UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 10-1726

PETER E. HENDRICKSON

Defendant-Appellant,

v.

UNITED STATES OF AMERICA

Plaintiff-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN (ROSEN, G.)

APPELLANT'S SUPPLEMENTAL BRIEF

Peter E. Hendrickson
appearing in propia persona

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

I respectfully request oral argument.

JURISDICTIONAL STATEMENT

I appeal the verdict of the U.S. District Court, Eastern District of Michigan in *U.S. v. Hendrickson*, Case No. 08-20585 and Judge Rosen's post-trial sentencing enhancement. The District Court exercised original jurisdiction under Title 18, §3231, based on the U.S. Department of Justice's allegation that I violated a law of the United States. Specifically, the U.S. alleges that I violated Title 26, Section 7206. This Court has appellate jurisdiction of the District Court's verdict and decisions pursuant to 28 U.S.C. §§1291 and 1294(1). Final judgment was entered on May 25, 2010 (RE#101) and the Notice of Appeal was filed on May 31, 2010 (RE#104).

STATEMENT OF THE ISSUES

This case raises the following issues in addition to, and expansion of, those listed in Appellant's Brief filed with the court on September 1, 2010:

1. Whether the indictment failed to state an offense, and whether Judge Rosen erred when he failed to dismiss the indictment on this ground upon my motion.

2. Whether Judge Rosen erred when he sustained the case after a confrontation clause violation and complete evidentiary failure as to the offense element of "falseness" and then directed a conviction as to that element.

3. Whether Judge Rosen erred when he sustained the case after a confrontation clause violation and complete evidentiary failure as to the element of "materiality" and then directed a conviction on this element.

4. Whether Judge Rosen erred when he failed to charge the jury with the defense theory of the case, and acted to prevent the jury from understanding and considering the defense theory.

5. Whether Judge Rosen erred when he allowed the admission of more than 700 pages of testimonial documents unsupported by any witness, and in instructing the jury that these documents contained official conclusions that my filings are false.

6. Whether Judge Rosen erred when he prejudicially questioned me from the bench, suggested that I bore the burden of proof, and then refused a jury request to examine authorities I cited in support of my theory of the case.

7. Whether Judge Rosen erred when he refused to give a *Cheek* instruction as to "reasonableness" while giving other instructions making my positions appear unreasonable, denying the jury access to the statutory language on which my positions are based, and after questioning me from the bench in a manner calculated to suggest that my positions are "unreasonable."

8. Whether Judge Rosen erred when he refused to grant my motions to dismiss the indictment a) as a bad-faith persecution of an inconvenient legal

scholar, who the government knows has committed no crime, but wishes to silence; b) because the charges are brought for the corrupt purpose of punishing me for refusing to endorse a government claim to my property; and c) because I am not among the "persons" under a statutory duty to whom the charged offense properly applies.

9. Whether Judge Rosen erred when he enhanced the sentence imposed on me based on a spurious "obstruction" allegation and a rule-violating adoption of prosecutors' assertions regarding "tax loss."

10. Whether Judge Rosen violated my right to a speedy trial, and to relief for unwarranted delays, by declaring "retroactive" and unilateral exclusions.

STATEMENT OF THE CASE

The elements of the Statement of the Case are set forth in the Appellant's Brief filed in this Court on September 1, 2010 and are incorporated by reference herein.

STANDARDS OF REVIEW

Sufficiency of an Indictment

The sufficiency of an indictment is reviewed *de novo*. *U.S. v. DeZarn*, 157 F.3d 1042, 1046 (6th Cir. 1998).

Elements of Proof

It was the prosecutor's burden to prove a) I had received "wages" subject to reporting requirements in approximately the amounts alleged during each year charged; b) that I had made and subscribed specified documents containing inaccurate reports to the contrary; c) that allegedly inaccurate reports of "wage" receipts made on each document were material to a determination of whether I owed a tax for the years involved; and d) that I made and subscribed these documents containing allegedly false reports as to material matters willfully – that is, in intentional violation of a known legal duty. U.S. Department of Justice, Tax Division, *Criminal Tax Manual 2008*, §12.05; United States Supreme Court in *U.S. v. Bishop*, 412 U.S. 346 (1973).

Presumptions in a Criminal Case

Because I had contemporaneously rebutted every presumption relevant to allegations that I had received "wages" when they were made each year through my testimony on the forms I filed in response to those allegations; and because I declared myself not guilty of the offenses charged, the government was and is entitled to the benefit of NO presumptions. On the contrary, as the defendant, I am entitled to the benefit of having all presumptions operate in my favor.

This means, for instance, that withholding applied to my earnings, which was done without my authorization, and over my objection (see Government

Exhibits 42 and 43 and page 51 from Exhibit 7), must be presumed to have been done in error, due to a misunderstanding of the withholder as to the legal status of my earnings and/or the proper application of withholding. No testimony was presented on this matter in trial despite the government having every opportunity to question those responsible for the withholding, had it felt that doing so would help, rather than harm, its case. No testimony was presented in trial regarding ANY issue upon which a presumption supporting any aspect of the government's allegations could be based.

Errors of Law

The failure of the government to prove the elements of the charge raises questions of law meriting reversal. *U.S. v. Gaudin*, 515 U.S. 506, 517 (1995). This Court reviews the trial judge's legal decisions and all errors of law *de novo.*

Factual Errors

The standard of review of the trial court's multiple factual errors consists of an analysis of whether each such error was obvious or plain, affected substantial rights of the defendant, and was not harmless to the fairness and integrity of the judicial proceedings. *U.S. v. Thomas,* 11 F.3d 620, 630 (6th Cir.1993); *U.S. v. Baird*, 134 F.3d 1276, 1282 (6th Cir. 1998).

Jury Instructions

Jury instructions are reviewed as a whole to determine whether they fairly and adequately submit the issues and applicable law to the jury. *U.S. v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991). The district court's choice of jury instructions is reviewed according to an abuse of discretion standard. *U.S. v. Beaty,* 245 F.3d 617, 621-22 (6th Cir. 2001).

When a district court refuses to give a requested instruction, the Sixth Circuit holds that a subsequent conviction is reversible if that requested instruction is "(1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant's defense." *Williams*, 952 F.2d at 1512, citing *U.S. v. Parrish*, 736 F.2d 152, 156 (5th Cir. 1984).

Denial of Defendant's Motions

Generally, the trial judge's denial of defendant's motions is reviewed for an abuse of discretion.

In reviewing the denial of motions for judgment of acquittal or motions to dismiss, this Court employs a deferential abuse of discretion standard, considering the evidence in a light most favorable to the government and then determining whether there is any evidence from which a reasonable jury could find guilt beyond a reasonable doubt. *U.S. v. Walton*, 908 F.2d 1289, 1294 (6th Cir. 1990).

This standard does not, however, allow the Court to entertain presumptions favorable to the government for which **no** supporting evidence was presented in trial, especially when the government carefully avoided the risk of subjecting relevant testimony to the rigors of cross-examination. Further, any conclusion of the jury's which reflects the operation of any presumption must be deemed invalid for the same reason.

Sentencing

The trial judge's sentence-enhancing decisions are reviewed *de novo* as questions of law. Further, at sentencing, the guidelines are not entitled to a presumption of reasonableness. "The [U.S. Sentencing] Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable." *Nelson v. U.S.*, 555 US ___,129 S. Ct. 890, 172 L. Ed. 2d 719 (2009).

Speedy Trial Act

This court reviews a district court's application of the Speedy Trial Act's provisions *de novo*. *U.S. v. Thomas*, 111 F.3d 426, 428 (6th Cir. 1997).

STATEMENT OF FACTS

The Statement of Facts as set forth in the Appellant's Brief filed in this Court on September 1, 2010 is incorporated by reference herein.

ARGUMENT SUMMARY

The government failed to articulate an actual offense in the indictment, thereby concealing key aspects of its burden of proof from the jury. It also utterly failed to prove an offense in trial. Indeed, it made no attempt to do so, putting not a single witness on the stand to testify to, or be challenged about, any element of an offense. Instead, with the collusion and participation of the trial court judge, who had actually announced on the record during a hearing two weeks before the trial that determination of the elements of the offense of "falseness" was his to make, and not the jury's; that he "has already [] determined" that my filings were false; and that he intended to instruct the jury accordingly, the government engaged in a sustained series of ploys intended to direct a conviction, all of which are thoroughly documented in the record. This concerted effort involved the following actions of the judge:

- Denying the jury access to key exculpatory evidence – even in the face of the jury's specific request to see the evidence withheld;
- Prejudicial questioning from the bench designed to disparage my views, impeach my testimony and suggest to the jury that I bore a burden of proof;
- Failing to charge the jury with my theory of the case, and, in fact, attempting to prevent the jury from fair consideration of my theory of the case as explicated in my testimony, by deliberately and comprehensively

misrepresenting to the jury the statutory language relevant to the charges, and integral to my view of the case;

- Failing to charge the jury with a *Cheek* instruction regarding "reasonableness," while manipulating the evidence so as to make my stated conclusions about the laws appear inherently unreasonable, and even perjurious;
- Admitting into evidence hundreds of pages of prejudicial documents suggesting "official" disagreement with my views of the laws and the facts, while shielding every single one of these prejudicial, jury-influencing suggestions from the possibility of clarification and/or impeachment in cross-examination; exacerbated by:
- Pronouncing from the bench that these silent and untestable expressions represent the "views" of the absent and unknown persons who had produced them – described by the judge as representatives of official agencies – that the reports I filed are false (a specific element of the offense charged);
- Invading the jury's province as finders of fact as to several elements of the offense charged and directing its verdict on these elements; and
- Failing to dismiss the charges despite the government having not put a single witness on the stand throughout the entire trial who acknowledged

responsibility for, testified about, or was subject to cross-examination about any element of the charges.

For instance, the alleged falseness of the forms over which I was charged is that they report my receipt of no "wages" during the years involved, whereas the government alleges that I received "wages" during those years. However, the government left unacknowledged in the indictment, and throughout the trial, that only payments of a very specialized type qualify as the "wages" to be reported on the forms involved. The judge allowed this omission, and denied my pre-trial motion for accuracy in this regard.

No witness testified that I received anything referred to as "wages" under any definition, in any event. No witness testified that my forms were false in any regard, or that payments were made to me which met any of the characteristics of the "wages" subject to the reporting requirements. Instead, the government merely offered testimony that I was paid for my work as a general proposition (in no specific amounts and on no specific occasions), and the judge then mis-instructed the jury with prosecution-written "interpretations" of relevant statutory definitions which declare that any and all payments for work qualify as "wages" – "for purposes of this case." This was done over my objection and insistence that the jury see the actual definitions written by Congress, and despite a jury request to see the actual statutory language, which had been among the subjects of my testimony.

The jury's conclusion as to "materiality" was also directed by the judge. Indeed, the term "material" wasn't uttered even once by a single government witness throughout the trial, meaning that not only did this element go unproven, but that I was denied any opportunity to confront and question the person alleging that my reports were material. Nonetheless, the judge sent the matter to the jury anyway, thereby unmistakably directing it to conclude that either "materiality" required no proof; or that it could be assumed to have been somehow proven to the judge's satisfaction, and that was good enough; or that I bore the burden of proving the charged declarations were NOT "material."

Similarly, lacking any evidence of "willfulness," the government resorted to presenting general comments I had made about the "income" tax 17 years ago, and the bizarre, confrontation-clause-violative, witness-free presentation to the jury of hundreds of pages of documents bearing sometimes cryptic, but always context-, basis- and explanation-free bureaucratic pronouncements which the judge told the jury represented official declarations that my filings were false. My having received these unexplained, unchallengeable alleged pronouncements over the years while continuing to make the reports I did was said to prove "willfulness." Unsurprisingly, how the importance of this "evidence" of who-knows-what outweighed its obvious prejudicial effect went unexplained by the judge when admitting the 739 pages of documents involved.

Additionally, the judge improperly denied my pre-trial motion to dismiss the charges as a vindictive, bad-faith persecution rather than a legitimate prosecution, a motion for which supporting evidence was revealed during trial. Further, the judge made an improper and completely unsupported ruling on my motion to dismiss for failure of the indictment to allege that I am a "person" to whom these charges can apply, and because I am not, in fact, such a person, in plain disregard of extensive, well-settled Supreme Court jurisprudence on the subject, and the fully-documented legislative history of the charging statute and the definition of "person" provided for that statute, all of which was furnished to the judge in painstaking detail. Judge Rosen added injury to insult by improperly enhancing the sentence he imposed on the pretext that my testimony of my opinion of the validity regarding a civil ruling was perjurious, and by adopting the prosecution's mere unsupported assertions concerning "tax loss." Finally, my right to a speedy trial and my remedies under the Speedy Trial Act were compromised by several improper actions of the judge, including "retroactive" exclusion of an already-past 94-day delay, and an unagreed-to extension of the length of a stipulated exclusion.

ARGUMENT

A. The Indictment Failed to State an Offense

1. The indictment alleges I received "wages" in various amounts during six listed years, and that my reports of receiving no "wages" for those years were therefore false, and were "willfully" false as well. (RE #3) However, the indictment fails to acknowledge a key element of the alleged offense: As a matter of law, it isn't "wages as generally defined or understood" – that is, any and all *undistinguished* payments for work – that must be reported on forms I submitted. On the contrary, the only "wages" to be reported are those distinguished from the broad, common class of wages by the definitions found at 26 U.S.C. §3401(a) and §3121(a), as is plainly specified at 26 U.S.C. §6051:

> §6051. Receipts for employees
>
> (a) Requirement
>
> .....
>
> (3) the total amount of wages **as defined in section 3401(a)**,....
>
> (5) the total amount of wages **as defined in section 3121(a)**.

26 U.S.C. §6051(a) (Emphasis added). Since a failure to report wages NOT so defined on the forms involved in the charges is NOT an offense, and since the indictment fails to allege that I received "wages so defined," it fails to state an actual offense. An indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the

offense intended to be punished." *Hamling v. U.S.*, 418 U.S. 87 (1974), quoting *U.S. v. Carll*, 105 U.S. 611 (1882); *U.S. v. Gatewood*, 173 F.3d 983 (6th Cir. 1999). I moved the District Court to dismiss the indictment on these grounds pre-trial (RE #18), but Judge Rosen improperly denied my motion (RE #70). This Court should dismiss the indictment now.

B. The Confrontation Clause Was Violated, The Government's Case Was Improperly Sustained, And Judge Rosen Directed A Conviction As To The Offense Element Of "Falseness"

2. Prosecutors needed to prove that I received payments meeting the specific statutory definitions of "wages" laid out in 26 U.S.C. §3401(a) and/or §3121(a). "Wages" as defined in these statutes are distinguished payments, and entirely confined to the statutory specifications. "It is axiomatic that the statutory definition of [a] term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465 (1987); see also *Mobley v. C.I.R.*, 532 F.3d 491, 496 (6th Cir. 2008).

3. "Wages" as defined in 26 U.S.C. §3401(a) are payments made for services rendered by members of the class "employee":

> For purposes of this chapter, the term "wages" means all remuneration… …for services performed by an employee…

26 U.S.C. §3401(a). This doesn't mean "employee" as commonly understood. The term "employee" is defined, "for the purposes of this chapter" at 26 U.S.C. §3401(c), as a particular class of workers, illustrated by the following list of specific members:

> ...officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term employee also includes an officer of a corporation.

26 U.S.C. §3401(c). See *Helvering v. Morgan's, Inc.*, 293 U.S. 121 (1934); 27 CFR 72.11.

4. "Wages" as defined in 26 U.S.C. §3121(a) are payments made for services rendered while in "employment":

> For purposes of this chapter, the term "wages" means all remuneration for employment . . .

26 USC §3121(a). "Employment" is defined "for purposes of this chapter" at §3121(b). That definition is complex, involving several additional specially defined terms. But the very fact that a special definition of "employment" exists reveals that the term does NOT have its common meaning of "the status of any employee" – even within the scope of relevant federal jurisdiction – which it would if left undefined in the statute. The fact that "employee" is defined in the same statute (at §3121(d)(2)) with the all-inclusive language of "any individual who, under the usual common law rules applicable for determining the employer-employee relationship, has the status of an employee" means that "employment," which would be co-extensive with this scope if left undefined, is narrowed for the purposes of the statute, and is NOT all-inclusive. Instead, "employment" only covers the status of SOME of those who, under the common law rules, have the

status of an employee, and not others; and the "remuneration for employment" which qualifies as "wages as defined at §3121(a)" required to be reported as such, is NOT all remuneration paid to any and all workers, even any and all workers under federal jurisdiction as such.

5. What's more, even payments to those who otherwise meet the definitions of "employee" in Chapter 24 or "in employment" in Chapter 21 *do not universally qualify* as reportable "wages," for both "wages" definitions list numerous circumstances of exception under which payments made even to those defined recipients don't qualify as "wages." As the Department of the Treasury points out in relevant CFR sections:

> *§31.3121(b)-4 Employment; excepted services in general.*
> (a) Services performed by an employee for an employer **do not constitute employment for purposes of the taxes** if they are specifically excepted from employment under any of the numbered paragraphs of section 3121(b) .....
> (b) . . .
> *Example.* A is an individual who is employed part time by B to perform services which are specifically excepted from employment under one of the numbered paragraphs of section 312(b). A is also employed by C part time to perform services which constitute employment. **While no tax liability is incurred** with respect to A's remuneration for services performed in the employ of B (the services being excepted from employment), the exception does not embrace the services performed by A in the employ of C (which constitute employment) and the taxes attached with respect to the wages (see §31.3121(a)–1) for such services.
>
> **§31.3401(a)-2 Exclusions from wages.**
> (a) *In general.* (1) **The term "wages" does not include any remuneration for services performed by an employee for his employer which is specifically excepted from wages under section 3401(a)**.

> §31.3401(c)-1 Employee.
> (h) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, that **the remuneration paid for such services does not constitute wages within the meaning of section 3401(a).**

6. In sum, "wages" as defined in §3121(a) and §3401(a) are NOT payments-to-anyone-who-works-for-someone-else-as-a-common-dictionary-definition-employee. Further, NO payments can be characterized as such "wages" without the establishment of particular statutorily-specified fact information, which in a trial would have to be specifically alleged by a prosecution witness made available for cross-examination. Therefore, prosecutors needed to prove much more than merely that I was paid for working. Specifically, they needed to prove I received payments for services rendered as an "employee" as defined at §3401(c), and/or remuneration for "employment" as that term is defined at §3121(b) (and payments not excepted from being "wages" even under those standards) – these being the only classes of payments to be reported as "wages" on the forms involved. <u>But this they did not do</u>.

7. Throughout the entire trial, prosecutors failed to produce a single witness to testify I DID, in fact, receive "wages" as IRC-defined and subject to reporting, or even attesting to an opinion to that effect. No witness was brought forward to testify that I was an "employee" as defined in §3401(c) or in "employment" as defined in §3121(b), or that payments I received were anything

but undistinguished, common pay-for-labor, or in support of anything by which any of the foregoing might appear to be implied.

8. Prosecutors simply made no effort to carry their burden of proving my forms were incorrect in any way. In fact, the definitions of "wages" required to be reported as such, and of related terms, were never mentioned by the prosecutors or any of their witnesses. Judge Rosen therefore erred in not dismissing the charges on my motion at the end of the prosecution case-in-chief and post-verdict.

9. Judge Rosen's declared reasoning for refusing to dismiss was that "forms W-2" he had allowed into evidence without testimonial support or opportunity to confront, and over my objection, contained assertions that payments had been made to me. He said that these assertions could be assumed true as to amounts paid, and that the jury would be given instructions by which it could decide whether those payments qualified as "wages" (even though, at this point, the "jury instruction" colloquy had not yet taken place):

> COURT: The legal interpretation as to whether those are quote, wages, will be supplied to jurors – well, jurors will receive legal – will receive the Court's legal instruction as to what are wages and jurors can determine whether the numbers that are on the W-2 Forms are, in fact, wages, on the Court's legal instructions.

(TR, Vol.3 at 498.) Simultaneously, Judge Rosen indicated that expert witnesses capable of explaining the purposes of forms I completed, what is to be reported on them and what is not, what is "material" to determination of a tax liability or

anything else relevant to the charges, would not be allowed. (TR,Vol.3 at 499-500.)

10. Judge Rosen's instructions should have been selected or designed to educate the jury as to what payments qualify as reportable "wages" and which do not. However the judge had long since resolved to direct the jury on the element of falseness, rather than let it come to its own conclusions, as he plainly declared during a motion hearing weeks before the trial:

> [W]hether the defendant received "wages" in a given year, which would be subject to taxation is a question of law for the Court to determine, ***indeed which has already been determined*** and to instruct the jury on.

(RE #72, TR 10/7/09 Motion Hearing, p. 52, emphasis added.) Judge Rosen had no basis for making a "determination" on such an issue of blended fact and law, of course – he has no personal knowledge of the circumstances of any payments made to me, or even that any have been made, and for all he knows, every single thing he imagines might support such a determination is an error, is misunderstood, or is outright fraudulent. Further, it is the jury's exclusive authority to make such determinations in the context of this case, whatever Judge Rosen may think is true.

11. Nonetheless, consistent with his naked October 7 declaration, and the careless first words of his mid-trial explanation ("The legal interpretation as to whether these are quote, wages, will be supplied to the jurors"), Judge Rosen proceeded to improperly instruct the jury that I had received "wages" by giving it

inaccurate prosecution-written "interpretations" of the statutory terms "employer", "employee", and "wages" designed to conceal the distinctions between payments which qualify as "wages" and those that do not, making ALL payments to ANY worker appear to be reportable "wages".

12. Judge Rosen's instructions were:

> WAGES DEFINED
> As it relates to the charges in this case, I instruct you that the term "wages" means all payments for services performed by an employee for his employer. The term wages applies to all employees and is not restricted to persons working for the government.
> 26 U.S.C. §3401(a); 26 U.S.C. §3121(a).
>
> EMPLOYER DEFINED
> As it relates to the charges in this case, I instruct you that the term "employer" means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person. This definition applies to all employers, whether private or government.
> 26 U.S.C. §3401(d); 26 U.S.C. §3121(b).
>
> EMPLOYEE DEFINED
> As it relates to the charges in this case, I instruct you that the term "employee" means any individual who performs services and who has a legal employer-employee relationship with the person for whom he performs these services.
> 26 U.S.C. §3121(d)(2); 26 U.S.C. §3401(c).

(TR,Vol.5 at 788-789.) The phrase "legal employer-employee relationship" went unexplained to jurors. Since prosecutors presented no evidence purporting to show me in anything but a common relationship with the company for which I worked, but the case was allowed to proceed anyway, my jury was made to presume that "legal employer-employee relationship" is just a courtly way of saying "the

relationship between anyone who hires and is hired", and that it could and should presume that "as it relates to the charges in this case," the term "employee" means "someone like Pete Hendrickson." Judge Rosen then used this improper construct to control the meaning of the term "wages" that he gave to jurors. The limiting, custom-defined term "employment" – the actual definitional element in §3121 that controls the meaning of "wages" in that section – is *nowhere to be seen*, **nor are its limiting effects**. Indeed, all elements of the actual statutory language and structure that would have revealed to jurors that "wages" AREN'T "any-and-all-remunerative-payments-to-any-worker" *have been concealed by these instructions*.

13. For instance, the vast number of statute-specified exceptions are missing. The "employee" definition at §3401(c), which explicitly enumerates certain employees, thus making clear the term "employee" being defined is **not** all-inclusive, is also…missing. The very fact that "wages," "employee," "employer" and "employment" are custom-defined terms, and therefore axiomatically stripped of their common meanings when used in these statutes, which by itself would make clear to jurors that more explanation and proof are needed than merely "Hendrickson worked and was paid," *is concealed by these instructions*. See *Stenberg v. Carhart,* 530 U.S. 914 (2000); *Meese v. Keene*, *supra* at 481 U.S. 465 (1987).

14. In addition to being flatly inaccurate, and grossly prejudicial generally in light of my testimony concerning the actual words of §3401(c) and the limits to the meaning of "wages" I had seen in the law, instructions like Judge Rosen's are a Constitutional error. In *Sandstrom v. Montana*, 442 U.S. 510 (1979), citing to *In re Winship*, 397 U.S. 358, 364 (1970), the Supreme Court holds Constitutionally-invalid an instruction to the effect that if one thing is proven, then another offense element must also be true.

Judge Rosen instructed jurors that if they simply found I had been paid by a company for which I worked, they must find I received "wages," and that my reports to the contrary were false, despite no evidence directly addressing either of these issues throughout the trial whatever. The success of this manipulation of the jury was summarized in all its impropriety by Judge Rosen himself in his denial of my post-verdict motion for judgment of acquittal:

> Under the court's descriptions of the elements and definitions of the pertinent terms of the tax code, the evidence introduced by prosecutors at trial was sufficient to establish beyond a reasonable doubt that defendant's claims of zero "wages" were false.

(RE# 97, p.4.) Indeed, this contrivance is the only one in which the paucity of prosecutors' evidence could have been sufficient to prove any such thing. Had Judge Rosen's descriptions been correct under law, no such conclusion could have been reached.

15. Judge Rosen's inaccurate instructions on these critical definitions were delivered to jurors as those by which it must exclusively assess the evidence. This despite jurors asking to see true definitions written by Congress, and despite my insistence that jurors see these actual statutes – requests refused by the judge with the bizarre explanation that to give jurors the REAL statutory words "would invite them to speculate as to what the legal meaning of the status [sic] were." (TR,Vol.5 at 808.) As a consequence of these refusals, and the content and form of the instructions given, my jury did not decide anything about the "falseness" element of the offenses charged. Instead, Judge Rosen invaded the jury's province and made the decisions on this element himself. Judge Rosen instructed the jury that I was in "employment" as defined at §3121(b). Judge Rosen instructed the jury that I was an "employee" as defined at §3401(c). Judge Rosen instructed the jury that none of the "wage" exceptions in §3121(a) or §3401(a) applied to me.

16. In short, Judge Rosen instructed the jury that I had received "wages," and that I was guilty as to the "falseness" element of the offenses charged. The error made by the *Sandstrom* trial court was to direct the jury as to Sandstrom's intent, letting it decide on its own only about the objective fact elements. In my case, Judge Rosen simply flipped this error around. He directed my jury on the objective fact elements, and only let it decide on its own the question of intent – a

decision which itself was profoundly and prejudicially influenced by the judge's directions as to the other elements.

17. This error tracks with remarkable precision another circuit's application of principles articulated by the Supreme Court in *Sandstrom*. In *U.S. v. Bass*, 784 F.2d 1282 (5thCir.1986), being an "employee" as defined at 26 U.S.C. §3401(c) was an element of the offense charged. Bass acknowledged being an employee in the common sense, but denied being an "employee" as defined in the statute. In trial, the judge instructed jurors that Bass was an "employee" as a matter of law, and he was convicted of the charges.

18. The government opposed Bass's subsequent appeal, arguing that the instruction only told the jury that Bass was an employee in the common sense, not the statutory sense. However, recognizing that even if ambiguous, the trial court's instruction removed from the jury the proper consideration of this question, the Fifth Circuit reversed, saying,

> Because one of Bass's defenses was that he was not an "employee," we cannot conclude that the instruction was harmless error.

U.S. v. Bass, 784 F.2d 1282 (quotations in original).

19. In my case, Judge Rosen didn't declare my forms to be false directly. Instead, but to the same effect, he instructed jurors that EVERYONE with the common-status-of-employee is an "employee" "as it relates to the charges in this case," and that all payments to "employees" are "wages." Thus, upon merely

seeing evidence I was paid by a company for work, my jury was outright directed to conclude I received reportable "wages" and that my forms were therefore false. This error requires reversal of my conviction:

> [N]o fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system, the Trial Court may never instruct a verdict either in whole or in part.

Roe v. U.S., 287 F.2d 435 (5th Cir. 1961) . Indeed, in light of their failure to produce evidence that I received payments I was required to report as "wages" in connection with the "income tax," prosecutors *failed to make even a prima facie* case against me, and the charges should be dismissed with prejudice.

C. Judge Rosen Erred By Failing To Charge The Jury With The Defense Theory Of The Case, And, In Fact, Acted To Prevent The Jury From Considering The Defense Theory

20. It was made clear through my testimony, and is clear as a matter of law, that only payments of specific, statutorily-defined varieties are to be reported as such on the forms I filled out. The relevant specifications begin with 26 U.S.C. §6051, where it is stated that payments to be reported are those meeting the definitions of "wages" at §3401(a) and §3121(a); and the reason for those specifications and the limits they define is found in the United States Constitution. To properly charge the jury, Judge Rosen was obliged to acknowledge and articulate these specifications and the reason behind them in a manner consistent with my testimony and other evidence presented, particularly by furnishing the

jury with the exact text of the statutes that I said draw a distinction between payments which are to be reported as "wages" and those which are not (TR Vol.4 at 594-597, 599, 600, 608, 614-624, 626-628 and 653-657). Not only did Judge Rosen NOT charge the jury in this fashion, despite my explicit request (Tr Vol. 5 at 807), but he deliberately gave it substitutes for the actual words of the statutes which were designed to contradict my testimony and the overall "defense theory" by concealing those elements in the statutes which support my conclusions and informed my testimony. (TR Vol. 5 at 788-789)

21. Further, Judge Rosen not only refused MY request that the jury see the exact words of the statutes, and not only gave the jury artificial substitutes designed to make my conclusions appear to be without any basis in the law by any reading, but he even refused a direct JURY request to see the actual words of the statutes fundamental to the "defense theory of the case" (TR Vol.4, pp. 657-658). This was all done with the remarkable explanation that to give the jurors a full and accurate statement of the law "would invite them to speculate as to what the legal meaning of the status [sic] were." (TR, Vol. 5 at 808). In other words, Judge Rosen feared that if given the actual words of the law, the jurors might awaken to a view of its meaning contrary to the one he and the prosecutors intended them to have – a contrary view comprising the defense theory of the case. This is a plain error requiring reversal.

> A refusal to give requested instructions is reversible error [if] (1) the instructions are correct statements of the law; (2) the instructions are not substantially covered by other delivered charges; and (3) the failure to give the instruction impairs the defendant's theory of the case. *Id.* [*U.S. v. Williams*, 952 F.2d 1504, 1512 (6th Cir. 1991)] ... so long as there is even weak supporting evidence, "[a] trial court commits reversible error in a criminal case when it fails to give an adequate presentation of a theory of defense." *U.S. v. Plummer*, 789 F.2d 435,438 (6th Cir. 1986).

U.S. v. Newcomb, 6 F.3d 1129, 1132 (6th Cir. 1993).

> It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, **he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible.**

Strauss v. U.S., 376 F.2d 416, 419 (5th Cir. 1967) (bold emphasis added).

This obligation is clearly not met by the jury being provided nothing but a statement of the law as interpreted and drafted by the prosecution, something massively underscored by the jury's request to see the actual statutory language I cited, and Judge Rosen's refusal of that request. Not only did the judge fail to charge the jury with the defense theory of the case, but he actively strove to thwart the jury's ability to give due consideration to that theory.

> It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently falls into error, is sufficient reason for reversal. . . . The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other,

and to bring into view the relations of the particular evidence addressed to the particular issues involved.

Bird v. U.S., 180 U.S. 356, 391, 21 S.Ct. 403 (1901).

D. Judge Rosen Erred In Admitting Prejudicial Hearsay And Instructing Jurors That It Reflected Official Opinions That My Filings Are False, In Clear Violation of the Sixth Amendment's Confrontation Clause And An Improper Effort To Direct A Conviction

22. Prosecutors put no one on the stand who testified under oath and was subject to cross-examination regarding characterization of any payment to me as "wages" as defined in law, subject to reporting as such on tax forms. Nonetheless, in a massive violation of my rights to confront my accusers, and clarify or impeach anything presented to the jury, prosecutors were allowed to present to jurors 739 pages of documents *making or implying such characterizations, the vast majority of which were created specifically for evidentiary purposes*. These included W-2s created by Personnel Management, Inc., as well as:

- IRS "examination" documents *created for use* in tax court;
- testimonial declarations filed in a civil action against me concerning four of the forms at issue;
- a host of documents produced by Michigan Department of Treasury ; and
- a series of additional filings, and rulings, in the aforementioned civil case.

All these documents appear to reflect their authors' conclusions that I had received "wages" as defined in 26 U.S.C. §3401(a) and/or §3121(a), subject to reporting

requirements as such. The pretense under which these documents were admitted was a prosecution "theory" that my having seen them over the years must have persuaded me that my conclusions about the legal character of my earnings was wrong, and that therefore my continued expression of those conclusions was "willful." This "theory" is not only transparently insincere; it is patently frivolous, as well. There is (and could be) no law requiring an individual to adopt or endorse the assertions of another – even when bombarded with them over a period of years. After all, if I wrote 739 pages which reflected assumptions that you had received "HendricksonBucks" (as a result of which you owe me money), and had a "record-keeper" testify that I had mailed copies to you over the years, would this be evidence in support of the proposition that you are acting in bad faith, or "violation of a known legal duty," in not having adopted those assumptions, and endorsed them over your own signature? Of course it would not, and it doesn't become such evidence even if the one making the assertions and doing the bombarding is a government agent.

23. None of these documents, nor the positions reflected therein, were supported by testimony. Had they been, every single one other than the W-2s would have been revealed to jurors in cross-examination as based on *nothing but* the assertions on those W-2s. The W-2s themselves, the only documents of this massive presentation for which a potential competent witness appeared, also went

unsupported by testimony, even though Warren Rose, the person responsible for those forms, took the stand, since prosecutors carefully avoided asking anything about the content of the forms on direct. But on cross, Rose admitted ignorance of the laws related to that content, and therefore that even the W-2s DO NOT represent deliberate assertions that payments were made to me which qualified as "wages" subject to reporting as such (TR, Vol. 2 at 407-408). None of the other documents could be subjected to even indirect impeachment of this sort, but all were admitted anyway, with the substance and significance of positions apparently reflected thereon being allowed to stand as self-evidently authoritative.

24. Every one of these documents was thus prejudicial, and its admission alone a violation of my right to confront and impeach. But it gets worse. In an effort to shield this error from review and remediation by this Honorable Court, Judge Rosen instructed the jury that:

> *[T]his evidence has been admitted only for the purpose of establishing that the IRS was of the view that – I'm sorry.* ***That the Internal Revenue Service was of the view*** *that Personnel Management, Inc.'s payments to Mr. Hendrickson constituted wages and that* ***this view was communicated*** *to Mr. Hendrickson. The evidence is not offered for the purpose of establishing the fact that Mr. Hendrickson received wages from Personnel Management, Inc.*

(TR, Vol. 2 at 267; Vol. 3 at 437; emphasis added)

These "curative" instructions tell the jury that it is the "official IRS position" that my earnings are "wages" – meaning by extension that these hearsay documents declare that it is the "official IRS position" that my "wage" reports are

false. At the same time, these instructions tell the jury that it is not to take this purported view of the IRS as evidence that my earnings really ARE "wages," but I should have done so! This is absurd, and these "curative" instructions cure nothing, but they DO manipulate the jury in the prosecution's favor.

25. No explanation is offered as to why Judge Rosen takes the view he does of what these documents represent. In any event, by his instruction, Judge Rosen DECLARES that the jury must accept as self-substantiated the unsupported facial assertions of these documents as to the "views" of absent preparers, rather than admitting that without testifying witnesses, no one can actually know what the content of these documents really represents.

26. Further, this improper bench offering of prejudicial testimony about matters of which he actually has no personal knowledge included none as to WHY those responsible for these documents were of the "views" Judge Rosen ascribes to them, if indeed they were, nor as to why I could be seen to have a reason, much less a duty, to adopt and agree with these alleged "views" rather than see them as unsworn and poorly-informed, if not actively fraudulent. In any event, what rational jury could parse such instructions in weighing "evidence"? These absurd instructions in no way remedy the prejudicial effects of allowing these documents into evidence without any opportunity to confront; indeed, by adding Judge Rosen's unsworn, inexplicable, prejudicial-to-the-defense opinion as to the

documents' contents to the un-testable facial contents themselves, they did just the opposite.

27. Admission of these documents violated my right to confront my accusers and subject their apparent assertions to examination and challenge. That the documents were purportedly introduced for a limited purpose is immaterial, on at least two grounds. First, the apparent assertions and conclusions on these documents unquestionably influenced jurors, but did so without my having an opportunity to demonstrate that none of the apparent assertions and conclusions actually are what they appear to be, and that I had reason to know that they are not. Second, even evidence of a "limited purpose" is subject to the rules, if it is evidence of anything at all. Admission of these documents was a Constitutional error and the verdict in this unfair, rights-violating trial should be reversed. See *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

E. My Right To Confront Was Violated; The Prosecution Failed To Carry Its Evidentiary Burden; And The Jury Was Directed To Convict On The Element Of "Materiality"

28. As part of its proof burden, prosecutors were expressly required to show that my "wage" reports on the ten forms at issue were actually false as a matter of objective fact (*U.S. v. Reynolds*, 919 F.2d 435 (7th cir. 1990) and *U.S. v. Borman*, 992 F.2d 124 (7th Cir. 1993)). Further, prosecutors had to show that these reports – my personal conclusions about what I had received that qualified as

”wages” subject to reporting as such – were “material,” meaning, “essential to an accurate determination of a tax liability,” according to Judge Rosen’s definition of the term in this case.

29. According to the U.S. Supreme Court, materiality is a question of fact and is therefore an issue for jurors. *U.S. v. Gaudin*, 515 U.S. 506 (1995). This court agrees: “Materiality is a mixed question of law and fact that **must** be submitted to the jury” *U.S. v. Latouf*, 132 F.3d 320 (6th Cir. 1997) citing to *Gaudin*, emphasis in the original. See also *U.S. v. Ayoub*, 498 F.3d 532 (6th Cir. 2007).

30. To meet their obligation, prosecutors must prove “materiality” with the “clear, unequivocal and convincing evidence” of that element called for by the Supreme Court in *Kungys v. U.S.*, 485 U.S. 759 (1997), rather than mere inferences or implications. To do less is to imply that no proofs NEED be offered, encouraging jurors to *imagine* that SOMETHING on the forms in question has been found BY THE COURT to be “material,” or to improperly suggest that jurors should presume that some things on such forms are inherently “material” as a matter of law, or that the defendant bears the burden of proving the charged items are NOT “material.” This would make the jury’s role in deciding on this element an empty charade, and any conviction that might result an invalid, directed verdict. Furthermore, nothing could be legitimately found to be “material” even by a judge

alone without explicit, detailed information and explanation subject to challenge in cross-examination – especially in a matter involving a 3.5 million word tax code even specialists struggle to understand.

31. In *U.S. v. Uchimura*, 107 F.3d 1321 (1997), the Ninth Circuit agrees:

> Under 26 U.S.C. §7206(1), deciding whether a statement is material surely requires a similar determination of (a) "what statement was made?" and (b) "**what information was necessary in this case to a determination of whether income tax was owed?"**

The *Uchimura* court goes on to point out that nothing can be deemed inherently "material" as the term is used in §7206(1) cases, and that determining whether something is or is not involves an informed application of the Internal Revenue Code and its regulatory provisions:

> The government correctly notes that the answer to (b) is spelled out in detail in the Internal Revenue Code and Regulations. Appellee Br. at 31. The answer to (b) in Section 7206 cases is therefore not "purely" a matter of historical fact. But each case is different, and the answer to (b) in each case is necessarily different....
>
> …Even if any failure to report income is material in *most* circumstances, it is not necessarily material in *all* circumstances, since the materiality of an underreporting of income necessarily depends on the facts of each case.

Id. at 1324.

32. Plainly, the prosecution was obliged to present witnesses to explain to the jury the basis for the allegation that the charged items on my forms were "material." Indeed, the whole concept of a technical issue like "materiality" (a "mixed question of law and fact," *Gaudin* at 512) being an issue for the jury's

decision makes inescapable that the jury MUST receive instruction on the uses, exceptions, nuances and so forth by which a charged item interrelates with the tax system in order to reach a rational decision on this element of the offense. As this court observes in *U.S. v. Safa*, 484 F.3d 818 (6th Cir. 2007) concerning a question of "materiality":

> [W]ithout the information provided by the [expert] witness... the jurors would have had no information on which to base their verdict because they could not have intuitively ascertained the relevance of Safa's [charged] testimony..."

Flipping a coin is the only alternative to making a specifically-instructed, informed decision, since, as the *Kungys, Gaudin, Uchimura*, and *Safa* courts – and simple common sense – make clear, "Everybody knows" is NOT evidence (and what "everybody knows" is very often nonsense, as well – sometimes even deliberately cultivated, prosecutorially-exploited nonsense).

33. No matter how "material" is defined – "necessary to the determination of whether a tax is owed," "having the natural tendency to influence or is capable of influencing the federal agency," "having the capacity to impair the functioning of a federal agency," or "essential to an accurate determination of a tax liability" – an explanation of how a charged item does or could meet the definition **must** be asserted if the jury is to reach a rational, valid decision on "materiality," other than a decision of acquittal due to lack of evidence on this element.

34. Furthermore, that necessary explanation of "materiality" has to be concrete and specific as to its subject and purpose, so that it can be properly tested and possibly impeached in cross-examination. Deeming ephemera like disembodied "inferences" and "implications" to suffice in lieu of actual testable evidence is an offense against justice, and a violation of a defendant's right to confront his accuser on this element, and to have all elements of the charges against him truly decided by his jury.

> We cannot relieve the Government of its burden of proof on an essential element of a crime whenever we believe it might satisfy it.

U.S. v. Kratt, 579 F.3d 558 (6th Cir. 2009).

35. In the instant case, prosecutors presented not even a scintilla of evidence supporting "materiality." No witness even alleged, much less attempted to explain, that anything on my forms was "material" – indeed, *the word was not uttered in front of the jury throughout the entire evidence portion of the trial.* Mere evidence of bureaucratic behavior cannot fill this void without explanation and opportunity to confront and impeach, since bureaucratic behavior can, despite appearances, be unrelated to my forms, or can result from mistake, misunderstanding, miscommunication or simple agency malfeasance.

For instance, prosecutor Daly's sole argument in response to my motion under Rule 29 in regard to "materiality" was that evidence of what he calls "erroneous" refunds to my wife and me of amounts withheld during 2002 and 2003

had been introduced (TR Vol. 3, p. 495). But his argument destroys itself, while also being nothing but meaningless attorney rhetoric. First of all, Daly's claim that it has been legitimately determined that the refunds issued were erroneous is an argument that my "wage" reports were NOT "essential to an accurate determination of a tax liability," because according to Daly's claim, "accurate determinations" were made despite my reports. Secondly, without testimony by a competent witness, neither Daly, nor Judge Rosen, nor the jury can know that those refunds were related to my "wage" reports in any way, or if so, how they were related, and purportedly "essential," especially in light of the government having its hands on W-2s asserting contrary "wage" reports. Thus, Daly's "evidence" is nothing but his own self-serving construct, and a self-contradictory construct, at that.

36. There simply was no evidence of "materiality," and the Supreme Court says that under such circumstances the issue *shouldn't* go to the jury "even on our view of the matter [as laid down in *Gaudin*]," *because in such a case, the charges should simply be dismissed outright*.

> The prosecution's failure to provide minimal evidence of materiality, like its failure to provide minimal evidence of any other element, of course raises a question of "law" that warrants dismissal.

U.S. v. Gaudin, 515 U.S. at 517.

37. However, rather than dismiss, Judge Rosen sent the matter to the jury, along with the unmistakable message that it had no decision to make on this element of the offense, since it had no legitimate means of making any decision. In effect, Judge Rosen directed the jury to convict on this element. The sole instruction given on this subject was, "The false statement in the return must be material. So this means it must be essential to an accurate determination of the defendant's tax liability." (TR Vol. 5 at 788). It is not possible for the jury to have actually come to a rational conclusion that the charged items on my forms meet this standard under any circumstances, and particularly not in the face of its solemn responsibility to presume them NOT to be "material" absent clear and convincing relevant evidence indicating the contrary beyond a reasonable doubt.

38. The fact is, Judge Rosen effectively made the "materiality" decision on his own, and denied my right to trial by jury. This is an impermissible violation of the trial process and my Constitutionally-secured rights. Plainly, the guilty verdict in this case is invalid and the conviction should be reversed; further, the government's failure to make even a *prima facie* case as to "materiality" warrants dismissal of the charges with prejudice.

F. Judge Rosen Prejudicially Questioned Me From The Bench And Suggested To The Jury A Shift In The Burden Of Proof

39. At the close of my cross-examination by the prosecution, Judge Rosen personally questioned me (TR,Vol.4 at 653-657). No questions were asked

seeking clarification of my testimony. Instead, the judge simply had me repeat myself, in such a fashion as to disparage my analysis of the law, impugn the likelihood of my sincerity and asperse my theory of defense.

40. For instance, I had already clearly testified about Supreme Court cases supporting my analysis of the nature of the income tax (TR,Vol.4 at 614-619), but Judge Rosen asked me if any court had ever agreed with me – a plain effort to suggest to jurors that my testimony was wrong, incomplete, baseless or even perjurious. Judge Rosen also asked about HIS OWN tax liability and that of the prosecutors (as if to imply I simply thought only government people or people in authority should pay taxes). Judge Rosen asked,

> So correct me if I'm wrong.....So anybody who receives money directly from the federal government, ***for example, me*** –

(TR, Vol. 4 at 655), and,

> ***So my income's taxable?***....Prosecutor's income taxable....Anybody who receives money which is the result of any benefit from the federal government. That's the basis of *your disagreement with the taxing of the money you have received* during the years in question. Is that a fair statement?

(TR, Vol. 4 at 656, emphasis added.) These questions, particularly when asked with the scornful and condescending tone heard by everyone present, suggest that the judge took my conclusions on the nature and application of the tax to be politically based rather than grounded in organic, statutory and case law, with the

implication that the judge did so because he knew of no organic, statutory and case law basis for my position.

41. This was improper and prejudicial, pitting the judge's perceived credibility against mine as to my truthfulness. These improper questions not only trivialized the defense theory, and impugned the credibility of my accurate prior testimony regarding Supreme Court cases, but they also improperly implied to jurors that I *bore a burden-of-proof* – that I was obliged or needed to support my innocence both as to the correctness of what I reported on my forms, and as to my sincerity, by citation of authority or otherwise. In fact, it was immediately after this questioning by the judge that the jury asked to see for itself some of the authorities I had cited, an effort at verification the judge refused to allow, leaving a burden improperly imposed on me which Judge Rosen then exacerbated by preventing it from being met. (TR, Vol. 4 at 657-658.) Plainly, the jury was influenced by Judge Rosen's questioning of me, which ended with the jury's active interest being closed down by Judge Rosen's decree. Clearly, this highly prejudicial plain error was harmful and merits reversal.

G. Judge Rosen Erred By Violating The *Cheek* Doctrine On The Element Of "Reasonableness" And Directing A Conviction As To "Willfulness"

42. Among other things, I testified as to what I read in several statutes relevant to the charges and issues in this case. (TR, Vol. 4 at 608, 626-628, 653-

657.) The words of the statutes defining "wages" in particular, which were the subject of much of my testimony, and are very integral to the case, make clear that my conclusions that not all payments are reportable "wages" are not only credible, they are obvious. However, since Judge Rosen a) refused to let the jury see the actual words of those statutes, b) didn't give jurors an explicit instruction that the reasonableness of my views is irrelevant to its deliberations regarding willfulness, and c) gave misrepresentations of the statutes designed to communicate erroneous notions that all payments are reportable "wages," and from which no reasonable alternative could be read, jurors were left with no choice but to conclude my reports were not only false, but willfully false. This is a straightforward violation of the doctrine laid down by the U.S. Supreme Court in *Cheek v. U.S.*, 498 U.S. 192 (1991), holding that defendants are not subject to a standard of "objective reasonableness," and that juries must be instructed that the objective reasonableness of a defendant's views is not relevant to their deliberations as to "willfulness."

> Characterizing a belief as objectively unreasonable transforms what is normally a factual inquiry into a legal one, thus preventing a jury from considering it.

Cheek 498 U.S. at 193. Contriving to make a stated belief APPEAR unreasonable has the same ill effect. Failing to give the jury this instruction regarding "reasonableness" while allowing it to see only "interpretations" regarding "wages"

designed to make my stated reading of the statutes appear unreasonable was inescapably prejudicial error – a set-up calculated to ensure conviction, and even more obviously so since the judge had suggested to the jurors that they needn't worry too much about the care with which they sorted out testimony or evidence, because, Judge Rosen said, "***If I make a mistake on the law, there's an appellate court down in Cincinnati that reviews my decisions***." TR,Vol.2 at 187 (emphasis added).

H. Judge Rosen Erred In Denying My Pre-Trial Motions To Dismiss All Charges As Baseless, Selective And Vindictive Prosecution And Because I Am Not Among The Statutorily-Defined "Persons" To Whom These Charges Can Apply

43. My January 15, 2009 pre-trial Motion to Dismiss the charges as a vindictive prosecution brought in bad faith (RE #18 and 23) was denied based on Judge Rosen's assertion that I hadn't demonstrated the existence of others similarly-situated but uncharged. During trial, however, prosecutors were forced to admit that one IRS office alone has seen, "conservatively speaking," at least 10,000 filings identical to mine in substance and form over the last five years. In its response to my Motion, prosecutors were unable to identify a single person ever so charged. Combining these facts with prosecutors' inability to produce a single witness able to testify that I had actually received "wages" and that my filings therefore were false, it's clear these charges were brought in bad faith – a vindictive, corrupt and lawless effort to frighten Americans away from truths about

the income tax which I have revealed. Judge Rosen's denial of my Motion was an abuse of discretion. My Motion should have been granted and the charges dismissed with prejudice.

44. On May 7, 2009, I also moved the District Court to dismiss all charges because the indictment failed to allege I am among the "persons" to whom 26 U.S.C. §7206(1) applies, and because I am, in fact, not among that class of persons (RE#29 and 39). I renewed and expanded that motion with additional argument and authority in my post-verdict motion under Fed.R.Cr.P., Rules 29(c) and 33(a), RE#s 87, 90. Judge Rosen denied this motion on specious reasoning that "person relevant to §7206(1) has no special definition or meaning." This denial was in deliberate disregard of the Congress's very plain provision of a special definition for that term as used in §7206(1); the Supreme Court's well-settled doctrine relevant to the application of that definition to §7206(1); the legislative history explicitly and elaborately making clear Congressional intent that "person" in §7206(1) is confined to that specialized definition; and the fact that neither Judge Rosen nor the responding government were able to identify a single ruling from another court in which analysis of this issue led to different conclusions. Judge Rosen's denial of this Motion to Dismiss was abuse of discretion, and my Motion should be granted and all charges dismissed with prejudice.

I. Judge Rosen's Enhancements Of My Sentence For "Obstruction" And "Intended And Actual Tax Loss" Are Arbitrary, Capricious, Contrary To Applicable Rules And Unsupported By The Facts And The Record

45. In addition to the improprieties involved in arranging my conviction, Judge Rosen adopted prosecution assertions of "tax loss" for purposes of sentencing enhancement, despite not only no evidence of any tax liability ever being presented in trial or elsewhere, but also despite United States Department of Treasury Assessment Certificates declaring the government's long-standing formal position of it owing ME money, not the other way around (see Government trial exhibits 8,10,12,14,16, and 18). Prosecutors also moved the District Court to enhance my sentence by two points on fanciful, mendacious and bad-faith accusations I had "obstructed justice" during my own testimony in trial.

46. Judge Rosen declined the prosecutors' pretense for an enhancement on the basis that I had claimed that "wages are not taxable," doubtless because I never said any such thing during this trial or in any associated filings, and, in fact, said repeatedly throughout the trial that "wages" as defined at 26 U.S.C. §3401(a) and §3121(a) certainly ARE taxable. Judge Rosen WAS willing to go along with the prosecutors' similar false assertions that I was perjuring myself when I expressed my opinion that the civil judgment against me and my wife is a "void judgment." The judge claimed there was "simply no explanation for [Hendrickson's] view" that a summary civil judgment granting the government a

multi-thousand-dollar claim against Mr. and Mrs. Hendrickson –

- without the presentation of any government evidence whatever,
- without a single hearing,
- in the face of our unanswered, sworn rebuttals of all government allegations, and
- which included a command that my wife and I repudiate our sworn rebuttals and replace them with sworn statements attesting to the truth of the allegations upon which the government based its claims,

– could possibly qualify as a void judgment! RE#102, Sent. Hearing, p. 66. Frankly, it is disturbing that a sitting federal judge *doesn't* consider this a void judgment. Actually, since Judge Rosen lacks intimate knowledge of the case or of grounds for my view aside from testimony made during a hostile cross-examination, he can't form an opinion about the judgment even from an objective position, much less one concerning my subjective view. He is therefore exposed as unable to understand how ANYONE can view ANY judicial ruling as void! This is an obviously frivolous position, the wrongness of which is matched only by that of using it as a pretext for adding six months of imprisonment to an already grossly unjust conviction and sentence.

47. That I do, in fact, believe that this civil judgment meets all standards of voidability is readily demonstrated: I argued this very opinion in petition to the

Supreme Court months before this trial, with no reason to expect the matter to ever arise in trial. In fact, the matter should not have come up in trial, and only did so because prosecutor Leibson violated the Court's *in limine* ruling, extending his questioning beyond the initial (non-final) 2/26/07 civil case ruling. (TR Vol. 4 at 632-648)

48. Prosecutors repeatedly "misstated" facts in support of this enhancement. For example, prosecutors quoted me explaining my speculation that the Supreme Court had declined to hear my petition in part because no effort had been made to enforce the judgment and thus the matter was moot. The government attempts to suggest this was perjury because, as it says, "The statement was false as the judgment was valid and is in the process of being enforced." However, NO enforcement efforts had been undertaken at the time of my testimony, and those begun since, and the void status of the judgment (which is a matter of opinion in any event) are still being litigated.

49. Similarly, prosecutors declared, "[T]he matter was material" because "The judgment occurred before Mr. Hendrickson's 2006 filing." There was, in fact, no final civil case ruling even at just the district court level at the time of my 2006 filing. At the time of my filing the district court in the civil case had before it not only two motions by us (for reconsideration, and for relief under Fed.R.Cr.P.,

Rule 60(b)), but a Motion to Amend Judgment by prosecutors, as well. No final judgment was issued by that court until May 2, 2007, well after my 2006 filing.

50. Interestingly, Judge Rosen admitted recognizing my sincerity during the same sentencing hearing – and therefore to knowing on at least one level that the charges here are bogus. At the same time, he explained the real reason for this prosecution: Discouraging Americans from honest and informed caretaking of their own interests, and encouraging fearful subordination to the government's competing interest, instead.

> **No matter how firmly you hold your beliefs as to the definitions of the tax code** and the application of the tax code to your earnings as wages, once those responsible for making decisions, interpreting them, whether you agree with them or not have made their decisions, your obligation is to follow them or pay the consequences of your decision not to follow them **in the only currency we have in a civilized society, which is a criminal sentence.**

(Sent.TR, p.103-104.) Judge Rosen is essentially saying "once the federal government says IT wants to treat your earnings as subject to its claims, YOU have to adopt the same view, and say so over your own signature, or be punished." After all, the only thing involved in this case is my written expression of what I believe to be true about the legal character of my earnings, rendered over my own signature. This is not a case involving the concealment of assets, or any other effort to thwart the tax by some subterfuge. The government HAD my money. I just said I think it should be returned to me, because I don't think I did anything to

which the tax applies, and Judge Rosen says I must be locked in a cage for a few years for my temerity.

51. Further, Judge Rosen appears to be confused as to the facts of this case. My filings DIDN'T occur in defiance, or even in dispute, of any government "decisions." My filings each occurred only in response to assertions and behavior of a private company, Personnel Management, Inc., which in testimony in this trial admitted to ignorance of what it was saying when it made the assertions and conducted the withholding which my filings addressed.

52. Judge Rosen also appears oblivious to the fact that "those responsible" have never "made decisions" concerning the matters involved in this case. No government actor has ever signed any instrument formally declaring me to have received "wages" subject to reporting requirements, or to be liable for any tax, in dispute of, or contrary to, my own sworn statements. No witness could be produced to testify to either of these things in trial. Thus, the sordid irony of Judge Rosen's incoherent pontification is its unconscious acknowledgement that I am being persecuted simply for refusing to CREATE claims against my own property on behalf of the government by declaring – under penalties of perjury – that my earnings are "wages," when "those responsible" have never declared such a thing. Judge Rosen seeks to justify this entire abusive episode with a malevolent appeal to some mythical right of "the authorities" to unquestioning obedience, as a

perverse substitute for producing a single real authority for his and the prosecutor's implicit proposition that "all earnings are federally taxable as 'income.'"

J. Judge Rosen Denied My Speedy Trial Act Rights By "Retroactive" And Unagreed-To Exclusions

53. U.S. Constitution Amendment VI holds, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . ." The Speedy Trial Act, 18 USC §3161, provides further and specifically that defendants must be brought to trial within 70 days of indictment, except for certain exclusions set forth in §3161(h). A failure to meet this deadline makes dismissal of the indictment mandatory. *U.S. v. Jenkins*, 92 F.3d 430, 438 (6th Cir. 1996). My arraignment was on November 12, 2008. Trial did not commence until October 20, 2009. This circuit has found that a delay of this length is presumptively prejudicial. *U.S. v. Watford*, 468 F.3d 891, 901 (6th Cir. 2006).

54. On June 24, 2009, Judge Rosen issued an order (RE#47) referencing a stipulation directed by the judge and signed by prosecutors and my counsel to "excludable" delay from February 10 to September 25, 2009 (RE#45). The order itself, however, reflects a *change in the dates* to February 10 through October 20, 2009 (unilaterally extending the delay an extra 25 days). In the judge's order, none of his "findings" retroactively address or relate to the period February 10 to May 14, 2009 at all, which passed simply while Judge Rosen was assigned to the case and a hearing date was scheduled and arrived. Nor is it even theoretically

possible that a legitimate finding of justification for an exclusion can take place retroactively; or that I can waive my rights for such a period. *Zedner v. U.S.* 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed 2d 749 (2006). Further, even if exclusion of February 10 to September 25 was legitimate/lawful, the time before trial commenced, when added to the 61 days from indictment to the first allegedly stipulated extension, still greatly exceeds 70 days.

55. Because more than 70 non-excluded days elapsed from the time of my arraignment, before trial, the District Court judgment must be vacated. *U.S. v. Howard*, 218 F.3d 556 (6thCir.2000). My failure to move for dismissal with prejudice prior to trial due to ignorance of this remedy may be argued to function as a waiver under the Act, but it did not, and could not, amount to a waiver of my right to a speedy trial pursuant to the Constitution. *Zedner v. U.S.*, 547 U.S. 489 (2006).

56. In cases that are not brought to trial promptly due to "unnecessary delay," the court is authorized to dismiss them. Fed.R.Cr.P., Rule 48(b). See also *Barker v. Wingo*, 407 U.S. 514 (1972); *U.S. v. Loud Hawk*, 474 U.S. 302 (1986). Further, if any failure by me to move for dismissal or raise such defenses prior to or during trial constitutes waiver pursuant to statute, this Honorable Court for cause shown may grant relief from waiver pursuant to Fed.R.Cr.P., Rule 12(f). Further still, I changed counsel after Judge Rosen's order went into the record. My

new counsel would have recognized the opportunity to have charges dismissed prior to trial if not misled into believing the entire time to be excluded, due to the erroneous order. Consequently, Judge Rosen's subterfuge caused a clear and concrete harm to my interests, effectively denying me the benefit of a right secured under the Constitution and codified by Congress.

57. Clearly, Judge Rosen's penchant for playing fast and loose with the law and facts is evident early in this case. His willingness to falsify exclusions was only the beginning of this judge's efforts to steer this case to his preferred conclusion—the conviction of an innocent but inconvenient man. This gaming of the record and consequent violation of my right codified in the Speedy Trial Act entitles me to a judgment dismissing the charges. In the alternative, even if I were not so entitled because of a perceived "waiver" of this Constitutionally-guaranteed right, I am entitled to such relief from fruits of the poisoned tree of this biased and unethical proceeding—the sheer density of errors in this short case makes dismissal the only right remedy.

CONCLUSION

This trial was off to a bad start months before it even began. In May of 2009, Presiding Judge Gerald Rosen declared me guilty, having just seen me for the first time, and without a single government allegation having been subject to test:

> He failed to comply with the tax laws and the requirements that he file tax returns for anybody whose (sic) had wages or other income subject to tax.

(RE#84, p. 28). In October, weeks before any testimony, Judge Rosen announced that it "has already been determined" that I had received "wages" and that he intended to instruct the jury to this effect (RE#72, p. 52).

Whatever may have been the basis for his hostile pre-judgment, rather than expose it to the hazards of cross-examination and impeachment, Judge Rosen participated in a prosecution scheme to shepherd the jury to the same conclusion by craft, rather than trying to do so with evidence. There was, in fact, no actual evidence ever produced that any legitimate case existed against me. Instead, there was a studied effort to manipulate the jury, while ensuring that no one was put on the stand who could be questioned about any of the government's allegations. So, we had hundreds of unchallengeable testimonial documents apparently alleging my guilt; conveniently confrontation-proof "inferences" that my reports were "material," and nothing else; 17-year-old words and events; a witness-free prosecution focus on an irrelevant civil case which was, in any event, still in progress when the last act involved in the instant case occurred; and a careful evasion of the fact that the only "wages" anyone is required to report are payments meeting special definitions, not any-and-all payments made to any worker by any company.

This was a patently unfair trial violating my fundamental rights, a classic example of a "kangaroo court," – "…a sham legal proceeding in which a person's

rights are totally disregarded and in which the result is a forgone conclusion because of the bias of the court…" *Black's Law Dictionary*, 5th Edition. The confrontation clause violations were complete. The lack of evidence was complete. The mis-instruction of the jury on the reporting requirements, the meaning of "wages," the meaning of "materiality" and the meaning of "willfulness" was complete. The poisonous bias and prejudice of the trial judge – of so irrepressible a level as to compel Judge Rosen to articulate it openly, repeatedly, and on the record, and which is enough by itself to invalidate the verdict in this case – was complete. The outcome of this "kangaroo court" trial was determined in advance – a conviction, thanks to the law, facts and procedure being shamelessly manipulated for that purpose. This type of injustice cannot be allowed to stand in a society that takes pride in our judiciary (the envy of other nations),[1] as Judge Rosen boasted to the prospective jury during *voir dire* (TR, Vol. 1 at 27-30). *U.S. v. Barnwell*, 477 F.3d 844 (6th Cir. 2007), *Tumey v. Ohio*, 273 U.S. 510 (1927), *U.S. v. Gaudin*, *supra* at 515 U.S. 506.

Judge Rosen was right about the antidote: "[T]here's an appellate court down in Cincinnati that reviews my decisions." TR,Vol.2 at 187. With the full

[1] "[T]he Rule of Law is . . . an American value. Confidence in the Rule of Law rests entirely at any given point in time **on the character and the integrity of the individual American judge and on that judge's absolute commitment to fairness and impartiality**." U.S. District Judge John E. Jones III, Feb. 10, 2006 Speech to the Anti-Defamation League National Executive Committee Meeting, Palm Beach, FL. http://www.adl.org/Civil_Rights/speech_judge_jones.asp

record in this case, this Honorable Court has more than ample reason to reverse the District Court's judgment and verdict, or, at the very least, to remand, and release me pending a new trial before a different judge.

PRAYER

I respectfully pray this Honorable Court to vacate the judgment against me and order my acquittal or, in the alternative, order my immediate release from custody pending a new trial assigned to a judge other than Judge Gerald Rosen.

Respectfully submitted this 28th day of October, 2010.

/s/ Peter E. Hendrickson
Peter E. Hendrickson,
Appellant *in propia persona*

ADDENDUM
DESIGNATION OF SUPPLEMENTAL APPENDIX CONTENTS

Defendant-Appellant Peter E. Hendrickson, pursuant to Rules of Appellate Procedure, Rule 28(d) and 30(b), hereby designates the following portions of the record below for inclusion in the Appendix:

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MOTION to Dismiss Indictment for Violation of Rule 7 and Rule 12(b), Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the United States Constitution	5/5/09	27
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Description of Entry	Date	Docket #
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