

Ride Across the *Marinello* Bridge Cases Could Be Bumpy

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Courts are wrestling with the effect of the Supreme Court's narrowing of the tax obstruction charge on cases that predate that decision.

The Supreme Court in *Marinello v. United States*, [138 S. Ct. 1101](#) (2018), narrowed felony tax obstruction under the omnibus clause of [section 7212\(a\)](#) to obstructive conduct connected with either a pending proceeding or one "then reasonably foreseeable by the defendant." While prosecutors can adapt new tax obstruction indictments to address *Marinello*, that still leaves open the question of what happens in pre-*Marinello* cases.

At a December conference in Las Vegas, Edward Cronin, IRS division counsel/associate chief counsel (criminal tax), said questions like whether to include the *Marinello* nexus requirement in an indictment will probably be settled with the passage of time, but that there are so-called bridge cases that were outstanding in one form or another involving indictments using the old language.

Cronin added that he doesn't want the IRS Criminal Investigation division to shy away from using [section 7212\(a\)](#) just because of *Marinello*. "If you have a target who is lying to the revenue officer or revenue agent, which I think would fit cleanly in here, it's a beautiful charge. You can supplement your original three-year pattern with a year and a half later, they're lying through their teeth, shredding documents, threatening people," he said. Lies on information statements could also fit the slimmed-down tax obstruction charge, he said.

Bridge to Where?

Two recent court decisions in *Marinello* bridge cases demonstrate some of the limits to those challenges.

In *Platten v. Ortiz*, [No. 1:18-cv-17082](#) (D.N.J. 2019), a man convicted of securities fraud and tax obstruction in 2009 filed a habeas corpus motion to vacate the latter in light of *Marinello*. Donald Platten had previously directly appealed his conviction and sentence and moved to vacate his sentence, but both efforts were unsuccessful by the end of 2014, long before *Marinello* was decided in 2018.

Platten's latest collateral attack on his tax obstruction conviction relied on the new *Marinello* requirements to claim that his conduct wouldn't be criminal anymore because the conduct alleged in his indictment preceded a known or anticipated proceeding. The problem with that actual innocence argument, according to the New Jersey federal court, was that he had to actually be innocent. The trial evidence included lies to IRS investigators and backdated documents given to the government during an investigation that would easily satisfy the new

standard, according to the court.

Greg Takesian had a more obvious avenue to raise *Marinello*: He wasn't [convicted of tax crimes](#), including obstruction, until November 2017, so he got to raise the new standard on direct appeal. He also convinced the appeals court (*U.S. v. Takesian*, [No. 18-1140](#) (1st Cir. 2019)) that the trial court had committed plain error by not giving a *Marinello*-compliant jury instruction on tax obstruction, something he had to do to get any analysis of the issue because he didn't object based on the yet-to-be-issued requirements.

However, Takesian's success at raising the *Marinello* issue was short-lived because as soon as the First Circuit panel agreed that he could raise the issue, it found that he didn't prove that the bad jury instructions "seriously imperiled the fairness, integrity, or public perception of his trial."

While Takesian complained that his tax-obstructive conduct occurred during the investigation of another party's potential healthcare fraud (and the IRS agent he lied to said she wasn't investigating him), "he never explains why an IRS investigation was not reasonably foreseeable given the special circumstances arrayed above — circumstances that show that when the IRS was investigating the money trail that could lead to him, he fabricated a loan story to throw the agency off the scent," according to the First Circuit.

Into the Future

Jenny L. Johnson Ware of Johnson Moore told *Tax Notes* that courts fielding the *Marinello* bridge cases will have to confront the issue of constructive amendment of an indictment by the time they get to the jury instruction phase. Jury instructions that differ too substantially from the language in an indictment would violate a defendant's Sixth Amendment rights, she said.

However, collateral attacks like Platten's habeas case won't be able to take advantage of those arguments, Johnson Ware said. While he would have had a good argument in a direct appeal, the actual innocence gateway of his habeas case prevented that, she said.

The bridge cases will also have to flesh out just what the proper post-*Marinello* jury instructions are, Johnson Ware said. "Is it enough to instruct the jury that they need to find that a pending proceeding existed, and then that any conduct that occurred after that date automatically has a nexus, or does the jury have to find the element of the nexus?" she asked, adding that she'd prefer the latter. Another open jury instruction question is whether there will be special unanimity requirements, she said.

Larry A. Campagna of Chamberlain, Hrdlicka, White, Williams & Aughtry said habeas cases like Platten's typically spring up after substantive rulings like *Marinello*. He agreed that collateral attack and direct appeal bridge cases will encounter different burdens.

Campagna added that he found it curious for the judge in *Platten* not to have made an explicit factual finding when referring to the evidence regarding Platten's actions during the investigation. While implicit in the opinion, it would have been more normal for the judge to explicitly find that the jury would have convicted on the post-investigation conduct alone, he said.

Sandra R. Brown of Hochman Salkin Toscher Perez PC compared the bridge-case transition with the change in behavior that followed *Booker v. United States*, 514 U.S. 220 (2005) — the case in which the Supreme Court declared that the sentencing guidelines were merely advisory and not mandatory. While defense attorneys had already been used to presenting the sentencing factors under 18 U.S.C. section 3553(a), it took prosecutors three to five years to adapt their case selection and development practices to the point that their new evidence balanced out the judges' new discretion, she said.

Brown, a former tax prosecutor and acting U.S. attorney in California, said she expects both that indictments charging [section 7212\(a\)](#) violations will be more carefully constructed and that many of the facts that would have supported those charges will be used to bolster [other Title 26 charges](#). “We may actually see an uptick in prosecutors in the tax world charging more [section] 7201 [tax evasion] cases,” she said.

The evidence that might have supported a tax obstruction charge before *Marinello's* nexus and pending proceeding requirements could instead be admitted under Rule 404(b) of the Federal Rules of Evidence to demonstrate a defendant's willfulness for a substantive tax charge under sections 7201, 7202, or 7206, Brown said. “Most defense lawyers would much prefer to see a 404(b) motion over a substantive charge because, at least when it comes to an evidentiary issue, you have more of an ability to keep it out than you have to keep out a charge,” she said.