ISSUE I

UNCONTROVERTED FUNDAMENTAL JURISDICTIONAL CHALLENGES VIOLATE BURDEN OF PROOF REQUIREMENTS AND CONSTITUTIONAL DUE PROCESS.

Applicant, an individual, was accused, in Counts 1-5 and 18-23, (or, 11 of the 12 Felony Counts), with "Aiding and Assisting in the Filing of "False Federal Income Tax Returns", charging 26 U.S.C §7206(2), and, Count 17 accused Applicant with Attempt to Evade and Defeat Payment of Tax, charging 26 U.S.C. § 7201. (Appendix E: Applicant's Criminal Indictment Filed March 24, 2004.) Applicant asks this Court to take formal notice of the facts:

1. The charging instrument does not include any mention of the Subtitle A income taxing statute(s) or Internal Revenue Code Sections upon which the criminal penalty Code Sections charged are made applicable; and,
2. Both, the Magistrate Judge and District Court Judge refused to make findings and conclusions of law accordingly in response to the pretrial Motions raising this fundamental jurisdictional challenge.

On March 30, 2004, (two weeks before formal arraignment), Applicant timely filed 4 (four) Motions to Dismiss the Indictment, (district court Case No. CR-S-04-0119-KJD (LRL), Doc. Nos. 13 through 16, (Appendix G)), raising challenges to the jurisdiction of the district court based upon various constitutional and statutory grounds, including:

1.) The district court's lack of jurisdiction, (Appendix G, Doc. No. 13), due to the fact that the individual income tax was not "traceable" to either of the two constitutional provisions giving Congress the power to "lay and collect taxes,"

2.) The district court's want of jurisdiction, (Appendix G, Doc. No. 14), based upon the lack of any underlying statute making the accused "liable" for

income taxes; or, in other words, the court's want of power to proceed with a trial on an unidentified subject matter, (the "known legal duty"), Applicant allegedly conspired with others to willfully violate, and, when the crimes charged in the Indictment can only attach to the prerequisite "Liability" or duty.

3.) The third motion challenging the district court's jurisdiction, (Appendix G, Doc.15,) requested dismissal of all charges because the federal prosecutors and agents working together to secure the Indictments, fraudulently misled the grand jury to believe that "income" as used in the Internal Revenue Code, §61 "Income defined", meant "income" in its ordinary sense, rather than correctly informing them that the Internal Revenue Code used "income" in its "Constitutional" sense, as shown in Congressional Report No. 1337 and Senate Report No. 1622. (Exhibit A and A-1 of Doc. No. 15, (Appendix G)).

4.) In the fourth Motion to Dismiss the Indictment, (Appendix G, Doc. No. 16), Applicant pointed out that U.S.C. Title 26 does not give federal courts jurisdiction with respect to alleged criminal violations of that Title.

As the following will show, the government did not assert a statutory duty, (an identified taxing statute violated), in the indictment; it did not call even one witness who testified that Applicant violated any revenue laws, sold any book, document, audio tape or video recording that advised anyone to violate any Internal Revenue law; nor did the government bring any other evidence to prove the charges brought. The federal government-Plaintiff not only failed to meet its burden of proving the charges in the indictment – it did not even attempt to do so. The prosecution moved on an "implied presumption" of a legal duty without naming it, a flagrant denial of due process, as enumerated in Supreme Court authorities, including:

"The Sixth Amendment requires that an indictment (1) enumerate each prima facie element of the charged offense; (2) fairly inform the defendant of the charges filed against him." Almendarez v. U.S., 523 US 224,228 (1998). [emphasis added]

Note the charge is a separate entity from the elements set forth. Even the I.R.S. is required to conform their prosecutions to actions that are clearly defined in the statutes or face dismissal of indictments. *U.S. v. Carroll*, 345 US 457 (1953).

I – A. Congress has no jurisdiction to enact a tax that is not "traceable" to its constitutional power to "lay and collect taxes."

Applicant's motion that the federal courts have no jurisdiction to enforce a tax that is not "traceable" to Congress' constitutional power to "lay and collect taxes" is based on no less than five Supreme Court decisions, (which have never been reversed or overturned), that are so formidable and incontrovertible that it is impossible to understand how any federal judge or magistrate judge would consider ignoring or contesting it.

As shown in Applicant's memorandum, (Appendix G, Doc. No.13-2), the motion was primarily based on the 1887 Supreme Court decision United States v. Hill, 123 U.S. 681, which held that,

> *The term "revenue law," when used in connection with the jurisdiction of the courts of the United States means…a law which is directly traceable to the power granted to Congress by Article I, Section 8 of the Constitution, to lay and collect taxes, duties, imposts and excises."* (emphasis added)

All of the Supreme Court cases cited by the Applicant in Document 13 (Appendix G) make it irrefutably clear that:

1) The 16th Amendment did not amend the Constitution, nor did its passage give the government any new taxing power;

2) That the power of Congress to "lay and collect taxes" is still limited by the Constitution's original taxing powers, to enact and enforce only two classes of taxes: A) Direct Taxes, which must be imposed pursuant to the Rule of Apportionment; and, B) Indirect Taxes, such as "duties, imposts, and excises," which must be imposed pursuant to the rule of geographic uniformity;

3) Since the individual income tax is not imposed pursuant to either class, it is not a tax authorized by the Constitution, and thus cannot be legally enforced by any federal court;

4) Pursuant to *Pollock v. Farmers Loan and Trust*, 157 U.S. 429, (1895), income can only be constitutional if it is imposed on income "separate from its source." Currently, it is being enforced as a tax on property and not a tax on income, in violation of the Pollock decision. The tax is imposed on source (i.e. the property that generated the income) rather than on the income that is generated from these sources.

The Magistrate's Report and Recommendation, (Appendix C, Doc. No. 85, Entered 12/07/04), pretends to refute and overcome Applicant's claim of *Pollock's* precedential authority. In its refutation[1] the Magistrate cited five Appellate Court decisions, including *In re Becraft*, 885 F. 2d 547,548, a decision that is not material or equitable, and which Applicant had already ruled out in his original memorandum. Obviously, these lower court decisions could not have reversed or challenged in any way the five Supreme Court decisions that supported Applicant's motions. The three Supreme Court decisions cited by Magistrate Leavitt were *Brushaber v. Union Pacific Railroad*, 240 U.S. 1; *Bowers v. Kerbaugh,* 271 U.S. 170; and *Tyee Realty, Co. v. Anderson*, 240 U.S. 115, all of which support the Applicant's position, not the government-plaintiff's, nor the

[1] For the purpose of this Petition for Certiorari, Applicant will only raise the first two motions related to jurisdiction) believing that the other two motions are for the purpose of reversing his conviction and gaining his immediate release.

courts.

The district court's order, (Appendix D), denying Applicant's four pre-trial motions is dated August 31, 2005, less than two weeks before the Applicant's trial started on September 12. However, Applicant did not receive the order until less than one week before the trial started. In the United States District Court for the District of Nevada, Judge Dawson waited an unconscionable 17 months before denying the four jurisdictional challenges. The judge, therefore, exercised jurisdiction for 17 months before ruling that the court had that power when certainly he well knew that without jurisdiction, all court orders are extra-judicial and void, not merely voidable.

"It is well settled that (even) the entry of a guilty plea does not act as a waiver of jurisdictional defects such as an indictment's failure to charge an offense and the defendant may raise such failure at any time (even by habeas corpus or by coram nobis)." – *US v. White*, 258 F3d 374, 379 (5th Cir 2001).[2]

The district court's failure and neglect to issue a prompt and concise Order on the matters challenging jurisdiction severely prejudiced Applicant's due process protections, using the element of time to deny Applicant the opportunity and right to file interim jurisdictional challenges on appeals before the trial started. *"A jurisdictional defect can never be waived."* *Freytag v. CIR*, 501 US 868, 896.

As stated in Applicant's Memorandum, the Supreme Court ruled, "Once the question of jurisdiction is raised, it must be considered and decided before the court can take one step further." Actually the issue of jurisdiction should have been decided before Applicant was arraigned, because the courts have also ruled: *"jurisdiction can not be assumed."* But it was assumed to arraign and it

[2] See also: Bowen v. Johnston, 306 US 19, 24; Machibroda v. US, 368 US 487; Kaufman v. US, 394 US 217, 222; Moore v. Dempsey, 261 US 86; Patton v. US, 281 US 276. Emphasis in original, quotes and citations omitted.

continued to be assumed for 17 months until August 31, 2005. This should invalidate all of the Court's rulings made prior to that date.

In addition, as noted in Applicant's Memorandum, the Supreme Court stated in *McNutt v. General Motors Acceptance Corp*. - 298 U.S. 178 (1936), "the party alleging jurisdiction (must) justify his allegation by preponderance of the evidence."

> Under § 5 *of the Act of March 3, 1875, Jud.Code, § 37, 28 U.S.C. 80*, a ***plaintiff in the District Court must plead the essential jurisdictional facts and must carry throughout the litigation the burden of showing that he is properly in court;*** if his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, ***he must support them by competent proof***, and, even where they are not so challenged, the court may insist that the jurisdictional facts be established by a preponderance of evidence, or the case be dismissed. Pp. 298 U. S. 182, 298 U. S. 189. [Emphasis added]

However in this case the government could cite no Supreme Court decision that refuted or contested the five Supreme Court decisions relied upon by Applicant in claiming the district court lacked subject matter jurisdiction. The Magistrate did not cite one Supreme Court decision that held that the government could enforce a tax that is neither imposed as an apportioned direct tax nor as a uniform "impost, duty, or excise."

The Government failed to identify, as per Applicant's request, into which of the Constitution's three taxing clauses the income tax fell. As a result, Magistrate Leavitt was unable to contest or refute any of the claims made by the Applicant on this issue. Similarly, he could not prove the Court had jurisdiction by "a preponderance of the evidence," when his entire claim was contained in only five lines of his Report and Recommendation.

Applicant's conviction should be reversed and his immediate release from imprisonment should be ordered based on the irrefutable and un-controverted holdings as contained in Appendix G, the Applicant's four pre-arraignment,

pretrial jurisdictional challenges. However, even if his memorandum was debatable, Applicant's conviction should be reversed and his immediate release ordered grounded solely on the fact that the trial court prevented Applicant from filing an interim appeal by exercising jurisdiction for 17 months before ruling on the jurisdictional issues presented.

"A pro forma opportunity will not do. Due process demands an opportunity to be heard at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965)[3]

It should be further noted that none of the Applicant's three lawyers presenting the post conviction appeals raised the issue of want of jurisdiction as a basis for reversing of Applicant's conviction[4].

I – B. Magistrate Leavitt claimed jurisdiction without addressing applicant's claim that no statute made applicant "liable" for individual income taxes.

In his "Report and Recommendation" (Appendix C), Magistrate Leavitt's sought to refute Applicant's jurisdictional claims in the following manner:

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[3] See *In re Oliver*, 333 U.S. 257, 275 (1948) (defendant must be afforded "a reasonable opportunity to meet [the charges against him] by way of defense or explanation"); *Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them.")

[4] Applicant's Original attorney on appeal raised this issue as a basis for reversal. However the 9th Circuit rejected the claim, stating that that the attorney did not state specifically how Applicant was injured by the 17-month delay. The injury should have been apparent to both Applicant's attorney and the Ninth Circuit, for the challenges to jurisdiction were not controverted and the court's delay in ruling was a clear denial of due process. However, **Applicant's attorney was negligent and ineffective** in failing to specifically mention how the delay was injurious. **Applicant's subsequent attorneys were also ineffective and negligent** in not raising these jurisdictional challenges in his §2255 appeal.

> *"Schiff's argument that "this court lacks (subject matter) jurisdiction because no statute makes him or anyone else 'liable' for income taxes"* ***…is frivolous and does not merit discussion."*** [Appendix C, Page 2].

The Magistrate Judge stated that "Similar challenges to the federal tax laws have been routinely rejected by the courts," citing *"Binding Ninth Circuit precedent"* as *In re Becraft,* 885 F. 2d 547, 548. The Magistrate's reliance on *Becraft* for authority is ill placed in answer to jurisdictional challenges presented based upon constitutional misapplications, Supreme Court precedence, legislative intent of laws, and, vagueness of published statutory-regulatory language. Notification of legal responsibility is *"the first essential of due process of law"* – *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). The court in *United States of America v. Lanier*, (1996) FED App. 0025P (6th Cir) stated,

> *"Courts may not create or extend criminal law by using a common-law process of interpretation. If Congress has not been clear about the type of conduct that it wishes to criminalize, courts should not hold a defendant criminally liable by creating a new federal crime."*

Magistrate Leavitt's sworn duty is to fairly and competently dispense a lawfully just decision based upon Applicant's pretrial Motions and the record of Plaintiff/government's response, and, a proper finding would cite the statute that made Applicant "liable" for the federal individual income tax.

The requirement of a charge is maintained as recently as 1998. *"An indictment must set forth each element of the crime it charges."* *Almendarez v. U.S.*, (at 228).[5] Conformance with this requirement has clearly not been made.

In addition to the lack of statutory support, Applicant based his jurisdictional challenges on a number of other factors, including the *Privacy Act*

[5] Also: *Hamling v. US*, 418 U.S. 87, 117; *U.S. v. Miller*, 471 U.S. 130, 136; *U.S. v. Wicks*, 187 F3d 426 (4th Cir. 1999); *U.S. v. Gaytan*, 74 F3d 545, 551-552 (5th Cir. 1996); *U.S. v. Cavalier*, 17 F3d 90 (5th Cir. 1994); *Separate v. Rees*, 909 F2d 1234 (9th Cir. 1989).

Notice that is contained in the Form1040 Instruction Booklet; several code sections; and, court decisions. Since the government failed to address any of these issues, it certainly could not prove jurisdiction by a "preponderance of the evidence", and, yet, the Magistrate's Report and Recommendation made no mention of the uncontroverted documentary evidence in support of Applicant's challenges and the government's lack of response.

"Before placing its hand in the taxpayer's pocket, the Government must place its finger on the law authorizing its action." – *United Dominion Industries, Inc. v. United States,* 532 U.S. 822, 839 (2001)

I – C. Judge Dawson's claim in his order of August 31, 2005, that he was accepting Magistrate Leavitt's report was not entirely truthful.

In an interim Jury Instruction, (at TP – 2525-2533, 2722, 4635, (Appendix I, pgs. 1 - 11), and, in his Jury Instruction No.19, (Appendix K, Exhibit 2), Judge Dawson claimed that "Sections 1, 61, 63, and 6012, '*working together'*, make persons liable for income taxes." If this were true, the government had a duty to answer accordingly in its response to Applicant's Motion to Dismiss for failure to state such claim in the Indictment; Magistrate Leavitt should have made the same claim in his Report and Recommendation to properly dispose of the challenges, and, District Court Judge Dawson had a duty to put the same ruling in his Order (Appendix D) accepting the Magistrate's Report & Recommendation. From the Record made in this case, it appears no one wanted to discuss the statutory duty violated until mid way through the trial.

As far as the court's claim that Sections 1, 61, 63 and 6012 make persons "liable" for income taxes is concerned, no Supreme Court decision ever made such a claim, nor did the treasury department ever make such a claim, so what was the authority? The claim itself contradicts the Treasury Department's published Privacy Act and Disclosure Notice in the 1040 Instruction Booklet, (Appendix K, Exhibit 4). They state that sections "6001, 6011, and 6012"

authorize the government to ask for information and require the filing of returns for any tax persons may be liable for. This is probably true, but the Notice does not identify any Code Section making individuals "liable" for "individual income taxes". In addition, if any of the Code Sections named in the Privacy Act Notice did make individuals liable and required to file and pay the income tax, the section or sections applicable to liability would have to appear in Subtitle A, the Income Tax subtitle, not in Subtitle F, Procedure and Administration, where 26 U.S.C. §§6001, 6011 and §6012 are found. (Appendix INDEX Pg. 2)

The notions of due process and reasonableness dictate that Procedural and Administration Code Sections would only come into relevance once the liability, requirements to file and pay the individual income tax is established by law and notice published, in just the same way as criminal enforcement provisions of the Code would lawfully be applied, as the Applicant is showing in this Petition.

Yet this instruction was given as an interim instruction as well as a final instruction, (in which the judge also inserted the term "wages", a word that is not found in Section 61, as it was in Section 22 of the 1939 IR Code. (Appendix I, Pgs. 2-5, (Trial Transcript Pgs. 2526-2529))

In recognition of the lack of judicial power to alter written law, in *Federal Trade Com. v Simplicity Pattern Co.*, 360 US 55, p. 55: "The United States Supreme Court cannot supply what Congress has studiously omitted in a statute."

And, in *United States v. Merriam*, 263 U.S. 179, 44 S.Ct. 69 (1923), the Supreme Court clearly stated at pp. 187-88:

"But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer. Gould v. Gould, 245 U.S. 151, 153."

In his objections to this Jury Instruction, Applicant explained in great detail (TP 4635) why the instruction violated a number of statutes, the Congressional Reports, the 1040 Privacy Act Notice[6], and common sense.

In *Russello v United States*, 464 US 16, 23, 78 L Ed 2d 17, 104 S Ct. 296 (1983) (citation omitted), and *Keene Corp. v United States,* 508 US 124 L Ed 2d 118, 113 S Ct. (1993), the court recognizes that:

"This fact only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out. Where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Whereas, Congress has enacted statutes specifying lawful authority for the liability, (mandatory requirement to pay, and, to keep books and records), for over 20 various federal taxes imposed and published in Title 26 of the United States Code, (Appendix K Exhibit 12), it is reasonable and right to trust that the omission of the same with regard to the individual income tax is a deliberate exclusion. Congress would not leave out[7] such pertinent language and guidance leaving the American people, IRS agents, federal prosecutors and the courts in the untenable position of guessing or assuming a liability exists.

The defendant in a case does not have to search through Title 26 and assume some statute imposes a duty upon him; the government is required to confront the defendant with the legal duty and to carry the burden of proof of a lawful duty. *Cole v. Arkansas*, 333 US 196. The burden of proof must be on the

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[6] From the Privacy Act Notice published in the 1040 Form Instruction Booklet: "Our legal right to ask for information is Internal Revenue Code sections 6001, 6011, and 6012(a), and their regulations. They say that you must file a return or statement with us for any tax you are liable for. Your response is mandatory under these sections. Code section 6109 requires you to provide your identifying number on the return. This is so we know who you are, and can process your return and other papers. You must fill in all parts of the tax form that apply to you."

[7] Indeed, the mandatory language was *removed* from the income tax statutes (appearing in the 1939 IRC) when Congress enacted the 1954 Internal Revenue Code.

party levying the tax to comply with due process. *Speiser v. Randall*, 357 US 513, 529 (1958); *First Unitarian Church v. Los Angeles*, 357 US 545. It is the responsibility of government to prove the existence of a tax; a citizen is not required to prove the nonexistence of a tax. *Spreckles Sugar v. McClain*, 192 US 397. "...the taxpayer must be liable for the tax. Tax liability is a condition precedent to the demand. Merely demanding payment, even repeatedly, does not cause liability." *Terry v. Bothke,* 713 F2d 1405, at 1414 (1983).

The false Jury Instructions suggested a statutory flexibility that does not exist, and, therefore, all three defendants in the original case should have had their convictions reversed on appeal, but *the attorneys did not raise the issue*. And, based on the above the due process clauses of the Constitution require that the Supreme Court reverse Applicant's conviction and order his immediate release.

ISSUE 2

APPLICANT'S CLAIM OF ZERO INCOME FOR ALL THE YEARS AT ISSUE WAS 100% CORRECT, DESPITE THE GOVERNMENT'S ASSERTION THAT THE CLAIM WAS "FALSE AND FRAUDULENT." THE GOVERNMENT ADMITTEDLY DID NOT EVEN ATTEMPT TO PROVE THE FALSE CHARGE.

Applicant based his "zero income" claim for all the years at issue on his understanding of the Supreme Court's *Merchant's Loan & Trust Co. v. Smietanka*, 255 U.S. 509 (1921) decision, in which the Court held:

"The word (income) must be given the same meaning in all the income tax acts of Congress that was given to it in the Corporate Excise Tax Act (1909), and what that meaning is has now become definitively settled by decisions of this Court."

Since neither the Applicant nor any of those who filed zero returns had any income that would be reported under the Corporation Excise Tax of 1909, they had no income that would be reportable under current revenue laws. Therefore, they did rightfully report zero income on all the returns at issue.

(See Applicant's zero return, (Appendix K, Exhibit 5), and as published on pp. 274-275 of his Book "The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes," hereinafter referred to as "The Federal Mafia.")

Since Applicant supported his claim of "zero" income in the 4-page explanation attached to the Form 1040(s) so filed, quoting the *Merchant's Loan & Trust Co.* case, (and other significant cases[8], to clearly state the nature of and authority for the claim made on all the zero returns), all of the Federal Courts involved had to know exactly on what basis Applicant was reporting zero income. In so doing he explicitly was not "falsely" reporting income in the "ordinary" sense, but ***correctly*** reporting "income" in the "constitutional" sense as decided by the Court in *Merchant's* and as defined by the legislature.

At trial Applicant testified at length as to why the *Merchant's* decision was still valid law. In addition he testified that the 1895 *Pollock* Decision (never reversed, never overturned; the 16th Amendment to the Constitution notwithstanding), as well as **House Report #1337** and **Senate Report #1662** (Second Session, 83rd Congress - Appendix G, Doc. No. 15, Exhibits A and A-1), also supported his understanding of why he could lawfully report zero income.

These Congressional reports, issued simultaneously with the revised 1954 Internal Revenue Code, stated that: ***"Income as used in Section 61 of the 1954 Internal Revenue Code is used in the constitutional sense,"*** which is obviously distinguished from income in its "ordinary sense." However, in all of its litigation, both civil and criminal, federal courts have wrongfully calculated income

[8] Also: *Stratton's Independence v. Howbert*, 231 U.S. 399, 416, 417; *Southern Pacific Railroad v. Lowe*, 247 U.S. 330 (1918); *Bowers v. Kerbaugh-Empire Co.,* 271 U.S. 170, 174 (1926)

in the "ordinary sense," and, never, as they are required to do, in the "*constitutional sense*."

Income in its "*constitutional sense*"– (which is not defined or explained in the Code) means, "income separated from its source." If this "separation" is not made, then the so-called income tax falls directly on the source (i.e. the property that generated the income). This would qualify it as a "property tax" rather than an "income tax." As a result of this error, federal courts have been enforcing the income tax in a manner held unconstitutional by the Supreme Court in 1895 *Pollock* Decision, which held that *"a tax on the income from real and personal property is unconstitutional and void if not apportioned."* (Emphasis added).

"No attempt has ever been made by Congress to define with specificity the term 'income' as it is used in the sixteenth amendment" *Conner v. U.S* , 303 F. Sup.1187, 1189. " The general term 'income' is not defined in the Internal Revenue Code," *U.S. v. Ballard* , 535 F.2d 400, 404. The reason that Congress has never defined "income" is because it has no authority to do so. "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution" (*Eisner v. Macomber* 252 U.S. 189 (1920, page 206), which Congress does every time it changes what is taxable as "income" in each succeeding tax "reform" act.

It does not appear that Congress' 1954 clarification of Section 61 providing the definition of the term "income" has been brought to the Court's attention. When the district court rejected Applicant's proposed Jury Instruction No. 1, (Appendix M, Page 2), the judge took the basic premise of the defense out of the jury deliberations. In order for the jury to understand the theory of the defense and to consider the good faith belief that Applicant was following the law as written, the jury needed to see the Congressional Reports, or, at the very least, have an instruction based upon that legislation defining the meaning of "income" as used in Sections 61 and 63. Instead, the charged Jury Instructions,

particularly Instruction No. 19 were inconsistent with the construction placed on the definition of "income" by Congress.

At trial the prosecutor did not in any way challenge Applicant's understanding of these decisions and the Congressional Reports. Nor did they call any witnesses to testify as to the basis by which the prosecution claimed that Applicant's zero returns were "false and fraudulent." No pleading, no testimony, no documentary evidence, or, evidence of any kind was presented to the court or the jury in an attempt to contradict Applicant's defenses of the claim of zero income as reported on the Form 1040 returns at issue in the case.

Because the government failed to meet this basic burden of proof, Applicant called as a witness I.R.S. Special Agent David Holland whose testimony in front of the Federal Grand Jury was largely responsible for the indictment-charging Applicant with filing "false and fraudulent" returns. At trial Applicant handed Holland a zero return and asked him (at TP 4482, Appendix I, Pg. 15), to "identify any statement in it that he considered "false and fraudulent." The prosecutor, knowing that Holland could do no such thing, sought to rescue Holland, (and the government's case), with the following objection: *"It is appropriate for the Court to be the only one to opine on what may be an accurate or inaccurate statement of the law…I think it's appropriate that no witness on either side go into that. We leave that to the Court."* (Emphasis added)
Whereupon the Court immediately sustained the objection (without hearing from the Applicant) and said:

"The Court instructs on the law. The Court addressed the attachments, or will address them later if I haven't addressed them already."

Judge Dawson's statement was a total fabrication designed to mislead the jury as to the significance of Holland's inability to identify any "false and fraudulent" statements allegedly contained in Applicant's zero returns, as he had been requested to do.

Significantly, Applicant never asked Holland to comment on any law, as suggested by the Court, but only to point out "false and fraudulent" factual statements, (as Holland had previously testified before the grand jury). In addition, Judge Dawson knew that he had never "addressed the attachments before" and would not "address them later if he had not done so already." Judge Dawson knew that he had *no legal authority* to address the factual validity or invalidity of Applicant's zero returns, because that was not the issue of the trial. But the following is what the jury heard:

"It is irrelevant that the witness did not address the attachments because the Court has already done so, or will do so later."

So, from the Court's actual statement, the jury was led to believe that the Court would answer the question that the witness did not. Since the government could not meet its burden of proof, it sought to shift the burden to the Court, who validated the shift and misled the jury with prejudice against the accused.

But even if it had such authority, the Court's subsequent statements on the attachments in question reveal its incapacity to factually and impartially address them.

At TP 2527-2533, (Appendix I, Pgs. 3 – 9), (while the jury was out), Applicant raises the significance of the *Merchant's Loan & Trust, Co.* case, to which the judge replies:

"Merchants Loan & Trust was decided in 1921. It has nothing to do with this case. There are subsequent cases that say so. Are you arguing sir for a position that has been rejected by every court in the United States for the last 91 years?"

How could *Merchant's* have "nothing to do" with this case when Applicant's claim of zero income was primarily based upon the words of the Court in that case, and appended to every zero return he filed?

In order to be found guilty of 11 of the 12 counts against him, the government would have to prove that 1) Applicant either quoted *Merchant's*

incorrectly, or, 2) applied the quote incorrectly. Therefore, Judge Dawson could have said with equal logic (and truth) "the law has nothing to do with this case."

Obviously a conviction would have been much cleaner had the *Merchant's* case been reversed, or, more accurately – had the case *"expired",* as Judge Dawson suggested. Obviously, the judge "Shepardized" the *Merchant's* case, pretrial, and discovered that the case had never been reversed or overturned, and, was still a valid law that Applicant could rely upon.

Judge Dawson's assertion that a Supreme Court decision loses validity by the mere passage of time is false. Also, his secondary claim that every court in the United States had consistently rejected the case in the last 91 years is pure fiction. Applicant doubts that any other layperson would have sufficient tax knowledge to raise the *Merchant's* case in the manner that he did, showing that for tax purposes, income is meant as a corporate profit. And, while a tax lawyer might have the understanding and ability to raise the issue in the manner that Applicant did, no such officer of the court whose livelihood depends on good standing within the institution, would risk his career by raising such a game changing issue. In addition, even if numerous federal courts conveniently ignored *Merchant's* in order to facilitate the government's collection of income taxes, the decision has never been specifically invalidated at it must be considered controlling.

Therefore, on TP 2531, (Appendix I, Pg. 7), Applicant asked Judge Dawson to specifically identify a court decision that reversed the *Merchant's* decision. He replied by saying, "I can do so, but I'm not going to do it." If he could have, he would have done that. The legal and factual basis of the case screamed for such a clarification. By plainly ducking this responsibility Judge Dawson laid bare his bias in the case.

The government did not call any witness to prove that the Applicant's statements about the *Merchant's* case that appeared on his zero returns were

"false and fraudulent." Therefore, it did not even attempt to prove 11 of the 12 counts on the indictment. However, in Jury Instruction No.1, (Appendix K, Exhibit 1), Judge Dawson asserted that the jury had to find Applicant guilty based on the evidence, which he defined as the testimony or evidence presented at trial. But the government admittedly called no witnesses "to opine" that Applicant's zero returns were "false and fraudulent," nor did they introduce any exhibits such as books, documents, audio or video tapes in which Applicant advised people to file false returns or false refund claims. Thus, the prosecution provided no basis upon which the jury should find the Applicant guilty on the counts involving the filing of zero returns.

For its part the government verified, (on pages 39 and 40 of their reply brief to Applicant's opening §2255 motion, Case No.12-17712 Ninth Circuit Court of Appeals, (Appendix J)), it never attempted to refute Applicant's understanding of *Merchant's* or *Pollack* decisions. On page 39 the government acknowledged that in claiming zero income, Applicant relied on those decisions in order to form the basis of his claim to having zero income for tax purposes in the years in question. However on page 40 of the same brief, the government states, ***"However, the government did not attempt to refute Applicant's understanding of these Supreme Court decisions."***

Absent such refutation how could the government assert moreover prove "false" Applicant's understanding of the cases, or that he "knew they were false" as was charged in 11 counts of his indictment? Applicant believes that his case is likely the first time in the annals of U.S. legal history that the government blatantly *admitted* that it was successful in subjecting a U.S. citizen to a lengthy prison sentence without having proven the charges at issue.

Self-serving conclusions of law do not suffice nor do they have any status in criminal prosecutions. The decisions on Appeal here do not hold to this

constitutionally sound principle, and, therefore, Applicant's conviction should be reversed and his immediate release from incarceration should be ordered.

Issue 3.

JUDGE DAWSON'S FALSE EXPLANATION OF HOW INCOME TAX LIABILITY CAN BE ESTABLISHED SHOULD HAVE RESULTED IN THE REVERSAL OF CONVICTION FOR ALL DEFENDENTS CONNECTED TO APPLICANT'S PROSECUTION.

As shown in TP 4145-4146, (Appendix I, Pgs. 13 – 14), the government's summation witness testified that none of the five prosecution witnesses could find a law that made the defendant, or individuals in general, liable for income taxes. On redirect the prosecutor could have easily shown these witnesses to be negligent by simply producing the statutes establishing such a liability. Given the failure of those five prosecution witnesses to identify the statutes, (and similar testimony from four defense witnesses), the prosecutor was duty bound to clear up the confusion for the jury. After all, Applicant was charged with evading a tax that Congress enacted. By failing to do so, the government did not meet its burden of proof. To compensate for the government's failure, Judge Dawson constructed a legal fabrication, claiming that four statutes "work together" to create a liability not established in either. Even if this argument were valid, which it is not, it does not compensate for the reversible failure of the prosecution.

When on TP 4145-4146 Applicant asked the government's summation witness whether any of the witnesses called by the government had testified concerning the existence of a liability-establishing statute, the government objected on the grounds that only the Court could offer opinions on the law. The objection was sustained.

However, Applicant's question did not ask for an interpretation of the law, but simply asked if an individual law had been introduced into evidence. But in

sustaining the objection the Court showed clear collusion with the prosecution in order to prevent the jury from recognizing the fact that no witness could produce a statute that provided for income tax liability.

In his Jury Instruction to create this liability, Judge Dawson claimed that "Code Sections 1, 61, 63 and 6012, working together, make persons liable for income tax." This claim cannot be supported by any legitimate source document or Supreme Court decision. Even Magistrate Leavitt in his Report and Recommendation did not make such a claim in connection to an income tax liability and neither did the judge when his Order adopted the Magistrate's Report and Recommendation. If Judge Dawson's claim were true, notice of it would have had to appear in the Privacy Act Notice of the Form 1040 Instruction Booklet as already discussed. However the original version of the Privacy Act notice, which is supposed to offer an official explanation to the public as to who is required to file and pay income taxes, only contains references to sections 6001 and 6002. Some five or six years later the original notice was amended to include Section 6012. But the fact that 6012 was not included in the original notice shows that the Section had nothing to do with the payment of the individual income tax.

The Privacy Act specifically advises individuals to find the law that establishes their personal liability. Nothing remotely similar to Judge Dawson's "four cooperative statute" claims appear anywhere on the Privacy Act in the 1040 booklet. In reality, the Sections cited by Judge Dawson establish that a liability does not exist.

For example, he cites Code Sections 61 and 63, which allegedly define gross income and taxable income. However the word "income" is not defined in the Internal Revenue Code, *U.S. v. Ballard* 525 F. 2d, 400, 404 because the Supreme Court in *Eisner v. Macomber* 252 U.S. 189 (1920), ruled that Congress has no authority to define income since by doing so it would be amending the

Constitution by legislation alone. Therefore when Congress developed the 1954 IR Code, Congress used wording that reflected the earlier Supreme Court decisions (such as *Merchant's Loan & Trust*) holding that for tax purposes income means "income separated from its source," as in a corporate profit.

That is why Congress simultaneously issued two Congressional Reports along with the enactment of the 1954 Code in which they distinguished the meaning of the term income in Code Section 61 from its meaning in Section 22 of the 1939 IR Code, saying that the word "income" was used in its constitutional sense. Because of the Pollock decision, income for tax purposes had to be given a different meaning than income in its general sense. Therefore Sections 61 and 63 that Dawson includes in his "four statute" summation use income in their constitutional sense not in the ordinary sense as the Instruction implies. If the correct definition had been applied to these sections, it would be clear that no liability could be established because individuals (unlike corporations) cannot separate income from its sources. Since Code 61 and 63 preclude individuals from having taxable income, they also preclude any individual from being liable for income taxes, and, following; no penalties are applicable for the failure to claim "income" on an individual income tax return.

For these reasons, Judge Dawson's "four statutes" argument not only contradicts the Privacy Act Notice, but also *Eisner v. Macomber*, the meaning of Code Sections 61 and 63 as provided in the legislative reports, and the testimony of all five prosecution witnesses. Given that the existence of a liability is a central element in establishing Applicant's guilt, it is impossible to understate the damage caused by Judge Dawson's erroneous Jury Instructions, which he presented to the jury twice– as an interim Instruction and in Jury Instruction 19 of his final Instructions over the objections of Applicant. This error provides a clear path for reversal that was not raised by any of Applicant's appellate attorneys even after Applicant pleaded with each of them to raise the issue. This failure

proves that they were all ineffective. The Supreme Court now has the opportunity to correct this error and reverse Applicant's conviction.

Am Jur 2D TRIAL Vol. 75A (Jury Instructions, Generally) Sec. 1034 Generally

> When instructing the jury, *the trial court should reasonably set forth all of the salient and essential propositions of law that relate to material issues of fact which the evidence tends to support*. However, the parties must request and object to specific Jury Instructions. *The propositions of law must be correct statements of the law. Jury Instructions should be written with the particular facts and legal theories of each case in mind, and must be based upon the actual issues in the case as presented by the evidence.* ***That is, the law to be charged to a jury must be determined from the evidence presented at trial***.[9] Ordinarily, a defendant is entitled to any Jury Instruction reasonably supported by the evidence.

In the Applicant's case, the entire defense depended upon the actual language of the laws as written and as supported by Supreme Court decisions, Congressional Reports, Treasury Regulations and official governmental pronouncements, none of which were controverted by witness or any other evidence. The Applicant proposed Jury Instructions to show his factual and legal theories of the defense in the case, but the judge rejected those Instructions. (Appendix L, page 2). The prosecution depended upon the judge to cure its failure, neglect and want of jurisdiction, and, the judge obliged the prosecution accordingly by way of charging the jury with the instructions.

On April 1, 2004, Applicant notified the government and the Court that he intended to plead "guilty" to all charges in the Indictment if the government would produce at the arraignment any statute which specifically made Applicant "liable" for income taxes. (Appendix K, Exhibit 17). The silence in response was

[9] State v. Wharton, 367 S.C. 71, 624 S.E. 2d 654 (Ct. App. 2005).

deafening. The government remained silent. In all of the pretrial briefs, the government dodged the questions pertaining to the charge, "known legal duty". It was not until October 13, 2005, the day that the Jury was charged with its instructions that the government finally put its answer in writing: GOVERNMENT'S PROPOSED SUPPLEMENTAL JURY INSTRUCTION. (Appendix K, Exhibit 18).

Federal courts are limited to the statutory construction used. The courts of the United States do not possess any legislative powers. Under the Constitution of the United States of America, it states at **Article I, § 1, cl. 1:**

> "**All legislative powers herein granted shall be vested in a Congress of the United States,** …".

This means that while the courts possess the power to reject a provision, or a statute in its entirety, for want of constitutionality, it does not possess the power to amend, edit, alter or change the law from the actual language used and written by Congress, who possesses "*All legislative powers*".

The courts have a plain and simple judicial duty to apply the statutes as written to the circumstances, facts and evidence of the case as presented and argued in the instant matter before them. When considering whether a defendant is entitled to his or her proffered instruction, the trial court must consider the evidence in the light most favorable to the defendant.

The statutes are almost always simple and clear, without ambiguity or conflict. The laws simply mean what the words used in them say, and nothing more can be read into the law or assumed about it into existence. The following U.S. Supreme Court cases below clearly reveal these irrefutable facts:

In Demarest v. Manspeaker, 498 US 184, 112 L Ed 2d 608, 111 S Ct. 599, (1991), the court held: "In deciding a question of statutory construction, we begin of course with the language of the statute."

In Connecticut National Bank v. Germain, 503 US 249, p. 253-254, 117 L.Ed 2nd 91(1992), the court identifies that: "When the words of a statute are

unambiguous, the first canon of statutory construction -- that courts must presume that a legislature says in a statute what it means and means in a statute what it says, there is also the last, and judicial inquiry is complete."

In *McNary v Haitian Refugee Center,* 498 US 479, 112 L Ed 2d 1005, 111 S Ct. 888, (1991), the court invokes these basic standards of statutory construction again: "In construing a federal statute, it is presumable that Congress legislates with knowledge of the United States Supreme Court's basic rules of statutory construction."

In *Reiter v Sonotone Corp*., 442 US 330, 337, 60 L Ed 2d 931, 99 S Ct. 2326 (1979), the court again recognizes its duty to begin with the specific words of the statute: "As in all cases involving statutory construction, "our starting point must be the language employed by Congress."

"(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." – *Connally v. General Construction Co*., 269 US 385, 391 (1926)

ISSUE 4.

DESPITE APPLICANT'S UNCHALLENGED STATEMENTS THAT HE HAD NO DISAGREEMENT WITH LAWS THAT HE BELIEVED TO BE VOLUNTARY, THE PROSECUTER FALSELY CLAIMED IN CLOSING ARGUMENTS THAT THE APPLICANT'S POSITION WAS BASED ON A DISAGREEMNT WITH THE LAW.

As was shown throughout the trial, the bedrock of the Applicant's defense and belief rested on his assertion that the income tax was based on "voluntary compliance." Many times at trial Applicant made clear that this belief led him to conclude that all the income tax laws were constitutional because they were voluntary and did not provide for liability, require anyone to pay income taxes or to keep books and records in connection with such a tax.

Based on this, it would have been pointless for the Applicant to disagree with a law that he felt placed no burden on him. So, while it could have been

argued that the Applicant misunderstood the law, there was no evidence that he disregarded or disagreed with it. Despite this, in his closing argument prosecutor Ignall stated repeatedly that a simple "disagreement" with the law motivated the Applicant. The prosecutor knew that those statements misstated the evidence and the testimony in the case; in fact the prosecutor plainly lied. That conduct is not allowed:

> "It is misconduct of a very serious nature, often resulting in a reversal of the judgment obtained, for counsel in arguing to the jury to make misstatements of the evidence; and where certain facts are testified to by witnesses of apparent intelligence and credibility who are not impeached or contradicted, it is improper for opposing counsel to state that such facts have not been established."[10] 53 Am Jur TRIAL Sec. 484. Misstatement of Facts in Evidence.

The evidence of the Applicant's beliefs, (to the limited point that the court allowed for it to be presented at trial), showed that his defense and explanations relied upon the laws as written with other substantial documentation, judicial authority, and governmental pronouncements. (See Appendix K, Exhibits 6 through 15 for some examples).

For example, the first chapter of the Applicant's book, *The Federal Mafia* (which was placed into evidence) is entitled "Surprise: The Income Tax is Voluntary." (Appendix K, Exhibit 11). The first line of that chapter quotes the Supreme Court, saying, (in *Flora v. United States*, 362 U.S. 145, p. 176) "the payment of income tax is based on voluntary compliance, not upon distraint." The first page of *The Federal Mafia* also includes many quotations from former IRS Commissioners that state clearly that the income tax system is based on

[10] Anno: 46 LRA 665, 667; LRA1918D 7 et seq. See cases cited supra, Sec. 480. As to reversible error in misstatements of the evidence, see 3 Am Jur 613, Appeal AND ERROR, Sec. 1073 Davis v. Chicago, M. & St. P. R. Co. 93 Wis 470, 67 NW 16, 1132, 33 LRA 654, 57 Am St Rep 935. See also Berger v. United States, 295 US 78, 79 L ed 1314, 55 S Ct 629. Anno: LRA1918D 7.

voluntary compliance and self-assessment. In the third paragraph of the front page in *The Federal Mafia* Applicant states that, in "in order for the 1954 IR Code to be constitutional, the government removed all of the enforcement provisions that had been included in the 1939 Code.

Page 16 of *The Federal Mafia* (see Appendix K, Exhibit 6) includes a statement made at a hearing in front of the House Ways and Means Committee by Dwight Avis, then head of the Alcohol and Tobacco Tax Division of the Treasury Department:

"Let me point out this out now, the income tax is 100% voluntary tax, and your liquor tax is 100% enforced tax. Now the situation is as different as day and night."

The statement made clear that the income tax (unlike alcohol and tobacco taxes) was voluntary. On page 17 of the book Applicant reproduced a letter he received from the Bureau of Alcohol Tobacco and Firearms in response to his inquiry of the Bureau seeking whether the payment of such taxes were based on "voluntary compliance." The letter includes the unequivocal response that alcohol and tobacco taxes originate from statutes, and as a result, "compliance is compulsory." (Appendix K, Exhibit 7).

When held up against the statements made by the Supreme Court and by former IRS Commissioners about the nature of income tax obligations, it becomes clear that the Applicant had a strong basis for forming his belief that filing and paying income taxes was based on voluntary compliance. The advocacy and action of the Applicant was consistent with a person who *believes he was complying* with voluntary *laws* rather than disagreeing or disregarding compulsory laws. Applicant maintained throughout the trial that it was the government that disregarded the law by treating a voluntary tax as if it were compulsory.

The government prosecutor did not raise or address one statement printed in Applicant's books or other research material, nor did he produce evidence to controvert Applicant's evidence, and, in fact the prosecutor objected to the defense introducing the books and research as evidence.

Despite this, prosecutor Ignall, in his summation to the jury, (on transcript pages 5112-5141, Appendix I, Pgs. 16 - 45), made at least a dozen clear statements that the Applicant simply disagreed and disregarded the law in order to form his opinions and undertake his actions. Here are some of his more direct statements on the subject:

> "The Federal Mafia, like everything Mr. Schiff sells shows his *disagreement* with the law." (page 5113) (Appendix I, Pg. 17)
>
> "But a *disagreement* with the law, no matter how adamantly held, is not evidence of good faith." (page 5117) (Appendix I, Pg. 21)
>
> "His disagreement with the law is not good faith." (TP 5123) (Appendix I, Pg. 27)
>
> "But as the Judge has instructed you, *disagreement* with the law is not good faith." (TP 5128) (Appendix I, Pg. 32)
>
> "It's part of his pattern of stubbornly *disregarding* the law." (page 5136) (Appendix I, Pg. 40)
>
> "He just *disagrees* with the requirement that he report his income to the IRS." (TP 5139) (Appendix I, Pg. 43)
>
> "These defendants can't knowingly *disregard* the laws and hope to escape the consequences." (TP 5141) (Appendix I, Pg. 45)

The second chapter of *The Federal Mafia*, entitled "Why an Income Tax Must be Voluntary" lists five reasons why the tax must be voluntary. Chapter 6 is entitled "No Law Establishes a "Liability" for Income Taxes: The Heart of the Issue." The material in these chapters provides ample basis for the Applicant to

conclude that he was obeying the law rather than disagreeing or disregarding it.

No evidence presented at trial contradicted any of Applicant's beliefs regarding the voluntary nature of the income tax. If any of the documentation Applicant relied on to reach his conclusions were false, the prosecution had a duty to confront and impeach that evidence at trial. In so doing they would have demonstrated that Applicant was simply "disagreeing" or disregarding the law, thereby attempting to prove their theory of the case. But they chose not to.[11]

The purpose of the final argument is to summarize the evidence that was presented at trial, not to offer opinions on issues that are not supported by evidence. It is clear that Applicant based his opinions on the Supreme Court's *Merchant's Loan & Trust* case. Instead of showing the jury how Applicant's written statements or testimony showed a disregard for the law, either through delusional misinterpretation or legal error, prosecutor Ignall simply chose to assert, again and again, with no basis of proof, that Applicant knew what the law really was, but simply chose to *disregard* it because he *disagreed* with it. The repetition of those false statements undoubtedly played a large role in the jury's verdict. A plentiful amount of case law clearly asserts that prosecutorial misstatements in final summation provide ample grounds for reversal as found in 53 Am Jur TRIAL Secs. 479, 480:

c. MATTERS OUTSIDE EVIDENCE. Sec. 480. Generally. – There is no rule of trial practice more universally accepted and applied than the rule that counsel may not introduce into his argument to the jury statements unsupported by evidence produced on the trial and made not as expressions of belief or opinion, but as assertions of fact. Judicial censure of misstatements of the

[11] The prosecutor even objected to the introduction of *The Federal Mafia* as evidence. If they could have proven false Applicant's claims, they would have introduced The Federal Mafia as their own prime piece of evidence. Instead they tried to keep it out.

evidence by counsel in arguing their case or statements of facts not in evidence has been equally emphatic in both civil and criminal cases.[12]

In addition, the prosecutor attempted to establish Applicant's disagreement with the law by claiming that prior tax cases involving Applicant provided him with "notice" that his ideas were wrong.

Putting aside the fact that the prior cases involved different tax issues, and the fact that a respected legal journal (THE JOURNAL OF TAXATION, February 1987, (Appendix K, Exhibit 14)), expressed grave reservations on the legality of Applicant's 1985 conviction, these events can be no substitute for a direct demonstration as to how Applicant was actually noticed by law and then showing how he willfully and with evil intent disagreed with or disregarded specific laws.

It was only due to an unfortunate combination of factors that defense was unable to object to these statements while they were being made. During trial, Applicant acted as a pro se defendant. However, as was amply demonstrated at trial, the defendant's auditory shortcomings prevented him from hearing much of the proceedings. Any competent defense counsel would have made successful objections to the type of unsubstantiated assertions made by the prosecution, but Applicant's hearing impairment caused him to miss the opportunities to challenge. This situation likely contributed to the Jury's verdict of conviction since no objections to the statements were made.

Clearly, the repeated and libelous false statements in the prosecutor's summation were composed and presented in order to compensate for the government's want of proof through evidence and testimony and, to defeat any consideration and deliberation the jury may have made based upon *Cheek v.*

[12] United States. – Berger v. United States, 295 US 78, 79 L ed 1314, 55 S Ct 629; Waldron v. Waldron, 156 US 361, 39 L ed 453, 15 S Ct 383; Hall v. United States, 150 US 76, 37 L ed 1003, 14 S Ct 22.

United States, (498 US 192, 112 L ed 2d 617, 111 S Ct 604), where this Court ruled in its decision:

"In federal criminal tax cases, the statutory requirement of willfulness requires the Federal Government to prove that (1) the law imposed a duty on the defendant, (2) the defendant knew of that duty, and (3) the defendant voluntarily and intentionally violated that duty;...

(1) if the Federal Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement, but (2) carrying this burden requires negating a defendant's ... good-faith belief that the defendant was not violating any provisions of the tax laws for one cannot be aware that the law imposes a duty and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist; in the end, the issue is whether, based on all the evidence, the Federal Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits good-faith misunderstanding and belief submission, regardless of whether the claimed belief or misunderstanding is objectively reasonable." (Blackmun and Marshall, JJ., dissented in part from this holding).

The Federal Government in this case did not prove that Applicant *knew* he was violating any law, and, it did not disprove Applicant's belief that the individual income tax is voluntary and that no duty therefore existed. So, the inaccurate and misleading statements made by the prosecutor in his final summation were intended to nullify the *"Cheek"* defense, and they were the final words of the trial made after the Jury was charged with the Instructions as shown at (TP 5128) (Appendix I, Pg. 32)

Jury Instruction No. 48 states in part, *"Neither disagreement with the requirements of the law, nor a belief that the tax laws are unconstitutional – no matter how earnestly held – constitutes a defense of good faith."* (Appendix H, Page 27, and Appendix K, Exhibit 3).

Knowingly fashioning a closing summation contradicting all of the evidence violates the *"rule that counsel may not introduce into his argument to the jury*

statements unsupported by evidence produced on the trial and made not as expressions of belief or opinion, but as assertions of fact", and should provide a clear pathway for relief on appeal that unfortunately was not taken by any of the Applicant's ineffective counsels.

ISSUE 5

THE GOVERNMENT HAD NO JURISDICTION TO PROSECUTE APPLICANT FOR INCOME TAX EVASION AS CHARGED IN COUNT 17 OF THE INDICTMENT.

Count 17 charges Applicant with violating 26 U.S.C. §7201, *tax evasion* for the years 1979-1985. Apart from the fact that the government has no jurisdiction to prosecute the Applicant for an alleged income tax crime, (as established in Issue #1 this Petition), the law outlines the agency requirements to be met before referral for Department of Justice prosecution.

First, the government must prove that Applicant had a "deficiency" for each of the years at issue in order to be brought up on charges and found guilty of income tax evasion. In order to find a deficiency, government records (Form 4340's) would have to show a receipt of a tax return from Applicant claiming an amount of self-assessment. Since the 4340 Forms do not show a receipt of returns, the government had no lawful premise (i.e. jurisdiction) to charge Applicant with tax evasion under §7201 for any of those years. It is the law:

Section 6201 (a) (1) of the IR Code states as follows:

"The Secretary shall assess all taxes determined by the taxpayer or the Secretary as to which returns or lists are made under this title." (Appendix INDEX page 3).

However, the Government does not show or identify any "list or return" which were made or filed by Applicant pursuant to this statute for 1979-1985, which are the years at issue in Count 17 of the Indictment.

As the government witness Kristy Morgan (whose credentials are shown

in TP's 1534 to 1536, (Appendix I, Pgs. 46 -48)), and testified (as shown in TP 1540 – (Appendix I, Pg. 49)):

"An (IRS) Form 4340 gives us a record of everything that's happened on that account from the taxpayer for that year…if the return was filed, if there were payments made, when the refund was sent out…"

Included, as Appendix L, is the District Court's Order "Directing Entry of Judgment Against Irwin A. Schiff."[13] Included in that order is a declaration by Revenue Officer Sandra Davaz in which she lists all the income tax assessments and additional penalties standing to the Applicant for the years 1979 –1985.

According to her calculation the total amounts owed by Applicant for (1979 – 1985) income taxes and related penalties, (and, without mentioning and accounting for the amounts illegally seized by the IRS for the years 1979 and 1980), was $2,651,187.31. However, not one penny of the amounts shown on her declaration were lawfully owed by Applicant for any of the years charged.

The declaration includes exhibits showing the Form 4340's, (Appendix L, Pgs. 7 – 13), of Applicant for the years 1979 through 1985. At the criminal trial, (TP 1542, (Appendix I, Pg. 50), Ms. Morgan testified as to the contents of Applicant's 1984 Form 4340 document, stating that:

"The very first item shows the date of August 8, 1991, there was a Prompt assessment made."

Her testimony revealed that none of assessments made on the 4340's for 1979 to 1985 "were made" from returns received by the government. Therefore, all of the assessments shown on the declaration, (and the additional penalty and interest assessments), have no legal basis, and are therefore nullities. Lacking such a lawful assessment the government cannot claim that the Applicant was "liable" for any of the taxes, or the penalties and interest charges shown on Ms.

[13] This is an Order made in one of the parallel proceedings, a civil case, preceding the coordinated civil and criminal cases brought against Applicant and others associated with him in the years 2002 through 2005. The case is CV-S-01-0895 PMP (LRL).

Davaz's declaration for the years 1980-1985.

Applicant filed no tax return for the year 1979. If the government wanted to collect income taxes from him for that year, the government's only legal remedy, as required by IR section 6501 (c) (3), (Appendix INDEX pg. 4), would have been to file a lawsuit against Applicant in District Court for the amount of tax it alleged that Applicant owed. Instead it devised a fraudulent and unlawful method to circumvent the provisions of section 6501 (c) (3).

The first entry (as shown in Applicant's 1979 Form 4340, (Appendix K, Exhibit 15)), shows *"return filed and tax assessed."* However the "return" entry on that record in this case is not one prepared and filed by the Applicant, but a "substitute return" (often referred to as a "dummy return") prepared by the IRS. Nowhere in the Internal Revenue Code is there a provision of law authorizing the Secretary (or anyone at the IRS) to prepare a substitute for return. When an IRS data entry clerk enters "return filed" into the IRS' "master computer," it is assumed by the automated agency system that the return was one filed pursuant to the provisions of IR Code Section 6201 (a) (1), thereby allowing the agency to proceed further. Similarly, since the "master computer" can't tell the difference between an alleged "0.00" assessment and a "9.00" assessment, the database is tricked into assuming that a legitimate tax "liability" was assessed on 10/06/1986, (for 1979), and the computer entry allows the IRS to proceed further. However Section 26 U.S.C. 6203, (Appendix INDEX Pg. 3) which authorizes tax assessments states as follows:

"The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary."

The assessment of a 0.00 tax liability is to record the absence of a self-assessment on that date and Section 6203 does not permit the Secretary to record the absence of a tax liability in the guise of recording the existence of one.

In addition, Ms. Davaz' declaration shows only one assessment for the each of the years 1979-1985. The law states that *two* assessments are required to determine a deficiency (an original assessment pursuant to Code section 6201 (a) (1), and a supplemental assessment, (authorized under IR Section 6204 and 6211), (Appendix INDEX Pgs. 3 & 4), when it is determined that the original assessment was either imperfect or incomplete. And, to be found guilty of the fraud penalties that are charged in the years 1979-1985, there would have to be a *deficiency* shown in each of those years – not just the single assessments that are shown in Ms. Davaz' declaration.

Therefore, any IRS employee, (including Ms. Davaz), who read that declaration would know that under the provisions of applicable law, the fraud penalties were assessed in error. This is particularly true of Ms. Morgan, testifying at the criminal trial, whose extensive experience would have provided her with the knowledge of agency requirements. Since she introduced all of the 4340's for the years 1979-1985, she would have obviously notified the prosecutors in the case that Applicant could not lawfully be charged with fraud penalties for those years knowing full well the prerequisite conditions for tax fraud had not been established under the required administrative procedures. Nevertheless Applicant was charged, prosecuted, and convicted of 26 U.S.C. §7201 crimes and was sentenced to 5 years incarceration accordingly.

In addition to the misapplications of law shown above, the IRS never imposes tax fraud penalties when the maximum amount that could have been evaded is under $10,000.00. Yet it did so here for the years 1981, 1984, and 1985. The IRS never imposed a fraud penalty, (or brought criminal charges), against taxpayers when the alleged evasion was as low as the $5,567 that Applicant allegedly evaded in 1985. But since Applicant was a well-known critic of the IRS' unlawful and unconstitutional *forced collection* of individual income taxes, the IRS specially modified standard procedural rules in order to

vault over its requirements to insure that Applicant received the maximum sentence possible regardless of the law, the facts, or constitutional due process protections.

The agency must follow its own regulations. Actions by an agency of the executive branch in violation of its own regulations are illegal and void. A relevant treasury regulation pertinent to this issue is found at 26 CFR §601.106 (f), which states in part: (Appendix K, Exhibit 15)

"[t]he following rules are also applicable to practice before the Appeals:

(1) Rule 1. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law ***shall hew to the law*** *and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers."*

Yet, the agency regularly practiced targeting and abuse for decades in countless numbers of cases as revealed in 1997 when the Senate Finance Committee held hearings as part of an extensive investigation of the IRS. Following the investigation and subsequent legislation called the 1998 I.R.S. Restructuring and Reform Act, the head of that Committee, former Senator William Roth, wrote a book entitled *"The Power to Destroy*" recounting some of the testimony given by the witnesses and offering his analysis. Shown in (Appendix K, Exhibit 16), is the back dust jacket of that book where it states among other things, "Shocking Revelations about the IRS in *The Power to Destroy*":

1) The maliciousness and malfeasance by the Internal Revenue Service…should disturb all citizens."

2) "Witnesses told of an IRS that brought terror to the heart of the U.S. and is almost never held accountable (by either the judiciary or Justice Department lawyers) for its many errors and sins."

3) "How the IRS, with absolute authority granted by Congress played judge, jury, and executioner, depriving countless taxpayers of basic rights (especially) those who have criticized or challenged the agency" (as Applicant has done).

Amazingly the Committee was not aware that Congress never gave the IRS the authority to commit any of its worst offenses, including filing dummy returns when none existed.

But as a result of the many IRS abuses uncovered by the investigation, Congress passed new laws (such as 26 U.S.C. §6320 and §6330) intended to help protect the public from IRS abuses that the Senate uncovered. Unfortunately, the Federal Judiciary and the Justice Department lawyers do not respect and enforce the provisions of these statutes, so, as this case illustrates, the abusive practices of the IRS have not changed.

CONCLUSION

May this Court find that Issues 1 and 5 herein irrefutably establish that the Court had no subject matter jurisdiction to prosecute Applicant for any of the criminal offenses charged in the indictment; and,

The due process clauses of the Constitution of the United States guarantees that all Americans cannot be deprived of "life, liberty, or property without due process of law," and, yet Applicant continues to be deprived of his liberty based upon numerous violations of this cherished American principal and prior landmark rulings of this Court; and,

Applicant therefore, prays that this Court grant this petition for Writ of Certiorari in order to finally settle the questions of wide scale public importance presented and to vacate Applicant's judgment of conviction.