



CRIMINAL TAX BULLETIN

August 2023

Department of the Treasury | Internal Revenue Service Office of Chief Counsel | Criminal Tax Division

FOURTH AMENDMENT

Third Circuit Upholds Denial of *Franks* Hearings as Not Clearly Erroneous

In *United States v. Desu*, 23 F.4th 224 (3d Cir. 2022), the Third Circuit held, *inter alia*, that the district court did not clearly err in denying defendant's request for a *Franks* evidentiary hearing challenging a search-warrant application.

For several years, Rao Desu (Desu) owned two pharmacies, each with a different co-owner. For each pharmacy, Desu and each co-owner diverted a portion of the cash receipts, which was not deposited into the pharmacies' bank accounts or included in the general ledgers. In turn, the accountants underreported the pharmacies' revenue on the tax returns by relying on the revenue figures found in each general ledger. This underreporting led to underreported net income on Desu's individual income tax returns. Following a government investigation, the co-owners of each of Desu's pharmacies agreed to testify against Desu. A jury convicted Desu of conspiracy to obstruct the lawful functions of the IRS (18 U.S.C. § 371) and willfully assisting in the preparation of materially false tax returns (26 U.S.C. § 7206).

On appeal, Desu argued, *inter alia*, that the district court erred in denying an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). During the investigation, the government applied for a warrant to search Desu's home. To establish probable cause for the warrant, the affiant submitted an affidavit detailing evidence of Desu's wrongdoing based, in part, on evidence seized from co-owner Darshna Desai's (Desai) residence under a previous search warrant; witness interviews with Desai and others; and a notebook provided by Desai containing a record of the cash skim. After the government executed the warrant, Desu filed a motion for a *Franks* hearing, seeking to suppress the evidence seized as a result of the search. Desu argued the affidavit in support of the warrant

application contained material omissions and misstatements made with reckless disregard for the truth. The district court orally denied Desu's motion for a *Franks* hearing after concluding that each of the alleged omissions or misstatements was not made with reckless disregard for the truth or was not material.

The Third Circuit first noted that to obtain a *Franks* hearing, a defendant must establish two elements: (1) whether a warrant application contains false statements made with reckless disregard for the truth and (2) whether the remaining truthful statements could establish probable cause by themselves. With respect to the standard of review applicable to a district court's denial of a motion for a *Franks* hearing, the Third Circuit stated that it reviews for clear error a district court's determination regarding whether false statements in a warrant application were made with reckless disregard for the truth. "Next, after putting aside any false statements made with reckless disregard for the truth, [the appellate court] review[s] *de novo* a district court's substantial-basis review of a magistrate judge's probable cause determination."

With respect to the first element required to obtain a *Franks* hearing, the Third Circuit analyzed each of Desu's examples of alleged false statements in the affidavit. It concluded the district court did not clearly err in finding that the government's affiant had not acted with reckless disregard for the truth when he made the supposedly material omissions and false assertions. In light of this conclusion, the appellate court did not analyze the second element. Accordingly, the Third Circuit upheld the district court's denial of Desu's request for a *Franks* hearing.

Fifth Circuit Holds Evidence Was Obtained Following Constitutionally Valid Investigatory Stop

In *United States v. Rose*, 48 F.4th 297 (5th Cir. 2022), the Fifth Circuit held the investigatory stop at issue was justified by reasonable suspicion.

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

Five minutes after receiving a tip from an anonymous 911 caller of a possible armed robbery, police officers arrived at the scene where they immediately saw an individual (later determined to be Terrel Rose (Rose)) standing behind a dumpster, who matched the general description provided by the 911 caller. Nearby was an empty Ford Crown Victoria, still running, which also matched the tipster's description. After one officer motioned the individual to come out from behind the dumpster, another officer proceeded to search that area, where he quickly found a black handgun with an extended clip, which also had been described by the 911 caller. The officers learned the handgun was reported stolen and that Rose was a gang member and also had an outstanding arrest warrant. With Rose's consent, the officers searched the vehicle and found multiple baggies of marijuana. They handcuffed Rose and during a search of his pockets, found prescription bottles with pills for which Rose had no prescription. After Rose was indicted for unlawful possession of a firearm, the district court partially granted his motion to suppress all evidence and statements obtained during and after the stop, which Rose claimed were obtained without a lawful warrant, probable cause, or any other lawful authority.

On interlocutory appeal, the Fifth Circuit reversed and remanded, holding suppression was not warranted because the evidence was obtained after a constitutionally valid investigatory stop. In so doing, the appellate court determined that the investigatory stop was supported by reasonable suspicion, based on (1) the informant's credibility and reliability; (2) the specificity of the information contained in the tip; (3) the extent to which the information in the tip could be verified by the two officers; and (4) the freshness of the tip. As to the first factor (reliability and credibility of an anonymous tipster), the Fifth Circuit concluded the government had met the factors set forth by the Supreme Court in *Navarette v. California*, 572 U.S. 393, 398-401 (2014)—*i.e.*, “[t]he tipster identified himself as an eyewitness to the events in the liquor store parking lot; he professed to describe those events as they unfolded, and the setting the officers found on their arrival five minutes later tended to support that timeline; and he used the 911 emergency system, which, as reflected by the record, both traced his number and recorded his call.” Second, the Fifth Circuit concluded the information the informant provided was highly specific, including the make, model, and color of the car; its location in the parking lot of a particular liquor store, beside the building and next to a trash can; the suspect's race, sex, and clothing, and unique details about the gun involved. Third, the information conveyed by the informant was mostly consistent with what the officers saw upon arrival on the scene, *i.e.*, the white Ford Crown Victoria, still running, parked on the side of the liquor store beside a trashcan, and a man who fit, in significant ways, the description received by the officers and who was in distinctive attire. And within seconds of confronting Rose, officers found a firearm in his proximity

that precisely matched the extended-clip handgun described by the informant. Fourth, the Fifth Circuit concluded that consistent with the tip described, upon arriving to the scene, officers found multiple indicators that the setting of the alleged crime remained mostly intact: the car remained parked exactly where the informant had said and a suspect mostly fitting the description provided was close by and acting abnormal. Accordingly, the Fifth Circuit concluded no reasonable view of the evidence supported the district court's ruling. Thus, the ruling of the district court was reversed.

Ninth Circuit Holds Federal Regulation of Electronic Service Provider (ESP) Does Not Transform ESP Private Searches into Governmental Action

In *United States v. Rosenow*, 50 F.4th 715 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 786 (2023), the Ninth Circuit held, *inter alia*, that for purposes of the Fourth Amendment, federal regulation of electronic service providers (ESPs) does not transform private searches by ESPs into governmental action, and a mandatory reporting statute does not transform reporting entities into government actors.

Carstern Rosenow (Rosenow) arranged foreign child sex tourism involving minors through Yahoo and Facebook's online messaging services. Yahoo discovered Rosenow's illegal activities after investigating numerous user accounts Yahoo suspected were involved in child sexual exploitation. Yahoo reported this activity to the National Center for Missing and Exploited Children (NCMEC) pursuant to mandatory reporting requirements by ESPs under the Protect Our Children Act of 2008 (PCA). Yahoo also notified the Federal Bureau of Investigation (FBI) and Homeland Security Investigations (HSI). Facebook also reviewed Rosenow's account activity after receiving subpoenas for Rosenow's Facebook basic-subscriber information and internet-protocol (IP) information. Upon discovering child-exploitation content, Facebook disabled Rosenow's accounts and also reported the illegal activity to the NCMEC. Rosenow was convicted of attempted sexual exploitation of a child (18 U.S.C. § 2251(c)) and possession of sexually explicit images of children (18 U.S.C. § 2252(a)(4)(B)).

On appeal, Rosenow argued the evidence discovered by Yahoo and Facebook should have been suppressed because the ESPs were acting as government agents when they searched his online accounts without a warrant. Rosenow's reasoning was that taken together the Stored Communications Act (SCA) authorizes ESPs to conduct warrantless searches, and the PCA requires private parties to report evidence derived from those searches to a government agent.

The Ninth Circuit rejected these arguments. First, the appellate court noted that although the SCA criminalizes the unauthorized search of stored electronic communications contents, the statute expressly excludes ESPs from liability from the search of their own servers. The Ninth Circuit further reasoned that the PCA does not require ESPs to search users' content. Rather, it requires the ESP to report to the NCMEC any apparent violation of "specified criminal offenses involving child pornography." The appellate court emphasized that mandatory reporting is different than mandated searching and stated that "a private actor does not become a government agent simply by complying with a mandatory reporting statute."

The Ninth Circuit next concluded that the ESPs' private searches did not implicate the Fourth Amendment based on a "sufficiently close nexus" between the government and the private party. The appellate court analyzed "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further [its] own ends." The appellate court concluded that the government did not participate in Yahoo and Facebook's searches, and that Yahoo and Facebook investigated Rosenow's accounts due to their own independent motivations. Accordingly, the Ninth Circuit affirmed the district court's rulings.

The dissent concurred with most of the majority opinion's analysis of the Fourth Amendment issues. The exception was the dissent's view that in conducting its searches of Rosenow's chat messages, Yahoo was acting as an instrument or agent of the government. The dissent reasoned that Yahoo's motivation was not independent as it was intertwined with the government's motivation to enforce criminal laws.

FOURTH AMENDMENT AND Fed. R. Crim. P. 41(b)(3)

Tenth Circuit Holds Venue Requirement Need Not Be Addressed in Extraterritorial Search Warrant Application

In *United States v. Jumaev*, 20 F.4th 518 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 245 (2022), the Tenth Circuit held, *inter alia*, that an extraterritorial search warrant application under Fed. R. Crim. P. 41(b)(3) need not establish Rule 41(b)'s venue requirement of a connection between the magistrate judge's district and the terrorism activities under investigation.

Jamshid Muhtorov (Muhtorov) lived in Colorado and Bakhtiyor Jumaev (Jumaev) lived in Pennsylvania. Both men were Muslims, Uzbekistani refugees, and shared an interest in the Islamic Jihad Union (IJU), a designated foreign terrorist organization (DFTO) with ties to al-Qaeda.

After they met in Pennsylvania in 2009, Muhtorov and Jumaev stayed in contact. Unbeknownst to them, the government was intercepting their communications pursuant to the Foreign Intelligence Surveillance Act. Through this surveillance, the government learned Jumaev planned to send \$300 to Muhtorov, who would then give the money to the IJU. After bank records confirmed this transaction, Muhtorov was arrested. On the same date, a magistrate judge in the District of Colorado issued an arrest warrant for Jumaev and extraterritorial search-and-seizure warrants for Jumaev's home, cellular phone, and laptop computer in Pennsylvania. After incriminating material was found on the devices, Jumaev was arrested and detained pending trial. He was charged with and convicted of two counts of conspiring to provide and providing material support to a DFTO (18 U.S.C. § 2339B). The statute provides for a sentence of up to 20 years for a person who "knowingly provides material support or resources to a foreign terrorist organization or attempts or conspires to do so." Jumaev's conviction was based on a single check on a single occasion. During the trial, the government established Jumaev's knowledge that the check was for a DFTO through intercepted communications and email exchanges. Jumaev was sentenced to 76-months-and-three-days' incarceration.

On appeal, Jumaev argued, *inter alia*, that the evidence obtained from the execution of extraterritorial search warrants for his home, cellular phone, and laptop computer should have been suppressed because the warrant applications did not establish any connection to Colorado. The Tenth Circuit disagreed. It first noted that while Fed. R. Crim. P. 41 "generally limits a federal magistrate judge's warrant-issuing authority to the district where he or she sits," Rule 41(b)(3) is one exception to this general limitation. Rule 41(b)(3) provides that "a magistrate judge, in an investigation of domestic or international terrorism, with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district." The Tenth Circuit also noted that Rule 41(b) requires that there be a connection between the magistrate judge's district and the terrorism activities under investigation. The appellate court concluded that this venue requirement is a substantive provision, not one that "details the procedures for obtaining and issuing warrants." Thus, Rule 41 does not obligate the government to address the 41(b)(3) venue requirement in its warrant application materials. The appellate court clarified that its holding should not be construed as meaning "that a magistrate judge may issue an extraterritorial warrant pursuant to Rule 41(b)(3) without having any basis for concluding that activities related to the terrorism under investigation may have occurred in her district, so long as the government could have showed such a connection at the time the warrant was issued." In sum, no provision of Rule 41 demands that the Rule 41(b)(3) venue requirement be addressed in the warrant application

materials. Thus, the Tenth Circuit held that the extraterritorial search warrants for Jumaev's home, cellular phone, and laptop computer did not violate Rule 41.

SIXTH AMENDMENT

Second Circuit Reverses Fraud Conviction on Speedy Trial Grounds

In *United States v. Pikus*, 39 F.4th 39 (2d Cir. 2022), the Second Circuit reversed defendant's convictions, holding the excessive pre-trial delay was caused by the government's delay in producing discovery and the district court's failure to effectively respond.

Aleksandr Pikus (Pikus) was charged with money laundering (18 U.S.C. § 1956(a)(1)(B)(i)); money laundering conspiracy (18 U.S.C. § 1956(h)); conspiracy to pay and receive health care kickbacks (18 U.S.C. § 371); and conspiracy to obstruct the IRS (18 U.S.C. § 371). The charges stemmed from allegations that a network of Brooklyn, New York medical clinics engaged in a systematic scheme to defraud Medicare and Medicaid.

Between June 2016 and November 2017, the government provided Fed. R. Crim. P. 16 discovery material, and the court issued Fed. R. Crim. P. 17 subpoenas to federal and state agencies for audit records central to Pikus' defense theory. By November 2017, the parties disputed whether the government had fulfilled its obligations under Rule 16 and *Brady* and whether the state and federal agencies had produced all records in compliance with the subpoenas. Pikus filed a motion to dismiss the indictment for violation of the Speedy Trial Act, arguing the delay was caused by the government's delinquent discovery. The district court denied the motion and set a trial date for May 2018. Thereafter, the district court adjourned the trial date four times while the government continued to make discovery productions, including the production of seven (7) gigabytes of data in August 2018 just two months before the jury trial commenced on October 28, 2019. Ultimately, Pikus was convicted and sentenced to 156 months' imprisonment.

On appeal, the Second Circuit held that the district court clearly erred in attributing the multi-year delays to the case being complex, to negotiations, and to motions, when the true cause of the delay was the government's discovery conduct. The appellate court remarked that the district court's "perfunctory" time exclusions on the record fell short of the Speedy Trial Act's requirement that a court set forth its reasons for finding that the ends of justice are served, and they outweigh other interests. The Second Circuit criticized the district court's "passing reference to the case's complexity" to repeatedly justify delays without ever explaining what made it complex, or why this complexity warranted adjournment.

The Second Circuit further concluded that the district court failed in its responsibility to hold the government accountable for its discovery obligations and did not appropriately consider the causes and implications of the extraordinary delays introduced by the government's dilatory conduct of discovery. The appellate court noted that the government "repeatedly and inaccurately represented" to the district court it had completed discovery. Accordingly, the Second Circuit vacated Pikus' convictions and remanded to the district court to determine whether the charges should be dismissed with or without prejudice.

TAX EVASION – 26 U.S.C. § 7201

Fifth Circuit Holds Additional Tax Due And Owing Does Not Require Tax Deficiency Assessment

In *United States v. Green*, 47 F.4th 279 (5th Cir. 2022), *cert. denied Green v. United States*, 143 S. Ct. 747 & *Selgas v. United States*, 143 S. Ct. 1058 (2023), the Fifth Circuit upheld defendants' tax evasion conviction (26 U.S.C. § 7201) holding, *inter alia*, that proof of additional tax due and owing under the statute does not require a formal IRS tax deficiency assessment.

In 2005, Thomas Selgas (Selgas) and his wife received over \$1 million from their partnership, MyMail, Ltd. (MyMail), which they used to purchase gold coins. In 2006, Selgas, with the assistance of his attorney, John Green (Green), sought to amend MyMail's 2005 tax return to reduce the reported gross receipts and distributions, based on the frivolous "lawful-dollar" theory. After the amended return was disallowed by the IRS and later rejected in court, the IRS began auditing MyMail. In response, the Selgases engaged in a decade-long scheme to conceal their income and assets from the IRS (e.g., they purchased a house with gold coins and later transferred it to a trust controlled by a relative; hid income in Green's client trust accounts and used the concealed funds to pay their living expenses for at least a decade). As a result, the IRS was unable to collect any money to satisfy the Selgases' tax debt. In 2018, Thomas Selgas and Green were convicted of conspiracy to defraud the United States (18 U.S.C. § 371), and Selgas was convicted of tax evasion.

On appeal, the Fifth Circuit rejected, *inter alia*, Selgas' argument that the government had failed to meet the elements of the tax-evasion charge because it had not offered a formal tax deficiency assessment of his taxes. The appellate court explained that while a formal assessment is one piece of evidence that *may* prove the existence of a tax deficiency or a tax due and owing, it is not a requirement. In this case, the evidence showed Selgas received more than \$1 million in income from MyMail in 2005; that he did not file a valid tax return; he instead filed a Statement that misreported receipt of

\$178,640 in “lawful dollars,” and denied that this was “income,” and that he did not pay the tax on his substantial unreported income. Thus, the Fifth Circuit affirmed Selgas’ evasion-of-payment conviction.

AGGRAVATED IDENTITY THEFT – 18 U.S.C. § 1028A(A)(1)

Supreme Court Holds Use of Another Person’s Means of Identification Under Aggravated Identity Theft Statute Must Be at Crux of Criminality

In *Dubin v. United States*, 143 S. Ct. 1557 (2023), the Supreme Court held a defendant “uses” another person’s means of identification “in relation to” a predicate offense within the meaning of the aggravated identity theft statute (18 U.S.C. § 1028A(a)(1)), when the use is at the crux of what makes the conduct criminal.

David Dubin (Dubin) was convicted of healthcare fraud (18 U.S.C. § 1347) after he overbilled Medicaid for psychological testing by misrepresenting the professional credentials of the employee who conducted the testing. Dubin also was convicted of aggravated identity theft. At trial, the government argued § 1028A(a)(1) was satisfied because Dubin’s fraudulent billing included the patient’s Medicaid reimbursement number, a “means of identification.” The district court doubted the case involved aggravated identity theft as the whole crux of the case was how Dubin was billing. Nevertheless, due to binding Fifth Circuit precedent, the district court denied Dubin’s post-trial challenge to his aggravated identity theft conviction. On appeal, a Fifth Circuit panel affirmed, and on rehearing *en banc*, a fractured court affirmed again.

The Supreme Court vacated the judgment and remanded the case to the Fifth Circuit. First, the Court noted that the government had construed two of § 1028A(a)(1)’s elements, “use of a patient’s means of identification” and “in relation to healthcare fraud,” “broadly and in isolation.” Interpreting these words within their statutory context, the Court interpreted the term “in relation to” as meaning that the means of identification is at the crux of the underlying criminality, and the term “uses” means that identity theft is committed “when a defendant uses the means of identification itself to defraud or deceive.” The Court reasoned that the government’s broad reading of the statute would apply an “aggravated” label to all manner of everyday over-billing offenses, turning the statute into “something the ordinary user of the English language would not consider identity theft at all.”

Analyzing the statute’s text and context, from content to common sense, the Court concluded that under § 1028A(a)(1), a “defendant ‘uses’ another person’s means of identification ‘in relation to’ a predicate offense

when this use is at the crux of what makes the conduct criminal.” The Court explained that “being at the crux of the criminality requires more than a causal relationship, such as ‘facilitation’ of the offense or being a but-for cause of its ‘success.’” Instead, the Court noted, “with fraud or deceit crimes like the one in this case, the means of identification specifically must be used in a manner that is fraudulent or deceptive. Such fraud or deceit going to identity can often be succinctly summarized as going to ‘who’ is involved.”

In this case, Dubin’s “use of the patient’s name was not at the crux of what made the underlying overbilling fraudulent.” The crux of the healthcare fraud was a misrepresentation about the qualifications of [Dubin’s] employee. The patient’s name was an ancillary feature of the billing method employed. Thus, because Dubin did not use the patient’s means of identification in relation to a predicate offense within the meaning of § 1028A(a)(1), the Court vacated the judgment and remanded the case back to the Fifth Circuit.

Justice Gorsuch concurred in judgment, adding that § 1028A(a)(1) is unconstitutionally vague as “the statute fails to provide even rudimentary notice of what it does and does not criminalize.”

WIRE FRAUD – 18 U.S.C. § 1343

Supreme Court Holds Right-to-Control Theory Cannot Form Basis for Wire-Fraud Conviction Because Valuable Economic Information is not a Property Interest Under Statute

In *Ciminelli v. United States*, 598 U.S. 306 (2023), the Supreme Court unanimously held that the right-to-control theory, which allowed wire-fraud convictions based on the deprivation of valuable economic information, is not a property interest encompassed by the federal wire fraud statute (18 U.S.C. § 1343).

Louis Ciminelli (Ciminelli) owned LPCiminelli, a New York construction company. Alain Kaloyeros (Kaloyeros) was a board of directors member of nonprofit Fort Schuyler Management Corporation (Fort Schuyler) ’s board of directors and in charge of developing project proposals for New York’s \$1 billion Buffalo Billion investment initiative, which was administered through Fort Schuyler. Todd Howe (Howe) was a lobbyist with deep ties to the then New York Governor’s administration. Ciminelli, Kaloyeros, and Howe were involved in a scheme to rig the bid process for obtaining state-funded Buffalo Billion development projects. Kaloyeros tailored Fort Schuyler’s bid process so that LPCiminelli would receive major Buffalo Billion contracts. Ciminelli, Kaloyeros, and Howe were charged with, *inter alia*, wire fraud and conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349).

At trial, the government relied on the Second Circuit's "right-to-control" theory, under which the government can establish wire fraud by showing the defendant schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions. Consistent with this theory, the jury was instructed that the term "property" in § 1343 includes intangible interests such as the right to control the use of one's assets. Thus, the jury could find defendants harmed Fort Schuyler's right to control its assets if Fort Schuyler was deprived of economic information it would consider valuable in deciding how to use its assets. Based on these instructions, Ciminelli was convicted of, *inter alia*, wire fraud and conspiracy to commit wire fraud and was sentenced to 28 months' imprisonment, followed by two years' supervised release. The Second Circuit affirmed.

The Supreme Court granted certiorari to determine whether the Second Circuit's right-to-control theory of wire fraud is a valid basis for liability under 18 U.S.C. § 1343. The Court first noted that the federal fraud statutes are limited to the protection of property rights. Despite this limitation, however, lower federal courts had interpreted the mail and wire fraud statutes to protect intangible interests unconnected to traditional property rights. The Court concluded that the right-to-control theory is inconsistent with the text, structure, and history of the federal fraud statutes, which are limited in scope to the protection of property rights. It further concluded that this theory vastly expands federal jurisdiction without statutory authority. Thus, the Court held that since the right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest, it cannot form the basis for a conviction under the federal fraud statutes.

BANK SECRECY ACT

Supreme Court Holds Civil Penalty for Non-Willful FBAR Violations Applies Per Report, Not Per Account

In *Bittner v. United States*, 589 U.S. 85 (2023), the Supreme Court, in a 5-4 opinion, concluded that the Bank Secrecy Act's (BSA) penalty for non-willful failure to file timely and accurate Reports of Foreign Bank and Financial Accounts (FBAR) applies on a per-report, not per-account basis.

Alexandru Bittner (Bittner) was a dual citizen of Romania and the United States. In 2011, upon his return to the United States from Romania, Bittner learned of his BSA reporting obligations. He submitted the required annual reports covering five years (2007 through 2011). The government deemed Bittner's late-filed reports deficient

because they did not address all accounts for which Bittner had either signatory authority or a qualifying interest. Bittner filed corrected FBARs providing information for each of his accounts. The government did not contest the accuracy of Bittner's new filings, or suggest Bittner's previous errors were willful. Instead, the government determined that non-willful penalties applied to each account not accurately or timely reported. Since Bittner's five late-filed annual reports collectively involved 272 accounts, the government assessed a \$2.72 million penalty. Bittner challenged that penalty in court, arguing the BSA authorizes a maximum penalty for non-willful violations of \$10,000 per report, not per account. The district court held in Bittner's favor, but the Fifth Circuit reversed, upholding the government's assessment.

On certiorari, the Supreme Court reversed the Fifth Circuit's judgment, holding the BSA's \$10,000 maximum penalty for non-willful FBAR violations accrues on a per-report, not a per-account, basis. The Court first reviewed the language of 31 U.S.C. §§ 5314 and 5321, noting that § 5314 delineates an individual's legal duties under the BSA, and § 5321 outlines the penalties for failing to discharge those duties. The Court stated that § 5314 does not speak of accounts or their number, but instead focuses on the duty to file reports. Section 5321 also does not mention accounts and imposes a penalty for a "violation." The Court then contrasted the language used in § 5321 for willful violations and the reasonable cause exception to penalties, noting these sections are tailored to accounts. Analyzing congressional intent, the Court concluded that Congress intended the difference in language to have a difference in meaning. The Court noted that government-issued guidance suggests that failure to file a report represents a single violation exposing a non-willful violator to one \$10,000 penalty. The Court added that Congress's statement of purpose in enacting the BSA was to require reports to be filed to assist the government in criminal, tax, intelligence, and counterintelligence investigations, not to maximize penalties for every non-willful error. The Court further noted that asserting penalties on a per-account basis could lead to larger fines for non-willful violations than for willful violations. The Court reversed the judgment of the Fifth Circuit.

Two Justices opined that, to the extent there is any ambiguity in the statute, the rule of lenity requires a per-report approach that would limit BSA penalties, rather than a per-account theory that would enhance them.

The dissent, however, concluded that "[t]he most natural reading of the BSA and its implementing regulations establishes that a person who fails to report multiple accounts on the prescribed reporting form violates the law multiple times, not just once."

SENTENCING

Tenth Circuit Holds District Court Abused Discretion by Imposing Harsher Sentence on Defendant Who Pled Guilty Without Plea Agreement

In *United States v. Cozad*, 21 F.4th 1259 (10th Cir. 2022), the Tenth Circuit held that as an apparent matter of first impression, under 18 U.S.C. § 3553(a), the district court's decision imposing a harsher sentence based on a defendant's decision to plead guilty without entering into a plea agreement was procedurally unreasonable and an abuse of discretion.

Leroya Cozad (Cozad) was charged with aiding and abetting the making of counterfeit currency (18 U.S.C. §§ 2, 471). The government declined Cozad's offer to plead guilty in exchange for a recommendation of a probationary sentence and countered with an offer to recommend a custodial sentence at the low end of the guideline range. Cozad declined and entered an open plea. The presentence report (PSR) recommended a 24-30 months' custodial sentence. Neither party objected to the PSR, but submitted sentencing memoranda. Cozad advocated for a term of probation, while the government recommended a 24 months' custodial sentence. The district court sentenced Cozad to 27 months' imprisonment, which was the midpoint of the guideline range. The district court explained its practice of favoring a midpoint guideline range and leaning against a low-guideline sentence when a defendant pleads guilty without a plea agreement.

On appeal, the Tenth Circuit reviewed Cozad's sentence under an abuse-of-discretion standard. The appellate court first analyzed the district court's harsher sentence of Cozad based on her decision to plead guilty without a plea agreement. After discussing the permissible factors in the determination of a sentence, the Tenth Circuit noted it could not "see how the fact of a defendant's open plea, standing alone, bears any meaningful relationship to the § 3553(a) factors," adding that the fact that the parties failed to reach a mutually satisfactory bargain, "without more, can provide no insight into the defendant's character." Thus, the appellate court concluded it was arbitrary to penalize a defendant based on the absence of a plea agreement alone. The Tenth Circuit rejected the government's broad proposition that a district court may, "for uniformity purposes" and to provide a "compelling reason" for defendants to enter plea agreements, extend "additional leniency" to defendants who enter into plea agreements and withhold it from those who do not. The appellate court distinguished leniency under USSG § 5K3.1, which reflected Congress' intent to incentivize early plea deals pursuant to fast-track programs under the Guidelines, which was not at play here. Lastly, the Tenth Circuit noted that in the federal system, a court's role in plea bargaining is generally limited to accepting or rejecting an agreement after the parties have reached one, and it is the "role of the government, not the court, to provide a defendant with 'compelling reasons' for entering into a plea agreement." Thus, the Tenth Circuit vacated Cozad's sentence and remanded for resentencing, holding it was procedurally unreasonable and, thus, an abuse of discretion, for the district court to impose a harsher sentence based on Cozad's decision to enter an open plea.

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