Criminal Tax Bulletin

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FOURTH AMENDMENT

Supreme Court Holds Evidence Admissible Because Unlawful Stop Was Sufficiently Attenuated By Pre-Existing Warrant

In ***Utah v. Strieff***, 136 S. Ct. 2056 (2016), the Supreme Court, in a five-to-three decision, held that the exclusionary rule did not bar evidence discovered on the defendant's person during a search incident to his arrest after an initial, unlawful stop because the discovery of a pre-existing outstanding arrest warrant constituted a critical intervening circumstance wholly independent of the unlawful stop.

A narcotics detective observed Edward Joseph Strieff, Jr. ("Strieff") exit a house that was being monitored for suspected-drug activity. The detective detained Strieff at a nearby store, identified himself, and asked Strieff what he was doing at the residence. As part of the stop, the detective requested and received Strieff's identification. When running Strieff's information, the detective discovered that Strieff had an outstanding arrest warrant for a traffic violation and arrested Strieff. When searched incident to the arrest, the detective discovered drugs and drug paraphernalia. Ultimately, Strieff pleaded guilty to attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court's denial of his motion to suppress the evidence seized incident to his arrest. The Utah Court of Appeals affirmed the denial, but the Utah Supreme Court reversed and ordered the evidence suppressed.

On certiorari, the Supreme Court reversed the state supreme court's judgment, holding that the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The Court analyzed the application of the attenuation exception to the exclusionary rule by examining three factors articulated in *Brown v. Illinois*, 422 U.S. 590 (1975): (1) the "temporal proximity" between the unconstitutional conduct and the discovery of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

Justice Sotomayor's dissenting opinion (joined in part by Justice Ginsburg) noted that because the warrant check was foreseeable, it was not an "intervening circumstance" separating the stop from the search for drugs, but rather, part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." As such, prior Supreme Court precedent required exclusion of the evidence found by exploiting a constitutional violation, which the Fourth Amendment should not allow.

Justice Kagan's dissenting opinion (joined by Justice Ginsburg) agreed that the warrant discovery was "an eminently foreseeable consequence of stopping Strieff" and, thus, not an intervening circumstance. The opinion concluded that the majority had misapplied the *Brown* factors, creating unfortunate incentives for the police to violate the Constitution by offering potential advantages in stopping individuals without reasonable suspicion, "exactly the temptation the exclusionary rule is supposed to remove."

Second Circuit *En Banc* Court Upholds Government's Retention and Subsequent Search of Non-Responsive Digital Media

In ***United States v. Ganias***, 824 F.3d 199 (2d Cir. 2016), the Second Circuit, sitting *en banc*, upheld the denial of defendant's motion to suppress evidence obtained through the retention and subsequent search of non-responsive digital records. The *en banc* court declined to rule on the Fourth Amendment issue, but instead held that the search was objectively reasonable and thus fit within the exclusionary rule's good-faith exception under *United States v. Leon*, 468 U.S. 897 (1984).

In 2003, Army investigators executed a search warrant of Stavros Ganias' ("Ganias") accounting business in connection with an investigation of one of Ganias' clients. The agents seized mirror images of

Ganias' computers hard drives, but assured him that any non-responsive records would be purged after the search for responsive records was completed. In 2004, the IRS joined the investigation after a review of the seized records revealed suspicious payments by Ganias' client to an unregistered business with unreported income. Further investigation between 2004 and 2006 revealed that Ganias had underreported his and his client's income. After unsuccessful attempts to obtain Ganias' consent to search the preserved images of his personal financial records, which were part of the nonresponsive documents still in the government's possession, the government obtained a new search warrant to search the mirror images again.

After he was indicted for tax evasion, Ganias moved to suppress the evidence acquired pursuant to the 2006 warrant, claiming it was obtained in violation of the Fourth Amendment. The district court denied the motion, and Ganias was convicted and sentenced to 24 months' imprisonment. On appeal, a panel of the Second Circuit vacated Ganias' conviction, holding that the evidence obtained pursuant to the 2006 warrant should have been suppressed because it was obtained in violation of the Fourth Amendment.

On rehearing *en banc*, the Second Circuit reversed the panel's decision and affirmed the district court's denial of Ganias' suppression motion. The court declined to address whether a Fourth Amendment violation had occurred. Instead, it concluded that the agents had acted in good faith and, therefore, even if there was a Fourth Amendment violation, the case fit within the *Leon* good-faith exception to suppression. Nevertheless, the opinion offered guidance on the reasonableness of the agents' actions, *inter alia*, to "highlight the importance of careful consideration of the technological contours of digital search and seizure for future cases." The court emphasized that in assessing the reasonableness of the search and seizure of digital evidence for purposes of the Fourth Amendment, courts must consider the technological features unique to digital media as a whole and to those relevant in a particular case. For example, forensic investigators may search for and discover evidence that a file was deleted as well as evidence sufficient to reconstruct a deleted file. They may seek responsive metadata about a user's activities, or the manner in which information was stored, to show knowledge or intent, or to create timelines as to when information was created or accessed. Forensic examiners may seek evidence on a storage medium that something did not happen. The complexity of data on digital media and the manner in which it is stored also presents potential challenges to parties seeking to preserve digital evidence, authenticate it at trial, and establish its integrity for a fact-finder. Accordingly, the court acknowledged the plausibility of the government's contention that a digital-storage medium or its forensic copy may need to be retained during the course of an investigation and prosecution to permit the accurate extraction of the primary evidentiary material sought pursuant to the warrant; to secure metadata and other probative evidence stored in the interstices of the storage medium; and to preserve, authenticate, and effectively present at trial the evidence thus lawfully obtained. Although the court acknowledged the privacy concerns implicated when a hard drive or forensic mirror is retained, even pursuant to a warrant, it noted that parties with an interest in retained storage media may move for the return of the property under Federal Rule of Criminal Procedure 41(g)—which Ganias did not do.

The dissent opined that the same Fourth Amendment principle that limits government searches and seizures to items for which there is probable cause, applies to the search and seizure of computer records. The dissent viewed the Fourth Amendment protections as more important in the context of modern technology, given the government's increased ability to intrude into a person's private affairs. The dissent agreed with the panel's unanimous holding that the government violated Ganias's Fourth Amendment rights when it retained his non-responsive files for nearly two-and-a-half years and then re-examined the files for evidence of additional crimes. The dissent further opined that the government's actions were not excused by the good-faith exception.

Fourth Circuit *En Banc* Holds Government's Acquisition of Historical Cell-Site Location Information from Cell-Phone Provider is Not a Fourth Amendment Search

In ***United States v. Graham***, 824 F.3d 421 (4th Cir. 2016), the Fourth Circuit, sitting *en banc*, applied the third-party doctrine and held that the defendants did not have a reasonable expectation of privacy in historical cell-site location information ("CSLI") voluntarily conveyed by the defendants to their cell-phone providers.

Aaron Graham ("Graham") and Eric Jordan ("Jordan") were arrested for robbing two restaurants. Each provided their cell phone numbers to the arresting officers. Suspecting that Graham and Jordan were involved in other recent robberies, investigators

sought an order seeking historical CSLI under the Stored Communications Act ("SCA") to link the defendants to the vicinities of the robberies. The cell-phone providers produced substantial data for a 221-day period. Graham and Jordan moved to suppress this evidence, arguing that the SCA violates the Fourth Amendment by permitting the government to obtain CSLI without a warrant. The district court denied their motion and Graham and Jordan were convicted. A panel of the Fourth Circuit held, *inter alia*, that the government's warrantless procurement of historical CSLI violated the Fourth Amendment, but fell within the good-faith exception to the exclusionary rule. Graham and Jordan moved for a rehearing *en banc*, which was granted.

The Fourth Circuit, *en banc*, affirmed the district court's judgment. The court held that the government's acquisition of the historical CSLI did not constitute a search. The court concluded that Graham and Jordan did not have a reasonable expectation of privacy in the CSLI because they voluntarily turned this information over to third parties—their cell-phone providers. The court rejected the defendants' arguments that individuals do not convey CSLI to their cell-phone providers, voluntarily or otherwise; that CSLI should be treated as "content" because it records the individual's movements; and that a warrant should have been obtained due to the copious amount of information obtained. The court noted that the Third, Fifth, Sixth, and Eleventh Circuits also have held that individuals do not have a reasonable expectation of privacy in historical CSLI obtained pursuant to the Act. Finally, the court opined that "the third-party doctrine does not render privacy an unavoidable casualty of technological progress," and noted that Congress is free to require greater privacy protection.

Sixth Circuit Holds Compelled Production of Historical Cell-Site Information to Government is Not a Fourth Amendment Search

In ***United States v. Carpenter***, 819 F.3d 880 (6th Cir. 2016), the Sixth Circuit joined the Third, Fourth, Fifth, and Eleventh Circuits in holding that individuals do not have a reasonable expectation of privacy in historical cell-site location information ("CSLI") that the government obtains from cellular phone service providers pursuant to 18 U.S.C. § 2703(d) of the Stored Communications Act ("SCA").

Defendants were convicted of nine bank robberies. The government's evidence at trial included business records from the defendants' cell-phone providers showing that each defendant had used his cell phone within one-half to two miles of the robberies during the times the robberies occurred. The Federal Bureau of Investigation ("FBI") obtained the CSLI from the defendants' cell-phone providers pursuant to a 18 U.S.C. § 2703(d) court order, which allows the government to compel the disclosure of certain telecommunications records based on "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication … are relevant and material to an ongoing criminal investigation." Before trial, the district court denied the defendants' motion to suppress the CSLI, holding that the government's collection of CSLI created and maintained by the defendants' wireless carriers is not a Fourth Amendment search.

In affirming the district court's decision, the Sixth Circuit explained that in Fourth Amendment cases, the Supreme Court has long recognized a distinction between the content of communications and the information necessary to convey it. Per this distinction, the content of a letter or email, for example, is protected, but routing information, such as sender and recipient addresses or Internet Protocol addresses, is not. Accordingly, the Sixth Circuit concluded that historical-CSLI records are not protected, as they say nothing about the content of any calls and simply include routing/location information, which cell-phone providers gather in the ordinary course of business. Therefore, the government's collection of such business records from the cell-phone providers was not deemed a search.

Eighth Circuit Holds No Fourth Amendment Protection for Information in Magnetic Strip on Credit, Debit, and Gift Cards

In ***United States v. DE L'Isle***, 825 F.3d 426 (8th Cir. 2016), the Eighth Circuit held that law enforcement's access to the magnetic strips on the backs of credit, debit, and gift cards, which were lawfully seized, was not a Fourth Amendment search and, therefore, no search warrant was required.

After a traffic stop, law enforcement searched a vehicle being driven by Eric-Arnaud Benjamin Briere DE L'Isle ("DE L'Isle") and seized a large stack of credit, debit, and gift cards. Subsequently, United

States Secret Service agents scanned the magnetic strips on the seized cards and found they contained either no account information or stolen American Express account information. The district court denied DE L'Isle's motion to suppress any evidence discovered from the scanning of the magnetic strips, and after a jury trial, DE L'Isle was convicted of possession of counterfeit and unauthorized access devices. DE L'Isle appealed the district court's denial of his motion, arguing that he had a Fourth Amendment privacy interest in the information contained in the magnetic strips on the credit, debit, and gift cards seized from his vehicle.

On appeal, the Eighth Circuit affirmed the district court's denial of DE L'Isle's motion to suppress, holding that the scanning of the cards' magnetic strips did not constitute a search for Fourth Amendment purposes. The appellate court's rationale was that (1) there was no physical intrusion into a protected area because the information contained in the magnetic strips is the same as that embossed on the front of the card, and will only be different if the card has been tampered with; and (2) DE L'Isle failed to show either a reasonable subjective or objective expectation of privacy in the magnetic strip information. The court explained that when using a card, a cardholder knowingly discloses the information on the magnetic strip to a third party and, thus, cannot claim a reasonable subjective expectation of privacy in it. Nor is there a reasonable objective expectation of privacy that society is prepared to recognize, because the information in the magnetic strips should match that printed on the front of the card.

Second Circuit Holds Stored Communications Act Warrant Not Applicable to Information Stored Abroad

In ***In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation***, 829 F.3d 197 (2d Cir. 2016), the Second Circuit held that a search warrant issued under the Stored Communications Act ("SCA") is not enforceable to compel the disclosure of electronic communications stored outside the United States.

The government served a search warrant on Microsoft Corporation ("Microsoft"), seeking email and account information of a Microsoft customer's account that appeared to be used in furtherance of narcotics trafficking. In response, Microsoft provided the customer's basic account information, which Microsoft maintained on servers within the United States, but refused to provide the customer's content data, which Microsoft stored on its Ireland server, even though Microsoft could access this information from its locations in the U.S. The district court denied Microsoft's motion to quash and held Microsoft in contempt for its failure to provide the data stored in Ireland.

On appeal, the Second Circuit reversed the district court and held that enforcement of a search warrant issued under the SCA, insofar as it directed Microsoft to seize the contents of its customer's communications stored in Ireland, constitutes an unlawful extraterritorial application of the SCA. In so holding, the appellate court analyzed the following factors: (1) the plain meaning of the SCA language; (2) the privacy focus of the statute; (3) the presumption against extraterritorial application of U.S. laws; and (4) the legislative history of the SCA warrant provisions for evidence of congressional intent regarding extraterritorial application. The court noted that the legislative history of the SCA is consistent with the use of warrants for information or items located within the U.S. and for the protection of U.S. citizens' privacy interests.

The Second Circuit disagreed with the government's argument that an SCA search warrant should be treated like a subpoena. First, the court noted that SCA § 2703 "uses the 'warrant' requirement to signal (and to provide) a greater level of protection to priority stored communications, and 'subpoenas' to signal (and provide) a lesser level." Second, the court distinguished the line of cases cited by the government in which banks were required to comply with subpoenas requiring disclosure of their overseas records. In those cases, the court noted, the records were created by and belonged to the banks. As such, the banks, not the depositors, had a protectable privacy interest in the records. In contrast, the appellate court noted it had never upheld the use of a subpoena to compel a recipient to produce an item under its control and located overseas when the recipient (like Microsoft here) is merely a caretaker for other individuals (in this case Microsoft's clients), and the individuals, not the subpoena recipient have a protectable privacy interest in the item.

Sixth Circuit Holds Pole-Camera Surveillance Did Not Violate Fourth Amendment

In ***United States v. Houston***, 813 F.3d 282 (6th Cir. 2016), the Sixth Circuit held, *inter alia*, that the warrantless use of a stationary video (pole) camera to conduct surveillance of defendant's property did not violate the Fourth Amendment.

Rocky Houston ("Houston") was convicted of being a felon in possession of a firearm and sentenced to 108 months' imprisonment. The main evidence against Houston was video footage of his possessing firearms at his and his brother's rural Tennessee farm. The video was recorded over a 10-week period by a camera installed on a public-utility pole about 200 yards away from the farm. The camera was installed by the utility company at the government's direction and without a warrant. At trial, the investigating agent testified that the view captured by the camera was identical to what agents would have observed if they had driven down the public roads surrounding the farm.

On appeal, Houston argued that admission of the video footage at his trial violated his Fourth Amendment rights. The Sixth Circuit held that there was no Fourth Amendment violation because Houston did not have a reasonable expectation of privacy in the warrantless video footage captured by the pole camera since the same views could have been enjoyed by passersby on public roads. In addition, the length of the warrantless surveillance did not make the use of the pole camera unconstitutionally unreasonable because law enforcement officers could have (however impracticable) conducted round-the-clock surveillance of Houston's farm and residence, but instead lawfully chose to use technology (the pole camera) to more efficiently conduct their investigation. Finally, the court distinguished Houston's case from the Supreme Court's recent decision in *United States v. Jones*, 132 S. Ct. 945 (2012), stating that the surveillance was not so comprehensive as to monitor Houston's every move since it only recorded Houston's outdoor activities on the farm.

SIXTH AMENDMENT

Supreme Court Holds Pre-Trial Restraint of Substitute, Untainted Assets Violates Defendant's Right to Counsel

In ***Luis v. United States***, 136 S. Ct. 1083 (2016), the Supreme Court held that the pre-trial restraint of legitimate, untainted assets violated defendant's Sixth Amendment right to counsel.

Sila Luis ("Luis") was charged with healthcare fraud involving kickbacks, conspiracy, and other crimes relating to healthcare (18 U.S.C. §§ 1349 and 371; 42 U.S.C. § 1320a). Claiming that Luis obtained almost $45 million from the fraud, the government applied for and received pre-trial a temporary restraining order to freeze Luis' remaining assets valued at $2 million. The government then moved for a preliminary injunction restraining the assets under 18 U.S.C. § 1345, which authorizes the pre-trial restraint of assets that are: (1) the result of the crime; (2) traceable to the crime; or (3) assets of equivalent value. The parties agreed that the frozen assets were neither the result of nor traceable to the crime, and that the freeze prevented Luis from hiring the lawyer of her choice with her untainted assets. The district court entered the preliminary injunction, finding that "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." 966 F. Supp. 2d 1321, 1334 (S.D. Fla. 2013). The Eleventh Circuit agreed and upheld the preliminary injunction.

On certiorari, a plurality of the Supreme Court held that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violated the Sixth Amendment. The Court distinguished *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989), stating they dealt with tainted assets, while the funds at issue in this case were not proceeds of the crime or traceable to the crime. The plurality reasoned that untainted (*i.e.*, innocent) assets that belong to the defendant are not the property of the government in the way that proceeds of a crime are government property under the relation-back theory. Further, the Sixth Amendment right to counsel is fundamental and the government's interest in restitution may not be completely thwarted as there may be tainted assets that can be forfeited. The plurality also stated that tracing the tainted funds is something courts do in other cases and therefore the courts have experience in separating tainted and untainted funds. As such, the lower courts should

determine if funds to be restrained are tainted prior to pre-trial restraint.

SPEECH OR DEBATE CLAUSE

Third Circuit Holds Speech or Debate Clause Does Not Prohibit Disclosure of Records During Criminal Investigation

In ***In the Matter of the Search of Electronic Communications (Both Sent and Received) in the Account of Chakafattah@gmail.com at Internet Service Provider Google, Inc.,*** 802 F.3d 516 (3d Cir. 2015), the Third Circuit held, *inter alia*, that a Congressman's privilege under the Speech or Debate Clause, U.S. Const. art.1, § 6, cl. 1, did not confer jurisdiction upon the appellate court for an interlocutory appeal of an unexecuted search warrant.

During a grand jury investigation into allegations of fraud, bribery, and extortion, the government served a sitting Congressman, Chaka Fattah, with a grand jury subpoena seeking various documents, including electronic data from his Gmail account. In response, the Congressman turned over some emails but objected to others on the bases of, *inter alia*, the Speech or Debate Clause. Several months later, a magistrate judge issued a search warrant for the search of the Congressman's Gmail account. The warrant sought essentially the same information as the grand jury subpoena. The Congressman received an email from Google regarding its receipt of the search warrant and gave the Congressman seven calendar days to object to the request in a court of competent jurisdiction. The Congressman moved to intervene and to quash the warrant, arguing that its execution would violate the Speech or Debate Clause, among other things, because the email was used for personal and professional matters touching upon his representation as a member of Congress. The district court denied the petition after concluding that the Speech or Debate Clause did not apply. The Congressman sought an interlocutory appeal under 28 U.S.C. § 1291.

The Third Circuit held it had no jurisdiction to consider the interlocutory appeal because, *inter alia*, the Speech or Debate Clause did not prevent the disclosure of evidentiary records during a criminal investigation. Relying upon *In re Grand Jury (Eilberg)*, 587 F.2d 597, 589 (3d Cir. 1978), the court rejected the Congressman's argument that disclosure would present a harm that could not be remedied after a criminal prosecution. The court recognized the Speech or Debate Clause provides three protections: (1) it bars liability for "legislative acts;" (2) it prevents compelling a member to answer questions regarding such "legislative acts;" and (3) it prevents the use of "legislative acts" against a member in a criminal or civil proceeding. In the court's view, none of the three protections justified an interlocutory appeal because it would shield members from investigation merely by asserting the protections found in the clause. The court reasoned that the Speech or Debate Clause does not prohibit the disclosure of privileged documents during a criminal investigation, but rather, prohibits the evidentiary submission and use of those documents.

CONSPIRACY

Supreme Court Holds Conspiracy to Commit Hobbs Act Extortion Does Not Require that Conspirators Agree to Obtain Property from Someone Outside the Conspiracy

In ***United States v. Ocasio***, 136 S. Ct. 1423 (2016), the Supreme Court, in a five-to-three decision, held that a conspiracy to commit Hobbs Act extortion (defined as "the obtaining of property from another, with his consent . . . under color of official right," *i.e.*, taking a bribe) does not require that the conspirators agree to extort money or property from a third party outside of the conspiracy; it can involve the purported victims of the extortion as members of the conspiracy.

Samuel Ocasio ("Ocasio"), a former police officer, participated in a kickback scheme in which he and other officers routed damaged vehicles from accident scenes to a local auto repair shop in exchange for payments from the shop owners. Ocasio was convicted of Hobbs Act extortion (18 U.S.C. § 1951) and of conspiring to violate the Hobbs Act (18 U.S.C. § 371). At trial, the district court rejected Ocasio's argument that, because the Hobbs Act prohibits the obtaining of property "from another," a Hobbs Act conspiracy requires proof that the alleged conspirators agreed to obtain property (in this case, money) from someone outside the conspiracy. Ocasio was convicted on all counts, and the Fourth Circuit affirmed.

On certiorari, the Supreme Court rejected Ocasio's argument that he could not be convicted of a Hobbs Act conspiracy because the shop owners were members of the conspiracy. The Court held that a defendant may be convicted of conspiring to violate the Hobbs Act based on proof that he reached an

agreement with the owner of the property in question to obtain that property under color of official right. The Court explained that although conspirators must be pursuing the same criminal objective, an individual conspirator need not agree to facilitate every element of the crime; the intent to agree that the substantive offense be committed is all that is necessary. The Court further explained that that was what happened in Ocasio's case: Ocasio and the shop owners shared a common purpose, namely, that they would commit every element of the substantive extortion (*i.e.*, bribery) offense. The Court affirmed the Fourth Circuit opinion.

FORFEITURE

Second Circuit Holds Court Can Consider Whether Forfeiture Would Deprive Defendant of Livelihood

In ***United States v. Viloski***, 818 F.3d 104 (2d Cir. 2016), the Second Circuit held, *inter alia*, that when analyzing a forfeiture's proportionality under the Eighth Amendment's Excessive Fines Clause, a court can consider whether the forfeiture would deprive the defendant of his livelihood (*i.e.*, his future ability to earn a living).

Benjamin Viloski ("Viloski"), an attorney and real-estate broker, worked with Dick's Sporting Goods ("DSG") on a number of development projects. From 1998 to 2005, he participated in a kickback scheme involving the construction of new DSG stores. Viloski was convicted on multiple counts, including conspiracy to commit mail and wire fraud (18 U.S.C. § 371), mail fraud (18 U.S.C. § 1343), and conspiracy to commit money laundering (18 U.S.C. § 1956(h)). The district court sentenced him to five years' imprisonment and ordered him to forfeit $1,273,285.50; *i.e.*, the amount of funds he had acquired as part of the kickback scheme.

Viloski appealed. The court of appeals affirmed the conviction and sentence, but remanded for the district court to determine whether its forfeiture order violated the Excessive Fines Clause in light of the four factors described in *United States v. Bajakajian*, 524 U.S. 321 (1998): (1) the essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct. The district court concluded that the forfeiture did not violate the Eighth Amendment and Viloski again appealed.

The Second Circuit addressed whether, when analyzing a forfeiture's proportionality under the Excessive Fines Clause, the four *Bajakajian* factors are exhaustive, or whether a court may, in addition to such factors, consider whether the forfeiture would deprive the defendant of his livelihood—*i.e.*, his future ability to earn a living. Reasoning that the proportionality determination required by *Bajakajian* is sufficiently flexible to permit such consideration, the court held that a court may consider whether the forfeiture would deprive the defendant of his livelihood, but further held that courts should not consider a defendant's personal circumstances as a distinct factor in such determination. Concluding that the challenged forfeiture was not "grossly disproportional" to the gravity of Viloski's offenses and that Viloski had failed to establish that the forfeiture would deprive him of his livelihood, the court affirmed the order of forfeiture.

Fifth Circuit Holds that Forfeiture Statutes Authorized Imposition of a Personal-Money Judgment Upon Defendant's Convictions

In ***United States v. Nagin***, 810 F.3d 348 (5th Cir. 2016), the Fifth Circuit held, *inter alia*, that forfeiture statutes (18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c)) authorized the imposition of a personal-money judgment as a form of criminal forfeiture.

C. Ray Nagin ("Nagin") was the Mayor of the City of New Orleans from May 2002 to May 2010. While Mayor, Nagin solicited and accepted payments from contractors and business entities in exchange for favorable treatment and contracts from the City of New Orleans. Eventually, a jury convicted Nagin of bribery, honest-services wire fraud, conspiracy to commit bribery and honest-services wire fraud, conspiracy to commit money laundering, and filing false tax returns. The district court sentenced Nagin to ten years' imprisonment, imposed forfeiture in the form of a personal-money judgment in the amount of $501,200.56, and ordered Nagin to pay $84,264 in restitution to the federal government for unpaid taxes. On appeal, Nagin argued, *inter alia*, that the personal-money judgment, rather than the forfeiture of specific property, was unauthorized since the § 981(a)(1)(C) statute did not expressly provide for that form of forfeiture.

The Fifth Circuit rejected Nagin's argument based primarily on its decision in *United States v. Olguin*, 643 F.3d 384, 395 (5th Cir. 2011) where the court held that 21 U.S.C. § 853(a), a "substantively identical" statute to § 981(a)(1)(C), authorized personal-money judgments as forfeiture because even though § 853(a) did not expressly provide for such, its broad language did not prohibit them. Relying on *Olguin*, the court stated that neither § 981(a)(1)(C) (authorizing civil forfeiture of the proceeds of certain offenses and including forfeiture of "personal property") nor § 2461(c) (permitting criminal forfeiture whenever a civil or criminal forfeiture is authorized by statute and the defendant is found guilty of the relevant offense) could be read to exclude personal-money judgments. Additionally, the court reasoned that the exclusion of personal-money judgments would undermine the purpose of criminal forfeitures, which are a sanction against the individual defendant rather than a judgment against the property itself.

Federal Circuit Holds Forfeiture is a "Fine or Similar Penalty" and Not Deductible from Income Tax

In ***Nacchio v. United States***, 824 F.3d 1370 (Fed. Cir. 2016), the Federal Circuit addressed a question of first impression when it held that criminal forfeiture is a "fine or similar penalty" as described in 26 U.S.C. § 162(f) and therefore is not deductible from income tax pursuant to 26 U.S.C. §§ 162 or 165, and not entitled to special tax relief under 26 U.S.C. § 1341.

Joseph P. Nacchio ("Nacchio") was the Chief Executive Officer of Qwest Communications from 1997 to 2001. In 2007, a jury found Nacchio guilty of insider trading related to the exercise of options and sale of over $100 million worth of Qwest stock in 2001. The indictment included criminal forfeiture allegations and, in addition to a sentence of 72 months' imprisonment and a fine of $19 million, the district court ordered Nacchio to forfeit gross income derived from insider trading of more than $52 million, which was later reduced on appeal to net proceeds of approximately $44.6 million. Subsequently, the forfeited funds were subject to claims for remission by victims of Nacchio's fraud.

Nacchio and his wife, Anne M. Esker, amended their 2007 Federal income tax return claiming a nearly $18 million credit for the tax they paid on profits from the Qwest stock. When the IRS denied the claim, Nacchio filed a suit for refund claiming entitlement to special relief under 26 U.S.C. § 1341, which requires the taxpayer show amounts are deductible under another provision. The government agreed forfeited amounts were a loss as described in 26 U.S.C. § 165(c)(2), but argued they remained non-deductible on public-policy grounds. The Court of Federal Claims found the deduction was allowed as a § 165 loss and not barred by 26 U.S.C. § 162(f), which bars deductions for fines or penalties for violations of the law, reasoning in part that disallowance would result in a "double sting" by requiring both payment of restitution and taxation on income paid as restitution.

On appeal, the Federal Circuit rejected the lower court finding and reasoning, stating that criminal forfeiture must be paid with after-tax dollars just as a fine is paid. In reaching its conclusion, the court noted that forfeitures are punitive in nature, even if the funds are ultimately used to compensate victims, and the forfeiture in this case was specifically computed in reference to "proceeds," which is not computed after income taxes paid. The lower court's finding that Nacchio could deduct the forfeiture payments as a § 165 loss was reversed, its finding that the deduction was not allowable under § 162 was affirmed, and because the payments were not otherwise deductible, no special relief under § 1341 was allowed.

SENTENCING

Sixth Circuit Rejects, in *Dicta*, Reading "Usability" Requirement into U.S.S.G. § 2B1.1

In ***United States v. Moon***, 808 F.3d 1085 (6th Cir. 2015), the Sixth Circuit concluded, in *dicta*, that the definition of intended loss for the purpose of sentencing in an access device fraud case, is not limited to stolen access devices that are actually usable.

In 2011, Jimmie Moon ("Moon") and another conspired to obtain credit card numbers and gift cards for the purpose of making fraudulent purchases with the cards. Moon was indicted on multiple counts, including access device fraud, conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349), and aggravated identity theft (18 U.S.C. § 1028A). In 2013, Moon pleaded guilty to the wire fraud count. As part of the plea agreement, Moon admitted that he obtained scores of credit-card and gift-card numbers with fraudulent intent, though only a fraction of them were usable. At sentencing, the court applied

U.S.S.G. § 2B1.1 to determine Moon's offense level. The court calculated the intended loss of the crime by assuming a $500-minimum loss for each stolen card number, and sentenced Moon to 96 months' imprisonment.

On appeal, Moon argued that the district court should have calculated the loss resulting from his offense by including only actual losses from the usable card numbers. The Sixth Circuit rejected Moon's argument, citing other cases (*e.g.*, *United States v. Gilmore*, 431 Fed.Appx. 428 (6th Cir. 2011)) that had found the $500 per access device loss calculation discussed in § 2B1.1(b)(1) and Application Note 3(F)(i) to apply even to unused devices. The application note "sets a floor for calculating the loss attributable to each device, namely $500; it does not limit loss calculations to devices actually used." *Id*., at 430. As had another panel of the court in *United States v. Vyniauskas*, 593 Fed.Appx. 518 (6th Cir. 2015), the court also declined to follow the approach adopted by the Ninth Circuit in *United States v. Onyesoh*, 674 F.3d 1157 (9th Cir. 2012) (assessing loss by counting only actual loss suffered from usable access devices). Determining that the district court committed no error of law, arrived at no clearly erroneous finding of fact, and otherwise did not abuse its discretion, the Sixth Circuit concluded that even if Moon had not waived his right to appeal (which the court determined Moon had based on the clear language of the plea agreement), Moon's sentence was substantively reasonable.

CRIMINAL TAX BULLETIN

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