

Criminal Tax Bulletin

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BANK FRAUD

Supreme Court Holds Second Clause of Bank Fraud Statute Does Not Require Intent to Defraud Financial Institution

In *United States v. Loughrin*, 134 S. Ct. 2384 (2014), the Supreme Court held that 18 U.S.C. § 1344(2) does not require the government to prove the defendant intended to defraud a financial institution.

Kevin Loughrin (“Loughrin”) stole checks from residential mailboxes, altered or forged the checks, and then converted them into cash. Over several months, Loughrin used six altered checks to make purchases at the retailer Target, for amounts of up to \$250. After making the purchases, Loughrin returned the goods for cash. Each of the checks Loughrin presented to Target was drawn on an account at a federally insured bank. Based on this conduct, Loughrin was charged with six counts of committing bank fraud in violation of § 1344(2), which prohibits obtaining property from a financial institution “by means of false or fraudulent pretenses, representations, or promises.”

At trial, the court instructed the jury that it could convict Loughrin under § 1344(2) if it found he had “knowingly executed or attempted to execute a scheme or artifice to obtain money or property from the [banks on which the checks were drawn] by means of false or fraudulent pretenses, representations, or promises.” The court declined to give Loughrin’s proposed additional instruction that the jury must find Loughrin acted with “intent to defraud a financial institution.” Loughrin was convicted on all counts, and the Tenth Circuit affirmed.

The Supreme Court granted certiorari to resolve a circuit split on whether § 1344(2) requires the government to show that a defendant intended to defraud a financial institution. The Court held that it does not, reasoning that imposing such a requirement would make § 1344(2) apply only to conduct already falling within § 1344(1), which prohibits execution of a scheme “to defraud a financial institution.”

FOURTH AMENDMENT

Fifth Circuit Upholds Admission of Historical Cell Site Data

In *United States v. Guerrero*, 768 F.3d 351 (5th Cir. 2014), the Fifth Circuit held that the district court properly admitted historical cell site data at trial.

Javier Guerrero (“Guerrero”) was tried on racketeering charges, including two charges of murder in aid of racketeering. The evidence at trial included historical cell site data indicating that on the afternoon of one of the murders Guerrero made calls using phone service from a cell tower located near the murder site. The government had obtained this data from state officials, who had received it from third-party providers using a subpoena rather than a court order as mandated by the Stored Communications Act (the “SCA”). Guerrero was found guilty and received five life sentences.

On appeal, Guerrero argued that the district court should have suppressed the historical cell site data. The Fifth Circuit noted that because suppression is not a remedy for an SCA violation, Guerrero needed to show the data was obtained in violation of the Fourth Amendment. The court rejected Guerrero’s argument that the Supreme Court’s decision in *Riley v. California*, 134 S. Ct. 2473 (2014) (“*Riley*”), overruled the Fifth Circuit’s prior holding that historical cell site information is not protected by the Fourth Amendment. See *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013) (“*Historical Cell Site*”). In *Riley*, the Supreme Court held that the search-incident-to-arrest doctrine did not permit a warrantless search of an arrestee’s cell phone because there are significant privacy interests at stake in the search of a cell phone. The Fifth Circuit reasoned that unlike *Riley*, *Historical Cell Site* addressed whether a cell phone owner has a reasonable expectation of privacy in information the owner voluntarily provides to a third party. Concluding that *Riley* did not overrule its decision in *Historical Cell Site*, the Fifth Circuit affirmed the decision of the district court.

Third Circuit Upholds Warrantless Tracing of Unauthorized Wireless Signal

In *United States v. Stanley*, 753 F.3d 114 (3d Cir. 2014), the Third Circuit held that the government's warrantless tracing of the defendant's unauthorized wireless signal did not constitute a search implicating the Fourth Amendment.

A state police officer investigating the online distribution of child pornography traced suspected child pornography files to a computer that used an IP address registered to a particular subscriber. Execution of a search warrant at the subscriber's home revealed that the subscriber's computers contained neither child pornography nor the file-sharing software used to distribute the files. Because the subscriber's wireless Internet router was not password-protected, the officer suspected that the targeted computer was connecting wirelessly to the subscriber's router from a nearby location. Using a mobile tracking software tool, the officer traced the targeted computer's wireless signal to the home of Richard Stanley ("Stanley"), the subscriber's neighbor. When a search warrant was executed at Stanley's home, Stanley confessed that he had connected to his neighbor's router to download child pornography. The officers seized Stanley's laptop, which contained child pornography files.

Stanley was charged with possession of child pornography. He filed a pretrial motion to suppress his confession and the evidence obtained from his home and computer, arguing that the officer's use of the mobile tracking software tool constituted an impermissible warrantless search. The district court denied the motion. Stanley pleaded guilty and was sentenced to 51 months' imprisonment.

On appeal, the Third Circuit affirmed the denial of Stanley's motion to suppress. The court explained that because Stanley had connected to his neighbor's router without authorization, he lacked a reasonable expectation of privacy in the path of his wireless signal.

Third Circuit Declines to Apply Exclusionary Rule Where Warrant Lacked List of Items to Be Seized

In *United States v. Franz*, 772 F.3d 134 (3d Cir. 2014), the Third Circuit held that the exclusionary rule did not apply when an agent executing an otherwise-valid search warrant mistakenly failed to provide the homeowner with the list of items to be seized.

In 2009, the Bureau of Land Management ("BLM") obtained evidence that Robert Franz ("Franz") had smuggled a woolly mammoth tusk and other items from BLM-managed land in Alaska to his house in Pennsylvania. The BLM sought a search warrant for Franz's house. On the face sheet of the warrant, the description of items to be seized stated "See attached sheet." One of the attachments, Attachment B, listed the items to be seized. A magistrate judge approved the warrant and ordered it sealed, in order to maintain the secrecy of the grand jury investigation.

During the execution of the warrant, a BLM agent provided Franz with a copy of the face sheet of the warrant but did not provide the attachments. The agent mistakenly believed that, because the warrant had been sealed, he could not reveal the attachments. Instead, he gave Franz a verbal description of the items to be seized. During the search, agents found evidence of child pornography and seized certain items in plain view. Upon referral of the child pornography case to the FBI, an additional warrant was obtained to search the items that the BLM had seized.

Franz pleaded guilty to conspiracy and theft of government property with respect to his smuggling of the tusk. Subsequently, he was indicted for receipt and possession of child pornography. In the child pornography case, he filed a motion to suppress the evidence collected pursuant to both warrants. The district court denied the motion. Franz was found guilty of receipt of child pornography and sentenced to 60 months' imprisonment.

On appeal, the Third Circuit determined that the execution of the first warrant violated Franz's Fourth Amendment rights because the warrant was presented without a particularized list of items to be seized. The court determined, however, that the agent's conduct was an isolated mistake based on the agent's lack of experience. Concluding that application of the exclusionary rule would provide little deterrent effect, the Third Circuit affirmed the district court's denial of Franz's motion to suppress.

CONFRONTATION CLAUSE

Ninth Circuit Holds Testimony Describing Telephone Call Violated Confrontation Clause

In *United States v. Brooks*, 772 F.3d 1161 (9th Cir. 2014), the Ninth Circuit held that a postal inspector's testimony about his phone conversation with a non-

testifying post office supervisor, who identified the defendant as the person who mailed a parcel later found to contain marijuana, violated the Confrontation Clause.

In 2011, a task force of DEA officers and local law enforcement began investigating Rafiq Brooks (“Brooks”) for transporting marijuana by mail. On November 9, 2011, Brooks was observed entering a post office with a box. A task force officer contacted a U.S. postal inspector and described Brooks’s attire. The postal inspector telephoned the post office supervisor and conveyed the same information. The supervisor confirmed Brooks’s presence in the post office and gave the postal inspector mailing information for the parcel Brooks had dropped off. The postal inspector obtained a warrant, searched the parcel, and found marijuana.

Brooks was indicted on several narcotics charges, including conspiracy and possession of marijuana with intent to distribute on November 9, 2011. At trial, the postal inspector testified regarding the substance of his November 9 communication with the post office supervisor, who did not testify. The defense objected to this testimony on Confrontation Clause grounds, but the district court overruled the objection. Brooks was convicted on all counts and sentenced to concurrent prison terms of 110 months on the conspiracy count and 60 months on each of the possession counts.

On appeal, the Ninth Circuit held that allowing the postal inspector to testify about the telephone call without having the supervisor testify violated the Confrontation Clause because, by conveying the substance of what the supervisor said, the inspector introduced out-of-court “statements,” even though he did not quote the supervisor verbatim. The court determined that these statements were testimonial and were offered for their truth. Declining to hold the violation harmless as to the November 9 count, the court reversed that conviction and remanded to determine whether resentencing was appropriate.

SPEECH OR DEBATE CLAUSE

Ninth Circuit Holds Admission of Rebuttal Evidence Did Not Violate Speech or Debate Clause

In *United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014), the Ninth Circuit held that admission of the government’s rebuttal evidence regarding legislative acts that the defendant, a member of Congress, had

disclosed at trial, did not violate the Speech or Debate Clause of the Constitution.

Richard Renzi (“Renzi”) and James Sandlin (“Sandlin”) were friends and partners in a real estate development company. Shortly after his election to Congress, Renzi sold Sandlin his share of the company, partly in exchange for an \$800,000 promissory note. Sandlin also owned a parcel of land in southeastern Arizona (the “Sandlin tract”). Renzi, a member of the House Natural Resources Committee, met with two companies – the Resolution Copper Company (“RCC”) and the Aries Group (“Aries”) – that were interested in acquiring federal land through land exchanges. In these meetings, he implied that he would sponsor a federal land exchange bill with whichever company purchased the Sandlin tract. After RCC declined to make the purchase, Renzi introduced a bill featuring RCC, but no action was ever taken on it. Aries ultimately purchased the Sandlin tract, but a federal land exchange bill with Aries was never introduced.

Renzi was ultimately convicted of public corruption, insurance fraud, and racketeering and sentenced to 36 months’ imprisonment. On appeal, he argued in part that the district court erred by allowing testimony from his former District Director, Joanne Keene (“Keene”), in violation of the Speech or Debate Clause. This clause provides that, “for any Speech or Debate in either House, [a member of Congress] shall not be questioned in any other Place.” U.S. Constitution, Art. I, § 6, cl. 1. The Ninth Circuit explained that the Speech or Debate Clause may be violated when the government reveals legislative act information to a jury. In this case, Renzi challenged Keene’s testimony that (1) Renzi did not seem interested in the RCC land exchange bill when Sandlin’s tract was no longer a part of it; and (2) Renzi told her he did not want to introduce the Aries land exchange bill because another congressman had been indicted for public corruption. The court of appeals determined that in both instances the government had elicited limited rebuttal testimony from Keene after Renzi himself raised these issues through his cross-examination of executives from RCC and Aries. The court held that, if a member of Congress offers evidence of his own legislative acts at trial, the government is entitled to introduce rebuttal evidence narrowly confined to these acts. Accordingly, the court concluded that admission of Keene’s testimony did not violate the Speech or Debate Clause.

UNDERCOVER INVESTIGATIONS

Seventh Circuit Holds Defendant Entitled to Present Entrapment Defense at Trial

In *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014) (en banc), the Seventh Circuit held that the defendant had proffered sufficient evidence to defeat the government's motion to preclude him from presenting an entrapment defense.

Leslie Mayfield ("Mayfield") had a lengthy criminal record for violent crimes. In 2008, he found a temporary job. His coworker, Jeffrey Potts ("Potts"), was working as a confidential informant for the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"). After repeated offers from Potts to participate in the robbery of a "stash house" controlled by drug suppliers, Mayfield agreed to participate. He was arrested at the scene of the crime and charged with drug conspiracy and various firearms offenses. The government moved in limine to prevent him from presenting an entrapment defense. Mayfield proffered evidence to oppose the government's motion, but the court granted the motion. He was convicted on all counts and sentenced to 322 months' imprisonment. A divided panel of the Seventh Circuit affirmed.

On rehearing en banc, the Seventh Circuit advised that in ruling on a pretrial motion to preclude the entrapment defense, a district court must accept the defendant's proffered evidence as true and not weigh the government's evidence against it. With respect to Mayfield, the Seventh Circuit observed that his proffered evidence suggested Potts had targeted him at a time of prolonged difficulty finding permanent work. Mayfield claimed that Potts gave him money in order to create a debt that Mayfield would be unable to repay, and then conveyed an implied threat of violence if the debt were not repaid. Finally, Mayfield's evidence indicated that Potts repeatedly asked Mayfield to participate in the robbery over a substantial period of time. Accepting the proffer as true, the court concluded that Mayfield had presented sufficient evidence to defeat the government's motion, and that the district court should not have precluded him from presenting his entrapment defense at trial.

EVIDENCE

Second Circuit Holds Printout of Defendant's Purported Profile Page Was Not Properly Authenticated

In *United States v. Vayner*, 769 F.3d 125 (2d Cir. 2014), the Second Circuit held that the government failed to provide proper authentication for the printout of a web page purported to be the defendant's profile, and therefore the page was inadmissible.

Defendant Aliaksandr Zhylytsou ("Zhylytsou") was charged with transferring a false identification document, in violation of 18 U.S.C. §§ 1028(a)(2) and (b)(1)(A)(ii). At trial, the government's principal evidence was the testimony of Vladyslav Timku ("Timku"), who stated that, in order to avoid compulsory military service in his native Ukraine, he asked Zhylytsou to create a forged birth certificate reflecting that Timku was the father of an invented infant daughter. Timku testified that Zhylytsou sent the forgery to Timku via e-mail from azmadeuz@gmail.com (the "Gmail address"). To corroborate Timku's testimony, the government sought to introduce a printout of a web page that the government claimed to be Zhylytsou's profile on "the Russian equivalent of Facebook," through the testimony of a Special Agent with the State Department's Diplomatic Security Service ("DSS"). Zhylytsou objected, contending that the page had not been properly authenticated and was thus inadmissible under Rule 901 of the Federal Rules of Evidence. The district court overruled the objection. During his testimony, the DSS Special Agent pointed out that the profile listed "Azmadeuz" as Zhylytsou's address and that the web page reflected other identifying information that corroborated Timku's testimony. Zhylytsou was convicted and sentenced to time served.

On appeal, the Second Circuit concluded that the district court had abused its discretion in admitting the web page without proper authentication under Rule 901. The court explained that because the web page was introduced to corroborate Timku's testimony, Rule 901 required that there be some basis beyond Timku's testimony on which a reasonable juror could have concluded that the page was in fact Zhylytsou's profile and had been created by him or on his behalf. Since no such showing was made, the court held that the evidence should have been excluded.

SENTENCING

Eleventh Circuit Holds General Fraud Guidelines, Rather than Tax Guidelines, Apply to Stolen Identity Refund Fraud

In *United States v. Baldwin*, 774 F.3d 711 (11th Cir. 2014), the Eleventh Circuit held that the district court properly applied the United States Sentencing Guidelines (“U.S.S.G.” or “guidelines”) for general fraud under U.S.S.G. § 2B1.1, rather than the tax guidelines under U.S.S.G. § 2T, when determining the defendant’s sentence for conspiring to file false returns using stolen identities.

Lineten Belizaire (“Belizaire”), together with brothers Earnest and Earl Baldwin (“Earnest” and “Earl”), filed hundreds of fraudulent tax returns using stolen identities. The returns claimed approximately \$1.8 million in fraudulent refunds, and the IRS paid out approximately \$840,000, much of which was loaded onto debit cards. Belizaire’s role in the scheme involved recruiting people to provide addresses to receive debit cards loaded with fraudulent refunds, exchanging personal identification information of victims, filing fraudulent returns, and using debit cards loaded with fraudulent refunds.

Earnest and Earl were convicted by a jury of a number of identity-theft-related charges and were sentenced to 84 months’ and 172 months’ imprisonment, respectively. Belizaire pleaded guilty to conspiracy to defraud the government with respect to claims in violation of 18 U.S.C. § 286 and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). He was sentenced to a total of 129 months’ imprisonment.

On appeal, Belizaire argued in part that the district court erred in applying the general fraud guidelines under § 2B1.1 when determining his offense level, because the tax guidelines under § 2T were more applicable to his conduct. The Eleventh Circuit disagreed, reasoning that, although Belizaire’s conduct involved filing tax returns, his goal was to enrich himself by defrauding the government with entirely fictitious returns, and thus the general fraud guidelines more aptly fit his crimes. The court further noted that, assuming the offense conduct was covered by both guidelines, the commentary to U.S.S.G. § 1B1.1 instructs courts to apply the provision resulting in the greater offense level, which in this case was § 2B1.1.

Eleventh Circuit Holds Probationary Sentence for Multi-Year Bribery Scheme Was Substantively Unreasonable

In *United States v. Hayes*, 762 F.3d 1300 (11th Cir. 2014), the Eleventh Circuit held that a probationary sentence imposed on a business owner who paid over \$600,000 in bribes to a state official over a four-year period was substantively unreasonable.

James Winston Hayes (“Hayes”) operated a computer software company that sold educational software to the Alabama Department of Postsecondary Education (“ADPE”). From 2002 to 2006, Hayes paid over \$600,000 in bribes to the Chancellor of the ADPE and the Chancellor’s family and friends. During that time, Hayes’s company received more than \$14 million in gross income from the ADPE, from which it realized a profit of approximately \$5 million. Subsequently, Hayes began cooperating with the federal government in an investigation of corruption at the ADPE. In 2007, Hayes pleaded guilty to bribing an agency receiving federal funds (18 U.S.C. § 666(a)(2)) and conspiring to commit money laundering (18 U.S.C. § 1956(h)). At sentencing, the government filed a motion under U.S.S.G. § 5K1.1 for downward departure based on substantial assistance to authorities, and recommended a guidelines range of 57 to 71 months’ imprisonment. After granting the motion and considering the sentencing factors under 18 U.S.C. § 3553(a), the court sentenced Hayes to concurrent terms of three years’ probation, with six to twelve months’ home confinement.

On appeal, the Eleventh Circuit held that the district court committed a clear error of judgment in its balancing of the § 3553(a) factors, and that its downward variance to probation had resulted in a sentence that was outside of the range of reasonable sentences permitted by the record. The court opined that the sentence conveyed the message that would-be white-collar criminals stood to lose little more than a portion of their ill-gotten gains and therefore did not constitute just punishment or promote respect for the law. The court further remarked that the sentence did not provide for general deterrence because the threat of probation did not provide the same level of deterrence as the threat of incarceration. In addition, the court stated that the sentence was not required to eliminate any sentencing disparity among similarly situated offenders because no such disparity existed. Accordingly, the court vacated the sentence and remanded the case for resentencing.

Seventh Circuit Clarifies Scope of Relevant Conduct for Jointly Undertaken Criminal Activity

In *United States v. Davison*, 761 F.3d 683 (7th Cir. 2014), the Seventh Circuit held that a defendant's relevant conduct for jointly undertaken criminal activity under U.S.S.G. § 1B1.3(a)(1)(B) does not include the criminal activity of other participants unless that activity was both (1) reasonably foreseeable to the defendant; and (2) an objective of the joint undertaking that the defendant agreed to help achieve.

William J. Davison ("Davison"), a member of a street gang that sold narcotics, was convicted of two counts of distributing at least 50 grams of crack cocaine. Davison was acquitted of the charge of conspiracy, but the district court determined by a preponderance of the evidence that he was a member of a drug conspiracy for sentencing purposes. On this basis, the court asserted that drug sales by other gang members, to the extent those sales were reasonably foreseeable to Davison, constituted relevant conduct for purposes of calculating his guidelines range. The quantity of the other members' drug sales increased Davison's base offense level to 38. Davison's total offense level was 40, and the court imposed a within-guidelines sentence of 360 months' imprisonment. Subsequently, the Sentencing Commission retroactively increased the quantity of crack cocaine that must be sold to make a defendant's base offense level 38, and Davison moved for a sentencing reduction. He argued that he was not responsible for the drug sales of other gang members, and therefore the amount of drug sales for which he was responsible did not meet the amended requirements for a base offense level of 38. The district court denied the motion, on the grounds that the drug sales of Davison's co-conspirators were reasonably foreseeable to him and therefore constituted relevant conduct for purposes of calculating his guidelines range.

On appeal, the Seventh Circuit reversed, explaining that the question of whether Davison should be held accountable for the drug sales of his fellow gang members depended not only on whether those sales were reasonably foreseeable to him, but also on whether he joined or agreed to join their enterprise with the objective of making the other members' sales. The court noted that such a joint undertaking could have been established by showing that Davison took any action to promote the other members' drug sales. Accordingly, the court remanded the case for reconsideration of Davison's motion.

Ninth Circuit Holds Government's References to Defendant's Criminal History Breached Plea Agreement

In *United States v. Heredia*, 768 F.3d 1220 (9th Cir. 2014), the Ninth Circuit held that the government breached its fast-track plea agreement with the defendant by making repeated references to the defendant's criminal history in its sentencing memorandum.

Paul Gabriel Morales Heredia ("Morales"), a Mexican citizen, crossed the southwest border into the United States several times without authorization. After being removed three times, he again entered without inspection in 2011 and was apprehended by immigration authorities. In January 2012, Morales and the government executed a written fast-track plea agreement under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. Morales agreed to plead guilty to one count of illegal reentry, in violation of 8 U.S.C. § 1326. Morales and the government further agreed to recommend a prison sentence at the low end of the applicable guidelines range, plus three years' supervised release. Both parties also agreed not to suggest that the court impose a different sentence.

The government subsequently filed its sentencing memorandum, which recommended a sentence of six months' imprisonment (the low end of the guidelines range) and three years' supervised release. The memorandum also described Morales's 20-year criminal history, which had been detailed in the probation officer's pre-sentence report ("PSR"). The memorandum argued that Morales posed a danger to the community and that an appropriate sentence was needed to ensure sufficient deterrence. A few weeks later, the district court rejected the terms of the plea agreement. Morales declined to withdraw his guilty plea and was sentenced to 21 months' incarceration and three years' supervised release.

On appeal, the Ninth Circuit held that the government had breached its agreement by implicitly recommending a higher sentence than agreed upon, through its repeated references to Morales's criminal history in its sentencing memorandum. Accordingly, the court vacated Morales's sentence and remanded for resentencing before a different district judge.

Eleventh Circuit Holds District Court Erred in Considering Rehabilitation When Imposing Prison Sentence upon Revocation of Supervised Release

In *United States v. Vandergrift*, 754 F.3d 1303 (11th Cir. 2014), the Eleventh Circuit held that the district court had committed procedural error in considering the benefits of rehabilitation when it sentenced the defendant to a period of incarceration after revocation of his supervised release.

After serving a 97-month sentence for the possession and distribution of child pornography, Walter Henry Vandergrift (“Vandergrift”) began a three-year term of supervised release. During this term, Vandergrift’s probation officer filed a petition seeking revocation of Vandergrift’s supervised release on the grounds that he had committed five violations. The district court found that Vandergrift had committed the alleged violations and revoked his supervised release. At sentencing, the court considered how vocational training in the prison system could benefit Vandergrift. The court then imposed an above-guidelines sentence of 24 months’ imprisonment, to be followed by one year of supervised release.

On appeal, Vandergrift argued that the district court had improperly considered his need for rehabilitation when it sentenced him to imprisonment. The Eleventh Circuit agreed, noting that in *Tapia v. United States*, 131 S. Ct. 2382 (2011), the Supreme Court stated that federal courts are prohibited from considering a defendant’s rehabilitative needs when imposing a prison sentence. The Eleventh Circuit determined that *Tapia* applies in the context of resentencing upon the revocation of supervised release. Turning to Vandergrift’s case, the court of appeals held that the district court’s consideration of rehabilitation when crafting his prison sentence amounted to procedural error. The court distinguished between treating rehabilitation as the reason for imposing a sentence of incarceration, which is prohibited, and discussing rehabilitation during sentencing, which is not.

Although the court of appeals held that the district court had committed procedural error, it affirmed Vandergrift’s sentence on the grounds that Vandergrift failed to show his sentence would have been different but for the district court’s consideration of rehabilitation.

RESTITUTION

Eleventh Circuit Holds Entity that Admits to Fraud Cannot Be Awarded Restitution

In *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234 (11th Cir. 2014), the Eleventh Circuit held that an entity that admits to engaging in fraudulent conduct cannot be treated as a “victim” of that fraud for purposes of obtaining restitution under Crime Victims’ Rights Act (“CVRA”), 18 U.S.C. § 3771, and the Mandatory Victims Restitution Act of 1996 (“MVRA”), 18 U.S.C. § 3663A.

Wellcare Health Plans, Inc. (“Wellcare”) was charged with conspiracy to commit healthcare fraud. The company entered into a deferred prosecution agreement, pursuant to which it admitted that, acting through its former officers and employees, it conspired to defraud Florida healthcare programs of approximately \$40 million. Wellcare also agreed to pay \$40 million in restitution and \$40 million in civil forfeiture. After additional investigation, a federal grand jury indicted several of Wellcare’s officers and employees (the “defendants”) for conspiracy, making false statements, and healthcare fraud. Before the defendants’ trial, the government designated Wellcare as an un-indicted co-conspirator. A jury found three of the defendants guilty of healthcare fraud. Wellcare moved to be recognized as a victim of the defendants’ crimes and sought restitution under the CVRA and MVRA. The district court denied Wellcare’s motion.

Wellcare petitioned the Eleventh Circuit for a writ of mandamus. The Eleventh Circuit noted that Wellcare admitted its participation in the fraud conspiracy, was designated as an un-indicted co-conspirator, and had paid restitution and forfeited assets. Based on these facts, the court concluded that Wellcare was not a “victim” within the meaning of the CVRA or the MVRA, but rather an admitted perpetrator of the healthcare fraud scheme. The court explained that by moving for restitution from its top-level executives, Wellcare was impermissibly seeking restitution for its own conduct.

Given Wellcare’s admitted role in the criminal conspiracy, the court of appeals ruled that the district court did not clearly abuse its discretion in denying Wellcare’s motion to be recognized as a crime victim and to be awarded restitution. Accordingly, the court of appeals denied Wellcare’s petition for mandamus.

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