[PUBLIS ɥ

he

U i ed S a es Cour of Appeals

For he Ele e h Circui

Nos. 23-13254, 23-13383

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK GYETVAY, ɥ

Defendant-Appellant.

Appeals from the United States District Court
for the Middle District of Florida

D.C. Docket No. 2:21-cr-00083-JNE-NPM-1

ɥ

B for ROSENBAUM, LAGOA, an WILSON, irc i J g s.

LAGOA, irc i J g :

Mark Gy vay, an American acco n an an financial x c - iv w o work for many y ars in R ssia, was in ic on a vari y of ax-r la c arg s, following an inv s iga ion in o is all g ar y filings an conc alm n of f n s in Swiss bank acco n s. Gy vay was convic a rial of fo r co n s: fail r o fil incom ax r rns for 2013 an 2014 in viola ion of 26 U.S. . § 7203, making fals s a m n s on is S r amlin For ign Offs or Proc - r s c r ifica ion in viola ion of 18 U.S. . § 1001, an fail r o fil a 2014 For ign Bank Acco n R por in viola ion of 31 U.S. . d §§ 5314 an 5322(a).

On app al, Gy vay rais s fo r arg m n s. Firs , arg s a is ric co r rr in olling s a of limi a ions for o n s 10 an 11, w ic c arg fail r o fil ax r rns in violaion of 26 U.S. . § 7203. S con , arg s a is ric co r rr in nying is mo ion o s ppr ss a s arc warran a orizing s iz r of is mail acco n b ca s bo warran an s iz r viola Fo r Am n m n . T ir , arg s a gov rnm n cons r c iv ly am n or ma rially vari from o n 13 of in ic m n , w ic c arg fail r o fil a 2014 For ign Bank Acco n R por , viola ing Fif Am n m n . Finally, arg s a is ric co r ma a vari y of rrors a s n ncing, incl ing in calc la ing is g i lin rang an or r- ing im o pay $4,021,074 in r s i ion o IRS. Af r car f l d rev ew, a d w th the be efit ral argume t, we affirm art, reverse art, va ate art, a d rema d r rese te g.

I. FACTUAL AND PROCEDURAL BACKGROUND

Every Amer a t ze mak g a gr ss me ab ve a m - mum exem pt am ou t must file a ual tax retur s. 26 U.S.C. §§ 6011(a), 6012(a). U der 26 U.S.C. § 7203, w ll ully a l g t t mely file me tax retur s s a m isdemea r.[1] Add t ally, u - der the Ba k Se re y A t a d ts m pleme t g regulat s, every Amer a t ze w th terests r auth r ty ver a re g ba k a u t w th a bala e ex eed g $10,000 must file a a ual

[1] 26 U.S.C. § 7203 r v des as ll ws:

> A y ers requ red u der th s t tle t ay a y est mated tax r tax, r requ red by th s t tle r by regulat s made u der auth r ty there t make a retur , kee a y re rds, r su - ly a y rmat , wh w ll ully a ls t ay su h est mated tax r tax, make su h retur , kee su h re rds, r su ly su h rmat , at the t me r t mes requ red by law r regula- t s, shall, add t t ther e alt es r v ded by law, be gu lty a m isdemea r a d, u v t there , shall be fi ed t m ore tha $25,000 ($100,000 the ase a r- rat), r m pr s ed t m ore tha 1 year, r b th, t - gether w th the sts r se ut . I the ase a y ers w th res e t t wh m there s a a lure t ay a y est mated tax, th s se t shall t a ly t su h ers w th res e t t su h a lure there s add t t tax u der se t 6654 r 6655 w th res e t t su h a lure. I the ase a w ll ul v la- t a y r v s se t 6050I, the first se te e th s se t shall be a l ed by subst tut g " el y" r "m isde- mea r" a d "5 years" r "1 year". c

R por of For ign Bank and Financial Acco n s form known as an “FBAR”) wi IRS, id n ifying and d scribing a acco n . *See* (31 .F.R. §§ 1010.306 c), 1010.350 a). “T s r por s ar d sign d o lp gov rnm en ‘ rac f nds’ a may b s d for ‘illici p rpos s’ and id n ify ‘ nr por d income’ a may b s bj c o axa ion s para ly nd r rms of In rnal R v n od .” *Bittner v. United States*, 598 U.S. 85, 89–90 2023) q o ing IRS P b. 5569, R por of For ign Bank & Financial Acco n s FBAR) R f r- nc G id , p.1 R v. 3–2022)). Willf l fail r o fil an FBAR is a f lony nd r 31 U.S. . § 5322 a).

Gy vay, an Am erican ci iz n, is an acco n an and financial x c iv . In 1990s and arly 2000s, Gy vay work d in Moscow offic of Pric Wa r o s oop rs, v n ally ac i ving rank of par n r. In 2003, l f Pric Wa r o s oop rs o b com e i f Financial Offic r of Nova k, R ssia’s larg s pri- va na ral gas company. In 2005, Gy vay was “poin man” for Nova k’s ini ial p blic off ring “IPO”). Ov r n x s v ral y ars, in xc ang for is work on IPO, Gy vay r c iv d $9.35 million in form of a call op ion and 7,287,134 s ar s of Nova k s ock, on op of millions of dollars in ann al incom e. In 2007, d posi d $9.35 million in a Swiss bank acco n ld in nam of Opo iki Mark ing L d. “Opo iki acco n ”). In 2009, (d posi d Nova k s ock in a Swiss s c ri i s acco n ld in nam e of F licis omm rcial orp. “F licis acco n ”). Bo acco n s w r op n d a o s Bank. (

In mid-2010, Coutts Bank informed Gyetvay that his Ontik and Felicis accounts needed to be closed or declared tax compliant by the end of June 2010. Gyetvay then closed the Ontik and Felicis accounts at Coutts and transferred them to another Swiss bank, Hyposwiss, this time listing his then-wife, Nadezda Gavrilova, as the "beneficial owner" of both accounts. Coutts recorded Gyetvay's "reason for departure" from the bank as "U.S. client not tax compliant."

Around September 2010, Gyetvay hired an accountant named Alex Knight to prepare his U.S. income tax returns for 2006–2009. By that point, Gyetvay's tax returns for 2006, 2007, and 2008 were already late. To aid in the preparations, Knight asked Gyetvay whether he had any foreign bank accounts, and Gyetvay indicated that he had only "[o]ne account" in Russia with a balance over $10,000. Knight also informed Gyetvay of his obligation to file FBAR forms for the preceding years, but, according to Knight, Gyetvay dismissed the recommendation and did not file FBARs for the years prior to 2010. Gyetvay concedes that he "did not file timely tax returns or FBARs from 2008 to 2013," and he admits that the "Felicis account went undisclosed" throughout that entire period.

In 2014, Coutts Bank notified Gyetvay that it was participating in a program, established by the U.S. and Swiss governments, that would require it to provide U.S. tax authorities with information about Gyetvay's past accounts at Coutts. Coutts advised Gyetvay of the IRS' "Streamlined Foreign Offshore Procedures," w ic allow d axpay rs o fil any d linq n ax r rns for mos r c n r y ars and any d linq n BARs for mos r -F c n six y ars. To par icipa in S r amlin d Proc d r s, ax-pay rs ad o c r ify a any prior fail r s o fil ax r rns, r por for ign acco n s, and pay ax s w r "non-willf l," *i.e.*, "d o n glig nc , inadv r nc , or mis ak " or "a good-fai mis nd r-s anding of r q ir m n s of law." In 2014, Gy vay r ain d firm Anaford o lp im wi S r amlin d Proc d r s, and in 2015, s bmi d is S r amlin d filing o U.S. gov rnm n , along wi is long- ardy ax r rns for 2011–2013 and BARs for 2008–2013. Gy vay r por d in is la -fil d 2013 BAR a licis acco n ad grown o con ain $84,264,354, w il Opo iki acco n ld $9,148,420. In is S r amlin d filing, Gy vay c r ifi d a is "d lay in filing U.S. ax r rns [was] no d o any willf ln ss, b ra r r s l of [is] r asonabl a mp s o comply wi incr asingly diffic l adminis ra iv r q ir m n s." In J n 2015, Gy vay fil d a la BAR for 2014, in w ic r pr - s n d a ad signa r a ori y ov r—b no financial in r-s in—a singl Swiss bank acco n con aining an "amo n n-known." I is ndisp d a Gy vay in n ionally "omi d Opo iki acco n " from is 2014 BAR (al o g Gy vay insis s a i was b ca s "[ran] o of blank fi lds" on form).

Ev n ally, a grand j ry b gan inv s iga ing v raci y of Gy vay's s a m n s on is S r amlin d c r ifica ion, as w ll as is is ory of ax vasion, fail r o r por incom e, " s of s cr Swiss bank acco n s," and "fail r o disclos xis nc of os ac-co n s o gov rnm n as r q ir d." B for an indic m n was F retur ed, the g ver me t filed a *ex p rte* a l cat u der 18 U.S.C. § 3292(a)(1) t sus e d the ru g the statute l m ta- a t s r certa "Target Offe ses" that the gra d jury was vest - gat g. O A r l 3, 2020, the d str ct c urt versee g the gra d jury vest gat gra ted that a l cat a d t lled the statute l m tat s " r the ffe ses set rth the g ver me t's *ex p rte* a l cat ."

The gra d jury retur ed a t al d ctme t Se tember 22, 2021, a d a sec d su ersed g d ctme t May 4, 2022 (wh ch we'll re er t as the "su ersed g d ctme t"). I the su- ersed g d ctme t, the gra d jury charged Gyetvay w th three c u ts ass st g the re arat alse tax retur s, v la- t 26 U.S.C. § 7206(2) (C u ts 1–3), three c u ts tax eva- s , v lat 26 U.S.C. § 7201 (C u ts 4–6), a d five c u ts w ll ully a l g t file c me tax retur s betwee 2010–2014 (C u ts 7–11). C u t 12 charged Gyetvay w th w ll ully mak g alse stateme ts h s IRS Streaml ed Pr cedures cert ficat , v lat 18 U.S.C. § 1001. C u t 13 charged Gyetvay w th w ll- ully a l g t file a FBAR d scl s g that he had a fi a c al ter- est , a d s g ature a d auth r ty ver, a re g ba k acc u t, "t w t, the O t k acc u t." C u ts 14 a d 15 charged Gyetvay w th w re raud.

Gyetvay we t t tr al March 2023. The jury retur ed a gu lty verd ct ur the fi tee c u ts: C u ts 10 a d 11 (a l- ure t file c me tax retur s r 2013 a d 2014), C u t 12 (mak g alse stateme ts h s Streaml ed cert ficat), a d C u t 13 a (fail r o fil a complian 2014 FBAR . T j ry acq i d Gy vay on on of co n s of wir fra d and ng on all o r c arg s.) T dis ric co r s n nc d Gy vay o 86 mon s' imprisonm n and ord r d im o pay $4,021,074 in r s i ion o IRS.

II. ANALYSIS

A. Tolling the Statute of Limitations

T firs iss in is cas pos s a q s ion of firs impr s-sion for is o r : nd r 18 U.S. . § 3292(a (1 , can a dis ric co r oll s a of limi a ions for an off ns a was no id n ifi d in gov rnm n 's *ex parte* olling applica ion? Und r a plain r ad-ing of s a , w concl d a answ r is no.

Gy vay was convic d of o n s 10 and 11 of s p rs d-ing indic m n , w ic c arg d im wi willf l fail r o fil f d-ral incom e ax r rns for y ars 2013 and 2014, in viola ion of 26 U.S. . § 7203. T s a of limi a ions for § 7203 is six y ars. 26 U.S. . § 6531(4 . Gy vay's 2013 ax r rn was d on Oc ob r 15, 2014, and is 2014 ax r rn was d on April 15, 2015. T ini ial indic m n was fil d on S p mb r 22, 2021. T par i s s agr a , abs n olling of s a of limi a ions, o n s 10 and 11 ar im ebarr d, sinc indic m n was r rn d mor an six y ars af r d adlin s for Gy vay's 2013 and 2014 ax r rns.

In a criminal cas , pon applica ion of gov rnm n , 18 U.S. . § 3292 allows for olling or "s sp nsion" of s a of limi a ions if s v ral condi ions ar m e . T s a provid s:)

> U a l cat the U ted States, filed be re re- tur a d ctme t, d cat that ev de ce a ffe se s a re c u try, the d str ct c urt be re g wh ch a ra d jury s m pa eled t vest ate the - e se shall sus e d the ru the statute l m- tat s r the ffe se the c urt fi ds by a re - dera ce the ev de ce that a ffic al request has bee made r such ev de ce a d that t reas ably a ears, r reas ably a eared at the t me the re- quest was made, that such ev de ce s, r was, such re c u try.

Id. § 3292(a)(1). I ter ret th s statute, th s C urt has held that, due t the "*ex parte* ature § 3292 r ceed s," a d because "statutes l m tat s are themselves mecha sms r e sur the rel ab l ty ev de ce subm tted c urt r ceed s," § 3292(a)(1) requ res the ver me t t " r v de s meth w th ev de t ary value—that s, test m o y, d cume ts, r ffers, a d ther subm ss s bear s me d c a rel ab l ty—te d t r ve t s reas ably l kely that ev de ce the char ed ffe ses s a re c u try." *United States v. Trainor*, 376 F.3d 1325, 1332 (11th C r. 2004). The d str ct c urt must make fi d s by a re- dera ce the ev de ce, wh le the ver me t bears ts w burde rese t the c urt w th e u h ev de ce t sat s y that sta dard, wh ch "requ res the tr er act t bel eve that the ex st- e ce a act s m ore r bable tha ts ex ste ce[.]" *Id.* at 1331 (qu t *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993)). g

On April 3, 2020, during inv s iga ory s ag o is cas , gov rnm en l d an *ex parte* applica ion und r § 3292(a)(1) o fi susp nd running o s a u o limi a ions or c r ain "Tar- g Off ns s." In suppor o i s applica ion, gov rnm en r pr - s n d a :

> A grand jury duly mpan l d in is dis ric as b n inv s iga ing Mark Gy vay wi r sp c o als s a - m en s mad on a volun ary disclosur l d wi IRS, is us o s cr Swiss bank accoun s, is ail- ur o disclos xis nc o os accoun s o gov rnm en as r quir d, and is po n ial ailur o r por all incom e arn d roug accoun s. Pos- sibl criminal c arg s agains Gy vay includ : (i) ax vasion, in viola ion o 26 U.S. . § 7201; (ii) ling als ax r urns and docum en s wi IRS, in viola ion o 26 U.S. . § 7206(1); (iii) aiding and assis ing in pr para ion and pr s n a ion o als docum en s wi IRS, in viola ion o 26 U.S. . § 7206(2); (iv) imp d- ing du adminis ra ion o In rnal R v nu laws, in viola ion o 26 U.S. . § 7212(a); (v) conspiracy o d raud Uni d S a s, in viola ion o 18 U.S. . § 371; (vi) als s a m en s o Uni d S a s, in vi- ola ion o 18 U.S. . § 1001; (vii) ailur o l FBARs, in viola ion o 31 U.S. . §§ 5314 and 5322; and wir fi raud and conspiracy o commi wir raud, in viola- ion o 18 U.S. . § 1343 and § 1349; (" Targ O - ns s").

T gov rnm en av rr d a " vid nc o [s] Targ Off ns s, o wi , bank accoun , busin ss r cords, and or ign ax r cords, ar fi [*sic*] l cated Sw tzerla d Russ a a d Cy rus.” The d str ct judge r the gra d jury vest gat gra ted the a l cat t sus e d , the “ru g the statute l m tat s r the ffe ses set rth the g ver me t’s *ex parte* a l cat ” based ts fi d g that “ t reas ably a ears that ev de ce the Target Offe ses s l - cated Sw tzerla d Russ a a d Cy rus.” Ne ther the a l cat r the t ll g rder de t fied a v lat § 7203 as e the “Target Offe ses.”

O May 4 2022 the gra d jury retur ed the sec d su er- sed g d ctme t wh ch d cted Gyetvay r v lat s § 7203 clud g r w ll ully a l g t make c me tax retur s r cale - dar years 2013 a d 2014 C u ts 10 a d 11. The § 7203 v lat s were t charged the t al d ctme t a d Gyetvay m ved t d sm ss the su ersed g d ctme t clud g C u ts 10 a d 11 gr u ds u t mel ess. The g ver me t argued res se that the t ll g rder a l ed t th se charges des te the act that the g ver me t’s a l cat d d t de t y the statute u der wh ch th se ffe ses were charged a d the t ll g rder c ta ed ev de t ary fi d gs r th se charges. The d str ct c urt de ed Gyetvay’s m t t d sm ss w th ut rejud ce. The g ver me t the filed a m t *in limine* request g that the c urt “fi d that the t ll g rder r erly t lled the statute l m tat s A r l 3 2020 ” r “all charges the I d ctme t.” With ut much ex la a- t the d str ct c urt gra ted that m t fi d g that “the U ted States’ a l cat u der Sect 3292 . . . [was] val d a d r erly a l cable t all charges the [su ersed g] d ctme t ” , clud g C u ts 10 a d 11.

On app al, Gy vay con nds a dis ric cour rr d in olling s a u o limi a ions or oun s 10 and 11 o indic - . m en Gy vay's argum en is s raig orward: On is r ading o s a u , p ras " off ns " wi in § 3292(a)(1) r rs o off ns a gov rnm en s ks o b oll d—h r , o- ns o ailur o fil ax r urns in viola ion o § 7203 B caus gov rnm en n v r appli d or olling o off ns o ailur o fil ax r urns in viola ion o § 7203, Gy vay r asons, s a- u o limi a ions or os off ns s s ould no av b n oll d, and c arg s w r im ebarr d Gy vay ur r argu s a , v n i gov rnm en ad includ d § 7203 in i s applica ion, dis ric cour i s l rr d b caus i ail d o mak i s r quir d ac- ual findings und r § 3292(a)(1)

T gov rnm en acknowl dg s a i did no "ci 26 U S § 7203 (will ul ailur o fil a ax r urn)" in i s olling applica ion, bu i ass r s a i did no n d o According o gov rnm en , i s "d scrip ion o off ns s" was suffici n ly sp cific o "cov r[ ] ailur - o-fil off ns s ul ima ly c arg d in oun s 10 and 11 " T gov rnm en adds a a Sp cial Ag n 's d clara ion fil d in suppor o olling applica ion did m en ion Gy vay's ailur o fil im ely incom e ax r urns, so (in gov rnm en 's vi w) dis ric cour was corr c o la r find a applica ion and oll- ing ord r oll d limi a ions p riod or oun s 10 and 11

To sum up, gov rnm en 's *ex parte* applica ion soug olling or ig "Targ Off ns s," non o w ic c arg d a viola- ion o § 7203 T olling ord r issu d during inv s iga ory .

er d the case sus e ded the ru g the statute l m ita-t s " r the ffe ses set rth" the a l cat . N etheless the d str ct c urt later read the g ver me t's t ll g a l cat a d the vest gat g judge's t ll g rder t have sus e ded the statute l m itat s r b th c u ts alleg g v lat s § 7203. ,

The a l cat a statute l m itat s s a quest law rev ewed *de novo* wh le a d str ct c urt's fi d gs act are re-v ewed r clear err r. *Trainor* 376 F.3d at 1329–30. Whe t c mes t quest s statut ry ter retat we beg as always "by exam i g the text the statute t determ i e whether ts mea g s clear." *Harry v. Marchant* 291 F.3d 767 770 (11th C r. 2002) (e ba c). I deed "[ ] c stru g a statute " we " te sh uld e d as well w th the la guage the statute tsel ." *United States v. Steele* 147 F.3d 1316 1318 (11th C r. 1998) (e ba c). "We g ve the w rds a statute the r ' rd ary c temp rary c mm mea g ' ab-se t a d cat C gress te ded them t bear s me d ffere t m rt." *Williams v. Taylor* 529 U.S. 420 431 (2000) (qu t g *Walters v. Metro. Educ. Enters., Inc.* 519 U.S. 202 207 (1997)).

As qu ted ab ve § 3292 erm its the U ted States t file a "a l cat . . . d cat g that ev de ce a ffe se s a re g c u try." 18 U.S.C. § 3292(a)(1). The the d str ct c urt "be re wh ch a gra d jury s m pa eled t vest gate *the offense* shall sus-e d the ru g the statute l m itat s r *the offense* " t "fi ds by a re dera ce the ev de ce that a ffic al request has bee made r such ev de ce a d that t reas ably a ears" that "such ev de ce" s abr ad. *Id.* (em phas s added). "Words are , o b giv n m eaning a prop r grammar and usag would assign m." A. ALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXT 140 (2012). In is cas , "grammar and usag s ablis a ' ' is 'a unc ion word . . . indica [ing] a a ollowing noun or noun quival n is d fini or as b n pr viously sp cifi d by con x .'" *Nielsen v. Preap*, 586 U. . 392, 408 (2019) (quo ing MERRIAM-WEB TER' OLLEGIATE DI TIONARY 1294 (11 d. 2005)). Wh r a law us s a "d fini ar icl wi a singular noun," law r rs o a "discr ing." *Niz-Chavez v. Garland*, 593 U. . 155, 166 (2021). On a plain r ading o our s a u , r or , a dis ric cour can only oll s a u o limi a ions or "an off ns " i Uni d a s fil s an applica ion indica ing a vid nc o " off ns "—*i.e.*, a d fini or pr viously sp cifi d off ns —is in a or ign coun ry. Lik wis , dis ric cour mus find by a pr pond ranc o vid nc a vid nc o a d ini or pr viously sp cifi d off ns is or was r asonably lik ly o b in a or ign coun ry.

Bas d on is plain- x r ading o s a u , w ic is unambiguously off ns -sp cific, w conclud a dis ric cour rr d in susp nding limi a ions p riod or oun s 10 and 11, b caus gov rnm n 's olling applica ion did no indica a vid nc o os off ns s was loca d in a or ign coun ry, and dis ric cour n v r ound by a pr pond ranc o vid nc a suc vid nc was abroad.

Whil gov rnm n do s no app ar o con s is plain- x r ading, i argu s a i s applica ion was suffici n b caus S g ver me t, whe a ly g r t ll g, eed t de t y ffe ses by statut ry tat , a d, stead, " eed ly r v de a reas ably c s e fi des r t the ffe ses u der vest gat " t meet the requ reme ts § 3292(a)(1). The g ver me t la ms that ts de- s r t the ffe ses was s e fi e ugh t e m pass the a l- ure-t -file ffe ses later harged C u ts 10 a d 11, be ause the a l at "des r bed the gra d jury's vest gat mult le - e ses, lud g de e da t's ' te t al a lure t re rt all me ear ed.'"

We agree that the text § 3292(a)(1) d es t *require* the g ver me t t l st by tat the ffe ses that may have bee m- m tted. But we are hes ta t t reate a rule s br ad that t w uld all w the g ver me t t a t w th a w de brush a d later be able t swee (a d r l g the statute l m tat s r) all s rts ffe ses t me t ed ts a l at .[2] O the g ver me t's v ew the suffi e y a a l at , the g ver me t a seem i gly "[meet] the sta dard" r t ll g as l g as t "de- s r be[s]" a ffe se w th reas able s e fi ty. As the g ver me t

---

[2] I e ut- - r u t ase ted by the U ted States, r exam ple, a d str t urt held that a a l at was suffi e tly "s e fi " t t ll the statute l m tat s a tax- raud u t t me t ed the a l at r t ll g rder, be ause "tax raud s *intimately related to* the w re raud, m o ey lau der- g, a d s ra y t mmit m o ey lau der g ffe ses that were u der vest gat a d l sted the a l at a d t ll g [ ]rder." *United States v. Swartzendruber*, 2009 WL 485144, at *5 (D.N.D. Feb. 25, 2009) (em phas s added).

c

argu d b low, " v n oug gov rnm en ' applica ion pap r-work did no ci o 26 U.S. . § 7203, r can b no di pu a applica ion d crib d off n o ailing o fil a ax r urn," and "[ ] a i all a u r quir ."

Bu a i no all a u r quir . A bo a u ory languag and our ca law mak plain, § 3292(a)(1) r quir gov rnm en *and* di ric cour o a i y a pr pond ranc -o - vid nc andard. T gov rnm en mu m e a andard by providing r liabl vid nc a vid nc o ac off n a i u i r a onably lik ly o b loca d abroad. *See Trainor*, 376 F.3d a 1336 (gov rnm en mu provid vid nc " a i r a onably app ar *the requested evidence* i in a or ign coun ry" (mp a i add d)); *id.* a 1332 (gov rnm en mu provid om e ing wi vid n iary valu " nding o prov i i r a onably lik ly a vid nc *of the charged offenses* i in a or ign coun ry" (mp a i add d)). For i par , cour " o w om applica ion i pr n d" mu find, again by a pr pond ranc , a "(1) Gov rnm en a mad an official r qu or vid nc loca d in a or ign coun ry, and (2) 'i r a onably app ar , or r a onably app ar d a im e r qu wa mad , a uc vid nc i , or wa , in uc or ign coun ry.'" *Id.* a 1328 (quo ing § 3292(a)(1)). So, w il x o § 3292(a)(1) do no r quir gov rnm en o num era off n by ci a ion, w r j c argum en a gov rnm en ' d crip ion o an o - n —w ic , in i ca , did no v n d crib off n o ail-ing o fil incom e ax r urn —i "all a u r quir ."

At a h gh level, “C gress has declared a l cy that the statute l tat s sh uld t be exte ded ‘(e)xce t as therw se expressly r v ded by law.’” *Toussie v. United States*, 397 U.S. 112, 15 (1970) (qu t g 18 U.S.C. § 3282). Whe a y d ubt ex sts ab ut the statute l tat s a cr al case, the l tat s er d s c strued arr wly aga st the g ver t a d av r the de e da t. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 95 (2006); *United States v. Gilbert*, 136 F.3d 1451, 1454 (11th C r. 1998). Th s rule s “des g ed t r tect d v duals r hav g t de e d the elves aga st charges whe the bas c acts y have bec bscured by the assage t a d tm ze the da ger ffic al u sh te because acts the ar-d sta t ast. Such a t l t ay als have the salutary effect e c urag g law e rce te ffic als r tly t vest gate sus ected cr al act v ty.” *Toussie*, 397 U.S. at 114–15. Whe ever stat t ry ter “exte d[ ] the statute l tat s,” th se ter sh uld be c strued “ arr wly.” *United States v. Maher*, 955 F.3d 880, 885 (11th C r. 2020) (c t g *Toussie*, 397 U.S. at 115). m

With all th s d, we th k the best way t c strue § 3292(a)(1) s t requ re the g ver t t de t y the ffe se r ffe ses at ssue w th e ugh s ec fic ty t 1.) ake clear t the judge t wh the a l cat s rese ted wh ch charges the g v- m e er t seeks t be t lled, a d 2.) “el c t ev de ce the alleged v lat s u der vest gat by the gra d jury.” *United States v. Wilson*, 249 F.3d 366, 374 (5th C r. 2001) (qu t g *United States v. Neill*, 952 F. Su . 831, 833 (D.D.C. 1996)), *abrogated on other grounds by Whitfield v. United States*, 543 U.S. 209 (2005). F r exa le, m

Wilson, Fi ircui affir d a dis ric cour 's § 3292 olling or- d r and r j c d app llan 's argu n a gov rn n 's m “r qu s was no suffici n o oll s amui o li a ions wi r gard o 18 U.S. . § 1957, b caus a s a u was no sp cifically nu ra d in l r.” 249 F.3d a 374. *Wilson* r li d on ac a gov rn n us d p ras “ n oy laund ring” in i s olling applica ion, and a viola ion o 18 U.S. . § 1957 is co only r rr d o as “ n oy laund ring.” *See id.* (“T is circui as r - rr d o a viola ion o 18 U.S. . § 1957 as ‘ n oy laund ring.’”). As suc , i was “cl ar” o cour a “[g]ov rn n 's us o p ras ‘ n oy laund ring’ in i s r qu s or assis anc was ‘r a- sonably sp cific’ [o lici vid nc o all g d viola ions und r inv s iga ion] and ad quam io oll li a ions or is off ns .” *Id.*

Having co o is conclusion, w r urn o analysis in is cas . As mana ini ial r, w find i irr l van a on o “Targ Off ns s” in olling applica ion was ax vasion in vio- la ion o 26 U.S. . § 7201. T par i s agr a (a l as und r *Schmuck* s) § 7203 is no a l ss r-includ d off ns o § 7201, b - caus or r off ns “r quir s an l n no r quir d or gr a r off ns .” *Schmuck v. United States*, 489 U.S. 705, 716 (1989).

N x , gov rn n did no r quir n s o § 3292(a)(1) o oll oun s 10 and 11, and r r nc o Gy vay's ailur o fil ax s in a d clara ion was inad qua . T gov rn- n 's applica ion did no id n i y § 7203 as an off ns und r inv s- iga ion. And applica ion's broad languag —r r ncing Gy - vay's “po n ial ailur o r por all inco arn d roug m acc u ts”—is suffic e t t c ver r e c mpass “the ffe se” a lure t le t mely c me tax retur s. Because the s ec c - fi e se w ll ul a lure t le c me tax retur s was t me t ed the g ver me t’s a l cat , the g ver me t d d t sat s y the requ reme ts § 3292(a)(1) t sus e d the ru g the statute l m tat s r C u ts 10 a d 11.

Gyetvay als argues that the d str ct c urt de e de tly a led t make d gs as requ red by the t ll g statute. We agree. Recall, u der § 3292(a)(1), the d str ct c urt must “ d[ ] by a re- dera ce the ev de ce that a ffic al request has bee made r [ev de ce a ffe se a re g c u try] a d that t reas - ably a ears, r reas ably a eared at the t me the request was made, that such ev de ce s, r was, such re g c u try.” A d str ct c urt “ca d th s ly t s g ve s meth g w th ev de - t ary value, that s, s meth g bear g d c a rel ab l ty, t eval- uate.” *Trainor*, 376 F.3d at 1332. But the c urt must tsel make d gs su rted by a re dera ce the ev de ce be re sus- e d g the ru g the statute l m tat s r the ffe se u der vest gat . A ter all, due t the *ex parte* ature § 3292 r ceed gs, “the d str ct c urt s res s ble r e sur g that [a de e da t’s] terests are r tected.” *Id.*

Here, the d str ct c urt made d gs whats ever ev- de ce a v lat § 7203 ts rder gra t g the *ex parte* a - l cat , stead mak g d gs the “Target Offe ses” al e. The c urt u d, based a re dera ce the ev de ce, that “ t reas ably a ears that ev de ce *of the Target Offenses* s l cated fi in Swi z rland, Russia, and yprus,” u i mad no suc finding r garding vid nc o Gy vay’s ailur o fil income ax r urns. T us, v n i gov rnm n ’s applica ion som ow ncompass d viola ions all g d in oun s 10 and 11, os c arg s w r no prop rly oll d, caus ord r issu d y dis ric cour did no con ain r quisi findings or any off ns s ou sid o “Targ Off ns s.” T dis ric cour , r or , rr d in r roac- iv ly applying olling ord r o oun s 10 and 11, caus i n v r ound y a pr pond ranc o vid nc a vid nc o Gy vay’s ailur o fil in 2013 and 2014, in viola ion o § 7203, was loca d in a or ign coun ry.

For s r asons, w conclud a oun s 10 and 11 ar im - arr d. We r v rs Gy vay’s convic ions on os coun s, vaca is s n nc , and r mand or r s n ncing.

B. Fourth Amendment Challenge

N x , Gy vay argu s a dis ric cour rr d in d nying is mo ion o suppr ss vid nc o ain d rom a s arc warran or is mail accoun caus warran and s izur viola d Four Am ndm n .

T Four Am ndm n pro c s “[ ] rig o p opl o s cur in ir p rsons, ous s, pap rs, and ff c s, agains unr asona l s arc s and s izur s.” U.S. ONST. am nd. IV. T Warran laus o Four Am ndm n “ca gorically pro i i s issuanc o any warran xc p on ‘par icularly d scri ing plac o s arc d and p rsons or ings o s iz d.’” *Mar- yland v. Garrison*, 480 U.S. 79, 84 (1987) (quo ing U.S. ONST. am nd. b

IV). As the Su reme C urt has ex la ed the "ma est ur se" the art cular ty requ reme t s t " reve t ge eral searches." *Id*. "By l m t g the auth r zat t search t the s ec fic areas a d th gs r wh ch there s r bable cause t search the requ reme t e sures that the search w ll be care ully ta l red t ts just ficat s a d w ll t take the character the w de-ra g g ex l rat ry searches the Framers te ded t r h b t." *Id*.

O February 21 2020 a mag strate judge s g ed a search a d se zure warra t auth r z g a search "[t]he c te t all ema ls ass c ated w th" Gyetvay's Yah .c m ema l acc u t " r the er d Ja uary 1 2005 t N vember 11 2019." U der the sec- t t tled "I rmat t be se zed by the g ver me t " the war- ra t auth r zed law e rceme t ers el t "rev ew the rec rds r duced by the Pr v der rder t l cate a y ev de ce ru ts a d strume tal t es a scheme t h de assets ffsh re e t t es a d acc u ts a d evade taxat c me der ved r m such as- sets s ec fically the cr mes : ( ) evad g taxes v lat 26 U.S.C. § 7201; ( ) mak g a d subscr b g t a alse tax retur v lat 26 U.S.C. § 7206(1); ( ) a d g a d ass st g the re - arat a alse tax retur v lat 26 U.S.C. § 7206(2); (v) w ll ully a l g t make a tax retur v lat 26 U.S.C. § 7203; (v) w ll ully a l g t file r w ll ully fil g a alse re rt re g ba k acc u t v lat 31 U.S.C. §§ 5314 5322; a d (v) w re raud a d c s racy t c mmit w re raud v lat 18 U.S.C. § 1343 a d § 1349." The warra t urther s ec fied the ty es ev de ce t s ught t u c ver clud g "[e]v de ce c - cer g a y d mest c r re g r ert es assets fi a c al , in r s s, p rsonal xp ndi r s, and/or bank acco n s ld in Gy ay's nam eor nominally ld by o r indi id als or n i i s," "[ ] id nc r fl c ing communica ions or corr spond nc b - w n Gy ay and is acco n an s and ad isors abo s r c ring financial ransac ions and/or Gy ay's ass s in a mann r o con- c al Gy ay's own rs ip of ass s," and "[ ] id nc r fl c ing comm unica ions or corr spond nc in ol ing Gy ay and any b sin ss par n r, associa , fri nd or r la i d mons ra ing Gy - ay's d cision o alloca im e, r so rc s, and ffor on affairs and ma rs o r an complying wi is ax and o r filing obliga- ions."

Gy ay ak s iss wi is las cla s , arg ing a "[a] s arc warran a d mands all mails r la ing o id n ifi d ax ac i i i s, and mails no r la ing o os ac i i i s, simply d - mands all mails." H ealso arg s a ca gori s r la ing o is financial ac i i i s w r no drawn wi par ic lari y. Gy ay mo d o s ppr ss warran on S p mb r 2, 2022, on similar gro nds. On D c mb r 19, 2022, dis ric co r d ni d Gy - ay's mo ion o s ppr ss. T co r ld, firs , a mo ion was n im dy, b ca s i was "fil d l n mon s af r D f ndan r - c i d s arc ma rials in disco ry, [ ] long af r [c]o r 's d adlin for pr rial mo ions," and " l n mon s af r r c i ing a copy of warran and affida i ." T dis ric co r n ld a , " n if mo ion w r im dy fil d, [c]o r wo ld s ill d ny r li f," sinc warran "app ars o b s ffici n ly par ic lar in lig of compl x na r and siz abl im ed ra ion of ax fra d sc m eD f ndan is acc s d of commi ing." v

I rev ew g a d str ct c urt's de al a m t t su ress ev de ce, we rd ar l rev ew the c urt's fi d gs act r clear err r a d the c urt's a l cat the law t th se acts *de novo*. y *United States v. Noriega*, 676 F.3d 1252, 1259 (11th C r. 2012). H wever, whe a d str ct c urt de es a m t t su ress the bas s u t mel ess, we rev ew r a abuse d screti . *United States v. Smith*, 918 F.2d 1501, 1509 (11th C r. 1990); *see also United States v. Taylor*, 792 F.2d 1019, 1025 (11th C r. 1986), *cert. denied*, 481 U.S. 1030 (1987) (h ld g that the d str ct c urt d d t abuse ts d scret where the de e da t challe ged the de al h s m t t su ress t mel ess gr u ds); *United States v. Andres*, 960 F.3d 1310, 1315 (11th C r. 2020) ("We rev ew r abuse d scret the de al [a] m t t su ress the gr u ds t mel ess." (c t g *Smith*, 918 F.2d at 1509)).[3] Whe a art a ls t establ sh g d cause r a u t mel m t t su ress, the ssue ra sed the m t s t reserved, s we rev ew the mer ts the m t r y la err r. *Andres*, 960 F.3d at 1315–16; *United States v. Milian-*

[3] *Smith* a d *Taylor* ter reted the r r vers Rule 12 the Federal Rules Cr m i al Pr cedure, wh ch has s ce bee ame ded. The ame ded vers we t t e ect December 1, 2014. Th s C urt has c t ued t a l the abuse- -d scret sta dard t de als u t mel retr al m t s u der the ame ded vers Rule 12. *See, e.g.*, *Andres*, 960 F.3d at 1315; *United States v. Bowers*, 811 F.3d 412, 421 (11th C r. 2016) ("B wers m ved t sever the - d cted c u ts a ter the d str ct c urt's re-tr al-m t deadl e, but be re h s tr al, a d w th attem t t establ sh g d cause r h s dela . H s m t was, there re, u t mel u der re-ame dme t Rule 12(e) a d w uld l kew se be u t mel u der ame ded Rule 12(c)(3)."). y

Rodriguez, 828 F 2d 679, 683–84 (11 ir 1987); *United States v. Bowers*, 811 F 3d 412, 421 (11 ir 2016) .

Und r Rul 12 o F d ral Rul s o riminal Proc dur , any mo ion or suppr ssion o vid nc mus b mad b or rial FED R RIM P 12(b)(3)( ) T dis ric cour may "s a d adlin or par i s o mak pr rial mo ions and may also sc dul a mo ion aring I cour do s no s on , d adlin is s ar o rial " FED R RIM P 12(c)(1) "I a par y do s no m e d adlin or making a Rul 12(b)(3) mo ion, mo- ion is un im dy Bu a cour may consid r d ns , obj c ion, or r qu s i par y s ows good caus " FED R RIM P 12(c)(3) .

T dis ric cour did no abus i s discr ion in d nying Gy vay's mo ion o suppr ss on im din ss grounds r T d adlin o fil pr rial mo ions was Oc ob r 7, 2021 Gy vay fil d is mo ion o suppr ss on S p mb r 2, 2022—n arly l v n mon s la r We r cogniz a Gy vay did no r c iv a copy o warran un il around Oc ob r 7, 2021, sam e im eas mo- ions d adlin Bu Gy vay n v r mov d or an x nsion o im , nor did v n acknowl dg mo ion's un im din ss or a mp o s ow good caus w n v n ually fil d is mo ion o suppr ss

Again, Rul 12 provid s a a dis ric cour may consid r an un im dy mo ion o suppr ss only i moving par y "s ows good caus " FED R RIM P 12(c)(3). Gy vay did no do so in is un- im ly mo ion o suppr ss or in a mo ion or x nsion o im e, so w canno conclud a dis ric cour abus d i s discr ion in .

de y g the m ct as u t mely. *See, e.* ., *Milian-Rodri uez*, 828 F.2d at 682–83 (affirm i g d str ct c urt's de al m ct t su ress as g u t mely abuse- -d scret sta dard where the a ella t m cved r rec s derat the c urt's su ress dec s rty- e days a ter the fil g deadl e, a d the a ella t's just fi- cat that he ly rece tly lear ed terve g case law d d t suffice); *Andres*, 960 F.3d at 1316 (h ld g that the d str ct c urt d d t abuse ts d scret de y g m ct t su ress as u t mely because the de e da t's "dec s t t t mely file a m ct t su ress . . . based h s bel e that he w uld be subject t ma - dat ry l e m pr s me t" d d t c st tute g d cause).

I h s re ly br e , Gyetvay argues that the d str ct c urt's de- al h s su ress m ct was a abuse d scret because he rece ved the warra t at the same t me as the deadl e, he filed h s su ress m ct s x m o ths be re tr al, a d the "g ver - me t where de t fies a earl er deadl e that Gyetvay sh uld have met." But we have held that cla ms made retr al m ct s were u t mely a d, there re, r e ted[4] where the de e da t "m ved t sever the d cted c u ts a ter the d str ct c urt's re- tr al-m ct deadl e, but *before his trial*, a d w th attem pt t establ sh g d cause r h s delay." *Bowers*, 811 F.3d at 421 g

---

[4] Pr r t the 2014 ame dme ts, Rule 12 used the term "wa ved" t re er t a m ct t t mely led. U der the ew vers the rule, wh ch m its the w rd "wa ved," u t mely m ct s are c s dered " r e ted rather tha wa ved." *Bowers*, 811 F.3d at 421. g

(mp asis add d). So oo r , Gy ay fil d is mo ion o suppr ss b or rial bu off r d no good caus or is l n-mon d lay.

Mor o r, qu s ion b or us is w r dis ric cour abus d i s discr ion in d nying mo ion as un im dy—no w r go rnm n s ould a id n ifi d an arli r d adlin , nor w r dis ric cour could (or n s ould) a andl d mo ion diff r n ly. *See Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1298 (11 ir. 2002) ("Wh n a dis ric cour as discr ion, r ar usually a rang o c oic s i may mak and s ill b affirm d; r is no only on rig c oic or cour o mak ."); *In re Rasbury*, 24 F.3d 159, 168 (11 ir. 1994) ("By d finiion[,] und r abus o discr ion s andard o r i w r will b occasions in w ic w affirm dis ric cour n oug w would a gon o r way ad i b n our call. T a is ow an abus o discr ion s andard diff rs rom a *de novo* s andard o r i w."). In is cas , cour simply n orc d i s own d adlin a r Gy ay ail d o s ow good caus o xcus is l n-mon d lay in filing a mo ion o suppr ss. A dis ric cour 's "sc duling ord r is no a ri olous pi c o pap r, idly n r d, w ic can b ca ali rly disr gard d by couns l wi ou p ril." *Cruz v. Bristol-Myers Squibb Co., PR, Inc.*, 699 F.3d 563, 570 (1s ir. 2012) (quo ing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9 ir. 1992)). Rul 12 is cl ar a onus is on un im dy par y o s ow good caus , and Gy ay did no do so r .

Add t ally, Gyetvay argues that a de al a m ct t su ress t mel ess gr u ds s a a use d scret where the c urt als reaches the mer ts the m ct . But ur case law el es th s assert . I *Milian-Rodriguez*, r exam ple, we held that the d str ct c urt d d t a use ts d scret fi d g that a m ct t rec s der a su ress rder was u t mely, the r ceeded t h ld that the d str ct c urt's a lure t su ress the ev de ce was t la err r. 828 F.2d at 683–84. We rejected the a ella t's r s t that a arty's r e ture thr ugh u t mel ess " s ex-cused the d str ct c urt r ceeds t e terta the mer ts the arty's u t mely m ct ." *Id.* at 683. F r all these reas s, the , we c clude that the d str ct c urt d d t a use ts d scret de y g Gyetvay's m ct t su ress as u t mely, ecause the m - t was filed eleve m o ths a ter the deadl e set y the c urt, a d Gyetvay d d t sh w g d cause r the delay, as requ red y Rule 12(c)(3).

Because the d str ct c urt d d t a use ts d scret de y g Gyetvay's m ct t su ress as u t mely, we rev ew the u derly g mer ts the m ct r la err r. *Andres*, 960 F.3d at 1315–16; *Bowers*, 811 F.3d at 421. U der la -err r rev ew, we w ll reverse a d str ct c urt's dec s ly (1) a err r ccurred; (2) the err r was la ; (3) t affected the a ella t's su sta t al r ghts; a d (4) t ser usly affected the a r ess, tegr ty, r u l c re uta-t jud c al r ceed gs. *United States v. Doyle*, 857 F.3d 1115, 1118 (11th C r. 2017). We c clude that the d str ct c urt d d t la ly err decl g t su ress the ev de ce ta ed thr ugh the search warra t. b

In *United States v McCall*, w r c n ly ld a " r ar g n rally wo yp s o limi a ions a can par iculariz [ ] a war- . ran " au orizing a s arc o som eon 's digi al accoun . 84 F.4 1317, 1327 (11 ir. 2023). T firs yp o limi a ion a can sa is y par iculari y r quir m en is "narrowing s arc bas d on subj c ma r o da a. For xampl , a warran may limi inv s iga ors' s arc o communica ions da a o only communica- ions wi known or susp c d co-conspira ors." *Id*. T s cond and "pr rr d m e od o limi ing scop o a s arc warran or a cloud accoun " is a " mporal limi a ion." *Id*. a 1327–28. As w xplain d in *McCall*: "By narrowing a s arc o da a cr a d or upload d during a r l van im e conn c d o crim e b ing inv s iga d, offic rs can par iculariz ir s arc s o avoid g n- ral rummaging. loud or da a-bas d warran s wi a suffici n ly ailor d im e bas d limi a ion can und rmin any claim a y ar in rn - ra v rsion o a 'g n ral warran .'" *Id*. a 1328 (in- rnal quo a ions omi d).

H er , dis ric cour d rmin d a warran was su - fici n ly par iculariz d b caus i laid ou discr ca gori s o v- id nc o b s arc d. Sp cifically, warran laid ou n ca go- ri s o vid nc a offic rs w r allow d o s arc and a w r ailor d o crim es und r inv s iga ion. Som e o s ca go- ri s us d narrow languag , suc as "[ ]vid nc conc rning any do- m es ic or or ign bank accoun s ld by Gy vay, including in is nam , in nam e o a nomin n i y, and in nam e o a nom- in individual." Non l ss, Gy vay argu s a o r ca go- ri s w r ov rbroad b caus y soug "communica ions abou .

taxes a d *not* ab ut taxes" a d "thus c uded 'every ema ' he se t ver 14 years."

We are t c v ced by th s ter retat the warra t. The warra t d es auth r ze aw e rceme t ers e t cate ev de ce c mmu cat s betwee Gyetvay a d h s acc u ta ts ab ut a y ssues re ated t "taxes [a d] the av da ce taxes," as we as ev de ce " v v g Gyetvay a d a y [ass c ate] dem o - strat g Gyetvay's dec s t a cate t me, res urces, a d eff rt affa rs . . . *other than* c m py g w th h s tax a d ther fi g b- gat s" (em phas s added). Gyetvay takes th s a guage t mea that the warra t auth r zes a search r every ema he ever se t ver 14 years. Wh e the " ther tha " a guage s adm itted y m- rec se, we ter ret the hrase, "dec s t a cate t me a d re- s urces affa rs *other than* c m py g w th h s tax a d ther fi g b gat s" t mea , "dec s t a cate t me a d res urces *away from* c m py g w th h s tax b gat s." Th s ter retat s b - stered by the a guage the d ctme t, wh ch a eged that, be- twee 2005 a d 2015, Gyetvay tra s erred u ds a d ut Sw ss ba k acc u ts "t make ers a vestme ts a d t ay r var - us ers a ex e ses, c ud g the urchase art, m t r veh - c es, a d rea estate." Add t a y, the warra t was ex ress y tar- geted at u c ver g ev de ce a scheme t "evade taxat " a d "c cea Gyetvay's w ersh [ ] assets." We are thus d s - c ed t ter ret the warra t's " ther tha " a guage as "s m py dema d[g] a ema s." l

In any v n , as dis ric cour also no d, v n i a warran is ov rbroad, w do no suppr ss vid nc on ov rbr ad grounds i warran 'ad qua ly conv ys i s param e rs.'" *McCall*, 84 F.4 a 1328 (quo ing *United States v. Delgado*, 981 F.3d 889, 899 (11 ir. 2020)). H er , inv s iga ing offic rs r asonably could av b li v d" a n ca gori s o accoun in orma ion r qu s d ll wi in prac ical margin o fl xibili y or [ ] broad inv s iga iv ask." *Id.*; *see also United States v. Schandl*, 947 F.2d 462, 465–66 (11 ir. 1991) (up olding d nial o mo ion o suppr ss w r [i] was in vi abl a som e irr l van ma rials would b s iz d as ag n s s arc d roug num erous docum en s or vid nc o ax vasion and ailur o fil , crim es a ar g nrally only d c d roug car ul analysis and syn sis o a larg numb r o docum en s").

T warran also con ain d a mporal limi a ion—t pr rr d m e od" o par iculariza ion or scop o a s arc warran . *McCall*, 84 F.4 a 1328. T warran sp cifi d a im ep riod or in orma ion o b produc d (January 1, 2005, o Nov mb r 11, 2019), w ic corr spond d xac ly o im ep riod govrnm en was inv s iga ing: T indic m en s a s a Gy vay op n d Opo iki" Swiss bank accoun [i]n or abou S p mb r and Oc ob r o 2005," and gov rnm en av rr d in i s affidavi fil d in suppor o warran a Subj c Accoun was b ing acc ss d, or logg d in o, up un il on or abou Nov mb r 11, 2019." Tim -bas d limi a ions on s arc o an mail accoun , sp cially w n combin d wi subj c -ma r limi a ions, pr v n sor o g n ral, xplora ory rummaging . . . ab orr d by c l sts." *Coolidge* . *New Hampshire*, 403 U.S. 443, 467 (1971). That s, "[b]y arr w g a search t the data created r u l aded dur g a releva t t me c ected t the cr me be g vest gated, fficers ca art cular ze the r searches t av d ge eral rummag g." *McCall*, 84 F.4th at 1328.

We have u held s m lar warra ts as suffic e tly art cular eve where th se warra ts d d t set ut a tem p ral l m tat . I *United States* . *Blake*, r sta ce, we u d suffic e tly art cular a warra t that "was l m ted t certa categ r es ema ls," 868 *v* F.3d 960, 966 (11th C r. 2017), eve th ugh the warra t "d d t l m t the ema ls s ught t ema ls se t r rece ved w th the t me er d [the de e da t's] sus ected art c at the c s racy," *id.* at 973 .7. Des te the "lack a t me l m tat ," we reas ed, "the warra t was a r r ately l m ted sc e because t s ught ly d screte categ r es ema ls that were c ected t the alleged cr mes." *Id.* at 973 .7. Th s subject-matter l m tat al e " reve ted a ge eral, ex l rat ry rummag g thr ugh [the de e da t's] ema l c rres de ce." *Id.* at 973 (ter al qu tat s m tted).

Here, by c trast, the warra t was c rcumscr bed t te categ r es ema ls c rres d g t Gyetvay's alleged cr mes *and* the t me er d be g vest gated by the g ver me t. As a result, alth ugh the warra t auth r zed a exte s ve search ver a le gthy er d t me, we c clude that the d str ct c urt d d t la ly err fi d g that the search a d se zure warra t at ssue the *v* mo ion o suppr ss was suffici n ly par iculariz d so as no o b consid r d an uncons i u ional g n ral warran .

C. Constructive Amendment and Material Variance

N x , Gy vay argu s a gov rnm en soug (and ac i v d) convic ion und r oun 13 or conduc no c arg d in indic m en Sp cifically, Gy vay argu s a , al oug oun 13 c arg d im wi "Failur o Fil [an] FBAR" or cal ndar y ar 2014, gov rnm en n v r prov d ailur o fil or a y ar, ins ad proving o jury a Gy vay fil d a *false* 2014 FBAR— "a crim e or w ic [ ] was no indic d " In Gy vay's vi w, gov rnm en 's argum en a fil d an FBAR a ail d o disclos on o is Swiss accoun s w n b yond w a was c arg d in indic m en , viola ing Fi Am endm en 's dic a a "[n]o p r- son s all b ld o answ r or a capi al, or o rwis in amous crim , unl ss on a pr s n m en or indic m en o a Grand Jury" U S ONST am end V T is claus , known as Grand Jury laus , "do s no 'p rmi a d ndan o b ri d on c arg s a ar no mad in indic m en agains im' or convic d on o- ri s a indic m en 'canno airly b r ad as c arging'" *United States v. Feldman*, 931 F 3d 1245, 1259–60 (11 ir 2019) (quo ing . *Stirone v. United States*, 361 U S 212, 217 (1960))

Two dis inc rrors can aris w n vid nc a rial or cour 's jury ins ruc ions d via rom w a was c arg d in indic m en *United States v. Flynt*, 15 F 3d 1002, 1005 (11 ir 1994) . T firs ca gory o rror is a cons ruc iv am endm en , w ic oc- curs w n " ss n ial l m en s o off ns con ain d in d ctme t are altered—f r sta ce, by a aulty jury struct — t br ade the ss ble bases r c v ct bey d hat [as] w c ta ed the d ctme t." *Feldman*, 931 F.3d at 1260 (ter al qu tat s m tted). A c struct ve ame dme t the d ctme t s "*per se* revers ble because t v lates the de e da t's c st tut al r ght t be tr ed s lely the charges retur ed by the gra d jury." *United States v. Johnson*, 713 F.2d 633, 643 (11th C r. 1983). The sec- d ty e err r s a mater al var a ce, h ch ccurs " he the charg g terms the d ctme t are le t u altered, but the ev - de ce ffered at tr al r ves acts mater ally d ffere t r m th se alleged the d ctme t." *Id*. at 643 .9. U l ke th a c struc- t ve ame dme t, a var a ce requ res reversal ly he the de e d- a t "suffered substa t al rejud ce as a result." *United States v. Goldstein*, 989 F.3d 1178, 1198 (11th C r. 2021). F r exam le, e c - s der a var a ce t be rejud c al he "the r at tr al d ffered s greatly r m the charges that [the de e da t] as u a rly sur- r sed a d as u able t re are a adequate de e se." *United States v. Lander*, 668 F.3d 1289, 1295 (11th C r. 2012).

Here, Gyetvay argues that the g ver me t c struct vely ame ded r "at least" mater ally var ed r m the allegat s c - ta ed C u t 13 the su ersed g d ctme t, h ch charged Gyetvay th a l g t file a FBAR r the cale dar year 2014. We d sagree as t b th c te t s.

F rst, there as c struct ve ame dme t C u t 13 be- cause Gyetvay as c v cted the same ffe se that as alleged the d ctme t. As e've sa d, c struct ve ame dme t ca w occur w n vid nc pr s n d a rial or ins ruc ions giv n o jury so al r ss n ial l m n s o off ns all g d in indic m n a d ndan is ul ima ly convic d on a ground no c arg d *Feldman*, 931 F 3d a 1260; *United States v. Gonzalez*, 661 F 2d 488, 492 (5 ir Uni B 1981) [5] ons ruc iv am ndm n do s *not* occur w n a jury ins ruc ion "did no xac ly ma c orm o indic m n "—so long as " subs anc o indic m n r main d in ac " *United States v. Vernon*, 723 F 3d 1234, 1264 (11 ir 2013) In is cas , sup rs ding indic m n c arg d Gy vay wi "will ully ail[ing] o fil an FBAR[ ] disclosing a ad a financial in r s in, and signa ur and o r au ori y ov r, a bank[ ] accoun in a or ign coun ry, w ic ad an aggr ga valu in xc ss o $10,000 during 2014 cal ndar y ar, o wi , Opo iki accoun —Acc xxx4056—a Falcon,"[6] in violaion o 31 U S §§ 5314 and 5322(a) In urn, dis ric cour ins ruc d jury a " oun 13 c arg s a d ndan willully ail d o fil a r por wi D par m n o Tr asury a disclos d is own rs ip and signa ory or o r au ori y ov r . a or ign financial accoun a con ain d mor an $10,000 "

---

[5] D cisions issu d by Uni B o orm r Fi ircui ar binding pr c d n in El v n ircui *Stein v. Reynolds Secs., Inc.*, 667 F 2d 33, 34 (11 ir 1982)

[6] In 2013, Falcon Priva Bank AG, ano r Swiss bank, acquir d ass s o Hyposwiss and b cam e cus odian o Gy vay's Opo iki and F licis accoun s .

We fi d mea g ul d ffere ce betwee the ffe se charged the d ctme t a d the struct s g e t the jury. Wh le the d str ct c urt's struct C u t 13 may t ha e arr ted the la guage the d ctme t, the substa ce the charge rema ed tact. *Vernon*, 723 F.3d at 1264. M re er, the d str ct c urt s ec fically ex la ed t the jury that "[ ]t s a Federal cr me r a U.S. c t ze r res de t t w ll ully a l t re rt t the U ted States Treasury h s r her w ersh , s g at ry, auth r ty, r c tr l er *each* re g fi a c al acc u t that c ta s m re tha $10,000 at a y t dur g the year" (em has s added). A d the c urt structed the jury that, u der C u t 13, the burde was the g er me t t r e that Gyet ay a led t file a FBAR "that re rts *all* the de e da t's re g fi a c al acc u ts." All these struct s m rr r what C u t 13 charged: that Gyet ay lated 31 U.S.C. §§ 5314 a d 5322(a) by a l g t file a FBAR d scl s g *one* h s re g ba k acc u ts.

Furtherm re, b th the text the d ctme t a d the jury struct s re lect that § 5314 s lated whe e a ls t le a *compliant* FBAR. As the Su reme C urt has ex la ed:

> Whe t c mes t the duty t le re rts, . . . [§ 5314] says that re rts "shall c ta " rmat ab ut "the de t ty a d address art c a ts a tra sac- t r relat sh ," "the legal ca ac ty wh ch a art c a t s act g," a d "the de t ty real art es terest," al g w th a "descr t the tra sac- t ." §§ 5314(a)(1)–(4). The law als d rects the Sec- retary t rescr be "the way a d . . . the exte t" t wh ch re rts must be led. § 5314(a).

> . . . .
>
> [T] r l van l gal du y is du y o il r por s. O c ours , os r por s mus in lud various kinds o in orma ion abou an individual's or ign " ransa - ion[s] or r la ions ip[s]." Bu w r a r por is il d la , w r a imely r por on ains on mis- ak abou "addr ss o [ ] par i ipan s in a rans- a ion," or w r a r por in lud s mul ipl will ul rrors in i s "d s rip ion o . . . ransa ion[s]," du y o supply a omplian r por is viola d. Pu an- o r way, s a u ory obliga ion is binary. Ei r on il s a r por "in way and o x n S r ary pr s rib s," or on do s no . Mul ipl will- ul rrors abou sp i i a oun s in a singl r por may on irm a viola ion o § 5314, bu v n a singl nonwill ul mis ak is noug o pos a probl m. On way or ano r, § 5314 is viola d.

Bittner, 598 U.S. a 93. In o r words, on ommi s off ns o ailur o fil und r § 5314 w n on fil s an ina ura or non- omplian FBAR. Bo indi m n and jury ins ru ions r - fl Supr m e our 's in rpr a ion o s a u .

Nor did gov rnm n 's vid n a rial ons ru iv ly c am nd oun 13 by modi ying ss n ial l m n s o off ns arg d. T gov rnm n argu d o jury and pr s n d vi- d n a Gy vay fil d a 2014 FBAR in w i " only dis los [d] on o is Swiss a oun s" bu "l off" a s ond Swiss a oun , Opo iki a oun , on aining ov r ig million dollars. T is vid n did no broad n possibl bas s or onvi ion or c m od y the eleme ts the cr me charged the d ctme t, wh ch (aga alleged that Gyetvay filed a 2014 FBAR that a led t d scl se) e re g fi a c al acc u t. I sum, the d ctme t, the jury - struct s, a d the ev de ce rese ted at tr al all re erred t C u t 13 the same way—as charg g Gyetvay w th a lure t file a 2014 FBAR that d scl sed the O t k acc u t. There re, we c clude that there was c struct ve ame dme t here.

F r s m lar reas s, we c clude that the g ver me t d d t mater ally vary r m the allegat s la d ut the d ctme t. A mater al var a ce d ffers r m a c struct ve ame dme t that a var a ce " ccurs whe the charg g terms the d ctme t are le t u altered, but the ev de ce ffered at tr al r ves acts mater - ally d ffere t r m th se alleged the d ctme t." *United States v. Salinas*, 654 F.2d 319, 324 (5th C r. U t A 1981 , *overruled in part on other grounds by United States v. Adamson*, 700 F.2d 953 (5th C r. 1983 . Th s C urt has ex la ed that "[a] atal var a ce ex sts ly 'where the ev de ce at tr al r ves acts *different* r m th se alleged the d ctme t, as sed t acts wh ch, alth ugh t s ec fically me t ed the d ctme t, are e t rely c s ste t w th ts allega- t s.'" *Goldstein*, 989 F.3d at 1198–99 (qu t g *United States v. Champion*, 813 F.2d 1154, 1168 (11th C r. 1987 . A var a ce the r just fies reversal ly where the de e da t has bee "substa - t ally rejud ced thereby," *Flynt*, 15 F.3d at 1005; that s, whe the ev de ce rese ted at tr al "affect[ed] a substa t al r ght the accused," *Gonzalez*, 661 F.2d at 492.)

Gy vay argu s a gov rnm en "pr judicia y vari d l oun 13" b caus vid nc a ria "s ow[d] a Gy vay im y fi d is 2014 FBAR," w r as indic m en c arg d "Fai - ur o Fi ." Bu im ein ss o Gy vay's 2014 FBAR is imma- ria , as indic m en c arg d Gy vay, in oun 13, wi ai ur l o fi an FBAR *"disclosing that he had a financial interest in, and signature and other authority over, a bank, securities, and financial account in a foreign country* . . . o wi , Opo iki accoun " (mp asis add d). As Gy vay ims s us, gov rnm en argu d a ria a Gy vay fi d a d fici n FBAR a disc os d on y on o is Swiss bank accoun s, w i aving off Opo iki accoun . In- d d, Gy vay conc d s a , w n fi ing ou is 2014 FBAR, in n iona y "omi d Opo iki accoun " b caus "[ran] ou o b ank fi ds" on orm. We us r j c a vid nc o- r d a ria prov d ac s ma ria y diff r n rom os a g d in indic m en . *See Goldstein*, 989 F.3d a 1198–99. T r or , w n d no r ac w r Gy vay was subs an ia y pr judic d, b - caus r was no ma ria varianc r . *See United States v. Seher*, 562 F.3d 1344, 1366 (11 ir. 2009) ("On y a r making finding o ma ria varianc do w n d o xamin w r varianc subs an ia y pr judic d d ndan .").

In sum, w conc ud a gov rnm en n i r cons ruc- iv y am end d nor ma ria y vari d rom a ga ions con- ain d in oun 13 o sup rs ding indic m en . l

D. Sentencing Err rs

Lastly, Gyetvay argues that the d str ct c urt c mm tted a o var ety err rs at se te c g, clud g calculat g h s gu de- l e ra ge a d rder g h m t ay $4,021,074 rest tut .

1. Releva t C duct

We beg w th the gu del e ra ge. As backgr u d, Gyetvay's gu del e ra ge was calculated us g U.S.S.G. § 2S1.3, wh ch c rres ds t C u t 13 as the ffe se c v ct (a lure t file a 2014 FBAR v lat 31 U.S.C. §§ 5314 a d 5322(a)).[7] Sect 2S1.3 the Se te c g Gu del es d rects the se te c g c urt t ass g t the de e da t a base level "6 lus the umber ffe se levels r m the table § 2B1.1 (The t, Pr erty Destruct , a d Fraud) c rres d g t the value the u ds" the de e da t's u re rted re g acc u ts. § 2S1.3(a)(2). Here, the PSI

---

[7] Gyetvay's ur c u ts c v ct were gr u ed t gether u der U.S.S.G. § 3D1.2, wh ch r v des that "[a]ll c u ts v lv g substa t ally the same harm shall be gr u ed t gether t a s gle Gr u ." "C u ts v lve substa t ally the same harm w th the mea g th s rule . . . . [w]he the - e se level s determ i ed largely the bas s the t tal am u t harm r l ss, the qua t ty a substa ce v lved, r s me ther measure aggregate harm, r the e se behav r s g g r c t u us ature a d the e se gu del e s wr tte t c ver such behav r." *Id.* § 3D1.2(d). "I the case c u ts gr u ed t gether ursua t t § 3D1.2(d), the e se level a - l cable t a Gr u s the e se level c rres d g t the aggregated qua - t ty, determ i ed acc rda ce w th Cha ter Tw a d Parts A, B a d C Cha ter Three." *Id.* § 3D1.3(b). "Whe the c u ts v lve e ses the same ge eral ty e t wh ch d ere t gu del es a ly," the se te c g c urt a l es the e se gu del e that r duces the h ghest e se level. *Id.* o

d rmin d a Gy vay "did no fil FB R's [sic] or 2005 roug 2007 and fil d un im dy FB R's [*sic*] or 2008 roug 2013, [so] A os unds ar also b ing consid r d." T PSI calcula d "valu o unds" as sum o (1) " ig balanc " o unr por d Opo iki accoun in 2014 ($8.7 million), and (2) combin d valu o unr por d Opo iki and F licis accoun s in 2013, w n ir combin d valu was ig s ($93.4 million). T o al valu o unds a ribu abl o FB R viola ions was us $102,112,774, incr asing Gy vay's bas off ns l v l o 30.[8] T dis ric cour ound a PSI corr c ly calcula d guid lin s, oug i impos d a b low-guid lin s s n nc o 86 mon s.

On app al, Gy vay argu s a PSI and dis ric cour rr d in including larg r $93.4 million sum— combin d valu o unr por d Opo iki and F licis accoun s in 2013—in is s n ncing-rang calcula ion. Gy vay argu s a was only "convic d o no disclosing Opo iki accoun in is 2014 FB R," so dis ric cour s ould no av consid r d valu o is unr por d accoun s in 2013, including " all g dly muc larg r valu o F licis accoun ," w n calcula ing o al "valu o unds" und r § 2S1.3(a)(2).

---

[8] Gy vay's bas o ns l v l was n incr as d by wo l v ls b caus "( ) A was convic d o an o ns und r subc ap r II o c ap r 53 o i l 31, Uni d S a s od ; and (B) commi d A o ns w il viola ing ano r law o Uni d S a s or as par o a pa rn o unlaw ul ac ivi y involving mor an $100,000 in a 12-mon p riod." U.S.S.G. § 2S1.3(b)(2)(B).

We rev ew the r cedural reas able ess a se te ce, wh ch cludes whether the gu del e ra ge was r erly calcu- lated, u der a abuse- -d scret sta dard *United States v. Register*, 678 F 3d 1262, 1266 (11th C r 2012) "A d str ct c urt abuses ts d scret t a l es a c rrect legal sta dard, ll ws m pr er r cedures mak g the determ i at , r makes fi d gs act that are clearly err e us " *Id* (ter al qu tat s m itted) Se - te c g bject s t ra sed be re the d str ct c urt are rev ewed a eal r la err r *United States v. Siegelman*, 786 F 3d 1322, 1330 (11th C r 2015) With res ect t se te c g-gu del e ssues, th s C urt rev ews a d str ct c urt's actual fi d gs r clear err r, a d, m ost cases, a d str ct c urt's a l cat the gu del es t the acts w th due de ere ce *United States v. Rodriguez-Lopez*, 363 F 3d 1134, 1136–37 (11th C r 2004) Whether a act qual fies as rel- eva t c duct u der U S S G § 1B1 3 s a quest act rev ewed r clear err r *Siegelman*, 786 F 3d at 1332

U der § 1B1 3 the Gu del es, a d str ct c urt must "c - s der all releva t c duct whe determ i g the de e da t's t tal ffe se level " *United States v. Bradley*, 644 F 3d 1213, 1296 (11th C r 2011) "[R]eleva t c duct s br adly defi ed t clude b th u - charged a d acqu tted c duct that s r ve at se te c g by a re dera ce the ev de ce " *Siegelman*, 786 F 3d at 1332 U - der § 1B1 3, releva t c duct cludes "all acts a d m ss s c m- m tted, a ded, abetted, c u seled, c mma ded, duced, r cured, r w ll ully caused by the de e da t," as well as "all reas ably re- seeable acts a d m ss s thers urthera ce " j tly u - dertake cr m i al act v ty, "that were art the same c urse .

conduc or common sc m eor plan as off ns o convic ion." § 1B1.3 a) 1)– 2). "B caus § 1B1.3 calls or a ac ual finding a (c r ain conduc is 'r l van ' o off ns o convic ion, . . . a s n- ncing cour s ould mak xplici r l van -conduc findings in or- d r o acili a app lla r vi w." *Siegelman*, 786 F.3d a 1331. "[H]ow v r, a dis ric cour 's ailur o mak suc xplici findings do s no pr clud app lla r vi w—and r or do s no war- ran r v rsal—'w r cour 's d cisions ar bas d on cl arly id n ifiabl vid nc .'" *Id.* quo ing *Bradley*, 644 F.3d a 1293).

In c all nging dis ric cour 's inclusion o F licis unds in i s § 2S1.3 a) 2) calcula ion, Gy vay rais s wo s para bu r - la d argum n s on r l van conduc . On , Gy vay argu s a dis ric cour ail d o mak " xplici r l van -conduc find- ings." T a is, according o Gy vay, dis ric cour rr d by no xplici ly xplaining w y Gy vay's r por ing ailur s rom 2005 o 2013 w r "r l van conduc " und r § 1B1.3. Two, Gy vay argu s a is pas la filings and non-filings w r no , in ac , r l van (conduc . B caus is "pas FBAR non-filings w r no r l van o calcula ing guid lin s rang on oun 13," r asons, dis- ric cour rr d in "p rmi [ing] addi ion o [$93.4] million o purpor d loss amoun ," w ic incr as d is guid lin rang by our o fiv y ars.

We b gin wi Gy vay's con n ion a dis ric cour rr d in no xplici ly finding a is non-disclosur o F licis accoun up un il 2014 qualifi d as r l van conduc . T is issu is r vi w d or plain rror b caus Gy vay "did no obj c o (

d str ct c urt's a lure t ex la why [h s r r re rt g a lures] ual fied as releva t c duct" bel w.[9] *Siegelman*, 786 F.3d at 1330. q

We c clude that the d str ct c urt d d t la ly err. Wh le the d str ct c urt d d t ex ressly art culate why t elt Gyetvay's r r re rt g a lures c u ted as "releva t c duct" u der § 1B1.3, we k w exactly r m what ev de ce the d str ct c urt reached ts c clus . Dur g the se te c g hear g, the c urt re ere ced the " re g ba k acc u t re rt table" at aragra h 25 the PSI, wh ch la d ut the h gh bala ces the O t k a d Fe- l c s acc u ts r m 2005 t 2014. Th s table c rres ded t IRS Age t C llee Ra aha 's gra h the a ual h gh bala ces th se acc u ts ver the same er d, wh ch was ubl shed at tr al a d d scussed exte s vely d rect exam i at . The c urt als asked the g ver me t t ex la aragra h 45 the PSI, wh ch d scussed the "t tal value u ds attr butable t FBAR v la- t s." The g ver me t walked thr ugh ts calculat s, wh ch were aga su rted by the ev de ce tr duced at tr al. A ter c s der g Gyetvay's argume ts at se te c g, the d str ct c urt

[9] Gyetvay s sts that he d d bject t the PSI's use the Fel c s bala ce t calculate the aggregate sum the u ds a d the gu del e ra ge. Gyetvay als stated h s t ce u res lved bject s t the PSI that "[t]he u ds v lved the re rt g c duct r wh ch Mr. Gyetvay was c v cted ca ly v lve the u ds the O t k acc u t wh ch was t t mely re rted." But these bject s were d rected t ward the d str ct c urt's ult mate clu- s Fel c s u ds ts § 2S1.3 calculat , t the d str ct c urt's a lure t make actual d gs. Where a arty d d t bject t the d str ct c urt's " a l- q ure t ex la why" certa c duct ual ed as releva t c duct, ur rev ew that ssue s r la err r ly. *Siegelman*, 786 F.3d at 1330.

s a d a i ad " ard vid nc a rial," and i fo nd a vid nc s ppor d "fac al ass r ions" in PSI " y pr - pond ranc of vid nc a a minim um."

B ca s i is cl ar o s w a vid nc dis ric co r r - li d pon in calc la ing i s s n nc , dis ric co r did no plainly rr y failing o provid an xplici r l van -cond c xpla- na ion. *See Siegelman*, 786 F.3d a 1331; *Bradley*, 644 F.3d a 1293 (finding "no rror, m c l ss plain rror, in dis ric co r 's fail- r o mak sp cific fac al findings" ca s w co ld " asily d - rmin on w ic vid nc co r r li d, and w r q ir no - ing mor "). T r for , r v rsal is no warran d on is asis.

T n x q s ion is w r Gy vay's r por ing fail r s w n 2005 and 2013 w r , in fac , r l van cond c s c a $93.4 million s o ld av n add d o val of f nds, incr asing Gy vay's as off ns l v l o 30. Gy vay arg s a PSI and dis ric co r w r wrong o consid r is arli r n im ely filings and is fail r o disclos F licis acco n from 2008 o 2013 as r l van cond c for p rpos s of o n 13, w ic c arg d Gy vay wi fail r o fil an acc ra 2014 FBAR. Gy - vay's 2014 FBAR did disclos F licis acco n . Upon r vi w, w do no ink dis ric co r cl arly rr d in adop ing PSI's "r l van cond c " d rmina ion.

As d fin d y S n ncing G id lin s, r l van cond c incl d s, "wi r sp c o off ns s of a c arac r for w ic § 3D1.2(d) wo ld r q ir gro ping of m l ipl co n s," "all ac s and omissions . . . a w r par of sam eco rs of cond c or b c mm o scheme r la as the ffe se c v ct ."[10] § 1B1.3 a) 2). The PSI cludes a sect ex la g why Gyetvay's "u t mely 2008–2013 FBARs are releva t c duct r the [c] urt's c s derat ." The PSI determ i ed that Gyetvay's "earl er w ll ul a lures t file FBARs [were] a r r ate releva t c duct" u der b th the r es me t ed the Se te c g Gu del es. O the e ha d, the PSI determ i ed that "[t]he c u t c v ct a d the earl er a lures t d scl se were art a c mmo scheme r la g ve the c mm v ct m the De artme t Treasury) a d the c mm o ur se the ffe se c ceal g re g ba k ac- c u ts)." O the ther, the c duct r ve C u t 13 a d Gyet- vay's r r re rt g a lures "were als art the same c urse c duct," s ce Gyetvay "c s ste tly a led t d scl se h s Sw ss

---

[10] The c mme tary tes t the Gu del es state that e ses rm the same c urse c duct " they are su c e tly c ected r related t each ther as t warra t the c clus that they are art a s gle e s de, s ree, r g g ser es e ses." § 1B1.3 a) 2) cmt. .5 B)). The c mme tary tes add that e ses ca als rm the same scheme r la they are "sub- sta t ally c ected t each ther by at least e c mmo act r, such as c m- m o v ct ms, c mmo acc m pl ces, c mmo ur se, r s m lar m odus - era d ." *Id.* at cmt. .5 B)). Further, "[t]he ature the e ses may [ ] be a releva t c s derat ," such that "a de e da t's a lure t le tax retur s three c secut ve years a r r ately w uld be c s dered as art the same c urse c duct because such retur s are ly requ red at yearly tervals." *Id.* at cmt. .5 B)). But we d t "de er" t the c mme tary r a l cat tes here because we d t d the text § 1B1.3 a) 2) t be "ge u ely amb gu us." *See United States v. Dupree*, 57 F.4th 1269, 1274 11th C r. 2023) e ba c).

bank accoun s," and "[ ]is ac ions ar b s s n as on con inuin a mp o id s accoun s."

We canno say dis ric cour cl arly rr d in adop in is d rmina ion. T ov rnm en in roduc d vid nc a Gy - vay n v r fil d FBARs or cal ndar y ars 2005–2007 and ail d o im ly fil FBARs or cal ndar y ars 2008–2013. T ov rnm en also pr s n d vid nc a Gy vay did no im ely fil incom e ax r urns b w n 2005 and 2014. Gy vay's couns l acc p d, in closin , a Gy vay's "r urns w r la -fil d," and Gy vay now admi s a "did no fil im ely ax r urns or FBARs rom 2008 o 2013." Addi ionally, jury ard rom Al x Kni , on o Gy vay's accoun an s, w o a s d a is firm advis d Gy vay in 2010 "o is obli a ion o fil [FBAR] orms or pas y ars, bu [Gy vay] dismiss d our r commenda ion and did no fil suc orms or y ars prior o 2010." Kni also s ifi d a Gy vay old Kni 's firm a ad only on or i n bank accoun wi a balanc ov r $10,000, w ic Gy vay now acknowl d s was als , as is "F licis accoun w n undisclos d un il 2014 FBAR." T is vid nc indica s a Gy vay conc al d millions o dollars rom IRS or y ars a a im e T vid nc pr s n d a rial us suppor s—a l as by a pr pond ranc —t a Gy vay's r - por in ailur s rom 2005 o 2013 w r subs an ially conn c d o is r por in ailur in 2014 rou a common vic im (U.S. D par m en o Tr asury) and a common cours o conduc .

T vid nc also suppor s findin a Gy vay's r - por in ailur s rom b or 2014 ad a common purpos wi is g a lure t re rt the O t k acc u t h s 2014 FBAR: t c ceal ta able m o ey Sw ss ba k acc u ts. The g ver me t sh wed, x r sta ce, that a ter Gyetvay cl sed h s acc u ts at C utts (wh ch were deemed by C utts t be " t ta c m pl a t"), he e ed ew acc u ts at Hy sw ss, th s t me l st g h s the -w e, Nadezda Gavr l va—a Russ a c t ze —as the be efic al w er the O t k a d Fel c s acc u ts. Gavr l va test fied at tr al that she layed r le the fi a ces the h useh ld, a d that she had "deal gs w th a y re g ba k acc u ts at all." She urther test fied that she "d d 't k w" that she was l sted as a w er re g ba k acc u ts. D uglas M ller, wh w rked w th Gyetvay at Pr ceWaterh useC ers, test fied that, Russ a, the r cess by wh ch vest rs " w the r shares thr ugh c m pl cated structures," clud g by ass g g "be efic al w ersh " t thers, s carr ed ut art t "d sgu se" assets. Based ur rev ew th s ev de ce a d ther ev de ce the rec rd, we d t th k the c urt clearly erred fi d g that the PSI's releva t-c duct determ i at was adequately sh w by a re dera ce the ev de ce.

Gyetvay s sts that h s " r r a lures t file FBARs" are t releva t c duct because h s 2014 FBAR, "u l ke r r -fil gs, [ ] d scl sed the Fel c s acc u t." But the quest s whether Gyetvay's r r -d scl sure re g acc u ts, art cularly 2013, s releva t t h s -d scl sure the O t k acc u t 2014— a d the ev de ce su rts *that* fi d g by a re dera ce. We w ll t fi d clear err r u less we are le t w th the defi te a d firm c v ct that a m stake has bee made. *United States v. White*, 335 x

F.3d 1314, 1319 (11 ir. 2003). We us conc ud a dis ric cour did no c ar y rr in r a ing Gy vay's pr -2014 r por ing l ai ur s as r van conduc b caus i "is p ausib in ig o r cord vi w d in i s n ir y" a Gy vay's ai ur o r por or- ign accoun s b w n 2005 and 2013 and is ai ur o r por Opo iki accoun on is 2014 FBAR w r par o sam ecommon sc m e, p an, or cours o conduc . *See Siegelman*, 786 F.3d a 1333 (ci ing *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

2. <u>Va ua ion o Unr por d Accoun s</u>

Gy vay argu s a , "apar rom w r F icis ac- coun 's va u s ou d av b n consid r d a a , dis ric cour ai d o consid r accoun 's prop r va ua ion." Gy vay's - ory is a dis ric cour ov rva u d unds in F icis ac- coun b caus F icis accoun con ain d Nova k s ock, and, according o Gy vay, Nova k s ock is "no v ry iquid." Gy vay, r or , urg s us o vaca is s n nc b caus dis ric cour ai d o ca cu a s ock's air mark va u .

T dis ric cour did no c ar y rr in adop ing PSI's va ua ion o F icis accoun b caus gov rnm en suppor d i s ca cu a ion wi "r iab and sp cific vid nc ." *United States v. Sepulveda*, 115 F.3d 882, 890 (11 ir. 1997). Und r § 2B1.1(b)(1), "[ ] dis ric cour is p rmi d o bas i s oss d rmina ion on ac ua findings d riv d rom, 'among o r ings, vid nc ard during ria , undispu d s a m en s in PSI, or vid nc pr - s n d during s n ncing aring.'" *Bradley*, 644 F.3d a 1290 (quo ing *United States v. Polar*, 369 F.3d 1248, 1255 (11 ir. 2004)). l

"The d str ct c urt eeds ly t make a reas able est mate the l ss am u t " *United States v. Medina*, 485 F 3d 1291, 1304 (11th C r 2007)

Here, the PSI der ved ts calculat the c mb ed values the O t k a d Fel c s acc u ts us g IRS Age t Ra aha 's calculat s Age t Ra aha test fied a d ex la ed that she c - ducted her a alys s by rev ew g Gyetvay's ba k stateme ts a d add g u all the assets Age t Ra aha walked thr ugh her "gra h the a ual h gh bala ce the O t k a d Fel c s acc u ts" w th the jury She urther test fied that the h ghest figure— r 2013—was $93,412,774 Gyetvay h msel came u w th the same figure h s late-filed 2013 FBAR I l ght th s ev de ce a d test m o y, we ca t say that the d str ct c urt clearly erred ad t g the PSI's valuat the Fel c s acc u t, because "the umbers a d the calculat s themselves were suffic e tly s e- c fic," a d "there s d cat that t was u rel able " *Bradley*, 644 F 3d at 1292 Gyetvay has t subm tted r that the g ver - me t's "averages, est mates, r results are s w ldly accurate as t be u reas able " *Id* A d " e ther th s [C] urt r the Gu de- l es s st that d str ct c urts calculate the am u t l ss w th ut- m st rec s ; the Gu del es merely requ re the d str ct c urt t reach a reas able est mate the l ss am u t " *Id* at 1290 The ev de ce at tr al a d the PSI's ar thmet c were suffic e tly reas a- ble th s case .

3. R s i u ion

Finally, Gy vay argu s a is ric cour cl arly rr in or ring im o pay $4,021,074 in r s i u ion o IRS. We r vi w *de novo* l gali y o a r s i u ion or r, w il w r vi w a ac ual fin ing r gar ing sp cific amoun o r s i u ion or cl ar rror. *United States v. Huff*, 609 F.3 1240, 1247 (11 ir. 2010).

T Man a ory Vic ims R s i u ion Ac ("MVRA") r quir s r s i u ion or an "off ns agains prop r y." 18 U.S. . § 3663A(c)(1)(A)(ii). For an off ns o quali y un r is provision, "[p]rop r y . . . mus s rv as obj c o off ns , no simply a colla ral compon n ." *United States v. Collins*, 854 F.3 1324, 1331 (11 ir. 2017). T is inclu s si ua ions w r a n an "in n s o amag ano r's prop r y" or "s ks o riv an unlaw ul b n fi rom ano r's prop r y or o rwis priv a p rson o is prop r y." *Id.* riminal con uc o s no au oma ically quali y as an off ns agains prop r y "sol ly b caus i r sul s in prop r y amag or b caus som on suff rs a loss a som e poin ur ing i s x cu ion." *Id.* a 1331–32. Wh n a is ric cour or rs r s i u ion, i "mus xplain i s fin ings wi suffici n clari y o n abl is cour o a qua ly p r orm i s unc ion on app lla r vi w." *Huff*, 609 F.3 a 1248; *see also* 18 U.S. . § 3664( ) ("Any is pu as o prop r amoun or yp o r s i u ion s all b r solv by cour by pr pon ranc o vi nc .").

Gy vay was convic o oun 12 o sup rs ing in ic m n , w ic c arg im wi will ully making als s a m n s on is IRS S r amlin Proc ur s c r ifica ion, in viola ion d

18 U.S.C. §§ 1001 a d 2. Acc rd g t the PS , th s c v ct requ red ma dat ry rest tut "because Gyetvay's alse state- I me ts resulted h m av d g ther e alt es, t tal g $2,813,382, exclud g terest." Add g terest the sum $1,207,692 t the u derly g l ss am u t, the PS r v ded a t tal rest tut figure $4,021,074. Gyetvay bjected t b th the legal bas s r rest tu- t a d the am u t m p sed, argu g that the MVRA "d es t a ly . . . because the c v ct C u t Twelve s t a ' ffe se aga st r erty.'" With ut ex la at , the d str ct c urt ad ted the PS 's figure a d rdered Gyetvay t ay $4,021,074 rest tu- t t the RS.

O a eal, Gyetvay aga argues that h s c v ct u der C u t 12 "ca t su rt rest tut " because the d str ct c urt ever u d that that c v ct was a ffe se aga st r erty. He adds that the d str ct c urt ever made fi d gs that he "ha[d] the g al caus g r erty l ss" t the g ver me t, r that the r erty l ss was a yth g ther tha c llateral r c de tal.

We agree w th Gyetvay th s t: The d str ct c urt r - v ded ex la at r the rest tut am u t be g $4,021,074. Th s C urt has held that a d str ct c urt must make rest tut fi d- gs w th e ugh clar ty t substa t ate a ellate rev ew. *Huff*, 609 F.3d at 1248; *see also United States v. Singleton*, 649 F.3d 1212, 1222 (11th C r. 2011) ("T e able mea g ul a ellate rev ew, a d str ct c urt's calculat rest tut must be su rted by s ec fic ac- tual fi d gs."). Here, the d str ct c urt d d t r v de a s gle actual fi d g t su rt ts rest tut figure, much less address I

Gy vay's obj c ion and xplain y oun 12 coun s as an off ns agains prop r y, as oppos d o an off ns " i only incid n al w prop r y loss." *Collins*, 854 F.3d a 1332.

I may ll b ru a obj c o Gy vay's off ns o making als s a m en s on is S r amlin d Proc dur s c r ifica- ion, in viola ion o § 1001, as o in n ionally d priv IRS o prop r y in orm o ax dollars, as gov rnm en posi s. Bu dis ric cour did no mak a finding, nor do s gov rn- m en say i did. B caus dis ric cour gav us no ac ual find- ings o consid r on qu s ion o w r prop r y s rv d as "obj c o off ns " in oun 12, *see id.* a 1331, "[ ] only cours op n o us . . . is o vaca [r s i u ion] ord r and r mand cas or dis ric cour o corr c i s ov rsig ," *United States v. Maurya*, 25 F.4 829, 837 (11 ir. 2022); *see also Huff*, 609 F.3d a 1248–49 (vaca ing r s i u ion ord r and r manding or a lim- i d r s n ncing on sol issu o amoun o r s i u ion b - caus dis ric cour "did no mak sp cific ac ual findings o vic ims' ac ual loss s, as r quir d by § 3664").[11] Accordingly, vaca r s i u ion a ard and r mand on is issu .

---

[11] In a no ic o suppl m en al au ori y, Gy vay argu s a *United States v. Schwarzbaum*, 114 F.4 1319 (11 ir. 2024) s o s a r s i u ion im- pos d in is cas as improp rly puni iv ra r an prop rly r m edial. In *Schwarzbaum*, ld a " FBAR p nal y is a in subj c o Eig Am endm en 's Exc ssiv Fin s laus ." 114 F.4 a 1334. Ho v r, civil FBAR p nal y is no a issu in is cas , so d clin o x nd *Schwarzbaum*'s w olding r .

III. CONCLUSION

F r the reg g reas s we affirm Gyetvay's c v ct s C u ts 12 a d 13 reverse Gyetvay's c v ct s C u ts 10 a d 11 vacate h s se te ce a d rema d t the d str ct c urt r rese te c g. Add t ally we vacate the rest tut rder a d d - rect the d str ct c urt t rec s der the ssue rest tut ac- c rda ce w th th s .

AFFIRMED IN PART; REVERSED IN PART; VACATED AND REMANDED IN PART.

,