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TITLE 26

IRS Wins Chief Counsel Advice Case Against Tax Analysts

In ***Tax Analysts v. IRS***, WL 2333691 (2005), the district court for the District of Columbia granted summary judgment for defendant IRS. Tax Analysts, a nonprofit corporation dedicated to the publication and public dissemination of tax law information, brought action seeking disclosure of documents known as Chief Counsel Advice, or CCA, prepared by the Office of Chief Counsel concerning cases pending in the U.S. Tax Court. Tax Analysts' complaint stems from the IRS's recent decision to withhold such documents in their entirety, rather than disclosing those portions discussing the general application of tax law (or "agency working law"), as it had previously done. Tax Analysts argued the new policy violated 26 U.S.C. § 6110 which requires the text of IRS "written determinations" to be open to public inspection. CCAs are documents prepared by Office of Chief Counsel attorneys in response to field office requests for legal interpretation and IRS policy regarding tax laws.

Prior to July 2003, CCAs were processed for public dissemination under a Chief Counsel Notice that noted, "the attorney work product doctrine in a CCA does not … include general discussion of the law, including the application of those legal principles to the particular facts of the case that is the subject of the CCA." Under this policy, the IRS would regularly separate and release "agency working law" from protected attorney work product when responding to requests for disclosure of a CCA.

In July 2003, the IRS changed its interpretation of the scope of the attorney work product doctrine as it applies to the dissemination of CCAs. This new policy provided that attorney work product in CCAs "may include general discussion of the law" and may be withheld in its entirety whenever the IRS determines that the documents were prepared with a "litigation predicate." Pursuant to this new policy, the IRS withheld a number of documents which were later requested by Tax Analysts pursuant to 26 U.S.C. § 6110 and FOIA.

The court determined that the real dispute concerned the proper scope of the attorney work product doctrine. FOIA Exemption 5 incorporates the traditional work product doctrine by exempting from the general rule of disclosure any documents "which would not be available by law to a party … in litigation with the agency." It also requires the responding agency to disclose any reasonably segregable non-exempt portions of a record unless they are "inextricably intertwined" with the exempt portions.

In this case, the IRS determined the documents at issue were protected in full by the attorney work product doctrine because "[e]ach CCA was written, in its entirety, in the context of litigation." Tax Analysts disagreed and argued that the IRS could and should have segregated and released those portions of the CCAs consisting of "agency working law."

The court decided there was nothing in FOIA's segregability requirement that carved out "agency working law" from otherwise exempt material. Thus, if the portions of the CCA described by Tax Analysts as "agency working law" were prepared in anticipation of litigation and met the criteria established in case law, they were properly covered by the attorney work product doctrine and exempt from disclosure pursuant to FOIA, as incorporated by 26 U.S.C. § 6110. Moreover, the court found after reviewing complete copies of the CCAs provided to the court for its *in camera* inspection, the IRS was sufficiently justified in its conclusion that no reasonably segregable materials could be separated from protected attorney work product. Thus, the court held the IRS was authorized to withhold each CCA in full pursuant to 26 U.S.C. § 6110 and granted summary judgment in its favor.

IRS Required to Seek Enforcement of Summons Prior to Seeking Punishment for Disobedience

In ***Schulz v. IRS***, 413 F.3d 297 (2d Cir. 2005), the government petitioned for panel rehearing of the prior

Second Circuit opinion in *Schulz v. IRS,* 395 F.3d 463 (2d Cir. 2005)(*Schulz I*). In *Schulz 1,* the taxpayer appealed the district court's dismissal of his motion to quash IRS summonses for lack of subject matter jurisdiction. The Court of Appeals, in a *per curiam* opinion, affirmed and held that in absence of an effort by the IRS to seek enforcement of the summons in federal court, dismissal of the motion to quash was proper because there was no Article III case or controversy. *Schulz 1,* 395 F.3d at 465. The government filed its petition for panel rehearing, citing concerns that the Second Circuit misunderstood the nature of jurisdictional bars on motions to quash and the government's authority to punish disobedience of an IRS summons. The court granted the petition for the limited purpose of clarifying the prior opinion. As a result, the holding in *Schulz 1* remains in effect.

The government argued that under 26 U.S.C. § 7210 and § 7604, failure to obey an administrative summons may be punished without first being enforced by a court order. The Second Circuit labeled this a "draconian" view of the enforcement scheme. The court reasoned that to read § 7210 and § 7604 as allowing punishment for failure to comply with an administrative summons would render those sections unconstitutional as violating due process guarantees under the Fifth and Fourteenth Amendments, unless the summoned taxpayer had an opportunity to seek judicial review of the summons *before* being placed at risk. In order to preserve the constitutionality of those sections, the IRS must seek enforcement in federal court prior to seeking punishment of the taxpayer for disobedience. This establishes an adversarial proceeding in which the taxpayer can test the validity of the summons.

Under the government's view, a summoned taxpayer must choose to either comply with the summons or place himself in jeopardy of sanction without first having the opportunity for judicial review of the summons. The Second Circuit reaffirmed its holding in *Schulz 1* that if the summons is not enforced, then no contempt sanction is available, nor is prosecution possible. By requiring both judicial review and an intervening opportunity to comply with a court order of enforcement prior to punitive sanctions, the court found this to be a non-draconian solution. *Schulz 1* remains in force.

Eighth Circuit Affirms Convictions for Willfully Failing to File Income Tax Returns and Making False Statements

In ***United States v. McNeally***, 132 Fed.Appx. 63 (8th Cir. 2005), McNeally was convicted by a jury of five counts of willfully failing to file income tax returns, in violation of 26 U.S.C. § 7203 and eleven counts of knowingly making or using false statements in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 1001(a)(3).

On appeal, McNeally argued the evidence proffered at trial was insufficient to prove he acted willfully when he failed to file his returns and was insufficient to prove his statements were false, made knowingly, and in a matter within the jurisdiction of a federal agency. He also challenged the district court's refusal to strike a juror. The Eighth Circuit ultimately found the evidence presented at trial sufficient to support his convictions.

In making its determination that McNeally willfully failed to file his income tax returns for 1995 through 1999, the court relied upon "his admissions at trial that he had filed federal tax returns in the past, and had used his wife's bank account to maintain his anonymity." *Id.* at 64.

As for the remaining false-statement convictions, the court first noted that "McNeally repeatedly informed several contractors for whom he had performed construction services that he was a nonresident alien," an act which caused many of them not to file a required Form 1099 with the Internal Revenue Service. *Id.* It then found the evidence submitted at trial actually "established that McNeally was born in Minnesota, lived in Nebraska during the years at issue, and had no citizenship other than that of the United States." *Id.*

The Eighth Circuit also found the district court had not abused its discretion when it refused to strike the potentially biased juror. In doing so, it relied upon the fact that "[b]efore the case was submitted to the jury, the [district] court stated -- without objection by McNeally -- that it would talk to the juror outside the presence of counsel and would let him remain on the jury only if, based on this discussion, the court believed the juror had an open mind about the case." *Id.* The Eighth Circuit was satisfied with the steps the district court took to identify any potential bias of the juror.

Belief IRC is Unconstitutional Does Not Negate Willfulness Element of Tax Offense

In ***United States v. Massey***, 2005 WL 1529703 (2005), the Ninth Circuit, in pertinent part, held that: (1) a taxpayer's disagreement with the IRS or belief that the Internal Revenue Code is unconstitutional does not negate the element of willfulness for purposes of willful failure to file income tax returns, and (2) under statute prohibiting corruptly endeavoring to impede the administration of the revenue laws, the term "corruptly" was properly defined as performing with the intent to secure an unlawful benefit for oneself or another.

In this case, Massey was convicted of one count of corruptly endeavoring to impede the administration of the tax laws in violation of 26 U.S.C. § 7212(a) and three counts of willful failure to file income tax returns in violation of 26

U.S.C. § 7203. On appeal, Massey challenged both his conviction and sentence, arguing, in pertinent part: (1) that the district court erred in instructing the jury on the element of willfulness under § 7203 and on the omnibus clause of § 7212(a), and (2) that the district court violated his Sixth Amendment right to have a jury find, beyond a reasonable doubt, all the facts used to enhance his sentence. The Ninth Circuit ultimately affirmed his convictions but remanded the matter for sentencing pursuant to the Supreme Court's decision in *Booker*.

In doing so, the appellate court rejected Massey's arguments as to any error in the district court's instructions on the willfulness element in §§ 7203 and 7212(a). Specifically, the court found that, "with respect to § 7203, the district court properly instructed the jury that a disagreement with the Internal Revenue Code or a belief that the Code is unconstitutional does not negate the element of willfulness."

The Ninth Circuit then held with regard to § 7212(a) that the trial court "correctly instructed the jury that 'corruptly' means 'performed with the intent to secure an unlawful benefit for oneself or another,'" since prior law in that circuit established "that the government need not prove that the defendant was aware of an ongoing tax investigation to obtain a conviction under § 7212(a). It is sufficient that the defendant hoped 'to benefit financially' from threatening letters or other conduct."

As for Massey's sentence, however, the Ninth Circuit relied upon its prior decision in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) in addition to the Supreme Court's decision in *United States v. Booker,* 125 S.Ct. 738, 769 (2005) and remanded the matter so that the district court could "consider whether it would have imposed the same 41-month sentence on Massey if the U.S. Sentencing Guidelines system had been advisory rather than mandatory."

TITLE 18

False Statements as to Place and Date of Birth Were Material on Application to Admit Alien Relatives for Purposes of Prosecution under 18 U.S.C. § 1546(a)

In ***United States v. Wu,*** 419 F.3d 142 (2d Cir. 2005), defendant was convicted of making false statements on an immigration document in violation of 18 U.S.C. § 1546(a). He appealed arguing the materiality element was not satisfied because the false statements were not material to the Affidavit of Support in which they were made. The Second Circuit affirmed the conviction and held that although the misrepresentations were not material to the affidavit, the assertions were material as to the larger application process.

Defendant, an alien, obtained the birth certificate of a U.S. citizen who died in 1988. He then changed his name to match the birth certificate and assumed the dead man's identity. By doing so, he was able to get a passport, which he used to obtain a Social Security card and apply for Supplemental Security Income. He also used the passport and his new identity to try to bring other family members to the United States. As part of his Petition for Alien Relative, he supplied an Affidavit of Support on which he placed his false identity and the place and date of birth of the dead man. The purpose of the Affidavit was to assure immigration officials that he had the ability to provide support for the relatives to be admitted. The government missed the statute of limitations for charging defendant with false statements on the petition. Instead, defendant was tried and convicted of placing false statements on the Affidavit of Support in violation of 18 U.S.C. § 1546(a).

Section 1546(a) makes it a crime for a person to "knowingly subscribe as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder." Following his conviction, defendant appealed challenging the materiality of the false statements. Although he conceded the statements would be material on the Petition for Alien Relative, he argued materiality as to the petition was irrelevant since the government missed the statute of limitations. The Second Circuit disagreed.

In its analysis, the Second Circuit noted that the falsehoods were material to the decision to admit alien relatives but not to the determination that defendant had the financial ability to support them. The court ruled that the materiality of the place and date of birth on the affidavit needed to be assessed against the process as a whole. The determination of defendant's ability to provide financial support is not separate from the overall decision to admit his relatives. Being prosecuted only for the false statements on the affidavit made the falsehoods no less material in the court's opinion. The court reasoned that repetition of the same lie several times might constitute only one crime. However, that would not preclude the government from bringing charges where the statute of limitations had run on one lie but not another. Defendant's conviction was affirmed.

Improper Venue in Mail Fraud and Visa Fraud Case

In ***United States v. Ramirez,*** 420 F.3d 134 (2d Cir. 2005), defendant Vitug was convicted of visa fraud, 18 U.S.C. § 1546; making false statements to an agency of the U.S., 18 U.S.C. § 1001; mail fraud, 18 U.S.C. § 1341; and conspiracy to commit those offenses, 18 U.S.C. § 371. Vitug appealed her convictions arguing venue was improper in the

Southern District of New York. The Second Circuit agreed as to four counts of visa fraud and two counts of mail fraud, but affirmed the remaining challenged counts.

Vitug, an endocrinologist, and her co-defendant, Ramirez, an immigration lawyer, organized a scheme in which they obtained fraudulent visas for Ramirez's clients. They made false statements to both INS and the Department of Labor (DOL) certifying these individuals would have jobs with sponsoring employers.

The false statements, made on Form I-129 petitions and attached Labor Condition Applications (LCA), stated that Vitug's medical practice would hire the individuals as Public Health Educators. In fact, the practice was not hiring Public Health Educators and Vitug lacked the hiring authority she claimed on the forms.

Vitug first obtained approval from the DOL in New York and then mailed the completed forms from New Jersey to Vermont. She also filed false Forms ETA-750, another type of visa application, which requires sponsorship by an American employer. On those forms, Vitug falsely stated she had made the requisite effort to recruit American citizens to fill the positions the aliens would receive. Those forms were filed at the New Jersey DOL and then forwarded to the DOL in New York. Vitug moved to dismiss under Rule 29, arguing venue was improper in the Southern District of New York. The district court denied the motion and following conviction, Vitug appealed.

The Second Circuit cited the Sixth Amendment and Federal Rule of Criminal Procedure 18 as authority for requiring that a defendant be tried in the district where the crime was committed. Absent statutory guidance for determining the location of the crime, the court said "'the locus delecti must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" (citation omitted). The government carries the burden of proving venue is *proper*.

Vitug was charged with submitting the Form I-129 package, not with assembling it. Acquiring approval from the DOL in New York was merely preparation for the charged offense. The locus delecti was in Vermont where the forms were filed. Venue was therefore improper in the Southern District of New York for four counts of visa fraud (counts Six through Nine).

By contrast, Forms ETA-750 were filed in New Jersey but forwarded to New York. Since the false statements continued to be false after filing them in New Jersey, the crime of making false statements under § 1001 was not complete until they were processed in New York. Venue was therefore proper in the Southern District of New York for making false statements (counts Eleven through Fourteen).

Finally, the Second Circuit reviewed venue for the mail fraud charges. The issue was whether the act of mailing the LCA form to New York for approval was mere preparation for the offense. The government argued that since the scheme was devised in the co-defendant's New York office and the approval was needed from the DOL in New York, the conduct was part of the crime charged. The Second Circuit disagreed stating that a scheme to defraud, while an essential element of mail fraud, is not an essential conduct element for determining the locus delecti of the crime. One scheme can result in several separate offenses of mail fraud through multiple uses of the mail. In order to avoid running afoul of double jeopardy, the individual acts are punished and not the fraudulent scheme. The defendant in this case committed mail fraud when she mailed the completed package from New Jersey to the INS in Vermont. Venue was therefore improper in the Southern District of New York for two counts of mail fraud (counts Eighteen and Twenty-One).

FORFEITURE

Pretrial Restraint of Forfeitable Assets Not Authorized by CAFRA

In ***United States v. Razmilovic,*** 419 F.3d 134 (2d Cir. 2005), defendant was indicted on charges of securities, mail, and wire fraud. The district court entered an *ex parte* order for pretrial restraint of defendant's assets, indicating the government would seek forfeiture upon conviction. The district court denied defendant's motion to vacate the restraining order and defendant appealed. The Second Circuit ruled that the Civil Asset Forfeiture Reform Act (CAFRA) authorizes criminal forfeiture, but does not allow pretrial restraint of forfeitable assets.

Defendant was the Senior Vice President of Finance and Chief Financial Officer of Symbol Technologies, Inc. (Symbol). The indictment alleged that defendant and his co-conspirators manipulated Symbol's books to make it appear that Symbol met or exceeded security analysts' performance forecasts. Defendants also participated in a look-back scheme, wherein defendants exercised their stock options and backdated the exercise date to claim a lower stock price and reduce taxable gains. Following the indictment, the government obtained an ex parte order freezing over $7.5 million of the defendants' assets. The government claimed the assets were proceeds of the illegal scheme and subject to criminal forfeiture upon conviction.

The question presented on appeal was whether § 2461(c) of CAFRA authorizes pretrial restraint of assets. The Second Circuit looked to the plain language of the statute. Section 2461(c) instructs that "upon conviction" an order of forfeiture shall be entered "in accordance with the procedures" set out in 21 U.S.C. § 853. Subsection (e) of §

853 authorizes pretrial restraint of assets in drug cases if the indictment alleges the property will be subject to criminal forfeiture. The issue was whether § 2461(c) incorporated § 853(e).

The government argued that since § 2461(c) specifically excluded § 853(d), it must have incorporated all of the other subsections of § 853. Defendant argued that since § 2461(c) only authorizes forfeiture in accordance with the procedures of § 853 "upon conviction," there was no need for Congress to exclude pretrial procedures. However, § 853(d) needed to be excluded because it created a rebuttable presumption that would apply "upon conviction" but for the exclusion.

In its analysis, the Second Circuit stressed the severity of pretrial restraint, noting the Supreme Court dubbed it the "'nuclear weapon'" of the law. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 332 (1999). Pretrial restraint is a separate remedy independent of forfeiture. A criminal forfeiture by definition is a divestiture of property, which constitutes a punishment for a crime and necessarily occurs post-conviction. The distinction between the terms forfeiture and pretrial restraint is important when reading the plain language of the statute.

According to the Second Circuit, the language of § 2461(c) permits two things: inclusion of forfeiture allegations in certain indictments "in accordance with" the Federal Rules of Criminal Procedure, and "forfeiture . . . upon conviction . . . in accordance with the procedures of section 853, except for subsection (d)." A plain reading of the statute results in only one plausible interpretation. Procedures for including forfeiture allegations in indictments are found in the Federal Rules of Criminal Procedure while the procedures for forfeiture "upon conviction" are found within § 853. Only the post-conviction procedures of § 853, with the exception of (d), are incorporated in § 2461(c). Subsection 853(e) which covers pretrial restraint was not incorporated, so Congress did not need to exclude it to prohibit pretrial restraint of assets.

The court also contrasted the language of § 2461(c) with that of 18 U.S.C. § 982, the general criminal forfeiture statute. Section 982(b)(1) states "[t]he forfeiture of property . . . including any seizure . . . shall be governed by section 853, except subsection (d)." This suggests it may incorporate more than just the procedures relevant to forfeiture. Absence of such language in § 2461 prevents a similar interpretation.

Eleventh Circuit Holds Government Had No "Immediate Right to Possession" of Laundered Money

In ***United States v. Bailey***, 419 F.3d 1208 (11th Cir. 2005), the Eleventh Circuit held the "relation back" rule found in 21 U.S.C. § 853(c), the federal statute authorizing the forfeiture of property acquired by way of drug-law violations, did not give the government an "immediate right to possession" where criminal defendants established a legal trust fund with laundered money.

In this case, the government filed a civil action for conversion and civil theft against F. Lee Bailey and sought to recover the proceeds of a drug transaction used to establish a legal trust fund paid out to Bailey and his co-counsel as legal fees. The proceeds were retained by Bailey and disbursed to his co-counsel after they had been forfeited to the United States.

After the government filed suit, but prior to trial, the district court granted partial summary judgment in the government's favor on the conversion claim. In doing so, it held that, "as a result of the 'relation-back doctrine'…the Government acquired all right, title, and interest in the money comprising the trust fund the moment that it was laundered by the [defendants] in violation of federal law, and that Bailey, therefore, necessarily converted the fund when he disbursed it to himself and the [defendants'] other attorneys." The conversion claim then proceeded to trial as to punitive damages and the civil theft claim on the issue of intent.

Following the jury's award of $3 million in punitive damages and its verdict against Bailey on the civil theft claim, Bailey moved for reconsideration of the court's decision to grant summary judgment and to set aside the punitive damage award as unconstitutional. The court granted Bailey's motion for reconsideration, vacated its earlier order which granted the government partial summary judgment, and entered judgment as a matter of law in favor of Bailey as to both counts. Its order was based upon a re-evaluation of its earlier ruling regarding the relation-back provision of § 853(c) and the state-law tort requirement that a plaintiff in a suit for conversion or civil theft establish possession or a right to immediate possession at the time of the alleged conversion. In short, the court held that the Government could not rely exclusively on the relation-back doctrine to establish any such possessory interest.

On appeal, the Eleventh Circuit reviewed the pertinent case law and concluded that "the relation-back doctrine operates *retroactively* to vest title in the Government effective as of the time of the act giving rise to the forfeiture. That is, it does not 'secret[ly]' vest title at the very moment of the act, but rather title vests at the time of the court-ordered forfeiture and then relates back to the act." The appellate court then considered whether such a "legal fiction" also establishes the "immediate right of possession" that is an element of the two state-law torts.

Answering in the negative and affirming the decision of the

district court, the Eleventh Circuit concluded "that the better understanding of the relation-back doctrine is that it does not satisfy the state-law tort requirement that 'the plaintiff…establish that he was in possession of the goods, or entitled to possession, *at the time of the conversion.*'" It further stated that "the Government did not actually possess, or have an immediate right to possess, the legal trust fund at the time it was converted; rather, additional judicial proceedings were then necessary to reduce its ownership interest to a right to possession." When Bailey controlled the trust fund, the government had no claim of possession, and by the time it "perfected" such a right, Bailey was in no position to "disturb that right".

The Eleventh Circuit also recognized that the government is never powerless to prevent any third party from dissipating assets that will be subject to forfeiture upon conviction. In doing so, it specifically noted that pursuant to 21 U.S.C. § 853(e)(1) and "[u]pon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property" subject to forfeiture under the statute. Further, pursuant to 21 U.S.C. § 853(f), the government could have sought a warrant authorizing actual seizure of the trust fund.

MONEY LAUNDERING

Attorney Fees' Defense to Money Laundering Limited

In ***United States v. Elso***, 2005 WL 2108090 (2005), the Eleventh Circuit restricted use of the attorney fees' exception under 18 U.S.C. §1957(f) by defendants prosecuted under different money laundering statutes.

Defendant Elso, an attorney, represented two cocaine importers on drug trafficking charges. After one of his clients expressed concern that law enforcement officials would find $266,800 in drug money secreted in his home, Elso agreed to "take care of the situation", retrieving the money himself and later claiming the money was payment for legal services. Elso was prosecuted under 18 U.S.C. §1956(a)(1)(B)(i) which makes it a crime to conduct a financial transaction involving proceeds of a crime knowing that the transaction is designed to conceal the nature, location, source, ownership, or control of those proceeds.

As an affirmative defense, Elso raised the statutory exception in 18 U.S.C. §1957(f). The exception allows an attorney to avoid culpability if the attorney accepts, *as payment for legal services*, money the attorney knows to be the proceeds of criminal activity.

The court rejected this defense and found the §1957 statutory exception does not carry over into §1956. The crime in §1956 is the intent to conceal criminal proceeds, while the crime in §1957 is the intent to accept criminal proceeds. The two are not the same. "The issue of whether the money involved in [the] transaction was for an attorney's fee is not relevant to the issue of whether [the defendant] had the requisite knowledge and intent to support a conviction under §1956."

SEARCH AND SEIZURE

No Reasonable Suspicion Required for Probation Search

In ***United States v. Barnett,*** 415 F.3d 690 (7th Cir. 2005), the Seventh Circuit affirmed the district court's denial of Barnett's motion to suppress evidence seized from a search of his home. Barnett pled guilty as a felon in possession of a firearm, but reserved his right to appeal the denial of his motion to suppress. Barnett was serving a term of "Intensive Probation Supervision," in lieu of prison, following a conviction in state court on various criminal charges. Among the conditions of probation agreed upon by Barnett and the State of Illinois, Barnett was required to "submit to searches of [his] person, residence, papers, automobile and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings." During one of these searches, law enforcement officials uncovered the firearm later used to convict Barnett.

In upholding the search, the Seventh Circuit held that law enforcement officers do not violate the Fourth Amendment when they search a probationer's home pursuant to a condition of probation that requires a defendant to submit to searches at the request of a probation officer. Relying on *United States v. Knights*, 534 U.S. 112 (2001), which upheld a suspicionless search of the home of a probationer who was subject to a search condition, the court addressed the question left open in *Knights* as to whether a blanket waiver of Fourth Amendment rights as a condition of probation is valid.

The court determined that "[c]onstitutional rights like other rights can be waived, provided that the waiver is knowing and intelligent, as it was here." Further, the court reasoned, "[n]othing in the Fourth Amendment's language, background, or purpose would have justified forcing Barnett to serve a prison sentence rather than to experience the lesser restraint of probation." An accused who bargains for intensive probation as an alternative to prison time, as Barnett did in this case, validly waives his Fourth Amendment right to privacy with respect to searches of his home pursuant to a condition of that probation.

Sixth Circuit Holds Search Warrant Lacked Particularity and Denies ATF Agents' Claims of Qualified Immunity

In ***Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms***, 401 F.3d 419 (6th Cir. 2005), ATF agents executed a search and seizure warrant at a U.S. Customs High Security Bonded Warehouse operated by Pars International Corp., a Kentucky corp. owned by Keith Baranski, that had been issued a federal license to import firearms and ammo.
Both the search warrant and the underlying search warrant application accurately described the place to be searched, but with regard to the person or property to be seized and the facts supporting a finding of probable cause, simply referred to the "attached affidavit." That affidavit was drafted by an ATF agent who averred that a six-month investigation had uncovered probable cause that Baranski had conspired with other individuals to import and resale restricted machine guns and alleged that the contraband machine guns were being stored at Pars' warehouse. When the search warrant application was granted on April 10, 2001, the magistrate judge sealed both the application and the underlying affidavit.

On April 11, 2001, ATF agents arrived at the location to be searched and were greeted by Shafizadeh, the manager of the storage facility. When Shafizadeh asked to see the affidavit referenced in the search warrant but not attached thereto, one of the agents indicated that it was part of the court records but had been sealed. Accordingly, at the time of the search, the agents provided Shafizadeh with a copy of the warrant but not the underlying affidavit.

Shafizadeh then directed the agents to the bonded warehouse portion of the building, and indicated which section of the vault contained the firearms imported and owned by Baranski. The agents ultimately seized 372 firearms and 12 wooden crates containing firearm parts.

As a result of the evidence seized during the execution of the search warrant, Baranski was charged with and ultimately convicted of conspiring to import machine guns by making knowingly false entries on applications and other records, in violation of 26 U.S.C. § 5861(1). The district court sentenced him to 60 months' imprisonment followed by three years of supervised release and ordered forfeiture of the seized machine guns and crates.

Baranski has since alleged *Bivens* claims against the ATF agents, asserting that the search warrant upon which they relied did not comport with the particularity requirement of the Fourth Amendment as to: (1) the items to be seized and (2) the place to be searched.

Relying upon *Groh v. Ramirez*, 540 U.S. 551, 561 (2004), the facts of which it deemed "not materially distinguishable," the Sixth Circuit held "that the warrant...procured for the search of Pras' warehouse was plainly invalid" and "was deficient as to the Fourth Amendment's particularity requirement because it provided no description of the type of evidence sought."

Quoting *Groh*, the Sixth Circuit stated that "[a]lthough the warrant used appropriate words of incorporation, the supporting documents that the warrant purported to incorporate did not accompany the warrant. Because Agent Johnson "did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly 'unreasonable' under the Fourth Amendment."

The appellate court also held that "[t]he recent *Groh* decision compels the conclusion that the Defendants are not entitled to qualified immunity for conducting a search based on the defective warrant."

The Sixth Circuit also addressed the various claims for damages and held that: (1) Baranski's *Bivens* claim was not barred, under *Heck v. Humphrey*, as an improper attack upon his criminal conviction, (2) Baranski's claims for injured reputation, mental anguish, or punitive damages were also not barred, and (3) Pars' claim, as a bailee, for compensatory and punitive damages could proceed as it related to the seizure of Baranski's inventory of guns.

ELECTRONIC SURVEILLANCE

First Circuit Holds Wiretap Act Covers E-Mail Communications Maintained In Electronic Storage

In ***United States v. Councilman***, 418 F.3d 67 (1st Cir. 2005), a grand jury returned a two-count indictment against Bradford C. Councilman, Vice President of Interloc, Inc., an online book listing service specializing in rare and out-of-print books.

Count one of the indictment charged Councilman with violation of 18 U.S.C. § 371, conspiracy to violate the Wiretap Act by intercepting certain electronic communications, disclosing their contents, using their contents, and causing a person providing an electronic communications service to divulge the contents of those electronic communications to persons other than the addressees. The object of the alleged conspiracy was to exploit the content of e-mail Amazon.com sent its dealers so as to develop a list of popular books, learn about competitors, and attain a commercial advantage for Interloc and its parent company.

Councilman moved to dismiss the government's indictment for failure to state an offense under the Wiretap Act, arguing that the e-mail communications at issue were maintained in "electronic storage," as defined by 18 U.S.C. § 2510(17) and, therefore, were not subject to the Wiretap Act's prohibition against interception. The United States District Court for the District of Massachusetts initially denied the Motion to Dismiss; however, it reconsidered, *sua sponte*, its decision in light of *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002). The district court ultimately granted the Motion to Dismiss Count One, ruling that the messages were not, at the time of interception, "electronic communications" under the Wiretap Act.

A divided panel of the First Circuit affirmed, concluding that the Wiretap Act's prohibition on "intercept[ion]" does not apply to messages that are, even briefly, in "electronic storage" because the definition of "wire communication" includes "electronic storage" while the definition of "electronic communication" does not. The court then granted the government's petition for an *en banc* rehearing.

Realizing Councilman's arguments "raised important questions of statutory construction with broad ramifications," the First Circuit set forth a detailed examination of the Wiretap Act's text, structure and legislative history. While the appellate court opined that the plain text of the Wiretap Act failed to resolve whether a communication is still an "electronic communication" within the scope of the Wiretap Act when it is in electronic storage during transmission, the court concluded, based on the legislative history of the Act, that "the purpose of the broad definition of electronic storage [set forth in 18 U.S.C. § 2510(17)] was to enlarge privacy protections for stored data under the Wiretap Act, not to exclude e-mail messages stored during transmission from those strong protections."

Deciding communications in electronic storage are indeed subject to the Wiretap Act, the First Circuit found no merit in Councilman's argument that "the acquisition of electronic communications in temporary electronic storage is regulated by the Stored Communications Act" rather than the Wiretap Act, or in his alternate argument that the potential overlap of the two acts implicates the rule of lenity or some other doctrine of "fair warning." The court was satisfied there was no grievous ambiguity or unconstitutional vagueness in the text of the Wiretap Act, nor was the Act interpreted in an "unforeseeably expansive" manner.

In short, the First Circuit held that the term "'electronic communication' includes transient electronic storage that is intrinsic to the communication process," such that the interception of an e-mail message in electronic storage is actionable pursuant to the Wiretap Act." Further, it held that the various doctrines of fair warning do not bar prosecution for that offense as "[t]he simplest reading of the statute is that e-mail messages [a]re 'electronic communications' under the statute at the point where they were intercepted."

Failure to Name Authorizing Official Does Not Invalidate Wiretap Order

In ***United States v. Callum***, 410 F.3d 571 (9th Cir. 2005), the Ninth Circuit affirmed the district court's denial of Callum's motion to suppress certain intercepted communications. Defendants challenged the validity of wiretap applications and district court orders approving the wiretaps, contending that: 1) the documents were facially insufficient because they didn't identify who at DOJ authorized the applications, 2) the applications had not been authorized by DOJ before being presented for approval to the judge who issued the wiretap orders, and 3) the affidavits accompanying the applications omitted significant facts relating to prior interceptions. In this case, the government applied for wiretaps when other investigative means had failed to uncover evidence of the defendants' drug dealings. The defendants motioned the court to suppress the fruits of the wiretaps, which the court denied. Defendants then entered conditional pleas of guilty to drug trafficking, preserving their right to appeal the court's rulings.

In affirming the district court, the Ninth Circuit held a wiretap order that is silent as to which DOJ official authorized the application for the order is deficient on its face, but can nonetheless withstand a suppression motion because the mistake on the application is a "minor … insufficiency." The court noted the federal wiretapping statute requires court orders approving wiretaps to "specify … the identity … of the [Department of Justice official] authorizing the [wiretap] application." In this case, however, the court determined it needed to decide whether suppression was required when wiretap orders and corresponding applications say nothing about who authorized them.

In concluding that suppression was not required, the court looked to Supreme Court precedent as well as its own prior decision. The court found the Supreme Court had not considered a case where an order is "insufficient on its face" under the wiretap statute, 18 U.S.C. § 2518(10)(a)(ii). The Ninth Circuit took guidance, however, from two cases where the wiretap orders appeared facially sufficient but contained mistakes as to the identity of the DOJ official who provided the authorization. Reading those cases together, the court noted, "… it is clear the Supreme Court was far more concerned with the wiretap applications being authorized by an empowered DOJ official than with correct identification of that official in the wiretap applications and order."

The court also acknowledged its precedent where it refused

to suppress an order involving misstated identity. In that opinion, the court reviewed opinions from other circuits and, "held that the misstatement was merely a minor facial insufficiency that does not substantially impair the accomplishment of Congress' purpose.'" Because the DOJ official who authorized the application was empowered to do so and the failure to identify the authorizing official was a "minor facial insufficiency," the court refused to suppress the fruits of the wiretaps.

SIXTH AMENDMENT

Post-*Booker* Forfeiture Penalty Using Preponderance of the Evidence Standard Valid Under Sixth Amendment

In ***United States v. Fruchter**, 411 F.3d 377* (2d Cir. 2005), and ***United States v. Hall***, 411 F.3d 651 (6th Cir. 2005), the Second and Sixth Circuit Courts of Appeal reviewed challenges to criminal forfeitures based on judicially determined facts established by only a preponderance of the evidence. The defendants argued under *United States v. Booker*, 125 S.Ct. 738 (2005), that their Sixth Amendment right to a trial by jury had been violated.

In *Fruchter*, the defendant was convicted of RICO violations, and therefore subject to criminal forfeiture of illegal proceeds under 18 U.S.C. § 1963. In *Hall*, the defendant was convicted of bank fraud and money laundering, and as part of her sentence, was ordered to forfeit the illegal proceeds under 18 U.S.C. § 982(a)(2). The courts in both cases cited *Libretti v. United States*, 516 U.S. 29 (1995), in which the Supreme Court rejected the argument that the Sixth Amendment right to a jury verdict extends to criminal forfeiture. "Forfeiture concerns sentencing," reasoned the Court, "not the elements of a crime." *Id*. at 49. However, both courts noted the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which required the trier of fact to make factual determinations based on the "beyond a reasonable doubt" standard for any fact that increases the penalty for a crime beyond the statutory maximum. The *Booker* case extended *Apprendi's* logic to mandatory sentencing under state and federal sentencing guidelines. The issue the courts faced in these cases was whether the preponderance standard used for determining criminal forfeiture is still the rule following the *Booker* decision.

The Second and Sixth Circuits both concluded the rule in *Libretti* remains the law. In their analysis, each court found that it was the *determinate* sentencing regimes that violated a defendant's Sixth Amendment rights when the Guidelines mandated a sentence above the range authorized solely by the jury verdict, based on facts found by the judge by a preponderance of the evidence. In *Booker*, the Supreme Court held the Sentencing Guidelines were unconstitutional because they were determinate. Criminal forfeiture is not a determinate scheme, and is not subject to any statutory maximum, according to the courts in *Fruchter* and *Hall*. *Apprendi* and *Booker* prohibited increases in punishment beyond the statutory maximum or specified range based on judicial factfinding. Since there is no specified range in criminal forfeiture, a judge cannot exceed his authority, said the *Fruchter* court. Using the same reasoning, the court in Hall stated "[t]he absence of a statutory maximum or any sort of guidelines system indicates that forfeiture amounts to a form of indeterminate sentencing which has never presented a Sixth Amendment problem." *Hall*, 411 F.3d at 655.

SENTENCING GUIDELINES

Seventh Circuit Presumes Reasonable Any Sentence Properly Calculated Under the Guidelines

In ***United States v. Mykytiuk***, 415 F. 3d 606, (7th Cir. 2005), the Seventh Circuit affirmed the 150-month sentence imposed by the United States District Court for the Western District of Wisconsin after declaring "that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."

In this case, Robert Mykytiuk was convicted in the district court of narcotics trafficking and possession of a firearm in furtherance of drug trafficking. The case was heard before the Supreme Court's decision in *Booker* and the district court enhanced Mykytiuk's sentence based on facts found by a preponderance of the evidence.

Following Mykytiuk's appeal, the Seventh Circuit affirmed his conviction and ordered a limited remand to determine whether the district court would be inclined to change its sentence since the sentencing guidelines had recently been rendered merely advisory. The district court then informed the Seventh Circuit that it was not disposed to change its sentence whether the guidelines system was mandatory or advisory. The Seventh Circuit then applied the plain error standard and found the district court's 150-month sentence to be reasonable.

Before reaching its determination, however, the Seventh Circuit set forth a detailed explanation of how it would determine "reasonableness" post-*Booker*. First, the appellate court recognized that "[w]hen the Supreme Court

directed the federal courts to continue using the Guidelines as a source of advice for proper sentences, it expected that many (perhaps most) sentences would continue to reflect the results obtained through an application of the Guidelines. But "many or most" sentences cannot mean "all" sentences. Put differently, *Booker* does not hold that a Guidelines sentence must conclusively be presumed to be reasonable."

Further, it noted that "while a *per se* or conclusively presumed reasonableness test would undo the Supreme Court's merits analysis in *Booker,* a clean slate that ignores the proper Guidelines range would be inconsistent with the remedial opinion." The court then opined that "the best way to express the new balance...[was] to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."

As for overcoming such a presumption, the Seventh Circuit noted that the presumption of reasonable was a "deferential standard" which a defendant could rebut by "demonstrating that his or her sentence [was] unreasonable when measured against the factors set forth in § 3553(a)." Even though the court envisioned that it would find a guidelines sentence unreasonable in only the rarest of circumstances, it fully understood that such a determination was possible given the Supreme Court's charge in *Booker* that every defendant's sentence be measured against those factors set forth in 18 U.S.C.§ 3553(a).

Ultimately, the Seventh Circuit found Mykytiuk's 150-month sentence reasonable given the district court's proper calculation under the sentencing guidelines, *i.e.*, the application of Criminal History Category II and a three-level enhancement pursuant to U.S.S.G. § 2D1.1(b)(6)(B), its own determination that the factors set forth in 18 U.S.C. § 3553(a) did not require any sort of downward departure, and the fact that defendant proffered no evidence to rebut the presumption of reasonableness.

EVIDENCE

Classification of Hearsay Statement as "Testimonial"

In ***United States v. Summers***, 414 F.3d 1287 (10th Cir. 2005), the Tenth Circuit applied a broad interpretation of *Crawford v. Washington* and reversed the admission of a co-defendant's statement used to convict the defendants. Summers and Thomas were convicted of bank robbery, aiding and abetting, and conspiracy to commit bank robbery. Both Summers and Thomas appealed their convictions. Summers argued the evidence adduced at trial was insufficient to support his conviction. The Tenth Circuit agreed and reversed his conviction as it found there was no evidence tying him to the robbery other than his presence with the co-defendants.

Thomas argued, among other things, that the admission of a hearsay statement by a co-defendant violated his Sixth Amendment right under *Crawford v. Washington* as the co-defendant did not testify at trial. When Thomas and his co-defendants were arrested, one co-defendant, the declarant, asked the police officer "How did you guys find us so fast?" The statement was used against Thomas at trial, coming in under the present-sense hearsay exception.

In *Crawford*, the Supreme Court held "that the admission of testimonial hearsay at trial, absent the unavailability of the declarant and a prior opportunity for cross-examination by the defendant, violates the accused's confrontation right under the Sixth Amendment." The Court, however, did not define the term "testimonial," other than stating it was, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." The Court further decided that all of the proposed formulations to define what is "testimonial" share a "common nucleus" that includes statements made by a witness during an interrogation at a police station.

The Tenth Circuit decided *Crawford* provided a "hint" as to the proper test for determining what is "testimonial" when it commented on the various existing formulations of the controlling principle. The court said, "…an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment." Thus, the court held "that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime."

Looking at the facts of this case, the court determined the statement was an assertion within the meaning of Rule 801(a) and (c) of the Federal Rules of Evidence (FRE), as it was offered in evidence to prove the truth of the question. The inquiry concerned the declarant's intent, and in this case, the court concluded the co-defendant's question "clearly contained an inculpatory assertion." As the declarant's intent was to make an assertion, it constituted hearsay for purposes of FRE Rule 802. The court held that declarant's hearsay statement "…was testimonial in nature and that its admission at trial violated the rule in *Crawford*." The court, however, found the error was harmless and affirmed Thomas' conviction.

PRIVILEGES

Order to Comply with Grand Jury Subpoena Served on Defendant's Former Counsel

Deemed Overbroad

In ***In Re: Grand Jury Subpoena***, 419 F.3d 329 (5th Cir. 2005), the defendant, previously indicted for various weapons and drug offenses, moved to quash a grand jury subpoena served on his former counsel during a separate investigation into whether he and a certain witness conspired to obstruct the law or commit perjury.

Defendant initially argued that the testimony of his former attorney, the documents, and the other items sought by the government were protected from disclosure by the attorney-client, work product, and Fifth Amendment privileges and were not subject to disclosure by way of the crime-fraud exception. In the alternative, he argued the grand jury subpoena was overbroad as it sought information and work product related to all of his communications with his former attorney, rather than simply that information and work product that fell within the crime-fraud exception.

The United States District Court for the Middle District of Louisiana denied defendant's motion, finding the government made a *prima facie* showing that: (1) the defendant and the witness had committed or had intended to commit a crime or fraud while the former counsel was representing the defendant, and that their communications with defendant's former counsel were in furtherance of that crime or fraud and (2) defendant's Fifth Amendment privilege against self-incrimination would not be implicated by the attorney's compliance with the grand jury subpoena.

On appeal, the Fifth Circuit agreed that the evidence presented was sufficient to establish a *prima facie* showing that the crime-fraud exception to the attorney-client and work product privilege applied to defendant's communications with his former counsel and to the work product generated from the attorney's communications with certain witnesses. It disagreed, however, as to what communications and documents were discoverable within the scope of the crime-fraud exception and held that the district court's order was overbroad.

The Fifth Circuit held that "the proper reach of the crime-fraud exception…does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct…Based upon our examination of the sealed record, including the *in camera* examination of Former Counsel, this case does not present a situation where Appellant's entire criminal representation by Former Counsel was based upon or sought for the sole purpose of perpetuating a crime or fraud. The district court's orders compelling Former Counsel's compliance with the grand jury subpoena here did not in any way limit the required disclosures. The orders compel Former Counsel to bring all written statements of Appellant and Witness and all notes, records, and recordings of interviews of Appellant and Witness. Moreover, because the court's orders compel Former Counsel to appear and order that he cannot assert any attorney-client or work product privilege, no boundary exists as to the extent of his compelled testimony."

In sum, the Fifth Circuit opined that the district court's application of the crime-fraud exception lacked "the requisite specificity to reach only communications and documents no longer protected by the attorney-client and work product privileges." Thus, the district court's order compelling defendant's former attorney to comply with the grand jury subpoena and the denial of defendant's motion to quash were issued in error.

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