IRS

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18 U.S.C. § 371, *KLEIN* CONSPIRACY

Eighth Circuit Holds that Nexus to a Pending Proceeding Requirement does not Extend to Klein Conspiracies

In ***United States v. Flynn***, 969 F.3d 873 (8th Cir.), *reh'g and reh'g en banc denied* (8th Cir. Sep. 17, 2020), the Eighth Circuit held, *inter alia*, that the nexus requirement of *Marinello* does not extend to *Klein* conspiracies.

During 2006 and 2008, Scott Phillip Flynn ("Flynn") assisted in two reverse-merger transactions. As payment, he received shares of stock in the resulting public companies. Flynn transferred millions of these shares to two companies he controlled and, with the help of a co-conspirator, transferred millions more to Australian nominees, who then placed their shares in U.S. brokerage accounts that Flynn could access. From 2006 to 2014, Flynn controlled these accounts and used them to sell around $15 million worth of stock and transfer the proceeds to Australian bank accounts that he also controlled. In 2007, he purchased a house with $2.7 million of that money, yet only reported $26,136 of income on his tax return. During this period, all $15 million in sales was considered income to Flynn, none of which he reported.

Flynn pleaded guilty to conspiracy to defraud the United States (18 U.S.C. § 371) and filing a false tax return (26 U.S.C. § 7206(1)). Flynn attempted to withdraw his plea before sentencing, but the district court denied his motion and sentenced him to 87 months in prison — 60 months for conspiracy and 27 months for the false return — and ordered him to pay roughly $5.4 million in restitution.

Flynn appealed, arguing, *inter alia*, that his guilty plea should have been withdrawn because it lacked a factual basis supporting his conviction. Alternatively, Flynn argued that after the Supreme Court's decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018), *Klein* conspiracies include the same nexus requirement, despite the fact that the broad language in § 371 makes no reference to "the due administration [of the Internal Revenue Code]." The Eight Circuit stated, "[a]s the Second Circuit has explained, the broad scope of *Klein* conspiracies is sanctioned in 'long-lived Supreme Court decisions' and arguments aimed at narrowing it 'are properly directed to a higher authority.'" *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012), *cert. denied*, 571 U.S. 819 (2013). Accordingly, the Eighth Circuit affirmed the judgment of the district court.

18 U.S.C. § 1343, WIRE FRAUD

Supreme Court Holds Wire Fraud and Federal-Program Fraud Offenses Require Intent to Obtain Money or Property

In ***Kelly v. United States***, 140 S. Ct. 1565 (2020), the Supreme Court held that a defendant may not be convicted of violating the wire fraud (18 U.S.C. § 1343) or federal-program fraud (18 U.S.C. § 666) laws if the scheme did not aim to obtain money or property.

During former New Jersey Governor Chris Christie's 2013 reelection campaign, Fort Lee's (New Jersey) mayor refused to back the governor's campaign. To punish the mayor, the governor's Deputy Chief of Staff, Bridget Anne Kelly ("Kelly"), Port Authority Deputy Executive Director William Baroni ("Baroni"), and others reduced from three to one the number of lanes reserved at the George Washington Bridge's toll plaza for Fort Lee's morning commuters. The lane realignment caused four days of gridlock in Fort Lee, and only ended when the Port Authority Executive Director learned of the scheme. Baroni and Kelly were convicted of wire fraud, fraud on a federally-funded program, and conspiracy to commit those crimes. The Third Circuit affirmed.

The Supreme Court reversed, holding the government failed to prove that an object of the defendants' scheme was to obtain money or property. The Court opined that

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such proof is required because the wire fraud and federal-program fraud statutes are limited in scope to protecting property rights. Rejecting the government's arguments, the Court explained that the realignment of the city's access lanes to the bridge was an exercise of regulatory power which did not involve the taking of government property, and that the costs of compensating the traffic engineers and back-up toll collectors for their time and labor were just the implementation costs of the scheme. Because the scheme did not aim to obtain money or property, the Supreme Court held that the defendants could not have violated the wire fraud or federal-program fraud laws. Accordingly, the Supreme Court reversed the convictions and remanded the case.

GRAND JURY SUBPOENA

Second Circuit Holds District Court Lacks Jurisdiction to Issue or Enforce Grand Jury Subpoena After Expiration of Grand Jury Term

In ***In re Grand Jury Proceeding***, 971 F.3d 40 (2d Cir. 2020), the Second Circuit held, *inter alia*, that a district court lacks jurisdiction to issue or enforce a subpoena after the grand jury term expires.

Felix Sater ("Sater") pleaded guilty in 1998 to securities fraud and thereafter secretly cooperated with the government. The fact of Sater's cooperation remained sealed until it was inadvertently disclosed in 2012. From 2010 to 2013, Frederick Oberlander ("Oberlander"), an attorney, filed several lawsuits alleging Sater had defrauded his clients. As part of these lawsuits Oberlander repeatedly sought to publicly disclose sealed information related to Sater's cooperation with the government. In 2011, the Second Circuit enjoined Oberlander from publicly disclosing the sealed information.

In 2012, Sater filed a civil contempt action against Oberlander, alleging he had intentionally violated the Second Circuit court's injunction. In 2015, the Second Circuit referred the matter for federal criminal investigation, pursuant to which a grand jury was impaneled ("First Grand Jury"). In June 2016, the First Grand Jury issued a subpoena requesting documents related to Oberlander's communications with reporters. Oberlander refused to comply, and in December 2016 the First Grand Jury's term expired. In April 2017, the government served Oberlander with another grand jury subpoena ("April 2017 Subpoena"), with which Oberlander also did not comply. Two weeks later, a new grand jury ("Second Grand Jury") was impaneled to investigate the same conduct by Oberlander. In June 2018, the district court denied Oberlander's motion to quash the April 2017 Subpoena, and directed the government reissue it with some minor changes. On June 12, 2018, the Second Grand Jury issued the revised subpoena ("June 2018 Subpoena"). Oberlander produced some responsive materials only to the district court, requesting *in camera* review. In September 2018, the district court ordered Oberlander to produce the withheld materials to the government within six days. After the Second Grand Jury's term expired, in response to the government's motion to compel, the district court ordered Oberlander to produce any remaining responsive documents or be subject to civil contempt sanctions. Oberlander did not comply.

On appeal, the Second Circuit held that the April 2017 Subpoena was invalid because it was served by the government in the name of an expired grand jury. The appellate court noted it would have been impossible for Oberlander to produce documents and appear before the First Grand Jury after it had expired. The appellate court added that the impaneling of the Second Grand Jury before the April 2017 Subpoena's return date did not alter its conclusion that the April 2017 Subpoena was a nullity. The Second Circuit reasoned that "each grand jury's investigation is separate and independent from its predecessor's," and that "the duty imposed by a subpoena to produce documents to, or testify before, a specific grand jury ceases once that grand jury's term expires." The court further held that the invalid April 2017 Subpoena did not taint the June 2018 Subpoena, which had been duly issued by the Second Grand Jury. However, the Second Circuit held that the district court lacked the authority to order sanctions against Oberland after the Second Grand Jury's term had expired.

ATTORNEY-CLIENT PRIVILEGE

Fifth Circuit Holds Law Firm's Disclosure of Clients' Identities Pursuant to a Summons Did Not Violate Attorney-Client Privilege

In ***Taylor Lohmeyer Law Firm P.L.L.C. v. United States***, 957 F.3d 505 (5th Cir.), *reh'g en banc denied*, 982 F.3d 409 (5th Cir. 2020), the Fifth Circuit held the attorney-client privilege does not apply to quash an IRS summons if the firm's clients' identities are not inextricably connected with a privileged communication.

The IRS issued a John Doe summons to Taylor Lohmeyer Law Firm P.L.L.C. ("Firm") as part of an investigation into the identity and federal income tax liability of U.S. persons who employed the Firm to conceal unreported taxable income offshore. The Firm filed a petition to quash the summons claiming, *inter alia,* that compliance would violate the attorney-client privilege. While acknowledging the general rule that a lawyer's clients' identities are generally not covered by the privilege, the Firm argued that in this case, the court should apply the exception to the rule where disclosure of a client's identity would result in disclosure of a confidential communication. The government filed a motion to dismiss the petition to quash

and a counter summons to enforce the petition. The district court granted the government's counter petition, holding, *inter alia,* that the Firm had not met its heavy burden of proving the application of the narrowly-defined exception upon which it relied.

On appeal, the Fifth Circuit affirmed the district court's ruling, holding that the narrow exception to the general rule that client identities are not protected by the attorney-client privilege did not apply in this case. The appellate court explained that this limited and rarely-available exception recognizes that in certain cases, an attorney must conceal even the identity of a client, not merely his communications. The exception, however, does not expand the scope of the privilege or apply independent of the privileged communications. Rather, a client's identity is shielded only where revelation of the information would disclose other privileged communications, such as the confidential motive for retention. In this case, the Fifth Circuit held the privilege did not apply, concluding that disclosure of the John Does' identities would not necessarily disclose what motive or other confidential communication of legal advice could be inferred from that information alone.

WITNESS TESTIMONY

Fifth Circuit Upholds Admission of IRS Summary Witness Testimony and Charts

In ***United States v. Nicholson***, 961 F.3d 328 (5th Cir. 2020), the Fifth Circuit held, *inter alia*, that the district court did not commit reversible error in admitting IRS special agent's summary witness testimony and charts.

Carl Nicholson ("Nicholson"), a certified public accountant, owned the accounting firm Nicholson & Co. ("N&C"). In 2018, Nicholson was charged with conspiracy to commit tax fraud (18 U.S.C. § 371), filing false tax returns (26 U.S.C. § 7206(1)), and aiding and assisting in the preparation of false tax returns (26 U.S.C. § 7206(2)). The government's final trial witness was an IRS special agent, who testified as a summary witness and as a fact witness regarding his investigation into Nicholson's tax returns. During the special agent's testimony, the government introduced charts showing summaries of Nicholson's tax returns for 2012 to 2015 and American Express reimbursement requests. Before jurors began deliberating, the district court instructed them that "summary charts and witnesses are no better than the underlying testimony and the documents upon which they are based and are not themselves independent evidence." Ultimately, the jury convicted Nicholson on all counts, and he was sentenced to 60 months' imprisonment.

One of the arguments Nicholson raised on appeal was that the district court's admission of the IRS special agent's summary witness testimony was reversible error because it was improper "expert-type testimony." The Fifth Circuit rejected this argument, concluding that the district court correctly recognized that this case involved accounting concepts, nuances of tax law, and business arrangements outside the experience of most jurors; that the special agent's testimony and charts were based on already-admitted evidence; and that the district court correctly instructed the jury on how to properly consider such summary evidence. Accordingly, the Fifth Circuit held that admitting this evidence was not an abuse of discretion.

CRIMINAL COLLATERAL ESTOPPEL

Tenth Circuit Holds Criminal Collateral Estoppel Bars Re-Litigation of Suppression Order Where Issue Was Fully Litigated Before and Government Chose to Forego Appeal

In ***United States v. Arterbury***, 961 F.3d 1095 (10th Cir. 2020), the Tenth Circuit held that the government is collaterally estopped from relitigating a motion to suppress, if it was granted after the government had full opportunity to brief and argue the motion and chose not to appeal the district court's adverse decision.

The federal government twice charged Scott Fredrick Arterbury ("Arterbury") with the same crime for the same possession of child pornography. In the original prosecution, the district court suppressed the child-pornography evidence seized from Arterbury's personal computer. The government appealed the suppression order, but withdrew its appeal and had the case dismissed without prejudice. Eight months later, in a related case involving a defendant in a different state, the Tenth Circuit reversed an order suppressing child-pornography evidence obtained in reliance on the same FBI search warrant at issue in Arterbury's case. Based on this decision, the government re-indicted Arterbury on the original child-pornography charge. Arterbury moved to enforce the district court's original suppression order, arguing the district court was bound by collateral estoppel. The district court disagreed and later denied the motion to suppress on the merits.

On appeal, the Tenth Circuit vacated the district court's order denying Arterbury's motion to enforce the original suppression order. The appellate court concluded that Arterbury satisfied the two requirements of federal common-law collateral estoppel: (1) the issue was actually and necessarily decided in the prior case; and (2) the party against whom collateral estoppel is invoked (in this case

the government) had a full and fair opportunity to litigate the issue in the prior case. The Tenth Circuit reasoned that even though the district court dismissed the first case without prejudice, the government had an opportunity to appeal and chose to dismiss it. Accordingly, the Tenth Circuit held that the district court erred in its analysis of criminal collateral estoppel.

SENTENCING

Fourth Circuit Holds District Courts Must Orally Pronounce Discretionary Conditions of Supervised Release at Sentencing Hearing

In ***United States v. Rogers***, 961 F.3d 291 (4th Cir. 2020), the Fourth Circuit held, *inter alia*, that discretionary conditions imposed on a sentence must be announced at the sentencing hearing.

Cortez Lamar Rogers ("Rogers") pleaded guilty to possession of a firearm by a felon and was sentenced to incarceration followed by three years' supervised release. Rogers violated the conditions of his supervised release when he eluded arrest for a drug offense by leading police officers on a high-speed car chase. After a hearing, the district court revoked Rogers' supervised release and imposed a revocation sentence that included 12 months' supervised release. In a written judgment memorializing the sentence, the district court, for the first time, listed 26 conditions of supervised release, four of which were mandatory.

On appeal, Rogers argued that the 22 non-mandatory conditions of supervised release listed in the written judgment were inconsistent with the oral sentence pronounced at his sentencing hearing, and that the orally-pronounced sentence must prevail. The Fourth Circuit agreed, reasoning that in order to protect a defendant's right to be present when he is sentenced, a district court must orally pronounce a defendant's sentence in the defendant's physical presence. With respect to supervised release, the appellate court distinguished mandatory versus discretionary conditions of supervised release, noting that because mandatory conditions are necessarily part of any supervised-release term pronounced at sentencing, the defendant has notice, via statute, that he will be subject to those conditions as a matter of law. In contrast, discretionary conditions may only be imposed upon the district court's exercise of discretion, based on an individualized assessment of the defendant and the statutory factors. For that reason, the Fourth Circuit vacated Rogers' sentence, joining the Fifth and Seventh Circuits in holding that a district court must orally pronounce any discretionary conditions of supervised release at sentencing.

Eighth Circuit Holds District Court Did Not Err in Refusing to Grant Sentencing Downward Departure

In ***United States v. Dailey***, 958 F.3d 742 (8th Cir. 2020), the Eighth Circuit, *inter alia*, upheld the district court's conclusion that defendant's illness was not an extraordinary physical condition warranting a sentencing downward departure.

John Dailey ("Dailey"), a podiatrist, pled guilty to Medicare fraud. A presentence investigation report calculated his total offense level as 17 and his criminal history category as II, resulting in a U.S. Sentencing Guidelines ("USSG") range of 27-33 months' incarceration. Prior to sentencing, Dailey was diagnosed with a rare and incurable skin cancer. At sentencing, the district court refused to grant Dailey's request for a downward departure based on an extraordinary physical impairment under USSG § 5H1.4. Ultimately, the district court sentenced Dailey to 27 months' incarceration.

On appeal, Daley claimed the district court's erroneous statement at sentencing that he did not yet have cancer was procedural error. The Eighth Circuit remanded the case for resentencing. At resentencing, the district court again denied Dailey's request for a downward departure and sentenced Dailey to 27 months' imprisonment. The district court explained the government had established that the Bureau of Prisons would be able to provide Dailey with adequate medical treatment.

On review for clear error, the Eighth Circuit upheld the district court's conclusion that Dailey's rare form of skin cancer was not an "extraordinary physical condition" warranting a downward departure. The appellate court explained that the district court appropriately considered the factors that are relevant when considering a downward departure and sufficiently explained its reasons for declining to depart downward. Finding no procedural error, the Eighth Circuit also held that based on the totality of the circumstances, Dailey's sentence was substantively reasonable.

RESTITUTION

Second Circuit Holds Restitution Under Mandatory Victims Restitution Act Includes Losses Incurred Outside Statute of Limitations if Attributable to Same Underlying Scheme

In ***United States v. Parnell***, 959 F.3d 537 (2d Cir. 2020), the Second Circuit held restitution under the Mandatory Victims Restitution Act ("MVRA") includes losses incurred outside the statute of limitations period, if they are attributable to the same underlying scheme, and part of the scheme occurred within the limitations period.

Linda Parnell ("Parnell"), a former nurse at a U.S. Department of Veterans Affairs hospital, began receiving federal worker's compensation benefits after injuring her back in 1995. Between 2010 and 2016, Parnell submitted hundreds of false or inflated expense reimbursement claims to the U.S. Department of Labor, certifying that the claims represented reimbursable medical-related travel costs. In August 2017, Parnell pled guilty to wire fraud (18 U.S.C. § 1343), and was sentenced to five years' probation and ordered to pay restitution of $72,207.16, the total amount of fraudulent reimbursements she claimed between 2010 and 2016.

On appeal, Parnell argued that the five-year statute of limitations for wire fraud barred restitution for losses occurring before August 2012. The Second Circuit rejected this argument and affirmed the order of restitution. Based on the plain meaning of the statute, the Second Circuit held that restitution under the MVRA includes all losses arising from criminal conduct in the course of a scheme, including acts outside the statute-of-limitations period, as long as those losses are attributable to the same underlying scheme, and as long as some part of that scheme for which the defendant was convicted occurred within the statute of limitations. In this case, the Second Circuit concluded that since the entire amount of restitution ordered was attributable to the same underlying scheme, the district court did not abuse its discretion by including all losses in its restitution order, including those that occurred outside the statute-of-limitations period.

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