Criminal Tax Bulletin

Department of Treasury ***Office of Chief Counsel***
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CONFRONTATION CLAUSE

Supreme Court Holds Confrontation Clause Requires Testimony of Certifying Analyst Prior to Admission of Forensic Laboratory Report

In ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011), the Supreme Court, relying on its decisions in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), held that a forensic laboratory report containing a testimonial certification may only be introduced through the in-court testimony of the particular scientist who performed and certified the test, unless he is unavailable and the accused had an opportunity to cross-examine him pretrial.

Donald Bullcoming ("Bullcoming") was arrested for driving while intoxicated ("DWI"). After securing a warrant, the police obtained a blood sample and sent it to a forensic laboratory for a blood-alcohol concentration ("BAC") analysis. During the trial, the principal evidence against Bullcoming was the laboratory report certifying a BAC level above the threshold for aggravated DWI. Because the forensic analyst who performed and certified the test was on unpaid administrative leave at the time of the trial, the prosecution introduced the report through the testimony of a different analyst, who was familiar with the testing procedures but had not performed the analysis or participated in the preparation of the report. The trial court admitted the report over the defendant's objection, and Bullcoming was convicted. The conviction was affirmed by the Court of Appeals of New Mexico, and Bullcoming appealed to the Supreme Court of New Mexico.

While Bullcoming's appeal was pending, the U.S. Supreme Court held in *Melendez-Diaz* that a forensic laboratory report, created to serve as evidence in a criminal proceeding, is testimonial for Confrontation Clause purposes and, absent stipulation, the prosecution may only introduce it through the live testimony of a witness competent to testify about the report. Although the New Mexico Supreme Court acknowledged that, under *Melendez-Diaz*, the report of Bullcoming's blood sample was testimonial evidence, it upheld the admission of the blood sample after concluding that the certifying analyst was a "mere scrivener" who simply transcribed machine-generated test results, and that the analyst who testified qualified as an expert witness with respect to the testing machine and procedures.

The U.S. Supreme Court reversed, holding that Bullcoming had the right to confront the analyst who made the certification, unless the analyst was unavailable at trial and the accused had a pretrial opportunity to cross-examine him. As the Court explained, the analyst's certification represented that he had adhered to a precise protocol in testing the sample and that no circumstance affected the sample's integrity or the validity of the analysis. Such representations, the Court concluded, should be subject to cross-examination. Further, surrogate testimony could neither convey what the certifying analyst knew about the particular testing process he employed, nor expose any lapses or lies on the analyst's part.

SPEEDY TRIAL ACT

Supreme Court Holds Delays Resulting from Pretrial Motions Are Automatically Excluded from Speedy Trial Act's 70-Day Requirement

In ***United States v. Tinklenberg***, 131 S. Ct. 2007 (2011), the Supreme Court held, *inter alia*, that the Speedy Trial Act's exclusion for delays resulting from pretrial motions applies automatically upon the filing of a pretrial motion irrespective of whether the motion actually causes or is expected to cause delay of a trial.

Jason Louis Tinklenberg ("Tinklenberg") was charged with federal drug and gun violations. His trial began 287 days after his initial appearance. Just before trial, he moved to dismiss the indictment on the ground that the trial violated the Speedy Trial Act's 70-day requirement. The district court denied the motion after

finding that 218 of the 287 days fell within exclusions to the Speedy Trial Act, leaving 69 nonexcludable days and making the trial timely. On appeal, the Sixth Circuit held that nine days during which three pretrial motions were pending were not excludable because the motions did not cause – and were not expected to cause – delay of the trial. Because these nine days brought the total number of nonexcludable days above 70, the Court of Appeals held there was a violation of the Speedy Trial Act.

The Supreme Court reversed the Sixth Circuit's determination with respect to the non-excludability of the nine days. The Court determined that the exclusion for delays resulting from pretrial motions stops the Speedy Trial clock from running automatically upon the filing of a pretrial motion irrespective of whether the motion has any impact on when the trial begins. Accordingly, the Court held that the exclusion for delays resulting from pretrial motions does not require a court to find that the filing of the pretrial motion actually caused or was expected to cause delay of the trial.

The Court next addressed Tinklenberg's argument that the Sixth Circuit had wrongly interpreted a different exclusion provision of the Act, *i.e.*, the provision excluding delay resulting from transportation to a medical facility, except for time in excess of ten days. *See* 18 U.S.C. § 3161(h)(1)(F). Prior to trial, Tinklenberg had requested a competency evaluation, and 20 days elapsed during his transportation to and from the medical facility. In applying the exclusion provision, however, both the lower court and the Sixth Circuit had exempted weekends and holidays and thus considered only two of the transportation days excessive.

The Supreme Court interpreted subparagraph (F) to include weekends and holidays and concluded that ten of the transportation days were excessive. On that basis, the Court held that Tinklenberg's trial violated the Speedy Trial Act and affirmed the Sixth Circuit's judgment ordering dismissal of the indictment on remand.

SEARCH AND SEIZURE

Supreme Court Holds Exclusionary Rule Inapplicable If Officers Reasonably Rely on Binding Precedent

In ***Davis v. United States,*** 131 S. Ct. 2419 (2011), the Supreme Court held that when law enforcement officers conduct a search in objectively reasonable reliance on binding appellate precedent that is later overruled, the exclusionary rule does not apply.

In 2007, police officers conducted a routine traffic stop that resulted in the arrests of driver Stella Owens ("Owens"), for driving while intoxicated, and passenger Willie Davis ("Davis"), for giving a false name to the police. The police handcuffed Owens and Davis and placed them in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle and found a revolver inside Davis's jacket pocket.

Davis was indicted on one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). In his motion to suppress the revolver, Davis acknowledged that the officers' search complied with existing Eleventh Circuit precedent, but he raised a Fourth Amendment challenge to preserve the issue for review on appeal. The District Court denied the motion, and Davis was convicted.

While Davis's appeal was pending in the Eleventh Circuit, the Supreme Court decided *Arizona v. Gant*, 129 S. Ct. 1710 (2009), in which the Court adopted a new rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search; or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. Applying *Gant*'s new rule, the appellate court held that the vehicle search incident to Davis's arrest violated his Fourth Amendment rights. The court declined to apply the exclusionary rule, however, and affirmed Davis's conviction.

The Supreme Court affirmed, holding that the good-faith exception to the exclusionary rule applied in these circumstances. The Court explained that the sole purpose of the exclusionary rule is to deter misconduct by law enforcement. Where officers reasonably rely on binding precedent, the Court concluded that suppression would do nothing to deter police misconduct and would come at a high cost, both to the truth and to public safety.

Eleventh Circuit Holds Pervasive Fraud Doctrine May Apply Even If Fraud Is Small Fraction of Legitimate Business

In ***United States v. Bradley***, 644 F.3d 1213 (11th Cir. 2011), the Eleventh Circuit held, *inter alia*, that the "pervasive fraud" doctrine applies when evidence of fraud is likely to be found in a broad spectrum of the defendant's records, even when the fraud is only a small fraction of the defendant's legitimate business.

Martin J. Bradley III ("Bradley III") and his father (collectively, the "Bradleys") owned Bio-Med Plus, Inc., a pharmaceutical wholesaler. The Bradleys engaged in multiple schemes to defraud the Florida and California Medicaid programs by causing them to pay for the same blood-derivative medications more than once. Although these recycled blood-derivatives accounted for less than two and a half percent of Bio-Med's overall sales, they accounted for a much larger portion of Bio-Med's profits, yielding in excess of $39 million over a five-year span from 1998 through 2002.

The Bradleys and Bio-Med were charged with racketeering, conspiracy, mail fraud, wire fraud, money laundering, and failure to disclose a foreign financial account. The defendants moved to suppress evidence obtained in a search of Bio-Med's headquarters on the ground that the warrant that was overbroad and lacking in particularity, in that it allowed the agents to seize all personal and business files relating to Bio-Med's wholesale business from 1997 through 2002. The district court denied the motions under the "pervasive fraud doctrine," holding that the pervasiveness of the defendants' fraudulent schemes justified the warrant's breadth.

On appeal, the defendants argued that the "pervasive fraud" doctrine is inapplicable unless the government alleges that the business in question is engaged almost exclusively in fraudulent business practices. Because the fraud at issue here represented only a small fraction of Bio-Med's legitimate business, the defendants claimed that the district court erroneously denied their motion to suppress. The Eleventh Circuit disagreed, noting that the "pervasive fraud" doctrine is not concerned with the depth of the fraud but rather its breadth, *i.e.*, whether evidence of fraud is likely to be found in records related to a wide range of company business.

Here, the court concluded that the standard was met, as the alleged fraud supposedly infected Bio-Med, its principals and officers, its suppliers, and numerous other individuals and businesses with whom it did or had done business. As such, even though the fraud amounted to a small percentage of Bio-Med's overall business, traces of that fraud were likely to be found spread out among all the records in Bio-Med's possession.

FIFTH AMENDMENT

Ninth Circuit Holds Fifth Amendment Privilege Inapplicable to Subpoena for Foreign Bank Records Required under Bank Secrecy Act

In ***In re Grand Jury Investigation M.H. v. United States,*** 648 F.3d 1067 (9th Cir. 2011), the Ninth Circuit held that foreign bank account records required to be kept under the Bank Secrecy Act ("BSA") fall within the Required Records Doctrine, thus rendering the Fifth Amendment privilege against self-incrimination inapplicable to a subpoena for these records.

M.H. was the target of a grand jury investigation seeking to determine whether he used secret Swiss bank accounts to evade federal taxes. The grand jury issued a subpoena to M.H. for the production of records relating to his offshore banking activity that were required to be kept under the BSA. M.H. refused to comply, arguing that if he provided the requested information, he risked incriminating himself in violation of his Fifth Amendment privilege. The district court granted the government's motion to compel after concluding that the requested records fell within the Required Records Doctrine and, therefore, the Fifth Amendment was inapplicable. When M.H. again refused to comply, the court held him in contempt, but stayed the contempt order pending appeal.

The Ninth Circuit affirmed the district court's contempt order. Relying on *Shapiro v. United States*, 335 U.S. 1 (1948), the court reasoned that, under the Required Records Doctrine, the Fifth Amendment privilege does not extend to records required to be kept as a result of an individual's voluntary participation in a regulated activity. The court noted that the Required Records Doctrine applies if "(1) the purpose of the government's inquiry is regulatory, not criminal; (2) the information requested is contained in documents of a kind the regulated party customarily keeps; and (3) the records have public aspects." *In re Grand Jury Investigation M.H.*, 648 F.3d at 1072 (citation omitted).

In this case, the court first determined that the purpose of the BSA record-keeping requirements is regulatory, not criminal, because having an offshore account is not

inherently illegal. Second, the court noted that the records at issue consisted of basic account information that bank customers would customarily keep in order to access their foreign bank accounts and to report the information to the IRS. Third, the records had public aspects because they were required in furtherance of a valid regulatory scheme. Accordingly, the court concluded the Required Records Doctrine applied, and M.H. could not invoke the Fifth Amendment privilege to resist compliance with the subpoena.

VENUE

Eleventh Circuit Holds Venue for Failure to File FBAR Lies in Any District that Houses an IRS Office

Note: This case is also discussed under "Search and Seizure," above, with respect to a different issue.

In ***United States v. Bradley***, 644 F.3d 1213 (11th Cir. 2011), the Eleventh Circuit held, *inter alia*, that venue for failure to file an FBAR properly lies in any district that houses a local IRS office, so long as the chosen venue does not create a constitutional hardship for the defendant.

As discussed above, the Bradleys and their company, Bio–Med Plus, Inc., engaged in multiple schemes to defraud the Florida and California Medicaid programs by causing them to pay for the same blood-derivative medications more than once, resulting in $39 million in profits. The Bradleys and their associates attempted to camouflage these profits by forming a Bahamas corporation and opening two Bahamas bank accounts in the corporation's name. The Bradleys then arranged for millions of dollars to be transferred from their domestic accounts into the Barclays accounts. The Bradleys failed to check the appropriate box on Form 1040, Schedule B acknowledging their interest in a foreign financial account, and they also failed to file Treasury Department Form 90–22.1, Report of Foreign Bank and Financial Accounts ("FBAR").

The Bradleys and their associates were convicted of a number of offenses and received sentences of varying lengths. Bradley III was sentenced to 300 months' imprisonment, a term that included 60 months for failure to disclose a foreign financial interest as part of a pattern of illegal activity, under 31 U.S.C. §§ 5314 and 5322(b). He moved the district court for a judgment of acquittal on the FBAR count, arguing that venue had been improperly laid in the Southern District of Georgia. The district court disagreed and denied the motions, and Bradley III appealed.

The Eleventh Circuit noted that venue, in a criminal case, is constitutionally proper only in the district where the crime was committed, and that the failure to perform a legally required act occurs where the act is supposed to be performed. The FBAR instructions provide that the form may be filed in any district that houses a local IRS office. Accordingly, the court held that the government could bring an indictment in any of these districts, so long as no constitutional hardship was created. In this case, the court determined that the possibility that Bradley III could have filed the form in the Southern District of Georgia, the district where his returns were prepared and home to a local IRS office, was sufficient to establish venue in that district. Because no constitutional hardship was created for Bradley III, the court upheld the denial of Bradley III's motion for a judgment of acquittal.

EVIDENCE

Eighth Circuit Holds Government's Failure to Disclose IRS Documents Did Not Violate *Brady*

In ***United States v. Ellefsen***, 655 F.3d 769 (8th Cir. 2011), the Eighth Circuit held that the government's failure to disclose IRS documents to the defense did not violate *Brady v. Maryland*, 373 U.S. 83 (1963), because the undisclosed information was not material.

Southwest Missouri Bone & Joint, Inc. ("SMBJ") was owned by Brian Ellefsen ("Brian"), an orthopedic surgeon, and managed by Mark Ellefsen ("Mark"). In 1997, the Ellefsens joined the Aegis Business Trust System, an offshore tax shelter. From 1997 to 2003, SMBJ transferred over $1 million to various Aegis-created domestic and foreign entities and deducted the transfers as "management fees" on SMBJ's tax returns. During the same period, Brian declared on his tax returns that he had no interest or authority over any foreign account. In 2005, after Brian's and SMBJ's records were subpoenaed, Brian amended his prior years' individual tax returns, adding most of the "management fees" to his taxable income.

In May 2009, a jury convicted the Ellefsens of conspiracy to defraud the United States, filing false income tax returns, and aiding and assisting in the preparation of false tax returns. The Ellefsens moved for acquittal or a new trial, arguing, among other things, that the government had withheld material exculpatory

information regarding the IRS treatment of Brian's amended individual tax returns, in violation of *Brady*. The district court denied the motion, holding that the withheld information did not contain any new evidence and was not material or exculpatory.

On appeal, the Ellefsens argued that the withheld documents constituted *Brady* material because they showed the IRS had accepted the amended returns, had treated the earnings as regular income, and had deemed the amended returns a final civil assessment. The Eighth Circuit held that no *Brady* violation had occurred, because even if the withheld evidence was favorable, the Ellefsens had not shown it was material. The court noted that evidence is material for purposes of *Brady* if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. Applying this standard, the court concluded that the amended returns, which had been submitted years after the filing of the false original returns and months after the Ellefsens learned they were under investigation, were of minimal probative value as to the Ellefsens' state of mind at the time of the alleged crimes and, therefore, were not material.

District Court Finds Failure to Disclose IRS Investigation of Cooperating Witness Was *Brady* Violation

In ***United States v. Stevens***, No. 10-200-01/02, 2011 WL 4344016 (W.D. La. Sept. 14, 2011), the U.S. District Court for the Western District of Louisiana granted the defendants' motion for a new trial after finding that the government's failure to disclose an IRS investigation of a cooperating witness violated due process under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).

Robert E. Stevens ("Stevens") and Arthur Gilmore, Jr. ("Gilmore") were tried and convicted of violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), and the Hobbs Act, 18 U.S.C. § 1951, based on their acceptance of bribes as public officials. The government's primary witness at trial was Eddie Hakim ("Hakim"), a local businessman and cooperating witness who had offered bribes to Stevens and Gilmore.

Hakim had begun cooperating with FBI investigators in February 2008. In October 2009, his former employer, Blake Deshotels ("Deshotels"), contacted the FBI with allegations that Hakim was hiding assets from the government and committing criminal tax violations. FBI investigators and an Assistant U.S. Attorney ("AUSA") directed Deshotels to IRS Criminal Investigation Division ("IRS-CI"), which opened an investigation. The AUSA informed the special agent working the IRS-CI investigation that Hakim was a cooperating witness in an ongoing FBI investigation. In May 2010, approximately one month before Stevens and Gilmore were indicted, the IRS-CI special agent informed the AUSA that he had closed his investigation of Hakim. Hakim had not been informed that he was under investigation.

On the penultimate day of trial, Deshotels informed Stevens's counsel of his allegations and the IRS investigation of Hakim. The defendants filed a motion to dismiss or, alternatively, for a new trial, arguing that the government's failure to disclose this information violated *Brady* and *Giglio*. The district court determined the government's conduct in this case was not so outrageous as to require dismissal, but it did find a *Brady* violation and granted the defendants' motion for a new trial. The court reasoned that the undisclosed evidence was material because the case hinged on Hakim's credibility, and because the evidence demonstrated that he was motivated to assist the FBI in order to deflect attention away from his own actions. Further, the court found that Hakim received a benefit from the government of which the jury was unaware, namely, that IRS-CI did not forward Hakim's case to the civil side of the IRS for review after closing the criminal investigation. The court found that, without this evidence, the defendants were prevented from effectively cross-examining the government's most important witness, and the jury was unable to properly evaluate Hakim's testimony.

SENTENCING

Tenth Circuit Holds Unclaimed Deductions May Be Considered in Calculating Tax Loss

In ***United States v. Hoskins***, 654 F.3d 1086 (10th Cir. 2011), the Tenth Circuit held, *inter alia*, that a sentencing court was not precluded in appropriate cases from considering unclaimed deductions in determining tax loss under § 2T1.1 of the Sentencing Guidelines. In the present case, however, the lower court had not erred in rejecting the defendant's calculation of tax loss based on previously unclaimed deductions.

Jodi Hoskins ("Hoskins") and her husband operated an escort service in Salt Lake City, UT. In 2008, Hoskins was convicted of attempting to evade federal income taxes for the tax year 2002 based on her failure to report approximately $1.2 million in gross receipts. The government calculated a tax loss of more than $485,000 for sentencing, which included deductions actually claimed on Hoskins's 2002 income tax return. Hoskins proposed a tax loss calculation of $160,202 based on deductions she argued she could have claimed but did not. These unclaimed deductions were premised on her estimation that more than 60% of her company's gross receipts were deductible commission payments given to the escorts. The district court rejected Hoskins's alternative accounting of tax loss and arrived at a sentencing range based on the government's tax loss estimates.

On appeal, the Tenth Circuit determined that the district court had not erred in declining to consider Hoskins's unclaimed deductions. The appellate court identified many reasons to be skeptical of Hoskins's proposed tax loss estimate, including her failure to provide credible evidence to support the deductions. Her proposal was based on information from a two-month period in 2007 and 2008 that had no demonstrated relation to the situation in 2002.

The court made clear, however, that it was not creating a bright-line rule categorically prohibiting a court from considering unclaimed deductions in its sentencing analysis. In cases where a defendant offers convincing proof for a tax loss estimate, such as providing evidence that, given his tax filing practices, he would have claimed deductions on the unreported income, a court could properly consider this argument. The court reasoned that the government could not claim to have lost revenue it never would have collected had the defendant not evaded his taxes.

Eighth Circuit Upholds Below-Guidelines Sentence for Tax Evasion

In ***United States v. Renner***, 648 F.3d 680 (8th Cir. 2011), the Eighth Circuit upheld the district court's decision to grant a downward variance in a tax evasion case based on the fact that the defendant had consulted with tax professionals, even though the jury did not believe the defendant met all the requirements for a good-faith defense.

Steven Mark Renner ("Renner") was convicted of four counts of tax evasion, in violation of 26 U.S.C. § 7201. At sentencing, the district court found an offense level of 22 based on a tax loss of approximately $1.13 million. After the court adjusted Renner's Criminal History Category to I, the advisory Sentencing Guidelines ("Guidelines") range was 41 to 51 months. The court granted Renner a downward variance and sentenced him to 18 months' imprisonment.

On appeal, the Eighth Circuit noted that, in the absence of significant procedural error, it was required to review the sentence for substantive reasonableness under an abuse-of-discretion standard. Here, the government argued that the district court abused its discretion and imposed an unreasonably lenient sentence by granting the downward variance based on a fact – *i.e.*, good-faith reliance upon expert advice – that had been considered and rejected by the jury. The appellate court acknowledged that the district court based its variance, in part, on the fact that Renner had consulted with a tax attorney and accountant before filing his tax returns, a fact that the district court believed distinguished Renner from other tax evaders. The appellate court reasoned, however, that the sentence was not based on facts that contravened the jury's verdict, because the sentencing transcript indicated that the district court accepted the jury's rejection of the good-faith defense. The appellate court concluded that the district court was entitled to consider that Renner had consulted tax professionals, even if the jury did not believe that Renner met all of the requirements for a good-faith defense.

Holding that the district court did not commit procedural error and that the sentence was substantively reasonable, the Eighth Circuit affirmed the judgment of the district court.

Third Circuit Emphasizes Distinction between Departure and Variance

In ***United States v. Fumo***, 655 F.3d 288 (3d Cir. 2011), the Third Circuit vacated the defendants' sentence in part because the district court failed to articulate clearly whether its sentencing procedure was a departure or a variance.

During his three decades as Pennsylvania state senator, Vincent J. Fumo ("Fumo") engaged in a wide-ranging scheme to use state funds and employees for his personal benefit. He was convicted on 137 counts of fraud, tax evasion, and obstruction of justice. At sentencing, the district court first calculated a combined offense level of 32, resulting in a Guidelines range of 121 to 151 months' imprisonment. The court then stated it would grant a "departure" for Fumo's extraordinary public service and sentenced Fumo to 55 months' imprisonment and $2,084,979 in restitution. The district court subsequently stated that its sentencing procedure

was "perhaps more akin to that associated with a variance than a downward departure" but that "the argument over which it was elevates form over substance." 655 F.3d at 301.

On appeal, the Third Circuit explained that a "departure" diverges from the originally calculated sentencing range for reasons contained in the Guidelines themselves, whereas a "variance" diverges from the Guidelines range, including any departures, based on an exercise of the court's discretion under § 3553(a). The court cautioned that the distinction between the two is important because a district court has more discretion in imposing a variance, and a sentence resulting from a variance is subject only to substantive reasonableness review, a lower standard than that applied to departures.

In this case, the appellate court noted that the district court's statements indicated it was uncertain whether it was departing or varying. Here, the distinction was particularly significant because Third Circuit precedent places certain limitations on courts' abilities to depart based on the good works of public officials. Accordingly, the court vacated Fumo's sentence and remanded with instructions to first calculate the final Guidelines range, including any departures, and then consider whether the § 3553(a) factors weigh in favor of a variance. The appellate court emphasized that, to the extent the district court's sentencing reduction was a departure rather than a variance, the district court erred by failing to calculate a new, final Guidelines range after granting the departure.

Fourth Circuit Limits Government's Discretion to Refuse to Move for Acceptance-of-Responsibility Adjustment

In ***United States v. Divens***, 650 F.3d 343 (4th Cir. 2011), the Fourth Circuit held that the government cannot base its refusal to move for an additional one-level sentencing reduction for acceptance of responsibility solely on a defendant's unwillingness to sign a waiver of appeal rights.

Pleading guilty to a narcotics charge, Lashawn Dwayne Divens ("Divens") signed an acceptance-of-responsibility statement but declined to sign a plea agreement waiving his right to appeal. At sentencing, the government refused to move for an additional one-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) solely on the ground that Divens declined to waive his appeal rights. Divens objected, claiming that his unwillingness to execute the appellate waiver did not justify the government's refusal. Overruling his objection, the district court concluded that the government had complete discretion as to whether to move for an acceptance-of-responsibility reduction. Divens appealed.

Based on its analysis of the commentaries in the Sentencing Guidelines, the Fourth Circuit declined to follow the First, Fifth, Seventh, and Ninth Circuits, which have held that the government may refuse a § 3E1.1(b) acceptance-of-responsibility motion based on any rational interest. Instead, the court held that a § 3E1.1(b) reduction is mandatory for a defendant who meets the specified criteria of that provision, namely, that the defendant has alleviated the burden of trial preparation by timely notifying the authorities of his intention to plead guilty. The court acknowledged that the government retains discretion to determine whether the defendant's assistance has relieved it of the need to prepare for trial, but stated that once this determination is made, the defendant merits the reduction. The court clarified that the text of § 3E1.1(b) demonstrates a concern for the efficient allocation of trial resources, not appellate resources. Accordingly, the court vacated the sentence and remanded.

FORFEITURE

Eleventh Circuit Holds Knowledge of Forfeiture Proceeding Required for Conviction of Obstruction

In ***United States v. Friske***, 640 F.3d 1288 (11th Cir. 2011), the Eleventh Circuit held that conviction for obstructing a forfeiture proceeding requires proof that the defendant knew of, or at least foresaw, the proceeding.

Dennis Friske ("Friske") was charged with attempting to obstruct a forfeiture proceeding involving the property of a friend, William Erickson ("Erickson"), who was in jail awaiting trial on drug and conspiracy charges. Through a recorded conversation, DEA agents learned that Erickson asked Friske to do a "little repair job" at his home around the pool deck and then visit him in jail. Prior to Friske's arrival at Erickson's home, DEA agents executed a search warrant and found $375,000 buried by the pool deck. The next day, the agents returned to Erickson's home, where they encountered Friske, along with evidence that he had been digging around the pool deck. Friske was charged with and convicted of obstructing a forfeiture proceeding in violation of 18 U.S.C. § 1512(c)(2). At trial, he filed a motion for judgment of acquittal arguing there was insufficient evidence to support his

conviction, which was denied.

On appeal, the Eleventh Circuit noted that, in *United States v. Aguilar*, 515 U.S. 593 (1995), a case involving corrupt obstruction of the due administration of justice under 18 U.S.C. § 1503, the Supreme Court relied on the principle that a person lacking knowledge of a pending proceeding necessarily lacks the intent to obstruct that proceeding. The appellate court reasoned that this principle applies equally to § 1512(c)(2), because without knowledge of the forfeiture proceeding, Friske could not know that his actions were likely to affect it. The court concluded that the government was required to prove Friske knew of, or at least foresaw, the forfeiture proceeding in this case.

Because the government had offered no evidence that Friske knew his actions were likely to affect a forfeiture proceeding, the court held that a reasonable jury could not find, beyond a reasonable doubt, that Friske had the requisite intent to obstruct. Accordingly, the court vacated Friske's conviction and sentence and reversed the district court's denial of Friske's motion for judgment of acquittal.

TITLE 26

First Circuit Upholds Convictions under §§ 7206 and 7212 Based on False Responses to Question on IRS Form 990

In ***United States v. Mubayyid***, No. 08–1846, 2011 WL 3849749 (1st Cir. Sept. 1, 2011), the First Circuit upheld the defendant's convictions under 26 U.S.C. §§ 7206(1) and 7212(a), based on his failure to disclose his organization's non-charitable activities on IRS Form 990.

In 1993, Emadeddin Muntasser ("Muntasser") incorporated Care International, Inc. ("Care"), an organization with a stated purpose of providing worldwide humanitarian aid. Samir Al–Monla ("Al-Monla") and Muhamed Mubayyid ("Mubayyid") served as officers of Care. Soon after incorporating Care, Muntasser applied to have the organization granted tax-exempt status by filing IRS Form 1023. In Care's Form 1023 filing, Muntasser did not disclose the organization's numerous activities advocating for Islamic jihad. Muntasser also denied that Care was a successor to any other organization, despite the fact that Care had replaced the Boston branch of a pro-jihad organization. Based on the information provided, the IRS approved Care's application for tax-exempt status. In order to maintain its tax exemption, Care filed annual IRS Forms 990, disclosing the earnings and activities of the organization. None of Care's Form 990s revealed its pro-jihad activities. Although Muntasser had failed to disclose these same activities in Care's initial application, the defendants answered "No" when the Form 990s asked whether the organization engaged in any activities that had not previously been reported to the IRS.

At trial, the district court acquitted Al-Monla of all charges, convicted Muntasser of a false statement to the FBI, and convicted Mubayyid of scheming to conceal material facts from the IRS (18 U.S.C. § 1001(a)(1)), endeavoring to obstruct the administration of the Internal Revenue laws (26 U.S.C. § 7212(a)), and filing a false tax return (26 U.S.C. § 7206(1). The district court acquitted all the defendants of conspiracy under 18 U.S.C. § 371. The defendants and the government appealed.

The First Circuit reversed the district court's acquittal of the defendants on the conspiracy count and affirmed the defendants' other convictions. With respect to Mubayyid's convictions under 26 U.S.C. §§ 7206(1) and 7212(a), the court noted that these were based on his answers to Question 76 on Care's Form 990, which asked, "Did the organization engage in any activity not previously reported to the IRS?" For each of the charged years, Mubayyid answered "No," an answer the government argued intentionally concealed from the IRS Care's non-charitable purposes. Mubayyid countered that Question 76 was fundamentally ambiguous, precluding the jury from finding deliberate falsity.

Because the instructions to Question 76 required an explanation of any "significant changes" in the organization's activities, Mubayyid argued that he was not required to report activities that were ongoing and unchanged, even if they had never previously been reported. The court determined, however, that Question 76 plainly sought the disclosure of information about activities not accurately depicted on the organization's Form 1023, or in any other year's return. Accordingly, the court held that sufficient evidence supported the jury's finding that Mubayyid willfully failed to disclose on Form 990 at least one reportable activity that occurred in each of the charged years.

PROSECUTORIAL IMMUNITY

Fifth Circuit Holds Prosecutorial Immunity Inapplicable to Post-Trial Disclosure of Federal Tax Records

In ***Lampton v. Diaz***, 639 F.3d 223 (5th Cir. 2011), the Fifth Circuit held that prosecutorial immunity from suit did not extend to a prosecutor's post-trial transfer of a defendant's private federal tax records to a state ethics commission.

Between 2003 and 2006, Dunnica Lampton ("Lampton"), the U.S. Attorney for the Southern District of Mississippi, prosecuted Oliver Diaz ("Diaz"), a Mississippi Supreme Court justice, and Diaz's wife, Jennifer Diaz, for fraud, bribery, and tax evasion. Diaz was acquitted, but his wife pleaded guilty to tax evasion. Lampton then filed a complaint with the Mississippi Commission on Judicial Performance (the "Commission") regarding Diaz's conduct. He included copies of the Diazes' federal tax records obtained during the criminal investigation. The Commission dismissed the complaint in December 2008.

The Diazes sued Lampton in federal court, alleging a violation of 42 U.S.C. § 1983 based on deprivation of rights under a number of statutes that prohibit government officials from releasing private tax records obtained in the course of their duties, including 26 U.S.C. §§ 6103, 7213, and 7431. Lampton filed a motion to dismiss the § 1983 claim, arguing that absolute prosecutorial immunity shielded his decision to give the tax records to the Commission. The district court denied the motion, and Lampton appealed.

The Fifth Circuit affirmed the district court's denial of Lampton's motion to dismiss, holding that prosecutorial immunity did not apply to Lampton's conduct. The appellate court reasoned that, as a federal prosecutor, Lampton had no duty to bring complaints before a state ethics commission, and the actions for which Lampton sought immunity were unrelated to his prosecution of the Diazes. Further, Lampton could have reported Diaz's misconduct without releasing the tax records, so his ethical responsibilities did not compel violation of the federal statute.

TABLE OF CASES