IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 5, 2019
Lyle W. Cayce
Clerk

No. 18-11591

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROBERT EARL RAMSEUR,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-65-1

Before OWEN, Chief Judge, and HAYNES and COSTA, Circuit Judges.

PER CURIAM:*

Appellant Robert Earl Ramseur was indicted for twenty-six counts of willfully assisting in the preparation of false tax returns, in violation of 26 U.S.C. § 7206(2), and was convicted by a jury on all counts. The district court sentenced Ramseur to sixty-four months of imprisonment and restitution of $399,400 to the Internal Revenue Service ("IRS"). Ramseur appeals the district court's judgment on three grounds, arguing that (1) the evidence was

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

not sufficient to show that the false statements were material, as required under § 7206(2); (2) the restitution order unlawfully considered more than the actual loss suffered by the IRS; and (3) the written judgment contained a clerical error that should be corrected under Federal Rule of Criminal Procedure 36(k). He also argues for the first time on appeal that his trial counsel was constitutionally ineffective. For the reasons set forth below, we AFFIRM the district court's judgment as to his conviction and VACATE the district court's restitution order and REMAND for proceedings consistent with this opinion in that regard. We further REMAND for the district court to correct the written judgment to incorporate all of the convictions. Lastly, we DENY without prejudice Ramseur's ineffective assistance of counsel claim.

I. Background

Ramseur operated a tax preparation business in Dallas. While investigating Ramseur for insurance fraud in February 2013, the Texas Department of Insurance ("TDI") discovered that multiple treasury checks were being deposited directly into Ramseur's business account. TDI informed the IRS that Ramseur may have been engaged in filing fraudulent tax returns (hereinafter "February 2013 Statement").

During initial investigation of Ramseur's tax filings, the IRS found that eighty-seven percent of his prepared tax returns from 2009 to 2012 included a Schedule C—a document that reports profit or loss by a self-employed individual—and reported business losses at a frequency that exceeded national statistics. The IRS interviewed taxpayers who had used Ramseur's services for multiple years; it discovered that most of them were not self-employed and thereby were precluded from claiming a Schedule C loss.

In April 2013, an undercover IRS agent went to Ramseur's office posing as a client wanting to have a tax return prepared to confirm whether Ramseur was filing false Schedule Cs to obtain greater tax returns. Indeed, Ramseur

did just that and filed a false Schedule C for the undercover IRS agent, reporting a loss for a non-existent marketing business.

A grand jury charged Ramseur with twenty-six counts of willfully assisting in the preparation of materially false tax returns for ten different clients, in violation of 26 U.S.C. § 7206(2). For each count, the indictment alleged a single, material falsity: "that the taxpayer was entitled to claim a Schedule C business loss . . . when . . . said taxpayer was not entitled to claim a Schedule C business loss, or the loss amount was grossly overstated."

At trial, the ten clients confirmed that the charged tax returns contained false Schedule Cs. Nine clients testified that they either never operated a business or never told Ramseur they did. One client operated a business but never told Ramseur that his business lost the amount of money reported on his Schedule C. Further, seven clients were audited for back taxes. After the close of evidence, the district court instructed the jury on the elements of the § 7206 charges:

> First: That the defendant aided and assisted in or procured, counseled, or advised the preparation of a return arising under the internal revenue laws;
>
> Second: That this return falsely stated on Schedule C, line 31 and on line 12 of Form 1040 that during the tax year charged in the count, the taxpayer was entitled to claim a business loss in the amount set forth in the count;
>
> Third: That the defendant knew that the statement in the return was false;
>
> Fourth: That the false statement was material; and
>
> Fifth: That the defendant aided and assisted in, or procured, counseled, or advised the preparation and/or presentation of this false statement willfully, that is, with intent to violate a known legal duty.

The jury instructions also informed the jury that "[a] statement is 'material' if it has a natural tendency to influence, or is capable of influencing,

the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer." The jury found Ramseur guilty on all counts.

The Presentence Investigation Report ("PSR") noted that, as Title 26 offenses, the district court could impose discretionary restitution for the convicted counts. Based on the IRS's initial investigation, which uncovered fifty-five tax returns, each containing at least one false Schedule C deduction, the PSR stated that the defendant could be responsible for restitution of $399,400. Ramseur objected to the restitution, stating that the PSR did not "include sufficient evidence on which to base a restitution award" as required under *United States v. Sharma*, 703 F.3d 318, 322 (5th Cir. 2012). In particular, Ramseur pointed out that "several taxpayer witnesses . . . testified that they were never audited, their returns were never adjusted, and they [had] not made any payments to the IRS for alleged taxes due."

At sentencing, the district court orally pronounced a within-Guidelines sentence for all counts. The court accurately imposed the sentence for each count in its written judgment but left out Counts 21 to 26 in its "Counts of Conviction," and it ordered Ramseur to pay $399,400 in restitution to the IRS. Ramseur timely appealed his judgment.

On appeal, Ramseur raises four claims: (1) the district court lacked sufficient evidence to support the conviction under 26 U.S.C. § 7206(2); (2) the restitution order was illegal; (3) the written judgment incorrectly recited the counts of conviction under Federal Rule of Criminal Procedure 32(k); and (4) trial counsel provided ineffective assistance for failure to investigate, develop, and present evidence of the February 2013 Statement.

II. Discussion

A. Sufficiency of Evidence

We review Ramseur's sufficiency of evidence claim de novo, viewing "all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find guilt beyond a reasonable doubt." *United States v. Morrison*, 833 F.3d 491, 499 (5th Cir. 2016) (quoting *United States v. Churchwell*, 807 F.3d 107, 114 (5th Cir. 2015)). As the jury instruction correctly stated, a statement is material if it has "a natural tendency to influence, or be capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Richardson*, 676 F.3d 491, 505 (5th Cir. 2012) (internal quotation marks omitted) (quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995)).

Ramseur contests only the materiality element of his § 7206(2) charges. He contends that the IRS could not have investigated him based on the allegedly false Schedule C losses because the IRS did not discover these losses until it started investigating him based on the February 2013 Statement. He argues that, rather than the allegedly false Schedule Cs, the February 2013 Statement was material. Alternatively, Ramseur contends that the Schedule Cs were not capable of influencing the IRS to investigate or audit because the alleged tax scheme was not covert or complex and thus could not have triggered any anomaly for investigation.

Even if we were to accept Ramseur's arguments, the jury instruction on materiality refers not only to investigating a tax return, but also "verifying . . . the reporting of income by a taxpayer." In *United States v. Taylor*, we held that because accurate information on an individual income tax return was "vitally necessary for the IRS to verify" a taxpayer's income, failure to provide such information constitutes a materially false statement. 574 F.2d 232, 235–36 (5th Cir. 1978); *see also United States v. Damon*, 676 F.2d 1060, 1064 (5th

Cir. 1982) (stating that "[t]he appended Schedule C's, claiming business loss deductions to which the taxpayers were admittedly not entitled, rendered the returns 'fraudulent' or 'false as to (a) material matter,' within the meaning of Section 7206(2)"). Here, the Schedule Cs on Ramseur's clients' tax returns were necessary for the IRS to verify their income. Thus, a rational jury could have found that the inaccurate information on those Schedule Cs was material.

B. Restitution Order

Ramseur argues the district court's restitution order was unlawful because (1) the IRS failed to account for the repayments some of Ramseur's clients made to the IRS, and (2) the restitution exceeded the actual loss from the offenses of conviction by accounting for fifty-five tax returns of twenty-one taxpayers.[1]

Because Ramseur failed to raise these objections in the district court proceedings, we review for plain error. *United States v. Maturin*, 488 F.3d 657, 659–60 (5th Cir. 2007); *see also United States v. Tolentino*, 766 F. App'x 121, 125 (5th Cir.) (per curiam) (concluding that plain error review applies where the defendant failed to object to the specific issue on appeal), *cert. denied*, 205 L. Ed. 2d 146 (2019). Ramseur contends that he preserved his restitution objections and that we should review de novo. However, his objection to the restitution recommended in the PSR was that the PSR failed to "include sufficient evidence on which to base a restitution award" because "several

[1] Ramseur also argues that the restitution order is illegal because the Mandatory Victims Restitution Act ("MVRA") does not apply. We agree that the MVRA does not apply. 18 U.S.C. § 3663A(c)(1)(A) (omitting Title 26 tax offenses from the MVRA); *U.S. v. Nolen*, 523 F.3d 331, 332 (5th Cir. 2008) (holding that "restitution may not be ordered for a Title 26 offense except as a condition of probation or supervised release"). But the PSR did not recommend restitution under the MVRA, and the district court may discretionarily impose restitution as a condition of supervised release under 18 U.S.C. §§ 3583(d) and 3663, which it did here. *See United States v. Westbrooks*, 858 F.3d 317, 327 (5th Cir. 2017), *vacated on other grounds by* 138 S. Ct. 1323 (2018) (mem.).

taxpayer witnesses . . . testified that they were never audited, their returns were never adjusted, and they ha[d] not made any payments to the IRS for alleged taxes due." Thus, he raises new claims on appeal, and we review for plain error.

Under plain error review, "this court can correct an error in the district court proceedings only if the error was clear or obvious and affected the substantial rights of the defendant." *Maturin*, 488 F.3d at 660; *see also* FED. R. CRIM. P. 52(b). If the defendant satisfies these requirements, "this court may, in its discretion, grant the defendant relief if 'the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Maturin*, 488 F.3d at 600 (quoting *United States v. Ibarra-Zelaya*, 465 F.3d 596, 606 (5th Cir. 2006)).

Restitution is limited to "the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413 (1990). This loss takes into account the loss already repaid to the victim. *See United States v. Udo*, 795 F.3d 24, 34 (D.C. Cir. 2015) (holding that restitution be reduced by the amount the defendant already paid to the victim); *see also United States v. Austin*, 479 F.3d 363, 373 (5th Cir. 2007) (holding that restitution for falsely claimed benefits for funding employees' pension plans be reduced by the amount the defendant funded after the benefits reporting deadline). Thus, a district court commits plain error when it orders a defendant to pay restitution exceeding the actual loss, and this "error affects substantial rights as well as the fairness and integrity of the judicial proceeding." *Austin*, 479 F.3d at 373.

Here, as the Government concedes, the district court committed reversible plain error when it imposed a restitution order that included losses from tax returns other than the twenty-six for which Ramseur was convicted. Moreover, the district court committed reversible plain error by failing to

account for the fact that several of Ramseur's clients paid the IRS for payments owed on tax returns that were the basis of Ramseur's convictions. Other witnesses testified that they made back payments to the IRS for unidentifiable tax years, which may be attributable to one of Ramseur's convicted offenses.

Although the testimonies do not specify the amount of actual loss that has been repaid, the Government expressed willingness to provide more specific information on payments received by the IRS on the tax returns associated with Ramseur's convictions to determine the correct actual loss. In a similar case where the district court failed to consider the repayments made by the defendant's clients in its restitution order, the D.C. Circuit remanded the case for the district court to reconsider the actual loss "with any information about updated payments from [the defendant's] clients." *Udo*, 795 F.3d at 34. In the same manner, we vacate the district court's restitution order and remand for the court to reconsider the restitution order in a manner consistent with this opinion.

C. Correction of the Written Judgment

Ramseur also argues that the case should be remanded for correction of the final judgment in accordance with Federal Rule of Criminal Procedure 36 because the final judgment omits Counts 21 to 26. The Government agrees. "This court has authority to review errors in a judgment for the first time on appeal." *United States v. Perez-Melis*, 882 F.3d 161, 168 (5th Cir. 2018). Consistent with our holding in *Perez-Melis*, we remand the case to the district court to correct the final judgment to reflect all twenty-six counts of conviction. *See id.* (remanding the case for correction of the final judgment to reflect the counts dismissed from the indictment).

D. Ineffective Assistance of Counsel

"As a general rule, we decline to review claims of ineffective assistance of counsel on direct appeal" because it requires the court to "proceed on a trial

record not developed precisely for the object of litigating or preserving the claim and thus [is] often incomplete or inadequate." *United States v. Gordon*, 346 F.3d 135, 136 (5th Cir. 2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). We decline to reach this issue on direct appeal, so we deny it without prejudice. *See United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014).

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's judgment as to his conviction and VACATE the district court's restitution order and REMAND for proceedings consistent with this opinion in that regard. We further REMAND for the district court to correct the written judgment to incorporate all of the convictions. Lastly, we DENY without prejudice Ramseur's ineffective assistance of counsel claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. 12-cr-00090-BJR**
	*	
ENYINNAYA E. UDO	*	
	*	
Defendant	*	
	*	
	*******	

JOINT MEMORANDUM REGARDING RESTITUTION

The United States of America, by and through the undersigned attorney, together with the defendant, by and through counsel, respectfully submit this Joint Memorandum Regarding Restitution and request that the Court amend page 4 of the Judgment to reflect restitution as a condition of supervised release in the amount of $63,513.57. The parties state the following in support.

BACKGROUND

On August 6, 2012, a jury convicted the defendant, Enyinnaya E. Udo, of twenty-five counts of aiding or assisting in the filing of a false tax return, in violation of Title 26, United States Code, Section 7206(2). On November 1, 2012, the defendant was sentenced to 24 months' incarceration, twelve months' supervised released, and ordered to pay a special assessment in the amount of $2,500. As a condition of supervised release, Mr. Udo was also ordered to pay restitution to the IRS in the amount of $262,966.[1] The restitution total

[1] The Judgment indicates that, "to the extent that this amount includes taxpayers who were audited, the defendant will be jointly and severally liable." (Judgment, Dkt. No. 63 at 4.)

encompassed not just the loss resulting from the twenty-five counts of conviction but also erroneously included, *inter alia*, uncharged relevant conduct.

The defendant appealed his convictions and the restitution calculation. On July 24, 2015, the U.S. Court of Appeals for the District of Columbia affirmed the defendant's convictions but remanded the case to the district court regarding the improperly calculated restitution.[2] *See United States v. Udo*, 795 F.3d 24 (D.C. Cir. 2015). The defendant has served his sentence and his term of supervised release, which expired on June 8, 2015.[3] The only issue before this Court is to correct page 4 of the Judgment regarding restitution during supervised release.

On September 22, 2015, the Court ordered the Government to provide evidence regarding the credit of payment made by one of the Defendant's clients along with any argument no later than September 30, 2015. That deadline was subsequently extended to October 9, 2015. The parties now submit the requested evidence and the following recommendation to the Court.

ARGUMENT

It is a "firmly established principle that federal courts may not order restitution in the absence of statutory authorization." *United States v. Akande*, 200 F.3d 136, 138 (3d Cir. 1999) (citing cases); *see also United States v. Moore*, 703 F.3d 562, 573 (D.C. Cir. 2012) ("Federal courts have authority to order restitution solely pursuant to statute." (internal quotation marks

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[2] The government conceded error on this point.

[3] As discussed further below, at the time the defendant's term of supervised release expired, the defendant had outstanding special assessment and restitution balances. Because his term of supervised release has expired, the parties acknowledge that the instant exercise of amending the Judgment to reflect a corrected restitution amount is essentially ministerial, as Mr. Udo's restitution obligation does not survive his term of supervised release. His special assessment obligation remains outstanding, however, and Mr. Udo will continue to make payments until that obligation is satisfied.

omitted)). Neither the Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A, nor the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, authorizes restitution orders compelling payment to the IRS for a Title 26 offense, however. *See* 18 U.S.C. § 3663(a) (listing applicable offenses); 18 U.S.C. § 3663A(c)(1)(A) (same); *see also, e.g.*, *United States v. Stout*, 32 F.3d 901, 905 (5th Cir. 1994) (vacating restitution ordered under § 3663 for offense under Title 26). Thus, sentencing courts that wish to provide for the payment of restitution in criminal tax cases may only do so by ordering the defendant to make restitution as a condition of supervised release.

District courts are authorized by Title 18, United States Code, Section 3583(d) to impose, as a condition of supervised release, "any condition set forth as a discretionary condition of probation in section 3563(b)." 18 U.S.C. § 3583(d). Section 3563(b) authorizes a district court to order a defendant to "make restitution to a victim of the offense under section 3556." 18 U.S.C. § 3563(b). Section 3556 authorizes a district court to "order restitution in accordance with section 3663," which in turn provides that a court "may order . . . that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3556.

I. The Amount of Restitution Should be Limited to the Offenses of Conviction.

In the instant case, the Court originally ordered the defendant to pay $262,966 to the IRS as a condition of his supervised release. This amount was calculated by totaling the tax loss relating to all twenty-five counts of conviction, including Count 1, which related to a tax return

prepared by the defendant for an IRS undercover agent,[4] plus the tax loss relating to uncharged relevant conduct. On appeal, the government conceded that the relevant conduct amount should not have been included in the restitution calculation and that the restitution was improperly calculated.

The amount of restitution in a criminal case is generally limited to the loss attributable to the specific offenses of conviction and may not include losses resulting from relevant conduct. *See Hughey v. United States*, 495 U.S. 411, 420 (1990) ("[T]he loss caused by the conduct underlying the offense of conviction establishes the out limits of a restitution order."); *United States v. Dorcely*, 454 F.3d, 266, 377 (D.C. Cir. 2006). In this case, the loss associated with the offenses of conviction was $74,047. The proper restitution amount in this case should be the loss associated with the offenses of conviction minus any payments made to the IRS either by the taxpayers or by the defendant himself.

II. The Judgment Should Be Amended To Reflect Restitution As A Condition Of Supervised Release In The Amount Of $63,513.57.

The parties jointly request that the Court revise page 4 of the Judgment in this case to reflect restitution as a condition of release in the amount of $63,513.57.[5] Revenue Agent Tammy Barker recalculated the restitution amount the defendant owes to the IRS. (Exhibit A.) Revenue Agent Barker obtained this figure by adding the tax loss pertaining to the counts of conviction (not including the undercover agent's fraudulent return charged in Count 1 of the Indictment)

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[4] The IRS did not issue a refund relating to this tax return. As such, it should not be included in the revised restitution calculation.

[5] The joint and several provision referenced above, *see supra* note 1, should remain.

and subtracting from that total any payments made to the IRS as of September 24, 2015, by the individuals whose tax returns were charged as false in the Indictment. The revised restitution amount of $63,513.57 represents the total amount currently owed to the IRS pertaining to Counts 2 through 25 of the Indictment.[6]

The parties note that, due to (1) Probation's assessment of the defendant's ability to pay and (2) the payment allocation policy of the Finance Office of the Clerk of Court, the defendant has made payments toward his special assessment, but has not made any payments toward the restitution amount that would offset the $63,513.57 figure listed above. The defendant began his period of incarceration in December of 2012. Payment records indicate that the defendant began making payments on October 25, 2013, continuing through his term of incarceration, which ended on June 9, 2014.[7] (Exhibit B.) Based on U.S. Probation's financial assessment, on September 23, 2014, the Court concurred with U.S. Probation's recommendation and ordered the defendant "to make payments of no less than $25 per month and/or at the discretion and direction of the probation officer." Accordingly, the defendant made $25 monthly payments through the remainder of his term of supervised release, which expired on June 8, 2015. The defendant's last payment was made on May 22, 2015, just before his term of supervised release expired.[8] Each

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[6] On June 27, 2011, taxpayer P.L. referenced in Counts 6 through 9 of the Indictment made a $20,562 payment to the IRS for his tax liability pertaining to the years 2007 through 2009. As indicated by the "P.L." tab in Exhibit A, the restitution amount has been reduced by the amount of money that was attributed to the 2007 and 2008 tax years.

[7] These payments were automatically deducted from the defendant's jail account, likely pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program, as directed by the Court on page 4 of the Judgment.

[8] Defense counsel informed Mr. Udo that his restitution obligation ceased with the expiration of his term of supervised release. It was based on this information, and no contrary instructions from Probation, that Mr. Udo stopped making his $25 monthly payments when his term of supervised release expired. It was not until defense (continued...)

of the payments the defendant made was applied to the $2,500 special assessment.[9] In total, the defendant paid $325 toward the special assessment, leaving him with an outstanding balance of $2,175.

CONCLUSION

For the reasons set forth above, the parties respectfully request that the Court revise the defendant's Judgment to reflect restitution as a condition of supervised release in the amount of $63,513.57.

Dated: October 9, 2015

Respectfully submitted,

CAROLINE D. CIRAOLO
ACTING ASSISTANT ATTORNEY GENERAL

By: */s/ Erin B. Pulice*
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(... continued)
counsel began preparing for the instant remand proceedings that she became aware that Mr. Udo had a special assessment balance that remains outstanding. Counsel has since informed Mr. Udo that his special assessment obligation survives his term of supervised release, and Mr. Udo is making arrangements to resume payment with respect to his special assessment as soon as possible.

[9] Per U.S. Probation and the Finance Office of the Clerk of Court, funds cannot be applied toward restitution until the special assessment has been paid.

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2015, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record in this case.

/s/ Erin B. Pulice

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§ 7206. Fraud and false statements.

Any person who-

(1) **Declaration under penalties of perjury.** Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) **Aid or assistance.** Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) **Fraudulent bonds, permits, and entries.** Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) **Removal or concealment with intent to defraud.** Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331 [26 USCS § 6331], with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) **Compromises and closing agreements.** In connection with any compromise under section 7122 [26 USCS § 7122], or offer of such compromise, or in connection with any closing agreement under section 7121 [26 USCS § 7121], or offer to enter into any such agreement, willfully-

(A) Concealment of property. Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11591

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ROBERT EARL RAMSEUR,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before OWEN, Chief Judge, and HAYNES, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

Dated: 12-5-2019

ENTERED FOR THE COURT:

/s/ Catharina Haynes
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

FORT WORTH, OPC
2201 S. E. Loop 820
Mail Stop: ROI-FW
Ft. Worth, TX 76119

DEPARTMENT OF VETERANS AFFAIRS

DATE: 1/18/2019
In Reply Refer To: ROI-FW
SSN: 3410

ROBERT EARL RAMSEUR
2320 NORTH HOUSTON ST
APT 1206
DALLAS, TX 75219

RE: ROI Plus Request for ROBERT EARL RAMSEUR

Dear MR RAMSEUR:

This individually identifiable information is privileged. Its confidentiality should be maintained along with appropriate security safeguards to protect against individual harm (identity theft), embarrassment, or inconvenience.

Sincerely,

Paulette R. Dickens, Supervisor, R.O.I.

Prepared by: MARION FRANCIS - Release of Information

Progress Notes

LOCAL TITLE: AMB CARE ADMIN/TELEPHONE NOTE
STANDARD TITLE: PRIMARY CARE ADMINISTRATIVE NOTE
DATE OF NOTE: JAN 18, 2019@10:50 ENTRY DATE: JAN 18, 2019@10:51:02
AUTHOR: SHAH,ASMA A EXP COSIGNER:
URGENCY: STATUS: COMPLETED

T Whom it may concern

Mr Robert Ramseur is a patient of Fortworth VA clinic. He has history of severe traumatic Brain injury during military duty. His confusion, poor speech, body tremors, poor balance, depression is a result of his traumatic brain injury. He will see specialist for this problem in Dallas VA Medical centre. MRI of brain is also requested. He does not use alcohol or any illegal substance .

If you have any question , Please contact me at 817-730-0115, Ext 29115.

Thank you

Dr. Asma Shah

/es/ ASMA A SHAH
MD
Signed: 01/18/2019 10:55

PATIENT NAME AND ADDRESS (Mechanical Imprinting, if available)
RAMSEUR,ROBERT EARL
2320 NORTH HOUSTON ST
APT 1206
DALLAS, TEXAS 75219

VISTA Electronic Medical Documentation
Printed at FORT WORTH VA CLINIC

Case No. 18-11591

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA, Plaintiff – Appellee,	§
v.	§
ROBERT EARL RAMSEUR, Defendant – Appellant	§

PETITION FOR PANEL REHEARING ON BEHALF OF ROBERT EARL RAMSEUR

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STATUTES

STATEMENT OF THE ISSUE

This Court's opinion is not supported by the facts and operative law. The government charged *Ramseur* with a § 7206(2) offense for preparing Schedule Cs containing false claims of business losses. Unlike *Taylor*, the government in *Ramseur* did not charge or prove a § 7206(1) perjury offense for the failure to report income; thus, unlike *Taylor* no rationale jury could find "the Schedule Cs on Ramseur's clients' tax returns were necessary for the IRS to verify their income."

The question presented is whether the substitution by the *Ramseur* opinion of the 1978 *Taylor* materiality instruction for the 2018 jury charge given at the *Ramseur* trial is in direct conflict with binding Fifth Circuit precedent, *United States v. Richardson*, 676 F.3d 491, 505 (5th Cir. 2012), and Supreme Court precedent, *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

STATEMENT OF THE CASE & FACTS NECESSARY TO THE ISSUE

Appellant Robert Earl Ramseur was indicted for twenty-six counts of violating 26 U.S.C. § 7206(2) for aiding and assisting in the preparation of a tax return "that falsely stated on Schedule C ... that during the tax year charged in the count, the taxpayer was entitled to claim *a business loss* in the amount charged in the count." (Emphasis supplied). *See* jury instruction, ROA.29.

The jury instructions also required that the "statement" (in this case, the Schedule C) be proven beyond a reasonable doubt to be material. ROA.297. The jury instruction defined materiality:

> A statement is "material" if it *has a natural tendency to influence or is capable of influencing the Internal Revenue Service* in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

(Emphasis supplied). ROA.298.

To prove the business-loss-claims were false, the record reflects the government called Special Agent Williams, who had interviewed "21 taxpayers and learned most of them worked as Form W-2 employees who did not own or operate any type of business, precluding them from claiming a Schedule C loss." PSR, paras. 22, 23, ROA.1746.

The government also called ten former clients of Mr. Ramseur's as witnesses, who confirmed that their tax returns contained false Schedule Cs. ... Nine clients testified that they either never operated a business or never told Ramseur they did. One client operated a business but never told Ramseur that his business lost the amount of money reported on his Schedule C. *United States v Ramseur*, slip op. No. 18-11591 at 3 (5th Cir. Nov. 5, 2019).

Further, the trial record reflects that the alleged fraudulent business loss tax

scheme was so straight forward, and the loss calculations so simple, that Ms. Peil, the government's expert witness, remained in the courtroom to listen to the taxpayer witnesses called by the government and ***performed tax loss calculations*** from what the taxpayers testified to. ROA.484. The pre-trial tax loss calculations of Ms. Peil, were a mere one-page in length. *See* Exhibits 6-103, Exhibit 130. ROA.941; ROA.942.

In closing, the prosecutor argued to the jury:

> ***One of the elements in this case*** is that you have ***to prove*** that the lie on the return – in this case ***the Schedule C... was capable of influencing the IRS in its investigation or audit of a return.***

ROA.896.

The PRS, which the district court adopted as having an adequate evidentiary basis, proved the "material statement" was the February 2013 Statement by the Texas Department of Insurance (TDI) communicated by TDI to the IRS. The PRS recites the February 2013 Statement "prompted the IRS investigation into Ramseur's tax filings." That February 2013 Statement was as follows:

> "***During the TDI investigation [for insurance fraud],*** Ramseur's bank records were subpoenaed, and ***it was discovered multiple treasury checks were being deposited directly into Ramseur's R&R business account. This raised suspicion [of tax fraud] since treasury refund checks were normally deposited into the account of the taxpayer and not the filer. This prompted the initial IRS investigation into Ramseur's tax filings."*** (hereinafter "February 2013 Statement").

> (Emphasis supplied) PSR para. 14, ROA.1744. See also PSR, para. 51, ROA.1752 ("... the investigation into the instant offenses, stemmed from an investigation into a criminal insurance scheme perpetrated by the defendant").

The jury returned a verdict of guilty on all counts. After the court entered its judgment and sentenced Mr. Ramseur, he appealed to this Court. Mr. Ramseur argued among other issues, that the evidence was not sufficient because it was not the Schedule Cs but instead the 2013 February Statement of the Texas Department of Insurance (TDI) that influenced the IRS to investigate or audit the returns prepared by Mr. Ramseur based on information in the PSR prepared for sentencing in the case-at-bar following the jury verdict.

Rejecting Mr. Ramseur's argument, the *Ramseur* opinion held:

> "Even if we were to accept Ramseur's arguments, the jury instruction on materiality refers not only to investigating a tax return, but also "verifying ... the reporting of income by a taxpayer." In *United States v. Taylor*, [574 F.2d 232, 235–36 (5th Cir. 1978)] we held that because accurate information on an individual income tax return was "vitally necessary for the IRS to verify" a taxpayer's income, failure to provide such information constitutes a materially false statement...; *see also United States v. Damon*, 676 F.2d 1060, 1064 (5th Cir. 1982) (stating that "[t]he appended Schedule C's, claiming business loss deductions to which the taxpayers were admittedly not entitled, rendered the returns 'fraudulent' or 'false as to (a) material matter,' within the meaning of Section 7206(2)"). Here, the Schedule Cs on Ramseur's clients' tax returns were necessary for the IRS to verify their income. Thus, a rational jury could have found that the inaccurate information on those Schedule Cs was material." *Ramseur*, slip op. at 5-6.

INTRODUCTION

The *Ramseur* opinion recites: "Here, the Schedule Cs on Ramseur's clients' tax returns were necessary for the IRS to verify their income. Thus, a rational jury could have found that the inaccurate information on those Schedule Cs was material." *Ramseur*, slip op. at 6. There is no factual support in the trial record, and no operative law in the jury charge, for any such finding by a rationale jury.

The facts and law in *Ramseur* pertain to an indictment for false claims on a Schedule C of "business loss" – not a failure to report income and concomitant problem of proof in verification by the IRS. Assuming for the sake of argument income verification was at issue, applying the 2018 jury charge given at the *Ramseur* trial, the facts contradict the Court's holding that the Schedules Cs were material. The PSR, which the district court adopted as having an adequate evidentiary basis, ROA.931, proved the "material statement" was the February 2013 Statement by the Texas Department of Insurance (TDI). It was the February 2013 Statement by the Texas Department of Insurance that influenced the IRS to act, not the Schedule Cs.

The *Ramseur* opinion illegally substituted the irrelevant 1978 *Taylor* materiality definition for that in the jury charge given in the *Ramseur* trial. The *Ramseur* opinion is not supported by the operative jury charge and facts at trial. The

Ramseur opinion is in direct conflict with binding Fifth Circuit precedent, *United States v. Richardson*, 676 F.3d 491, 505 (5th Cir. 2012), and Supreme Court precedent, *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

For all the reasons more fully discussed below, Appellant Ramseur respectfully requests that this Court grant his motion for rehearing, and acquit the defendant on Counts 1 through 26, Aiding or Assisting in the Preparation or Presentation of a False or Fraudulent Individual Income Tax Return in violation of 26 U.S.C. § 7206(2).

Alternatively, Appellant Ramseur requests that one or more members of this panel make a request for *en banc* reconsideration because this panel is imposing a 1978 definition of materiality that is illegal and contrary to the governing legal standard for materiality in the Fifth Circuit's jury instruction provided to the jury in the 2018 trial.

I. The *Ramseur* opinion is contrary to both the facts and operative jury charge given the jury in the *Ramseur* trial because nothing in the trial pertained to income verification. The case is about a simple, straightforward business loss scheme

The *Ramseur* opinion recites: "Here, the Schedule Cs on Ramseur's clients' tax returns were necessary for the IRS to verify their income. Thus, a rational jury could have found that the inaccurate information on those Schedule Cs was material." *Ramseur*, slip op. at 6.

There is no factual support in the trial record for any such finding by a rationale jury. *Ramseur* has nothing to do with "IRS income verification." The government's case pertained to proof of a simple, straightforward "business loss" scheme.

A. The jury charge required the government to prove beyond a reasonable doubt that the "return falsely stated on Schedule C ... , the taxpayer was entitled to claim *a business loss*"

The operative legal standard in *Ramseur* was set forth in the jury charge. It required the prosecution to prove beyond a reasonable doubt that the Schedule Cs in the tax return falsely claimed business losses, and that the Schedule Cs were material because they influenced the IRS to act.

The jury charge recites:

> For you to find the defendant guilty of this crime [a violation of 26 U.S.C. § 7206(2)] you must be convinced that the government has

proved each of the following beyond a reasonable doubt:

First: That the defendant aided and assisted in or procured, counseled, or advised the preparation of a return arising under the internal revenue laws;

Second: That ***this return falsely stated on Schedule C***, line 31 and on line 12 of Form 1040 that during the tax year charged in the count, ***the taxpayer was entitled to claim a business loss*** in the amount set forth in the count;

Third: that the defendant knew that the statement in the return was false;

Fourth: That ***the false statement was material***; and

Fifth: That the defendant aided and assisted in, or procured, counseled, or advised the preparation and/or presentation of this false statement willfully, that is, with intent to violate a known legal duty.

It is not necessary that the government prove that the falsity or fraud was with the knowledge or consent of the person authorized or required to present such a return."

A statement is "material" if it has a natural tendency to influence or is capable of influencing the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer.

(Emphasis supplied) ROA.297-298; *Ramseur*, slip op. at 3-4.

B. The jury instruction of materiality in the 2018 *Ramseur* trial is the governing legal standard, not the 1978 *Taylor* instruction that pertained to failure-to-report income

Unlike Mr. Ramseur who was indicted under 26 U.S.C. § 7206(2), the

defendant in *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978), was indicted under 26 U.S.C. § 7206(1).[1] Title 26 U.S.C. § 7206(1) is a perjury statute, the gist of which "is a false statement, willfully made, of a material matter. The statement must be *with respect to a fact or facts .... such that the truth or falsity of it is susceptible of proof....*" (Emphasis supplied). *Kolaski v. United States*, 362 F.2d 847, 848 (5th Cir. 1966).

The government's problem of proof arises when it is required to prove an omission of information because the taxpayer fails to report income, and other than the taxpayer, there is no readily available source through whom the government can prove its case. *United States v. Fontenot*, 628 F.2d 921, 923 (5th Cir. 1980) was a failure-to-report income case. However, the government proved Fontenot's failure-

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[1] Any person who –

(1) Declaration under penalties of perjury. – Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. – Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; ....

is guilty of a felony.....

to-report income through Mr. Williams, an employee of a company, owned and operated by Mr. Fontenot. Mr. Fontenot had thrown invoices from a second machine into the trash each day, and reported only the income from the invoices from the first machine. Because Mr. Fontenot offered to give Mr. Williams a raise based on a 3% cash commission on all invoices from the second machine, and concerned Fontenot would cheat him out of his raise, Mr. Williams retrieved the invoices that Mr. Fontenot tossed into the trash and kept them as a record of what he was owed.

Like *Fontenot*, *Taylor* was a failure-to-report income case; specifically, Mr. Taylor failed to report any livestock receipts at all on his 1970 or 1971 income tax returns *and* failed to file Schedules E or F2 with either return. *Taylor*, 574 F.2d at 234.[2] However, unlike *Fontenot*, in *Taylor* there were "no systematic written records of [Taylor's] cattle transactions." Mr. Taylor relied "upon periodic mental calculations to determine that his losses exceeded profits." *Id.*

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[2] This Court's reliance on the 1982 *Damon* opinion is misplaced. *Damon* "attempt[ed] to stretch the rationale of *Levy*," to Schedules Cs, asserting that a form "which was not required by statute or regulation, failed to state an offense." The *Damon* Court held:

> An attempt to stretch the rationale of *Levy* to cover schedules appended to a Form 1040 return was considered and rejected by this Court in *United States v. Taylor*, 574 F.2d 232, 237 (5th Cir. 1978), affirming a conviction under 26 U.S.C. 7206(1) for making and subscribing individual income tax returns containing false and fraudulent Schedules E and F.

At trial, the defendant objected to the jury charge on materiality, which recited:

> I also rule as a matter of law that if you find that a substantial amount of partnership income, livestock receipts, commissions, or other income was omitted from one or more of the federal income tax returns in issue here, such omission is of a material matter as contemplated by Section 7206, Subsection 1, of Title 26 of the United States Code.

(Emphasis supplied) *Taylor*, 574 F.2d at 235.

On direct appeal, this Court in *Taylor* defined the question presented as a failure-to-report income:

> Whether a taxpayer's failure to report substantial amounts of gross livestock receipts on Schedule F renders the return materially false."

Taylor, 574 F.2d at 232 (emphasis). And the *Taylor* holding was "that the jury was correctly instructed that *the omission of [income]* substantial amounts of livestock receipts from Taylor's income tax returns in 1970, 1971 and 1972 would, as a matter of law, constitute the omission of a material matter." (Emphasis supplied) *Taylor*, 574 F.2d 236.

This Court reasoned in *Taylor* that the omission of "the information required by Schedule F *was vitally necessary* ... [because] the taxpayer conducted dozens of transactions involving over one hundred thousand dollars in receipts in each tax year and *kept no written records*. [Mr. Taylor relied "upon periodic mental calculations to determine that his losses exceeded profits]. In such a case *the burden imposed upon*

the IRS to verify the taxpayer's return is so extreme that it verges upon impossibility." *Taylor*, 574 F.2d at 235–36 (emphasis supplied).

Taylor is inapplicable to *Ramseur*, *see infra*.

C. This Court's holding in *Ramseur* is contrary to the three-prong analysis in the binding precedent, *Richardson* and *Gaudin*, which disproves the Schedules Cs were "material"

The *Ramseur* opinion is in direct conflict with binding Fifth Circuit precedent, *United States v. Richardson*, 676 F.3d 491, 505 (5th Cir. 2012), and Supreme Court precedent, *United States v. Gaudin*, 515 U.S. 506, 509 (1995) that set out a three-pronged framework for analyzing the materiality of a statement. *See Ramseur* Brief at 13-19.

Assuming for the sake of argument, without conceding, that the second question posited by *Gaudin* is that the decision the agency (IRS) was trying to make was whether "the IRS should verify income," the Schedule Cs are still *not* material. *See Richardson*, 676 F.3d at 505.

The jury charge in *Ramseur* has a predicate to each of the operative, agency-actions. That predicate which must be satisfied by proof beyond a reason doubt, is that the statement "ha[d] a natural tendency to influence or [was] capable of influencing the Internal Revenue Service" to act (*e.g.*, investigating or auditing a tax

return; or verifying or monitoring a taxpayer's reporting of income) (hereinafter the "operative act"). ROA.298.

There is no evidence in the record that any Schedule C prepared by Mr. Ramseur was a material statement that influenced the IRS in verifying income.

The jury charge recited that for the jury to convict, the prosecution must prove beyond a reasonable doubt:

> Second: That ***this return falsely stated on Schedule C***, line 31 and on line 12 of Form 1040 that during the tax year charged in the count, ***the taxpayer was entitled to claim a business loss*** in the amount set forth in the count. (Emphasis supplied) ROA.297; *Ramseur*, slip op. at 3.

The prosecutor's closing argument to jury asserted:

> ***One of the elements*** in this case is that you have ***to prove*** that the lie on the return – in this case ***the Schedule C*** was the biggest lie on every return – that the lie on the return ***was capable of influencing the IRS in its investigation or audit of a return.***

ROA.896 (emphasis supplied).

1. The PSR proves "the material statement" was the 2013 Statement of the Texas Department of Insurance. There is no evidence in the record that the Schedule Cs influenced the IRS

The first question posited by *Gaudin* is: What statement was made? The PSR proves the "material statement" was the 2013 Statement by the Texas Department of Insurance (TDI), and disproves the Court's holding that the Schedule Cs were

material:[3]

> "During ***the TDI investigation [for insurance fraud]***, Ramseur's bank records were subpoenaed, and it was discovered multiple treasury checks were being deposited directly into Ramseur's R&R business account. This ***raised suspicion [of tax fraud] since treasury refund checks were normally deposited into the account of the taxpayer and not the filer. This prompted the initial IRS investigation into Ramseur's tax filings.***" (hereinafter "February 2013 Statement"). (Emphasis supplied) PSR para. 14, ROA.1744. *See also* PSR, para. 51, ROA.1752 ("... the investigation into the instant offenses, stemmed from an investigation into a criminal insurance scheme perpetrated by the defendant").

2. The evidence is not sufficient to show the IRS engaged in verifying income

It was only *after* the 2013 Statement from the Texas Department of Insurance, that an "initial investigation was conducted by the IRS Austin Scheme Detection Center (ASDC) which concluded from 2010 through 2013, Ramseur filed a total of 707 returns which were preliminarily reviewed ***and determined to be indicative of***

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[3] Although the February 2013 Statement was not admitted into evidence at the guilt/innocence phase of the trial, the district court at sentencing determined that the PSR in which this information was recited, had an adequate evidentiary basis and was reliable. *See* ROA.931 ("I am adopting the presentence report and addendum as my factual determination at sentencing."). *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012) (district court may adopt facts in PSR without inquiry if facts have adequate evidentiary basis and sufficient reliability and defendant does not present rebuttal evidence or demonstrate that information in PSR is unreliable).

fraudulent behavior." PSR, para. 15. ROA.1744.[4]

Based on the representative sampling, "This yielded 21 taxpayers filing 55 returns." PSR, paras. 22, 23, ROA.1746. Special Agent Williams "interviewed each of these 21 taxpayers and learned most of them worked as Form W-2 employees who did not own or operate any type of business, ***precluding them from claiming a Schedule C loss.***" PSR, paras. 22, 23, ROA.1746 (emphasis supplied). Brief at 4, .

Thus, contrary to the *Ramseur* opinion, the trial evidence was that after the IRS learned about potential fraud from TDI, the IRS made maximum use of the *in*accuracies in the Schedules Cs to investigate whether individual taxpayers were entitled to claim a business loss.

Moreover, unlike *Taylor* the trial record in *Ramseur* also made clear that the alleged tax scheme was not covert or complex, and had to do with loss calculations, *not* income verification. *See* Brief at 19. ***The pre-trial tax loss calculations of Ms. Peil, the prosecution's expert,*** were a mere one-page in length. *See* Exhibits 6-103,

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[4] In fact, because of the inaccuracies in the Schedule C, the IRS complied a statistical comparison, that was admitted at trial as Exhibit 165, and discussed though various witnesses to prove falsity. (Testimony of Hui - ROA.867-873; Exhibit 165 admitted - ROA.882. When the returns prepared by Mr. Ramseur, including a comparison of the Schedule Cs, refunds, earned income credits, and education credits for his clients, were compared against those for the Dallas/Fort Worth, Texas, and the United States, the loss deductions were out of the norm. ROA.497-498.

United States v. Richardson, 676 F.3d 491, 505 (5th Cir. 2012), and Supreme Court precedent, *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

Respectfully submitted,

s/ Lydia M. Brandt

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CERTIFICATE OF SERVICE

This certifies that on November 15, 2019, I electronically filed the foregoing document with the clerk of court using the electronic case filing system of the court. The electronic case filing system sent a notice of electronic filing to the attorney of record for the Appellee, Gregory S. Knapp, S. Robert Lyons, Alexander Robbins, Attorneys for the United States, Leigha Simonton, Assistant U.S. Attorney, who have consented in writing to accept this notice as service of this document by electronic means.

s/ Lydia M. Brandt

Lydia M. Brandt