IRS

CRIMINAL TAX BULLETIN

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Department of the Treasury | Internal Revenue Service
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FOURTH AMENDMENT

Third Circuit Holds Error in Admitting Evidence Not Material to Defendant's Guilty Plea Decision Was Harmless

In ***United States v. Dyer***, 54 F.4th 155 (3d Cir. 2022), *cert. denied*, 143 S. Ct. (2023), the Third Circuit held that an erroneous admission of evidence was harmless error as it had no material effect on defendant's decision to plead guilty to being a felon in possession of a firearm.

In 2017, law enforcement received information that Ernest Dyer (Dyer) had attacked his girlfriend with a handgun and was trafficking women and drugs from his residence. Dyer's criminal history also indicated that if this information was true, Dyer was a felon in possession of a firearm in violation of Pennsylvania law. Based on this information, law enforcement obtained a search warrant for Dyer's residence, where officers seized a firearm, illegal drugs, and cellphones. They also found and seized a box containing green pills, drug-packing material, and an identification card. Based on information from another witness, officers obtained and executed a second warrant of Dyer's residence and seized additional drugs and drug-packing materials. Dyer was charged with drugs and firearm violations.

Before trial, Dyer moved to suppress all evidence seized during both searches, arguing his Fourth Amendment rights were violated because the warrants lacked probable cause. With respect to the first warrant, the district court held there was probable cause to search for cellphones and firearms, but not for drugs and/or drug-related items. However, the district court concluded that the box containing the pills, identification card, and drug-packing materials was validly seized under the plain-view doctrine and as part of a protective sweep following Dyer's arrest. The district court denied the motion to suppress any evidence seized during execution of the second warrant. Dyer pleaded guilty to one count of possession of a firearm as a convicted felon (18 U.S.C. § 922(g)), but, pursuant to Fed. R. Crim. P. R. 11, reserved the right to appeal the denial of his suppression motion. He was sentenced to 110 months' imprisonment.

On appeal, Dyer argued the district court erred in denying his motion to suppress the box with the pills, identification care, and drug-packing materials based on the plain-view exception to the warrant requirement. The Third Circuit agreed the district court erred in concluding the box was validly seized as a part of a protective sweep. With respect to the plain-view doctrine, the appellate court remarked that one could reasonably infer the box was large enough to contain a cellphone or any other items for which the officers had a valid warrant to search.

However, the Third Circuit declined to reach the issue, explaining that in the context of a conditional guilty plea, appellate courts must apply the harmless error standard, which is whether the government has proved beyond a reasonable doubt that the erroneously denied suppression motion did not contribute to the defendant's decision to plead guilty. In this case, the Third Circuit concluded that none of the evidence contained in the box pertained to the count to which Dyer pleaded guilty, *i.e.,* being a felon in possession of a firearm, nor did it add anything to the government's case or support the charges in any meaningful way. The government never asserted the seized pills were narcotics—the record suggests they were iron supplements. While there was testimony that the identification card was possible evidence of a crime, it was unclear how it provided evidence of Dyer's criminal activities. While the drug-packing material had the most obvious relationship to the offenses for which Dyer was charged, the Third Circuit noted that the government had significantly more relevant and probative evidence that Dyer committed drug-trafficking offenses, which would have been presented to a jury, and which Dyer did not challenge on appeal. Thus, the Third Circuit concluded the box added "absolutely nothing to the Government's case. It could not reasonably have contributed to Dyer's decision to plead guilty." Accordingly, the Third Circuit affirmed the district court's decision.

This bulletin is for informational purposes. It is not a directive.

First Circuit Holds Warrantless Search of Electronic Devices Fell Within Scope of Border Search Exception of Fourth Amendment

In ***United States v. Qin***, 57 F.4th 343 (1st Cir. 2023), the First Circuit held that non-routine border search of defendant's electronic devices was permissible based upon reasonable suspicion and 60-day duration of the search was justified by the amount of data to be searched, language barriers, and encryption.

Shuren Qin (Qin), a Chinese national, held dual residences in China and Massachusetts. Federal agencies were investigating export activities Qin conducted through his company, LinkOcean Technologies, Ltd. Upon his return from China to the United States, U.S. Customs and Border Protection (CBP) agents interviewed Qin in the public baggage claim area of the airport, which resulted in the seizures of his laptop and phone for further search. The seized electronic devices contained over 825 gigabytes of data, of which a portion was encrypted. Qin did not provide passwords for the encrypted files. Additionally, some of the files were in Mandarin and no local agent was available to translate. Near the end of the initial 60-day period of the search, CBP agents found evidence that Qin had illegally exported hydrophones to a Chinese university with military ties. Agents then applied for warrants that were used to conduct additional searches of the devices.

Qin's motion to suppress the fruits of the warrantless search was denied by the district court and he pleaded guilty to several charges relating to his illegal export activities, reserving his right to appeal. On appeal, Qin argued that the CBP agents lacked the requisite reasonable suspicion. The First Circuit held that the evidence gathered in the ongoing investigation of Qin and statements made to CBP agents during the border stop supported a reasonable suspicion that he was engaging in unlawful export activities. Qin also challenged whether the search could be considered a border search due to its extended duration and the agents use of keyword searches on his data. The appellate court held that, while pushing the bounds of what can be considered a border search, the duration did not disconnect the search from its purpose because of the delays caused by encryption and the language barrier. Lastly, the First Circuit held that the agents' use of keyword searches did not turn the search into a "general exploratory search," reasoning that alone, a keyword search, is not sufficient to demonstrate that a search falls outside of the scope of a border search.

FIFTH AMENDMENT AND FREEDOM OF INFORMATION ACT

Second Circuit Holds FOIA Obligations Distinct from Criminal Disclosure Obligations

In ***United States v. Jabar***, 62 F.4th 44 (2d Cir. 2023), the Second Circuit held, *inter alia*, that *Brady v. Maryland*, 373 U.S. 83 (1963), neither expands nor alters the government's Freedom of Information Act (FOIA) obligations.

In 2016, Steve Jabar (Jabar) was found guilty of wire fraud and related charges stemming from his misuse of a United Nations grant. Shortly after he was found guilty, Jabar filed a FOIA request with the investigating agency, the Federal Bureau of Investigation (FBI). Prior to receiving a response, Jabar filed a FOIA complaint in district court. Thereafter, the FBI provided 21 sets of responsive documents as well as a detailed index listing the applicable FOIA exemptions for all withheld documents. The documents included 154 pages released in full, 632 pages in part, and 4,582 pages withheld in full. The government then moved for summary judgment, and included an affidavit detailing its search methodologies and efforts to redact documents subject to partial release. The district court declined to conduct an in camera review of the withheld documents and granted the motion for summary judgment.

Jabar appealed, arguing that the FOIA action was part of his attempt to vindicate himself and obtain material under *Brady*, and further asserted that the district court erred by declining in camera review. The Second Circuit affirmed, holding that FOIA and criminal discovery are two distinct procedures, neither of which impacted the government's obligations. Citing *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 75 (2d Cir. 1981), the appellate court held that the government's obligations under FOIA are not affected by whether documents may assist a defendant in his defense. Brown did not contend that the withheld documents fell outside the FOIA exemptions, but instead argued he needed the documents to overturn his conviction. The Second Circuit held that the *Brown* opinion controlled and defeated Jabar's argument, stating that FOIA has no special rules or exceptions that apply when the documents sought relate to a criminal case. Further, the Second Circuit reasoned summary judgment is appropriate in a FOIA action where, as here, the agency declaration provided specific details concerning the

exemptions claimed and there was no evidence of bad faith. The appellate court further held that the district court acted within its discretion in not conducting an in camera review in light of the particularity of the government's affidavit describing the search, review, and redaction processes. The Second Circuit explained that Jabar had not provided any basis to question the claimed exemptions or any other aspect of the search process.

AID OR ASSISTANCE – 26 U.S.C. § 7206(2)

Sixth Circuit Holds Filing a Tax Return is Not a Required Element of 26 U.S.C. § 7206(2)

In ***United States v. VanDemark***, 39 F.4th 318 (6th Cir. 2022), the Sixth Circuit held, *inter alia*, that filing a tax return is not a required element of 26 U.S.C. § 7206(2).

Gregory VanDemark (VanDemark) was the sole owner of Used Car Supermarket (UCS), a C Corporation, and several related S Corporations. VanDemark provided to his individual income tax return preparer books and records that did not reflect the distributions he received from UCS for tax year 2013. Unable to successfully file the return electronically, VanDemark's preparer mailed the return to the Internal Revenue Service (IRS). However, the IRS located no record of the return. A jury convicted VanDemark of, *inter alia*, aiding and assisting in the preparation of his false 2013 tax return in violation of § 7206(2).

On appeal, VanDemark challenged his § 7206(2) conviction, arguing that one of the elements of § 7206(2) is that a return has to be filed. The Sixth Circuit disagreed and affirmed the conviction, holding that the filing of a tax return is not a required element of § 7206(2) based on the statutory language. Section 7206(2) explicitly states "preparation *or* presentation"—and not "preparation *and* presentation," which renders a defendant guilty of assisting the "preparation" of a fraudulent return without also "presenting" it. The appellate court further noted that its holding was consistent with the Eighth and Eleventh Circuits, as well as with its holding in *United States v. Feaster,* 843 F.2d 1392 (6th Cir. 1988) (per curiam).

GRAND JURY MATERIALS

Eleventh Circuit Holds Access to Grand Jury Materials Requires Showing of Particularized Need

In ***Beiter v. United States***, 2023 WL 1980773, No. 22-12282 (11th Cir. Feb. 14, 2023) (unpublished), *cert. denied*, 143 S. Ct. 2677 (2023), *reh'g denied*, 144 S. Ct. 51 (2023), the Eleventh Circuit held, *inter alia*, that the district court did not abuse its discretion in denying a motion for access to grand-jury information where the defendant did not show a particularized need that is preliminary to or in connection with a judicial proceeding. A grand jury, in a superseding indictment, charged the defendant with obstruction of the IRS and multiple counts of tax evasion. A jury found the defendant guilty on all counts. The defendant filed a motion for a "copy of any and all grand jury transcripts for each and every grand jury hearing" against him, arguing that the documents would show the government committed perjury. The district court denied the motion and the defendant appealed.

On appeal, the Eleventh Circuit recognized that a district court has broad discretion over whether grand-jury materials are released, but that grand-jury materials should only be released where a moving party shows a particularized need that is preliminary to or in connection with a judicial proceeding. The appellate court defined particularized need as being necessary to avoid a possible injustice in a judicial proceeding such that disclosure outweighed the need for secrecy. The Eleventh Circuit upheld the district court, stating that the defendant had failed to show a connection with any pending judicial proceeding and that any alleged errors in the indictment had been corrected by the jury's guilty verdict. The appellate court further stated that unsubstantiated allegations and blanket requests for otherwise secret information did not satisfy the requirements of a particularized need.

***Note*:** This is an unpublished opinion.

VENUE

Ninth Circuit Holds Venue in 18 U.S.C. § 1001 Case Lies Where the False Statement Was Made

In ***United States v. Fortenberry***, 89 F.4th 702 (9th Cir. 2023), the Ninth Circuit held, *inter alia*, that venue of an 18 U.S.C. § 1001 violation is predicated on where the false statement is made.

Jeffrey Fortenberry (Fortenberry), a former Congressman from Nebraska, was indicted in the Central District of California on one count of scheming to falsify and conceal material facts (18 U.S.C. § 1001(a)(1)) and on two counts of making false statements (18 U.S.C. § 1001(a)(2)). The charges stemmed from allegations that Fortenberry had funneled foreign-campaign contributions through straw donors to circumvent campaign-finance laws. During the investigation, Federal Bureau of Investigation (FBI) agents twice interviewed Fortenberry, once in Nebraska and once in Washington, D.C. During these interviews Fortenberry denied having any knowledge of any foreign or conduit contributions to his campaign. At trial, Fortenberry moved to dismiss the case for improper venue, arguing the alleged false statements were not made in the Central District of

California, but in Nebraska and D.C. The district court denied his motion, holding that because materiality was an essential conduct element of a § 1001 offense, venue was proper not only where the statements were made but also in any "district in which the effects of the false statement were felt." Fortenberry was convicted on all counts.

Fortenberry appealed, arguing the district court erred in denying his motion to dismiss for improper venue. The government argued that since materiality is an essential conduct element of a § 1001 violation, a § 1001 violation occurs both where the false statement is made and where it has an effect on the federal investigation. Agreeing with Fortenberry, the Ninth Circuit held that venue for an 18 U.S.C. § 1001 violation is based on where the false statement was made. The appellate court rejected the government's materiality argument, noting it was not supported by the Constitution or the text of the statute. "The text of the statute plainly identifies the essential conduct of a [s]ection 1001 offense to be the making of a false statement." Regarding materiality, the Ninth Circuit observed that § 1001(a)(2) does not contain any language suggesting any essential conduct element other than making a false statement. "It is the act of uttering a false statement that is the criminal behavior essential to liability under [s]ection 1001." Thus, a § 1001 offense is complete at the time the false statement is uttered. Accordingly, the Ninth Circuit reversed Fortenberry's convictions.

SENTENCING

Third Circuit Holds Sentencing Enhancement for "Loss" is Inapplicable When "Actual Loss" is $0

In ***United States v. Banks***, 55 F.4th 246 (3d Cir. 2022), the Third Circuit held, *inter alia*, that a court cannot apply a loss enhancement under the United States Sentencing Guidelines ("USSG") § 2B1.1 when an individual's crime resulted in no actual loss to victims.

Frederick Banks ("Banks") was convicted of four counts of wire fraud and one count of aggravated identity theft related to a scheme to fraudulently gain money from an investment platform. Banks opened multiple accounts using an intermediary platform that allows individuals to invest in foreign currency exchanges. He then made deposits into these accounts from bank accounts that contained insufficient funds to cover the deposits. Shortly after, he attempted to withdraw funds from the platform, hoping to complete the withdrawals before the platform recognized that he had not successfully deposited the initial funds. Banks fraudulently "deposited" $324,000 and initiated 70 withdrawals totaling $264,000. However, he did not successfully withdraw any money. After conviction, Banks was sentenced to 104 months' imprisonment and three years' supervised release. This sentence reflected a 12-point enhancement under the USSG § 2B1.1, accounting for a loss greater than $250,000 but less than $550,000. In determining loss, the district court relied on the commentary to the Guidelines, defining loss as "the greater of actual loss or intended loss." The district court reasoned that Banks intended a loss of $324,000.

The Third Circuit rejected this sentence, reasoning that the district court erroneously applied the 12-point sentencing enhancement, considering the victim suffered $0 in actual loss. In light of *Kisor v. Wilke*, 139 S. Ct. 2400 (2019), the Third Circuit reasoned that a court must exhaust traditional tools of statutory construction to interpret the meaning of a regulation before referring to commentary. Using the plain language of USSG § 2B1.1, and the ordinary meaning of the term "loss," the appellate court found the term loss to mean "actual loss," not "intended loss." Therefore, the USSG commentary impermissibly expanded the definition of loss, and the Third Circuit accorded the commentary no weight. Accordingly, the Third Circuit vacated the sentence and remanded the case for resentencing without the loss enhancement.

Ninth Circuit Holds PINs Associated with EBT Cards Constitute an "Authentication Feature" Within the Meaning of the USSG

In ***United States v. Barrogo***, 59 F.4th 440 (9th Cir. 2023), the Ninth Circuit held, *inter alia*, that a personal identification number (PIN) associated with a debit-type card is an "authentication feature" under the United States Sentencing Guidelines (USSG) and the statute provisions they reference.

Marites Barrogo (Barrogo) pleaded guilty to conspiracy to use, transfer, acquire, alter or possess Supplemental Nutrition Assistance Program (SNAP) benefits without authorization (7 U.S.C. § 2024 and 18 U.S.C. § 371). SNAP is a federal program that provides food-purchasing assistance for low-income individuals. SNAP recipients are provided with an Electronic Benefits Transfer (EBT) card, which can be used at authorized stores to buy certain food products. Each EBT card is imprinted with a card number, and each cardholder has a PIN that must be entered to complete each transaction. Barrogo, who was not a SNAP beneficiary, was the owner of a restaurant in Guam. From 2015 to 2020, she bought SNAP benefits from various individuals at a substantial discount and used those benefits to buy bulk food items for her restaurant. A grand jury indicted Barrogo on two counts of unauthorized use of SNAP benefits (7 U.S.C. § 2024) and one count of conspiracy to violate § 2024 (18 U.S.C. § 371). Barrogo pled guilty to the conspiracy count. As part of her plea agreement, she stipulated to a two-level authentication-feature enhancement under USSG § 2B1.1(b)(11)(A)(ii), which was based on her use of EBT cards and PINs to purchase food. With the two-level increase, the advisory USSG range was 10-16 months of confinement. Ultimately, Barrogo was sentenced to 10 months' imprisonment.

On appeal, the Ninth Circuit addressed, *inter alia*, whether the district court properly applied the authentication-feature enhancement. Using the plain error standard of review (but noting that the outcome would be the same under any standard), the Ninth Circuit explained that a PIN satisfied the first part of the "authentication feature" definition because it is a "code" or "sequence of numbers" used by the EBT card's issuing authority. Further, "an EBT card is an 'access device'—and therefore a 'means of identification'—because it is a 'card … that can be used … to obtain money, goods, services, or any other thing of value.'" An EBT card is also associated with an account number, which is also an "access device" as defined by the statute. In short, the Ninth Circuit held that a PIN (which is a code or sequence of numbers) is an "authentication feature" because it is used by the issuing authority as a "means of identification" (the EBT card or account number, which are "access devices") to determine if the access device was counterfeit, altered, or otherwise falsified. In other words, a sequence of numbers that is used by the issuing authority on a means of identification (such as a card that can be used to obtain a thing of value) qualifies as an "authentication feature."

The Ninth Circuit rejected Barrogo's argument that a PIN does not count as an "authentication feature" because its numbers are not physically on the card noting that this argument was not consistent with the statutory text (18 U.S.C. §§ 1028A(d)(1), 1029(e)(1) and 1028(d)(7)). The appellate court explained that the statutes do not require that an "authentication feature" be a physical thing. The Ninth Circuit likewise rejected Barrogo's argument that the authentication feature enhancement should not apply to her because the EBT cards she used were genuine, reasoning that she still presented a "falsified" EBT card and PIN when she falsely represented herself as a SNAP beneficiary. As such, the Ninth Circuit affirmed the sentence.

First Circuit Affirms Fraud and Conspiracy Sentence Using Calculated Intended Loss Amount

In ***United States v. Akoto***, 61 F.4th 36 (1st Cir. 2023), the First Circuit held, *inter alia*, that the district court did not err in using the government's calculated intended loss amount to determine the sentencing guideline range for the defendant's conspiracy, wire fraud, and identity theft convictions.

Emmanuel Akoto (Akoto) was convicted by a jury for his participation in an international scheme involving the use of stolen identities to file 310 fraudulent federal income tax returns with the Internal Revenue Service (IRS). Those fraudulent tax returns claimed $1,326,633 in refunds, $551,601 of which were paid by the IRS. The district court sentenced Akoto using the government's calculated intended loss amount of $1,326,633 and a corresponding guidelines offense level of 14. On appeal, Akoto argued that the district court: (i) erred in calculating the loss amount attributable to his conduct; and (ii) should have used the same (lesser) loss amount that the district court attributed to a co-conspirator.

Regarding Akoto's argument that the district court erred in its loss calculation, the First Circuit noted that, according to USSG § 2B1.1, a defendant's guideline range for fraud convictions is based in part on the amount of loss, which includes the greater of either the actual loss or intended loss, and further noted that district courts have considerable discretion in determining what evidence should be regarded in calculating the amount of loss. Rejecting Akoto's argument, the appellate court determined that there was sufficient evidence presented by the government for the district court to find that the 310 fraudulent returns and related claims for refund were all tied to Akoto. Specifically, the government used a multistep process to prove, by a preponderance of the evidence, that Akoto's email addresses and correspondence was connected to the personally identifying information (PII) used in the fraudulent returns at issue.

The First Circuit also rejected Akoto's second argument that the district court should have sentenced him using the lesser loss amount ($364,758) that was attributable to his co-conspirator. In holding that the district court did not err in declining to adopt the co-conspirator's loss amount, the First Circuit reasoned that the government had calculated separate loss amounts attributable to each conspirator based on the fraudulent returns that could be tied to each conspirators' emails, and Akoto's use of emails tied to the PII on the fraudulent returns was broader, reflecting Akoto's "deeper involvement in the conspiracy." Ultimately, the First Circuit affirmed Akoto's sentence of 70 months' imprisonment.

Third Circuit Holds "Tax Loss" Includes Actual and Intended Loss for Sentencing

In ***United States v. Upshur***, 67 F.4th 178 (3d Cir. 2023), the Third Circuit held that "tax loss" encompassed both actual and intended loss, for purposes of calculating the base offense level for tax crimes.

Albert W. Upshur (Upshur) was convicted for conspiracy to defraud the United States (18 U.S.C. § 371) and eight counts of aiding and assisting in the preparation of false returns (26 U.S.C. § 7206(2)) for his involvement in two fraudulent tax schemes. The schemes involved false refund claims based on either fictitious income tax withholding paid from Upshur and his co-defendant's trust or tax overpayments to the IRS. The false claims did not result in an actual loss to the government. Instead, applying U.S.S.G. § 2T4.1, Upshur was sentenced to a below-Guidelines sentence of 84 months' imprisonment, based on the intended loss of $325 million.

Upshur appealed, arguing the Third Circuit's intervening decision in *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022), where the court held theft offenses sentenced under U.S.S.G. § 2B1.1 included only actual not intended losses required his resentencing. Reviewing for plain error, the Third Circuit affirmed Upshur's sentence. In *Banks*, the appellate court reasoned that the text of § 2B1.1 did not differentiate between actual and intended monetary loss, and without a specific definition of "loss" the ordinary meaning of "actual loss" controlled. In contrast, Upshur was sentenced under sections 2T1.1 and 2T1.4, and § 2T1.1(c)(1) specifically defines "tax loss" as "the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)." This definition encompasses both actual and intended losses, and § 2T1.4(a) expressly applies that definition to "the tax loss . . . resulting from the defendant's aid, assistance, procurance or advice."

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