Criminal Tax Bulletin

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FOURTH AMENDMENT

Ninth Circuit Holds Evidence May Be Admissible Under Plain-Hearing Doctrine

In ***United States v. Carey***, 836 F.3d 1092 (9th Cir. 2016), the Ninth Circuit, in a matter of first impression, held officers may use evidence obtained in "plain hearing" when they overhear speakers unrelated to the target conspiracy while listening to a valid wiretap, without having complied with the Wiretap Act requirements of probable cause and necessity as to those specific speakers. The court further held, however, that officers must cease monitoring the wiretap once they know, or reasonably should know, the calls only involve speakers outside of the target conspiracy.

As part of its investigation into a drug conspiracy led by Ignacio Escamilla Estrada ("Escamilla"), the Federal Bureau of Investigation ("FBI") obtained wiretap orders for phone numbers thought to be associated with the conspiracy. During the wiretap, agents heard drug-related phone conversations. At some point, agents realized that Escamilla was not using the phone, but still believed the people speaking might have been part of the Escamilla conspiracy and continued listening. Although agents ultimately confirmed the people on the phone had no connection to Escamilla, based on information obtained from the wiretaps, Michael Carey ("Carey") was identified as a speaker in some of the phone calls and was charged with conspiracy to distribute cocaine. Carey moved to suppress evidence derived from the wiretaps, arguing the government failed to comply with the Wiretap Act with respect to him and his co-conspirators. In denying Carey's motion, the district court found the government could rely on the Escamilla wiretap order to listen to Carey's conversations because the agents reasonably believed the callers and calls might be affiliated with Escamilla or other offenses. Ultimately, Carey was found guilty of conspiracy to distribute cocaine.

On appeal, Carey argued suppression of the evidence was warranted because the government did not comply with the statutory requirements for wiretaps as to him or his co-conspirators, but only as to the unrelated Escamilla conspiracy. Noting the lack of Ninth Circuit precedent regarding whether agents could lawfully use a valid wiretap to listen to someone not involved in the conspiracy under surveillance, the Ninth Circuit considered dicta from *United States v. Ramirez*, 112 F.3d 849 (7th Cir. 1997). In *Ramirez*, the Seventh Circuit noted if, in the course of executing a valid wiretap order, agents discovered it was procured by mistake and at the same time overheard incriminating conversations, the record of such conversations would be admissible into evidence. The Seventh Circuit reasoned that it was "just the 'plain view' doctrine translated from the visual to the oral dimension." *Id*. at 852 (citing *Maryland v. Garrison*, 480 U.S. 79, 87 (1987)). Finding the Seventh Circuit's observations persuasive and drawing by analogy to Fourth Amendment case law surrounding search warrants, the Ninth Circuit concluded that the government may use evidence obtained from a valid wiretap prior to agents' discovering a factual mistake that causes, or should cause, the agents to realize they are monitoring phone calls erroneously included in the wiretap order.

Because the record did not reflect what evidence was obtained before agents knew, or should have known, they were listening to calls outside of the Escamilla conspiracy, the Ninth Circuit vacated the district court's denial of Carey's motion to suppress and remanded for the district court to determine what evidence was lawfully obtained in "plain hearing."

Fifth Circuit Holds Scanning Magnetic Stripes on Gift Cards is Not a Fourth Amendment Search

In ***United States v. Turner***, 839 F.3d 429 (5th Cir. 2016), the Fifth Circuit joined the Sixth and Eighth Circuits in holding, *inter alia*, that that a law enforcement officer's scanning of the magnetic stripe on the back of a gift card is not a search within the

meaning of the Fourth Amendment. *See United States v. DE L'Isle*, 825 F.3d 426, 432-33 (8th Cir. 2016) and *United States v. Bah*, 794 F.3d 617, 633 (6th Cir. 2015).

Courtland Turner ("Turner"), who was charged with aiding and abetting the possession of unauthorized access devices, moved to suppress evidence discovered when an officer scanned magnetic strips on gift cards that were lawfully seized from a vehicle in which Turner was a passenger. Without obtaining a warrant, the officer swiped the gift cards with his in-car computer. Unable to make use of the information shown, the officer turned the gift cards over to the Secret Service. A subsequent scan of the gift cards revealed that at least 43 of the 143 gift cards were altered, meaning the numbers encoded in the cards did not match the numbers printed on the cards. The officer later contacted the stores where the gift cards where purchased; the stores provided photos of Turner and the vehicle driver purchasing the gift cards. Turner moved to suppress evidence of the gift cards, arguing the officer's examination of the magnetic strips violated the Fourth Amendment. The district court disagreed, finding a scan of the gift cards did not constitute a search within the meaning of the Fourth Amendment.

On appeal, the Fifth Circuit affirmed the denial of Turner's motion to suppress, holding there was no reasonable expectation of privacy in the magnetic stripe of the gift cards. The court reasoned that unlike cell phones and computers, in which a privacy interest exists because such items store personal information, no such privacy interest exists in the magnetic stripe of gift cards because gift cards are typically used to buy things rather than store information. Therefore, information encoded in the magnetic stripe of a gift card is commonly accessed by third parties such as cashiers.

Although the court held that no privacy interest exists in the gift cards of today, the Fifth Circuit recognized today's rapidly evolving technology and noted the following:

> The technology of today will not, however, be the technology of tomorrow. The Supreme Court has noted the need to take account of rapidly evolving capabilities when applying the Fourth Amendment to other Information Age technologies . . . As other courts deciding this issue have, we thus limit our holding to the gift cards of <u>today</u>, which are not intended to be used for—and rarely are used for—storing information entered by the user. . . . And even with the gift cards of today, law enforcement can view the encoded information only after coming into lawful possession of the cards.

Seventh Circuit Holds No Reasonable Expectation of Privacy in Internet Protocol Address

In ***United States v. Caira***, 833 F.3d 803 (7th Cir. 2016) the Seventh Circuit held, *inter alia*, that an individual has no right to privacy in his Internet Protocol ("IP") address.

The Drug Enforcement Administration ("DEA") monitored a website that sold an element necessary to manufacture the drug ecstasy. The DEA noticed that someone used a specific email address issued by Hotmail to attempt to purchase the substance. The DEA issued an administrative subpoena to Microsoft Corporation, which owns Hotmail, to obtain relevant information about the owner of the email address, including information provided to open the email address as well as login dates and locations based on the IP addresses from which the user logged into the email account. The DEA then subpoenaed account information from Comcast Corporation, the owner of an IP address from which the individual often logged into the Hotmail account. The email address was registered to the residence and wife of Frank Caira ("Caira"), who ultimately was arrested and charged with various narcotics violations. Caira moved to suppress the evidence obtained from the subpoenas served on Microsoft and Comcast on the basis that the information requested was an unreasonable search that required a warrant. Caira argued that an IP address reveals information about a computer user's physical location—in which people have both a subjective and objectively reasonable expectation of privacy. The district court denied the motion and Caira appealed.

The Seventh Circuit relied on *United States v. Miller*, 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), the holdings of which stand for the proposition that there is no reasonable expectation of privacy in information voluntarily disclosed to a third party. A computer user voluntarily discloses his IP address each time he uses the internet. Such disclosures are necessary for a user to view his Hotmail inbox on the computer where he is physically located. The appellate court compared the disclosure of an IP address during internet usage to the disclosure of telephone numbers conveyed to a telephone company in the course of usage. Caira attempted to argue that a higher standard of privacy

applied because the IP address was associated with his home. The court rejected this proposition, stating a similar argument had been rejected by the Supreme Court in *Smith*, when the information sought was known to be associated with the defendant's home. Caira then asserted that the information obtained was similar to global position system ("GPS") tracking technology. The court also rejected this position, explaining that the government received records reflecting Caira's locations from which he logged into his Hotmail account, home and work, and did not include the type and breadth of information obtained from a tracking device. In summary, the Seventh Circuit held that because Caira voluntarily shared his IP address with Microsoft each time he logged into his Hotmail account, he had no reasonable expectation of privacy in the IP address. Accordingly, the DEA's use of subpoenas to request that information did not constitute a search within the meaning of the Fourth Amendment.

Seventh Circuit Upholds Warrantless Use of Cell-Site Simulator to Track Arrestee's Location to Execute Arrest Warrant

In ***United States v. Patrick***, 842 F.3d 540 (7th Cir. 2016), the Seventh Circuit held, *inter alia*, in a matter of first impression that use of a cell-site simulator to determine the physical location of a person to execute an arrest warrant did not violate the arrestee's Fourth Amendment rights.

Damian Patrick ("Patrick") was released from state prison on probation. After he violated the terms of his probation, the police obtained an arrest warrant, as well as a warrant to use cell-phone data to effectuate the arrest. The second warrant did not specify how cell-phone data would be obtained, or the possible use of a cell-site simulator. Ultimately, a cell-site simulator (a/k/a Stingray) was used to locate Patrick in a public location, where he was arrested. He did not challenge the arrest warrant, but objected to the use of the cell-site simulator to track his location. Patrick was convicted and he appealed.

On appeal to the Seventh Circuit, the government conceded for purposes of this case that the use of the cell-site simulator constituted a Fourth Amendment search. It claimed, however, that a warrant authorized the use of the simulator. Patrick disagreed, arguing the warrant was invalid because it did not specify a cell-site simulator would be used. Siding with the government, the court concluded there was no requirement that the warrant specify precisely how the government intended to use cell-phone data to locate Patrick. The court held that if a person is arrested based on probable cause and taken into custody in a public location, he has no expectation of privacy and cannot complain about how law enforcement determined his location, even if the manner of locating him should have been disclosed on the search warrant application. The court emphasized the facts of this case did not require a determination of other significant issues, including whether the use of a simulator constitutes a search, and if so, whether its use is a reasonable means of executing a warrant. The Seventh Circuit affirmed the denial of Patrick's motion to suppress.

The dissenting opinion expressed concern with the government's efforts to keep the technology secret, noting, for example, that "[w]ith certain software the Stingray is much more than a high-tech pen register. It can capture the emails, texts, contact lists, images, and other data disclaimed" by the Department of Justice Policy Guidance, and it can also "eavesdrop on telephone conversations and intercept text messages." In this case, the dissent emphasized that knowing the way the Stingray technology was used, its configuration, and the extent of its surveillance capabilities was important to determine whether the government used the technology within the scope of the warrant.

Second Circuit Upholds Warrantless Real-Time Tracking of Defendant's Cell Phone Based on Exigent Circumstances

In ***United States v. Caraballo***, 831 F.3d 95 (2d Cir. 2016), the Second Circuit held exigent circumstances justified the real-time tracking of defendant's cell site location information ("CSLI") without a warrant. The court declined to address whether, absent exigent circumstances, a warrant would be required.

Frank Caraballo ("Caraballo") was being investigated for narcotics trafficking when police discovered the body of a known associate. Evidence at the scene indicated the victim was shot execution style earlier the same day. Two months prior, the victim had told police she dealt drugs for Caraballo, who was violent and had multiple guns; she feared he would kill her if he thought she was talking to the police; and he had harmed other informants in the past. Fearing others could be in danger, including undercover agents who had infiltrated Caraballo's operation, the police decided to immediately arrest Caraballo on narcotics charges related to recent controlled purchases in order to get him off the street. To locate him, the police had Caraballo's cell-phone provider track in

real time, Caraballo's CSLI. Before trial, the court denied Caraballo's motion to suppress the evidence obtained through the warrantless real-time tracking of his CSLI. Caraballo was convicted of narcotics and firearms related charges, and he appealed.

The Second Circuit held, *inter alia*, exigent circumstances justified the real-time CSLI tracking of Caraballo's cell phone. To determine whether exigent circumstances were present, the court analyzed the following factors, but remarked no one factor is determinative: (1) gravity of the offense to be charged; (2) likelihood the suspect was armed; (3) probable cause to believe the suspect committed the crime; (4) strong reason to believe the suspect is on the premises to be entered; (5) likelihood the subject would escape if not swiftly apprehended; (6) peaceful circumstances of the entry; and (7) the degree of intrusion on defendant's privacy interests. Applying these factors, the court concluded the police had reason to believe the victim was executed; Caraballo was the primary suspect; he was armed; their investigation and the identities of other informants and undercover agents may have been comprised; Caraballo's immediate apprehension was necessary to prevent serious bodily harm to others; and there was insufficient time to obtain a warrant before Caraballo could harm other compromised persons. The court further concluded Caraballo's privacy interests were "dubious at best," and any intrusion thereon was "relatively slight." The court added the police acted in good faith, after consulting the county attorney, adding that Caraballo's arrest occurred before the United States Supreme Court's global positioning system ("GPS") tracking decision in *United States v. Jones*, 132 S. Ct. 945 (2012), at a time when there was little authority governing real-time CSLI tracking.

D.C. Circuit Holds Inevitable-Discovery Exception Did Not Apply to Preclude Application of Exclusionary Rule

In ***Gore v. United States***, 145 A.3d 540 (D.C. Cir. 2016), the D.C. Circuit concluded, *inter alia*, testimony that police "could" have applied for a warrant was too speculative to trigger application of the inevitable-discovery exception to the exclusionary rule.

Nia Gore ("Gore") was convicted of misdemeanor malicious destruction of property. In 2015, police officers responded to a request for help from Dwayne Ward ("Ward") in recovering Ward's personal property. Ward claimed Gore had refused to allow him back into a hotel room where Gore was staying and showed officers a text message from Gore stating she had "trashed" Ward's belongings. Following an exchange with Gore during which Gore stated that "[she] trashed everything" and claimed Ward's possessions were not in the building but in a dumpster, officers entered Gore's hotel room without her consent and handcuffed her. Within seconds of being handcuffed, Gore admitted to destroying Ward's belongings and stated the belongings were in the bathtub. Officers then retrieved property belonging to Ward from the bathroom and arrested Gore. During the trial, Gore moved to suppress the physical evidence seized from the bathroom and her statements to the police as having been obtained in violation of the Fourth Amendment. The court denied the motion finding that Gore's statements provided probable cause to arrest her, and that recovery of Ward's items from the bathtub was inevitable, regardless of the lack of consent or a warrant.

On appeal, Gore again claimed the police officers' unconsented entry and search violated her Fourth Amendment rights, both because the police lacked probable cause to believe she had committed a crime, and because there was no exigent circumstance excusing the officers' failure to apply for and secure a warrant. The government argued that even if Gore had not told the officers that Ward's property was in the bathroom, the officers would have inevitably found the property using a search warrant. In support of this contention, the government relied solely on testimony of one of the officers that "we would have probably searched through the trash cans ... [and] had we not found it in the dumpsters ... [w]e could have applied for a warrant." Citing the standard used in *Nix v. Williams*, 467 U.S. 431, 444 (1984), the court stated that the inevitable-discovery doctrine shields illegally-obtained evidence from the exclusionary rule if the government can show, by a preponderance of evidence, that the evidence ultimately or inevitably *would* have been discovered by lawful means. Reasoning there was no solid evidence that the officers would have applied for, let alone obtain, a warrant to search Gore's room, the court held the requirements for the inevitable-discovery doctrine were not met.

The D.C. Circuit determined that the physical evidence and incriminating admissions obtained by the police following their unconstitutional entry into Gore's hotel room should have been suppressed, vacated Gore's conviction, and remanded the matter for a new trial.

Second Circuit Holds Exigent Circumstances Justify Obtaining GPS Tracking Information from Cell-Phone Provider Without a Warrant

In ***United States v. Gilliam***, 842 F.3d 801 (2nd Cir. 2016), the Second Circuit held exigent circumstances permitted police to obtain global positioning system ("GPS") location-tracking information from a cell-phone provider to determine the defendant's location without a warrant.

Jabar Gilliam ("Gilliam") met a minor in Maryland, where the minor began working for Gilliam as a prostitute in November 2011. On November 30, 2011, Gilliam took the minor to New York, where the minor continued to work for him as a prostitute. On the same date, the minor's foster mother reported her missing. The minor's biological mother told Maryland State Police ("MSP") that Gilliam told her that he planned on taking the minor to New York to work as a prostitute. MSP subsequently contacted Sprint Corporation and requested GPS-location information for Gilliam's cell phone, explaining that they were "investigating a missing child who is … being prostituted," and this request was based on "an exigent situation involving … immediate danger of death or serious bodily injury to a[] person." Sprint provided the GPS-location information to the Federal Bureau of Investigation ("FBI") and the New York Police Department ("NYPD"), which led NYPD to a neighborhood where they observed Gilliam and the minor on the street, followed them to an apartment building, and arrested Gilliam. Ultimately, Gilliam was convicted of sex trafficking of a minor by force, fraud, or coercion (18 U.S.C. §§ 1591(a), (b)(1), and (b)(2)) and transporting a minor in interstate commerce for purposes of prostitution (18 U.S.C. § 2423(a)). Gilliam argued that Sprint's disclosure of his location information and the use of that information to locate and arrest him without a warrant violated the Fourth Amendment.

On appeal, the Second Circuit first determined that the statutory language of 18 U.S.C. § 2702(c)(4), with respect to what records a provider may divulge, includes the location of a subscriber's cell phone. The court further determined that prostitution of a child poses a significant risk of bodily injury that constitutes exigent circumstances such that disclosure of the defendant's location information and subsequent arrest without a warrant did not violate the Fourth Amendment. The appellate court rejected Gilliam's contention that the time required to obtain a warrant would not have significantly added to the risk of injury to the minor, concluding that the MSP faced exigent circumstances, based on credible information that Gilliam was engaged in prostituting a missing child across state lines and that the MSP acted reasonably in obtaining Gilliam's GPS-location information without a warrant.

Second Circuit Denies Rehearing *En Banc* Regarding Warrant for Microsoft Customer's Email Content Stored on Servers Located Outside United States

In ***In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation***, 855 F.3d 53 (2d Cir. 2017), after a 4-4 vote, the Second Circuit denied rehearing *en banc* to revisit the panel opinion issued in ***In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation***, 829 F.3d 197 (2d Cir. 2016). The Second Circuit panel held the Stored Communications Act ("SCA") did not apply to compel disclosure of digital information accessible from within the United States but stored in another country because the SCA did not have extraterritorial application and its primary focus of privacy prevented the enforcement of the warrant. The order denying rehearing *en banc* was accompanied by one concurring opinion and four dissenting opinions.

In *dicta*, the concurrence opined quashing of the warrant was called for based on Supreme Court precedent and the text of the SCA, and then addressed several points raised in the dissents. Acknowledging a significant concern that law enforcement will not be able to obtain electronic data that a federal Magistrate Judge has determined is likely connected to criminal activity, the concurrence reasoned that the application of the SCA and the extraterritoriality analysis of *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), as set forth in the panel opinion, require this result. Addressing the dissents' argument that the focus of the SCA is within the U.S.—*i.e.*, where the data is actually disclosed, the concurrence rejected the dissents' premise that if the warrant is served on a provider in the U.S., then there are no extraterritorial considerations if the data is stored in another country. The concurrence provided two situations in which there are extraterritorial considerations: when enforcement of a warrant could violate the law of the jurisdiction where the data is located; or when information could be obtained through a Mutual Legal Assistance Treaty ("MLAT"). The concurrence reasoned the SCA limits access to the place where

data was stored without addressing nationality or citizenship. Notwithstanding how easily electronic data is stored, moved, and accessed, the concurrence noted data is still stored in a specific location—*i.e.*, Ireland. There is no evidence that the jurisdiction in which the data is stored (Ireland) relinquished any claim to control of the data. The concurrence further explained that MLATs allow for law enforcement assistance while acknowledging sovereign borders and the location of the data has import under the SCA. The concurrence emphasized that the scenario at issue is not domestic and contravenes the concerns underlying the Supreme Court's strong presumption against extraterritoriality.

Finally, the concurrence reiterated that privacy—rather than disclosure—is the focus, and the next inquiry is where the privacy is physically based. The concurrence stated that by looking beyond privacy to disclosure, the dissents' focus is on the exceptions to the SCA, rather than its provisions. An amended or updated SCA could address situations like these, but as written, the SCA requires the quashing of the warrant. In light of technological advances and the need to balance international comity with law enforcement needs and the obligation of service providers, the concurrence suggested revision to the SCA may be warranted.

FIFTH AMENDMENT

Supreme Court Held Double Jeopardy Clause Does Not Bar Retrial on Vacated Counts After Inconsistent Verdicts

In ***United States v. Bravo-Hernandez***, 137 S. Ct. 352 (2016), the United States Supreme Court held the issue-preclusion component of the Double Jeopardy Clause (*i.e.*, collateral estoppel), which bars the re-litigation of an issue once it has been legally determined, does not prevent the government from retrying co-defendants on a count for which they were found guilty but was later vacated on appeal, even though the jury also acquitted them of other charges that involved the same essential issue.

Juan Bravo-Fernandez ("Bravo") and a co-defendant were indicted in separate counts for, *inter alia*, federal program bribery, conspiracy to commit that bribery, and traveling in furtherance of the bribery. At trial, the jury acquitted on the conspiracy and travel counts, but returned guilty verdicts on the substantive bribery counts. On appeal, the First Circuit vacated the convictions on the bribery counts due to errors in the jury instructions. However, because the evidence would have been sufficient to sustain bribery convictions under proper instructions, the case was remanded for retrial on the bribery counts.

On remand, Bravo and his co-defendant argued that this issue-preclusion component of the Double Jeopardy Clause prohibited their retrial on the bribery counts. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Supreme Court ruled when the record reflects that a jury's acquittal necessarily decided an essential element of an offense, Double Jeopardy prevents the government from retrying that defendant on another count that requires proof of that same element. In *Yaeger v. United States*, 557 U.S. 110 (2009), the Court further held, where an acquittal verdict is accompanied by a hung jury on another count turning on the same critical issue, issue preclusion prevents retrial on the hung count, as the failure to reach a verdict is a legal nullity that cannot be considered in assessing whether a jury has necessarily decided an issue. Bravo and his co-defendant argued that, under *Ashe* and *Yaeger*, the vacated convictions, like a hung verdict, should not be considered in assessing whether the jury had necessarily decided an issue. As such, they argued, the jury's acquittals in their case, standing alone, prohibited their retrial on the bribery counts because the acquittals demonstrated the jury had "necessarily decided" they had not committed bribery. The district court and the First Circuit both concluded that issue preclusion did not bar retrial on the vacated bribery counts.

The Supreme Court granted *certiorari* in order to resolve a conflict amount circuit courts on the question of whether the issue-preclusion component of the Double Jeopardy Clause barred retrying the defendants under the facts of the present case. In answering this question, the Court concluded that a vacated guilty verdict was not analogous to the hung verdict in *Yaeger*. Rather, the inconsistent verdicts here were properly controlled by *United States v. Powell*, 469 U.S. 57 (1984). In *Powell*, the Court held when acquittal and conviction verdicts in the same case are logically inconsistent, both verdicts stand since they are logically irreconcilable. An acquittal thus gains no issue-preclusive effect on a conviction verdict involving the same issue. In the present case, the guilty verdicts were vacated on appeal due to error in the jury instructions unrelated to the verdicts' inconsistency. The Court held that the *vacatur* of the convictions for unrelated legal error did not reconcile the jury's previously inconsistent verdicts. Ultimately, the Court concluded that issue preclusion did not therefore apply and the co-defendants could be retried on the vacated bribery counts.

Ninth Circuit Holds Post-*Miranda* Confession Should Have Been Suppressed Given Interrogation Method Used

In ***Reyes v. Lewis***, 833 F.3d 1001 (9th Cir. 2016), the Ninth Circuit held (in an amended opinion and denial of rehearing *en banc*) the defendant's post-*Miranda* confession should have been suppressed due to detectives' deliberate employment of a two-step interrogation technique and failure to take "curative measures" ensuring the defendant understood the *Miranda* warning and its waiver.

Adrian Reyes ("Reyes"), a 15 year old, was questioned over two days regarding the murder of Derek Ochoa. On the first day, detectives conducted a two hour, unwarned interrogation of Reyes at the police station. On the second day, at the sheriff's station, after an unwarned polygraph test and a non-confrontational interrogation, Reyes confessed to the shooting. Immediately after, the detectives drove Reyes back to the police station (15 miles away) and obtained a post-warning confession. Reyes was convicted of first degree murder and sentenced to 50 years' imprisonment. After exhausting the state appellate process, Reyes filed a petition for federal habeas corpus under 28 U.S.C. § 2254 arguing, *inter alia*, that his post-*Miranda* confession should have been suppressed under *Missouri v. Seibert*, 542 U.S. 600 (2004) (Souter, J., plurality; Kennedy, J., concurring in the judgment). The district court upheld Reyes' conviction.

On appeal, the Ninth Circuit agreed with Reyes, stating that per § 2254, a writ of habeas corpus may only be granted for a state prisoner adjudicated on the merits in state court if the state's adjudication is contrary to "clearly established" federal law. According to the Ninth Circuit, in this case, "clearly established" federal law for purposes of § 2254 is the narrowest opinion rendered by a justice in the fractured *Seibert* majority. In *Seibert*, Justice Souter's plurality opinion requires suppression only where officers employ a two-step interrogation technique that renders the *Miranda* warnings ineffective. Justice Kennedy's concurring opinion, however, applies a narrower view—*i.e.*, the interrogator must deliberately intend to employ the forbidden two-step technique. Applying the narrowest *Seibert* opinion, the Ninth Circuit held that the detectives deliberately employed a two-step interrogation method eliciting Reyes' confession in a custodial, yet unwarned interrogation, where they made Reyes feel comfortable. While the detectives gave Reyes *Miranda* warnings soon after his confession, rather than applying curative measures, the same detective involved in all of the interrogations downplayed the importance of the warnings suggesting he was only "clarifying" Reyes' previous statements. "The psychological, spatial, and temporal break between the unwarned and warned interrogations" did not cure the *Miranda* violation and Reyes' post-warning confession should have been suppressed.

SIXTH AMENDMENT

Supreme Court Holds Speedy Trial Guarantee Does Not Apply to Sentencing Phase of a Criminal Prosecution

In ***Betterman v. Montana***, 136 S. Ct. 1609 (2016), the United States Supreme Court held that the Sixth Amendment's speedy trial guarantee protects the accused from arrest or indictment through the trial, but does not apply once the accused has been found guilty at trial or has pleaded guilty to criminal charges, and therefore does not apply to the sentencing phase of a criminal prosecution

Brandon Betterman ("Betterman") pleaded guilty to a bail jumping charge. He was then jailed for over 14 months awaiting sentencing. The delay was caused by the time taken to prepare the presentence report and the time the court took to decide two presentence motions and set the sentencing hearing. Betterman was eventually sentenced to seven years' imprisonment, with four of the years suspended. Betterman appealed, arguing that the 14-month gap between conviction and sentencing violated his speedy trial right. The Montana Supreme Court affirmed the conviction and sentence, ruling that the Sixth Amendment's Speedy Trial Clause does not apply to post-conviction, presentencing delay. Because federal and state courts were split on the question of whether the Speedy Trial Clause applies to sentencing, the Supreme Court granted certiorari.

The Supreme Court affirmed the judgment of the Montana Supreme Court and held that the Sixth Amendment's speedy trial guarantee does not apply once the accused has been found guilty at trial or has pleaded guilty to criminal charges. In reaching its holding, the Court broke down the criminal process into three stages: pre-charge, pending trial, and presentencing. The Court explained that the law provides protections against delay in all three stages of criminal proceedings, but those protections originate from different sources. In that regard, statutes of limitations and, in cases of unfair prosecutorial conduct, the Due Process Clause

protects against undue delay in the investigation and charging stage of the proceedings. The speedy trial right protects against unfair delay in the stage between charge and conviction. Finally, procedural rules and statutes protect against unreasonable delay in sentencing, with the Due Process Clause providing additional protection against exorbitant delay. Since conviction terminates the presumption of innocence, the Court held that the Sixth Amendment speedy trial right does not extend beyond conviction.

TAX SHELTER ENFORCEMENT

Second Circuit Affirms Convictions and Sentence of Tax-Shelter Promoter

In ***United States v. Daugerdas***, 837 F.3d 212 (2d Cir. 2016), the Second Circuit affirmed the convictions and sentence of a tax-shelter promoter, holding evidence was sufficient to support the convictions; the sentence was procedurally and substantively reasonable; and the challenges to the proceeding were meritless.

From 1994 through 2004, Paul M. Daugerdas ("Daugerdas"), a Certified Public Account ("CPA") and tax attorney at several large accounting and law firms, designed, sold, and implemented several tax strategies that sought to reduce wealthy clients' tax liabilities. As an essential part of the marketing of the tax shelters, Daugerdas and his colleagues issued to clients "more-likely-than-not" opinion letters, which stated that "under current U.S. federal income tax law it is more likely than not that" the transactions comprising the shelters are legal and will have the effect sought by the clients. They protect clients from the IRS's imposition of a financial penalty in the event that the IRS does not permit the losses generated by the shelter to reduce the client's tax liability. The letters also stated that the clients had knowledge of the transactions underlying the shelter and that the clients were entering into the shelter for non-tax business reasons. Because Daugerdas and his colleagues designed the transactions with a focus on their tax consequences rather than their profitability, they generally did not generate meaningful returns. In addition, as part of the implementation of some of the shelters, Daugerdas either directly or through his team participated in the correction and backdating of certain transactions that had originally been incorrectly implemented on behalf of some clients. Daugerdas also used the tax shelters to reduce his personal tax liability. Ultimately, Daugerdas was convicted of conspiracy to defraud the IRS; client tax evasion; IRS obstruction; and mail fraud. Daugerdas was sentenced to 180 months' imprisonment, three years' supervised release, and ordered to forfeit proceeds of $164,737,500 and pay restitution of $371,006,397 to the IRS.

On appeal, the Second Circuit affirmed the convictions, holding that the evidence was sufficient for a jury to find that Daugerdas was guilty of tax evasion, mail fraud, obstruction of the IRS, and conspiracy. The court also held that Daugerdas' sentence was procedurally and substantively reasonable, and that the government established the required nexus between the forfeited property and the crimes for which Daugerdas was convicted. The court rejected as meritless Daugerdas' remaining evidentiary and procedural arguments, holding that the indictment was neither constructively amended nor duplicitous, and that there were no errors in the trial proceedings that violated Daugerdas' Due Process right to a fair trial.

TITLE 26 – AIDING OR ASSISTING IN PREPARATION OR PRESENTATION OF FALSE RETURN UNDER 26 U.S.C. § 7206(2)

Fifth Circuit Holds Direct Involvement in Specific Returns Charged is Not Required Under 26 U.S.C. § 7206(2)

In ***United States v. Morrison***, 833 F.3d 491 (5th Cir. 2016), the Fifth Circuit held, *inter alia*, that a conviction under 26 U.S.C. § 7206(2) can be supported even when a defendant has no direct involvement in preparing the false returns underlying the charges.

Gladstone Morrison ("Gladstone") and Jacqueline Morrison, spouses, owned and operated a tax preparation firm, Jacqueline Morrison & Associates ("JMA"). From 2006 through 2009, JMA prepared many returns reflecting grossly-overstated or simply-fictitious Schedule C losses. The Morrisons were both indicted, *inter alia*, for conspiracy to prepare false returns (18 U.S.C. § 371; 26 U.S.C. § 7206(2)), aiding and abetting in the assistance of preparing false returns (18 U.S.C. § 2; 26 U.S.C. § 7206(2)). Ultimately, the Morrisons were convicted on all counts, sentenced to 187 months' imprisonment, and ordered to pay restitution of $17,807,106. Gladstone appealed his conviction, in relevant part due to the fact that he did not prepare most of the returns underlying the § 7206(2) counts—Jacqueline did.

The Fifth Circuit held that although a "close call," there was sufficient evidence to uphold the conviction of the § 7206(2) counts. The court acknowledged Gladstone's point that § 7206(2) is typically applied to individuals who have involvement with a specific return, but held that restricting the application of the statute to those circumstances is inconsistent with general principles of aiding and abetting. The concept of aiding and abetting with respect to § 7206(2) does not require direct involvement in the preparation of the specific returns charged, but can be met through "active involvement in, and knowledge of, the scheme" to prepare false returns. To support the conviction, the defendant must "share in the principal's criminal intent" and "take affirmative steps" to aid or assist the person committing the underlying crime. The same evidence underlying the conspiracy charges against Gladstone also supported his § 7206(2) aiding and abetting violations: Gladstone co-owned the business, served as the chief operating officer, oversaw the entire business operation, prepared several false Schedules C, and prepared a false return for himself and Jacqueline Morrison. Additionally, Gladstone created client forms, including information-verification and Schedule C due-diligence forms. Although he had no direct involvement in the preparation of many of the returns underlying the § 7206(2) charges, he personally prepared at least two returns containing fraudulent Schedule C losses. The court held that Gladstone's active involvement in and knowledge of the overall scheme served as sufficient evidence upon which a jury could base the conviction. Accordingly, the evidence was sufficient to support Gladstone's guilty verdict for knowingly assisting in the submission of all the false returns underlying the § 7206(2) counts. In a footnote, the court also noted that the indictment had taken the "unnecessary step of charging the separate aiding and abetting statute under 18 U.S.C. § 2" in conjunction with a charge of 26 U.S.C. § 7206(2), which by its terms addresses the conduct of aiding and abetting.

TITLE 26 – OMNIBUS CLAUSE UNDER 26 U.S.C. § 7212(a)

Second Circuit Holds Omnibus Clause Does Not Require Knowledge of Pending IRS Action or Affirmative Act

In ***United States v. Marinello***, 839 F.3d 209 (2d Cir. 2016), the Second Circuit held a conviction under the omnibus clause of 26 U.S.C. § 7212(a) does not require the government to prove the defendant knew of a pending IRS action. The court also held a conviction under this section does not require proof of an affirmative act, but can be based on an omission.

Carlo J. Marinello, Jr. ("Marinello") owned and operated a freight service business. From 1992 to 2010, Marinello either failed to maintain or discarded corporate books and records, and failed to file individual and corporate income tax returns. Unbeknownst to Marinello, in or about 2004, IRS Criminal Investigation ("CI") began investigating Marinello and eventually closed the investigation. In 2009, CI re-opened its investigation into Marinello, and in 2012, he was charged with violations of 26 U.S.C §§ 7212(a) (corrupt endeavors to obstruct or impede the due administration of the Internal Revenue laws) and 7203 (failure to file returns). The government argued Marinello violated the omnibus clause of § 7212(a) by, *inter alia*, failing to maintain corporate books and records and failing to provide accurate information to his accountant. A jury convicted Marinello on all counts and he appealed.

On appeal, the Second Circuit affirmed Marinello's conviction. First, the appellate court declined to adopt the Sixth Circuit's holding in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998) that an omnibus-clause conviction requires proof of a pending IRS action of which the defendant is aware. The court noted that the *Kassouf* decision was based on a comparison of the omnibus clause to the general obstruction of justice statute under 18 U.S.C. § 1503. The court explained, however, that while § 1503 expressly prohibits impeding jurors or court officers during "judicial proceedings," the omnibus clause more broadly prohibits impeding officers or employees "acting in an official capacity," which can include administrative acts done before the initiation of a proceeding. The court added this conclusion was consistent with the legislative history of both statutes, the holdings of other Circuit courts, and Department of Justice policy.

The Second Circuit also rejected Marinello's claim that the omnibus clause must be based on an underlying affirmative act, not on an omission. The court reasoned that § 7212(a)'s language prohibiting impeding the due administration of the tax laws "in any other way" is broad enough to include a corrupt omission with the intent to delay the IRS in the administration of its duties.

Update: The First, Second, Fifth, Ninth, and Tenth Circuits have held that the omnibus clause does not require proof that defendant knew of a pending IRS action. Only the Sixth Circuit, in *United States v. Kassouf*, 144 F.3d 952 (6th Cir. 1998), has held that the omnibus clause requires the existence of a pending IRS action and the defendant's knowledge of it when committing any corrupt acts.

On February 15, 2017, the Second Circuit denied Marinello's petition for rehearing *en banc*, but two circuit judges dissented—raising not only the investigation-requirement issue, but also concerns regarding the broad types of acts that could support conviction under the omnibus clause. The dissent opined that the panel opinion "affords the sort of capacious, unbounded, and oppressive opportunity for prosecutorial abuse that the [United States] Supreme Court has repeatedly curtailed." *United States v. Marinello*, 855 F.3d 455, 457 (2017). On June 27, 2017, the Supreme Court granted certiorari to review the circuit split.

TITLE 18 - WIRE FRAUD UNDER 18 U.S.C. § 1343

Eleventh Circuit Holds Wire Fraud Requires Proof Defendant Misrepresented an Essential Element of the Bargain

In ***United States v. Albert Takhalov***, 827 F.3d 1307 (11th Cir. 2016), the Eleventh Circuit held, *inter alia*, that wire fraud (18 U.S.C. § 1343) requires proof the defendant misrepresented an essential element of the bargain (*i.e.*, a scheme to defraud) and that proof solely of deceit that induced victims to enter into transactions is insufficient to prove wire fraud. The Eleventh Circuit's position on this issue is now squarely in accord with that of the Second Circuit. *See*, *e.g.*, *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007).

Albert Takhalov and his co-defendants operated clubs that employed women, who posed as tourists, to lure men to the clubs. During the trial, defendants admitted they deceived men into coming to their clubs, but argued there had been no illegal fraud. The defendants requested the jury be instructed that they be acquitted "if [the jury] found that the defendants had tricked the victims into entering a transaction but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay." The trial court refused to give that instruction, and ultimately, the defendants were convicted of several counts, including wire fraud and money laundering.

On appeal, the Eleventh Circuit distinguished schemes to deceive from schemes to defraud. The court adopted the Second Circuit's interpretation of wire-fraud cases, which have "drawn a fine line between schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes." *Shellef*, 507 F.3d at 108. The Eleventh Circuit concluded the defendants' requested jury instruction was a correct legal statement and not substantially covered by the trial court's instructions. Unconvinced that the error was harmless, the Eleventh Circuit reversed the defendants' wire fraud and wire-fraud conspiracy convictions, as well as the money-laundering convictions that were based upon the wire-fraud counts.

TITLE 18 - BANK FRAUD UNDER 18 U.S.C. § 1344

Supreme Court Holds Bank-Fraud Statute Under 18 U.S.C. § 1344(1) Applies Even When Intent is to Defraud Bank Customer and Not the Bank Itself

In ***Shaw v. United States***, 137 S. Ct. 462 (2016), the United States Supreme Court held, *inter alia*, that the "scheme to defraud a financial institution" under 18 U.S.C. § 1344(1) of the bank-fraud statute covers schemes to deprive a bank of money in a customer's account, even if the defendant intended to cheat only the bank's customer and not the bank itself.

Lawrence Shaw ("Shaw") was convicted of violating § 1344(1) after obtaining a bank customer's account information and using that and other related information to transfer funds from the customer's account to other accounts under Shaw's control. The Ninth Circuit affirmed Shaw's conviction. Shaw then filed a petition for writ of certiorari arguing that the words "scheme to defraud a financial institution" require the government to prove that the defendant had "a specific intent not only to deceive, but also to cheat, a *bank*," rather than "a *non-bank* third party."

A unanimous Supreme Court rejected Shaw's argument that he could not be convicted of violating § 1344(1) because he intended to cheat only a bank depositor and not a bank. The Court held that Shaw violated the bank-fraud statute because: (1) the bank had property rights in the customer's deposits; (2) Shaw may not have intended to cause the bank financial harm, but the statute, while insisting upon a "scheme to defraud," does not require a showing that the bank suffered a financial loss or that the defendant intended to cause such a loss; (3) Shaw need not have known that, as a legal matter, the customer's deposit account counted as bank property; and (4) it was not necessary that Shaw have the intended purpose of harming the bank's property.

RESTITUTION

Ninth Circuit Holds Restitution Under MVRA Includes All Victims of the Count of Conviction that Fit Within Its Scope

In ***United States v. Zhou***, 838 F.3d 1007 (9th Cir. 2016), the Ninth Circuit held that restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA") includes all victims directly and proximately harmed as a result of the offense of conviction even if those victims were not specifically mentioned in the count of conviction.

Yijun Zhou ("Zhou") purchased items totaling approximately $150,000 from a Target store in Colorado and a Nordstrom store in California using fraudulent credit cards. He was indicted on and pleaded guilty to one count of unauthorized use of access devices, and aiding and abetting others to do so (18 U.S.C. §§ 2(a) and 1029(a)(2)). At his plea colloquy, the government stated it would prove at trial that Zhou used fraudulent credit cards to make purchases at Nordstrom. Zhou answered affirmatively when asked if he was pleading guilty because he did the things charged in Count One. He was informed that restitution could be as high as $160,000. In a presentence report, the probation officer recommended restitution of $146,725.02, which included the purchases at both Nordstrom and Target. At sentencing, the court ordered Zhou to pay the recommended restitution. Zhou first challenged the restitution order on appeal, arguing that the district court erred by awarding restitution to the Target victims, because the offense of conviction covered only the victims of the Nordstrom charge—*i.e.*, the only charge the government asserted that it would prove at the plea colloquy.

The Ninth Circuit focused its analysis solely on whether the Target victims were persons "directly and proximately harmed as a result of the commission of" the offense of Zhou's conviction. Although the Target transactions were not mentioned at the plea colloquy, the court agreed with the government that the text of the indictment was broad enough to cover both the Nordstrom and Target charges based on location and timeframe references. The court reasoned that given "the MVRA's broad remedial purpose," Congress likely intended restitution to all victims within the scope of an admitted crime, even if the parties focused primarily on one set of victims at the plea colloquy. Ultimately, the Ninth Circuit concluded the district court did not plainly err in imposing restitution and, therefore, affirmed the order.

The dissent opined that the majority's reading of the indictment could literally encompass fraudulent conduct anywhere in the United States, thereby making it unclear what specific fraudulent conduct was covered by the charge. The dissent further opined that Zhou's admissions to the government's allegations could not have included the Target charges, because the government's proffer at the plea colloquy referred only to the Nordstrom charges. Finally, the dissent pointed to the presentence report, which referred to the Nordstrom charges as "the transactions charged in the instant offense," while it characterized the Target charges as conduct "relevant … to the instant conviction." Inasmuch as the district court "may award restitution … only for loss that flows directly from 'the specific conduct that is the basis of the offense of conviction[,]'" the dissent concluded the district court plainly erred in ordering restitution for the losses attributable to relevant conduct rather than the offense of conviction.

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