



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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FIRST AMENDMENT

Fifth Circuit Holds First Amendment Protects Recording Police Activity Subject Only to Reasonable Time, Place, and Manner Restrictions

In *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), the Fifth Circuit held, *inter alia*, that the First Amendment protects recording of police activity, subject only to reasonable time, place, and manner restrictions.

Philip Turner (“Turner”) was video recording a Ft. Worth (Texas) police station from a public sidewalk across the street when Officers Grinalds and Dyess arrived and asked Turner for identification (“ID”). Turner, who was unarmed, continuously refused to provide any ID. Eventually, the officers handcuffed him, took his camera, and placed him in the back of their patrol car. The officers’ commander, Lieutenant Driver, arrived and ultimately, released Turner and returned his video camera. Turner filed suit against all three officers alleging violations of his First Amendment rights (among others). The district court granted all three officers’ motions to dismiss on the basis of qualified immunity and Turner appealed.

The Fifth Circuit noted that Turner’s burden in demonstrating the inapplicability of the officers’ qualified immunity defense required him to show that (1) the officials violated a statutory or constitutional right and (2) the right was “clearly established” at the time of the challenged conduct. The court’s analysis centered on the clearly established prong, which was the focus of the district court’s analysis, and concluded that there was no clearly established First Amendment right to record police at the time of Turner’s activities. However, the court then proceeded to determine (for future cases) whether such a constitutionally-protected right existed. The court reasoned that the First Amendment protects news gathering and film and a major purpose of the First Amendment is to protect the free discussion of governmental affairs. Thus, given that filming the

police contributes to the public’s ability to hold the police accountable, ensure officers are not abusing their power, make informed decisions about police policy, and often helps police officers; the Fifth Circuit concluded that the First Amendment protects the right to record the police subject to time, place, and manner restrictions.

Dissenting, Judge Clement opined that the majority violated longstanding principle and Supreme Court precedent because it employed a high level of generality in defining “clearly established law” when acknowledging the right to film the police. A law is clearly established when there is directly-controlling authority, a consensus of cases, or persuasive authority such that a reasonable officer could not have believed his actions were lawful. Here, the only consensus (if any) focuses only on whether there is a right to film the police carrying out their duties in public, which is inapplicable according to the dissent, because Turner was filming the police station. Finally, because the majority did not hold that the officers actually violated the First Amendment, an officer acting under similar circumstances in the future will not have violated any clearly-established law.

FOURTH AMENDMENT

Fifth Circuit Holds Consent Search was Limited in Time to Initial Search

In *United States v. Escamilla*, 852 F.3d 474 (5th Cir.), *cert. denied*, 138 S. Ct. 336 (2017), the Fifth Circuit held, *inter alia*, that a suspect’s consent to search his cell phone terminated when the officer handed the phone back to the suspect, and did not extend to a second search later that day.

Border Patrol agents conducted a traffic stop after Miguel Escamilla (“Escamilla”) was seen driving on private land near the Mexican border, on a known smuggling route. During the stop, agents asked Escamilla if they could search his cell phone.

Without verbally agreeing, he handed an agent his phone. The agent looked through the visible information on the phone, which was sparse, then handed the phone back to Escamilla. After Escamilla's arrest and arrival at the border patrol station, agents took his personal property, including the cell phone, and turned it over to Drug Enforcement Administration ("DEA") agents, informing them that Escamilla had consented to a search of his phone. The DEA agents then searched the phone to obtain its number and the numbers of any contacts or calls. After completing the second search, agents told Escamilla to reclaim his personal property. He reclaimed his driver's license and other personal items, but not the cell phone. The DEA agents asked Escamilla about the phone and he stated it did not belong to him, although he admitted he had used it. The DEA performed a third, more thorough search several days later. Escamilla was convicted of drug possession and conspiracy and subsequently moved to suppress the electronic evidence obtained from each search of the phone.

Misunderstanding the sequence of events, the district court believed the phone had not been returned to Escamilla after the first search and held that his consent rendered the second search permissible. The district court also found the third search, after Escamilla disclaimed any ownership of the phone, did not violate his Fourth Amendment rights.

The Fifth Circuit held that, during the initial stop, the consent search was completed when the phone was given back to Escamilla. The appellate court explained that the scope of consent is determined by an objective reasonableness standard, taking into account express or implied limitations of the consent. A reasonable person would believe that the consent and the search both ceased at that point. The second, more thorough DEA search of the phone was a separate search which was not covered by Escamilla's earlier consent. Without a warrant, the second search violated the Fourth Amendment. The court, however, held that admission of the information obtained through the second warrant was harmless error. The court agreed with the district court's ruling that Escamilla lacked standing to challenge the third search of the phone, conducted after he had disclaimed any ownership interest and left the phone with the DEA agents.

Seventh Circuit Holds No Reasonable Expectation of Privacy During Transportation in Marked Police Van

In *United States v. Paxton*, 848 F.3d 803 (7th Cir. 2017), the Seventh Circuit held, *inter alia*, that use of a recording device concealed in the holding compartment of a marked police van did not violate a reasonable expectation of privacy of the individuals transported in the van immediately after their arrests.

Cornelius Paxton ("Paxton") and four other individuals were charged with drug conspiracy, conspiracy to commit robbery, and firearms offenses. Two defendants were arrested in one location and the remaining three where the robbery was to occur. Each individual was asked his name, age, and place of residence just before entering the police van used to transport them to the police station. None were read their *Miranda* rights until their arrival at the station. The van, clearly marked as a police vehicle, had three compartments separated by steel walls and thick plexiglass windows. The driver and one officer were in the front section, the second was unoccupied, and all five defendants were in the rear of the van, in very-close quarters. Speaking in a normal voice, conversations in the rear of the van would not typically be audible to individuals in the front. The van was set up for audio and audio-visual recording of the rear-holding compartments. Although the devices could transmit in real time, during the drive at issue they were set to record for later listening and/or viewing. Police officials did not hear the conversations until a later time when they listened to the recordings.

Paxton and another detainee began conversing once they were in the van, and Paxton made several incriminating statements. After the other three defendants were arrested and entered the van, they all began conversing about the crime and made additional incriminating statements. At some point, one of the other individuals voiced a concern about whether the van was bugged, but they all continued to talk and made additional incriminating comments. The devices in the van recorded not only the conversations, but also the identifying information each individual stated to the police upon entering the van. The identifying information each defendant provided just prior to entering the van was used to identify each speaker on the recording.

Paxton moved to suppress all statements that he and his co-conspirators made in the police van. The trial court held that the initial conversations were subject

to a reasonable expectation of privacy protected by the Fourth Amendment's prohibition against unreasonable searches, but only until one of the men raised the probability that the van was monitored. Paxton challenged the partial suppression as delineated by the trial court, while the government challenged the finding that there was any reasonable expectation of privacy in a marked police vehicle.

On appeal, the Seventh Circuit held that although there may have been a subjective expectation of privacy in the rear compartment of the van, any expectations were not objectively reasonable. Previous decisions by numerous courts have rejected Fourth Amendment protection to defendants held in a squad car, but did not address different types of law-enforcement vehicles with varying configurations. Notwithstanding the configuration of the vehicle or the lack of visible electronic-recording devices, the defendant was a detainee in restraints, transported to the police station in a marked police vehicle. Reversing the district court's partial suppression of the statements made in the van, the Seventh Circuit held that when applied to detainees held in a police van for transport to the police station subsequent to their arrest, any subjective expectation of the defendant that his conversation could not be overheard by the driver was not objectively reasonable.

FIFTH AMENDMENT

Supreme Court Holds Sentencing Guidelines Not Subject to Void-for-Vagueness Challenge

In *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court held the advisory Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause and residual clause of U.S.S.G. § 4B1.2(a) is not void for vagueness.

Travis Beckles ("Beckles") was convicted of possession of a firearm by a convicted felon (18 § 922(g)(1)). According to the presentence investigation report, the firearm was a sawed-off shotgun, and Beckles was therefore eligible for a sentencing enhancement as a "career offender" under the Sentencing Guidelines. The version of the Guidelines in effect when Beckles was sentenced provided a defendant is a career offender if, among other things, "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense." U.S.S.G § 4B1.1(a). The Guidelines defined "crime of violence" as "any offense under federal or state law, punishable by

imprisonment for a term exceeding one year that ... *otherwise involves conduct that presents a serious potential risk of physical injury to another.*" § 4B1.2(a) (emphasis added). Agreeing that Beckles' § 922(g)(1) conviction qualified as a "crime of violence" under the "residual clause" (shown in italics above) and that Beckles qualified as a career offender, the district court sentenced Beckles to 360 months' imprisonment, a sentence within the Guidelines range for a career offender.

The Eleventh Circuit affirmed Beckles' conviction and sentence and the Supreme Court denied certiorari. Beckles then filed a motion to vacate his sentence, contending his offense was not a "crime of violence" and, therefore, he did not qualify as a career offender under the Guidelines. The district court denied the motion, and the appellate court again affirmed. While Beckles' second petition for certiorari was pending, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), holding imposing an increased sentence under the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) ("ACCA"), which contained the same language as the Guidelines' residual clause, violated Due Process because the clause was unconstitutionally vague. The Court then vacated Beckles' judgment, and remanded in light of *Johnson*. The Eleventh Circuit again affirmed, distinguishing the ACCA's unconstitutionally vague residual clause from the Guidelines' residual clause. Beckles filed another petition for certiorari, arguing § 4B1.2(a)'s residual clause is void for vagueness.

The Court granted certiorari to resolve a conflict among the circuit courts on whether *Johnson's* vagueness holding applies to the Guidelines' residual clause. In answering this question, the Court noted that the ACCA's residual clause, where applicable, *required* sentencing courts to increase a defendant's prison term from a statutory maximum of ten years to a minimum of 15 years, a requirement that fixed, in an impermissibly vague way, a higher range of sentences for certain defendants. The Court concluded that unlike the ACCA, the advisory Guidelines do not fix the permissible range of sentences but, rather, "merely guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." Accordingly, the Guidelines are not subject to a vagueness challenge under the Due Process Clause and the residual clause in § 4B1.2(a)(2) is not void for vagueness.

In reaching its holding, the Court also concluded the twin concerns underlying the vagueness doctrine—providing notice and preventing arbitrary

enforcement—were not implicated. As to the former, the Court reasoned all of the notice required is provided by the applicable statutory range, which establishes the permissible bounds of courts’ sentencing discretion. As to the latter, because the Guidelines merely advise sentencing courts how to exercise their discretion within the bounds established by Congress, they do not implicate the vagueness doctrine’s concern with arbitrary enforcement.

In *dicta*, distinguishing, for example, *ex post facto* from void-for-vagueness inquiries, the Court noted that its holding did not render the advisory Guidelines immune from constitutional scrutiny.

Eleventh Circuit Holds Special Agent’s Testimony Neither False Nor Misleading

In *United States v. Horner*, 853 F.3d 1201 (11th Cir. 2017), *cert. denied*, ___ S. Ct. ___, No. 17-6559, 2018 WL 311598 (January 8, 2018), the Eleventh Circuit held, *inter alia*, that an IRS special agent’s testimony regarding the effect of unclaimed business expenses on the calculation of tax due was neither false nor misleading, and thus did not constitute prosecutorial misconduct under *Giglio*.

After a trial by jury, Kenneth and Kimberly Horner (the “Horners”) were each found guilty of false subscription (26 U.S.C. § 7206(1)) and aiding or assisting a false return (26 U.S.C. § 7206(2)) stemming from their omissions of cash receipts on the corporate tax returns of their S-corporation towing business, and subsequently their individual income tax returns for 2007-2008. Under cross-examination at trial, an IRS special agent testified that certain unaccounted-for business expenses noted by the defense counsel would not have had a material impact on the tax due and owing. On appeal, the Horners argued that the government had committed prosecutorial misconduct by presenting false testimony at trial from the agent about the tax-loss calculations in light of potential unclaimed deductions. They claimed the final tax loss figures determined at sentencing showed more than \$573,000 in unclaimed business expense deductions, which reduced the unreported income by almost one-third.

The Eleventh Circuit determined that the Horners’ argument took the agent’s testimony out of context. Specifically, the agent’s answers regarding the impact of unclaimed expenses were tethered to specific checks that defense counsel had suggested were missed tax deductions, and the total potential

deductions directly addressed by the defense counsel were an order of magnitude less than the figures determined at sentencing. Ultimately, the court concluded that the agent’s testimony was thus neither false nor misleading, but rather responsive to the questions actually asked. Accordingly, the Eleventh Circuit held that no *Giglio* violation had occurred.

Third Circuit Holds Requiring Defendant to Provide Passwords for Encrypted Digital Devices Did Not Violate Fifth Amendment

In *United States v. Apple MacPro Computer*, 851 F.3d 238 (3d Cir. 2017), the Third Circuit held the government’s ability to compel the decryption of digital devices previously seized pursuant to a valid search warrant does not violate defendant’s Fifth Amendment privilege against self-incrimination.

John Doe (“Doe”) was the subject of an investigation into his access to online child pornography. Police executed a valid search warrant at his residence and seized two iPhones and an Apple MacPro computer with two attached external hard drives, which were all password protected. The Department of Homeland Security applied for a warrant to search the devices. Doe provided passwords for both iPhones, but did not grant access to an application on one iPhone that contained additional encrypted information. Nevertheless, forensic analysts were able to determine the iPhone’s encrypted database contained numerous images and video files. Doe refused to provide the passwords for the computer and external hard drives. Forensic analysts discovered the computer password, but could not access the hard drives. On the computer, they discovered a child pornography image and logs showing Doe had visited child pornography websites and downloaded thousands of files containing child pornography onto the hard drives. Police interviewed Doe’s sister, who informed them Doe showed her images of child pornography that were saved to the hard drives.

A Magistrate Judge issued an order pursuant to the All Writs Act requiring Doe to produce all of the devices in an unencrypted state. Doe moved to quash, arguing the act of decrypting the devices violates the Fifth Amendment. The Magistrate Judge denied his motion, holding that, because the government possessed the devices and knew they contained child pornography, the act of decrypting was not testimonial. Doe then appeared at the police department and decrypted the iPhone database. However, he claimed he could not remember the

passwords for the hard drives and entered several incorrect passwords. The Magistrate Judge granted the government's motion for an Order to Show Cause Why Doe Should Not Be Held in Contempt, and ordered Doe to appear for a hearing before the district court. After a hearing, the district court granted the government's motion to hold Doe in contempt. He was taken into custody and subsequently appealed.

Because Doe did not appeal the denial of his motion to quash, the Third Circuit reviewed for plain error. The appellate court noted that the Fifth Amendment only applies when the accused is compelled to make a testimonial communication that is incriminating. To be testimonial, the communication must explicitly or implicitly relate a factual assertion or disclose information. The Third Circuit explained that the production of evidence can implicate the Fifth Amendment if the act of production concedes the existence, custody, and authenticity of that evidence. However, the "foregone conclusion" rule, which acts as an exception if the act of production is a foregone conclusion, does not protect an act of production when it adds little or nothing to the sum total of the government's information. For the exception to apply, the government must be able to describe the evidence it seeks to compel with reasonable particularity. In this case, the government was able to show that child pornography was stored on the encrypted devices, Doe owned the devices prior to the seizure, and that he can access them. Doe never asserted an inability to remember the passwords—he simply refused to provide them. Any testimonial component of producing decrypted devices added little or nothing to the information the government already had, and was, therefore, a foregone conclusion. Therefore, the Third Circuit found no plain error and affirmed the order holding Doe in contempt.

TITLE 18 - CONSPIRACY **UNDER 18 U.S.C. § 371**

Eleventh Circuit Holds Whether Defendant Withdrew from a Conspiracy Was Question of Fact for Jury

In *United States v. Bergman*, 852 F.3d 1046 (11th Cir.), *cert. denied*, 138 S. Ct. 283 (2017), the Eleventh Circuit upheld the district court's finding that a defendant was not entitled to a judgment of acquittal because whether he withdrew from a conspiracy outside of the five-year limitations period was a question of fact for the jury.

From late 2003 to August 2008, Roger Bergman ("Bergman") was employed as a physician's assistant by American Therapeutic Corporation ("ATC"), a health-care business that operated an extensive Medicare scam. Bergman's role in the conspiracy was to falsify patient notes, which were submitted to Medicare to justify payments. On January 28, 2014, the grand jury returned an indictment against Bergman and two other defendants. On June 24, 2014, a grand jury returned a superseding indictment against the three defendants, charging Bergman with (1) conspiracy to commit health care fraud and wire fraud (18 U.S.C. §§ 1343, 1347, and 1349) (Count 1), and (2) conspiracy to make false statements relating to health care matters (18 U.S.C. §§ 371 and 1035) (Count 2). Bergman was convicted on all counts and sentenced to 180 months' imprisonment on Count 1 and 60 months' on Count 2, running concurrently. Having already denied motions for acquittal from Bergman during the trial, the district court later denied Bergman's post-trial motions for judgment of acquittal and for a new trial.

One of Bergman's defenses at trial was that he withdrew from the conspiracy in August 2008, which meant the January 2014 indictment was barred by the five-year statute of limitations. At Bergman's request, the district court instructed the jury on his affirmative defense of withdrawal. On appeal, Bergman argued that he established his withdrawal defense as a matter of law and that the district court should have granted his motion for judgment of acquittal and not submitted the withdrawal issue to the jury.

The Eleventh Circuit held that the withdrawal issue presented a jury question. The court explained that there was "conflicting testimony" over why Bergman ceased working at ATC. Bergman testified that he voluntarily resigned because of the fraud being committed at ATC, whereas his supervisor testified that she permitted him to resign rather than firing him based on his sloppy and untimely dictations of patient progress notes. The appellate court distinguished the case from *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 838 (1999), *cert. denied*, 529 U.S. 1130 (2000). In *Morton's Market*, the Supreme Court concluded that the owner of one of several dairies that were engaged in a price-fixing conspiracy had withdrawn from the conspiracy when it sold the dairy in a publicized sale. That sale constituted an affirmative step because it "deprived the remaining conspirator group of the services which [the defendant] provided to the conspiracy." The Eleventh Circuit distinguished the sale of a business in *Morton's Market* from an "employee resignation

from a company” engaged in a conspiracy. Confronted with that latter fact pattern, the Eleventh Circuit concluded that whether a defendant had taken “an affirmative step to disavow or defeat the conspiracy” when he ceased working for a business was a question for the jury. As such, the Eleventh Circuit held that the issue was properly submitted to the jury and the district court properly instructed the jury on the affirmative defense of withdrawal rather than holding for Bergman as a matter of law.

FORFEITURE

. First Circuit Holds Proceeds of Relevant Conduct Forfeitable

In *United States v. Cox*, 851 F.3d 113 (1st Cir. 2017), the First Circuit upheld, *inter alia*, a forfeiture award entered as part of the defendant’s sentence in a mortgage-fraud case that included proceeds of uncharged and acquitted conduct that was part of the fraud scheme.

Sirewl Cox (“Cox”), a real estate agent, developer, and broker, used straw buyers to purchase real property with fraudulently-obtained loans as part of a mortgage-fraud scheme. In 2011, a jury convicted him on eight counts of wire fraud, bank fraud, and money laundering related to certain real-property transactions, but acquitted him of eight additional counts involving other properties. The trial court sentenced him to 150 months’ imprisonment and entered a forfeiture order for \$2,966,334.37. Of this sum, only \$860,210.52 represented proceeds from the convicted transactions. The balance represented proceeds of relevant conduct including transactions that were not charged or for which Cox was acquitted. On appeal, Cox contested the award’s inclusion of proceeds from unconvicted conduct.

The First Circuit joined the Seventh and Ninth Circuits in holding that a district court can order the forfeiture of proceeds from uncharged conduct that was part of the same fraudulent scheme alleged in the counts of conviction. The appellate court reasoned that the relevant forfeiture statutes, 18 U.S.C. §§ 981(a)(1)(C), 982(a)(1) , 982(a)(2)(A), and 28 U.S.C. §2461, are broadly framed to reach all proceeds obtained directly or indirectly as a result of an offense and are not limited to the direct net gain from a particular transaction. For crimes involving schemes to defraud, the court concluded that forfeitable proceeds consist of any funds involved in the overall scheme, including additional executions of the scheme that were not charged or for which the

defendant was acquitted. Because criminal forfeiture is a sentencing issue, the trial court need only find that the uncharged or acquitted conduct was part of the overall scheme to defraud by a preponderance of the evidence.

SENTENCING

Sixth Circuit Holds Use of Sentencing Guidelines for Tax-Evasion Offense Appropriate for Obstruction of the IRS Violation of 26 U.S.C. § 7212(a)

In *United States v. Ballard*, 850 F.3d 292 (6th Cir. 2017), the Sixth Circuit held that the district court appropriately applied the sentencing guidelines for the offense of tax evasion rather than obstruction of justice when sentencing Ballard for corruptly obstructing or impeding the administration of the tax laws in violation of 26 U.S.C. § 7212(a).

In 2008, John Ballard (“Ballard”) was classified as a "non-filer" for failing to pay taxes on his income as a securities broker. In response to IRS inquiries in 2009, Ballard claimed he had no income and no ability to pay. In actuality, he was employed by a securities-brokerage firm and made over \$500,000 that year alone. Rather than paying on the more than \$800,000 he owed to the government, Ballard used his wife’s and mother-in-law’s bank accounts to deposit earnings and spent this income on luxurious personal expenditures. In response to an IRS notice of intent to levy his income in 2010, Ballard quit his job to spite the IRS. He also filed and later dismissed a Chapter 13 bankruptcy petition in order to halt collection efforts of the IRS and other creditors. In a 2012 interview with IRS agents, Ballard lied about being employed and earning income in 2009. Ballard ultimately was charged with and agreed to plead guilty to violating § 7212(a). At sentencing, Ballard was sentenced under the tax-evasion guideline (U.S.S.G. § 2T1.1) rather than the obstruction-of-justice guideline (U.S.S.G. § 2J1.2), which in his case, resulted in a higher base-offense level. Ballard appealed the application of the tax-evasion guideline.

The Sixth Circuit affirmed, noting that there are two guidelines options for sentencing violations of § 7212(a), depending on which better covers the conduct described in the indictment or stipulated to in the plea agreement: § 2T1.1 (tax evasion) or § 2J1.2 (obstruction of justice). Here, Ballard stipulated that he had lied to IRS investigators to avoid paying taxes and that he failed to pay the debt even though he earned a significant income. The Sixth Circuit determined this conduct was similar to tax evasion and held that Ballard was appropriately sentenced pursuant to that guideline.

D.C. Circuit Upholds Above-Guidelines Sentence Based on Oral Statement of Sentencing Court

In *United States v. Jackson*, 848 F.3d 460 (D.C. Cir. 2017), the D.C. Circuit upheld the defendant's above-guidelines sentence based upon the trial court's oral explanation for the upward departure despite the trial court's potentially insufficient written explanation.

In 2006, Jeffrey Jackson ("Jackson") was sentenced to five years' probation after pleading guilty to a fraud charge involving his diversion of approximately \$373,000 in employment taxes from his security business. While on probation, Jackson formed a new security business and began a similar scheme. Over the next four years, he collected but failed to pay over approximately \$600,000 in employment taxes from employees of his new company. Instead, Jackson used the money for personal expenditures, such as clothing, furniture, jewelry, and rent. Jackson again pleaded guilty—this time to willful failure to collect and pay over tax (26 U.S.C. § 7202)—under a plea agreement with a recommended sentence of 27-33 months. The district court sentenced Jackson to 42 months' imprisonment—nine months more than the top of the guidelines range.

During sentencing, the district court orally explained that an above-guidelines sentence was necessary to promote deterrence because Jackson was on probation for a nearly identical crime when he committed his latest offense. As required by 28 U.S.C. § 994, the district court also issued a written "Statement of Reasons" for the upward departure to the Sentencing Commission. Jackson appealed, claiming the district court's explanations in the written statement were deficient.

The D.C. Circuit affirmed, holding that the district court's oral explanation was sufficient to support the upward departure so it was unnecessary to determine the adequacy of the written statement. In doing so, the D.C. Circuit joined every other circuit in holding that a deficient written statement does not affect the defendant's substantial rights or warrant vacating the defendant's statement where a sufficient oral explanation for a departure has been provided.

Tenth Circuit Holds Judge Not Required to Specifically Respond to Sentencing Arguments as Long as Guidelines Followed

In *United States v. Wireman*, 849 F.3d 956 (10th Cir. 2017), the Tenth Circuit held, *inter alia*, that the district court adequately explained why it rejected a defendant's arguments for a downward variance based upon the defendant's critiques of a child pornography offense level sentencing enhancement for engaging in a pattern of activity involving sexual abuse or exploitation of a minor.

Mark Wireman ("Wireman") was a repeat sexual offender who, in this instance, pled guilty to five counts of possessing child pornography and one count of distributing child pornography. Wireman argued his sentence of 240 months' imprisonment was procedurally unreasonable because the district court did not specifically address and reject his arguments for a downward variance from his within-Guidelines sentence. Section 2.G2.2 of the Sentencing Guidelines, the applicable sentencing provision for Wireman's crimes, set the base-offense level for his crimes at 22. Five Specific Offense Characteristics under § 2.G2.2 applied and increased his sentence to 37. After factoring in a 3-level decrease for acceptance of responsibility, his total offense level was 34. Coupled with his category IV criminal history, the Guidelines' range was 201-262 months' imprisonment. Wireman argued in a sentencing memorandum to the district court that he was entitled to a downward variance from the Guidelines' range because § 2.G2.2 was inherently flawed. He made three sub-arguments in support of his claim that: (1) § 2G2.2(a)(2)'s base-offense level of 22 is "harsher than necessary" under the 18 U.S.C. § 3553(a) sentencing factors; (2) courts should be hesitant to rely on § 2G2.2 because the Sentencing Commission did not depend on empirical data when drafting § 2G2.2; and (3) the Specific Offense Characteristics outlined in § 2G2.2 are utilized so often "that they apply in nearly every child-

pornography case” and therefore fail to distinguish between various offenders. Wireman then argued in the memorandum that his individual circumstances—including a traumatizing childhood where he was repeatedly sexually abused by family members and the fact that in this instance he shared a relatively small amount of child pornography with only one of his friends—warranted a downward variance from this excessive Guidelines range.

At sentencing, the district court alluded to the memorandum but did not speak at length about it or specifically address Wireman’s three sub-arguments. On appeal, Wireman argued that his sentence was procedurally unreasonable because the district court did not adequately address his critiques of § 2.G2.2. Thus, the question presented for the Tenth Circuit’s review was whether the particular argument Wireman made to the district court—namely, that the Guideline under which he was sentenced was inherently flawed on policy grounds—warranted an exception to a long-held rule that the district court was not required to explicitly address and reject a defendant’s arguments in such an instance.

The Tenth Circuit affirmed, holding that the district court did not have to explicitly reject Wireman’s arguments. The court explained that because the district court’s ultimate sentence of 240 months’ imprisonment was right in the middle of the suggested Guidelines’ range of 210-262 months’ imprisonment, it needed only to “indicate that [it] did not rest on the guidelines alone, but considered whether the guidelines sentence conforms, in the circumstances, to the [§ 3553(a)] statutory factors.” The Tenth Circuit noted that the district court did just that—as such, it did not err by failing to explicitly respond to Wireman’s arguments for a more lenient sentence nor was it required to defend § 2.G2.2 or otherwise do or say anything more.

WORK-PRODUCT DOCTRINE

Third Circuit Holds Crime-Fraud Exception to Attorney Work-Product Privilege Did Not Apply to Inadvertently-Disclosed Email

In *In re: Grand Jury Matter #3*, 847 F.3d 157 (3d Cir. 2017), the Third Circuit held, *inter alia*, that the crime-fraud exception to the attorney work-product privilege did not apply to an inadvertently-disclosed email at issue.

In 2008, John Doe (“Doe”), the owner and president of a company, purportedly sold the company to a business associate. Nevertheless, Doe continued to report ownership of the company on his individual and corporate tax returns for tax years 2008 through 2012, and still was responsible for the company’s day-to-day operations. Prior to the purported sale, multiple individuals sued Doe alleging that his business practices violated various state laws. During the litigation, Doe forwarded an email to his accountant that he received earlier from his attorney. The email referenced an ongoing litigation and advised Doe of the steps needed to take to correct his returns to reflect that he sold the company in 2008. When Doe forwarded the email, he wrote: “Please see the seventh paragraph down re: my tax returns. Then we can discuss this.” Doe’s attorney later told the accountant to “stand by” for further guidance. In 2014, Doe stated in a deposition that he had sold his company to his business associate. Shortly after the deposition, plaintiffs settled their claim with the business associate for 10% of their claimed damages.

After the settlement, the government empaneled a grand jury to investigate Doe and his business associate. The government’s theory was that Doe owned the company, but tricked the plaintiffs into thinking he sold it to encourage them settle with his business associate for lesser amounts. At some point, the grand jury issued a subpoena to Doe’s accountant requesting his tax returns. The accountant produced the returns and the email Doe had forwarded to the accountant. The following day, the accountant’s attorney sought to recall the email, arguing that it was privileged and inadvertently produced. The government opposed, arguing that Doe waived privilege. The district court ruled in the government’s favor, concluding the attorney work-product privilege attached to the email, but the crime-fraud exception applied. Doe then filed an interlocutory appeal. While the appeal was pending, the grand jury viewed the email and returned a 17-count indictment against Doe, his lawyer, and his business associate.

On appeal, the Third Circuit held that the email from Doe’s attorney was protected by the attorney work-product privilege because it was used to prepare for Doe’s case against those suing him. The appellate court stated that work-product protection is fundamental to the proper functioning of the legal system, but noted that the crime-fraud exception exists to prevent the perversion of the attorney-client relationship. For the exception to apply, a party must demonstrate that (1) the lawyer or client was committing, or intending to commit, a crime or fraud, and (2) the attorney’s work product was used in

furtherance of the crime or fraud. The government satisfied the first requirement. In addition to the email, the government produced a recording of Doe bragging about defrauding the plaintiffs. The court likened the second prong to the requirement of an overt act in a conspiracy charge, and noted that both second prong and overt-act requirement are intended to prevent someone from being punished for merely thinking about committing a bad act. The only purported act in furtherance of the crime or fraud was Doe forwarding the email to his accountant and saying he wanted to discuss it—there was no indication that Doe had decided to amend his returns. The Third Circuit concluded that Doe merely thought about using his attorney’s work product to commit fraud, but never actually did so. The court noted, however, that if Doe had amended his returns, it would have constituted an act in furtherance of the crime or fraud. Since this did not occur, the Third Circuit reversed the district court’s ruling.

CRIMINAL TAX BULLETIN

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