

CRIMINAL TAX BULLETIN

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

FOURTH AMENDMENT

Fifth Circuit Extends *Carpenter* Holding Geofence Warrants are Unconstitutional

In *United States v. Smith*, 110 F.4th 817 (5th Cir. 2024), petition for cert. docketed, Smith v. United States, No. 24-7237 (U.S. May 19, 2025), the Fifth Circuit held, inter alia, as a matter of first impression, that geofence warrants are "general warrants" categorically prohibited by the Fourth Amendment, rejecting the Fourth Circuit's recent decision in *United States v. Chatrie*, 107 F.4th 319 (4th Cir. 2024), and creating a circuit split.

In February 2018, Gilbert McThunel (McThunel) robbed a United States Postal Service (USPS) mail truck driver at gunpoint as he collected registered mail bags from a post office in rural Mississippi. Based on a video obtained from a business office located across the street and an interview of a nearby resident, investigators suspected two other men assisted McThunel using their cell phones. Investigators were unable to identify any suspects from the video footage or witness interviews. In November 2018, a magistrate issued a geofence warrant seeking information from Google to locate potential suspects and witnesses in connection to the robbery. Google identified three devices within the requested parameters - the first was associated to McThunel, the second was associated to his coconspirator, Jamarr Smith (Smith), and the third was deemed unrelated to the investigation. Investigators then used this information to execute additional warrants and identify all three perpetrators.

The government charged the three men with robbery and conspiracy, and the men moved to suppress the evidence derived from the geofence warrant that was used to identify them arguing, *inter alia*, that they had a reasonable expectation of privacy in the location history associated with their Google accounts and that the geofence warrant violated that privacy interest as an unconstitutional general warrant. The district court denied the motion to suppress. A jury found the three men guilty on both counts.

On appeal, the three men argued that the geofence warrant violated the Fourth Amendment and that the district court erred by failing to suppress all evidence derived therefrom. The Fifth Circuit held that the use of geofence warrants, at least as described in this case, was unconstitutional under the Fourth Amendment. Extending the U.S. Supreme Court's analysis in Carpenter v. United States, 585 U.S. 296 (2018), regarding cell-site location information, the Fifth Circuit concluded Google users have a reasonable expectation of privacy in their location history because of the intrusive nature of even a snapshot of their precise location data—"highly sensitive information" that could reveal a visit to "the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, [or] the by-the-hour motel."

Further, the Fifth Circuit rejected the Fourth Circuit's application of the third-party doctrine in this context, finding that users do not "voluntarily relinquish their right to privacy" when entrusting Google with such highly sensitive information even though they opt in to having their account location history monitored. Therefore, because a geofence warrant requires Google to search its entire database of user location history to determine whether a particular account's location data fell within the geofence (*i.e.*, near the Mississippi post office) at the specific account, the Fifth Circuit held that geofence warrants are akin to a general warrant and are plainly unconstitutional.

However, because the investigators diligently sought to comply with the Fourth Amendment while utilizing a "cutting-edge investigative technique" without any court precedent to follow, the Fifth Circuit concluded the good-faith exception to the warrant requirement applied and declined to suppress the defendants' location history.

FOURTH AND FIFTH AMENDMENTS

First Circuit Holds IRS's Use of "John Doe"
Summons to Obtain Virtual Currency Records
Did Not Violate Fourth or Fifth Amendment or
the Administrative Procedure Act

In *Harper v. Werfel*, 118 F.4th 100 (1st Cir. 2024), *cert. denied sub nom.*, ___ S. Ct. __, No. 24-922, 2025 WL 1787823 (June 30, 2025), the First Circuit held, *inter alia*, that the IRS's use of a "John Doe" summons to acquire account information and records from a virtual currency exchange did not violate the Fourth Amendment, the Fifth Amendment, or the Administrative Procedure Act (APA).

In 2019, James Harper (Harper) received a letter from the IRS informing him that the agency "ha[s] information that you have or had one or more accounts containing virtual currency but may not have properly reported your transactions involving virtual currency." The "information" referred to by the letter was records obtained by the IRS pursuant to a so-called "John Doe" summons¹ that the agency served on the virtual currency exchange, Coinbase, in 2016.

The 2016 summons to Coinbase sought the account information for all accountholders in the United States who had conducted virtual currency transactions between 2013 and 2015. Coinbase opposed the summons, and the IRS filed a petition to enforce it in the U.S. District Court for the Northern District of California (N.D. Calif.). Eventually, the IRS voluntarily narrowed the summons to cover only users who engaged in at least \$20,000 worth of any one type of virtual-currency transaction, which implicated 14,355 accounts. The district court enforced the summons, finding it was properly issued pursuant to 26 U.S.C. § 7602(a).

After receiving the 2019 letter, Harper filed a complaint in the U.S. District Court for the District of New Hampshire (D.N.H.) alleging violations of the Fourth and Fifth Amendments and the APA, and seeking a declaration that the summons did not satisfy the 26 U.S.C. § 7609(f) factors. The district court initially dismissed the complaint on procedural grounds that were later overturned by the

First Circuit before dismissing the complaint a second time holding that Harper lacked a reasonable expectation of privacy in information that he voluntarily divulged to Coinbase, and therefore had no Fourth or Fifth Amendment claims. The district court also determined that Harper's APA claim was an improper collateral attack on the prior order by the N.D. Calif. enforcing the summons. Harper appealed the district court's dismissal.

On appeal, the First Circuit affirmed the district court's dismissal of the complaint on all grounds. With respect to the Fourth Amendment challenge, the First Circuit held that Harper had neither a reasonable expectation of privacy nor a property interest in Coinbase's records, reminding him that the Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," and that the principle holds true "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." The appellate court rejected Harper's argument that virtual currency records should be treated differently from other financial transactions.

Regarding the Fifth Amendment challenge, the First Circuit held that the procedural protections of the Due Process Clause were not implicated by the summons because Harper lacked any reasonable expectation of privacy in the records, and because the Due Process Clause offers no protection from an agency "using its subpoena power to gather evidence adverse to [a person]."

Finally, the First Circuit rejected Harper's APA-based challenge to the summons because while the statute provides for judicial review of a "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. § 704), the summons to Coinbase was not a "final" action, but was rather a "preliminary investigative step, far upstream of any potential tax enforcement actions against Coinbase accountholders like Harper or any broader agency action regarding the reporting of digital asset transactions."

the summons be "narrowly tailored to information that pertains to the failure (or potential failure) of the [individuals targeted by the summons] to comply with [the tax code]." See 26 U.S.C. § 7609(f).

¹ A "John Doe" summons is an *ex parte* third-party request for records issued in cases where the IRS does not know the identity of the taxpayer[s] under investigation, and only after a court proceeding in which the IRS establishes that certain statutory criteria have been satisfied, including that

FIFTH AMENDMENT

Ninth Circuit Holds Clear Error Review Applies to District Court's Factual Findings in the *Brady* Context and Upholds Sanctions Imposed for *Brady* Violation

In *United States v. Cloud*, 102 F.4th 968 (9th Cir. 2024), as a matter of first impression, the Ninth Circuit held, *inter alia*, that clear error review applies to a district court's factual findings in the *Brady* context. Additionally, the Ninth Circuit affirmed the imposition of monetary sanctions against the Department of Justice levied for failing to disclose impeachment evidence that was favorable to the accused, thus violating his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

In March 2022, James Cloud (Cloud) was tried for multiple offenses, including five counts of murder. The government intended to call witnesses who would identify Cloud as the killer, including an individual identified as Esmeralda. The night before her scheduled testimony, Esmeralda's boyfriend, James, sent a text message to the special agent on the case referencing pending charges he was facing, stating that he needed them to "go away," and that Esmeralda would testify "to whatever you need her to if you can make that happen." Shortly thereafter, James sent a text message to the special agent regarding the Federal Bureau of Investigation (FBI) helping with relocation and protection for Esmeralda. A few minutes later, an Assistant United States Attorney (AUSA) informed Esmeralda's attorney about the text messages, and, after obtaining a privilege waiver, Esmeralda's attorney informed Cloud's counsel, who he knew personally, of the text messages.

The next morning, before court was called into session, defense counsel asked the government whether they had anything to disclose and they responded that they did not. Once in session, defense counsel informed the court of the text messages. The district court excused the jury and Esmeralda testified that she knew James texted the special agent, and that he did so with her approval. She stated that she had been speaking with the special agent for two weeks about getting financial assistance for relocation and help in resolving James' charges. Esmeralda admitted that she was willing to change her testimony in exchange for receiving these benefits. After this testimony, the government indicated that it would not call Esmeralda as a witness and the district court excluded her as unreliable.

The district court made a finding that the government's conduct violated *Brady*, and that it would impose sanctions. The government was ordered to pay \$4,844.68 to the Federal Defenders of Eastern Washington & Idaho,

which was based on the amount of time defense counsel spent dealing with the matter, and \$216 to the district court clerk, which was the amount paid to the jurors while they sat idle.

The government appealed the sanctions order. As a matter of first impression, the Ninth Circuit joined its sister circuits in holding that clear error review applies to a district court's factual findings in the *Brady* context. The appellate court noted that this framework is consistent with its approach to other mixed questions of law and fact in criminal cases.

In *Brady*, the Supreme Court opined that suppression of evidence favorable to a defendant violates due process when the evidence is material to guilt or punishment. In *Giglio v. United States*, 405 U.S. 150 (1972), the Court stated that this includes evidence that would impeach the credibility of a key witness. The three components of a due process violation under *Brady* and *Giglio* are "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the [government], either willfully or inadvertently; and [3] prejudice must have ensued."

With respect to the first component, the Ninth Circuit opined that because Esmeralda was negotiating benefits for herself and her boyfriend and was willing to shape her testimony in exchange for those benefits, her credibility was in doubt. Therefore, the appellate court concluded, and the government did not argue, that the evidence of the text messages was favorable to Cloud.

With respect to the suppression component, the government made several arguments attempting to justify what it characterized as a temporary withholding of the text messages. First, the government argued that it had doubt as to whether Esmeralda would comply with her subpoena, and if she did not, prosecutors planned to apply for a material witness arrest warrant for her and then disclose James' text messages. The Ninth Circuit noted that this "would've-could've" failed to explain what, if anything, the government would have done to disclose the text messages if Esmerelda showed up to take the stand.

Next, the government argued that it had not yet confirmed that Esmeralda was aware of James' text messages, and that it thus acted reasonably in trying to meet with Esmeralda and her counsel to determine whether the messages were attributable to her before deciding on a course of action. The appellate court noted that it is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false or has diminished probative value. In rejecting this argument, the Ninth Circuit stated

that the government's constitutional obligation was to promptly inform defense counsel of the problematic text messages, not to contact Esmeralda's attorney to discuss prosecutors' concerns that she might not show up to testify.

Third, the government argued that there was insufficient evidence that it would have disclosed the impeachment information too late for it to be used effectively. In response to this argument, the Ninth Circuit noted that "[t]he rule is disclosure, not gaming the impact the disclosure might have," and stated that the government remained silent rather than abide by that rule.

Lastly, the government argued that Esmerelda neither received nor was ultimately promised benefits for her testimony. In rejecting this argument, the appellate court noted that nothing in the record showed that these promised benefits were withdrawn. Ultimately, the Ninth Circuit concluded that the evidence was suppressed.

Finally, with respect to prejudice, the government argued that any prejudice was ultimately avoided because Esmeralda did not testify. In rejecting this argument, the Ninth Circuit relied on precedent foreclosing the argument and warned that accepting the government's argument "could risk preventing a trial judge from imposing *any* forward-looking *Brady* sanction under the rationale that there can be no due process violation unless and until the court permits the government's concealment of evidence to fatally taint the trial's result."

Concluding that all three components of a due process violation under *Brady* and *Giglio* were met, the Ninth Circuit affirmed the district court's remedy of witness exclusion and a monetary sanction stating that this approach was both a reasonable response to the government's "egregious conduct," and correct as a matter of law.

AGGRAVATED IDENTITY THEFT – 18 U.S.C. § 1028A

Ninth Circuit Vacates Aggravated Identity Theft Conviction Where Possession of Identifying Information Was Not at Crux of Fraud

In *United States v. Ovsepian*, 113 F.4th 1193 (9th Cir. 2024), the Ninth Circuit, relying on *Dubin v. United States*, 599 U.S. 110 (2023), held, *inter alia*, that the defendant's possession of the victim's identifying information was not at the crux of the fraud, and therefore vacated his conviction for aggravated identity theft (18 U.S.C. § 1028A).

Artak Ovsepian (Ovsepian) participated in a healthcare fraud scheme operating out of a sham medical clinic. Ovsepian was charged with conspiracy to commit

healthcare fraud and aggravated identity theft in violation of § 1028A, among other related counts, for his role in the healthcare fraud scheme. Of relevance to the aggravated identify theft violation, the scheme was alleged to have created false prescription drug claims using multiple victims' identifications. At trial, the government narrowed the case against Ovsepian to "possession" of a single victim's identifying information. The evidence presented at trial alleged that the victim's identifying information was kept in a patient file and used by conspirators to bill Medicare for medications not authorized by the victim. The government argued that although the victim's file was kept on the premises at issue in case of an audit related to the claims, the file containing the identification was also "possessed in furtherance of [the] healthcare fraud conspiracy." Ovsepian was convicted, among other counts, of aggravated identity theft by the jury.

Ovsepian appealed various aspects of the conviction and was ultimately denied certiorari. Ovsepian then moved to vacate his aggravated identity theft conviction under 28 U.S.C. § 2255. The district court denied his motion, and both the district court and Ninth Circuit denied Ovsepian's request for a certificate of appealability.

Ovsepian petitioned the Supreme Court for a writ of certiorari. While Ovsepian's petition was pending, the Supreme Court decided *Dubin*, which narrowed the application of § 1028A. The *Dubin* opinion favored a "narrower reading" of key provisions in § 1028A, generally holding that in "fraud or deceit crimes ... the means of identification specifically must be used in a manner that is fraudulent or deceptive." In accordance with *Dubin*, the Supreme Court granted certiorari to Ovsepian, vacated the denial of the certificate of appealability, and remanded his case to the Ninth Circuit for reconsideration.

On remand, the Ninth Circuit found that Ovsepian misused the patient's means of identification to commit the healthcare fraud at issue; however, this misuse was not at the crux of the fraud. The appellate court reasoned that Ovsepian's possession of the means of identification was an "ancillary feature" of the scheme that merely facilitated its commission and was not at the "crux" of the fraud.

REPORTING REQUIREMENTS – 26 U.S.C. § 6050I

Sixth Circuit Holds District Court Has Standing to Hear Constitutional Claims Related to Cryptocurrency Reporting Requirement Amendments

In *Carman v. Yellen*, 112 F.4th 386 (6th Cir. 2024), the Sixth Circuit held that the district court had subject matter jurisdiction to proceed in hearing constitutional challenges to the amendments to 26 U.S.C. § 6050I (returns relating

to cash received in trade or business, etc.) that require reporting of certain cryptocurrency transactions to the federal government under the First and Fourth Amendments and the Enumerated Powers Clause.

Generally, § 6050I requires that businesses that receive more than \$10,000 in cash in a singular transaction, or in two or more related transactions, must file a form reporting the transaction to the federal government. In 2021, Congress amended the definition of "cash" to include "any digital asset." See 26 U.S.C. § 6050I(d)(3). Four plaintiffs, business owners and entities that transacted in cryptocurrency, filed suit against the United States, IRS, Department of the Treasury, the heads of those agencies, and the Attorney General (collectively, the defendants). The plaintiffs' suit alleged that the amendment to § 6050I violated the First Amendment, Fourth Amendment, the Fifth Amendment (vagueness and self-incrimination claim), and the Enumerated Powers Clause. The plaintiffs sought declaratory and injunctive relief. The defendants moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the plaintiffs lacked standing because their injuries were speculative or not cognizable. The district court found that it did not have subject matter jurisdiction to proceed because each of the plaintiffs' claims were not ripe for adjudication, or the plaintiffs lacked standing. The plaintiffs appealed.

On appeal, the Sixth Circuit reversed in part, finding that the plaintiffs' claims under the Fourth Amendment, First Amendment, and Enumerated Powers Clause were ripe for adjudication, and remanded for proceedings on those claims. The Sixth Circuit held that the plaintiffs demonstrated injury in fact under the First and Fourth Amendments and the Enumerated Powers Clause because adherence to the § 6050I amendment would result in compliance cost and economic harms.

As to the Fourth Amendment, the appellate court reasoned that the claim was ripe because the disclosure of a specific transaction to the government implicates the Fourth Amendment bar on unreasonable searches regardless of any further steps taken by the government. As to the First Amendment, the Sixth Circuit reasoned that the claim was ripe because the disclosure of transactions to the government impedes First Amendment associational rights. As to the Enumerated Powers Clause, the appellate court reasoned that the claim was ripe because the amended statute's existence imposes costs on plaintiffs and subjects them to regulations that they do not want to comply with.

The Sixth Circuit further noted that it is not appropriate to disregard the plaintiffs' claimed injuries at the motion-to-dismiss stage, and that the court must instead accept what the plaintiffs have pleaded with respect to their injuries and determine whether the pleaded injuries are sufficient to meet the standing requirements.

As to the Fifth Amendment, the Sixth Circuit did not find standing for the vagueness claim opining that the plaintiffs only posed hypotheticals about how the provision may be applied, and it is uncertain if any of the alleged vagueness issues will come to pass. Additionally, the Sixth Circuit did not find standing for the self-incrimination claim reasoning that, as a general matter, a Fifth Amendment self-incrimination claim is not ripe until a claim of privilege is actually asserted.

SUBJECT MATTER JURISDICTION

D.C. Circuit Affirms Threshold to Establish Jurisdiction to Appeal an Award Determination in Tax Court

In *Shands v. Comm'r of Internal Revenue*, 111 F.4th 1 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 1178 (2025), the D.C. Circuit, following its holding in *Comm'r of Internal Revenue v. Li*, 22 F.4th 1014 (D.C. Cir. 2022), affirmed that in order to establish jurisdiction to appeal an award determination, the appellant must show that the IRS proceeded with an administrative or judicial action against a taxpayer based upon the whistleblower's information provided to the IRS.

Martin Lack (Lack) and Renzo Gadola (Gadola), two Swiss bankers employed at UBS, were under federal criminal investigation for their involvement in a tax evasion scheme in which UBS bankers were believed to be hiding the assets of certain U.S. taxpayers in undisclosed, offshore accounts to conceal clients' assets from the IRS. UBS client, Thomas Shands (Shands), asked Lack to open an account for him. Lack, purportedly unbeknownst to Shands, opened a Swiss bank account on his behalf at Basler Kantonalbank (BKB). Shands did not disclose the account or its assets to the IRS, as required. When Shands eventually attempted to voluntarily disclose the account, he learned that he was already a subject of an IRS criminal investigation. In return for criminal immunity, Shands cooperated in the investigation of certain bankers for their use of offshore accounts to hide client assets from the IRS. Shands' cooperation included, inter alia, recording telephone calls with Lack and meeting with Gadola while using a concealed recording device. The government prosecuted Lack and Gadola, and expanded its criminal investigation to encompass BKB, other Swiss banking professionals, and a few U.S. accountholders.

In October 2010, Shands submitted a Form 211, Application for Award for Original Information, to the IRS claiming a whistleblower award in connection with his cooperation with the Department of Justice and IRS Criminal Investigation Division in the investigations into Lack and Gadola. Shands collected more than \$8.5 million in whistleblower awards based on his claims.

In June 2012, Shands sought to apply for a whistleblower award based on the money collected by the IRS through the Offshore Voluntary Disclosure Initiative (OVDI), which was established as a result of the investigations of UBS and BKB. The IRS denied Shands' claim on the basis that the IRS took no action based on the information that Shands provided with respect to the OVDI. Shands subsequently filed a petition for review with the U.S. Tax Court to challenge the denial of this whistleblower claim. The Tax Court dismissed Shands' petition for lack of jurisdiction, reasoning that an OVDI case does not fall under the applicable regulatory definition of "administrative action" or "judicial action" and cannot provide a basis for jurisdiction under *Li*. Shands subsequently appealed.

On appeal, the D.C. Circuit considered Shands' claim in light of its holding in Li, in which it held that Tax Court jurisdiction "arises only when the IRS proceeds with any administrative or judicial action [against a taxpayer] . . . based on the information brought to the Secretary's attention by [the whistleblower]." In Shands' case, the D.C. Circuit reasoned that taxpayers who participate in the OVDI program do so voluntarily, and thus, OVDI cases are generally not considered actions taken "against a taxpayer." The D.C. Circuit acknowledged that OVDI cases (or cases arising from other voluntary disclosure programs) could lead to administrative or judicial actions where, for example, the OVDI case results in an IRS audit of the taxpayer. However, because Shands' case did not appear to involve such a situation, nor did Shands cite OVDI cases involving such a situation arising from the information he provided the government, the D.C. Circuit held that Shands did not establish jurisdiction to appeal the IRS's denial of his claim.

EVIDENCE

Supreme Court Holds Expert Witness Testimony Did Not Violate Federal Rule of Evidence 704(b) Prohibiting Expert from Stating Opinion About Whether a Criminal Defendant Did or Did Not Have Mental State or Condition that Constitutes an Element of the Crime Charged

In *United States v. Diaz*, 602 U.S. 526 (2024), the Supreme Court, in a 6-3 opinion, held that testimony by the government's expert witness that "most people" in a group have a particular mental state is not an opinion about the defendant specifically and thus did not violate Fed. R. Evid. 704(b).

Delilah Diaz (Diaz) was stopped at a port of entry on the United States-Mexico border. Border patrol officers searched Diaz's vehicle and found more than 54 pounds of methamphetamine concealed in the door panels and under the trunk carpet. Diaz was charged with importing methamphetamine (21 U.S.C.A. §§ 952 and 960), which

require the government to prove that the defendant "knowingly" transported drugs.

Diaz claimed that she did not know the drugs were hidden in the car. To rebut her claim, the government planned to call a Homeland Security Investigations (HSI) special agent as an expert witness to testify that drug traffickers generally do not entrust large quantities of drugs to people who are unaware that they are transporting them. Diaz objected in a pretrial motion under Fed. R. Evid. 704(b), which provides: "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." The district court ruled that the expert witness could not testify in absolute terms whether all couriers knowingly transport drugs but could testify that most couriers know they are transporting drugs. Thus, at trial, the expert witness testified that most couriers know they are transporting drugs. The jury found Diaz guilty, and the district court sentenced her to 84 months' imprisonment.

On appeal to the Ninth Circuit, Diaz again challenged the expert witness' testimony under Fed. R. Evid. 704(b). The appellate court held that Rule 704(b) prohibits only "an 'explicit opinion' on the defendant's state of mind." The Ninth Circuit reasoned that because the expert witness did not opine whether Diaz knowingly transported methamphetamine, the testimony did not violate Fed. R. Evid. 704(b).

The Supreme Court granted certiorari. In affirming the holding of the Ninth Circuit, the Court summarized the history of Fed. R. Evid. 704, which generally permits expert opinions on ultimate issues, and the exception contained in subsection (b). The Court determined that the expert witness testimony did not run afoul to Fed. R. Evid. 704(b) because the special agent did not opine about whether Diaz in particular knew she was transporting drugs. Moreover, the Court noted that the expert witness did not state that all couriers know they are transporting drugs. Instead, the expert witness asserted that Diaz was part of a group of persons that may or may not have a particular mental state, and that of all drug couriers, a group that included Diaz, he opined that the majority knowingly transport drugs. The Court explained that the jury was then left to decide whether Diaz was like the majority of couriers and knew she was transporting drugs or whether she was someone who unwittingly transported drugs. Since the ultimate issue of Diaz's mental state was left to the jury's judgment, the Supreme Court held that the expert witness' testimony did not violate Fed. R. Evid. 704(b).

The dissent argued that while the opinion offered by the expert witness was not definitive, it was still an "opinion about whether the defendant did or did not have a mental state or condition" and thus should have been excluded.

SENTENCING

Ninth Circuit (*En Banc*) Overrules Prior Precedent Regarding Standard of Proof Required at Sentencing

In *United States v. Lucas*, 101 F.4th 1158 (9th Cir. 2024) (en banc), the Ninth Circuit, sitting en banc, held that fact-finding at sentencing does not require application of the clear and convincing standard; rather, the lesser preponderance of the evidence standard is sufficient to satisfy due process requirements.

In 2022, Francisco Lucas Jr. (Lucas) pleaded guilty to a single count of illegal possession of a firearm as a convicted felon. At sentencing, the parties disputed whether Lucas' base offense level should be increased pursuant to U.S.S.G. § 2K2.1(a)(4)(B) because the offense involved a large capacity magazine capable of accepting more than 15 rounds of ammunition. Evidence in the form of expert testimony as well as a jail recording that Lucas was in prison "for a 40 Glock with a 30 round stick" was presented at the sentencing hearing. The district court found the evidence met the clear and convincing standard of proof, applied the Sentencing Guidelines enhancement, and sentenced Lucas to 57 months' imprisonment.

On appeal, Lucas argued the district court erred in finding there was clear and convincing evidence that the magazine could accept more than 15 rounds of ammunition at the time of the offense. A divided three-judge panel of the Ninth Circuit reversed the sentence and remanded for resentencing, concluding that although the district court correctly applied the clear and convincing standard of proof, the evidence presented at the sentencing hearing did not meet that standard. Subsequently, the Ninth Circuit voted to rehear the case en banc in light of the Supreme Court's holdings regarding the advisory nature of the Sentencing Guidelines in *United States v. Booker*, 543 U.S. 220 (2005) and *Beckles v. United States*, 580 U.S. 256 (2017).

Regarding its history of implementing the clear and convincing standard, the Ninth Circuit noted that when the Sentencing Guidelines first became law, adherence to them was mandatory. Although the preponderance of the evidence standard was initially identified by all circuits as the appropriate standard, the Ninth Circuit hinted in *United States v. Restrepo*, 946 F.2d 654, 655-56 (9th Cir. 1991) that "there may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has a disproportionate effect on the sentence relative to the offense of conviction." As a result, the clear and convincing standard became well-

established Ninth Circuit precedent. In 2005 the Supreme Court rendered the Sentencing Guidelines advisory rather than mandatory, effectively eliminating any due process argument that a heightened standard of proof was needed at sentencing.

The Ninth Circuit noted it was the only circuit adhering to the heightened standard of proof and determined that it would now "join our sister circuits in holding that clear and convincing evidence is not required for factual findings under the Guidelines, even when potentially large enhancements are at stake; fact-finding by a preponderance of the evidence is sufficient to satisfy due process at sentencing." In so holding, the Ninth Circuit vacated Lucas' sentence and remanded for resentencing with instructions to apply the preponderance of the evidence standard without limitation on the evidence the district court could consider.

Fourth Circuit Holds District Court Properly Deferred to United States Sentencing Guidelines § 2B1.1 Commentary Defining "Loss"

In *United States v. Boler*, 115 F.4th 316 (4th Cir. 2024), the Fourth Circuit held that the district court properly deferred to the U.S. Sentencing Commission commentary on U.S.S.G. § 2B1.1 to calculate defendant's tax loss.

Maggie Boler (Boler) was convicted of six counts of presenting false claims against the United States by submitting false tax returns to the IRS (18 U.S.C. § 287) and one count of making a false statement on her fraudulent Paycheck Protection Program (PPP) loan application (18 U.S.C. § 1014). Boler submitted six tax returns to the IRS, but only received refunds on four of those returns. As a result of her convictions, she was sentenced to 30 months' imprisonment. The probation officer, following the commentary to § 2B1.1 that defined "loss" as the "greater of actual loss or intended loss," calculated the loss associated with the six counts of § 287 by combining all six fraudulent claimed refunds, despite the IRS rejecting two of the returns.

On appeal, Boler argued that the sentencing court should not have included the tax loss from the two tax returns rejected by the IRS, but only the actual loss she caused. Boler relied on *Kisor v. Wilkie*, 588 U.S. 558 (2019), which requires a court to determine that a regulation is genuinely ambiguous before deferring to an agency's interpretation of its own regulation — in this case, the Guidelines commentary. Boler contended that "loss" in § 2B1.1 is not ambiguous and should be given its plain text meaning, the actual amount lost by the victim, instead of the definition provided in the commentary.

The Fourth Circuit reviewed this argument de novo and applied a two-part test, (1) the regulation must be ambiguous and (2) the interpretation must be in the "zone of ambiguity" with a character and context that entitles it to a controlling weight, to determine whether the commentary required deference.

Applying the test, the appellate court first held that "loss" is ambiguous because it can mean different things in different contexts. Further, the appellate court noted that Guidelines § 1B1.3(a) directs sentencing courts to define harm, in all sections where harm is not "otherwise specified," as "all harm that was the object of such acts and omissions." The Fourth Circuit determined that § 1B1.3(a) should apply to § 2B1.1 since "loss" is not specified in § 2B1.1.

Second, the Fourth Circuit held that the commentary falls within the "zone of ambiguity" because it is the "official position,' Commission's 'implicate[s] substantive expertise' in some way, and reflects the 'fair and considered judgment' of the Commission such that it is not simply a 'convenient litigating position" as required under Kisor. The appellate court held that the "character and context" of the commentary entitles it to controlling weight because including intended loss in the definition of "loss" has been a longstanding position of the Commission. Additionally, the appellate court noted that the Commission collects a vast amount of federal sentencing data and refines the Guidelines considering the data periodically, imparting its substantive expertise on the matter.

Ultimately, the Fourth Circuit affirmed the district court's application of the commentary and its reliance on Boler's full intended loss amount to calculate her Guidelines sentencing range pursuant to § 2B1.1 because a genuine ambiguity exists as to the meaning of "loss" in Guidelines § 2B1.1 and the character of the commentary supports that it is deserving of deference.

Note: Boler conflicts with a Third Circuit opinion, United States v. Banks, 55 F.4th 246, 257-58 (3d Cir. 2022), which held the "ordinary meaning of the word 'loss' is the loss the victim actually suffered." See also Pub. 5354 (Rev. 3-2024), Criminal Tax Bulletin (March 2024). Other circuits disagreed with the Third Circuit's Banks ruling, including, e.g., the Fourth Circuit in Boler and the Ninth Circuit in United States v. Hackett, 123 F.4th 1005 (9th Cir. 2024). To resolve this circuit split, the Sentencing Commission moved the definition of loss from the commentary to the text of the guideline in Amendment 287, which became effective on November 1, 2024. See U.S.S.G. § 2B1.1(b)(1)(A).

RESTITUTION

Fifth Circuit Holds District Court Did Not Err in Imposing Restitution After Defendant Filed His First Notice of Appeal

In *United States v. Boswell*, 109 F.4th 368 (5th Cir.), *cert. denied*, 145 S. Ct. 780 (2024), the Fifth Circuit held, *inter alia*, that considering both the district court's authority to defer on ordering restitution and the district court's jurisdiction to modify conditions of supervised release during the pendency of an appeal, the district court did not err in imposing restitution after the defendant filed his first notice of appeal.

Joseph Boswell (Boswell) operated a business that cleaned and serviced pizza ovens for restaurant chains nationwide. In 1995, Boswell stopped reporting his income and paying his taxes. In the 2000's, the IRS began investigating Boswell and started enforcement efforts. As a result, Boswell began operating his business through various nominee corporate entities and individuals. He also used nominees as signatories on business bank accounts; used business funds to pay personal expenses; and withdrew significant amounts of cash. In 2011, Boswell filed for bankruptcy and claimed he owed \$751,000 in back taxes to the IRS for tax years 2001 through 2010. In August 2013, the bankruptcy court denied Boswell's discharge. In February 2019, Boswell was indicted on one count of bankruptcy fraud and one count of tax evasion of payment for his 2001 through 2009 taxes. He was convicted, by jury, of both counts and sentenced to 60 months' imprisonment and three years' supervised release. Boswell appealed his convictions. Thereafter, the district court ordered Boswell to pay restitution to the IRS as a condition of supervised release, and he appealed the restitution order as well.

On appeal, Boswell argued, *inter alia*, that the district court lacked jurisdiction to issue an amended judgment imposing restitution payments while his appeal was pending. Boswell argued that the district court lacked jurisdiction to impose restitution as a condition of supervised release after he filed his first notice of appeal, asserting that the district court's authority under 18 U.S.C. § 3664(d)(5) to hold open the issue of restitution does not provide any basis for the district court to revisit terms of supervised release already imposed.

The appellate court noted that while the parties did not cite Fifth Circuit authorities directly on point, other circuit courts addressing this issue generally recognized that a notice of appeal does not deprive the district court of jurisdiction to modify the terms of supervision. Ultimately, the Fifth Circuit agreed with its sister circuits and held that the district court did not err in imposing restitution after Boswell filed his first notice of appeal. Considering both the district court's authority to defer on ordering restitution and the district court's jurisdiction to modify conditions of supervised release during the pendency of an appeal, the appellate court affirmed the district court's restitution order.

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