IRS

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Department of the Treasury | Internal Revenue Service
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FOURTH AMENDMENT

Fifth Circuit Holds Consent to Complete Cell-Phone Search Was Broad Enough to Encompass Forensic Search of Extracted Data

In ***United States v. Gallegos-Espinal***, 970 F.3d 586 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1247 (2021), the Fifth Circuit held a consent to a complete cell-phone search was broad enough to include a search of the extracted data.

Federal agents suspected Cristofer Gallegos-Espinal (Gallegos-Espinal) was involved in his mother's alien-smuggling conspiracy. When the agents arrested his mother and searched her home, she requested that her minor children be left in his custody. When he arrived at the scene, officers stated that before he could take custody of a minor child, they needed to search his vehicle for "something illegal" and look through his phone to ensure it had no child pornography. Gallegos-Espinal agreed to both searches orally and in writing. The written consent allowed a complete search of his cell phone and car, and permitted agents to "take any letters, papers, materials, or other property which they may desire to examine." A later review of data extracted from the cell phone revealed three videos showing Gallegos-Espinal's sexual abuse of a minor. The district court suppressed the videos, holding the consent did not support review of data extracted three days after returning the cell phone.

On appeal, the Fifth Circuit reversed the district court's ruling, holding Gallegos-Espinal signed a consent form which by its broad terms allowed for the search and seizure conducted, and Gallegos failed to affirmatively limit the scope of his broad consent. The appellate court noted the Supreme Court's standard for measuring the scope of a consent is objective reasonableness—what a reasonable person would have understood by the exchange between the officer and the suspect. *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991). The Fifth Circuit explained that the terms of Gallegos-Espinal's written consent were broad enough for the court to conclude the search and subsequent review of the extracted data did not exceed the scope of consent. The appellate court stated that no aspect of the search fell outside the range of conduct that a typical reasonable person would expect from a complete cell-phone search or from the subsequent seizure of any "materials ... which [the government] may desire to examine." Thus, the Fifth Circuit held suppression of the evidence constituted reversible error.

Ninth Circuit Holds Law Enforcement May Not Exploit Position of Trust to Expand Scope of Warrant

In ***United States v. Ramirez***, 976 F.3d 946 (9th Cir. 2020), the Ninth Circuit held, *inter alia*, the government violated the Fourth Amendment by exploiting its position of trust in law enforcement to lure the defendant into the search-warrant premises.

As part of a child-pornography investigation, the Federal Bureau of Investigation (FBI) obtained a warrant to search the residence of Stefan Ramirez (Ramirez) and any vehicle registered to him located near the residence. When agents arrived, neither Ramirez nor his vehicle was at the premises. To lure Ramirez into the search premises, the agents called him and falsely claimed they were police officers responding to a burglary. When Ramirez arrived, the agents obtained evidence from his car and person, as well as incriminating statements. Ramirez filed a motion to suppress the evidence, which was denied. Ramirez pleaded guilty, but reserved his right to appeal the denial of his motion.

On appeal, the Ninth Circuit reversed the district court's denial of the suppression motion. The appellate court noted that the agents had a valid warrant to search Ramirez and his vehicle, but executed it in an unreasonable manner through the use of an unlawful ruse in violation of the Fourth Amendment. The Ninth Circuit explained that the propriety of a ruse search or seizure depends on the particular facts of each case, but there is a clear line between two categories of deception: (i) law enforcement may generally use deception to hide its law

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enforcement identity to facilitate a search or seizure within its lawful authority; and (ii) deception is unlawful when law enforcement identifies itself as such and then uses its position of trust to expand the scope of a search or seizure.

This case fell into the second category. The Ninth Circuit explained that FBI agents posed as police officers and played on Ramirez's trust and reliance on their story that his home had been burglarized to bring Ramirez and his car within the ambit of the warrant when they were not otherwise within its ambit. The FBI had no acceptable government interest in using this ruse as the agents could have simply waited for Ramirez to get home. Thus, the Ninth Circuit held the FBI's conduct violated the Fourth Amendment.

The dissent took the position that because the agents had authority to seize Ramirez and his car had Ramirez voluntarily returned home when the agents were executing the warrant, the agents' use of deceit was lawful.

Fifth Circuit Holds Individual Has No Standing to Claim Fourth Amendment Violation Based on GPS Tracking of Another's Cell Phone

In ***United States v. Beaudion***, 979 F.3d 1092 (5th Cir. 2020), the Fifth Circuit held, *inter alia*, the defendant lacked Fourth Amendment property or privacy interest in the location of his girlfriend's cell phone.

During a narcotics investigation, multiple drug dealers and cooperating witnesses identified Matthew Beaudion (Beaudion) and his girlfriend, Jessica Davis (Davis), as their suppliers. With this information the police obtained a search warrant for Verizon to provide global positioning system (GPS) tracking information of Davis' cell phone over the next sixteen hours. After obtaining the location and route of Davis' cell phone, the officers stopped the car, searched it, seized the drugs, arrested Davis and Beaudion, and seized Davis' cell phone. Beaudion moved to suppress the seized evidence, which the district court denied for lack of Fourth Amendment standing. Beaudion pleaded guilty, but reserved the right to appeal the denial of his motion to suppress.

On appeal, the Fifth Circuit affirmed the denial of the motion to suppress for lack of Fourth Amendment standing. The appellate court explained that the standing inquiry is both defendant- and location-specific, requiring that a *particular* defendant have a property or privacy interest in a *particular* place. The Fifth Circuit first identified the place searched as the GPS coordinates and registered-owner information of Davis' cell phone. In fact, the warrant did not mention Beaudion or his phone. The Fifth Circuit rejected Beaudion's claim that the search extended to him and the car in which he and Davis were traveling, explaining that for Fourth Amendment standing purposes, what matters is not the purpose of a search but its scope. Here, the scope of the search included only the GPS coordinates of Davis' cell phone and her corresponding location information. The Fifth Circuit next determined that Beaudion had no Fourth Amendment property or privacy interest in that location information. Rather, Davis—not Beaudion—had such Fourth Amendment interest because she lawfully possessed and controlled the cell phone as the primary user. Beaudion's subjective expectation of privacy was irrelevant because it was not reasonable. The appellate court found that the Supreme Court's opinion in *Carpenter v. United States*, does not change the result, because *Carpenter* "did not address the question whether an individual maintains a legitimate expectation of privacy in a record that reveals someone else's location."

Supreme Court Holds Application of Physical Force to Person is Seizure, Even if Person is Not Subdued

In ***Torres v. Madrid***, 141 S. Ct. 989 (2021), the Supreme Court, in a 5-3 opinion, held, *inter alia*, that application of physical force to a person with intent to restrain is a Fourth Amendment seizure, even if the force does not subdue the person.

State police officers arrived at an apartment complex to execute an arrest warrant for a woman accused of various crimes. The officers observed Roxanne Torres (Torres) standing with another woman in the parking lot near a vehicle. Concluding neither woman was the target of the warrant, the officers approached. At the time, Torres was experiencing methamphetamine withdrawal and, believing the officers were carjackers, she started to drive away. Two officers fired 13 shots at her to try to stop her. They struck her twice in the back and paralyzed her left arm temporarily. Torres was airlifted to a hospital, where she was arrested the next day. She pleaded no contest.

Torres later sought damages from the Officers Madrid and Williamson under 42 U.S.C. § 1983, which provides a cause of action for the deprivation of constitutional rights by persons acting under color of state law. She claimed the officers applied excessive force, making the shooting an unreasonable Fourth Amendment seizure. The district court granted summary judgment to the officers on qualified-immunity grounds, holding Torres failed to show she was seized by the officer's use of force. The Tenth Circuit agreed there was no seizure, reasoning that a suspect's continued flight after being shot by police negates an excessive-force Fourth Amendment claim.

The Supreme Court vacated the Tenth Circuit's judgment. The Court first noted that in *California v. Hodari D.*, 499 U.S. 621 (1991), it interpreted the term "seizure" by reference to the common law of arrest. Therein the Court explained that an officer's application of physical force to the body of a person for the purpose of arresting him is an

arrest—not an attempted arrest—even if the person is not subdued. In the Court's view, the analysis does not change because force is applied from a distance as the focus of the Fourth Amendment is the privacy and security of individuals, not the particular form of governmental intrusion. Here, the shooting applied physical force on Torres with intent to restrain her from driving away, and the seizure occurred the instant a bullet struck her.

A dissenting opinion by three Justices pointed out that under the majority's holding a Fourth Amendment seizure takes place whenever an officer merely touches a suspect. In other words, it "is a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again." In the dissent's view, "[t]hat view is as mistaken as it is novel."

FOURTH AND FIFTH AMENDMENTS

Eighth Circuit Holds Search Supported by Probable Cause and Self-Incriminating Statements Were Non-Custodial and Voluntary

In ***United States v. Roberts***, 975 F.3d 709 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2822 (2021), the Eighth Circuit upheld the admissibility of Martell Roberts' (Roberts) self-incriminating statements, holding, based on a totality of the circumstances, that the search of Roberts' residence and vehicle were supported by probable cause, and that Roberts' statements were not custodial or coerced.

During execution of a search warrant of Robert's residence and vehicle, Roberts came out of the residence and agreed to talk to the officers in an unmarked police car. When asked where he had obtained the two firearms found in the residence, Roberts said he "guessed he was under arrest." An officer replied that he was not under arrest, after which Roberts admitted bringing the guns into the residence. The officers told Roberts he could face federal firearm charges because he was a felon, to which Roberts replied, "sounds like I'm going to jail." After he was read his *Miranda* rights, and asked if he wanted to continue to talk, he replied, "not really," but continued the interview. He eventually admitted driving a man to the scene of the shooting, where the firearms were left. The officers arrested Roberts three hours later and continued to question him for two more hours at the police station. Roberts entered a conditional guilty plea to being a felon in possession of a firearm and ammunition, but reserved the right to appeal the denial of his motion to suppress.

On appeal, the Eighth Circuit upheld the denial of Roberts' motion to suppress, holding that the search warrant being executed when he made incriminating statements was supported by probable cause, and that his statements were made in a non-custodial setting and were voluntary. The appellate court explained that the search warrant was supported by probable cause based upon the totality of the circumstances found within the four corners of the supporting affidavit, which created a fair probability that contraband or evidence of a crime would be found in the places to be searched. Regarding the incriminating statements, the Eighth Circuit first noted that Roberts was not in custody while he was interrogated in the unmarked police car because the officers repeatedly assured Roberts he was not under arrest and could stop the questioning at any time, and Roberts understood his freedom to do so. The appellate court also reasoned that the interrogation did not become custodial simply because the officers advised Roberts of the potential consequences of a criminal investigation, letting him make an informed decision on whether self-incriminating disclosures might be in his best interest. The appellate court further held Roberts' incriminating statements were voluntary because they were not extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination. The Eighth Circuit explained that none of the police tactics amounted to improper threats or promises that overbore Roberts' will—adding that absent improper threats, use of physical force, or intimidation tactics, psychological pressure almost never renders a confession involuntary.

FIFTH AMENDMENT

Eighth Circuit Holds Law Enforcement Questions to Identify Search Location Prior to Executing a Search Warrant Are Not Custodial Interrogation Under *Miranda*

In ***United States v. Tapia-Rodriguez***, 968 F.3d 891 (8th Cir. 2020), the Eighth Circuit held, *inter alia*, that a police officer asking defendant whether he lived in the apartment and which bedroom was his prior to searching the bedroom did not constitute interrogation under *Miranda.*

Idelfonso Tapia-Rodriguez (Tapia-Rodriguez) pleaded guilty to various narcotics crimes and was sentenced to 87 months' imprisonment. In his plea, Tapia-Rodriguez reserved the right to appeal the district court's denial of his motion to suppress. The motion related to his responses to police questions prior to conducting a search consented to by Tapia-Rodriguez's roommate. The officers asked Tapia-Rodriguez if he lived in the house and which bedroom was his.

On appeal, Tapia-Rodriguez argued police officers subjected him to an unconstitutional custodial interrogation when they asked him the questions without providing *Miranda* warnings. The Eighth Circuit rejected this argument, holding that a request for routine information needed to identify the search location is not interrogation unless the officers reasonably should be aware that the information sought is directly relevant to the substantive

offense charged. Rather, the appellate court reasoned that the officers' query of whether Tapia-Rodriguez lived in the apartment was merely to identify his presence and ascertain why he was there. Further, the appellate court noted that asking Tapia-Rodriguez which bedroom was his was necessary to ensure officers did not exceed the scope of the original consent, as his roommate had no authority to consent to a search of Tapia-Rodriguez's room, and to obtain Tapia-Rodriguez's consent to search his room. The Eighth Circuit emphasized that law enforcement need not provide *Miranda* warnings before a request to search. Accordingly, the Eighth Circuit affirmed the district court's denial of the motion to suppress, holding that neither of the two questions at issue constituted interrogation that required *Miranda* warnings.

Eighth Circuit Holds Agent's Response to Defendant's Question did not Amount to Interrogation Requiring Miranda Warnings

In ***United States v. Smialek***, 970 F.3d 1070 (8th Cir. 2020), the Eighth Circuit held, *inter alia*, that a Federal Bureau of Investigation (FBI) special agent's response stating the date of the bank robbery, in reply to the defendant's repeated questions as to when the robbery occurred, was not an interrogation under *Miranda.*

Steven Smialek (Smialek) was arrested two months after robbing a bank in Minnesota. He had robbed the same bank in 2008 in a nearly identical fashion and had previously been convicted of two other bank robberies. After he was taken into custody, Smialek repeatedly asked an FBI agent for the date of the robbery. When the agent eventually answered, Smialek volunteered a detailed alibi. During this exchange, the agent repeatedly tried to give Smialek *Miranda* warnings, but did not do so because Smialek continually cut him off. Smialek filed a motion to suppress the alibi statements, arguing he was interrogated without *Miranda* warnings. After the district court denied the motion, a jury convicted Smialek and sentenced him to 140 months' imprisonment.

On appeal, Smialek argued the district court erred in denying his motion to suppress his alibi statements because he made them in response to interrogation while in custody and was not given *Miranda* warnings. The government conceded Smialek was in custody, so the sole issue on appeal was whether he was interrogated when he provided the statements. The Eighth Circuit first noted that in most cases where an officer responds to a defendant's question, his response does not amount to an interrogation. In this case, the agent attempted to give Smialek *Miranda* warnings, but Smialek repeatedly interrupted, insisting on knowing the date of the robbery. Smialek contended that after the agent responded, he should have reasonably known that providing the information would elicit an incriminating response and, therefore, instead of responding, the agent should have continued to insist on providing *Miranda* warnings. The Eighth Circuit disagreed, concluding that the statements were not interrogation but instead responses to defendant's inquiries, and thus part of a conversation normally attendant to arrest and custody. The appellate court added that even if the agent expected a response from Smialek, it was not reasonably likely it would be incriminating because an expectation of voluntary statements does not amount to deliberate elicitation of an incriminating response. Thus, the Eighth Circuit held that the agent's stating the date of the robbery in response to Smialek's questions was not an interrogation, and therefore, the district court did not err in denying the motion to suppress.

TAX EVASION – 26 U.S.C. § 7201

Ninth Circuit Holds Tax Evasion Statute of Limitations Runs from Later of Completion of Offense or Last Affirmative Act of Evasion

In ***United States v. Orrock***, 23 F.4th 1203 (9th Cir. 2022), the Ninth Circuit held the statute of limitations in all cases under 26 U.S.C. § 7201 runs from the last act necessary to complete the offense or the last affirmative act of evasion, whichever is later.

Craig P. Orrock (Orrock) was convicted, *inter alia,* of evasion of assessment of taxes (26 U.S.C. § 7201), based on his concealing income received from the sale of a vacant lot he controlled. He did not report the sale proceeds on his personal tax return, but instead belatedly disclosed the sale in the return of a partnership he also controlled. In the partnership return, he significantly underreported the sale proceeds.

On appeal, Orrock claimed the statute of limitations barred his conviction, which he argued ran from the date he filed his false personal tax return, not from the later filing of the partnership return. The Ninth Circuit disagreed, holding that in both evasion of assessment and payment cases the statute of limitations runs from the last act necessary to complete the offense or the last affirmative act of evasion, whichever is later.

The Ninth Circuit, *inter alia*, recognized that language from its prior unpublished opinion appeared to support Orrock's argument. In *United States v. Galloway*, 802 F. App'x 247, 248-49, 249 n.2 (9th Cir. 2020) (unpub.), a Ninth Circuit panel construed *United States v. Carlson,* 235 F.3d 466 (9th Cir. 2000) as establishing the last act necessary to complete the offense as the sole method for calculating the limitations period for evasion of assessment cases. In this case, however, the Ninth Circuit clarified that *Carlson* stands for the proposition that, at the earliest, the limitations period begins once all the elements of § 7201 are complete, and that evasion of assessment and evasion of payment cases are treated the same for purposes of

calculating the limitations period. Thus, the Ninth Circuit affirmed Orrock's conviction because the indictment was brought within six years of Orrock's last evasive act.

WILLFUL FAILURE TO COLLECT OR PAY OVER TAX – 26 U.S.C. § 7202

Third Circuit Holds Willfulness Does Not Require Knowledge that Conduct is Criminal, Only that Conduct Violates Known Legal Duty

In ***United States v. Gilmore***, 837 F. App'x 101 (3d Cir. 2020) (unpublished), the Third Circuit upheld the district court's willfulness jury instruction, holding, *inter alia*, that willfulness does not require knowledge of "criminal" conduct but only that conduct was "unlawful."

George Gilmore (Gilmore), an attorney, failed to timely pay his firm's employment taxes, and to disclose his outstanding tax obligations and a personal debt on a loan application. During trial, the district court instructed that willfulness, for failure to collect and pay over employment taxes (26 U.S.C. § 7202), could not be found if Gilmore believed in good faith that the tax laws did not make his conduct unlawful. The district court rejected Gilmore's request that the word "criminal" be used instead of "unlawful." Ultimately, the jury convicted Gilmore of two counts of § 7202, and one count of making a false statement on a loan application (18 U.S.C. § 1014).

On appeal, Gilmore claimed, *inter alia*, that the willfulness jury instruction was "legally erroneous because it equated belief of 'unlawful' action with belief of 'criminal' action." The Third Circuit disagreed, holding that "willfulness in the context of tax crimes merely requires knowledge that one is violating a legal duty," not knowledge that one is committing a criminal act. Thus, to prove willfulness, the government had to show that the law imposed a duty on the defendant, the defendant knew of this duty, and he voluntarily and intentionally violated that duty. There is no requirement that a person must be aware that the conduct is criminal. It is enough that he knew he had a legal duty and violated it—in other words, that he acted unlawfully.

FOREIGN EVIDENCE – STATUTE OF LIMITATIONS – 18 U.S.C. § 3292

Fifth Circuit Holds Defendant Improperly Deprived of Statute-of-Limitations Defense and Jury Instruction

In ***United States v. Pursley***, 22 F.4th 586 (5th Cir. 2022), the Fifth Circuit held the district court should have considered the defendant's statute-of-limitations defense under 18 U.S.C. § 3292, determined the length of the suspension of the limitations period while the government sought information from foreign authorities, and instructed the jury on such defense.

As part of an investigation of Jack Pursley (Pursley) for alleged tax fraud involving offshore accounts, the United States government sought various documents and interviews from the Isle of Man. After providing various documents, the Isle of Man government notified the U.S. that it believed it had fully complied with the requests. The government disagreed and moved to suspend the statute of limitations, which is allowed under 18 U.S.C. § 3292 when the government seeks evidence from a foreign country. The district court granted the motion without specifying the length of the suspension. Pursley was charged with conspiracy to defraud the U.S. and tax evasion. He twice moved to dismiss the indictment on statute-of-limitations grounds, but the district court denied both motions. The district court also denied Pursley's proposed statute of limitations jury instruction. Ultimately, Pursley was convicted on all counts.

On appeal, the Fifth Circuit first noted that the statute of limitations in these cases begins to run when the foreign government has taken "final action," which turns on whether the U.S. government obtained a dispositive response to an official request for evidence. In this case, the appellate court remanded the case after concluding the record was insufficient to make this "final action" determination. The Fifth Circuit also concluded the district court should have granted Pursley's request for the statute of limitations jury instruction and explained that Pursley could not be faulted for not incorporating any suspension period into the instruction, given the district court provided no guidance on the length of the suspension. The appellate court further explained that once Pursley raised the statute-of-limitations defense, the government was required to prove that at least one affirmative act took place within the limitations period as to each count. Thus, the Fifth Circuit held that Pursley was entitled to have the district court consider his statute-of-limitations defense, to have the district court calculate the exact time the statute of limitations ran, to dismissal of any charge that was untimely under that calculation, and to a jury instruction on the statute-of-limitations defense.

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