

# *Criminal Tax Bulletin*

*Department of Treasury  
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This bulletin is for informational purposes. It is not a directive.

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## **CONFRONTATION CLAUSE**

### **Supreme Court Holds Victim's Statements Non-Testimonial Under "Ongoing Emergency" Test**

In *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), the Supreme Court held that a shooting victim's statements were obtained by police for the primary purpose of meeting an ongoing emergency. Therefore, the court concluded that these statements were not testimonial and their admission at trial did not violate the Confrontation Clause.

In response to a report that a man had been shot, police arrived at a gas station parking lot and found the victim lying next to his car, bleeding from an apparent gunshot wound. They asked him what had happened, who had shot him, and where the shooting had occurred. The victim stated that Richard Bryant ("Bryant") had shot him through the back door of Bryant's house. The victim was then taken to the hospital, where he died within hours.

The trial court admitted the victim's statements through the police officers' testimony, and Bryant was convicted. On appeal, the Supreme Court of Michigan reversed his convictions, holding that the victim's statements were testimonial and had been admitted in violation of the Confrontation Clause.

The U.S. Supreme Court granted certiorari and vacated the decision of the Supreme Court of Michigan, holding that the victim's statements were not testimonial and thus their admission at Bryant's trial did not violate the Confrontation Clause. The Court clarified that the relevant inquiry to determine the primary purpose of an interrogation is not the subjective intent of the individuals involved in the exchange, but rather the purpose that reasonable individuals in similar circumstances would have had. Further, the Court stated that the existence of an ongoing emergency at the time of the interrogation is one of the most important circumstances informing the primary purpose of an

interrogation. The Court added that determination of whether an ongoing emergency exists is highly "context dependent." In this case, the Court determined that the threat of an emergency extended beyond the first victim, making it more likely that the victim's statements, even if they related to past events, were obtained for the primary purpose of enabling police to meet an ongoing emergency, *i.e.*, to prevent the shooter from hurting additional persons.

## **SENTENCING**

### **Supreme Court Holds Evidence of Defendant's Post-Sentencing Rehabilitation May Be Considered at Resentencing**

In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Supreme Court held that when a defendant's sentence has been set aside on appeal, the resentencing court may consider evidence of the defendant's post-sentencing rehabilitation, and that such evidence may support a downward variance from the advisory Sentencing Guidelines range.

In October 2003, Jason Pepper ("Pepper") pleaded guilty to conspiracy to distribute 500 grams or more of methamphetamine. The government recommended a 15% downward departure from the Guidelines range of 97 to 121 months based on Pepper's substantial assistance. The district court, however, sentenced Pepper to 24 months in prison, resulting in an approximately 75% downward departure. The government appealed the sentence to the Eighth Circuit, which reversed and remanded for resentencing in light of *United States v. Booker*, 125 S. Ct. 738 (2005). Pepper completed his term of imprisonment three days after the Eighth Circuit decided his case.

At the resentencing hearing, Pepper presented evidence of his rehabilitation since his initial sentencing, including the facts that he was now drug-free and was a full-time student at a local community college, earning straight As while working part-time. Based on this evidence, the district court sentenced Pepper to 24

months in prison, the term he had already served. After a series of appeals, the Eighth Circuit concluded that post-sentencing rehabilitation was an impermissible factor to consider in granting a downward variance and remanded to the district court for resentencing. At Pepper's third sentencing hearing, the district court sentenced Pepper to 65 months' imprisonment. The Eighth Circuit affirmed the sentence, and Pepper sought certiorari.

The Supreme Court vacated the Eighth Circuit's ruling prohibiting the district court from considering evidence of Pepper's post-sentencing rehabilitation, holding that the ruling conflicted with longstanding principles of federal sentencing law, as codified in 18 U.S.C. § 3661, which states that "no limitation shall be placed on the information" a sentencing court may consider concerning a defendant's "background, character, and conduct." The Court also determined that 18 U.S.C. § 3742(g)(2), which prohibits a district court at resentencing from imposing a non-Guidelines sentence except on a ground it relied upon at the prior sentencing was inconsistent with *Booker* and expressly invalidated the provision. Accordingly, the Court vacated the Eighth Circuit's judgment and remanded for resentencing, directing the district court to consider the evidence of Pepper's post-sentencing rehabilitation, including evidence of his conduct since his last sentencing.

### **Fifth Circuit Holds Sentencing Miscalculation Was Not Harmless Error**

In *United States v. Ibarra-Luna*, 628 F.3d 712 (5th Cir. 2010), the Fifth Circuit held that the harmless error doctrine did not apply to a miscalculation of the applicable Sentencing Guidelines range because the government failed to demonstrate convincingly that the district court would have imposed the same sentence absent the error.

In 2003, Jaime Ibarra-Luna ("Ibarra") pleaded guilty to a Texas state felony for delivery of cocaine and was deported. Five days later, Ibarra reentered the country without permission and returned to Texas. In April 2008, Ibarra was charged with murder, pleaded guilty, and received a 22-year sentence. Ibarra subsequently pleaded guilty to illegally reentering the U.S. after previously having been deported.

During Ibarra's sentencing for the illegal reentry offense, the district court applied the government's recommendation of an eight-level sentencing enhancement for the prior drug conviction, and calculated a Guidelines range of 12 to 18 months.

Reasoning that the 22-year state murder sentence would be too low given the risk of early release, the district court believed the (incorrect) 12 to 18 month sentence would not satisfy the 18 U.S.C. § 3553(a) factors. Consequently, the district court imposed a 36-month sentence to run consecutive to the state murder sentence.

Ibarra appealed the sentence. The government conceded error, acknowledging that the drug conviction was not an "aggravated felony," and therefore the correct Guidelines range was 6 to 12 months. Noting that an incorrect Guidelines calculation will usually invalidate a sentence, the Fifth Circuit explained that, in order for a sentencing miscalculation to be excused as harmless error, the government must show that (1) the district court would have imposed the same sentence had it not made the error; and (2) it would have done so for the same reasons it gave at the prior sentencing. Here, the appellate court was convinced that the district court's reasons for imposing an above-Guidelines sentence would have led it to do so even if it had considered the correct Guidelines range. However, the appellate court was uncertain whether the district court would have imposed precisely the same sentence because the district court did not indicate whether the 36-month sentence was based on its Guidelines calculations or on independent factors. Accordingly, the Fifth Circuit held that the error was not harmless, vacated Ibarra's sentence, and remanded for resentencing.

### **First Circuit Holds *Apprendi* Does Not Apply to Criminal Fines**

In *United States v. Southern Union Co.*, 630 F.3d 17 (1st Cir. 2010), the First Circuit held that criminal fines are not subject to the rule enunciated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requiring facts that increase a criminal penalty beyond the statutory maximum to be submitted to a jury and proved beyond a reasonable doubt.

In this case, a jury convicted Southern Union Company ("Southern Union") of knowingly storing mercury—a hazardous waste—without a permit. The district court imposed a \$6 million fine and a \$12 million community service obligation, based on a maximum statutory fine of \$50,000 per day of violation. On appeal, Southern Union argued, *inter alia*, that the financial penalties violated *Apprendi* because the issue of the number of days of violation had not been submitted to the jury.

The First Circuit affirmed the financial penalties, holding that *Apprendi* does not apply to criminal fines. The court based its holding on the Supreme Court's

reasoning in *Oregon v. Ice*, 555 U.S. 160 (2009), in which the Supreme Court declined to extend the *Apprendi* rule to the determination of whether a sentence should be imposed concurrently or consecutively. The First Circuit noted that the *Ice* decision was premised on the fact that at common law this determination was made by judges, and thus it was not a traditional jury function. The court reasoned that a similar logic should apply to criminal fines, which were historically assessed without input from a jury.

### **Fourth Circuit Upholds Sentencing Enhancement for Attorney Who Organized Tax Fraud Scheme**

In *United States v. Thorson*, 633 F.3d 312 (4th Cir. 2010), the Fourth Circuit upheld a four-level enhancement applied to the sentence of a lawyer involved in a tax fraud conspiracy, based on his being an organizer or leader of the scheme.

Thomas Thorson (“Thorson”) and his co-conspirators designed and operated a scheme to solicit investors in partnerships that purchased and subsequently donated cemetery lots in order to create tax deductions. To make the scheme more attractive, Thorson fabricated documents to support an earlier purchase date for the cemetery sites, thus appearing to satisfy an Internal Revenue Code requirement that the property be held for more than a year. Thorson’s participation in the enterprise was advertised in some of the partnerships’ marketing materials, which cited his expertise in tax and non-profit law. Some individuals were willing to invest only after consulting with and receiving assurances from Thorson. Over the course of three years, investors paid three partnerships more than \$2.3 million and received \$9.9 million in tax deductions.

Thorson was charged with and convicted of one count of conspiracy to defraud the United States and three counts of filing false tax returns. At sentencing, the district court applied a four-level enhancement under U.S.S.G. § 3B1.1, finding that Thorson was “an organizer or leader” of the fraud scheme. Thorson appealed this enhancement on the ground that it was not supported by the evidence.

The Fourth Circuit determined that there was ample evidence to support the district court’s finding that Thorson was an organizer or leader. The court cited the facts that Thorson performed the legal work needed to carry out the conspiracy, was critical to the recruitment of investors, supervised the collection of data needed to consummate the transactions, and was regarded by his co-conspirators as a leader of the scheme.

### **Second Circuit Holds Mortgage Fraud Loss for Sentencing Purposes Was Unaffected by Drop in Market Value**

In *United States v. Woolf Turk*, 626 F.3d 743 (2d Cir. 2010), the Second Circuit held that, for sentencing purposes, the loss from the defendant’s mortgage fraud scheme was the full amount of the unpaid loans obtained from investors, regardless of the properties’ market value at the time the fraud was discovered.

Between 2003 and 2007, Ivy Woolf Turk (“Woolf Turk”) and her business partner persuaded 70 people to loan them \$27 million, purportedly for use in renovating and reselling real estate properties. The investors were told they would hold recorded first mortgages in the buildings, but Woolf Turk never recorded the mortgages. However, she obtained additional loans from banks and recorded the liens securing the banks’ loans. When the individuals’ loans came due, the company defaulted. Upon filing a civil action for relief, the investors discovered that their interests in the properties (if any) were secondary to the recorded interests of the banks. In the months after the investors filed suit, the housing market crashed, reducing the value of the properties.

In early 2009, Woolf Turk pleaded guilty to conspiracy to commit wire and mail fraud. In calculating the offense level under §2B1.1 of the Sentencing Guidelines, the government applied a 22-level enhancement because the victims’ “actual loss,” defined as the “reasonably foreseeable pecuniary harm” resulting from the offense, was between \$20 million and \$50 million. Woolf Turk argued at sentencing that the foreseeable loss was zero because the properties had not lost value at the time the fraud ceased. She argued that the subsequent housing crash caused the victims’ loss, not her actions. The trial court disagreed and sentenced her based on the government’s calculation.

On appeal, the Second Circuit affirmed, reasoning that because the victims were fraudulently induced to extend credit to Woolf Turk as unsecured creditors, the “reasonably foreseeable pecuniary harm” of the fraud was the total loss of the funds the victims had given her. The court held that the properties’ decline in value need not have been foreseeable to Woolf Turk in order for her to be held accountable for the entire loss.

## **RESTITUTION**

### **District Court Rules Government Was Not Entitled to Restitution for Lost Tax Revenues Based on Title 18 Conspiracy Convictions**

In *United States v. Hirmer*, No. 3:08cr79, 2011 WL 577378 (N.D. Fla. Feb. 8, 2011), the district court ruled that the government was not entitled to restitution under the Mandatory Victims Restitution Act (“MVRA”) for lost tax revenues arising from the defendants’ convictions under 18 U.S.C. § 371.

Claudia and Mark Hirmer (“the Hirmers”), along with a number of co-conspirators, conducted a fraudulent scheme to promote tax- and debt-elimination products through PQI, a Panamanian business headquartered in Florida. The Hirmers and their co-defendants were convicted of conspiracy to defraud the United States and to commit wire fraud in violation of 18 U.S.C. § 371, and conspiracy to commit money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and (h). The Hirmers themselves were also convicted of tax evasion and failure to file returns in violation of 26 U.S.C. §§ 7201 and 7203.

The government sought restitution for its loss of tax revenue under the MVRA, based on the defendants’ convictions for conspiracy to defraud the IRS. Arguing that the actual tax loss could not be determined because of the sparseness of the defendants’ financial records, the government asked the court to estimate the loss as 20% of the defendants’ gross receipts, pursuant to the guidelines for failure to file returns under U.S.S.G. § 2T1.1(c)(2)(A). The government further argued that it was unable to comply with the MVRA requirement of proving the amount of loss incurred by each victim of the offense, because it was impossible to determine which of PQI’s 11,000 customers were true victims and which had purchased PQI products for the purpose of avoiding tax.

The district court rejected the governments’ arguments and denied its claim for restitution. The court found that government counsel had failed to work with the IRS to determine the actual tax loss and did not provide a reasonable basis to estimate the loss. The court also found that the government had failed to demonstrate that it was unable to seek restitution on behalf of the individual victims and had offered no proof that PQI’s customers intended to defraud the IRS.

### **Fourth Circuit Holds Sentencing Court Must Specify Statutory Basis for Restitution**

In *United States v. Leftwich*, 628 F.3d 665 (4th Cir. 2010), the Fourth Circuit held that, to ensure effective appellate review, a district court ordering restitution must indicate whether it has done so pursuant to the Victim Witness Protection Act (“VWPA”) or the Mandatory Victims Restitution Act (“MVRA”).

June Orlando Leftwich (“Leftwich”) pleaded guilty to charges of mail fraud and filing false claims. The plea agreement established that he engaged in a multi-year scheme to defraud the United States through the submission of fraudulent tax returns to the IRS. Of the more than \$4 million claimed on the false returns, the IRS issued \$2,404,087 in refund payments to Leftwich and his co-conspirators before the scheme was detected.

Based upon the information provided by the government at sentencing, the district court ordered restitution in the amount of \$2,404,087. Neither the court’s statement during the sentencing hearing nor its written order indicated the statute under which the restitution was imposed. Leftwich did not contest his convictions but appealed from the district court’s restitution order, arguing that the district court failed to make sufficient findings of fact to support a restitution order under the VWPA. The government countered that restitution in the full amount of \$2,404,087 was mandatory under the MVRA, which did not require the district court to make the specific findings that Leftwich contended were necessary.

The Fourth Circuit observed that the VWPA and the MVRA impose different requirements for determining restitution and concluded that the failure of the district court to specify the statute under which it ordered restitution prevented effective appellate review of the district court’s exercise of discretion. Accordingly, the appellate court vacated the restitution order and remanded to the district court for further proceedings to identify the statute under which restitution was awarded and to make the required findings under that statute.

### **Second Circuit Holds Restoration is Discretionary**

In *United States v. Pescatore*, 637 F.3d 128 (2d Cir. 2011), the Second Circuit held that the Department of Justice was not required to use the defendant’s forfeited assets as restoration to satisfy his restitution obligations.

In mid-2003, Michael Pescatore (“Pescatore”) was arrested on charges of fraud and enterprise corruption. Subsequently, the United States commenced an *in rem* civil forfeiture action against property owned by Pescatore on the ground that the property was derived from proceeds traceable to illegal trafficking in stolen vehicles and vehicle parts. The following year, Pescatore was indicted on several charges, including operation of an illegal chop shop, mail fraud, conspiracy to defraud the U.S., and money laundering (the “Chop Shop Indictment”). A second indictment charged him with six counts of extortion, and he was convicted on three of the six counts.

In March 2006, Pescatore pleaded guilty to one count of the Chop Shop Indictment. The plea agreement was designed to settle not only the Chop Shop Indictment charges, but also the civil forfeiture action and the sentence for the extortion conviction. Pescatore was sentenced to 132 months imprisonment, ordered to pay restitution of no less than \$3 million, and ordered to forfeit \$2.5 million in cash and real estate. With respect to the forfeited assets, the United States Attorney’s Office (“USAO”) agreed to recommend that the Department of Justice (“DOJ”) grant restoration, *i.e.*, the use of Pescatore’s forfeited assets to satisfy all or part of his restitution obligation. Pescatore was advised that the USAO had authority only to recommend restoration and that the final decision whether to grant such relief rested with DOJ.

DOJ declined the restoration request, and the district court denied Pescatore’s motion for an order compelling restoration. On appeal, the Second Circuit affirmed, noting that nothing in the statutory provisions, DOJ’s normal operating procedures, or in the plea agreement required DOJ to use the forfeited assets to relieve Pescatore of his restitution obligations. Further, the court noted that forfeiture and restitution are separate remedies with different purposes, and that, under its manual, DOJ has discretion to transfer forfeited assets to victims where no other property is available to satisfy a restitution order. In this case, there was no evidence that Pescatore lacked sufficient assets to pay restitution.

## **FORFEITURE**

### **Ninth Circuit Holds Dismissal of Civil Forfeiture Action Bars Criminal Forfeiture Involving Same Assets**

In *United States v. Liquidators of European Federal Credit Bank*, 630 F.3d 1139 (9th Cir. 2011), the Ninth Circuit held that a final judgment against the government in an earlier civil forfeiture proceeding acted as *res judicata*, barring a subsequent criminal forfeiture action involving the same assets.

The case involved Pavel Ivanovich Lazarenko (“Lazarenko”), Ukraine’s former prime minister, who had laundered money through many banks worldwide, including the European Federal Credit Bank (“Eurofed”) in Antigua and Barbuda (“Antigua”). Antigua ordered liquidation of Eurofed and appointed Liquidators of Eurofed (“Liquidators”) to assist in collecting and distributing Eurofed’s assets to its rightful owners. At the same time, the U.S. indicted Lazarenko on money laundering and other charges. The indictment contained a criminal forfeiture count for certain specified property, but did not include \$2.5 million in funds and Ukrainian bonds that had been moved from Eurofed to a Bank of America account in San Francisco. Lazarenko was convicted of money laundering in 2004, and the government moved for criminal forfeiture of the assets mentioned in the indictment.

In 2005, the government initiated a civil forfeiture action against the \$2.5 million that had not been included in the indictment. The district court dismissed the civil action on statute of limitations grounds, but issued a criminal seizure warrant over the same assets. The government retained possession of the assets and applied for a forfeiture order. Liquidators raised various legal challenges to the seizure and the criminal forfeiture action, but the court ultimately entered a final forfeiture order in the government’s favor.

On appeal, the Ninth Circuit reversed the forfeiture order, concluding that the action was barred by *res judicata*. The court noted that, because a civil forfeiture action carries a lower burden of proof, the government may pursue civil forfeiture after the failure of a criminal forfeiture action, but not vice versa. The court held that dismissal of the civil forfeiture action in this case barred the government from subsequently obtaining criminal forfeiture because the claims arose from the same set of facts, *i.e.*, the defendant’s criminal conduct.

## MONEY LAUNDERING

### **Ninth Circuit Holds Cash Transfers during Ponzi Scheme Supported Convictions under 18 U.S.C. § 1957**

In *United States v. Bush*, 626 F.3d 527 (9th Cir. 2010), the Ninth Circuit upheld the defendant's convictions under 18 U.S.C. § 1957 for certain wire transfers to his bank accounts on the grounds that the transfers did not merge with his underlying fraud offenses and did not reflect "costs" of his Ponzi scheme.

Between 1998 and 2002, Charles Nolon Bush ("Bush") conducted a \$36 million Ponzi scheme, defrauding approximately 400 victims. When the FBI began investigating the scheme, Bush established an office on the Caribbean island of Nevis and asked victims to wire him money at the Bank Crozier in Grenada, purportedly for the purpose of engaging in other high-yield investments. Subsequently, Bush and his associates began directing their office manager in Nevis to transfer money from the Bank Crozier to various accounts in the U.S., including accounts held by Bush in Seattle.

In 2008, Bush was convicted of securities fraud, wire fraud, mail fraud, and fifteen counts of engaging in unlawful monetary transactions in violation of 18 U.S.C. § 1957. The money laundering charges were based on transfers to Bush's Seattle accounts that exceeded \$10,000. The district court sentenced Bush to 360 months' imprisonment. On appeal, Bush contended, *inter alia*, that his wire fraud convictions merged with his money laundering convictions and that the government failed to prove that his money-laundering transactions involved the "profits" of his Ponzi scheme, as required under *United States v. Santos*, 553 U.S. 507 (2008).

The Ninth Circuit first held that *Santos*, which involved 18 U.S.C. § 1956, also applies to Section 1957 convictions and that where a transaction in criminally-derived property creates a "merger" problem, the "proceeds" used in the transaction must include the "profits" of the predicate criminal activity. Next, the court determined that the circumstances surrounding the securities, wire fraud, and mail fraud convictions were all distinct from the money laundering, thus alleviating any merger concerns. With respect to the wire transfers from Bank Crozier to Bush's Seattle accounts, the court further determined that these did not represent "costs" of the scheme because their purpose was primarily to conceal the illegal sources of Bush's income rather than to generate new investments. Accordingly, the court

affirmed Bush's money laundering convictions.

## TITLE 26

### **Fifth Circuit Rejects Defendant's Argument that Section 7206(1) Case Was Not a Tax Case**

In *United States v. Bishop*, 629 F.3d 462 (5th Cir. 2010), the Fifth Circuit held, *inter alia*, that the trial court did not commit plain error by preventing the defendant from arguing that a case brought under § 7206(1) was "a perjury case" rather than a "tax case."

Gladys Bishop ("Bishop") was the owner and president of Quality Trucking, Inc. ("Quality Trucking"). On her 2000, 2001 and 2002 corporate tax returns, Bishop failed to report a total of \$534,937 in income. She was convicted on three counts of making a false statement in a tax return in violation of 26 U.S.C. § 7206(1) and sentenced to 36 months in prison.

On appeal, Bishop argued in part that the trial court violated her constitutional right to present a complete defense by preventing her from arguing that her case was a "perjury case" rather than a "tax case." She did not argue that she should have been charged under a different statute. Rather, her allegation of error stemmed from the district court's ruling preventing her attorney from asking an IRS special agent whether the case was "basically a perjury case." The government objected to the question, and the court sustained the objection, observing, "[t]his is a tax case." Because Bishop's counsel did not inform the district court that barring the question potentially violated Bishop's constitutional rights, the Fifth Circuit reviewed her argument for plain error.

The appellate court affirmed, reasoning that Bishop had misread its discussion of § 7206(1) in *United States v. Adams*, 314 Fed.Appx. 633, 638 (5th Cir. 2009). In that case, the court had stated in dicta that a § 7206(1) false return case is "a perjury case," unlike a tax evasion or failure to file case. The court interpreted those remarks as simply distinguishing a charge under § 7206(1) from other types of tax-related charges. The court emphasized, "[w]e did not hold, nor would it make sense to hold, that false return cases are not 'tax cases.'" 629 F.3d at 468-69. Moreover, the court noted that even if Bishop's characterization of *Adams* were accurate, she could not show that the district court's ruling affected the outcome of its proceedings, as is required for a reversal based on plain error.

## TITLE 18

### **Ninth Circuit Holds Breach of Fiduciary Duty Not Required for “Honest Services” Mail Fraud Conviction**

In *United States v. Milovanovic*, 627 F.3d 405 (9th Cir. 2010), the Ninth Circuit held that “honest services” mail fraud does not require proof of a fiduciary relationship or economic harm to the victim.

Brano Milovanovic (“Milovanovic”) and Tony Lamb (“Lamb”) were indicted for corrupting the issuance of State of Washington commercial drivers’ licenses (CDLs). Milovanovic was a contract translator for the state, and Lamb also was a contractor hired to administer CDL driving tests. Milovanovic, Lamb, and their clients allegedly arranged to get CDLs by cheating on the written and driving tests, as well as by falsifying state residency, in exchange for bribes. The state did not suffer economic harm on account of the dishonest tests and residency certifications.

The indictment charged Milovanovic, Lamb, and four customers with mail fraud and conspiracy to commit mail fraud under 18 U.S.C. §§ 1341, 1346, and 2. The district court dismissed the indictment on the ground that the “honest services” mail fraud statute required a fiduciary relationship, and indicated that the jury would be instructed that the crime required economic harm to the victim. The government appealed, arguing that the defendants were fiduciaries of the State of Washington.

The Ninth Circuit “assume[d] without deciding” that the defendants were not fiduciaries and focused instead on whether a fiduciary duty is an essential element of “honest services” mail fraud. Based on an analysis of the text of the mail fraud statute and its purpose of preventing and punishing fraud, the appellate court determined that the statute was not limited to fiduciaries. The court further held that “honest services” mail fraud did not require a showing of economic harm to the victim, explaining that “[t]he gravamen of the harm prohibited by the statute is dishonesty in providing services where the victim, the government in this case, was entitled to have the services performed honestly.” 627 F.3d at 413. Accordingly, the appellate court concluded that the district court erred in dismissing the indictment.

## SEARCH AND SEIZURE

### **Third Circuit Upholds Application of Plain View Doctrine to Computer Searches**

In *United States v. Stabile*, 633 F.3d 219 (3d Cir. 2011), the Third Circuit held that the plain view doctrine applies to searches of computer files, but the doctrine’s scope will depend on the facts of each case.

In July 2006, Secret Service special agents and local law enforcement visited Salvatore Stabile (“Stabile”) to question him about passing counterfeit checks. Stabile was not home, but the woman with whom he lived consented to a search of the premises. The investigators found evidence of financial fraud, as well as DVDs with titles suggestive of child pornography. After seizing six hard drives and the DVDs, investigators obtained state search warrants to search the hard drives for evidence of financial crimes and child pornography. However, upon discovering that the DVDs did not contain evidence of child pornography, a Secret Service special agent instructed a local detective to search only for evidence of financial crimes. During his search, the detective viewed file names suggestive of child pornography and opened twelve of these files. Investigators then sought a federal search warrant to search the hard drives for further evidence of child pornography, which they ultimately found.

Stabile was arrested and pleaded guilty to receipt and possession of child pornography, and to bank fraud. He was sentenced to 78 months’ imprisonment. On appeal, he argued, *inter alia*, that the plain view doctrine did not permit the detective to examine the file names that were suggestive of child pornography. The Third Circuit concluded that the government properly examined the file names pursuant to the plain view doctrine because the government had a legal right to seize and search the hard drives for evidence of financial crimes and because the incriminating character of the file names was immediately apparent.

In a footnote, the court declined to follow the Ninth Circuit’s suggestion in *United States v. Comprehensive Drug Testing*, 621 F.3d 1162 (9th Cir. 2010), that the government “forswear reliance on the plain view doctrine” when seeking a warrant to examine a computer hard drive. Instead, the court stated that the scope of the plain view doctrine should be allowed “to develop incrementally through the normal course of fact-based adjudication.” *Stabile*, 633 F.3d at 241 n. 16 (citation omitted).

## **Sixth Circuit Holds Warrantless Seizure of E-mails from Defendant's ISP Violated Fourth Amendment**

In *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2011), the Sixth Circuit held that the government violated the defendant's Fourth Amendment rights by compelling his internet service provider ("ISP") to turn over his e-mails without first obtaining a warrant.

Steven Warshak ("Warshak") ran several small companies that sold herbal supplements. To increase profits, Warshak engaged in various fraudulent business practices. In 2006, a grand jury returned a 112-count indictment charging Warshak with numerous offenses, including mail, wire, and bank fraud; money laundering; and conspiracy to commit those offenses.

During its investigation of Warshak, government agents had requested, pursuant to the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 *et seq.*, that Warshak's ISP preserve his e-mails. The government later obtained a subpoena under the SCA compelling the ISP to turn over the e-mails it had preserved. In a pretrial motion, Warshak sought to exclude thousands of e-mails that the government had obtained from his ISP. The trial court denied Warshak's motion, and Warshak was convicted of the majority of charges he faced. On appeal, Warshak argued, *inter alia*, that the government's warrantless seizure of his e-mails violated the Fourth Amendment's prohibition on unreasonable searches and seizures.

The Sixth Circuit held that an ISP subscriber enjoys a reasonable expectation of privacy in the contents of e-mails that are stored with, or sent or received through, a commercial ISP. Accordingly, the court agreed with Warshak that the government violated his Fourth Amendment rights by compelling his ISP to turn over his e-mails without obtaining a warrant. The court further held that, to the extent the SCA purports to permit the government to obtain such e-mails without a warrant, the SCA is unconstitutional.

The court concluded, however, that the e-mails were not subject to the exclusionary rule because the government relied in good faith on the SCA when it subpoenaed them from the ISP.

## **Seventh Circuit Holds Evidence Found in Improper Search Incident to Arrest Is Admissible under Inevitable Discovery Doctrine**

In *United States v. Cartwright*, 630 F.3d 610 (7th Cir. 2010), the Seventh Circuit held that a firearm found during the improper search of a vehicle incident to the driver's arrest was admissible because it would inevitably have been discovered through lawful means.

Dewayne Cartwright ("Cartwright") was pulled over by a police officer for a traffic violation. When he failed to produce a driver's license and gave a false name, the officer arrested him and searched the car, finding a gun in the back seat. Because Cartwright was under arrest and his passenger, who owned the car, did not have a driver's license, the officer had the car towed pursuant to the police department's policy. He performed an inventory search of the car prior to its impoundment, finding nothing of value. Contrary to department policy, the officer did not make a list of the property found during the inventory search.

Cartwright was charged with possessing a firearm as a felon. He moved to suppress the firearm, relying on *Arizona v. Gant*, 129 S. Ct. 1710 (2009), which permits a warrantless search of a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment, or it is reasonable to believe the vehicle contains evidence of the offense of arrest. The government acknowledged that *Gant* made the search in this case improper but argued that the police would have inevitably discovered the gun pursuant to an inventory search. The district court agreed and denied the motion. Cartwright entered a conditional guilty plea and was sentenced to 84 months in prison.

On appeal, the Seventh Circuit affirmed Cartwright's conviction. The court explained that under the inevitable discovery doctrine, if the government can establish that the evidence would inevitably have been discovered through lawful means, then the evidence should be admitted. The court concluded that an inventory search would inevitably have been conducted under the circumstances of this case and that, if it had not been found earlier, the gun would have been found during such a search. Although the actual inventory search that was performed deviated from department policy because the officer failed to list the property found, the court stated that this "minor" deviation did not render the inventory search unreasonable.

## **Sixth Circuit Holds Discovery of Arrest Warrant Did Not Dissipate Taint of Unlawful Stop**

In *United States v. Gross*, 624 F.3d 309 (6th Cir. 2010), the Sixth Circuit held that where an officer engages in an illegal stop and learns that the target has an outstanding arrest warrant, the discovery of the warrant does not constitute an intervening circumstance that would purge the taint of the illegal stop.

Demetrios Gross (“Gross”) was sitting alone in the front passenger seat of a legally parked car with its engine running. A police officer encountered the car and checked its license plates, confirming that there were no outstanding warrants related to its owner. The officer then parked behind the car and turned on his spotlights. He approached Gross, requested identification, and ran a warrant check, which revealed that Gross had an outstanding felony warrant for carrying a concealed weapon. Gross was arrested, taken to the sheriff’s department, and searched. He set off the metal detector, but the police were unable to identify the source. Gross then requested to use the restroom, where police later discovered a firearm. A DNA test conducted pursuant to a search warrant matched Gross’s DNA to genetic material from the firearm.

Gross was charged with one count of illegal possession of a firearm. He initially entered a plea of not guilty and filed a motion to suppress all evidence obtained after the stop. The district court denied the motion, and Gross pleaded guilty, reserving his right to appeal the denial of the motion. On appeal, he argued that the officer’s act of blocking his car in its parking space constituted an illegal stop and that all evidence obtained after the stop should be suppressed.

The Sixth Circuit agreed that the stop was unlawful and held, *inter alia*, that the discovery of the outstanding arrest warrant did not amount to an intervening circumstance that would purge the taint of the illegal stop. Accordingly, the court reversed the denial of Gross’s motion to suppress as to the firearm.

### **EVIDENCE**

#### **Ninth Circuit Holds Best Evidence Rule Inapplicable to Witness Testimony Regarding the Absence of Records**

In *United States v. Diaz-Lopez*, 625 F.3d 1198 (9th Cir. 2010), the Ninth Circuit held that the best evidence rule

did not apply to a Border Patrol agent’s testimony regarding his search of a computer database, which had revealed the absence of records showing the defendant had completed the necessary process to re-enter the United States after being removed.

Luis Miguel Diaz-Lopez (“Diaz”), a Mexican citizen, was charged under 8 U.S.C. § 1326(a) with being a removed alien found in the United States without permission. During the trial, the government introduced testimony from a Border Patrol agent that he had searched a government database and found no record of the defendant having filed the required application to re-enter the United States after having been removed. The district court found Diaz guilty and sentenced him to 21 months in prison followed by three years of supervised release.

On appeal, Diaz argued, *inter alia*, that the Border Patrol agent’s testimony regarding the results of his computer database search violated the best evidence rule under Federal Rules of Evidence (“FRE”) 1002 because the testimony was offered without the production of an “original” printout showing the search results. The Ninth Circuit first noted that the best evidence rule requires the production of an original document instead of a copy to prove the contents of the document. The court held that the best evidence rule was not applicable to the agent’s testimony because it had not been introduced to prove the content of a writing, but rather to prove that a particular record was not part of the contents of a database. Accordingly, the court affirmed Diaz’s conviction.

#### **Ninth Circuit Holds Government’s Failure to Disclose Evidence of Investigation of Witness Violated Brady/Giglio**

In *United States v. Kohring*, No. 08–30170, 2011 WL 833263 (9th Cir. March 11, 2011), the Ninth Circuit held that the government’s suppression of evidence that a key witness in a public corruption case was under investigation for sex offenses violated *Brady/Giglio*.

Victor Kohring (“Kohring”), a former member of the Alaska State House of Representatives, was convicted on three public corruption counts arising from purported cash payments and other benefits received from Bill Allen (“Allen”) in exchange for various legislative acts benefitting Allen’s oil field services company, VECO Corporation. Kohring’s appeal of his conviction coincided with the prosecution of former U.S. Senator Ted Stevens for failure to disclose gifts he

had received from Allen. Stevens was convicted on public corruption charges but the charges were later dismissed because the prosecution had suppressed evidence pertaining to Allen, a key witness against Stevens.

After the dismissal of charges against Senator Stevens, Kohring sought an order directing the government to disclose all evidence favorable to him under *Brady/Giglio*. On remand, the district court found that the government had failed to disclose evidence favorable to Kohring, including evidence that Allen was under investigation for alleged sexual misconduct with a minor. The district court concluded, however, that the suppression of this evidence did not violate *Brady/Giglio* because the suppression did not prejudice Kohring.

The Ninth Circuit disagreed, holding that much of the suppressed evidence was prejudicial and that the prosecution had therefore violated *Brady/Giglio*. The court noted that evidence is considered prejudicial or material for purposes of *Brady/Giglio* if there is a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different. Applying this standard, the court concluded, *inter alia*, that information concerning the investigation of Allen for sex offenses, which included evidence that he had attempted to suborn perjurious testimony from a witness, was material to Kohring's case because it was probative of Allen's character for truthfulness.

## **STATUTE OF LIMITATIONS**

### **Ninth Circuit Upholds Suspension of Statute of Limitations from Date of Government's MLAT Request**

In *United States v. Jenkins*, 633 F.3d 788 (9th Cir. 2011), the Ninth Circuit held that the district court properly suspended the running of the statute of limitations from the date of the government's Mutual Legal Assistance Treaty ("MLAT") request to Canada until the date Canada took final action on the request.

Ira Gentry ("Gentry") and Randy Jenkins ("Jenkins") engaged in a scheme by which they secretly acquired millions of shares of stock in a corporation and artificially inflated the stock's value through misrepresentations in SEC filings and press releases. They then transferred the shares to Canadian brokerage accounts, sold the stock for a profit, and wired the proceeds to bank accounts in the U.S. and abroad. Both failed to report any income from their stock sales on

their tax returns.

On March 16, 2005, the government sent an MLAT request to Canada seeking the records of accounts linked to Gentry and Jenkins. On March 22, 2005, the government applied to the district court for suspension of the five-year statute of limitations pursuant to 18 U.S.C. § 3292, which permits a district court to suspend the statute if the government reasonably believes evidence of a crime under grand jury investigation is in a foreign country and has requested that evidence. The suspension period lasts until the foreign government has taken "final action" on the official request. The government's March 22 application included an unverified copy of the MLAT request and an unsworn memorandum. On June 20, 2005, the government submitted a "supplemental application" including a sworn declaration from an IRS agent detailing why the government believed there was relevant evidence in Canada. The district court suspended the statute of limitations from March 16, 2005 to April 12, 2006, the last date on which Canada provided certified copies of the corporate records at one of the brokerage houses.

Gentry and Jenkins were indicted May 3, 2006, and were ultimately convicted of conspiracy, securities fraud, wire fraud, tax evasion, international concealment money laundering, concealment money laundering, and transactional money laundering. The district court sentenced Gentry to 180 months and Jenkins to 90 months of imprisonment.

On appeal, the defendants argued in part that the district court erred in suspending the statute of limitations. The Ninth Circuit disagreed. The court first held that whether or not the government's March 22, 2005 application was sufficient, the June 20, 2005 supplemental application was adequate to show that it was reasonably likely that evidence of the charged offenses was in Canada. Second, with respect to those counts for which the statute of limitations had expired before the government applied for a suspension, the court determined that the application satisfied the temporal requirements of a § 3292 application in the Ninth Circuit, *i.e.*, that the MLAT request be made before the statute of limitations expires and that the application for suspension be submitted before the indictment is filed. Finally, the Ninth Circuit agreed with the district court that final action in the case occurred on April 12, 2006. The court concluded that no counts of the indictment were time-barred.

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