Criminal Tax Manual

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40.00 TAX DEFIERS (also known as illegal tax protesters)[1]

40.01 GENERALLY

Over the past fifty years, tax defiers have advanced frivolous arguments and developed numerous schemes to evade their income taxes and frustrate the Internal Revenue Service, under the guise of constitutional and other meritless objections to the tax laws.[2] Individuals who merely express dissatisfaction with the income tax system are not criminally prosecuted. However, the right to freedom of speech is not so absolute as to protect conduct that otherwise violates or incites a violation of the tax laws. ***United States v. Citrowske,*** 951 F.2d 899, 901 (8th Cir. 1991); *see also* ***United States v. Fleschner,*** 98 F.3d 155, 158-159 (4th Cir. 1996) (denying instruction on First Amendment defense where defendants' "words and acts were not remote from the commission of the criminal acts"); ***United States v. Kuball,*** 976 F.2d 529, 531 (9th Cir. 1992) ("First Amendment does not protect those who go beyond mere advocacy and assist in creation and operation of tax evasion schemes.")

Tax defier schemes range from simply failing to file tax returns, to concealing financial transactions and assets in warehouse banks and trusts, to filing frivolous liens to interfere with IRS investigations. These schemes give rise to charges under all of the criminal tax statutes. Thus, this chapter should be read in conjunction with those chapters of this Manual that discuss the various substantive offenses in detail. *See* Chapters 8.00 through 25.00, *supra*.

[1] The IRS Restructuring Act of 1998, Section 3707, precludes the IRS from labeling a taxpayer as an "illegal tax protester" or using any other similar designation. The Department of Justice is not included in this legislation, and the preclusion therefore does not apply to it. Prosecutors, however, should be careful not to elicit from an IRS employee testimony characterizing a person as an "illegal tax protester" or a similar designation.

[2] The IRS has published guidance describing and rebutting frivolous arguments taxpayers have used. *See The Truth About Frivolous Tax Arguments* (February 16, 2012) at http://www.irs.gov/pub/irs-utl/friv_tax.pdf.

40.02 SCHEMES

40.02[1] Paper Terrorism

40.02[1][a] Harassment Schemes

Tax defiers have employed various schemes designed to harass IRS employees and agents, as well as prosecutors and judges, and to interfere with audits and criminal investigations. An early harassment scheme involved filing with the IRS false Forms 1099 reporting that an IRS agent, judge, or prosecutor had been paid large amounts of money. This scheme was designed to trigger an IRS audit during which the Form 1099 recipient would have to explain the discrepancy between the income reported on his or her return and that reported on the Form 1099. *See, e.g.*, ***United States v. Van Krieken***, 39 F.3d 227, 228 (9th Cir. 1994); ***United States v. Citrowske***, 951 F.2d 899, 900 (8th Cir. 1991).

Form 1099 schemes have been prosecuted under a variety of criminal tax statutes. *See, e.g.*, ***United States v. Bowman***, 173 F.3d 595, 600 (6th Cir. 1999) (26 U.S.C. § 7212(a) is appropriate charge in Forms 1099/1096 scheme); ***United States v. Winchell,*** 129 F.3d 1093, 1098-99 (10th Cir. 1997) (26 U.S.C. §§ 7212(a) and 7206(1)); ***United States v. Heckman,*** 30 F.3d 738 (6th Cir. 1994) (discussing application of sentencing guidelines in Form 1099 scheme charged under 26 U.S.C. § 7206(1)); ***United States v. Dykstra***, 991 F.2d 450 (8th Cir. 1993) (26 U.S.C. §§ 7206(1) and 7212(a)); ***United States v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992) (filing false tax forms 1096 or 1099 with IRS prosecuted under 26 U.S.C. § 7206(1)); ***United States v. Kuball***, 976 F.2d 529, 530-531 (9th Cir. 1992) (26 U.S.C. §§ 7206(1) and 7212(a)); ***United States v. Parsons***, 967 F.2d 452, 453-454, 456 (10th Cir. 1992) (18 U.S.C. §§ 287 and 1001); ***United States v. Hildebrandt***, 961 F.2d 116, 117 (8th Cir. 1992) (18 U.S.C. § 1001); ***United States v. Yagow***, 953 F.2d 423, 424 (8th Cir. 1992) (26 U.S.C. §§ 7206(1) and 7212(a)); ***United States v. Citrowske***, 951 F.2d 899, 900 (8th Cir. 1991) (18 U.S.C. § 1001); ***United States v. Telemaque***, 934 F.2d 169, 170 (8th Cir. 1991) (18 U.S.C. § 371).

A resurrection of the so-called "Redemption" scheme in the late 1990s and early 2000s involved the filing of false Forms 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business), Forms 4789 (Currency Transaction Reports (CTRs)),

and Suspicious Activity Reports (SARs) for harassment purposes.[3] Forms 8300 are IRS reporting forms covered by the confidentiality provisions of 26 U.S.C. § 6103.[4] Forms 4789 and SARs are Financial Crimes Enforcement Network (FinCEN) documents not subject to tax information confidentiality requirements.

Essentially, the "Redemption" scheme involves filing one of these forms with the IRS to report that a large amount of cash, sometimes foreign currency, was paid to the named recipient. IRS agents, federal and state prosecutors and judges, state troopers, and private creditors are often targeted. Typically, the tax defier will send his or her victim an IRS Form W-9, requesting a Social Security number. Even without the target's Social Security number, the tax defier will file the Form 8300, which often triggers a letter to the target from the IRS, or other contact, in which the IRS requests additional information and warns of possible penalties for incomplete information. More recently, tax defiers have used IRS Forms 1099-OID (Original Issue Discount) rather than Forms 1099-Misc to harass IRS employees, prosecutors, and judges. IRS Criminal Investigation (CI) investigates such false document filings involving non-IRS employees, while Treasury Inspector General for Tax Administration (TIGTA) has jurisdiction over filings against IRS personnel. All cases, whether investigated by CI or TIGTA, require authorization for prosecution from the Tax Division.

There are several ways to prosecute these schemes. First, the prosecutor should determine whether the tax defier has attempted to pass any fraudulent sight drafts or other fictitious financial instruments. This inquiry may require consultation with other federal law enforcement agencies, such as the U.S. Secret Service and/or the Federal Bureau of Investigation. If the tax defier has filed false Forms 8300 or Forms 1099 *and* used fictitious financial instruments, the prosecutor should consider charging the fictitious financial instrument(s) under 18 U.S.C. § 514[5] (*see* § 40.02[1][b], *infra*), using the false

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[3] Typically, perpetrators of the "Redemption" scheme filed these forms in conjunction with filing bogus financial instruments, entitled "sight drafts" or "bills of exchange." *See* § 40.02[1][b], *infra*.

[4] Section 6103(l)(15) authorizes the Secretary of Treasury, upon written request, to disclose to officers and employees of any federal agency, any agency of a State or local government, or any agency of the government of a foreign country, information contained on Forms 8300, on the same basis, and subject to the same conditions, as apply to disclosures of information on reports filed under 31 U.S.C. § 5313, except that no disclosure shall be made for purposes of the administration of any tax law.

[5] Section 514 essentially punishes anyone who, with the intent to defraud, uses a fictitious instrument appearing to be an actual security or financial instrument.

Forms 8300 or 1099 as evidence of intent. If the tax defier has filed a large number of false Forms 8300 or 1099, 26 U.S.C. § 7212(a) is a possible charge. *See, e.g.*, ***United States v. Pansier***, 576 F.3d 726 (7th Cir. 2009); ***United States v. Saldana***, 427 F.3d 298, 301-02 (5th Cir. 2005) (convictions under § 7212 and 18 U.S.C. § 1001 for two defendants who, respectively, filed with the IRS 12 and 16 Forms 8300 that targeted various individuals who were connected with state or federal government). On plain error review, the Fifth Circuit held that a defendant acts "corruptly" under § 7212 by seeking an unlawful advantage or benefit for oneself or another, and it *need not* be with regard to the tax laws. *Id.* at 304-05. Because Forms 8300 are signed under penalties of perjury, they may also be charged as violations of 26 U.S.C. § 7206(1). Forms 4789 and 1099 and SARs do not contain jurats (text regarding the filer's signing under penalties of perjury), so they cannot form the bases for Section 7206(1) charges.

In some cases, it may be best to simply use the false Forms 8300 or 1099 as evidence to support an obstruction enhancement at sentencing. *See, e.g.*, ***United States v. Veral Smith***, 3:99-CR-00025 (D. Idaho 2000) (district court considered false Forms 8300 filed against prosecutors and judge as evidence supporting obstruction enhancement).

Tax defiers have also filed frivolous liens against the property of federal employees to harass them, or have employed similar acts of interference. The tax defier files with the local county recorder a lien against the federal employee's real property for a large amount of money. The purpose of the lien is to encumber the property. This tactic is designed to disrupt IRS audits and investigations by personally targeting the financial affairs of IRS personnel involved in the tax defier's case. The tax obstruction statute, 26 U.S.C. 7212(a), may be a viable charge in this kind of case. *See, e.g.*, ***United States v. McBride***, 362 F.3d 360, 372-373 (6th Cir. 2004) (conviction under § 7212 for filing a false petition for IRS employee's involuntary bankruptcy); ***United States v. Boos,*** Nos. 97-6329, 97-6330, 1999 WL 12741, at *1-2, 8 (10th Cir., Jan. 14, 1999) (conviction under 18 U.S.C. § 372 and 26 U.S.C. § 7212(a)); ***United States v. Gunwall***, Nos. Nos. 97-5108, 97-5123, 1998 WL 482787 (10th Cir., Aug. 12, 1998); ***United States v. Bowman***, 173 F.3d 595, 600 (6th Cir. 1999) (upholds § 7212(a) conviction for false 1096, 1099s); ***United States v. Trowbridge***, Nos. 96-30179, 96-30180, 1997 WL 144197, at *2 (9th Cir., Mar. 26, 1997); ***Kuball***, 976 F.2d at 531 (upholding Section 7212(a) conviction for sending threatening letters to IRS employees); ***United States v. Reeves***, 782 F.2d 1323, 1326 (5th Cir. 1986) (upholding Section 7212(a) conviction for filing false liens against IRS agent) ("***Reeves II***").

Tax defiers also have sued agents, prosecutors, and judges, and threatened "arrest" and "prosecution" in so-called "common-law" courts. "Common-law" courts -- which have no legal standing -- are often set up by anti-government groups. In some instances, they "indict" and "convict" individuals.

"Common-law" documents -- ranging from "promissory notes," to "arrest warrants," to "criminal complaints" -- are created to resemble authentic legal documents, but are bogus documents designed to harass IRS employees. *See, e.g.*, ***United States v. Hart***, 701 F.2d 749, 750 (8th Cir. 1983); ***United States v. Knudson***, 959 F. Supp. 1180, 1185-1186 (D. Neb. 1997); ***United States v. Van Dyke***, 568 F. Supp. 820 (D. Or. 1983). Depending on the circumstances, use of the documents may give rise to 26 U.S.C. § 7212(a) charges. *See, e.g.*, ***United States v. Wells***, 163 F.3d 889, 896-97 (4th Cir. 1998); ***Reeves***, 782 F.2d at 1323, 1326. Because defendants' use of "common law" documents often begins during investigation and continues during prosecution, their use is evidence of willfulness for substantive tax charges or the basis for an obstruction of justice or other enhancement at sentencing. *See, e.g.*, ***United States v. Lindsay***, 184 F.3d 1138, 1143-1144 (10th Cir. 1999) (upholding denial of acceptance of responsibility for obstructive conduct such as filing numerous frivolous documents); ***Wells***, 163 F.3d at 894, 898-900 (upholding upward departure for "domestic terrorism" for, *inter alia*, active participation in "Freemen's court" to try IRS agents, and preparation of future harm by group).

It should be noted that the Court Security Improvements Act of 2007 provides another statute to consider when charging the filing of false liens in retaliation against federal officers or employees. *See* 18 U.S.C. § 1521 (10-year felony for retaliating against a federal judge or federal law enforcement officer by false claim or slander of title).[6]

Tax defiers have also filed frivolous lawsuits or criminal complaints against prosecutors and agents in legitimate state and federal courts. Cases based on these filings are rarely authorized for prosecution because such lawsuits and criminal complaints are difficult to distinguish from the host of frivolous cases filed in courts all the time -- thus

[6] Where a violation of 18 U.S.C. § 1521 arises under the internal revenue laws (*see* 28 CFR § 0.70), Tax Division authorization of such charges is required. It is the conduct, not the charging statute, that controls Tax Division jurisdiction.

making it difficult to overcome a defense based on the right to petition for a redress of grievances.

40.02[1][b] Fictitious Financial Instruments

For years, tax defiers have submitted bogus financial instruments to "pay" their tax liabilities and obtain erroneous IRS refunds, and to "pay" private creditors. These instruments are designed to deceive the IRS and financial institutions into treating them as authentic checks or real money orders. For example, a tax defier will submit a large bogus check to the IRS or a creditor for an amount in excess of the amount owed and request a refund of the difference. If the IRS or creditor rejects the bogus check, the tax defier may respond with threatening letters to force acceptance of the bogus payment. Over the years, these bogus financial instruments have had various titles. Early versions were entitled "Certified Money Order," "Certified Bankers Check," "Public Office Money Certificate," or "Comptroller Warrant."

Several groups have promoted the use of such bogus financial instruments. One of the earliest "bogus money order schemes" was perpetrated by an organization in Wisconsin known as "Family Farm Preservation." *See, e.g.*, ***United States v. Stockheimer,*** 157 F.3d 1082, 1084-1086. 1089-90 (7th Cir. 1998) (describing Family Farm Preservation scheme and noting that the potential loss calculation exceeded $80 million; government asserted $180 million). An organization known as "USA First" learned of the scheme and sold over 800 "Certified Money Orders" (CMOs) with a face value of $61 million. *See* ***United States v. Mikolajczyk***, 137 F.3d 237, 239-240 (5th Cir. 1998); ***United States v. Moser***, 123 F.3d 813, 818-819 (5th Cir. 1997). The Montana Freemen are perhaps the most notorious group to promote this scheme. *See, e.g.*, ***United States v. Wells***, 163 F.3d 889, 893 (4th Cir. 1998); ***United States v. Hanzlicek***, 187 F.3d 1228, 1231-1232 (10th Cir. 1999); ***United States v. Switzer***, Nos. 97-50265, 97-50293, 97-50442, 1998 WL 750914 (9th Cir. Oct. 19, 1998).

The "redemption" scheme involves the use of fictitious financial instruments, sometimes called "Sight Drafts," "Bills of Exchange," or other titles, as well as the filing of Forms 8300, 4789, and 1099 and SARs. *See* § 40.02[1][a], *supra*.

The fictitious financial obligation component of the "Redemption" scheme is based on the premise that, when the United States went off the gold standard in 1933, the government began to be funded with debt instruments secured with the energy of current

and future inhabitants. The theory is that a fictitious identity or "straw man" was created for all Americans and the value of a person's birth certificate became the collateral for United States currency. Supposedly, the value of an individual's birth certificate is determined by the number of times it is traded on the world futures market, and the amount is purportedly maintained in a Treasury Direct Account under that person's social security number.

A participant in the scheme attempts to reclaim his or her "straw man" and therefore the value of the fictitious identity by redeeming his or her birth certificate. The participant sometimes files a Form UCC-1 with the Secretary of State in any State, claiming title and a security interest in his or her social security, driver's license, and birth certificate numbers. The individual then writes "acceptance for value," "non-negotiable charge back," or other prescribed language diagonally on a government paper and returns it to the government official who issued it. Typically, the types of documents used for redemption include anything from a traffic ticket to a federal indictment. The "charge back" allegedly creates a "treasury direct account" that contains the amount assigned to the charge back, which the participant purportedly can then draw upon by writing a fictitious check. These fictitious financial obligations are then written for varying amounts, some as high as trillions of dollars. A Form UCC-3 indicating the partial release of collateral in the amount of each sight draft may be filed with the same Secretary of State who accepted the Form UCC-1.

These bogus financial instruments purport to be drawn on the United States Treasury Department. They are of very high print quality and usually contain some reference to HJR 192, the House Joint Resolution that took the United States off the gold standard in 1933.

Historically, fictitious financial instrument cases involving private creditors were prosecuted under a variety of statutes, such as

- 18 U.S.C. § 371 (Conspiracy),
- 18 U.S.C. § 1341 (Mail fraud),
- 18 U.S.C. § 472 (Uttering a false security), and
- 18 U.S.C. § 513 (Possessing and uttering a counterfeit security).

See, e.g., ***United States v. Pullman***, 187 F.3d 816, 818, 820-821 (8th Cir. 1999); ***Hanzlicek***, 187 F.3d at 1230-31; ***Wells***, 163 F.3d 892; ***Stockheimer***, 157 F.3d at 1086; ***Moser***, 123 F.3d 813.

Cases involving bogus financial instruments presented to the IRS can be prosecuted under 18 U.S.C. § 371 **(*Klein*** conspiracy), 18 U.S.C. § 287 (false claims for refunds), and 18 U.S.C. § 514 (fictitious financial obligations). To bring a false claim charge, a prosecutor should have evidence that the tax defier expected a refund from the IRS as a result of submitting the instrument. Such evidence might include (1) the tax defier's written request for a refund; (2) proof that the tax defier received an IRS notice of tax due and owing and, in response, submitted a bogus check for a significant amount over the amount owed; and (3) proof that the tax defier learned of this scheme in a seminar that advertised it would teach participants how to obtain tax refunds. Submission of a bogus financial instrument may also be used as an affirmative act of evasion (26 U.S.C. § 7201).

In 1996, Congress passed 18 U.S.C. § 514 specifically in reaction to the use of comptroller warrants. Noting that anti-government groups used fictitious financial instruments to commit economic terrorism against government agencies, private businesses, and individuals, Congress enacted Section 514 as a Class B felony, which carries a maximum prison sentence of 25 years.[7] *See* 18 U.S.C. 514(a); 142 Cong. Rec. S10155-02, S1013 (daily ed. Sept. 10, 1996). Section 514 provides in part:

> Whoever, with the intent to defraud –
>
> > (1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same, within the United States;
> >
> > (2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or
> >
> > (3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States, any false or fictitious instrument, document,

[7] *See* 18 U.S.C. § 3581(b)(2).

> or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class B felony.

Section 514 of Title 18 of the United States Code is the obvious charge when prosecuting a case involving a fictitious financial instrument. Before deciding which charges to bring in cases involving fictitious financial obligations, a prosecutor should determine how often the tax defier used a fictitious financial obligation and whether he or she also filed false Forms 8300, Forms 1099, CTRs, or SARs.

In ***United States v. Howick***, 263 F.3d 1056, 1066 (9th Cir.2001), the Ninth Circuit addressed the scope of § 514 and concluded that § 514's coverage for "false or fictitious" obligations is intended to be different from "counterfeit" obligations under 18 U.S.C. 472. Section 472 addresses bogus or counterfeit documents that appear similar to *existing* documents. ***Howick***, 253 F.3d at 1067. In contrast, § 514 encompasses a fictitious document that "bears a family resemblance to genuine financial instruments," but need not be similar to any existing financial obligation in particular. *Id*. at 1068. Moreover, while the document must contain some "hallmarks and indicia of financial obligations" so as to appear within the family, the "likeness" need not meet the higher standard of "similitude" required for § 472. *Id*. at 1067. Instead, the document will be considered under § 514 in light of the "idea of verisimilitude -- the quality of appearing to be true or real." *Ibid*.

The analysis in ***Howick*** is the starting point for several succeeding opinions. *See* ***United States v. Salman***, 531 F.3d 1007 (9th Cir. 2008); ***United States v. Heath***, 525 F.3d 451 (6th Cir. 2008); ***United States v. Morganfield***, 501 F.3d 453, 457-61 (5th Cir. 2007) (relying on ***Howick***'s determination that § 514 encompasses nonexistent instruments, court concluded that § 514 did not encompass legitimate or "real" checks drawn on bank account opened under false pretenses and with insufficient funds); ***United States v. Anderson***, 353 F.3d 490, 500-501 (6th Cir. 2003) ("sight drafts" properly charged as fictitious financial instruments under § 514).

In ***Salman***, 531 F.3d at 1011-12, the Ninth Circuit reiterated that a fictitious document under § 514 is a "nonexistent instrument" and that ***Howick*** imposed a "low threshold for what constituted a credibly fictitious financial instrument." The Ninth

Circuit rejected the defendant's claim that the IRS may not be a victim under § 514, based on the "plain language of the statute and [the court's] holding in ***Howick***." *Id.* at 1012. The Ninth Circuit rejected the defendant's assertion that § 514 and ***Howick***'s analysis limited fictitious financial instruments to negotiable instruments. *Id*. at 1012-14. In ***Salman***, 531 F.3d at 1012-13, the court concluded that ***Howick*** specifically focused on negotiable instruments because that was the type of instrument in issue in that case, but that § 514 encompassed documents that appear to be either a negotiable or non-negotiable instrument. The Ninth Circuit noted the broad breadth Congress intended for § 514: the court decided that to accept Salman's argument that § 514 was limited to fictitious, negotiable instruments "would unnecessarily limit the scope of § 514, contrary to what Congress said in its statutory language, and would reopen a loophole . . . that Congress purposely closed when it enacted § 514." *Id*. at 1013. Finally, the Ninth Circuit rejected Salman's claim that the fictitious sight drafts did not appear sufficiently genuine to violate § 514. 531 F.3d at 1014-15. Again, the court stated that ***Howick*** provided a "nonexhaustive" list of attributes for negotiable instruments, but did not identify all criteria for an instrument to be deemed a fictitious document that appeared to be "a member of the family of actual financial instruments." *Id*. at 1014-1015. Moreover, the court stated that the "context in which the fictitious sight drafts were presented is not wholly irrelevant." *Id*. at 1015.

In ***United States v. Heath***, 525 F.3d 451, 455 (6th Cir. 2008), the district court had granted a motion under Fed. R. Crim. P. 29 to dismiss one § 514 charge because the face of the instrument stated it was "not negotiable." This dismissal was not appealed, however. In addition, in instructing on Section 514, the district court stated, "To trigger liability, the document must credibly hold itself out as [a] negotiable instrument." *Id*. at 459. In reading the instructions to the jury, the district court also told the jurors to consider whether the document was free of "disqualifying remarks," as opposed to "disqualifying marks." The Sixth Circuit held that this misstatement did not amount to plain error. In discussing that issue, the Sixth Circuit noted the Ninth Circuit's comment in ***Howick*** "that 'the document need only credibly hold itself out as a negotiable instrument' and be 'free of disqualifying marks, such as for example, a statement that the document is not negotiable.'" There is no indication, however, that the instrument at issue in ***Heath*** purported to be anything but a negotiable instrument, and it therefore appears that the court had no reason to address the question whether § 514 reaches a document that does not purport to be a negotiable instrument. Thus, it is the Tax Division's position that ***Heath*** does not stand for the proposition that § 514 reaches only bogus documents

purporting to be negotiable instruments, and that a purported non-negotiable instrument may fall within the statute. *Cf.* ***Salman***, 531 F.2d at 1012 (sight drafts with text "non-negotiable" were within purview of § 514).[8]

A common issue in fictitious financial instrument cases involves the discrepancy between "intended loss" and "actual loss," and the impact on sentencing. Often, little or no actual loss results from the use of a bogus financial instrument. In ***United States v. Ensminger***, 174 F.3d 1143, 1145 (10th Cir. 1999), the court was faced with a scheme to obtain ownership of real property through submission of bogus financial instruments. The district court enhanced Ensminger's mail fraud sentence under the Sentencing Guidelines based on an intended loss of $540,700, the uncontested value of the property. *Ibid.* The facts in ***Ensminger***, however, showed that there was no way the scheme could have succeeded, because the properties Ensminger attempted to obtain had already been sold to third parties. *Id*. at 1146. Based on these facts and two previous decisions (***United States v. Galbraith***, 20 F.3d 1054 (10th Cir. 1994); ***United States v. Santiago***, 977 F.2d 517 (10th Cir. 1992)), the court held that a ten-level enhancement was clearly erroneous. ***Ensminger***, 174 F.3d at 1146. The ***Ensminger*** court noted that the Fifth, Seventh, Ninth, Eleventh, and District of Columbia Circuits, relying on application note 10 to section 2F1.1 of the Guidelines (authorizing a downward departure where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it), disagreed with its analysis. *Id.* at 1146-47. In ***United States v. Flanders***, 491 F.3d 1197, 1218 (10th Cir. 2007), the Tenth Circuit distinguished ***Ensminger,*** stating that that decision focused on the absence of possibility of success, while Flanders' "furtive" actions had led to "near success" in creating a $2 million loss.

On the other hand, in a case specifically involving use of bogus financial instruments, the Fifth Circuit upheld sentencing based on the face value of fictitious financial instruments, titled "Certified Money Orders," even though there was no actual loss. *See* ***Moser***, 123 F.3d at 830 (distinguishing intended loss based on the face value of property or investments from intended loss of zero when the defendant intends to repay a loan). *See also* ***United States v. Ismoila***, 100 F.3d 380, 396-97 (5th Cir. 1996) (intended losses considered); ***United States v. Switzer***, Nos. 97-50265, 97-50293, 97-50442, 1998 WL 750914 (9th Cir. Oct. 19, 1998) (upholding sentence based on intended loss); ***United States v. Lorenzo,*** 995 F.2d 1448, 1460 (9th Cir. 1993).

[8] Counsel should note that in ***Salman***, 531 F.2d at 1010, an employee from the Office of the Comptroller testified about elements of checks versus sight drafts and the meaning of "non-negotiable."

On November 1, 2001, Part F of the Guidelines was deleted and consolidated with the provisions of § 2B1.1 by Amendment 617. *See* USSG §2B1.1 (Nov. 2001). Significantly, Guideline § 2B1.1 (2007), comment. 3, states that subject to specific exclusions, "loss is the greater of actual loss or intended loss." Moreover, "intended loss . . . includes intended pecuniary harm that would have been impossible or unlikely to occur." USSG § 2B1.1, comment. (n.3(A)(ii)). However, the Application Notes further acknowledge, "There may be cases in which the offense level determined under these guidelines substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted." USSG § 2B1.1, comment. (n.19(B)).

This amendment and the discussion of measuring loss under § 2B1.1 overruled some circuits' precedent that rejected sentences based on intended losses that were unrelated to economic reality or possibility. *See, e.g.,* ***United States v. McBride***, 362 F.3d 360, 374 (6th Cir. 2004). Notwithstanding § 2B1.1's statement regarding consideration of intended loss as being broadly defined, the debate continues on whether, or to what extent, intended loss based on the use of fictitious financial instruments should be considered at sentencing. *See* ***McBride***, 362 F.3d at 373-78 (remanded for sentencing based on the district judge's apparent misunderstanding of his authority to grant a downward departure under § 2B1.1 for bankruptcy fraud). Relying heavily on ***United States v. Roen***, 279 F. Supp. 2d 986, 990 (E.D. Wis. 2003), the Sixth Circuit engaged in a lengthy discussion of factors that may affect a court's decision to depart downward because of impossibility, after intended loss is calculated. *Id.* at 375-76.

40.02[2] Warehouse Banks

"Warehouse banks" were common in mid-1980's abusive tax shelter schemes, and they continue to be used by tax defiers to hide assets and income from the IRS. Typically, the warehouse bank operates as a subsidiary or service wing of a broader collective or association. One must be a member of the association to use the warehouse bank services. *See, e.g.,* ***United States v. Meek***, 998 F.2d 776, 778 (10th Cir. 1993).

A warehouse bank maintains total privacy of all "account holders" by commingling the funds of numerous depositors in a single bank account held at a legitimate bank. The depositor's privacy is achieved through the use of arbitrarily numbered accounts, tracked by the warehouse bank operator. Using only the account number, the depositor endorses all checks to the warehouse bank association. *See*

generally ***Strough v. United States***, 326 F. Supp. 2d 1118, 1121-22 (C.D. Cal. 2003) (upholding third-party summons for bank records to investigate warehouse bank scheme).

Depositors retrieve their funds by requesting cash via registered mail or by instructing the warehouse bank operator to pay specific bills from the warehouse bank account. Some warehouse bank promoters also sell gold and silver to members and claim to hold all deposit balances in gold or silver. *See* ***United States v. Hawley***, 855 F.2d 595, 597 (8th Cir. 1988). The warehouse bank promoter asserts that only records of the current balance and immediately preceding transaction are maintained in order to avoid revealing records in the event of a subpoena or search warrant.

Some depositors also use trusts and unincorporated business organizations (UBOs) to further conceal their identities. For example, a warehouse bank customer might request that his or her paychecks be made payable in the name of a trust or UBO, which then endorses the check to the warehouse bank association. This method ensures that the original check deposited will not have the name of the depositor. It can be traced back to a specific individual only if the name of the trust or UBO being used by that individual is known.

Operators of warehouse banks have been prosecuted on ***Klein*** conspiracy charges (26 U.S.C. § 371), with varied results. *See, e.g.,* ***United States v. Caldwell***, 989 F.2d 1056, 1058-1061 (9th Cir. 1993) (reversing conspiracy conviction for failure to prove or instruct jury that use of deceitful and dishonest means was an element of conspiracy charge); ***United States v. Stelten***, 867 F.2d 446 (8th Cir. 1989) (convictions of conspiracy and tax evasion charges upheld; appeal challenged search warrant); ***United States v. Cote***, 929 F. Supp. 364, 366-68 (D. Or. 1996) (relying on ***Caldwell***, conspiracy indictment dismissed for failure to allege an essential element of the crime, *i.e.*, deceitful and dishonest means, and for failure to so instruct the grand jury).

Warehouse bank operators also have been charged with violating currency transaction reporting requirements. *See* ***Hawley***, 855 F.2d at 599-601 (upholding instruction that allowed jury to find that the Exchange was a "financial institution" because it was a "private bank").

Account holders have been charged with tax evasion, in violation of 26 U.S.C. § 7201, and willful failure to file, in violation of 26 U.S.C. § 7203. *See* ***United States v. Dack***, 987 F.2d 1282, 1283 (7th Cir. 1993) (tax evasion); ***Meek***, 998 F.2d at 777-778

(failure to file and tax evasion); ***United States v. Becker,*** 965 F.2d 383, 385 (7th Cir. 1992) (evasion and failure to file).

Use of a warehouse bank is one factor that supports a "sophisticated means" enhancement at sentencing. ***United States v. Frandsen***, No. 99-30159, 2000 WL 366272, at *2 (9th Cir. Apr. 10, 2000) (purchasing cashier's checks from a warehouse bank one factor supporting "sophisticated means" enhancement); ***Becker,*** 965 F.2d at 390. *See also* ***United States v. O'Doherty,*** 643 F.3d 209, 220 (7th Cir. 2011).

Caution is advised during any investigation of a warehouse bank, however, because of the danger of treading on First Amendment freedom of association rights. Prosecutors must take care to avoid overly broad searches or subpoenas. *See, e.g.*, ***United States v. Ford***, 184 F.3d 566, 576-78 (6th Cir. 1999) (where search warrant authorizes a broader search than is reasonable given facts in supporting affidavit, warrant is invalid, and conviction based on improperly seized documents reversed); ***National Commodity and Barter Ass'n v. United States***, 951 F.2d 1172, 1174-75 (10th Cir. 1991) (government must meet burden of showing "substantial relationship between the subpoenaed records and its compelling interest in the criminal investigation" to overcome *prima facie* showing of First Amendment infringement); ***Stelton***, 867 F.2d at 450-51 (evidence seized pursuant to overbroad warrant may be used if officers acted in "objectively reasonable reliance" on warrant (citing ***United States v. Leon***, 468 U.S. 897 (1984)); ***In re First National Bank***, 701 F.2d 115, 118 (10th Cir. 1983) (reversing enforcement order regarding grand jury supboena duces tecum and remanding for an evidentiary hearing to assess First Amendment claim). The remedy for an overbroad warrant is severance of the excess portions from those that are sufficiently particular. ***Ford***, 184 F.3d at 578; ***United States v. Blakeney***, 942 F.2d 1001, 1027 (6th Cir. 1991).

40.02[3] Trusts

Another well-known and frequently-promoted tax defier scheme is the use of sham trusts, both foreign and domestic, to hide assets and property. A valid trust is a legal arrangement whereby a grantor transfers property into a trust and a trustee holds legal title to property for the benefit of another person, the beneficiary. In order for a trust to be regarded as a valid trust for income tax purposes, the trustee must manage and control the property for the beneficiary's benefit. The beneficiary cannot manage or control the property. Treas. Reg. §301.7701-4(a)&(b). Every trust that has over $600 in gross

income, regardless of the amount of taxable income, must file a tax return and must pay taxes on taxable income. 26 U.S.C. § 6012(a)(4); 26 U.S.C. § 641.

A trust is invalid for Federal income tax purposes if (1) the grantor retains the same relationship to the property both before and after the trust is established, *or* (2) the trustee does not have independent control over the property in the trust, *or* (3) the beneficiary did not receive an economic interest in the property. 26 U.S.C. §§ 671-677; Treas. Reg. § 1.671-1 *et seq*; ***Zmuda v. Commissioner***, 79 T.C. 714, 720-722 (1982), *aff'd*, 731 F.2d 1417 (9th Cir. 1984); ***Markosian v. Commissioner***, 73 T.C. 1235 (1980); ***Hanson v. Commissioner***, T.C. Memo 1981-675 (1981), *aff'd*, 696 F.2d 1232 (9th Cir. 1983).

The use of "trusts" and "unincorporated business organizations" is promoted on Internet web sites, by word-of-mouth, and through seminars. Trust scheme promoters can be charged with a variety of offenses, including ***Klein*** conspiracy (18 U.S.C. § 371), aiding and abetting tax evasion (26 U.S.C. § 7201 & 18 U.S.C. § 2), aiding in preparation of false tax returns (26 U.S.C. § 7206(2)), tax obstruction (26 U.S.C. § 7212(a)), and tax evasion (26 U.S.C. § 7201) if they knowingly used the trusts to evade taxes.

However, some trust scheme users may have a valid reliance defense if the promoters present the trust scheme as a legal way to avoid taxes. *See* § 40.05[1][a] and [b], *infra*, for more discussion of the reliance defense.

40.02[4] Church Schemes

40.02[4][a] Generally

Some tax defiers claim tax exempt status by feigning ordination in a church. Many become ministers in mail-order churches, such as the Universal Life Church, the Basic Bible Church of America, or the Life Science Church. Typically, officers and members of the congregation include only the tax defier and his or her immediate family.

Using church rubric, the tax defier usually adopts one of two schemes. Under the first, the tax defier takes a sham vow of poverty and purportedly assigns all income and worldly possessions to the church. The tax defier then contends that his or her income is the church's income and, therefore, not taxable to the minister, even though he or she used the funds to pay personal and other expenses just as he or she did before taking the

sham vow of poverty. *See, e.g.*, ***United States v. Masat***, 948 F.2d 923 (5th Cir. 1991); ***United States v. Dube***, 820 F.2d 886 (7th Cir. 1987); ***United States v. Zimmerman***, 832 F.2d 454 (8th Cir. 1987); ***United States v. Ebner***, 782 F.2d 1120 (2d Cir. 1986).

Under the second scheme, the tax defier supposedly makes charitable contributions of 50 percent of his or her adjusted gross income (the maximum amount that can be deducted as a charitable contribution) to a church. 26 U.S.C. § 170(b). The "contribution" is then deposited into "the church's" bank account, and the tax defier claims a deduction on his or her individual return, even though the "donated" funds are used for his or her personal purposes. ***See United States v. Heinemann***, 801 F.2d 86, 88 (2d Cir. 1986).

40.02[4][b] Vow of Poverty

Generally, in a vow of poverty scheme, the government introduces evidence proving the tax defier's putative vow of poverty was not fulfilled in practice -- *i.e.*, the tax defier lived and carried out his or her economic and financial affairs exactly as in the past. See ***United States v. Peister***, 631 F.2d 658 (10th Cir. 1980), which upheld Peister's conviction for filing a false "withholding exemption certificate form W-4." Peister formed a church, with himself as minister and his wife and parents as trustees, took a vow of poverty, supposedly gifted all his worldly possessions to the church, set up church checking accounts, and used the funds in those accounts for personal purposes. *Id.* at 660. The government's evidence showed that "the church was a shell entity, fully controlled by Peister and his wife, . . . together with Peister's parents. The vow of poverty was one in form only, and had no substantive effect on defendant's lifestyle." *Id.* at 663.

40.02[4][c] Charitable Contributions

In a charitable contribution scheme, the tax defier purports to donate 50 percent of adjusted gross income (the maximum allowable amount for a charitable contribution deduction) to his or her church. 26 U.S.C. §§ 170(a)(1); 170(b)(1)(A), (E). The tax defier then uses the "donated" funds for personal purposes. *See* ***United States v. Michaud***, 860 F.2d 495 (1st Cir. 1988). In such a case, the government must prove that either no contribution or gift to the church was made or that it was not made to a qualified church under 26 U.S.C. § 170(c)(2)(C), which requires that "no part of the net earnings . . . [inure] to the benefit of any private shareholder or individual."

There is no true charitable gift or contribution where a donor does not totally relinquish dominion and control over his or her property. *See* ***Pollard v. Commissioner***, 786 F.2d 1063, 1066-67 (11th Cir. 1986); ***Stephenson v. Commissioner***, 748 F.2d 331 (6th Cir. 1984); ***Macklem v. United States***, 757 F. Supp. 6 (D.Conn. 1991); ***Gookin v. United States***, 707 F. Supp. 1156 (N.D. Cal. 1988). If a gift is made with the incentive of anticipated economic benefit, no deduction is available even if the payment is made to a tax-exempt organization. *See* ***Transamerica Corp. v. United States***, 902 F.2d 1540 (Fed. Cir. 1990); ***DeJong v. Commissioner***, 309 F.2d 373 (9th Cir. 1962); ***Hess v. United States***, 785 F. Supp. 137 (E.D. Wash. 1991); ***Dew v. Commissioner***, 91 T.C. 615 (1988) (members of Universal Life Church made contributions to church with understanding that church was to pay all personal bills incurred by the "contributor").

A tax defier church is not organized and operated exclusively for religious purposes; therefore, it is not exempt from taxation. 26 U.S.C. § 501(c)(3). To enjoy tax-exempt status under section 501(c)(3), an organization must satisfy three criteria: (1) it must be organized and operated exclusively for an exempt purpose ("the organizational test"); (2) no part of its net earnings may inure to the benefit of any private shareholder or individual ("the operational test"); and (3) no substantial part of its activity may include carrying on propaganda, or otherwise attempting to influence legislation, or participating or intervening in any political campaign. 26 U.S.C. § 501(c)(3). *See also* ***Ecclesiastical Order of Ism of Am v. Commissioner***, 80 T.C. 833, 838 (1983), *aff'd*, 740 F.2d 967 (6th Cir. 1984); ***Unitary Mission Church of Long Island v. Commissioner***, 74 T.C. 507, 512 (1980), *aff'd*, 647 F.2d 163 (2d Cir. 1981).

If a minister uses the religious organization's funds for personal purposes or receives an excessive or unreasonable salary from the net earnings of the church, there is deemed to be private inurement, and the church will fail the operational test. ***United States v. Daly***, 756 F.2d 1076, 1083 (5th Cir. 1985). *See also* ***Hall v. Commissioner***, 729 F.2d 632, 634 (9th Cir. 1984); ***United States v. Dykema***, 666 F.2d 1096, 1101 (7th Cir. 1981).

40.02[4][d] First Amendment Considerations

Tax defiers often attempt to use the Freedom of Religion Clause of the First Amendment to prevent the government from questioning the integrity of alleged religious beliefs. The courts have long held, however, that the Freedom of Religion Clause cannot

be used as a blanket shield to prevent the government from inquiring into the possible existence of criminal activity. ***Davis v. Beason***, 133 U.S. 333, 342-43 (1890), *overruled in part on other grounds*, ***Romer v. Evans***, 517 U.S. 620, 634 (1996); ***Cohen v. United States***, 297 F.2d 760, 765 (9th Cir. 1962). Thus, although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined. ***United States v. Seeger***, 380 U.S. 163, 184-85 (1965). *See also* ***United States v. Ward***, 989 F.2d 1015, 1018 (9th Cir. 1992) ("focus of judicial inquiry is not definitional, but rather devotional . . . That is, "is [the defendant] sincere? Are his beliefs held with the strength of traditional religious convictions?"); ***United States v. Daly***, 756 F.2d 1076, 1081 (5th Cir. 1985); ***United States v. Moon***, 718 F.2d 1210, 1227 (2d Cir. 1983); ***United States v. Peister***, 631 F.2d 658, 665 (10th Cir. 1980). In ***Moon***, the defendant argued that the trial court was required to charge the jury that it must accept as conclusive the Unification Church's definition of what it considered a religious purpose. The Second Circuit flatly rejected the defense argument, citing ***Davis v. Beason***, 133 U.S. 333 (1890), and explaining:

> The "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.

Moon, 718 F.2d at 1227.

A similar argument was rejected in ***United States v. Jeffries***, 854 F.2d 254 (7th Cir. 1988). In ***Jeffries***, the defendant argued that the IRS should not be permitted to define what constituted a church, because to do so would result in the creation of a "federal church, which would restrict a person's individual religious beliefs." ***Jeffries***, 854 F.2d at 256. In rejecting this argument, the court stated:

> [T]here is no need to try to resolve any conflict there may be between a person's personal view of what constitutes a church and that which the tax law recognizes as a church qualifying it for tax exempt status, even if we could. For tax purposes the tax law prevails.

Jeffries, 854 F.2d at 257.

The courts also have held that the Internal Revenue Code sets forth objective requirements or criteria (*e.g.*, 26 U.S.C. §§ 170 and 501), which enable the Internal Revenue Service to determine whether an organization qualifies as a tax-exempt organization or whether an individual's contribution qualifies as a deductible charitable contribution, without entering into the type of subjective inquiry that is prohibited by the First Amendment. ***Dykema***, 666 F.2d at 1099-1100; ***Hall v. Commissioner***, 729 F.2d 632, 635 (9th Cir. 1984).

Further, there is no First Amendment right to avoid federal income taxes on religious grounds. ***United States v. Indianapolis Baptist Temple***, 224 F.3d 627, 629-32 (7th Cir. 2000); ***United States v. Ramsey***, 992 F.2d 831-833 (8th Cir. 1993). Therefore, the defendants' religious objections to filing tax returns signed under penalty of perjury do not eliminate the requirement to file tax returns. ***See Hettig v. United States***, 845 F.2d 794 (8th Cir. 1988); ***Borgeson v. United States***, 757 F.2d 1071, 1073 (10th Cir. 1985). *But see* ***Ward***, 989 F.2d at 1019 (conviction of tax defier overturned because trial court refused to allow him to swear oath of his own creation; "the court's interest in administering its precise form of oath must yield to Ward's First Amendment rights").

An order requiring a defendant to comply with federal income tax laws as a condition of probation does not violate the First Amendment. ***Ramsey***, 992 F.2d at 833.

40.03 TRIAL TACTICS/CONSIDERATIONS

40.03[1] Criminal Summons

The government has the option, in misdemeanor cases, to charge the defendant by filing a criminal information and issuing the defendant a summons instead of arresting him pursuant to a warrant. Tax defiers have argued that a showing of probable cause is required under Fed. R. Crim. P. 9 and 4(a) for issuance of a summons. The courts, however, have held to the contrary. *See* ***United States v. Birkenstock***, 823 F.2d 1026, 1030-31 (7th Cir. 1987); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986). *See also* ***United States v. Saussy***, 802 F.2d 849, 851-52 (6th Cir. 1986). *Cf.* ***United States v. Kahl***, 583 F.2d 1351, 1355-56 (5th Cir. 1978) (holding that an arrest warrant, rather than a summons, issued on the basis of an information violates the requirements of Fed. R. Crim. P. 9 if not supported by oath or affirmation.)

40.03[2] 26 U.S.C. § 6103(h)(5) Juror Audit Information (REPEALED)

Prior to August 5, 1997, Section 6103(h)(5) allowed any party in a tax administration proceeding to obtain audit information about a prospective juror. The information was limited to a "yes" or "no" answer to the inquiry about whether a "prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation" by the IRS. 26 U.S.C. § 6103(h)(5) (REPEALED). This provision was repealed on August 5, 1997. The repeal applies to "judicial proceedings commenced after the date of enactment." Pub.L.No. 105-34, § 1283 (The Taxpayer Relief Act of 1997).

40.03[3] IRS Agents' Authority

Tax defiers have asserted that IRS agents cannot investigate tax offenses or appear in court, because they are not agents of the United States government but are agents of an alien foreign principal, the International Monetary Fund (IMF). *See* ***United States v. Rosnow***, 977 F.2d 399, 413 (8th Cir. 1992). This argument is based on the premise that the United States has been in bankruptcy since the gold standard was eliminated. Because of the alleged bankruptcy, the United States purportedly has no standing to demand money or file liens. Instead, the IMF was supposedly given the power to collect income taxes, with the IRS as its depository and fiscal agent. The theory is that the income taxes collected by the IRS do not go into the United States Treasury but instead are deposited into the Federal Reserve Bank for the benefit of the IMF. *See* ***DeLaRosa v. Agents for International Money Fund Internal Revenue Service, et al.***, No. CIV-S951170DFLGGH, 1995 WL 769345, at *3 (E.D. Cal. Oct. 16, 1995). This argument has been deemed "completely without merit [and] patently frivolous." ***United States v. Jagim***, 978 F.2d 1032, 1036 (8th Cir. 1992); *see also* ***McNeil v. United States***, 78 Fed. Cl. 211, 219 (Fed. Cl. 2007); ***United States v. Higgins***, 987 F.2d 543, 545 (8th Cir. 1993); ***Steinman v. Internal Revenue Service***, No. CIV 95-1889 PHX EHC, 1996 WL 512333, at *1 (D. Ariz. June 5, 1996)**.**

40.03[4] Indictment Not Sufficient Notice of Illegality

Tax defiers sometimes argue that an indictment is insufficient because it fails to cite 26 U.S.C. § 6012, the section that requires a return to be filed, or other Internal Revenue Code sections containing provisions for tax liabilities. *See* ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006, at *1 (11th Cir. Sept. 10, 2008) (rejecting argument that information was insufficient because it did not specifically reference §

6012). As long as the indictment contains the elements of the offense charged, fairly informs the defendant of the charge against which he or she must defend, and enables him or her to "plead an acquittal or conviction in bar of future prosecution for the same offense," the indictment is constitutionally sufficient. ***United States v. Vroman***, 975 F.2d 669, 670-71 (9th Cir. 1992) (quoting ***Hamling v. United States***, 418 U.S. 87, 117 (1974)). The government need not specifically cite 26 U.S.C. § 6012 in an indictment alleging willful failure to file in violation of 26 U.S.C. § 7203. ***Vroman***, 975 F.2d at 671; ***United States v. Kahl***, 583 F.2d 1351, 1355 (5th Cir. 1978). *See also* ***United States v. Jackson***, 2008 WL 4150006, at *1 ("an information is sufficient when it alleges that the defendant earned enough to require her to file a return and she willfully failed to do so." (*citing* ***Kahl***)).

In a similar vein, the Ninth Circuit rejected the argument that an indictment charging a violation of 26 U.S.C. § 7206 and setting forth the elements of the offense was insufficient because the CFR provisions dealing with the enforcement of section 7206 reference the Bureau of Alcohol, Tobacco and Firearms, an agency unrelated to the case against the defendant. ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993). An indictment need only provide "the essential facts necessary to apprise a defendant of the crime charged; it need not specify the theories or evidence upon which the government will rely to prove those facts." *Ibid*.

40.03[5] Filing of Protest Documents: Is the Document Filed a Tax Return?

40.03[5][a] Generally

Tax defiers frequently fail to file tax returns, or file return forms that are unsigned or signed with the jurat crossed out, report no financial information, and/or espouse tax defier rhetoric. *See, e.g.*, ***Morgan v. Commissioner***, 807 F.2d 81, 83 (6th Cir. 1986) (no error to conclude that tax forms containing only name, address, filing status and exemptions with other lines stamped "OBJECT 5TH AMEND." are not returns); ***Mosher v. Internal Revenue Service***, 775 F.2d 1292, 1294 (5th Cir. 1985) (upholding frivolous return penalty for striking the jurat on filed tax form); ***Edwards v. Commissioner***, 680 F.2d 1268, 1269-70 (9th Cir. 1982); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (tax forms that are blank except for signature and printed asterisks are not "returns"; no Fifth Amendment protection for filing a protest return); ***United States v.***

Pilcher, 672 F.2d 875, 877 (11th Cir. 1982); ***Lovelace v. United States***, No. 89-375TD, 1990 WL 284740, at *1 (W.D. Wash. Oct. 18, 1990), *aff'd*, 951 F.2d 360 (9th Cir. 1991).

40.03[5][b] What Is a Tax Return?

A tax return consists of an IRS Form 1040 (or other relevant form) containing enough information about the taxpayer's income to compute the tax. ***United States v. Saussy***, 802 F.2d 849, 854 (6th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Grabinski***, 727 F.2d 681, 686-687 (8th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir. 1980); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977); ***United States v. Daly***, 481 F.2d 28, 29 (8th Cir. 1973); ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir. 1970).

A taxpayer who submits a form containing only his or her name, address, and arguments supposedly excusing him or her from filing tax returns has not filed a "return" within the meaning of the Internal Revenue Code. In ***Porth*** and ***Daly***, *supra*, defendants filed Forms 1040 containing only their names, addresses, and references to various constitutional provisions that purportedly excused them from filing tax returns. Appellate courts upheld convictions in both cases. In ***Porth***, the court held:

> The return filed was completely devoid of information concerning his income as required by the regulations of the IRS. A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.

426 F.2d at 523 (citations omitted).

It is well established that tax forms reporting objections or nominal amounts in the blanks provided for income and expenses do not constitute legal returns. *See, e.g.*, ***United States v. Kimball***, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*) (form filed with lines containing asterisks and signed by the taxpayer not a return); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (form filed with lines containing objections based on fourth and fifth amendments and only bottom line assertions as to amount of taxable income not a return); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir. 1986) (form filed with lines containing the word "object" not a return); ***United States v.***

Grabinski, 727 F.2d 681, 686-87 (8th Cir. 1984) (form filed with only a bottom line nominal figure for taxable income with no information as to how the reported taxable income was derived, such as the source of the income, the amount of gross income and deductions, and the number of exemptions claimed, not a return); ***United States v. Vance***, 730 F.2d 736, 737-38 (11th Cir. 1984) (forms filed with lines containing objections and zeros not a return); ***United States v. Heise***, 709 F.2d 449, 450-51 (3d Cir. 1983) (return without information to determine tax liability is not a return; here, only constitutional objections noted on the form; cases cited); ***United States v. Stillhammer***, 706 F.2d 1072, 1073-74, 1075 (10th Cir. 1983) (form filed with lines containing objections and signed by the taxpayer not a return); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir. 1982) (form filed containing only the amount of withheld employment tax, claiming refund, not a return); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Edelson***, 604 F.2d 232, 233-34 (3d Cir. 1979) (form filed with lines containing assertions of fifth amendment privilege and total income figure based on his interpretation of "constitutional dollars" not a return); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir. 1979) (form filed with lines containing objections and word "unknown" not a return); ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979) (form filed nearly blank and with assorted constitutional objections on some lines not a return).

Most courts that have considered the issue have held that tax forms that report only the number zero in each line are not valid returns. *See, e.g.*, ***Hamzik v. United States***, 64 Fed. Cl. 766, 768 (Fed. Cl. 2005); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir. 1980); ***United States v. Rickman***, 638 F.2d 182, 183-84 (10th Cir. 1980); ***Taylor v. United States***, 2001 WL 721850, *1 (D.D.C. 2001). Additionally, *see* ***United States v. Marston***, in which the Eight Circuit, in *dicta*, reiterated the established principle that a form filed with lines containing zeroes is not a tax return. 517 F.3d 996, 1001 (8th Cir. 2008). In ***Marston***, the court did not directly address the issue of whether a zero return constitutes a tax return; instead, it affirmed convictions for tax evasion, filing false returns, and aiding and abetting the filing of false tax returns, based on tax return forms filed by the defendant and others which contained zeros. *Id*. at 1000. The ***Marston*** court held that in a prosecution under sections 7206(1) and (2), the government was not required to prove that the defendant had filed a "tax return" in order to prove what it had alleged -- that the defendant had filed and aided and assisted in the filing of a number of specified documents -- false tax return forms. *Id*. at 1001-02.

On this issue, the Ninth Circuit has taken a minority position that forms filed with lines containing the number zero, as opposed to blank lines or lines containing objections which lack numerical significance, *are* tax returns because the number zero constitutes "information relating to the taxpayer's income from which the tax could be computed . . . just as it could if [the taxpayer] had entered other numbers." ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980). The court explained that a form containing false information could still constitute a tax return if "some computation was possible." *Id*.; *cf.* ***Kimball***, 925 F.2d at 358 (an asterisk, unlike a zero, contains no information from which a computation can be made).

"[T]he test is whether the defendants' returns themselves furnished the required information for the IRS to make the computation and assessment, not whether the information was available elsewhere." ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983). The Ninth Circuit has interpreted that test broadly, finding that a filed Form 1040 with no computational figures except for a refund claim for the total amount of withheld tax was a return because the defendant had filed the Form 1040 with Forms W-2 that contained figures from which the tax could be computed. ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir. 1980).

Omission of isolated information, such as a taxpayer's social security number or names of dependent children, which does not impede the IRS's ability to check a taxpayer's asserted tax liability, does not disqualify the document as a valid a return. ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984).

The Sixth Circuit has held, in a bankruptcy case, that a return filed *after* the IRS assesses deficiencies is not a return because it no longer serves a tax purpose and has no legal effect. ***In re Hindenlang***, 164 F.3d 1029, 1034-1035 (6th Cir. 1999).

40.03[5][c] What Is or Is Not a Tax Return: A Matter of Law or Fact?

Some courts have held that the determination of whether a return is valid for section 7203 purposes is a question of law for the court to decide. *See* ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985); ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984). "This determination . . . in no way removes from the jury fact questions regarding whether a defendant was required

to file a return, . . . actually failed to make a return, . . . and whether a failure to file was willful." *Ibid; see also* ***Green***, 757 F.2d at 121.

Other courts caution that a jury should decide whether or not the filing met the definition of a return. For example, the Sixth Circuit held that the trial court should only "properly state[] the law respecting the definition of a return, and [leave] it to the jury to decide whether [the] defendant had properly filed a return." ***United States v. Saussy***, 802 F.2d 849, 854 (6th Cir. 1986). In ***Saussy***, the court found the following jury instruction proper:

> A document which does not contain sufficient information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code and the Regulations thereunder. Whether any document submitted by the defendant constitutes [a] tax return[] is a matter for the jury to decide.

Ibid.

Similarly, the Eleventh Circuit determined that, although a trial court's ruling that "alleged tax returns which do not contain any financial information are not 'returns' within the meaning of section 7203" was correct, the court exceeded its authority and invaded the province of the jury by concluding that the forms submitted were not returns. ***United States v. Goetz***, 746 F.2d 705, 707-09 (11th Cir. 1984); *see also* ***United States v. Grote***, 632 F.2d 387, 391 (5th Cir. 1980) (upholding jury instruction that "taxpayer's return which does not contain financial information enabling the Internal Revenue Service to determine the party's tax liability, if any, is not a return within the meaning of the Internal Revenue Code" and leaving jury to conclude whether the document filed met the definition reported). While noting that some courts held otherwise, the Eleventh Circuit emphatically stated that a court may not find any element of a charged offense, even if "the evidence seems overwhelming in favor of the government." *Id*. at 708. A trial court's ruling on a verdict, in whole or in part, is not harmless error. *Id*. at 709.

40.03[6] Discovery of IRS Master Files

Each individual who has filed a tax return with the IRS has a record in the IRS master computer under his or her social security number. The IRS Individual Master File (IMF) is the transcript generated by the IRS master computer. It contains coded information about the individual's tax history, including the filing of federal income tax forms, payment of taxes, refunds due, audits, and IRS notices sent to the individual. Certificates of Assessments and Payments (IRS Forms 4340) -- certified IRS records reflecting filings and payments by an individual that are generally introduced at trial -- are prepared from the information contained in the IMF.

Rule 16 of the Federal Rules of Criminal Procedure does not require the government to provide the IMF in discovery, absent some showing of materiality. *See* ***United States v. Pottorf***, 769 F. Supp. 1176, 1180-1181 (D. Kan. 1991); ***United States v. Huebner***, 48 F.3d 376, 383 (9th Cir. 1994) (no "demonstration of unfair prejudice nor taht any information would have been exculpatory). When portions of the IMF are relevant, however, it may be sufficient to provide just those relevant parts of the IMF in discovery. *See* ***United States v. Fusero***, 106 F. Supp. 2d 921, 925 (E.D. Mich. 2000).

When materiality has been established, it is an abuse of discretion for the district court to fail to conduct an *in camera* review of the IMF. ***United States v. Buford***, 889 F.2d 1406, 1408 (5th Cir. 1989). ***Buford*** was a prosecution for aiding and assisting in the preparation of false returns and conspiracy to defraud the United States. *Id*. at 1407. At trial, the government introduced evidence, for impeachment purposes only, that the defendant failed to file individual tax returns for several years. ***Id.*** at 1407-08. On cross-examination, the defendant testified that he had filed individual returns for the years in question. *Id*. at 1408. In rebuttal, the government called an IRS records custodian, who based her testimony on the Certificates of Assessments and Payments, which had been prepared using information taken from the IMF. *Ibid*. After eliciting, on cross-examination of the IRS custodian, evidence that contradicted the information in the Certificates of Assessments and Payments, the defendant repeatedly asked for an *in camera* review of the IMF. *Ibid*. During trial, the district court ordered the government to produce the IMF for *in camera* inspection. *Id*. at 1407. The government complied with the order, but the court was unable to decipher the IMF without the production of the relevant code book. *Ibid*. The court then ordered production of the code book, but the trial continued to verdict before the government produced the book. *Ibid*. The Fifth Circuit

reversed the defendant's conviction and remanded for a new trial, finding that the district court abused its discretion in denying the defendant's pretrial discovery request for the IMF and failing to provide the *in camera* review of the IMF. *Id*. at 1408.

40.03[7] Motions in Limine

In many tax defier cases, the defendant will attempt to present "evidence" or argument relating to what the law should be, the constitutionality and validity of the tax laws, or alternative interpretations of the tax laws on which he or she did not rely. In such a case, it may be useful to file a motion *in limine* requesting an order to prevent the defendant from presenting inappropriate and irrelevant materials that could confuse the jury. The text of a sample motion in limine is set out in an appendix at the end of this chapter.

40.03[8] Attorney Sanctions

Attorneys representing tax defiers will sometimes repeatedly make frivolous arguments or behave inappropriately in court. However, as noted by the Tenth Circuit,

> the sixth amendment does not encompass a defendant's effort to transform judicial proceedings into a forum for the advancement of political, economic or social views and the obfuscation of the legal and factual questions at issue. A criminal trial is, first and foremost, a vehicle for the structured discovery of truth. Advocacy which contravenes the truth-seeking function of the criminal trial and deliberately misrepresents the legal authority governing the proceeding has no place in a court of law.

United States v. Collins, 920 F.2d 619, 633 (10th Cir. 1990). As a result, sanctions may be appropriate. *See id.* (upholding district court's revocation of defense counsel's *pro hac vice* status after counsel, who had a "past reputation for hijacking judicial proceedings onto his tax protester bandwagon," filed several legally frivolous pre-trial motions); *see also* ***In re Becraft***, 885 F.2d 547, 550 (9th Cir. 1989) (ordering defense counsel to pay $2,500 in damages, pursuant to Fed. R. App. Proc. 38, for filing frivolous petition for rehearing); ***United States v. Summet***, 862 F.2d 784, 786-87 (9th Cir. 1988) (upholding district court's formal censure of defense attorney and revocation of his *pro hac vice* status when defense counsel violated local rules by continuously challenging the court's authority and ignoring repeated warnings of the court); ***United States v. Howell***, 936 F. Supp. 774, 775-76 (D. Kan. 1996) (denying defense attorney's motion for reconsideration

of order revoking his *pro hac vice* admission because he failed to appear at a pretrial motions hearing, made false and misleading statements regarding his past disciplinary proceedings to magistrate judge, and failed to disclose all past disciplinary proceedings in an affidavit submitted to the court).

Prosecutors should take care to ensure that any contempt proceeding is brought under the appropriate section of Rule 42 of the Federal Rules of Criminal Procedure. For example, the Ninth Circuit upheld a three-year suspension from practice imposed in one district after defense counsel asserted during opening statement that his client believed that the court was engaged in a conspiracy to defraud the American people and made additional "various disrespectful and confrontational remarks" to the court. ***United States v. Engstrom***, 16 F.3d 1006, 1010-12 (9th Cir. 1994). However, also in ***Engstrom***, the Ninth Circuit overruled the trial court's finding of contempt that the trial court had imposed summarily due to counsel's opening statement with assertions about a judicial conspiracy. *Id*. at 1010. The Ninth Circuit clarified that summary contempt proceedings are appropriate only when the conduct is exceptional. *Ibid***.** Contemptuous conduct is exceptional if it poses such an "open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, is necessary . . . to protect the judicial institution itself." *Ibid*. The court further stated that ordinary contemptuous conduct must not be handled summarily and noted that the district court was not precluded from addressing on remand defense counsel's conduct under a non-summary contempt proceeding at which evidence would be presented. *Id*. at 1011.

Even *pro se* defendants can be the subject of criminal contempt orders, so long as the requisite written orders are made. *See* ***United States v.* Cohen**, 510 F.3d 1114, 1119-1120 (9th Cir. 2007) (remanding criminal contempt conviction of Irwin Schiff, who was representing himself, in order for the court to file the requisite contempt order.)

40.03[9] Evidentiary Issues

40.03[9][a] Prior or Subsequent Tax Protest Activities: Rule 404(b)

Evidence of a defendant's tax defier activities prior or subsequent to the criminal conduct charged may be admissible at trial as either "intrinsic" or "extrinsic" evidence. Intrinsic evidence will arise out of the same transaction or series of transactions in issue, will be "inextricably intertwined with the evidence of the charged offense," or is necessary to complete the story of the crime on trial. ***United States v. Gonzales***, 110 F.3d

936, 942 (2d Cir. 1997) (thwarted burglary close in time admissible as intrinsic evidence). Evidence that is intrinsic is not subject to Fed. R. Evid. 404(b), although, as with all relevant evidence, it also must satisfy the balancing test under Fed. R. Evid. 403. ***United States v. Hilgeford***, 7 F.3d 1340, 1345 (7th Cir. 1993). We may assert that evidence is "intrinsic" or "intricately related to the facts of the case" because it is directly probative of an element of the tax crime charged, such as willfulness. *Ibid.* In ***Hilgeford***, the defendant's prior failed litigation established his knowledge that he no longer owned property that was once his. *Id*. at 1342. Accordingly, his submission of returns that included accounts receivable based on this alleged (false) ownership that he knew was not his was evidence of willfulness. *Id*. at 1346; ***see also United States v. Tutiven***, 40 F.3d 1, 5-6 (1st Cir. 1994) (possession of VIN-altering tools intrinsic to charge of sale of stolen vehicles).

Prosecutors in the Third and Seventh Circuits, however, need to be aware that the "inextricably intertwined" analysis has been rejected in those circuits. *See* ***United States v. Green***, 617 F.3d 233, 248 (3d Cir.), *cert. denied*, 131 S. Ct. 363 (2010) and ***United States v. Gorman***, 613 F.3d 711, 719 (7th Cir. 2010) (abandoning the inextricable-intertwinement test because it has "become overused, vague, and quite unhelpful"). In ***Green***, the Third Circuit held that the "intrinsic" label applies to only "two narrow categories of evidence." ***Id.*** at 248. The first category is evidence of uncharged acts that "directly proves" the charged offense. ***Id.*** The second category is evidence of "'uncharged acts performed contemporaneously with the charged crime' " that " facilitate the commission of the charged crime.' " ***Id.*** at 249 (*quoting* ***United States v. Bowie***, 232 F.3d 923, 929 (D.C. Cir. 2000)). While not specifically rejecting the "inexplicably intertwined" test, the D.C. Circuit in Bowie questioned the helpfulness of the test and language used in other circuits. ***Bowie*** at 928.

An act may be intrinsic to the charged offense if the act arose out of the same series of transactions as the charged offense, even if it occurred outside the time period of the crime charged. ***United States v. Loayza***, 107 F.3d 257, 263-64 (4th Cir. 1997).

Alternatively, if it is determined that the evidence of other crimes or acts is extrinsic to the case, the evidence may be admissible under Fed. R. Evid. 404(b) to show "intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Generally, the purpose of Rule 404(b) is to prevent a defendant's conviction for "general bad character" rather than commission of the specific, charged offense. ***Hilgeford***, 7 F.3d

at 1345. Other act evidence may be admitted under Rule 404(b) if the following four requirements are met: (1) the evidence is offered for a proper purpose, a purpose other than to prove the character of the defendant in order to show action in conformity therewith; (2) the evidence is relevant; (3) the trial court makes a Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the district court submits a limiting instruction, if requested. ***Huddleston v. United States***, 485 U.S. 681, 691-92 (1988); ***United States v. Grissom,*** 44 F.3d 1507, 1513 (10th Cir. 1995); ***United States v. Zapata***, 871 F.2d 616, 620 (7th Cir. 1989); *see also* ***United States v. Queen***, 132 F.3d 991, 997 (4th Cir. 1997) (explaining that evidence of prior acts is admissible if the court determines that: (1) the evidence is relevant to issue, such as element of offense, and must not be offered to establish general character of defendant; (2) the evidence is probative of an essential claim or element of offense; (3) the evidence is reliable; and (4) evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in sense that it tends to subordinate reason to emotion in fact-finding process).

Under ***Huddleston***, "[t]he threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." 485 U.S. at 686. To be probative, evidence must have "some special relevance in determining a disputed material fact." ***United States v. Hadfield***, 918 F.2d 987, 994 (1st Cir. 1990). Evidence has special relevance if the evidence "would allow a juror to make at least one inference probative" of a material issue such as knowledge, intent, opportunity, plan, preparation, or motive. ***United States v. Nickens***, 955 F.2d 112, 124-25 (1st Cir. 1992) (citations omitted) (affirming admission of defendant's prior narcotics convictions; concluding that a reasonable jury could have inferred that the defendant's prior experience selling cocaine made it more likely that he knew how drug traffickers operate and therefore less likely that he had been duped by two friendly young men who, according to defendant, had planted drugs in his suitcase); *see also* ***United States v. Moccia***, 681 F.2d 61, 63 (1st Cir. 1982) (explaining that a jury can "infer that one who lives on a farm with marijuana in the freezer room and under the chicken coop and has a prior possession conviction is more likely to know about the presence of marijuana than one who lives on such a farm and does not have a past possession conviction").

Evidence of other similar acts is relevant only if the evidence is sufficient to support a jury finding that the defendant committed the similar act. ***Huddleston***, 485 U.S.

at 689 (citing ***United States v. Beechum***, 582 F.2d 898, 912-913 (5th Cir. 1978)); ***Zapata***, 871 F.2d at 620; *see also* ***United States v. Ayers***, 924 F.2d 1468, 1473 (9th Cir. 1991) (articulating four-part test for admission under 404(b) -- (1) sufficient evidence must exist for jury to find defendant committed other acts; (2) other acts must be introduced to prove a material issue; (3) other acts must not be too remote in time; and (4) if admitted to prove intent, other acts must be similar to offense charged).

A defendant's prior or subsequent tax defier activities, filing and payment history, or participation in civil tax court proceedings often will be relevant in criminal tax cases, especially where the defendant raises a good faith defense. See, for example:

- ***United States v. Daraio***, 445 F.3d 253, 264-65 (3d Cir. 2006) (in section 7201 prosecution, evidence of defendant's prior non-compliance with tax laws admissible and relevant to prove willfulness);

- ***United States v. Bok***, 156 F.3d 157, 165-66 (2d Cir. 1998) (in prosecution under sections 7201 and 7206(1), evidence of failure to file state and federal individual and corporate returns in years prior to the prosecution period admissible to prove willfulness circumstantially because such evidence is "indicative of an intent to evade the tax system");

  United States v. Wisenbaker, 14 F.3d 1022, 1028 (5th Cir. 1994) (in excise tax prosecution, prior state tax convictions relevant to prove willfulness and to negate defendant's assertion of good faith defense);

- ***United States v. McKee***, 942 F.2d 477, 480 (8th Cir. 1991) (in section 7201 prosecution, testimony concerning prior IRS audit and defendant's prior filing of false exempt Form W-4 relevant to issues of intent or absence of mistake under Fed. R. Evid. 404(b));

- ***United States v. Fingado***, 934 F.2d 1163, 1165 (10th Cir. 1991) (in section 7203 prosecution, evidence of defendant's failure to file in prior years admissible pursuant to Fed. R. Evid. 404(b) to prove willfulness);

- ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990) (in section 7201 prosecution, evidence that defendant submitted Form W-4 claiming more allowances than he was entitled to and failed to file a return both in

the year immediately following the charged years relevant to show willfulness and absence of mistake in filing false Schedule C forms during charged years);

United States v. Poschwatta, 829 F.2d 1477, 1484 (9th Cir. 1987) (prior tax conviction admissible generally to show defendant's knowledge and intent; no error to admit conviction and bar testimony to explain conviction), overruled on other grounds by *Cheek v. United States*, 498 U.S. 192, 201 (1991) (see ***United States v. Powell***, 936 F.23d 1056, 1064 n.3 (9th Cir. 1991);

- ***United States v. Birkenstock***, 823 F.2d 1026, 1027-28 (7th Cir. 1987) (in section 7203 prosecution, defendant's prior "pseudo-dollar/gold standard" returns and attempts to create a "family trust" admissible to show intent and absence of mistake)

United States v. Grosshans, 821 F.2d 1247, 1253 (6th Cir. 1987) (in section 7201 prosecution, defendant's attendance at "tax protester" meetings admissible to show that she knew what she was doing and knew she had an obligation to pay taxes);

- ***United States v. Bergman***, 813 F.2d 1027, 1029 (9th Cir. 1987) (in section 7203 prosecution, filing of false exempt Form W-4 admissible under Fed. R. Evid. 404(b) to show willfulness);

United States v. Blood, 806 F.2d 1218, 1222 (4th Cir. 1986) (in prosecution under sections 7201 and 7206(1) in which defendant had represented himself and testified in prior Tax Court proceedings, prior Tax Court decision admissible to show intent and pattern of tax avoidance);

- ***United States v. Upton***, 799 F.2d 432, 433-434 (8th Cir. 1986) (in section 7203 prosecution, evidence that defendant had sent "tax protestor" materials to the IRS and had failed to comply with tax laws in prior and subsequent years admissible and probative of willfulness);

United States v. Ausmus, 774 F.2d 722, 727-728 (6th Cir. 1985) (in prosecution under § 7203 for failure to pay, evidence that defendant failed

to pay income taxes for years prior to and following years charged was admissible to show pattern, plan and scheme indicating that failure to pay taxes was not the result of accident, negligence or inadvertence); and

- ***United States v. Heise***, 709 F.2d 449, 451 (3d Cir. 1983) (prior tax returns admissible under Rule 404(b) to show knowledge of duty to file for § 7203 prosecution for willful failure to file).

But see ***United States v. Mikolajczyk***, 137 F.3d 237, 244-245 (5th Cir. 1998) (in mail fraud prosecution for submission of USA First "Certified Money Orders," trial court erred in allowing government to cross-examine defendant on her prior filing of public notice "rescinding" tax returns, because there was no compelling evidence that defendant had protest motive in submitting the "Certified Money Orders"; however, erroneous admission of impeachment evidence held harmless).

40.03[9][b] IRS Agent's Testimony and Sequestration

IRS agents usually testify during the course of a tax trial. Often their testimony will consist of summarizing the government's documentary evidence and providing tax requirements and calculations based on that testimony. Provided the agent has been properly qualified as an expert witness, would be helpful to the jury, and does not offer any opinion on the ultimate issue of guilt, such testimony is fully admissible pursuant to Fed. R. Evid. 702. *See* ***United States v. West***, 58 F.3d 133, 140-41 (5th Cir. 1995) (admission of testimony of IRS expert witness testimony, which included summary of testimony given by other government witnesses, was not error because the agent referred to other evidence when necessary to explain her analysis); *see also* ***United States v. Moore***, 997 F.2d 55, 57-58 (5th Cir. 1993) (IRS summary witness may summarize facts that indicate criminal tax violation without reaching the ultimate issue of whether defendant intended to commit criminal tax violation); ***United States v. Mohney***, 949 F.2d 1397, 1406 (6th Cir. 1991) (IRS summary witness may give opinion as to whether tax is due and owing without reaching the ultimate issue of whether or not defendant is guilty); ***United States v. Beall***, 970 F.2d 343, 347-348 (7th Cir. 1992) (IRS expert's summary of documentary evidence and testimony regarding tax consequences of subcontractor relationship within agent's area of expertise); ***United States v. DeClue***, 899 F.2d 1465, 1473 (6th Cir. 1990) (IRS special agent with accounting degree, regular IRS training and experience spanning seven years qualified to testify as expert about tax due and owing);

United States v. Bosch, 914 F.2d 1239, 1242 (9th Cir. 1990) (IRS summary witness who had specialized narcotics training permitted to give opinion as to whether defendant's conduct aided and assisted drug distribution because testimony did not include an opinion as to defendant's state of mind -- a jury issue); ***United States v. Mann***, 884 F.2d 532, 539-40 (10th Cir. 1989) (IRS summary witness permitted to summarize previously admitted evidence in order to compute defendant's tax liability); ***United States v. Marchini***, 797 F.2d 759, 765-66 (9th Cir. 1986) (IRS expert summary witness permitted to summarize evidence for purpose of tax analysis). *But see* ***United States v. Benson***, 941 F.2d 598, 603-06 (7th Cir. 1991) (conviction reversed where IRS expert gave opinions that the appellate court determined were not helpful to the jury because those opinions were not based on any special knowledge or skill).

Rule 615(2) of the Federal Rules of Evidence allows an investigatory case agent designated as the representative of the government to remain in the courtroom during all witness testimony. Rule 615(3) extends that privilege to an IRS agent who testifies as an expert or summary witness, once the government has shown that the witness is essential to the presentation of the government's case. *Id.*; *see, e.g.*, ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991) (case agent who was summary witness allowed to remain in courtroom during witness testimony); *see also* ***United States v. Avalos***, 506 F.3d 972, 978 (10th Cir. 2007); ***United States v. Charles***, 456 F.3d 249, 257 (1st Cir. 2006); ***United States v. Rivera***, 971 F.2d 876, 889-890 (2d Cir. 1992); ***United States v. Gonzalez***, 918 F.2d 1129, 1138 (3rd Cir. 1990); ***United States v. Adamo***, 882 F.2d 1218, 1235 (7th Cir. 1989); ***United States v. Parodi***, 703 F.2d 768, 773 (4th Cir. 1983); ***United States v. Butera***, 677 F.2d 1376, 1381 (11th Cir. 1982); ***United States v. Cueto***, 611 F.2d 1056, 1061 (5th Cir. 1980); ***United States v. Cline***, 188 F. Supp. 2d 1287, 1299 (D. Kan. 2002).

Some courts have specified that the government must identify only one agent for each subsection of Rule 615. *See, e.g.*, ***United States v. Pulley***, 922 F.2d 1283, 1285-86 (6th Cir. 1991) (allowing one agent under Rule 615(2) and one agent under Rule 615(3)); ***United States v. Farnham***, 791 F.2d 331, 334-36 (4th Cir. 1986) (conviction reversed where court failed to exclude one of two case agents during trial). In ***United States v. Neely***, 76 F.3d 376 (4th Cir. 1996) (unpublished), the Fourth Circuit reaffirmed its holding in ***Farnham*** and reconciled its decision in ***United States v. Kosko***, 870 F.2d 162, 164 (4th Cir. 1989), in which an IRS agent had been allowed to remain in the courtroom along with a DEA agent after the IRS agent had testified as an expert witness, because, according to the Fourth Circuit in ***Kosko***, the agents' testimony did not overlap and, thus,

their "mutual presence during trial could not have undermined the integrity of the fact-finding process." ***Neely***, 76 F.3d at **12-13. In ***Neely***, under facts similar to ***Kosko***, the Fourth Circuit confirmed that the district court had committed error in failing to exclude one of two designated case agents but held that the error was harmless because the defendant could not demonstrate prejudice due to the agents' non-overlapping testimony. *Id*. *But see* ***United States v. Jackson***, 60 F.3d 128, 134 (2d Cir. 1995) (declining to follow ***Pulley*** and ***Farnham***; holding that trial court has discretion to exempt from the rule against presence of witnesses more than one witness under each subsection of Rule 615).

40.03[9][c] Admissibility of IRS Computer Records

Computer data evidence is often introduced in tax cases to show the defendant's filing history, to prove that the defendant did not file returns as required, or to show that the defendant received notices about his tax liabilities. The introduction of the actual Individual Master File (IMF) transcript of account through a witness can open the witness to cross-examination by the defense about every code and data item contained in the transcript. In order to avoid this problem, it may be wiser to offer IRS computer records at trial in the form of Certificates of Assessments and Payments (IRS Forms 4340) or Certificate of Lack of Record (IRS Forms 3050), which are certified documents that summarize specific information regarding a taxpayer's filings and payment history.

Tax defiers often challenge the admissibility of computer records, and courts routinely reject such challenges. Certified transcripts, whether Forms 4340 or 3050, may be admitted under Federal Rule of Evidence 803(6) as business records or under Rule 803(10) as certificates of lack of official records. *See* ***Perez v. United States***, 312 F.3d 191, 195 (5th Cir. 2002) (certificate of assessments and payments is *prima facie* evidence of taxpayer's assessed liabilities and the IRS's notice thereof); ***Hughes v. United States***, 953 F.2d 531, 535 (9th Cir. 1992) (certificate of assessments and payments is proof of fact that federal tax assessments actually were made); ***United States v. Spine***, 945 F.2d 143, 148-149 (6th Cir. 1991) (certificates of assessments and payments, which showed defendant filed no returns, admissible under Rule 803(10)); ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990) (IRS records admissible as certificates of lack of official record under Rule 803(10)). Such records may be self-authenticating under Rule 902(1) if under seal, or they may be authenticated by an IRS employee. *See* Fed. R. Evid. 902. No showing of the accuracy of the computer system needs to be made to introduce the documents. *See* ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992) (certified

copies of master file transcripts admissible as self-authenticating documents). summarize specific information regarding a taxpayer's filings and payment history.

Prosecutors in the Sixth Circuit should be aware of ***United States v. Maga***, 475 Fed. Appx., 538 (6th Cir. 2012), an unpublished decision. In ***Maga***, the court held that a Form 4340 is testimonial,triggering confrontation rights, under the reasoning of ***Melendez-Diaz v. Mass***., 557 U.S. 305 (2009) In so ruling, the court noted that the certified transcripts in a Form 4340 are not exact copies of the data the IRS ordinarily maintains in its master files. Here, for example, generating a Form 4340 involved searching through raw data and returning the result, "NO RECORD OFRETURN FILED," as opposed to copying a preexisting record. Therefore, the proper witness to authenticate the Form 4340 is the individual who actually generated the form.

40.03[10] Use of Pseudonyms by IRS Revenue Agents and Officers

Criminal prosecutors should be aware that IRS Revenue Agents and Officers are permitted to use officially issued pseudonyms in their dealings with the public. Although IRS procedure requires that case referrals identify employees using a pseudonym and all documents in the file that reflect the use of a pseudonym, prosecutors, nevertheless, should ask IRS employee witnesses whether the employee uses his or her true name or a pseudonym. As part of the IRS Restructuring Act of 1997, Congress codified the use of pseudonyms, which had been permitted administratively since March 1992. Pub.L. 105-206, Title III, Section 3706, July 22, 1998, 112 Stat. 778.

Use of pseudonyms is intended to prevent personal harassment of IRS employees by taxpayers and other members of the public, especially tax defiers. According to a 1988 Federal Bureau of Investigation Report, more IRS enforcement officers suffered assaults than any other federal law enforcement group.

In using pseudonyms, IRS employees are only required to identify themselves by last name. Moreover, if an employee believes that, because of the unique nature of his or her last name and/or the nature of the office locale, the use of the last name will still identify him or her, he or she may "register" a pseudonym with his or her supervisor. The IRS Restructuring and Reform Act of 1997 requires that an employee give "adequate justification . . . including protection of personal safety" and obtain prior approval from his or her supervisor before using a pseudonym.

The registered pseudonym may be issued only in place of the employee's last name; the real first name must be used. Once a pseudonym is issued, it is used by that employee at all times while on duty, whether working in the field or in the office. All history sheets, liens, levies and summonses are signed using the pseudonym. Pocket commissions (credentials) are issued in the pseudonym only.

Although IRS employees are permitted to use pseudonyms, government attorneys, as officers of the court, should never submit a declaration or affidavit signed by an IRS employee using a pseudonym without informing the court that a pseudonym is being used. An IRS employee may sign a declaration under a pseudonym if it is disclosed in the body of the declaration or affidavit that the name is a pseudonym and that the use of the pseudonym is in accordance with IRS procedures. Absent such a statement, the document must be signed with the declarant's true name and generally should be filed under seal.

There has been very little litigation concerning the use of pseudonyms, and what has occurred involves summons enforcement. Generally, courts have not found fault with the practice. *See, e.g.,* ***Sanders v. United States***, No. 94-1497, 1995 WL 257812 (10th Cir. May 2, 1995) (IRS employee's use of a pseudonym in signing declaration failed to establish a factual question as to the validity of the declaration); ***Springer v. Internal Revenue Service***, Nos. S-97-0091 WBS GGH, S-97-0092 WBS GGH, S-97-0093 WBS GGH, 1997 WL 732526, *5 (E.D. Cal. Sept. 12, 1997) (agent's use of pseudonym on summonses does not render it unenforceable); ***United States v. Wirenius***, No. CV 93-6786 JGD, 1994 WL 142394, at *n.2 (C.D. Cal. Feb. 11, 1994) ("the Court finds no legal basis for attacking the practice"); ***Dvorak v. Hammond***, Civ. No. 3-94-601, 1994 WL 762194, at *n.1 (D. Minn. Dec. 5, 1994) ("Revenue Officers assigned to investigate tax defiers and other potentially dangerous individuals are authorized to use professional pseudonyms to protect themselves and their families from harassment and reprisal").

Caution always should be exercised when tendering any witness who is using a pseudonym, and particularly if the witness is the summary witness/IRS expert witness.[9] In those instances, the witness should either relinquish the pseudonym or not be used as a witness. Employees must testify in court using their true names, unless, prior to giving

[9] Generally, the initial decision whether to testify under a pseudonym should be left to the IRS employee, although the prosecutor should explain that the court will make the ultimate determination. Where the prosecutor determines that the use of the pseudonym would prejudice the Government's position in the litigation, the IRS employee should be advised to use his or her real name. The prosecutor also should evaluate whether an IRS employee's testifying under a pseudonym may cause the fact finder to question the witness's veracity or may otherwise prejudice the government's case.

testimony, the court has been informed and consents to the employee's use of a pseudonym. *See IRM 1.2.4.7(3)* (9-28-2000)." When an IRS agent using a pseudonym testifies in court, the court and opposing counsel should be notified in advance of the testimony. It is prudent to file a motion raising the matter in advance of the trial or hearing rather than to advise the court immediately prior to the testimony. At least one court has refused to allow an IRS Revenue Agent to testify using a pseudonym. ***United States v. Nolens***, 4:96-CV-934-A (N.D. Texas, 1997). If an agent is permitted to testify using a pseudonym, it may be advisable for the agent to respond, after being sworn as a witness and asked to state his or her name for the record, "My pseudonym is . . ." and explain why a pseudonym is used.

In a jury trial, both the agent's real name and pseudonym should be included on the witness list and disclosed to the jurors during voir dire. As potential jurors are asked whether they know any of the witnesses, parties or attorneys involved in the case, it is important that the employee's real name be disclosed. A failure to disclose the real name could result in a mistrial if it later turned out that a member of the jury knew the employee under his or her real name. Prosecutors always should consult with their supervisors and the IRS about how best to proceed in these instances.

40.03[11] Jury Nullification

"Jury nullification" is the concept that a jury has the right to ignore a judge's instructions on the law, if it feels the law is unjust, and acquit the defendant even if the government has proven guilt beyond a reasonable doubt. Tax defiers have argued that the authors of the Bill of Rights intended the Sixth Amendment to incorporate such a right. There is, however, no constitutional right to a jury nullification instruction. ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Krzyske***, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding court's response to jury's inquiry about meaning of "jury nullification" that "[t]here is no such thing as valid jury nullification. Your obligation is to follow the instructions of the court as to the law given to you"); ***United States v. Drefke***, 707 F.2d 978, 982 (8th Cir. 1983); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir. 1978). *See also* ***United States v. Dougherty***, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972), for a thorough discussion of the issue of jury nullification and its historical origins.

40.04 WILLFULNESS

Willfulness, the voluntary, intentional violation of a known legal duty (***Cheek v. United States***, 498 U.S. 192, 201 (1991)), may be proved entirely by circumstantial evidence. ***United States v. Hills***, 618 F.3d 619, 639 (7th Cir. 2010); ***United States v. Stierhoff***, 649 F.3d 19, 26 (1st Cir. 2008); ***United States v. McCaffrey***, 181 F.3d 854, 856 (7th Cir. 1999); ***United States v. Threadgill***, 172 F.3d 357, 368 (5th Cir.1999); ***United States v. Tucker***, 133 F.3d 1208, 1218 (9th Cir. 1998); ***United States v. King***, 126 F.3d 987, 993 (7th Cir. 1997); ***United States v. Rosario***, 118 F.3d 160, 164 (3d Cir. 1997); ***United States v. Klausner***, 80 F.3d 55, 62 (2d Cir. 1996); ***United States v. Wynn***, 61 F.3d 921, 925 (D.C.Cir. 1995); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v. Fingado***, 934 F.2d 1163, 1167 (10th Cir. 1991); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979); ***Hellman v. United States,*** 339 F.2d 36, 38 (5th Cir. 1964).

> [T]rial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance.

United States v. Collorafi, 876 F.2d 303, 305 (2d Cir. 1989).

In tax defier cases, admissible evidence of willfulness may include the following:

1. Tax protest activities and philosophies. ***United States v. McKee***, 506 F.3d 225, 249 (3d Cir. 2007; ***United States v. Eargle***, 921 F.2d 56, 58 (5th Cir. 1991); ***United States v. Grosshans***, 821 F.2d 1247, 1253 (6th Cir. 1987); ***United States v. Bergman***, 813 F.2d 1027, 1029 (9th Cir. 1987); ***United States v. Turano***, 802 F.2d 10, 11-12 (lst Cir. 1986); ***United States v. Marchini***, 797 F.2d 759, 766 (9th Cir. 1986).[10] *But see* ***United States v. Knapp***, 25 F.3d 451, 456 n.1 (7th Cir. 1994) (declining to review propriety of court's instruction that tax protestor status could be

[10] A tax defier may rebut a charge of willfulness by testifying about or quoting from materials on which he allegedly based his good faith belief. ***United States v. Nash***, 175 F.3d 429, 435 (6th Cir. 1999) (defendant may briefly mention or quote from documents forming basis for his belief, but court need not admit documents themselves); ***United States v. Gaumer***, 972 F.2d 723, 724-725 (6th Cir. 1993) (defendant entitled to read into evidence legal materials he claimed support his beliefs). *But see* ***United States v. Hauert***, 40 F.3d 197, 201-202 (7th Cir. 1994) ("defendant's beliefs about the propriety of his filing returns and paying taxes . . . are ordinarily not a proper subject for lay witness opinion testimony"); ***United States v. Willie***, 941 F.2d 1384, 1395 (10th Cir. 1991) (no error to exclude confusing documents).

considered in determining willfulness because issue not raised below).

2. Filing blatantly false IRS Forms W-4. ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); *see also* ***United States v. Brooks***, 174 F.3d 950, 955 (8th Cir. 1999); ***United States v. Mal***, 942 F.2d 682, 685 & n.3 (9th Cir. 1991); ***United States v. Sloan***, 939 F.2d 499, 502 (7th Cir. 1991); ***United States v. Connor***, 898 F.2d 942, 945 (3rd Cir. 1990); ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986); ***Granado v. Commissioner***, 792 F.2d 91, 93-94 (7th Cir. 1986); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Carpenter***, 776 F.2d 1291, 1295 (5th Cir. 1985).

3. Prior taxpaying history, such as the prior filing of valid tax returns followed by the filing of a protest return and receipt of a letter from the Internal Revenue Service telling a defendant that his or her return "did not comply with tax laws and might subject him to criminal penalties." ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986). *See also* ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v. Fingado***, 934 F.2d 1163, 1165, 1168 (10th Cir. 1991); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 123-24 (7th Cir. 1985); ***United States v. Grumka***, 728 F.2d 794, 796-797 (6th Cir. 1984); ***Hayward v. Day***, 619 F.2d 716, 717 (8th Cir. 1980); ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir. 1980); ***United States v. Karsky***, 610 F.2d 548, 551 (8th Cir. 1979).

4. Subsequent taxpaying conduct. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Sempos***, 772 F.2d 1, 2 (1st Cir. 1985); ***United States v. Richards***, 723 F.2d 646, 648-649 (8th Cir. 1983); ***United States v. Serlin***, 707 F.2d 953, 959 (7th Cir. 1983).

5. The amount of a defendant's gross income. ***Fingado***, 934 F.2d at 1168; ***United States v. Bohrer***, 807 F.2d 159, 161-62 (10th Cir. 1986); ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986). The higher the defendant's gross income, the less likely the defendant was unaware of the filing requirement and the more likely the defendant's failure was intentional rather than inadvertent.

6. Proof that knowledgeable persons warned the defendant of tax improprieties. ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***Fingado***, 934 F.2d at 1168; ***United States v. Collorafi***, 876 F.2d 303, 305-306 (2d Cir. 1989); ***United States v. Sempos***, 772 F.2d 1, 2 (1st Cir. 1985); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984).

40.05 DEFENSES

40.05[1] Good Faith

A defendant's conduct is not willful if it resulted from "ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." ***Cheek v. United States***, 498 U.S. 192, 202 (1991). Cheek claimed that he did not file tax returns because he believed that he was not a taxpayer within the tax laws, that wages were not income, that the Sixteenth Amendment did not authorize the taxation of individuals, and that the Sixteenth Amendment was unenforceable. ***Cheek***, 498 U.S. at 195. The Court explained:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

Cheek, 498 U.S. at 202. The Supreme Court held the trial court's jury instructions that Cheek's good faith beliefs or misunderstanding of the law would have to be objectively reasonable to negate willfulness were erroneous:

> It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

Cheek, 498 U.S. at 203.

The trial court did not err, however, in instructing the jury not to consider Cheek's claims that the tax laws are unconstitutional. A claim that the tax laws are unconstitutional or otherwise invalid, or mere disagreement with the tax laws, do not constitute a good-faith defense:

> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance.

Cheek, 498 U.S. at 206. *See also* ***United States v. Simkanin***, 420 F.3d 397, 404 (5th Cir. 2005); ***United States v. Ambort***, 405 F.3d 1109, 1115-1116 (10th Cir. 2005) (no error to strike testimony regarding defendant's beliefs on legal means to challenge validity of tax laws; "[h]e cannot disguise his knowing disregard of well-established legal principles and duties as a good faith procedural effort to evade those principles and duties"); ***United States v. Saussy***, 802 F.2d 849, 853-854 (6th Cir. 1986); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***United States v. Karsky***, 610 F.2d 548, 550 & n.4 (8th Cir. 1979).

The ***Cheek*** Court stated that a jury considering a good faith belief claim

> would be free to consider any admissible evidence from any source showing that [the taxpayer] was aware of his [duties under the tax laws], including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretations of the tax law, of authoritative rulings of the Internal Revenue Service, or of any contents of the personal income tax return forms and accompanying instructions . . . .

Cheek, 498 U.S. at 202.

In determining whether a subjective good faith belief was held, a jury should not be precluded from considering the reasonableness of the taxpayer's interpretation of the law:

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Cheek, 498 U.S. at 203-04. After remand and retrial, the Seventh Circuit upheld Cheek's conviction, ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), holding that it was proper for the trial court to instruct that the jury could "consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith." ***Cheek***, 3 F.3d at 1063. *See also* ***United States v. Dean,*** 487 F.3d 840, 850-851 (11th Cir. 2007)**;** ***United States v. Pensyl,*** 387 F.3d 456, 459 (6th Cir. 2004)**;** ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992); ***United States v. Powell***, 955 F.2d 1206, 1212 (9th Cir. 1992).

Tax defiers often claim to have conducted a careful study of legal decisions, statutes, and legal treatises, and they attempt to introduce the materials that they claim underlie their beliefs into evidence. In order to do so, the taxpayer must lay a sufficient foundation that he or she actually relied on the materials in forming his or her claimed belief. *See, e.g.,* ***United States v. Marston***, 517 F.3d 996, 1003 (8th Cir. 2008); ***United States v. Delfino***, 510 F.3d 468, 470-71 (4th Cir. 2007).

Even if the tax defier lays such a foundation, the materials may be excluded because of other competing interests. For example, there is a high probability that such evidence may confuse the jury as to the actual state of the law or contradict the court's instructions regarding the law. *See* ***United States v. Gustafson***, 528 F.3d 587, 592 (8th Cir. 2008); ***United States v. Simkanin,*** 420 F.3d 397, 412 (5th Cir. 2005); ***United States v. Middleton,*** 246 F.3d 825, 839 (6th Cir. 2001)**;** ***United States v. Payne***, 978 F.2d 1177, 1181-82 (10th Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1395-97 (10th Cir. 1991); ***United States v. Flitcraft,*** 803 F.2d 184, 186 (5th Cir. 1986)**;** ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Kraeger***, 711 F.2d 6, 7-8 (2d Cir. 1983).

It is not necessary to admit such materials into evidence, because the defendant may still present his defense through testimony about his asserted beliefs and how he allegedly arrived at them. *See* ***Simkamin***, 420 F.3d at 412; ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991); ***United States v. Hairston***, 819 F.2d 971, 973

(10th Cir. 1987). Indeed, the defendant's testimony regarding the basis for his beliefs is *more* probative than the materials themselves. *Id*.; ***United States v. Mann***, 884 F.2d 532, 538 (10th Cir.1989). If the defendant testifies regarding his beliefs and is permitted to read relevant materials to the jury, the materials themselves may be excluded as cumulative. *See, e.g.*, ***United States v. Willis***, 277 F.3d 1026, 1033 (6th Cir. 2002); ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991).

Although the prosecutor may object to the materials' being sent back to the jury, the defendant should generally be permitted to read relevant materials to the jury. Appellate courts have found error when defendants were not permitted to testify regarding the materials. *E.g.*, ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992).

Restraint should be exercised where appropriate so as not to jeopardize convictions on appeal. This is particularly true where the defendant has made a specific claim of reliance on a relatively limited amount of material. *See* ***Barnett***, 945 F.2d at 1301 n.3. In such a situation, the prosecutor should consider requesting a limiting instruction rather than opposing the admission of the evidence.

Additionally, if the defendant advances an erroneous interpretation of the tax laws as an explanation for his or her conduct, the prosecutor may request that the trial court instruct the jury on the correct interpretation of the tax laws, so long as that instruction does not direct the jury's verdict on an essential element of any offense. *See* ***United States v. Simkanin,*** 420 F.3d 397, 406-08 (5th Cir. 2005); ***United States v. Middleton,*** 246 F.3d 825, 840-41 (6th Cir. 2001).

For examples of jury instructions on willfulness and the good faith defense that have been upheld, *see* ***United States v. Dean,*** 487 F.3d 840, 850-51 (11th Cir. 2007)**;** ***United States v. Dykstra***, 991 F.2d 450, 452-53 (8th Cir. 1993); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992); ***United States v. Droge***, 961 F.2d 1030, 1037-38 (2d Cir. 1992); ***United States v. Masat***, 948 F.2d 923, 931 n.15 (5th Cir. 1991); ***United States v. Collins***, 920 F.2d 619, 622-23 (10th Cir. 1990).

40.05[1][a] Reliance on Return Preparer/Accountant

Evidence that the defendant relied on the advice or instructions of an accountant or other qualified tax return preparer may negate the element of willfulness.[11] *See, e.g.*, ***United States v. Moran***, 493 F.3d 1002, 1013 (9th Cir. 2007); ***United States v. Charroux***, 3 F.3d 827, 831 (5th Cir. 1993); ***United States v. Civella***, 666 F.2d 1122, 1126 (8th Cir. 1981); ***United States v. Brimberry***, 961 F.2d 1286, 1290 (7th Cir. 1992).

To claim third-party reliance successfully, a defendant must show that he or she truthfully and completely disclosed all relevant facts to the preparer or accountant and relied in good faith on the preparer's or accountant's advice -- that is, that the defendant had no reason to believe that the return was not correct. ***Charroux***, 3 F.3d at 831***;*** *see also* ***United States v. DeSimone,*** 488 F.3d 561, 570-71 (1st Cir. 2007); ***United States v. Bishop,*** 291 F.3d 1100, 1107 (9th Cir. 2002); ***United States v. Masat***, 948 F.2d 923, 930 (5th Cir. 1991); ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989); ***United States v. Michaud***, 860 F.2d 495, 500 (1st Cir. 1988); ***United States v. Meyer***, 808 F.2d 1304, 1306 (8th Cir. 1987); ***United States v. Whyte***, 699 F.2d 375, 379-80 (7th Cir. 1983); ***United States v. Samara***, 643 F.2d 701, 703 (10th Cir. 1981); ***United States v. Lisowski***, 504 F.2d 1268, 1272 (7th Cir. 1974); ***United States v. Stone***, 431 F.2d 1286, 1288-1289 (5th Cir. 1970).

"In a tax evasion case in which the defendants assert that blind reliance on their accountant, not criminal intent, caused an underreporting, the critical datum is not whether the defendants ordered the accountant to falsify the return, but, rather, whether the defendants knew when they signed the return that it understated their income." ***United States v. Olbres***, 61 F.3d 967, 970-71 (1st Cir. 1995). A defendant who knew the return's contents and knew that the return understated income or was otherwise incorrect cannot claim to have blindly relied on a preparer. *Ibid.* "A jury may permissibly infer that a taxpayer read his return and knew its contents from the bare fact that he signed it." *Id.* at 971.

Counsel should be careful in raising hearsay objections to a defendant's testimony regarding an accountant or other professional's advice. *See* ***United States v. Moran***, 493 F.3d 1002, 1013 (9th Cir. 2007). In ***Moran***, *ibid.*, the Ninth Circuit held that the district court abused its discretion in barring defendant's testimony information she had received

[11] Some cases refer to reliance as an "affirmative defense." Reliance is not a classic affirmative defense; rather, it is a specific defense that negates the element of willfulness. Prosecutors should be careful not to suggest to the jury that the ultimate burden of persuasion has shifted to the defendant; the burden always remains with the government to prove that the defendant did not act in good faith.

regarding an accountant's advice, since the testimony was not offered for the truth of the advice, but to rebut the charge of her willfulness. The court held that the exclusion of the testimony was not harmless. Rather than challenging the admissibility of such testimony, counsel should request a limiting instruction by the court that notes to the jury that the accountant (or other professional's) testimony is not offered for the truth of the matter asserted, but for its impact on the defendant.

Good faith reliance on third parties is an issue to be determined by the jury. ***United States v. Duncan,*** 850 F.2d 1104, 1117 (6th Cir. 1988), *overruled in part on other grounds,* ***Schad v. Arizona***, 501 U.S. 624, 634-35 (1991). Therefore, a jury instruction on this issue should be submitted if credible evidence of third-party reliance is presented at trial. A defendant who demonstrates that he made full disclosure of all pertinent facts and relied in good faith on the advice received is entitled to a reliance-on-advice-of-accountant jury instruction. ***United States v. Ford***, 184 F.3d 566, 579 (6th Cir. 1999). A reliance-on-advice-of-accountant instruction may be warranted "even without *per se* testimony that the defendant relied on the accountant's advice, so long as the circumstances support an inference that he did so rely." *Ibid.; see also* ***Duncan***, 850 F.2d at 1115-19.

Where there is no evidentiary basis for a reliance defense, however, a defendant is not entitled to a jury instruction. ***Ford***, 184 F.3d at 579-80 (insufficient evidence to support reliance instruction); ***United States v. Evangelista***, 122 F.3d 112, 118 (2d Cir. 1997); ***United States v. Brimberry***, 961 F.2d 1286, 1290-91 (7th Cir. 1992).

The defendant's education, sophistication, and degree of reliance are relevant to a reliance defense. *See* ***United States v. Estate Preservation Services***, 202 F.3d 1093, 1103 (9th Cir. 2000) (defense unavailable in a civil action seeking an injunction where the defendant was a physicist who received training in taxation at the University of Southern California Law School). A defendant will not succeed in asserting third-party reliance if he or she seeks advice but, to further his scheme, chooses to ignore advisors skeptical of the legality of his statements and to follow the advice of others who unquestioningly agree. *Ibid.*

Furthermore, a taxpayer may not successfully assert the reliance defense where certain pertinent information, such as filing deadlines, is common knowledge. *See* ***United***

States v. Boyle, 469 U.S. 241, 251-52 (1985) (defense unavailable in action seeking to overturn civil penalty).

40.05[1][b] Reliance on Advice of Counsel

Reliance on the advice of an attorney in the preparation of income tax returns, including incomplete or "Fifth Amendment" returns, may negate willfulness. Reliance on counsel also may negate *mens rea* for other types of criminal charges, such as fraud. *See, e.g.*, ***United States v. Van Allen***, 524 F.3d 814, 823 (7th Cir. 2008); ***United States v. Rice***, 449 F.3d 887, 897 (8th Cir. 2006); ***United States v. Wenger***, 427 F.3d 840, 853 (10th Cir. 2005); ***United States v. West***, 392 F.3d 450, 457 (D.C. Cir. 2004); ***United States v. Petrie***, 302 F.3d 1280, 1287 (11th Cir. 2002); ***United States v. Butler***, 211 F.3d 826, 833 (4th Cir. 2000); ***United States v. Kenney***, 911 F.2d 315, 322 (9th Cir. 1990). The elements of the defense are the same regardless of the crime charged, but the effect depends on the applicable *mens rea*.

The Seventh Circuit, in ***United States v. Cheek***, 3 F.3d 1057, 1061 (7th Cir. 1993), used the following test to determine whether Cheek was entitled to a reliance-on-counsel defense instruction:

> In order to establish an advice of counsel defense, a defendant must establish that: "(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

(quoting ***Liss v. United States***, 915 F.2d 287, 291 (7th Cir. 1990)). The Seventh Circuit held that Cheek was not entitled to the instruction because he did not seek advice on possible future conduct, but "merely continued a course of illegal conduct begun prior to contacting counsel." ***Cheek***, 3 F.3d at 1062. Cheek did not make a full disclosure to his attorney nor follow his attorney's advice that he should obey the tax laws until told by a court that the laws were not valid. *Ibid.*

If evidence supporting the defense is presented at trial, the court should instruct the jury that the defendant's conduct is not "willful" if he acted with a good faith

misunderstanding based on the advice of counsel. However, no instruction should be given if the defendant does not present evidence to support the defense. *See* ***United States v. Bostian,*** 59 F.3d 474, 480 (4th Cir. 1995) **(**upholding refusal to give instruction where the attorney was hired to advise a third party not the defendant); ***United States v. Becker***, 965 F.2d 383, 387-88 (7th Cir. 1992) (upholding refusal to give reliance instruction where there was no testimony that the defendant told lawyer everything about his situation, received specific advice in response, and followed that advice); ***United States v. Snyder***, 766 F.2d 167, 169 (4th Cir. 1985) (testimony not sufficient to justify instruction concerning good faith reliance).

The defense requires that the defendant be seeking advice regarding the lawfulness of future conduct. ***United States v. Polytarides,*** 584 F.2d 1350, 1352-53 (4th Cir. 1978) (no error to reject reliance defense when evidence shows illegal acts before advice was sought). Additionally, if the defendant subsequently acquires information that indicates the advice was not valid, that may negate reliance. ***United States v. Benson,*** 941 F.2d 598, 614 (7th Cir. 1991), *amended*, 957 F.2d 301 (7th Cir. 1992).

If the criteria to present evidence regarding reliance on counsel are met, the prosecutor should be mindful of the testimony and, where appropriate, request a limiting instruction regarding the counsel's advice. See § 40.05[1][a], *supra*.

40.05[1][c] No Defense in Non-Tax Cases

In ***Cheek v. United States***, 498 U.S. 192, 199-201 (1991), the Supreme Court carefully limited the "good faith" defense to tax cases, emphasizing the complexity of the Internal Revenue Code**,** the average citizen's difficulty in comprehending duties it imposes, and the construction of "willfulness" in the tax context.

Various appellate courts have confirmed ***Cheek's*** limited application. *See* ***In re Air Disaster at Lockerbie Scotland***, 37 F.3d 804, 818 (2d Cir. 1994), *overruled in part on other grounds*, ***Zicherman v. Koran Air Lines Co.***, 516 U.S. 217 (1996); ***United States v. Chaney***, 964 F.2d 437, 446 n.25 (5th Cir. 1992) (bank fraud); ***United States v. Dockray,*** 943 F.2d 152, 155-156 (1st Cir. 1991) (mail and wire fraud).

The defense of reliance on advice of counsel may be available in some non-tax cases, but the effect of the defense will be determined by the *mens rea* of the crime charged.

40.05[2] Constitutional Challenges

40.05[2][a] Fourth Amendment -- Unreasonable Search and Seizure

The government's use at trial of a defendant's filed income tax returns or Forms W-4 does not violate the Fourth Amendment right against unreasonable searches and seizures. ***United States v. Amon***, 669 F.2d 1351, 1357-1358 (10th Cir. 1981); ***United States v. Warinner***, 607 F.2d 210, 211-13 (8th Cir. 1979).

The IRS has authority to obtain evidence through the execution of search warrants. ***United States v. Rosnow***, 977 F.2d 399, 409 n.17 (8th Cir. 1992). In ***Rosnow***, *ibid.*, the court noted that "Congress has given the IRS wide authority to conduct criminal investigations, including the execution of search warrants, regarding those individuals suspected of violating tax laws." *See also* ***United States v. Scott***, 975 F.2d 927, 928 (1st Cir. 1992) (IRS systematic search, seizure, and reconstruction of shredded documents from garbage bag in front of defendant's home did not violate Fourth Amendment); ***United States v. Dunkel***, 900 F.2d 105, 106 (7th Cir. 1990), *vacated on other grounds*, 498 U.S. 1043 (1991) (use of financial records obtained from taxpayer's dumpster does not violate Fourth Amendment).

40.05[2][b] Fifth Amendment -- Due Process; Freedom from Self-incrimination

Tax defiers' claims that taxes constitute a "taking" of property without due process of law in violation of the Fifth Amendment have been rejected. *See* ***Schiff v. United States***, 919 F.2d 830, 832 (2d Cir. 1990). The Supreme Court has held that the government's need for revenues justifies use of summary procedures to collect taxes. ***Phillips v. Commissioner***, 283 U.S. 589, 595 (1931).

Tax defiers often submit tax returns on which they refuse to provide any financial information, asserting their Fifth Amendment right against self-incrimination. U.S. CONST. amend. V. However, the Supreme Court has long held that the statutory requirement to file tax returns does not violate the Fifth Amendment. ***United States v. Sullivan***, 274 U.S. 259, 263-264 (1927).

Return forms containing little or no financial information from which a tax can be computed are sometimes referred to as "Fifth Amendment returns." The filing of a so-called Fifth Amendment return may constitute an affirmative act for the purpose of

proving evasion. *See* ***United States v. Waldeck***, 909 F.2d 555, 559 (1st Cir. 1990) ("fifth amendment" or "no information" return and false W-4s are evidence of willful attempt to evade and defeat assessment of taxes); ***United States v. DeClue***, 899 F.2d 1465, 1471 (6th Cir. 1990) (filing of return with no financial information, on which was typed, "object: self-incrimination," was evidence of willfulness for tax evasion).

In ***United States v. Sullivan***, 274 U.S. 259, 263 (1927), the Supreme Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for the complete failure or refusal to file a tax return. The Court, *id.* at 263, stated, however, that the privilege could be claimed against *specific disclosures* sought on a return:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.

The Court further stated, "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the *amount* of his income because it had been made in crime." *Id.* at 263-64 (emphasis added); *see* ***Garner v. United States,*** 424 U.S. 648, 650 (1976).

In ***Garner***, *id.* at 649-50, 656, the Court held that the admission of a defendant's prior Forms 1040, which reported his occupation as "professional gambler," did not violate his Fifth Amendment rights, since he had waived the privilege by supplying this information on his Forms 1040. The Court further stated what it deemed "implicit in the dictum of ***Sullivan***" -- that is, "a § 7203 conviction cannot be based on a valid exercise of the [Fifth Amendment] privilege." ***Garner***, 424 U.S. at 662. Moreover, the Court noted that it need not decide "what types of information are so neutral that the privilege could rarely, if ever, be asserted to prevent their disclosure." *Id*. at 650 n. 3. However, the Court specially limited its discussion of the privilege to a fear of self-incrimination *other than* under the tax laws. *Ibid*.

Sullivan is frequently cited for the proposition that a taxpayer may not use the Fifth Amendment to justify the failure to file any return at all. *See, e.g.,* ***Garner***, 424 U.S. at 650 n.3 ("nothing we say here questions the continuing validity of ***Sullivan***'s holding that returns must be filed"); ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006, at *2 (11th Cir. Sept. 10, 2008); ***United States v. Dack***, 987 F.2d 1282, 1284 (7th Cir.

1993) (upholding jury instruction summarizing ***Sullivan***); ***United States v. Stillhammer***, 706 F.2d 1072, 1076-77 (10th Cir. 1983); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir. 1982). Although not specifically citing ***Sullivan***, other courts hve held the same. *See* ***United States v. Leidendeker***, 779 F.2d 1417, 1418 (9th Cir. 1986); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (cases cited); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir. 1982); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979).

The Court has held that disclosure of routine financial information on a tax return ordinarily does not, in itself, incriminate an individual and does not violate one's Fifth Amendment right against self-incrimination. ***Garner***, 424 U.S. at 660-61; *see* ***California v. Byers***, 402 U.S. 424, 428, 430 (1971) ("the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure"). The Court has distinguished the filing of tax returns with questions that are neutral on their face for the public at large from a form's requirements that are directed to a discrete group who are "inherently suspected of criminal activity." ***Garner***, 424 U.S. 660-61; ***Albertson v. Subversive Activities Control Board***, 382 U.S. 70, 79 (1965) (distinguishing tax forms from registration queries directed to members of communist organization); ***Marchetti v. United States***, 390 U.S. 39, 52 (1968).

Courts will reject a defendant's Fifth Amendment claim if the defendant does not include any substantive tax information on Forms 1040 and fails to assert any clear threat of self-incrimination to warrant the absence of such information. *See, e.g.*, ***United States v. Warner***, 830 F.2d 651, 655-56 (7th Cir. 1987) (no legitimate Fifth Amendment claim based on fear of inaccurate return and income earned legitimately); ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir. 1983) (no privilege recognized when no data provided on Form 1040); ***United States v. Drefke***, 707 F.2d 978, 982-83 (8th Cir. 1983); ***Lawson***, 670 F.2d at 927; ***Reed***, 670 F.2d at 623-24 (pending criminal investigation, income from legitimate activities and potential civil liability are insufficient bases to assert Fifth Amendment privilege); ***United States v. Carlson***, 617 F.2d 518, 520-523 (9th Cir. 1980) (rejecting Fifth Amendment privilege as means to cover up past tax crimes; here, false Form W-4 previously filed by defendant); ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir. 1980) (assertion of privilege on 25 specific queries on Form 1040 rejected under extensive, multi-factor Fifth Amendment analysis); ***United States v. Schiff***, 612 F.2d 73, 77, 83 (2d Cir. 1979) (rejecting Fifth Amendment claim for entire return); ***Edelson***, 604 F.2d at 234; ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977); *See also*

United States v. Saussy, 802 F.2d 849, 854-55 (6th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 122-23 (7th Cir. 1985) (affirming jury instruction that stated, *inter alia*, that reporting income from legitimate activities would not fall within the Fifth Amendment privilege).

As noted, a Fifth Amendment claim may be asserted as to specific line items on tax forms. ***Sullivan***, 274 U.S. at 263. There are, however, few successful assertions of the Fifth Amendment privilege in this context. *See* ***Marchetti v. United States***, 390 U.S. 39, 49-52 (1938) (Fifth Amendment privilege protected gamblers from statutory obligations to register and pay occupational tax for wager). While rejecting defendants' broader claims, several courts, following ***Sullivan***, have recognized that a taxpayer may assert a Fifth Amendment privilege with respect to the *source* of income, although he may not assert the privilege with respect to the *amount* of income. *See* ***United States v. Harting***, 879 F.2d 765, 770 (10th Cir. 1989) (approving jury instruction that taxpayer is obliged to report the *amount* of income but may assert Fifth Amendment privilege regarding the *source* of income); ***United States v. Shivers***, 788 F.2d 1046, 1049 (5th Cir. 1986) (amount of taxpayer's income not privileged though source may be); *see also* ***United States v. Turk***, 722 F.2d 1439, 1441 (9th Cir. 1983) (invalid claim of privilege for entire return when taxpayer asserted information substantiating deductions might be incriminating).

In order to validly assert a Fifth Amendment privilege against self-incrimination, a defendant must do the following:

(1) claim the privilege on his or her return in response to a specific question (***Garner***, 424 U.S. at 665; ***United States v. Neff***, 615 F.2d 1235, 1238 (9th Cir. 1980));

(2) demonstrate a real and substantial danger of self-incrimination (***Neff***, 615 F.2d at 1239-40; ***Daly v. United States***, 393 F.2d 873, 878 (8th Cir. 1968)); and

(3) submit the claim to the reviewing court for resolution. (***Garner***, 424 U.S. at 663-65 (rejecting defendant's assertion that privilege claim must be resolved by court before § 7203 charges are pursued); ***Neff***, 615 F.2d at 1240). *See* ***Saussy***, 802 F.2d at 855.

A defendant must make some affirmative or "colorable" showing that providing the withheld data could subject him to prosecution. ***United States v. Verkuilen***, 690 F.2d

648, 654 (7th Cir. 1982). But, while a bald assertion that he is excising this right is insufficient, a defendant need not admit to the crime he seeks to avoid admitting. ***Green***, 757 F.2d at 123; ***United States v. Goetz***, 746 F.2d 705, 710 (11th Cir. 1982).

A court's determination that the defendant's claim of the Fifth Amendment privilege against self-incrimination is invalid does *not*, however, prohibit the defendant from offering evidence that he or she believed in good faith that providing the challenged information could subject him or her to criminal prosecution. ***Garner***, 424 U.S. at 663, n.18; *see* ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir. 1980) (extensive discussion of standard for Fifth Amendment claim). Such a good-faith claim, even if erroneous, is a valid defense to the element of willfulness under § 7203. *Id.* at 663 n.18; *see also* ***Saussy***, 802 F.2d at 854-855; ***Shivers***, 788 F.2d at 1049; ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir. 1983) (no good faith reliance on the Fifth Amendment by a tax defier who "attempted to frustrate the tax laws by use of the fifth amendment" in not providing substantive information on a Form 1040). A defendant cannot intentionally and knowingly violate an obligation to file under § 7203 if he or she believes, albeit erroneously, that the Fifth Amendment privilege protects him or her from the obligation to file.

Whether the defendant validly exercised the privilege against self-incrimination is a question of law for the court. ***Turk***, 722 F.2d at 1440. On the other hand, whether the defendant asserted the privilege in good faith, thereby entitling the defendant to acquittal, is a question of fact for the jury to resolve. ***Goetz***, 746 F.2d at 711-12; ***United States v. Smith***, 735 F.2d 1196, 1198 (9th Cir. 1984); ***Turk***, 722 F.2d at 1441.

Further, Section 6702 of Title 26 of the United States Code ("Frivolous Tax Submissions") imposes a civil penalty against any individual who, based on "a position [which is] frivolous" or "reflects a desire [which appears on the purported return] to delay or impede the administration of Federal tax laws," files an incomplete return. Courts repeatedly have upheld frivolous return penalties for taxpayers who assert Fifth Amendment privilege claims on incomplete forms. *See* ***Sochia v. Commissioner***, 23 F.3d 941, 942, 944 (5th Cir. 1994) (return frivolous where defendant supplied only names, address, and claimed Fifth Amendment privilege by inserting phrase: "Object -- Fifth Amend"); ***Eicher v. United States***, 774 F.2d 27, 29 (1st Cir. 1985) (blanket claim of privilege on return frivolous); ***Ricket v. United States***, 773 F.2d 1214, 1215 (11th Cir. 1985) (return containing only signature and date and invoking privilege was "frivolous");

Peeples v. Commissioner, 771 F.2d 77, 78-79 (4th Cir. 1984) (words "refused" and Fifth Amendment claim rendered return frivolous); ***Hudson v. United States***, 766 F.2d 1288, 1291 (9th Cir. 1985) (taxpayer's statement that complete return could be used to prosecute potential false claims action insufficient to invoke Fifth Amendment protection).

40.05[2][c] Tax Laws Are Unconstitutionally Vague

Sections 7203, 7205 and 7206 have withstood challenges that they are unconstitutionally vague. ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (§ 7206) ("The void-for-vagueness doctrine requires [only] that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" (citation omitted)); ***United States v. Dunkel***, 900 F.2d 105, 107-108 (7th Cir. 1990) (§ 7203) ("It is enough that a reasonable person can see what Congress is driving at"), *vacated on other grounds*, 498 U.S. 1043 (1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (§ 7205); ***United States v. Pederson***, 784 F.2d 1462, 1463-64 (9th Cir. 1986) (§ 7203); ***United States v. Parshall***, 757 F.2d 211, 215 (8th Cir. 1985) (§ 7203); ***United States v. Damon***, 676 F.2d 1060, 1063 (5th Cir. 1982) (§ 7206(2)); ***United States v. Annunziato***, 643 F.2d 676, 677-78 (9th Cir. 1981) (§ 7205); ***United States v. Russell***, 585 F.2d 368, 370 (8th Cir. 1978) (§ 7203); ***United States v. Buttorff***, 572 F.2d 619, 624-25 (8th Cir. 1978) (§ 7205); ***United States v. Lachmann***, 469 F.2d 1043, 1046 (lst Cir. 1972) (§ 7203).

40.05[2][d] Sixteenth Amendment Never Ratified

Tax defiers have claimed that the Sixteenth Amendment, which grants Congress the power to collect income taxes without apportionment, is not part of the United States Constitution. See Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar -- Whatever His Demands*, 32 Gonz. L. Rev. 291, 301-302 (1997) (reciting litany of tax defier arguments).

The Supreme Court has stated that assertions regarding proper ratification of Constitutional Amendments are political questions for Congress to decide and are beyond federal court jurisdiction. *See* ***Coleman v. Miller***, 307 U.S. 433, 450-56 (1939) (Black, J., concurring). The Secretary of State's certification that the required number of states have ratified an amendment is binding on the courts. *See* ***Leser v. Garnett***, 258 U.S. 130, 137 (1922) (Secretary of State's certification that the Nineteenth Amendment had been

ratified by the requisite number of state legislatures was conclusive upon the courts); ***United States v. Stahl***, 792 F.2d 1438, 1439 (9th Cir. 1986) (Secretary of State's certification that the Sixteenth Amendment was properly ratified was conclusive upon the courts); *accord* ***United States v. Thomas***, 788 F.2d 1250, 1253-54 (7th Cir.1986).

In ***United States v. House***, 617 F. Supp. 237, 240 (W.D. Mich. 1985), the district court rejected the defendant's argument that the Sixteenth Amendment is not a part of the Constitution. Chief Judge Miles stated that the "sixteenth amendment and the tax laws passed pursuant to it have been followed by the courts for over half a century. They represent the recognized law of the land." *Id*. In 1989, citing ***McDougal v. Commissioner***, 818 F.2d 453, 455 (5th Cir. 1987), the Ninth Circuit found the Sixteenth Amendment argument to be in "direct conflict with 'firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification (citation omitted)." ***In re Becraft***, 885 F.2d 547, 549 (9th Cir. 1989).

Courts have consistently rejected the contention that the Sixteenth Amendment was never properly ratified and that the federal government therefore lacks authority to collect an income tax. *See* ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990) (sixteenth amendment argument devoid of any arguable basis in law); ***Axmann v. Ponte***, 892 F.2d 761, 761 (8th Cir. 1990); ***In re Becraft***, 885 F.2d 547, 548-49 (9th Cir. 1989) (recognizing patent absurdity and frivolity of claim that "Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens and thus such citizens are not subject to the federal income tax law"); ***Miller v. United States***, 868 F.2d 236, 240-41 (7th Cir. 1989); ***United States v. Sitka***, 845 F.2d 43, 45-47 (2d Cir. 1988) (rejecting clerical errors argument); ***Pollard v. Commissioner***, 816 F.2d 603, 604-05 (11th Cir. 1987) (rejecting as frivolous claim that Sixteenth Amendment was never ratified); ***United States v. Stahl***, 792 F.2d 1438, 1439-40 (9th Cir. 1986); ***Coleman v. Commissioner***, 791 F.2d 68, 70 (7th Cir. 1986); ***Sisk v. Commissioner***, 791 F.2d 58, 60-61 (6th Cir. 1986) (rejecting clerical errors and "Ohio not a State" arguments); ***United States v. Thomas***, 788 F.2d 1250, 1253 (7th Cir. 1986) (rejecting argument that states had to approve exactly the same text Congress transmitted to them); ***Knoblauch v. Commissioner***, 749 F.2d 200, 201-202 (5th Cir. 1984) (variant wording in state ratification resolution without consequence; "Ohio not a State" argument rejected).

40.05[3] Selective Prosecution and Freedom of Speech

40.05[3][a] Generally

Tax defiers have asserted that their prosecutions violated their First Amendment rights to freedom of speech. Defiers argued that they were being prosecuted merely because they were outspoken, prominent critics of the Internal Revenue Code. This is actually a selective prosecution defense, not a First Amendment defense. There is consensus among the circuits that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment. ***United States v. Rowlee***, 899 F.2d 1275, 1279 (2d Cir. 1990) (collecting cases); ***United States v. Holecek***, 739 F.2d 331, 334-335 (8th Cir. 1984).

On the other hand, in certain limited instances, a First Amendment freedom of speech issue may be presented where a tax defier is prosecuted on an aiding and abetting or conspiracy charge and the tax defier claims that his or her counseling or advice to others was limited to speech, without action, and is therefore protected by the First Amendment.

40.05[3][b] Selective Prosecution Defense

"A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." ***United States v. Armstrong***, 517 U.S. 456, 463 (1996).

The test for selective prosecution is rigorous. In order to overcome a presumption of prosecutorial regularity, a defendant must present "clear evidence" that the decision to prosecute was based on "an unjustifiable standard, such as race, religion, or other arbitrary classification" or that the "administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that prosecution amounts to 'a practical denial' of equal protection of the law." ***Armstrong***, 517 U.S. at 464-65 (quoting ***Oyler v. Boles,*** 368 U.S. 448, 456 (1962) and ***Yick Wo v. Hopkins,*** 118 U.S. 356, 373 (1886)). The defense that tax defiers are being selectively prosecuted because they are outspoken opponents of the Internal Revenue Code rarely succeeds.

The defendant who asserts selective prosecution carries a heavy burden. In ***United States v. Berrios***, 501 F.2d 1207, 1211 (2d Cir. 1974), the Second Circuit set out the two prongs of the test that the defendant must satisfy:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Other circuits have also adopted this rigorous standard. *See* ***United States v. Sutcliffe,*** 505 F.3d 944, 954 (9th Cir. 2007); ***United States v. Khan***, 461 F.3d 477, 498 (4th Cir. 2006); ***United States v. Hedaithy***, 392 F.3d 580, 607 (3d Cir. 2004); ***United States v. Alameh,*** 341 F.3d 167, 172-74 (2d Cir. 2003); ***United States v. Smith***, 231 F.3d 800, 807-08 (11th Cir. 2000); ***United States v. Hastings***, 126 F.3d 310, 313-14 (4th Cir. 1997) (tax case); ***United States v. Michaud***, 860 F.2d 495, 499-500 (lst Cir. 1988) (tax case); ***United States v. McMullen***, 755 F.2d 65, 66-67 (6th Cir. 1984) (tax case); ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (tax case); ***United States v. Holecek***, 739 F.2d 331, 333-34 (8th Cir. 1984) (tax case); ***United States v. Mangieri***, 694 F.2d 1270, 1273 (D.C. Cir. 1982); ***United States v. Damon***, 676 F.2d 1060, 1064-1065 (5th Cir. 1982) (tax case); ***United States v. Amon***, 669 F.2d 1351, 1356 n.6 (10th Cir. 1981) (tax case).

Absent clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties, and a defendant bears the burden of establishing a prima facie case of selective prosecution. ***United States v. Armstrong***, 517 U.S. at 464; ***United States v. Lewis***, 517 F.3d 20, 25 (1st Cir. 2008); ***United States v. Deberry,*** 430 F.3d 1294, 1299 (10th Cir. 2005). The defendant bears the burden of production before he or she is entitled to an evidentiary hearing or discovery. ***United States v. Lewis***, 517 F.3d at 25; ***United States v. Darif,*** 446 F.3d 701, 708 (7th Cir. 2006); ***United States v. Deberry,*** 430 F.3d at 1299.

Courts use different terms to describe the evidentiary showing that the defendant must make to be entitled to an evidentiary hearing or discovery; in general, the defendant need not completely establish his prima facie case, but must present some evidence on both prongs of the test. The standard requires that the defendant make a "credible showing" on the elements of his or her claim; the standard is intentionally "rigorous" and intended to be "a significant barrier to the litigation of insubstantial claims." ***United States v. Armstrong***, 517 U.S. at 470, 468, 464; *see also* ***United States v. Lewis***, 517 F.3d at 25; ***United States v. Alcaraz-Arellano***, 441 F.3d 1252, 1264 (10th Cir. 2007); ***United States v. Hedaithy***, 392 F.3d at 607; ***United States v. Alameh,*** 341 F.3d at 173-74; ***United States v. Hastings***, 126 F.3d at 313-14; ***United States v. Hayes,*** 236 F.3d 891, 895 (7th Cir. 2001). The defendant must present "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." ***United States v. Berrios***, 501 F.2d 1207, 1211-12 (2d Cir. 1974); *see also* ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986); ***United States v. Moon***, 718 F.2d 1210, 1229 (2d Cir. 1983); ***United States v. Ness,*** 652 F.2d 890, 892 (9th Cir. 1981).

As a practical matter, the government should resist discovery or an evidentiary hearing on this issue until the defendant has made the requisite showing. Defendants may use frivolous claims of selective prosecution to obtain documents, such as internal government memoranda, they otherwise would not be entitled to under Fed. R. Crim. P. 16.

If the defendant makes the required showing, the burden shifts to the government to show that there was no selective prosecution.

Generally, courts have upheld government targeting of vocal tax defiers for prosecution against defendants' selective prosecution attacks. "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. . . . Selection, moreover, is not impermissible solely because it focuses upon those most vocal in their opposition to the law which they are accused of violating. The fact that tax protestors are vigorously prosecuted for violation of the tax laws demonstrates nothing more than a legitimate interest in punishing flagrant violators and deterring violations by others." ***United States v. Johnson***, 577 F.2d 1304, 1309 (5th Cir. 1978) (citations omitted); *see also* ***United States v. Amon***, 669 F.2d 1351, 1355-57 (10th Cir. 1981). The government's initiation of prosecution because of a defendant's "great notoriety" as a tax

defier would not, as a matter of law, be an impermissible basis for prosecution. ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983). Indeed, "selection for prosecution based in part on the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws. Since the government lacks the means to investigate and prosecute every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media." ***United States v. Catlett***, 584 F.2d 864, 868 (8th Cir. 1978); *see also* ***United States v. Hastings***, 126 F.3d at 314-15; ***United States v. Kelley***, 769 F.2d 215, 218 (4th Cir. 1985) ("There is no impermissible selectivity in a prosecutorial decision to prosecute the ringleader and instigator, without prosecuting his foolish followers, when a prosecution of the instigator can be expected to bring the whole affair to an end.").

"[S]elective enforcement of the law is not in itself a constitutional violation, in the absence of invidious purpose. * * * 'The government's prosecution of tax protesters as a group merely indicates a valid interest in punishing violators who flagrantly and vocally break the law.'" ***United States v. Rice,*** 659 F.2d 524, 527 (5th Cir. 1981) (quoting ***United States v. Tibbetts,*** 646 F.2d 193, 195 (5th Cir. 1981)).

The fact that some tax evaders and defiers elude prosecution is insufficient to establish selective prosecution. ***United States v. Brewer***, 681 F.2d 973, 974 (5th Cir. 1982). The defendant must show that others similarly situated were not prosecuted *and* that her or his prosecution was based on some impermissible consideration, such as race or religion. *See* ***United States v. Hastings***, 126 F.3d at 314-16; ***United States v. Amon***, 669 F.2d at 1356-57. Furthermore, the IRS is not required to treat similarly all who engage in roughly the same conduct. ***United States v. Michaud***, 860 F.2d at 499. Vigorous prosecution is not selective prosecution. ***United States v. Brewer***, 681 F.2d at 974.

"Unless one can show that the tax laws are deployed against protesters in retaliation for the exercise of their rights, a selective prosecution argument will fail." ***United States v. Wilson***, 639 F.2d 500, 505 (9th Cir. 1981).

Absent special circumstances, a selective prosecution claim must be raised prior to trial, or the claim will be deemed waived. Fed R. Crim. P. 12(b)(3)(A); 12(e); ***United States v. Huber***, 404 F.3d 1047, 1054 (8th Cir. 2005); ***United States v. Gary***, 74 F.3d 304, 313 (1st Cir. 1996); ***United States v. Bryant***, 5 F.3d 474, 476 (10th Cir. 1993).

40.05[3][c] Freedom of Speech

In ***Brandenburg v. Ohio***, 395 U.S. 444, 447 (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Where a person's activity is limited to the mere advocacy of non-compliance with the tax laws and the defendant does not prepare or assist in the preparation of tax returns, there may be a viable First Amendment defense.

Where a defendant's speech is combined with action, however, as when a defendant encourages and is actually involved in the preparation of false or fraudulent returns for others, the defendant has gone beyond the protection of the First Amendment and may be subject to criminal prosecution. *See*, *e.g.*, ***United States v. Fleschner***, 98 F.3d 155, 158-59 (4th Cir. 1996) (First Amendment lends no protection to speech which urges the listener to commit violations of current law); ***United States v. Knapp***, 25 F.3d 451, 457 (7th Cir. 1994); ***United States v. Citrowske***, 951 F.2d 899, 901 (8th Cir. 1991); ***United States v. Rowlee***, 899 F.2d 1275, 1279-80 (2d Cir. 1990); ***United States v. Kelley***, 769 F.2d 215, 217 (4th Cir. 1985); ***United States v. Damon***, 676 F.2d 1060, 1062 (5th Cir. 1982); *cf.* ***United States v. Freeman***, 761 F.2d 549, 551-552 (9th Cir. 1985) (reversing convictions on twelve counts because district court failed to allow jury to consider First Amendment defense; conviction on two counts affirmed since defendant directly participated in preparation of returns).

A taxpayer cannot claim protection under the First Amendment by simply characterizing his filing of false information and tax returns as "petitions for redress." ***United States v. Kuball***, 976 F.2d 529, 532 (9th Cir. 1992); *see also* ***United States v. Ambort***, 405 F.3d 1109, 1117 (10th Cir.2005); ***United States v. Barnett***, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.").

In ***United States v. Buttorff***, 572 F.2d 619, 624 (8th Cir. 1978), the Eighth Circuit held that the defendant's activities went beyond the scope of protection of the First Amendment:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal

> syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

See also ***United States v. Fletcher,*** 322 F.3d 508, 515 (8th Cir. 2003); ***United States v. Moss***, 604 F.2d 569, 571 (8th Cir. 1979); *but see* ***Freeman***, 761 F.2d at 551-552 (convictions on section 7206(2) charges based on Freeman's instructional seminars reversed because of trial court's failure to instruct that First Amendment defense was a question of fact for the jury).

In ***United States v. Fleschner***, 98 F.3d 155, 158-59 (4th Cir. 1996), the Fourth Circuit discussed some of the factors that made the First Amendment defense inapplicable:

> The evidence in this case, however, does not support a First Amendment defense. The defendants' words and acts were not remote from the commission of the criminal acts. The evidence shows that the defendants held meetings and collected money from attendees whom they instructed and advised to claim unlawful exemptions and not to file income tax returns or pay tax on wages in violation of the United States Tax Code. The evidence shows that the attendees followed the instruction and advice of the defendants, that the attendees' unlawful actions were solicited by the defendants, and that the defendants were aware that the attendees were following their instructions and advice. The evidence discloses that a purpose of the meetings was to encourage people to unlawful actions by convincing them that it was legal to claim false exemptions, to hide income, and to refuse to file income tax returns or pay income tax.

"Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." ***Freeman***, 761 F.2d at 552 (citations omitted). *See also* ***Kelley***, 769 F.2d at 217.

"[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself." ***United States v. Varani***, 435 F.2d 758, 762 (6th Cir. 1970) (citing statutes criminalizing perjury, bribery, extortion, threats, and conspiracy). "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." ***United States v. O'Brien***, 391 U.S. 367, 376 (1968); *see also* ***New York v. Ferber***, 458 U.S. 747, 761-62 (1982) ("It has rarely been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); ***Cox v. Louisiana***, 379 U.S. 559, 563 (1965); ***Giboney v. Empire Storage & Ice Co.***, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (citing ***Fox v. Washington***, 236 U.S. 273, 277 (1915)).

The necessity of "maintaining a sound tax system" is a compelling governmental interest. *See* ***United States v. Lee***, 455 U.S. 252, 260 (1982); ***United States v. Malinowski***, 472 F.2d 850, 857-58 (3d Cir. 1973). "[N]oncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment." ***Welch v. United States***, 750 F.2d 1101, 1108 (1st Cir. 1985); *cf*. ***United States v. Rowlee***, 899 F.2d 1275, 1279 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment.").

Applying ***O'Brien***, the Court of Appeals for the Second Circuit has found that, as to charges of conspiracy to violate the tax laws, the charged conduct "was not protected by the First Amendment merely because, in part, it may have involved the use of language." ***United States v. Rowlee***, 899 F.2d 1275. 1278 (2d Cir. 1990). Additionally, the Fifth Circuit has held that because the defendant must have acted corruptly, that is, with the intent to secure an unlawful advantage or benefit, 26 U.S.C. § 7212(a) does not infringe on First Amendment rights. ***United States v. Reeves***, 752 F.2d 995, 1001 (5th Cir. 1985).

Additionally, prosecutors should bear in mind that evidence of the defendant's tax protest activities, advocacy, and beliefs may be admissible to show willfulness, *see* ***United States v. McKee***, 506 F.3d 225, 249 (3d Cir. 2007); ***United States v. Hogan***, 861

F.2d 312, 316 (1st Cir. 1988); ***United States v. Bergman***, 813 F.2d 1027, 1029 (9th Cir. 1987); ***United States v. Reed***, 670 F.2d 622, 623 (5th Cir. 1982), and that the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent, ***Wisconsin v. Mitchell***, 508 U.S. 476, 489 (1993).

In ***United States v. Turano***, 802 F.2d 10, 12 (1st Cir. 1986), for example, the defendant in a section 7203 failure-to-file case claimed that his First Amendment rights had been violated by the introduction of evidence of his "tax protest" activities and instructions to the jury about "tax protesters." The court rejected this argument, explaining that the defendant

> was not convicted of speaking out against taxation or for encouraging others not to file, but rather for willfully failing to file his own returns. In order to determine his state of mind, the jury was entitled to know what he said and did regarding Federal income taxation. The First Amendment protects the appellant's right to express beliefs and opinions; it does not give him the right to exclude beliefs and opinions from a jury properly concerned with his motivations for failing to file.

40.05[4] District Court Lacks Jurisdiction over Title 26 Offenses

40.05[4][a] Generally

Despite tax defiers' claims to the contrary, it is clear that United States District Courts have jurisdiction over criminal offenses enumerated in the Internal Revenue Code, notwithstanding the absence of a statute within Title 26 conferring such jurisdiction. Section 3231 of Title 18 of the United States Code gives the district courts original jurisdiction over "all offenses against the laws of the United States," and the Internal Revenue Code defines offenses against the laws of the United States. *See* ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006 (11th Cir. Sept. 10, 2008); ***United States v. Chisum***, 502 F.3d 1237, 1243 (10th Cir. 2007); ***United States v. Rosnow***, 977 F.2d 399, 412 (8th Cir. 1992); ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992); ***United States v. Huguenin***, 950 F.2d 23, 25 n.2 (1st Cir. 1991); ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990) ("it defies credulity to argue that the district court lacked jurisdiction to adjudicate" 26 U.S.C. § 7201 action); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987); ***United States v. Bressler***, 772 F.2d 287, 293 n.5 (7th Cir. 1985); ***United States v.***

Isenhower, 754 F.2d 489, 490 (3d Cir. 1985); ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984); ***United States v. Eilertson***, 707 F.2d 108, 109 (4th Cir. 1983); *see also* ***United States v. McMullen***, 755 F.2d 65, 67 (6th Cir. 1984); *see generally* ***United States v. Daraio***, 445 F.3d 253, 259 (3d Cir. 2006).

There is no merit to the argument that the United States has jurisdiction only over the District of Columbia, federal enclaves and territories, and possessions of the United States. *See* 26 U.S.C. §§ 7701(a)(9) ("The term 'United States' when used in a geographical sense includes only the States and the District of Columbia") and 7701(c) ("The term 'includes' . . . when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined"); ***United States v. Mundt***, 29 F.3d 233, 237 (6th Cir. 1994) (argument that district court lacks jurisdiction over Michigan resident "completely without merit and patently frivolous"); ***United States v. Collins***, 920 F.2d at 629; ***Lonsdale v. United States***, 919 F.2d 1440, 1448 (10th Cir. 1990); ***United States v. Ward***, 833 F.2d at 1539.

40.05[4][b] The Gold-Fringed Flag ("The American Maritime Flag of War")[12]

Various litigants, including tax defiers, argue that the placement in a court room of a gold-fringed American flag denotes (1) admiralty jurisdiction, (2) suspension of constitutional governmental functions, and/or (3) martial law. This frivolous argument merits little response by the prosecutor.

Litigants call the gold-fringed American flag the "maritime flag of war" and claim its display signifies "[d]eprivation of rights under color of law." ***McCann v. Greenway***, 952 F. Supp. 647, 649 (W.D. Mo. 1997). They maintain that a court that flies a gold-fringed flag (1) lacks jurisdiction over those coming before it and (2) deprives the litigant of due process rights. Not surprisingly, courts uniformly reject such claims. *See* ***Salman v. Nevada***, 104 F. Supp. 2d 1262, 1266 (D. Nev. 2000) ("Plaintiff's argument that the gold fringe around an American flag in a courtroom designates admiralty jurisdiction is . . . wholly frivolous"); ***Schneider v. Schlaefer***, 975 F. Supp. 1160, 1161-64 (E.D. Wis. 1997) (contention that court proceedings were conducted unconstitutionally because of flag form rejected; claims or defenses based upon preeminence of American "flag of peace" over all other flags frivolous and sanctionable); ***United States v. Greenstreet***, 912 F. Supp. 224, 229 (N.D. Tex. 1996) (rejecting argument that display of fringed flag limits

[12] ***McCann v. Greenway***, 952 F. Supp. 647, 648-49 (W.D. Mo. 1997).

federal court to admiralty jurisdiction); ***Moeller v. D'Arrigo***, 163 F.R.D. 489, 491 & n.1 (E.D. Va. 1995); ***Vella v. McCammon***, 671 F. Supp. 1128, 1129 (S.D.Tex. 1987) (rejecting contention that federal court flying fringed flag lacks jurisdiction to impose penalty for criminal contempt).

"[I]n the interests of killing this argument for good, and to facilitate appellate review," Judge Whipple of the United States District Court for the Western District of Missouri provided a history of the flag and concluded that the litigant's claims of constitutional deprivation

> must be dismissed because his factual predicate is incorrect as a matter of law. Even if the Army or Navy do display United States flags surrounded by yellow fringe, the presence of yellow fringe does not necessarily turn every such flag into a flag of war. Far from it: in the words of the Adjutant General of the Army, "[i]n flag manufacture a fringe is not considered to be a part of the flag, and it is without heraldic significance." . . . If fringe attached to the flag is of no heraldic significance, the same is true *a fortiori* of an eagle gracing the flagpole. Nor are the fringe or eagle of any legal significance. . . . Jurisdiction is a matter of law, . . . , not a child's game wherein one's power is magnified or diminished by the display of some magic talisman.

McCann v. Greenway, 952 F. Supp. at 650-651 (citations omitted).

Trial attorneys responding to a motion to dismiss based on a gold-fringed-flag jurisdictional argument should utilize Judge Whipple's history and analysis.

40.05[5] Filing Income Tax Returns Is Voluntary, Not Mandatory

In ***Flora v. United States***, 362 U.S. 145, 176 (1960), a case in which the Supreme Court held that the government *could*, if it so desired, collect taxes by distraint, the Court noted that "[o]ur tax system is based upon voluntary assessment and payment and not upon distraint." Tax defiers, taking the Court's observation out of context, have argued that the filing of income tax returns is purely voluntary, a claim that has been repeatedly rejected by the courts. *See* ***United States v. Gerads,*** 999 F.2d 1255, 1256 (8th Cir. 1993) ("Appellants' claim that payment of federal income tax is voluntary clearly lacks substance"); ***Lonsdale v. United States***, 919 F.2d 1440, 1448 (10th Cir. 1990); ***Wilcox v. Commissioner***, 848 F.2d 1007, 1008 (9th Cir. 1988); ***Newman v. Schiff***, 778 F.2d 460,

467 (8th Cir. 1985); ***United States v. Hartman***, 915 F. Supp. 1227 (M.D. Fla. 1996) ("Any assertion that the payment of income taxes is voluntary is without merit"); *see also* ***United States v. Schiff***, 379 F.3d 621, 629 (9th Cir. 2004) (finding that a tax defier's books that promoted a tax scheme that fraudulently claimed that payment of federal taxes was voluntary was properly enjoined).

The word "voluntary" as used in ***Flora*** and other cases refers to our system of allowing taxpayers to determine the correct amount of tax and complete the appropriate returns rather than having the government determine tax for them. *See* ***United States v. Schiff***, 876 F.2d 272, 275 (2d Cir. 1989) ("To the extent that income taxes are said to be 'voluntary,' however, they are only voluntary in that one files the returns and pays the taxes without the IRS first telling each individual the amount due and then forcing payment of that amount."). The filing of tax returns and the payment of tax are not voluntary. The obligation to pay tax is described in 26 U.S.C. § 6151, which requires taxpayers to submit payment with their tax returns. Section 6012(a)(1)(A) of Title 26 U.S.C. requires that every individual who earns a threshold level of income must file a tax return. If the taxpayer received more than the statutory amount of gross income, then he or she is obligated to file a return. See 26 U.S.C. §§ 1, 6012; ***United States v. Tedder***, 787 F.2d 540, 542 (10th Cir. 1986), *abrogated on other grounds as stated in* ***United States v. Collins***, 920 F.2d 619 (10th Cir.1990); ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); *see also* ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir. 1982) ("Every income earner is required to file an income tax return"); ***United States v. Hurd***, 549 F.2d 118, 119 (9th Cir. 1977).

A taxpayer who does not file faces both civil and criminal penalties: "In assessing income taxes, the Government relies primarily upon the disclosure by the taxpayer of the relevant facts . . . in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions . . . criminal or civil." ***Helvering v. Mitchell***, 303 U.S. 391, 399 (1938).

Prosecutors should note, however, that pursuant to the Supreme Court's decision in ***Cheek v. United States***, 498 U.S. 192 (1991), a defendant may, of course, present evidence that he holds a good faith belief that the payment of taxes is "voluntary." *See* ***United States v. Willis***, 277 F.3d 1026, 1033 (8th Cir. 2002); ***United States v. Dunkel***, 927 F.2d 955, 956 (7th Cir. 1991). However, when a tax defier claims a good-faith belief that filing tax returns or paying taxes is voluntary, it is not error for the district court to

correctly instruct the jury that the word "voluntary" does not mean "optional." *See* ***United States v. Middleton***, 246 F.3d 825, 841 (6th Cir. 2001). In ***Middleton***, the Court gave the following instruction based upon the Second Circuit's decision in ***Schiff***, 876 F.2d at 275:

> The word voluntary is not the equivalent of optional. To the extent that income taxes are said to be voluntary, they are only voluntary in that one files the returns and pays the taxes without the IRS first telling each individual the amount due and then forcing payment of that amount. The payment of income taxes is not optional.

246 F.3d at 840. The defendant argued that the jury instruction undermined his good-faith defense because it was an improper substitution of the court's view of the validity of the defendant's good-faith defense. *Id*. at 841. The Sixth Circuit rejected that argument, holding that the court's instruction was a correct statement of the law that the jury was obligated to consider in evaluating the credibility of the defendant's asserted good-faith belief. *Id*.

40.05[6] Wages Are Not Income

A common defense raised by tax defiers is that salaries and wages are not "income" within the meaning of the Sixteenth Amendment, which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived."

The Supreme Court has defined income as "the gain derived from capital, from labor, or from both combined . . . ." ***Eisner v. Macomber***, 252 U.S. 189, 207 (1920). Section 61(a) of Title 26 of the United States Code defines gross income as "all income from whatever source derived, including . . . (1) Compensation for services . . .." Wages or salaries received in exchange for services rendered are income that must be reported on a tax return. *See* ***Commissioner v. Glenshaw Glass Co.***, 348 U.S. 426, 429-33 (1955); ***Commissioner v. Smith***, 324 U.S. 177, 181 (1945); ***Robertson v. Commissioner***, 190 F.3d 392, 395 (5th Cir. 1999); ***United States v. Sloan***, 939 F.2d 499, 500 (7th Cir. 1991); ***Capp v. Eggers***, 782 F.2d 1341, 1343 (5th Cir. 1986); ***Perkins v. Commissioner***, 746 F.2d 1187, 1188 (6th Cir. 1984)***; Funk v. Commissioner***, 687 F.2d 264, 265 (8th Cir. 1982); ***United States v. Lawson***, 670 F.2d 923, 925 (10th Cir. 1982); ***United States v. Romero***, 640 F.2d 1014, 1016 (9th Cir. 1981). Courts uniformly interpret "income" to include wages and salaries. *See* ***Connor v. Commissioner***, 770 F.2d 17, 20 (2d Cir. 1985)

("The argument that they are not has been rejected so frequently that the very raising of it justifies the imposition of sanctions."

40.05[7] Defendant Not A "Person" or "Citizen"; District Court Lacks Jurisdiction Over Non-Persons and State Citizens

40.05[7][a] Generally

Tax Defiers often argue that they are not liable for federal income taxes because they are not "persons" subject to taxation under the Internal Revenue Code. A citizen or resident of the United States is included in the Internal Revenue Code's definition of a United States person. 26 U.S.C. § 7701(a)(30)(A). The not-a-person argument has been dismissed by the courts as "frivolous," "patently frivolous," "fatuous," and "obviously incorrect." ***See Lonsdale v. United States***, 919 F.2d 1440, 1448 (10th Cir. 1990); ***United States v. Karlin***, 785 F.2d 90, 91 (3d Cir. 1986); ***Biermann v. Commissioner***, 769 F.2d 707, 708 (11th Cir. 1985); ***United States v. Rice***, 659 F.2d 524, 528 (5th Cir. 1981); ***United States v. Romero***, 640 F.2d 1014, 1016 (9th Cir. 1981). Similar arguments asserting that the defendant was an "individual" and therefore not a "taxpayer" have also been rejected. *See* ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990); ***Lonsdale***, 919 F.2d at 1448; ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987); ***United States v. Studley***, 783 F.2d 934, 937 (9th Cir. 1986); ***Lovell v. United States***, 755 F.2d 517, 519 (7th Cir. 1984) ("All individuals, natural or unnatural, must pay federal income tax on their wages").

Another popular tax defier argument is that the defier is not subject to federal law because he or she is not a citizen of the United States, but a citizen of a particular "sovereign" state. This argument seems to be based on a misinterpretation of 26 U.S.C. § 3121(e)(2), which states in part: "The term 'United States' when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa." The not-a-citizen assertion directly contradicts the Fourteenth Amendment, which states "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This argument has been consistently rejected by the courts. *See* ***United States v. Cooper***, 170 F.3d 691, 691(7th Cir. 1999) ("These arguments, frivolous when first made, have been rejected in countless cases. They are no longer merely frivolous; they are frivolous squared"); ***United States v. Mundt***, 29 F.3d 233, 237 (6th

Cir. 1994) (rejecting "patently frivolous" argument that defendant was not a resident of any "federal zone" and therefore not subject to federal income tax laws); ***United States v. Hilgeford***, 7 F.3d 1340, 1342 (7th Cir. 1993) (rejecting "shop worn" argument that defendant is a citizen of the "Indiana State Republic" and therefore "an alien beyond the jurisdictional reach of the federal courts"); ***United States v. Gerads***, 999 F.2d 1255, 1256-57 (8th Cir. 1993) (imposed $1,500 sanction for frivolous appeal that included the argument that defendants were "not citizens of the United States, but rather 'Free Citizens of the Republic of Minnesota' and, consequently, not subject to taxation"); ***United States v. Silevan***, 985 F.2d 962, 970 (8th Cir. 1993) (rejected as "plainly frivolous" defendant's argument that he was not a "federal citizen"); ***United States v. Jagim***, 978 F.2d 1032, 1036 (8th Cir. 1992) (rejected as "imaginative" argument that defendant could not be punished under the tax laws of the United States because he was a citizen of the "Republic" of Idaho, claiming "asylum" in the "Republic" of Colorado); ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991) (rejected as frivolous argument that court lacked personal jurisdiction over defendant who claimed "non-citizen," "non-resident," "freeman" status); ***United States v. Sloan***, 939 F.2d 499, 500-01 (7th Cir. 1991) (rejecting "strange argument" that defendant is not subject to jurisdiction of the laws of the United States because "he is a freeborn, natural individual, a citizen of the State of Indiana, and a 'master'-not 'servant'-of his government"); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (citizens of the State of Texas are subject to the provisions of the Internal Revenue Code).

40.05[7][b] Filing U.S. Nonresident Alien Income Tax Return (Form 1040NR)

Some tax defiers who argue that they are citizens of a "sovereign state" also claim to be exempt from federal taxes because they are nonresident aliens. This argument is flawed because (1) persons who were born in a state within the United States are citizens of the United States, not nonresident aliens (U.S. Const., Amend. XIV, § 1, and (2) nonresident alien individuals are taxed on income from sources within the United States and on sources outside the United States effectively connected with a trade or business in the United States (26 U.S.C. § 871; Treas. Reg. §1.871-1(b)).. Courts have ruled that the non-resident alien arguments put forth by individuals born in the United States are frivolous. *See* ***United States v. Ambort***, 405 F.3d 1109, 1114 (10th Cir. 2005) (noting that "Ambort does not, and cannot, argue that he has a good faith belief that he is a nonresident alien not subject to taxation. We have specifically said as much, and Ambort concedes that his argument has been repeatedly rejected"); ***United States v.***

Hanson, 2 F.3d 942, 945 (9th Cir. 1993) (rejecting appellant's contention "that as a natural born citizen of Montana he is a nonresident alien and, thus, is not . . . subject to the tax laws"); ***Betz v. United States,*** 40 Fed. Cl. 286, 294-96 (1998); ***United States v. LaRue***, 959 F. Supp. 959, 961 (C.D. Ill. 1997) (imposing Rule 11 sanctions upon determining that "Plaintiffs' claim that they are nonresident aliens and thus not subject to the income tax is not 'warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law'"); ***In re Weatherley***, 169 B.R. 555, 558-59 (1994) (rejecting debtor's contention that he was a non-resident alien not subject to federal income tax, and noting that debtor's "argument, or variants thereof . . . has been uniformly rejected by the courts").

Sometimes tax defiers file false Forms 1040NR (U. S. Nonresident Alien Income Tax Return), claiming to be exempt from federal income taxation. *See, e.g.*, ***United States v. Ambort***, 405 F.3d 1109, 1113 (10th Cir. 2005)*;* ***United States v. Ambort,*** 193 F.3d 1169, 1170-71 (10th Cir. 1999) (dismissal of interlocutory appeal of denial of motion to dismiss indictment charging defendants with violations of 18 U.S.C. § 371 and 26 U.S.C. § 7206(2) for teaching seminar attendees how to complete false Forms 1040NR). One way to prove the tax defier's willfulness and lack of good faith belief is to show that the defendant did not file state tax returns or pay state or local taxes. Another way is to show the tax defier's admission of U.S. citizenship when such admission conferred a benefit, including passport applications, job applications, federal voting records, or receipt of social security or other benefits (including the application for the Alaska Permanent Fund Dividend).

Depending on what information is included on the Form 1040NR, the filing of a false Form 1040NR may be charged as a false claim for refund (18 U.S.C. § 287), a false income tax return (26 U.S.C. § 7206(1)), or a false statement (18 U.S.C. § 1001). For further guidance on whether the Form 1040NR filed in a particular case can be charged as a false return, see § 40.03[5], *supra*, discussing what constitutes a return. A violation of 18 U.S.C. § 1001 can be an appropriate charge for a false Form 1040NR when the form either lacks the required signature or does not include enough information to constitute a tax return. For a discussion of section 1001, *see* Chapter 24.00, *supra*.

40.05[8] IRS Has Duty to Prepare Returns for Taxpayer (26 U.S.C. § 6020(b))

Tax defiers have argued that 26 U.S.C. § 6020(b)(1)[13] obligates the Internal Revenue Service to prepare a tax return for an individual who does not file. There is no merit to this claim. Section 6020(b)(1) merely provides the Internal Revenue Service with a civil mechanism for assessing the tax liability of a taxpayer who has failed to file a return. The civil mechanism is often referred to as the preparation of a "substitute for return," or "SFR." Section 6020(b) does not require the Internal Revenue Service to prepare tax returns for individuals who fail to file, nor does it excuse the taxpayer from criminal liability for that failure. *See* ***Deutsch v. Commissioner,*** 478 F.3d 450, 452 (2d Cir. 2007); ***United States v. Schiff,*** 919 F.2d 830, 832-33 (2d Cir. 1990) ("There is no requirement that the IRS complete a substitute return"); ***Selgas v. Commissioner***, 475 F.3d 697, 700 (5th Cir. 2007); ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993) ("[A]lthough [§ 6020(b)] authorizes the Secretary to file for a taxpayer, the statute does not require such a filing"); ***United States v. Cheek***, 3 F.3d 1057, 1063 (7th Cir. 1993); ***Geiselman v. United States***, 961 F.2d 1, 5 (1st Cir. 1992); ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***In re Bergstrom***, 949 F.2d 341, 343 (10th Cir. 1991); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982); ***United States v. Tarrant***, 798 F. Supp. 1292, 1302-03 (E.D. Mich. 1992); *see also* ***Laing v. United States***, 423 U.S. 161, 174 (1976) ("Where there has been no tax return filed, the deficiency is the amount of tax due").

When a defendant raises this argument during trial, the court may properly instruct the jury that while Section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to Section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good faith defense." ***Powell***, 955 F.2d at 1213. It would be wise to request that an instruction on the meaning of Section 6020(b) be coupled with a reminder to the jury that the issue in a criminal tax case is not the validity of the defendant's interpretation of Section 6020(b), but whether the defendant had a good faith belief that his or her actions were in compliance with the tax laws. ***Powell***, 955 F.2d at 1213 ("The proper response to the jury's question regarding the IRS's ability to file a tax return on behalf of the taxpayer was to couple an instruction on the meaning of § 6020(b) with a

[13] Section 6020(b)(1) of the Code (Title 26) provides that if a person fails to make a return required by law, then the Internal Revenue Service "shall" make a return based on information available to it.

strong reminder that the validity or invalidity of the [defendants'] interpretation of that section was not at issue: all that mattered was whether the [defendants] had a good faith belief that the law did not require them to file their own tax returns").

40.05[9] Violation of the Privacy Act

Courts have also rejected Privacy Act (5 U.S.C. § 552(a)) challenges to the IRS Form 1040 instruction booklet and to Forms W-4. *See* ***United States v. Bressler***, 772 F.2d 287, 292 (7th Cir. 1985) ("the IRS notice . . . adequately and clearly informs taxpayers that filing [a tax return] is mandatory. . . . The notice need not inform the taxpayer of the specific criminal penalty that may be imposed to comply with Privacy Act requirements"); ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); ***United States v. Bell***, 734 F.2d 1315, 1318 (8th Cir. 1984) ("We have considered this Privacy Act argument in other appeals of convictions for willful failure to file tax returns and rejected it as meritless"); ***United States v. Wilber***, 696 F.2d 79, 80 (8th Cir. 1982) ("the Privacy Act does not require notice of a specific criminal penalty which might be imposed on the errant taxpayer"); ***United States v. Annunziato***, 643 F.2d 676, 678 (9th Cir. 1981) (same); ***United States v. Rickman,*** 638 F.2d 182, 183 (10th Cir. 1980) (Form 1040 instructions adequate); ***United States v. Gillotti***, 822 F. Supp. 984, 988 (W.D. NY 1993).

40.05[10] Federal Reserve Notes Are Not Legal Tender

Another argument raised by tax defiers is that because their wages were paid in Federal Reserve Notes, *i.e.*, U.S. currency, they need not pay tax on those wages. The tax defiers assert that the Constitution requires coins in gold and silver and that Federal Reserve Notes are therefore not valid currency or legal tender. Accordingly, those who are paid in Federal Reserve Notes cannot be subject to a tax on them. *See* ***United States v. Ellsworth***, 547 F.2d 1096, 1097 (9th Cir. 1976). This argument has been consistently rejected in numerous opinions. *See* ***Sanders v. Freeman***, 221 F.3d 846, 849, 855 (6th Cir. 2000); ***Schiff v. United States***, 919 F.2d 830, 831-32 (2d Cir. 1990); ***Zuger v. United States***, 834 F.2d 1009, 1010 (Fed. Cir. 1987); ***United States v. Davenport***, 824 F.2d 1511, 1521 (7th Cir. 1987); ***Jones v. Commissioner,*** 688 F.2d 17, 18 (6th Cir. 1982) ("this claim is clearly without merit and has been rejected in numerous opinions"); ***United States v. Ware***, 608 F.2d 400, 402-03 (10th Cir. 1979); ***United States v. Rifen***, 577 F.2d 1111, 1112-13 (8th Cir. 1978); ***Mathes v. Commissioner***, 576 F.2d 70, 71 (5th

Cir. 1978); ***United States v. Gardiner***, 531 F.2d 953, 955 (9th Cir. 1976); ***United States v. Whitesel***, 543 F.2d 1176, 1180-81 (6th Cir. 1976); ***United States v. Scott***, 521 F.2d 1188, 1192 (9th Cir. 1975); ***United States v. Daly***, 481 F.2d 28, 30 (8th Cir. 1973); ***United States v. Condo***, 741 F.2d 238, 239 (9th Cir. 1984) ("The Ninth Circuit has repeatedly rejected this theory as frivolous"); ***United States v. Moore***, 627 F.2d 830, 832-33 (7th Cir. 1980) ("the courts have consistently rejected these views as totally frivolous").

Congress is empowered "[t]o coin Money, regulate the value thereof, and of foreign coins, and fix the Standard of weights and measures" (U.S. Const. art. I, § 8, cl. 5). "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues." 31 U.S.C. § 5103; *see also* 12 U.S.C. § 411. Further, the Supreme Court long ago held that "[t]he constitutional authority of Congress to provide a currency for the whole country is now firmly established." ***The Legal Tender Cases (Julliard v. Greenman)***, 110 U.S. 421, 446 (1884). "Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the nation [sic] government or private individuals." ***Id***. at 448; *see also* ***The Legal Tender Cases (Knox v. Lee***), 79 U.S. 457, 462 (1871); ***United States v. Anderson***, 584 F.2d 369, 374 (10th Cir. 1978); ***Rifen***, 577 F.2d at 1112.

40.05[11] Form W-2 As Substitute for Form 1040

Some tax defiers have claimed reliance on a long-defunct 1946 Federal Register regulation which allowed the filing of a Form W-2 in lieu of a Form 1040 tax return; the tax defiers argue that they were not required to file a return because their employers sent the IRS copies of their Forms W-2. This argument has been rejected. *See* ***Bachner v. Commissioner***, 81 F.3d 1274, 1281 (3d Cir. 1996) (collecting cases) ("[W]e cannot find a single federal court decision to have addressed the competence of Forms W-2 as tax returns without also rejecting the same"); ***United States v. Lussier***, 929 F.2d 25, 31 (1st Cir. 1991); ***United States v. Birkenstock***, 823 F.2d 1026, 1030 (7th Cir. 1987); ***Manka v. United States***, No. CIV.A.89N49, 1993 WL 268386, at *4 (D. Colo. Apr. 6,

1993) ("merely allowing one's employer to file a W-2 form does not fulfill the requirements set forth by the treasury regulations in this area. *See* Treas.Reg. § 1.6011-1(b) . . . .").

The court in ***Birkenstock*** noted two problems with this argument. First, the 1946 Federal Register regulation was no longer the law, having been eliminated when the Federal Register was codified in the 1949 Code of Federal Regulations (CFR). Second, even if the 1946 regulation survived the CFR codification, the regulation provided that the employee's *original* Form W-2 can substitute for a Form 1040, so the employee would be required to file the W-2 form; the employer's filing of a *copy* of the W-2 would not suffice. ***Birkenstock***, 823 F.2d at 1030 (emphasis added).

Even though the 1946 regulation argument is frivolous, the court should permit the defendant, upon the establishment of proper foundation, to testify regarding his good faith reliance on the regulation in deciding not to file a return. *See* ***Lussier***, 929 F.2d at 31. Importantly, the 1946 regulation itself is inadmissible as a defense exhibit unless the defendant can establish relevance. *Id*. In ***Lussier***, the 1946 regulation

> was properly excluded because the exhibits lacked a foundation of evidence or offer of proof to link them to the willfulness issue. The exhibits would have been relevant only insofar as they supported other evidence offered to negate the element of willfulness, for example, testimony that [the defendant] knew of the 1946 regulation and relied on it when he decided not to file a tax return, or that he attempted to consult the tax code and was led astray by its bulk and confusing language. But no evidence to that effect was introduced or proffered. Absent such a foundation, the exhibits could only have confused the jury.

Id.

40.05[12] Paperwork Reduction Act ("PRA") Defense

The Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* ("PRA"), was enacted to minimize the paperwork burden on the public. The "Public Protection" provision of the PRA states that "no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if -- (1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget (OMB)] in accordance with this

subchapter; or (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). The statute further provides: "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." 44 U.S.C. § 3512(b).

Tax defiers argue that they cannot be penalized for failing to file Form 1040, because the instructions and regulations associated with the form do not display an OMB control number. "[E]very court that has considered the argument that the regulations and the instruction books promulgated by the IRS are within the scope of the PRA has rejected it." ***Salberg v. United States***, 965 F.2d 379, 384 (7th Cir. 1992). Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and because the Form 1040 does have a control number, there is no PRA violation. *See* ***United States v. Patridge***, 507 F.3d 1092, 1094 (7th Cir. 2007) (holding that the IRS has complied with the PRA by placing a control number on tax forms); ***United States v. James***, 970 F.2d 750, 753 n.6 (10th Cir. 1992) (noting that the lack of an OMB number on IRS notices and forms does not violate PRA); ***Salberg v. United States***, 969 F.2d at 383-84; ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir. 1992) (holding that tax form instruction books are not an agency request for information subject to the PRA); ***United States v. Dawes***, 951 F.2d 1189, 1191-93 (10th Cir. 1991); ***United States v. Wunder***, 919 F.2d 34, 38 (6th Cir. 1990).

Courts have also held that Congress created the duty to file returns in 26 U.S.C. § 6012(a) and that "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." ***United States v. Neff***, 954 F.2d 698, 699 (11th Cir. 1992); ***Patridge***, 507 F.3d at 1094-95 (holding that the obligation to file a tax return stems from 26 U.S.C. § 7203, not from an agency demand for information, and thus the PRA did not repeal § 7203 by implication); *see also* ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006 (11th Cir. Sept. 10, 2008); ***United States v. James***, 970 F.2d 750, 753 n.6 (10th Cir. 1992) (lack of OMB number does not violate PRA); ***Salberg v. United States***, 965 F.2d 379, 383-84 (7th Cir. 1992); ***United States v. Hicks***, 947 F.2d 1356, 1359 (9th Cir. 1991) ("PRA" not enacted "to create loophole in the tax code"); ***United States v. Bentson***, 947 F.2d 1353, 1355 (9th Cir. 1991) (defendant convicted of violating a statute requiring him to file, not a regulation lacking OMB number); ***United States v. Kerwin***, 945 F.2d 92 (5th Cir. 1991) (*per curiam*)

(defendant was convicted under statutory requirement that he file return, and since statute is not an information request, there is no violation of the PRA); ***Lonsdale v. United States***, 919 F.2d 1440, 1443-45 (10th Cir. 1990). In ***United States v. Chisum***, the Tenth Circuit held that the PRA protects a person only "for *failing* to file information. It does not protect one who files information which is false." 502 F.3d 1237, 1243-44 (10th Cir. 2007) (quoting ***United States v. Collins***, 920 F.2d 619, 630 n.13 (10th Cir. 1990)).

Section 3507(g) of Title 44 provides that OMB "may not approve a collection of information for a period in excess of 3 years." Tax defiers have claimed that tax forms do not comply with this provision of the PRA and that prosecution therefore is barred because the OMB control number on a Form 1040 does not have an expiration date. Courts have rejected this argument. ***Patridge***, 507 F.3d at 1095 (holding that there is no requirement that the control number on a tax form be changed every three years because "[s]ection 3507 requires periodic review, not a periodic change in control numbers"); ***Salberg***, 969 F.2d at 384 (7th Cir. 1992) (holding that the failure to display an expiration date on a tax form containing a control number does not violate the PRA and does not preclude criminal prosecution).

Tax defiers should not be able to argue that their failure to provide information collected during an investigation is excused because any IRS form or regulation does not comply with the PRA. In a civil tax case, the Tenth Circuit held that the Paperwork Reduction Act is inapplicable to "information collection request" forms issued during an investigation against an individual to determine his or her tax liability. ***Lonsdale v. United States***, 919 F.2d 1440, 1444-45 (10th Cir. 1990).

40.05[13] Lack of Publication in the Federal Register

Tax defiers have occasionally argued that Form 1040 and its instructions constitute a "rule" for purposes of the Administrative Procedure Act (APA) and therefore must be published in the Federal Register. This defense has been held to be "meritless." ***United States v. Bentson***, 947 F.2d 1353, 1355-56 (9th Cir. 1991); ***United States v. Hicks***, 947 F.2d 1356, 1360 (9th Cir. 1991).

The Internal Revenue Code itself, a statute and not a regulation, imposes the duty to file a return. *See* 26 U.S.C. 6012; ***United States v. Clayton***, 506 F.3d 405, 409 (5th Cir. 2007) (Section 6012, being a congressionally enacted federal statute, is not the rule of an "agency" as the term agency is defined by the APA); *see also* ***Hicks***, 947 F.2d at 1360

(noting that the Form 1040 does not add to a taxpayer's basic substantive duty to file a tax return and thus is not a "rule" within the meaning of the APA); ***United States v. Bowers***, 920 F.2d 220, 221-23 (4th Cir. 1990) (APA protects only those with no notice: "[t]o reverse their convictions, we would have to conclude that (i) the statutes provide no notice of the obligation to pay income taxes, (ii) the IRS forms and offices are secret though known to over two hundred million Americans, (iii) the [defendants] somehow forgot about the forms and offices after filing their 1979 return, and (iv) all of this secrecy and forgetfulness would be rectified by printing a notice in a publication read by, and perhaps even known to, only a handful of the population"); ***United States v. Kahn***, 753 F.2d 1208, 1222 n.8 (3d Cir. 1985) (claim that IRS failure to publish interpretive guidelines in Federal Register violates 5 U.S.C. §§ 552 and 706(2)(D), was "totally devoid of merit").

In ***Clayton***, the Fifth Circuit rejected a tax defier's argument that Section 6012 was not a valid law requiring the filing of a tax return. 506 F.3d at 409-410. The defendant argued that § 6012 did not validly impose a duty to file a tax return because it contained a formula for establishing the exemption amount that incorporated the Consumer Price Index ("CPI"), which was compiled by the Department of Labor and not promulgated pursuant to the APA. *Id*. Rejecting the defendant's claim, the Fifth Circuit reiterated the settled rule that the obligation to file a tax return was statutory and held that the APA was not implicated, because there was no requirement that the CPI, an objective numerical standard validly incorporated by reference in § 6012, be itself an enforceable rule of law. *Id*.

40.05[14] Taxpayer's Name in Capital Letters or Misspelled

A tax defier will sometimes argue that she or he is not the individual named in the indictment or in court proceedings because her or his name is capitalized in court documents. Similarly, the defier will sometimes add strange punctuation to his name, again claiming that because the indictment and other documents do not use the same punctuation, the indictment and other documents describe a different individual.

In ***United States v. Lindsay***, 184 F.3d 1138, 1144 (10th Cir. 1999), the court of appeals affirmed a district court's decision not to accord such a tax defier a sentencing reduction for acceptance of responsibility, where, claiming not to be the named party, he refused to (1) comply with court procedures, (2) review court correspondence on which

his name appeared in all capital letters, and (3) respond to questions the court posed. *See also* ***United States v. Washington***, 947 F. Supp. 87, 92 (S.D.N.Y. 1996) (rejecting defendant's "baseless" contention that the indictment must be dismissed because his name, spelled in capital letters, "is a fictitious name used by the government to tax him improperly as a business").

As a practical matter, the prosecutor should have certified copies of public documents, such as the defendant's birth certificate, passport application, or driver's license, to rebut assertions that the defendant is not the person named in the proceedings.

40.05[15] Protest Against Government Spending

Generally, a taxpayer's beliefs do not entitle him to refuse to file his tax returns or to pay his taxes. *See* ***United States v. Lee***, 455 U.S. 252, 260 (1982) ("[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief"), *superseded by statute on other grounds*, Exemption Act of 1988, 26 U.S.C. § 3127;[14] ***Autenrieth v. Cullen***, 418 F.2d 586, 588-89 (9th Cir. 1969); *see also* ***Packard v. United States***, 7 F. Supp. 2d 143, 144-45 (D. Conn. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999) (discussing general rule that taxpayers must file and pay taxes regardless of their beliefs.)

In Packard, the court stated:

> There has been a long history of cases in which citizens have contested their obligation to pay taxes on religious grounds. Almost thirty years ago, the Ninth Circuit rejected such religious objections finding that the Income Tax Acts do not aid a particular religion or punish anyone for their religious beliefs. It commented that "[o]n matters religious, it is neutral" and noted that the ability of the Government to function could be impaired if persons could refuse to pay taxes because they disagreed with the Government's use of tax revenues. ***Autenrieth v. Cullen***, 418 F.2d 586, 588-89 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036, 90 S. Ct. 1353, 25 L. Ed. 2d 647 (1970). The Supreme Court took the same tack in ***United States v. Lee***, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), by holding that the payment of social security taxes

[14] *See* ***United States v. Bauer***, 75 F.3d 1366, 1375 (9th Cir. 1996) (discussing the Exemption Act of 1988, 26 U.S.C. § 3127, which provides a special Social Security tax exemption for employers and their employees who apply for and are recognized by the Commissioner as members of "a recognized religious sect," for example, the Old Order Amish, whose "established tenets" oppose participation in the Social Security Act program).

> was compulsory even if it violated Amish religious beliefs and interfered with their free exercise of religion. Earlier attempts by Quakers to object to the collection of taxes through withholding were also rejected. ***United States v. American Friends Serv. Comm.***, 419 U.S. 7, 95 S. Ct. 13, 42 L. Ed. 2d 7 (1974); *see also* ***United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends***, 753 F. Supp. 1300 (E.D. Pa. 1990) (enforcing IRS levies against the salaries of two members of a Quaker organization). Congress has also rejected these "war tax deductions" as illustrated by its passage in 1982 of section 6702 of the Internal Revenue Code assessing an immediate civil penalty of $500 against taxpayers filing frivolous returns such as claiming a war tax deduction

Id.

Failure to furnish information on income tax returns cannot be justified by an asserted disagreement with tax laws or in protest against government policies. *See* ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir. 1982) (citing ***United States v. Smith***, 618 F.2d 280, 282 (5th Cir. 1980)). A taxpayer who contends that paying taxes would require him to violate his pacifist religious beliefs cannot take refuge in the First Amendment, because there is "no First Amendment right to avoid federal income taxes on religious grounds." ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993).

A defier who contends that his refusal to pay taxes or file tax returns is justified by his disagreement with government policies or spending plans is not entitled to a jury instruction on his theories. It is well established that arguments challenging the constitutionality or validity of the tax laws are precluded as irrelevant to the issue of willfulness, because those arguments, rather than reflecting innocent mistakes caused by the Code's complexity, reveal full knowledge of the provisions at issue and a studied conclusion that those provisions are invalid and unenforceable. ***Cheek v. United States***, 498 U.S. 192, 204-05 (1991).

APPENDIX

Sample Motion *in Limine*

GOVERNMENT'S MOTION IN LIMINE TO EXCLUDE CERTAIN EXHIBITS AND LIMIT CERTAIN TESTIMONY

The United States, by and through undersigned counsel, hereby moves *in limine* to exclude arguments, exhibits, and testimony regarding matters which are irrelevant to the factual determinations to be made by the jury in the instant case and which will also be substantially more prejudicial than probative. Based on the Defendant's pretrial motions, as well as discovery items recently provided by the Defendant to the United States, the government anticipates that the Defendant will try to present legal arguments and evidence that challenge [INSERT A SUMMARY OF WHATEVER ARGUMENTS OR EVIDENCE THE DEFENDANT WILL PRESENT, I.E., "the constitutionality or legal authority of the Sixteenth Amendment, the Internal Revenue Code, and the Treasury regulations"]. Such exhibits, testimony, and arguments constitute incorrect statements of the law and invade the province of the Court to instruct the jury on the law. Allowing such arguments and evidence will confuse the jury as to their true role of determining the factual issues before them as opposed to making determinations on the law. The United States respectfully asks the Court, therefore, to limit the jury's exposure to arguments that are not relevant to the factual issues the jury must decide. The United States seeks to prevent the defense from arguing or presenting evidence regarding:

1) incorrect interpretations of the law;

2) self-serving hearsay; or

3) speculation from witnesses regarding the contents of the Defendant's mind.

I. Defendant Should Not Argue Incorrect Interpretations of the Law During Opening Statement and Closing Arguments.

As a preliminary matter, the courts have made it clear that a defendant should not be allowed to confuse the jury with incorrect interpretations of the law, including the Constitution, the Internal Revenue Code, and Treasury regulations. [INCLUDE BASIS FOR WHAT ARGUMENTS THE DEFENDANT IS EXPECTED TO MAKE. FOR EXAMPLE: "On June 30, 2006, the defendant filed two motions that made frivolous legal arguments, based upon the Paperwork Reduction Act ("PRA") and the Administrative Procedure Act ("APA"), challenging one of the statutes under which he was indicted. This Court, in accordance with other courts, found that these legal arguments lacked merit. The government fully expects the defendant to raise these frivolous arguments again before the jury. In addition, the government expects that the defendant will attempt to raise the "861 argument"[15] before the jury.

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[15] The Third Circuit adopted the following summary of the frivolous 861 (or U.S. Sources) argument:

> The Internal Revenue Code defines "gross income" as "all income from whatever source derived." 26 U.S.C. § 61(a). [The defendant] claims that the word "source" in section 61 is defined in the "Source Rules and Other General *Rules Relating to Foreign Income*." 26 U.S.C. §§ 861-865 (emphasis supplied). Section 861 states that certain "items of gross income shall be treated as income from sources within the United States...." 26 U.S.C. § 861(a). According to the [defendant's 861] argument, domestically earned wages of U.S.

"The PRA, APA, and 861 arguments are all meritless and, as a matter of law, presenting them to a jury would be highly improper. The PRA and APA arguments are meritless for the reasons set forth in the government's consolidated response motion of July 10, 2006. Furthermore, Courts have invariably held that the "861 argument" is frivolous. *See* ***United States v. Bell***, 414 F.3d 474, 475-76 (3rd Cir. 2005) (calling the 861 argument "universally discredited").]

"In our judicial system the court instructs the jury on the applicable law, and directs the jury to determine the facts from the evidence and to apply the law as given by the court to those facts. The law is neither introduced as evidence nor presented through witnesses at trial." ***United States v. Garber***, 589 F.2d 843, 849 (5th Cir. 1979). Moreover, "it is within the sole province of the court 'to determine the applicable law and to instruct the jury as to that law.'" ***United States v. Hill***, 167 F.3d 1055, 1069 (6th Cir. 1999) (*quoting* ***In re Air Crash Disaster***, 86 F.3d 498, 523 (6th Cir. 1996); ***see also United States v. Mann***, 884 F.2d 532, 538 (10th Cir. 1989) ("It is the district court's peculiar province to instruct the jury on the law . . . ."). "The law is given to the jury by the court

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> citizens are not taxable because such wages are not specifically mentioned in the list of items of gross income that "shall be treated as income from sources within the United States." See 26 U.S.C. § 861(a). . . . [S]ection 861 plainly provides that "compensation for labor or personal services performed in the United States ..." shall be treated as income from sources within the United States. 26 U.S.C. § 861(a)(3).

United States v. Bell, 414 F.3d 474, 475 n.1 (3d Cir. 2005) (*quoting* ***United States v. Bell***, 238 F. Supp. 2d 696, 699 (M.D. Pa. 2003)).

and not introduced as evidence . . . . Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be . . . . Juries only decide facts, to which they apply the law given to them by the judge." ***United States v. Willie***, 941 F.2d 1384, 1396 (10th Cir. 1991) (quoting numerous cases, including ***Cooley v. United States***, 501 F.2d 1249, 1253-54 (9th Cir. 1974)) (internal citations omitted).

The defendant's arguments must be limited to the facts presented during trial and the instructions given by this Court. The defendant is permitted to argue that he lacked the requisite willfulness to commit the crimes with which he is charged, based upon a good faith misunderstanding of his duty under the law. *See* ***Cheek v. United States***, 498 U.S. 192, 202 (1991) (government required to rebut claim of good faith misunderstanding or ignorance of the law); ***United States v. Whiteside***, 810 F.2d 1306, 1311 (5th Cir. 1987) (approving of jury instruction stating that "[t]he defendant's conduct is not willful if he acted through negligence, inadvertence, justifiable excuse, mistake, or due to his good faith misunderstanding of the requirements of the law."). A disagreement with the law, however, is not a defense to the crimes alleged in the indictment since one has to know what the law is in order to disagree with it. The Defendant is not permitted to blur the line between factual evidence about his state of mind and the actual law. *See* Fed. R. Evid. 103(c). Moreover, if the Defendant interjects into the proceedings his disagreements with the law, the Supreme Court in ***Cheek*** indicated that it would be proper for the Court to

issue an instruction to to disregard them. ***Cheek***, 498 U.S. at 206. A reading of the language of ***Cheek*** supports the following instruction:

> A person's opinion or belief that the tax laws are invalid or violate his constitutional rights is not a defense to the crime charged in this case. Mere disagreement with the law does not constitute a good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Any evidence that you have heard to the contrary in this regard is irrelevant and should be ignored.

See ***Cheek***, 498 U.S. 192, 202-206. If the defendant has legal arguments regarding the interpretation of the Internal Revenue Code, he can present such arguments to the Court in a trial brief or through proposed jury instructions. The Court can then determine the law and present it to the jury after all evidence has been presented.

II. Evidence Which has Been Found to be Irrelevant to the Issue of Willfulness.

Under the Federal Rules of Evidence, the jury shall not be exposed to inadmissible evidence. Fed. R. Evid. 103(c). "[E]vidence which is not relevant is not admissible." Fed. R. Evid. 402. "Relevant evidence," moreover, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

The primary issue in this case will be the Defendant's willfulness. Thus, the relevance of most evidence will depend on how probative it is of the Defendant's state of mind. The Defendant likely will argue that certain evidence is necessary to demonstrate

that he held a good faith belief that he was not required to [INSERT BRIEF SUMMARY OF CASE, SUCH AS "file 1999 through 2004 income tax returns and that he honestly believed he was entitled to a refund of taxes paid for the 1997 and 1998 years."] The Defendant, however, is only permitted to introduce *factual* evidence upon which he relied during those years to form his opinions about the tax laws.

Thus, evidence presented by the Defendant in support of his interpretation of the law should be excluded, unless the Defendant lays a proper foundation to reveal: 1) the evidence was seen prior to the Defendant forming his views (as opposed to after the views were already formed); (2) an explanation of how such evidence helped form his views in order to prove such information was relied upon by the Defendant and was instrumental in forming his views; and 3) the evidenc is not self-serving hearsay which the Defendant helped create in support of his already existing views. A document or conversation is not relevant to the Defendant's state of mind unless he relied upon it in making his decision not to file tax returns. Moreover, such conversations and documents are only relevant if the defendant was exposed to them prior to the date he committed the crime. Furthermore, only the defendant can lay the proper foundation for the above-mentioned evidence, and he must do it by testifying in court.

A. Testimony of Expert Witnesses

Among the evidence that the courts have ruled should be excluded is "expert" testimony regarding alternative interpretations of the tax laws, especially where the

defendant did not actually rely on the expressed views of the expert at the time they committed the offenses charged. ***United States v. Burton***, 737 F.2d 439, 443 (5th Cir. 1984). In ***Burton***, the Court affirmed the exclusion of a tax professor's proposed "expert" testimony that defendant's theory and belief that wages were not taxable income was not implausible. *Id*. The district court had excluded the testimony pursuant to Rule 403 after weighing its "marginal contribution" with regard to the Section 7203 charges to the "potential prejudice and confusion, keeping in mind that the judge remains the jury's source of information regarding the law." *Id*. The Court indicated that "[t]estimony such as that offered by Burton's 'expert' is not admissible as an explication of plausible readings of the statutory language." *Id*. In so ruling, the Court noted that the defendant did not in his proffer suggest that he actually relied upon the expressed views of the tax professor in failing to file tax returns. *Id*. at 444.

B. Testimony of Lay Witnesses

The government anticipates that the defendant may wish to introduce testimony of two types of lay witnesses: those who knew the defendant personally, and those who share the Defendant's views of the tax system. It is not permissible for witnesses of the first type to express their opinion as to what the Defendant purportedly believed as this calls for **speculation** regarding the true contents of the Defendant's mind. The issue of whether the Defendant truly believed, albeit mistakenly, that he was not required to file tax returns and pay income taxes is an ultimate issue of fact, for the jury alone to decide. *See* ***United States v. Hauert***, 40 F.3d 197, 201-202 (7th Cir. 1994) ("by the nature of a

tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances . . . "); ***United States v. Rea***, 958 F.2d 1206, 1216 (2d Cir. 1992) (witness testimony regarding a defendant's observations, what the defendant was told, and what the defendant said or did "will often not be 'helpful' within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant knew."); ***United States v. Phillips***, 600 F.2d 535, 538-539 (5th Cir. 1979) (opinion of lay witness that defendant indicated he "understood" what he was doing gave no objective basis for jury to determine defendant's state of mind).

Witnesses of the second type should be precluded from testifying as to their own subjective beliefs regarding the 861 arguments as this is irrelevant to the subjective beliefs of the Defendant. Only the Defendant's subjective beliefs are at issue. The jury will not be asked to determine whether other individuals in good faith believed that 861 eliminated a legal duty to pay taxes on domestic earned income.[16]

C. Documents Created by the Defendant are Inadmissible Hearsay.

Materials created by the Defendant are inadmissible as lacking evidentiary foundation and are self-serving hearsay. See Fed. R. Evid. 801(c); *see also* ***United States***

[16] This is not to say that the jury may not use its common sense in assessing the reasonableness of the 861 argument for the purpose of determining whether the Defendant actually believed what he purports to believe. *See* ***Cheek v. United States***, 498 U.S. 192, 206 (1991).

v. Bond, 87 F.3d 695, 699-700 (5th Cir. 1996) (defendant's self-recorded tape was self-serving hearsay and inadmissable). In the instant case, the Defendant was active in the 861 movement and helped create materials in support of his views. The "Theft by Deception" videotape, which Defendant has indicated they plan to introduce at trial, was created with the financial assistance of the Defendant and specifically mentions the Defendant's web site in support of the 861 argument. As such, these materials are self-serving hearsay and are not reliance materials as they were created in support of Defendant's already existing views in support of the 861 argument. They also present an incorrect statement of the law to the jury which invades the province of the Court. Should the defendant testify, the documents remain hearsay and, moreover, are inferior to his own testimony. Regardless of whether the defendant testifies, admission of the documents into evidence would be unduly prejudicial, as they would contain incorrect interpretations of the law. See discussion, Part III.B, *infra*.

In addition to being self-serving hearsay, such materials do not address the issue of willfulness. "A normative belief that the law *should not* apply to him leaves [the defendant] fully aware of his legal obligations and simply amounts to a disagreement with his known legal duty and 'a studied conclusion . . . that [the law is] invalid and unenforceable.'" ***Willie***, 941 F.2d at 1392. As such, documents created by the defendant are irrelevant.

III. Evidence that is More Prejudicial than Probative.

Even if certain evidence is relevant, the Court may exclude the evidence if its "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Absent abuse of discretion, a district court's ruling under Rule 403 is final. *See* ***United States v. Burton***, 737 F.2d 439, 443 (5th Cir. 1984).

The government anticipates that the Defendant will attempt to introduce prejudicial and superfluous legal and pseudo-legal materials during the trial. Defense counsel has indicated in a letter dated June 22, 2006, that he may introduce "reliance materials" that were found at the Defendant's home, including documents and videocassettes. Such materials are highly likely to be confusing to the jury, cumulative of the Defendant's own testimony, and prejudicial in that the legal arguments presented are contrary to the law. In addition, the referenced videocassettes were created **after** the Defendant had already formed his views.

A. The Defendant Should Not Invade the Province of the Court by Publishing Court Opinions, Statutes, or Regulations to the Jury.

Some of the reliance materials the Defendant likely will offer into evidence include current and obsolete case law, Internal Revenue Code sections, and corresponding regulations. These materials should be excluded as confusing to the jury and invasive of the Court's province. ***United States v. Simkanin***, 420 F.3d 397, 404 (5th Cir. 2005) ("[T]he district court must be permitted to prevent the defendant's alleged

view of the law from confusing the jury as to the actual state of the law. . ."). Juries may not decide what the law is and should not be given the opportunity to do so. ***Hill***, 167 F.3d at 1069. Admission of written copies of court opinions, statutes, and regulations amounts to legal instruction and only serves to confuse the jury as to the law and invites disagreement with the Court's final instructions. *See* ***United States v. Flitcraft***, 803 F.2d 184, 186 (5th Cir. 1986) (holding that case law and other documents offered by the defendant as evidence of reliance were properly excluded as they suggested to the jury that the law was unsettled and that the jury should resolve the legal uncertainty); *see also* ***Simkanin***, 420 F.3d at 412 (*quoting* ***Flitcraft***). *But see* ***United States v. Powell***, 955 F.2d 1206, 1214 (9th Cir. 1992) ("statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance").

The Defendant may, of course, testify as to how he interpreted a particular code section or regulation and how such interpretation formed his purported beliefs. He may, in addition, read portions of "reliance materials" into the record, with proper foundation and a limiting instruction from the court.[17] *See* ***United States v. Gaumer***, 972 F.2d 723, 724-25 (6th Cir. 1992) (opining that defendant should be permitted to read relevant

[17] The danger of confusing the jury with excerpts of official legal source material quoted out of context is especially great, as the source itself is authoritative and the average juror will have no idea how to interpret the quoted language within the context of relevant case law, statutes, and underlying regulations. Moreover, if the Defendant were permitted to quote legal authorities in support of a legal argument, the government would be obliged to rebut the Defendant's misstatements of the law with other legal authority. To avoid confusing the jury and wasting time, the Court exclusively should provide legal instruction to the jury. If the Court is inclined to allow the Defendant to quote from official source materials, the government respectfully requests that the Court provide a limiting instruction or provide the jury with a correct statement of the law *vis a vis* the quoted excerpt.

excerpts of reliance materials into the record). Such a distinction provides the Defendant with a full opportunity to present facts to rebut the government's evidence of willfulness without inviting the danger of jurors debating the law while deliberating.

B. Third Party "Reliance Materials" Are Less Probative than Defendant's Testimony.

In addition to official legal sources, the Defendant likely will attempt to introduce third party materials. Many of these materials contain statements of the law and interpretations thereof. The defendant's purpose in presenting these documents, as with the official sources, is to attempt to erroneously instruct the jury on the law. As with the official sources, third party materials are only relevant for the purpose of rebutting evidence of willfulness.

The Defendant may quote portions of third party materials, if such materials are relevant to the issue of willfulness and are contemporaneous with the prosecution years. *See* ***Gaumer***, 972 F.2d 723, 724-25 (6th Cir. 1992) (opining that defendant should be permitted to read relevant excerpts of reliance materials into the record). As with the official source material, however, it is not necessary for the Court to allow publication of legal authorities to the jury or offer them into evidence to rebut the government's evidence that he was willful. *See* ***Simkanin***, 420 F.3d at 412 (quoting ***Flitcraft***, 803 F.2d at 185-86 (holding that introduction of cases and documents are cumulative in light of defendant's own testimony)); *see also* ***United States v. Nash***, 175 F.3d 429, 436 (6th Cir. 1999) (affirming district courts refusal to physically admit certain reliance materials,

where defendant was permitted to mention and quote from them); ***Gaumer***, 972 F.2d at 725 (opining that trial court need not physically admit hundreds of pages of tax protest documents); ***Willie***, 941 F.2d at 1395; ***United States v. Hairston***, 819 F.2d 971, 973 (10th Cir. 1987) (holding that defendant's testimony, which included reading portions of tax protest materials, was more probative than the materials themselves). Moreover, although a jury may consider any evidence in determining whether the Defendant truly believed that what he was doing was legal, the court need not admit every piece of evidence the Defendant offers. *See* ***Willie***, 941 F.2d at 1394-95.

C. Testimony of Defendant

The Defendant may choose to testify in his own defense. As part of a ***Cheek*** defense, the Defendant can testify, for example, that he honestly believed that he was not required to file tax returns, as he believed that his domestically earned income was not taxable under section 861 *et seq*. The Defendant may not, however, be permitted to give legal opinions during his testimony, nor quote legal precedent to support his testimony. Testimony containing a legal conclusion is generally unhelpful to the trier of fact. "The problem with testimony containing a legal conclusion is in conveying the witnesses' unexpressed, and perhaps erroneous, legal standards to the jury." ***Torres v. County of Oakland***, 758 F.2d 147, 150 (6th Cir. 1985); *see also* ***Owen v. Kerr-McGee Corp.***, 698 F.2d 236, 240 (5th Cir. 1983) It is the Court's domain to instruct the jury on the law, not the witness's. *See* ***Torres***, 758 F.2d 147 at 150.

It is sometimes difficult, however, to determine whether testimony contains a legal conclusion. *See, e.g.*, ***United States v. Parris***, 243 F.3d 286, 288-289 (6th Cir. 2001) (holding that testimony opining that defendant's tax scheme was illegal was fair, as the defendant's conduct was so outrageous that the influence on the jury of such legal characterization was inconsequential); ***Owen***, 698 F.2d at 240 (holding that attorney's questioning about the cause of an accident was improper when the factual cause was already clear; attorney was seeking a legal conclusion). One way to screen for testimony that might invade the Court's province is to determine whether terms used by witnesses have different legal and vernacular meanings. *See* ***Torres***, 758 F.2d at 151 (*citing* ***United States v. Hearst***, 563 F.2d 1331, 1351 (9th Cir. 1977) (finding no objection to testimony containing legal terms that had same essential meaning to the average layman). If a term has a distinctive legal meaning, the Court should prevent any lay witnesses from giving an opinion couched in such terms.

With respect to evidence presented to the jury that amounts to a disagreement with the law, the government requests that the Court give a limiting instruction, such as the one suggested in Part I, *supra*. *See, e.g.*, ***Hairston***, 819 F.2d at 973 n.4 (court instructed jury as to proper use of testimony).

IV. The Defendant Should Not Ask Questions During Cross Examination That Would Require a Fact Witness to Give a Legal Opinion.

The government also moves to limit the scope of the Defendant's cross-examination to the facts of the case. The Defendant should be prohibited from asking

questions to fact witnesses as a method of confusing the jury as to the state of the law. *See* ***United States v. Middleton***, 246 F.3d 825, 838 (6th Cir. 2001). Such questioning would also go beyond the scope of direct examination. Such prohibition should include questioning IRS employees about constitutional and legal interpretations of the law (which invades the province of the Court). The Court has the power to limit such confusing questions. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 679-80 (1986) (holding that the Confrontation Clause is not absolute and it is within a court's discretion to limit inappropriate questioning); ***Kittelson v. Dretke***, 426 F.3d 306, 319 (5th Cir. 2005); ***Norris v. Schotten***, 146 F.3d 314, 329 (6th Cir. 1998). "[A] defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." ***Cheek***, 498 U.S. at 206.

V. CONCLUSION

For the above-stated reasons, the government respectfully requests that the Court exclude evidence or testimony on direct or cross-examination that is irrelevant to the issue of willfulness or substantially more prejudicial than probative.