

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 1:02-CR-57

William Wallace Lear,

Hon. Gordon J. Quist
District Court Judge

Defendant.

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**MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO VACATE AND SET ASIDE JUDGMENT**

FOR LACK OF JURISDICTION

AND FOR

**FAILURE TO STATE A CRIMINAL OFFENSE
IN NATURE OF HABEAS CORPUS**

This Motion is filed pursuant to statutory provisions of 28 USC §2255 for habeas corpus and FRCrP 12(b)(2) that authorizes a challenge to jurisdiction/for failure to state an offense to be noticed at any time.

The defendant is federal prisoner number 10875-040 at FPC Duluth, Minnesota prison, sentenced by this court to 12 months incarceration on each of Counts One and Two, to be served concurrently, on January 26, 2003.

The court will take judicial notice that the indictment claims the defendant violated Title 26, United State Code, Section 7203 by reason that he had gross income of \$73,719 for 1995 and \$111,746 for 1996 and that he did willfully fail to make a tax return “as required by law.” There is no other statute from Title 26 mentioned in the indictment.

The court will also notice that §7203 is an administrative procedure in Subtitle F, PROCEDURE AND ADMINISTRATION that is applicable to all 80 or so taxes the IRS collects. It does not identify what tax is being enforced.

There is no statute/law cited that imposes any type of legal responsibility on the defendant. The only law cited (§7203) is that the IRS/DOJ is empowered to prosecute and punish individuals who willfully refuse to pay any taxes legally collected by the IRS. This premise is not challenged.

It appears from a generous reading of the indictment that an income tax has been pursued. The adjective ‘income’ is found before the noun ‘tax.’ Is the defendant supposed to make some legal assumption from that phrase? Defendants cannot be required to make legal assumptions from criminal process.

Does the term ‘gross income’ impose some legal responsibility? If so, the indictment does not identify it. An indictment is required to identify any legal duty allegedly violated by the offender.

In brief, the indictment does not charge the defendant with being legally responsible for any tax. This position has been obliquely observed in recent adjudication that might be best to review.

In *US v Moore*, 692 F2d 95, pro se Moore suggested IRC §7203 was unconstitutionally vague and additionally failed to specify who has to pay an income tax. The trial court prevented such arguments from being made to the jury and the appellate court declared IRC §1 and §6012(a) made the defendants responsible for the income tax.

In three appeals by the same lawyer from tax court, the court in *Lively v CIR*, 705 F2d 1017 declared a claim of “no law imposing an income tax on (Lively)” was without merit while in *Ficalaro v CIR*, 751 F2d 85 and *Charczuk v CIR*, 771 F2d 471 the court declared §§1 and 61

made the taxpayers liable for the income tax. Since all three citizens had petitioned tax court,

there was no indictment served nor did the 'taxpayer' have standing to challenge the legality of the income tax. A petitioner to tax court cannot make such a challenge. To file a petition in non judicial tax court inherently assumes jurisdiction of the legislative Article I 'court' (not an Article III judicial court) and the legal position of a taxpayer. This is the Roman civil law procedure that is applicable in administrative tax court. To challenge liability for the income tax in appellate court after acquiescence to the status of taxpayer in tax court is an absurd appeal that justified personal sanctions on the lawyer. It might be in the public interest to revoke his license. Legal conclusions of the tax court are declared to be reviewed denova while factual findings are upheld unless they are 'clearly erroneous', but the tax court will not make any legal conclusions regarding the constitutionality of the income tax.

In *Stelly v CIR*, 761 F2d 1113, the court declared §61(a) made the defendant responsible for the income tax.

In *US v Pederson*, 784 F2d 1462 (1986), the court declared liability was imposed by §§1 and 6012.

In *US v Bowers*, 920 F2d 220, the court declared IRC §6012 requires payment of taxes.

This list is not exhaustive. District and circuit courts have in other published and in unpublished opinions denied motions during trial and by habeas corpus that challenge the adequacy of the indictment, and occasionally offer their favorite statute which the court claims to impose liability. There is no known opinion that attempts to address the Supreme Court holdings and conclusions that are presented in this Motion.

While not holding on this court, we can observe the Treasury Department has recently suggested several statutes impose liability on the taxpayer. At website http://treas.gov/irs/ci/tax_fraud/docnonfilers.htm, we find: "The Truth: The tax law is found in Title 26 of the United States Code. The requirement to file an income tax return is not voluntary and it is clearly set forth in the Internal Revenue Code (IRC) Sections 6011(a), 6012(a), et seq., and 6072(a)." id 7-8. {Earlier editions were at page 4} At IRS website http://www.irs.gov/pub/irs-utl/friv_tax.pdf, the publication THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS, subsection B. Contention: Payment of Tax is Voluntary declares "the requirement to pay taxes is not voluntary and is clearly set forth in section 1 of the Internal Revenue Code, which imposes a tax ..." on page 4 of 32. The same article is also found at website

http://www.ustreas.gov/irs/ci/tax_fraud/frivolous.pdf .

It can additionally be shown that the Congressional Research Report titled FREQUENTLY ASKED QUESTIONS CONCERNING THE FEDERAL INCOME TAX prepared for members of Congress declares IRC §§1, 61, 63, 6012 and 6151 "working together, make an individual liable for income taxes." Page numbers vary in different publication dates.

Since different statutes are claimed by various sources to impose legal responsibility, is there any justifiable reason why legal liability was not declared in the indictment? Of more importance, is the indictment in this case, which does not include a statute declaring legal responsibility for a tax, consistent with fundamental requirements of due process as established by the Supreme Court to confer jurisdiction upon this court?

The inescapable conclusion is that various sources recognize the requirement that legal responsibility for a tax must be made by statute, and they all offer their favorite statute as the authority. It is a violation of due process if a taxpayer has to guess what law makes him responsible for a tax. "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v General Construction Co.*, 269 US 385, 391 (1926). But the quotation almost misses the real point. We are not addressing a vague statute. There is no 'statute which requires the doing of an act' averred in the instant indictment, and that "violates the first essential of due process of law."

It is manifestly obvious the defendant cannot violate IRC §7203. The section reads: "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof ..." *emphasis added*. The requirement is clearly outside §7203; the defendant cannot violate §7203. If the defendant is required "under/by this title", then the punishment of §7203 can be pursued by the prosecutor. §7203 is statutory authorization to prosecute putative taxpayers. What law "under/by this title" requiring the payment of a tax and making the defendant into a 'taxpayer' has been violated? The indictment has no answer. Concurrence that legal responsibility is acknowledged to be outside §7203 is evidenced in the circuit court opinions, Congressional Report, and government websites listed above.

Federal Rules of Criminal Procedure 7(c)(1) requires the indictment to "state for each count the

official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.” The notification of legal responsibility "or other provision of law which the defendant is alleged therein to have violated" is not found in the indictment. Criminal process must allege every essential element of the offense. *Evans v US*, 153 US 584; *Hagner v US*, 285 US 427; *Hamling v US*, 418 US 87. Notification of legal responsibility is "the first essential of due process of law." *Connally v General Construction Co.*, 269 US 385, 391 (1926).

"Law is something more than mere will exerted as an act of power...Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law...the limitations imposed by our constitutional law upon the action of the governments...are essential to the preservation of public and private rights...the enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities... against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." *Hurtado v California*, 110 US 516, 536 (1884).

The phrase “as required by law” within the indictment is a conclusion of law that is unacceptable in criminal process. In *Boyd v US*, 116 US 616 (1886), the court observed the succinct statement by Lord Camden: "If it is law, it will be found in the books; if it is not to be found there, it is not law." *id* 627. "(A)s required by law" in the indictment is an implicit acknowledgment that responsibility for an income tax is not within §7203. All the IRS must do is cite their favorite statute.

Without a statutory claim that the defendant is legally responsible for paying a tax, the defendant has not been charged with the performance of a legal duty. If he is not charged with violating a legal duty, no crime has been alleged. If no crime is alleged, there is no case. If there is no case, there is nothing for this court to have jurisdiction over. The above steps are the fundamental requirements of due process. If due process is not followed, the court does not have jurisdiction. "A judgment rendered in violation of due process is void." *World Wide Volkswagen v Woodsen*, 444 US 286, 291 (1980); *National Bank v Wiley*, 195 US 257 (1904); *Pennoyer v Neff*, 95 US 714 (1878).

“(T)he record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court; otherwise, the judgment will be erroneous.” *Crain v US*, 162 US 625, 645.

Due process requires the government to affirmatively evidence their authority to tax:

"...jurisdiction of the Courts of the United States means a law providing in terms of revenue; that is to say, a law which is directly traceable to the power granted to Congress by §8, Article I, of the Constitution, 'to lay and collect taxes, duties, imposts, and excises.'" US v Hill, 123 US 681, 686 (1887). US v Hill, read simply, declares the court does not have jurisdiction unless the law cited in the indictment reflects a constitutional authorization. In the instant case, there is no law cited that claims to impose statutory responsibility on the defendant, which is far less than the required averment of constitutional authorization.

The Supreme Court, in reversing a conviction, stated: "It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process." Vachon v New Hampshire, 414 US 478 (1973). The instant application is not to mere evidence as in the Vachon case; it is to accusing the defendant of violating a law, and that accusation is never made. It is inconceivable that there is a more 'crucial element of the offense.' Without a claim of a lawful duty being violated, there is no offense; the requirement for evidence is superfluous.

The Supreme Court again reversed a conviction of a crime that was not charged in the indictment. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. If, as the State Supreme Court held, petitioners were charged with a violation of §1 [and convicted of §2], it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Cole v Arkansas, 333 US 196, 201 (1947), citations omitted.

The present situation is not of charging the defendant under one statute and convicting him under another as in the Cole case; it is a situation of convicting him under an unidentified statute---of "a charge that was never made." The IRS has not charged the defendant with being legally responsible for an income tax. The present situation is precisely the example envisioned by the court as a most

egregious violation of due process. Defendant must be given adequate notice of the offense charged against him and for which he is to be tried. *Smith v O'Grady*, 312 US 329 (1941).

"Conviction upon a charge not made would be sheer denial of due process." *De Jonge v Oregon*, 299 US 353, 362. (1937).

Would the lack of a statute averring legal liability constitute harmless error? Again, let the Supreme Court address the issue. In *Smith v US*, 360 US 1, the court held the Fifth Amendment right to an indictment for a capital offense, as restated in Federal Rule of Criminal Procedure 7(a), could not be waived by the defendant and that a proceeding in violation of this constitutional requirement negated the jurisdiction of the court. (The Supreme Court could not have returned the case for a new trial if jeopardy had attached in the first trial.) The constitutional right to be left alone unless charged with violating a law (the essence of due process) is no less a constitutional right than being indicted for an infamous crime. The Magna Carta's declaration of protection by "law of the land" (the historic origin of due process) arguably predates the origin of the indictment.

While all legal theory and case history given herein focus on the absence of a law within the indictment, a reflection on the history of the Magna Carta's protection in the frame of the instant application underscores why the safeguard was demanded by the Barons so many years ago. Without a requirement that the law be cited to justify the King's seizure of the peasant's goodies, there can be no meaningful defense to arbitrary confiscation under color of law. If there is no law requiring an affirmative declaration of the law imposing the tax, the dispossessed must carry the burden of proof to show the theft is illegal; i.e., that the seizure cannot be justified under some unidentified law. This reversal of our traditional placement of the burden of proof is impossible to overcome; a negative cannot be proven. It is a violation of due process to require a defendant to prove exclusion from a tax. *Unitarian Church v Los Angeles*, 357 US 545. The burden of proof must be on the party levying the tax to comply with due process. *Speiser v Randall*, 357 US 513, 529 (1958).

The court has said it very well: "It is not permissible to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." *Tot v US*, 319 US 463, 469. Applied in the instant case, it could be read: The acknowledgment that the IRS collects taxes cannot be automatically converted into indisputable proof that anyone accused by the IRS is inherently legally responsible for an unidentified tax.

To be denied the opportunity to present a defense to a (supposed) criminal charge is a reversion to the barbaric days of the Salem (and continental) witch trials and the Inquisitions. The IRS has a lengthy and consistent track record of refusing to declare in court documents and in testimony, in correspondence to private citizens, and to members of congress, a law that imposes an income tax and exposing it to a challenge in court while carrying the burden of proof as required by due process. "...notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused..." *Cole v Arkansas*, id 201, emphasis added. In reflecting on Star Chamber proceedings, the Supreme Court quoted J. Stephen: "There is something specially repugnant to justice in using rules of practice in such a manner as to (prevent a defendant) from defending himself, especially when the professed object of the rules so used is to provide for his defense." *Faretta v. California*, 422 U.S. 806, 822-823 (1975). The object in the instant procedure of the IRS "to prevent a defendant from defending himself " may be even less meritorious: to expedite the confiscation of revenue.

The ultimate question before this court is whether 800 years advancement of civilized jurisprudence must yield to the whim of the IRS for expedited extortion of revenue under color of law. We cannot use the phrase "collection of taxes" until the citizen is confronted with a statutory duty to pay a tax and an opportunity to challenge that contention.

"If this requirement of the (Bill of Rights) is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus." *Johnson v Zerbst*, 304 US 458, 468 (1938). Since the indictment failed to state an offense and a crime has not been charged, the judgment must be vacated and set aside. *US v Osiemi*, 980 F2d 344 (1993). A challenge to the jurisdiction of the court is not waived by failure to raise the issue in trial court or on direct appeal. id 345. Nor is the challenge waived by lack of an appeal. *FRCrP 12(b)(2)*. Even the IRS is required to conform their prosecutions to actions that are clearly defined in the statutes or face dismissal of indictments. *US v Carroll*, 345 US 457 (1953).

Habeas corpus will lie where no offense has been committed. *Strauss v US*, 516 F2d 980; *Martency v US*, 216 F2d 760; *Robinson v US*, 313 F2d 817; *Roberts v US*, 331 F2d 502; *Martyn v US*, 176 F2d 609. An indictment that does not charge an offense can be discharged by habeas corpus. *Roberts v Hunter*, 140 F2d 38; *Brock v Hudspeth*, 111 F2d 447; *White v Levine*, 40 F2d

502. Lack of a valid indictment is cause for release by habeas corpus. Ex parte Bain, 121 US 1; Ex parte Wilson, 114 US 417.

April 25, 2003

Rose A. Aleszka - Lear