IRS

CRIMINAL TAX BULLETIN

July 2021

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

FIRST AND FOURTH AMENDMENTS

Tenth Circuit Holds "Clearly Established Law" for Qualified Immunity Rests on Objective Test

In ***Frasier v. Evans***, 992 F.3d 1003 (10th Cir. 2021), the Tenth Circuit held law enforcement enjoyed qualified immunity from alleged constitutional violations because the right to record law enforcement during execution of a warrant had not been clearly established under an objective standard; thus, it was irrelevant that the officers subjectively knew the right existed based on their training.

Levi Frasier ("Frasier") filmed police officers using force while arresting an uncooperative suspect in public. When police asked him to turn over his video, Frasier first denied having filmed, but then acquiesced, allegedly under pressure. Frasier sued the officers under 42 U.S.C. § 1983, claiming they violated his First- and Fourth-Amendment rights by retaliating against him for filming the suspect's arrest; by detaining him and searching his tablet computer; and by conspiring to commit these violations. The district court denied in part the officers' motion for summary judgment on the issue of qualified immunity.

On appeal, the Tenth Circuit reversed the denial of qualified immunity on Frasier's First- and Fourth-Amendment claims. The appellate court noted that qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To show the law is clearly established, plaintiff has to point to a Supreme Court or within-Circuit decision on point, or that the clearly established weight of authority from other courts must have found the law to be as plaintiff claims. Clearly established law is defined by an objective standard, such that officers' subjective beliefs or understanding of what the law is is irrelevant. Only judicial decisions are valid interpretive sources of clearly established law; thus, the officers' training regarding Frasier's First Amendment rights was irrelevant to the clearly established law inquiry. The appellate court rejected Frasier's claim that the Tenth Circuit and other federal appellate courts of appeals had already adopted a Supreme Court concurring opinion on this issue, noting that the Tenth Circuit had only mentioned it in an opinion's dictum. Moreover, out-of-circuit authorities appear to be split on the clearly established law issue.

The Tenth Circuit also reversed the denial of qualified immunity against Frasier's Fourth Amendment conspiracy claim regarding the search of his tablet computer, concluding that Frasier's merit-related arguments were "woefully deficient" as they did not apply the cited authorities to the facts of this case or otherwise explain why they clearly established with particularity his Fourth Amendment rights to be free from the officers' alleged conspiracy.

FOURTH AMENDMENT

Sixth Circuit Holds No Reasonable Expectation of Privacy in Unlocked Common Area of Apartment Building

In ***United States v. Trice***, 966 F.3d 506 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1395 (2021), the Sixth Circuit held video footage from a camera hidden in an unlocked common area of an apartment building does not violate the Fourth Amendment.

Law enforcement hid a camera across from Raheim Abdullah Trice's ("Trice") apartment in a common area of his apartment building. The camera, which activated whenever the door to the unit opened or closed, recorded Trice entering and exiting his apartment. Law enforcement used the footage to obtain a search warrant, which led to the seizure of drugs and other paraphernalia. After the district court denied Trice's motion to suppress on Fourth Amendment grounds, he pleaded guilty conditioned on his appeal of the denial of the motion. Ultimately, Trice was sentenced to 192 months' imprisonment.

The Sixth Circuit affirmed the denial of the motion, holding Trice had no reasonable expectation of privacy in the unlocked common area of his apartment building. The

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

appellate court analyzed whether Trice: (1) was legitimately on the premises; (2) had a proprietary or possessory interest in the search premises; (3) had the right to exclude others from the premises; and (4) had taken precautions to maintain his privacy. The Sixth Circuit concluded only the first factor weighed in Trice's favor, explaining the search area was not enclosed around Trice's home; he did not take measures to protect the area from observation; and the outdoor common area was not curtilage of Trice's apartment, since there was no evidence it was an area adjacent to Trice's home to which he extended his home activity. Thus, the Sixth Circuit held the camera was not placed in a constitutionally protected area. The appellate court also rejected Trice's argument that the use of the camera was such an intrusion that it violated his reasonable expectation of privacy. The Sixth Circuit concluded there was no prolonged monitoring, and the evidence obtained (*i.e.*, entry and exit from Trice's apartment) revealed nothing about Trice's private life. Thus, the Sixth Circuit affirmed the district court's denial of Trice's motion to suppress.

Second Circuit Holds Delay in Obtaining Warrant to Search Tablet Contents Violated Fourth Amendment

In ***United States v. Smith***, 967 F.3d 198 (2d Cir. 2020), the Second Circuit held, *inter alia*, that a 31-day delay in obtaining a warrant to search the contents of a tablet seized from a vehicle violated the Fourth Amendment.

The police seized a tablet belonging to Kirkland Smith ("Smith") after noticing a screen with child pornography images. The police waited 31 days before applying for a warrant to search the tablet's contents. The search yielded dozens of videos and images of child pornography, which led to additional warrants to search Smith's homes. During these searches the police seized more devices containing child pornography. The district court denied Smith's motion to suppress the evidence from his tablet and the additional searches. Smith entered a conditional plea of guilty, but reserved the right to appeal the denial of his suppression motion. He was sentenced to 212 months' imprisonment.

On appeal, Smith claimed the police delay in seeking a warrant to search his tablet violated the Fourth Amendment. The Second Circuit agreed, after analyzing the following factors: (1) length of delay; (2) importance of the tablet to Smith; (3) whether Smith had a reduced property interest in the seized item; and (4) the state's justification for the delay. The Second Circuit concluded the balance of factors weighed in Smith's favor, reasoning that (1) a month-long delay exceeded what is ordinarily reasonable; (2) the tablet was important to Smith, but he had other available devices and did not ask for its return; (3) the existence of probable cause diminished Smith's interest in the tablet but only during a reasonable period to obtain a warrant to search its contents; and (4) the state's justification for its delay (investigator's extensive caseload) was far outweighed by the Fourth Amendment's time-sensitive mandate. Based on the good-faith exception, however, the appellate court, declined to apply the exclusionary rule, reasoning the investigator's unreasonable delay was due to isolated negligence, and that a reasonable officer would not have known the delay violated the Fourth Amendment. Thus, the Second Circuit affirmed Smith's conviction.

Fifth Circuit Holds Bitcoin Users Lack Privacy Interests in Blockchain Records and Virtual Exchange Transactions

In ***United States v. Gratkowski***, 964 F.3d 307 (5th Cir. 2020), the Fifth Circuit held, in matters of first impression, defendant had no reasonable expectation of privacy in his information located on both a virtual-currency blockchain and exchange.

Richard Gratkowski ("Gratkowski") used Bitcoin to purchase and download child pornography from a website. After federal agents identified a cluster of Bitcoin addresses controlled by the website, they subpoenaed Coinbase, the virtual-currency exchange, to learn which of its customers had sent Bitcoin to any of these addresses. Coinbase identified Gratkowski as one of the customers, and federal agents obtained a warrant to search his residence. After, pursuant to the warrant, agents seized a hard drive containing child pornography, Gratkowski admitted he was a customer of the child-pornography website. He subsequently moved to suppress the evidence, which the district court denied.

On appeal, the Fifth Circuit held Gratkowski lacked any privacy interest in his Bitcoin records on the public blockchain and in his Coinbase exchange transactions. The appellate court analogized the blockchain and Coinbase exchange records to the bank records in *U.S. v. Miller,* 425 U.S. 435 (1976), which the Supreme Court, applying the third-party doctrine, held were not protected by the Fourth Amendment. The Fifth Circuit further noted that all Bitcoin users can access the public Bitcoin blockchain and see every Bitcoin address and transfer, and that the government's access to Coinbase records does not provide agents with "an intimate window into a person's life," as does cell-site location information, which the Supreme Court in *Carpenter v. U.S.,* 138 S. Ct. 2206 (2018) held was protected by the Fourth Amendment. Further, blockchain and Coinbase transactions require an "affirmative act" by Bitcoin holders and exchange users. The Fifth Circuit added that Coinbase and traditional banks are regulated by the Bank Secrecy Act as financial institutions, the main difference between them being that Coinbase deals with virtual currency and traditional banks deal with physical currency. Lastly, due to the technical

expertise required to transact in Bitcoin, users elect to transact through a third party like Coinbase and sacrifice privacy. Thus, Gratkowski had no reasonable expectation of privacy in his Bitcoin records and Coinbase transactions.

FIFTH AMENDMENT

Second Circuit Holds Trusts Must Comply with Subpoenas Based on Collective-Entity Exception to Fifth Amendment Privilege

In ***United States v. Fridman***, 974 F.3d 163 (2d Cir. 2020), *cert. denied*, No. 20-1548, __ S. Ct. __, 2021 WL 2405211 (June 14, 2021), the Second Circuit held, *inter alia*, that a traditional trust is a collective entity, and therefore is not entitled to the Fifth Amendment's protection against self-incrimination.

In 2013, the IRS issued several summonses to Natalio Fridman ("Fridman"), one of them in his capacity as Trustee of the David Marcelo Trust, a U.S. domestic trust with a foreign financial account named for Fridman's son, and of which Fridman was both trustee and a beneficiary. Invoking his Fifth Amendment privilege against self-incrimination, Fridman refused to comply with the summonses, claiming the act of producing the documents was testimonial. In March 2015, the government filed a petition to enforce the summonses, which the district court granted, concluding, *inter alia*, that the David Marcelo Trust fit the collective-entity exception to the Fifth Amendment privilege. As such, Fridman was required to produce the requested documents as either an individual or custodian of the collective entity.

On appeal, Fridman argued that trusts are more akin to sole proprietorships, which are covered by the Fifth Amendment's privilege against compelled self-incrimination. The Second Circuit disagreed, noting the privilege protects only natural persons, not collective entities such as corporations or partnerships. Moreover, even though the Fifth Amendment privilege applies to sole proprietorships, they are protected because they have no legal existence apart from their owner. The Second Circuit reasoned that a traditional common law trust, like the one for which Fridman was a trustee and beneficiary, has a legal existence separate from that of the trustee, such that even when a trustee resigns or is removed, the trust is still able to continue, and as such, it is a collective entity. The Second Circuit added that the decision to create a trust is made with knowledge that it generates not only benefits, such as limited liability, but also burdens, including requirements to comply with summonses and subpoenas requesting records.

ATTEMPTS TO INTERFERE WITH ADMINISTRATION OF INTERNAL REVENUE LAWS – 26 U.S.C. § 7212

Eleventh Circuit Holds IRS Collection Activity Qualified as Particular Administrative Proceeding

In ***United States v. Graham***, 981 F.3d 1254 (11th Cir. 2020), the Eleventh Circuit, as a matter of first impression in the circuit, held that IRS collection activities can, and in this case did, constitute a "targeted administrative proceeding" under *Marinello v. United States*, 138 S. Ct. 1101 (2018).

Richard Graham ("Graham") owed $3.6 million in taxes for tax years 2006 to 2009, including interest and penalties. In 2014, the IRS began a number of collection activities to satisfy Graham's tax liabilities, including placing liens and levies on his property and seizing some of his real estate. The proceeds only partially satisfied Graham's tax debt. In 2018, Graham submitted to the IRS a $3.6 million instrument entitled "International Bill of Exchange," a copy of the IRS notice of levy, and a signed statement that Graham was not an individual under the tax code or subject to any revenue tax or tax withholding. A jury convicted Graham of filing a fictitious financial instrument (18 U.S.C. § 514(a)(2)) and corruptly endeavoring to obstruct the administration of the internal revenue laws (26 U.S.C. § 7212(a)) and sentenced him to 48 months' imprisonment.

On appeal, Graham argued, *inter alia,* that IRS collection activities did not constitute "a particular administrative proceeding" as required by § 7212 post-*Marinello.* Acknowledging it had not yet had an opportunity to further construe the *Marinello* nexus requirement, the Eleventh Circuit rejected Graham's argument, after concluding that the interaction between the IRS and Graham went well beyond the ordinary course of the agency's regular interaction with taxpayers. The appellate court also rejected Graham's claim that there was no nexus between his submission of the bill of exchange and the IRS collection action since his actions were not likely to actually obstruct the IRS. The Eleventh Circuit explained that a § 7212 conviction does not require proof "that the administration of the internal revenue laws was actually obstructed or impeded, but *only* that the defendant corruptly attempted to do so." Accordingly, the Eleventh Circuit affirmed Graham's § 7212(a) conviction.

***Note*:** In dicta, the Eleventh Circuit stated that *Marinello* created a new element—a "nexus" element—in the § 7212 statute.

26 U.S.C. § 7212 AND KLEIN CONSPIRACY – 18 U.S.C. § 371

Second Circuit Holds *Marinello*'s Narrow Construction of Tax Obstruction Statute Inapplicable to Conspiracy to Defraud Clause

In ***United States v. Atilla***, 966 F.3d 118 (2d Cir. 2020), the Second Circuit held, *inter alia*, that narrow statutory construction of 26 U.S.C. § 7212(a) does not apply to 18 U.S.C. § 371's conspiracy to defraud clause.

Turkish national Mehmet Hakan Atilla ("Atilla") was the former Deputy General Manager of Turkey's state-owned bank, Türkiye Halk Bankasi, A.S. ("Halkbank"). He was in charge of the bank's relationships with Iranian banks, the Central Bank of Iran, and U.S. correspondent banks. The trial evidence showed that Atilla and others assisted Halkbank's customers to direct financing of billions of dollars to the Government of Iran by disguising the character of oil funds from the National Iranian Oil Company ("NIOC") as permissible private trade and humanitarian assistance. Atilla repeatedly lied to senior officials of the U.S. Department of the Treasury to conceal the scheme and protect Halkbank from U.S. sanctions. Atilla was convicted, *inter alia,* of conspiracy to obstruct the lawful functions of the Department of the Treasury (18 U.S.C. § 371).

On appeal, Atilla argued, *inter alia,* for a narrow construction of the defraud clause of § 371, to avoid the vagueness concern expressed in *Marinello v. United States*, 138 S. Ct. 1101 (2018). Under a narrow construction, Atilla claimed the defraud clause would not apply to agreements to obstruct the Department of the Treasury's enforcement of economic sanctions against Iran. The Second Circuit disagreed, concluding *Marinello* is inapposite because in that case, the Supreme Court analyzed 26 U.S.C. § 7212(a)'s unique text, context, and history – which are wholly unrelated to § 371's defraud clause. The appellate court noted it had rejected a previous similar attempt to invoke vagueness concerns to narrow the construction of § 371, reasoning it was bound to follow the law of the circuit and Supreme Court decisions "that have definitively adopted and reaffirmed the expansive reading of § 371 given by courts." Thus, the Second Circuit affirmed Atilla's § 371 conviction.

26 U.S.C. § 7212 AND FED. R. CRIM. P. RULE 8 – JOINDER

Second Circuit Upholds Joinder of Tax Counts and § 7212 *Marinello* Challenge

In ***United States v. Scali***, 820 F. App'x 23 (2d Cir. 2020) (unpublished), the Second Circuit held, *inter alia*, that the joinder of tax and non-tax counts was proper, and that the trial special verdict form precluded a *Marinello* challenge to a 26 U.S.C. § 7212(a) conviction.

Attorney Joseph Scali ("Scali") unauthorizedly used funds in an escrow account and failed to file tax returns for several years. Eventually, Scali asked the IRS to prepare his 2010 through 2012 returns. He claimed he had provided all relevant information but had not provided information about the escrow account from which he misused funds and structured-in four cash deposits in a 24-hour period. The district court, aware that the Supreme Court was considering the scope of § 7212(a) in *Marinello*, provided the jury with a special verdict form that required the jury to indicate whether it unanimously found that Scali committed one or more of the specified obstructive acts "*after becoming aware of a pending IRS proceeding*, specifically the IRS's civil collection activities."

Ultimately, Scali was convicted of mail fraud, structuring, making false statements to an IRS officer, obstructing and impeding the IRS (§ 7212(a)), tax evasion, obstruction of justice, and perjury, and sentenced to 84 months' imprisonment.

On appeal, Scali challenged, *inter alia,* the joinder of tax charges under Fed. R. Crim. P. Rule 8(a) and the § 7212(a) charge jury instructions. The Second Circuit held there was no misjoinder of the tax and non-tax counts. The appellate court explained that joinder of tax and non-tax counts are properly joined if the tax offenses arose directly from the other offenses charged (*e.g.,* funds derived from non-tax violations produce the unreported income). In this case, the Second Circuit concluded that joining all ten counts was proper because the evidence showed Scali's actions in concealing taxable income (by structuring-in cash transactions to evade currency-reporting requirements, effectively obstructing the IRS); making false statements to the IRS about the filing status of his returns at issue; and failing to report his actual taxable income, shared a "sufficient logical connection" to his common scheme to obstruct and defraud the IRS.

The Second Circuit also rejected Scali's § 7212 *Marinello* claim, holding that the special verdict form forced the jury to find evidence of the nexus between Scali's obstructive acts and the pending IRS proceeding of which Scali was aware. Thus, the Second Circuit held that this, and the substantial evidence presented at trial, barred any claim of reversible plain error.

SENTENCING

Eighth Circuit Upholds Sentencing Upward Variance Based on Length of Scheme and Lavish Lifestyle in Employment Tax Case

In ***United States v. Minner***, 809 F. App'x 340 (8th Cir. 2020) (per curiam) (unpublished), the Eighth Circuit held the district court's upward variance of the defendant's sentence based on the defendant's long-standing fraudulent scheme and lavish living was not an abuse of discretion.

Rodney Minner ("Minner") pleaded guilty to willfully failing to collect or pay employment taxes (26 U.S.C. § 7202). With a stipulated tax loss of $1,095,267 and Sentencing Guidelines' range of 27-33 months' incarceration, the district court sentenced Minner to 36 months' imprisonment. The district court's upward variance was based on the duration of Minner's fraud, his lavish living, and the fact that his failure to pay employment taxes jeopardized his employees' well-being.

On appeal, Minner argued that the district court abused its discretion by ignoring or failing to adequately weigh his efforts to pay restitution, as well as his age, acceptance of responsibility, and the consequences that his incarceration would have for his employees. The Eighth Circuit noted that Minner never made progress towards paying restitution despite having ample time to liquidate his assets, and he had plenty of time to get his affairs in order related to his employees. The appellate court also rejected Minner's claim that the district court improperly based its upward variance on the duration of his failure to pay taxes, which was already accounted for in his base-offense level. The Eighth Circuit explained that the district court had set the base-offense level at 20 because the amount of tax loss exceeded $550,000, not because of the nine-year duration of his fraud scheme. Lastly, the Eighth Circuit concluded that even if Minner's Guidelines range had accounted for his nine-year scheme to defraud, there was precedent in the circuit for the proposition that factors already taken into account in calculating the advisory Guidelines range can form the basis of a sentence variance. Accordingly, the appellate court affirmed Minner's sentence, holding that the district court did not abuse its discretion, nor did it give an improper factor significant weight.

Sixth Circuit Upholds Sentencing Offense-Level Increase and Sophisticated-Means Enhancement

In ***United States v. Igboba***, 964 F.3d 501 (6th Cir. 2020), the Sixth Circuit affirmed defendant's sentence holding (1) the base-offense-level increase was warranted based on $4.1 million in losses attributable to defendant's criminal activity; and (2) the sophisticated-means enhancement was warranted based on defendant's use of concealing technology, shell companies, and multiple email aliases to perpetrate his crime.

Oghenevwakpo Igboba ("Igboba") was convicted on multiple charges of conspiracy to defraud the United States by preparing and filing false tax returns with others' identities. He was sentenced to, *inter alia,* 162 months' imprisonment. Igboba appealed his sentence claiming (1) the increase in his base-offense level was erroneous because the district court failed to distinguish between losses attributable to him and losses attributable to the entire conspiracy; and (2) his offense did not involve sophisticated means warranting application of a two-level enhancement.

The Sixth Circuit affirmed Igboba's sentence. The appellate court concluded the $4.1 million in losses were properly attributable to acts and omissions committed, aided, abetted, counseled, induced, commanded, procured, or willfully caused by Igboba, per the Sentencing Guidelines. The Sixth Circuit rejected Igboba's claim that the losses were solely caused by others' criminal activity, thus requiring proof they were the product of "jointly undertaken criminal activity" under the Guidelines, concluding Igboba personally participated in the activity that caused each of the losses attributed to him. The Sixth Circuit also found no error with the sophisticated-means enhancement, concluding the evidence showed that Igboba (1) acquired personal identifying information ("PII") from a Somalian website and used a virtual private network ("VPN") and the ultra-private Tor browser to conceal his actions; (2) used corporate shell companies to receive tax refunds in furtherance of his criminal activities; and (3) used multiple email aliases to perpetrate his crime.

TABLE OF CASES

First and Fourth Amendments

Frasier v. Evans, 992 F.3d 1003 (10th Cir. 2021) 1

Fourth Amendment

United States v. Trice, 966 F.3d 506 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 1395 (2021) 1

United States v. Smith, 967 F.3d 198 (2d Cir. 2020) 2

United States v. Gratkowski, 964 F.3d 307 (5th Cir. 2020) 2

Fifth Amendment

United States v. Fridman, 974 F.3d 163 (2d Cir. 2020), *cert. denied*, No. 20-1548, __ S. Ct. __, 2021 WL 2405211 (June 14, 2021) 3

Attempts to Interfere with Administration of Internal Revenue Laws – 26 U.S.C. § 7212

United States v. Graham, 981 F.3d 1254 (11th Cir. 2020) 3

26 U.S.C. § 7212 and Klein Conspiracy – 18 U.S.C. § 371

United States v. Atilla, 966 F.3d 118 (2d Cir. 2020), ... 4

26 U.S.C. § 7212 and Fed. R. Crim. P. Rule 8 – Joinder

United States v. Scali, 820 F. App'x 23 (2d Cir. 2020) (unpublished) 4

Sentencing

United States v. Minner, 809 F. App'x. 340 (8th Cir. 2020) (unpublished) 5

United States v. Igboba, 964 F.3d 501 (6th Cir. 2020) 5