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Docket 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 Judgment in a Criminal Case filed May 5, 2004, and entered May 6, 2004, in No. 4:03-CR-188A (John McBryde, U.S.D.J.) in the United States District Court for the Northern District of Texas

BRIEF FOR APPELLANT SIMKANIN

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 28.2.1, counsel for the appellant, Richard M. Simkanin, certify that no person, association, firm, corporation or other legal entity other than the defendant-movant-appellant himself is financially interested in the outcome of this direct criminal appeal.

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted,

Dated: December 31, 2004

By: PETER GOLDBERGER
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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.4, counsel for the appellant request that this Court allow oral argument. In the dozen years since Cheek v. United States, 498 U.S. 192 (1991), was decided in the Supreme Court, this Court has had remarkably little to say about how it should be implemented in the district courts, both in terms of admission of evidence and in jury instructions. The Court's consideration of the issues presented in this appeal can only be aided by an informed dialog with counsel. This process will necessarily enhance the quality of the Court's decisionmaking.

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STATEMENT OF JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. § 1291, in that this appeal arises from a "final decision," to wit, the district court's May 5, 2004, Judgment, confirming the sentence imposed April 30, 2004. R.E. 15.[1] Notice of Appeal was timely filed on May 7, 2004, R.E. 2, after the entry of judgment on May 6, R.E. 1, at 2 (Dkt. ## 135, 140, 141). Fed.R.App.P. 4(b). The United States District Court for the Northern District of Texas had subject matter jurisdiction under 18 U.S.C. § 3231, in that the indictment (and superseding indictments) alleged offenses against the United States committed in that district. R.E. 3.

[1] Material from the record compiled in the Record Excerpts is cited in this brief as "R.E. *n*," where *n* represents the tab number. Passages from the trial transcript are cited as TT followed by the volume number representing the day of trial. (Day II was January 5, 2003; Day III was January 6; Day IV was January 7.) Other transcripts are cited with appropriate abbreviations, and also the date.

STATEMENT OF THE ISSUES

1. Did the district court violate appellant's Sixth Amendment rights when it told the jury, in response to a question during deliberations, that the court had determined one of the elements of the charged offenses against the defendant?

2. Did the trial court abuse its discretion when it refused to give an instruction on "good faith," which was the theory of the defense?

3. Was appellant denied a fair trial by the cumulative effect of numerous arbitrary rulings restricting cross-examination, rejecting relevant evidence, cutting off the defendant's own testimony, and limiting closing argument?

4. Did the district court err, on any of several grounds, in sentencing to an upward departure?

5. Were not only the upward departure but also the underlying guideline calculations, unconstitutional under the rule announced in Apprendi and elaborated in Blakely?

STATEMENT OF THE CASE

This direct criminal appeal raises both trial and sentencing issues arising from a conviction after an initial mistrial on tax charges in the Northern District of Texas. Judge McBryde imposed an upward departure at sentencing.

a. The Course of Proceedings Below

Richard Simkanin testified before a federal grand jury, and the grand jury returned a no bill. The defendant accepted an invitation to testify before a second grand jury, and that grand jury also returned a no bill. TT II, at 23.

A third grand jury was convened. Defendant asked to appear and testify, but the United States Attorney's Office denied this request. Id. That grand jury then returned an indictment on June 19, 2003,[2] charging defendant Simkanin with 12 counts of willful failure to collect, account for and pay over employment taxes imposed under Subtitle C of the Internal Revenue Code, in violation of 26 U.S.C. § 7202, and 14 counts of filing false claims against the United States by filing various amended IRS Forms 941 and 940-EZ, in violation of 18 U.S.C. § 287.[3] A

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[2] Despite his voluntary appearances before the grand jury and the nonviolent nature of the charged offenses, a warrant was issued with the indictment. Mr. Simkanin was arrested the next day, June 20, 2003, and temporarily detained. R.E. 1 (DE 4). The magistrate judge ordered him released on conditions June 25, R.E. 1 (DE19), but on the government's appeal, that order was rescinded June 27, 2003, R.E. 1 (DE 26), and pretrial detention was confirmed by order filed July 14, 2003. R.E. 1 (DE 51).

[3] On July 28, 2003, defense counsel filed twelve pretrial motions. R.E. 1 (DE 68-79). On July 30, 2003, after a telephone conference, the district court signed an order directing the clerk to "unfile" all twelve motions for one or

superseding indictment was filed on August 13, 2003. DE 96.[4]

On September 18, 2003, the defense filed eight motions for leave to file various pretrial motions (R.E. 1 [DE 117-126]) and a Rule 16 request for disclosure. R.E. 1 (DE 124, 125). The parties filed an amended agreed charge of the court. R.E. (DE 141). On September 26, 2003, the district court granted the Defendant's eight motions for leave to file pretrial motions, directed the clerk of the court to file the motions, and then immediately denied all eight pretrial motions. R.E. 1 (DE 142).

Trial was set for October 6, 2003. R.E. 1 (DE 91). On September 30, 2003, however, Mr. Simkanin pleaded guilty to Count 4 of the superseding indictment (R.E. 1 [DE 157]) as part of a plea bargain. R.E. 1 (DE 158). Three weeks later, on October 28, 2003, the district court set aside the plea agreement on the grounds that the defendant had been incorrectly advised as to the maximum penalty for a violation of 26 U.S.C.

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more reasons relating to the failure of counsel to comply with applicable rules of court. R.E. 1 (DE 87, Order).

[4] The superseding indictment differs from the original in some respects. For example, Paragraph 1 of the superseding indictment, unlike the original, alleged that the Internal Revenue Code requires employers to pay their share of FICA and Medicare taxes owed on employees' wages. Paragraph 2 of the superseding indictment, unlike the original, alleged that the Internal Revenue Code requires employers to withhold their share of FICA and Medicare and income taxes owed on employees' wages, to account for those taxes and to pay them to the United States. Paragraph 3 of the superseding indictment, unlike the original, alleged that a person is responsible for collecting, accounting for, and paying over the employees' share of FICA, Medicare and income taxes if he has the authority to exercise significant control over the employer's financial affairs, regardless of whether the individual exercised such control in fact. Paragraph 4 of the superseding indictment, unlike the original, alleged how one acts willfully in the context of a tax case.

§ 7202. DE 162. The attorneys for the government and for the defendant both claimed a "good faith belief" that the statutory maximum stated in the written agreement had been correct (R.E. 1 [DE 161]); the court neither offered an explanation for overlooking the error nor offered the defendant the option of adhering to his plea once properly advised. Instead, the court simply reset the case for trial on November 24, 2003. R.E. 1 (unnumbered entry between DE 162 and 163).

The initial trial before Judge McBryde and a jury commenced on November 24 (R.E. 1 [DE 197]) and ended on November 25, 2003. Without objection, the court gave the jury an instruction that the defendant's "good faith belief" in the legality of his actions would negate the element of willfulness. Typescript of instructions (DE 198), at 8. After a period of deliberation the jury could not reach a unanimous verdict, and the district court declared a mistrial. R.E. 1 (DE 198).

Retrial was set for January 5, 2004. R.E. 1 (DE 204). On December 17, 2003, a second superseding indictment was filed, adding four counts of willful failure to file personal income tax returns for the years 1998 through 2001, in violation of 26 U.S.C. § 7203. The remaining counts reiterated the twelve under § 7202 of failure to withhold employment taxes from the employees of Arrow Custom Plastics, Inc., on a quarterly basis, from March 2000 through December 2002, and 15 counts under 18 U.S.C. § 287 of filing false claims in January 2000 for refunds of amounts previously withheld and paid over. R.E. 3.

On December 31, 2003, the government filed its proposed jury instruction No. 4. R.E. 1 (251). The district court was asked to instruct as a matter of law, among other things, that wages or salaries received by employees of Arrow Custom Plastics constitute taxable income that must be reported to the IRS on a tax return, that every employer must deduct and withhold income tax on the amount of wages that are paid to any employee, and that the employer shall be liable for the payment of the tax.

On December 22, in anticipation of the new trial, the defense filed a witness list and a new exhibit list identifying documents that Mr. Simkanin relied upon in arriving at his beliefs about taxes. R.E. 1 (DE 235, 236). On December 30, 2003, the government filed its motion for a pretrial evidentiary hearing based upon the defendant's witness and exhibit lists. R.E. 1 (DE 245). That motion was practically identical to a motion in limine filed November 20, 2003, for the first trial. See R.E. 1 (DE 173). The next day, December 31, 2003, the district court held a telephone conference. Although the defense had just received the government's motion and had not had any time to consider or answer it, Judge McBryde granted the prosecutor's motion in full. Tr., 12/31/03, at 7-10. Likewise, the district court granted a motion in limine as to every exhibit on the defendant's list. Id. at 45-46. The district court ordered that neither defense counsel nor any witness could mention any exhibit in the presence of the jury, without first obtaining permission from the court to do so. Id. at 47.

On December 31, 2003, the government filed its Proposed Jury Instructions for the retrial. In request No. 5, the prosecutors changed their position from the first trial that a good faith belief instruction was appropriate in the case. R.E. 4. On January 5, 2004, Defendant requested jury instructions, including one on good faith belief and another articulating a theory of defense. R.E. 5. Defendant renewed his request for a good faith belief jury instruction during trial. R.E. 11.

The second trial started on January 5, 2004, and ended on January 7, 2004. R.E. 1 (DE 272, 281). In its instructions for the retrial, the court advised the jury that Arrow Custom Plastics had a legal duty in 2000-2002 to collect, by withholding from the wages of its employees, the employee's share of social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay over the withheld amounts to the United States of America. R.E. 10, at 252. At the same time, it instructed the jury to determine whether or not Arrow was an employer that paid wages. Id. 254. The court did not charge on good faith. Id. 259-60. During deliberations, the jury requested clarification as to the issue of willfulness, R.E. 12, at 2-5, and on whether Arrow was an employer. R.E. 12, at 9-10. On the latter occasion, Judge McBryde expressly directed the jury, over objection, that Arrow was an employer obligated to withhold. Id. 11-14.

The jury eventually hung on counts 1 and 2 (willful failure to file and pay over employment taxes in March and June 2000) but found Mr. Simkanin guilty on counts 3 through 31 of the

second superseding indictment. R.E. 13 (Verdict). The court declared a mistrial as to the first two counts. R.E. 1 (DE 281). Judge McBryde initially reset trial on counts 1 and 2 of the second superseding indictment for March 8, 2004, R.E. 1 (DE 292), but the government moved to dismiss those counts without prejudice, R.E. 1 (DE 307), which motion was granted. R.E. 1 (DE 310).

On April 30, 2004, after resolving numerous objections to the PSI (R.E. 14, at 46-47), Judge McBryde sentenced Mr. Simkanin to serve 60 months on each of Counts 3-12 and 13-26, the sentences to run concurrently. The court further sentenced him to serve 24 months on count 27 to run consecutively to the sentence on counts 13-26, and three years of supervised relief of each count of conviction. On each of counts 28 to 31, the court sentenced Mr. Simkanin to serve 12 months concurrently, and one year of supervised relief to run concurrently. R.E. 14. at 76. This total sentence of seven years' imprisonment implemented a substantial upward departure. R.E. 14, at 77-80. The court also ordered the defendant to pay $302,076.33 to the IRS as restitution. R.E. 14, at 80-81.

A signed judgment incorporating the sentence was prepared and filed on May 5, 2004. R.E. 15. The judgment was entered on the docket May 6. R.E. 1 (DE 326). This appeal followed. R.E. 2. Mr. Simkanin has been incarcerated since his arrest on June 20, 2003. He is presently serving his sentence in the Federal Correctional Institution at Texarkana, Texas.

b. Statement of Facts

Dianne Clemonds was an employee of Arrow Custom Plastics, of Bedford, Texas, in the Dallas/Fort Worth area, from 1988 through the end of 1999. Ms. Clemonds began as a file clerk, and was later an accounting clerk and bookkeeper. When she left her employment there, she was President. Ms. Clemonds had a sister who was married to Richard Simkanin, the defendant. Mr. Simkanin was the owner of Simkanin, Inc., d/b/a Arrow Custom Plastics (TT II, at 105-06), a manufacturing operation that builds molds for plastic products. TT II, at 19-20. Simkanin, an engineer by training, made "all the decisions" regarding Arrow's taxes and financial affairs during the entire time Ms. Clemonds worked there. Id. 30-32. Until 1997, Mr. Simkanin had been President of the company. At that time, he made Ms. Clemonds President, because, as he said, he "needed to get out of the system." Nevertheless, he continued to exercise ultimate authority over the company. Id. 34.[5] In December 1999, Ms. Clemonds decided to leave Arrow Custom Plastics so as not to be responsible for the company's acts. From that time forward, Arrow was not going to withhold taxes from its employees' wages. Those who did not agree could leave their jobs. Id. 46-48.

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[5] Later, Ms. Clemonds testified that she did not "really recall" when she "became president." TT III, at 6. A bank employee testified to the change in signature cards which resulted from Ms. Clemons' succeeding Mr. Simkanin as president of Arrow Custom Plastics, and that in January 2000 Mr. Simkanin's signature was added back as signatory in place of Ms. Clemons'. In 2001, according to the bank signature card, Arrow Custom Plastics became a sole proprietorship of Mr. Simkanin rather than a corporation. TT II, at 44-47.

Al Sharp of the Texas Work Force Commission testified that Arrow made all its required filings with the state for unemployment insurance on its workers. Robert Dean, an IRS records custodian, testified that Arrow made quarterly filings concerning withholding of income tax from employees through the end of 1999, but none from March 2000 through September 2003. TT II, at 113-14.

An IRS Revenue Agent specializing in employment tax cases, Joe Wayne Cooper, testified that he reviewed claims for refund of employment taxes submitted by Mr. Simkanin on behalf of Arrow Custom Plastics dated January 28, 2000. Id. 119-22; Exh. 91-106. Mr. Cooper testified that he considered the case law and sections of the Internal Revenue Code (hereinafter sometimes referred to as "IRC") submitted to him by Mr. Simkanin and concluded that the claims "had no merit." TT II, at 123. Cooper also related that he told Mr. Simkanin "that the courts have consistently ruled against this type of position that he was taking in regards to seeking refunds of employment taxes." Id. 124.

Mr. Cooper testified he knows how to calculate employers' shares of withholding taxes. He opined that the figures alleged in counts 1 through 12 of the indictment were "correct." Id. at 125-126.

Louis Morris, a witness who was not called at the first trial, testified that he worked for the defendant, that he had received an e-mail from Mr. Simkanin regarding withholding, and that he forwarded the e-mail to a friend of his who happened to

be an IRS agent for his opinion. His friend responded, and Mr. Morris forwarded that response by e-mail to the defendant. Id. at 148-152.[6]

On cross-examination, Mr. Morris testified that Simkanin had "a library of material" pertaining to withholding, and that in the witness's opinion Mr. Simkanin thought his position was actually a correct understanding of the law, and that the defendant was not "just trying to get out of paying taxes." To the contrary, he seemed to be sincere. Id. at 153-54.

Charles Phillip Eastman, another new government witness for the second trial, was a "tax compliance officer" with the IRS. Id. at 156. Mr. Eastman testified that government exhibits 136 through 147 were correspondence between the IRS and Mr. Simkanin regarding the status of workers as either employees or independent contractors. Id. at 157-58. On cross-examination the IRS witness testified that the workers were, in "our opinion," employees. TT II, at 164. Inquiry into the basis for the witness's legal conclusion was precluded by Judge McBryde as either beyond the scope of direct or because the definition of an employee under the IRC was not to be developed. Id.

Jim Kelly, Arrow Custom Plastics' accountant until the end of 1999, testified that he prepared and filed corporate income tax returns for Arrow beginning in 1994. TT II, at 61. He also prepared and filed individual returns for Mr. and Mrs. Simkanin in 1993, 1994, and 1995. Id. 64-65. He filed no personal

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[6] The e-mail, Gov. Exhibit 148, was admitted into evidence without any hearsay objection.

returns for 1996 and 1997 for them, because Mr. Simkanin said he had no taxable income in those years. Id. 66. Mr. Kelly said that Simkanin relied on certain information that supported his position with respect to taxes and gave Kelly copies, but that Kelly did not read it and could not say what it was. Id. 67.

Mr. Kelly, who was neither a lawyer nor a CPA, told the jury he had expressed the opinion to Mr. Simkanin that not filing withholding returns was illegal. Id. 68. Mr. Kelly was also asked for, and testified about, the law with respect to the difference between cash basis and accrual basis accounting based on IRS regulations. Id. at 57-58. Judge McBryde himself asked the witness to testify about what the law required with respect to withholding. Id. at 69. The prosecution successfully proffered Government Exhibit 13 as evidence, a copy of Section 3402 of the IRC which Kelly had faxed to Simkanin. Id. at 69-70.

Government Exhibit 114 was apparently the same fax, as received at Arrow Custom Plastics. Ms. Clemonds called it a copy of an "actual statute from the Internal Revenue Code" concerning withholding, that is, 26 U.S.C. § 3402. She said she had received it from Arrow's accountants in early 2000 and gave to Mr. Simkanin. TT II, at 45-46, 50-51. Ms. Clemonds testified on cross-examination she does not know what Section 3402 means. Id. at 51.

Fred Taylor, a Forth Worth CPA, was Kelly's employer. Mr. Taylor gave a legal opinion that Mr. Simkanin, "as the owner of Arrow Custom Plastics," was the responsible party to collect taxes on Arrow's employees' taxable income. TT II, at 95. He

testified that he visited Mr. Simkanin in March 2000 for a half hour to discuss Arrow's failure to withhold and remit employment taxes. Simkanin expressed the opinion that the Internal Revenue Code did not apply to him, according to Taylor, basing that view on his own studies. Id. at 92-93. Taylor said his firm resigned from the Arrow account for the sake of their "ethics" and "reputation." Id. at 96-97. Judge McBryde sustained objections when the defense attempted to cross-examine CPA Taylor about his direct testimony that Mr. Simkanin was required to file tax returns. Id. at 98-99.

A congressional staffer presented in evidence correspondence between Mr. Simkanin and Congressman Barton, occurring from January 2000 through March 2001, some of which had been forwarded for response to the IRS. TT II, at 166-71. One of these exhibits, admitted without objection, asserted that:

> These schemes are based on an incorrect interpretation of the Internal Revenue Code that wages are not a source of income and that the definition of sources of income does not apply to U.S. individuals. This incorrect interpretation is contrary to the express language of the Internal Revenue Code and its regulations, and the interpretation has been refuted in court.

TT II, at 170 (Exh. 134). On cross-examination, the witness noted that the Congressman recognized a need to simplify the tax code. TT II, at 172. The witness also concurred that in all his correspondence, Mr. Simkanin "always agreed we are all subject to the tax code but not necessarily liable for the particular taxes ...." Id. at 173.

The defendant stipulated that in the year 1998 he had at least $42,933 in gross income. In 1999 he had at least $62,007.

In 2000, his gross income was at least $189,750, and in 2001 at least $115,500. TT II, at 42. IRS Special Agent Allan McGowan, the case agent, testified that based upon the amount of gross income Mr. Simkanin received in 1998 through 2001, he was legally required to file individual tax returns for each of those years. TT III, at 15-16.[7]

Mr. Simkanin took the stand in his own defense. He started testifying about his research into the tax law, including particular Supreme Court cases on which he said he relied. He also testified that he relied on advice from Victoria Osborn, an accountant from Colorado Springs, Colorado, with whom he talked in 1997 or 1998 after hearing her speak as a guest on a radio talk show. Ms. Osborn advised him that the IRS owed him money. TT III, at 44.

Defense Exhibit 12, a 1999 GAO report admitted into evidence during the first trial, was not allowed during the second trial, despite Mr. Simkanin's reliance on it with respect

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[7] The only charges relating to personal income tax in the indictment were for 1998-2001, and these were for simple nonfiling, not for evasion. Yet Ms. Clemonds was allowed to testify with regard to 1996 and 1997 that Mr. Simkanin received funds from Arrow in addition to his $1500 weekly salary as an officer. TT III, at 8-9. First, at some point during that period, the company changed the classification on its general ledger of Mr. Simkanin's pay from salary to "remuneration," id. 8, stopped withholding from the $1500 and stopped identifying the payments on the books with his name; for these payments, no Form W-2s were issued. Id. 10. In addition, irregular amounts of $2500 to $5000 were paid to Mr. Simkanin in cash during those years, which were accounted for on the corporate books as "repairs and maintenance." Id. 8, 9. The witness did not know how those funds were expended or whether they may have served to reimburse Mr. Simkanin for maintenance payments he had made on Arrow's projects or properties. Id. 9, 13.

to participation in the Social Security program and payment of FICA tax. Judge McBryde stated he had "made some mistakes" during the first trial that it was "going to try not to make them again." R.E. 7, at 48. Another reason the court advanced for not admitting the exhibit was that defense counsel had violated the in limine ruling by merely offering the exhibit, without first approaching the bench. Id. Judge McBryde also denied the admission into evidence of a Treasury regulation that the Defendant testified he relied on. TT III, at 53-54. Mr. Simkanin testified that the IRC is some 7000 pages in length; one reason it is so lengthy is that "it names a lot of industry and activity that is taxable." TT III, at 57-58.

If Arrow Custom Plastics were engaged in any of those industries, Mr. Simkanin testified, he would pay the income and/or employment taxes required. Two examples of such specifically-identified taxable industries, he mentioned, were "[t]he manufacturing of fishing lures," and "[m]anufacturing of gasoline and petroleum products." Id. 58. Mr. Simkanin also testified that after consulting the applicable Treasury Regulations, he concluded that "the employees at Arrow Plastics" did not fit the definition of "employee" for withholding purposes. R.E. 7, at 59. The district court prohibited the Defendant from "using or making reference to the text of the Internal Revenue Code" to back up these statements. Id.

Judge McBryde prohibited the defendant from testifying as to what he learned from a two-volume report commissioned by the U.S. Attorney General in 1954 or 1956, which he said he relied

upon in forming his beliefs. TT III, at 69-70. The district court prohibited Mr. Simkanin from telling the jury about other laws he studied that "crystallized his thinking with regard to the enforcement of the Internal Revenue Code." Id. at 73-74.[8]

The defense called Joe Banister, a CPA and former Special Agent with the criminal investigation division of the IRS. Judge McBryde told defense counsel, before the examination began, over objection, that Mr. Banister would be allowed to testify what he told the defendant, but could not go into the basis of his conclusions. TT III, at 133-35.[9]

Mr. Banister testified he was a guest speaker at a seminar at which Mr. Simkanin was present, and that the defendant spoke with him off and on all day. Judge McBryde ordered that Mr. Banister could only testify as to what he directly told Mr. Simkanin, not even what he stated to an audience group of which the Defendant was a part. TT III, at 138.

Attorney Eduardo M. Rivera was called by the defense. Mr. Rivera is a member of the State Bar of California. Mr. Simkanin flew from Texas to California in 1999 to consult with Mr. Rivera about taxes, and Mr. Rivera gave the Defendant an opinion that

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[8] Defense counsel passed the witness without attempting to introduce a key letter of advice from CPA Wayne Paul, used in evidence at the first trial, on which Mr. Simkanin also had relied.

[9] After Mr. Banister gave his qualifications -- a bachelor's degree in accounting; 17 years of experience; Certified Public Accountant; former IRS CID -- the district court called a bench conference and instructed the defense: "Included in what you're not allowed to do is developing how and why he reached the conclusions he reached." TT III, at 135-36.

he did not have to withhold taxes from his employees' pay without their voluntary, contractual consent. TT III, at 167-68. Mr. Rivera testified that he explained to Mr. Simkanin how the law was constructed, its origins, its history, why his workers had no legal duty to make returns or to pay a tax, and that only if he 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. The authority is provided by the employee by using a Form W-4, and that it is a voluntary matter between the employer and the employee, according to attorney Rivera. TT III, at 169.

On cross-examination, the district court admitted Gov't Exhibit 180, a file stamped copy of a permanent injunction issued by a United States District Court in California in 2003, four years after the dates in issue, against Mr. Rivera's tax counseling. TT III, at 170-71, 182.

The government offered into evidence its Exhibit 181, a letter Mr. Rivera allegedly wrote some years later regarding the jurisdiction of the federal courts. The defense objected on the grounds that the letter was outside the scope of direct examination, there was no evidence that the witness and the defendant discussed jurisdiction,[10] and that it contained references to court opinions. Judge McBryde admitted the exhibit on the

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[10] According to the evidence, Mr. Rivera and the Defendant discussed the Defendant's "legal question about whether he had the right -- not to withhold Medicare and social security from his workers." TT III, at 168. See also id. at 183.

ground that "it's absolute nonsense" and therefore affected the credibility of the witness. TT III, at 173-74.

Robert Schulz, founder of the We the People Foundation for Constitutional Education, a "research and educational foundation" (TT III, at 185), testified that he spoke with Mr. Simkanin several times between July and November 1999 (TT III, at 191), directed him to the Foundations' website, and advised him that he had a right under the Petition Clause of the First Amendment to ask questions of the government and to expect answers. Id. 187-88. Mr. Schulz testified he had advised Mr. Simkanin that the Foundation's research supported the conclusion that "there is no law that requires most Americans to file and pay an income tax, or most companies to withhold an income tax from the paychecks of the men and women working for them." TT III, at 190. Mr. Schulz particularly directed Mr. Simkanin to a letter written by Senator Inouye which addressed the questions that the Defendant was asking regarding taxes. Judge McBryde would not allow the contents of the letter to be published to the jury. Id. at 189.

Larken Rose, who operates a medical transcription service near Philadelphia, Pennsylvania (id. 204, 210), testified that he gave the Defendant advice regarding income taxes by providing written reports and e-mail correspondence. Id. at 198. Mr. Rose advised the defendant in 1999 that according to the IRC "the income of the average American is not subject to the federal income tax despite conventional wisdom to the contrary." Id. at 199, 200.

SUMMARY OF ARGUMENT

The trial court committed reversible error when it charged the jury, in response to a question during deliberations, that the defendant's company was in fact an employer required under the law to withhold taxes from its workers' wages. It is unconstitutional for the court to take from the jury any element of any charged offense, as defense counsel urged in objecting. Where the "employer" question went to the heart of the contested willfulness issue in this tax case, the court's error was not harmless beyond a reasonable doubt. Reversal of the affected counts is therefore required.

The trial judge abused his discretion in refusing to elaborate the bare bones "willfulness" charge with any mention of the concept of "good faith," which was the theory of the defense.

Judge McBryde also denied the defendant a fair trial -- which was a retrial following an initial mistrial -- when he excluded all of the defendant's documentary evidence corroborating his testimony of good faith belief, arbitrarily limited defense cross-examination of government witnesses, and limited the scope of defense witness testimony including the defendant's own. These restrictions cumulatively denied appellant his right to present a defense, and to confront the witnesses against him. The resulting denial of a fair trial and abuse of discretion under Fed.R.Evid. 403 requires reversal.

The upward departure sentence was erroneous. No written statement of reasons appears in the judgment (or otherwise in the record), as required by 18 U.S.C. § 3553(c)(2). Moreover, the reasons given orally -- which focus on the defendant's political beliefs -- are invalid and do not support an upward departure. In any event, Judge McBryde failed to justify the extent of the departure, which essentially doubled the guideline sentence, on either of the theories that the court offered -- whether "vertical" or "horizontal." On remand, pursuant to 18 U.S.C. § 3742(g) as amended by the PROTECT Act, no departure will be permitted.

Finally, in anticipation of the Supreme Court's forthcoming decisions in Booker and Fanfan, the Court should find plain constitutional error in the sentence. Upward departures under the Sentencing Reform Act violate the defendant's Fifth and Sixth Amendment rights, as recently clarified. In this case, so too did the two-level adjustment for obstruction of justice. As these errors were not harmless beyond a reasonable doubt, and bring the proceedings into disrepute, a remand for resentencing will be required on this basis as well.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DIRECTED A VERDICT ON AN ELEMENT OF THE OFFENSE OF FAILURE TO WITHHOLD AND PAY OVER: THE STATUS OF DEFENDANT'S COMPANY AS AN "EMPLOYER."

Standard of Review: An instruction which partially directs a verdict is reversible error unless proven harmless beyond a reasonable doubt. Neder v. United States, 527 U.S. 1 (1999).

Discussion: In response to a question from the jury, the trial court instructed, apparently as a matter of fact and law, that Arrow Custom Plastics, the defendant's company, was an employer required ("through its responsible officials") to withhold and pay over taxes from employees' pay. The defense properly objected to this partial directed verdict. Reversal of the affected convictions is required.

The jury began its second day of deliberations on the morning of January 7, 2004. At 11:00 a.m., the jury sent out a fourth note[11] asking for further instructions:

> Since no proof has been made that the defendant and his employees are in an occupation listed in those 7,000 [pages], are we to conclude that they are, in fact, not in that 7,000, or do we need to read all 7,000 [pages of the Internal Revenue Code] to see what the defendant was referring to, and, in fact, wasn't listed in the 7,000.

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[11] By 10:15 a.m., the jury had two more notes: 1) the jury wanted "the full wording of the law(s) that the defendant allegedly broke for the first twelve indictments" [i.e., the counts charging failure to withhold and pay over]; and 2) "what are the three points that must be met for counts 13 through 27?", that is, the elements of the false claims counts under 18 U.S.C. § 287. R.E. 12, at 2.

R.E. 12, at 9-10.[12]

Judge McBryde's response was:

> 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 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.

R.E. 12, at 14. Defense counsel objected to the district court's response on the ground, inter alia, that "it amounts to an instructed verdict of guilty by instructing them on that point[,] since that is the disputed issue and the basis for his defense." All objections were overruled. R.E. 12, at 12.[13] Shortly thereafter, the jury returned verdicts of guilty on counts 3 through 31, and reported they were hung as to counts 1

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[12] The defendant had testified that the Internal Revenue Code was some 7,000 pages long, and that much of that length was attributable to specific listings of industries in which labor is subject to income tax and in which businesses are required to withhold tax from employees' wages. TT III, at 57-58.

[13] The other grounds of objection were: (1) there was insufficient evidence to prove the Court's legal statement beginning with 'the Court has made a legal determination that,' et cetera, down through the word 'America'", and (2) including mention of the years 1997 through 1999 was non-responsive. (The original charge on this subject had referenced 2000-2002 only.) Id.

and 2. The district court accepted a partial verdict on counts 3 through 31, and declared a mistrial as to counts 1 and 2. R.E. 13, at 43-35; TT IV, at 42-49.

In two different ways, the court's instruction in response to jury note 4 was reversible error. First, by declaring straight out that "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 social security taxes, Medicare taxes, and federal income taxes, and to account for those taxes and pay the withheld amounts," Judge McBryde removed an element of the § 7202 offense -- Arrow's employer status -- from jury consideration. In its principal instructions, the court had arguably left this for the jury to determine and for the government to prove beyond a reasonable doubt. R.E. 10, at 254; but see id. 252. (Thus, presumably, the source of the jury's question in Note 4 as to how it was to go about performing that task.) In United States v. Bass, 784 F.2d 1282 (5th Cir. 1986), the Court reversed a tax conviction on the basis of this precise error.[14] As explained by Judge Jones in her opinion for this Court, "A judge may not direct a verdict of guilty no matter how conclusive the evidence." Id. 1284,

[14] The only difference was that in Bass, involving a charge of willfully submitting an allegedly false and fraudulent withholding certificate, the defendant claimed he was not (or at least in good faith did not believe he was) an "employee," while here, the questioned status is that of "employer."

quoting Connecticut v. Johnson, 460 U.S. 63, 73 (1983). Accord, United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984).

Although the court did not commit the same error in its principal instructions, the "prior unexceptional and unilluminating abstract charge" does not excuse the later, specific mistake. Bollenbach v. United States, 326 U.S. 607, 612 (1946). To the contrary, "the judge's last word to the jury is apt to be the decisive word." United States v. Cohen, 450 F.2d 1019, 1022 (5th Cir. 1971), quoting Bollenbach, id. The error which occurred in this case was thus particularly likely to be prejudicial, by reason of its timing alone.

Error of this kind requires reversal unless the government can prove it was harmless beyond a reasonable doubt, because it deprives the defendant of his Sixth Amendment right to trial by jury. See Neder v. United States, 527 U.S. 1 (1999). Unlike the situation in United States v. Herzog, 632 F.2d 469, 471-72 (5th Cir. 1980), since a timely and specific objection was lodged, the appellant need not bear the burden to establish plain error. In Neder the court's determination of a "materiality" element "as a matter of law" was held harmless where the issue was never contested and the proof was genuinely overwhelming. Here, by contrast, as in Bass itself, "one of [appellant's] defenses was that he was not an 'employe[r]'"; in such a case, the Court "cannot conclude that the instruction was harmless error." 784 F.2d at 1285. Moreover, in this case, the jury's question about whether it needed to peruse the entire 7000-page Code shows that it was not convinced beyond a reason-

able doubt, before receiving Judge McBryde's erroneous response, that Arrow Plastics necessarily was a "employer" under the Internal Revenue Code. After all, the only evidence on the subject was the conclusory statement of an IRS agent, which the jury could well have thought was biased and apparently did not find satisfying.

The supplemental instruction given in response to Jury Note 4 was erroneous for a second (albeit related) reason as well. In stating that "You are to follow that legal instruction [i.e., the one directing a verdict on the 'employer' issue] without being concerned whether there are certain employers who are not required to collect and withhold taxes from the wages of their employees," Judge McBryde could easily have been understood by the jury as advising them to disregard the defendant's own extensive testimony on that subject, which bolstered his good faith defense. Any such instruction has long been held reversible, even standing alone. Burton, 737 F.2d at 440-43. As stated by the Supreme Court in the leading case:

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

Cheek v. United States, 498 U.S. 192, 203-04 (1991). So too, it was error to instruct the jury, in effect, to disregard evidence of Simkanin's understanding that, within the meaning of the tax laws, Arrow Custom Plastics was not an "employer" required to withhold from those who worked for it, so that he,

as a responsible officer, could not be guilty of the crimes charged.

This error directly affects and therefore requires reversal of the convictions on counts 3-12 (charging willful failure to withhold and pay over) and counts 13-27 (false claims for refund of taxes withheld). If no other relief is granted, the judgment of sentence on the remaining counts must be vacated and the case remanded for resentencing.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO CHARGE THE JURY ON GOOD FAITH -- THE THEORY OF THE DEFENSE.

Standard of Review: Abuse of discretion. United States v. St. Gelais, 952 F.2d 90, 93 (5th Cir. 1992).

Discussion: The defendant-appellant, Richard Simkanin, based his defense at trial on the issue of good faith -- an honest belief that his conduct was warranted under the Internal Revenue Code and therefore not "willful" in the sense used in criminal tax law.[15] If the jury entertained so much as a reasonable doubt on this score, Mr. Simkanin was entitled to

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[15] Ordinarily, "to establish a 'willful' violation of a statute, 'the Government must prove [at most] that the defendant acted with knowledge that his conduct was unlawful.'" Bryan v. United States, 524 U.S. 184, 192 (1998) (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)). In prosecutions under statutes "involving willful violations of the tax law," on the other hand, the Supreme Court has "concluded that the jury must find that the defendant was aware of the specific provisions of the tax code that he was charged with violating." Bryan, 524 U.S. at 194. In all federal criminal tax cases, willfulness requires the "intentional violation of a known legal duty." This standard was authoritatively established in United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam). See generally Cmte. on Pattern Jury Instr., Dist. Judges Ass'n of the Fifth Circuit, *Pattern Jury Instructions (Criminal Cases)* § 1.38, at 61-63 (2001).

acquittal. He therefore properly requested a jury instruction on good faith (R.E. 5), and objected both before and after the delivery of the instructions (R.E. 8, at 222, 224-25) when Judge McBryde omitted that instruction from the jury charge at the retrial.[16] (At Mr. Simkanin's first trial, which resulted in a hung jury, a "good faith" instruction was given at the request of both parties.)

The district court instructed the jury that:

> 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.

R.E. 10, at 254-55. The district court also instructed the jury that "for the government to establish willfulness as to Counts 28 through 31 of the indictment, it must prove beyond a reasonable doubt as to the count under consideration that the defendant knew of the requirement of federal law that he file an income tax return, and that he voluntarily and intentionally failed to do so." R.E. 10, at 259.

After instructing the jury, the district court asked the parties if they had any objections to the jury charge. The

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[16] This change of charge occurred at the government's behest. On December 31, 2003, the prosecutors filed their proposed jury instruction No. 5, in which the government changed its mind about the necessity of a good faith instruction. R.E. 4.

defense objected to the failure of the court to instruct on good faith under Cheek v. United States. Judge McBryde overruled the objections. R.E. 10, at 266-67. After less than 90 minutes of deliberation, the jury issued a note asking what is the definition of "willful?" Judge McBryde's response again did not include a good faith defense instruction. R.E. 10, at 270-73.

In so instructing the jury, the district court denied Mr. Simkanin the only defense allowed to him as a matter of law. The jury began deliberating again at 9:00 a.m. the next day. By 10:15, the jury had two more notes. Meanwhile, the defense filed a motion for reconsideration and request for (1) pattern jury instruction regarding mistake, ignorance, negligence or gross negligence and (2) good faith instruction under Cheek. R.E. 11. Judge McBryde advised defense counsel that his position that the pattern jury instructions contained a reference to the requested mistake, ignorance, etc. language was wrong (although that language, in fact, appears in the pattern charge on "knowingly") and denied the defense motion for reconsideration. R.E. 12, at 4-5.

In this case, the jury was denied an instruction on the defense theory with respect to the key contested element of the offense -- the requirement that any violation of the tax law be "willful." The defense theory of the case was that Mr. Simkanin did not act willfully because he operated in good faith. For lack of such an instruction to the jury in this case, the petitioners' tax evasion convictions cannot be affirmed. See United

States v. Mathews, 485 U.S. 58, 63 (1988) (defendant's right to charge on theory of defense, when supported by some evidence).

This Court's precedents holding that a proper instruction on specific intent can, in some circumstances, excuse the failure to charge on good faith are not persuasive in the context of this case. See generally United States v. Giraldi, 86 F.3d 1368, 1376 (5th Cir. 1996); United States v. Storm, 36 F.3d 1289, 1294-95 (5th Cir. 1994); United States v. Rochester, 898 F.2d 971, 978-79 (5th Cir. 1990).[17] Most important, those cases require that the court have given instead "a detailed instruction on specific intent." Id. 978. Thus, in United States v. Chaney, 964 F.2d 437 (5th Cir. 1992), this Court affirmed only after finding that the instruction given by the court was "in essence, a good faith instruction." Id. 445. Here, the willfulness charge recited the minimally mandated words of Pomponio (see note 15 ante), but completed failed to elaborate or explain them, as required by the Supreme Court's decision in Cheek. It did not even include a reference to "mistake" as being inconsistent with willfulness, although the absence of mistake is essential to the knowledge which is a component of specific intent. See 5th Cir. Pattern Instr. No. 1.37; "Without the knowledge, the intent cannot exist." Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943); accord, Anderson v. United States, 417 U.S. 211, 224 (1974). As defense

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[17] See also United States v. Daniels, 247 F.3d 598, 601 (5th Cir. 2001); United States v. Daniel, 957 F.2d 162, 170 (5th Cir. 1992) (per curiam).

counsel pointed out, the instruction did not necessarily even make clear to whom it had to be "known" that the law imposed a legal duty on the defendant. R.E. 10, at 266.

In addition, in sometimes finding no abuse of discretion in the omission of a "good faith" charge, this Court has generally also considered whether defense counsel was "circumscribed in his argument to the jury regarding [the] defense of good faith." Storm, 36 F.3d at 1295; accord Chaney, 964 F.2d at 445. Here, by contrast, Judge McBryde placed counsel under a strict 15-minute limit for closing argument. TT III, at 151.[18] In the transcript, the closing argument for the defendant occupies less than eight pages. RE 9. During this period it was hardly possible even to marshal the main evidence adduced from 14 witnesses and numerous documents, much less to fully argue the inference of good faith or elaborate the meaning of reasonable doubt concerning willfulness, as applied to three different types of statutory offenses.[19] Thus, this is not a case where a generous approach to counsel's argument might excuse the refusal to charge on the defense theory of good faith.

According to the United States Supreme Court:

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[18] Defense counsel's request for just three minutes more was denied with a facetious remark. Id. Judge McBryde then rigidly policed the 15-minute limit at trial, including interruptions to announce the elapsed time. R.E. 9, at 240.

[19] Had the objection been lodged below on this ground, appellant would be arguing here that Judge McBryde's arbitrary restriction of the allowable length of closing argument itself deprived the defendant of the effective assistance of counsel by literally preventing the defense from persuading the jury that it should entertain a reasonable doubt, on the whole record, of the defendant's guilt on each count.

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. We deal first with the case where the issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating, a case in which there is no claim that the provision at issue is invalid. In such a case, if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws -- in this case, 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.

Cheek, 498 U.S. at 201-02 (emphasis added). A jury would have to listen very carefully (and have an outstanding memory, as it was denied a written copy of the charge) to find in the one sentence quoted from Pomponio the tripartite requirement of Cheek that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." 498 U.S. at 201. As the Court added, "[O]ne 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." Id. at 202.

In the dozen years or more since the Supreme Court decided Cheek, this Court does not appear to have addressed the extent to which that case may require a more informative jury instruction than the simple formula delivered here. For example, in

United States v. Masat, 948 F.2d 923, 931-32 (5th Cir. 1991), soon after the decision in Cheek, this Court held that a willfulness instruction need not tell the jury that the defendant acted with a "bad purpose" or "evil motive." In United States v. Charroux, 3 F.3d 827, 831 (5th Cir. 1993), United States v. Wisenbaker, 14 F.3d 1022, 1025-26 (5th Cir. 1994), and United States v. Townsend, 31 F.3d 262, 267 (5th Cir. 1994), the Court addressed sufficiency arguments about the proof of willfulness under Pomponio and Cheek, but did not consider challenges to the instructions along the lines raised here. In contrast with the elaborate good faith instruction set forth at length (and sustained) in United States v. Barnett, 945 F.2d 1296, 1299 (5th Cir. 1991), for example, the instruction on willfulness delivered by Judge McBryde at appellant Simkanin's trial, in the absence of an instruction on good faith, failed to convey to the jury the unusual and particular meaning given to "willfulness" in criminal tax law.

For this reason, particularly when coupled with the restrictions placed on the presentation of defense evidence as discussed in the following Point of this Brief, Judge McBryde abused his discretion in refusing any instruction on the defense theory of the case -- that Mr. Simkanin acted in the "good faith" belief that his conduct was lawful. For this reason, the Court should reverse all the convictions and remand for further proceedings.

III. THE TRIAL COURT UNFAIRLY RESTRICTED THE PRESENTATION OF EVIDENCE TO CORROBORATE THE DEFENDANT'S ASSERTED GOOD FAITH.

Standard of Review: Rulings on the admission and exclusion of evidence and restricting the scope of witness examination are reviewed for abuse of discretion. United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984). If the rulings impair the defendant's rights to confrontation and compulsory process, and to present a defense, any error is reversible unless harmless beyond a reasonable doubt. Rock v. Arkansas, 483 U.S. 44, 56 (1987); United States v. Davis, 639 F.2d 239, 244-45 (5th Cir. 1981).

Discussion: Throughout the retrial of this case Judge McBryde ruled arbitrarily and unfairly to exclude defense evidence and restrict the scope of direct and cross-examination, all with the effect of hampering the presentation of appellant Simkanin's good faith defense. Reversal of the convictions is therefore required.

The instances of the trial court's unfair conduct are so numerous that space considerations do not permit identification even of most of them in this Brief.[20] The main point is clear, however: if the jury, at the end of the trial, entertained a reasonble doubt whether the defendant acted willfully, that is, with knowledge of his statutory obligations under the tax law, then he was entitled to be acquitted. While Mr. Simkanin was allowed to say, briefly, what he knew, believed, and understood, he was hardly permitted at all to corroborate his sincerity in

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[20] Many, but not all, are referenced in the Statement of Facts.

these assertions by showing that his beliefs about the law were rationally arrived at. Yet it is common sense that it may be hard for jurors to accept the honesty and good faith of an asserted belief which seems to them patently unreasonable. The more corroborated a belief is in published sources, the more widely it is shared by a number of thoughtful people, the better it is documented, the more likely its assertion is to be sincere.

Yet at Mr. Simkanin's trial, question after question and answer after answer were interrupted, cut off, rephrased or disallowed by Judge McBryde. Exhibits that would document not the accuracy but the reasonableness of his beliefs (most of them allowed at the first trial, where the jury could not agree to convict) were disallowed on the basis of "confusion." He could assert what he believed his legal obligation to be, or not to be, but was not permitted to show the jury the statute or regulation that he read to lead him to this conclusion. E.g., TT III, 53-54, 73-74; R.E. 7, at 59.[21] When Mr. Simkanin started testifying in his own defense about his research into

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[21] This restriction was not applied even-handedly. The government was permitted to introduce copies of IRC § 3402 into evidence (twice) as proof that Mr. Simkanin had been shown, and therefore presumably actually "knew" the law with regard to withholding. Yet he was not allowed to explain in his own testimony, beyond a bare and thus unconvincing conclusion, what he thought that very provision said and meant. Even that answer was then cut off by the judge in mid-sentence. R.E. 7, at 59-60. Worse, IRS press releases describing the refusal to withhold taxes from employees as a "scheme" or "scam" were introduced into evidence, during cross-examination of the defendant, on the basis that he had seen them on the IRS website, over objection under Fed.R.Evid. 403 and without any limiting instruction. TT III, at 87.

the tax law, the district court ruled such testimony was not relevant. TT III, at 25-26. Similarly, the district court sustained an objection to the defendant's reading to the jury parts of a Supreme Court opinion that he said he had relied upon in forming his opinion about his duties under the tax code. TT III, at 15-16.

Perhaps 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, R.E. 7, at 103-04, even though the defendant himself had been allowed only to state that belief in one short sentence and not to elaborate upon it or explain. See R.E. 7, at 78-79. Judge McBryde openly explained that he had "made some mistakes in the last trial," and "we're going to try not to make them again." R.E. 7, at 48 (referring to exclusion of Def't Exh. 12).

Under an in limine ruling, R.E. 1 (DE 262), defense counsel was prohibited from even offering documentary corroboration for the defendant's credibility, or asking about the basis for his legal opinions, without first approaching the bench; the government was thus even excused from making timely objections. And when defense counsel occasionally forgot this awkward limitation and actually moved an exhibit without advance permission, that "violation" was treated as a basis to deny admission of the evidence. See TT III, at 48-49.[22]

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[22] Defense counsel was so flustered or perhaps intimidated by

The district court also prohibited the defense from cross-examining government witnesses regarding the legal assertions and conclusions which they had been allowed to advance. Such examination was not for the improper purpose of showing the witnesses' (or the court's) interpretation of the law to be wrong and the defendant's right, but rather for the legitimate and necessary purpose of showing his asserted beliefs to be more likey genuine because not wholly unreasonable. How else could the defense show the jury that there is at least some basis for honest mistakes in deciding whether particular income is subject to withholding? Defense counsel properly argued he was attempting to raise the issue of the reasonableness of the defendant's belief as a way of showing its genuineness. The district court disallowed this, because it might be persuasive to the jury. R.E. 6, at 128-129. The district court also ruled arbitrarily that the questioning went beyond the scope of direct, even though it squarely challenged the expertise and accuracy of the witness's testimony. R.E. 6, at 126, 128.[23]

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this odd ruling, or so it seems, that he never even offered into evidence the reliance letter from CPA Wayne Paul which was a principal point of support for the defense at the first trial.

[23] Agent Cooper had, for example, opined and asserted that in determining the correct amount of tax due with respect to the defendant's claims for refund, the amount of gross income of the employees was irrelevant. TT II, at 132-33. Again, the radically limited scope of cross-examination applied to the defense was not applied even-handedly to the prosecutors' cross-examination of defense witnesses. The credibility and expertise of Attorney Rivera was attacked, over objection, with opinions on other issues he had expressed years later. Yet when the defense asked for a limiting instruction regarding reading from the preliminary injunction that had been entered against him,

When the defense called as witnesses some of the individuals on whose advice Mr. Simkanin had in fact relied, sharp and arbitrary restrictions were placed on their testimony as well. For example, Mr. Banister was allowed to tell what opinions he had relayed to Mr. Simkanin in one-on-one conversation, but not what he had said when giving a lecture which the defendant attended. TT III, at 138. Compare United States v. Barnett, 945 F.2d 1296, 1302 (5th Cir. 1991) (critical to affirmance that defendant was permitted to relay, although not for its truth, what he had heard said at seminars which influenced his beliefs), with United States v. Daly, 756 F.2d 1076, 1083-84 (5th Cir. 1985) (no abuse of discretion to exclude expert of uncertainty in tax law on whose opinion defendant had not actually relied); United States v. Herzog, 632 F.2d at 472-73 (exclusion of expert testimony as irrelevant affirmed where witness did not speak with defendant during pertinent time frame).

Despite having introduced copies of the statute as physical exhibits during direct examination of both Ms. Clemonds and Mr. Kelly, the government successfully objected to the defense utilizing income tax statutes during its cross-examination of Mr. Kelly. TT II, pp. 71-73. The defense was further precluded from asking questions regarding IRC § 3402 -- the statute admitted into evidence on direct -- on the grounds that such

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the district court told defense counsel to raise such matters "at the appropriate time." TT III, at 174. Of course, the appropriate time for a cautionary instruction was at that precise moment.

questions were beyond the scope of the direct examination. TT II, at 74. Where, as here, the trial court fails to apply even-handedly to both parties its analysis of unfair prejudice and confusion versus probative value under Fed.R.Evid. 403, reversal is required. United States v. Lueben, 812 F.2d 179, 184 (5th Cir. 1987).

Charles Phillip Eastman, a "tax compliance officer" with the IRS, testified that the workers were, in "our opinion," employees. R.E. 6, at 164. Yet absolutely no inquiry into the basis for the witness's legal conclusion was permitted -- either as going beyond the scope of direct or because the definition of an employee under the IRC was not to be developed. Id. Mr. Simkanin's asserted beliefs in this regard were at the absolute heart of the case. The restriction was thus not only an abuse of discretion but also unconstitutional. See Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam).

The "delicate balancing required by Rule 403 of the Federal Rules of Evidence" in a case like this, to quote Barnett, 945 F.2d at 1301, must be exercised with attention to the defendant's Sixth Amendment right to a jury trial. United States v. Stafford, 983 F.2d 25, 27 & n.12 (5th Cir. 1993), citing Cheek. In the instant, case (unlike Stafford, for example, id. at 28[24]) not only was documentary corroboration of the defendant's good faith barred but his own testimony was also tightly restricted

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[24] See also United States v. Flitcraft, 803 F.2d 184, 185-86 (5th Cir. 1986) (permissible under Rule 403 to exclude defendant's documents if cumulative of testimony).

and hampered. In that light, admission of the evidence with a limiting instruction would have reflected the proper balancing of interests. See United States v. Whiteside, 810 F.2d 1302, 1310 (5th Cir. 1987).

Admission of the excluded evidence would have supported the defendant's credibility, in his testimony to having acted in good faith. The exclusion could therefore not have been harmless under any test, much less beyond a reasonable doubt. Because Judge McBryde failed to exercise discretion under Rule 403 with a keen attention to fundamental fairness, the convictions must be reversed and remanded.

IV. JUDGE McBRYDE ERRED IN IMPOSING AN UPWARD DEPARTURE WHICH ESSENTIALLY DOUBLED APPELLANT'S SENTENCE.

Standard of Review: Review of the key aspects of the decision to impose an upward departure, over objection, is (for sentences imposed after April 2003) de novo. 18 U.S.C. § 3742(e); United States v. Bell, 371 F.3d 239, 242-43 (5th Cir. 2004) (per curiam). Review of the extent of a valid departure, however, is for abuse of discretion. Id. If the sentencing court fails to include a written statement of reasons in the judgment, then review of all aspects is de novo. United States v. Nichols, 376 F.3d 440, 441 (5th Cir. 2004).

Discussion: Based on the amount of "tax loss," and even with an adjustment for "obstruction of justice," the guideline range in this case would not support a sentence of more than 51 months. Yet Judge McBryde, at the government's behest and over adamant defense objection, imposed a sentence of seven years (84

months) based on an upward departure. Even assuming no Fifth and Sixth Amendment constitutional error (but see point V infra), that departure sentence was unlawful and must be reversed. Because the reasons for the departure, although stated orally at sentencing, are not also "stated with specificity in the written order of judgment," 18 U.S.C. § 3553(c)(2), no departure can be imposed at the resentencing on remand. Nichols, 376 F.3d at 444 n.3, interpreting 18 U.S.C. § 3742(g)-(2)(A).

It is undisputed that Mr. Simkanin had no criminal record, and that his Criminal History Category was therefore I. RE 14, at 47. Judge McBryde nevertheless imposed an upward departure on the horizontal axis of five categories. R.E. 14, at 80. Pursuant to 18 U.S.C. § 3553(c)(2), he stated the reasons for upward departure under id. (b)(1) and USSG § 5K2.0(a)(2)(B) (p.s.), on the record at sentencing as follows:

(1) (a) the defendant has displayed contempt and disrespect for the law of the United States, the State of Texas, and the city of Bedford, and he has further confirmed that contempt in his conduct since his bail was revoked in July 2003;

(b) the defendant, and those who share his views, have a cult-like belief that "the laws" are not applicable to them; the defendant has entrenched himself in antigovernment groups and is part of a movement which questions the power of the government to exercise authority over them;

(c) the defendant and members of his movement believe that the United States and its instrumentalities, including the

federal courts, do not have jurisdiction over them. The defendant's beliefs have in the past caused him to violate the laws. The court is satisfied that he will in the future continue to operate on those beliefs. The defendant's conduct based on his beliefs has ranged from giving up his driver's license yet continuing to drive, to threatening to kill federal judges, to his failure to comply with the tax laws. R.E. 14, at 78-79.

(2) As provided in USSG § 4A1.3(a)(1), "based on the defendant's radical beliefs relative to the laws of the United States, it is likely that he will commit future tax-related crimes." R.E. 14, at 79.

The first reason that the upward departure must be reversed is a purely procedural one. As already noted, the 2003 PROTECT Act amendments to § 3553 require that the court not only state its "specific reason for the imposition of a" departure sentence "in open court" "at the time of sentencing," but also state those reasons "with specificity in the written order of judgment and commitment ...." 18 U.S.C. § 3553(c)(2) (as amended, 2003). Here, the written order of judgment does not contain any statement of reasons. See R.E. 15. Following the judge's signature, a statement appears that "The 'Statement of Reasons' and personal information about the defendant are set forth on the attachment to this judgment." R.E. 15, at 6. But no such

Statement appears anywhere in the Record,[25] and in any event something "attach[ed] to" the judgment is not, by definition, something which is "in" the judgment. By not including that Statement (if it exists) "in" the judgment and thus in the record, the district court has deprived both this Court and appellant's counsel of any opportunity to examine the Statement to determine what those reasons are, whether they meet the specificity requirement, and whether they justify the departure under the standards of 18 U.S.C. § 3742(f)(2).

Reading § 3742(e)(3)(A) and (f)(2)(A) together, it appears that the district court's failure to include a written statement of reasons in the judgment is itself grounds for automatic reversal of the sentence, which is ipso facto thereby deemed to be "too high." Even if reversal is not automatic, but the absence of a written statement in the record merely results in across-the-board de novo review (as suggested in Nichols), reversal should result here because the sentence is objectively "too high." The offenses for which Mr. Simkanin was convicted are nonviolent property offenses against the government. They were committed openly, even defiantly, and were thus easy to detect and relatively easy to prove. One of the factors considered, Mr. Simkanin's alleged "contempt" for authority and so-called "threats" to kill a judge were the basis for his

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[25] Nor is the "Statement of Reasons" something automatically added to or made part of the appellate record under 18 U.S.C. § 3742(d), as is the presentence investigation report.

"obstruction of justice" enhancement and therefore could not justify any upward departure at all.

The rest of the "reasons" given orally have to do with his beliefs and associations, which obviously demand the strictest scrutiny before the First Amendment will tolerate their consideration as grounds to double a sentence. After all, "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993). Yet "beliefs" were explicitly made the centerpiece of Judge McBryde's rationale for increasing Mr. Simkanin's sentence. Even unprotected conduct, when interconnected with First Amendment activity, requires a highly cautious approach. See McDonald v. Smith, 472 U.S. 479 (1985) (malice and absence of good faith necessary to destroy First Amendment privilege with respect to defamatory letter sent to public official); Watts v. United States, 394 U.S. 705 (1969) (per curiam) (strict construction of "threat" required in political context, to avoid First Amendment issues); Noto v. United States, 367 U.S. 290, 297-98, 299-300 (1961); cf. 28 U.S.C. § 994(d) (Sentencing Commission's policy statements, such as § 4A1.3 and § 5K2.0, must be "entirely neutral as to" a defendant's "creed"). Under our Constitution, a person's opinions, including "radical beliefs" in opposition to government authority, simply cannot justify increased criminal punishment. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

For lack of a written statement of reasons in the judgment, and because the sentence is "too high" for the offenses

committed, a reversal and remand of the sentence is required.

Even assuming that the Statement of Reasons is procedurally valid, the upward departure must be reversed. None of the reasons given orally justifies a departure, much less an upward departure of the degree imposed. But see United States v. Andrews, 390 F.3d 840, 850 (5th Cir. 2004) (open question whether oral statements explaining departure may be considered on appeal after PROTECT Act). First, assuming that the first set of reasons really stands independently of the § 4A1.3 rationale, these explanations are unjustifiable. Surely a defendant's "contempt and disrespect for the law" does not distinguish him significantly from the heartland of those convicted of crimes. Denial of any adjustment for acceptance of responsibility fully takes this factor into account. See Andrews, 390 F.3d at 847-48.

Similarly, Judge McBryde's inference that Mr. Simkanin 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. See Dawson v. Delaware, 503 U.S. 159 (1992) (membership in violent, racist prison gang is not aggravating circumstances for death penalty); Fuller v. Johnson, 114 F.3d 491, 497-98 (5th Cir. 1997) (under Dawson, associational evidence is relevant to sentencing only upon concrete logical connection to future dangerousness). Under the First Amendment, an intent to commit future crimes cannot be inferred from bare association or membership. Where the defendant's conduct involves a mixture of alleged crime and

protected First Amendment activity, the Court must review questions of intent "strictissimi juris" (by the strictest standard known to the law). United States v. Dellinger, 472 F.2d 340, 392 (7th Cir. 1972), quoting Noto v. United States, 367 U.S. 290, 299-300 (1961). In any event, the Commission has determined that a defendant's "creed" is simply "not relevant" to sentencing. USSG § 5H1.10.[26] Departure on this ground was thus "prohibited." See Andrews, 390 F.3d at 848.

As for the judge's "second" reason, invoking § 4A1.3, the basis to infer future criminality was unpersuasive. There was no evidence here of a pattern of past criminality which had somehow gone undetected, or of past violations of the law which were not technically criminal. Rather, Judge McBryde simply took it upon himself to guess that Mr. Simkanin would not be deterred or reformed by four years' imprisonment and would instead require seven to achieve the lawful purposes of sentencing. Even trained mental health professionals, making such predictions based on scientific examinations and their study of others' research, are not in agreement that such predictions are reliable. See generally Flores v. Johnson, 210 F.3d 456, 462-68 (5th Cir. 2000) (per curiam) (Garza, J., concurring specially). The judgment that Mr. Simkanin's Category I criminal history understated his risk of future criminality in this case was thus arbitrary, not reasoned.

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[26] Unlike other provisions of Chapter 5, this section is an absolute rule, not a mere policy statement.

In any event, the notion that the appropriate degree of departure, if any were warranted, would be to the equivalent of Category VI, went completely unexplained by the court below. (Assuming that the first group of reasons was intended to explain a conventional, vertical departure, then the extent of departure here was some six levels upward.[27]) To put Mr. Simkanin in that category is, in effect, to say his future prospects are like those of a four-time felon who had been to prison repeatedly without reforming his behavior. This Court requires that a sentencing judge either expressly or implicitly explain, when departing under § 4A1.3, "why a sentence commensurate with a bypassed criminal history category was not selected." United States v. Lambert, 984 F.2d 658, 663 (5th Cir. 1993) (en banc). This record, however, affords no clue why Category III, for example, or any other, was deemed either insufficient or not analogous.

The failure to include a specific written statement of reasons in the judgment itself requires reversal. Moreover, the conclusion that Mr. Simkanin's beliefs and associations created the equivalency of the highest possible criminal history category, or creates an aggravated offense seriousness equivalent to a Level 28 rather than a Level 22 crime, has no basis in Judge McBryde's reasoning. It must be reversed for that reason

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[27] The only explanation the judge offered for this was that "an 84-month sentence based on the reasons I've given would be appropriate to satisfy the objectives of the sentencing statute." R.E. 14, at 79. This, of course, is no reason at all.

as well. In addition, because at least one of the reasons given for the departure is invalid, a reversal and remand is also required. Andrews, 390 F.3d at 850. On remand, the district court must impose a sentence no higher than the top of the correctly calculated guideline range. Under the PROTECT Act, no departure is permitted on remand except for a reason previously given in writing, 18 U.S.C. § 3742(g)(2), and then only if specifically "held" by this Court, in remanding, to be "a permissible ground" of departure.[28] Since no such holding is jurisprudentially possible in this appeal, on remand a sentence no more severe than the applicable guideline range must be imposed instead.

V. AN UPWARD DEPARTURE SENTENCE, SUCH AS THAT IMPOSED IN THIS CASE, IS UNCONSTITUTIONAL UNDER RECENT SUPREME COURT CASE LAW.

Standard and Scope of Review: Constitutional error in determining the maximum allowable sentence is reversible unless harmless beyond a reasonable doubt. When the issue was not raised below, review is for plain error. United States v. Cotton, 535 U.S. 625 (2002); United States v. Castillo, 386 F.3d 632, 634-38 (5th Cir. 2004); United States v. Solis, 299 F.3d 420, 449 (5th Cir. 2002).

Discussion: Appellant Richard Simkanin was sentenced to serve 84 months' (seven years') imprisonment based on an upward departure from a guideline range which the district court calcu-

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[28] This Court should also consider, in remanding for resentencing, whether in light of the entire record reassignment of the case to a different district judge would not better serve the interests of justice. See Andrews, 390 F.3d at 851.

lated as 41-51 months. The sentence was calculated like this: Base offense level 20 (USSG § 2T4.1(H) ($400,000 to $1 million in "tax loss"), +2 levels for obstruction of justice under USSG § 3C1.1 (based on supposed false testimony at the bail hearing). Judge McBryde added a five-category upward departure, to the equivalent of Category VI, for "understatement of criminal history score." See USSG § 4A1.3 (p.s.). This sentence was unconstitutional under the Fifth and Sixth Amendments, as recently construed by the Supreme Court. A remand for resentencing is therefore the least relief to which Mr. Simkanin is entitled on this appeal.

Under 18 U.S.C. § 3553(b)(1), a sentence cannot exceed the top of the guideline range unless *the judge* makes additional findings to justify a "departure." The top of each guideline range -- or at least the top of the properly calculated range -- is thus a "statutory maximum" as defined in Blakely v. Washington, 542 U.S. --, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). See also Apprendi v. New Jersey, 530 U.S. 466 (2000), as elaborated in Ring v. Arizona, 536 U.S. 584 (2002). It follows that the Sentencing Reform Act's authorization for upward departures is facially unconstitutional in this and all cases, regardless of whether the guidelines themselves survive Blakely analysis in the pending cases of United States v. Fanfan, 2004 WL 1723114 (D.Me., June 28, 2004), cert. granted, No. 04-105, and United States v. Booker, 375 F.3d 508 (7th Cir. 2004), cert. granted, No. 04-104.

Moreover, the upward adjustment for "obstruction of justice" was also error under Blakely, or so appellant believes the Supreme Court will decide in Booker and Fanfan. The superseding indictment did not charge Mr. Simkanin with obstructing justice at his bail hearing, and the jury never considered that accusation. The defendant disputed the judge's interpretation and findings; a jury applying the reasonable doubt standard might have come to a different conclusion. For these reasons, the two-level adjustment was also unlawful.

The defendant did not make this objection at sentencing. Nevertheless, appellant expects the Apprendi/Blakely error in his sentence to become obvious by the time his appeal is decided. See Johnson v. United States, 520 U.S. 461, 466-67 (1997) (whether error is "plain" under Fed.R.Crim.P. 52(b) is determined as of date of appellate decision). Compare United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004) (pre-Booker/Fanfan law does not call for application of Blakely to federal guidelines sentencing); cf. United States v. Kaczher, 2004 WL 2617978 (5th Cir., Nov. 18, 2004) (per curiam) (non-precedential)[29] (mistakenly accepting concession that Blakely challenge to upward departure is analytically indistinguishable from challenge to Guideline calculation, and thus governed by Pineiro).

The error affected Mr. Simkanin's substantial rights, because it was not harmless beyond a reasonable doubt. Had a

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[29] A copy of this opinion is attached pursuant to Loc.R. 47.5.4.

reasonable doubt standard been applied, it is certainly debatable whether a jury would have found that Mr. Simkanin's risk of recidivism -- on account of his deeply held political beliefs, as Judge McBryde viewed and interpreted them -- was equivalent to that of a career criminal, or of a defendant with more than four prior felony sentences of imprisonment (the typical Category VI offender). The Court should therefore exercise its power under Rule 52(b) to notice this plain error.

The inflation by five of Mr. Simkanin's criminal history category more than doubled his sentence, adding four years or more to the term of imprisonment. A sentence calculated from a range exceeding the "statutory maximum" under Blakely created a miscarriage of justice -- an unnecessarily extended sentence of imprisonment for a stable, 60-year-old, businessman and engineer with no record of criminality or violence based expressly upon his disfavored expression of dissident political opinion. As Judge Farris wrote, even while dissenting from the reversal of a conviction of two "tax protesters" on right-to-counsel grounds:

> Unfortunately, these defendants have been labeled by some as 'tax protesters.' That label has no use in a court of law. America was built by 'protesters.' Their input should always be considered. It is legitimate for a court on appeal to be concerned about those rare instances when those who are identified as 'protesters' (of any sort) are given less than their due at trial.

United States v. Wadsworth, 830 F.2d 1500, 1511 (9th Cir. 1987) (dissenting opinion). Judge Farris's view is more consonant

with recent Congressional command[30] and the First Amendment than was Judge McBryde's justification for doubling Mr. Simkanin's punishment.

Other jurists might well conclude that a sentence of about four years (that is, consistent with the 41-51 month range) was "sufficient but not greater than necessary," 18 U.S.C. § 3553(a). A public perception that illegal sentences can be upheld based on a defendant's political views would surely affect the fairness and public reputation of the proceedings. See United States v. Cotton, 535 U.S. 625 (2002); United States v. Reyna, 358 F.3d 344, 352-53 (5th Cir. 2004) (en banc) (discussing this component of plain error rule). In this way, all the aspects of a plain error showing are presented. Reversal and a remand for resentencing are therefore required.

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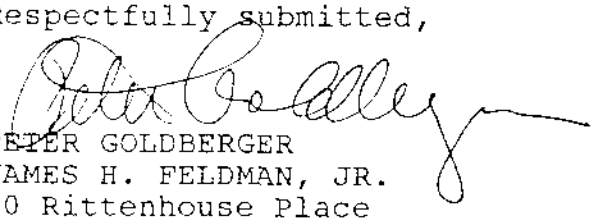
[30] In 1998, Congress enacted the "Taxpayer Bill of Rights III" as Title III of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, 105th Cong., 2d Sess., 112 Stat. 685. Part of that Bill, effective July 22, 1998, was to prohibit the "officers and employees of the Internal Revenue Service" from "designat[ing] taxpayers as illegal tax protesters (or any similar designation) ...." Id. § 3707(a).

CONCLUSION

For any or all of the various reasons discussed above, the judgment of conviction and sentence must be reversed, and the case remanded for dismissal, a new trial, or a resentencing.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

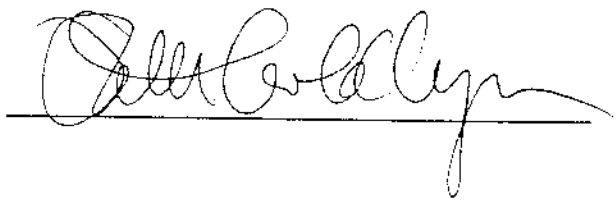
Pursuant to Fed.R.App.P. 32(a)(7)(C) and 5th Cir. R. 32.2.7(c), I certify, based on the word-counting function of my word processing system (XyWrite vers. 4.07), that this brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) and 5th Cir. R. 32.2.7(b):

1. Exclusive of the exempted portions specified in 5th Cir. R. 32.2.7(b)(3), the brief contains fewer than 14,000 words, to wit, 13,938 words; and

2. The brief has been prepared in a monospaced format using Courier type, with ten characters per inch, used for both text and footnotes.

3. A verbatim, PDF copy of the brief is being provided on disk with the printed originals of the brief.

4. I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.



Briefs and Other Related Documents

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United States Court of Appeals.
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee.
v.
Sherri Ann KAETHER, Defendant-Appellant.

No. 04-10396.
Summary Calendar.

Decided Nov. 18, 2004.

Floyd Clardy, U.S. Attorney's Office, Dallas, TX, for Plaintiff-Appellee.

Peter Michael Fleury, Assistant Federal Public Defender, Federal Public Defender's Office, Fort Worth, TX, for Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:03-CR-251-I-A.

Before JOLLY, HIGGINBOTHAM, and WIENER, Circuit Judges.

PER CURIAM: [FN*]

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

*1 Sherri Ann Kaether appeals her upward departure sentence for unlawful possession of stolen mail. Kaether contends that the "non-serious" nature of her prior conviction for possession of stolen mail was insufficient to warrant an upward departure and that her commission of the same offense within a five-year period failed to render her criminal record "atypically egregious." Based on the Sentencing Guidelines' allowance for upward departures based upon prior similar adult conduct that did not result in a criminal conviction, [FN1] Kaether draws the negative inference that there is no basis for a departure if the prior similar adult conduct did result in a conviction. Kaether also argues that, because the guidelines assess additional criminal history points for defendants who commit offenses while on supervised release and/or within two years of their release from confinement, it necessarily follows that increased punishment is not intended for a defendant who, like Kaether, commits a new offense beyond two years from release from incarceration and after completion of a prior term of supervised release.

FN1. U.S. Sentencing Guidelines Manual § 4A1.3(a)(2)(E) (2003).

With respect to the extent of the departure, Kaether argues that the district court failed to explain why intervening criminal history categories V and VI under-represented Kaether's risk of recidivism. Kaether also contends that the district court failed to distinguish her criminal record as more serious than those of defendants falling within the intervening criminal history categories.

The district court's decision to depart upward was warranted since it was based on Kaether's likelihood to recidivate. [FN2] In addition, the district court's departure did not constitute an abuse of discretion, and was adequately explained and justified by the court. [FN3]

FN2. *See United States v. Bell*, 371 F.3d 239, 243 (5th Cir.2004) (exercising *de novo* review over district court's decision to depart); *United States v. McDowell*, 109 F.3d 214, 218 (5th Cir.1997) ("We find no clear error in the district court's conclusion that the likelihood of recidivism, in the light of McDowell's prior conduct, warranted an upward departure from the guidelines."); *United States v. De Luna-Trujillo*, 868 F.2d 122, 125 (5th Cir.1989) (" '[P]rior similar adult criminal conduct' may indicate the seriousness of the past crime and the possibility of future crimes whether or not it

has resulted in conviction." (alteration in original)).

FN3. *See Bell*, 371 F.3d at 243; *United States v. Lambert*, 984 F.2d 658, 663 (5th Cir.1993) (en banc) ("We do not ... require 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.").

For the first time on appeal, Kaether cites to *Blakely v. Washington* [FN4] and asserts that the district court's upward departure violated her Sixth Amendment rights since it was based upon findings that were neither charged in the indictment nor found by a jury beyond a reasonable doubt. Kaether correctly concedes that this argument is foreclosed by our decision in *United States v. Pineiro*. [FN5]

FN4. 124 S.Ct. 2531 (2004).

FN5. 377 F.3d 464, 473 (5th Cir.2004), *pet. for cert. filed* (U.S. July 14, 2004, No. 03-30437).

AFFIRMED.

2004 WL 2617978 (5th Cir.(Tex.))

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CERTIFICATE OF SERVICE

On December 31, 2004, I served two copies of the foregoing Brief for Appellant and a copy of the Record Excerpts upon the attorneys for the appellee, the United States, by Federal Express, second day service, postage prepaid, addressed as follows:

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