No. 04-10531

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD M. SIMKANIN,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEE UNITED STATES

EILEEN J. O'CONNOR
Assistant Attorney General

ROBERT E. LINDSAY (202) 514-3011
ALAN HECHTKOPF (202) 514-5396
S. ROBERT LYONS (202) 307-6512
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

RICHARD B. ROPER
United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.4, counsel for the United States of America respectfully inform the Court that they believe oral argument might assist the Court resolving the issues in this case.

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BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

Defendant appeals from a judgment of conviction in a criminal case. The District Court's jurisdiction arose under 18 U.S.C. 3231. The District Court entered judgment on May 5, 2004. (R.1873.) 1/ Defendant filed a timely notice of appeal on May 7, 2004. (R.1882.) *See* Fed. R. App. P. 4. Jurisdiction for this appeal lies under 28 U.S.C. 1291 and 18 U.S.C. 3742(a).

1/ "R." references are to the original record on appeal as repaginated by the Clerk of the District Court. "RT" references, preceded by volume numbers, are to the reporter's transcript of the trial held on January 6 and 7, 2004. "S.RT" references are to the transcript of the April 30, 2004 sentencing hearing.

STATEMENT OF THE ISSUES

1. Whether the District Court directed a verdict on an element of the offenses under 26 U.S.C. 7202.

2. Whether a separate instruction on good faith was required.

3. Whether defendant was unfairly restricted from presenting evidence demonstrating that his asserted understanding of the tax law was held in good faith.

4. Whether defendant's sentence was reasonable.

5. Whether treatment of the Sentencing Guidelines as mandatory was "plain error."

STATEMENT OF THE CASE

On December 17, 2003, defendant was charged in a superseding indictment with twelve counts of willfully failing to collect and pay over employment taxes, in violation of 26 U.S.C. 7202, fifteen counts of knowingly making and presenting false claims for refund of employment taxes, in violation of 28 U.S.C. 287 and 2, and four counts of failing to file federal income tax returns, in violation of 26 U.S.C. 7203. (R.1182.)

Trial began on January 6, 2004, and, on January 7th, the jury returned a verdict of guilty as to counts 3-31. (R.1621.) The jury indicated that it did not want to deliberate further as to counts 1 and 2, and the District Court declared a mistrial as to those two counts. (4RT 49.)

The District Court departed upward from the 41-51 month sentencing range calculated under the Federal Sentencing Guidelines and imposed a sentence of 84 months' incarceration, after determining that a departure was independently warranted under both USSG §5K2.0 and USSG §4A1.3(a)(1). (S.RT 76-85.)

STATEMENT OF FACTS

Defendant was the owner and president of Arrow Custom Plastics, Inc. ("Arrow"), a manufacturer of plastic molds, since its incorporation in 1982. (2RT 31; 3RT 19.) In 1993, defendant hired an accounting firm, Simpson & Taylor, to prepare tax returns for Arrow and himself. (2RT 53-54.) Defendant was advised by an employee of Simpson & Taylor, Jim Kelly, that because Arrow maintained inventory and accounts receivable, Arrow was required to change from the cash basis method of accounting to the accrual basis method of accounting. (2RT 58.) The change in accounting method resulted in a temporary increase in Arrow's corporate income tax, which increase was payable over time. (2RT 59-63.) Defendant agreed to the change, and the accounting firm prepared Arrow's corporate income tax return for the fiscal period ending March 31, 1994, on the accrual basis. (2RT 59-61.) The accounting firm also prepared Arrow's employment tax returns (Forms 940 and 941) and defendant's individual income tax return (Form 1040). (2RT 64, 112-114.)

Defendant identifies the increased tax bill resulting from the change in accounting method as the event that started his questioning

of the federal government and the federal tax system. (3RT 21-24.) When defendant filed his 1994 and 1995 individual income tax returns, defendant wrote "UCC 1-207" next to his signature, thus indicating that the returns were filed "under protest" and that defendant "reserved his rights." 2/

The 1995 return was the last individual income tax return filed by defendant. Defendant did not file a federal income tax return for 1996, 1997, 1998, 1999, 2000, or 2001, though he earned sufficient income in each of those years to be required to file a return and pay tax. (2RT 115-116.) When it was time to file the 1996 and 1997 returns, defendant told accountant Kelly that he was not required to file a return, because he didn't have any income and lived on savings. (2RT 65-66.) But that was a lie; in 1996 and 1997, defendant was paid a salary of $1,000 to $1,500 a week by Arrow, plus expenses. (2RT 35-36; 3RT 6-12, 83.) Initially, the weekly payments to defendant were identified on Arrow's books as "officer salary," but defendant directed Arrow's bookkeeper to change the bookkeeping entries to "remuneration," without any reference to defendant's being the recipient of the funds. (3RT 6-12 91.) The payments of defendant's personal expenses were listed on Arrow's books as being for "repair and maintenance." (3RT 9.)

2/ Section 1-207 of the Uniform Commercial Code ("UCC") provides: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved." *See United States v. Clark*, 139 F.3d 485, 487 (5th Cir. 1998) (the Court noted that an anti-IRS group instructed its members to write "Without prejudice, UCC 1-207" next to their signatures).

In 1996, defendant surrendered his Texas driver's license, but he continued to drive. (3RT 68-69.) Whenever he was stopped by the police and asked to present a driver's license, defendant showed the officers a card styled "British West Indies International Motor Vehicle Qualification Card," which defendant obtained from a mail order business in Connecticut. Defendant mailed to the U.S. Treasury Secretary, and placed on Arrow's Internet website, a statement that he had expatriated himself from the United States and repatriated to the Republic of Texas, and he vowed to ignore the laws of the United States. (3RT 67-68.)

In 1997, defendant removed his name from Arrow's bank checking account and Arrow's credit card account, and replaced it with the name of Dianne Clemonds, who was Arrow's bookkeeper and defendant's sister-in-law. (2RT 31-34, 145.) Defendant told Clemonds that he wanted to "drop out of the system" and did not want his name on documents that required his social security number. (2RT 34.) Defendant listed Clemonds as the president of Arrow on legal documents, including the corporate income tax return filed for the fiscal year ending March 31, 1997. (2RT 63.) But Clemonds was made president in name only, and she did not perform the duties of the president of Arrow. (2RT 34.) Defendant retained responsibility for the affairs of the company and continued to make all the decisions. (2RT 32-34.)

By May, 1999, defendant had become involved with an organization by the name of "We The People Foundation for Constitutional Edu-

cation," which promotes the view that: (1) "there is no law that requires most [A]mericans to file and pay income tax, or most companies to withhold the income tax from the paychecks of the wage earner"; and (2) "the 16th [A]mendment was fraudulently declared to have been ratified" and "deals with the constitutional definition of income, which is different from the definition of income most Americans have." (3RT 185, 190.)

Defendant told accountant Kelly and others that, as a "free man," he was not required to pay taxes and that filing returns was voluntary. (2RT 67.) Kelly advised defendant that filing tax returns and paying taxes was not voluntary and that defendant would get in trouble if he failed to file returns and pay taxes. (2RT 67.) Defendant ignored Kelly's warnings, and by the summer of 1999, defendant began to pressure Arrow's employees to attend seminars sponsored by the "We The People Foundation for Constitutional Education." (2RT 33.) Defendant also told the employees that they were slaves if they paid taxes. (3RT 83.)

On November 5, 1999, defendant told Kelly that Arrow would stop withholding employment taxes from the wages of its employees beginning January 1, 2000. (2RT 68.) The employees were to be given no say in the matter; defendant determined that Arrow would stop withholding employment taxes even if an employee wanted Arrow to continue to withhold taxes. (2RT 48; 3RT 81.) Kelly advised defendant against that course of action and advised defendant that he was

required to withhold taxes from the wages paid to employees. (2RT 45-46, 68-70.)

Clemonds consulted with an attorney and was told that she could be personally liable if she went along with defendant's plan to stop collecting and paying over employment taxes. Clemonds told defendant she would not go to prison for him and, in December 1999, quit her position with Arrow. (2RT 43-45, 48.) When Clemonds left, defendant put his own name back as the sole signatory for Arrow's bank account, adding "without prejudice ucc 1-207" after his signature. (2RT 146.)

Defendant followed through on his stated intent to stop withholding employment taxes from the wages of Arrow's employees beginning January 1, 2000. (2RT 114.) In addition, on January 20, 2000, defendant filed 15 claims for refund with the IRS, claiming a refund not only of the employment taxes paid in 1997-1999 by Arrow, but also claimed for himself the employment taxes collected from, and paid by, Arrow's employees. (2RT 120-122.) The IRS denied the claims, and defendant did not seek further review. (2RT 123, 143.)

In March 2000, Kelly and a named partner at Simpson & Taylor, Fred Taylor, went to defendant's office to discuss defendant's refusal to pay taxes or file returns. (2RT 91-92.) Defendant reiterated that he had no intention of filing returns or paying taxes. Taylor advised defendant that he could be criminally prosecuted for his actions and, by letter dated March 28, 2000, terminated defendant and Arrow as clients. (2RT 94-95.)

In August, 2000, defendant wrote his congressional representative and asked him to support a proposal to repeal the current system of withholding and replace it with a system in which employees would pay their employment taxes on a monthly basis. (2RT 167-169.) The government argued at trial that defendant's support for a change in the law demonstrated that defendant was aware that, under current law, wages paid to employees were taxable and subject to employment tax withholding.

On March 2, 2001, photographs of defendant and four other individuals were prominently displayed in an advertisement placed in the newspaper USA Today by "We the People Foundation for Constitutional Education." (Govt.Ex. 172, 173.) The full-page advertisement, which defendant helped pay for (3RT 195), stated that the Sixteenth Amendment to the Constitution had not been properly ratified and that there was no obligation for employees of domestic corporations to pay income or employment taxes on their wages.

On March 14, 2001, defendant was advised that he was the target of a criminal investigation regarding his failure to file individual income tax returns since 1995 and his failure to collect and pay over employment taxes since January 2000. (Govt.Ex. 107.) In July 2001, defendant was served with a grand jury subpoena that sought the corporate records of "Arrow Custom Plastics, Inc." In response to the subpoena, defendant dissolved the corporation and operated the business as a sole proprietorship. (2RT 107, 147.) After the corpora-

tion was dissolved, defendant refused to produce Arrow's corporate records. But because Arrow had continued to pay State unemployment tax even after refusing to pay Federal taxes, the government was able to obtain information about the amount of wages paid to Arrow's employees from the Texas Workforce Commission, an agency of the State of Texas that collects unemployment tax from employers. (2RT 102-108.)

On June 19, 2003, an indictment was returned charging defendant with 12 counts of willfully failing to collect and pay over employment taxes, in violation of 26 U.S.C. 7202, and 15 counts of filing false claims for tax refunds, in violation of 18 U.S.C. 287. (R.46.)

The government moved for pre-trial detention (R.69), and the District Court ordered defendant detained pending trial, citing, among other things, that defendant and others met at defendant's place of business and that a person present at the meeting indicated that defendant stated that "I think we need to knock off a couple of federal judges." (R.193.) After ordering defendant detained, the District Judge began to receive harassing letters and phone calls from defendant's supporters. (R. 211, 225, 229, 249, 759, 771, 1058, 1098, 1124, 1179, 1294, 1313, 1320, 1327, 1329, 1333.) The court disclosed many of the communications as attachments to orders, but there were so many that "the workload of the court [did] not permit it to prepare similar orders with respect to all" of them. (R.1395-96.) The District Judge described the communications as containing "threats to the court and members of

the court's staff," and as being part of a "concerted effort" to "harass and intimidate the court and its staff and to disrupt the normal judicial process in the handling of [the] case." (R.1396.)

On August 13, 2003, a superseding indictment was returned charging defendant with 12 counts of willfully failing to collect and pay over employment taxes, in violation of 26 U.S.C. 7202, and 15 counts of filing false claims for tax refunds, in violation of 18 U.S.C. 287. (R.329.) The superseding indictment stated the applicable law more fully but was not substantively different from the initial indictment.

On September 3, 2003, the parties filed a plea agreement and a factual resume in which defendant agreed to plead guilty to count four of the superseding indictment, which charged defendant with willfully failing to collect and pay over employment taxes for the quarter ending December 31, 2000, in violation of 26 U.S.C. 7202. (R.742-758.)

On October 17, 2003, counsel for defendant advised government counsel that the plea agreement and factual resume erroneously stated that the maximum penalty was three years' incarceration and one year of supervisory release, whereas the correct maximum penalty was five years' incarceration and three years' supervisory release. (R.762.) On October 24, 2003, the government notified the District Court of the errors and informed the court that defendant had not agreed to plead guilty to a count with a five year maximum. (R.763.) The government requested that the court schedule a hearing so that defendant could be

"admonished as to the correct statutory maximum penalty following conviction of Count 4 of the indictment." (R.763-64.)

As of October 28, 2003, defendant had not advised the court or government counsel that he was willing to plead guilty to a count with a five-year maximum term. The District Court accordingly set aside the plea and adjudication of guilt, and put the case back on the trial calendar. (R.767.) The court further ordered that if defendant desired to enter into a new plea agreement, the deadline for completing the plea was November 17, 2003. (R.767.) Defendant refused to enter into a new plea agreement and the case went to trial on November 25, 2003.

Supporters of defendant were in front of the courthouse prior to the beginning of jury selection, handing out pamphlets supporting jury nullification. (R.1067, 1436.) During jury selection it was learned that some members of the jury pool had been contacted by defendant's supporters and given the pamphlets. (R.1067.) During closing arguments in the case, defendant's attorney "made arguments to the jury that, in effect, urged the members of the jury to vote their conscience even if doing so would violate legal instructions given them by the court." (R.1068.) The trial resulted in a mistrial by reason of the jury's inability to reach a unanimous verdict. (R.1062.) Subsequently, one of the jurors contacted the court's staff and expressed concern "about the behavior of some of the defendant's supporters, and the behavior of one of the other trial jurors." (R.1436.) It was also learned that some of the

jurors on the case had been contacted by defendant's supporters after the trial. (R.1080.)

On December 17, 2003, a second superseding indictment was returned, which charged the offenses in the first superseding indictment and added four counts of failure to file individual income tax returns. (R.1182.) In counts 1-12, defendant was charged with willfully failing to collect and pay over employment taxes, in violation of 26 U.S.C. 7202. In Counts 13-27, defendant was charged with knowingly making and presenting 15 false claims for refund of the employment taxes paid by Arrow and Arrow's employees, in violation of 28 U.S.C. 287 and 2. In Counts 28-31, defendant was charged with four counts of failing to file federal income tax returns, in violation of 26 U.S.C. 7203.

The second trial began on January 5, 2004, and defendant's supporters were again outside the courthouse and inside the courtroom. This time, though, security measures were taken to prevent defendant's supporters from contacting members of the jury pool or the jurors selected for the case. (R. 1080, 1346.)

Defendant testified that after conducting his own research and seeking out others who shared his tentative beliefs, he came to believe the following: (a) that "[t]he Constitution provides for two types of taxes, a direct tax and an indirect tax" (3RT 25); (b) that, according to the Supreme Court case *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916), the income tax is an indirect tax (3RT 36); (c) that a man's labor is his own property and cannot be subject to an indirect tax (3RT

38-39); and (d) that the wages a person receives for his labor are not subject to the income tax (3RT 38-39). Defendant further testified that he stopped paying his own income taxes and stopped withholding employment taxes from the wages of Arrow's employees because he "could not find out what the tax was on." (3RT 34.)

Joseph Banister, whose photograph was prominently displayed in an advertisement placed by the "We the People Foundation for Constitutional Education," testified on direct that he met defendant when he (Banister) was a speaker at a conference entitled "Citizens Summit to End the Unlawful Operations of the Internal Revenue Service." (3RT 137.) On cross-examination, Banister denied that he had ever "advised Mr. Simkanin to stop withholding" employment taxes. (3RT 143.)

Eduardo Rivera, an attorney from California, testified that in 1999 defendant flew from Texas to California to "consult" with him. (3RT 168.) Rivera testified that he was paid over $10,000 by defendant and that he told defendant that "his workers had no legal duty to make returns or pay a tax, and that only if [defendant] contracted with them to withhold on their authority was he to have an obligation to send that money to the Treasury of the United States." (3RT 169, 182.) On cross-examination, Rivera agreed that, in 2003, a permanent injunction had been entered against him, barring him from making such false statements. (3RT 171.)

Robert Schultz, the founder and CEO of the "We the People Foundation for Constitutional Education," testified that he advised defendant that his research indicated that the Sixteenth Amendment "was fraudulently declared to have been ratified" and that "the constitutional definition of 'income' is different than the definition of income most Americans have." (3RT 190.) On cross-examination, Schultz denied that he advised defendant "not to withhold taxes from the wages of his employees" or that he advised defendant "not to file individual federal income tax returns." (3RT 193-195.)

Larken Rose, who operates a medical transcription business in Pennsylvania and whose contacts with defendant were limited to phone calls and email, testified that "the punch line of [his] taxable income report and [his] explanations to [defendant] and others is that according to the law itself the income of the average American is not subject to the federal income tax despite conventional wisdom to the contrary." (3RT 199, 204.) Rose testified that "[w]hat [he] explained to [defendant]" "is that those sections of law show that the tax applies primarily to people engaged in certain types of international or foreign trade, such as U.S. citizens receiving foreign source income or non-resident aliens or foreign corporations getting income from doing business here in the states." (3RT 201.) On cross-examination, Rose denied having specifically advised defendant to stop withholding taxes or to stop filing tax returns. (3RT 213.)

The jury began its deliberations on January 6, 2004. 3/ On January 7th, the jury returned a verdict of guilty as to counts 3-31. (R.1621.) The jury indicated that it did not want to deliberate further as to Counts 1 and 2, and the District Court declared a mistrial as to those two counts. (4RT 49.)

After ruling on the objections to the Presentence Investigation Report, but before considering an upward departure requested by the government, the court determined defendant's criminal history category to be 1 and his offense level to be 22, with a corresponding range of 41-51 months' imprisonment. (S.RT 42, 47.)

At the sentencing hearing, defendant advised the court that he still "firmly believed" that "the wages of a laborer are withheld through fraud" and that it was "fundamental law" that the "wages of employees" were exempt from tax. (S.RT 75.) Defendant further told the court that he apologized to his wife "for what she will go through in [his] absence, but that was "the only thing that [he was] very sorry for." (S.RT 75.)

The court departed upward from the 41-51 month sentencing range calculated under the Guidelines, determined that a sentencing range of 84-105 months was appropriate, and imposed a sentence of 84 months' incarceration, holding that the upward departure was indepen-

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3/ The jury began its deliberations without defendant's counsel's having moved for a judgment of acquittal at the close of the government's case-in-chief or at the close of all the evidence. (4RT 18.)

dently warranted under both USSG §5K2.0 and USSG §4A1.3(a)(1). (S.RT 76-85.)

SUMMARY OF ARGUMENT

1. During its deliberations, the jury asked a question related to defendant's testimony that only specific industries and activities listed in the 7,000 pages of the Internal Revenue Code are subject to income tax, and that Arrow was not required to withhold employment taxes from the wages paid to its employees because the activities in which Arrow's employees were engaged were not included in the list of activities subject to income tax. Specifically, the jury asked whether it needed to determine whether Arrow's employees "were in an occupation listed in those 7,000" pages. The District Court instructed the jury that it did "not need to concern [itself] with whether defendant's employees are in an occupation 'listed in those 7,000' [pages]" because "[t]he Court has made the legal determination that [Arrow] had a legal duty to collect, by withholding from the wages of its employees, the employees' share of the [employment] taxes, and to account for those taxes and pay the withheld amounts to the [government]."

Defendant contends that the court's response to the jury's question constituted a directed verdict on an element of the Section 7202 offenses; namely, the element that "Arrow Custom Plastic was an employer that paid wages to its employees." In particular, defendant contends that the response constituted a directed verdict as to whether Arrow was an "employer."

Defendant's contention is incorrect. In answering the jury's question, the court expressly instructed the jury that it must still "bear in mind all other instructions the Court has given you concerning the law applicable to this case." The jury had been instructed that one of the elements of a Section 7202 offense was that "Arrow was an employer that paid wages to its employees." The court's response did not remove that element from the jury's consideration. Viewing the instructions as a whole, and in the context of defendant's testimony and the question posed, the Court instructed the jury that, if it found that Arrow was an employer that paid wages to its employees, Arrow was legally obligated to withhold employment taxes. In doing so, the court corrected defendant's legally erroneous testimony that, even if Arrow paid wages to employees, Arrow was not required to withhold employment taxes because the wages were not subject to income tax.

2. Defendant argues that the District Court abused its discretion in not giving a separate good faith instruction. But a separate instruction on good faith is unnecessary where the trial court has adequately instructed the jury on specific intent. The jury in this case was properly and adequately instructed on specific intent. The District Court accordingly did not abuse its discretion in not giving a separate good faith instruction.

3. Defendant argues that he was unfairly restricted from presenting evidence in support of his good faith defense. But defendant was not unfairly restricted from presenting evidence in support of his

position that his asserted understanding of the tax laws was held in good faith. Most of the rulings about which defendant complains were a result of repeated efforts to admit evidence of defendant's views about the *validity* of the tax laws, as opposed to defendant's *understanding* of the tax laws. The District Court's rulings were in accord with *Cheek v. United States*, 498 U.S. 192, 206 (1991), in which the Court held that "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 in the few instances where defendant did actually testify about the effect of documents on his *understanding* of the tax laws, the District Court did not abuse its discretion in excluding from evidence the documents themselves, as they were cumulative of defendant's testimony.

4. Defendant challenges an upward departure that was imposed based on the likelihood of recidivism. But defendant was a high profile member of the tax protest movement and a cause celebre of that movement. Though he had already spent over six months in pretrial detention, defendant advised the court during the sentencing hearing that he still "firmly believed" that "the wages of a laborer are withheld through fraud" and that it was "fundamental law" that the "wages of employees" were exempt from tax. There accordingly was overwhelming evidence from which the District Court could conclude that the likelihood of recidivism was such that an upward departure was warranted.

5. Any error in the court's treating the Sentencing Guidelines as mandatory when sentencing defendant would be subject to plain error review. Defendant cannot satisfy the plain error test, because he cannot show that the error affected his substantial rights -- *i.e.*, that he would have received a lower sentence if the Guidelines had been deemed to be advisory. Indeed, there is a distinct possibility that the court would have imposed a longer sentence if the Guidelines had been treated as advisory.

ARGUMENT

I

THE DISTRICT COURT DID NOT DIRECT A VERDICT ON AN ELEMENT OF THE SECTION 7202 OFFENSES

A. *Standard of Review*

This Court reviews *de novo* whether a jury instruction constitutes a directed verdict on an element of an offense. *See United States v. Bass*, 784 F.2d 1282, 1284 (5th Cir. 1986).

B. *Law regarding obligation to withhold, account for, and pay over employment taxes*

The Internal Revenue Code imposes four types of tax with respect to wages paid to employees: social security tax and medicare tax (which are collectively known as FICA), unemployment tax (also known as FUTA), and income tax.

1. *Withholding of income tax*

The income tax owed on wages received by employees is largely collected through employers' withholding a portion of the wages paid to

the employees. *See Cencast Services, L.P. v. United States*, 62 Fed. Cl. 159, 2004 WL 2212080 (No. 02-1916 Sept. 30, 2004). Employers must deduct and withhold income tax on the amount of wages that are actually or constructively paid to any employee. 26 U.S.C. 3402(a)(1), 3403. Code Section 3402(a)(1) provides that "[e]xcept as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures provided by the Secretary" of the Treasury. Code Section 3403 provides that "[t]he employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall be liable to any person for the amount of any such payment." The reference to "this chapter" is a reference to Chapter 24, entitled "Collection of Income Tax at Source on Wages," which chapter includes Sections 3401 through Section 3406, inclusive. Thus, pursuant to Code Section 3403, an employer who fails to withhold (or pay over) income tax is liable for the amount of tax that should have been withheld (or paid over) under § 3402(a).

Definitions for certain of the terms used in Chapter 24, the withholding tax provisions, are provided in Code Section 3401. Section 3401(a) provides that the term "'wages" means all remuneration "for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash." Code Section 3401(c) provides that the term "'employee' includes," but is not limited to, "an officer of a corporation." Code Sec-

tion 3401(d) provides that for purposes of income tax withholding, "the term 'employer' generally means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person."

2. *FICA (Social Security and Medicare taxes*)

The Federal Insurance Contributions Act (FICA) imposes two types of tax on employees and employers, which taxes are measured by the amount of wages paid with respect to employment. Code Section 3101(a), which imposes tax on employees, imposes the FICA tax "on the income of every individual." Code Section 3111(a), which imposes tax on employers, imposes the FICA tax "on every employer" with respect to wages paid to employees. The FICA tax compromises two components: old-age, survivor and disability insurance, which is commonly referred to as "social security," and hospital insurance, which is commonly referred to as "medicare." Social security taxes are used to fund retirement and disability benefits, and medicare taxes are used to provide health and medical benefits for the aged and disabled.

Employers are required to collect the employee portion of the FICA tax by deducting the tax from the wages of each employee at the time of payment. 26 U.S.C. 3102(a). If the employer withholds less than the correct amount of tax or fails to withhold any part of the tax, the employer is nevertheless liable for the correct amount. 26 U.S.C. 3102(b).

Definitions for certain of the terms used in the FICA Chapter, Chapter 21, are provided in Code Section 3121. Section 3121(a) provides that "the term 'wages' means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." Code Section 3121(b) provides that, except for listed exceptions, "the term 'employment' means any service, of whatever nature, performed" "by an employee for the person employing him." Code Section 3121(d) provides that the term "employee" includes, among other things, "(1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining employer-employee relationship, has the status of an employee." 4/ In *Breaux and Daigle, Inc. v. United States*, 900 F.2d 49, 51 (5th Cir. 1990), this Court discussed the common law rules applicable in determining employer-employee relationships, which factors include degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required in the claimed independent operation.

3. *FUTA (Unemployment tax)*

The Federal Unemployment Tax Act (FUTA), which funds federal-state unemployment compensation programs, imposes a tax "on every employer," which is measured by the amount of wages paid by an em-

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4/ The courts have held that Section 3401(d)'s definition of "employer" also applies to the withholding of FICA and FUTA taxes. *See Otte v. United States*, 419 U.S. 43, 50-51 (1974) (applying §3401(d) definition to FICA); *In re Armadillo Corp.*, 561 F.2d 1382, 1386 (10th Cir. 1977) (applying §3401(d) definition to FICA and FUTA).

ployer during such year "with respect to employment." 26 U.S.C. 3301(a). Code Section 3306(b) defines the term "wages" as "all remuneration for employment." Code Section 3306(a)(1) defines "employer" as including any person who paid wages of at least $1,500 during a quarter. The term "employment" is defined in Code Section 3306(c) as including "any service, of whatever nature, performed after 1954 by an employee for the person employing him."

C. *Sanctions for willful failure to collect, account for, and pay over income tax and employee's portion of FICA*

Code Section 7501(a) provides that "[w]henever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States." Code Section 7501(b) states that "[f]or penalties applicable to violations of this section, see sections 6672 and 7202."

Code Sections 7202 and 6672 largely track each other; the difference between the two statutes is that the criminal penalty for "evasion" is governed by a separate statute (26 U.S.C. 7201), and the element of "willfulness" in Section 7202 is the criminal standard, as opposed to a civil standard under Section 6672. Section 7202, similarly to Section 6672, applies to "[a]ny person required under this title to collect, account for, and pay over any tax imposed by this title," and prescribes a penalty for any person "who willfully fails to collect or truthfully account for and pay over such tax." Case law construing

Section 6672 thus is helpful in construing Section 7202. *See Slodov v. United States*, 436 U.S. 238, 247-48 (1978).

Sections 6672 and 7202 apply to "any person who is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States." 26 U.S.C. 7501(a). Both statutes are limited to taxes that a person is required to collect or withhold from another. Therefore, they do not apply to the portion of the FICA tax imposed on employers or the FUTA tax. Nor do the statutes apply to unpaid corporate income tax. The primary (though not exclusive) focus of the two statutes is on income taxes and FICA tax (social security and medicare) required to be withheld from the gross wages paid to employees.

D. *Defendant's testimony, jury instructions, jury's question, and Court's response*

Defendant's trial attorney elicited the following testimony during his direct examination of defendant (3RT 56-58, 66):

> Q. In reaching your conclusion that Arrow Custom Plastics did not have an obligation to withhold Medicare and social security from its workers' checks, did you -- were you brought to that decision by realizing that if you were in a different kind of industry that you would, in fact, have to withhold or otherwise pay taxes to the federal government, through the Internal Revenue Service?
>
> A. But you're talking about two different taxes here. You're talking about income taxes and you're talking about employment taxes.
>
> Q. Right. I beg your pardon, and I apologize. You're more learned than I. I misspoke. But with regard to income taxes only, did that help crystalize your

thinking in reaching your decision not to withhold from your workers?

A. Yes.

. . . .

Q. And I think you were about to name an industry that if you were in you would income taxes on.

A. Yes. As a matter of fact, the Code, which is 7,000 pages long, and the reason it is, is because it names a lot of industry and activity that is taxable.

THE COURT. He just wants to know -- His question, Mr. Simkanin, were you about to name an industry that would require payment of income tax if you were in that industry. That was his question.

THE WITNESS. Yes.

THE COURT. Were you about to name one.

THE WITNESS. The manufacturing of fishing lures is one.

. . . .

Q. Are there others that are in the Code?

A. Manufacturing of gasoline and petroleum products.

Q. Any others?

A. Offshore mining; Alcohol, Tobacco, and Firearms. Any government agency -- GOA (sic), FDIC, FAA, CIA, FBI -- all of these are taxable because they fall under an indirect tax, which is a privilege to work for the government. And that's a privilege so it's taxable, indirect tax.

. . . .

Q. So why didn't you file your returns?

A. (Pause.) Well, here again, the income tax laws are not being applied according to law. If they are, then there should be a law in the statutes that say I'm liable for a particular tax. The activities that I was

> doing at the company that I formed was not a taxable activity. It was not a revenue taxable activity in the 7,000 pages in the Internal Revenue Code. It was not there. A lot of other things were there but not that.
>
> Q. Okay. So if the examples that you gave earlier of other industries, if you had been in that, you would have filed a return.
>
> A. Absolutely.

During its deliberations, the jury posed the following question: "Since no proof has been made that the defendant and his employees are in an occupation listed in those 7,000, are we to conclude that they are, in fact, not in that 7,000, or do we need to read all 7,000 to see what the defendant was referring to, and in fact, wasn't listed in the 7,000."

Addressing the jury's confusion as to the status of the law, the court responded to the jury's inquiry as follows:

> Members of the jury, I have your note which is worded as follows: Four. Since no proof was given that the defendant and his employees were in an occupation listed in those 7,000, are we to conclude that they are in fact not in that 7,000, or do we need to read all 7,000 to see what the defendant was referring to and, in fact, wasn't listed in that 7,000.
>
> Now, in answer to your note: You are instructed that you do not need to concern yourself with whether defendant's employees are in an occupation "listed in those 7,000." The Court has made the legal determination that within the meaning of Title 26, United States Code, Section 7202, during the years 1997, 1998, 1999, 2000, 2001, and 2002, Arrow Custom Plastics, through its responsible officials, had a legal duty to collect, by withholding from the wages of its employees, the employees' share of the social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay the withheld amounts to the United States of America. You are to follow that legal

> instruction without being concerned whether there are certain employers who are not required to collect and withhold taxes from the wages of their employees.
>
> Of course, you will bear in mind in your deliberations all other instructions the Court has given you concerning the law applicable to this case.

The jury, as noted above, convicted defendant on ten of the Section 7202 counts, but deadlocked on two (Counts 1 and 2).

E. *The District Court did not direct a verdict on an element of the Section 7202 offenses*

Defendant contends (Br. 21) that the court's response to the jury's question constituted a directed verdict on an element of the Section 7202 offenses; namely the element that "Arrow Custom Plastic was an employer that paid wages to its employees." In particular, defendant contends (Br. 23) that the response constituted a directed verdict as to whether Arrow was an "employer." Defendant's contention is incorrect.

In responding to the jury's question, the court expressly instructed the jury that it must still "bear in mind all other instructions the Court has given you concerning the law applicable to this case." The jury had twice been instructed that one of the elements of a Section 7202 offense was that "Arrow was an employer that paid wages to its employees." (3RT 253-254.) Read in the context of defendant's testimony, the question posed by the jury, and the court's edict that all of the principal instructions still applied, the court's instructing the jury that Arrow had a legal duty to collect, by withholding from the wages of its employees, the employees' share of employment taxes, did not take away from the jury the question whether Arrow was, in fact, "an

employer that paid wages to its employees." Rather, considered in context, the Court's response meant that if the jury found as a factual matter that "Arrow was an employer that paid wages to its employees," Arrow had a legal duty to collect the employees' share of employment taxes. In doing so, the court corrected defendant's legally erroneous testimony that Arrow was not required to withhold employment taxes from the wages of Arrow's employees because the wages were not subject to income tax.

This case is comparable to *United States v. Barnett*, 945 F.2d 1296 (5th Cir. 1991). In *Barnett*, one of the defendant's asserted beliefs was that he did not have to file a tax return because the IRS would file on his behalf and assess him any taxes owed. To advance this theory, defense counsel asked the government's summary IRS witness whether he was familiar with Internal Revenue Code Section 6020(b) or any other provision which provided that the IRS would file a tax return on behalf of a taxpayer. Before the defendant testified, the district court instructed the jury that a Fifth Circuit case held "that there was no merit to a defendant's claim of entitlement to an instruction that the Internal Revenue Service was under a duty pursuant to Title 26, United States Code, Section 6020(b)(1) to prepare his return. In other words, the Internal Revenue Service is under no duty under the law to prepare a taxpayer's tax return."

On appeal, the defendant contended that the instruction "undermined his testimony and implied to the jury that he had no reasonable

grounds for his beliefs." This Court rejected that contention, holding that "[t]he jury must know the law as it actually is respecting a taxpayer's duty to file before it can determine the guilt or innocence of the accused for failing to file as required. Defense counsel raised the inference that the IRS actually has some statutory duty to file returns for delinquent taxpayers such as might relieve those taxpayers from the duty to file themselves. The court therefore needed to properly instruct the jury on the state of the law."

Defendant cites *United States v. Bass*, 784 F.2d 1282 (5th Cir. 1986), in support of his contention that the court's response to the jury's question was a directed verdict warranting reversal of the Section 7202 convictions. But the facts of this case are materially distinguishable from the facts of *Bass* and dictate a different result. First and foremost, unlike *Bass*, where the court expressly instructed that the defendant was an "employee," 784 F.2d at 1284, the District Court in this case did not affirmatively instruct the jury that "Arrow was an employer." Rather, the court instructed that Arrow had a legal duty to collect, by withholding from the wages of its employees, the employees' share of the employment taxes. The jury was free to find that Arrow's workers were not employees and that the remuneration paid to them therefore was not subject to employment taxes. Further, the supplemental instruction was not given as a principal instruction, but was given to remedy the jury's confusion as to the status of the law, and it was expressly limited by the court's instructing the jury that all

of the principal instructions still applied. Read in context, the only thing that was removed from the jury's consideration by the supplemental instruction was the legally incorrect proposition that, even if Arrow was an employer that paid wages to its employees, Arrow was not required to withhold employment taxes.

In an attempt to demonstrate (Br. 24-25) that the supplemental instruction was prejudicial, defendant contends that the "only evidence" that "Arrow was an employer that paid wages" was the conclusory statement of an IRS agent." Defendant is incorrect. After Arrow stopped withholding federal employment taxes, Arrow continued to file documents with the Texas Workforce Commission. (2RT 102-108.) Those documents both substantiated the amount of wages paid to Arrow's workers and represented that the workers were employees. Indeed, it was never defendant's position that the workers were independent contractors. Rather, it was defendant's position that the wages were not subject to income tax and that, as a result, he was not required to withhold employment tax.

Defendant argues (Br. 25) that the supplemental instruction was erroneous because it "in effect, [instructed the jury] to disregard evidence of [defendant's] understanding that" Arrow was not an "employer" within the meaning of the tax laws. But the court did not instruct the jury to disregard defendant's understanding of the law. Rather, the court only instructed the jury as to the correct status of the law. As this Court held in *Barnett*, the jury must know the actual status of the

law in order to determine whether a defendant's purported understanding of the law is held in good faith.

II

BECAUSE THE JURY WAS ADEQUATELY INSTRUCTED ON SPECIFIC INTENT, A SEPARATE INSTRUCTION ON GOOD FAITH WAS NOT REQUIRED

A. *Standard of Review*

A District Court's refusal to give a requested jury instruction is reviewed for abuse of discretion. *See United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994).

B. *A separate good faith instruction was not required*

In *United States v. Bishop*, 412 U.S. 346, 360 (1973), the Supreme Court interpreted the term "willfully," for criminal tax offenses, as "a voluntary, intentional violation of a known legal duty." *See also United States v. Pomponio,* 429 U.S. 10, 12 (1976) (per curiam). In *Cheek v. United States*, 498 U.S. 192, 202 (1991), the Court elaborated that "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."

In *Cheek*, the defendant filed federal tax returns through 1979 but thereafter ceased to file returns, except for 1982, when he filed a frivolous return. 498 U.S. at 194. Prior to 1980, Cheek began to claim an increasing number of withholding allowances, and for 1981-1984, he

indicated on his Forms W-4 that he was exempt from federal income taxes. 498 U.S. at 194. Cheek asserted that he was not a taxpayer or a person for purposes of the Internal Revenue Code, that his wages were not income, and that the withholding of taxes from wages violated the Sixteenth Amendment. 498 U.S. at 195 & 195 n.3.

In 1987, Cheek was charged in a superseding indictment with six counts of willfully failing to file federal tax returns for 1980-1981 and 1983-1986, in violation of 26 U.S.C. 7203. 498 U.S. at 194. He was further charged with three counts of willfully attempting to evade his income taxes for 1980, 1981, and 1983, in violation of 26 U.S.C. 7201. 498 U.S. at 194. Cheek represented himself at trial and testified in his defense. 498 U.S. at 195. He admitted he had not filed the returns at issue and that as early as 1978 he had begun attending seminars sponsored by a group that advocated the view that the federal income tax is unconstitutional. 498 U.S. at 195-96. Cheek testified that, based on the indoctrination he received from this group and from his own study, he believed, among other things, that wages from a private employer do not constitute income under the Internal Revenue Code. 498 U.S. at 196 n.5. Cheek's defense was that he sincerely believed that the tax laws were being unconstitutionally enforced and that his actions during the 1980-1986 period were lawful. 498 U.S. at 196. He argued that he had therefore acted without the willfulness required for convictions of the various offenses for which he was charged. 498 U.S. at 607.

In the course of its instructions, the trial court advised the jury that to prove "willfulness" the government was required to prove the voluntary and intentional violation of a known legal duty. 498 U.S. at 607. The court further told the jury that an objectively reasonable good-faith misunderstanding of the law would negate willfulness, but mere disagreement with the law would not. 498 U.S. at 608. In answering a question from the jury, the district court further stated that "[a]n honest but unreasonable belief is not a defense and does not negative willfulness" and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." 498 U.S. at 197. The court also instructed the jury that "[p]ersistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law." 498 U.S. 197-98. Cheek was convicted, and the judgment was affirmed by the Seventh Circuit. 498 U.S. at 198. In the Supreme Court, Cheek challenged the lower courts' ruling that a "good-faith misunderstanding of the law or a good-faith belief that one is not violating the law, if it is to negate willfulness, must be objectively reasonable." 498 U.S. at 201.

The Supreme Court reiterated its previous holding that the definition of "willfulness" in criminal tax statutes -- "the voluntary, intentional violation of a known legal duty" -- is an exception to the general rule that ignorance of the law or a mistake of law is no defense to crimi-

nal prosecution. 498 U.S. at 199-201. The basis for the exception, the Court observed, was that in "our complex tax system, uncertainly often arises even among taxpayers who earnestly wish to follow the law," and "[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." 498 U.S. at 205 (internal citations and quotes omitted.) Noting that the justification for the exception was grounded on not penalizing erroneous interpretations of the law, the Supreme Court bifurcated Cheek's claims into two groups: claims that the law, as written, did not require him to pay tax, and claims that the law itself was invalid or unenforceable.

With respect to Cheek's asserted belief that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code, the Court held that the lower courts erred in requiring "that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." 498 U.S. at 203. The Court ruled that "if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however, unreasonable a court might deem such a belief." 498 U.S. at 202.

But the Court also held that a defendant who knows what the law requires and who merely disagrees with it, does not present a good-faith defense (498 U.S. at 202):

> Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duty to file a return and to treat wages as income, including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretation 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 that made it plain that wages should be returned as income.

The Court also held that in determining whether a defendant subjectively knew what the law required, one of the things the jury may consider is the unreasonableness of the asserted belief: "Of course, the 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." 498 U.S. at 203-204.

Noting that the justification for requiring knowledge of the law was that the tax laws were complex, the Supreme Court held that Cheek's claims that the law was unconstitutional were analytically different (498 U.S. at 205-206):

> Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order. They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue

> and a studied conclusion, however wrong, that those provisions are invalid and unenforceable. Thus, in this case, Cheek paid his taxes for years, but after attending various seminars and based on his own study, he concluded that the income tax laws could not constitutionally require him to pay a tax.

The Court held that "[w]e do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions." 498 U.S. at 206. The Court held that "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." 498 U.S. at 206. The Court accordingly held that "[i]t was therefore not error in this case for the District Judge to instruct the jury not to consider Cheek's claims that the tax laws were unconstitutional." 498 U.S. at 206-207.

The Supreme Court vacated the judgment based on its holding that "it was error for the [trial] court to instruct the jury that [Cheek's] asserted beliefs that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code should not be considered by the jury in determining whether Cheek had acted willfully." 498 U.S. at 206-207. On remand, Cheek was retried and was again convicted. *See United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993).

In the case under consideration, the jury was properly instructed that in order to find that defendant acted willfully, it was required to find that defendant voluntarily and intentionally violated a known legal duty (3RT 254-55):

> With respect to the requirement that the government prove beyond a reasonable doubt that the defendant's failure was "willful," you are instructed: To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty. For the government to establish willfulness as to Counts 1 through 12 of the indictment, it must prove beyond a reasonable doubt as to the count under consideration that defendant knew of the requirements of federal law that Arrow Custom Plastics collect, by withholding from its employees' wages, Medicare taxes, social security taxes, and federal income taxes, and to account for such taxes and pay them over to the Internal Revenue Service, and that he voluntarily and intentionally caused Arrow Custom Plastics to fail to comply with those requirements.

Defendant contends (Br. 26) that the willfulness instruction was insufficient and that the District Court was required to give a separate instruction that would have instructed the jury that a defendant does not act willfully if he acted due to a good faith misunderstanding of the requirements of the law. Defendant is incorrect.

It is well settled that although "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," *Mathews v. United States*, 485 U.S. 58, 63 (1988), a defendant is not entitled to an instruction using his exact words. A refusal to include a requested instruction is reversible error only if the requested instruction is substantially correct, the actual charge given the jury did not substantially cover the

content of the proposed instruction, and the omission of the proposed instruction seriously impaired the defendant's ability to present a defense. *See United States v. Pettigrew*, 77 F.3d 1500, 1510 (5th Cir. 1996).

The actual charge given the jury in this case substantially covered the content of defendant's proposed instruction. The requirement that the jury find that defendant acted with specific intent to violate the law necessarily precluded a finding of willfulness if defendant "acted through negligence, gross inadvertence, careless disregard, justifiable excuse, mistake, or due to a good faith misunderstanding of the requirements of the law." As the Supreme Court observed in *Cheek*, 498 U.S. at 202, "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." Since the good-faith defense was covered by the willfulness instruction given by the district court, a separate instruction on good faith was unnecessary. *See Pomponio*, 429 U.S. at 12 (because "[t]he trial judge * * * had adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary"); *Cheek*, 498 U.S. at 201. An instruction on a good-faith misunderstanding of the law would have added nothing to the willfulness instruction: a good-faith instruction is no more than a restatement that willfulness is not established if the knowledge required by the willfulness instruction is not proven.

Consistent with *Pomponio* and *Cheek*, it is the law of this Circuit that it is not reversible error to refuse to give a separate good-faith instruction if the jury is adequately instructed on specific intent. *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994); *United States v. Rochester*, 898 F.2d 971, 979 (5th Cir. 1990); *United States v. Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986).

In this case, the jury was instructed that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." That definition was amplified with the instruction that, for the government to establish willfulness, "it must prove beyond a reasonable doubt . . . that defendant knew of the requirements of federal law that Arrow Custom Plastics" withhold and pay over employment taxes, and that defendant "voluntarily and intentionally caused Arrow Custom Plastics to fail to comply with those requirements." (3RT 254-55.) That instruction adequately instructed the jury on specific intent. *See e.g., United States v. Rochester*, 898 F.2d 971, 979 (5th Cir. 1990) (approving of similar instruction).

Defendant's challenge to the District Court's refusal to give a separate good faith instruction is largely based on defendant's contention that he was unfairly restricted from presenting evidence in support of his good faith defense. As shown below, that contention, made in Argument III of defendant's brief, is incorrect.

III

DEFENDANT WAS NOT UNFAIRLY RESTRICTED FROM PRESENTING EVIDENCE TO DEMONSTRATE THAT HIS ASSERTED UNDERSTANDING OF THE TAX LAW WAS HELD IN GOOD FAITH

A. *Standard of Review*

Rulings on the admission and exclusion of evidence are reviewed for abuse of discretion. *See United States v. Flitcraft*, 803 F.2d 184, 186 (5th Cir. 1986).

B. *Defendant was not unfairly restricted from presenting evidence*

Defendant argues that he was unfairly restricted from presenting evidence in support of his good faith defense. But defendant was not unfairly restricted from presenting evidence to demonstrate that his asserted understanding of the tax laws was held in good faith. Most of the rulings about which defendant complains were a result of his attorney's repeated efforts to present evidence of defendant's views about the *validity* of the tax laws, as opposed to defendant's *understanding* of the tax laws. The District Court's rulings were in accord with *Cheek*, 498 U.S. at 206, which held that "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."

In the few instances where defendant did actually testify about the effect of documents on his *understanding* of the tax laws, the District Court did not abuse its discretion in excluding from evidence the documents themselves, as defendant was allowed to testify about their contents and the effect the information had in the formulation of

his beliefs, and the documents themselves were cumulative of that testimony. *See United States v. Stafford,* 983 F.2d 25, 27-28 (5th Cir. 1993); *United States v. Barnett,* 945 F.2d 1296, 1301 (5th Cir. 1991); *United States v. Flitcraft*, 803 F.2d 184, 186 (5th Cir. 1986).

In *Barnett, supra,* the defendant "contend[ed] that the trial court erred in excluding from evidence several items of documentary evidence relating to taxation laws that he tendered. He claim[ed] that such evidence would have bolstered the legitimacy of the claim that he sincerely believed that he did not have to file tax returns." 945 F.2d at 1301. This Court held that "[t]he law applicable to this issue was established in this Circuit in *United States v. Flitcraft*, 803 F.2d 184 (5th Cir. 1986)," which "recognized both the need to allow the defendant to establish his beliefs through reference to tax law sources and the need to avoid unnecessarily confusing the jury as to the actual state of the law. The *Flitcraft* court found the delicate balancing required by Rule 403 of the Federal Rules of Evidence to have been satisfied by excluding the documents themselves but allowing the defendant to testify as to their contents and effect in forming his beliefs. *Flitcraft*, 803 F.2d at 185-86. In allowing such testimony, the documents themselves become cumulative and the potential for jury confusion is minimized." 945 F.2d at 1301. The *Barnett* Court concluded that the "trial court appropriately applied the *Flitcraft* standard. While not allowing the documents themselves to go to the jury, the court allowed Barnett,

during his testimony, to make references to these documents as the sources of his beliefs." 945 F.2d at 1301.

Addressing the trial court's refusal to allow the defendant to read the front of the IRS Special Agent's Handbook, this Court opined that "[a]t one point in Barnett's testimony, the trial court may have gone further than necessary in excluding Barnett's documentary evidence." 945 F.2d at 1301 n.3. The Court stated that "[w]hile the voluminous 'cover the waterfront' exhibits that Barnett originally offered into evidence posed a real danger of confusing the jury and inviting them to instruct themselves on the presently applicable law by their extraction of it from this undifferentiated mass of material, most of which was entirely irrelevant, nevertheless Barnett's limited and specific offer of one or two sentences from the IRS Special Agent's Handbook would not have posed the same threat." 945 F.2d at 1301 n.3. The Court ruled, though, that "if the exclusion of this item were error, it is clear to us that it was harmless error and did not affect Barnett's substantial rights." 945 F.2d at 1301 n.3.

The teachings of *Barnett* are instructive here. There was no error in the District Court's exclusion of the contested exhibits; defendant was not precluded from testifying as to their contents and their effect in forming his beliefs. Even if defendant could cite an example where a limited portion of a particular document might have been admitted under a Rule 403 balancing test, such exclusion would be harmless error not affecting defendant's substantial rights, as there was

overwhelming evidence demonstrating defendant's willfulness. Moreover, there was no error in the Court's restricting defense counsel's attempt to elicit testimony as to the legal definitions of "income," "employee," and "taxpayer." It is the court's position to instruct the jury as to the law; further, defendant was not precluded from testifying as to his understanding of those terms and how his understanding of those terms supported his good faith defense.

Defendant cites (Br. 15, 34) the exclusion of a Treasury Regulation as an example of the court's supposedly abusing its discretion in refusing to admit a document into evidence. But defendant was allowed to testify that he received and followed advice that an IRS regulation provided that an employer was not required to withhold employment taxes from the wages paid to employees unless the employer agreed to be a "withholding agent." (3RT 51-53.) In denying the defense's request to admit the regulation itself into evidence, the court noted that testimony and gave careful consideration to the Rule 403 balancing test. (3RT 53-54.)

Defendant complains that he was not allowed to read the text of a statute, 26 U.S.C. 3402, to the jury, but the statute was in evidence, and defendant was allowed to testify regarding the effect the statute allegedly had in the formulation of his beliefs. For example, defendant testified: (1) that it was his understanding that, under § 3402, the definition of "employee" was a person who worked for a "governmental entity, including the state and including a political subdivision thereof";

and (2) that the definition of "employee" in § 3402 did "not fit the employees at Arrow Plastics." (3RT 58-60.)

Defendant states (Br. 34-35) that when he "started testifying in his own defense about his research into the tax law, the district court ruled such testimony was not relevant. But at the transcript pages cited by defendant (3RT 25-26), defendant was allowed to testify, over the government's objection, that wages are not subject to income tax because the income tax is an indirect tax under the Constitution. In overruling the government's objection, the court stated that it was "going to instruct the jury on what the law is in the instructions I give the jury at the end of the case. I do have some misgivings about the relevance of this testimony, but I'll allow it to continue, at least for the time being." (3RT 25-26.)

Defendant challenges (Br. 35) the District Court's sustaining "an objection to the defendant's reading to the jury parts of a Supreme Court opinion" -- *Brushaber v. Union Pacific Railroad*, 240 US 1 (1916), -- "that he said he had relied upon in forming his opinion about his duties under the tax code." But there was no error; defendant testified expansively about his supposed understanding that *Brushaber* held that the Sixteenth Amendment does not give Congress the power to levy an income tax. (3RT 36-40.) There also was no prejudice. As this Court stated in *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir. 1984), the *Brushaber* opinion itself "pointedly noted" that Congress's power to levy an income tax emanated from Section 8 of Article I; the

Sixteenth Amendment merely eliminated the requirement that a direct income tax be apportioned among the states. If defendant had read from the *Brushaber* opinion, the jury would have heard, both on cross-examination and in curative instructions, that defendant's position was refuted by the very Supreme Court case upon which he relied.

Defendant states (Br. 35) that "[p]erhaps least fair of all, the government was permitted to cross-examine the defendant and introduce an inflammatory document to attack the sincerity and consistency of his professed religious belief," whereas he "had been allowed only to state that belief in one short sentence and not to elaborate upon it or explain." When defense counsel indicated he wanted to elicit testimony that defendant's "religious feelings about this matter were part of his motivation," the prosecutor queried whether such testimony would "open the door to the Proclamation of Warning exhibit where he uses his religious belief to threaten and intimidate everyone through his website." (3RT 76-77.) Stating that it might, the court ruled that defendant would be allowed to testify that "he has a religious belief that keeps him from paying taxes." (3RT 77.) Complying with his attorney's statement to keep it very short, defendant testified that withholding employment taxes violated a proverb that "the first fruits of a person's labor should be given unto the Lord." (3RT 79.)

On cross-examination, defendant testified, without objection, that the Proclamation of Warning had been posted on his website and that the proclamation was related to his testimony about his religious con-

victions and belief. (3RT 103.) Defense counsel did object to admitting the document itself into evidence, stating that he had asked only one question about religion. (3RT 103-104.) The Court overruled the objection, stating that defendant had testified expansively about his state of mind and the prosecution was entitled to cross-examine defendant on that issue. (3RT 104.) Defendant's assertion that the prosecution unfairly "attack[ed] the sincerity and consistency of his professed religious relief" is incorrect. Indeed, defendant was not asked any questions about either the document or his religious beliefs after the exhibit was admitted into evidence.

Defendant complains (Br. 35) about an *in limine* ruling requiring his counsel to approach the bench prior to offering any exhibit into evidence. But the ruling was appropriate given the documents listed on defendant's exhibit list. See R.1384. Among clearly inadmissible documents included on defendant's exhibit list were the Communist Manifesto (Exh. 8), three versions of the Bible (Exhs. 93-95), and six publications that translate Greek and Hebrew (Exhs. 96-101). A review of the exhibit list confirms that only a small number of the documents on the exhibit list had any chance of being received into evidence. The court's requiring counsel to approach the bench prior to offering an exhibit into evidence was both appropriate and reasonable to prevent inappropriate jury exposure to inadmissible documents.

Defendant's contention (Br. 35) that the procedure "excused [the prosecutors] from making timely objections" is inaccurate, as any objec-

tion needed to be made known during a given bench conference. Defendant states (Br. 35) that a "violation" of the procedure was cited as "a" basis to deny admission of an exhibit, but the referenced exhibit (Exh. 12), a report of the General Accounting Office, was correctly excluded as posing a real threat of confusing the jury regarding the applicable law. See R.1742-1753.

Defendant argues that the court ruled "arbitrarily" that his counsel's cross-examination of government witnesses went "beyond the scope of direct," and he cites (Br. 36), as an example, his counsel's cross-examination of Agent Joe Wayne Cooper during the government's case-in-chief. Our broader response to defendant's argument is that his counsel could have recalled the government's witnesses during his presentation of the evidence and asked them the questions that were ruled beyond the scope of direct. Defendant accordingly was not restricted from properly questioning the witnesses in any meaningful way. *See United States v. Smith*, 44 F.3d 1259, 1269 (4th Cir. 1995).

More specifically, a defendant in a criminal proceeding may not present his case during cross-examination of a government witness by asking questions and eliciting answers thereto beyond the scope of the direct examination. *See* Fed. R. Evid. 611(b). The questions posed to Cooper that were ruled outside the scope of direct examination contained the predicate that Arrow's "corporate income" was exempt from tax. (2RT 126-128.) But Cooper testified only that he had calculated the amount of employment tax due based on the wages received by the

employees and that those figures were accurately restated in the indictment. (2RT 125-126.) Defense counsel's questions thus were clearly outside the scope of Cooper's testimony on direct examination.

Defendant contends (Br. 37) that "sharp and arbitrary restrictions" were placed on the direct examination of his witnesses. In support of that contention, defendant states (Br. 37) that "Banister was allowed to tell what opinions he had relayed to [defendant] in one-on-one conversation, but not what he had said giving a lecture which the defendant attended." But defendant's counsel did not demonstrate that what was stated during the lecture would not have been cumulative of what defendant was personally told during the one-on-conversation. At all events, any error in the court's ruling was harmless error and did not affect defendant's substantial rights; Banister affirmatively denied that he had ever "advised Mr. Simkanin to stop withholding" employment taxes. (3RT 143.)

Defendant asserts (Br. 38) that the trial court did not apply its Rule 403 analysis "even-handedly." In support of that contention, defendant states (Br. 37-37) that a tax statute was admitted as a physical exhibit during the direct examination of government witnesses (bookkeeper/sister-in-law Clemonds and accountant Kelly) but the defense was prevented from using income tax statutes during its cross-examination of Kelly. Defendant's assertion of unfairness is incorrect. A copy of a statute (26 U.S.C. 3402) was properly admitted into evidence during the government's case-in-chief, because the statute had

been given to defendant by the witnesses and thus constituted documentary evidence of what defendant had been made aware of regarding his withholding obligations. Defendant's attorney, on the other hand, sought to admit copies of tax statutes during the cross-examination of accountant Kelly in an effort to elicit testimony that § 3402 limited the definition of "employee" to a persons who work for a governmental entity. (2RT 71-77.) That line of questioning was beyond the scope of direct and also encroached on the court's duty to instruct the jury as to the law. (2RT 72.)

Defendant cites (Br. 38) the examination of IRS Taxpayer Compliance Officer Charles Eastman an example of the District Court's not ruling "even-handedly." Defendant's contention is again incorrect. In the direct examination of Eastman, the prosecutor elicited testimony that allowed the introduction of certain documents into evidence: namely, defendant's responses to the IRS's requests for information. (2RT 159.) Those responses included nonsensical statements, which supported the government's position that defendant knew what the law required and that his "asserted misunderstandings of the law were nothing more than simple disagreement with known legal duties imposed by the tax laws." *Cheek*, 498 U.S. at 203-204.

Defendant states on brief (Br. 38) that his counsel's cross-examination of Eastman was improperly limited because Eastman "testified that the workers were, in 'our opinion,' employees." Implicit in defendant's argument is a representation that Eastman provided

that testimony on direct examination. But contrary to that suggestion, the referenced testimony was elicited on cross-examination by defendant's counsel. (2RT 164.) Defendant's attorney then sought to cross-examine Eastman on the "definition of employee in the Internal Revenue Code." That line of questioning was correctly ruled to be beyond the scope of the direct examination conducted by the prosecutor. (2RT 163-164.)

IV

THE DISTRICT COURT'S RULINGS UNDER THE GUIDELINES WERE CORRECT, AND THE RESULTING SENTENCE IS REASONABLE

A. *Standard of Review*

This Court reviews a sentence for reasonableness. *United States v. Booker,* 125 S. Ct. 738 (2005).

B. *Defendant's sentence is reasonable*

After the filing of defendant's opening brief, the Supreme Court held, in *United States v. Booker,* 125 S. Ct. 738 (2005), that the Sentencing Guidelines are no longer mandatory and binding, but are now advisory. A district court must nevertheless consult the Guidelines and take them into account in sentencing, and this Court reviews a sentence for reasonableness, judging it with regard to the factors in 18 U.S.C. 3553(a).

Prior to the upward departure, defendant's Guidelines calculation was criminal history category I, offense level 22, which corresponded to a sentencing range of 41-51 months' incarceration. The District Court

determined that an upward departure was warranted under both USSG §5K2.0 and USSG §4A1.3(a)(1), and the court imposed a sentence of 84 months' incarceration. 5/ The District Court's rulings under the guidelines were correct, and the resulting sentence is reasonable.

1. *The departure was warranted under §4A1.3(a)(1)*

Section 4A1.3 of the Sentencing Guidelines provides, "If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted." The District Court determined that criminal history category I substantially under-represented defendant's likelihood of committing other crimes and sentenced defendant under category VI. Criminal history category VI, offense level 22, corresponds to a range of 84-105 months' incarceration. As noted, the court sentenced defendant to 84 months' incarceration.

Defendant argues (Br. 43) that some of the reasons stated for the upward departure "have to do with his beliefs and associations" and thus are protected by the First Amendment. Accordingly, he asserts, those reasons "demand the strictest scrutiny." Citing *Dawson v. Delaware*, 503 U.S. 159 (1992), defendant argues (Br. 44) that the

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5/ Defendant argues (Br. 41) that the sentence must be vacated because it is "procedurally" deficient, asserting that the District Judge failed to include a written statement of reasons for the sentence. But that assertion is factually incorrect. A written statement of reasons was included with the judgment and is part of the appellate record.

court's determination that he had "'immersed' himself in a 'movement' that the court likened to a 'cult' is not an 'aggravating circumstance' which makes an increased sentence permissible, much less necessary."

However, "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Dawson*, 503 U.S. at 164. Beliefs and associations are properly considered, for example, if they are relevant to a defendant's intent and conduct. Defendant's tax protest activities were properly considered, because defendant was convicted of tax crimes and his activities and associations are relevant to his intent and conduct. *See United States v. Tampico*, 297 F.3d 396, 402 (5th Cir. 2002) (appendix) (holding, in child pornography case, that evidence of defendant's membership in North American Man Boy Love Association might indicate the increased likelihood of recidivism or a lack of recognition of the gravity of the wrong, and thus was relevant to his intentions and his conduct), *aff'd on different issue after remand*, 2004 WL 1730376, No. 03-20258 (5th Cir. Aug. 3, 2004).

Defendant began and continued his tax protest activities despite being advised against it. Defendant became a high profile member of the tax protest movement and a cause celebre of that movement after appearing in the USA Today advertisement. Though he had already spent over six months in pretrial detention, defendant advised the court during the sentencing hearing that he still "firmly believed" that

"the wages of a laborer are withheld through fraud" and that it was "fundamental law" that the "wages of employees" were exempt from tax. (S.RT 75.) There accordingly was overwhelming evidence from which the District Court could conclude that the likelihood of recidivism was such that an upward departure was warranted.

With respect to the extent of the departure, defendant argues that the court failed to adequately explain why the intervening criminal categories under-represented his risk of recidivism. But this Court has never "require[d] the district court to go through a ritualistic exercise in which it mechanically discusses each criminal history category it rejects en route to the category it selects." *United States v. Lambert,* 984 F.2d 658, 663 (5th Cir. 1993) (en banc). The District Court stated that it "used as a reference the criminal history applicable to defendants whose likelihood to recidivate most closely resembles that of the defendant's," and, in stating the grounds for the departure, the court provided ample reasons for imposing a sentence of 84 months. That was sufficient to comply with the requirements of *Lambert*. *See United States v. Ashburn*, 38 F.3d 803, 809 (5th Cir. 1994) (en banc).

Further, departing from a range of 41-51 months to 84 months of imprisonment was reasonable when compared to other departures this Court has upheld. *Cf. United States v. Daughenbaugh*, 49 F.3d 171, 174-75 (5th Cir. 1995) (upholding a departure from a guideline range of 57-71 months to a sentence of 240 months); *United States v. Ashburn*,

38 F.3d 803, 809 (5th Cir. 1994) (en banc) (increase from a range of 63-78 months to 180 months).

2. *The departure was warranted under §5K2.0*

Section 5K2.0 of the Sentencing Guidelines provides that a court may depart from a sentencing range based on circumstances of a kind not adequately taken into consideration by the Sentencing Commission. USSG §5K2.0. The District Court found that the facts of this case took it outside the heartland of the typical tax case, and departing upward from the range of 41-51 months, sentenced defendant to 84 months' incarceration. Based on a criminal history category of I, the 84-month sentence corresponded to an increase of five offense levels, from level 22 to level 27 (70-87 months).

This case was outside the heartland of the typical tax case, as exemplified by the fact that defendant discussed killing judges with fellow members of an anti-government cult, whose members also threatened the particular judge hearing defendant's case. (R.193.) The extent of the departure was reasonable when compared to other mandatory Guidelines cases, as discussed above.

Pursuant to *United States v. Booker*, 125 S. Ct. 738 (2005), the Guidelines are no longer mandatory, but advisory, and this Court is to review defendant's sentence for reasonableness, judging it with regard to the factors in 18 U.S.C. 3553(a). It is the Government's position that defendant's guideline sentence was correctly calculated and is reasonable.

V

THE DISTRICT COURT'S SENTENCING DEFENDANT PURSUANT TO THE THEN-MANDATORY GUIDELINES SYSTEM, RATHER THAN UNDER THE ADVISORY GUIDELINES SYSTEM IMPLEMENTED BY *BOOKER*, WAS NOT PLAIN ERROR

A. *Standard of Review*

Defendant did not raise a constitutional challenge to judicial fact-finding or the mandatory application of the Sentencing Guidelines in the District Court. (S.RT. 1-74.) Therefore, any error in the judge's sentencing defendant pursuant to the then-mandatory Guidelines system, rather than under the advisory Guidelines system implemented by *Booker*, would be subject to plain error review. *United States v. Olano*, 507 U.S. 725, 732-37 (1993).

B. *There was no plain error*

Defendant's opening brief was filed after the Supreme Court decided *Blakely v. Washington*, 124 S. Ct. 2531 (2004), but before the Court decided *Booker*. As of this date, defendant's counsel has not requested leave to file a supplemental brief that takes *Booker* into account. Defendant thus has not yet indicated whether he even seeks resentencing before Judge McBryde under an advisory Guidelines system.

At all events, any error in the judge's sentencing defendant pursuant to the then-mandatory Guidelines system, rather than under the advisory Guidelines system implemented by *Booker*, does not rise to the level of plain error.

Defendant cannot satisfy the plain error test because he cannot show that the error affected his substantial rights -- *i.e.*, that he would have received a lower sentence under the advisory Guidelines system. *See United States v. Rodriguez*, 2005 WL 272952, at *9 (11th Cir. Feb. 4, 2005) (in applying the third prong of plain error test to *Booker* claim, court "ask[s] whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing guide"). Indeed, there is a distinct possibility that Judge McBryde might have given defendant a longer sentence under an advisory guidelines system.

CONCLUSION

For the reasons stated, this Court should affirm the judgment.

Respectfully submitted,

EILEEN J. O'CONNOR
Assistant Attorney General

ROBERT E. LINDSAY (202) 514-3011
ALAN HECHTKOPF (202) 514-5396
S. ROBERT LYONS (202) 307-6512
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

RICHARD B. ROPER
United States Attorney

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_____
Attorney for United States
Dated: February 25, 2005

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing brief has been made on counsel for defendant on this 25th day of February, 2005, by mailing two paper copies and one copy on computer diskette to them, in an envelope, properly addressed as follows:

Peter Goldberger, Esq.
50 Rittenhouse Place
Ardmore, PA 19003-2276

Robert G. Bernhoft, Esq.
207 East Buffalo St., Suite 600
Milwaukee, WI 53202

_____
ROBERT E. LINDSAY
Attorney