IRS

CRIMINAL TAX BULLETIN

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FOURTH AMENDMENT

Seventh Circuit Upholds Pre-Carpenter Warrantless Collection of Historical and Real-Time CSLI

In ***United States v. Hammond***, 996 F.3d 374 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 2646 (2022), the Seventh Circuit held the government's collection of historical cell site location information (CSLI) is a Fourth Amendment search, but admissible in this case under the good-faith exception, and that the collection of real-time CSLI was not a Fourth Amendment search under the facts of this case.

In October 2017, police began investigating Rex Hammond (Hammond) in connection with a three-week spree of seven armed robberies. Officers obtained Hammond's cell phone number and sought real-time CSLI from AT&T under the Stored Communications Act (SCA) to locate him, and historical CSLI going back to the date when the robberies began. At trial, the district court denied Hamond's motion to suppress CSLI evidence, ruling that, while the CSLI collection was a Fourth Amendment search, the officer relied in good faith on the SCA. Ultimately, Hammond was convicted of various crimes and sentenced to forty-seven years' imprisonment.

On appeal, the Seventh Circuit affirmed the denial of Hammond's motion to suppress the historical and real-time CSLI. First, the appellate court noted that while under *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (decided six months after Hammond's convictions) the government may no longer rely on an 18 U.S.C. § 2703(d) order to obtain historical CSLI and must obtain a warrant, under Seventh Circuit precedent the exclusionary rule does not apply where, as here, the government relied in good faith on pre-*Carpenter* precedent. Second, the Seventh Circuit held the collection of real-time CSLI data did not constitute a Fourth Amendment search. The appellate court relied on Seventh Circuit precedent after noting that the narrow *Carpenter* opinion expressly declined to address the collection of real-time CSLI. In this case, the Seventh Circuit reasoned the collection of real-time CSLI was limited to a matter of hours while Hammond traveled on public roads, and it was used for the limited purpose of finding the armed suspect who they had reason to believe was likely to engage in another armed robbery. The Seventh Circuit distinguished *Carpenter,* noting that here the record of Hammond's movements for a matter of hours on public roads does not provide a "window into the person's life, revealing his familial, political, professional, religious, and sexual associations - to the same, intrusive degree as the collection of historical CSLI." Thus, the Seventh Circuit held the CSLI evidence was admissible.

Fourth Circuit Holds Coworker's Warrantless Search of Private Office at FBI's Direction Violated Fourth Amendment

In ***United States v. Shelton***, 997 F.3d 749 (7th Cir. 2021), the Seventh Circuit held a search of a co-worker's private office at law enforcement's direction violated the Fourth Amendment.

Stafford Garbutt (Garbutt), who worked at a local government office, informed the Federal Bureau of Investigation (FBI) that his boss and coworkers, including Ethel Shelton (Shelton) were using government time and resources for personal purposes. At the FBI's direction, Garbutt searched Shelton and his coworkers' offices outside working hours and obtained documents, files, and photos, which he provided to the FBI. He also recorded conversations for several months. Although Shelton's office was in a private workspace, coworkers occasionally entered in her absence for work-related reasons. The FBI used the information provided by Garbutt to obtain a search warrant. Shelton learned of Garbutt's searches during trial. The district court held Shelton had no reasonable expectation of privacy in her office because Garbutt and others routinely entered, including in her absence, there were security cameras (though not in individual offices), office policy allowed for searches of employees and possessions, and Shelton often left papers on her desk in plain view.

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The Seventh Circuit reversed, holding Garbutt's searches at the FBI's direction violated Shelton's Fourth Amendment rights. The appellate court noted government employees' expectation of privacy must be assessed in the context of the employment relation. Here, the search was not of the workplace by the government as an employer but rather a search by law enforcement seeking evidence of a crime. Thus, the security cameras in the suites and the office policy allowing workplace searches had no bearing on Shelton's reasonable expectation of privacy. The appellate court reasoned that when Garbutt entered to gather evidence, he exceeded his access as a business invitee into Shelton's office. Moreover, Shelton had a door that closed, kept personal items in her office, concealed documents from view when people entered, and was the sole occupant of the office for many years. Thus, Shelton had a reasonable expectation that co-workers would not enter her office except in her presence during business hours or for limited purposes in her absence. For these reasons, the Seventh Circuit held the government obtained the evidence in violation of Shelton's Fourth Amendment rights.

Fourth Circuit Holds Aerial Surveillance Program was Fourth Amendment Search

In ***Leaders of a Beautiful Struggle v. City of Baltimore***, 2 F.4th 330 (4th Cir. 2021) (*en banc*), the Fourth Circuit held that warrantless use of an aerial-surveillance program that allows police to deduce personal information from the whole of individuals' movements violated the Fourth Amendment.

Plaintiffs—Baltimore community advocates—sought to enjoin implementation of the Aerial Investigation Research (AIR) Program, an aerial-surveillance program operated by the Baltimore (Maryland) Police Department (BPD) in partnership with private contractor Persistent Surveillance Systems (PSS). The AIR Program uses aerial photography to capture roughly 32-square miles per image per second, The planes fly at least 40 hours a week, obtaining roughly twelve hours of coverage of around 90% of the city daily. PSS utilizes the photographs to track individuals and vehicles from a crime scene and extract information to prepare reports and briefings about a "target crime" as requested by BPD. The district court denied the injunction, which was affirmed by a split panel of the Fourth Circuit.

On rehearing *en banc*, the Fourth Circuit reversed the district court's denial of plaintiffs' motion for a preliminary injunction, holding plaintiffs are likely to succeed on their Fourth Amendment claim based on the Supreme Court's rationale in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The appellate court explained that the touchstone in *Carpenter* was the line of cases addressing a person's expectation of privacy in their physical location and movements. The Fourth Circuit explained that *Carpenter* identified a reasonable expectation of privacy in the whole of a person's physical movements and held that government access to cell site location information contravenes that expectation. Thus, the appellate court reasoned, *Carpenter* solidified the line between short-term tracking of public movements and prolonged tracking that can reveal intimate details through habits and patterns. The latter form of surveillance invades the reasonable expectation of privacy that individuals have in the whole of their movements and therefore requires a warrant. The Fourth Circuit acknowledged that the AIR Program did not allow perfect tracking of all individuals it captures across all the time it covers, and that the tracks are often shorter snippets of several hours or less. Still, the appellate court explained the program enables photographic, retrospective location tracking in multi-hour blocks, often over consecutive days, with a month and a half of daytimes for analysts to work with. That is enough to yield a wealth of detail, greater than the sum of the individual trips. Therefore, the Fourth Circuit held, because the AIR Program opens an intimate window into a person's associations and activities, it violates the reasonable expectation of privacy individuals have in the whole of their movements. The AIR Program records the movements of a city. With analysis, it can reveal where individuals come and go over an extended period. Because the AIR Program enables police to deduce from the whole of individuals' movements, the Fourth Circuit held that accessing its data is a search, and its warrantless operation violates the Fourth Amendment.

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

Eighth Circuit Holds Marinello's Nexus and Knowledge Requirement Need Not Be Charged in Indictment

In ***United States v. Prelogar***, 996 F.3d 526 (8th Cir. 2021), the Eighth Circuit held, *inter alia*, that post-*Marinello v. United States,* 138 S. Ct. 1101 (2018), a conviction under 26 U.S.C. § 7212(a) requires the government to prove a nexus between defendant's conduct and a particular pending administrative proceeding but does not require that such language be charged in the indictment.

Barrett Prelogar (Prelogar) entered into an installment agreement with the IRS to pay Trust Fund Recovery Penalties (TFRPs) assessed for his failure to pay employment taxes. When Prelogar failed to pay his 2008 personal income taxes, the IRS began investigating his ability to pay his outstanding tax liabilities and discovered he had used personal funds to purchase various personal assets. Collection activities ensued, including issuance of liens and levies. After discovering Prelogar used corporate

funds to pay personal expenses, structured cash withdrawals from his business account, and cashed his paychecks without depositing them, the IRS charged Prelogar with, *inter alia,* § 7212(a). After the district court denied his motion to dismiss, he was convicted and sentenced to 18 months' imprisonment and a year of supervised release.

On appeal, the Eighth Circuit held that *Marinello* clarified the government's requirement to prove a nexus between defendant's conduct and a particular pending or reasonably foreseeable administrative proceeding but did not require such language to be charged in the indictment. The Eighth Circuit further held Prelogar's conviction was not premised on routine tax collection activity, which would have run afoul of *Marinello*'s particular administrative-proceeding requirement. Instead, the appellate court held Prelogar knew of the targeted collection activities against him from 2011 to July 2012, and of the criminal investigation against him that had begun in 2013, adding: "That Prelogar used corporate funds to pay his personal expenses, structured cash withdrawals, and cashed, without depositing, his paychecks during these time periods indisputably creates a nexus between the IRS collection activities and the alleged acts." Thus, the Eighth Circuit affirmed Prelogar's conviction.

AIDING OR ASSISTING IN FILING FALSE TAX RETURNS – 26 U.S.C. § 7206 & CONSPIRACY TO DEFRAUD THE UNITED STATES – 18 U.S.C. § 371

First Circuit Holds CPA Knowingly and Willfully Conspired with Client to Prepare and File False Returns

In ***United States v. Nardozzi***, 2 F.4th 2 (1st Cir. 2021), the First Circuit affirmed the defendant's convictions for conspiring to defraud the United States and aiding and assisting in the preparation of a false tax return, concluding ample evidence supported the jury's findings of both a conspiratorial agreement and willfulness.

John H. Nardozzi (Nardozzi), a certified public accountant (CPA), operated his own accounting firm since 2008. He provided tax preparation and filing services to clients, including Brian and Mary Joyce, as well as Brian Joyce's law firm. At the time, Brian Joyce (Joyce) was a Massachusetts state senator. In December 2017, a federal grand jury indicted Joyce on 113 felony counts, including racketeering, extortion, fraud, money laundering, and conspiracy to defraud the IRS. The indictment alleged that Joyce solicited payments from businesses in exchange for political favors, and then falsely characterized those payments as legitimate legal fees paid to his law firm. Joyce died in September 2018, before his case went to trial. After Joyce was indicted, a grand jury indicted Nardozzi for his role in preparing and filing tax returns for the Joyces, and the Joyce law firm. The indictment charged Nardozzi with conspiracy to defraud the United States (18 U.S.C. § 371) and aiding or assisting in filing false tax returns (26 U.S.C. § 7206(2)).

At trial, the evidence showed that Nardozzi had prepared and filed tax returns on behalf of the Joyces and the law firm that misreported income and mischaracterized transactions, causing a total tax loss of nearly $600,000. The government also introduced evidence that Nardozzi was aware of the specific tax considerations for a C-corporation, such as the Joyce law firm. Nardozzi's defense counsel argued Nardozzi relied on information provided to him by Joyce's bookkeepers, or by Joyce directly. The jury returned a verdict of guilty on all counts, and Nardozzi was sentenced to 18 months' imprisonment.

On appeal, Nardozzi argued, *inter alia,* that the government failed to introduce sufficient evidence that he knowingly conspired to defraud the United States or that he willfully aided or assisted Joyce in filing false tax returns. Nardozzi argued there was no evidence of a conspiratorial agreement between Joyce and Nardozzi, and that there was insufficient evidence that Nardozzi acted either knowingly or willfully. The First Circuit disagreed, concluding there was ample evidence in the record from which the jury could have concluded there was a conspiratorial agreement between Joyce and Nardozzi. The appellate court added that "it is a 'well-established legal principle that a conspiracy may be based on a tacit agreement shown from an implicit working relationship.'" *United States v. Mubayyid*, 658 F.3d 35, 57 (2011) (quoting *United States v. Patrick*, 248 F.3d 11, 20 (1st Cir. 2001)). The First Circuit reasoned Nardozzi was a seasoned CPA, with knowledge of the tax consequences of C-corporations such as Joyce's law firm. Nardozzi repeatedly mischaracterized personal expenses as business expenses on Joyce's returns, allowing Joyce to claim millions of dollars in business-tax deductions. The appellate court noted that in at least two instances, Nardozzi expressly informed Joyce that a transaction would have negative tax consequences. When Joyce objected to paying additional taxes, Nardozzi, knowing it was illegal to do so, followed Joyce's wishes and reported these transactions in a way that avoided any increased taxes. These facts, the First Circuit explained, support the jury's conclusion that Nardozzi's conduct was knowing and willful.

CONSPIRACY TO DEFRAUD THE UNITED STATES – 18 U.S.C. § 371 & FED. R. EVID. 106

Fifth Circuit Finds No Reversable Error in Excluding Recordings with IRS Undercover Agent and Declines to Extend the Marinello Nexus to 18 U.S.C. § 371's Defraud Clause

In ***United States v. Herman***, 997 F.3d 251 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 787 (2022), the Fifth Circuit held, *inter alia*, that there was no reversible error when the district court excluded portions of audio recordings of defendants' conversations with an IRS undercover agent ("UCA"). The appellate court also declined to extend *Marinello's* nexus requirement to 18 U.S.C. § 371's defraud clause.

Michael and Cynthia Herman (Hermans) owned and operated three restaurants in Texas. In 2013, the IRS initiated an undercover operation to determine whether the Hermans understated gross receipts and deducted personal expenses as business expenses on their business tax returns. In 2017, a grand jury returned an indictment against them on one count of conspiring to defraud the United States in (18 U.S.C. § 371). In addition, they indicted Michael on six counts and Cynthia on three counts of willfully filing false tax returns (26 U.S.C. § 7206(1)). A jury ultimately convicted them, *inter alia*, on one count of 18 U.S.C. § 371. Michael was sentenced to 21 months' imprisonment followed by three years of supervised release, and Cynthia was sentenced to five years' probation. Both were ordered to pay restitution of $157,719 to the IRS.

Before trial, the government presented audio clips it intended to play of recorded conversations between the Hermans and the UCA. In response, the Hermans provided audio clips pulled from the same set of recordings. In urging the district court to admit their audio clips, the Hermans relied on Federal Rule of Evidence 106, which allows a party to introduce the remainder of a written or recorded statement when its adversary has selectively introduced another portion of that statement in a way that creates a misleading impression. The district court ruled that the Hermans could present the audio recordings. However, at trial, during cross-examination of the UCA, the Hermans moved to admit 15 additional audio recordings, and the district court denied their motion.

On appeal, the Hermans collectively argued that the district court erred by excluding 14 of the audio recordings. The Fifth Circuit explained that Rule 106 requires the introduction of a writing or recorded statement only when the omitted portion is "necessary to qualify, explain, or place into context the portion already introduced." It then analyzed the excluded exhibits under this standard. The appellate court found that 12 of the exhibits did not meet this standard, but two did because they corrected misimpressions that the government's corresponding exhibits alone created. However, the court found no reversable error, noting that even without the government's exhibits that these two recordings sought to explain/correct, the jury had ample evidence to convict the defendants.

Cynthia also argued that the indictment regarding the conspiracy charge was legally insufficient because it failed to include an essential element that "the alleged fraud be directed at a foreseeable government proceeding." While not an element of 18 U.S.C. § 371, Cynthia argued the court should extend the rule announced in *Marinello v. United States*, 138 S. Ct. 1101 (2018), and apply it to 18 U.S.C. § 371; that rule being, to convict under 26 U.S.C. § 7212(a)'s omnibus clause, the government must show a "nexus" between the defendant's conduct and a pending or reasonably foreseeable tax-related proceeding, such as an investigation or audit." The Fifth Circuit declined to extend the nexus requirement, explaining that *Marinello* "lives in a separate vein of law" and "did not address, cite or analogize to § 371…." As such, the Fifth Circuit joined the Second and Eighth Circuits (the only two circuits that have considered this argument) in declining to extend the nexus requirement to § 371's defraud clause.

FEDERAL TORTS CLAIM ACT

Eighth Circuit Holds Federal Torts Claim Act Lawsuit Barred by Discretionary-Function Exception to Waiver of Sovereign Immunity

In ***Willis v. Boyd***, 993 F.3d 545 (8th Cir.), *cert. denied*, *Willis v. United States*, 142 S. Ct. 584 (2021), the Eighth Circuit held a conversion lawsuit was barred under the Federal Torts Claim Act (FTCA) because an IRS special agent's decision to deposit seized coins rather than preserve them in kind fell under the FTCA's discretionary-function exception to waiver of sovereign immunity.

During a search of Carrie Willis' (Willis) home, the police seized 364,000 commemorative one-dollar coins, which were delivered to an IRS special agent. The agent deposited the coins at face value into an IRS account without making any effort to determine whether the coins had any numismatic value. Years later, after Willis had requested the coins' return, the IRS sent her the coins' face value, explaining the coins had been converted to cash. Asserting the coins were collectors' items worth more, Willis brought an FTCA suit against the government. The district court awarded her $94,880 in damages.

On appeal, the Eighth Circuit reversed, holding the suit was barred by the sovereign-immunity doctrine. The appellate court explained the government generally waives sovereign immunity in money-damages suits against the federal government if the injury or loss of property caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his/her office or employment, if a private person, in similar circumstances would be liable to the claimant. Under the discretionary-function exception, however, there is no waiver when government agents make decisions that are discretionary. The Eighth Circuit concluded this exception applied because the Internal Revenue Manual details separate procedures for forfeited property that is fiat currency or collectibles but does not detail how to classify the property. Thus, the agent's decision was discretionary. Moreover, the property classification was subject to policy considerations such as prompt processing to avoid internal-control problems, especially given the large amount of cash, and preserving and protecting the value of seized property. Thus, the Eighth Circuit held the suit was barred by the discretionary-function exception to sovereign immunity waiver.

RESTITUTION

Fourth Circuit Holds Government May Garnish Retirement Plan Under Mandatory Victims Restitution Act

In ***United States v. Frank***, 8 F.4th 320 (4th Cir. 2021), the Fourth Circuit held the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA) does not impede enforcement of a criminal restitution order against defendant's 401(k) retirement account under the Mandatory Victims Restitution Act (MVRA), and that the Consumer Credit Protection Act's (CCPA) cap on garnishments does not apply to single, lump-sum withdrawals from retirement accounts.

In 2017, Jon Lawrence Frank (Frank) pled guilty to one count of wire fraud (18 U.S.C. § 1343) after embezzling more than $19 million from his former employer over ten years. Frank was sentenced to 78 months' imprisonment followed by three years of supervised released and ordered to pay over $19 million in restitution. To satisfy a portion of the restitution order, the government sought to garnish Frank's 401(k) retirement account under the MVRA. The plan fell within ERISA. The terms of the plan allowed a lump-sum distribution, less a 20-percent withholding to be remitted to the Internal Revenue Service as a credit against Frank's tax liability. The plan also provided that a participant, like Frank, who had not reached the retirement age "may also have to pay an additional 10% tax." The district court denied Frank's motion to quash the garnishment writ, holding the funds were not protected by ERISA's anti-alienation provision or the wage garnishment restriction of the CCPA.

On appeal, the Fourth Circuit agreed, holding that ERISA's anti-alienation provision does not impede the enforcement of a criminal restitution order against Frank's 401(k) retirement account. The appellate court explained that the MVRA expressly provides that restitution orders may be enforced against "all property or rights to property" and "[n]otwithstanding any other Federal law." (quoting 18 U.S.C. § 3613(a)). The Seventh Circuit further held the CCPA's 25-percent garnishment cap does not apply to single, lump-sum withdrawals from retirement accounts. The appellate court relied on the text of the CCPA, which "expressly addresses retirement accounts, and specifies which forms of retirement account payments – those that are 'periodic' – will qualify as 'earnings' subject to its garnishment cap."

Accordingly, the Seventh Circuit affirmed the denial of Frank's motion, but remanded the case to the district court for a determination of whether, under the terms of Frank's plan the 20% withholding of any present withdrawal was mandatory, and the lump-sum distribution would in fact trigger the 10-percent additional tax for early withdrawal from a qualified plan (26 U.S.C. § 72(t)). The appellate court noted that a mandatory withholding provision would constitute a limit on the government's garnishment amount. Similarly, if the lump-sum distribution would trigger the early withdrawal additional tax, such 10-percent additional tax would qualify as an additional limit on Frank's right to access his 401(k) funds and thus, would further limit the government's right of access.

***Note*:** On February 22, 2022, the district court issued a memorandum opinion concerning the issues on remand. *United States v. Frank*, No. 17-CR-114, 2022 WL 528852 (E.D. Va. Feb. 22, 2022). Defendant filed an appeal on July 13, 2022.

ATTORNEY-CLIENT PRIVILEGE

Eleventh Circuit Upholds Government Filter-Team Protocol

In ***In re Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Means v. Korf***, 11 F.4th 1235 (11th Cir. 2021), *petition for cert. filed*, *Korf, et al. v. United States*, No. 21-1364 (Apr. 20, 2022), the Eleventh Circuit upheld a modified filter-team protocol that allowed the document owners to determine in the first instance potentially privileged materials and required company or court approval before providing the records to the investigative team.

As part of a money-laundering investigation, the government executed a search warrant at a suite of offices that housed the Optima Family Businesses (OFB). The materials seized included items from an in-house attorney. The warrant outlined a filter-team protocol where a walled-off government filter team would review the seized records for privilege and forward non-privileged records to the investigative team. OFB and its owners, managers, and controllers (intervenors) claimed privilege over some of the seized documents. The district court imposed a modified filter-team protocol (Protocol) and denied the intervenors' motion to enjoin the government from reviewing documents before the intervenors agreed or the court ordered disclosure.

On appeal, the Eleventh Circuit upheld the Protocol and the denial of the intervenors' motion to the extent it sought to preclude government review of documents before the intervenors agreed or the court ordered disclosure. To obtain a preliminary injunction, the intervenors had to clearly establish: (1) substantial likelihood of success on the merits; (2) irreparable injury if no injunction was granted; (3) harm from the injunction would outweigh harm to the government; and (4) the injunction would not contravene the public interest. The Eleventh Circuit emphasized that a preliminary injunction is an extraordinary and drastic remedy, and appellate review is exceedingly narrow because of the expedited nature of the proceedings. Thus, the review is deferential, requiring the appellants to show the district court clearly abused its discretion in its consideration of each of the four prerequisites for a preliminary injunction. Failure to meet even one factor "dooms an appeal."

In this case, the Eleventh Circuit concluded the intervenors failed to establish a substantial likelihood of success on their argument that the Protocol violated their rights. The appellate court noted that the Protocol allowed the intervenors to conduct the initial privilege review and required the intervenors' permission or court order for any purportedly privileged documents to be released to the investigation team. The Eleventh Circuit noted that several federal appellate courts have approved similar filter-team protocols. Further, the intervenors had cited no authority for the broad remedy of precluding the government from reviewing privilege-claimed documents until after a court had ruled on the privilege assertion.

Lastly, the Eleventh Circuit distinguished the two cases relied on by the intervenors, *In re: Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d 511 (6th Cir. 2006) (*Winget*), and *In re: Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019) (*Baltimore Law Firm*). *Winget* involved a government filter-team protocol in a non-search warrant context, which the Sixth Circuit questioned. Under the protocol, the government filter team identified privileged documents and only submitted a document to the court for privilege review if it found it to be definitely or possibly privileged. The Sixth Circuit held this protocol failed to sufficiently protect the plaintiffs' claims of privilege. The court reasoned that as the first decider on whether a document was privileged, the government could miss privileged items and mistakenly pass them to the investigative team. In *Baltimore Law Firm*, the search warrant was limited to a lawyer's records relating to a specific client. The government, however, took all the lawyer's emails, including correspondence with clients other than the one specified in the warrant. The filter-team protocol in that case allowed the government filter team to initially identify potentially privileged records and to submit records deemed non-privileged directly to the investigative team. The filter team could only provide potentially privileged materials to the investigative team if the parties agreed or the court, after review, allowed it. The Fourth Circuit held the filter-team protocol was legally flawed because it assigned judicial functions (resolution of a privilege dispute) to the executive branch, and because the district court authorized the filter-team protocol *ex parte* and before knowing what had been seized. Thus, the Eleventh Circuit concluded the intervenors had not met the standard for a preliminary injunction.

Note: On July 22, 2022, the Solicitor General of the United States filed the government's response in opposition to the defendants' petition for a writ of certiorari.

ATTORNEY-CLIENT PRIVILEGE & FED. R. CRIM. P. 41(G)

Fifth Circuit Reverses Dismissal of Pre-Indictment Motion for Return of Privileged Materials

In ***Harbor Healthcare System, L.P. v. United States***, 5 F.4th 593 (5th Cir. 2021), the Fifth Circuit held the district court abused its discretion when it dismissed a Federal Rule of Criminal Procedure 41(g) motion for the return of privileged information seized pursuant to search warrants.

Harbor Healthcare System, L.P. (Harbor) was the subject of two *qui tam* lawsuits alleging violations of the False Claims Act. As part of its investigation, the Department of Justice (DOJ) Civil Division issued Harbor a request for information. Eric Sprott (Sprott), Harbor's Director of Compliance, retained outside counsel to assist in responding. DOJ Civil shared the allegations with the U.S. Attorney's Office, which obtained warrants to search Harbor's offices for email exchanges, documents, and electronic devices. Pursuant to the warrants, the government seized a total of 3.59 terabytes of data and hundreds of boxes of paper records, including Sprott's computer, email account, iPhone, and paper documents. The government set up a taint team to review the seized items for privilege. Harbor filed a pre-indictment 41(g) motion seeking return of the privileged records. Since there

was no criminal proceeding against Harbor, the motion was filed as a civil case. After motions by both parties, the district court proposed a privilege-screening plan, including the creation of a privilege log. Harbor identified 3,843 privileged emails and received a list of documents that the taint team had already transferred to civil and criminal investigators. The government moved to dismiss Harbor's motion, claiming Harbor had not demonstrated irreparable harm. The district court granted the motion, holding Harbor's assertion of privilege was reasonably addressed through the privilege-screening plan and noting that Harbor could make its arguments in a post-indictment motion to suppress if an indictment was returned.

On appeal, the Fifth Circuit reversed the dismissal of Harbor's Rule 41(g) motion. The appellate court analyzed whether: (1) the motion accurately alleged the government displayed a callous disregard for plaintiff's rights; (2) plaintiff had an individual interest in and need for the material whose return is sought; (3) plaintiff would be irreparably injured by the denial of the return of the property; and (4) plaintiff had an adequate remedy at law for the redress of his grievance. First, the Fifth Circuit concluded the government showed a callous disregard for Harbor's rights because it did not seek prior authorization from the Magistrate Judge to seize privileged materials, even though it knew the items seized from Sprott contained privileged documents, and it refused to destroy or return materials the taint team identified as privileged. Second, the Fifth Circuit concluded Harbor's need for the documents did not lie in its ability to access the government's copies of the materials, but rather in the protection of the privacy of the privileged materials. Third, the appellate court concluded the government's ongoing intrusion into Harbor's privacy created an irreparable injury that could only be cured by returning and destroying the privileged materials. Finally, the Fifth Circuit concluded Harbor did not have an adequate remedy at law. The Fifth Circuit explained that a motion to suppress is not an adequate remedy because criminal charges may never be brought against Harbor, and the suppression motions vindicate a different interest than Rule 41(g) motions. Suppression prevents the use of evidence in a criminal proceeding, whereas Rule 41(g) protects the movant from deprivation of property by an unlawful search and seizure. Thus, the Fifth Circuit reversed the district court's dismissal of Harbor's Rule 41(g) pre-indictment motion.

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