IRS

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FILTER TEAM REVIEW OF PRIVILEGED MATERIALS

Fourth Circuit Holds Use of Filter Team to Inspect Privileged Attorney-Client Materials is Improper

In ***In re: Search Warrant Issued June 13, 2019***, 942 F.3d 159 (2019), *reh'g and reh'g en banc denied* (4th Cir. Jan. 28, 2020), the Fourth Circuit held that the use of a Filter Team to inspect privileged attorney-client materials is improper, reasoning, *inter alia*, the Team's creation inappropriately assigned judicial functions to the executive branch, the Team was approved in *ex parte* proceedings prior to the search and seizures, and the use of the Team contravened foundational principles that protect attorney-client relationships.

Over the last three years, "Lawyer A," a partner of "Law Firm," has been handling the representation of "Client A" in an investigation conducted by federal authorities. According to the government, its investigation of Client A was obstructed by Lawyer A, thus triggering the crime-fraud exception to the attorney-client privilege and work-product doctrine, and an investigation of Lawyer A commenced. As part the investigation, an IRS agent applied for a warrant to conduct a search of Law Firm's office. The magistrate judge approved the search warrant and contemporaneously authorized a Filter Team, a team of federal agents and prosecutors assembled to inspect privileged attorney-client materials, which was proposed by prosecutors *ex parte*. Five days after its approval, the search warrant was executed. IRS and DEA agents seized voluminous materials and electronic records, including certain "confidential, privileged materials" and all of Lawyer A's email correspondence. It was later determined that less than 1% of the seized emails pertained to Client A.

During the execution of the search warrant, various Law Firm partners voiced objections, notably, to the breath of the search and seizure. Law Firm moved in the district court for a temporary restraining order and a preliminary injunction regarding the Filter Protocol as it applied to the search. The motion was denied, and Law Firm appealed, challenging the government's use of the Filter Team.

In its review, the Fourth Circuit cited *Centro Tepeyac v. Montgomery County*, stating, "to prevail on a request for [a preliminary injunction], the plaintiff must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm absent the requested preliminary relief, (3) the balance of the equities weighs in its favor, and (4) a preliminary injunction is in the public interest." *See Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 188 (4th Cir. 2013) (*en banc*).

First, the court evaluated whether Law Firm was likely to suffer irreparable harm absent injunctive relief and concluded that the Filter Team's review of the materials was and is so injurious to the Firm and its clients, and that harm is plainly irreparable. The appellate court held that the district court abused its discretion in failing to acknowledge Law Firm's evidence that less than one percent of the seized emails pertained to Client A. Further, many of the seized emails contained privileged communications and attorney work product concerning other Law Firm clients. The Fourth Circuit held that the district court erred as a matter of law by affording insignificant weight to the principles that protect attorney-client relationships, noting that the district court crucially failed to recognize that an adverse party's review of privileged materials seriously injures the privilege holder.

The Fourth Circuit next evaluated the likelihood of success factor, concluding that Law Firm demonstrated that it is likely to succeed on the merits of its challenge of the Filter Team and its Protocol. The appellate court held that the district court erred in assigning judicial functions to the Filter Team (part of the executive branch), authorizing the Filter Team and its Protocols in *ex parte* proceedings that were conducted prior to the seizures at the Law Firm, and failing to properly weigh the foundational principles that protect attorney-client relationships.

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The court emphasized that when a dispute arises as to whether a lawyer's communications or a lawyer's documents are protected by the attorney-client privilege or work-product doctrine, the resolution of that dispute is a judicial function, and a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute. The court went on to address issues that may arise when using a filter team, noting: There is the possibility that a filter team, even if composed entirely of trained lawyers, will make errors in privilege determinations. Although filter teams might have an interest in preserving privilege, the teams also possess a conflicting interest in pursuing the investigation. Lastly, filter team errors can arise from differences of opinions regarding privilege.

Next, the Fourth Circuit considered whether the equities weigh in favor of Law Firm and concluded that the harm to the Law Firm and its clients that would be caused by allowing the Filter Team to continue its review outweighed any harm to the government that might result from the magistrate judge conducting the privilege review of the seized materials. The court noted that any delay in the government's investigation does not outweigh the harm to the Law Firm and its clients caused by the review.

Finally, the Fourth Circuit considered whether the injunction is in the public interest, concluding that an award of injunctive relief in these circumstances supports a strong public interest in the integrity of the judicial system.

Concurring, Judge Rushing emphasized two points. First, the majority does not suggest that the Modified Privilege Assessment Provision (prohibiting documents, including those that the Filter Team considers nonprivileged, from being sent to the Prosecution Team without Law Firm's consent or a court order) impermissibly usurps a judicial function. Second, a procedure where the government voluntarily delays review for a brief time until the court can schedule a hearing on the motion for a restraining order or injunction may be salutary, but the burden remains on the parties to voice their objections and accommodate the orderly resolution of those objections.

FIRST AMENDMENT

Third Circuit Holds Grand Jury Secrecy is Compelling Interest Warranting Limited Restrictions on First Amendment Right

In ***In the Matter of the Application of Subpoena 2018R00776***, 947 F.3d 148 (3d Cir. 2020), the Third Circuit, utilizing a strict scrutiny analysis, held that the limited restrictions placed on a private citizen's First Amendment right to free speech were narrowly tailored to serve the overriding compelling governmental interest in maintaining grand jury secrecy.

Pursuant to the Stored Communications Act, 18 U.S.C. § 2703, *et. seq.*, a grand jury issued a subpoena to ABC Corp., an electronic service provider, for the data of one of its customer's employees who was under criminal investigation. Later, a search warrant demanded additional data regarding the same subscriber. Each request was accompanied by a nondisclosure order ("NDO") prohibiting ABC Corp. from notifying anyone of the existence of the data requests. ABC Corp. complied with the requests, but challenged the constitutionality of the NDOs, arguing they infringed upon its freedom of speech. ABC Corp. moved to amend the NDOs to permit disclosure to an individual who, in ABC Corp.'s view, posed no risk to the grand jury investigation. The district court denied the motion.

On appeal, the Third Circuit affirmed the denial of the motion, holding that the governmental interest in maintaining grand jury secrecy was sufficiently compelling for the NDOs to withstand strict scrutiny against a First Amendment challenge. In so holding, the appellate court reasoned that disclosure to anyone outside of the grand jury process would undermine the proper functioning of the grand jury process and that the limited restrictions placed by the NDOs on ABC Corp.'s right to free speech were narrowly tailored to serve the compelling interest in grand jury secrecy.

FOURTH AMENDMENT

Supreme Court Holds Automobile Exception to Warrant Does Not Extend to Home Curtilage

In ***Collins v. Virginia***, 138 S. Ct. 1663 (2018), the Supreme Court held that the automobile exception to the warrant requirement does not extend to the curtilage of a home.

While investigating two traffic incidents involving an orange and black motorcycle with an extended frame, police officers suspected the motorcycle was stolen and in the possession of Ryan Collins ("Collins"). After discovering on Collins' Facebook profile photographs of a motorcycle with the above characteristics parked in the driveway of a house, a police officer drove to the house and parked on the street. From there, he saw what appeared to be the motorcycle under a white tarp parked in the same location as the motorcycle in the photographs. Without a search warrant, the officer walked to the top of the driveway, removed the tarp, confirmed that the motorcycle was stolen by running the license plate and vehicle identification numbers, took a photograph of the uncovered motorcycle, replaced the tarp, and returned to his car to wait for Collins.

After the district court denied Collins' motion to suppress the evidence obtained from the warrantless search, he was convicted of receiving stolen property and sentenced to three years' imprisonment. The Court of Appeals of Virginia and the Supreme Court of Virginia affirmed his conviction.

On certiorari, the Supreme Court vacated Collins' conviction, holding that (1) the partially enclosed top portion of the driveway of the home in which the motorcycle was parked, was curtilage, for Fourth Amendment purposes, and (2) the automobile exception to the search warrant requirement does not justify the invasion of the curtilage of a home. The Court reasoned that the area where the motorcycle was parked and searched was curtilage because the area was enclosed on two sides by brick walls and on the third by the house, was adjacent to the home, and home life extended into it. With respect to the automobile exception, the Court explained that expanding the automobile exception to allow a warrantless search of an item within the curtilage would undervalue the Fourth Amendment protection of the home.

Tenth Circuit Holds Electronic Searches Must Focus on Items Specified in Warrant Rather than Location Within Device

In ***United States v. Loera***, 923 F.3d 907 (10th Cir.), *cert. denied*, 140 S. Ct. 417 (2019), the Tenth Circuit held, *inter alia*, the Fourth Amendment does not require halting execution of an electronic search warrant upon discovery of evidence of a crime outside the warrant scope, but the search must remain focused on discovering items specified in the warrant.

During execution of a search warrant authorizing FBI agents to search and seize, in relevant part, "[a]ll records, in any form, relating to violations of [computer fraud], involving Jason Loera," at Jason Loera's ("Loera") home, the FBI discovered four compact disks ("CDs") with child pornography. The agents continued the search for computer fraud evidence and seized several electronic devices, including the CDs containing child pornography. A week later, the FBI looked at the CDs containing child pornography for images to describe in an affidavit in support of a new warrant. Execution of the second warrant uncovered more child pornography evidence. Loera pled guilty to child pornography but preserved his right to appeal the denial of his motion to suppress the child pornography evidence uncovered during the execution of the first and second search warrants.

On appeal, the Tenth Circuit held the search pursuant to the first warrant was reasonable because both before and after the discovery of child pornography, the search was reasonably directed at discovering evidence of computer fraud. In contrast, the Tenth Circuit held that the searches conducted pursuant to the second warrant were unreasonable because the FBI intentionally searched the CDs seized during the execution of the first warrant, which were within the scope of the original warrant, for evidence relating to child pornography prior to seeking the second search warrant. The FBI agent did not simply review the same images he had inadvertently discovered during the first unrelated search one week earlier, rather he searched the CDs for additional evidence, not previously discovered, of child pornography. The appellate court concluded that once the descriptions based on the unreasonable second search were excised, what remained in the affidavit did not support probable cause. Accordingly, the Tenth Circuit held that the second warrant was not supported by probable cause and the good-faith exception was inapplicable. However, the Tenth Circuit affirmed the denial of the suppression motion based on the inevitable-discovery doctrine, reasoning investigators would have seen the unlawful images while conducting the authorized search of Loera's laptop and CDs for evidence of computer fraud.

SIXTH AMENDMENT

Tenth Circuit Holds Warnings Inadequate to Secure Knowing and Intelligent Waiver of Counsel

In ***United States v. Hansen***, 929 F.3d 1238 (10th Cir. 2019), the Tenth Circuit held, *inter alia*, that, because the district court failed to reasonably ensure that the defendant understood that he would be required to comply with federal procedural and evidentiary rules if he represented himself at trial, the defendant did not knowingly and intelligently waive his right to counsel.

Louis Hansen ("Hansen") was charged with tax evasion (26 U.S.C. § 7201) and obstruction of the internal revenue laws (26 U.S.C. § 7212(a)). At his arraignment, Hansen purported to waive his right to counsel, and the district court held a hearing to determine if the waiver was made knowingly and intelligently. At the hearing, Hansen interjected a series of challenges to the district court's jurisdiction and his status as the defendant, raising sovereign-citizen and other frivolous arguments. He provided ambiguous responses to questions and told the court he did not understand that he would be required to abide by federal procedural and evidentiary rules. The district court allowed Hansen to represent himself with stand-by counsel, after concluding he fully understood the risks given his education, intelligence, and prior experience. Ultimately, Hansen was convicted of all charges and sentenced to 33 months' imprisonment.

On appeal, Hansen argued that his waiver of the right to counsel was not made knowingly and intelligently and was, therefore invalid. The Tenth Circuit agreed, noting Hansen's ambiguous and unclear responses at the waiver

hearing, flat denial that he understood his obligation to follow federal procedural and evidentiary rules, numerous frivolous filings, and his conduct at trial. The appellate court found no evidence at the time of the waiver, nor at any other point during the pretrial and trial phases, that Hansen understood he would have to follow federal procedural and evidentiary rules. Accordingly, the Tenth Circuit reversed the district court's decision and remanded the case.

26 U.S.C. § 7212

First Circuit Holds Plain Error Not to Instruct Jury of Pending IRS Proceeding

In ***United States v. Takesian***, 945 F.3d 553 (1st Cir. 2019), the First Circuit held, *inter alia*, that after *Marinello v. United States,* 138 S. Ct. 1101 (2018), it was plain error for a district court not to instruct the jury that a conviction under 26 U.S.C. § 7212(a) requires the government to show that there was a pending IRS investigation against defendant of which defendant was aware or could at least reasonably foresee, and that defendant's substantial rights were not affected by such jury-instruction error.

Greg Takesian ("Takesian"), a certified public accountant and business owner, used approximately $1 million from his business account to cover personal expenses and failed to not report the $1 million as income on his returns. Ultimately, Takesian was convicted of filing false tax returns (26 U.S.C. § 7206(1)) and attempting to obstruct the internal revenue laws (26 U.S.C. § 7212(a)) and sentenced to 24 months' imprisonment. The evidence showed that Takesian He appealed, arguing that the judge erred by, *inter alia*, failing to instruct the jury that post-*Marinello,* to convict for obstruction under § 7212(a), prosecutors had to prove that Takesian obstructed a particular tax-related proceeding he was aware of or could reasonably foresee. The *Marinello* opinion was issued after completion of Takesian's trial.

On appeal, the First Circuit held, and the parties agreed, that because of *Marinello,* the district court committed plain error when it failed to instruct the jury that it had to find that there was a pending administrative proceeding or that such proceeding was reasonably foreseeable to Takesian. The appellate court, however, affirmed Takesian's § 7212(a) conviction, holding that he did not bear his burden of proving that the district court's plain error affected his substantial rights. In the appellate court's view, the trial evidence showed that Takesian could reasonably foresee that an IRS investigation of him was "at least ... in the offing."

The undisputed evidence showed that Takesian knew the IRS was investigating his business' financial activities as part of a healthcare-fraud investigation against his primary client—"an investigation that would foreseeably cast a very bright spotlight on the $1 million payout, because a subpoena requested "'[a]ll' of [the business'] 'corporate records and books relative to [its] financial transactions'." The First Circuit noted that with the IRS primed to check the flow of money to and from Takesian's business, he concocted a fraudulent story, that the $1 million was a loan, "to put one over the revenuers." The appellate court concluded that Takesian was not able to explain why an IRS investigation was not reasonably foreseeable, given that he fabricated a fraudulent story to throw the IRS "off the scent" while it was investigating the money trail that could lead to Takesian.

Furthermore, the First Circuit noted that Takesian's testimony that he believed investigators "put the screws on him" because they believed Takesian and his partner were overpaid or laundering money, demonstrated that an IRS investigation could have reasonably been foreseen in those situations, because "IRS special agents ... investigate complex financial crimes associated with tax evasion, money laundering," plus "much more."

Thus, the First Circuit concluded that Takesian could not show a reasonable probability that a properly-instructed jury would have acquitted him of the obstruction charge. Nor could he show that the trial evidence could have rationally led a properly-instructed jury to acquit him of that charge.

AGGRAVATED IDENTITY THEFT

Fourth Circuit Joins Sister Circuits in Holding "Person" in Aggravated Identity Theft Statute Includes Deceased Persons

In ***United States v. George***, 946 F.3d 643 (4th Cir. 2020), the Fourth Circuit, following every other federal circuit to have ruled on the issue, held that the term "person," as used in the aggravated identity theft statute (18 U.S.C. § 1028A) includes deceased victims.

In May 2013, Lester Dean George ("George") used a deceased person's name, date of birth, and Social Security number to secure a mortgage loan to purchase a residence in North Carolina. In September 2018, George pleaded guilty to false representation of a Social Security number (42 U.S.C. § 408(a)(7)(B)) and aggravated identity theft (§ 1028A). George subsequently moved to withdraw his guilty plea as to the § 1028A count on the basis that the district court had previously ruled that a defendant could not be convicted of aggravated identity theft if the stolen identity was that of a deceased person. The district court granted the motion and dismissed the § 1028A count.

On appeal, the Fourth Circuit considered whether the phrase "means of identification of another *person*," as used in § 1028A(a)(1), encompasses the unauthorized use of

the identification of a deceased person. In light of its plain, ordinary meaning and the statutory context, as well as the legislative history, the Fourth Circuit held that the term "person" under § 1028A is unambiguous and includes deceased persons as victims of identity theft. Moreover, the appellate court noted that every other federal court of appeals to have considered the issue has held that the term "person" includes deceased persons.

EXPERT TESTIMONY

Seventh Circuit Affirms Exclusion of Expert Testimony

In ***United States v. Truitt***, 938 F.3d 885 (7th Cir. 2019), the Seventh Circuit held that the district court properly excluded proffered expert testimony in light of his questionable methods and limited experience.

Cathy Truitt ("Truitt") was a member of the Moorish Temple, an organization that teaches its members that they are not subject to U.S. governmental authority; that the U.S. funds a trust for Moorish Nationals, and that members are entitled to collect funds from this purported trust via U.S. tax returns. Under the direction of the Moorish Temple, Truitt filed seven nearly identical tax returns, each falsely claiming a $300,000 refund. The IRS approved one of the returns and issued a check for the full amount, but quickly recognized the error and demanded the return of the funds. Truitt refused and was subsequently indicted for violations of 18 U.S.C. § 287 (false claims against the United States) and § 641 (theft of government funds). The district court granted the government's motion *in limine* to exclude the proposed expert testimony from a forensic psychologist, and a jury convicted Truitt of all charges.

On appeal, the Seventh Circuit affirmed the district court's exclusion of the expert testimony, holding that the judge acted within his discretion. The appellate court reasoned that the expert lacked expertise to speak authoritatively about charismatic groups, having only worked once in a case involving religious themes and lacking any experience with charismatic groups. The court further reasoned that the expert's methods were unreliable, as he deviated dramatically from the methods of other experts in the field, noting, in particular, that the expert did little to learn about the Moorish Temple other than interviewing Truitt.

RESTITUTION

Sixth Circuit Holds Restitution May Be Ordered for Entire Period of Fraudulent Scheme Included in Indictment

In ***United States v. Ellis***, 938 F.3d 757 (6th Cir. 2019), the Sixth Circuit held, *inter alia*, that the district court did not err in ordering restitution, noting that the Mandatory Victims Restitution Act of 1996 ("MVRA") does not specify a time limit on restitution, and that the statute of limitations does not treat restitution differently than the underlying criminal liability.

Over the course of more than four years, Monique Ellis ("Ellis") used stolen identities to file fraudulent tax returns and directed the IRS to deposit the fraudulent refunds into bank accounts she controlled. Ellis was convicted of wire fraud (18 U.S.C. § 1343) and aggravated identity theft (18 U.S.C. § 1028A) and sentenced to 72 months' imprisonment and ordered to pay restitution of $352,183, which was the amount of tax refunds fraudulently obtained by Ellis.

On appeal, Ellis argued that the district court's restitution order for any fraud predating November 2011 was barred by the statute of limitations. The Sixth Circuit disagreed and affirmed the restitution order. The appellate court noted that the MVRA mandates restitution in the full amount of each victim's losses, and that it defines "victim" as "any person directly harmed in the course of the scheme" without specifying a time limit. The Sixth Circuit also indicated that the MVRA requires restitution for all losses attributable to the defendant's scheme to defraud. Lastly, the appellate court reasoned that the statute, which states that "no person shall be prosecuted, tried, or punished for any offense" unless an indictment is returned within five years of the offense, treats prosecution, trial, and punishment (here, restitution) equally.

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