

TAX LITIGATION ISSUES

Expert Analysis

## Two Years Later: Have Defendants Benefited From ‘Marinello’?

The Supreme Court’s March 2018 decision in *Marinello v. United States*, 138 S. Ct. 1101 (2018), was widely seen as a potentially significant limitation on the government’s ability to bring obstruction charges under 26 U.S.C. §7212(a). Specifically, the *Marinello* court held that, to obtain a conviction under the so-called Omnibus Clause, the government must prove that the alleged obstructive conduct had a nexus to “a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action.” Nearly two years later, a body of case law has developed addressing various aspects of *Marinello*’s reach. These cases suggest that *Marinello*’s impact may not be extensive as hoped. Nonetheless, there is reason to believe the case is having a significant impact on charging decisions.

### Efforts to Leverage ‘Marinello’ Prove a Mixed Bag

Defendants whose §7212(a) convictions were on appeal when *Marinello*

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was decided have seen mixed results in trying to get those convictions overturned. In *United States v. Takesian*, \_\_\_ F.3d \_\_\_, 2019 WL 6887255 (1st Cir. 2019), the defendant was convicted of four counts of filing false returns and one count of obstruction under §7212(a). On appeal, the government conceded that the pre-*Marinello* jury instructions were erroneous, particularly as to Takesian’s knowledge of a pending proceeding. In light of Takesian’s failure to object to the jury instructions, however, the U.S. Court of Appeals for the First Circuit applied the plain error test and upheld the conviction in light of undisputed evidence that Takesian had used \$1 million from a corporate account for personal purposes, the jury’s conclusion (drawn from its verdict on another count) that Takesian knew he should have reported that expenditure as income on his own returns, and the further evidence that

he knew the corporate entity in question was under IRS investigation. Thus, the appeals court found Takesian could reasonably foresee that the IRS would investigate him after discovering the \$1 million payout, and therefore could not show a “reasonable probability” that a proper instruction would have led to his acquittal.

Similarly, in *United States v. Beckham*, 917 F.3d 1059 (8th Cir. 2019), the U.S.

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Court of Appeals for the Eighth Circuit upheld a conviction under §7212(a) based on uncontroverted evidence that Beckham had given a falsified day planner to an IRS agent during an audit, thereby satisfying both the nexus and the particular-proceeding requirements in one stroke.

By contrast, the defendant in *United States v. Adams*, 354 F. Supp. 3d 63 (D.D.C. 2019), was able to benefit from *Marinello*, which came down while he was appealing his conviction of having violated §7212(a). Although the government acknowledged that the

instructions given to the jury that convicted Adams were insufficient in light of *Marinello*, it nevertheless maintained that the conviction should be upheld because the erroneous instructions did not affect substantial rights or the fairness of the proceedings as required under the applicable plain-error analysis. On remand, the district court found in Adams's favor, rejecting the government's argument that it had satisfied the nexus requirement by presenting evidence that Adams had: (1) submitted W-4 forms falsely claiming he was exempt from withholding tax; (2) filed a bankruptcy petition without listing the IRS as a creditor; and (3) filed tax returns falsely claiming unreimbursed employee expenses. The court vacated Adams's conviction, concluding that the W-4s, which have only prospective effect, could not have impaired a pending investigation into past tax years, that the government failed to prove that the bankruptcy petition actually harmed its collection efforts, and that the false returns, which were filed many years later, were too attenuated from the years under investigation.

In several other cases, the government conceded that §7212(a) convictions could not survive *Marinello*. The defendants in those cases, however, received limited benefits. In *United States v. Gentle*, 721 F. App'x 91 (2d Cir. 2018), the defendant's conviction was on appeal at the time that *Marinello* was decided. In light of *Marinello*, the government acknowledged that "the jury at Gentle's trial was not told it must find, and the proof did not show, that a particular administrative proceeding was pending or reasonably foreseeable to Gentle at the time he filed any of the

fraudulent returns at issue." The U.S. Court of Appeals for the Second Circuit vacated Gentle's obstruction conviction and remanded the case for resentencing. Unfortunately for Gentle, the obstruction conviction was only one of 39 counts as to which he was convicted, and the district court imposed the same sentence (51 months) the second time around.

Faring ever so slightly better was the defendant in *United States v. Westbrook*, 728 F. App'x 379 (5th Cir. 2018). As in *Gentle*, Westbrook's appeal ended when the government acknowledged

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that her obstruction conviction was no longer valid. Her three false returns convictions, however, were left to stand, with remand granted solely for resentencing. The sentencing judge, however, gave little weight to the vacated conviction. Where initially Westbrook received a sentence of 40 months, she received 38 months on remand.

Meanwhile, defendants serving sentences imposed after §7212(a) convictions have been unsuccessful in their attempts to obtain habeas relief in light of *Marinello*. For example, in *Platten*

*v. Ortiz*, 2019 WL 6168003 (D.N.J. Nov. 20, 2019), the court rejected a habeas petition in light of evidence that Platten had lied to an IRS agent and provided backdated documents to investigators. Similarly, in *Dowell v. Hudgins*, \_\_\_ F. App'x \_\_\_, 2019 WL 5406240 (10th Cir. Oct. 22, 2019), the Tenth Circuit rejected a habeas petition brought under 28 U.S.C. §2241, holding that, to the extent the Supreme Court had established a new constitutional rule, Dowell could seek relief under 28 U.S.C. §2255, while to the extent *Marinello* qualified as a new statutory interpretation, he would be unable to demonstrate that §2255 was "ineffective or inadequate" and thus ineligible for relief under §2241.

### Is the Nexus Requirement An Element of the Offense?

One question that remained open after the Supreme Court's decision was whether the new nexus requirement constitutes an element of a §7212(a) offense, which must be alleged in an indictment and proved at trial beyond a reasonable doubt. Courts answering this question in the context of motions to dismiss indictments have split on *Marinello*'s import.

In a report and recommendation in *United States v. Prelogar*, 2018 WL 6737426 (W.D. Mo. Oct. 9, 2018), a magistrate judge in the Western District of Missouri addressed this issue. Against the defendant's argument that, in light of *Marinello*, nexus must be treated as an element of the offense, the government responded that the requirement instead "establishes an evidentiary and level-of-proof benchmark that the Government must meet at trial." In agreeing with the government, the

magistrate judge looked to case law addressing similarly worded statutes: 18 U.S.C. §1503 and 18 U.S.C. §1512(b), which prohibit obstruction of the due administration of justice and witness tampering, respectively. As with §7212(a), the Supreme Court had added a nexus requirement to both §1503 and §1512(b) as a matter of statutory interpretation, and district courts had consistently concluded that the requirement created by those Supreme Court decisions constituted an issue of proof, not an element of the offense charged, and therefore did not need to be alleged. On that basis, the magistrate judge recommended that the defendant's motion to dismiss the obstruction count be denied, and the district court subsequently adopted that recommendation, 2018 WL 5730165 (W.D. Mo. Nov. 2, 2018).

A judge in the District of Hawaii reached the same conclusion in *United States v. Guirguis*, 2018 WL 5270315 (D. Ha. 2018), agreeing with the government that *Marinello* addressed the proof at trial, not the sufficiency of an indictment. So too did a magistrate judge in the District of Nevada, in a report and recommendation, *United States v. Orrock*, 2018 WL 7254703 (D. Nev. Dec. 3, 2018), which was adopted by the district court, 2019 WL 187866 (D. Nev. Jan. 14, 2019).

On the other hand, a case from the District of Alaska takes the opposite view, concluding, "it is now clear that the essential elements of endeavoring to obstruct the IRS include ... a nexus between the defendant's obstructive endeavors and [a reasonably foreseeable] proceeding." *United States v. Lawson*, 2018 WL 3375170 (D. Alaska July

5, 2018), report and recommendation adopted, 2018 WL 3370517 (D. Alaska July 10, 2018). In reaching this conclusion, the court rejected the analogy to §§1503 and 1512(b) that the *Prelogar* court later found persuasive.

Occupying a middle ground is an opinion from the U.S. Court of Appeals for the Sixth Circuit in *United States v. Rankin*, 929 F.3d 399 (6th Cir. 2019). There, in a pre-*Marinello* decision, the district court refused to dismiss a §7212(a) count for failure to allege the elements of the crime. See *United States v. Rankin*, 2017 WL 3318188 (S.D. Ohio Aug. 2, 2017). The defendant was convicted just days after *Marinello* was decided and renewed that argument on appeal. The Sixth Circuit cited the *Marinello* nexus and particular-proceeding requirements in its recitation of the elements of the offense, but rejected Rankin's challenge, concluding that the indictment had, in fact, alleged that he had acted with knowledge of a pending investigation. Because the Sixth Circuit assumed that nexus and a particular proceeding must be alleged without specifically saying as much, it did not address the government's argument that *Marinello* did not, in fact, add to the elements that must be alleged in an indictment charging a violation of §7212(a). As a result, *Rankin* is of limited value on the ultimate resolution of the issue. At a minimum, defense counsel faced with an indictment charging a violation of §7212(a) should evaluate whether the government has alleged the required nexus and consider moving to dismiss if it has not.

## Conclusion

That few defendants have been able to use *Marinello* to have their convic-

tions reversed or charges dismissed may indicate that the statutory overreach the court addressed was not extensive. However, what is harder to measure is the extent to which the decision has impacted the Department of Justice's charging decisions. At this stage, the Criminal Tax Manual has not been updated to fully incorporate *Marinello*, with the case instead appearing as an alert at the front of §17.00 regarding §7212(a). Nevertheless, the government's acknowledgments in *Gentle* and *Westbrook* that it could not comply with *Marinello* suggests that the government may opt against testing the case's outer limits.