducted his audit and the special agent who conducted the criminal investigation. The circuit court concluded this testimony supported the inference that Kruse altered his story because he knew the returns were false.

The court also determined that Kruse’s knowledge that he should have reported additional income could be inferred from testimony that he told the special agent he earned amounts greatly exceeding the figures on his returns. Similarly, evidence of Kruse’s personal draws from the business, which greatly exceeded his reported income, supported the inference that he knew the business was taking in at least as much money as he took out. The court further noted that Kruse’s unreported gambling winnings allowed the fact-finder to infer a lack of respect for the tax laws. Accordingly, the court affirmed the false return convictions.

The court also examined the circumstantial evidence of Kruse’s complicity in understating his income – including his admission that he and his return preparer had agreed to “cover each other’s backs” – and concluded that this evidence was sufficient to support his conspiracy conviction.

### **First Circuit Holds Evidence of Accountants’ Standard of Care Was Properly Excluded in Tax Evasion Case**

In *United States v. St. Pierre*, 599 F.3d 19 (1st Cir. 2010), the First Circuit held, *inter alia*, that evidence regarding the standard of care owed to the defendant by her accountants was properly excluded because the evidence did not constitute a defense under the facts of the case and therefore had the potential to confuse the jury.

Shirley St. Pierre (“St. Pierre”) owned Staab Agency (“Staab”), an S corporation providing agency services to trucking companies. St. Pierre regularly diverted company funds for her personal use and failed to report the funds as income to the company or to herself. She was charged with three counts of tax evasion in violation of 26 U.S.C. § 7201 and one count of obstructing the administration of the internal revenue laws in violation of 26 U.S.C. § 7212.

At trial, the central issue was whether St. Pierre had the requisite state of mind for the offenses. She argued that she relied on her accountants to report all Staab income and that they erred in failing to ask her about the diverted income. In support of this argument, she sought to introduce evidence of the standard of care owed to her by her accountants. The district court excluded the evidence on the ground that its potential to confuse the jury outweighed its probative value. The jury found St. Pierre guilty of one count of evasion and one count of obstruction.

On appeal, the First Circuit affirmed the district court’s evidentiary ruling. The circuit court noted that cases could be envisioned where the professional accounting standards could have some bearing on an accountant’s negligent conduct, which in turn could be relevant to the likelihood that a taxpayer’s under-reporting resulted from honest reliance. In the instant case, however, the evidence revealed that St. Pierre failed to follow her accountants’ instructions to report income, that she failed to disclose the existence of multiple personal accounts to her accountants, that her accountants were unaware of the diversion, and that she falsified documents to conceal her wrongdoing. Because her accountants’ failure to prevent the fraud would not be a defense under these facts, the court concluded that the proposed accounting standards evidence had the potential to confuse and mislead the jury and was therefore properly excluded.

**Ninth Circuit Holds Exclusion of  
Evidence Related to Potentially  
Responsible Third Parties Violated  
Defendant's Right to Present a Defense**

In *United States v. Stever*, 603 F.3d 747 (9th Cir. 2010), the Ninth Circuit held that the denial of discovery and exclusion of evidence tending to show that individuals other than the defendant had committed the crime without the defendant's involvement violated the defendant's Sixth Amendment right to present a defense.

While executing a search warrant on the 400-acre rural property where Andrew Stever ("Stever") lived with his mother, officers discovered a marijuana-growing operation in an isolated area and observed two men fleeing the scene. Stever was charged with manufacturing marijuana and conspiring to manufacture marijuana in violation of federal law. He sought to defend on the ground that the marijuana growing operation was the work of a Mexican drug trafficking organization ("DTO") that had recently infiltrated Oregon.

The district court denied Stever's pretrial discovery request for government reports regarding Mexican DTOs without reviewing the requested documents in camera. The court reasoned that evidence about the role of third parties in manufacturing the marijuana was not relevant to assessing the likelihood that Stever was involved. Further, the court ruled that Stever was not permitted to put on other evidence regarding Mexican DTOs or the involvement of third parties. Stever was convicted on both counts.

On appeal, the Ninth Circuit reversed Stever's convictions, holding that the combination of the discovery ruling and the exclusion of all evidence about Mexican DTOs violated Stever's Sixth Amendment right to present a defense. The court explained that the government reports Stever had requested and the other evidence he had proffered were probative on the central issue of the case because they would have rebutted the inference that Stever was the only person who could have committed the crime. The court also noted that the proffered evidence and any undisclosed government reports were reliable and capable of evaluation by the jury. Because Stever was precluded from pointing to any alternative explanation for the marijuana operation on his mother's property, the court held that he was not only prevented from putting on evidence important to his defense, but that he was prevented from presenting any defense at all.

**SENTENCING**

**Ninth Circuit Holds Restitution May Be  
Ordered for Title 26 Violation But Is  
Limited to Offense of Conviction**

In *United States v. Batson*, No. 09-50238, 2010 WL 2473234 (9th Cir. June 21, 2010), the Ninth Circuit held that restitution may be ordered for a Title 26 violation as a condition of supervised release but that the amount must be limited to the loss resulting from the offense of conviction, unless the offense involves a scheme, conspiracy, or pattern of criminal activity.

Alma Batson ("Batson") operated a tax return preparation business that falsified tax returns in order to generate fraudulent refunds. She was indicted on charges of conspiracy, aiding in the preparation of false tax returns, and making a false statement to a government agent. Batson pleaded guilty to one count of aiding in the preparation of a single fraudulent tax return, with a tax loss of between \$4,571 and \$8,028. She stipulated in her plea colloquy that her clients collectively received at least \$965,673 in refunds to which they were not entitled.

The district court sentenced Batson to 12 months' imprisonment followed by 12 months' supervised release. As a condition of supervised release, the court required Batson to pay restitution in the amount of \$176,854, representing the total amount of erroneous refunds not recoverable through IRS collections procedures. Batson appealed, arguing that the authority of the federal courts to order restitution is limited by the Victim and Witness Protection Act ("VWPA") and the Mandatory Victims Restitution Act ("MVRA"), neither of which includes restitution for violations of Title 26.

On appeal, the Ninth Circuit held that the district court was authorized to order restitution for a Title 26 violation as a condition of supervised release by 18 U.S.C. §§ 3563(b)(2) and 3583(d). The court stated that nothing in the VWPA or the MVRA limits the pre-existing authority of federal courts to order restitution. The court further held, however, that restitution is limited to the loss resulting from the offense of conviction, so long as that offense does not involve an element of scheme, conspiracy or pattern of criminal activity. In this case, the loss for restitution purposes was that caused by Batson's aiding in the preparation of a single fraudulent tax return. Accordingly, the court vacated and remanded for the purpose of determining the proper amount of restitution.

### **Fourth Circuit Holds Extrapolating Tax Loss from Non-Random Sample of Audited Returns Was Error**

In *United States v. Mehta*, 594 F.3d 277 (4th Cir. 2010), the Fourth Circuit held that the district court erred when it calculated the tax loss for sentencing purposes by extrapolating from a non-random sample of audited returns.

Jiten Mehta (“Mehta”) was a tax return preparer who filed numerous Schedule A returns claiming false itemized deductions. Under the Refund Anticipation Loan program, Mehta submitted the false returns and received fraudulent refunds through interstate wire communications. He was convicted of 16 counts of aiding and assisting in the preparation of false tax returns and 17 counts of wire fraud.

In establishing the tax loss for sentencing purposes, the government proposed that the district court consider the 4,321 Schedule A returns filed by Mehta over a four-year period. Of those returns, 775 were selected for a correspondence audit. Approximately 30% of the taxpayers who had filed the audited returns agreed to pay the additional tax assessed, and the average agreed-upon assessment was \$1,531.

At sentencing, the district court considered only the 2,500 returns that Mehta filed during the last two years of the investigation. The court extrapolated the tax loss by multiplying 2,500 by 30% and then multiplying the resulting number by the \$1,500 average audited tax loss. This extrapolation resulted in a tax loss between \$1,000,000 and \$2,500,000, corresponding to a base offense level of 22.

The Fourth Circuit held that the district court erred in assuming that, because 30% of the audited returns had an average tax loss of \$1,531, this meant that 30% of all Schedule A returns filed by Mehta during that period would also have an average tax loss of \$1,531. The problem with this approach was that the 30% figure was derived from a non-random sample of returns that had been flagged as being more likely to contain errors. The court explained that a valid extrapolation requires that the selected sample group reflect a trend likely to be present in the larger group.

Noting that a reasonable estimate of the tax loss would be in excess of \$1,000,000, the circuit court concluded that the error did not result in a longer sentence for Mehta and was therefore harmless.

### **Fourth Circuit Holds Multiple Deposits in One Structuring Offense Can Be Pattern of Unlawful Activity under Guidelines**

In *United States v. Peterson*, No. 09-4166, 2010 WL 2406068 (4th Cir. June 17, 2010), the Fourth Circuit held that, for purposes of the Sentencing Guidelines, a pattern of unlawful activity can consist of multiple structured transactions that occurred during the course of one structuring offense.

As part of a divorce settlement, Sarah Hiram Peterson (“Peterson”) was ordered to pay her ex-husband \$500,000, of which \$100,000 was to be paid from cash Peterson had stored in a safe deposit box. In an attempt to evade the currency reporting requirements set forth in 31 U.S.C. § 5313(a), Peterson made eleven separate deposits of \$9,500 or less into a bank account between August 8 and August 29, 2006.

On October 2, 2008, Peterson was indicted on one count of structuring transactions to evade reporting requirements in violation of 31 U.S.C. § 5324(a)(3), and she pleaded guilty to that offense. At sentencing, the district court determined that her offense was part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period. Therefore, the court applied a two-level enhancement under the Guidelines, which also meant that a safe harbor provision that would have reduced Peterson’s offense level did not apply. After consideration of the Guidelines range and the other factors set forth at 18 U.S.C. § 3553(a), the court sentenced Peterson to eight months’ community confinement with work release.

On appeal, Peterson argued that if the structured money came from one source, here her safe deposit box, there could be only one offense and no pattern of unlawful activity, regardless of the number of deposits or the amount ultimately deposited. The Fourth Circuit disagreed, explaining that a pattern of unlawful activity can consist solely of structured transactions that occurred during the course of one structuring offense. The circuit court held that the district court did not err when it determined that Peterson’s structuring offense was committed as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period, such that the two-level enhancement under the Guidelines applied and the safe harbor provision did not apply.

## **FORFEITURE**

### **Fourth Circuit Holds Criminal Forfeiture of Proceeds Is Subject to Excessive Fines Clause**

In *United States v. Jalaram, Inc.*, 599 F.3d 347 (4th Cir. 2010), the Fourth Circuit held that a criminal forfeiture of proceeds imposed as part of a defendant's sentence is punitive and thus subject to scrutiny under the Eighth Amendment's Excessive Fines Clause.

Jalaram, Inc. ("Jalaram") owned one of two motels used by a prostitution ring that operated from 2000 to 2003 and generated over \$670,000 in proceeds. The prostitution ring used the motel owned by Jalaram for a period of six months. Jalaram was indicted and ultimately found guilty of conspiracy and money laundering. The jury also found both motels and the total proceeds of the scheme subject to forfeiture. The district court vacated the money laundering convictions for insufficiency of evidence, set aside Jalaram's other convictions, and ordered a new trial. The Fourth Circuit reversed, reinstated the jury verdict against Jalaram on all counts and remanded for sentencing.

On remand, the government sought forfeiture of Jalaram's motel and of the proceeds generated during the six months when the motel participated in the conspiracy, which totaled \$385,390.22. The district court subjected the requested proceeds forfeiture to an Excessive Fines Clause analysis, concluded that it would be grossly disproportional to Jalaram's crime, and denied the government's request. The government appealed, arguing that the Excessive Fines Clause did not apply to the forfeiture of criminal proceeds.

The Fourth Circuit held that the proceeds forfeiture was punitive and therefore subject to scrutiny under the Excessive Fines Clause because the forfeiture resulted at least in part from Jalaram's criminal activity. It based this holding on its determination that the forfeiture was imposed at the culmination of a criminal proceeding, required conviction of an underlying felony, and could only be imposed on a person who had been convicted of a crime. The court further held, however, that because Jalaram's offense was serious and its individual culpability significant, the requested forfeiture was not "grossly disproportional" to the gravity of the offense. Accordingly, the circuit court reversed and remanded the case to the district court to resentence Jalaram and to determine the amount of proceeds subject to forfeiture.

**CRIMINAL TAX BULLETIN**

**TABLE OF CASES**

**COUNTERTERRORISM**

*Holder v. Humanitarian Law Project, et al.*, Nos. 08-1498, 09-89, 2010 WL 2471055 (U.S. June 21, 2010)..... 1

**HONEST SERVICES FRAUD**

*Skilling v. United States*, No. 08-1394, 2010 WL 2518587 (U.S. June 24, 2010) ..... 1

**MIRANDA RIGHTS**

*Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010)..... 2

**SPEEDY TRIAL ACT**

*Bloate v. United States*, 130 S. Ct. 1345 (2010)..... 2

**DOUBLE JEOPARDY**

*United States v. Rigas*, 605 F.3d 194 (3d Cir. 2010)..... 3

**SEARCH AND SEIZURE**

*United States v. Tracey*, 597 F.3d 140 (3d Cir. 2010)..... 3

**EVIDENCE**

*Arnold v. Sec’y, Dep’t of Corr.*, 595 F.3d 1324 (11th Cir. 2010)..... 4

*United States v. Struckman*, No. 08-30312, 2010 WL 2573211 (9th Cir. June 29, 2010)..... 4

*United States v. Kruse*, 606 F.3d 404 (7th Cir. 2010) ..... 5

*United States v. St. Pierre*, 599 F.3d 19 (1st Cir. 2010)..... 5

*United States v. Stever*, 603 F.3d 747 (9th Cir. 2010)..... 6

**SENTENCING**

*United States v. Batson*, No. 09-50238, 2010 WL 2473234 (9th Cir. June 21, 2010)..... 6

*United States v. Mehta*, 594 F.3d 277 (4th Cir. 2010)..... 7

*United States v. Peterson*, No. 09-4166, 2010 WL 2406068 (4th Cir. June 17, 2010)..... 7

**FORFEITURE**

*United States v. Jalaram, Inc.*, 599 F.3d 347 (4th Cir. 2010) ..... 8