



CRIMINAL TAX BULLETIN

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Department of the Treasury | Internal Revenue Service
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FOURTH AMENDMENT

Eighth Circuit Upholds Warrantless Use of Software Program to Identify Users of File-Sharing Program

In *United States v. Hoeffener*, 950 F.3d 1037 (8th Cir. 2020), the Eighth Circuit held, *inter alia*, that a defendant has no legitimate expectation of privacy in files made available to the public through peer-to-peer sharing networks.

In 2012, St. Louis police detectives conducted a child pornography undercover operation using Torrential Downpour (“TD”), a special law enforcement software. TD is configured to search the BitTorrent peer-to-peer file-sharing network for Internet Protocol (“IP”) addresses associated with individuals offering to share or possess child pornography. Law enforcement traced child pornography files to the IP address of a computer belonging to Roland Hoeffener (“Hoeffener”). Based on this information, law enforcement obtained a search warrant for Hoeffener’s house, pursuant to which multiple electronic devices were seized. Forensic analysis revealed the file-sharing applications on Hoeffener’s computer contained thousands of child pornography images and videos. Hoeffener was charged with receipt and possession of child pornography. He moved to suppress evidence obtained from the warrantless TD access of his BitTorrent information. The district court denied the motion, and Hoeffener entered a conditional guilty plea. He was sentenced to 120 months’ imprisonment.

Hoeffener appealed the district court’s denial of his motion to suppress, arguing that because BitTorrent is a software that intentionally obscures transmitted communications by encrypting the information and decentralizing the delivery system, his enhanced efforts to protect the privacy of the communications creates a reasonable expectation of privacy that might not exist with other file-sharing programs. The Eighth Circuit rejected this argument, noting that TD searches for download candidates in the

same way that any public user of the BitTorrent network searches, and it only searches for information that a user has already made public by the use of the uTorrent software, which was the file-sharing software Hoeffener used at the time of the online investigation. Thus, the Eighth Circuit affirmed the suppression ruling, holding Hoeffener had no legitimate expectation of privacy in files he had allowed the public to access on his computer.

FIFTH AMENDMENT

D.C. Circuit Holds At-Home Interview During Warrant Execution Not Custodial under *Miranda*

In *United States v. Cooper*, 949 F.3d 744 (D.C. Cir. 2020), the D.C. Circuit affirmed the denial of a motion to suppress incriminating statements made during execution of a search warrant of defendant’s house, holding the defendant was not in custody for *Miranda* purposes.

Tarkara Cooper (“Tarkara”) and Brian Bryant (“Bryant”) were under investigation for helping Antonio Cooper (“Antonio”) in a stolen identity refund fraud scheme involving millions of dollars in refunds. Antonio pled guilty and testified against Tarkara and Bryant. Agents obtained a search warrant for Tarkara’s house. Once there, they asked her if she “would agree to” answer a few questions and advised her of the voluntary nature of the interview. During the interview, agents drove Tarkara to drop off her daughter at school and returned to the house to resume the interview. Tarkara admitted to helping Antonio with the scheme. Before trial, Tarkara filed a motion to suppress the incriminating statements she made during the interview. The district court denied the motion, holding Tarkara was not interviewed while in custody. She was convicted, sentenced to 63 months’ imprisonment, and ordered to pay restitution of nearly \$2 million.

On appeal, the D.C. Circuit affirmed the denial of Tarkara’s pretrial motion to suppress, holding the evidence “amply” supported the district court’s conclusion that Tarkara was not in custody when she admitted her involvement in

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Antonio's fraud. The D.C. Circuit noted Tarkara was in her house, agreed to talk, and was cooperative with the agents, factors that usually weigh against a finding of "the kind of custodial situation that merits a *Miranda* warning." The D.C. Circuit rejected Tarkara's claim that she was prevented from leaving the house to take her daughter to school alone. Instead, the appellate court noted there was no evidence that Tarkara was prevented from leaving, she was not interviewed during the drive, and the agents acted reasonably in driving Tarkara to and from the house, in order to allow her to return home while the search was underway.

TAX EVASION – 26 U.S.C. § 7201

Ninth Circuit Holds Tax Evasion Statute of Limitations Begins to Run on Date False Tax Return Is Filed

In *United States v. Galloway*, 802 F. App'x 247 (2020), *reh'g denied* (9th Cir. Mar. 23, 2020) (unpublished), the Ninth Circuit held that the statute of limitations for 26 U.S.C. § 7201 should be determined using the date the false tax return was filed, rather than the date a later affirmative act was committed.

In May 2014, Michael Galloway ("Galloway") was indicted on four counts of tax evasion (26 U.S.C. § 7201) relative to tax years 2003 through 2006. Galloway filed false individual income tax returns for those tax years on October 24, 2005, November 7, 2005, November 6, 2006, and August 18, 2008, respectively. In the indictment, the government alleged the last affirmative act of evasion for each count included false statements Galloway made to IRS special agents on or about February 23, 2010. Prior to trial, Galloway moved to dismiss counts one through three of the indictment, relative to his 2003, 2004, and 2005 tax returns, arguing those counts were barred by the applicable statute of limitations. The district court denied Galloway's motion, finding that affirmative acts constituting an attempt to evade tax can include false statements made to the IRS, and can bring otherwise time-barred counts within the applicable statute of limitations. Galloway was subsequently convicted on all four counts.

On appeal, Galloway argued that the district court erred in not dismissing counts one through three on statute-of-limitations grounds because the indictment was brought more than six years after he filed his 2003, 2004, and 2005 tax returns. The Ninth Circuit agreed and reversed the convictions for those counts, holding that the six-year statute of limitations for tax evasion begins to run on the date false tax returns are filed. The appellate court reasoned that tax evasion is not a continuing offense for statute of limitations purposes, and therefore, the offense of tax evasion is complete as soon as every element in the crime occurs, *i.e.*, willfulness, a tax deficiency, and an

affirmative act constituting an evasion of the tax. In this case, when Galloway late-filed his 2003, 2004, and 2005 tax returns, he had already incurred a tax deficiency for each year, and thus the offense of tax evasion was complete when he willfully filed the false returns. The Ninth Circuit noted that its prior decision in *United States v. Carlson*, 235 F.3d 466 (9th Cir. 2000) foreclosed the government's ability to use Galloway's later-made false statements to the IRS to extend the statute of limitations.

Note: This unpublished opinion departs from precedent within the Ninth Circuit, as well as other federal circuit courts of appeals that have addressed this § 7201 statute of limitations issue.

WIRE FRAUD – 18 U.S.C. § 1343

Ninth Circuit Holds Wire Fraud Conviction Requires Proof of Intent to Both Deceive and Cheat Victim

In *United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020), the Ninth Circuit held, *inter alia*, that a wire fraud conviction requires proof that defendant had intent to both deceive and cheat the victim of money or property.

James Miller ("Miller") was managing member and president of MWRC Internet Sales, LLC ("MWRC"), an online retail platform. Between 2009 and 2012, Miller wrote to himself checks totaling over \$330,000 from MWRC, disguising them as inter-account bank transfers. When his scheme was discovered, Miller claimed the payments were loans that he was authorized to make and intended to repay. In 2017, a jury convicted him of wire fraud (18 U.S.C. § 1343) under an embezzlement theory, and for failing to report the embezzlement income on his personal income tax returns (26 U.S.C. § 7206(1)).

Miller appealed his wire fraud convictions, arguing that the jury charge misstated the law by instructing that 18 U.S.C. § 1343 requires an intent to "deceive or cheat" rather than an intent to "deceive and cheat." Miller argued that the "deceive or cheat" instruction permitted the jury to convict him of wire fraud based merely on his deceptive bookkeeping, even if it accepted his claim that the payments were legitimate loans.

The Ninth Circuit agreed. It recognized the "deceive or cheat" language is consistent with model instructions from the Third, Fifth, Sixth, Tenth, and Eleventh Circuits. It opined, however, that this instruction is no longer tenable after the Supreme Court's ruling in *Shaw v. United States*, 137 S. Ct. 462 (2016). In that case, the Court defined "scheme to defraud," in the context of the bank fraud statute, as requiring proof of intent to deceive a bank "and" to deprive it of something of value. Applying that reasoning to the wire fraud statute, the Ninth Circuit held that § 1343

requires proof that a defendant intended to deprive a victim of money or property by means of deception, not merely to deceive a victim. The Ninth Circuit upheld Miller's conviction, however, holding the error was harmless. The appellate court reasoned that Miller's tax convictions sufficiently demonstrated the jury's rejection of Miller's loan defense.

MONEY LAUNDERING – 18 U.S.C. § 1956

Ninth Circuit Holds Peer-to-Peer Bitcoin Transactions Affected Interstate Commerce

In *United States v. Costanzo*, 956 F.3d 1088 (9th Cir. 2020), the Ninth Circuit affirmed defendant's money laundering convictions under 18 U.S.C. § 1956, holding defendant's peer-to-peer bitcoin transactions affected interstate commerce.

Thomas Costanzo ("Costanzo") made a living selling bitcoin through peer-to-peer transactions. Costanzo's online profile caught the attention of the IRS, which was investigating digital currency transactions to facilitate illegal activity. Pursuant to an undercover operation, undercover agents arranged and completed multiple cash-for-bitcoin transactions with Costanzo over a two-year period. The agents explicitly told Costanzo that the cash used in the transactions was earned from trafficking black-tar heroin through Mexico. Costanzo continued to complete transfers for the undercover agents. Costanzo was charged with money laundering (18 U.S.C. § 1956) for his involvement in the cash-to-bitcoin transactions. He was convicted and sentenced to 41 months' imprisonment and 36 months' supervised release.

On appeal, Costanzo argued the government failed to prove the bitcoin transactions affected interstate commerce. In rejecting this argument, the Ninth Circuit noted the government had presented evidence regarding Costanzo's business; his use of global platforms; and the transfer of bitcoin through a digital wallet, which by its nature invokes a wide and international network. Costanzo advertised his business through a website based outside the United States. He encouraged the undercover agents to download applications from the Apple Store or similar platforms to facilitate communications and transactions. He utilized those applications to engage in encrypted communications to arrange the transfers. In each transaction, Costanzo and the agents used those applications on their smartphones to transfer bitcoin from one digital wallet to another. Each transaction was complete only after it was verified on the blockchain. Thus, the Ninth Circuit affirmed Costanzo's convictions, concluding the evidence was sufficient to find the "minimal" interstate commerce nexus required under § 1956.

OBSTRUCTING A GRAND JURY PROCEEDING – 18 U.S.C. § 1521

Fourth Circuit Holds That Discretionary Actions of a Third Person, such as the U.S. Attorney, Can Form Part of the Nexus to an Official Proceeding

In *United States v. Sutherland*, 921 F.3d 421 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020), the Fourth Circuit held, *inter alia*, that the government proved the nexus between the defendant's providing false documents to the United States Attorney's Office ("USAO") and obstructing the federal grand jury proceeding for purposes of 18 U.S.C. § 1512.

Patrick Sutherland ("Sutherland") owned and operated several insurance businesses that sold products out of the United States and Bermuda. Sutherland routed his international transactions through Stewart Technology Services ("STS"), a Bermuda company. Between 2007 and 2011, STS sent Sutherland, his wife, or his companies more than \$2.1 million in wire transfers, which STS treated as expenses paid to Sutherland. Sutherland, however, treated the wire transfers as non-taxable transactions (e.g., bona fide loans or capital contributions) or he failed to account for them in his general ledger altogether.

In April 2012, Sutherland was served with grand jury subpoenas seeking financial records from his companies. In response, Sutherland's attorney sent the USAO a letter that purported to explain away a large number of the transactions claiming that the transfers were loans that were "contemporaneously documented by written and fully-executed loan agreements," including the purported loan agreements. Sutherland was convicted for filing false returns for 2008-2010 (26 U.S.C. § 7206(1)) and for obstructing, influencing, or impeding the 2012 grand jury investigation, or attempting to do so (18 U.S.C. § 1512(c)(2)). Sutherland appealed his grand jury obstruction conviction.

On appeal, Sutherland argued, *inter alia*, that the government failed to prove a nexus between the obstructive conduct and an official proceeding, claiming that he was only "attempting to influence the [USAO]," and not the grand jury. The Fourth Circuit rejected this argument, holding that "discretionary actions of a third person" such as the U.S. Attorney, can form part of the nexus to an official grand jury proceeding. The appellate court determined that the grand jury proceeding that Sutherland attempted to influence was not some far-off possibility, rather, the grand jury had in fact convened and Sutherland's actions were "related to the grand jury in time, causation, and logic." Sutherland provided the false documents to the USAO in response to grand jury

subpoenas that were served upon him, and those false documents attempted to explain away the transactions reflected in the subpoenaed documents.

The Fourth Circuit further held that “a prosecutor tasked with presenting to the grand jury is more akin to a witness who has been subpoenaed than one who has not. As with a subpoenaed witness, there is a strong likelihood that the [USAO] would serve as a channel or conduit to the grand jury for the false evidence or testimony presented to it.” Accordingly, the appellate court affirmed the § 1512(c)(2) conviction.

CRIMINAL PROCEDURE

Supreme Court Holds Unpreserved Errors, Even if Factual, May be Reviewed for Plain Error

In *United States v. Davis*, 140 S. Ct. 1060 (2020), the Supreme Court reversed the Fifth Circuit’s “outlier” practice of refusing to review, even under a plain-error standard, certain unpreserved factual arguments.

In 2016, a federal grand jury indicted Charles Davis (“Davis”) for being a felon in possession of a firearm, and for possessing drugs with intent to distribute. Davis pled guilty and the district court sentenced him to 57 months’ imprisonment. The district court ordered that Davis’ sentence run consecutively to any sentences to be imposed in state court for pending charges related to 2015 offenses. Davis did not object.

On appeal, Davis argued, for the first time, that the district court erred by ordering his federal sentence to run consecutively to any state sentence related to his 2015 offenses. Davis claimed that his 2015 state and 2016 federal offenses were part of the “same course of conduct;” therefore, under the U.S. Sentencing Guidelines, his sentences should run concurrently, not consecutively. The Fifth Circuit refused to review Davis’ sentence, even under a plain-error standard, citing binding intra-circuit precedent. The appellate court explained that Davis’ claim of error raised factual issues that the district court could have resolved upon proper objection at sentencing. As such, it could never constitute plain error.

On certiorari, the Supreme Court vacated Davis’ sentence based on Fed. R. Crim. P. Rule 52(b). Pursuant to this rule, “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” The Court explained that the text of Rule 52(b) does not immunize factual errors from plain-error review, adding that the Court’s “cases likewise do not purport to shield any category of errors from plain-error review.” Accordingly, the Supreme Court concluded that there was “no legal basis for the Fifth Circuit’s practice of declining to review certain unpreserved factual arguments for plain error.”

COMPETENCY TO STAND TRIAL

Second Circuit Holds District Court Did Not Abuse Its Discretion in Denying Defendant’s Request for Competency Hearing

In *United States v. DiMartino*, 949 F.3d 67 (2d Cir. 2020), the Second Circuit held that, after holding a *Daubert* hearing on proffered expert psychological testimony and noting its own observation of the client before and during trial, the district court did not abuse its discretion in denying the defendant’s request for a competency hearing under 18 U.S.C. § 4241.

Terry DiMartino (“DiMartino”), who ascribes to legal theories associated with the sovereign-citizen movement, was charged with one count of corruptly endeavoring to obstruct the IRS (26 U.S.C. § 7212), two counts of filing false tax returns (26 U.S.C. § 7206(1)), and five counts of willful failure to file tax returns (26 U.S.C. § 7203). DiMartino invoked his right to represent himself at trial, testifying that his mind was clear and that he was not under the care of a psychiatrist. At trial, DiMartino emphasized that his views were based on years of study and deliberation. The jury found him guilty on all counts. Before sentencing, DiMartino retained counsel, who asked the court to order a psychological evaluation and hold a competency hearing pursuant to 18 U.S.C. § 4241, citing a psychological report prepared at counsel’s request that concluded that DiMartino was suffering from a delusional disorder. Following a hearing to examine the reliability of the psychological report, the district court denied defendant’s competency hearing request, highlighting methodological flaws in the report and setting forth its own observations of DiMartino. DiMartino appealed.

The Second Circuit held that the district court did not abuse its discretion in both denying the defendant’s request for competency hearing and giving no weight to the psychologist’s report. The appellate court found that the district court reasonably inferred from DiMartino’s conduct at trial that he understood the proceedings against him and was capable of participating meaningfully in his defense, noting that DiMartino’s “unorthodox political and legal theories” are not presumptive evidence of mental incompetence. The appellate court also found that testimony from a court-appointed expert and the psychologist supports the district court’s opinion that the psychological report was both based on insufficient facts and data and failed to “consider the context of the Sovereign Citizen movement when evaluating DiMartino’s belief system.”

SENTENCING

Supreme Court Holds District Court Argument for Specific Sentence Preserves Reasonableness Challenge to Sentence on Appeal

In *Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020), the Supreme Court held that asking a district court for a specific sentence preserves the claim on appeal that the sentence imposed was unreasonably long.

Gonzalo Holguin-Hernandez (“Holguin-Hernandez”), was convicted of drug trafficking and sentenced to 60 months’ imprisonment and five years’ supervised release. At the time of his conviction, he was serving a term of supervised release related to an earlier crime. At sentencing, the government argued that Holguin-Hernandez had violated the conditions of his earlier period of supervised release and asked the court to revoke it and impose an additional consecutive prison term in accordance with the U.S. Sentencing Guidelines (“Guidelines”). Holguin-Hernandez urged the court to impose either no additional time or less than the Guidelines. Ultimately, the court imposed a consecutive 12-month prison term.

On appeal, Holguin-Hernandez argued that this sentence was unreasonably long because it was greater than necessary to accomplish the goals of sentencing. The Fifth Circuit held that he had forfeited that argument by failing to object to the reasonableness of the sentence in the district court.

On certiorari, the Supreme Court vacated the Fifth Circuit’s decision, holding that Holguin-Hernandez’s district-court argument for a specific sentence (nothing or less than 12 months) preserved his claim on appeal that the sentence imposed was unreasonably long. The Supreme Court disagreed with the suggestion that defendants are required to refer to the reasonableness of a sentence to preserve such claims for appeal. The Court reasoned that a defendant who, by advocating for a particular sentence, communicates to the trial judge his view that a longer sentence is “greater than necessary” has thereby informed the court of his objection to a longer sentence.

Second Circuit Holds District Court May Not Order Restitution to Begin Immediately Following Sentencing

In *United States v. Adams*, 955 F.3d 238 (2d Cir. 2020), the Second Circuit held, *inter alia*, that the district court could impose restitution as a condition of supervised release but could not order restitution payments to begin immediately after sentencing.

David M. Adams (“Adams”) failed to timely file returns and pay taxes due and owing for several taxable years. For at least 14 years, Adams engaged in obstructive conduct to prevent IRS’s efforts to collect his delinquent tax payments and secure overdue tax returns. Adams pled guilty to tax evasion (26 U.S.C. § 7201), false subscription (26 U.S.C. § 7206(1)), and obstructing the IRS (26 U.S.C. § 7212). During the plea hearing, the government advised Adams of the potential terms of imprisonment, fines, and restitution he faced as a result of his plea. Adams was sentenced to 90 months’ imprisonment and ordered to pay \$4,872,172.91 in restitution to the IRS. The district court ordered the restitution payments to begin immediately.

On appeal, the Second Circuit held that the district court lacked authority to order restitution payments to begin immediately after sentencing. The appellate court noted, however, that the district court had the authority to order restitution as a condition of supervised release. The Second Circuit agreed with Adams that neither restitution statute (18 U.S.C. §§ 3663(a), 3663A) permits restitution for Title 26 offenses. However, it noted that pursuant to 18 U.S.C. § 3583, a district court may order restitution as a condition of supervised release. The appellate court added that § 5E1.1 of the U.S. Sentencing Guidelines provides that in a case with an identifiable victim, the sentencing court must impose a term of supervised release with a condition requiring restitution for the full amount of the victim’s loss, even if the offense does not qualify for restitution under 18 U.S.C. § 3663(a). Accordingly, the Second Circuit affirmed Adams’ conviction and sentence, but modified the sentencing terms to provide for restitution as a condition of supervised release to commence after Adams’ release from custody.

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