Criminal Tax Bulletin

Department of Treasury ***Office of Chief Counsel***
Internal Revenue Service ***Criminal Tax Division***

October – March **This bulletin is for informational purposes. It is not a directive.** **2011-2012**

DEPORTATION

Supreme Court Holds Convictions under 26 U.S.C. § 7206 Constitute Aggravated Felonies for Removal Purposes

In ***Kawashima v. Holder***, 132 S. Ct. 1166 (2012), the Supreme Court held that convictions under 26 U.S.C. § 7206 constitute "aggravated felonies" and are thus deportable offenses under the Immigration and Nationality Act.

Akio Kawashima ("Mr. Kawashima") and Fusako Kawashima ("Mrs. Kawashima"), citizens of Japan, were lawful permanent residents of the U.S. In 1997, Mr. Kawashima pleaded guilty to subscribing to a false statement on a tax return, in violation of 26 U.S.C. § 7206(1), and Mrs. Kawashima pleaded guilty to aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. § 7206(2). Following their convictions, an Immigration Judge ("IJ") concluded that the Kawashimas' convictions constituted aggravated felonies under 8 U.S.C. § 1101(a)(43)(M)(i) and thus found them removable to Japan under 8 U.S.C. § 1227(a)(2)(A)(iii). Sections 1101(a)(43)(M)(i) and (ii) ("subsection (M)(i)" and "subsection (M)(ii)") define the term "aggravated felony" to mean an offense that:

> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
> (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000[.]

The Board of Immigration Appeals ("BIA") affirmed the decision of the IJ. On appeal, the Ninth Circuit held that the Kawashimas' convictions under § 7206 constituted aggravated felonies under subsection (M)(i).

The Supreme Court affirmed the judgment of the Ninth Circuit. The Court first determined that subsection (M)(i) is not limited to offenses that include fraud or deceit as formal elements but refers more broadly to offenses that necessarily entail fraudulent or deceitful conduct. The Court concluded that both §§ 7206(1) and (2) necessarily entail deceit. The Court next addressed whether reading subsection (M)(i) to include tax crimes would make subsection (M)(ii), which references tax evasion under § 7201, redundant to subsection (M)(i). The Court determined that it would not. In support of this conclusion, the Court noted that it is possible to willfully evade or defeat payment of a tax without making any misrepresentation. Accordingly, the Court opined that the elements of § 7201 do not necessarily involve fraud or deceit, and that the specific inclusion of § 7201 in subsection (M)(ii) was intended to ensure that tax evasion was a deportable offense.

BRADY VIOLATIONS

Supreme Court Holds Failure to Disclose Evidence Impeaching Sole Eyewitness to Alleged Murder Violated *Brady*

In ***Smith v. Cain***, 132 S. Ct. 627 (2012), the Supreme Court reversed the defendant's murder conviction after holding that the government's failure to disclose evidence impeaching the sole eyewitness violated *Brady v. Maryland*, 83 S. Ct. 1194 (1963).

Juan Smith ("Smith") was charged with killing five people during an armed robbery. At trial, a single witness, Larry Boatner ("Boatner"), linked Smith to the crimes. Boatner testified that he was socializing at a friend's house when Smith and two other gunmen entered the home, demanded money and drugs, and began shooting, resulting in the death of five of Boatner's friends. Boatner testified that Smith was the first gunmen to enter the house and that Boatner had been "face to face" with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith in the crime. A jury convicted Smith of five counts of first-degree murder.

After his trial and appeal, Smith obtained files from the police investigation of his case, including the notes of the lead investigator. These notes contained statements by Boatner that conflicted with his trial testimony

identifying Smith as the perpetrator. Specifically, notes taken the night of the murder stated that Boatner "could not...supply a description of the perpetrators other then [*sic*] they were black males." The files also contained an account of a conversation with Boatner five days after the crime in which Boatner said he could not identify anyone because he "couldn't see faces" and "would not know them if [he] saw them."

Based on the prosecutors' failure to disclose these notes pursuant to *Brady*, Smith sought to have his conviction vacated. The Louisiana state trial court rejected Smith's *Brady* claim, and the Louisiana Court of Appeal and the Louisiana Supreme Court denied review. The Supreme Court granted certiorari.

The Supreme Court noted that evidence is material under *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. Evidence impeaching an eyewitness may not be material if the other evidence is strong enough to sustain confidence in the verdict. The Court concluded that was not the case here, as Boatner's testimony was the only evidence linking Smith to the crime and Boatner's undisclosed statements directly contradicted his trial testimony. Accordingly, the Court reversed Smith's murder conviction.

SEARCH AND SEIZURE

Supreme Court Holds Installation of GPS Tracking Device to Monitor Vehicle's Movements Constitutes Search under Fourth Amendment

In ***United States v. Jones***, 132 S. Ct. 945 (2012), the Supreme Court held that the government's attachment of a Global-Positioning-System ("GPS") tracking device to the undercarriage of an individual's vehicle, and its use of the device to monitor the vehicle's movements, constituted a search within the meaning of the Fourth Amendment.

In 2004, Antoine Jones ("Jones"), the owner and operator of a District of Columbia nightclub, became the target of a narcotics trafficking investigation by a joint FBI and local police task force. After conducting visual surveillance of the nightclub and wiretapping Jones's cell phone, the government obtained a search warrant authorizing the installation of a GPS tracking device on a Jeep registered to Jones's wife but regularly driven by Jones. Although the warrant authorized installation of the device within 10 days and in the District of Columbia, the government installed the device on the 11th day and in Maryland, and then used it to monitor the vehicle's movements for 28 days.

Jones was indicted on narcotics charges and filed a pre-trial motion to suppress evidence obtained through the GPS device. The district court suppressed the data obtained while the vehicle was parked next to Jones's residence, but admitted the remaining data. Jones was convicted and sentenced to life in prison. The Court of Appeals for the District of Columbia Circuit reversed, holding that admission of the GPS data obtained without a warrant violated Jones's Fourth Amendment rights.

The Supreme Court affirmed, holding that "the government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search'" under the Fourth Amendment. 132 S. Ct. at 949. Noting that the Fourth Amendment has long been "understood to embody a particular concern for government trespass upon … 'persons, houses, papers, and effects,'" the Court interpreted the prohibition against government trespass to extend to "effects" such as vehicles. *Id.* at 950. Accordingly, the majority based its holding on the government's physical occupation of the undercarriage of Jones's Jeep, rather than determining whether the government had violated Jones's "reasonable expectation of privacy" under *Katz v. United States*, 389 U.S. 347 (1988). The Court explained that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test" for determining whether the government's actions constitute a search. *Id.* at 952. (emphasis in original). Notably, the fact that Jones's vehicle was parked in a public parking lot when the GPS was installed did not affect the Court's determination that a trespass had occurred within the meaning of the Fourth Amendment.

Supreme Court Holds Officers Entitled to Qualified Immunity with Respect to Allegedly Overbroad Warrant

In ***Messerschmidt v. Millender***, 132 S. Ct. 1235 (2012), the Supreme Court held that two police officers were entitled to qualified immunity from liability for civil damages based on their execution of an allegedly overbroad search warrant.

With the approval of his supervisor, Sergeant Robert Lawrence ("Lawrence"), Detective Kurt Messerschmidt ("Messerschmidt") obtained a warrant from a neutral magistrate to search the home of Augusta Millender, a

woman in her seventies, and her daughter Brenda Millender (the "Millenders"). The warrant authorized a search for all guns and gang-related material, in connection with the investigation of Augusta Millender's foster son, Jerry Ray Bowen ("Bowen"), a known gang member, for shooting at his ex-girlfriend with a black pistol-gripped sawed-off shotgun purportedly because she had "called the cops" on him. The warrant was executed by a team of officers that included Messerschmidt and Lawrence. The officers seized Augusta Millender's shotgun, a letter from Social Services, and a box of ammunition.

The Millenders filed suit under 42 U.S.C. § 1983 against a number of officers, including Messerschmidt and Lawrence, alleging that the search violated their Fourth Amendment rights because there was insufficient probable cause to believe the items sought constituted evidence of a crime. The district court found that the search for firearms was overbroad because the crime at issue involved one specific weapon, and the search for gang-related materials was overbroad because there was no evidence the crime was gang-related. On appeal, the Ninth Circuit, sitting *en banc*, agreed that the warrant was overbroad, and affirmed the district court's denial of qualified immunity to the officers. The Supreme Court granted certiorari and reversed.

The Court first noted that qualified immunity protects government officials from liability for civil damages so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The Court pointed out that the fact that a neutral magistrate issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner. Nevertheless, the Court has recognized a "narrow exception" allowing suit when it is "obvious" that no reasonably competent officer would have concluded that a warrant should issue.

Rejecting the Millenders' contention that the officers failed to provide any facts supporting probable cause to seize the scope of items sought, the Court concluded that the present case did not fall within the narrow exception to qualified immunity. Given Bowen's possession of the sawed-off shotgun, his gang membership, his willingness to use the gun to kill someone, and his concern about the police being called, the Court opined that it would not be unreasonable for an officer to conclude that Bowen owned other illegal guns. The Court similarly concluded that it would not be unreasonable for an officer to believe evidence of gang affiliation would be helpful in prosecuting Bowen, because the attack on his ex-girlfriend could be viewed as motivated by a desire to prevent her from disclosing his gang activity to the police.

The Court held that, even if the warrant at issue were invalid, it was not so obviously lacking in probable cause that the officers could be considered "plainly incompetent" for concluding otherwise. 132 S. Ct. at 1250. Accordingly, the Court reversed the judgment of the Ninth Circuit denying the officers qualified immunity.

Seventh Circuit Holds Fourth Amendment Permits Limited Warrantless Search of Cell Phone Incident to Arrest

In ***United States v. Flores-Lopez***, 670 F.3d 803 (7th Cir. 2012), the Seventh Circuit held that a police officer's search of the defendant's cell phone to determine its telephone number was a valid warrantless search incident to the defendant's arrest.

Abel Flores-Lopez ("Flores-Lopez") was a supplier of illegal drugs to another drug dealer, Alberto Santana-Cabrera ("Santana-Cabrera"). Santana-Cabrera, in turn, had a retail customer who, unbeknownst to him, was a paid police informant. While the police listened in, the informant placed a drug order with Santana-Cabrera and then overheard a telephone conversation between Santana-Cabrera and Flores-Lopez in which Flores-Lopez said he would deliver the ordered drugs to a garage, where the sale would take place. When Flores-Lopez arrived at the garage in a truck containing the drugs and met Santana-Cabrera, the police arrested them both, searched Flores-Lopez and his truck, and seized one cell phone from Flores-Lopez's person and two other cell phones from the truck. An officer searched each cell phone for its telephone number, which the government used to subpoena three months of each cell phone's call history from the telephone company. At trial, over Flores-Lopez's objections, the district court admitted the call history of the cell phone found on his person, which Flores-Lopez admitted belonged to him. The call history included his overheard conversation with Santana-Cabrera along with many other calls between Flores-Lopez and his co-conspirators. Flores-Lopez was convicted and sentenced to ten years in prison.

On appeal, Flores-Lopez argued that the evidence from the phone company was inadmissible as the fruit of an illegal warrantless search of his cell phone. The Seventh Circuit disagreed, holding that the search was a minimally invasive search incident to arrest and was therefore valid without a warrant. The court explained

that in the context of a warrantless search incident to arrest, "even when the risk either to the police officers or to the existence of the evidence is negligible, the search is allowed, provided it's no more invasive than, say, a frisk, or the search of a conventional container[.]" 670 F.3d at 809. In this case, the court concluded, the invasiveness of looking in a cell phone for just the cell phone's number did not exceed what Seventh Circuit law allows.

CONSPIRACY

Second Circuit Holds Unanimous Jury Agreement on Overt Act Not Required

In ***United States v. Kozeny***, 667 F.3d 122 (2d Cir. 2011), the Second Circuit held that a jury is not required to agree unanimously on which overt act was committed in furtherance of a conspiracy.

Viktor Kozeny ("Kozeny"), Frederic Bourke, Jr. ("Bourke"), and others were charged with participating in a conspiracy to purchase Azerbaijan's state-owned oil company illegally by bribing the Azerbaijani president and other officials. After a jury trial, Bourke was convicted of conspiring to violate the Foreign Corrupt Practices Act ("FCPA") and of making false statements to the FBI. (Kozeny became a fugitive in the Bahamas and did not face trial). On appeal, Bourke argued in part that the district court erred in refusing to instruct the jury that it needed to agree unanimously on a single overt act committed in furtherance of the conspiracy. The Second Circuit disagreed and affirmed Bourke's convictions.

In support of its analysis of the issue, the circuit court cited the Supreme Court's prior holdings that an overt act taken in furtherance of a conspiracy need not be a crime, and that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. *See Schad v. Arizona,* 501 U.S. 624, 631 (1991); *Braverman v. United States,* 317 U.S. 49, 53 (1942). The court further noted that, in the Second Circuit, the government may plead one set of overt acts in the indictment and prove a different set of overt acts at trial without prejudice to the defendant.

The court concluded that, although proof of at least one overt act is necessary to prove an element of conspiracy, which overt act supports proof of a conspiracy conviction is "a brute fact and not itself [an] element of the crime." 667 F.3d at 132. Because a jury is not required to decide unanimously which "brute facts" make up a particular element of a crime (*see Richardson v. United States*, 526 U.S. 813, 817 (1999)), the court held that the jury need not reach unanimous agreement on which particular overt act was committed in furtherance of the conspiracy.

MONEY LAUNDERING

Eighth Circuit Holds Money Laundering Convictions Did Not Merge with Predicate Fraud Offenses

In ***United States v. Rubashkin***, 655 F.3d 849 (8th Cir. 2011), the Eight Circuit upheld the defendant's money laundering convictions on the ground that they did not present a "merger problem" under *United States v. Santos*, 553 U.S. 507 (2008).

Sholom Rubashkin ("Rubashkin") managed Agriprocessors, a meatpacking company, and also owned a grocery store and a school. In 2009, Rubashkin was convicted of 86 counts of bank, wire and mail fraud; making false statements to a bank; money laundering; and violations of an order of the Secretary of Agriculture. Rubashkin's bank fraud convictions were based on his actions with respect to a revolving loan that Agriprocessors had obtained from a local bank. The loan was secured primarily by Agriprocessors's inventory and accounts receivable. To increase Agriprocessors's borrowing ability, Rubashkin fraudulently inflated the company's accounts receivable by (1) directing employees to create false invoices and bills of lading; and (2) directing some customer payments away from the bank account in which the loan agreement specified they should have been deposited. Rubashkin also made false statements to the bank regarding his compliance with immigration laws and the Packers Act.

Rubashkin's money laundering convictions were based on his use of loan proceeds to pay down the revolving loan in order to borrow additional funds. Rubashkin directed employees to deposit funds from Agriprocessors's operating account, which included the loan proceeds, into bank accounts held by his grocery store and school. These entities then wrote checks to Agriprocessors in the guise of customer payments, which were deposited into the Agriprocessors account designated in the loan agreement. In this way, Rubashkin paid down the loan without utilizing the other hidden customer payments and without reducing the company's accounts receivables.

Among other issues, Rubashkin appealed his money laundering convictions, arguing that because the money laundering charges arose from repayments of the loan, they were an essential part of the underlying bank fraud. Under *Santos*, he contended, this "merger problem" meant that he could not be convicted of money laundering unless the "proceeds" he had allegedly laundered were profits of the bank fraud. Because the jury had found that the loan proceeds Rubashkin used to pay down the loan did not constitute profits, he argued that there was insufficient evidence to convict him of money laundering.

The Eighth Circuit agreed with Rubashkin that, under *Santos*, "proceeds" must mean "profits" whenever a broader definition would result in a "merger problem." The court did not agree, however, that such a merger problem existed here. The court noted that the proceeds at issue were derived from bank fraud offenses that included false statements regarding compliance with the Packers Act and the immigration laws, as well as the false inflation of Agriprocessors' accounts receivable. Rather than transferring these proceeds directly from Agriprocessors' accounts to the bank as loan repayments, Rubashkin chose to pay down the loan by first making payments to third parties (*i.e.*, the grocery store and school) and then having those third parties make false customer payments to pay down the loan. The court held that this additional step of disguising the nature and source of the proceeds was separately punishable as money laundering.

Fourth Circuit Holds Using Another Person's Illegal Proceeds to Hire Defense Attorneys for Third Parties Was Outside Money Laundering Statute's Safe Harbor

In ***United States v. Blair***, 661 F.3d 755 (4th Cir. 2011), the Fourth Circuit held, *inter alia*, that the defendant's use of proceeds of a drug conspiracy to secure counsel for two individuals involved in the conspiracy did not fall under the safe harbor provision of 18 U.S.C. § 1957(f)(1).

Walter Blair ("Blair"), a criminal defense attorney, was given $170,000 by a client for safekeeping and was informed by the client that the money constituted illegal drug proceeds. Blair developed a plan to form a real estate corporation through which the client could use a portion of the money to purchase properties. In addition, Blair used a portion of the drug proceeds to purchase two $10,000 cashier's checks to hire defense attorneys for two individuals involved in the drug conspiracy. He also took nearly $10,000 in drug proceeds for himself, purportedly as his fee for being one of the individuals' co-counsel. Blair was convicted on eight counts of concealment money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i), one count of spending money laundering in violation of 18 U.S.C. § 1957(a), and a number of other charges. He received a 97-month sentence.

The basis for Blair's spending money laundering conviction was his use of a portion of the drug proceeds for the purpose of retaining counsel for the co-conspirators. On appeal, Blair argued that § 1957(f)(1), which provides a safe harbor for "transaction[s] necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution," shielded him from prosecution on this charge. The Fourth Circuit disagreed. Relying on *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *Texas v. Cobb*, 532 U.S. 162 (2001), the court noted that there is no Sixth Amendment right to use someone else's money to hire counsel, and that the right to counsel is personal to the defendant. Because Blair used someone else's money to hire counsel for others, the court held that Blair's conduct did not fit within the safe harbor provision.

BRIBERY

Seventh Circuit Holds Federal Funds Bribery Statute Covers Payments to Influence Law Enforcement

In ***United States v. Robinson***, 663 F.3d 265 (7th Cir. 2011), the Seventh Circuit held that the federal funds bribery statute applies to payments made to obtain intangible benefits, such as bribes paid to divert police attention from criminal activity.

During a sting operation conducted by Chicago police, Anthony Robinson ("Robinson") offered to pay a police officer $1,000 a week to divert police attention from his drug-selling operation. For the next several weeks, Robinson gave the officer smaller amounts of money. The officer then offered to sell Robinson two kilos of seized cocaine at a discounted price. When Robinson brought the money to the agreed-upon meeting place, he was arrested. At trial, Robinson was convicted of federal funds bribery in violation of 18 U.S.C. § 666(a)(2) and attempted possession of 500 grams of cocaine with intent to distribute in violation of 21 U.S.C. § 846. He was sentenced to 30 years in prison on the drug-possession count and 10 years on the bribery count, to run concurrently.

The bribery statute under which Robinson was convicted, 18 U.S.C. § 666(a)(2), prohibits offering or giving anything of value to a person with intent to influence or reward an agent of a federally funded organization, government, or agency "in connection with any business, transaction, or series of transactions … involving anything of value of $5,000 or more." On appeal, the Seventh Circuit considered in part whether this provision covers bribes offered to influence law enforcement. The court concluded that although law-enforcement services are intangible and difficult to quantify, the language of § 666(a) is broad enough to include bribes paid to a police officer to induce him to refrain from enforcing the law.

The court further held that evidence of the amount of the bribe, together with evidence of police salaries and the profit Robinson stood to realize from unfettered cocaine trafficking, was sufficient to prove that the business or transaction at issue was worth at least $5,000. Accordingly, the court concluded that the evidence was sufficient to permit the jury's finding that the government carried its burden of proof on the transactional element of the § 666(a) offense.

STATUTE OF LIMITATIONS

Second Circuit Upholds Suspension of Statute of Limitations to Permit Government to Obtain Foreign Evidence

In ***United States v. Lyttle***, 667 F.3d 220 (2d Cir. 2012), the Second Circuit held that a suspension of the statute of limitations was warranted to permit the government to obtain foreign evidence through diplomatic channels, even if the evidence could have been obtained through other means.

Violette Gail Eldridge ("Eldridge") was convicted of numerous offenses related to her involvement in a fraudulent investment scheme. Before she was indicted and before the statute of limitations had run, the district court granted a government application to suspend the statute of limitations pursuant to 18 U.S.C. § 3292 while the government sought the assistance of the Hungarian government in obtaining records of deposits of victims' funds into Hungarian bank accounts. Section 3292 requires a district court before which a grand jury is impaneled to toll the statute of limitations for an offense if the court finds that the government has officially requested evidence of the offense, and it reasonably appears that the evidence is in a foreign country.

Eldridge was subsequently indicted on charges of conspiracy, mail fraud, wire fraud, and money laundering, after the original statute-of-limitations period would have run. She was convicted on all counts and sentenced to 20 years' imprisonment.

On appeal, the Second Circuit determined that the government's application to suspend the running of the statute of limitations was supported by sufficient evidence. Next, the court held that § 3292 does not require the foreign evidence to be obtainable only through diplomatic channels for the statute of limitations to be suspended. Rather, if the requirements of § 3292 are satisfied, the statute of limitations must be suspended regardless of whether the government might have been able to obtain the evidence through other means. The court further held that § 3292 does not require the evidence sought to be "pivotal" to the indictment, but only that it be "evidence of an offense." 667 F.3d at 225. Finally, the court concluded there was nothing improper about an *ex parte* proceeding to determine whether to issue a § 3292 order, and that Eldridge was not entitled to a hearing on whether there was a factual basis for the order.

FIFTH AMENDMENT

Eleventh Circuit Holds Decryption and Production of Hard Drives' Contents Was Protected by Fifth Amendment Privilege

In ***United States v. Doe,*** 670 F.3d 1335 (11th Cir. 2012), the Eleventh Circuit held that the defendant's decryption and production of the contents of several hard drives would be testimonial and would therefore trigger Fifth Amendment protection.

During the course of a child pornography investigation of John Doe ("Doe"), several laptop computers and external hard drives were seized from Doe's hotel room. When FBI forensic examiners were unable to access the encrypted portions of the hard drives, Doe was issued a grand jury subpoena requiring him to produce the hard drives' unencrypted contents. To obtain Doe's compliance with the subpoena, the district court granted the government's request for an order giving Doe a limited act-of-production immunity. Doe appeared before the grand jury and refused to comply with the subpoena. He invoked his Fifth Amendment privilege against self-incrimination, on the ground that the government's use of the decrypted contents of the hard drives as evidence against him would constitute derivative use of his immunized testimony, which was not protected by the district court's grant of immunity.

The district court held Doe in contempt and ordered him incarcerated.

On appeal, the Eleventh Circuit noted that to fall within the ambit of the Fifth Amendment, an individual must show (1) compulsion; (2) a testimonial communication or act; and (3) incrimination. In this case, the government conceded that the decryption and production of the hard drives would be compelled and incriminatory. The court determined that these actions would also be testimonial because (1) they would require the use of Doe's mind; and (2) the government did not already know whether any files were located on the hard drives, or whether Doe was capable of accessing them. Accordingly, the circuit court held that the district court had erred in concluding that Doe's act of decryption and production would not constitute testimony and also in limiting his immunity so as to allow the government derivative use of the evidence such act disclosed. Holding that Doe had properly invoked the Fifth Amendment privilege, the circuit court reversed the district court's judgment holding him in contempt.

EVIDENCE

Second Circuit Holds Evidence of Defendant's Interactions with Undercover IRS Agent Was Admissible "Other Act" Evidence

In ***United States v. Cadet***, 664 F.3d 27 (2d Cir. 2011), the Second Circuit held that the district court properly admitted evidence of interactions between the defendant and an IRS undercover agent leading to the defendant's preparation of a fraudulent tax return.

Joseph Cadet ("Cadet") was indicted on multiple counts of violating 26 U.S.C. § 7206(2) (aiding and assisting in the preparation of false income tax returns). The indictment alleged that Cadet obtained fraudulent refunds for his clients by inflating their personal and business deductions. Before the trial, the government moved *in limine* to introduce evidence of interactions between Cadet and an IRS undercover agent, during which Cadet had proposed using "creative financing" to prepare a Form 1040 for the agent that would generate a fraudulent refund. The district court held the evidence was admissible under Federal Rule of Evidence 404(b), which generally provides that evidence of other crimes, wrongs, or acts may be admitted for certain purposes. Cadet was convicted of 16 counts of violating 26 U.S.C. § 7206(2) and sentenced to 41 months' imprisonment.

On appeal, Cadet argued the district court had abused its discretion in admitting evidence of his preparation of a tax return for the IRS undercover agent. The Second Circuit disagreed, holding the evidence had been properly admitted under Rule 404(b) to show Cadet's knowledge and intent. The court explained that when "other act" evidence is offered for this purpose the evidence must be sufficiently similar to the conduct at issue to permit the jury to draw a reasonable inference of knowledge or intent from the other act. In this case, the court concluded that although Cadet's interaction with the IRS undercover agent was not identical to the interactions between Cadet and his taxpayer clients, the interactions were sufficiently similar to the charged conduct to be "highly probative" of knowledge and intent. 664 F.3d at 33. The court also concluded that the high probative value of the evidence substantially outweighed the risk of unfair prejudice, particularly in light of the judge's limiting instruction to the jury prohibiting consideration of the evidence for any other purpose.

CONFRONTATION CLAUSE

Fourth Circuit Holds Defendant Did Not Have Constitutional Right to Confront Lab Analysts Who Provided Raw Data for Expert's Testimony

In ***United States v. Summers***, 666 F.3d 192 (4th Cir. 2011), the Fourth Circuit held that the admission of DNA test results through an expert's written report and trial testimony did not violate the Confrontation Clause, even though the defendant did not have an opportunity to cross-examine the lab analysts who conducted the tests.

On November 18, 2004, Kevin Tyrelle Summers ("Summers"), who was wearing a black North Face jacket, fled from an approaching police detective. When Summers later surrendered, he was no longer wearing the jacket. The police subsequently found a black North Face jacket along Summers's flight path. The jacket's contents included a handgun, ammunition, and a large packet of crack cocaine. After Summers was indicted on drug and firearm possession charges, the county police sent a black jacket to the FBI, which was forwarded to the agency's laboratory for DNA testing.

At trial, the government's case-in-chief featured the expert testimony of Brendan Shea ("Shea"), a forensic examiner at the FBI laboratory. Shea explained that he had directed his subordinate analysts to perform DNA tests on the jacket as well as on samples taken from

Summers's mouth. Shea compared the data, testifying that Summers was the major contributor of DNA found on the jacket. Shea documented his conclusions in a three-page report, which contained a table presenting the analysts' testing results. The jury found Summers guilty of two of the drug and firearm possession charges, and the district court sentenced him to 262 months in prison.

On appeal, Summers argued in part that his inability to cross-examine the lab analysts violated the Confrontation Clause of the Sixth Amendment. The Fourth Circuit disagreed, noting that Shea was not merely a transmitter of the analysts' conclusions. Rather, Shea provided his independent, subjective opinion, which was readily tested through cross-examination. The court further noted that Shea's written report generally mirrored his trial testimony. The court distinguished this case from *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), both of which involved an absent expert's "certification" as to the meaning of certain raw data. The court noted that in this case, "[t]he only evidence interpreting the raw data was provided by Shea via his report and live testimony, and he was strenuously cross-examined by the defense." 666 F.3d at 203.

SENTENCING

Seventh Circuit Holds Re-sentencing Court Not Required to Consider New Arguments Beyond Scope of Remand

In ***United States v. Barnes***, 660 F.3d 1000 (7th Cir. 2011), the Seventh Circuit held that when a case is generally remanded for re-sentencing, the district court is not obligated to consider new arguments unrelated to the issues raised on appeal.

Marlyn Barnes ("Barnes") and Melvin Taylor ("Taylor") were convicted of conspiring to possess with intent to distribute more than five kilograms of cocaine and with possessing firearms in furtherance of a drug-trafficking crime. Barnes was sentenced to 292 months' imprisonment and Taylor was sentenced to 188 months' imprisonment. On their initial appeal, the Seventh Circuit vacated both sentences and remanded for re-sentencing because of inconsistent factual findings by the district court regarding the quantity of cocaine for which the defendants were responsible. Upon re-sentencing, the district court dismissed as waived all new arguments raised by Barnes and Taylor, and again sentenced both Barnes and Taylor to 292 and 188 months' imprisonment, respectively. Both Barnes and Taylor appealed their sentences.

The defendants argued on appeal that, under *Pepper v. United States*, 131 S. Ct. 1229 (2011), they were entitled to the district court's consideration of any new arguments they raised at the re-sentencing hearing. Although the Seventh Circuit acknowledged that *Pepper* equated general remands to an order for "de novo" re-sentencing, the court rejected the defendants' broad interpretation of "de novo" in this context. Rather, the circuit court held that when a case is generally remanded for re-sentencing, the district court may entertain new arguments as necessary to effectuate its sentencing intent but is not obligated to consider any new arguments beyond those relevant to the issues raised on appeal. The court viewed *Pepper* as standing for the proposition that general remands render a district court unconstrained by any element of the prior sentence. But the court cautioned that allowing a district court freely to balance already-raised arguments to preserve or revise its sentencing objectives "does not equate to carte blanche for defendants to raise new arguments unrelated to the issues raised on appeal." 660 F.3d at 1007.

Eleventh Circuit Holds 152-Month Downward Variance in Terrorism-Related Sentence Was Substantively Unreasonable

In ***United States v. Jayyousi***, 657 F.3d 1085 (11th Cir. 2011), the Eleventh Circuit vacated the sentence of a defendant convicted of terrorism-related activities, holding the district court's 152-month downward variance was substantively unreasonable.

Jose Padilla ("Padilla") and others were charged with conspiring to support terrorist activities abroad and with actually providing material support for such activities. The defendants were convicted on all counts. In sentencing Padilla, the district court calculated a Sentencing Guidelines advisory range of 360 months to life imprisonment. The court then varied downward based on the 18 U.S.C. § 3553(a) factors, to arrive at a final sentence of 208 months' imprisonment.

On appeal, the Eleventh Circuit held that Padilla's sentence was substantively unreasonable, reasoning that the district court erred by (1) imposing a sentence 12 years below the low end of the Guidelines range, which was contrary to Congressional policy with respect to career offenders; (2) departing downward based on Padilla's age, which the court believed did not account for his "heightened risk of future dangerousness due to his al-Qaeda training;" (3) comparing Padilla to

criminals who were not similarly situated; (4) reducing Padilla's sentence because Padilla did not personally harm anyone and his crimes did not target the United States; and (5) providing for an extensive downward variance based on Padilla's harsh conditions of pretrial confinement. In reversing the sentence, the Court of Appeals remarked: "The Guidelines are not mandatory and a district court is often free to give a below-Guidelines sentence, but the discretion of a district court to sentence a criminal is not unbounded." 657 F.3d at 1117.

Fourth Circuit Holds Clear Findings Required for Sentencing Enhancement Based on Perjury

In ***United States v. Perez***, 661 F.3d 189 (4th Cir. 2011), the Fourth Circuit held that the district court improperly applied an obstruction of justice sentencing enhancement by failing to find the factual predicates necessary to conclude that the defendant had committed perjury.

Jose Luis Jaime Perez ("Perez") was convicted of conspiracy to manufacture, distribute, and possess with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846. At the sentencing hearing, the district court applied a two-level enhancement for obstruction of justice, based on the jury's determination that Perez did not testify truthfully at trial. Together with other adjustments, this resulted in a sentence of 262 months' imprisonment.

On appeal, the Fourth Circuit agreed with Perez that the district court improperly applied the obstruction of justice enhancement. The circuit court first explained that there are three elements necessary to impose the enhancement based on the defendant's perjurious testimony, *i.e.*, that the defendant (1) gave false testimony; (2) concerning a material matter; (3) with willful intent to deceive. Citing *United States v. Dunnigan*, 507 U.S. 87 (1993), the court noted that each element of the alleged perjury need not be addressed in a separate finding. Nonetheless, the court interpreted *Dunnigan* to require a finding that clearly established all of the elements, in order to allow for meaningful appellate review.

In this case, the Fourth Circuit determined that the sentencing court had established the elements of falsity and materiality but had failed to address the element of willfulness in its findings. Concluding that it was "impossible to conclude that willfulness was ever established," the circuit court held that the obstruction of justice sentencing enhancement was improperly applied. 661 F.3d at 194. Accordingly, the court reversed and remanded the case for resentencing.

Seventh Circuit Holds Sentencing Guidelines Generally Allow Double Counting

In ***United States v. Vizcarra***, 668 F.3d 516 (7th Cir. 2012), the Seventh Circuit held that double counting for purposes of calculating a sentencing range is generally permissible under the Sentencing Guidelines unless expressly prohibited.

David Vizcarra ("Vizcarra") committed a kidnapping for ransom to extract payment of a drug debt. He was indicted on conspiracy and kidnapping charges, pleaded guilty to the kidnapping count, and was sentenced to 168 months' imprisonment. On appeal, he argued, *inter alia*, that the district court's application of a six-level enhancement under U.S.S.G. § 2A4.1(b)(1) for kidnapping for ransom constituted impermissible double counting because the underlying offense involved a ransom demand.

The Seventh Circuit rejected Vizcarra's argument, holding that applying the ransom enhancement was not impermissible double counting because nothing in the text of the guideline or its application notes suggested the enhancement was inapplicable to a defendant in Vizcarra's position. The court explained that in the context of guidelines sentencing, the term "double counting" refers to using the same conduct more than once to increase a defendant's Guidelines sentencing range. Examining the amended application notes to U.S.S.G. § 1B1.1, the court determined that double counting is the "default rule" in the guidelines. 668 F.3d at 524. In other words, the same conduct may determine the base offense level and also trigger cumulative sentencing enhancements and adjustments unless the text of the applicable guideline says otherwise. Noting that other circuits generally adhere to this principle, the court overruled its own inconsistent decision in *United States v. Bell*, 598 F.3d 366 (7th Cir. 2010), and affirmed Vizcarra's sentence.

FORFEITURE

Seventh Circuit Holds Forfeiture of $279,500 for Structuring Offenses Was Not Excessive under Eighth Amendment

In ***United States v. Malewicka***, 664 F.3d 1099 (7th Cir. 2011), the Seventh Circuit held that the forfeiture of $279,500 for structuring cash withdrawals was not so "grossly disproportionate" to the offense as to violate the Eighth Amendment.

Jadwiga Malewicka ("Malewicka") operated Skokie Maid Service, a home cleaning service business. Her customers usually paid by checks made out to the business. Malewicka would deposit the checks in the business's checking account, keep a portion of the funds as a fee and then withdraw the remaining amounts to pay individual cleaners. Between January 2002 and April 2008, after having been advised by her bank of the requirements to report transactions involving withdrawals of cash greater than $10,000, Malewicka made withdrawals in the amount of approximately $9,900 on 244 occasions. In 2008, Malewicka was convicted of 23 counts of structuring transactions for the purpose of avoiding bank reporting requirements, in violation of 31 U.S.C. § 5324(a)(3). She was sentenced to 3 years' probation and ordered to pay a forfeiture amount of $279,500.

On appeal Malewicka argued, citing *United States v. Bajakajian*, 524 U.S. 321 (1998), that the forfeiture amount was grossly disproportionate to the offense for which she was convicted and violated her Eighth Amendment rights. The Seventh Circuit disagreed. First, the court noted that Malewicka was convicted of actively concealing the nature of her transactions on 23 occasions spanning six years. Second, the court noted that Malewicka's actions prevented the bank from filing currency transaction reports, which frustrated the purpose of § 5324. Third, the court reasoned that, although the forfeiture exceeded the maximum Guidelines range, it did not exceed the statutory range and was also supported by the language of both the Guidelines and the statute. Finally, the court disagreed with Malewicka that the harm caused by her offenses was minimal, emphasizing that her actions inhibited the government's ability to uncover and identify fraud.

Ninth Circuit Holds Ordering Defendants to Pay Restitution and Criminal Forfeiture Is Not Impermissible Double Recovery

In ***United States v. Newman***, 659 F.3d 1235 (9th Cir. 2011), the Ninth Circuit held, *inter alia*, that requiring defendants to pay both restitution and criminal forfeiture was not an impermissible "double recovery."

David Ray Newman ("Newman") and Jon Tedesco ("Tedesco") both committed crimes that subjected them to criminal forfeiture. Newman robbed two banks, and Tedesco conspired to defraud banks by using straw buyers to apply for mortgage loans to purchase properties. Each pleaded guilty and agreed to forfeit a specific amount of money. In Newman's case, the government included a criminal forfeiture allegation pursuant to 18 U.S.C. § 981 and 28 U.S.C. § 2461(c). In Tedesco's case, the government included a criminal forfeiture allegation pursuant to 18 U.S.C. § 982. In each case, the district court eliminated criminal forfeiture or reduced it to a trivial amount, and in each case the district court ordered restitution. The government appealed on several grounds. Because the district court's reasoning in the two cases was substantially similar, the Ninth Circuit issued a joint opinion.

The court first noted that, under 18 U.S.C. § 982(a)(2) and 28 U.S.C. § 2461(c), criminal forfeiture is mandatory, subject only to statutory and constitutional limits, and may not be reduced or eliminated at the district court's discretion. The court went on to explain that criminal forfeiture is separate from restitution, which serves an entirely different purpose: the purpose of forfeiture is to punish the defendant for the commission of crimes, whereas the purpose of restitution is to make the victim whole again by restoring to him or her the value of the losses suffered as a result of the defendant's crime. Given this distinction, the court held that ordering defendants to pay both restitution and criminal forfeiture was not an impermissible "double recovery." Accordingly, the court concluded that the district court erred to the extent that it reduced or eliminated criminal forfeiture because it had ordered restitution.

Ninth Circuit Holds Victim's Interest in Funds Invested in Ponzi Scheme Exceeded Government's Interest

In ***United States v. Wilson***, 659 F.3d 947 (9th Cir. 2011), the Ninth Circuit held that a victim's interest in funds he had transferred to the operator of a Ponzi scheme was greater than the government's interest, and thus the funds were not subject to criminal forfeiture.

Stefan Wilson ("Wilson") operated a Ponzi scheme that took almost $13 million from over 50 investors. Unaware that Wilson was under investigation, an investor named Richard A. Gray, Jr. ("Gray") wired $2.3 million to Wilson's bank account on February 2, 2008. Wilson then transferred these funds to an Ameritrade brokerage account. Prior to the transfer, the account balance was $324.43. On February 12, another investor named Nell Johnson ("Johnson") demanded that Wilson return her investment after she had met with an FBI agent about Wilson. Wilson transferred $425,000 from the Ameritrade account to an account held by Johnson. On February 15, Wilson was arrested, and the $1,490,418.57 balance of the Ameritrade account was seized. The government also seized the $425,000 that Wilson had transferred to Johnson. Wilson was indicted and entered into a plea agreement with the government. Pursuant to the plea agreement, the district court entered its preliminary order of forfeiture, forfeiting to the government the balance of the Ameritrade account and the $425,000 in Johnson's account.

Gray filed a petition under 21 U.S.C. § 853(n)(2) alleging that his interest in the forfeited funds was superior to the interests of both Wilson and the government. The district court granted the government's motion to dismiss Gray's petition, and Gray appealed.

The Ninth Circuit reversed, concluding that Gray's interest in the funds was superior to that of the government. The court noted that Gray's original interest in the funds existed prior to the government's interest, which attached when Gray transferred the funds to Wilson. At the time of transfer, the type of interest Gray held changed from an ownership interest to a "constructive trust" created by operation of state law. Nonetheless, the court rejected the district court's determination that this change in the nature of Gray's interest caused him to lose his right to the funds. The circuit court pointed out that the government's interest in the funds could not exceed Wilson's interest, and that Gray's interest was greater than Wilson's. Accordingly, the court reversed and remanded to resolve a number of issues, including the question of whether Gray's interest in the funds was greater than that of the other victims of Wilson's scheme.

TABLE OF CASES

SENTENCING

FORFEITURE